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Author	Gérard, Nicole.
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Problems of Implementation and Enforcement of EC Environmental Law at Community and Member State Levels -- France and Spain as case studies

Nicole Gérard
Ph.D. Candidate
Europa Institute
Law Faculty
Edinburgh University

pour mes vieux

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Despite a considerable body of environmental legislation, environmental degradation continues. The failure of environmental legislation to attain its protective goals is in part due to the widely acknowledged poor compliance with legal provisions. This thesis aims to discern the causes of the complex phenomenon of poor implementation and enforcement of environmental rules within the framework of European Community law.

A pragmatic approach has been chosen. In order to narrow the scope of the research, and yet to examine a wide spectrum of the types of problems that may arise, two very different types of Community environmental legislation have been selected: one all-encompassing and administrative in nature (the Environmental Impact Assessment directive), the other narrow and technical (the Large Combustion Plants directive). These are followed from the flaws embedded in the legal text that may give rise to subsequent problems, through difficulties inherent in implementing the rules, to enforcement where infringements are suspected.

Part I examines the role played by the institutions at Community level. The first chapter deals with the decision-making process, which affects the final quality of environmental law, thereby influencing its subsequent application. Next, the involvement of Community institutions and the pressures placed upon them in monitoring the performance of Member States are investigated. The final chapter of Part I concentrates upon attempts at supra-national level to enforce these rules where infringements arise.

The lion's share of implementation and enforcement tasks fall to the Member States, therefore Part II traces the same Community rules at national level. Insight into the variation that may exist across Member States is sought by following their progress in two significantly different national contexts (France and Spain). The purpose of Part II is to achieve an understanding of what happens to Community norms once injected into national legal systems, where they become national law. This implies a study of the various factors which undermine implementation, both formal and practical, and enforcement of environmental rules. Indeed, no single dramatic factor empties the Community rules of their substance or impedes their application. Rather the purpose of the Community rules is chipped away as various actors apply their discretion during the implementation and enforcement processes.

It emerges that the more predominant and intractable problems stem from an underlying obstacle: for the moment, environmental protection is low on the hierarchy of political priorities. Where margins of discretion exist, political considerations intrude into the application, at every stage, of environmental law. Nonetheless, other problems stem simply from the fact that frequently administrative situations and legal rules, without discriminating against environmental interests, are poorly adapted to the recent concern of environmental protection. It is suggested that progress in this latter area is more straightforward and less dependent on a fundamental societal change of perception. It is proposed that certain issues be addressed to adapt the legal situation, if often only in a piecemeal manner, permitting incremental improvements that will set the stage more positively.

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Problems of Implementation and Enforcement of EC Environmental Law at Community and Member State Levels – France and Spain as case studies

Conclusions

AFDI: Annuaire Français de Droit International
AJDA: Actualité Juridique, Droit Administratif
BOE: Boletín Oficial del Estado
CE: Conseil d'Etat or Conseil d'Etat ruling
CMLR: Common Market Law Reports
CMLRev : Common Market Law Review
EAP: Environmental Action Programme
EC: European Community Treaty as amended by the Treaty on European Union (referring especially to Title II: "Provisions Amending the Treaty establishing the European Economic Community with a view to establishing the European Community."
ECJ: European Court of Justice
ECOSOC: Economic and Social Committee (Community)
EEC: Treaty as amended by the Single European Act
EIA85/337: the European Directive on Environmental Impact Assessment
EIA: an environmental impact assessment procedure
EIS: an environmental impact study
ELRev: European Law Review
GJCE: Gaceta Jurídica de la CE
GYIL: German Yearbook International Law
JEL: Journal of Environmental Law
JEPP: Journal of European Public Policy
JO: Journal Officiel
JPL : Journal of Planning and Environment Law
LCP88/609: the European Directive limiting emissions from large combustion plants
LIEI: Legal Issues of European Integration
LOPJ: Ley Orgánica de Poder Judicial (Organic Law of Judicial Competence)
LPA: Les Petites Affiches
LRJPAC: Ley de Régimen Jurídico de las Adminstraciones Públicas y del Procedimiento Administrativo Común, (Law on the Juridical Regime of Public Administrations and of Common Administrative Procedure).
MINER: Spain's Ministry of Industry and Energy (*Ministerio de Industria y Energía*).
MOPTMA: Spain's Ministry of Public Works, Transport and Environment (*Ministerio de Obras Públicas, Transportes y Medio Ambiente*).
MOPU: Spain's Ministry of Public Works and Urbanism (*Ministerio de Obras Públicas y Urbanismo*).
RAP: Revista de Administración Pública
RD: real decreto
RDL: real decreto legislativo
RDP: Revue de Droit Public
RFDA: Revue Française de Droit Administratif
RIDC: Revue Internationale de Droit Comparé
RIDP: Revue Internationale de Droit Pénal
RJE: Revue Juridique de l'Environnement
RMC: Revue du Marché Commun et de l'Union Européenne
RTDE: Revue Trimestrielle de Droit Européen
SEA: Single European Act
STC: Sentencia del Tribunal Constitucional (Constitutional Court ruling)
STS: Sentencia del Tribunal Supremo (Supreme Court ruling)
TA: Tribunal Administratif (Administrative Court)
TEU: Treaty on European Union (or 'Maastricht Treaty')
Treaty: original Treaty of Rome
TS: Tribunal Supremo
YEL : Yearbook of European Law

to the problems that emerge at the national level, taking two Member States, France and Spain, as case studies.

Examination of these contexts is undertaken with a view, first, to obtain a wide perspective on the types of difficulties that arise in implementation and enforcement and to understand why they arise. With an understanding of the problems and, perhaps, of their causes, the issue of whether possible solutions present themselves is examined, in order to investigate whether co-operation between the European Union and the Member States can be rendered more efficient and ultimately more successful in achieving the goal of environmental protection.

1. General difficulties of a legal approach to environmental problems:

Prior to the discussion of the specific subject of implementation and enforcement of Community environmental law, awareness of general issues is beneficial. Various obstacles are inherent to the study of environmental issues and present difficulties even before a legal approach to an environmental problem is chosen.

Environmental protection is a complex, multi-disciplinary field that must establish a balance among many interests. The legislative route is one among several possible approaches. The use of market mechanisms is another approach increasing in popularity, for instance[2]; as is the increased concern for use of non-authoritative, or 'soft-law' type

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2 See, for instance, TURNER, R.K., PEARCE, D., BATEMAN, I., *Environmental Economics: An Elementary Introduction*, Harvester Wheatsheaf (division of Simon & Schuster), 1994; PEARCE, D., MARKANDYA, A., BARBIER, E., *Blueprint for a Green Economy*, Earthscan Publications Ltd, London, 1989; PEARCE, D., *Blueprint 4: Capturing global environmental value*, Earthscan Publications Ltd, London, 1995; ANDERSON, V., *Alternative Economic Indicators*, London: Routledge, 1991.

Particularly concerning economic instruments designed to achieve the same goals as the large combustion plants directive, see Pearce, D., "Toward the Sustainable Economy: Environment and Economics," *Royal Bank of Scotland Review*, Special Environment Issue, 1991; and ESTEVAN BOLEA, M-T, *Implicaciones económicas de la Protección Ambiental de la CEE: Repercusiones en España*, Informes del Instituto de Estudios de Prospectiva, Secretaría de Estado de Economía, Ministerio de Economía y Hacienda, 1991, pp.330-34.

instruments[3]. However the relative benefits between legal and non-legal approaches are not debated here. Rather, the use of legal rules once a legislative approach has been chosen is emphasised.

The state of scientific knowledge influences the legal approach and its validity, since the quality of legal rules is a function of the scientific certainty surrounding proposed solutions (which is itself affected by political priority concerning the types of scientific research that receive attention and funding). Scientific opinion on environmental issues is often far from static or concrete[4]. Unfortunately, at times a response to an environmental problem must be elaborated urgently, and waiting for complete scientific certainty is a luxury that cannot be afforded (as witnessed by the increased attention given to the precautionary principle). In such circumstances distinguishing the optimal role of law -- whether it should regulate, offer incentives, impose prohibitions -- is another problem that arises, and choices taken in this respect carry consequences for implementation and enforcement. Determining the substance of the law, particularly where it depends on scientific opinions that are contradictory, or data that are incomplete or rapidly changing, is a territory fertile in potential for error. While these difficulties are acknowledged as important, whether the

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As an aside, where market instruments are chosen, it must be recalled that, "the market itself is always likely to lead to a degree of contamination or depletion whose acceptability (or indeed, sustainability) will need to be assessed from some other perspective"; Steele, Jenny, "Remedies and Remediation: Foundational Issues in Environmental Liability," 58 (1995) MLR 615-36, at p.635.

3 The Commission, in the Fifth EAP has itself pointed out that "the legislative approach may not always be the best choice as a first step although it may have an essential role to play in the longer term" (OJ 1993 C138/81).

Two voluntary schemes have been adopted at Community level (Eco Labels, Regulation 880/92 (OJ 1992 L99) and Eco Audits in industry, Regulation 1896/93 (OJ 1993 L168)) in an attempt to put the commercial interest of undertakings at the service of environmental protection. It is hoped that companies, taking 'green' consumers into consideration, will find it useful to promote an ecological image.

4 Climate change illustrates the rapidity of shifts in scientific knowledge. In the mid-Eighties scientists estimated a general termperature increase of nine degrees Centigrade over the next decades. By the mid-Nineties, using advanced computer models capable of factoring in the climatic impact of the ocean depths, a more reassuring figure of 1.5 to 1.9 degrees Centigrade is estimated; Sir John Mason, of the Meteorological Office, discussion Climate Change, Edinburgh Science Festival, 1 April 1995.

legal choices made on the basis of scientific opinion were the appropriate ones is only mentioned in so far as this affects implementation and enforcement of the rules studied here.

Finally, a question that arises in judicial proceedings related to environmental matters surrounds an issue so basic as determining when grounds for a dispute exist, given the basic consideration that terms such as 'pollution', or 'environmental damage' are open to a variety of interpretations[5]. For example, Rio Principle 13 adds the idea of "*adverse effects* of environmental damage"; the European Commission's Green Paper on Remedying Environmental Damage[6] discusses the degree of impact that should be considered environmental damage and the point at which emissions are to be considered "pollution". This debate is not continued in this research.

2. The Choice of Community Law:

Environmental problems can have a transboundary nature (atmospheric pollution, pollution of water courses, protection of migratory fauna) or be firmly grounded at the local level (land planning, waste treatment). One of the advantages of examining issues of implementation and enforcement of environmental law at Community level is that it affords the opportunity to look at both local and international perspectives; both levels must be examined.

Particularly in its transboundary context, the European Community is unique in that it presents the advantages of a supranational perspective while overcoming some of the disadvantages of international law. Within the Community context, the issue of consent[7] that is often the downfall of international environmental law is side-stepped.

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5 Händl, Günther, "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisted," 13 (1975) Canadian Yearbook of International Law 156 at p.173.

6 Com(93)47 final, at p.10.

7 For instance, Member States of the European Community, through the procedures of qualified majority voting, may find themselves bound by legislation which they had voted against. Likewise, within the Community context, the Commission can bring infringement

The distinctive feature of Community law lies in the fact that, through the doctrines of direct effect and supremacy, and through the preliminary ruling procedure, it becomes an integral part of the national legal systems of the Members States. Member States cannot hide behind their sovereignty: in areas of Community competence, Community law is paramount. In accordance with the doctrine of direct effect, Community legislation that is sufficiently clear and precise, unconditional, and leaves no room for discretion in implementation[8], imposes obligations upon emanations of the state[9] even where the Community rule has not been, or not been correctly, transposed. Natural or legal persons can rely directly upon such provisions where individual rights are conferred. The presence of Community law at national level is reinforced by Article 177[10] on preliminary rulings, an option for any court or tribunal that deems a reference necessary, but obligatory for a court "against whose decisions there is no judicial remedy under national law"[11]. The *Verholen*[12]and *Kraaijeveld*[13] rulings indicate even that national judges are expected to bring up points of Community law of their own motion if the parties in question have not done so. Thus, in disputes involving Community

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proceedings without the concerned Member State's consent. In international law, the possibilities to bind a State against its will, or to bring it before a court or arbitration body are greatly restricted.

8 Case 41/71 *Van Duyn* 1974 ECR 1337

9 Case 152/84 *Marshall* 1986 ECR 723.

10 Article 177 EEC: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

a) the interpretation of this Treaty;

b) the validity and interpretation of acts of the institutions of the Community;

c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide."

11 Article 177(3) EEC.

12 Joined Cases C87/90, C88/90, C89/90: *A Verholen e.a. v. Sociale Verzekeringsbank*: 1991 ECR I-3757 at para.16: "The answer to the first question in case C-88/90 must therefore be that Community law does not preclude a national court from examining of its own motion whether national rules are in conformity with the precise and unconditional provisions of a directive, the period for whose implementation has elapsed, where the individual has not relied on that directive before the national court."

13 In an environmental case, C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV and others and Gedeputeerde Staten van Zuid Holland*, judgment 24 October 1996, not yet reported, para.57:"...where by virtue of national law courts or tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned...".

issues, the national judge must become a Community judge. Where national measures conflict with Community law they must be interpreted in the light of Community legislation[14], and if necessary, set aside[15].

While at various points Member States have protested that the Court's development of these doctrines was not only bold but brazen (*"mégalomanie maladive*[16]"), over-reaching the limits defined by the Treaty of Rome, they have thus far succeeded in slowing[17] but not halting this creeping *acquis communautaire*. The result is that European Community law pervades the national systems down to even the level of the individual in a manner unimaginable in international law[18]. By their willingness to make references to the European Court of Justice and by adhering to its rulings in deciding the case before them, national judges have lent Community law the respect formerly reserved for their own systems[19]. It is nonetheless evident that, at least where Community environmental rules are concerned, the respect Member States accord Community law is far from adequate.

The Community level is also of particular interest because national law is very much a presence in the implementation and enforcement of Community rules. Community directives

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14 Case 14/83 *Von Colson* 1984 ECR 1891: "It follows that in applying national law and in particular the provisions of a national law specifically introduced in order to implement a directive the national court is required to interpret its national law in the light of the wording and purpose of the directive in order to achieve the results referred to in the third paragraph of Article 189."

15 Case C-213/89 *R v Secretary for Transport, ex parte Factortame* 1990 ECR I-2433 at para 23: "...Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule."

16 Cf. Michel Debré, former prime minister, as cited in Mancini, G. F., "The Making of a Constitution for Europe," 1989 CMLRev 595, at p.595.

17 Case 152/84 *Marshall v Southampton & South West Hampshire Area Health Authority* 1986 ECR 723; confirmed in Case C-91/92 *Paola Faccini Dori v Recreb Srl*, 1994 ECR I-3325.

18 It must be noted that the Court's development of the supremacy doctrine was successful because it was accepted by the judiciaries and the administrations of "both the original and the new Member States, with the exception of some grumblings by the French *Conseil d'Etat*, the Italian *Corte costituzionale* and a couple of English law lords" (Mancini, *op.cit.*, p.600); not to forget concern on the part of the German Bundesverfassungsgericht about Community protection of fundamental rights (Solange, BVerGE 37, 271)

19 Mancini, *op.cit.*, p. 597.

must be transposed into national rules; their practical implementation requires concrete action within the Member States; and to a great extent, where enforcement is necessary, this hinges upon national procedural rules.

This is not to imply that the Community constitutes the perfect context for implementation and enforcement of environmental law. However, it is here considered to provide a unique opportunity to regulate environmental matters on a transboundary plane[20], while at the same time maintaining close contact with national realities.

Emerging Awareness of Problems in the Application of Community Environmental Legislation:

Without specific Treaty foundation, environmental action programmes and a considerable body of Community environmental rules[21] were nonetheless adopted -- an achievement in itself. However, as early as 1983 the Third Environmental Action Programme (EAP) hints at the beginnings of a realisation that implementation of these rules is presenting real difficulty. It notes a variety of factors that have stalled the implementation of projects, and stresses the importance of continuing and completing the projects already undertaken. Despite this small acknowledgement, it still took many years for attention to focus on implementation. In 1986 the Single European Act (SEA) was adopted, adding an Environment

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20 CALDWELL, L.K., *International Environmental Policy: Emergence and Dimensions*, Duke University press, 1990, pp.116-22; BIRNIE, P., and BOYLE, A., *International Law and the Environment*, Clarendon Press, 1992, at p. 79. *A contrario*, see Allot, P., "State Responsibility and the Unmaking of International Law," 1988 Harvard International Law Journal 1, at p.10.

21 Justified often by the need to approximate Member State rules affecting the functioning of the common market or the need to achieve the Community objective of environmental protection and the improvement of the quality of life based on Article 2 of the Treaty, and later the first EAP). Frequently Articles 100 (approximation of laws) or 235 (for action necessary to attain Community objectives were the Treaty has not provided the necessary powers) provided the legal foundations for early legislation, at times used together; see the Environmental Impact Assessment directive, below.

Occasionally, however, legal bases were borrowed from other titles in the Treaty: for example, Directive 80/51 on the limitations of noise emissions from aircraft (OJ 1980 L26) was adopted on the basis of Article 84(2) of the Transport Title.

Title and specifically environmental principles and legal bases to the Treaty. Ironically, despite the increasing attention given to environmental matters, and although at this time there was a growing realisation that effectiveness of general Community law was being undermined by poor Member State application, still awareness of the state of environmental law's implementation -- one of the worst areas of Member State performance -- was not yet apparent[22].

A fourth EAP[23] adopted after the SEA amendments continues and expands upon the themes developed in the first three programmes[24]. A deficiency had been spotted, however: poor application in Member States particularly of Community environmental rules. Consequently the fourth EAP stresses the importance of implementation and enforcement of existing rules and asks the Commission systematically to review application in order to assess the effectiveness of Community environmental rules and policy[25]. A small section[26] scratches the surface of the problems surrounding application, stressing the need to promote better compliance, to intensify dialogue with national and regional administrations, and to initiate infringement procedures against delinquent Member States.

Starting in the mid- and late- Eighties, therefore, concern began to shift away from the creation of environmental legislation to a growing realisation that its application in the various Member States was far from satisfactory. An illustration of the shift in focus is provided by an increase in infringement proceedings on environmental (and consumer) matters

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22 For instance the "First report on the application of Community law 1983", (Com(84)181) contained only a fleeting and unhelpful reference to environmental legislation, pointing out that "Overall the application of these Directives in the Member States would appear not to present any major problems".

23 OJ 1987 C328/1 (Fourth EAP).

24 In view of the criticism subsequently levelled at the Commission concerning its lack of consideration of the costs of legislation, it is interesting that this programme includes a brief discussion of costs to industry of applying environmental rules and of possibilities of job creation (OJ 1987 C328/14 point 2.4.6).

25 OJ 1987 C328/1 (Fourth EAP), at C328/2.

26 Section 2.2 on Implementation of Community Directives.

undertaken against Member States in the late Eighties[27]. Parliament was among the first to sound the alarm over application issues, particularly regarding the Seveso disappearance of toxic waste[28]. The situation was, as former Commissioner for the Environment Ripa di Meana phrased it, "intolerable"[29]. Many authorities have commented upon the fact that EEC environmental legislation was implemented "not in time, not correctly, not at all"[30]. Attempts were made to assess the situation and to uncover the reasons behind the failure to implement environmental directives[31].

The Fifth EAP[32] acknowledges the ineffectiveness of Community environmental legislation. Chapter 9, on "Implementation and Enforcement"[33] focuses on the problems that have emerged, citing a variety of factors from "lack of policy coherence" to "management inadequacies at all levels, from Community down to local authorities". The discussion does

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27 Figures include consumer protection: 43 in 1981; 100 in 1984; 155 in 1986; 221 in 1990; Eighth Application Report 1990, OJ 1991 C338/54.

28 In connection with Seveso, Parliament attacked specifically "the cavalier attitude displayed by the companies responsible", the Commission's "failure to perform fully and properly its role of guardian of the treaties"; OJ 1984 C127/67 at 68.

It has continued to register its concern at widespread failure to implement environment legislation through such texts as its "Resolution on the application of Community environment legislation," OJ 1990 C68/183.

29 *Bulletin Européen du Moniteur* ,19 février 1990. p.3.

30 Klatte, E., "Environmental and Economic Integration in the EC," in *Frontiers of Environmental Law*, Owen Lomas ed., Chancery Law Publishing, 1991, p.47 (Klatte, 1991); see also Ludwig Krämer, "Du Contrôle de l'application des directives communautaires en matière d'environnement," 1988 RMC 22; Macrory, R., "The Enforcement of Community Environmental Laws: Some Critical Issues," 19 (1992) 29 CMLRev 347.

31 Eighth Application Report 1990; the water (PE 116.085, 1988) and air reports of the European Parliament Environment Committee.

32 OJ 1993 C138. The programme generally reflects the climate of UNCED at Rio and the commitments undertaken there by the Community. A weightier document than the previous programmes, it purports to set the course -- for the Community as for "the rest of the world" -- for sustainable development. To do so, the Fifth Programme has changed the Community's tack: rather than attempt to repair environmental problems (merely the "symptoms of mismanagement and abuse"; (OJ 1993 C138/13) as they emerge or to try to prevent them from emerging, the goal has become to attack the harmful trends themselves. Conduct, thinking, consumption patterns -- all must be transformed, at all levels of society. A broader range of tools to encourage awareness and change is indicated, including financial and marketing tools, rather than just legislative instruments. (The sectoral approach is not completely abandoned: certain priority target sectors are listed.) The programme emphasizes shared reponsibility among all actors; OJ 1993 C138/17.

33 OJ 1993 C138/80-82.

not seek to excuse past deficiencies but to apply their lessons to future action, showing that some account has been taken of previous criticisms[34]. This section of the fifth EAP singles out areas for attention: improvement in legislation, integration of policies, involvement of public, environmental liability, involvement of the European Environment Agency, reports on implementation.

Years after discovering the extent of poor implementation of environmental rules, the situation is unchanged[35]. Indeed, the Commission has noted that in 1993 environmental infringements composed 28.5% of all infringements of Community law registered, in 1994 environmental infringements counted for 25%, and in 1995 they were still more than 20%[36]. The personal estimate of DG-XI's Dr. Ludwig Krämer[37] is that only about 20% of all environmental plans elaborated at the Community level are actually implemented[38], an enormous expenditure of effort for a paltry result. As MEP Ken Collins sums up, "...there is a fair bit of evidence to suggest that there is no Member State that is particularly good at implementation or they are certainly not as good as they themselves say. The trouble is that they frequently believe their own propaganda."[39]

Despite the successful introduction of a considerable body of environmental law and the adoption of firm Treaty foundation, often the potential of the Community environmental

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34 For instance, in the creation of three dialogue groups; see Chapter 2 point 3.2. Creation of information sources.

35 PE 152.144, rapporteur Vernier, J; MEP Ken Collins, HL Ninth Report Evidence 1991-92, p.33.

36 Commission, "Implementing Community Environmental Law," Communication to the Council of the European Union and the European Parliament, at p.2; Com (96)600, Thirteenth Annual Report on Monitoring the Application of Community Law (1995),pp.103-105.

Incongruously when compared to the number of infringements, in 1994, for instance, only three cases were referred to the ECJ for failure to notify, and one referral was made regarding the conformity of national implementing measures; Com(95)500 final, Twelfth Annual Report on Monitoring the Application of Community Law (1994), p.59 points 1.2. and 1.3.

37 Former Head of Legal Matters and Application of Community Law in DG-XI.

38 KRÄMER, LUDWIG, *Focus on European Environmental Law*, London, Sweet & Maxwell, 1992, p.215.

39 HL Ninth Report Evidence 1991-92, p.37.

rules is not fulfilled. At present, environmental rules frequently fail to attain the Community goals both of environmental protection and of establishing equitable conditions for the Internal Market, thereby defeating the purpose for which they were adopted.

3. 'Implementation' and 'Enforcement':

Implementation and, by extension, enforcement are crucial: without these protection of the environment cannot be guaranteed, even if high standards are embodied in environmental rules. Also, the economic impact of failure to implement and enforce is not to be underestimated. The fact that national measures cannot practically be adopted and applied simultaneously in all fifteen Member States undermines not only an abstract ideal of "harmonisation" but, more to the point, threatens to distort competition, deflect trade, and jeopardise the balanced development of the regions[40] -- all of which are objectives of the Community[41]. Furthermore, it is inefficient to devote resources to the creation of legislation that cannot or will not subsequently be given force and the effects of which are negligible; where implementation is not stressed, it would be more efficient simply not to use a regulatory approach to the environmental problem at issue. Finally, widespread disregard of Community environmental obligations bears negative consequences not only for the environment but for the force and authority of Community law itself: as one source put it, this "converts existing [Community] legislation into wet paper."[42]

On examining various texts it becomes apparent that a variety of meanings with subtle differences are attached to the terms 'implementation' and 'enforcement'. Implementation

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40 Article 130r(3) EEC: "In preparing its action relating to the environment, the Community shall take account of...(iv) the economic and social development of the Community as a whole and the balanced development of its regions."

41 Ironically, this is the justification that served in some cases as the basis for adoption of the measures in the first place.

42 "*...convierte en papel mojado la legislación existente*"; Martínez Aragón, "Aplicación del derecho medioambiental en España: El papel de vigilancia y control de las Comunidades europeas," 1993 GJCE , Serie D, p.193 at p.198.

and enforcement are aspects of the same process of application of Community law -- of ensuring that black letter law achieves an effective result. As one author notes, "the notion of enforcement...does not seem to be subject to a precise definition which would distinguish it from 'implementation'"[43]: indeed the two concepts share common territory[44]. In this work an attempt is made to use the terms consistently. Definitions are in order.

Implementation: The Commission has separated its tasks of monitoring implementation into formal implementation, which refers to the transposition of Community obligations into the national legal order; and practical implementation, which refers to the subsequent realisation of a complex range of practical activities necessary to meet the legal obligations. The latter includes, for instance, the correct administration of the legislation, the actions of private actors necessary to comply with their obligations, the potential involvement of the public, undertaking the appropriate follow-up activities to ensure compliance with the rules. In this research the Commission's division of its tasks is carried over to the national level in order to provide a framework for the in-depth examination of Member State treatment of Community rules that remains compatible with a Community perspective.

Furthermore, the European Court of Justice has ruled, in *Royer*[45], that in implementing Community directives

> The Member States are consequently obliged to choose, within the bounds of the freedom left to them by Article 189, the most appropriate forms and methods to ensure the effective functioning of the directives, *account being taken of their aims...* (emphasis added).

More recently in a case involving the Environmental Impact Assessment directive, the ECJ ruled that "the duty to take all appropriate measures, whether general or particular, is

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43 KRÄMER, *Focus...*, p.209n.

44 Martínez Aragón, GJCE 1993, p.207.

45 Case 48/75 *Royer* 1976 ECR 497 para. 73; see also para.75: "The freedom left to the Member States by Article 189 as to the choice of forms and methods of implementation of directives does not affect their obligation to choose the most appropriate forms and methods to ensure the effectiveness of the directives."

binding on all the authorities of Member States...".[46] As shall be seen in the national chapters, often Member States choose methods that fall short of those "most appropriate" to ensure the effective functioning of Community environmental directives.

At Community level, 'implementation' refers to the process of monitoring Member State compliance with Community rules. The Commission must ensure that Member States have notified their formal transposition and that this is correct; it must also undertake the more difficult task of verifying that the necessary practical actions have also been carried out.

Enforcement: Curtin and Mortelmans provide a very useful definition of enforcement to describe

> the role played by the Commission, the Member States or exceptionally private parties forcing -- in accordance with the weapons in their arsenal -- other actors to fulfil obligations imposed on them by Community law. Enforcement is in fact a 'stick' in the cupboard, to be utilised only in case of real necessity[47].

The concept includes action taken at the Community level against a Member State when a violation of a Community rule is alleged (the various stages of Article 169 infringement proceedings) as well as the rarer instances where a Community institution is itself alleged to have acted in violation of its obligations and an attempt is made to redress the situation (actions under Article 173).

Similarly, at Member State level enforcement refers to the stage of compelling actors to fulfil their obligations, i.e.: principally[48] to judicial action before administrative, civil or penal jurisdictions that is commenced where violations of national measures transposing Community law or of Community law itself (where capable of direct effect) are alleged.

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46 Case C-72/95 *Aannenersbedrijf P.K. Kraaijeveld BV and others and Gedeputeerde Staten van Zuid-Holland*, judgment of 24 October 1996, not yet reported, para.55.

47 Curtin, D., and Mortelmans, K., "Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script," in *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, vol II., eds. Deirdre Curtin and Ton Heukels, Martinus Nijhoff, 1994.

48 A clarification is in order: here a request to the Aministration to reconsider a decision is included in enforcement. This is because usually the Administration confirms its earlier decision, and therefore this request can, eventuallly, be viewed in practice as a procedural step prior to bringing an action before the courts.

While acknowledging that grey areas exist and draconian separations can be unhelpful, this work is structured on the above divisions also because a good compliance record in one area does not necessarily mean that obligations have been fulfilled in another area. For instance, emphasis is usually placed upon black letter transposition and accuracy in this is frequently equated with adequate implementation. Performance in the 'messier' area of practical implementation, which is much more difficult to examine and verify, is often played down. It shall be seen that accurate and even positive formal implementation can be negated by extremely poor performance in practice. Moreover, at times even where violations are noted they are not enforced: again Community obligations are unfulfilled. In order to have a meaningful view of compliance, regard must be had to all three stages.

4. Choice of specific Community rules:

To investigate the implementation and enforcement of the entire body of Community environmental rules would represent a vast and unwieldy task; this is not attempted here. A choice must be made concerning what type of legal instrument to examine, and then more specifically, which actual environmental rules.

Choice of Legal Instrument: The legal instrument overwhelmingly used to regulate environmental matters[49], the directive, itself gives rise to problems in subsequent implementation and enforcement. As defined in Article 189 EEC[50], directives set the goals to be achieved while leaving Member States free to choose the form and methods most appropriate to their national legal system and culture for achieving them. Member States are expected to transpose the provisions of a directive into binding national legislation; to notify

49 And required by Article 100 of the Treaty.

50 Article 189 EEC: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

the Commission of the transposition by the deadline specified in the directive; and to carry out, at a practical level, the measures the directive requires[51].

Paradoxically, directives have been criticised both for being too uniform[52] and not uniform enough[53]. The principle of institutional autonomy -- the margin for action on the part of the Member States -- is perceived by some to be a source of potential strength that enables national authorities to develop decision-making procedures appropriate to their own systems[54]. Flexibility and respect for local customs, legal traditions and administrative sensibilities are invaluable assets when attempting to harmonise measures across fifteen disparate national systems[55]. Directives are one way of providing that decisions are taken at a closer level to the citizen[56], in accordance with the principle of Subsidiarity.

On the other hand, as shall be seen in the national chapters, the freedom of Member States embodied in directives is one of the principal challenges in implementing Community environmental law, starting the chain of legislative command with a very 'flexible' link. National legislatures are occasionally reluctant to amend what they perceive to be superior national rules[57], have the (mistaken) impression that they are at liberty to modify the goals set[58], or tend to transpose those elements of the original directive which suit their purposes and to "forget" the rest[59]. At present, the freedom to choose the forms and methods of

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51 For example, to set up procedures necessary to sample waters or test air quality, for example, or to define licencing procedures for industrial emissions, or enforce limit values.

52 "For example not taking into account traditional hunting rights and the fact that wolves are widespread in Spain"; Vernier Report, EP A3-0001/92, p.9.

53 This specifically when it comes to variations in implementation: Member States are not eager to apply legislation which they believe other Member States are not applying; Heseltine, HL Ninth Report Evidence 1991-92, p.189.

54 Macrory in *EC Environment...*, 1991, at p.43.

55 Dr. Caroline Jackson, MEP, HL Ninth Report Evidence 1991-92, p.40; Collins and Earnshaw, 1993, p.226,

56 Collins and Earnshaw, 1993, p.226.

57 Vernier Report, EP A3-0001/92, p.16.

58 Simon and Rigaux, p.293.

59 Vernier Report, EP A3-0001/92, p.13.

implementation of Community directives is often abused by the Member States with the result that improper implementation, both formal and practical is extremely common[60].

Given the awkwardness of directives, a wider use of another authoritative Community instrument, the regulation, has been suggested[61]. Although in recent years a trend can be discerned to resort more frequently to regulations[62], they are still rarely used in environmental matters[63]. The main advantage of regulations[64] is that they do not require implementing legislation and must be applied as they are[65]. The Commission itself holds the opinion that regulations would, in some cases, "contribute to transparency and the sound application of the rules, without adversely affecting the features of national legal or administrative systems"[66] although it continues to resort principally to directives.

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60 KRÄMER, *Focus...*, p.195.

61 Particularly as the legal bases most commonly used for environmental legislation, Articles 130s and, more rarely, 100a, since the Treaty of European Union no longer dictate which legal instrument to use.

62 Collins and Earnshaw, 1993, p.226.

63 Being reserved here principally:

- to implement obligations derived from international conventions (such as the CITES implemented by regulation 3626/82; OJ 1982 L384);
- to regulate matters between the Community and third countries (such as Regulation 2219/89 OJ 1989 L211/4 on exportation of foodstuffs following a nuclear accident);
- to establish a Community-wide response, as for example, to prohibit certain activities deemed unacceptable (for instance, Regulation 3254/91 on leghold traps, OJ 1991 L308/1);
- or to establish Community institutions (e.g. Regulation 1210/90 (OJ 1990 L120/1) on the establishment of the European Environment Agency and the European environment information and observation network) or financial instruments (e.g. Regulation 1872/84, on financial support for clean technologies, et cetera, OJ 1984 L176).

64 Article 189 EEC: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States".

65 Case 93/71 *Leonesio v Italian Ministry of Agriculture and Forestry* 1972 ECR 287 at para.22.

66 Com(93)256 final, "Reinforcing the Effectiveness of the Internal Market" at p.12. The examples referred to concern the consolidation of directives in the form of a regulation where provisions of a strictly technical nature and when the work of harmonization has been completed in that area; and to simplify transposition of implementation measures of directives where the national systems have already been adapted as part of the transposition of the requirements of the directive, such as those implementing the procedures for intervention in the areas of veterinary or plant health rules.

The Choice of Directives examined:

The implementation and enforcement of two directives are investigated here in order to narrow the scope of the thesis while providing consistent examples and points of reference that can be followed throughout the research. The directives that have been selected are the Environment Impact Assessment directive (EIA85/337)[71] and the Large Combustion Plants directive (LCP88/609)[72]. Being very different types of legislation, it is hoped that they will illustrate a wide range of problems in implementation and enforcement and permit broader conclusions. Also, as Macrory has pointed out[73], where directives are market driven (have significant implications for the competitive position of similar industries, such as LCP88/609), competing companies tend to be vigilant with each other. On the other hand, procedural-type instruments such as the EIA85/337 pose a much greater challenge for implementation and enforcement.

Environment Impact Assessment directive: The aim of the first directive, EIA85/337, is to ensure that public authorities of all Member States take into account the possible harmful environmental effects of large projects prior to granting planning permission or authorisation, and to encourage them to prescribe measures to minimise these. The scope of its application is among the widest in environmental law: it affects many areas of public intervention -- transport, town planning, public works -- as well as a vast number of initiatives taken by the private sector. Thus it represents an approach to harmonisation that cuts across several sectors -- a horizontal approach, in Community jargon. Used effectively, it has the potential to be an important tool of environmental protection, since its goal is to integrate

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71 EIA85/337, OJ 1985 L175/40 on the assessment of the effects of certain public and private projects on the environment.

72 LCP88/609, OJ 1988 L336/1, on the limitations of emissions of certain pollutants into the air from large combustion plants.

73 Macrory, R., "The Enforcement of EC Environmental Law Against Member States," Conference: The Impact of EC Environmental Law in the United Kingdom, London, 3 November 1995.

environmental concerns into the execution of other policies that are usually at the root of environmental damage.

The directive's preamble notes that the rule is intended to put into practice the Preventive Principle as put forth by the first three Environmental Action Programmes[74], and subsequently, Article 130r(2) as added by the Single European Act. It stresses that the most effective environmental policy consists of preventing pollution from occurring rather than expending resources on cleaning up pollution after the fact, typically more difficult and less fruitful. To that end, it seeks to require authorities to "take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes"[75] (although it never actually requires that harmful projects be prevented[76].)

The interest of a rule such as EIA85/337 lies also in that it touches upon many of the issues inherent to the Community's approach to environmental regulation. It is a procedural measure: the obligation involves not a specific result, but rather a process that must be undertaken, involving the intervention of a variety of actors, both public and private. Implementation of the directive depends to some extent upon the involvement of an informed public; it therefore extends procedural rights to the public to be consulted and to give their opinion at a certain stage of the process. Furthermore, since the value of the public's input

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74 Council Declaration on the programme of action of the European Communities on the environment, OJ 1973, C112/1 (First EAP). It introduced the objectives and principles of the Community Environment Policy, among them: that the environment be taken into account in early stages of town planning, land use and other decision-making processes; that scientific knowledge be improved; that action be taken at an appropriate level (from local to international); the need for cooperation at the global level; and in accordance with Stockholm Principle 21, that care be taken to ensure that activities in one state do not cause damage in another.

The second EAP (OJ 1977 C139/1), while reiterating the principles and objectives of the first, shifts somewhat more towards prevention and for the first time mentions the desirability of environmental impact assessments. (See also Rehbinder and Stewart, p.18; Brusasco, M-K., and Kiss, A-C, p.320.)

The third EAP (OJ 1983 C46/1 places emphasis on the development of a more encompassing approach to environmental protection, whilst for the first time the integration of environmental considerations in the Community's other policies is mentioned.

75 Preamble, EIA85/337, OJ 1985 L175/40.

76 Chapter 1, point 2.5.1. *Adopted version.*

depends largely on its level of information, the practical implementation of EIA85/337 is affected also by another area of Community concern: the right of individuals and associations to access environmental information, as required by directive 90/313[77] and whether in practice *its* implementation has proceeded smoothly.

More technical details are also worthy of note. EIA85/337 was adopted prior to the inclusion in the Treaty of legal bases specific to the environment. The directive reflects a move towards achieving Community objectives in the sphere of protection of the environment and quality of life, as put forth in Article 2 of the Treaty[78]. Article 235[79] (for action necessary to attain Community objectives where the Treaty has not provided the necessary powers) was one of the legal bases relied upon.

In addition to these motivations, economic grounds more closely relevant to the European Economic Community provided a central justification for developing environmental policy and law, and proved useful here. Variations in national environmental legislation and in the costs incurred by businesses implementing it have the power to distort competition. Community legislative intervention, on the basis of Article 100[80], was justified in order to

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77 Directive 90/313 (OJ 1998 L158/56).

78 Article 2 Treaty: "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

Moreover, the first Environmental Action Programme asserted in its preamble that these "cannot now be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment," adding that "particular attention will be given to intangible values and to protecting the environment so that progress may really be put at the service of mankind"; First EAP, C112/1, 5.

79 Though significantly wider than Article 100, Article 235, used often in early Community environmental rules, does not cover everything: a link must still exist with the operation of the Common Market, although this need not be 'direct'. Unanimity is again required although the legislative form is not limited to the directive; rather the Council is authorized to take 'appropriate measures'.

80 Article 100 was initially interpreted as authorising approximation of laws only in response to a member state's legislation; accordingly much of the initial Community legislation regarding environmental matters based on Article 100 came in reaction to a unilateral move by a Member State. For example, Directive 70/220 on air pollution from

approximate national measures and to preserve the internal market's "level playing field". Compared to other environmental rules, EIA85/337 is relatively inexpensive to implement (independent consultants have judged the cost of EIA to be between 5% and 10% of total project design, excluding actual construction[81]). Nonetheless, the Commission points out that "disparities between laws in force in various Member States...may create unfavourable competitive conditions and thereby directly affect the functioning of the Common Market."[82] Consequently, EIA85/337 was adopted using Article 100 as its other legal basis.

Large Combustion Plants directive: The second directive followed throughout this work, LCP88/609, contrasts with EIA85/337 in that it corresponds to a more traditional sectoral, (in Community terms 'vertical') approach: it affects principally one industry, the energy industry, and is thus narrow in its immediate scope. It aims to address the problem of acid precipitation by progressively reducing emissions of SO_2, NO_x and dust particles produced by the operation of large combustion plants.

Whereas EIA85/337 puts the Preventive Principle into practice, a point of interest with LCP88/609 is that it arguably gives effect to the Precautionary Principle[83]. Ecological problems can be such that their treatment cannot wait until science offers conclusive evidence. Acid precipitation, the targeted problem of LCP88/609, was known to be closely linked to emissions of SO_2 and NO_x[84] although the complex reactions in the atmosphere that these

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motor vehicles (OJ 1970 L76/1, Special English edition at p.171) cites German and French regulations due to enter into force.

81 Com(93)28, p.85; the Commission itself has said that "[o]nly in exceptional cases for small projects requiring heavy capital investment will they be more than 1% of the total cost of the project; Com(93)575, p.5.

82 Preamble, EIA85/337, OJ 1985 L175/40.

83 Nor formally incorporated by the TEU into Article 130r(2)EC: "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should be rectified at source and that the polluter should pay...".

84 That acid deposition causes damage was apparently well enough understood in the 1950s to inspire Britain's tall stack policy. Emitting gases at a higher point, the policy shielded local towns and forests from the effects of acid precipitation. However, sulphur dioxide has the capacity to travel long distances, as indicated by the OECD/Nordic

underwent, requiring the presence of oxidants, was "far from well understood"[85]. In a case such as this, where more perfect knowledge cannot be awaited, the goal must be to apply the precautionary principle in making the best use possible of the data available even if full certainty is impossible. This is not explicitly stated in the preamble of LCP88/609, which simply says that "...the damage to the environment owing to air pollution makes it urgent to reduce and control emissions from new and existing large combustion plants." However, in fact a precautionary approach seemed justified and had been taken in the Convention on Long-Range Transboundary Air Pollution, to which LCP88/609 gives effect[86].

LCP88/609 was proposed prior to the Single European Act, but adopted after the SEA had added to the Treaty a title on the environment[87] as well as Article 100a, to be applied in derogation from Article 100[88]. Although the two fundamental reforms of the Single European Act, qualified majority voting and the co-operation procedure, were not included in the Environment Title's Article 130s[89], they were stipulated in Article 100a. This directive illustrates the practical effect of the new procedural choices offered by the SEA that affect both institutional involvement in the preparation of legislative texts, and in turn, the quality of the rules, introducing new tensions between Community institutions.

Council's research (1977). Not surprisingly, in the late 1960s Norway and Sweden grew concerned about the decline of fish in their inland waters and by the damage to their forests which had been attributed to the long-range transport of industrial emissions produced.

85 HL Select Committee on the European Communities, 22nd Report Session 1983-84, "Air Pollution,"at p.ix (HL Air Pollution Report, 1983-84).

86 To which the Community is party; Decision 81/462 (OJ 1981 L171/11).

87 Title VII (now Title XVI), Articles 130r-130t.

88 Thus the use of Articles 100 and 235 became largely obsolete in the area of environmental protection.

89 Article 130s EEC authorizes the Council to legislate within the limits set in the previous article, still on a unanimous basis, unless it agrees -- unanimously -- to act on a basis of qualified majority.

Significantly, the Council must consult the European Parliament, a procedure less onerous than cooperation. However, disregard of even so limited a power as this (which may amount to no more than the Council's waiting for an opinion from the Parliament) will render the measure so adopted void (Case 138/79 *Roquette Frères* 1980 ECR 3333 at para 33). By limiting the legal effect of Parliament's often perspicacious remarks, use of Article 130s as a base for most environmental legislation adopted during this period affected the quality of legislation.

As seen with the relatively inexpensive EIA85/337, before the SEA the Commission was disposed to be generous in seeing implications for competition which would justify use of Article 100 as a base, since this bolstered the competence of the Community to regulate the matter. From the point that Article 100a was adopted, stipulating vote by qualified majority and increasing Parliament's role, it became more expedient occasionally to play down the link to competition, and to use Article 130s, requiring unanimous voting and only consultation with Parliament[90]. Notably, in the large combustion plant proposal a good deal of attention was given in the preamble to the distortion of competition:

> Whereas there are disparities between the laws, regulations and administrative provisions concerning the obligations imposed in respect of large combustion plants which are liable to create unequal conditions of competition and thus have a direct effect on the common market; whereas, therefore, approximation of the laws in this field is required, as provided for by Article 100 of the Treaty [91].

As the ECOSOC pointed out, the directive "may influence the cost of energy and of products with a high energy content, thereby affecting competitiveness on world markets and employment opportunities"[92]. However, by the time the final version was elaborated, under the SEA, mention of competition had disappeared. Given Member State sensitivity towards issues of sovereignty especially where energy is concerned, such a directive could only realistically be envisaged using a unanimous vote: it was adopted on the basis of Article 130s. This can appear somewhat incongruous, since LCP88/609 is one of the Community 's most expensive pieces of environmental legislation[93] and certainly could affect competition.

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90 In fact, Article 100a EEC has been used very sparingly in environmental legislation to date, in such directives as those on exhaust from motor vehicles (for instance Directive 88/436, OJ 1988 L214/1 on emissions of pollutants from diesel engines; and Directive 88/77 OJ 1988 L36/1, on gaseous and particulate pollutants from diesel engines) and (after litigation: Case 300/89 *Commission v Council* 'Titanium Dioxide' 1991 ECR 2867) the Titanium Dioxide Directive (Directive 89/428 on the harmonisation of pollution reduction programmes).

91 Com(83)704 final, OJ 1984 C49/1.

92 Economic and Social Committee opinion on the proposal for a Council Directive on the limitation of emissions of pollutants into the air from lare combustion plants, OJ 1985 C25/33, point 2.2.2.

93 See Chapter 1, point 2.1. at *Consideration of costs.*

Adopted after the accession of new Member States, LCP88/609 further illustrates an approach based on variable geometry, in that different goals are set according to the capability of each Member State[94]. Because it affects the energy industry, it can have serious repercussions for many other industries. Of the two Member States studied here, Spain is particularly sensitive to this fact.

5. The Choice of Member States:

An in-depth examination of the Fifteen Member States is not feasible here. Two Member States, France and Spain, have been chosen as case studies, largely because of their disparities, in the hope that a wider range of problems will thus come to light. An initial difference regards their membership in the Community: France was one of the original members, and has therefore participated in all the negotiations for environmental legislation adopted to date; Spain joined only in 1986, and acceded to a body of environmental law that had been elaborated without its input (e.g. EIA85/337), although it participated in the formulation of subsequent rules (e.g. LCP88/609).

Environmental Disposition: A starting point in the selection of these two states was provided by various sources which point to the differences in the perceived disposition (a criterion that is admittedly not quantifiable) of Community states regarding implementation

94 See Chapter 1, point 2.5.2.

of Community environmental law[95]. France fell into a group of Member States[96] that are average: that neither cause particular difficulty nor show particular enthusiasm with regard to their Community environmental obligations. Spain[97], on the other hand, fits a more Mediterranean pattern; traditionally environment pulls up the rear of a long list of national priorities and implementation of Community environmental directives has suffered as a result[98]. Furthermore, Southern states see much of Community environmental policy as a response to primarily Northern problems, and resent it as such[99]. (Such criticism has been levelled at LCP88/609, since acid rain was indeed a problem affecting mostly Northern Member States, although Southern States have certainly contributed to it.) Spain is the most frequent objector on these grounds, indicating a fundamental disagreement on environmental policy goals among the Member States[100].

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95 Klatte, 1991, pp.45-47; also JOHNSON, S., and CORCELLE, G., *The Environmental Policy of the European Communities*, Graham & Trotman, 1989, at p. 8.

No examples were taken from the most progressive group: Denmark, the Netherlands and Germany (the Scandinavian Member States had yet to join at the time). The Member States that are regarded as the most recalcitrant before what they appear to regard as the over-intrusiveness of EC measures in the area (the United Kingdom and Ireland) have also been avoided.

Furthermore, although the categorisation is taken as a point of departure and of interest in the initial selection, it is not necessarily a factor in the discussion to follow. The point is not to attempt to discover which country is "best" in applying Community law; the classification was simply taken to indicate that the problems experienced are different in each case.

96 Belgium, Luxembourg and Italy fell into the same category (other authors would tend to place Italy in the same group as Spain, Portugal and Greece; see generally Cini, M., Porter, M., and Pridham, G., "Environmental standard setting and the Single European Market: Southern Europe as a Special Case?" in *The Evolution of Rules for a Single European Market, Part II: Rules, Democracy and the Environment*, Proceedings from the COST A7 workshop in Exeter, U.K. 8 - 11 September 1994, ed. David Mayes, European Commission D-G Science, Research and Development 1995, at p.306).

97 Joined by Portugal and Greece.

98 Spain consistently has one of the highest figures of presumed infractions of Community environmental rules: in 1989 Spain had 125 presumed infractions, as compared with 57 in France and 190 in the United Kingdom; in 1990 the figures were 129 (Spain), 49 (France) and 126 (UK); in 1991, 83 (Spain), 50 (France) and 70 (UK); in 1992, 115 (Spain), 49 (France) and 131 (UK); in 1993, 103 (Spain), 31 (France) and 64 (UK); see Eleventh Report 1993, OJ 1994 C154/59.

99 Aguilar, Susana, "Corporatist and Statist Regimes in Environmental Policy: German and Spain,"2 (1993) Environmental Politics 223, p.232.

100 Cini, Porter, Pridham, 1995, pp.312-13, 315.

Economic strength: Most environmental problems can be traced to an economic source or activity[101]. The level of economic (industrial, commercial) activity determines, in part, the nature of the environmental damage caused. More significant in the choice of these two Member States was that differences in economic power lead to variations also in a Member State's willingness to commit significant national resources to the environment or to take environmental decisions that negatively affect economic interests. The latter, in turn, greatly influences the implementation and enforcement of environmental law. Less-industrialised than many other Member States, Spain has faced a particular challenge: upon entering the Community in 1986, an enormous effort was necessary to adapt to EC requirements. Attaining this goal was made still more difficult because, simultaneously, Spain was continuing its efforts to adapt to recent internal territorial divisions[102] and was emerging from an industrial crisis and engaging in the conversion of industry[103].

The variation in economic strength of the two States chosen also gives rise to a difference in access to European funds. The Community generally has made efforts to help remedy the problem of insufficient financial resources to meet the costs of implementing environmental rules by providing access to a variety of Community funds (particularly the Cohesion Fund[104]). However, as Aguilar points out, referring to a 'widespread rumour' that only 20% of

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101 KERRY TURNER, R., PEARCE, D., BATEMAN, I., *Environmental Economics: An Elementary Introduction*, Harvester Wheatsheaf, 1994, at chapters 1-6.

102 Indeed, the existence of a single Community law has helped harmonise across autonomous communities.

103 ESTEVAN BOLEA, 1991, pp.183,228; Double, M.B., p.5.

104 Partially because Spain insisted on the creation of a specific fund independent of the Structural Funds; Aguilar, p.232.

Spain shall receive a total of ECU 32,810 million between 1994-99 (at 1994 prices). The Cohesion Fund has allocated some ECU 15.15 billion to Spain, Greece, Ireland and Portugal): Spain consistently receives the lion's share, between 52% and 58% of the total; Eurostat, *Europe in Figures*, 4th edition, 1995.

In fact the Cohesion Fund covers not only environment projects but also projects of trans-European transport; the latter have been controversial from an environmental perspective; (see Chapter 6, point 2.6. Practical illustration -- Tunnel du Somport) and more recent plans to make the longest trans-Alpine tunnel between France and Italy, through the Mercantour national park, where wolves have recently returned; *The Observer*, Sunday 25 August 1996, p.16.

the Cohesion fund money will be used for conservation, "...the arrival of Community money does not necessarily mean that the state of the environment will improve."[105]

Internal structure and environmental administration: Variations in their internal structures also influenced the choice of states. France's structure remains highly centralised despite significant efforts in the early Eighties to extend power and a measure of independence to territorial collectivities beyond the centre. Spain's system is quasi-federal in structure and significant tension exists between the centre and periphery; its seventeen autonomous communities vary among themselves in degrees of autonomy.

Administrative differences are also significant in the two Member States. While France has had a ministry of the environment since 1971, Spain's environmental activities, at the national level, are still mainly overseen by a department within the Ministry of Public Works, Transport and Environment (MOPTMA), a partnering where interests and priorities necessarily collide on occasion.

Legislative structures and traditions: These influence the manner in which the law is applied; here also certain differences are relevant. For example, France possesses a separate administrative court system; in Spain administrative procedures are heard before regular courts. Other fundamental differences may be expected to have an effect on the subject of this research, such as the fact that the Spanish Constitution, adopted two decades after the French Constitution, includes a reference to the environment. However, although its Constitution contains a reference to the environment, relatively little national environmental law exists: environmental legislation is generally a recent import from the Community.

Public involvement: The level of public concern in each of the Member States is crucial to environmental law, first because to some extent it is mirrored in political and legislative priorities; also because so much of the effectiveness of environmental legislation depends

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105 Aguilar, p.234. Furthermore, Community vigilance that funds will in fact be used to improve the state of implementation of environmental rules is, as shall be seen, unreliable; see generally Court of Auditors reports 3/92 and 4/94.

upon public awareness, participation, and outcry, and on the public's willingness to invest time and trouble into making a claim. Public involvement affects the number and force of environmental associations, in turn putting pressure on the government. Again differences are apparent: along with many other Western European countries, France experienced a surge in environmental interest in the Seventies[106]. Spain, more isolated from the rest of Europe at the time, did not have the activism of the Seventies to apply pressure for the creation of environmental rules[107]; public interest and involvement in environmental protection is a recent phenomenon.

As for public participation in environment associations, France can be considered average. In Spain on the other hand, the structure of participation in environmental associations impedes effective empowerment: generally, "...mass attitudes continue to rest very much on assumptions about the incompatibility of economic growth and environmental protection."[108] Although social preoccupation with environmental matters has grown in recent years[109], membership in environmental organisations (0.4% of the adult population) is lower than the European average (4%)[110]; 75% of the environmental organisations have fewer than 200 members. Moreover, lack of resources strangles the activities of these associations: in 1991 only 15.4% of these organisations were able to remunerate personnel[111]; this in turn, has a restrictive effect on the judicial actions that can be pursued.

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106 PRONIER, RAYMOND et LE SEIGNEUR, V.J., *Génération Verte: Les écologistes en politique*, Presses de la Renaissance, 1992.
107 Cini, Porter, Pridham, 1995, p.308.
108 *Ibid.*, p.317.
109 Baño León, p.613; Cini, Porter, Pridham, 1995, p.315.
110 Double, Mary Beth, "Spain Confronts Environmental Issues," 113 (1992) Business America 5, p.5.
111 MARTÍN MATEO, Ramón, *Tratado del Derecho Ambiental*, vol.I, Editorial Trivium, Madrid, 1991, p.159.

6. 'Upstream' and 'Downstream' Problems:

Finally, problems of implementation and enforcement identified at Community and Member State levels are divided into two categories. Those problems that can be traced back to the general context, or to the process of formulation of Community rules and thus flow from the administrative situation and the quality of the legislation produced are referred to as 'upstream problems'. In a study of implementation and enforcement, it may appear incongruous to insist upon these issues. However, it is argued here that certain problems of implementation and enforcement originate prior to the actual application of the rules. Difficulties of the environmental administration affect its efficiency in using environmental rules. Moreover, effective implementation and enforcement cannot be divorced from the quality of formulation of both environmental policy and rules[112]. As stated in the Fifth EAP, "[f]or the foreseeable future...the likelihood is that the effectiveness of implementation will be closely related to the quality of the measures themselves and of the arrangements for their enforcement."[113]

Problems that more obviously emerge during the process of properly implementing Community rules (i.e., national transposition or 'formal implementation'[114], and practical implementation); and that arise during their enforcement are considered 'downstream problems'.

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112 PE 116.085, 1988, at p.39; Chemical Industries Association, cited House of Lords Select Committee on the European Communities, 1991-92; HL Ninth Report Evidence 1991-92, p.9.

113 OJ 1993 C138/80.

114 Although national transposition could be considered legislative formulation at national level and therefore an 'upstream' problem (particularly France's EIA rules, which were adopted prior to the Community's EIA85/337), from the Community perspective they constitute formal implementation and are therefore classified for the purposes of this research among the 'downstream' problems. This is further supported by the fact that, where adopted to transpose Community rules, some shortcomings flow from inconsistencies in the Community legislation.

PART I: COMMUNITY LEVEL

CHAPTER 1: Upstream problems -- Administration, Legislative Formulation and Decision-making

1. Community Environmental Administration -- an indication of priority:

Prior to examining decision-making and legislative formulation, attention must be drawn to an initial upstream factor that significantly affects the Commission's ability to carry out its varied tasks: the Community's environmental administration, which reflects the fundamental subordination of environmental protection to other concerns. As shall be seen below, the priority accorded the environmental administration, in terms of resources and authority, have a

fundamental impact not only on legislative formulation, but also on monitoring compliance[1] and on the manner in which discretion is used in enforcement proceedings[2].

Initially a small environment and consumer protection service in DG-III (Internal Market and Industrial Matters) was entrusted with environmental protection. This became a Directorate General in 1981, to which civil protection was later transferred from DG-V[3]. It is now the Directorate-General for Environment, Consumer Protection and Nuclear Safety, DG-XI.

It had a difficult time imposing its authority[4]:

> the task force that preceded the formation of DG-XI was originally so weak that it sought the support of the NGOs and mobilised and supported them in order to defend itself. He (a Commission official) believed that without NGO support, DG-XI might have died in its early years.[5]

More than two decades after the Stockholm conference, still

> environmental departments are not heavyweight political actors. Though growing in importance in the 1980s the environmental portfolio of the Commission is still relatively junior, whereas those directorates-general responsible for the development of the single market programme were at the traditional centre of the Commission's activities -- finance and industry.[6]

Theoretically the position of DG-XI has been strengthened with relation to the other Directorates since the adoption of the principle that environmental policy be integrated into other policies[7], although it is still considered to be less influential within the Commission than other Directorates General[8]. The *Danish Bottles* case is frequently cited as a triumph for Community environmental policy; yet Weale and Williams[9] make the important point that the fact that a case was brought against Denmark at all (regarding its stricter drinks packaging rules) was the result of a power struggle within the Commission that DG-XI lost to DG-III. Still in the 1990s DG-XI is subjected to upheaval: until recently DG-XI's largely autonomous Legal Affairs Unit had considerable independence in its investigations and pursuit of complaints and

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1 See Chapter 2.
2 See Chapter 3.
3 Williams, R., p.354.
4 Apparently the same is true of the Council of Environment Ministers; Wurzel, 1996 JEPP, p.274.
5 Mazey and Richardson, 1993, p.121.
6 Weale, Albert and Andrea Williams, "Between Economy and Ecology? The Single Market and the Integration of Environmental Policy," in *A Green Dimension for the EC?*, David Judge editor, 1993, p.58.
7 Article 130r(2)EEC.
8 Collins and Earnshaw, *op.cit.*, p.223; Aguilar, p.228.
9 Weale and Williams, 1993, p.59.

infringements. However, in a controversial administrative reorganisation in 1994, proposed during the absence of the Director General, the Legal Affairs Unit has been moved to DG-XI's Directorate B[10]. Now in order to process complaints, the director of Directorate B, who has political functions as well as legal, must give approval[11].

Besides its impact on administrative functioning, with the ideological subordination of environmental protection comes an unwillingness to encroach on other interests for the environment's benefit. Administration of the Structural Funds[12] is but one of the examples of environmental ideology not being deeply enough entrenched to compete with other interests. Indeed, the problem is not that inadequate integration of environmental protection has gone unnoticed at the Community level[13]. Yet even where the problem is acknowledged and possible solutions have been identified, the Commission (its diverse Directorates General) and Council appear reluctant to resort to them. For instance, the Commission has the power to suspend payment on Structural Fund projects that have been found to inadequately integrate environmental considerations and has threatened to use it. However, "[t]he political pressure on the Commission is, in such cases extraordinarily high and, until now, no case has arisen where the Commission did not agree, in the end, to (co)finance the project."[14]

The fact that DG-XI is one of the youngest administrative sections, and that its many tasks outstrip its resources is a consideration that must be kept in mind, and will be referred to in more depth where appropriate.

2. Community Legislative Formulation -- Actors' Interventions:

The problems encountered in the development of legislation and the faults of the decision-making process have a significant impact on the legislation's quality[15]. Where the technical or scientific background of directives is lacking or costs are inadequately foreseen, legislation

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10 Water and air protection, nature conservation and civil protection.
11 Williams, R., pp.354-57.
12 Below, point 3.
13 It has been noted in the *Task Force on Environment and the Internal Market*, by the Court of Auditors and in several EP Resolutions (Collins: B3-1765; Harrison: A3-0170/92; Von de Vring: A3-0209/92).
14 Krämer, *Casebook*, 1993, pp.407,434.
15 Cf: question écrite 1584/87 "Inintelligibilité du droit communautaire" (OJ 1988 C296/15).

may be impractical, if not impossible to implement. In the event that legislation contains ambiguities, problems of implementation may be more due to uncertainty regarding the obligations than ill-will on the part of Member States. Where too much room for interpretation exists, harmony across the Union is threatened. A state of uncertainty may persist until (if ever) the ECJ is called upon to interpret the meaning of the provision that the actors in the formulation process were unable or unwilling to lay down unequivocally, a situation which, in the light of legal certainty, cannot be viewed as acceptable.

This section reviews the difficulties encountered, or indeed caused by the European institutions during the creation of environmental legislation, as illustrated by EIA85/337 and LCP88/609. Finally, the formulation of legislation and policies in *other* areas of Community policy and their effect on implementation and enforcement of environmental rules is examined.

A preliminary point should be noted. General problems of decision-making can arise even before the Institutions intervene. The decision to regulate an environmental problem -- and of which problem to address -- is often more to do with politics than environmental or even human well-being, as the development of LCP88/609 illustrates. In the Sixties and Seventies widespread consensus among European nations emerged that the effects of acid precipitation needed to be urgently addressed, and limiting emissions to the atmosphere of SO_2 and NO_x was considered one method of doing so[16]. However, Germany and the United Kingdom, the Community's principal emitters had earlier raised objections serious enough to rob a related international convention of its force[17]. Only when Germany had a change of heart inspired by its own newly discovered problems of forest die-back, did it appear reasonable to attempt to address the issue at Community level.

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16 See Introduction, point 4. at - *Large Combustion Plants directive.*

17 The Long-Range Transboundary Air Pollution Convention of the UN's Economic Commission for Europe: 1979 signed by the USSR, Eastern Europe, the USA and Canada and Western European states. The EEC later separately acceeded to the Convention: Decision 81/462, OJ 1981 L171/11. The Scandinavian countries wanted standstill clauses on sulphur dioxide, which would then be progressively reduced. The USA, the Federal Republic of Germany and the United Kingdom disagreed, with the result that the convention contains an agreement for signatories merely to cooperate in reasearch and "endeavour to limit and, as far as possible, gradually reduce air pollution." (Subsequent protocols containing more stringent obligations have been adopted.)

Actors' Interventions: Problems of implementation and enforcement may arise during the decision-making process as proposed legislation passes from one Community Institution to the next. These problems are examined as each Community Institution intervenes. While the Commission's draft may contain shortcomings, it is considered that the most serious difficulties arise during the legislation's passage through the Council. The role of the European Parliament is briefly examined, both for its limited past input into the legislation, as well as its enhanced (through co-decision) future input. Finally, although not widely associated with legislative formulation, the role of the European Court of Justice (ECJ) is not limited to enforcement and is also considered.

2.1. Commission:

The EC Commission drafts legislation, thereby exerting an obvious influence on the quality of environmental law and on the capacity to implement it[18].

Flaws stemming from consultation procedures: The Commission has in the past been frequently criticised for its approach to consultation regarding various aspects of the legislation it proposes. For instance, some have commented on the dubious scientific quality of certain environmental directives[19], which apparently varies according to medium[20]. Part of the problem is the above-mentioned lack of scientific and technical data: as a consultant to DG-XI put it, "We know that it is in bad shape. What we don't know, as of yet, is how bad it is."[21] Part of the problem, though, is related to the manner in which the Commission approaches consultation[22]. The Commission's scientific advisory committees are, reputedly, poorly organised and furthermore are not accorded sufficient time to review the scientific substance of

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18 Article 155 EC: "The Commission shall...have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty".

19 DoE Memo, HL Ninth Report Evidence 1991-92, p.15; PE 116.085, 1988.

20 Water directives are apparently particularly affected; PE 116.085, 1988, at p.40. See also *Financial Times*, 2 August 1993 "High Costs of Going Green."

21 Klatte, p.47.

22 On 2 December 1993, the Council restated the guiding principles for drafting and implementation of the Community legislation by the Commission and the Member States, particularly emphasising the need for legislation to be prepared and applied on the basis of thorough consultation with all interested parties; Bull.EC 12-1993, p.73.

the questions put to them[23]. Specifically in the instance of LCP88/609, the Commission's consultation -- allegedly limited to one consultant -- was simply inadequate, even judged on the basis of scientific information available at the time. The UK Minister on the Community Environment Council who participated in the negotiations, William Waldegrave, commented that "the Commission's study should have been produced and would have been largely taken apart by other scientists. The report was produced by one consultant and it was not very good."[24] Likewise the Commission's acceptance of, and insistence on the causes of acid rain was questioned, for although there was no doubt that SO_2 and small doubt that NO_x contributed to acid rain, there were doubts as to the urgency of regulating these two specific substances, particularly as the scientific community seemed to take a less alarmist view[25]. In recent years the scientific content of proposed legislation has possibly improved[26]; however, earlier legislation remains in force with such flaws intact.

Other groups with an interest in the Community's environmental legislation are also not adequately consulted and the consultation process is, apparently, inconsistent and contradictory[27]. When consultation of other organisations does take place, environmental groups are generally not well represented, as compared to representatives of industry and trade, a factor which may seriously jeopardise the protective elements of a given piece of

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23 PE 116.085, 1988, p.40. They in turn have pointed out that the Commission is unwilling to make efficient use of their capabilities, nor are their conclusions adequately published; also PE 156.269 Staff Situation at Commission DGXI, rapporteur: Hemmo Muntingh.

24 William Waldegrave, Minister of State DoE, HL Eighth Report Session 1986-87, "Fourth Environmental Action Programme" with evidence, p.86. (However, the United Kingdom's fundamental objection to the legislation must be recalled.)

25 The HL Air Pollution Report, 1983-84, cites research that does not support the hypothesis relating only sulphur dioxide and nitrogen oxides to the damage, but also a secondary air pollutant: ozone (point 61). The British Forestry Commission suggested there is not single cause to the problem and their experiments with acid rain produced few observable results (points 64 and 69).

26 For example, Simon Ball commented on the scientific sensitivity of the provisions of the recent Habitat Directive (Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L206/7); Ball, "Has the United Kingdom Government Implemented the Habitat Directive?" Conference: The Impact of EC Environmental Law in the United Kingdom, London, 3 November 1995.

27 Mazey, S., and Richardson, J., "Environmental Groups and the EC: Challenges and Opportunities,"pp.111-13; and Collins, K., and Earnshaw, D., "The Implementation and Enforcement of European Community Environment Legislation," p.223, both in *A Green Dimension for the EC?*, David Judge editor, 1993.

legislation[28]. Environmental organisations are hard pressed to compensate for the lack of consultation. Even those that do have resources and offices in Brussels[29] find it extremely difficult to follow an issue or a single piece of legislation through each stage of the process; they are usually unable to compete with industrial actors whose specific interests are threatened by a certain piece of legislation[30].

Ideally the Commission could enter into contact with those in national and regional administrations who will be called upon to implement legislation. Their practical input prior to adoption of legislation could perhaps help avert practical problems of implementation that, to them, would have been obvious at the stage of formulation[31]. However, at present this option is politically unlikely, as all contact with Member States is filtered through the State representation in Brussels.

Another problem with consultation -- of scientific researchers, interest groups, environmental agencies or Member State representatives -- is that usually those consulted and the substance of their advice are hidden from public scrutiny and criticism[32]. The overwhelming consensus among the above groups[33] is that the Commission needs to adopt both a more systematic and a more transparent approach to consultation at the drafting stage. For its part the Commission has indicated the ambition to regularise and improve its consultation procedures[34]. It has adopted new rules on legislative drafting and committed itself to taking

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28 KRÄMER, *Focus...*, p.139; Boons, F. "Product-oriented Environmental Policy and Networks: Ecological Aspects of Economic Internationalisation," in *A Green Dimension for the EC?*, David Judge editor, 1993, at p.94. Preparation of Directive 85/339 (waste from liquid beverage containers) took roughly a decade, and with the influence of groups with vested interest during the 1970s and early 1980s, the final result is weak; LUDWIG KRÄMER, *European Environmental Law Casebook*, Sweet & Maxwell, 1993, at p.103.

29 Friends of the Earth, Greenpeace, World Wide Fund and smaller organisations such as Pesticide Action Network and Climate Action Network

30 Mazey and Richardson, 1993, p.123; KRÄMER, *Focus...*, p.22; Aguilar, p.224.

31 Collins and Earnshaw, *op.cit.*, p.224; Mr. Plowman, HL Ninth Report Evidence 1991-92.

32 Van der Straaten, "A Sound European Environmental Policy: Challenges, Possibilities and Barriers," in *A Green Dimension for the EC?*, David Judge editor, 1993, at p.72; PE 116.085, 1988, p.40;

33 See PE 116.085, 1988, p.39-40; HL Ninth Report Evidence 1991-92, p.9; KRÄMER, *Focus...*, p.139.

34 Fifth EAP, p.81; Mazey and Richardson, 1993; Com(96)500, Communication from the Commission: Implementing Community Environmental Law, point 51, p.17.

increased care in the pre-proposal and drafting stages. It will consider including review clauses and the requirement that sanctions be provided in certain legislative proposals[35].

Consideration of costs: A sizeable problem during the formulation of legislation concerns the inadequate consideration of the cost of subsequently applying that legislation. The issue bears a direct link to legislative efficiency; it can be argued (and has been protested, as with LCP88/609) that some legislation is too costly to implement[36].

A wider vision of the enormous economic consequences of environmental legislation and the financial implications of enforcing these rules in all Member States is needed[37]. Although frequently used as a pretext to avoid regulation of a particular matter, it is true that the sometimes stunning costs of implementing legislation, and the effect on industries and companies (which will pass the burden to consumers), as well as on the insurance and banking sectors, must be kept in mind. Only after these are accurately calculated can the Commission realistically weigh the economic feasibility of the proposed legislation against the desirability of the goals to be attained or the standards set; "priorities must be established between competing claims."[38]

In addition to the issue of general costs of environmental legislation is the issue of 'variable geometry' and accommodating the particular economic circumstances of certain Member States. The Treaty requires that

> When drawing up its proposals with a view to achieving the objectives set out in Article 8a, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the internal market and it may propose appropriate provisions.
>
> If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the common market[39].

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35 Commission, "Implementing Community Environmental Law," Communication to the Council of the European Union and the European Parliament, 1996, at pp.14-20.

36 In the case of LCP88/609 is has been argued that a similar result could be achieved through other than regulatory methods; see TURNER, PEARCE, and BATEMAN, 1994, at p.90.

37 A illustration of the price tag that can be attached to environmental legislation was given by the United States Superfund to clean up contaminated land: the potential cost to the Environment Protection Agency and the private sector is $300 billion (in 1990 dollars) over the next 30 years, with the Defence and Energy departments facing liabilities of $200 billion; *Financial Times*, 2 August 1993: "High Costs of Going Green", p.13.

Although not a Community example, the fear of a similar experience with other environmental legislation sent tremors far beyond the United States' borders.

38 *Financial Times*, 2 August 1993: "High Costs of Going Green", p.13.

39 Article 7c EC as amended by the TEU.

The impact of the costs imbedded in environmental legislation has been softened, *inter alia*, through such 'appropriate provisions' as extending help to the less prosperous Member States (for example, through the Cohesion Fund[40]) and through use of directives with differing requirements according to economic capability.

LCP88/609 illustrates both the broader issue of costs and the effort that has been made to address the specific difficulties of less prosperous Member States. The original proposal was unacceptable to Spain because its Ministry of Public Works and Urbanism (MOPU) estimated the costs to involve 670,000 million pesetas investment in corrective measures, followed by an additional 67,000 million per year in operation costs entailing an increase of 20-25% in the price of the kilowatt hour[41]. The United Kingdom government also viewed the price tag for LCP88/609 as unacceptably high[42]; they judged the Commission to have underestimated costs by a factor of five[43]. The total cost to the Central Electricity Generating Board, they calculated, would be £350 million per year with between £16 and £40 million required for monitoring plant operations after 1995[44].

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40 And through various other funds: Structural Funds (regional, social, EAGGF), and programmes such as ACE, LIFE. Lack of solidarity of the wealthier Member States with these is still criticised; Report of the Committee on the Environment, Public Health and Consumer Protection on the implementation of European Community environmental legislation, 6 January 1992 (A3-0001/92); Rapporteur: Jacques Vernier.

41 The costs of the legislation actually adopted have been estimated to require an initial investment of 220,000 million pesetas, with operation costs of 19,033 million pesetas/year entailing an increase of 0.307 pesetas per kilowatt hour, according to one estimate; VALERIO MARTINEZ DE MUNIAIN, E., *La Legislación Europea de Medio Ambiente: Su Aplicación en España*, Colex, Madrid, 1991, p.99; see also Sanz Sa, *op.cit.*, p.425. Another source suggests that the operation costs will be closer to 473,000 million pesetas per year; J.A. Azuara, Director of CIEMAT, cited in MARTIN MATEO, Ramón, *Tratado del Derecho Ambiental*, vol.II, Editorial Trivium, Madrid,1992, p.353.

ESTEVAN BOLEA, 1991, pp.404-405: of total costs of electricity production, the cost of limiting atmospheric pollution from solid residues can reach 20% (+/-8%) of annual costs when purifying SO_2 by 90%, NO_x by 50%, and dust by 99.5%; if NO_x must be reduced by more than 50%, the investment costs go up by 3% and the annual costs by 5%.

Generally, however doubts have been voiced about both original cost estimates and those used today; ESTEVAN BOLEA, *op.cit.*, p.407.

42 BOEHMER-CHRISTIANSEN, S., and SKEA, J., *Acid Politics*, Belhaven Press, 1991, at p.238.

43 Although obviously not a disinterested party, the CEGB found that installing flue gas desulphurisation (FGD) technology to the twelve largest emitters would be necessary to meet the targets in the proposed directive. This would involve not only closing the plant in order to install the systems, but also, they estimated, a capital outlay of about £1,430 million with an associated loss of capacity of 663 MW. If this were to be replaced by a new coal-fired plant with FGD, the additional cost would be £560 million.

44 HL Air Pollution Report, 1983-84, points 74, 78, 79, 81, and 86.

Regarding the specific difficulties LCP88/609 posed for the economies of the newly joined Member States, a solution was found by varying the required emissions reductions in view of the differing problems and capabilities of the Member States[45]. In addition, several derogations from emission limits are provided for Spain's large plants as well as "for plants burning indigenous solid fuel."[46]

However, legislation such as this opens a debate on whether it is appropriate for a Community that promotes a level playing field for economic actors to impose varying targets on each State, or whether economic difficulties should -- and do -- trigger access to Community funds while the same goals are maintained. Although less wealthy Member States indeed have difficulty assuming the costs of implementing environmental legislation, the danger lies in their reliance on widespread acceptance of the fact that their economies need to grow in order to avoid taking environmental obligations seriously[47].

Lack of resources: On occasion the quality of legislative drafting suffers from the limited staff, and legal issues are at times poorly defined or contradictory[48]. Drafting is largely in the hands of administrators who may or may not have had any legal training; lawyers make a tardy entry in the process[49]. In 1991 Dr. Krämer reported that the Legal Unit of DG-XI had a staff of only ten lawyers, four officials and six on secondment[50]. In 1994 DG-XI disposed of about a dozen full-time lawyers[51]. This is inadequate: they are responsible for legal advice on

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45 For example, taking 1980 as a base, the calculated reductions of SO_2 emissions from existing plants for France are 40% for 1993, 60% by 1998 and 70% by 2003. For the same periods, the United Kingdom must reduce emissions by 20%, 40% and 60%. Spain is allowed to maintain its 1980 emissions without reduction in 1993; but required to reduce by 24% by 1998 and 37% by 2003; see LCP88/609, Annex I.

46 LCP88/609, Articles 5(2) and 6.

47 Ute Collier refers to a similar possibility with regard to carbon dioxide emissions; Collier, *op. cit.*, p.134.

Furthermore, certain economic advantages could eventually stem from the less-industrialised situation: the potential exists to build initial structures using environment friendly specifications, rather than investing to convert older infrastructure, and the investment necessary to fund clean-up efforts may well be less than in industrialised Member States, where economic activities have resulted in greater environmental harm.

48 Van der Straaten, *op.cit.*, p.71.

49 Mr. Plowman, HL Ninth Report Evidence 1991-92, at pp.21-22; Collins and Earnshaw, *op.cit.*, pp.223-24.

50 Dr. Ludwig Krämer, HL Ninth Report Evidence 1991-92, p.2.

51 Interview, Dr. Krämer, 25 July 1994.

drafting (as well as monitoring implementation[52]), and must grapple with the variety of legal traditions and languages that make up the Community[53].

2.2. Council:

The eventual deficiencies of the proposals that emerge from the Commission are often unresolved when passed to the Council; some are aggravated during Council negotiations. Composed of representatives of the Member States, the Council is where national interests are expressed, sovereignty is defended, and where environmental interests are appropriately balanced against other goals. Under the system established by the SEA, and for the most part even with Maastricht's modifications, ultimate responsibility for the quality of environmental legislation rests with the Council[54].

Proposals to receive attention: An initial manifestation of the influence of the various Member States lies in the selection of legislative proposals that are to receive the Council's attention[55]. The attitude of the Member State currently presiding in the Council is a determining factor in whether a proposal is examined or politely disregarded[56]. For instance, Germany was the champion of LCP88/609 in its early stages[57] and the turbulent negotiations were only successfully concluded when the German Council presidency came up again years after initial negotiations began. It was felt that only Germany had the authority to counter-balance British opposition to the proposal[58]; furthermore Germany's determination was reinforced by the knowledge that the Council presidencies coming up after it (Greece and Spain) were highly unlikely to consider this legislation a priority issue[59].

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52 Discussed in the following chapter.

53 Collins and Earnshaw, *op.cit.*, p. 223; Dr. Ludwig Krämer, HL Ninth Report Evidence 1991-92, p.9. See Chapter 2, points 1. Commission's tasks; and 2. Commission limitations.

54 Although co-decision, introduced by the Maastricht amendments to the EC Treaty, gives new importance to Parliament's intervention.

55 See for instance, Wurzel, K.W., "The Role of the EU Presidency in the environmental field: does it make a difference which member state runs the Presidency?", 3 (1996) JEPP 272-91.

56 KRÄMER, *Focus...*, p.143; Mazey and Richardson, 1993, pp.111-12; some would even argue that Council presidency is 'the most important feature of the Council in terms of its agenda setting; Weale, 1995, p.22.

57 After dropping its earlier objections; above, point 2.

58 The two had previously been allies in opposing legislation to curb acid rain, until Germany's change of heart in 1982; Weale, 1995, p.20.

59 BOEHMER-CHRISTIANSEN, S., and SKEA, 1991, pp.244-45; Haigh, "New Tools...", pp.30,32.

Compromise: The Council is where national interests are articulated and defended; each Member State tries to emerge from negotiations with legislation that is tailored to their specific national situation. The process of compromise necessary to obtain consensus on a proposal -- also referred to as "horse-trading"[60] and "emasculation of proposals by national administrations in the Council of Ministers"[61] -- is responsible for many of the shortcomings of quality of environmental legislation. Prior to the Maastricht Treaty, this negative national influence was aggravated by the need to achieve unanimous consensus in environmental matters[62]. Years of work and modifications between Commission, ECOSOC and European Parliament, as well as a majority consensus in the Council could be undone by one Member State's negative vote. Council representatives have therefore been willing to make large concessions to avert this possibility and during negotiation, intergovernmental haggling can take place over issues unrelated to the environment[63]. The result is that EC environmental legislation is at times "vague, ambiguous, and sometimes superficial"[64], and riddled with general clauses and vague standards that pave the way, at the national level, for practices that are not 'environment friendly'[65].

-- *Diversity of national interests across the Community:* One aspect of the pressures for compromise is the sum of the interests represented by the Twelve and now Fifteen Member States in the Council. Trying to accommodate the cumulative national influences exerts an obvious and powerful influence on the quality of the legislation that is adopted. The final act must incorporate pro-environment Scandinavian interests; interests of the Mediterranean states, which still popularly perceive the tensions between environmental and economic issues

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60 Royal Society for the Protection of Birds, in the House of Lords Ninth Report "Implementation and Enforcement of Environmental Legislation," Vol. I Report, p.9; Collins and Earnshaw, *op.cit.*, p.226.

61 OJ 1988 C94/155 at C94/156.

62 Between the Single European Act and the Maastricht modification to the EC Treaty, the main exception to unanimous voting in the Council was for the rare measures adopted on the basis of Article 100a, after the SEA. For the most part, however, the existing body of legislation required a unanimous consent in the Council.

63 Committee on the Environment Report on the implementation of European Community legislation relating to water, rapporteur: Kenneth Collins, PE Doc A2-298/87 (PE 116.085, 1988), p.42. Klatte, *op.cit.*, p.45; Collins and Earnshaw, *op. cit.*, p.226.

64 Collins and Earnshaw, *op.cit.*, pp.225, 243. The Commission has recognised that unanimity was partly the cause of "measures that were difficult to put into practical operation"; Fifth EAP, OJ 1993 C138/80; see also Van der Straaten, *op.cit.*, p.71.

65 KRÄMER, *Focus...*, 1992, p.19.

as a zero-sum game, in which any potential environmental gains are necessarily subtracted from their economic growth[66]; and all those in between. Moreover, basic national attitudes shift according to issue and divisions do not always run along North-South lines: for example Denmark and Greece found themselves allies in supporting higher vehicle emissions standards although the other Members were prepared to reach agreement[67].

- *The Hierarchy of interests within individual Member States:* Another factor in achieving compromise is that within any one State ecological concerns may not be foremost among national priorities[68] and a specific environmental issue may be seen to raise particular problems. Again a legislative proposal may unravel in the Council because it is not feasible politically. This can entail abandoning a legislative project (as with the Carbon Tax proposal, to which the United Kingdom and Spain objected[69]) or modifying its contents for certain Member States significantly.

Maastricht has changed and complicated the voting rules. The need for unanimity is now rarer and the influence of each single Member State has diminished. Nonetheless, it is likely that measures similar to EIA85/337, with a significant impact on town and country planning and land-use, or to LCP88/609, with its effect on energy policy, will continue to require a unanimous vote under Article 130s(2)[70] as modified by the TEU. And even where the need for

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66 Cini, M., Porter, M., and Pridham, G., "Environmental standard setting and the Single European Market: Southern Europe as a Special Case?" in *The Evolution of Rules for a Single European Market, Part II: Rules, Democracy and the Environment,* Proceedings from the COST A7 workshop in Exeter, U.K. 8 - 11 September 1994, ed. David Mayes, European Commission DG Science, Research and Development 1995.

67 Weale, 1995, p.22.

68 Few environmental organisations have the resources necessary to influence national bargaining positions; Collins, PE Doc A2-298/87, p.42.

69 Collier, Ute, "The European Union's climate change policy: limiting emissions or limiting powers?" 3 (1996) Journal of European Public Policy 122-38, at pp.132,134.

70 Article 130s(2)EC: "By way of derogation from Aricle 189c, "the Council, acting unanimously on a proposal from the Commission and after *consulting* the European Parliament and the Economic and Social Committee, shall adopt:

- provisions primarily of a fiscal nature;
- measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources;
- measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council may, under the conditions laid down in the preceding paragraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority."

achieving compromise is not as extensive, with qualified majority vote, compromise continues to influence the quality of legislation.

Lack of expertise in the matter regulated: Even where national priorities enable them to put environmental concerns first, Environment Ministers may be expected to take decisions that imply evaluation of scientific data that is not within their area of expertise[71]. The British Minister on the Environment Council remarked:

> "[t]here has never been an occasion -- I am sure it would be an offence against all proper constitutional procedures within the Community -- where the Council are addressed by scientists or have a briefing by a scientist or anything of that kind, which normal Ministers holding responsibilities in their countries would of course, always do."[72]

Costs: As with the Commission, the Council must also make a realistic appraisal of costs: this is the stage at which it is appropriate to decide whether they should be incurred. Surprise has been registered at the randomness of the Council's assessment of costs. One Environment Minister believes that generally the Ministers "do not do enough in trying to set an agenda or priorities which is based on a sensible application of not unlimited resources, not unlimited patience in terms of the consumer or taxpayer[73]." Wider consideration of costs and specific difficulties of individual States are inter-linked: a balanced approach to costs incorporated in the legislation affects States' willingness and ability to implement and enforce an act, and seeing that the goals are reasonably postulated will be a factor in the wealthier States' willingness to contribute, via Community funds, for implementation in the less wealthy States.

Inertia: National representatives have shown reluctance to undertake significant modifications of national policies and laws[74] particularly if these are perceived as superior to

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71 Wurzel, JEPP 1996, p.289.

72 Waldegrave, in HL Eighth Report Session 1986-87, p.86.

73 *Ibid.*, p.85.

74 Collins and Earnshaw, *op.cit.*, pp.224-5; Vernier Report, EP A3-0001/92, p.16. As the Parliament's Committee on the Environment has pointed out, the "Drins" directive illustrates the "tendency for Member States to seek to legislate only for what is already achievable". PE 116.085, 1988, p.46. During the adoption of a directive on toxic pesticides (aldrin, dieldrin, endrin, isodrin) the UK sought a standard that would enable it to avoid the introduction of quality objectives for drins and consequently, new measures to comply with these objectives. The UK government suggested a 50ng/l limit rather than the 5ng/l proposed, in spite of the fact that its own authorities considered that no safe level for drins existed and their use should be discontinued.

the Community legislation[75]. Re-aligning existing national measures and a traditional way of implementing them in a given area in order to accommodate Community legislation may be more strongly resisted than the introduction of absolutely new legislation[76]. This was apparent during negotiations of the EIA85/337. One source remarked at the time that "[a]s the Directive fits no single national planning system exactly and would require adaptation on the part of all, each Member State is interested in a final product which would cause the least amount of disruption."[77]

Lack of concern for implementation: It is not the formal duty of the Council to directly involve itself in the implementation and enforcement of Community rules and historically the Council has not demonstrated particular concern for the subsequent application of legislation[78]. Legal efficiency would perhaps improve if the adoption of an act were not viewed as the end of the Council's involvement with it. Discussion of the actual progress of specific directives would force ministers to take notice of practical issues of implementation and might lead them to pressure one another regarding subsequent implementation[79]. Perhaps more realistically, it would at least make them aware of the types of problems that arise when, due to insufficiently tight phrasing of legal obligations, excessive discretion is left to Member States.

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75 See Vernier Report, EP A3-0001/92, p.16: "This attitude appears relatively widespread in Germany, the Netherlands, France and, to a certain extent in Denmark (although here it is more often justified)."

76 Sheate, W.R. and Macrory, R.B., "Agriculture and the EC Environmental Assessment Directive: Lessons for Community Policy-Making," 28 (1989) Journal of Common Market Studies 68, at p.78 (Sheate and Macrory, 1989).

77 Kennedy, W., "The Directive on Environmental Impact Assessment," 8 (1982) Environmental Policy and Law 84-95. p.94. For instance, the Commission found France resisted separating EIA procedures from elaborate planning authorisation and classified installations schemes. This separation would have made the Commission's task of examining implementation easier, but would have disrupted national procedures that had been in place, in some instances for decades.

78 HL Ninth Report Evidence 1991-92, p11, p.35. However, concern for practical effect has more recently, received more attention: the Council Presidency meeting of Environment Ministers at Amsterdam, 11-13 October 1991; European Council of Edinburgh Presidency Conclusions, *Europe* no. 5878 Sunday/Monday 13/14 December 1992; Council Resolution of 29 June 1995 (OJ 1995 C188/1), on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market.

79 HL Ninth Report Evidence 1991-92, Memorandum by the Institute for European Environmental Policy, London p. 169. However, the Italian Embassy was lukewarm about the idea, suggesting that the Council be notified only of major difficulties encountered in practical application, p.232.

Transparency: Finally, the extent of the above factors' impact is difficult to calculate since obtaining information on what actually took place during negotiations of a specific piece of legislation is difficult to obtain. Council minutes are confidential; this lack of transparency contributes to concern that the substance of legal acts is being sacrificed in political swaps that have little to do with the subject at hand[80]. (In fact, lack of transparency is one of the major criticisms of the Community's entire legislative process[81].)

Furthermore, a subsequent judicial interpretation of a provision sometimes emerges that does not correspond to what was originally intended. As one minister pointed out: "...Ministers are often surprised at where the competence appears to exist to do things which had not occurred to anyone when these negotiations first took place."[82] If interpretation of a directive were at issue in infringement proceedings, one could imagine a situation (such as that of EIA85/337[83]) in which published minutes could be used to support a Member State's case, by indicating what the representatives in the Council believed they were agreeing to. Although the ECJ has ruled[84] that declarations in Council minutes cannot be used in the interpretation of Directives, a different view would perhaps be taken were the minutes published and therefore available for Member States to rely upon in implementation. After a recent Court of First Instance ruling[85], condemning the Council for failing to exert its judgment on the matter of access

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80 Collins and Earnshaw, *op.cit.*, pp.225-26.

81 Krämer, HL Ninth Report Evidence 1991-92; Klatte, 1991, p.45; Macrory, R., "The Enforcement of Community Environmental Laws: Some Critical Issues," 19 (1992) CMLRev 347.

82 Mr. Heseltine, HL Ninth Report Evidence 1991-92, p.186.

83 Concerning Annex II, where agreement was possibly obtained only because the Member States believed that assessment for the projects in this annex was wholly discretionary. The Commission, however, subsequently indicated that it believed otherwise; below.

84 Case 429/85 *Commission v Italy* 1988 ECR 843, at para. 9: "It must be observed in this regard that an interpretation based on a declaration by the Council cannot give rise to an interpretation different from that resulting from the actual wording of the fourth indent of Article 8(1) of the directive."

85 Case T-194/94 *John Carvel and Guardian Newspapers Ltd*, 1995 ECR II-2765, at para. 73: "Those two letters show that the Council, when responding to the applicants' requests, did not comply with the obligation of balancing the interests involved, laid down by Article 4(2) of Decision 93/731; and para.78 "In light of the foregoing, it must be found that, as regards the requests for access to the documents relating to the Justice and Agriculture Councils, the Council failed to exercise its discretion in compliance with the relevant provisions as interpreted by the Court...".

to documents in conformity with relevant dispositions in effect, the Council was expected to agree to publish minutes of meetings[86]. Progress here is still extremely slow[87].

2.3. Parliament:

Limited role: It is widely felt that another problem of the Community legislative process is that the most democratic and "greenest" of the EC institutions, the European Parliament, has a beneficial contribution to make during the formulation of Community rules (as illustrated below by its comments on the directives) but has had too limited a legislative role[88] (as illustrated, below, by the scant consideration given to its comments).

Parliament assiduously guards the formal role accorded it by the consultation and, later, the co-operation (after the SEA) and co-decision (after the TEU) procedures. Pressure from Parliament was a significant force behind the Single European Act generally, and specifically behind the inclusion of the Environment Title[89]. Parliament has since promoted, not always successfully[90], use of Article 100a and thereby its own role, in turn affecting the degree to which its comments on draft legislation must be taken into account. This is important, for its comments have at times foreshadowed issues which gave rise to problems in later application[91]. Also, its alert attitude has occasionally ensured that an element of environmental protection is integrated into other policies during the formulation of legislation, as with the inclusion in the Broadcasting Directive of the provision that "[t]elevision advertising shall not encourage behaviour prejudicial to the environment"[92].

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86 Wolf, Julie, "EU code to end secret decisions", *The Guardian*, 2 October 1995, p.9.

87 Bates, Stephen, "Secretive EU institution forced to go public about not being open," *The Guardian*, 27 November 1996; however, see also Commission, "The Week in Europe," 13 February 1997, WE/06/97.

88 E.g., KRÄMER, *Focus...*, p.214.

89 Judge, David, "'Predestined to Save the Earth': the Environment Committee of the European Parliament," in *A Green Dimension for the EC?*, David Judge editor, 1993, at p.189.

90 Case C-155/91 *Commission v Council* 1993 ECR I-939.

91 See the EIA and LCP directives, below.

92 Article 12e of the Broadcasting Directive (OJ 1989 L298/23).

It would be misleading to overstate the case however; numerous examples exist where the Parliament's Environment Committee, in spite of its efforts, has failed to significantly influence the outcome of the legislative process (Judge, 1993, at pp. 206-7). Furthermore, the Parliament faces its own restrictions in terms of resources and the efficiency of Parliament's work is generally perturbed by the constant shuttling between three physical locations (David Martin, MEP, in a lecture given at the University of Edinburgh, 21 February 1994).

The Maastricht Treaty has modified the relationships between institutions. Significantly, Parliament's role has been enhanced: it has been given the power to co-legislate with the Council through the procedures elaborated in Article 189b. Parliament has been extended the power to definitively reject, by an absolute majority of its members, any Council proposal[93] (under co-operation, a Parliament rejection could be overridden by the Council acting unanimously). Parliament also has the power, possibly more important[94], to amend an act. This procedure, referred to as "co-decision", can be hoped to improve the quality of environment rules. However, as it is complex and potentially time-consuming[95], dispute over correct legal bases may also be encouraged[96]. Furthermore, this positive step in Parliament's legislative involvement will not, of course, affect the existing body of legislation.

2.4. Court of Justice:

Competence to adopt environmental rules: Not typically associated with the formulation of rules, the ECJ has nevertheless played an important role here. Prior to explicit legal foundation for environmental rules in the Treaty, the ECJ supported Community competence to formulate environmental rules at all, even where these could restrict competition, and despite

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93 Article 189b(2)c EC: "...The European Parliament shall thereafter either confirm, by an absolute majority of its component members, its rejection of the common position, in which event the proposed act shall be deemed not to have been adopted, or propose amendments in accordance with subparagraph (d) of this paragraph;" Article 189b (6): "...In this case, the act in question shall be finally adopted unless the European Parliament, within six weeks of the date of confirmation by the Council, rejects the text by an absolute majority of its component members, in which case the proposed act shall be deemed not to have been adopted."

It is interesting to note that where Parliament wishes to approve a Council text, no provision is made, which is taken to mean that a mere majority of voting members is sufficient.

94 Hartley, T., "Constitutional and Institutional Aspects of the Maastricht Agreement," 42 (1993) International and Comparative Law Quarterly 213-37, p.225.

95 If the Parliament cannot agree to the Council's common position on a second reading of a proposal, or if the Council cannot accept Parliament's amendments, a Conciliation Committee is convened in which both institutions are equally represented. If the Conciliation Committee cannot come to agreement, the act will be deemed not to have been adopted unless the Council (Article 189b(6), acting by qualified majority, adopts it. In deference to co-decision, Parliament then has six weeks in which to reject the text by absolute majority. In practice co-decision may well take steps to address the "democratic deficit" while slowing the Community's gait down to a plod. Also note here, that where Parliament's power has been heightened, the Commission's has probably decreased: if the Council wishes to approve a Parliament amendment that the Commission has rejected, it can simply wait three months and set up a Conciliation Committee, after which it can adopt the text by a qualified majority even if the Commission objects; Hartley, 1993, pp.225-6.

96 Below, point 2.4. *Choice of legal basis -- quality of the rules.*

the SEA, the dividing line between possible legal bases was not distinct, and the ECJ gave important guidance in Case 45/86 *Commission v Council*[101], in which it indicated that the criteria for selecting a legal base must be objective and amenable to judicial review.

The adoption of the SEA increased the choices available by adding Articles 100a (measures having as their object the establishment of the internal market) and 130s (actions relating to the environment). The ECJ was again called upon to resolve disputes between institutions as to the correct choice of legal basis. The quality of Community intervention differed under the two articles: the principles outlined in Article 130r(2)[102] and guidelines in Article 130r(3)[103] of the Environment Title were to shape legislation adopted on the basis of

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101 Case 45/86 *Commission v Council* 1987 ECR 1493, regarding a choice between Articles 113 and 235, at para.11: "...the choice of legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued, but must be based on objective factors which are amenable to judicial review". At para. 13 it states further "It follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question."

The Court was also called upon to defend Article 100 (which also dictates the legislative form, "directives"), as a legal basis for legislation with an environmental aspect that would have an impact upon the undertakings required to adhere to its provisions: Case 91/79 *Commission v Italian Republic* (Detergents) 1980 ECR 1099 at para 8.

102 Article 130r(2)EEC lays down the principles "that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies."

Less forceful interpretations understand the provisions as mere guidelines for Community environmental action rather than obligations; Vandermeersch, D., "The Single European Act and the Environmental Policy of the European Economic Community," 12 (1987) European Law Review 407-29, at p.420 (Vandermeersch, ELRev 1987).

However, interpreting forcefully, Article 130r(2)'s principles have considerable potential to protect the environment. For instance, the polluter pays principle is a critical element in internalising the costs of environmental protection; strongly interpreted it could entail an evolution towards a concept of strict liability (*responsabilité sans faute*) such as that foreseen in the Commission's Green Paper on Remedying Environment Damage (Com(93)47). From the principle that preventive action should be taken one could, interpreting forcefully, deduce a legal obligation to carry out an environmental impact assessment.

103 Article 130r(3)EEC requires that "In preparing its action relating to the environment, the Community shall take account of: (i) available scientific and technical data; (ii) environmental conditions in the various regions of the Community; (iii) the potential benefits and costs of action or of lack of action; (iv) the economic and social development of the Community as a whole and the balanced development of its regions." The depth of contemplation this implies during the formulation of legislative proposals is unclear.

Also, a situation could be imagined in which these considerations have consequences at the enforcement stage: for instance, the cost-benefit provision could, theoretically, be used in proceedings against a Community measure that is challenged on the basis of proportionality; see Vivier Hannequin, p.227.

Article 130s. For example, where Article 130s[104] was used as a basis, the subsidiarity principle[105] required that Community action be more effective than that of Member States acting separately.

On the other hand, Article 100a[106] raises different types of issues. A positive requirement is that Article 100a(3) stipulates that in matters regarding, *inter alia*, environmental protection, the Commission "take as a base a high level of protection"[107] in its proposals (but is silent as to what happens to the "high level" in the final version). The implications for implementation are clear: where a high level is embodied in legislation itself it follows that, if properly implemented and enforced, a similarly high level exists in practice. Where Article 100a is used other important questions arise concerning, for instance, the modalities of the possibility to derogate (Article 100a(4)[108]), and the consequence of this on uniform implementation of the rules across Member States[109] -- a primary concern, after all, of legislation adopted on this basis.

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104 Article 130sEEC: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community.

The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority."

105 Article 130r(4)EEC: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures."

106 Article 100a(1)EEC: "...The Council shall, acting by a qualified majority on a proposal from the Commission, in cooperation with the European Parliament and after consulting the Economic and Social Committee, 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."

107 In Article 100a(3)EEC. As with Article 130tEEC, the phrase was included for the Member States that worried their superior environmental policies would be dragged to the level of the least environmentally concerned; Vandermeersch, ELRev 1987, pp.417-19; Krämer, SEA pp.669-80; Vivier Hannequin, p.229.

108 Article 100a(4)EEC opens the possibility for derogation from harmonization measures where a Member State "deems it necessary" on grounds referred to in Article 36 or for reasons pertaining to the protection of the environment or the working environment. The Member State shall notify the Commission of the derogating national provisions. This article only applies to measures based on Article 100a and actually adopted by a qualified majority.

109 For example, unlike Article 93 EEC (derogations regarding state aids; a Member State is in breach of Article 93 EEC if it fails to notify of an aid plan, regardless of the decision the Commission ultimately reaches on the compatibility of the plan with Community legislation), Article 100a(4)EEC mentions no time limit for notification and therefore provides no incentive for Member States to notify promptly, leading to legal uncertainty during the period where national derogating provisions are unconfirmed; see Flynn, J. "How Will Article 100a(4) Work? A Comparison with Article 93," 24 (1987) *CMLRev* 689-707, p. 700, who suggests that a

Procedural requirements also differ between these bases. Unanimity was necessary with Article 130s[110]; a qualified majority sufficed with Article 100a[111] and, with the latter, Member States saw their individual voting power reduced. The articles further differ with regard to the potentially time-consuming to-and-fro of co-operation with the EP, required only with Article 100a. The impact of these choices on the quality of the act in question can be significant.

Again the ECJ's rulings influenced the quality of formulation by providing guidelines on institutional involvement: it has ruled that the choice of legal basis dictates the procedures to be followed and is thus "capable of influencing the content of the measure. An incorrect choice of legal basis, if established, would not therefore constitute a purely formal defect."[112]

The ECJ gave further guidance in the context of proceedings brought by the Commission when the Council attempted, unsuccessfully, to avoid resorting to Article 100a[113]. Legally, Community measures must conform both to Community environment and competition policies; therefore, since environment protection requirements must in any case be a 'component part' of other Community policies, a Community measure cannot be covered by Article 130s simply because it also pursues environmental objectives (*Titanium Dioxide*[114]). Likewise, the simple

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"reasonable time" to review the provisions' compatibility is, as with Article 93, about two months (p.703). Disagreemeent exists as to whether derogations can be sought only for national measures adopted prior to Community harmonizing legislation: compare Flynn, *op.cit.*, p.696 and Usher, *op.cit.*, p.271; to Krämer, SEA, p.681.

110 Although the possibility existed for the Council to decide unanimously to vote by qualified majority: Article 130sEEC, second indent.

111 Previously the choice had not existed, except on those rare occasions where use of Articles 43 and 113 was envisaged, as both provide for qualified majority vote.

112 Case C-62/88 *Greece v Council* 1990 ECR I-1527 at para. 12.

113 See also LCP88/609, Introduction, point 4, where Article 100a was avoided as a legal basis.

114 Case C-300/89 *Commission v Council (Titanium Dioxide)* 1991 ECR I-2867, paras. 22 and 23. Further, judging both the aim and content of challenged Directive 89/428, the Court found that the measure concerned indissociably both the environment and competition; that to use both articles, and therefore to require the Council to act unanimously in any event, would divest the cooperation procedure of its very substance. The Court found the directive closely concerned production conditions and the elimination of competitive distortions in a given industrial sector and therefore annulled the directive as incorrectly based on Article 130s.

fact that a directive concerns the functioning of the internal market is not enough to justify recourse to Article 100a (*Commission v Council*[115]).

The quality of Community legislative intervention under these legal bases has again been modified with the Treaty on European Union. At a general level the TEU underscores the Community's commitment to environmental protection[116] while echoing the concept of "sustainable development"[117]. More specifically, the principles and guidelines in the Environment Title have again been somewhat altered[118]. One example is that the requirement that environmental protection be a "component" of other Community policies is here more specific: "environmental protection requirements must be integrated into the definition and implementation of other Community policies", a factor that was considered likely to increase the justiciability of the principle[119].

Article 130s now contains five subparagraphs, providing for a variety of procedures and, as a possible consequence, increased scope for dispute as to choice of legal basis. Article 130s(1), by

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115 Case C-155/91 *Commission v Council* 1993 ECR I-939. Here the Court ruled that Directive 91/156 was correctly founded on Article 130s. Dealing with both industrial and domestic waste, regardless of whether this was to be eliminated or priced, the directive had only an incidental effect on harmonisation of the internal market and must be considered to have, as principal objective, the protection of the environment (paras. 19 and 20).

116 Article B of the Common Provisions refers to the objective of promoting "economic and social progress which is balanced and sustainable" and Article 2 of Part One Principles speaks more explicitly of promoting "sustainable and non-inflationary growth respecting the environment."

117 Made popular by the Brundtland Commission and reiterated in the Fifth Action Programme.

118 For instance, the TEU amends the Article 130r(1) objectives to include the goal of "promoting measures at international level to deal with regional or worldwide environment problems", again invoking the wider field of action asserted in the Fifth Action Programme. Article 130r(2) EC has been amended to include a "high level of protection taking into account the diversity of situations in the various regions of the Community", disposing of the earlier discussion surrounding the absence of a 'high level' in SEA's Environment Title. The additional mention of the precautionary principle may entail that the burden of proving that environmental damage will not occur should be shifted to the polluter; Wilkinson, D. "Maastricht and the Environment: The Implications for the EC's environmental policy of the TEU," 4 (1992) JEL 221, p.224.

Although Subsidiarity is now applicable to the entire Treaty, Article 3B EC, that part of the SEA's subsidiarity provision that left the finance of environment policy to Member States surfaces in the TEU's amendment to Article 130s(4).

Also Article 130t maintains the existing right of Member States to implement stricter protective measures. It simply adds that these shall be notified to the Commission.

119 Lane, R., "New Community Competences Under the Maastricht Treaty," 30 (1993) CMLRev 939, p.972; however, see Conclusions, point 3.2. Integration of environmental considerations into other policies.

referring to Article 189c (co-operation with the Parliament[120]) provides that the Council will vote by qualified majority and Parliament will have a second reading of proposed legislation. Article 130s(2), by way of derogation from the above, provides for unanimous voting in the Council and only consultation with the Parliament in certain areas[121]. In these areas (which may be subject to interpretation[122]) the Council may agree unanimously to vote by qualified majority. Article 130s(3) provides that "in other areas, general action programmes setting out priority objectives to be attained" shall be adopted through the joint decision between Council and Parliament, as described in Article 189b[123]. Again, which "other areas" are referred to is not absolutely clear. Tensions may remain between Parliament and the Council as to choice of legal basis.

The debate that surrounded the Treaty on European Union and its entry into force may increase the ECJ's influence in the formulation of Community rules. With the added complexity of the choices -- not only between Articles 100a and 130s but also *within* Article 130s -- the ECJ may again be called upon to consider disputes involving choice of legal basis. And given the new insistence on the subsidiarity principle[124], the ECJ may also be called upon to decide broader issues of Community competence in environmental (and other) matters.

2.5. Practical Illustrations -- The Evolution of the EIA85/337 and LCP88/609:

A deeper look at the evolution of the two directives followed throughout the research more concretely illustrates the roles of the institutions and the effect on legislation of the problems discussed above, and provides background for the study to follow.

2.5.1. Environmental Impact Assessment Directive: As noted, EIA85/337 attempts to apply the Preventive Principle to Member States' development and construction projects[125]. Coming

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120 Above, point 2.3.

121 See above, point 2.2 at *Compromise*.

122 For example, the manner in which "land use with the exception of waste management and measures of a general nature" will be interpreted in practice, or what measures may be deemed to "significantly" affect a Member State's choice between energy sources are not unassailably clear.

123 Above, point 2.3.

124 See Conclusions, point 3.3 at *Subsidiarity*.

125 Commission proposal for a Council Directive concerning the assessment of the environmental effects of certain public and private projects, OJ 1980 C169/14, Article 1.

prior to the inclusion of the integration requirement in the SEA, it constitutes an early effort to require Member State authorities to consider environmental protection in their land-use and development plans[126].

Proposed version: The evolution of the EIA proposal highlights the general reluctance of Member States to adopt provisions that may imply considerable inconvenience to economic and administrative actors. The proposed EIA directive was stripped of many of its more stringent obligations: for instance, follow-up of conditions imposed in an authorisation, the cornerstone of effective intervention, is subtracted from the final version[127]. Thus, limits to the results that can be expected of a legal provision are inherent to the legislative text itself, even if correctly implemented.

The developer was required to assemble and submit with his[128] application for authorisation a good deal of information concerning not only his project but also reasonable alternatives entailing fewer adverse effects on the environment.

Various types of public and private projects were divided into three categories. Those listed in Annex I were to be systematically subjected to assessment. From this "exceptional cases which are unlikely to have any significant effect on the environment," and "below a specified threshold" could be exempted by the competent authority with the agreement of the Commission and "where appropriate" made subject to a simplified form of assessment[129]. Annex II projects were subject to assessment where their characteristics require, with competent authorities determining the criteria and thresholds for subjecting these projects to an assessment, either full or simplified[130]. Thirdly, the competent authority was to examine projects other than those listed in the Annexes which, particularly in light of the sensitivity of

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126 Commission proposal, Article 2. The assessment was to take into account the projects' effects on: water, air, soil, climate, flora, fauna and their interrelationships; and the built-up environment, including architectural heritage and the landscape (Article 3).

127 Taken out of proposed directive by Council: (proposal, Article 11) the competent authority shall check periodically whether the conditions attached under Article 10 to a planning permission are being complied with, whether they are still adequate, whether other provisions to protect the environment are being obeyed and whether it needs to take further easures to protect the environment from the effects of the project."

128 In order to simplify matters, throughout this research, 'he' is used where 'he' or 'she' is meant; 'his' were 'his' or 'her' is meant, et cetera.

129 Commission proposal, Article 4(1)

130 *Ibid.*, Article 4(2)

their location, were likely to have significant effects, in order to ascertain which should be made subject to an assessment[131].

Further obligations fell upon the competent authorities[132]: among them, to ensure that the developer supplied the information required, to publicise the information gathered and arrange for appropriate consultation of the concerned public[133]. In taking its decision the competent authority was not only required to take into account the above information but also to draw up its own assessment of likely significant effects of proposed project and, except where permission was denied for reasons not pertaining to the environment, make this publicly available[134]. Most significantly, it was required to monitor that imposed conditions and restrictions were indeed respected[135].

Undeniably, the draft contained ambiguities[136]. When called upon to give opinions, the Economic and Social Committee (ECOSOC) and Parliament had certain reservations and suggested additions to the proposal that may have helped eliminate subsequent confusion in application had they been heeded.

The ECOSOC[137] registered general concerns about the potential for administrative delay[138] and the fact that the proposal did not treat the important matter of allocation of costs, which could lead to divergent practices[139]. In several instances ECOSOC pointed out vague wording[140] or imprecise definitions[141], or questioned the classification of projects[142],

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131 *Ibid.*, Article 4(3)

132 Such as sending the above information to and consulting any relevant bodies (Article 7), including those in another Member State that might be affected (Article 7(2)), and fixing a suitable time limit for their comments.

133 Commission proposal, Article 8; and in doing so, respect commercial and industrial secrecy laws, provisions and practices, as well as public interest (Article 9).

134 Its assessment of the likely effects; a synthesis of main comments and opinions; its reasons for granting or refusing planning permission; and any conditions attached to the planning permission (Article 10).

135 Commission proposal, Article 11, above.

136 For instance Annex I, for which assessment was mandatory, includes airports and commercial harbours (point 9); Annex II, for which assessment is not necessarily required, also nincludes "harbours and airfields"(point 10).

137 OJ 1981 C 185/8.

138 Points 1.14 and 2.2.1.

139 Points 1.12 and 1.13.

140 For instance, the terms 'significant effects' and 'substantial changes' in Article 1, Commission proposal.

141 For instance, in point 2.4.6 ECOSOC notes that the proposal does not define the difference between a 'simplified' and a full assessment. In point 2.6.3 it provides its own

rightly pointing out that such imprecision may give rise to difficulties of interpretation and result in dispute that could cause harmful delays in the determination of planning applications[143]. Although some terms were in any event dropped, others that remained in the final version did give rise to difficulties (for instance, 'significant effects'[144]).

Parliament also had suggestions[145], most of which had the effect of widening the scope of the directive and strengthening the obligations required both of the developer and the competent authorities: for instance, Parliament wished to include Community projects among those that could be subjected to assessment[146]. Subsequent practice has revealed that two other points Parliament brought up would have been of particular importance (from the viewpoint of environmental protection rather than that of adequate implementation). Parliament wished the competent authority, in the evaluation required of it, to include "an assessment of the alternatives including that of not continuing with the project"[147]. As seen below, in the national contexts, the fact is that alternatives are rarely considered[148] and, as a general rule, projects are almost never discontinued for environmental reasons. Furthermore, concerning the public's intervention, Parliament speaks of both consultation *and objection*[149]. In practice, the public's opinion on a specific project is not accorded much weight: certainly its objections do nothing to halt important projects.

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definition of non-technical summary: "a printed explanation of the findings of the assessment which can be easily understood by the layman."

142 The Committee wondered if it should be more closely related to the extent of effect on environment in point 2.4.2.

143 Point 2.1.1.

144 The meaning of this is not clear and Spanish legislation, for instance, does not take much heed of the phrase; GARCIA URETA, 1994, pp.223,27; arguably neither does the French system of thresholds; see Chapter 4, point 2.2.1. at *Financial thresholds.*

145 Parliament Opinion, OJ 1982 C66/78.

146 Prior to the introduction of Article 130r(2) with the SEA or the reform of the Structural Funds, which subsequently subject certain Community projects to EIA.

It also noted imprecise definitions, suggested that the distinction between Annex I and II projects be reviewed after a trial period (Parliament Opinion, Points a. and b. Annex I), and added several projects to both annexes.

147 Parliament Opinion, Article 10.

148 For example, Chapter 5, point 1.2.1. *Reluctance to modify project; ibid.* Chapter 8, point 1.4.

149 Parliament Opinion, Article 8(3).

Rather than taking on some of the suggestions of Parliament and ECOSOC, the final version waters down even the provisions of the original version. Indeed, in view of the initial opposition to the idea of Community EIA legislation, it was an achievement that the directive was ever adopted[150]. Initially no Member State was wholly in favour of the directive, some because they felt the provisions were too intrusive[151] and others because the provisions did not go far enough[152]. Several Member States were simply leery of introducing similar legislation in the Community because early American experience with the NEPA[153], which inspired the EIA proposal, had resulted in massive litigation and delays[154].

The United Kingdom (and others) feared EIA's potential to cause delay and complicate the planning process and did not wish to add to the planning costs of developers[155]. Nonetheless, the House of Lords, having conducted an extensive hearing[156] came out strongly in favour of the Directive and may have been instrumental in the Government's eventual agreement to EIA85/337. Probably as crucial was the Government's firm conviction that assessment for projects in Annex II was entirely at their discretion[157], a conviction shared by other Member States; this error of formulation has since haunted implementation of EIA85/337.

The United Kingdom was not the only opponent. Germany objected to the need to seek Commission agreement for exemptions to Annex I projects[158]. The *Bundestag* further sought to

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150 For example, early on the UK made it clear that the directive would never be adopted while agriculture figured on the first Annex of projects for which assessment was mandatory; as a result, even by the time of the first draft agriculture is in Annex II. It also argued that the system of development control in their town and country planning procedures was more effective; Sheate and Macrory, 1989, p.72-74; see also Haigh, JPL 1987, p.8.

151 For example, the United Kingdom and West Germany, although for different reasons.

152 For example, the Netherlands; Kennedy, *op.cit.*; Haigh, N., "Environmental Assessment -- the EC Directive," 1987 JPL 4-20, at p.4.

153 United States' National Environmental Policy Act of 1969.

154 Kennedy, *op.cit.*, p.86.

155 Kennedy, *op.cit.*, p.90; Haigh, JPL 1987, p.8.

The House of Commons saw no point in adopting a Directive with which they were unsatisfied when, in their view, "[o]ur present system enables assessment to be made of environmental impact when required. We remain to be convinced that it is necessary or desirable to replace that eminently practical system with a rigid mandatory one"; Statement of Mr. Gordon Oakes in the British House of Commons, 9 June 1981, Hansard, p.11.

156 HL Eleventh Report, Session 1980-1, "Environmental Assessment of Projects," with minutes of evidence.

157 Sheate and Macrory, 1989, p.74; see Haigh JPL, p.8, which refers to a government consultation document in which it is stated, regarding Annex II projects, that "In general, the Government does not foresee that it will be necessary to make the carrying out of formal assessments mandatory in such cases...."

158 Kennedy, *op.cit.*, pp.90-91.

avoid adding to bureaucratic procedures. Still it should be noted that although the UK and Germany had similar misgivings, in Germany, where complex planning procedures already existed, the fear was not (as in the UK) that a mandatory system would be introduced, but that their many codified provisions would need to be modified to accord with the provisions of the directive. A further German reservation was that their high standard of protection might be reduced[159]. The Netherlands also had early qualms, mainly because, when compared to their national legislation, the directive was not extensive enough[160].

The principal objections were overcome in 1983 by shortening Annex I and providing the possibility to make exemptions without having to request the Commission's agreement[161]. However, at this point Danish objection emerged concerning the requirement to submit development projects authorised by an act of their Parliament, the *Folketing*, to the provisions of the Directive. The Danish Government was of the opinion that this infringed upon their sovereignty, and on this issue, the only unresolved point for many months, they would not cede[162]. It was finally settled with the inclusion of an exemption for projects authorised by a "specific Act of national legislation," of political necessity rather than environmental logic[163].

Adopted version: The actors' interventions are evident on the end result: the directive adopted in 1985[164] is less strict than the one proposed in 1980. The great advantage of EIA85/337, and one that should not be undervalued, is that it puts another criterion in the balance of "pro-con" factors that competent authorities must consider when authorising a project. However, the legislation merely requires that environmental costs be considered, not that the project be stopped if the costs are too high. Theoretically designed to give effect to the Preventive Principle, in fact, the authorities are simply required to consider prevention: in

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159 *Ibid.*, p.91.
160 *Ibid.*, pp.92-93.
161 HAIGH, NIGEL, *Manual of Environmental Policy: the EC and Britain*, Longman in association with the Institute for European Environmental Policy, London (updated yearly), at p.11.2-5; Haigh, JPL 1987, pp.8-9. Nonetheless, they must notify the Commission of such exemptions.
162 Haigh, JPL 1987, p.9.
163 If the EIA process is genuinely a tool to make the project evolve towards less environmental harm, there seems to be no logical reason to assert that projects adopted by national legislatures should not also undergo the process of evolution.
164 EIA85/337 OJ 1985 L175/40.

neither version, proposed or adopted, is the competent authority obliged to refuse planning permission to a project found to have significant harmful effects to the environment. Nor is it required to attach conditions to authorisation although this is arguably the purpose of the exercise (and implied in Article 9[165]). Without genuine ecological concern on the part of the competent authorities (extremely variable within Member States as well as across), the EIA becomes merely a complex set of formalities to be fulfilled before allowing the project to continue as planned. Even if correctly implemented and enforced, the goals set by EIA85/337 are very low.

More specifically on the issue of implementation and enforcement, it is an example of Community legislation where at least

> some of the difficulties of implementation stem from the imprecise language used in the Directive. Various opportunities exist for Member States to provide their own interpretations. As a result the Directive is not consistently applied across the Community.[166]

The fundamental elements of EIA85/337 (which are used throughout this research to structure the discussion) are: that public and private projects likely to have important repercussions on the environment be subject to the EIA procedure. Such projects are listed in the Directive's Annexes I and II. The EIA procedure, in turn, consists of the Environmental Impact Study (EIS: Article 5.2, EIA85/337) which is submitted to public consultation (Articles 6.2 and 6.3, EIA85/337). The administration must then consider both the EIS and the results of public consultation prior to granting permission or authorisation (Article 8, EIA85/337)[167].

- *Projects covered:* A positive list of projects caught by EIA85/337 is used. Notably, the projects *always* subject to an assessment have been greatly reduced: many projects have been shifted from Annex I to Annex II[168]. More exemptions are available: the directive

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165 EIA85/337, Article 9: "When a decision has been taken the competent authority or authorities shall inform the public conerned of: -- the content of the decision and *any conditions attached thereto,...* (emphasis added).

166 Salter, J. "Environmental Assessment: The Challenge from Brussels," 1992 *Journal of Planning and Environment Law* 14, at p.16.

167 Other Member States that risk being affected by the project must be notified (Article 7); by its nature, this obligation arises more rarely, and is referred to more briefly here. The public must be informed of the decision (Article 9, EIA85/337).

168 For example, projects concerning production and preliminary processing of metals and those in metal manufacture, with their various sub-categories (Commission proposal, Annex I points 3 and 6) were systematically subjected to assessment in the proposed version; in the adopted text only integrated works for the initial melting of cast-iron and steel remain in

does not apply to national defence projects[169]; to projects adopted by a specific act of national legislation[170]; or to specific projects which Member States in exceptional cases decide to exempt from the procedure. Furthermore, in the latter event, the Commission is given a smaller role in implementation: it is no longer called upon to give agreement but is merely informed of the reasons for the exemption[171].

The fact that the projects listed in the Annexes are not precisely defined[172] and are susceptible to widely divergent interpretations has affected implementation. The term "integrated chemical installation" has caused such a flourishing of national definitions that a working group of national experts was formed to attempt to narrow these down to an acceptable interpretation[173]. Indeed, the issue later arose before the ECJ for interpretation[174], as have the terms "modification to development projects"[175] and "canalisation and flood-relief works"[176].

The difficulties in categorising and defining specific projects pale in comparison to problems of implementation which have arisen due to the phrasing of Article 4(2) concerning Annex II projects: Annex II projects are subject to an assessment only "where Member States consider that their characteristics so require". Rather than clearly obliging Member States to define methods

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Annex I (point 4). Also, the subdivisions of the food industry and rubber processing, as well as most of the chemical industry, have slipped from Annex I in the proposal to Annex II in the final draft (Integrated chemical installations remain in Annex I, point 6).

169 EIA85/337, Article 1(4).

170 *Ibid.*, Article 1(5). The provision implies that rules for a legislative process are such as to enable the assessment procedure to be undertaken. but the rules of the House of Commons and the House of Lords had recently to be changed to include (possibly less strict) environmental impact assessment. See Salter, "The Challenge...," 1992, pp.16-17.

171 EIA85/337, Article 2(3)

172 With the exception of two that refer to definitions in other legislation; Macrory, Richard, "Environmental Assessment -- Critical Legal Issues in Implementation," in *EC Environment and Planning Law*, David Vaughan, ed., Butterworth, 1991, at pp.37.

173 Macrory in *EC Environment...*, 1991, pp.37-8.

174 Case C-133/94 *Commission v. Belgium*, judgment 6 May 1996, para.24: The Flemish executive interpreted 'integrated chemical installations' narrowly, excluding installations that fell below the minimum processing capacity of 100,000 tonnes. The Court found that the fact that the installation is "integrated" is the crucial criterion since other chemical installations had been included in the Annex II, and upheld the Commission's complaint on this matter.

175 Case C431-/92 *Commission v Germany* 1995 ECR I-2189, para.35.

176 Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV and Others and Gedeputeerde Staten van Zuid-Holland*, judgment 24 October 1996, paras.21-35.

for determining such characteristics, it indicates that they "may *inter alia* specify certain types of projects as being subject to assessment."[177] The wording seems to indicate that Member States may equally well choose not to specify such types[178] and (as seen particularly in the Spanish context, below), this has been a constant, important source of confusion and dispute since. Although harmonisation is a Community concern, this article provides fertile ground for discrepancies[179]; the final result is that, across the Community, many Annex II projects systematically escape the EIA procedure.

Indeed the fact that Member States had the impression that Annex II was wholly optional was a decisive factor in the directive's adoption[180] and many were surprised to find that by not specifying guidelines they had, in the Commission's opinion[181], fallen foul of the directive. The Commission holds the view that, at the least, Member State legislation must provide for the potential inclusion of Annex II projects[182]. Macrory suggests, convincingly, that it is assumed that Annex II projects are likely to have a significant effect although this may not be so in particular cases: therefore Member States are allowed to develop procedures to distinguish among these. (Furthermore, one such procedure -- the use of thresholds[183] -- has also been criticised for not taking sufficient account of 'significant effects', particularly in fragile areas[184].)

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177 EIA85/337, Article 4(2). If it does specify types of projects it must inform the Commission of any criteria and/or thresholds adopted for projects in question," Article 11(2).

Regarding the use of thresholds the Community legislation can be criticised for failing to consider that the cumulative effect of many small projects may also cause considerable environmental destruction. Furthermore, although thresholds may be useful in establishing legal certainty, care must be taken to respect the fragility of specific areas.

178 Haigh, JPL 1987, p.10: "admittedly optional wording of the Directive"; Salter, "The Challenge...," 1992, p.18: "no rules set down on how competent authority decides if Annex II problems require assesssment".

179 Indeed, as first implemented wide variations existed: Dutch legislation contained detailed thresholds for the various projects; the United Kingdom's DoE assumed that Annex II projects were wholly optional; Spain and Italy left Annex II legislation in the hands of the regions; in Belgium, the Walloon and Flemish regions chose different approaches; and Greece simply did not adopt any legislation concerning these projects. For a general discussion; Macrory in *EC Environment...*, 1991, pp.34-36; Salter, "The Challenge...," 1992, p.17-18; Sheate and Macrory, 1989, p.72

180 Sheate and Macrory, 1989, p.74; Macrory, 1992 CMLRev 347 at pp.359-60.

181 Spain, Italy, Portugal, Germany, and Greece, for instance; Macrory in *E C Environment...*, 1991, pp.34-35; Sheate and Macrory, 1989, pp.72-74.

182 Macrory in *EC Environment...*, 1991, p.34.

183 EIA85/337, Article 11(2).

184 See Chapter 4, point 2.2.1.

The Court has been called upon to address certain questions regarding the vagueness of EIA85/337. This is far from an optimal situation: clear statements on Annex II projects, (despite the fact that the Commission had made indications of its views) were not available until 1996[185]. Only in 1996 was it stated clearly that "Article 4(2) does not empower the Member States to exclude generally and definitively from possible assessment one or more classes mentioned in Annex II."[186]

- *Environmental Impact Study (Article 5.2 EIA85/337):* The developer faces less burdensome tasks in the final version. The substance of the information required in the EIS is reduced: it comprises at least a description of the project[187]; the measures foreseen "to avoid, reduce and, if possible, remedy[188] significant adverse effects"; the data required to assess the effects of the project; and a non-technical summary[189]. The developer is no longer required to describe the proposed project in relation to existing land-use plans in the area or explain his choice of site with regard to less damaging alternatives[190].

The developer -- the natural or legal person most interested in seeing that the project is approved -- prepares the EIS. This is the root of most of the problems related to the quality of the EIS. Where earlier French legislation can be criticised for including this of its own initiative[191], the fact that it is reprised in various other national rules specifically adopted to transpose Community obligations[192] can be attributed to the Community's formulation of EIA85/337, which implies repeatedly that the developer draws up the study[193].

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185 C-133/94 *Commission v Belgium*, 1996 ECR I-2323.

186 *Ibid.*, para 43; see also Case C-72/95 *Kraaijeveld*, judgment 24 October 1996, not yet reported, paras. 49-53.

187 Referring to site, design and size.

188 Rather than the proposed 'compensate'.

189 EIA85/337, Article 5: where they consider it necessary, the Member States should supply the developer with relevant infomration they may have.

190 Here note that the information thus gathered will not come in an easily publishable form, but rather will be a process in several steps: the supply of information by the developer(Article 5); consultation with other agencies (Article 6 (1) and with the public (Article 6(2) and (3)), where transboundary effects are likely, consultation of other Member States (Article 7) and consideration on the part of the competent authority (Article 8); Macrory in *EC Environment...*, 1991, p.33; Haigh, JPL 1987, p.5.

191 The legislation is examined in Chapter 4, point 2.2.

192 Including the Spanish texts, Chapter 7.

193 EIA85/337 Article 5(1) "the developer supplies in an appropriate form the information..." Article 5(2): "The information to be provided by the developer...".

It has been suggested that the simplicity of allowing the developer to draw up the EIS may have positive repercussions in enforcement since the responsibility for the EIS clearly rests with the developer[194]. However, this fails to justify the mistake: it seems likely that, even if the EIS were drawn up by an objective team, the responsibility could still be traced back to the developer, as it was his choice to submit it. It is better to guarantee the quality of the EIS while there is still a chance that it can serve the directive's preventive purpose in preference to remedying harm once it has occurred, i.e., prior to the enforcement stage. Practically speaking, once a project authorisation has advanced to the stage of being contested before the courts it is extremely unlikely that it will be stopped. Some sort of standard must be attained, or an administrative qualification must be required of the team responsible for drawing up the EIS, in the early stages of the procedure. Furthermore, the creation of jobs in a new market such as this is not to be ignored.

- *Public consultation (Articles 6.2 and 6.3 EIA85/337):* The public's intervention is a crucial tool in encouraging the modification of the project towards less damaging options. The competent authority must make public the gathered information and arrange for consultation of the public concerned; it may determine which public is concerned, how to consult, and the time limits[195]. Implementing the public consultation provision is problematic at national level largely because of the margin of discretion left by the Community rule, which suggests, but does not require a variety of means for publicising the event[196]. This is ironic, given the Community's insistence on the importance of public involvement in the implementation and enforcement of environmental rules. It would have been extremely straightforward, yet of the utmost importance for practical implementation, for the Community to make the use of local newspapers, or bill-posting obligatory. Furthermore, EIA85/337 refers only to the possibility of holding a public meeting. Again practically this means that usually the public does not benefit from a public meeting and has only the

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194 ROSA MORENO, Juan, *Régimen jurídico de la evaluación de impacto ambiental*, Estudio Trivium Administrativo, 1993, p.211.

195 EIA85/337, Article 6.

196 Article 6.3 merely indicates that the Member States may inform the public "by bill-posting within a certain radius, publications in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models, -- determine the manner in which the public is to be consulted, for example, by written submissions, by public inquiry...".

assembled documents to consult, which may compound confusion rather than elucidate the project's effects.

- *Administrative consideration of the EIS and the results of the public consultation prior to granting permission or authorisation (Article 8, EIA85/337):* It is the States' duty to ensure that the developer supply the information listed in a third Annex, only:

> inasmuch as (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected; and (b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.

This is an unfortunate turn of phrase, since the information that is required in the event that the State considers neither that the information is relevant, nor that the developer can be reasonably expected to compile it, is unclear. The term competent authority, frequently used in directives, has here been defined as "that or those which the Member States designate as responsible for performing the duties arising from this Directive"; the authority in question can then vary for different obligations in the directive and from project to project[197]. The competent authority must notify other Member States concerned[198]; and it must of course take the information thus gathered into account in taking the decision to grant, or withhold, consent[199]. Once a decision has been taken the competent authority must inform the public only of the content of the decision, attached conditions and, where its national legislation requires it, the reasons and considerations of the decision[200].

A crucial omission limiting the effectiveness of the legislation is that the directive does not require the national administration to monitor compliance with the conditions imposed by an eventual authorisation. Another omission is that EIA85/337 says nothing about the judicial review of the administration's decision; moreover there would not appear to be any right for third parties to appeal against a decision to permit development[201]. Finally, the competent

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197 Haigh, JPL 1987, p.6; see for example, the substantive and environmental authorities in the Spanish context, in Chapter 7.

198 EIA85/337, Article 7. In doing the above it must respect industrial and commercial secrecy and the public interest, and where information is transmitted to another Member State the limitations of the State where the project is proposed apply (Article 10).

199 *Ibid.*, Article 8.

200 *Ibid.*, Article 9.

201 Salter, "The Challenge...," 1992, pp.16-17; Macrory in *EC Environment...*, 1991, p.36.

authority is no longer required to provide its own assessment of the likely effects of the project; a synthesis of the main comments; and, if its own legislation does not require it, it is not obliged to explain the reasons behind a grant or refusal of planning permission[202].

In sum, not only are the goals of the directive moderate generally, but various weaknesses of the legislation herald difficulties in subsequent implementation and the legislation has given rise to an inordinate number of infringement proceedings[203]. It has been suggested that EIA85/337 may come to have a wider impact if its procedures become usual for developers and authorities; it may further create public pressure for assessment of projects that are at present not subject to such procedures[204]. However, this in no way guarantees that the procedure will be regarded as more than a mere formal exercise.

2.5.2. Large Combustion Plants Directive:

The original Commission proposal for LCP88/609 underwent similar changes during its long, complex negotiation period, which included the arrival of two new Member States and the adoption of the Single European Act. As with the EIA directive, given the initial opposition, a first success is that LCP88/609 was ever adopted.

Proposed version: The original 1983 document addressed the problem of acid precipitation by requiring States to draw up detailed programmes for progressive, across-the-board reductions of emissions so that by 31 December 1995 an overall reduction would be attained of at

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202 In fact the authority "does not appear to be under any duty to record and publish its assessment"; Salter, "The Challenge...," 1992, p.15. Haigh describes the 'assessment' as "a procedure involving the provision and publication of information on the part of the developer, the collecting of information from the public and others and culminating in a mental process on the part of the "competant authority" in arriving at its decision; Haigh, JPL 1987, p.5.

203 Infringement proceedings were commenced, and often later dropped, against almost every Member State: France, Belgium, Germany, Greece, Spain, Ireland, Italy, the Netherlands, Portugal, the United Kingdom were listed for not properly applying; against Luxembourg for not notifying measures (Eighth Application Report, OJ 1991 C338 at pp.45 and 80-82). Only Denmark was blameless. By the Ninth Report infringement proceedings continued against all of the above, and Denmark's handling of the bridge Øresund between Denmark and Sweden had been the subject of complaints(OJ 1992 C250/1 at p.151). The Tenth Report, p.308, mentions reasoned opinions sent to Belgium, Spain, Luxembourg and the United Kingdom (and the Commission had issued a press release on the latter in 1992, see Chapter 3, point 1.1. at *Commission discretion*); Germany had been referred to the Court. By the Eleventh Report, Italy and Ireland had joined the above list of those sent a reasoned opinion (OJ 1994 C154/1 at p.110).

204 Haigh, JPL 1987, pp.4,6.

least 60% for SO_2 emissions; 40% dust; and 40% NO_x[205]. The Commission was called upon to examine a variety of scientific and technical issues[206], as well as practical, administrative and legal questions[207].

Parliament considered its initial proposal "totally inadequate" but refrained from rejecting it "so as not to delay swift treatment of the subject in the Council of Environment Ministers"[208]; it called principally for drastic shortening of deadlines and sharp reduction of limit values[209]. Indeed Parliament may have been justified in finding the original proposal inadequate. The original LCP draft had been put together in only months when initial consultations often take years. Consultation was sketchy and "[n]ational governments, industrial interests and even sections of the European Commission felt excluded from a hasty and ill-considered drafting process"[210].

Negotiations got off to a shaky start. Germany, Denmark and the Netherlands were strongly behind LCP88/609. Since their nuclear programmes were such that the reductions did not present insurmountable obstacles, France and Belgium were neutral[211]. However the United Kingdom was a committed leader of the Member States opposed to the directive, which included Italy, Greece and Ireland. British challenge centred on the issues of costs, the scientific background used and the Commission's interpretation of it, and resentment that the proposal was inspired by, and too closely emulated, German domestic provisions[212].

An amended version in 1985[213] incorporated some of Parliament's suggestions, clarifying dispositions of the directive and somewhat strengthening the limit values for SO_2 and NO_x.

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205 Commission Proposal for a Council Directive on the limitation of emissions of pollutants into the air from large combustion plants, Com(83)704 , Article 3.

206 Such as composition of liquid and gaseous as opposed to solid fuels, chimney height, mean values of emission measurements according to time taken.

207 From reporting requirements to the procedures to follow in the event of a break-down in the purification equipment to the issue of costs

208 Parliament resolution closing the procedure for consultation of the European Parliament on the proposal from the Commission of the European Community to the Council for a Directive on the limitation of emissions of polutants into the air from large combustion plants, OJ 1984 C337/446, points 2 and 3.

209 OJ 1984 C337/446, point 4.

210 BOEHMER-CHRISTIANSEN, S., and SKEA, 1991, p. 235.

211 Haigh, N. "New Tools for European Air Pollution Control", 1 (1989) *International Environmental Affairs* 26-37 at p.32.

212 BOEHMER-CHRISTIANSEN, S., and SKEA, 1991, p.235; see also p.250.

213 Amended proposal, Com(85)47 final.

However, Parliament noted that "its *main* amendments which were agreed on by a large majority of the European representatives of the 270 million citizens of the Community have *not* been incorporated by the Commission of the European Communities."[214] Among other things, Parliament called for a more rapid and extensive reduction of emissions, the elimination of exceptions in Article 7 of the Commission proposal and reconsideration of earlier proposed amendments to height of stack and definition of low sulphur fuels[215]. Parliament also had less patience with the Council, condemning broadly its "irresponsible and obstructive attitude in its deliberations"[216]. Finally Parliament called upon the Council to bring forward the time limits for the adoption of a directive[217].

In this Parliament was not to find satisfaction: the composition of Community membership and the interests represented in the Council changed with the entry of Spain and Portugal in January 1986. The proposed legislation posed specific problems for Spain because of its economic situation: its energy sector, already facing an extremely high level of indebtedness[218], needed (and needs) to meet growing energy needs[219]. The fact that the least costly way of reducing emissions would be to reduce electricity supplied, raised fears concerning the consequences for the rest of the economy. With this added complication, negotiations on the directive foundered.

The Dutch Council presidency helped to shape the directive by introducing the idea to divide reductions in two stages and to vary each State's reduction[220]. The British position retreated on the issue of costs somewhat[221]. Forced to step out from behind British opposition,

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214 Parliament's resolution on the amended proposal, OJ 1985 C175/298 (taken from report PE Doc A2-57/85) at point 2.

215 OJ 1985 C175/298, point 3.

216 *Ibid.*; it singled out particularly the United Kingdom, "the major source of atmospheric pollution in the Community, for its delaying tactics and irresponsible attitude" (point 4) and Italy, which it called upon to "[a]bandon its obstructive attitude" (point 8).

217 *Ibid.*, point 10.

218 VALERIO, 1991, p.106.

219 Spain's energy consumption has increased 20% from 1980 to 1992. Furthermore, the Spanish energy situation is characterised by an extremely inefficient use of energy resources. Despite the fact that its own nuclear industry provides some of its energy needs (less than 30%) reliance on combustion plants for energy is much greater than in other Member States; VALERIO, p.106. See also ESTEVAN BOLEA, 1991, pp.191,395; Sanz Sa, J.M., "Air Pollution: Spain," *European Environmental Yearbook*, 1991, p.424, at p.426.

220 For a discussion of negotiations see generally BOEHMER-CHRISTIANSEN, S., and SKEA, 1991, pp. 234-250; HAIGH, *Manual...*, p.6.10-3-5.

221 Given the Central Electricity Generating Board's decision to retrofit 6000 MW of plant.

Spain and Ireland's positions became more defined: they found even a standstill difficult and limits for new plants and total SO_2 limits were unacceptable because of the constraint on industry of installing expensive abatement equipment. The Belgian presidency suggested three-stage uniform reductions taking account of changes in emission levels prior to the base-line date of 1980; notably both the United Kingdom and Spain objected to 1980 as a base-line year[222].

Attitudes as well as issues coloured the outcome: as the ideas evolved it emerged that "[w]hile the more ambitious Member States were concerned that Britain was getting off the hook...there was no comparable concern about the loosening of emission reduction requirements for other countries."[223] There was resistance to the "inflexibility and insensitivity to the wider European context" of German negotiators[224]. Also the United Kingdom made

> constant use of standard diplomatic ploys, such as keeping fruitless discussions going until the early hours of the morning.... Inevitably, this bred frustration and resentment on the part of negotiating partners who commented unfavourably on the technical grasp of the British team[225].

After bilateral meetings with both Britain and Spain, and Commission intervention to help find a solution, the directive was adopted under the German presidency.

Adopted version[226]: The purpose of the directive, as stated in the preamble of LCP88/609 is to monitor and gradually reduce the emissions of SO_2, NO_x and dust from new (for which clean coal technology and flue gas de-sulphurisation is implied in order to meet the emissions limit value) and existing (where either retrofitting or large-scale closure is implied) large combustion plants, i.e. with a rated thermal input of 50 MW[227]. To accomplish this, global

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222 The year 1980 appears to have been selected because it was the first year that emission data were available in the Member States; Haigh, "New Tools...", 1989, p.31. The United Kingdom objected because, although still the largest emitter, it had achieved reductions during the 1970s. This was due largely to economic circumstances that entailed a drop in demand and would pick up again as soon as the economy improved; HL Air Pollution Report, 1983-84, p.xii, point 37.

Regarding objections: HL, Air Pollution Report, 1983-84, p.xxi, point 88; VALERIO, 1991, pp.98-99; ESTEVAN BOLEA, 1991, at p.396.

223 BOEHMER-CHRISTIANSEN, S., and SKEA, 1991, p.250.

224 *Ibid.*, p.249.

225 *Ibid.*, 1991, p.250.

226 In 1994 this directive was amended (Directive 94/66 EC 15 December 1994, OJ 1994 L337/83); the amendments are of a technical nature.

227 That do not fall into any of the categories excepted in Article 2(7).

LCP88/609 did not set SO2 limits for new plants with a rated thermal input of between 50 and 100 MW using solid fuel; this was provided in the amendment to LCP88/609: Council Directive 94/66, OJ 1994 L337/83.

objectives must be set elaborating the progressive reduction in stages of SO_2, NO_x and dust. Member States are required to elaborate programmes comprising timetables and implementation measures to comply with emissions ceilings for reduction in three phases of SO_2 (Annex I) and in two phases for Nitrogen oxides (Annex II)[228], to inform the Commission of these programmes and to send intermediate reports in the middle of each phase, as well as reports on implementation one year after each phase ends[229]; the reports must also provide an overall view of all plants covered by the directive[230].

The general ceilings and reduction targets listed in Annexes I and II differ across the States, a reflection of the both their "specific situations"[231] and the compromise necessary to achieve agreement: Belgium, Germany, France, and the Netherlands face the most stringent cutbacks of SO_2 for existing plants, with those of Denmark nearly as high. More moderate cutbacks are required from Italy, Luxembourg and the United Kingdom and still more moderate cutbacks for Spain. Greece, Ireland, and Portugal are allowed to increase emissions. The overall EEC reductions are -23% in 1993, -42% in 1998, -58% in 2003. NO_x reductions are to take place in two phases, 1993 and 1998; again the most severe reductions apply to Belgium, Denmark, Germany, France, the Netherlands and this time also Luxembourg. More moderate cutbacks are envisaged for Spain, Italy and the United Kingdom, while substantial increases are allowed for Greece, Ireland, Portugal. In sum the Commission's original proposal of 60% cutbacks for SO_2 was reduced to 58% and delayed by eight years; while the overall NO_x reductions are of 13% for 1993 and 30% for 1998[232].

Member States must ensure that authorisations for the construction/exploitation of new plant[233] comply with the emissions ceilings in Annexes III-VII (SO_2, NO_x, dust)[234]. In

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228 LCP88/609, Article 3(1)

229 LCP88/609, Article 16(1).

230 And the other information indicated in LCP88/609, Article 16(2).

231 "...whilst making allowance for specific situations of Member States"; LCP88/609, preamble.

232 Haigh, "New Tools...", 1989, p.33.

233 Those that obtained licences on or after 1 July 1987; LCP88/609, Article 2(9).

234 LCP88/609, Article 4.1.

Annex III, sulphur dioxide emissions limit values in new plants using solid fuels; Annex IV sulphur dioxide emission in new plants using liquid fuels; Annex V, sulphur dioxide emission in new plants using gaseous fuels; Annex VI, nitrogen oxides emissions limit values in new plants; Annex VII, dust emission limit values in new plants.

granting licences for new plants, they must also calculate aggregate fuel-weighted limit values in the manner specified in Article 9 and ensure that this does not lead to an increase in emissions from existing plants[235].

Member States must ensure that measurement of emissions (as provided in Annex IX) takes place and may require monitoring to take place at the operator's expense[236]. The measuring methods and equipment shall conform to "best industrial measurement technology and provide reproducible and comparable results; information on these methods and equipment shall be made available (and forwarded to the Commission) by the competent authorities. The measurements from new plants must be continuous in most cases[237]. Presumably, the frequency of measurements for existing plants are included in the timetables and implementing measures of the programmes specified by the States pursuant to Article 3(1). The States shall ensure that the operators communicate the results of all measurements to the competent authorities. If unforeseen circumstances (accidents, difficulties) mean that limit values are not kept, the competent authorities can require operators to take appropriate primary measures, and must inform the Commission; the same applies to any exceptions that are authorised[238] (although, given that the Commission is overwhelmed by its obligations[239], whether it can realistically ensure follow-up with each break-down or exemption is questionable). Information concerning measurement technology and criteria must also be notified to the Commission[240].

The Commission, for its part, must generally ensure that the implementation of the Member States programmes produces the desired results[241]: it must assess and regularly compare the Member States' reports[242] and inform the Council of progress[243]. (Unfortunately such reports, if they have been drawn up, are not available to the public[244].) It may suggest changes in the targets or dates for the third phase SO_2 or the second phase NO_x reductions and, in the light of

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235 As well as verifying such details as stack height, which must be calculated in such a way as to safeguard health and environment (LCP88/609, Article 10).
236 *Ibid.*, Article 13(1).
237 *Ibid.*, Annex IX A.1.
238 *Ibid.*, Articles 6, 7, 8.4.
239 Chapter 2, point 2. Commission limitations.
240 LCP88/609, Article 13.3.
241 *Ibid.*, Article 16(3).
242 *Ibid.*, Article 16(3).
243 *Ibid.*, Article 3(4).
244 Commission Letter 21.3.96/XI/005205.

both technological and environmental developments, can submit proposals for the revision of limit values to the Council, which shall decide upon them unanimously[245].

A range of derogations and exceptions are possible[246]; *inter alia* since it is generally accepted that Spain's economy needs to grow, a special derogation easing requirements for Spain until 1999 was agreed[247]. Article 6, included particularly for the United Kingdom, provides that States may give derogations for plants burning indigenous high sulphur coal, where notwithstanding the use of BATNEEC[248] major difficulties connected with the nature of the lignite so require, provided that lignite is an essential source of fuel for the plants[249]. (In this case States must inform and consult the Commission on appropriate measures to be taken.) Besides the above derogations, Annex II provides that within one month of notification of the Directive Member States were able to delay phase one NO_x reductions for two years by notifying Commission for technical reasons (note 3, Annex II). In addition, competent authorities may authorise temporary exceptions in the event of breakdown in the abatement equipment, interruption in supply of low sulphur fuel or where the operator must resort to the use of other fuels because of a sudden interruption in the supply of gas[250].

LCP88/609 has had some impact on the behaviour of the Member States, forcing Member States to adopt provisions in order to reduce emissions more stringently than foreseen. For instance, without the directive 's requirements it is unlikely that the United Kingdom would have plans to reduce SO_2 emissions to the extent that it has[251]. On the wider plane, through

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245 LCP88/609, Article 4(2).

246 Those for new plants include derogations for plants not operating more than 2200 hours per year (LCP88/609, Article 5(1)); for plants burning indigenous solid fuel, where the emission limit cannot be met without using excessivly expensive technology (Article 5(2)).

Other derogations are possible in case of "unforeseen reasons" (Article 7) and "malfunction or breakdown of the abatement equipment" (Article 8).

247 Until December 1999 Spain may authorise new power plants, burning imported solid fuels, to meet a sulphur dioxide emission limit value of 800mg/Nm3 as opposed to the 400mg/Nm3 foreseen in Annex III. New plants burning indigenous solid fuels are authorised to reach only a 60% rate of desulphurisation rather than 90% (Article 5(3).

248 Best available technology not entailing excessive costs.

249 HAIGH, *Manual...*, p.6.10-6. However, the privatized electricity generators, Powergen and National Power, have considered importing lower sulphur coal or burning gas rather than fitting flue gas desulphurisation: the UK may therefore be the target of criticism since one of the reasons it was able to secure lower reductions, and the possibility to derogate, was because of its high sulphur indigenous coal.

250 Article 8 (1),(2), and (3).

251 HAIGH, *Manual...*, p.6.10-5.

this directive the European Community has secured more far-reaching reductions than provided in the Long-Range Transboundary Air Pollution Convention (LRTAP)[252]. It accomplishes a more complex task than the 30 Percent Club established by the 1985 Helsinki Protocol to the LRTAP Convention by assigning different and more appropriate reductions to the Member States as well as committing them to having only 'low acid' power stations[253].

3. Decision-making in other areas -- Integration of environmental protection into other Community policies:

Finally, the importance of decision-making in other policy areas must be noted. One of the factors that affects the subsequent implementation of Community environmental rules is the inadequate integration of environmental protection during the formulation and execution of *other* Community and national policies. Environmental rules cannot be elaborated in isolation from other policies and broadly speaking, 'where environmental problems exist the clues to their existence and their solution often...lie in the economy"[254]. For example, air pollution control generally is inextricably linked to energy and economic policy[255]; how these are formulated and carried out has an impact on LCP88/609's implementation and enforcement.

The Community has formally recognised the importance of taking the environment into consideration during formulation of policies. The SEA amendments required protection of the environment to be a "component part"[256] of Community policies; in 1990 the ECJ reinforced this by stating that "all Community measures must satisfy the requirements of environmental protection."[257] Later, the TEU linked the integration requirement more specifically to policy

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252 BOEHMER-CHRISTIANSEN, S., and SKEA, 1991, p. 230.

253 Haigh, "New Tools...", 1989, p.35.

254 Pearce, "Toward...", 1991, p. 4; TURNER, PEARCE, and BATEMAN, 1994, pp.1-27.

255 WEALE, A., *The New Politics of Pollution,* Manchester University Press, 1992, p.21; Knoepfel and Weidener, "Implementing Air Quality Programs in Europe" 11 (1982) *Policy Studies Journal* pp.103-15.

256 Article 130r(2) SEA.

At which stage of the elaboration of other policies environmental protection must be integrated is not spelt out, yet the EAPs indicate that the environment should be taken into account in early stages of decision-making process, and it seems reasonable to understand that ecological protection must be a conscious decision in the proposing, implementing and enforcing of all Community policies; see Jacobs, R. "EEC Competition Law and the Protection of the Environment," (1993) LIEI 37 at p.48.

257 Case C-62/88 *Greece v EC Council* 1990 ECR I-1527 at p.20.

formulation than previously: Article 130r(2)EC states "environmental protection requirements must be integrated into the definition and implementation of other Community policies". The environmental impact of Community agricultural, competition, and other policies should be envisaged as these policies are made, modifying them to minimise negative environmental consequences, and at least so as not to run counter to environmental policy and law.

Yet in practice[258], integrating an element of environmental concern poses considerable difficulty starting, ironically, with the process of establishing the internal market. Although the requirement was introduced by the SEA, the practical impact on the Community environment of achieving a single market was not seriously entertained at that time. *The Economics of 1992*[259] ("Cecchini Report), the fundamental starting point for appraisal of the internal market, when speaking of tunnelling and airport building, fails to mention environmental impact assessment[260] although the directive had been adopted three years earlier in order to integrate environmental considerations into precisely such projects[261]. The physical costs to the environment of achieving the Single Market were not subtracted from the gains, a lapse not remedied until 1989, "when a task-force was hastily assembled to report on the matter"[262]. The Task Force noted[263], somewhat tardily, that the single market itself could be expected to have a considerable negative environmental impact: "to the extent that barriers are removed or modified, and no alternative policy measures put in place, a number of additional environmental pressures is to be feared"[264].

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258 And quite apart from possible future tension between increased regard for the subsidiarity principle, which seems at present to imply less Community action in environmental policies, on the one hand; and on the other, ever more integration of environmental protection into other policies, which seems to call for greater Community involvement and verification.

259 European Economy number 35, March 1988.

260 Commission of the European Communities research on *The Costs of Non-Europe: Basic Findings* vol.5, *The Costs of Non-Europe in the Public Procurement Sector*; Weale and Williams, 1993, pp.52-55.

261 It is not surprising, then, that questions about subtler consequences of legislation were at times overlooked. For example, legislation that limits the pollution at source may well fail to achieve its purpose: the reduction in emissions from single companies will be outweighed by the total increase in companies polluting; KRÄMER, *Focus...*, p.220.

262 Weale and Williams, 1993, p.49.

263 Task Force, *"1992" -- the Environmental Dimension*, Report on the Environment and the Internal Market, chairman Gunter Schneider, 1990.

264 Task Force Report, 1990, p.9. For instance, an increase in transfrontier truck traffic entails a corresponding increase in damage, fiscal harmonisation in some instances may reduce the tax burden on polluting products; Weale and Williams, 1993, pp.52-54.

Still more striking an example of failure to integrate environmental protection is provided by management of the Structural Funds[265]. Article 130r(2) applies to policies pursued through these funds. More specifically Regulation 2052/88 on the functioning of the Structural Funds[266] stipulates that measures they finance must be in keeping with principles of environmental policy. The fact remains that

> the Community departments are seldom aware of the exact details of the individual operations funded by the structural instruments as decisions are essentially taken at national or regional level and, in many cases, during the execution of the programmes[267].

The Commission is unable to devote resources to a systematic check that projects conform with Community objectives[268]. As the Court of Auditors understates:

> if one compares the large number of programmes and projects submitted with the number of officials [within the Commission] dealing with them, one may suspect that the ecological aspects are not adequately examined in every case.[269]

The question of Community priorities in practice is raised, for certainly resources are applied to ensure that other policies are scrutinised for compatibility with internal market requirements[270].

Worse, not only is Article 130r(2) not sufficiently heeded in the administration of the Structural Funds, at times the Community actually helps fund projects that not only do not conform to general Community requirements, but are also in violation of specific environmental directives and international conventions[271]. In practice, the Commission contents itself with

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265 The European Regional Development Fund (ERDF), the European Social Fund (ESF) and the European Agricultural Guidance and Guarantee Fund (EAGGF).

266 Regulation 2052/88 (OJ 1988 L185/9) at L185/13. Article 7(1): "Measures financed by the Structural Funds or receiving assistance from the EIB or from other existing financial instruments shall be in keeping with the provisions of the Treaties with the instruments adopted pursuant thereto and with Community policies, including those concerning the rules on competition, the award of public contracts and environmental protection."

267 Court of Auditors Report, (OJ 1992 C245/7). Furthermore, the report found that "[a]t the national level the Court [of Auditors] checks did not establish that the reform of the Funds had brought about any appreciable progress in procedures designed to give more attention to environmental problems in the drafting of programmes"; at C245/13; specific examples C245/15-16.)

268 KRÄMER, *Focus...*, p.219.

269 HL Ninth Report Evidence 1991-92, p.55.

270 Article 30 *et seq.*

271 Specific examples are numerous: in Northern Greece lagoons designated as wetlands of importance under the Ramsar Convention as well as a protected area under Directive 79/409, (and the object of protective measures financed by ACE) was damaged through intensive exploitation projects funded by fisheries appropriations and the ERDF.

the recipients of Community funds assurances that the project is in conformity with Community environmental requirements[272]. Additionally, Community-financed environmental projects and pilot studies undertaken precisely with a view to integrating the results in other policies have subsequently been disregarded[273]. Furthermore, an environmental label does not mean that environmental considerations are paramount or even adequately incorporated in Community-funded projects; qualitative aspects of projects classed as "environmental" must also be examined more closely to verify that these are not, for instance, infrastructure projects in green clothing[274].

Recently the Commission was brought before the Court of First Instance because of its decision to continue funding two Spanish power stations after it became aware that the legally

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The wetlands of Mikra Prespa and Megali Prespa, again protected under Directive 79/409, were partially drained in the 1980s with the help of Community Structural Funds for the construction of fish farms, contructed in the most sensitive part of the lake, causing the maximum disturbance to the bird population.

In Spain the region of Castilla-La Mancha receives Structural Funds for a large number of afforestation projects for which no EIA was carried out. The region also submitted a plan in 1989 asking for 800,000 million pesetas: 50% to go to land transport and infrastructure, less than 1% to environmental investments. In total, a study by WWF-Spain claims that 27 regional, national and EC laws are contravened in this region of great natural importance, including EIA85/337, the wild birds directive, the Berne Convention, and the EC directive on pollution by dangerous substances dumped in the aquatic environment.

Such violations are not limited to southern States: for instance, a Court of Auditors on-the-spot visit found that in Saxony-Anhalt a plant for converting railway plant had been built in a drinking water protection area, with the risk that chemicals poured over sleepers would seep into the soil.

See de Sadeleer, N. "La directive 92/43 CEE concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages," 364 (1993) RMC, p.25n; HL Ninth Report Evidence 1991-92, pp.264-70, p.188, question 571; European Trends, first quarter, 1994, p.97-99; Court of Auditors Report 3/92, C245/6-7, C245/12, C245/16.

272 Krämer, L., "Public Interest Litigation in Environmental Matters Before European Courts," 8 (1996) JEL 1 at p.7; he notes that neither the European Investment Bank nor the World Bank rely on their debtors assurances of environmental conformity; p.8.

273 "The files on important research, such as the processing of waste or the protection of marine algae, are closed without any decision being taken as to the possibility of practical application or any order of priority established for the destination of future financing and without there being any possibility of making a check on the proposed measures so that the work done is not wasted"; Court of Auditors Report 3/92, C245/12.

274 For example, all the aid (ECU 178 million) for the Athens metro was classified under environmental protection rather than transport because it is hoped that the investment will limit the *increase* in road traffic and pollution; OJ 1992 C245/14.

required EIAs had not been carried out[275]. For the most part, however, no challenge is made to Commission decisions to help finance projects[276].

There is no shortage of such examples[277] most of which indicate several failures at Community level[278]. The reform of the Structural Funds[279], it appears, has not helped: more recent reports by the Court of Auditors[280] indicate that, despite awareness of the problem, there has been no improvement in recent years. The Maastricht Treaty provides for a new Cohesion Fund[281] available to eligible Member States in order to help reduce "the disparities between the levels of the least-favoured regions, including rural areas."[282] Not surprisingly, the Court of Auditors has registered concern that the environment be more effectively integrated into the working of this instrument than has been the practice to date[283].

Causes of inadequate integration: The causes for inadequate environmental integration are varied. More superficially, part of the problem is lack of manpower, organisation and sufficient communication between Directorates-General[284]. The Commission must urgently devote some

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275 The action failed when the applicants failed to establish legal title; T-585/93, *Greenpeace and others v Commission*, discussed, Chapter 3, point 2.1.

276 Krämer, 1996 JEL, p.9.

277 The Court of Auditors refers to several such clashes of interest between programmes in the lagoon and wetland areas along the Mediterranean; Court of Auditors Report 3/92, C245/7.

278 At the stages of decision-making as well as in implementation: failure to integrate environmental factors, to monitor the requirements of the Structural Funds, to monitor the implementation of specific directives (such as 79/409, as in many of the wetlands projects cited above). Of course, the Commission would not need to be so vigilant if Member States were not so eager to avoid environmental obligations.

279 Regulation 2080/93 (OJ 1993 L193/5), Regulation 2081/93, Regulation 2082/93, Regulation 2083/93, Regulation 2084/93, Regulation 2085/93.

Indeed, references are made to the Fifth EAP and Community environmental policy, and the preamble (OJ 1993 L193/6) indicates that "Member States should therefore supply, in the plans submitted under objectives 1,2, and 5b and appraisal of the state of the environment and the environmental impact of the operations envisaged, in accordance with the provisions of Community law in force, as well as the steps they have taken to associate their environmental authorities with the preparation and implementation of the plans".

280 Court of Auditors, Special Report no. 4/94, Observations pursuant to Article 188C(4), paragraph 2, of the Treaty on European Union on the Urban Environment, together with the Commission's replies.

281 Article 130d EC "...The Council, acting in accordance with the same procedure, shall before 31 December 1993 set up a Cohesion Fund to provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure."

Cohesion Fund regulation 1164/94, OJ 1994 L130/1.

282 Article 130a EC.

283 OJ 1992 C245/19.

284 The Court of Auditors points out that although a good deal of documentation on specific projects exists there is little that would give insight on the overall work of the various departments and Directorates-General, little documentation that would enable a global evaluation of the Funds. Although Directorates do communicate with each other regarding

resources and effort to verifying that conformity with Community environmental requirements is more than a vague wish where the projects that it helps to fund are concerned.

However, the root of the problem lies deeper. Underlying priorities are possibly the most intractable of environmental problems -- at the Community level as well as at national level. The development of environmental law and related disciplines are a relatively recent phenomenon. A veneer of ecology has been glossed over many social, economic, and commercial activities in the past two-and-a-half decades but it must compete with a more deeply entrenched attitude that regards the environment as belonging to no one, a good without price to be exploited freely[285].

The attitude is evident in the manner in which actors approach larger policy-defining issues as well as the thousands of small, daily decisions that environmental protection necessitates. The requirement that environmental protection be a part of all other policies, and the associated costs, are often seen as a fresh annoyance imposed on decision-makers, contributing to poor implementation of environmental rules. Notwithstanding "greenspeak"[286], industrialised economies have made little genuine attempt to attach economic values to the natural resource base[287]. Use of the environment continues to be inadequately priced, and therefore often viewed as without value[288]. This inherent distortion in society's approach to decision-making has widespread repercussions[289].

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specific projects, the information is usually too vague to be productive, especially since deadlines are very short (OJ 1992 C245/6); see also Economist Intelligence Unit, *European Trends*, first quarter 1994, p.12. Furthermore, the Commission has evidently indicated that centralisation of all EIAs is both practically impossible and contrary to spirit of Structural Funds (*ibid.*, p.99).

285 Krämer, "The Open Society, Its Lawyers and Its Environment," 1 (1989) JEL 1, p.7; WEALE, A., *The New Politics...*, p.158; Weale and Williams, 1993, p.54; TURNER, PEARCE, and BATEMAN, 1994, pp.6-7, 26; see generally World Commission on Environment and Development (WCED), *Our Common Future*, 1987.

286 KRÄMER, *Focus...*, p.171.

287 PEARCE, D., MARKANDYA, A., BARBIER, E., *Blueprint for a Green Economy*, Earthscan Publications Ltd, London, 1989; KRÄMER, *Focus...*, p.218: "The old ideology of the 'freedom to pollute' is the underlying reason".

288 For example, in France civil jurisdictions often grant only 'symbolic' compensation for environmental harm.

289 Pearce, "Toward...", 1991, pp.4-6.

A difficulty with the integration requirement and implementation of Community environmental rules generally is the gulf between what is recognised as needed and what is feasible, given the collision with other powerful interests. Incorporating environmental protection into agricultural policy provides an illustration.

4.1. Practical Illustrations

- *Agricultural policy*: Agricultural Policy, a *bête noire* that devours a huge proportion of Community resources[290], is traditionally an area of political tension, providing a fertile source of litigation in the ECJ and of dispute with Community international trading partners[291]. Attempts to diminish 'butter mountains' and 'wine lakes', to reduce the colossal costs of price support, or cope with the latest agricultural crisis have spurred heated, disruptive demonstrations from farmers, and occasionally heated, disruptive responses from Member State governments[292]. Agriculture, generally, is an issue which decision-makers approach cautiously. Attempts to integrate environmental protection reflect this extreme caution and are inevitably minimal.

In the mid-1980s reforms to the CAP were introduced in an attempt to reduce price supports[293] and to reduce the quantity of goods produced; also included were measures to encourage eco-friendly agricultural practices. Beginning with Regulation 797/85[294] on improving the efficiency of agricultural structures, Member State aid (subject to Articles 92-94 EEC) was allowed in environmentally sensitive areas[295]. Soon after, Regulation 1760/87[296]

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290 From 80.6% at the time of the UK's accession to 72.6% in 1985 to 62.6% in 1991; Usher, J.A., *Legal Aspects of Agriculture in the European Community* Clarendon Press Oxford, 1988, p.1; also, for 1991: Eurostats, p.41 (figures obtained after subtracting Fisheries share of 0.9% of 63.5%, Eurostats, p.51).

291 As illustrated by the Uruguay Round of the GATT negotiations.

292 As the recent 'mad cow'-BSE hostilities and the British non-cooperation policy illustrate.

293 The Common Agricultural Policy's manipulation of economic forces (guaranteed prices) has resulted in a stunning increase in productivity, accompanied by an unprecedented destruction of nature; see generally Corcelle, G., "Agriculture et environnement: une liaison tourmentée, mais tellement naturelle!" 1991 RMC 180.

294 Regulation 797/85 (OJ 1985 L93/1).

295 Regulation 797/85 (OJ 1985 L93/10) concerning national aid in environmentally sensitive areas, in order to introduce or promote agricultural practices compatible with requirements of conserving natural habitats, Member States are authorized to introduce special national schemes in environmentally sensitive areas (Article 19(1)). The farmer undertakes

introduced Community funding of 25-50% for conversion and extensification[297], a system of premiums for the 'set-aside' of arable land for at least five years and aid to afforestation and woodland projects. Although attempting to integrate environmental concerns, the primary purpose of the regulations[298] was to help adapt agriculture to market needs. More recently Regulation 7078/92[299] was adopted[300] providing higher rates of Community financing for protective activities[301], a more detailed and broader list of activities which qualify for such funding[302], and funding for courses and traineeships on ecological agricultural practice.

Certainly decision-makers have made a welcome attempt to integrate environmental considerations, yet it must be noted that participation in the above schemes is voluntary. Authoritative measures have been avoided, illustrating that where an issue of such overriding importance as agriculture is concerned environmental protection will only be integrated insofar as it does not seriously inconvenience the former.

Even when an authoritative approach has been chosen the end result is timid. For example, Directive 91/676[303] was designed to regulate excessive use of fertilisers and prevent pollution of surface and drinking water as well as run-off into the seas. The proposal contained some

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that there will be no further agricultural intensification and that intensity of agricultural production will be compatible with the environmental needs of the area (Article 19(3)).

296 Regulation 1760/87 (OJ 1987 L167/1) amending regulations 797/85, 270/79, 1360/78, 355/77 on agricultural structures, the adjustment of agriculture to the new market situation and the preservation of the countryside.

297 To be financed through the EAGGF. Conversion refers to the conversion of surplus to non-surplus products; extensification refers to the reduction in output of the product concerned by at least 20% without other production capacity being increased.

298 Adopted on the basis of Articles 42 and 43 of the Agriculture title.

299 Regulation 7078/9 (OJ 1992 L215/85) on agricultural production methods compatible with the requirement of the protection of the environment the maintenance of the countryside.

300 Still on the basis of Articles 42 and 43 EC but more specifically environmental in substance.

301 From 50% to 75% in regions falling under objective, point 1 of Regulation 2052/88 (OJ 1988 L185/9).

302 Regulation 7078/92 (above), applies to farmers who reduce use of fertilizers; change to more extensive types of crop; reduce proportion of sheep or cattle per forage area; employ farming practices compatible with ecology or rear animals of local breed in danger of extinction; keep up abandoned farmland/woodland; set aside farmland for at least 20 years; manage land for public access and leisure activities (Article 2).

303 Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L375/1).

fairly stringent obligations; by the end of the decision-making process these had been modified or eliminated[304].

Genuine integration of environmental protection into the formulation of policies such as agriculture apparently depends on a more favourable combination of regulatory and voluntary initiatives, and the perceived utility of farmers[305] as well as of the politicians who must be willing to risk the displeasure of the agricultural community. Finally, the basic force encouraging over-production, guaranteed prices, remains in place[306]. Environmental protection remains a suggestion, occasionally with incentives, rather than a requirement.

- *Transport Policy:* Of course, agriculture is not the only policy area where political will to take strong environmental initiatives is lacking. Transport policy seems to face a similar dilemma, for instance. The Commission has examined in some detail the many ways in which transportation contributes to the destruction of the environment[307]. (One which the Commission does not insist upon is the destruction caused by the creation of new trans-European road networks, promoted by the Community, which is examined in a subsequent chapter[308].)

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304 The Commission's draft directive was inflexible in its provisions relating to designation of vulnerable zones. The draft also specified maximum stocking densities to limit the application of livestock manure. Member States were required to establish codes of good agricultural practice, to set up training programmes, to establish action programmes for designated vulnerable zones and to monitor the effectiveness of these programmes, providing for the prohibition of fertilizers during certain periods, and for storage vessels for periods where application is prohibited. The proposed 50mg/l N limit above which catchments were to be designated as vulnerable zones was an absolute requirement.

Because of Member State objections (France and the UK), in the final draft, 50mg/l N is no longer and absolute limit but an average; vulnerable zones are only to be designated where it can be shown that the area contributes to nitrate pollution; action programmes can apply to only parts of the zone; HAIGH, *Manual...*, p.4.14-3.

305 Some farmers and agricultural organisations have recognised their interest in reorienting practices: easing intensive production methods lessens the costs of production and may make the product more attractive to ecologically aware consumers. But those members of the agricultural community considering the power of green consumers are as of now, in the minority; Corcelle, *op.cit.*, p.182.

306 Pearce, "Toward...", 1991, p.4.

307 Operational pollution has long-term and cumulative effects on air, water and soil, and immediate, transient effects of noise and vibrations; land use and intrusion of transport infrastructure has a permanent and often irreversible impact; congestion, although a temporary phenomenon, causes an increase in energy consumption and operational pollution; and finally there are risks of extremely serious damage inherent to the transport of dangerous goods; Com(92)46, "Green Paper on the Impact of Transport on the Environment: A Community strategy for 'sustainable mobility'," at pp.11-35.

308 Chapter 6, point 2.6. Practical illustration -- Tunnel du Somport. Also the more recent European network plans for a trans-Alpine tunnel between France and Italy through the Mercantour national park have been the subject of controversy.

The Commission also notes what is needed to establish a framework for 'sustainable mobility'[309]: *inter alia* measures laying down strict environmental standards for motor vehicles, motorcycles, aircraft, barges, ships, trains and fuel quality and environmental measures laying down strict air and water quality standards and strict limit values for air and water pollutants. Both these types of measures must be backed by other rules to ensure implementation and enforcement[310]. Use of fiscal and economic instruments is also perceived as required[311].

As elsewhere, the fact that the Commission here recognises what action is necessary does not guarantee that this will be taken: the Council has been reluctant to set progressively higher standards for emissions of pollutants in the area of transport. As for economic and fiscal instruments, in a subsequent communication the comments of most 'stakeholders' indicated that such instruments could be used successfully to influence transport demand; the important exception was industry, which "has warned against the possible negative effects of fiscal measures on economic growth."[312] Thus,

> [a]lthough the Community has recognised the need for a coherent and global approach to the impact of transport on the environment there is as yet no framework for a common strategy aimed at 'sustainable mobility' in the Community.[313]

Again, the transport example seems to indicate that effective integration of environmental concerns must wait until the more powerful transportation actors perceive that their utility lies in such integration -- an unlikely event, at present. As Ludwig Krämer has pointed out, even the green and white books on transport and the environment have not been seriously followed-up[314].

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309 The purpose of the communication was to initiate debate and comment from those with a stake in transport; Com(92)46, pp.55-56.

310 Com(92)46, pp.53-55.

311 As well as an overall action plan for transport of dangerous goods; guidelines on conversion and upgrading of relinquished infrastructure, development of urban 'soft' transport, research for clean transportation technology and eco-friendly fuels, rational use of private cars; minimum consumer information requirements on environmental performance of vehicles.

312 Com(92)494, "The Future Development of Common Transport Policy: A global approach to the construction of a Community framework for sustainable mobility," p.58, point 160.

313 Com(92)46 p.53.

314 Dr. Ludwig Krämer, "Recent Developments in EC Environmental Law," Conference: *The Impact of EC Environmental Law in the United Kingdom,* London, 3 November 1995.

The integration requirement as phrased in the Maastricht Treaty, it has been suggested, puts challenge to policies that insufficiently integrate environmental concerns on firmer judicial ground[315]. One could hope that the ECJ, if called upon to further define the meaning of the Article 130r(2) requirement, would energetically interpret, at the later stage of enforcement, that which the Council and Commission appear unable to sufficiently apply during the formulation and execution of Community policies. However, a recent ECJ decision takes a weak view of Article 130r(2) and seems to defer to whatever action the Council chooses[316]. Stating that Article 130r is "confined to defining the general objectives of the Community in the matter of the environment"[317], it seems to announce a retreat on the strength of the provision. The priority accorded to other policies, to the extent that these are permitted to have a negative impact on the environment[318], continues to undermine effective implementation and even enforcement of the rules designed to shield the environment from exactly such effects.

5. Conclusions:

Although awareness of poor implementation of environmental rules is recent, attempts to discern its causes have revealed, 'upstream' from actual implementation and enforcement, a variety of contributing factors. Generally it becomes evident that political considerations, typically favouring economic over environmental concerns, set the scene that then shapes implementation and enforcement. Decisions concerning which issues to address are already subject to political tensions and the decision-making process, among twelve and now fifteen Member States is, perhaps necessarily, unwieldy. In many ways the quality of legislative proposals, occasionally inadequately researched in terms of science and costs, then falls victim

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315 Lane, R., *op.cit.*, p.972; furthermore, a new commitment exists in Article 130r to "improve" the environment: Article 130r(1) "Community policy on the environment shall contribute to pursuit of the following objectives: - preserving, protecting and improving the quality of the environment;...".

316 Case C-379/92 *Criminal Proceedings Against Peralta* 1994 ECR I-3453, para.57: "Secondly, Article 130r is confined to defining the general objectives of the Community in the matter of the environment. Responsibility for deciding what action is to be taken is conferred on the Council by Article 130s."

317 For further discussion of factors that undermine the justiciability of the Article 130r(2) requirement, see also Scott, J., "Environmental Compatibility and the Community's Structural Funds: A Legal Analysis," 8 (1996) JEL 99.

318 And the fact that economic actors need not include the costs to the environment in their internal planning.

to the subordination of environmental concerns during negotiation. Moreover, the environment administration, a 'late-comer' on the political stage, frequently loses in the push and shove between other branches of the Community's administration. As a result, even at Community-level policies can conflict and contradict each other as seen, for instance, with the Structural Funds. Decision-makers in other policy areas seemingly view integration of environmental concerns and implementation of environmental protection rules as being of little concern to them, or as a hindrance.

These problems carry their impact downstream, adding themselves to further difficulties emerging directly from implementation and enforcement. Against this backdrop implementation and enforcement of Community environmental rules can be expected to proceed with some difficulty, both at Community and national levels.

CHAPTER 2: Community Level -- Problems of Monitoring Implementation

1. Commission's tasks:
- **1.1. Formal implementation:**
  - *Notification:*
  - *Complete and correct transposition:*
- **1.2. Practical Implementation:**

2. Commission limitations:
- **2.1. Not accorded priority:**
- **2.2. Insufficient resources:**
- **2.3. Limits to Commission powers:**
- **2.4. Dependence on external sources of information:**
  - *Member State reports and replies to Commission communications:*
  - *European Parliament:*
  - *Individuals and groups or associations:*

3. Addressing limitations:
- **3.1. Judicial promotion of adequate implementation:**
  - *General duties:*
  - *ECJ Decisions regarding formal implementation*
  - *Shifting the burden to national courts:*
- **3.2. Creation of information sources:**

4. Conclusions:

Implementation of Community environmental directives is largely in the hands of Member States, which must carry out the various actions implied by Community obligations. The role of Community institutions is therefore to monitor the Member States' performance and to ensure that they fulfil these obligations. At Community level, the principal actor involved in monitoring implementation is the Commission, but the European Court of Justice, European Parliament[1] and individuals play important supporting roles[2]. Problems encountered at Community level during the monitoring of implementation are examined here, concentrating first on the Commission's endeavours to carry out its tasks, and next on efforts made to help the Commission in its tasks, including those of the ECJ.

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1 For instance, Parliament was the first to draw attention to the poor state of implementation of environmental directives (see Introduction, point 2 at *Emerging Awareness of Problems in the Application of Community Environmental Legislation*) and periodically issues reports on the implementation of selected directives.

2 The role of the Court of Auditors, promoted to the status of Community institution by the TEU (Articles 188a-188cEC as modified by the TEU), is not specifically discussed. It should be noted however, that it has made a valuable contribution in monitoring financial aspects of implementation (see Chapter 1 point 3. Decision-making in other areas -- Integration of environmental protection into other Community policies).

1. Commission's tasks:

If the Member States' duty under Article 5[3] is to shoulder their Community obligations, the Commission's duty under Article 155 is to "ensure the proper functioning and development of the common market" and *inter alia*, to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". The Commission's task can be divided into two categories: monitoring formal, or black letter implementation; and, still more difficult, monitoring practical implementation. Both tasks require adequate information.

1.1. Formal implementation:

Formal implementation can, according to the Commission's own description of its duties, be further divided into monitoring that Member States have notified the measures transposing a specific directive, and verifying that the transposition is complete and correct[4]. At this stage the directives EIA85/337 and LCP88/609 present different types of difficulties: for a vertical directive such as LCP88/609, affecting mainly one industry, evaluation of implementation is relatively straightforward. On the contrary, a horizontal directive such as EIA85/337 requires the development of new administrative procedures -- often spanning distinct administrative levels -- and examination becomes much more complex[5].

Notification: Verifying notification to the Commission of national measures transposing Community rules is not complex. If the Commission has not been notified of the measures in the required time, it can advance directly into Article 169 proceedings, a move justified by the fact that Member States have at this stage been twice reminded of their duties[6]. (They have often been reminded informally several times.) If the transposition is found to be complete the proceedings are terminated.

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3 Article 5 EC: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

4 The Eighth annual report on Commission monitoring of the application of Community law, OJ 1991 C338/1 (subsequently Eighth Report 1990).

5 Martínez Aragón, GJCE 1993, p.212.

6 Reminders are sent to the Member States two months after the directive is adopted and again six months prior to its entry into force.

themselves and relate them to the directive in question."[15] To examine and understand these texts the Commission's Legal Affairs Unit tries to assign a lawyer from the French legal system to examine French measure, a Spanish lawyer examines the Spanish measures, and so on[16].

For example, monitoring French provisions implementing EIA85/337 was complicated by the fact that French EIA legislation preceded the directive and was not designed to implement it specifically. Several pieces of legislation cover the requirements of the directive. The Commission found that these were more complex than in most other Member States, and often unnecessarily confusing[17]. Spain, on the other hand, specifically adopted EIA rules to implement the Community directive, which made verification of national level legislation simpler, since there are only two key provisions[18]. The simplicity was marred, however, by the fact that a host of provisions adopted by regional authorities with different degrees of autonomy, at different times, had also to be examined[19].

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15 Macrory, R., "Environmental Citizenship and the Law: Repairing the European Road," 8 (1996) JEL 219 at p.225.

16 Thanks are given to Dr. Ludwig Krämer, for this interview 25 July 1994.

17 Com(93)28 final, pp.66,75,94.

18 The Real Decreto Legislativo 1302/1986 (equivalent to an Act) on environmental impact assessment and the Real Decreto 1131/1988 setting the procedure to implement the former. Two other pieces of legislation are also relevant: Act 25/1988 on highways and Act 4/1988 on conservation of natural areas and wildlife. See Com(93)28 p.229.

19 The complete list of legislation declared is:

Asturias: Ley 1/87, 30 March, of territorial coordination and management; Decreto 54/90, 17 May of the Consejería de Agricultura y Pesca, approving the normative regulating changes in forest cultures as well as new plantations;

Canarias: Ley 11/1990 13 July of Prevention of Ecological Impact;

Madrid: Ley 10/1991 4 April, for Environmental Protection;

Valencia: Ley 2/1989, 3 March, of EIA; Decreto 162/1990 15 October, of the Consell de la Generalitat Valenciana, approving the Reglament for implementing the Ley 2/ 1989;

Aragón: Decreto 192/1989, 19 September, of the Diputación General De Aragón, distributing competences on EIA; decreto 118/1989, 19 September, of the Diputación General De Aragón, on EIA procedure; and Decreto 148/1990 9 November, Diputación General De Aragón, regulating the procedure for the declaration of environmental impact in the territory of the Comunidad Autónoma de Aragón;

Baleares: Decreto 4/1986, 23 January, of establishment and regulation of the studies of EIA;

Cantabria: Decreto 50/1991 29 April, on EIA;

Castilla y Leon: Decreto 269/1989, 16 November on EIA;

Cataluña: Decreto 114/1988 7 April on EIA;

Extremadura: Decreto 45/1991 16 April on Measures for Ecosystem protection in the Comunidad Autónoma de Extremadura;

Galicia: Decreto 442/1990 13 September on EIA;

Navarra: Decreto Foral 245/1988 6 October, assigning determined functions on EIA matters to the organisms of the Comunidad Foral de Navarra.

País Vasco: Decreto 27/1989, 14 February, defining the competent authority for applying the normative on EIA and toxic and dangerous wastes.

Correct transposition remains a stumbling block in Community environmental law. For example, the legislation of most Member States implementing EIA85/337 has long been considered by the Commission as incomplete regarding Annex II projects (projects for which assessment is not systematically required in every case)[20]. The result is that, at national level many projects are now being authorised without prior EIA[21] in violation of Community law.

1.2. Practical Implementation:

The major problem lies not in the transposition of directives, but in their practical implementation[22], the most difficult area to monitor from the Community viewpoint. Concrete instances of conflicting interests, tensions within the various administrative hierarchies (Community, Member State, and regional or local authorities), and practical, technical problems of application manifest themselves here. Often difficulties in practical implementation are linked to black letter transposition[23]; for example a breach may involve both a failure in correct transposition as well as a physical project undertaken in violation of a directive[24]. Infringements of practical implementation are much more difficult to discover and then pursue, as illustrated by Case C-361/88[25] on air pollution, which approaches the problem of air pollution from the angle of legal questions of transposition rather than actual air pollution. Given that the Community has neither the inspectors nor the powers to inspect[26]: it is "only in exceptional circumstances that the

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Andalucia: orden of 12 July 1988, issuing norms to fulfil the mandatory requirement of including a study of environmental impact in the projects of the Consejería de Obras Públicas y Transportes. (Public Works and Transport);

See Com(93)28 pp. 245-5.

20 Tenth Report 1992 (Environmental Offprint) point 1.3.

21 Tenth Report 1992 (Environmental Offprint), p.8.

22 DoE Memorandum HL Ninth Report Evidence 1991-92, p.13.

23 Macrory, CMLRev 1992, p.355.

24 For instance, the black letter restriction of the definition of certain types of industry results in the practical environmental (and competitive) consequences of those industries escaping the legislative restrictions.

25 C-361/88 *Commission v . Germany* 1991 ECR I-2567.

26 Nor even inspectors collaborating with national enforcement officers; Geradin, D., "Trade and Environmental Protection: Community Harmonization and National Environmental Standards," 13 (1993) YEL 151, at p.192.

Commission will have sufficiently strong evidence for a case on actual air pollution to stand in the European Court."[27]

If Member States' records on formal implementation are bad, their records regarding practical implementation are worse. Even where Member States have timeously and correctly transposed Community environmental obligations they are notoriously lax in observing such obligations in practice.

Varying interpretations of the black letter rule can have serious repercussions on practical implementation and harmonisation across Member States[28]. For instance, differences in interpretation of EIA85/337, both among Member States and between the Member States and the Commission, were such that huge divergences in practical implementation resulted. Many Member States fail to apply the directive in its entirety[29] (largely because of vagueness in formulation[30]; a directive amending EIA85/337 and remedying some of its deficiencies has therefore been proposed[31]). Actual practice, for instance, regarding Annex II projects has witnessed both extremes: Annex II projects, which were initially excluded entirely in many Member States[32], are still not fully covered in some States (e.g. Spain), while in others excessive coverage takes place of minor projects due to thresholds that are too low (e.g. France[33]). The content of the Environmental Impact Study (EIS) is also subject to variations in interpretation. The EIS has been found in most cases to consist of the bare minimum required, disregarding the outline in Annex III. Although differences in practical implementation of EIA85/337 exist, one area of uniformity has, unfortunately, emerged: the procedures required by the directive are frequently carried out in a purely formalistic or cosmetic manner[34].

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27 Krämer, *Casebook*, 1993, p. 367.

28 Note here that variations in practical implementation are built into the requirements of LCP88/609: reductions vary according to Member State.

29 Com(93)575 Proposal for a Council Directive amending directive 85/337 on the assessment of the effects of certain public and private projects on the environment, p.2.

30 Chapter 1, point 2.

31 Com(93)575 final; see Conclusions, point 2. Lessons learned -- Amendments to the EIA legislation.

32 Martínez Aragón, GJCE 1993, p.214; Macrory, Richard "The Enforcement of Community Environmental Laws: Some Critical Issues," 1992 CMLRev 347 at pp.359-60.

33 In the Commission's opinion; national critics disagree.

34 Even Denmark, usually serious in its environmental obligations, has entered into an agreement with the Swedish government for the construction of a bridge between the two countries. The Danish Government overcame opposition in the Parliament by ensuring that the contracts were to go to Danes, and the measure passed within one day, without debate. When the

In sum, verifying Member State notification, the completeness and accuracy of transposition, and performance in practice are the monitoring tasks before the Commission. In order to complete these tasks properly the Commission must possess adequate information. However, what appears clear is precisely that the Commission does not have the means to obtain necessary information independently and is in fact almost entirely reliant on external sources of information. This in turn conditions its efficiency in carrying out its tasks.

2. Commission limitations:

Several factors leave the Commission ill-equipped to carry out the above tasks effectively and to counter the nonchalance of States regarding implementation: these include the Commission's own former lack of emphasis on implementation, its limited resources and lack of power, and Member States' continuing concern for sovereignty.

2.1. Not accorded priority:

An initial problem, since remedied, was that monitoring the application of Community law was simply not a priority. It has systematically taken place only since 1984, when the first report on application of Community law was published[35]. The administrative unit within DG-XI in charge of monitoring specifically environmental legislation was not created until 1987[36] and environmental legislation was first reviewed in detail (and amid considerable upset[37]) only with

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Commission objected to this abuse of the derogation (under Article 1(5) for "projects the details of which are adopted by a specific act of national legislation"), it was informed by Danish lawyers that an explanatory memorandum took the place of the debate; Krämer, interview 25 July 1994.

Mr. Marc van der Woude, Conseiller juridique, Service Juridique des Communautés Européennes, confirmed the tendency of authorities to make the decision to go ahead with whatever project and simply to manipulate minor details pursuant to the environmental impact assessment/public participation process; thanks are given for this interview, 26 July 1994.

35 Com(84)181, "First report on the application of Community law 1983", which failed to note the poor compliance record of Member States with regard to environmental obligations; see para. 85.

36 Martínez Aragón, GJCE 1993, p.201.

37 Prior to the release of the Eighth Report, Commissioner Ripa di Meana released figures on compliance by Member State, deeply offending the national sensibilities of these (Note de Presse de la Commission "Le Contrôle de l'application du droit communautaire en matière d'environnement," Bruxelles 9 février 1990). The practice of encouraging compliance through public embarrassment, although it produced positive results, has since decreased; Krämer interview 25 July 1994.

the publication of the Eighth Report's Annex C[38] in 1991. Until then formulation of environmental legislation took place largely at the expense of its proper application[39]. When the Commission did begin to concern itself more with monitoring the application of Community environmental law, this was generally limited to formal implementation: verifying notification and transposition. No infringement proceedings related to practical implementation were commenced before 1983, and by the end of 1985 only five had been commenced[40]. As a result, the Member States apparently drew the conclusion that there was little danger of being pursued for failing to fulfil practical environmental obligations.

Although deficiencies of practical implementation now increasingly preoccupy the Commission, it is hampered by the extreme shortage of legal staff and by limits on its ability to investigate, making it difficult to look beyond the simple evaluation of reports sent to it by Member States, information and questions put to it by the Parliament, and complaints made by individuals and associations -- all external sources of information.

2.2. Insufficient resources:

One problem, of a technical and institutional nature, could be overcome if the will to devote considerably increased resources to environmental priorities existed. While lack of resources is a common complaint in various administrations, it appears that regarding environmental administration, the degree to which resources are strained is indeed severe. The Commission is greatly constrained in its duties -- throughout the stages of formulation, monitoring, and enforcement -- by its limited budget and staff. Financially EC environmental policy is allocated about 100 Million ECU of the 70 Billion EC budget[41], or only about 0.14% of the EC's annual budget -- "a ridiculous misappropriation of a policy."[42] In 1994 DG-XI had a staff of about 200,

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38 Eighth Report 1990, C338/204.

39 See, for instance J.P. Plowman, Head of Environmental Protection, Europe Division, HL Ninth Report Evidence 1991-92, p.21; Aguilar, 1993, p.227.

40 Collins and Earnshaw pp.220-1. By 1990, 62 proceedings for poor practical implementation had been commenced.

41 Krämer, 25 July 1994.

42 Klatte, *op.cit.*, p.46.

As the Commission points out in "The State of the Environment in the European Community: Overview (Com(92)23 final Vol. III), there are "few comparative data available for all Member States"; p.82. The figures given for environmental expenditure as percentage of GDP in 1988 are for Spain, O.6%, for France 1.0%, for the UK 1.2% and for the EC (excluding Belgium,

with an additional 200 on temporary contracts[43]; (to compare, in 1991 the Dutch Ministry of the Environment employed some 900[44]). Moreover DG-XI had only one lawyer for each Member State and a head of unit, responsible for verifying all the legislation and following hundreds of cases[45]. The directorate's ability to perform its duties is torpedoed by its restricted resources, and although the Parliament, largely in control of the budget, every year attempts to increase DG-XI's budget and staff[46], these continue to remain too limited to enable DG-XI to adequately confront the tasks before it[47].

2.3. Limits to Commission powers:

A further constraint on the Commission is that, in terms of gathering environmental information and evaluating Member State performance, it must deal with Member States in a manner similar to an ordinary system of public international law: the Commission is unable to bypass central authorities[48]. All communications and inquiries directed from the Commission to the Member States must pass through the national representation in Brussels, which then forwards the document -- in the fullness of time -- to the appropriate national ministry or department. The procedure is further lengthened in those instances where the target of the

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Luxumbourg and Greece) 1.2%. A double trend has been noted: to slowly increase environmental expenditure on one hand, and for a growing proportion of this to be shouldered by the private sector on the other; p.83.

See also Court of Auditors testimony, HL Ninth Report Evidence 1991-92, pp.49-51. To compare, 3.9% is spent in development co-operation with Latin America, Asia and the Mediterranean (excluding the financial and technical aid to ACP countries under the Lomé Conventions), 25.9% is spent in structural measures, agriculture, of course takes the largest part of the budget at 58.4%; see *Europe in Figures*, third edition, Office for Official Publications of the European Communities, 1992, p.43.

43 Krämer, 25 July 1994; Williams, R., p.366.

44 Klatte, *Frontiers of Environmental Law*, p.44.

45 Rhiannon Williams states that this is a fair average over the years; furthermore, among these lawyers there is extremely rapid job turnover; Williams, R., pp.366, 372.

46 Thanks are given to Mr. Sjef Coolegem, Senior Administrator, Secretariat of the Committee on the Environment, Public Health and Consumer Protection, for this interview on 27 July 1994.

47 For instance, the Commission's resources are too stretched to cope with the increase in complaints to do with the environment; Martínez Aragón, GJCE 1993, p.232.

48 Macrory, CMLRev 1992, p.357; Krämer, GYIL 1991, p.34.

inquiry is a regional authority[49]. For a reply on the issue in question, the Commission must wait, first, for the Member State to be willing to answer, and then for the reply to filter through the various local and State levels back to the national representation in Brussels[50]. At present it remains

> extremely difficult to gain access to the data held by national, regional and local authorities on for example, the frequency and results of the inspections, the firms inspected, the conditions laid down in the licences granted, or the pollution levels recorded.[51]

Again the effects of the ideological ranking of environment can be discerned, for where in the area of competition, Regulation 17[52] authorises Community inspectors to descend upon firms suspected of infringements and search offices and seize documents, or in the area of fishing policy on-the-spot visits are authorised[53], no such power exists in the area of environment. As Krämer points out, where infringements of environmental law are similarly suspected, Community action is restricted to a polite exchange of letters -- "clearly an absurdity"[54]. This raises the question of where Community priorities lie and the vision of how the Community is to develop. Since initially environment protection did not exist at all, having any Community action in this area is an achievement. Yet more than two decades beyond the introduction of environmental protection as a Community concern, is the difference in priorities between policies still justified? On the contrary, it seems desirable and logical to extend the powers necessary to survey correctly the practical implementation of Community environmental rules in order to bolster their *effet utile*[55].

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49 Although direct contact can take place between regional authorities and the Commission, this can occur only at the regional authority's initiative. In Spain's case such contact has only been initiated when the problem in question bears financial implications or relates to Community funding. Concern for the environment alone has, apparently, not yet warranted the trip to Brussels; Krämer, interview 25 July 1994.

50 Although not referring specifically to the environment, the Commission envisages future contact that is increasingly decentralised, particularly with inspection and implementation authorities; Reinforcing the Effectiveness of Community Law, Com(93)256, p.16.

51 Krämer, GYIL 1991, p.31.

52 OJ special ed. no.13, 1962 No. 204/62 p.87, Article 14.

53 Regulation 2241/87 (OJ 1987 L207/1 amended by 3483/88 OJ 1988 L306/2) establishing certain control measures for fishing activities. Article 12(3): "To ensure that Member States comply with this Regulation, the Commission may verify on the spot the implementation thereof in liaison with the competent national departments." Article 12(4) outlines the formalities of inspections at sea, in air, or on land.

54 Krämer, L. "Community Environmental Law -- Towards a Systematic Approach," 11 (1991) Yearbook of European Law 151 at p.169.

55 Particularly since the compatibility of the Single Market and environmental protection is firmly espoused by the Commission in the Fifth EAP and emphasised in Article 2 EC since the TEU.

Genuine overall commitment to environmental policy, in spite of various positive statements, is particularly questionable on the issue of powers, since furthermore no real imagination is required in the development of powers. The powers that would be useful are known; they exist in these other areas (competition and fisheries).

The idea of extending the Commission's power is occasionally brought up, although less frequently in recent years[56]. That this has yet to be approved by the Council is a symptom of another obstacle to Commission monitoring: Member States' reluctance to allow the Commission to encroach further on their sovereignty -- a sovereignty that Member States continue to defend in spite of the long-established fact that the "Treaty carries with it a permanent limitation of their sovereign rights."[57]

As might be expected, concern for national sovereignty resurfaces especially in the area of practical implementation, which may imply physical inspection of national territory, unlike the documentary evidence required to ascertain formal implementation. As MEP Ken Collins has indicated, the idea of a corps of environment inspectors swarming over the national territory "armed with a measuring jar and pipette", testing the actual state of the environment was unacceptable to many Member States: "they did not like the idea of their environment being inspected by 'foreigners'."[58] On-site investigations are extremely rare[59], although the right to such visits can be inferred from Article 5, in fact they take place at the mercy of the Member State and the Commission has on at least one occasion been denied permission[60]. Again the importance of the distinction between practical and formal implementation is underlined, here in terms of repercussions in enforcement actions: considerations of national sovereignty generally bar the Commission from obtaining concrete evidence. Without power to investigate the facts of a case or impose periodic controls on Member States, the Commission is rarely able to prove successfully a practical infringement[61].

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56 Macrory, CMLRev 1992, p.362; Krämer, interview 25 July 1994.

57 Case 6/64 *Costa v ENEL* 1964 ECR 585.

58 Ken Collins, HL Ninth Report Evidence 1991-92, p.35.

59 Seventh Report on Commission Monitoring of Community Law 1989, Com (90)288 p.34.

60 Krämer, HL Ninth Report Evidence 1991-92 p.6; Although as Krämer himself points out, an on-the-spot visit by a lawyer to assess scientific ecological conditions is of "limited efficiency"; Krämer, *Casebook*, 1993, p.405.

61 Tenth Report 1992, p.101. This has been borne out before the Court; see for instance Case C-337/89 *Commission v UK* 1992 ECR I-6013.

2.4. Dependence on external sources of information:

Flowing from the former limitations on its ability to collect data, the Commission is highly dependent on three sources of information over which it has little control: data supplied by the Member States themselves (more useful in providing general information than in helping the Commission detect infringements, for obvious reasons); reports, petitions and written questions submitted by Parliament; and complaints from individuals and associations[62].

- *Member State reports and replies to Commission communications:* Reliance on Member States for the reports required by certain directives and for answers to specific questions carries the built-in drawback of counting on Member States to supply accurate information that may be eventually used against them.

Part of the blame for the States' poor performance in forwarding reports stems, again, from legislative formulation. In early directives the requirement for Member States to submit reports often was either non-existent or very vague. For instance, an often-used requirement in early legislation was to report "at intervals" ("what interval? Every hundred years? This millennium?"[63]). When reports were required, the requirement to notify the practical measures to implement was often omitted[64], encouraging focus on only black letter transposition. Accordingly, Member States tend to summarise administrative and technical measures and provide little information on the performance of concrete programmes and actions[65]. Furthermore the Commission was slow to insist on the importance of fulfilling reporting requirements: the first case against a State for failure to send reports was brought only in 1987[66].

Member States are more at fault, however. Even where a specific requirement exists, Member States commonly disregard their obligation: the "utility [of reports] is limited by the infrequency

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62 Tenth Report 1992 (Environmental Offprint), p.9.

63 MEP Dr. Caroline Jackson, HL Ninth Report Evidence 1991-92, p.39.

64 Krämer, GYIL 1991 p.30.

65 Moreover, occasionally officials seems to equate formal implementation with carrying out the concrete actions required: one official from the Spanish Ministry of Industry and Energy implied that, by forwarding the required programme to the Commission Spain had fulfilled its concrete obligations.

66 Case C-162/89 *EC Commission v Belgium* 1990 ECR I-2391.

These reports are also important in elaborating coherent protection programmes. In Case C-162/89 for instance, had the reports been forwarded in time it would have helped the Waste Management Committee set up by the Member States and the EEC, to co-ordinate and rationalise national waste policies; Krämer, *Casebook*, 1993, p.287.

of their transmission. The situation has not discernibly improved in recent years[67]". If the Commission does not devote enough attention to seeing that reports are forwarded by given deadlines[68], it must be stressed that in some cases it is almost impossible to extract any information from the Member States. An informal year-long[69] survey within DG-XI concerning requests to ten member States for information revealed that, of 111 letters sent by the Commission, only two had been answered within the two-month deadline; one third had received no answer at all; and the average period for a reply was six months[70]. An extreme example is Italy which, for more than four years and even during the course of infringement proceedings[71] failed to answer repeated Commission requests for information pertaining to practical implementation on matters relating to waste and hazardous waste. Despite the judgment against Italy, some questions remained unanswered in 1994[72]. (This has further consequences in enforcement, in that the ECJ's reasoning can be limited by inadequate information[73].)

Information is so rarely supplied that often the Commission, in turn, cannot carry out its own obligations to issue reports on implementation of particular directives[74]. EIA85/337 and LCP88/609 illustrate the pattern: the Commission's report on implementation of EIA85/337[75], due in July 1990, was published only on 2 April 1993. The Commission has stated[76] that it will proceed with the comparative analysis of pollution reduction as required by Article 3(4)

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67 Com(93)320 p.320; AUDRETSCH, H.A.H. *Supervision in Community Law* 2nd rev. ed. 1986, p.431-2.

68 Vernier Report, EP A3-0001/92, p.5; HL Ninth Report Evidence 1991-92, p.18.

69 July 1993-July 1994.

70 Williams, R., p.361.

71 Case C-33/90 *Commission v Italy* 1991 ECR I-5987.

72 Specifically regarding a US contract to import waste into Campania, confirmed by Krämer, interview 25 July 1994. Waste management is an area particularly affected by Member States' unwillingness to supply information, cf: Tenth Report 1992 (Environmental Offprint), p.44.

73 As in Case 57/89R *Commission v Germany* 1989 ECR 2849 (Chapter 3, point 1.2. Problems in the judicial phase).

74 Com(90)287 final; HL Ninth Report Evidence 1991-92, p.20; Krämer, *Casebook*, 1993, p.288. Such was the case with the Article 12 reports required by the Birds Directive 79/409: between 1981 and 1992 the Commission was unable to produce a single composite report; Krämer, *Casebook*, 1993, p.158.

75 Report from the Commission on the Implementation of Directive 85/337/EEC, Com(93)28 final.

76 Eleventh Report 1993, C154/49.

contraventions or maladministration in the implementation of Community law, which again may help promote the correct implementation of Community environmental law. (For instance, the Ombudsman is investigating the alleged failure of the Commission to make a diligent inquiry into the potential violation of EIA85/337 regarding the British widening of the M40 motorway[89].)

- *Individuals and groups or associations:* By contrast with traditional systems of public international law, through the Community's complaints procedure, individuals and associations become crucial actors, at Community level, in monitoring the implementation of Community law[90]. Complaints are by far the Commission's most important source of information on infringements. In 1982 the Commission received 10 complaints and detected none through other sources; in 1985 it received 37 and detected 10 cases; in 1988, 216 complaints were received and 33 cases detected; and in 1990 the figures were 480 and 42 respectively[91]. Clearly the procedure is an invaluable resource for the Commission. Moreover, complaints tend to concern inadequate implementation in practice[92], the Commission's most troublesome area to monitor. Interested individuals and ecological associations fulfil the critical function of acting as the Commission's eyes on Member State territory.

The procedure has many advantages. Local remedies need not have been exhausted. All written complaints are registered, and the complainant notified, and although no particular format is needed, the Commission has simplified matters by publishing a complaint form[93]. No violations of specific legislation need be cited, as long as the complaint is sufficiently precise to permit inquiry. Indeed, it falls upon the Commission to obtain factual and legal information on the object of the complaint. The procedure is free of charge.

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89 European Union, *The European Ombudsman*, Annual Report, 1995, Annex b, pp.42-43; investigating complaints no. 132/21.9.95/AH/UK-EN and 150/29.09.95/DL/UK-EN by two British citizens.

However, it would perhaps be mistaken to place too much hope in his role. As Dr. Krämer points out, his function is "rather to control the administrative activities of Community institutions than to check and eventually to challenge Commission's decisions"; Krämer, L., "Public Interest Litigation in Environmental Matters Before European Courts," 8 (1996) JEL 1 at p.10.

90 And in enforcing it, below 3.1. *Shifting the burden to national courts.*

91 Eighth Report 1990, p.318.

92 Com(90)288, p34

93 OJ 1986 C26/6.

However, while the complaint procedure presents these advantages and is a crucial source of information for the Commission, it does possess several drawbacks. It is, by nature, sporadic. It cannot reflect the true situation of the environment: relying on the public, the procedure passes through a cultural filter reflecting national perceptions about which issues are serious and merit attention. Complaints on environmental issues may be most frequent precisely in states where environmental awareness is most acute, where crucial public information and education are highest and where the true situation may in fact be better than elsewhere[94]. It also implies awareness of the Community source of obligations being breached. The procedure will be ineffective where the public is not vigilant or is (kept) unaware of the Community origin of national measures and does not complain to the Commission about breaches of Community law[95].

The complaints procedure also skews proceedings towards specific problems: it is logical that public attention be more focused on spectacular events or occurrences than on slow continuous degradation. For instance, in 1987-88 most of the complaints against Germany, the Netherlands, Italy, Belgium and France regarded drinking water, wild birds, and environmental impact assessment[96]; the last two were still the most frequent sources of complaint in 1992[97]. Yet that Commission attention is thus focused on wild birds and environmental impact assessments does not exclude the possibility that quality of shellfish waters, for example, or air pollution caused by industrial plants are also the subject of gross, if less obvious, breaches of environmental law.

Another difficulty is that the complaints procedure depends upon the ability to obtain relevant information. However, attempts to obtain information are often unsuccessful: individuals and pressure groups are often told that data are confidential and cannot be released[98]. Efforts to overcome this secrecy have been made, as with the adoption of Directive

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94 WWF, HL Ninth Report Evidence 1991-92, p.265.

95 PE 116.085, 1988 at p.17. Member States tend to play down the Community origin of national measures, for instance the Department of the Environment Booklet on Pollution Control Systems discusses air pollution controls and provides graphs for reductions in emissions from British Large Combusion Plants, yet never mentions the existence of the EC directive (DoE, Environment in Trust: Pollution Control Systems, pp.5-6.). Citizens must be aware of the Community source in order to make complaints to the Commission or to rely on Community provisions in a national court where the measure is capable of direct effect.

96 Com(90)288, p.35

97 Tenth Report 1992 (Environment Offprint), p.10.

98 Krämer, HL Ninth Report Evidence 1991-92, p.6.

90/313[99] on freedom of access to environmental information held by Member State public authorities[100]. However, derogations are built into the directive itself[101] and problems exist with its transposition and practical application, which "require substantial changes in the traditional administrative procedures of most Member States"[102]. And even if its provisions are respected by administrative agents (and examination of the two national contexts reveals that this is often not the case[103]), a concerned individual must be informed enough to know what kind of data to request.

As seen above, with the aid of Parliamentary petitions and questions the number of cases detected by the Commission independently of the complaints procedure has risen somewhat, but the figures show that the Commission is still over-reliant on irregular interventions of groups and individuals, as the Commission itself admits[104]. Complaints, though certainly of great use, can hardly substitute for a systematic approach to monitoring implementation.

An enormous drawback of the complaints procedure both for complainants and the environment is its length. Some 500 complaints a year entail a continuous flow of documents between Member States and the Commission and long delays while the central State authority then seeks information from regional or local authorities or companies -- delays that national authorities notoriously prolong unjustifiably[105]. While environmental problems often require urgent attention, a complaint to the Commission provides no short-term solution. In Case C-57/89[106] for instance, the first complaints were made in 1985 concerning work to increase an existing dike on the Leybucht (a designated birds habitat) and the disposal of dredged sludge in

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99 Directive 90/313 (OJ 1998 L158/56).

100 The Commission has announced the elaboration of a text regarding access to environmental information held by Community authorities as well; see Krämer, Ludwig and Pascale Kromarek, "Droit Communautaire de l'environnement; 1er octobre 1991 - 31 décembre 1993," RJE 2-3/1994, p.218.

101 Article 3(2) of this directive lists grounds on which a Member State may refuse to provide information, although stipulating that "[i]nformation held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above."

102 Tenth Report 1992 (Environment Offprint), p.7

103 The implementation of this directive has proceeded poorly, and the Commission has seen fit to warn that it considers several of the provisions of Directive 90/313 EEC to have direct effect and therefore to be applicable from 1 January 1993, with or without national implementing legislation; Tenth Report 1992 (Environment Offprint), point 1.6.

104 Eighth Report 1990, p.272.

105 Vernier Report, EP A3-0001/92, p. 4; Krämer, GYIL 1991, p.34.

106 Case C-57/89 *Commission v Germany* 1991 ECR 883.

the area of Rysumer Nacken, which the Commission believed would lead to the disappearance of birds habitats. By the time interim measures were considered, in August 1989, the ECJ judged construction to be so far along that there was no urgency in stopping the remaining construction[107]. The action, in which the Commission proved unsuccessful, was judged in February 1991, seven years after the first complaints. The shortcomings for environmental protection are obvious, and the potential to make Europeans lose confidence in the value of the complaints procedure are serious. Confidence in the complaints procedure has been affected: the public perceives that occasionally investigations are discontinued for political reasons[108].

Finally, a worrisome development with regard to this source of information is that, regarding Community law generally, the burgeoning number of complaints and the difficulties experienced by Commission departments in investigating cases have led to the Commission to advise complainants to raise the matter with the national authorities in the first instance, particularly when the complaint refers to "measures taken on the spot."[109] The same advice has been reiterated with specific reference to environmental complaints[110]. Where already Member States tend not to take their environmental obligations seriously, this diminishes an important Community-level avenue towards enforcement, for in the end the action taken by the Commission is usually provoked by a complaint. It is serious that this means of gathering information specifically related to infringements is being played down while no significant improvement to the Commission's ability to gather this information itself has been made (resources/competence). Also there is a certain irony in the fact that, on the one hand, the Community has taken pains to put powers at the disposal of European citizens (through such

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107 Case C-57/89R *Commission v Germany*, Order of the President of the Court, 1989 ECR 2849, at paras. 18, 19, 22.

108 Six non-governmental organisations, including WWF-UK, RSPB and Greenpeace International responding to a questionnaire indicated that

- all were dissatisfied with the reasons for closure of the complaints procedure, and very dissatisfied with the time it takes the Commisison to process complaints (one even cited its concern that the Commission used its "slow processing of complaints to avoid taking timely, but politically controversial decisions");
- all felt external political pressure may have played a part in the processing of their complaints (most felt, citing actual occasions, that it had indeed played a part);
- three felt internal Commission policy played a part;
- two felt that lack of Commission personnel might have been a factor;

Williams, R., pp.364-65, 372.

109 Com(93)256, p.14. Williams, R., pp.368-69.

110 Com(96)500, p.10 point 31; Martínez Aragón, GJCE 1993, p.232.

directives as 90/313[111] on access to information) in order that they may help monitor the implementation of environmental rules; on the other hand, the use of these powers is, to a certain extent, discouraged.

3. Addressing limitations:

Serious attempts have been made at the Community level to address the Commission's restrictions. The ECJ has placed useful tools at the Commission's disposal, by outlining general duties and more precisely, by giving guidance on acceptable methods of implementation. The ECJ has also developed certain doctrines that are instrumental in alleviating the Commission's burden of monitoring and enforcing Community law, by promoting the enforcement of Community rights and obligations at national level. Finally, in an effort to decrease its dependency on the sources of information outlined above, the Commission has established alternate sources.

3.1. Judicial promotion of adequate implementation:

The European Court of Justice (ECJ) has given the Commission valuable support in the Commission's task of monitoring implementation, both through development of general legal doctrines, most of which find their origins in Article 5 EC, and through specific decisions that outline the requirements of implementation.

General duties:

- *Duty to co-operate*: A tool the ECJ has given the Commission and that has been used in environmental litigation[112] is its development of the positive duty of "loyal co-operation" arising from Article 5(1) of the Treaty whereby Member States are required to facilitate the Commission's task by co-operating fully with it. (The Commission, likewise, must co-operate

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111 Above.

112 Case 52/84 *Commission v Belgium*, above, (para.16).
Case 272/86 *Commission v Greece* 1988 ECR 4875 "the lack of cooperation was particularly serious because it persisted before the Court" (para.31).
Case C-33/90 *Commission v Italy* (Campania) 1991 ECR I-5987 (paras.18-21).
See also AUDRETSCH, 1986, pp.15-18.

113 Case C-2/88 *Zwartveld and Others* 1990 ECR I-3365, para.17 "...relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treat, by a principle of sincere cooperation. That principle not only requires the Member States to

relating to more intractable difficulties (social turmoil and strikes, parliamentary difficulties making adoption within the time limit impossible, and constitutional or administrative division of competence placing implementation in the hands, not of the Member State, but of a local or regional authority[124]), often leaving Member States with a genuine problem. Arguing that a Member State is not alone in its failure will not shield it from its responsibility[125]; nor does the fact that Community institutions may also have failed to fulfil their obligations justify a Member State's failure[126]. Some allowance may be given to cases of *force majeure*, (although this will not

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- that the complex subject matter would entail amendment to the Civil Code; Case 17/85 *Commmission v Italy* 1986 ECR 1199 (para.5);

- *inter alia* the "need to take account of European capital market"; Case 390/85 *Commission v Belgium* 1987 ECR 761 (para. 6).

124 Social upheaval: Case 128/78 *Commission v United Kingdom* (Tachographs) 1979 ECR 419, it was claimed that compulsory measures would meet with "active resistance" from concerned sectors (para.7);

Parliamentary difficulties: Case 91/79 *Commission v Italy* (detergents) 1980 ECR 1099 (environment) efforts had been thwarted by the brief existence of the seventh legislature of the Italian Parliament (para.5); also Case 280/83 *Commission v Italy* 1984 ECR 2361 the early dissolution of Parliament prevented the draft directive from completing the Parliamentary procedure (para.3);

Division of competence: Case 227-230/85 *Commission v Belgium* 1988 ECR 1 (environment): the Belgian government is not empowered to compel the regions to implement the directive, nor to substitute itself for the regions (para.8). Rejecting this defence, the Court explained that although a Member State is free to delegate powers as it sees fit, it is not thereby released from its obligations to the Community (para.9); also Case 97/81 *Commission v Netherlands* 1982 ECR 1791 (environment) (paras. 11,12); and Case C-33/90 *Commission v Italy* (Campanian Waste) above, (paras.23-24).

Financial difficulties: Case C-42/89 *Commission v Belgium* 1990 ECR I-2821 (environment, para.24); (and certainly not if the request for an extension on compliance time comes after the deadling for transposition of the directive has passed, para.23).

125 Regarding the fact that a Member State cannot rely on possible infringement of Treaty by another MS to justify its own default, see:

Case 52/75 *Commission v Italy*, above (para. 7/9);

Case 232/78 *Commission v France*, above (para.9).

Case 325/82 *Commission v Germany* 1984 ECR 777 (para. 11).

Reference has been made to the Court in national cases where it was argued that application of national implementing legislation was prejudicial to nationals, since other Member States had not implemented, see

Case 78/76 *Steinike und Weinlig v Germany* 1977 ECR 595 (para.24).

Case C-38/89 *Ministère Public c/ Blanguernon* 1990 ECR I-83, (paras.4-7).

126 Cases 90 and 91/63 *Commission v Luxembourg and Belgium* 1964 ECR 625, the defendants argued that, as the Community had failed to comply with its obligations, the Commission has lost its right to plead infringement of Treaty. The Court disagreed: the fact that the Council failed to carry out its own obligations cannot relieve the defendants from carrying out theirs (p.631).

Case 7/71 *Commission v France* ("Supply Agency" Euratom) 1971 ECR 1003: the French Government, of the opinion since 1965 that the provisions of Chapter VI Euratom had lapsed (para.3) argued that it was not open to the Commission to bring action in 1971 for a situation that it has known about since 1965 (para 4). The Court ruled that the Commission only commenced action after a lengthy period of time cannot have the effect of regularizing a continuing contravention (para.6) and the fact that the Council has not reached a decision to confirm Chapter

justify excessive delay)[127] and in instances where real doubt as to the legal obligations of the Member State exists[128]; it is clear, however that such circumstances will be interpreted very narrowly.

Securing adequate legal certainty has been the force behind many rulings offering guidance in correct implementation. The ECJ has given technical assistance to the Commission by clarifying areas of possibly genuine doubt regarding the acceptable forms and methods of implementation. The over-riding issue is that persons concerned be made fully aware of their rights and obligations.

Through successive rulings the ECJ has made abundantly clear that administrative circulars that are inadequately publicised and can be modified at the whim of the administration, voluntary agreements, and legislative reference to non-binding technical rules are generally not enough to correctly transpose a directive[129]. Thus transposition of directives

> does not necessarily require that its provisions be incorporated formally and verbatim in express specific legislation; a general legal context may, depending on the content of the Directive, be adequate for the purpose provided that it does guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.[130]

VI provisions cannot prevent Commission from ensuring respect for provisions it esteems to be still in force (para.12).

127 Case 101/84 *Commission v Italy* 1985 ECR 2629. A bomb attack in 1979 on Italy's Ministry for Transport's data-processing centre hampered Italy's ability to compile the required statistical returns on carriage of goods by road required by the Commission. The Court found that although this may have constituted a case of *force majeure* "its effects could only have lasted a certain time" (para.16). Italy was found not to have fulfilled its obligations.

See also Case 52/84 *Commission v Belgium* 1986 ECR 89, (para.16).

128 Case 26/69 *Commission v France* (Olive Oil) 1970 ECR 565 in view of "the equivocal nature of the situation thus brought about, the French Republic cannot be accused of any failure to fulfil its obligations" (paras. 27-32). (This defence is unlikely to work again, cf: Case 7/71 *Commission v France* (Euratom); see Dashwood and White, 1989, p.402).

129 Case 102/79 *Commission v Belgium* 1980 ECR 1473 (environment): "...a Member State has not discharged the obligation imposed upon it by the third paragraph of Article 189 of the Treaty if, for the purpose of fulfilling the requirements under the directives in question , it simply relies on existing practices or even just the tolerance which is exercised by the administration (para.10); "...Mere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough cannot in these circumstances be regarded as a proper fulfilment of the obligation imposed by Article 189 (para.11)"; see also Case C-361/88 *Commission v Germany* 1991 ECR I-2567 (environment, paras.14-21).

130 Case 363/85 *Commission v Italy* 1987 ECR 1733 (para.7).

The fact that a measure is directly applicable or capable of direct effect does not make transposition redundant[131]. Furthermore, that a provision is applied in practice but not transposed is capable of causing confusion[132]. Although formal implementation does not necessarily require legislative action, the existing principles and provisions must

> guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts[133].

The maintenance in force of national provisions incompatible with Community legislation, even if not applied in practice, likewise clouds legal certainty[134]. The fact that the practice prohibited by a directive does not exist in a given Member State does not entail that the provision is not worth transposing and cannot justify the absence of appropriate legal provisions[135]. Nor does the expectation of an upcoming change in Community law justify the Member State's failure to transpose the Community provision that is currently valid; the binding force of a directive may not be challenged as long as it has not been abrogated or amended[136]. Prohibitions in a directive must be expressly set out in national law[137].

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131 Case 301/81 *Commission v Belgium*, above. The Court took the opportunity to explain that even if provisions are directly applicable, the state is not exempted from implementing them (para.13). See also 102/79 *Commission v Belgium* (para.12).

132 Case 300/81 *Commission v Italy* 1983 ECR 449 (para.10).

133 Case 29/84 *Commission v Germany* 1985 ECR 1661, at para.23.

See also:

Case 102/79 *Commission v Belgium* 1980 ECR 1473 (paras.10-11);
Case 236/85 *Commission v Netherlands* 1987 ECR 3989 (paras.18,25);
Case C-361/88 *Commission v Germany* (above; para.24);
Case C-339/87 *Commission v Netherlands* 1990 ECR I-851 (environment, para.36);
Cases C-13/90, C14/90 and C64/90 *Commission v France* 1991 ECR I-4327, I-4331 and I-4335 respectively (environment).

134 Case 167/73 *Commission v France* (Code de travail maritime) 1974 ECR 359. Although the regulation was directly applicable, the maintenance in force of the incompatible wording of the Code du Travail Maritime gave rise to "an ambiguous state of affairs by maintaining as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law" (para.41). The uncertainty was reinforced by the internal, verbal character of administrative directions to waive the application of national rules. As Dashwood and White note, *op cit.* at p.393: "legislation can produce effects incompatible with Community obligations independent of its application by national authorities."

135 Case C-339/87 *Commission v Netherlands* 1990 ECR I-851 (environment; paras.22,25,32).

136 C-310/89 *Commission v Netherlands* 1991 ECR I-1381 (environment) p.1381.

See also Case 220/83 *Commission v France* 1986 ECR 3662; Case 252/83 *Commission v Denmark* 1986 ECR 3713; Case 205/84 *Commission v Germany* 1986 ECR 3755; Case 206/84 *Commission v Ireland* 1986 ECR 3817: four insurance cases, where it was argued unsuccessfully that the Commission sought to pre-empt procedures in Council, where a proposal for a second directive on same matter was under discussion.

137 Case 252/85 *Commission v France*, (environment)(para 19);

Shifting the burden to national courts: Finally, certain general doctrines developed by the ECJ have had the effect of alleviating the Commission's burden with regards to investigating, and if the need arises, commencing infringement proceedings at Community level for alleged infractions[138].

- *Direct Effect*: The most notorious of the doctrines developed by the ECJ is that of direct effect. Even if not, or if poorly implemented, a directive is capable of creating rights that are enforceable in national courts against the State or an emanation of the state (*Marshall* and confirmed recently in *Paola Faccini Dori v Recreb*[139]). A provision is capable of direct effect if it is unconditional, sufficiently precise and "not qualified by any reservation which would make its implementation conditional upon a positive legislative measure enacted under national law" and if the deadline for its implementation has passed[140]. The doctrine has been instrumental in other areas of Community law, lightening the Commission's burden by making Community legislation enforceable directly in the Member States.

The difficulty is that the doctrine of direct effect, designed to ensure that individuals can assert their Community rights in national courts, has only limited application in environmental law. Environmental law rarely meets the criteria for direct effect: it is an area in which further

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Also C-339/87 *Commission v Netherlands* (above) (para.22); C-131/88 *Commission v Germany* 1991 ECR I-825 (environment) Germany's argument that, if no authorisation was granted, then discharge of dangerous substances were in effect prohibited (as required by the directive) did not satisfy the requirement of legal certainty for companies applying for authorisation (para.37).

138 Alternatively, a more cynical view might take this as 'passing the buck' to the Member States.

139 Case 154/84 *Marshall v Southampton A.H.A.* 1986 ECR 723; in Case C-91/92 *Paola Faccini Dori v Recreb Srl*, 1994 ECR I-3325. In the latter, although denying horizontal direct effect, the Court reminded Member States that the doctrine of sympathetic interpretation required the national courts, when applying national law, whether adopted prior to or after Community directive, to interpret that law as far as possible in the light of the wording and the purpose of the directive so as to achieve the result intended by the directive (para.26). As an added incentive, the Court (para.27) also reminded Member States of the judgment in *Francovich*, requiring them to make good damage caused to individuals through failure to transpose a directive provided that the *Francovich* conditions are fulfilled (see below).

140 Case 26/62 *Van Gend en Loos v Nederlandse Tarief Commissie* 1963 ECR 1, p.13). Cf Case 148/78 *Pubblico Ministero v Ratti* 1979 ECR 1629 at 1651. Case 8/81 *Becker* 1982 ECR 53 at 71.

"instructions" are typically given to authorities[141]. More intractably, it seldom creates individual rights[142] (although this does not diminish the obligation on the State[143]). This seems to rule out protection of directives designed to protect the environment as such, rather than the environment in conjunction with the health of individuals. Case C-236/92[144], the first case concerned with the direct effect of an environmental directive (directive 75/442[145], admittedly not a strong candidate for direct effect[146]) suggests a stringency in application of the doctrine to environmental rules. The argument that, rather than examining whether specific articles of a directive can confer individual rights, "rights of individuals should follow from the *general* protective aim of environmental directives, reflecting the close relationship between human health and environmental quality,"[147] is here strongly supported. Again[148], while the Community encourages individuals to be vigilant and active in the enforcement of Community environmental rules (access to information, complaints procedure, public participation), it is ironic that a rigid interpretation of individual rights could preclude this highly effective path for enforcement at Member State level. However, the case-law is young, and the effects of this judgment remain to be verified.

Moreover, enforcement of Community environmental law by individuals directly in national courts is not ruled out completely: some environmental directives are esteemed to have direct effect such as provisions laying down maximum values for discharges (limit values, emission values); prohibitions couched in absolute terms[149]. For example, EIA85/337 arguably creates a

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141 KRÄMER, *Focus...*, pp.159.

142 Insistance that rights be 'individual' further plagues would-be protectors of the environment with regard to legal title before the courts, both at Community level, and in the national contexts; see Chapter 3, point 1.2, problems of the judicial phase; and enforcement in the national chapters.

143 In Case C-431/92 *Commission v Germany* 1995 ECR I-2192, concerning EIA85/337, the ECJ marked the distinction between whether a provision was unconditional and sufficiently precise to impose obligations on the State and whether an individual could rely upon them.

144 Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and Others v Regione Lombardia and Others*, 1994 ECR I-483.

145 Directive 75/442 on waste; OJ 1975 L194/39.

146 Holder, J., "A Dead End for Direct Effect?: Prospects for Enforcement of European Community Environmental Law by Individuals," 8 (1996) JEL 313 at p. 332.

147 Holder, 1996, pp.330-31.

148 See above 2.4. at - *Individuals and groups or associations.*

149 KRÄMER, *Focus...*, pp.160-67. Interesting for this research, it is Krämer's opinion that Article 3 of EIA85/337 is, at least as far as Annex I projects are concerned, capable of direct effect, as is Article 6, providing that the public concerned must be consulted. See also Macrory in Vaughan, pp. 40-41, in which he states that "In my view most of the provisions of the Directive

right to participation[150]. The Drinking water directive could be esteemed to create an individual right to drinking water of a certain quality[151]. Unfortunately it would require both access to adequate information and a great deal of courage on the part of the individual to claim these rights in judicial proceedings[152]: indeed, the choice between buying bottled water or engaging in lengthy, costly legal proceedings that are uncertain as to outcome is usually quickly made.

- *State Liability:* The *Francovich* ruling, by which Member States may be held liable if their default results in damage to individuals, makes the consequences of inadequate formal implementation more costly for the Member States[153]. Interestingly, Jans argues that a form of strict liability has been introduced, where the State can be held liable for defaults of the government, for acts of public authorities (even at local or regional level) or even individuals[154]. Conditions sufficient to give rise to a right on the part of individuals to obtain reparation include[155] :

- the result required by the directive should entail the grant of rights to individuals;
- it should be possible to identify the content of these rights by reference to the provisions of the directive;
- a causal link must exist between the state's breach of obligations and damage suffered by the individual[156].

First, the pervasive difficulty in proving causation in environmental matters generally is noted, given the state of scientific knowledge, the possible accumulation of damage over many

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concerning Annex I are sufficiently clear and precise to have direct effect, being mandatory requirements with respect to such projects."

150 Furthermore, in Case 431/92 *Commission v Germany* 1995 ECR I-2211, paras. 37-40 indicates that Articles 2, 3, and 8 of EIA85/337 are clear and precise enought to lay down unequivocal obligations, but the ECJ stops short of discussing whether this confers rights on individuals.

151 Likewise the Court's ruling in C-361/88 *Commission v Germany* 1991 ECR I-2567 seems to set the stage for the argument for a right to clean air: "[Article 2, Directive 80/779] implies, therefore, that whenever the exceeding of the limit values could endanger human health the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights" (para.16).

152 Krämer, interview 25 July 1994.

153 Cases C-6, C-9/90 *Francovich and Others v Italian Sate* 1991 ECR I-5357; reaffirmed C-46, C-48/93 *Brasserie du Pêcheur SA v Germany, Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others* (Factortame III) (1996) 1 CMLR 889.

154 JANS, J.H., *European Environmental Law*, European Monographs, Kluwer, 1995, pp.189-90 (JANS, *European Environmental Law*).

155 C-6, C-9/90 *Francovich and Others v Italian Sate*, para.40.

156 These conditions vary somewhat in a later ruling: C-46, C-48/93 *Factortame III* (1996) 1 CMLR 889, para. 51:"...the rule of law infringed must be intended to confer rights on individuals; *the breach must be sufficiently serious;* and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties" (emphasis added).

years, multiple authors, et cetera. Secondly, it is again doubtful whether environmental directives meet the tests concerning 'individual rights' set up by this ruling[157] (setting aside the difficulties of evaluating financial compensation for environmental damage). Jans suggests that 'rights for individuals' should not be too strictly construed -- perhaps they should be interpreted in the sense of a "person's interests"[158] -- to widen the possibility of its application in environmental matters. As desirable as this may be to encourage effective implementation of environmental rules, it seems likely that "floodgates" considerations may intervene. Still it is not excluded that it could one day have considerable consequences in the environmental sector.

- *Indirect Effect (Von Colson):* The doctrine of indirect effect is probably more useful for the implementation and enforcement of environmental rules, since these often confer collective, rather than individual rights. The ECJ has developed a doctrine of 'sympathetic interpretation', whereby national courts are expected to interpret their national law[159], anterior or subsequent, in the light of Community directives (within the limits of principles of Community law, such as non-retroactivity and legal certainty[160]), whether the directive has or not been implemented. On at least one occasion in the national contexts studied here the requirement to interpret national law in conformity with Community norms has had a positive influence on the enforcement of an environmental directive[161].

Decisions such as those above simplify the Commission's monitoring task by streamlining it; by outlining the acceptable modalities of implementation; by giving the Commission Court rulings on which to rely in eventual contacts with Member States regarding alleged infringements. In some instances ECJ decisions have also been critical in prompting Member States to abandon certain practices. To illustrate, France, Italy, the United Kingdom and Germany

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157 Martínez Aragón, GJCE 1993, p.210; JANS, *European Environmental Law*, pp.187-191; Lane, *op.cit.* p.974.

158 JANS, *op.cit.*, p.188.

159 Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* 1984 ECR 1891, para.28: "...It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law". This was further extended in Case C-106/89 *Marleasing S.A. v La Comercial Internacional de Alimentación S.A.* 1990 ECR I-4135.

160 Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* 1987 ECR 3969.

161 See France, Chapter 6, point 2.6. Tunnel du Somport.

have indicated their willingness to forego the use of administrative circulars in formal implementation and use mandatory legislative instruments instead[162]. The fact remains that even when obligations and acceptable means of discharging these are clear, at times Member States choose to be in violation of their obligations, to postpone implementation of an environmental directive in order to accomplish or to accord priority to other goals[163] or simply in blatant disregard of Community law[164]. Where a breach is undertaken knowingly, the Commission must discover and prosecute the infringement, and once again its limited ability to monitor implementation has unfortunate effects.

3.2. Creation of information sources:

A variety of measures have been undertaken that should multiply the sources of information available to the Commission and, again, facilitate its task.

- *European Environmental Agency (EEA):* The political dispute that delayed the opening of the European Environmental Agency and the European Environment Information and Observation Network[165] has been resolved. The *raison d'être* of the Agency, now seated in Copenhagen, is to collect and distribute reliable, comparable data crucial to coherent environmental management. It is disappointing that the more active role in monitoring application of Community environmental rules, such as that originally envisaged by Parliament[166], was not adopted in the final version[167].

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162 Tenth Report, p.101; Vernier Report, EP A3-0001/92, p.16.

163 E.g.: UK's delay in implementing the Drinking Water Directive in order to create a more favourable climate for privatisation of the water industry in England and Wales; Collins and Earnshaw, p.217.

164 C-70/90 *Commission v Italy* 1990 ECR I-4817: "Italian legislation provides that the limit values are to be measured *upstream* of the point where the waste is discharged into the surrounding environment..." (para.10, emphasis added).

Likewise it is difficult to see how a Member State can argue in 1989 that a directive is not binding as to the result, but merely requires that a Member State take all measures reasonably possible; see C-337/89 *Commission v United Kingdom* 1992 ECR I-6103 (para.18).

165 Regulation 1210/90 OJ 1990 L120/1.

166 See the opinion of the European Parliament, OJ 1990 C68/50 at Article 2(15), suggesting adding to the EEA's role: "keep a record of the application of Community law in Member States and to advise the Commission on measures to be taken in this connection" and 2(16): "to monitor compliance by the Member States with their duty pursuant to Community directives and regulations, to submit plans and reports and to use them systematically." See also Article 6a.

167 In a subsequent opinion, Parliament did call for the role of the EEA to be revised, inter alia to include "the granting of powers of inspection with regard to the implementation of

The Agency's role in providing the Commission with the information necessary to carry out its tasks is specifically mentioned[168]. In order to help the Agency fulfil its role, an informal network has been set up composed of Member States' national networks of environmental information[169], national focal points for co-ordinating and communicating information to the Agency[170] and specific institutions responsible for co-operation and liaison with the Agency on particular subjects of interest[171]. Topic centres are created and designated specific tasks, according to the Agency's multi-annual work programmes[172].

- *General Consultative Forum:* In keeping with the idea that much environmental protection is in the hands not of 'greens' but of industry, business and other sectors, the Commission has created a forum[173] of dialogue on environmental issues, which may be consulted by the Commission on any problem relating to the Community's environment

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Community environmental legislation in cooperation with the Commission and exisitng competent bodies in the Member States"; OJ 1990 C96/112, Article 16b.

Parliament succeeded in securing a commitment in the founding Regulation (Article 20) to review the Agency's role two years after it commences operation, with a view to expanding its role.

168 Regulation 1210/90, Article 2(ii).

169 Article 4(2); see also Commission, "Implementing Community Environmental Law," Communication to the Council of the European Union and the European Parliament, 1996, points 55 and 56, on the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL).

170 Article 4(3).

171 See for instance, the French agency designed specifically to interact with the EEA, l'Institut français pour l'environnement: Chapter 4, point 1.3.2, *New national agencies*.

172 Article 4(5), (6).

In order to ensure "broad dissemination of reliable environmental information" the Agency shall publish a report on the state of the environment every three years (Article 2(vi)). Furthermore it will seek the co-operation of a variety of Community-level research and information bodies (Article 15(1)), such as the Joint Research Centre and the Statistical Office; as well as international organisations such as the United Nations Environment Programme, World Meteorological Organisation, and the Organisation for Economic Co-operation and Development (Article 15(2)). As an aside, the Agency is also open to non-Member States (Article 19).

173 Commission Decision 93/701 on the setting up of a general consultative forum on the environment, OJ 1993 L328/53.

174 The forum, mentioned in the Fifth EAP (OJ 1993 C138/80), consists of thirty-two unpaid (Article 5(4)) representatives from the various sectors of production: the business world (between seven and twelve representatives), regional and local authorities (three to five), environmental protection and consumer organisations (four to seven); unions (one to three). It also reserves between seven and ten seats for figures with particular competence in environmental issues (Article 3). Deliberations follow the requests for opinions lodged by the Commission (Article 11(1)) and the forum may invite experts to discuss particular matters on the agenda (Article 8).

policy[174]. It has given the Commission advisory opinions on a variety of topics, including the principles of sustainable development, agriculture and transport, and liability issues[175].

- *Environment Policy Review Group:* As announced in the Fifth EAP, the Commission has taken the decision to create an environmental policy review group to be modelled on the Committee of the Directors General of Industry. It is designed to promote dialogue and understanding between the Commission and the directors general of Member States administrations generally (rather than in the specific circumstances of infringement proceedings). Meetings are of an informal nature, examining the evolution of national environmental policies[176], and particular issues related to the target sectors of the Fifth EAP[177].

- *IMPEL:* A network of inspectors of industrial installations has evolved into an informal network of information that has been meeting since 1992 to exchange experiences regarding practical implementation of environmental legislation. It is especially concerned with ensuring better enforcement by national, regional and local bodies[178]. The Commission has been co-operating with it since late 1993[179] and has indicated that this network could be especially useful in defining minimum criteria for inspections and in determining which competences are required for carrying out inspection tasks[180].

- *Environmental Administrative Units:* Also in the spirit of integration, a positive development was that the Commission had reportedly decided to create administrative units especially to deal with environmental questions in other Directorates General, notably the DGs for Agriculture, Transport and Energy[181].

The above efforts are young (and not particularly aimed at notifying/investigating infringements). How seriously these initiatives are pursued and their effects cannot yet be fairly assessed. Although they could make a definite contribution to ameliorating implementation,

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175 Com(95)642, Progress Report from the Commission on the implementation of the European Programme of policy and action in relation to the environment and sustainable development: "Towards Sustainability," p.102.

176 OJ 1993 C328/80; Krämer and Kromarek, 1993, p.214; Eleventh Report 1993, C154/42.

177 Com(95)642, p. 102.

178 Com(96)500, Communication from the Commission, "Implementing Community environmental law," p.19, point 5.

179 Krämer and Kromarek, 1993, p.214; Eleventh Report 1993, C154/42.

180 Com(96)500, p.9, point 28.

181 Krämer and Kromarek, 1993, pp.213,215.

frequently after a well-publicised start, interest wanes or the objective shifts. And finally, actual application of Community rules remains the chore of the Member States, and the Commission still has no administrative structures in their territories[182].

4. Conclusion:

As seen in the previous chapter, during the creation of Community environmental law it is impossible to keep political considerations, as well as a plethora of technical details, from shaping the quality of the rules. The same pattern is evident here: while myriad details and malfunctions also hinder the Community's efforts to monitor implementation, it appears that the underlying cause of many of these is the absence of political will. This is evident not only in the laxity of Member States in meeting their obligations, but also in the failure to accord the Commission even reasonably adequate powers and personnel, in confining the Commission to contacts with Member State representations rather than directly with the parties implicated by an eventual complaint, in the Commission's consequent dependence on imperfect sources of information.

Certain efforts have been made to treat the symptoms, to address limitations by creating new sources of information; by encouraging the protection of Community rights in national courts; by giving clear indications to Member States of those defences that will be rejected by the ECJ. Evidently, though, some limitations are, for the present, inevitable. For example, allowing the Commission wider powers to act, if desirable, would require further amendment to the Treaty, an unlikely event given the atmosphere surrounding the adoption of Maastricht and its aftermath. For the present a great deal of the effectiveness of Community environmental law remains at the mercy of the Member States.

182 Krämer, YEL 1991, p. 157.

CHAPTER 3: Community Level -- Problems of Enforcement:

Still in the Nineties "the mandatory character of environment directives is not always recognised, in practice directives are commonly regarded as mere recommendations.... existing legislation is deprived of its effect and raises doubts about the status of future programmes."[1] As seen, monitoring performance is essential; so too, is enforcement, for widespread failure to implement Community environmental legislation, if allowed to continue with impunity, not only does nothing for the environment but undermines the credibility of the Community legal system.

Enforcement action at the Community level alone is discussed here; enforcement of Community law in national courts is reserved for subsequent chapters[2]. At this level two principal actions are available to control Member States[3]: the second, Article 170, by which one Member State can bring an action against another, has not yet been used in an environmental case

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1 Tenth Application Report 1992 (Environment Offprint) p.4; see also C-337/89 *Commission v United Kingdom* 1992 ECR I-6103 (para.18), an environmental case in which the United Kingdom that the directive at issue require Member States only to take all measures reasonably possible.

2 Part II of this work.

3 Control of Community institutions 174 (by which the Court declares an act found to be illegal void), 175 (failure of Commission or Council to act), 184 (plea of illegality), 178 (disputes relating to compensation for damage by Community institutions or servants in the exercise of duties) and 215 (contractual liability of Community) are outwith the scope of this research.

Also Parliament's Legal Affairs Committee has reportedly researched the possibility of taking the Council to the ECJ under Article 175 for failure to act because of its extensive delay in establishing the seat of the European Environment Agency because one Member (France), for reasons unrelated to the environment (having to do with the location of the European Parliament) blocked the decision on the location of the Agency and prevented the latter from entering into action.; see Ken Collins, HL Ninth Report Evidence 1991-92, p.36.

and is not discussed here[4]. This chapter therefore concentrates upon the Article 169 procedure, by which the Commission can commence an infringement procedure against a Member State. However, the Member States are not the only parties capable of infringing environmental law: at times the Community institutions themselves fail to carry out their duties. In this regard, attempts to enforce environmental rules under Article 173 (review of legality) have proven disappointing[5], and mention is made of problems of access to justice. Reference is also made to Article 171, which enters into play if a Member State disregards an ECJ judgment.

1. Article 169:

An Article 169[6] infringement procedure is the principal means by which the Commission can attempt to bring a Member State to remedy a breach of its Community obligations.

There are two phases to the 169 procedure: the administrative phase, in the hands of the Commission -- meaning here both DG-XI and the Legal Service (*Service Juridique*) which co-operate with each other at each step -- and the judicial phase, where the matter is referred to the ECJ. At each phase obstacles arise.

1.1. Problems during the administrative phase:

If, after what usually amounts to several discrete[7] informal contacts with a Member States regarding a suspected infringement, the Commission remains unsatisfied with the Member State's reply it initiates the administrative phase of Article 169 proceedings by issuing a letter of formal

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4 In fact, its use in any area of Community law is extremely rare and exceptions, such as Case 141/78 *France v United Kingdom* 1979 ECR 2923, are few.

5 Mainly where non-privileged applicants brought the action before the ECJ. However, privileged applicants have also used Article 173 actions in environmental matters or cases with environmental repercussions, for instance: C-62/88 *Greece v Council* 1990 ECR I-1527; C-300/89 *Commission v Council* (Titanium Dioxide) 1991 ECR I-2867; C-70/88 *European Parliament v Council* 1991 ECR I-4561.

6 Article 169 EC: "If the Commission considers that a Member State has failed to fulfil 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.

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."

7 HARTLEY, T.C., *The Foundations of European Community Law*, second edition, Clarendon Law Series, 1988, at p.292.

notice (*mise en demeure*). This formally notifies the Member State of the Commission's allegations against it and invites it to submit its observations within a given time limit[8].

If the Commission is unsatisfied with the Member State's response it issues a reasoned opinion (*avis motivé*), formally noting the suspected violation, defining the details of the dispute, and informing the State of the measures the Commission considers necessary to end the infringement. This gives the Member State a last chance to remedy the breach before the judicial phase. If the Commission receives no answer or continues to be dissatisfied it can refer the matter to the ECJ for judgment.

The objective of the pre-litigation phase is to permit the Member State to prepare its defence and to make sure that it is not barred from so doing by the addition of new or subsequently expanded arguments by the Commission[9]. One may be justifiably confused as to the exact relationship between the letter of formal notice and the reasoned opinion, as to whether the definitive statement of the Commission's complaints must be contained in the former, the latter, or in the two taken together[10]. While formal details may be somewhat unclear, it seems

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8 Usually two months, although in fact the Commission meets to decide which proceedings to continue only once every six months and the defendant usually disposes of more than two months in which to regulate its position.

9 Opinion of Advocate General Lenz in Case C-337/89 *Commission v United Kingdom* 1990 ECR I-6125 at, p.I-6129.

10 Indeed, the Court has made contradictory statements on this issue. In some rulings it has appeared clear that the letter of formal notice must contain the definitive exposition of the allegations against the Member State: certain grounds were declared inadmissible because they were mentioned in the reasoned opinion yet had not been contained in the original letter of formal notice, as in:

Case 31/69 *Commission v Italy* 1970 ECR 25 (para.12);

Case 51/83 *Commission v Italy* 1984 ECR 2793 (paras.6-8) where even the fact that the Italian Government subsequently replied to the grounds expanded in the reasoned opinion could not make up for the Commission's "breach of its duty to give the Italian Government a fair hearing."

Case 309/84 *Commission v Italy* 1986 ECR 599, (paras. 14-16).

In some instances even a vague letter of formal notice, when read in conjunction with previous correspondence, was deemed to have been sufficient: Case 211/81 *Commission v Denmark* (Electric Energy Meters) 1982 ECR 4547, (paras. 10-11).

On the other hand, the Court has also stated, in Case 274/83 *Commission v Italy* 1985 ECR 1077 that, "Although it follows that the reasoned opinion provided for in Article 169 of the EEC Treaty must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, *the Court cannot impose such strict requirements as regards the initial letter, which of necessity will contain only an initial brief summary of the complaints.* ...there is nothing therefore to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it had already made more generally in its initial letter" (emphasis added). Here the Court ruled that although the initial letter "was not very explicit" (para.23) the complaint was admissible.

reasonable to consider that if the objective of allowing a Member State to adequately prepare its defence is met, the action will be admissible[11], for what does emerge consistently from the case-law is that the ECJ considers the pre-contentious phase, because of the opportunity it gives Member States to submit their observations, to be "an essential guarantee required by the Treaty". The ECJ is not willing to compromise upon sufficient protection of Member States' interests during the administrative phase[12]. The fact that a Member State may choose not to avail itself of the opportunity to outline its arguments is irrelevant[13].

If, after the letter of formal notice and the reasoned opinion, the Commission still holds the view that the Member State has failed in its obligations, it makes an application (*requête*) to the ECJ; its role under Article 155 gives it sufficient legal interest to do this[14].

Throughout the stages of the administrative phase various obstacles act as filters, weeding out many environmental actions before they ever reach the judicial phase. These concern availability of information, the Commission's use of its discretion and its response to the various pressures upon it.

Information: The obstacles to obtaining information that plagued the monitoring process continue to obstruct the enforcement process. The Commission's decision that an infringement

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11 See opinion of Advocate General Lenz in Case C-337/89 *Commission v United Kingdom* 1990 ECR I-6125, at point 23. p.6129.

12 See Case 7/69 *Commission v Italy* (Wool Imports) 1970 ECR 111, (para.5);
Case 31/69 *Commission v Italy*, above, (para.13);
Cases 142 and 143/80 *Amministrazione delle Finance dello Stato v Essevi SpA and Carlo Salengo* 1981 ECR 1413, (para.15);
Case 211/81 *Commission v Denmark*, above (paras.8-9);
Case 325/82 *Commission v Germany* 1984 ECR 777 (para.8);
Case 309/84 *Commission v Italy* 1986 ECR 599, (paras.15-16);
Case 229/87 *Commission v Greece* 1988 ECR 6347, (paras.11-12).

13 Case 31/69 *Commission v Italy*, above (para.13).
Case 211/81 *Commission v Denmark*, above (para.9).

14 In an early case (Case 26/69 *Commission v France* 1970 ECR 565) it appeared that the presumption of legal interest on the part of the Commission was rebuttable, implied by the Court's statement that "[i]n these circumstances the Court...must consider whether the Commission still has a sufficient legal interest"(para.10). The Court found that "there can be no doubt as to the legal interest in the action brought by the Commission" (para. 13). The possibility of challenging the Commission's legal interest seems eliminated by Case 167/73 *Commission v France* (Code du travail maritime) above: France's challenge to the Commission's legal interest (para.13) was dismissed by the Court's statement that "The Commission, in the exercise of the powers which it has under Articles 155 and 169 of the Treaty, does not have to show the existence of a legal interest, since, in the general interest of the Community, its function is to ensure that the provisions of the Treaty are applied by the Member States and to note the existence of any failure to fulfil the obligations deriving therefrom, with a view to bringing it to an end" (para.15).

exists and proceedings should be commenced is utterly dependent on the sources of information discussed above. The consequences on enforcement regarding infringements of which the Commission is unaware are obvious.

Commission discretion: Once the Commission becomes aware of a possible infringement, there may be many reasons for which it decides not, or is simply unable, to pursue it. Of 100 proceedings initiated, only approximately six reach judgment[15]. Article 169, stating that the Commission "*shall* deliver a reasoned opinion" may give the impression that the Commission has the duty to pursue every suspected infringement, yet this is tempered by "if it considers that a Member State has failed to fulfil an obligation." It seems reasonable to conclude that a duty to seriously consider whether an investigation should be undertaken is implied[16].

- *Lack of evidence:* Where enough information exists to discern an infringement, this may yet be insufficient to prove it before the ECJ. The burden of proof under Article 169 falls upon the Commission, and it must produce enough information for the ECJ to conclude that the alleged failure has occurred[17]. This is especially difficult where practical implementation of environmental directives is concerned[18]. Insufficient evidence may lead the Commission to decide that an infringement is best not pursued, that Commission resources are better applied elsewhere.

- *Conciliation and political pressure:* The Commission may use its discretion to attempt to resolve a violation through conciliation rather than enforcement. The advantages to the environment of an amicable settlement rather than "a fight to the finish in the European Court"[19] are widely[20] accepted, and such a solution is actively sought by the Commission throughout both informal contacts with Member States and the formal administrative stages of 169 proceedings. For example, the Commission, although aware of serious problems of waste disposal in Greece,

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15 AUDRETSCH, 1986, pp.361-2, p.395. Note: the proportional relationship between stages of sending warning letters and final judgments has remained fairly stable over the years. Cf. Dashwood and White, 1989, p.338-9. The rough proportions were confirmed in 1994; Dr. Krämer, interview 25 July 1994.

16 HARTLEY, Foundations, p.292.

17 Dashwood and White, 1989, p.405.

18 See Chapter 2, point 2.3. Limits to Commission powers.

19 Martínez Aragón, GJCE 1993, p.246; Dashwood and White, 1989, p. 400.

20 Though not unanimously; some have expressed concern that conciliation may be sought where enforcement proceedings are more appropriate; PE 116.085, 1988, at p.16; Collins and Earnshaw, p.233. Indeed such concern is considered justifiable here.

actively sought "alternatives to infringement proceedings as a means of helping Greece to apply the relevant directives properly."[21]

From an environmental perspective, the advantages of conciliation can be considerable and must be emphasised. Environmental infringements can linger for many years through informal contacts and the administrative phase of Article 169, and through the judicial phase until finally a decision is reached[22] -- during which time deterioration of the environment is unrelenting, pollution accumulates unchecked, habitats are destroyed, protected migratory birds are hunted.... Certainly a passage through the ECJ means that, for the environment, a solution is still a long way off.

There is also an advantage to conciliation from the international relations viewpoint. Comments[23] made by Advocate General Roemer two decades ago are still pertinent:

> this procedure naturally puts in issue to a certain extent the prestige of the Member States concerned, even though it is merely an objective procedure intended to clarify the legal situation without any moral judgment[24].

Indeed -- and here the resemblance to any ordinary system of public international law is apparent -- sovereign pride is bruised with the initiation of formal infringement proceedings and there is a corresponding tendency for national governments to resent and bring enormous

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21 Tenth Application Report 1992 (Environment Offprint) p.23. Certain directives have set variable goals for different Member States; however one can wonder whether, at least in dealings with the Commission, variable geometry will lead to variable enforcement.

22 Random examples of the time length of environmental cases, *excluding* both the initial informal administrative phase and the time taken to comply with the judgment:

- five years, measuring between the letter of formal notice and the judgment (6 May 1986, 30 May 1991 respectively) in C-361/88 *Commission v Germany* 1991 ECR I-2567 in a matter regarding air pollution;
- just under four years (11 May 1987-28 February 1991)C-57/89 *Commission v Germany* 1991 ECR I-883 regarding habitats;
- four and a half years (30 July 1986-29 November 1990) C-182/89 *Commission v France* 1990 ECR I-4337 regarding endangered species covered by CITES;
- four and a half years (29 February 1988-9 July 1992) C-2/90 *Commission v Belgium* 1992 ECR I-4431 regarding waste disposal;
- six and a half years (letters of formal notice 27 November 1985, 4 December 1986-judgment 20 May 1992) C-190/90 *Commission v Netherlands* 1992 ECR I-3265 implementation of major accident hazards directive.

23 The comments were made in the context of evaluating factors that entering into consideration in the Commission's use of its discretionary power.

24 Advocate General Roemer in Case 7/71 *Commission v France* 'Supply Agency' 1971 ECR 1003, Opinion p.1023-1037 at p.1026: the discussion referred to Article 141, the enforcement provision of the Euratom Treaty.

political pressure to avoid the commencement of Article 169 procedures[25]. Usually then both sides are eager to seek out the quicker, less controversial amicable settlement. The Commission seeks to heighten co-operation and to find consensual solutions to difficulties. Group meetings (*réunions paquets*) designed to reconcile differences with regard to infringement proceedings[26] have been organised during which Commission representatives meet with the representatives of a Member State's national ministries to discuss violations of various directives. Results can be effective[27].

However, a very real danger exists that legal enforcement can become hostage to political pressure. "In this context, political considerations play a considerable role."[28]

An example relates to alleged infringements of EIA85/337 by the United Kingdom[29]. Enforcement proceedings that were engaged against the United Kingdom concerning the absence of EIA for the construction of several roads[30] engendered a fabricated[31] political uproar complete with alleged violations of national sovereignty, resentment of the European Commission's 'diktat' (supposedly as to where British roads should be located, although no mention had been made of the roads' location, but rather whether EIA85/337 had been correctly applied) and general accusations regarding Community interference. A personal request from the then Commissioner Mr Ripa di Meana to the then Transport Secretary Mr Rifkind not to proceed with work on these projects so that the environment would neither be lost nor damaged beyond repair[32] was also met with tremendous resentment[33]. In the ensuing media frenzy, much was made of the apparent

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25 HARTLEY, Foundations, pp.291-93; Krämer interview 25 July 1994 .

26 KRÄMER, *Focus...*, p.219; Vernier Report, EP A3-0001/92, p.11; Marc van der Woude, interview, 26 July 1994; Com(96)500, p.12, point 41.

27 For example where a DG-XI official attempts to discuss an environmental problem with an environment minister, but accord may be more elusive where an environmental problem also involves discussion with an agriculture minister, or a transport minister. Depending on the results of the group meetings, the Commission may drop the proceeding or continue to pursue it.

28 Krämer, 1996 JEL, p.2, also pp.9-10.

29 See generally Williams, R., pp.384-95; *The Financial Times, 21 November 1991; The Economist*, 2 November 1991, p.13; *The Guardian*, 22 October 1991 and 26 October 1991; *The Independent*, 22 October 1991.

30 Inter alia, Oxley Wood and Winchester Bypass.

31 "public misunderstanding...was created by senior members of the government"; Williams, R., p.387; for a similar account of the entire incident, see BRYANT, BARBARA, *Twyford Down: roads, campaigning and environmental law*, E&F SPON of Chapman and Hall, London, 1996, especially pp.258-81.

32 Williams, R., p.385.

33 *Ibid.*, p.385. It was represented to the press as an 'order' to stop works.

astonishment of the UK authorities[34], although they had received a pre-Article 169 letter[35], met twice with Commission authorities[36], and received a memorandum[37] and telephone call, prior to receiving the Article 169 letter[38]. A personal letter from di Meana to Rifkind was faxed at 17.03 prior to the 17 October 1991 Commission press release at 18.00[39]. Despite the inaccuracy of the UK's 'surprise', the Commission was accused of 'bad manners' by senior member of the government: ironically, since in this instance the Commission was merely attempting to enforce the law to which the Member States, including the UK, had unanimously agreed. Even the prime minister became involved in applying political pressure on the Commission[40] concerning the commencement of the Article 169 procedures: threats were made regarding the Maastricht Treaty, due for signature by EC leaders that December. As Williams accurately points out:

> [t]his is overt linkage of the political with the legal processes of the Commission. Here, a misrepresentation of a matter where the central issue is the interpretation of the law, has the effect that a Member State announces that it may jeopardise a major political conference. The message is very clear -- that the Commission should think twice about such legal proceedings (or, at the very least, their publicity) if it wants the United Kingdom to co-operate politically.... It is outrageous in a democratic system of government that such manipulation should be allowed to be threatened, carry any weight, or even seem feasible[41].

Subsequently, several of the proceedings were dropped with regard to the projects, Reasoned opinions were sent with regard to two, one of which was later dropped[42], leaving a variety of questions unanswered[43]. Also, Commissioner Ripa di Meana resigned from the Commission, six months prior to the end of his four-year term[44], apparently after having received a nudge from Mr. Delors.

> Whether or not this was so, it is an indictment of the system that it should have been perceived and widely believed to be true that a Commissioner who was committed to law enforcement and

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34 Major is reported to have said "We had no previous notice of it... It is on the basis of facts that were not discussed with the UK," Hansard, 8 Nov 1991, 727; cited by Williams, p.387.

35 24 January 1990.

36 10 June 1991, and 16 October 1991.

37 30 July 1991.

38 17 October 1991 which was faxed to the UKREP at 12.27 p.m. and to Rifkind at 12.44 p.m.

39 Williams, p.387; Commission Press Release, IP(91)928; BRYANT, pp.258-64.

40 Salter, "The Challenge...," 1992, pp.19-20; see also *The Times* 13 November 1991, p.1.

41 Williams, pp.393-94.

42 The Ombudsman is conducting investigations on the alleged failure by the Commission to carry out a diligent inquiry; European Union, *The European Ombudsman*, Annual Report, 1995, p.43.

43 By the Commissioner who replaced Ripa di Meana, see BRYANT, pp.267-281.

44 Along with Vasso Papandreaou, the of the Social Affairs Commission, who had also generated political dispute with Member States over her 'crusading style'; Williams, p.396; see also BRYANT, pp.265-67.

openness in that quest should forfeit his job because of the impact of that commitment on political processes[45].

Obviously this is an extreme (but not unique[46]) illustration[47]. However, while the Commission does not always succumb to Member State pressure, the fact that legal enforcement might be selective or conditional on politics is especially dangerous for environmental law, typically low in government hierarchies of political priorities. Furthermore, the perception that in a politically tense situation the Commission must know when to give up a fight damages the credibility of Community law. And unfortunately the situation cuts both ways, since to pursue an infringement where opposition to the issue is such that even a condemnation of the ECJ would be ignored might also damage the authority of Community law.

- *Lack of accord within the Commission:* As seen, an Article 169 proceeding may be dropped (or not commenced) through lack of information, conciliation and even political pressure on the Commission. It may also be dropped because of disagreement among the Commission directorates, who moreover experience their own political pressures, further eliminating proceedings prior to the judicial phase[48]. Although the legal unit of DG-XI tends to pursue most infringements enthusiastically, the Legal Service of the Commission, which handles various aspects of the 169 procedure for all the DGs, and ultimately the Commissioner, must agree to each step of the procedure. The latter has indicated that, given the excessive workload, the "gung ho"[49] attitude of the former is difficult to sustain. Where the number of judicial proceedings is necessarily limited, an attempt to attach as much value as possible to each decision must be made. Therefore the Legal Service attempts to pursue infringements that may be meaningful to several Member States, where the questioned behaviour is more systematic, and is reluctant to pursue isolated infringements[50].

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45 Williams, R., p.396.

46 Similarly, Dr. Ludwig Krämer was apparently transferred from his position as Head of the Legal Affairs Unit in late 1994 because of "political difficulties and embarrassment caused to the Commission by his refusal to compromise on issues of legal principle in enforcement investigations and infringement proceedings" 6 February 1995, European Report, cited in Williams, R., p.358, note 10.

47 The United Kingdom is, of course, not the only Member State adept at applying pressure.

48 Marc van der Woude, interview 26 July 1994.

49 "*Tous azimuts*," Marc van der Woude, interview 26 July 1994.

50 Both Dr. Krämer of the DG-XI Legal Unit and Marc van der Woude of the Service Juridique acknowledged this tendancy, although this is not to say that one isolated infringement will never be pursued; interviews 25 and 26 July 1994.

DG-XI's Legal Unit initially discerns a possible infringement and composes the letter of formal notice; to send it, however, not only must the accord of the Legal Service be sought, but that of the other Commission Directorates-General. Ultimate decisions regarding enforcement proceedings must be approved by the Commissioner[51], who is also responsible for a plethora of political decisions.

> ...given the proximity in the exercise of these two functions one would expect to see safeguards in the system designed to ensure that infringement cases could never be closed for political as opposed to legal reasons. However, there are none.[52]

And as Mr. Ripa di Meana's early resignation might indicate[53], even should the Commissioner actively pursue infringements he may subsequently be tripped up by political considerations. The dispute between DGs that took place prior to the Danish Bottles case must be remembered, where the environment DG lost to the Internal Market DG in the initial decision to pursue Denmark for its high-level environmental policy. Again tensions among the various Community policies emerge, and in any given instance one of the other DGs may well argue that the needs of industry, or transport, or agriculture must take precedence over the environment. As Dr. Krämer points out[54], in such a dispute the environment rarely wins. If a letter of formal notice is indeed sent, DG-XI receives and evaluates the Member State's response. The decision to send a reasoned opinion again requires the agreement (or must at least override the objections) of the various Commission departments, although this time the reasoned opinion is composed by the Legal Service. Co-operation takes place among all the Commission actors in evaluation of the Member State's reply to the reasoned opinion and in the decision to seize the Court, an action carried out by the Legal Service[55].

Hartley sums up the Commission's use of discretion succinctly:

> The true position seems to be that the Commission has a discretion but is also subject to a duty. The duty is to take the most appropriate action to ensure that Community law is obeyed; the discretion concerns the determination of what is most appropriate in the circumstances.[56]

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51 Krämer, interview 25 July 1995.
52 Williams, R., p.353.
53 Or Dr., Krämer's transfer, above, footnote 46.
54 Krämer, interview 25 July 1995.
55 The other Member States must also be made aware of such a decision in order to intervene before the Court should they wish.
56 HARTLEY, Foundations, p.293.

The decision not to apply to the Court: The discretion to bring a claim, or not, is the Commission's alone: Article 169 states specifically that proceedings may be brought "if the Commission considers". If this does not coincide with when a complainant or MEP considers an infringement to have taken place, they may only register a new complaint or submit another question. In contrast with the options available under the European Coal and Steel Community Treaty[57], under the EC Treaty the complainant or MEP can neither bring the matter directly to the ECJ nor bring the Commission before the ECJ for failing to start proceedings under Article 175[58]. (As an aside, although from a diplomatic point of view it may be difficult at present for the DG-XI to clarion out the reasons for dropping an issue, the complainant is under no such pressure and can make judicious use of national press to publicise the problem. Pressure and publicity are, after all, two effective tools.)

A sizeable problem when the Commission fails to pursue an infringement is that reasons for its choice are not transparent. Little official data on alleged or presumed infringements exist[59]; no explanations are exacted from the Commission[60]. For instance, in the Twelfth Application Report, it is mentioned that only three cases were referred to the ECJ in 1993 and again in 1994[61]; the figure seems remarkably low given the state of implementation of environmental directives (it is recalled that in those two years, environmental infringements accounted for, respectively, 28.5%

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57 If an individual or firm with standing (or another Member State) finds that the Commission has failed to excercise its discretion properly, he/it may apply to the Court under Article 35 ECSC for a ruling that the Commission has failed to fulfil a Treaty obligation by not recording the Member State's violation under Article 88 ECSC. If the Court finds against the Commission, without directly ordering the Commission to take an Article 88 decision, it may under Article 34 ECSC require that the Commission take the necessary steps to comply with the judgment. This action is not available under the EC treaty because a reasoned opinion is not legally binding and therefore is not a reviewable act; HARTLEY, Foundations, pp.300-302.

58 "Should the European Parliament, the Council or the Commission , in infringement of this Treaty fail to act, the Member States and the other insitutions of the Community may bring an action before the Court of justice to have the infringement established. The action shall be admissible *only if the institution concerned has first been called upon to act.*" Emphasis added.

59 AUDRETSCH, 1986, p.363; these are mentioned statistically in the Eleventh Report 1993, C154/57-63; and the Twelfth Report 1994 Com(95)500 final, p.59.

60 Collins and Earnshaw p.229; PE A2-298/87, Krämer p.225.

61 Twelfth Application Report 1994, p.59.

and 25% of all infringements registered[62]). Not surprisingly the Commission has been criticised for its use of discretion[63].

Many arguments support increased transparency. Given government hyper-sensitivity to their public image, increased publicity and increased political pressure might inspire them to be more circumspect in carrying out Community obligations. Such transparency/publicity would convince the individual that his complaint was worthwhile, enhancing Community Law's general credibility as well as public awareness of its presence in States' legal orders. Uniform interpretation among Member States would also be promoted[64]. Perhaps even more compelling is the argument that, with some measure of increased publicity, misrepresentation of issues for political reasons would become more difficult and public pressure on Member States' governments and on the Commission itself[65] would increase.

1.2. Problems in the judicial phase:

If indeed an application to the ECJ is made, further obstacles must be surmounted. Article 164 EC defines the ECJ's role as being to "ensure that in the interpretation and application of this Treaty the law is observed". In enforcement proceedings the ECJ is called upon to determine the position of the defendant State with regard to observance of Community law[66]. Many difficulties it confronts in its task flow from the problems previously mentioned; others arise specifically in the context of judicial enforcement.

Quality of drafting: The quality of the drafting[67] may itself be a problem of enforcement in that it leaves unclear what, exactly, are the legal obligations. In such circumstances, the ECJ may be

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62 Commission, "Implementing Community Environmental Law," Communication to the Council of the European Union and the European Parliament, at p.2.

Given such figures, Member States could reasonably wager against the odds of getting caught in an environmental infraction.

63 By the European Parliament for its less stringent perception of what constitutes a violation: for example, regarding Directive 78/319 on toxic and dangerous waste, where Parliament's Committee of Inquiry found the majority of member states' transpositions lacking, the Commission apparently felt that only two were worth pursuing formally, bringing proceedings against Belgium (for failure to properly implement) and Greece (for failure to notify measures); PE A2-298/87, point 15.

64 KRÄMER, *Focus...*, p.226-7.

65 Regarding the decision to pursue infringements.

66 Case 7/68 *Commission v Italy* 1968 ECR 423, p.431.

67 Chapter 1.

obliged to interpret a provision[68], with the risk that its interpretation may modify in some way the meaning that was originally intended and yet become the only interpretation that is applied[69]. The Drinking Water Directive (80/778) provides an illustration: in one case the Court, by contrast with the Commission's interpretation, found that the obligation to comply with the Maximum Admissible Concentration of 50µg/l of lead did not apply where lead pipes are present -- in these cases the 50µg/l indication is "for guidance only"[70] although, with or without the presence of lead pipes, the risk to health is the same. As Dr. Krämer mentioned[71], "one would have wished an interpretation which tries to ensure the protection of health to a greater extent."

Lack of information: Lack of information has, in earlier stages, led some infringements to pass unnoticed and led others to be dropped during the pre-litigation phase. Inevitably other consequences of inadequate information reach the enforcement stage. In one instance[72], regarding an application for interim relief the Commission had spoken of the protection of several birds in its application: the white-fronted goose, two species of tern and the avocet[73]. Considering the application, the ECJ was able to consider the impact of nearby construction only upon the avocet breeding grounds, since this was the only species for which data were supplied to the ECJ[74]. Germany in effect limited the ECJ's discussion by supplying data for only that species[75]. Again the over-reliance on the goodwill of Member States in supplying information is stressed.

Time and interim measures: The environment is vulnerable to the problem of time length between the occurrence of an infringement and eventual judgment[76] (particularly where, as with EIA85/337, the issues usually concern the construction of a large new project).

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68 A certain element of vagueness in the legislation may be necessary to achieve compromise in the Council, making a Court interpretation necessary.

69 Krämer, *Casebook*, 1993, p.263.

70 Case C-337/ 89 *Commission v UK* (above) paras.30-33.

71 Krämer, *Casebook*, 1993, p.263.

72 Order of the President of the Court of August 16, 1989 in Case 57/89R *Commission v Germany* 1989 ECR 2849.

73 *Ibid.* At para. 6.

74 *Ibid.* At para.19.

75 Although this raises the issue of whether the Commission could not have directly consulted national environment associations in order to obtain such information. Certainly the recent European Environment Agency can be hoped to help remedy this type of situation.

76 See below, footnote 162.

- *Non-availability of interim measures prior to reference to the ECJ:* The first problem with regard to interim measures is that they are not available sooner. Through protracted negotiations with Member States and possible in-house Commission disputes in the administrative phase, damage to the environment continues unimpeded. During this period the Commission cannot oblige member States to take any action; prior to the point at which the matter is placed before the ECJ -- usually several years -- the Commission is powerless to halt the damage[77].

Article 155 stipulates that the Commission shall (fourth indent) "exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter." There appears to be no legal obstacle to conferring some sort of injunctive power on the Commission and certain Commission actors have wished for this possibility[78]. For alleged environmental infringements one could also argue that failure to give the Commission such powers in the administrative phase robs Article 186 EC[79] of *effet utile*, for by the time a matter reaches the Court its urgency and therefore the usefulness of interim measures has often disappeared. Notably in the area of regulation of public procurement, a 1987 proposal would have given the Commission power to "act immediately to ensure the precedence of Community public interest."[80] However,

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77 The Commission "takes the view that it may order such measures only where secondary legislation or a ruling of the European Court has specifically empowered it to do so" (SHARPSTON, E., *Interim and Substantive Relief in Claims under Community Law*, Current EC Legal Developments Series, Butterworth 1993, p.87). This is the case with Regulation 17 in the area of competition, and the case-law of the ECJ has many times confirmed the availability of interim relief from the Commission in this area (see for instance Case 792/79R *Camera Care Ltd v Commission* 1980 ECR 119); the Court has even suggested that the Commission, in the area of competition, may be in the wrong to fail to order interim measures; see Case T-44/90 *La Cinq SA v Commission* [1992] 4 CMLR 449.

78 In the area of the environment, see Krämer, *Casebook*, 1993, p.433.

79 Giving the ECJ the power to order injunctive relief during the judicial phase.

80 Com(87)134 final, proposed Article 2: "It must be possible, in the course of judicial or administrative procedure instituted by a contractor or supplier if a competent authority for the Commission to act immediately to ensure the precedence of Community public interest and proper application of the Community rules on public procurement. These guaranteed powers for Commission would ensure that the Community rules on public procurement were interpreted and applied uniformly and that the contracting authorities were better informed of their obligations under those rules."

One author, Laurence Gormley, has suggested (speaking generally, rather than of environmental cases) that an alternative be found to the lengthy process of applying for interim measures and that "thought should be given to establishing mechanism similar to that of Order 14 of the Rules of the Supreme Court which could be used in appropriate cases without the somewhat long time span inherent in even the quickest proceedings"; Gormley, "European Communities: The Common Market, Quantitative restrictions and measures having equivalent effect,"14 (1989) ELRev 156 at p. 157.

the boldness of enabling the Commission to 'act immediately' in the public procurement directive proposal had vanished in the adopted version. Given that even in the area of public procurement the Council saw fit to keep such powers within the Member States' grip[81], and given further the political atmosphere surrounding Maastricht Treaty and subsidiarity debate, the present likelihood of the Council according emergency powers to the Commission in environmental matters is nil.

- *Criteria*: Although action before the Court "shall not have suspensory effect"[82], once a matter is actually before the ECJ it has the power to prescribe "any necessary interim measures"[83]. It has come to be accepted that this refers principally to interlocutory injunction[84], the purpose of which is to maintain the situation as is until a decision can be reached in the main action[85]. Interim measures may be prescribed on express application by one of the parties to a case before the ECJ. Without prejudging the substance[86], the President of the Court must consider whether *prima facie* the main action is well-founded[87]. The party applying must justify urgency of the measures[88], usually by demonstrating that "serious and irreparable damage" would occur to his interests if the order is not granted[89].

As in most legal systems, a balance of the parties' interests is implied[90]. In the Leybucht dikes case, one of the rare environmental situations to date in which a request for interim measures

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81 OJ 1989 L395/33 Council Directive 89/665 on the application of review procedures to the award of public works contracts, Article 3(1) and 3(3)c. Here the Commission may only invoke a procedure by which Member States may suspend the award of the contract.

82 Article 185EC.

83 Article 186EC.

84 HARTLEY, Foundations, p.307.

85 Article 86(3) and (4)/Court's rules of procedure.

86 Case 65/87R *Pfizer v Commission* 1987 ECR 1691.

87 E.g., Case 160/88R *FESA et al v Council* 1988 ECR 4121, at para.30.

88 The Rules of Procedure of the ECJ (OJ 1991 L176/7 at p.23, Article 83(2)) require that an application for interim measures "state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for".

89 HARTLEY, Foundations, p.309.

See, for instance cases C-143/88, C-92/89 *Zuckerfabrik Süderdithmarschen v Hauptzollamt Itzehoe et al*, 1991 ECR I-415, I-534, at para.33; Case T-353/94R *Postbank NV v Commission* 1994 ECR II-1141, at para.19; Case T-332/94R *Union Carbide Corporation v Commission* 1994 ECR II-1159, at para. 30; see however, Case T-368/94R *Pierre Blanchard v Commission* 1994 ECR II-1099, which refers to "irreversible damage", para. 31.

90 In the context of competition, see for instance Case T-353/94R *Postbank NV v Commission*, at paras.34-40; Case T-368/94R *Pierre Blanchard v Commission*, para. 31 which requires that the suspension be "not disproportionate to the defendant's interest in having the acts implemented".

came to a judgment[91], the Commission addressed the balance of interest[92], yet the president of the Court did not examine this argument, since the application was rejected on other grounds[93]. Nonetheless, more recently in an environmental case[94], the balance of interests was expressly addressed; in another concerning both competition and the environment, the parties also saw fit to argue the balance of interests[95]. Although this requirement does not seek to discriminate against environmental interests, in fact it presents a serious problem in an environmental situation, since the specific interests of a constructor or commercial enterprise are usually more individually and concretely identifiable than a collective 'environmental interest'.

Whereas during the administrative phase the difficulty with interim measures was that they were not available, in the judicial phase the problem is that, although available, they are possibly no longer useful. The urgency may disappear (to the detriment of the environment) before the

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91 A request made by An Taisce and WWF UK for interim measures to suspend Community funds for the construction of a visitors' centre at Mullaghmore in the delicate Burren region was registered at the Court on 23 December 1992 under the number C-407/92R. Six months later the request was dropped and the affair struck from the Court's list (6 July 1993) and so the opportunity to compare the results in another environmental situation was lost. (See Case T-461/93 *An Taisce and WWF UK v Commission* 1994 ECR II-733 para. 11). In fact, the Supreme Court of Ireland, on 26 May 1993 gave an order to suspend work on the Mullaghmore centre and the Office of Public Works must recommence the procedure of obtaining a construction permit (*ibid.* para.23).

92 Case 57/89R *Commission v Germany* 1989 ECR 2849, at para. 12: the Commission argues that "the sole disadvantage of a temporary suspension of the work would be to delay completion of the project; it would not have any appreciable financial repercussions."

93 Case 57/89R *Commission v Germany*, above, specifically paras. 17-22, which discuss the fact that the Commission submitted its application after the regional government's project was well under way. The acting president of the Court, T. Koopmans, therefore only considered the impact of the next stage of the construction on the protection of the avocet. The application was rejected because (para.19) its breeding grounds were no closer to the next scheduled stage of work than to the work that had already been undertaken; although in steady decline, the most significant fall in avocet breeding there had occurred prior to the commencement of the works (para.20); and the Commission failed to substantiate fears of disturbance caused by the development of mass tourism (para.21). "The Commission has thus failed to establish that there is an urgent need to interrupt the work already started."

94 Case T-219/95R *Danielsson a.o. c/ Commission* 1995 ECR II-3051 at II-3068. Admissibility of the main action; the existence of a prima facie case; and urgency were also considered. The application was rejected because the applicants were not considered directly and individually concerned (paras. 70-77).

95 Case T-228/95R *S. Lehrfreund Ltd c/ Conseil et Commission* 12 February 1996, not yet reported. S. Lehrfreund Ltd requested the suspension of regulation no. 3254/91 prohibiting leghold traps and importations from countries using them. (The situation required legal clarification since the Commission had told the Member States that the prohibition on importation was as yet impracticable and that therefore the trade in furs should not be disrupted by customs checks at this time.)

In their application the parties addressed the issues of admissibility, *fumus boni juris*, the urgency of the measure and a balance of interests. The application was rejected.

ECJ is empowered to consider injunctive measures[96]. The fact that the urgency of the order is difficult to demonstrate may have significant implications not only for the environment but for human health. For instance, in relation to the Drinking Water Directive the Commission had apparently considered applying for interim measures to be applied in a situation where lead was present in the drinking water, but without a fatality, it was afraid to waste resources where the urgency of the situation would probably not be recognised[97].

- *Applications for interim measures before national courts:* Although in theory, it is for each Member State to decide procedural modalities, the ECJ has never considered procedural autonomy an absolute value[98]. The ECJ has recently given stronger indications of conditions to be considered by national judges for granting interim measures[99]; these are discussed at Member State level.

Quality of judgments: Occasionally problems of implementation and enforcement emerge from the rulings themselves. It is not the purpose of this research to present a critique of the Court of Justice's rulings, yet the attitude of the ECJ and the quality of its judgments are undeniably of great importance in applying environmental law: although not bound by its own rulings, once the ECJ has ruled, its interpretation will be used as the yardstick by which situations are measured. This can have serious consequences for subsequent implementation and enforcement where ECJ decisions are inconsistent, or where it is felt that the interpretation made is inappropriate. Although some rulings are extremely forward-looking in terms of environmental protection[100],

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96 As was the case with the Leybucht bay area, where such measures were therefore rejected: Case 57/89R EC *Commission v Germany*, above.

97 Dr. Krämer, interview 25 July 1994.

98 Medhi, Rostane, "Le droit communautaire et les pouvoirs du juge national de l'urgence," RTDE 32 (1) janvier-mars 1996, p.92.

99 See for instance, Case C-213/89 *Factortame* 1990 ECR I-2433; cases C-143/88, C-92/89 *Zuckerfabrik Süderdithmarschen;* C-465/93 *Altanta Fruchthandelsgesellschaft mbH* e.a., 1995 ECR I-3761. However, the latter concern challenge to a national administrative act where the validity of Community legislation is in question. (Although national applications for interim measures, in environmental situations are more likely to concern the validity of the administrative act of a specific authorisation, than the validity of the national legislation based upon the Community measure). For instance, the conditions listed in *Atlanta* para. 51, include the serious doubt of the validity of Community measure, urgency must be proven, due account of Community interests must be taken by the national judge, who must also respect the decision of the ECJ on lawfulness of measure or on similar application for interim measures).

100 For instance, putting environmental protection on a par with other essential objectives (Case 240/83 *A.D.B.H.U.* 1985 ECR 531) or widening the choices available for enforcement of environmental law; for instance, the Court's ruling (Case 21/76 *Handelskwekerij GJ Bier v Mines de Potasse d'Alsace* 1976 ECR 1735) that interpretation of Article 5(3) of the Brussels Convention on

other decisions that appear positive at first glance may be mixed on closer examination[101]. The Danish Bottles ruling[102] was applauded for expressly expanding the *Cassis de Dijon* list of "mandatory requirements"[103] (concerns that may limit the application of Article 30 of the Treaty) to include environmental protection. Indeed, it was certainly an advance for Community environmental policy and law to be considered a mandatory requirement, despite the lack of express Treaty foundation at the time. On the other hand, from this point forward, environmental protection must meet the *Cassis de Dijon* criteria in that, in the absence of Community harmonisation measures, environmental measures that constitute an obstacle to movement of goods within the Community, may be justifiable but must be indistinctly applicable, necessary and proportionate[104]. Furthermore in this case the ECJ also found the restrictive effect on imports of Denmark's requirement to use non-approved containers in only limited quantities capable of protecting the environment (para.16) but disproportionate to the objective pursued (para.21). In effect Denmark's higher level of protection was esteemed too high for the rest of the Community and Denmark was forced to accept the ECJ's interpretation of which level of protection was high enough. The reasons for which one level of protection is deemed proportionate (the deposit and return scheme, to require re-use of containers, which impeded importation yet was found in itself to be proportionate) and the other is not (limited quantities of non-approved containers or the requirement to use only approved containers) are not clearly explained[105].

Comparison between rulings may reveal inconsistencies. In this event the message sent to the Member States on the correct interpretation of their obligations is unclear. Several rulings

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Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters "must acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it" has a direct impact on enforcement by facilitating the decision to bring an environmental action; see Sands, P. "European Community Environmental Law: Legislation, the European court of Justice and Common Interest Groups," 1990 *Modern Law Review* 685, p.695.

101 Generally the caselaw of ECJ has been harshly criticized by some authors: Crosby, "The Single Market and the Rule of Law," 16 (1991) ELRev 451; Geradin, 1993, pp.175-76.

102 Example: Case 302/86 *Commission v Denmark* 1988 ECR 4607; see para.9.

103 Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Brauntwein (Cassis de Dijon)* 1979 ECR 649; at para.8: which lists, non-exhaustively, "the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

104 Case 178/84 *Commission v Germany* (German Beer) 1987 ECR 1227.

105 See commentary, Krämer, *Casebook*, 1993, pp.94-105; Geradin, 1993, 156-58.

concerning the Birds directive[106] provide an illustration. For example Case 252/85[107], specifically states that the importance of "complete and effective protection of wild birds throughout the Community, irrespective of the areas they stay in or pass through, [is such that it] causes *any national legislation which delimits the protection of wild birds* by reference to the concept of national heritage *to be incompatible with the Directive* (emphasis added)." In *Gourmetterie van den Burg*, however, the Sixth Chamber of the Court introduces a national delimitation, between species of wild birds which do and those which do not occur naturally in the legislating Member State[108]. Moreover, the ECJ found here that migratory and endangered birds are afforded specific protection and that Article 14 of Directive 79/409 (allowing Member States to introduce stricter measures than those provided) applies only to migratory and endangered birds[109]. However, Article 14 of the directive[110] mentions no distinction between migratory and endangered birds and other birds; Article 1 states clearly that the directive "relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies."[111]

Furthermore, in another Birds case, the ECJ states clearly that one of the directive's intentions is precisely to restrict commercial pressures on bird populations[112]. Yet in *Gourmetterie* it is clearly stated that the Netherlands' ban on imported grouse, although aiming to protect birds in another Member State by easing commercial pressure to kill them, is unlawful[113].

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106 OJ 1979 L103/1.

107 Case 252/85 *Commission v France* 1988 ECR 2243, (para.15).

108 Case C-169/89 *Gourmetterie van den Burg* 1990 ECR I-2143 para.16.

109 Case C-169/89 *Gourmetterie van den Burg*, (above) para.12. Here, such species are protected "even more effectively" and "[w]ith regard to the other bird species covered by 79/409, the Member States are required to bring into force the laws regulations and administrative provisions necessary to comply with the directive but are not authorised to adopt stricter protective measures than those provided for under the directive, except as regards species occurring within their territory." As Minor points out (*op.cit.*, p.274) "...there is little textual support in Article 14 for this restrictive interpretation."

110 Directive 79/409 OJ 1979 L103/1, Article 14: "Member States may introduce stricter protective measures than those provided for under this directive."

111 See also 262/85 *Commission v Italy* 1987 ECR 3073, (para.6).

112 Case 262/85 *Commission v Italy* (above) para.18: "...it is clear from the protection to be afforded under the directive that it is intended to avoid a situation in which all the species that may be hunted may also be marketed *because of the pressure which marketing may exert on hunting and consequently on the population level of the species in question* (emphasis added)."

113 Case C-169/89 *Gourmetterie van den Burg*, (above) para.16: "A prohibition on importation and marketing cannot be justified in respect of a species of bird which does not occur in the territory of the legislating Member State but is found in another Member State where it may lawfully be hunted.

In this example conflict exists not only between ECJ rulings but also between an ECJ interpretation and other Community legislative acts: for instance the very purpose of Regulation 3254/91[114] is to ease commercial pressure on animal populations (and prevent cruelty) by prohibiting importation of furs from countries where use of leghold traps is permitted. Thus its goal is similar to that declared unlawful in *Gourmetterie*: to protect nature outside the territory of the legislating body -- in this case the Community. The same type of action has also been accepted between Member States[115]. The decisions sow confusion as to which species exactly are protected, and fail to explain why certain actions (e.g. importation bans) are acceptable in some situations while not in others.

Where rulings are inconsistent this may be due to the fact that the Court, also, is not immune to political developments. During periods when Community authority is challenged politically (as in the aftermath of the 1992 Edinburgh Summit) the ECJ may tread lightly where Member States' commercial or traditional[116] sensibilities are affected. Furthermore, the ECJ may simply choose not to address certain issues because they carry complex legal and practical implications, which again may politically inconvenience Member States. An example involving EIA85/337 is Case C-396/92[117], concerning authorisation requests made *after* the directive's entry into force (3 July 1988) but *prior* to entry into force of national transposing rules. In response to the German request for a preliminary ruling the ECJ answered that the relevant article did not permit a Member State to waive the EIA obligations of the directive for these projects. However, the ECJ avoided answering the question that would have resolved important implementation issues regarding authorisation requests initiated *prior* to the 3 July 1988 directive's deadline but not actually accorded before the deadline. Certainly the issue was pertinent: the German court expressly asked whether Member States were obliged "from the expiry of the deadline for transposition to make all non-approved projects subject to an EIA..."[118]. A variety of parties

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114 OJ 1991 L308/1.

115 Furthermore the Commission has accepted as legal a German ban on importation of *corallium rubrum*, a Mediterranean coral, although lawfully captured in another Member State, that was aimed at protection of the environment in that State (Italy). The issue was therefore settled before it came to the ECJ; Krämer and Kromarek, RJE 2-3/1994, p.244.

116 Dr. Krämer cites Case 252/85 *Commission v France* 1988 ECR 2243, and its over-sensitivity to traditional hunting as an example of a political judgment; Krämer, *Casebook*, 1993, p.176.

117 Case C-396/92 *Bund Naturschutz in Bayern v Freistaat Bayern* 1994 ECR I-3717

118 Case C-396/92, p. I-3725, see also p. I-3751.

considered the issue important enough to intervene: the Commission and the Netherlands claimed that EIA had to be undertaken for all projects not yet approved by 3 July 1988; the United Kingdom and Germany disagreed[119]. Advocate General Gulman identified the issue as being of "considerable significance."[120] Unfortunately, the Court preferred to leave the issue dangling, limiting its response to those projects for which "the consent procedure was already initiated before the entry into force of the national law transposing the directive, but after 3 July 1988..."[121].

1.3. Summary:

As seen, a series of obstacles hinder the progress of Article 169 enforcement proceedings during the administrative phase; of the procedures that make it to the judicial phase, progress is not necessarily much smoother. Even if arriving at an ECJ decision is in itself a small victory, this does not translate directly into an advance for future implementation: ECJ decisions may yet leave uncertainties, or create new difficulties.

2. Article 173 and Legal Title:

Community institutions also bear practical responsibilities for correct implementation of environmental law; as seen earlier, at times[122] they fail in their duties. To begin, the Commission's role as guardian of the Treaty is untenable where a Commission decision is challenged[123]. The limited experience with Article 173 challenges to environmental decisions taken by Community institutions indicates that problems -- seemingly insurmountable -- have arisen in judicial actions. These have concerned the existence of an administrative act[124], and

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119 As well as Friestaat Bayern, and the municipality of Vilsbiburg.

120 And subsequently found that EIA was not necessary, based on an argument of development convenience rather than environmental logic, illustrating how reluctant many officials are to 'inconvenience' economic forces: Case C-396/92, p. I-3730, point 34: "Such an interpretation would lead to arbitrary results, in particular to results which could considerably delay the execution of projects beneficial to the community and result in major inconveniences for developers and the community."

121 Case C-396/92, para.20.

122 See discussion of Structural Funds, Chapter 1, point 3.

123 Krämer, 1996 JEL, pp.9-10.

124 Case T-461/93 *An Taisce* 1994 ECR II-733 was brought by WWF UK and later joined by An Taisce, the National Trust for Ireland. At issue was the Community funding of the construction of a visitors centre in a protected national park, requiring a new access road and a waste water treatment plant. EIA85/337 had not been implemented in Ireland, and although an EIA had been carried out (February 1992) it, had been highly criticised (together with a later

particularly seriously, access to justice, when individuals or groups attempt to review the legality of a decision of one of the European Institutions. To do this, associations or individuals must rely upon Article 173[125]; this action is both much rarer and more difficult to pursue than Article 169 procedures.

Significantly, the Fifth EAP insists on access to justice for individuals[126]. Since obtaining information is a necessary preliminary step to enforcement, Directive 90/313 requires that

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report) particularly regarding the treatment of the waste water plant (para.7). The Director General of DGXI wrote the Irish Permanent Representative to inform him that he was recommending the Commission to commence Article 169 proceedings. The Commission later decided not to initiate the procedure. The applicants challenged the decision not to suspend or withdraw the allocation of IRL £2.7 million; alleging that the decision had been taken on 7 October 1992 (the date of a Commission press release stating that it had decided not to initiate Article 169 proceedings).

Without it being necessary to examine *locus standi*, the application was dismissed as inadmissible, for lack of an administrative decision (para.38): "Nothing however, can justify the conclusion that the Commission also decided at that time not to make use of the possibility given it by Regulation 4253/88 to suspend or reduce the use by the Irish authorities of Community funds for the construction of Mullaghmore centre." Or as Dr. Krämer puts it: "The Court of First Instance held that the Commission had not taken a decision, but had simply decided not to open proceedings against Ireland under Article 169": Krämer, 1996 JEL, p.5. An appeal has been lodged: C-325/94P.

Notably, the ECJ has in the past accepted that negative decisions can constitute 'acts'; Case C-313/90 *CIRFS and others v Commission* 1993 ECR I-1125 (in the context of state aids).

(The same issue, lack of an administrative decision, has thwarted administrative actions aat national level; see Chapter 9, point 3.3. Need for an Administrative act.)

125 Article 173 (fourth indent): "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

126 "Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped"; OJ 1993 C138/82.

information be given to a natural or legal person "without his having to prove an interest."[127] The proposed directive on civil liability for damage caused by waste[128] specifically provides that environmental associations shall have the right to seek remedy or join proceedings that are underway. Despite these urgings, legal interest is often the first hurdle at which environmental associations fall, including at the Community level.

2.1. Practical Illustration: T-585/93, Greenpeace and others v Commission, order of the Court of First Instance of 9 August 1995[129]:

The case involves the Commission decision[130], taken under the Regional Funds, to accord Spain a maximum of Ecu 108,578,419 for the construction of two electric power stations in the Canary Islands. Soon after the funds were authorised the Commission received complaints: that the works on Grand Canary had commenced illegally[131], without the EIA required by EIA85/337; and[132] that Unelco had undertaken the construction without the Environmental Declaration required by national legislation implementing the Community directive[133]. At Community level, the Article 173 action brought by Greenpeace and eighteen others sought to annul the Commission decision allocating a further Ecu 12,000,000, on top of the initial 28,953,000,

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127 Article 3(1), Directive 90/313 on the freedom of access to information on the environment; OJ 1990 L158/56 at 57; furthermore, judicial or administrative review must be available should the public authority refuse to give the information (Article 4).

128 Article 4(3), OJ 1991 C192/6 at 13.

129 For a more complete analysis see Gérard, N., "Access to Justice on Environmental Matter -- A Case of Double Standards? *Greenpeace and Others v Commission of the European Communities*," 8 (1996) JEL 139.

130 C(91)440 7 March 1991.

131 Letter of 23 December 1991, from Mrs. Aurora González González and Mr. Pedro Melián Castro (5th and 6th applicants).

132 Letter of 23 November 1992, from M. Domingo Viera González, second applicant.

133 The relevant national organ (Comisión de Urbanismo y Medio Ambiente de Canarias) issued the declarations in question on 26 February and 3 March 1993, more than a year after the Commission received the first complaint that the works had been commenced. Theoretically the project should have been suspended at this point: Real Decreto Legislativo 1302/1986 (the basic legislation transposing the Community directive), Article 9, stipulates that, if a project requiring Environmental Impact Assessment is commenced without having completed the procedure it "shall be suspended" (*"será suspendido"*); however, the automatic nature of this is possibly mitigated by the addition of "at the request of the environmental organ."

Various national level actions were commenced (apparently without benefit of interim relief): by Tagoror Ecologista Alternativo on 26 March 1993; by the Comisión Canaria contra la Contaminación, on 2 April 1993; and by Greenpeace Spain on 18 December 1993. They are, as yet, unresolved.

to reimburse Spain for the construction of the two power stations[134]. The applicants argued[135] that the Commission was under the double obligation to ensure that Spain respected Community environmental policy, specifically EIA85/337; and, in the case of violation of the policy, to refuse to allocate funding. The applicants further requested that the CFI order the Commission to release the documents relating to the funding.

Several aspects of the Commission's conduct are worthy of note, besides its failure adequately to verify the conformity of the Spanish project with Article 130r(2) EC or the Structural Funds regulations. The Commission not only did not suspend aid of its own accord once it had been notified of the alleged violations of Community law[136], it chose to allocate a further Ecu 12 million. Despite Commission calls for greater transparency[137], when Greenpeace requested information relating to the measures the Commission had taken regarding the conformity of the Spanish construction with Structural Funds requirements, the Commission responded that the requested information concerned the internal decision-making procedures of the Commission and could not be provided[138]. Furthermore, in this instance the Commission's actions fell short of its assurances that its "decision was taken only after a full consultation between the various services of the concerned"[139], since it has spent Ecu 40 million on a project that violates Community environmental law[140].

The matter centred on the plea of inadmissibility (*locus standi*)[141] raised by the Commission and whether the applicants were directly and individually concerned by the challenged decision,

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134 The Commission implied that it had taken this decision between 7 March 1991 (the date on which C(91)440 was adopted) and 29 October 1993, the date of the meeting during which the Commission confirmed that Ecu 40 million had been allocated in application of decision C(91)440.

135 Paragraph 25.

136 Which it is empowered to do by Article 5 of decision C(91)440.

137 See, for example, Communication 93/C 166/04, OJ 1993 C166/4.

138 Paragraph 11. Perhaps this tendency to guard its own secrets will be affected by the decision adopted pursuant to Case T-194/94 *John Carvel and Guardian Newspapers Ltd v Council*, judgment of 19 October 1995, in which the Council was condemned for having a similar attitude towards revealing internal information.

139 Paragraph 11.

140 It is presumed here that the projects fall within the scope of EIA85/337; the mere absence of an EIA for such a project (Annex I) constitutes a breach. The directive does allow derogations "in exceptional cases" for a specific project (Article 2(3)). In this case the competent authorities must still consider whether another form of assessment is appropriate, they must make the information relating to the exemption publicly available, and inform the Commission. This apparently did not take place.

141 Apparently the Court of First Instance considers the case to be so "manifestly inadmissible" (Cf: Article 111, Rules of Procedure of the Court of First Instance of the European

as required by Article 173. The CFI began by invoking the *Plaumann*[142] formula, developed three decades ago in the context of the common market. It dismissed the applicants' invitation to distance itself from the earlier case-law, and disregarded the fact that Article 173 case-law had indeed evolved greatly in other areas[143]. Instead it set itself the task of determining whether the applicants could be 'individually concerned' because the decision at issue "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed."[144] Against this test, the local residents, fishermen, farmers, ornithologists, the individuals with health problems (and admittedly, one wind-surfer) of this claim were found to be indistinguishable from any other local resident, fisherman, farmer. They therefore lacked legal interest to make a claim[145]. Nor was the fact that certain applicants had previously forwarded complaints to the Commission sufficient to consider them individually concerned[146]. The standing of individual applicants was thus ruled out.

Next, examining the legal title and interest of the associations, the CFI recalled that, again according to case-law, associations defending collective interests cannot be accepted as having interest in light of Article 173 of the Treaty. They cannot be considered to be more individually

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Communities of 2 May 1991, OJ L136/1 at 20) that it issues a reasoned order, rather than a judgment.

The question of reviewable act -- whether the Commission decision to continue funding was in fact a decision in the sense of Article 173 and therefore susceptible to judicial review -- was left unanswered. The grounds for review -- the violations of Directive 85/337 on the part of Spain and the Commission's failure to suspend funding in accordance with Article 130r(2) -- are also unresolved.

142 Case 25/62 *Plaumann and Co. v Commission* 1963 ECR 95.

143 Below.

144 Case 25/62 *Plaumann* 1963 ECR 95 at p.107.

145 Paragraphs 54 and 55.

146 Paragraphs 56 and 57.

Nonetheless, as early as 1986, in *Cofaz* (Case 169/84 *Cofaz v. Commission* 1986 ECR 391), the ECJ accepted individual concern of the third parties because they had played a role in the procedure investigating a possible violation of Community rules, and because "their position on the market is significantly affected by the State aid which is the subject of the contested decision" (para.25). This is further supported by other rulings: Case 323/82 *SA Intermills v Commission* 1984 ECR 3809, paragraphs 5 and 16; Case C-225/91 *Matra v Commission* 1993 ECR I-3203, see particularly the opinion of Advocate General van Gerven at I-3221-26.

In fact, the Court of First Instance has itself accepted a relaxation of the *Plaumann* test in T-2/93 *Air France v Commission* 1994 ECR II-323, paragraphs 44 through 48; and Case T-435/93 *ASPEC*, 1995 ECR II-1281, paras.63-64.

affected than the individuals of which they are composed. Since in this instance the individuals had been ruled out, so were the three associations [147].

Finally the CFI examined whether the correspondence between Greenpeace and the Commission regarding the financing of the projects could "constitute special circumstances such as to give it *locus standi* to bring an action as an association."[148] Since the association entered into dialogue with the Commission only after the challenged decisions were taken (i.e., once Greenpeace discovered the alleged breach of Community law, rather than before such a discovery) it could not be considered to have an interest.

As a result, the action was dismissed and the applicants were ordered to pay the costs.

The CFI's decision is especially disappointing since it defines the approach to similar situations in future. The Community seems to endorse the paradoxical situation by which the more people[149] adversely affected by Community decisions and breaches of Community law by Community institutions, the less chance they have of being heard. This for the simple reason that they are too numerous to be considered 'individually' concerned.

The underlying problem, both here and as shall be seen repeatedly at Member State level, is exactly illustrated by this: concepts of individual interest are fundamentally antithetical to the environment. Procedural rules requiring "individual" concern are simply ill-suited to environmental issues. Environmental interests, by nature, are collective, concerning the many rather than the few. The CFI here says, in essence, that environmental interests of a natural or legal person cannot ever usefully be invoked against a Community decision because they will not meet the test for admissibility. Held up against this, the Community's own emphasis on access to justice for environmental associations in the Fifth EAP seems untenable.

An element of political priority seems also to influence the outcome: In fact the problem is not so much the test as embodied in Article 173 as the CFI's interpretation of it. Environmental interests, being collective, cannot ever distinguish the claimant from "all other persons". The CFI stubbornly adheres to the language of *Plaumann*, despite the fact that the Treaty has since evolved

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147 Paragraph 60.
148 Paragraph 61.
149 For example, the 1266 resident members of Greenpeace, the 154 members of the Tenerife-based TEA, not to mention the European taxpayer who has put Ecu 40 million towards an allegedly illegal project.

to include environmental obligations, despite its own recognition that the circumstances under which this test was developed do not apply here[150], and finally, despite the fact that the case-law surrounding Article 173 has been an area where the ECJ has shown itself particularly inclined to take an active role in interpretation[151].

Even the *Plaumann* decision, in a portion that is rarely cited, suggests that the test could be relaxed:

> The provisions of the Treaty regarding the right of action of interested parties must not be interpreted restrictively; where the Treaty is silent a limitation in this respect may not be presumed.

Could it not then also be argued, that aid given through the European Regional Development Fund is not so different in effect from aid given by the State[152], where the test has been allowed to evolve? The applicants are not affected in the sense of economic competition, but they are adversely affected in terms of competition for limited natural resources. To borrow the words of Advocate General VerLoren van Themaat in *Cofaz*, it could be argued that the disadvantages for the environmental associations and the individuals bringing this action are the counterpart of the advantages conferred, in the form of a grant made under the Regional Funds, upon Unelco[153].

Furthermore, the case-law developed in the wider context of Community law is applicable here. In application of Article 5 EC[154], the ECJ has consistently held that

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150 Paragraph 50.

151 The considerable evolution has concerned the areas of which type of act can be challenged (Case 22/70 *Commission v Council* 1971 ECR 263; Case C-39/93P *Syndicat Français de l'Express International (SFEI) v Commission* 1994 ECR I-2681); against which institution the action can be directed (Case 294/83 *Parti Ecologist 'Les Verts' v European Parliament* (1987) 2 CMLR 343); standing for semi-privileged applicants (Case 302/87 *European Parliament v Council ('Comitology')* 1988 ECR 5615; C-70/88 *European Parliament v Council ('Chernobyl')* 1990 ECR I-2041Case 302/87 *European Parliament v Council ('Comitology')* 1988 ECR 5615; C-70/88 *European Parliament v Council ('Chernobyl')* 1990 ECR I-2041); standing for non-privileged applicants in the areas of anti-dumping (Case 239/82 and 275/82 *Allied Corporation v Commission* 1984 ECR 1005; Case 262/82 *Timex Corporation v Council and Commission* 1985 ECR 840), competition (Case 26/76 *Metro-SB-Großmärkte GmbH and Co.KG v Commission* 1977 ECR 1875), and (as invoked by the applicants) state aids.

152 The applicants pointed out that in matters of state aids (citing case C-198/91 *Cook v Commission* 1993 ECR I-2487) the legal interest of the *competitors* of recipients of state aids has been recognised; (paragraph 24) those with interest are defined as those "affected in their interests" by the aid, "notably the competing undertakings and professional organisations."

153 Even if, as VerLoren van Themaat suggests (Case 169/84 *Cofaz v. Commission* 1986 ECR 391, p.405), admissibility were limited to those who had earlier submitted complaints to the Commission, the present case could have proceeded to discuss the grounds for review, since three applicants had formulated complaints.

154 Article 5 EC; for text, see Chapter 2, footnote 3.

> any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law[155].

Unfortunately for the outcome of the present case, the CFI failed to apply to itself the obligation to set aside rules that would obstruct the application of Community law. Generally, this case seems to indicate that the CFI stops interpreting actively where environmental interests are involved.

On the present occasion the rigidity of the CFI concerning the arbitrary and inappropriate barrier of 'individual concern' and its failure to set aside obstructive technical rules resulted in a sizeable two-fold violation of Community law[156] being tolerated. The judicial control of the use of European funds that is so urgently required was denied. This is especially ironic when one recalls the dynamic pro-environment stance adopted by the ECJ at a time when no Treaty foundation for such a position existed. One can detect the effects of a change in the Community's political atmosphere, evident in a general retreat on environmental issues since the Edinburgh Summit in 1992[157], although it can be hoped that the environment fares better during the appeal of this case[158].

This illustration and various other cases[159], indicate that individuals cannot expect, at Community level, to benefit from the transparency, access to information and access to justice that the Community actively urges the Member States to grant them at national level.

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155 C-213/89 *R v Secretary of State for Transport, ex parte Factortame and others (No.2)* 1990 ECR I-2433, at paragraph 20; see also 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* 1978 ECR 629 at paragraphs 22 and 23.

156 Spain's violation of the EIA directive 85/337 (unless a derogation under Article 2(3) were accorded; apparently not the case); and the Commission's failure to ensure that the integration requirement in Article 130r(2) EC and the requirement in the Structural Funds in regulation 2052/88 were respected.

157 Cf: Council of Edinburgh Presidency Conclusions, Europe no. 5878 Sunday/Monday 13/14 December 1992 at p.1. Since this time, a variety of environmental obligations have been reviewed and amended, and the Community has become markedly more hesitant in proposing and adopting environmental legislation. When it has adopted new environmental rules, it has opted for broader, less specific and arguably less enforceable standards; Cf: "The Impact of EC Environmental Law in the United Kingdom," conference held in London, 3 November 1995, particularly comments made by Dr. Ludwig Krämer, "Recent Developments in EC Environmental Law," and David Freestone, "The Impact of Subsidiarity."

158 Which has been registered as Case C-321/95P.

159 See for instance, T-219/95R *Danielsson and others v Commission*, 1995 ECR II-3051, para.70-77, regarding French nuclear tests on Mururoa. The applicants sought to annul the Commission act which stated that, even in the worst hypothesis, scientific assessment demonstrated that basic safety standards concerning exposure to ionizing radiation would be met; therefore Article 34 of

3. Sanctions and compliance with rulings:

Especially frustrating is that the phase after an ECJ decision also presents difficulty. Presenting the limitations of a traditional system of public international law, the ECJ was until recently limited to a strictly declaratory finding that a Member State, by its act or omission, had failed to fulfil an obligation under the Treaty. Article 171 EC requires a Member State to take the measures necessary to comply with the Court of Justice's decisions; it makes no mention of time limit, although the Court insists that "it is beyond dispute that the action required to give effect to a judgment must be set in motion immediately and be completed in the shortest possible period."[160]

Member States frequently do not comply, however[161]. Examples exist regarding environmental legislation where infringements -- detected, pursued and then judged -- have continued for a decade or more, despite Community efforts to enforce appropriate provisions[162].

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the Treaty (Euratom) did not apply. The action was dismissed as 'manifestly inadmissible': again, the applicants could not show that they decision was of direct and individual concern.

See further, Case C-131 *Arnaud and others v Council* 1993 ECR I-2573;
Case T-475 *Buralux and others v Council*, decision of 17 May 1994 (appeal rejected);
Case T-117/94 *Rovigo v Commission* 1995 ECR II-455 (appeal C-142/95).

160 Case 69/86 *Commission v Italy* 1987 ECR 773 (para.8); also Case 131/84 *Commission v Italy* 1985 ECR 3531 (para.7).

161 Tesauro, "La sanction des infractions au droit communautaire," 32 (1992) Rivista di Diritto Europeo 477 at p.481. AUDRETSCH, 1986, pp.395-96; HARTLEY, Foundations, p.314n: in at least half the cases the judgment was not implemented within a year.

162 - More than a decade: An infringement regarding waste directives continued in one Member State from the entry into force of the directives in questions (July 1977 for directives 75/439 and 75/442 and February 1979 for directive 78/176) through initial judgments (68/81, 69/81 and 70/81, 1982 ECR, pages 153, 163 and 169 respectively), through a second judgment on 14 January 1988 for failure to implement the earlier judgments (cases 227 to 230/85 Commission v Belgium ECR 1).

- eleven years: Regarding the birds directive:, in Case 75/91 *Commission v Netherlands* 1992 ECR I-549 the Netherlands was condemned for failure to implement the judgment in Case 236/85 *Commission v Netherlands* 1987 ECR 3989. The lapse spanned the entry into force in 1981 of directive 79/409 to the judgment of February 6, 1992.

- eleven years: Case C-337/89 *Commission v UK* 1992 ECR I-6103, the UK was condemned for failures of both formal (failure to transpose in Norther Ireland and Scotland) and practical implementation (quality of drinking water). The directive entered into force in 1982, two years after its adoption, with an additional three years for quality of water to comply. The UK is still cited in the Eleventh Application Report in 1993 for not implementing the earlier judgment. and the situation is still not remedied in 1996. The infringement has lasted at least eleven years.

- twelve years: the Commission commenced proceedings against France for failure to implement the judgment in Case 252/85 *Commission v France* 1988 ECR 2243 regarding the birds directive, proceedings which are following the Article 169 stages still in 1993 (see Eleventh Report 1993, C154/169) -- at least twelve years from the entry into force of the directive.

Tesauro notes that the significance of failure to comply must not be exaggerated: often this is to do with the complexity of practical considerations rather than defiance[163]. However, particularly with environmental rules, on occasion failure to implement an ECJ ruling can be a political choice[164]. Even where the failure stems from practical difficulties, the result is the same from an environmental perspective: Community environmental legislation fails just as surely to attain its goals. Member States' failure to heed a judgment can be especially serious to the environment in that it compounds problems of time during which dangerous or harmful situations may continue unresolved[165]. At the very least, disrespect for an ECJ ruling, whatever the reasons, implies a waste of the already scant resources of DG-XI: the pursuit of an infringement that survived all the obstacles outlined above still amounts to very little (although a useful precedent is set). It is difficult to deny that failure to implement judgments does indeed damage the Community 's authority.

In the event that a decision is not implemented, the Community's formal options are limited. Until recently the only action possible against a State that failed to implement a judgment was the initiation of new infringement proceedings. The absence of effective sanctions, once widely deplored[166], has been modified by the Maastricht Treaty. Article 171(2)[167] as amended by the TEU gives the Court the power to impose a lump sum or penalty payment on Member States that have not complied with its judgment.

While this may provide valuable inspiration to comply, it has been pointed out that imposition of a fine may be an "unsubtle remedy"[168]. It raises questions regarding which sum can be considered dissuasive. It presents difficulties in that the dutiful taxpayer rather than the

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163 Tesauro, 1992, pp.482-83.

164 For instance, in order to create give priority to other national concerns; see comments on the UK's delay in implementing the drinking water directive; Collins and Earnshaw, p.217.

165 As for instance, in the Campania case (above) where situation that is frankly dangerous for public health lingered on.

166 Vernier Report, EP A3-0001/92, Point J, p.5; WWF and FoE, HL Ninth Report Evidence 1991-92, pp.267, 277.

167 After the Commission has proceeded once again through the stage of reasoned opinion, the Commission (Article 171(2)):"...may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it."

168 Lane, *op.cit.*, p.974.

polluter pays; and where one might hope that the taxpayer might then exert "grass-roots" pressure on defaulting Member States, it must be remembered that, at least in some Member States, the media coverage of any imposed fine may well distort the issues and be portrayed as an 'attack' from Brussels. However, at least from an environmental perspective (if not the taxpayers'), having this sanction available represents a considerable advance and may eventually encourage a Member State to avoid being singled out in this manner.

Commission discretion, a point on which it has insisted[169], may present problems similar to those discussed in the administrative phase (above). Nonetheless, amid a variety of references to those issues that the Commission would consider sufficiently serious to warrant use of Article 171 (economic freedoms[170], marketing, and functioning of the Community), the Commission has specifically referred to "particularly damaging effects of pollution arising from an action in breach of Community law."[171]

A remaining, important, shortcoming is that even the power to impose a fine for non-compliance with an ECJ decision adds nothing to the Community's arsenal prior to the disregard of the judgment. One can only agree with Tesauro when he points out that it would have been more useful to impose a sanction after the first condemnation -- without which "the Court's first decision may be 'banalised' and Member States may be incited to wait until the introduction of a second infringement procedure before satisfying their obligations"[172].

4. Conclusion:

The previous chapters have highlighted a variety of problems, some legal and procedural, others political, that on the one hand, can lead to the creation of environmental rules that are at times difficult to implement or enforce, and that on the other, obstruct the Commission in its attempts to monitor Member States performance with regard to those rules. Given the obstacles examined in this chapter, it seems that political pressures both from Member States and among the various Community departments, appear also to intrude on enforcement proceedings.

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169 Memorandum on applying Article 171 of the EC Treaty, OJ 1996 C242/6 at point 3.

170 "...attacks on fundamental rights and on the four fundamental freedoms should be regarded as serious"; *ibid.*, point 6.1.

171 *Ibid.*, point 6.2.

172 Tesauro, 1992, p. 489.

Despite the earnestness with which certain players attempt to enforce environmental rules, it seems that their efforts are occasionally[173] undone by more powerful actors. This too is a reflection of political priorities and the ranking of environmental protection as a goal. It is difficult to imagine the situation in reverse: other policies being sacrificed in favour of environmental law. However, it is not argued here that all the ills of the Community-level monitoring and enforcement are a result of Member State machinations. Indeed, the Community fails to apply to itself the requirements -- of transparency, of access to justice, of co-ordination between policies -- that it demands of the Member States.

Certainly, to some extent, various difficulties noted in this discussion can be problematic in any policy area and cannot be attributed only to lack of priority of environmental rules (for instance, the stage at which applications for interim measures can be made). However, in many cases it seems that their degree of obstructiveness is greater in environmental matters: it appears that arguments accepted in, for instance, state aids, (negative decisions constituting acts, direct and individual concern) are not accepted in environmental matters. Although surface improvements can be made, more deeply, and more so where environmental rules are concerned, it is difficult to separate politics from law in order to rigorously apply the latter.

In sum, efforts to enforce environmental rules at Community level are progressively restricted by cumulative obstacles, with the result that proportionally few cases reach a decision at Community level. The responsibility of the Member States in ensuring the effectiveness of these rules by securing adequate implementation and enforcement is, therefore, greater.

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173 Lack of transparency makes it difficult to judge how frequently.

PART II: MEMBER STATE LEVEL

UNIT I: FRANCE

CHAPTER 4: France -- Upstream Context and Formal Implementation

1. Upstream issues -- the French Context

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1. Upstream issues -- the French Context

Upstream issues surrounding France's environmental administration give insight to the backdrop onto which Community environmental law is grafted. The administrative context influences the efficiency of government actors in charge of formal and practical implementation. Subsequently, formal implementation of the two Community directives is examined.

1.1. France's Environmental Administration:

Prior to the early Seventies, the few existing environmental attributions were fragmented across several ministries[1]. By the late-Sixties/early-Seventies popular pressure was sufficient to spur the government to develop a more coherent approach[2]. The Ministry of Protection of Nature and Environment was created, without fanfare, in January 1971[3] and announced during a minor government reshuffling[4]. Its unobtrusive entry in the political arena heralded difficulties in imposing its authority as an equal among the other ministries. Certainly the fact that its basic attributions and the central administrative services allocated to carry out these attributions were subtracted from other ministries[5] (in a process that the first environment minister termed the *"strip-tease administratif"*[6]) elicited resentment and inertia from other governmental actors[7], necessarily restraining the ministry's activities and weakening its

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1 Mainly, the Ministry of Industry, the Ministry of Agriculture and the Ministry of Public Health.

2 After a consultation among some five hundred associations, the *Programme des Cent Mesures* was adopted: already efficient application of existing law was stressed as preferable to the creation of new law.

3 *Ministère de la Protection de la Nature et de l'Environnement,* Decree of 27 January 1971.

4 Prieur, Dalloz 1991, p.152.

5 Notably the Ministries of Industry, Agriculture, Cultural Affairs, Transport.

6 Robert Poujade, *le Ministère de l'Impossible,* Calmann-Lévy 1975, p.31.

Throughout this chapter, unless otherwise noted, the French has been translated by the author and should not be taken as authoritative. Where legislation is cited, the relevant portion of the original French text is provided in an appendix.

7 Prieur, Dalloz 1991, p. 153.

powers.[8] The Environment Ministry had few administrative resources of its own in the field (*services extérieurs*)[9] and, in order to carry out inspections and enforce legislation it was forced to borrow the regional administrative services of other ministries[10]. The potential for a conflict in priorities and loyalties is evident[11]. Necessarily aimed towards action in the field, and yet without autonomous resources at this level, the Ministry of the Environment was appropriately nicknamed the *Ministère de l'Impossible* by its first minister[12]. His efforts to assert the Ministry's legitimacy were poorly received by other political actors, as illustrated by his abrupt dismissal in 1974[13].

In fact, the problems experienced in these early days set the pattern for the Ministry's (or the administrative organ serving that function) development. There followed a period of experimentation and upheaval during which, although the competences and external services remained more or less the same, ministers and secretaries of state in charge of the environment were substituted for each other in rapid succession and the administrative body lost its status as

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8 The initial decree (Decree 71-94, 2 February 1971) intentionally shared certain powers between ministries and deliberately left ambiguities for fear of "indisposing" the other concerned ministries. See Prieur, Dalloz 1991, p.162.

9 Early experience with the Regional Environment Delegates (*Délégués régionaux à l'environnement*, Decree 73-355, 27 March 1973) who had been given some general inspection duties and yielded poor results.

10 The latter were to be called upon "insofar as necessary" but clearly, this could not take place without the prior consent of the minister in charge of the services at issue. (Decree 71-94, attributing powers, Article 3, states that the Minister of the Environment "can in so far as necessary, call upon the services and organs under the authorities to carry out the inspections he esteems necessary". Subsequent decrees echo this formula (decree 75-406, 26 May 1975; decree 76-1085, 29 November 1976).

Competent decentralised services included: Regional Directorates of Industry and Research (*Directions Régionales de l'Industrie et de la Recherche*, answering to the Ministry of Industry; the Departmental Agricultural and Forest Delegations (*Délégations Départementales à l'Agriculture et de la Forêt*, under the authority of the Ministry of Agriculture; and one of the most powerful state exterior services, the Departmental Public Works Delegation (*Délégations Départementales à l'Equipement*, of the Ministry of Public Works); see Prieur, Dalloz 1991, p.215.

11 Romi, RDP 1990, p.1124; Billaudot, Françoise, "Les Mutations administratives de l'environnement: Aspects de l'application du plan national pour l'environnement," 1991 RJE 333 at p.337.

12 Robert Poujade, whom Michel Prieur has referred to as "the bad conscience of the other ministries", Dalloz 1991, p.155.

13 A more recent parallel can be drawn to the unexpected transfer of former DG-XI Head of Legal Affairs Unit, Dr. Ludwig Krämer; see Chapter 3, footnote 46.

an autonomous ministry[14]. For example, in 1978 the Ministry of the Environment and Quality of Life[15] was created by merging the ministries of Public Works and the Environment -- a thin polish over the fact that the environment had been tucked into a corner of the Ministry of Public Works[16]. A serious practical consequence of such a tandem is that, where previously differences between the two ministries (and creation of infrastructure is obviously often in conflict with environmental protection) could be arbitrated by the prime minister, conflicts now took place within one ministry[17]. Also at this time the most profound upheaval in the French administrative system generally since l'An VIII[18] took place: the movement to decentralise transformed all areas of administration, including the environment[19]. Although this created new opportunities for environmental administration it also created new possibilities for confusion.

1.2. Problems of implementation and enforcement stemming from environmental administration:

Whereas the fact that France was among the earliest Member States to establish environmental ministries might give cause for optimism, it soon becomes apparent that application of Community rules has been negatively affected by the administrative situation.

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14 It was attached to other ministerial structures and for a time became the Ministry of the Quality of Life (1974-77) encompassing competing concerns such as sports, leisure, tourism and the environment.

15 *Cadre de Vie.*

16 The absorption becomes particularly noticeable when examining the disproportion in resources of each. See Prieur, Dalloz 1991, pp.153, 167-8.

17 Prieur, Dalloz 1991, p.168.

From 1981 to 1986, (with a gap from March 1983 - July 1984 when the Minister of Environment became a Secretary of State) the environment was entrusted to an autonomous ministry. Competences were juggled both in favour of the newly autonomous ministry and back to other ministries (Decrees 78-533, 79-460).

18 L'An VIII marked the setting up of Napoleon's centralised administrative organisation of the territory and the creation of the administrative institutions and justice system; Dalloz administratif, 1992, pp.19-20, p.278.

19 Which continued to undergo change. Socialist victory in 1988, brought an improvement in status and some extension of powers; environmental attributions were attached directly to the Prime Minister rather than the Ministry of Public Works (Decree 89-235, 17 April 1989); see Prieur, Dalloz 1991, p.176.

Just as DG-XI would later have difficulty imposing its authority at Community level[20], the French environmental administration had trouble asserting its authority; this had an unsettling effect on implementation and enforcement of environmental rules from any source, Community or national.

1.2.1. Legitimacy: The many administrative advances and retreats cast doubt on the legitimacy of the environmental administration and on the Government's commitment to environmental goals. Early upheavals show the wariness with which the new competitor in the political arena was regarded. Tensions between ministries and resentments over gained or lost influence were kept alive as attributions and manpower continued to be subtracted from one ministry and added to another. The Environment Ministry was subjected to metamorphoses that would have been unthinkable for a Ministry of the Interior or of Foreign Affairs. It was unable to develop the authority that comes of stability and seniority, and this detracted from the seriousness with which the Government's approach to environmental matters was perceived (and acted upon) by the other branches of the administration and private actors.

An illustration of the fact that the environment administration carried little real weight was given by a Conseil d'Etat[21] ruling in 1982[22] which effectively dismissed the Environment Minister's opinion within the context of the EIA procedure[23]. The litigation, involving a quarry linked to the construction of a nuclear power station, concerned the fact that authorisation was given prior to receiving the Environment Minister's opinion. The *commissaire du gouvernement*[24] granted that only in very exceptional cases could the soliciting of a minister's opinion be interpreted as *not* having a substantial character[25]. Clearly favouring economic

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20 See Chapter 1, points 1 and 3.

21 See appendix.

22 CE 5 February 1982 *Association de défense de la qualité de la vie du Val de Loire*, AJDA 1982, p.471.

23 Arguably violating the intention of the Nature Protection Act, Article 2; Note J.C., AJDA 1985, p.239; nevertheless, EIA85/337 does not indicate the value of an environmental authority's opinion.

24 See appendix.

25 He acknowledged that the solution is proposed on the grounds of bureaucratic convenience. At the same time as the *commissaire* dismissed the opinion, he notes that the interpretation of the environment minister's opinion as part of a true procedure of consultation is

priorities, however, he found that acknowledging the substantial nature of the opinion here "could...result in great disturbance to the progress of the diverse regulatory procedures onto which this *saisine*[26] is grafted."[27] Because the provision is inconvenient, it was to be considered not obligatory[28]. The Conseil d'Etat summarily ruled that the environment minister's opinion was devoid of legal effect[29] and dismissed the application. Legally, administrative actors need not even await the Environment Minister's opinion.

1.2.2. Lack of Resources and Power: Political priority is reflected in the scant resources devoted to environmental policy: still in 1990 only some 550 agents worked at the central level, with between 413 and 430[30] in the DRAE[31], the closest thing to environmental agents at the regional level. In 1990 the Nature Protection Directorate had only 85 agents, 3 of whom were assigned to natural reserves[32]. Environmental protection acquired some measure of authority and agents only with difficulty. The legitimacy of environmental administrators was questioned, "viewed as a concession to a hesitant policy"[33] -- a Government policy that commands no more than 0.06% of the annual budget[34] could hardly expect to be taken

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supported by the terms of the statute, by common sense and by the parliamentary debates (cf: JO déb. A.N. 11 June 1976, p.4060); AJDA 1982 p.473.

26 The fact of being seized for an opinion.

27 AJDA, p.473:*"elle pourrait, nous semble-t-il, se traduire par d'importantes perturbations dans le déroulement des diverses procédures réglementaires sur lesquelles cette saisine doit se greffer."*

28 He justifies this by pointing out that, in the event that a project does not require a public inquiry, the public would be neither be notified of the impact study nor able to seize the environment minister until after authorisation anyway; AJDA 1982, p.474. The *commissaire du gouvernement* fails to consider that this is perhaps precisely the reason that the environment minister is empowered to give an opinion of his own initiative.

29 And that the contents of the challenged EIS responded to the requirements of Article 2 of the Nature Protection Act.

30 Depending upon the estimate, see Romi 1990, p.1123.

31 Water resource management: *Direction régionale d'aménagement des eaux.*

32 While 30 proposals for nature reserves awaited approval; ROMI, *Droit et Administration*, 1994, pp.125-26.

33 Billaudot, 1991, p.338.

34 In 1980 environment was O.111% of state budget; 1985 it was 0.077% of state budget; in 1990 : 0.063% (source: Rapport B. Hugo, Sénat no.61, 21 November 1989, Projet de loi de finances pour 1990). In 1981 culture had a budget 4 times superior to that of the environment, in 1982 it was 8 times superior; Prieur, Dalloz 1991, (p.33-35).

seriously[35]. Furthermore, in an effort to make the collectivities provide for their own needs (creating new financial worries for these), the central state took the opportunity given by decentralisation to unload some of its financial and resource burdens[36].

1.2.3. Conflict of Commitment: As noted, the Environment Ministry, or body serving that function, was assisted by a host of regional and departmental services answering to other ministries. Practically, this stew of interests meant environmental protection could lose to the 'host' policies in the event of conflict, particularly where economic stakes were high, or that environmentally harmful situations would be approached with a more conciliatory attitude[37]. For example, despite the fact that the environmental administration relied upon these services to help protect flora and fauna, to police fishing and hunting, to inspect classified installations (*installations classées*), and to control pollution and waste[38], the DRIR[39] were also in charge of promoting large industry; the DDE[40] also promoted large infrastructure projects; the DDAF[41] answered to the ministry of agriculture. With so much of practical implementation dependent on decentralised agents answering to other than environmental authorities, effective implementation depended greatly upon the goodwill of local officials and their awareness and concern for environmental problems, with extreme variations from region to region[42].

1.2.4. Confusion and overlap: Community rules were introduced into a situation where constant shifting of administrative competences maintained a certain level of confusion regarding who was in charge of what[43]. Since the decrees outlining the attributions of

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35 Plan National de l'Environnement, June 1990, p.41; Romi, Raphaël, "La réforme de l'administration de l'Environnement en 1990: des 'grands mots' aux 'petits remèdes'?" 107 (1991) RDP 1089 at p.1091.

36 Albertini, P., "Les collectivités locales et l'environnement," 1993 AJDA 835 at p.837: *"si le contrat a conservé à l'Etat un rôle d'impulsion, il lui a permis aussi de soulager, rapidement, la masse de ses investissements publics"*. See also Dalloz administratif, 1992, p.265; Colson, RJE 1993, p.225.

37 Romi 1990, p.1123, p.1138 note 36.

38 Billaudot, 1991, p.338, pp.343-44.

39 Regional Directorates of Industry and Research.

40 Departmental Directorates of Public Works (*Equipement*).

41 Departmental Directorates of Agriculture and Forests.

42 Lavoux, 1991, p.72.

43 Billaudot, 1991.

environmental authorities often referred to a maze of earlier decrees, shedding light on the exact limits of competence was no easy matter[44]. And if authorities themselves were at times disoriented by the dispersion of services, then the public, even if committed, could hardly be expected to untie the administrative knot. The mechanism of public participation as a buttress of implementation and enforcement could not function properly. Also from the point of view of the outsider, notably the Community institutions, the administrative rearrangements can be puzzling. The Commission complaint that environmental administration is particularly fragmented is justified.

1.2.5. Decentralisation: Particularly since decentralisation[45], the environment is an area claimed by a multitude of administrative actors, compounding the confusion mentioned above. The landmark event of decentralisation was a 1982 statute[46] establishing the principles of equality and co-responsibility between the administrative partners (descending by size): the State, the now officially created region, the department, and the commune[47]. In the area of the environment, as elsewhere, decentralisation in the Eighties has created possibilities but has also added to existing problems and created new ones. In fact, decentralisation has been a lost opportunity in terms of clarity of roles, co-ordination between administrative levels and regional involvement.

In keeping with the renewed importance of local levels, all levels have been given environmental competences, yet an element of clarity has been sacrificed. The duties of each official actor are not precisely defined in the legislation, perhaps because the legislator chose

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44 Billaudot, 1991, p.336-7; Albertini, 1993, pp.835-39.

45 Subsidiarity-type arguments in favour of bringing people closer to the centre of decision were supported by: a basis for decentralisation existed in the Fifth Republic's Constitution of 1958 (Article 72); and dissatisfaction with the centralising trend among the approximately 37,000 traditionally individualistic French *communes;* Lorrain, "The French Model of Urban Services" 15 (1992) Western European Politics 77 at p.79.

46 Loi du 2 March 1982 relative aux droits et libertés des communes, des départements et des régions.

47 Two subsequent laws (Loi du 7 January 1983 and loi du 22 July 1983 *relatives à la répartition des compétences entre les collectivités locales et l'Etat*) attempted to disentangle the divisions of competence and were supported by later rules regarding matters of decentralisation.

an element of vagueness as the most neutral solution to the issue[48]. Many legal commentators[49] agree that decentralisation has complicated rather than simplified an already complex area[50] and efficiency may have diminished since no single entity holds the key to an entire sectoral policy[51], leaving certain issues unresolved[52]. The latest statute concerning decentralisation has not clarified matters:

> ...the law of 1992 proceeds to sprinkle competences, perhaps to conserve better a directing role for the State...the occasion for clarification has once again been lost![53]

Co-ordination between administrative levels has also suffered. As Albertini has remarked, harmonisation between levels is desired but the means for achieving this have not been clearly furnished[54] and no mechanism for arbitration is provided in case of disagreement[55]. Decentralisation has eliminated *la tutelle*[56] and thus the problem of coherence between levels is accentuated[57]. Where legal texts are silent, the State's role as co-ordinator of the various interventions is favoured[58] (and here the Government's commitment to genuine decentralisation

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48 Albertini, 1993, p.835-36. Apparently some local authorities have siezed the opportunity to occupy domains left undefined.

49 Albertini, 1993, p.840; Moreau, "Droit administratif: France," 5 (1993) Revue Européenne de Droit Public 397, at p.402; Prieur, Dalloz 1991, pp.220-25; ROMI, *Droit et Administration*, 1994, pp.154-55 .

50 The environment is a domain which touches on almost every area of public intervention; to hope for a truly stream-lined and simple administration is perhaps unrealistic.

51 Grémion, C., "Quelle méthodes pour évaluer la décentralisation?" AJDA numéro spécial 1992, p.116.

52 Such as the division of responsibility between state and collectivity; Morand-Deviller, Jacqueline, "Le Partage de responsabilité entre les communes et l'Etat dans l'instruction des autorisations de construire," LPA, 23 June 1993 p.24. See also Romi, RDP 1992 pp.1774-75, p.1779. See also, Loi du 7 janvier 1983, Article 35.

53 Albertini, 1993, p.839.

54 With the exception of controls of the legality of the measure and of financial advantages.

55 Albertini, 1993, p.837.

56 Administrative supervision by a higher authority established compulsorily over a public body in case of mismanagement.

57 It is suggested (Loi du 7 January 1983, Article 6) that coherence be fostered by the conclusion of conventions between local authorities (concerning mainly urban services, for example water, sewage, waste treatment and urban transportation) yet the details are left vague and harmonisation of interventions seems to depend upon the willingness of local authorities to form links on common projects and on the financial support of these; see Lorrain, p.81.

58 Prieur, Dalloz 1991, p.220; Albertini, 1993, p.837.

and the sharing of power can also be questioned. Ironically, Member States subdue at national level the same subsidiarity arguments they promote at the European level).

Decentralisation can further be considered a lost opportunity in that regional competences are restricted. Several sources have postulated that the newly created region is an administrative echelon well-adapted to environmental management[59]. Regional authorities are sufficiently close to local issues, priorities and cultural characteristics to take decisions well-suited to local problems, and yet not so close as to be easily swayed by political friendships and patronage relationships[60]. From the Community viewpoint, extending regional competence would fit well with European funding schemes and their new emphasis on regional identity. Regional authorities could appropriately carry out the task of implementing national and Community policies concerning economic and social development[61]. (However, despite the Community's intention to emphasise the role of regions in the framework regulation for Structural Funds programmes of 1994-99, regions are as yet "more objects than subject of new Community policies, notably in the attribution of funds under FEDER for regional development"[62].) Increased emphasis on this administrative level would bolster political statements prioritising regions and would be beneficial from the standpoint of environmental awareness and local political pressures. Nonetheless,

> to avoid confusing roles, the State regularly reminds local authorities of the limits of the direct relations with Community institutions. A distinction is made between contacts for information,

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59 Albertini, 1993; ROMI, *Droit et Administration*, 1994, p.268.

60 As Romi and Muscatelli comment, although communes and *départements* may be closer to the level of citizens, "[l]ike it or not, local pressures and the search for resources lead municipalities to choose the short term over the long term"; Romi and Muscatelli, "Protection de l'environnement et contentieux de l'urbanisme; sur les aspects frustrants des décisions d'annulation de mesures d'urbanisme," LPA, 14 April 1989, p.11. See also, e.g., T.A. Bastia, 24 November 1988, Chapter 5, footnote 101; Romi, Raphaël, "L'administration de l'environnement: entre décentralisation et déconcentration," 108 (1992) RDP 1771 at p.1779; Bouchardeau Report, 1993, p.8.

61 Oberdorff, Henri, "Des incidences de l'Union européennes et des Communautés européennes sur le système administratif français" 111 (1995) RDP 25 at p.32. Cf: Loi d'orientation, no.92-125, 6 February 1992 relative à l'administration territoriale de la République (JO 8 February 1992).

62 Bodson, Nicolas, "Communauté européenne: vers une reconnaissance institutionnelle des régions?", LPA 10 avril 1993, p.16

regarded as useful to the local authorities, and decision-making procedures, to do only with competence of the State[63].

1.3. Reform:

In 1989 the French Government[64] conceded that the environmental balance sheet had, thus far, been negative. Both the public and government became increasingly conscious that deeper change needed to be investigated. The previous notion that the Ministry of the Environment had to be "lightweight and flexible" (justifying the fact that it was given no personnel in the field), ceded to the idea that a greater stability was required for it to impose itself as a political actor of equal weight with others[65].

A report that influenced reform, the National Environment Plan[66] (*"Plan Vert"*), gave a harsh assessment of France's administrative treatment of the environment in comparison with other Community Member States. Two of the main problems it discussed are mentioned above: lack of real autonomy of 'environmental' agents and insufficient resources. Practically, it proposed a doubling of the budget allocated to environment and suggested that new taxes be voted to finance this; a regrouping of competences under the Environment Minister's authority was also proposed. The report also stressed that environmental choices do not necessarily run

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63 Oberdorff, 1995, p.33.

64 In the person of the *Garde des Sceaux: Le Monde* 17-18 December 1989, p.9; Romi, Raphaël, "Le droit public de l'environnement: vers la maturité?" 106 (1990) RDP 1121, at p.1122 (Romi, RDP 1990).

65 Three reports helped to shape the debate in the *Assemblée Nationale*, and subsequently the direction of reform: realistic if somewhat timid, the Rapport Lorit (sur la modernisation de l'administration territoriale de l'environnement, December 1989) stressed the need for increased number of agents in the field (pointing out that, for instance, the number of DRIR inspecting classified installations was so few that they were forced to unload a portion of their tasks onto other services, further fragmenting administration); (see Romi, RDP 1990 p.1127). The Rapport Barnier (sur la politique de l'environnement AN no.1227, 11 April 1990) demanded a doubling of the environmental budget and a regrouping of services with competence in environmental matters under a new, larger Ministry of the Environment. Between these two reports fell the National Plan for the environment or the *"Plan Vert"* -- the most influential of the three.

66 L. Chabason, J. Theys, *Plan National pour l'Environnement*, June 1990, Secrétariat d'Etat auprès du Premier Ministre chargé de l'environnement et de la Prévention des risques technologiques et naturels majeurs.

counter to economic objectives and notes that the former are obligatory in any case because of France's membership in the European Community[67].

A new seriousness about environmental issues and an increase in apparent political importance followed from the debate and the reform took several shapes. To begin, the environment's budget was raised from 857 million francs in 1990 to 1270 million in 1991 -- yet still remained only 0.09% of the State budget[68]. The environment budget 1995 showed an increase of 6.7% on the previous year, and an addition of 2351 agents for the Environment Ministry.

1.3.1. Modification of existing agencies:

- *DIREN:* Most notably, and as recommended in the debated reports, many of the environmental attributions dispersed amongst various ministries were regrouped into one external service under the authority of the Ministry of Environment: 25 Regional environment directorates (DIREN)[69] were created in 1991. A reversal of fortune, these are now at the disposition of the other concerned ministries[70]. Political tensions were, obviously, not erased with this move[71].

- *DRIRE:* The Regional Directorates of Industry and Research (DRIR) continue to exercise many environmental attributions for other ministries. (However, the inspection of classified installations was later transferred from the Ministry of Industry to the Ministry of the Environment[72]). The structure of the DRIR, however, has been modified to emphasise the environmental aspects of their role as well as an element of co-management of the DRIR

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67 Romi, RDP 1991, p.1089-91; see also Romi, RDP 1990 p.1123, note 3.

68 "L'Environnement est victime du verdissement artificiel des députés" *Le Monde* 26 October 1990, p.10. Romi, RDP 1991 p.1096.

69 *Directions Régionales de l'Environnement,* Decree 91-343, 9 April 1991.

70 Ministries of Agriculture (water competences), Public Works (architecture, urbanism, protection of sites and landscapes), Transport (navigable routes) and Culture (protection of historical monuments). For descriptions of their duties, see Romi, RDP 1992, p.1777; Billaudot, 1991, pp.341-43.

71 The relationship of the DIREN with department level bodies is not always well-defined, progress is not always smooth; Billaudot, 1991 p.343.

72 Decree 92-434 of 12 May 1992. See Deruy, Laurent, "France," in *Environmental Liabilities and Regulation in Europe,* edited by Mark Brealey, International Business Publishing Limited, The Hague, 1993, p.160.

between the ministries of Industry and Environment. Re-baptised the Regional Directorates of Industry, Research and the Environment (DRIRE[73]) they have been put unequivocally at the disposal of the Ministry of Environment. In keeping with Article 130r(2)EC the idea that it is better to have a greener industry than to add only to the Environment Ministry's resources, a "Regional Service of Industrial Environment" unit has been created within each of the DRIRE[74], and the environment representatives are co-appointed by the ministers of Industry and Environment.

1.3.2. New National Agencies: Another object of reform was the inadequate collection of data, on which the formulation of coherent policy and legislation, and effective implementation rely. Three agencies have been established in an effort to co-ordinate at the national level the efforts dispersed throughout France: ADEME, an agency of environment and energy[75]; INERIS, the National Institute of Environment and Risk[76]; and IFEN, the French Environment Institute[77], the latter specifically designed to provide a link with the European

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73 *Directions Régionales de l'Industrie, de la Recherche et de l'Environnement.*

74 Billaudot, 1991 p.344.

75 *Agence de l'environnement et de la maîtrise de l'énergie.* The Agency was created (Loi 90-1130, 19 December 1990) by regrouping three existing institutes: two small ones with a more environmental focus (*Agence Nationale pour la Récupération et l'Elimination des Déchets,* ANRED and *Agence pour la Qualité de l'Air,* AQA); and one large (*Agence Française pour la Maîtrise de l'Energie*).

Environmental priorities have been questioned in the creation of this Agency: the agencies are statutorily equivalent, but ADEME has already been criticised as an absorption of the environment-oriented ANRED and AQA by the industry-oriented AFME ("La Nouvelle Super-Agence de l'Environnement est-elle crédible?" *Libération,* 9 October 1990, p.5). The agency got off to a bad start politically, since even the directors of the agencies involved were unaware of the merger until it was announced; Romi, RDP 1991, p.1094-99; Billaudot, 1991, pp. 346-7; Deruy, 1993, p.172.

76 *Institut National de l'Environnement et des Risques,* created by Decree 90-1089, 7 December 1990. It is composed of two pre-existing scientific bodies (Centre d'Etudes et de Recherches de Charbonnages de France and l'Institute de Recherches Appliquées). Its purpose is to conduct and promote research and experimentation in the limited area of industrial pollution and the prevention of risk to persons and the environment stemming from economic activities; Billaudot, 1991, pp.350-4; Romi, RDP 1991, pp.1094-95).

77 *Institute Français pour l'Environnement* (Decree 18 November 1991), the counterpart of the European Environmental Agency, is designed to collect systematically its own statistical and scientific data concerning natural resources and the environment, or verify the validity of existing data without the involvement of political and commercial interests; Billaudot, 1991, pp.347-349. Perhaps environmental commitment runs deeper here than with the other agencies, for example: although nine ministries are represented in the administrative council, the Environment Minister has the final word; Romi, RDP 1992, pp.1774-76.

Environment Agency. With these agencies, emphasis has been placed both on gathering necessary information and on monitoring and surveillance of the actual environmental situation.

Indeed, although some overlap and consequently some confusion remains, the reform has laid groundwork that should help promote correct implementation and enforcement of Community, and of course national environmental rules.

1.4. Summary:

Government departments in any policy area undergo a certain amount of rearrangement and shuffling as political majorities come and go. However, the juggling to which France's environmental administration was subjected, and its lack of autonomy, exceeded the norm, indicating profound doubts concerning the legitimacy of its mission and wariness of the potential intrusion of environmental preoccupations into other policy areas. For two decades the environmental administration was placed in the untenable situation of having to 'borrow' the personnel of competing ministries in order to carry out its most basic duties. Implementation of environmental rules was compromised as a result.

Although clarity of roles between administrative levels has not been fully achieved, the recent improvements (resources, autonomy and data collection) should improve the efficiency of administrative actors, or at least make viable their role in implementing environmental rules.

2. Problems of Formal Implementation/ Transposition

Against an administrative backdrop that has recently been made more coherent, administrative actors must ensure, first, that texts fulfilling Community obligations exist, whether pre-existing or adopted specifically for that purpose (formal implementation). As with formulation of the original Community legislation, the characteristics and flaws of these national texts influence the results of their practical implementation and judicial enforcement.

2.1. Types of legislation:

An act adopted by the parliament (*loi*) may be examined by the Conseil Constitutionnel[78] prior to its promulgation; afterwards, however, a statute cannot be contested. *Règlements* (regulations[79]), generally[80] adopted by the executive authority[81], are to apply the law in detail, without modifying or contradicting it. A judge may verify the conformity of the regulation with a statute, and censure the illegality of the regulation[82].

Regarding formal implementation of EIA85/337, separate pieces of legislation preceded the European directive and therefore went through the normal national legislative processes. The legislation transposing the obligations of LCP88/609 was adopted after the European directive, by simple ministerial order (*arrêté ministeriel*).

2.2. Formal Implementation -- EIA85/337:

Environmental impact assessment (EIA) touches almost every area of public intervention[83] and forms part of a large planning framework. Several pre-existing legislative texts were notified to the Commission as fulfilling the obligations of EIA85/337. The principal texts

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78 See appendix.

79 Which include, inter alia, *décrets*, issued by the president or Prime Minister, and *arrêtés*, issued by government ministers, prefects and mayors.

80 Although exceptions exist, such as *règlements autonomes;* see Dalloz administratif, 1992, pp.50-51.

81 The president and government, subordinate to parliament.

82 The *loi du 27 August 1948* introduced the idea of a *domaine réservé* for the reglementary power: freedom of the legislator to act in all areas has been limited to the areas of Article 34 of the 1958 Constitution -- those in which Assemblée Nationale fixes the rules and those where it merely determines the fundamental principles. Matters other than those in the domain of the law (ie: included in Art. 34) are considered to possess a reglementary character; in these areas the government has competence unlimited by the legislator; Article 37, Constitution 1958.

However, both the Conseil Constitutionnel and the Conseil d'Etat have lessened this distinction: for the most part therefore, issues which challenge previous rules are reserved for the Assemblée Nationale; issues which put previous rules into operation are for the reglementary power. The environment is not specifically attributed to Parliament, but the Assemblée Nationale is required to consider any act touching the fundamental principles or rights and freedoms of citizens: environmental law falls into this area; see Dalloz administratif, 1992 p.41, pp.50-56; Prieur, Dalloz 1991, p.20.

83 Example: 11 ministers and five Secretaries of State are charged with carrying out the obligations of one of the principal EIA legislative acts, decree 77-1141; the decree entails modifications to, among other things, the *Code de l'Urbanisme, le Code Forestier, le Code de l'Expropriation*, and a variety of existing decrees (Chapter II, articles 8-18.).

include the 1976 Nature Protection Act[84]: Article 1[85] lays down a general interest in the natural environment and the obligation to protect it; EIA is outlined at some length in Article 2 (the rest of the Act concerns protection of nature and animals). EIA Decree 77-1141[86] was adopted to elaborate the procedure in Article 2 of the Nature Protection Act. Additionally France has a specific regime for certain undertakings classified for the protection of the environment: these are subject both to the Nature Protection Act and EIA Decree 77-1141 and to the 1976 Classified Installations Act[87] and its regulation[88] (Classified Installations Decree). The classified installations regime is generally more rigorous than the provisions of EIA85/337[89]. (Large combustion plants fall into the classified installations legal framework[90].) Public consultation procedures are contained in the 1983 Public Inquiries Act[91]

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84 Loi 76-629, du 10 juillet 1976 relative à la protection de la nature.

85 Loi 76-629, Article 1: "Protection of natural spaces and countryside, preservation of flora and fauna, maintenance of biological equilibirum in which these participate and the protection of natural resources against all the causes of degradation that menace these are of general interest.

It is the duty of each to watch over the the protection of the natural heritage in which he lives. Public or private activities of planning, infrastructure and production must conform to the same requirements...".

86 *Décret 77-1141 du 12 octobre 1977.*

87 *Loi 76-663, du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement*, modified by loi 76-1285, 31 December 1976; loi 85-661 of 3 July 1985, loi 86-2 of 3 January 1986, loi 86-1317 of 30 December 1986.

88 *Décret 77-1133 du 21 septembre 1977.*

89 For instance, once exploitation stops, the clean-up of the site of a classified installation requires that the prefect be notified and the site be restored to such a state that none of the dangers requiring the original authorisation or declaration are present (Decree 77-1133, Article 34), going beyond the EIA85/337. A statute passed in 1992 (Loi 92-646, 13 July 1992) has amended the Classified Installations Act (Article 8.1): an individual selling land that may be contaminated must provide the purchaser with a document registering the condition of the soil and notifying of any major risks or adverse effects.

90 Other decrees regarding classified installations also exist, as for example decree 79-1108 of 20 December 1979 on quarries: its article 10 requires more specifications than in the usual impact study; this is very specific and will not be used to illustrate problems in this research.

Another legal act covers projects concerning both national defense and private or public companies: *loi d'instruction mixte* 29.11.52 and its decree of application no. 55-1964 of 4 August 1955, modified by 78-1045 of 18 October 1978 and 83-997 of 17 November 1983; since decree 77-1141 many of these are submitted to EIA and the environment minister or DIREN are necessarily involved on an advisory basis; Prieur, Dalloz 1991, pp.206-207; Com(93)28, pp.75-75, p.80.

91 Loi 83-630, 12 juillet 1983 relative à la démocratisation des enquêtes publiques et à la protection de l'environnement.

and its principal regulation (Public Inquiries Decree[92]). Finally, problems of the EIA system set up by these rules, particularly regarding compliance w been addressed by Decree 93-245 of 25 February 1993 (EIA

To maintain coherence with the other chapters, t elements of the Community obligations, despite the fact influenced) EIA85/337. The Commission's views on the f response are then examined.

Fragmentation: From the Community point of view obligations are dispersed across three principal ac Identifying which portions of the national provisions other issues of nature protection, for instance) and then, which Community obligation each relevant provision is meant to cover is not always easy, as mentioned above[94].

2.2.1. Projects Covered[95]:

The European legislation requires that projects likely to have significant effects on the environment be subjected to assessment, either systematically (Annex I EIA85/337) or where Member States consider necessary (Annex II, EIA85/337).

EIA Decree 77-1141 provides a list of public and private projects to be exempted from EIA; if not on the list, it is to be assumed that an EIA is required[96]. The subsequent Classified Installations legislation widens the scope of projects subjected to EIA. Projects can fall in either of two categories: those requiring an authorisation and those, less risky, requiring a mere

92 Décret 85-453 du 23 avril 1985.
93 Décret 93-245 du 25 février relatif aux études d'impact.
94 Chapter 2, point 1.1.
95 The French provisions covering this are EIA Decree 77-1141, Article 3 (exempting, with exceptions projects listed in annexes I and II); annexe III (projects always subject to EIA); article 4, annexe IV on environmental impact *notice;* Classified Installations Act, Article 1; Classified Installations Decree, Article 1; Public Inquiry Act, Article 1; Public Inquiry Decree, Articles 1 and 2).
96 Article 3B, Referring to Annexes 1 and 2, (unless the project in question costs less than six million francs; Article 3C).

declaration[97]. Installations presenting grave dangers or inconveniences to the interests of public health, security, or sanitation; of agriculture; nature and environmental protection; or the conservation of sites and monuments must apply for prefectoral authorisation[98]. This can be accorded only if the dangers or inconveniences can be prevented through measures specified in the *arrêté préfectoral*[99]; any request for an authorisation must include *inter alia* the environmental impact study (EIS, one element of the EIA procedure) required by Nature Protection Act, Article 2[100]. Under the classified installations regime the authorisation or declaration must be renewed in the event either of a transfer, extension or transformation of the installation, or of a change in fabrication processes[101]; this is stricter than in the EC legislation[102]. The public inquiry statute and regulations further broaden the application of the earlier legislation, subjecting projects to public inquiry that avoided it before[103]. Therefore the projects of EIA85/337 are generally[104] covered in the national rules.

Financial thresholds: EIA Decree 77-1141 establishes a system of exemptions from EIA based on financial thresholds[105]. The French statute, however, required that projects that "by

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97 Installations presenting lesser risks, instead of the authorisation procedure, must be declared and must respect the general prescriptions protecting the interests listed in Article 1; additionally, the prefect may impose specific prescriptions at the request of a third party (Loi 76-663, Article 11).

98 Articles 1 and 3, loi 76-663.

99 Loi 76-663, article 3; further prescriptions can be included in complementary *arrêtés préfectoraux* on a proposal from the inspection of classed installations and after an opinion of the Departmental Council of Hygiene (Decree no. 77-1133, Article 18).

100 Loi 76-663, Article 3.4.

101 Loi 76-663, Article 4.

102 In EIA85/337, modifications to Annex I projects figure in Annex II, and are thus subjected to EIA "where Member States consider that their characteristics so require."

103 For example, construction permits, camping and caravan sties, railroad works...; Hostiou, René, "Démocratisation des enquêtes publiques et protection de l'environnement, analyse des décrets du 23 April 1985," 1986 RJE 5 at p.6; ROMI, *Droit et Administration*, 1994, p.63.

104 See below, exemptions for constructions in communes with certain land planning documents (POS and ZAC).

Also discrepancies appear to exist between the annexes of the French legislation regarding projects allowed to dispense with an EIS, and Annexes I and II of the EEC directive yet in fact, the only projects allowed to dispense with EIS in the French legislation are the classified installations requiring only a declaration rather than authorisation; Com(93)28, p.68.

105 Annexes I and II of the decree (not to be confused with the European directive's annexes), applied separately, exempt certain projects under specified conditions. Article 3C

their dimensions or their effect on nature may harm the latter"[106] be subjected to an impact study, foreseeing that a very small project with extremely harmful consequences could be included. More in keeping with the directive's concept of "projects likely to have significant effects," it mentioned the need to develop criteria, but never spoke of a financial threshold. Prieur[107] has argued, convincingly, that the appreciation of weak repercussions on the environment can in no way be based upon financial criteria[108], which apparently do not meet the European requirement that assessment be undertaken where projects could have "significant effects"[109] and yet the European legislation itself seemingly endorses the use of such thresholds[110]. EIA legislation is necessarily somewhat illogical by putting the conclusion (weak repercussions) before the test (EIS); however such criteria respond principally to a bureaucratic need to limit the number of studies undertaken. This need is real[111], yet more consideration of actual effects, particularly on fragile areas, could have been envisaged in developing criteria for weeding out projects.

At the least, the French legislation attempts to address a problem of practical implementation that had emerged in the first years of application of EIA procedures. By

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provides that projects costing less than six million francs are not subjected to study (unless listed in Annex III -- projects that must always have an impact study, regardless of cost).

The Public Inquiries rules use the same technique. Public Inquiry Act (Article 1) leaves to the decree the elaboration of technical thresholds and criteria, adding that special criteria can be added to take account of sensitive areas; once again the regulatory power's interpretation of this is disappointing. It was content to borrow the thresholds approach of the EIA Decree 77-1141 and use straightforward financial criteria. The special consideration given to fragile areas "figures in the annex only in homeopathic doses" (Hostiou, RJE 1986, p.7), and consists merely of lowering the financial thresholds from twelve million francs to six million in fragile areas. (Notably, the financial thresholds of the EIA and Public Inquiries regimes fail to accord between them.)

106 *"...par l'importance de leurs dimensions ou leurs incidences sur le milieu naturel, peuvent porter atteinte à ce dernier..."*

107 Prieur, Dalloz 1991, pp. 70-73. Most environmental associations would also like to see thresholds more closely linked (as indeed they are in other legislative acts) with the receptor environment; see Com(93)28, p.90.

108 And even within the purely national context, the manner in which the decree elaborates this is contrary to both the logic and the spirit of the French Act.

109 EIA85/337, Article 2(1).

110 Chapter 1, point 2.5.1.

111 Some 5000-6000 EIAs are carried out in France annually. Obviously implementation is not advanced if the administration is too overwhelmed with studies to effectively control them.

insisting that the financial threshold to be considered is that of the entire project, the legislation attempts to forestall the artificial division of projects into smaller units[112] (*saucissonnage*[113]) that would then fall under the threshold and escape the necessity of an EIA[114] or public inquiry.

Specific projects exempted: More problematic is the compatibility of exempting constructions that require authorisation in *communes* equipped with certain land planning documents[115]. In theory, French urbanism legislation requires the planning documents to 'respect environmental preoccupations'[116]. However, some planning documents were not themselves subjected to environmental requirements until this decree was passed, yet the extent of the exemption refers to "all projects", including those that were adopted *prior* to the requirement to respect environmental preoccupations[117]. Also, from the Community perspective, a further problem arose in that the "respect" for environmental preoccupations required by these land-planning frameworks did not always amount to an EIA[118].

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112 Decree 85-453, article 1.II.: "If the realisation of a single operation is fragmented, the evaluation of the thresholds and criteria mentioned in this table takes account of the entire project."

113 "Making sausage links," Commissaire du gouvernement Jean-Louis Rey, T.A. Pau, 2 December 1992, *Association France-Nature-Environnement et autres*, RFDA, 9 (2) March-April 1993, p. 277, at p. 280; see Chapter 6, point 2.6.

114 See also Decree 77/1141, Article 3C.

115 *Plan d'occupation des sols* (POS: the principal land-use planning document), or a *zone d'aménagement concerné* (ZAC: zone of concentrated construction), as well as allotments in communes with an approved POS.

116 Loi 76-629, Article 2: "...urbanism documents must respect environmental preoccupations". Decree 77-1141, Article 1 adds that "...Environmental preoccupations are taken into account by the urbanism documents within the framework of procedures relevant to them."

Several articles in the *Code de l'Urbanisme* require some element of environmental concern: Article L.121-10; Article R.311-10-2; Article R.123-7; see also (regarding the POS) CE 4 March 1983, *Association S.O.S. Paris*, Leb p.94.

117 Décret 77-1141, Annex II points 1 and 5; see CE 30 January 1985 *Association 'les Amis de la terre'* AJDA 1985, p.238, note J.C. at p.239. See also comments Prieur, Dalloz 1991, p.72.

Furthermore, only after the public inquiry statute of 1983 were any such documents subjected to public inquiry (although still well before the entry into force of the European directive).

118 Com(93)28, p.65.

For instance the POS is required to provide an analysis, with regard to the sensitivity of the area, of the initial site and its environment and the effects on these of the POS and the

2.2.2. Environmental Impact Study [119]:

EIS contents: As foreseen at Community level[120], a significant problem concerning the EIS is that the project developer or applicant prepares it[121], at times sabotaging the idea of carrying out the EIA at all. Still, this is in conformity with the European legislation and cannot therefore be regarded as a problem of formal implementation; in this instance, the seeds of ineffectiveness were in the European legislation itself.

Reviewing formal implementation, the Commission later found that the French legislation did not comply with EIA85/337 with regard to specific elements of the EIS contents. The French texts failed to include the non-technical summary, notification of potentially affected Member States, indication of difficulties encountered by the developer, indirect effects of the project, and effects on cultural heritage. The absence of the non-technical summary is particularly serious in that it impedes the exercise of the procedural right to participate that the European legislation extends to individuals.

2.2.3. Public consultation[122]:

The underlying problem of public consultation is that the purpose of the provisions conflicts with a general (rather than simply where environmental issues are concerned) tradition of

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measures of conservation and *mise en valeur* taken (Article R.123-17 Code de l'urbanisme). Technically this does not cover all the contents required of an impact study.

119 The French provisions related to this are: Nature Protection Act, Article 2; EIA Decree 77-1141, Articles 1,2, and 4; Classified Installations decree, Article 3.4.

120 See Chapter 1, point 2.5.1. at - *Environmental Impact Study (Article 5.2 EIA85/337).*

121 Decree 77-1141, Article 1.

Not surprisingly, complaints have been made about the quality of the studies carried out; Com(93)28, p.89-90, p.94: "An increasingly widespread view is that the limitations and difficulties of implementing EIA as it stands derive from the status of the EIS and from the fact that the developer is responsible for undertaking it."

Regarding France, the European Commission points out that "[s]ome developers, thanks to the new generation of young and 'greener' engineers and to the influence of dedicated 'greens', produce more accurate and more detailed information" and that the quality of the study was higher; Com(93)28, p.86.

It seems unreasonable, however, to gamble the EIS quality on the uncertainty of a "green" developer.

122 The French provisions concerned are: EIA Decree 77-1141, Article 5 and 6; Classified Installations Act, Article 5, Classified Installations Decree, Articles 5,6,6bis, and 7; and the Public Inquiries Act and Decree.

administrative secrecy[123]. The consequent reluctance to define a truly participative procedure is evident in many aspects of its formulation[124]. The Public Inquiries Act and its regulation modified earlier provisions and constitute the basic French legislation covering the public participation elements of EIA85/337[125]; they stipulate that inquiries, where required, must inform the public and take note of its observations and suggestions.

On the positive side, the drafter did attempt to make the public inquiry procedure more meaningful, to foresee and forestall potential conflicts of interests and loopholes: the commissioners leading the inquiries (*commissaire enquêteurs*)[126] are paid by the state[127] and cannot have an interest in the completion of the project[128]. An effort was also made to improve the coherence of public consultation, for where under earlier legislation a variety of inquiries and studies could be required for a very large single project[129], Public Inquiries Decree provides two procedures for regrouping the inquiries[130]. This may make the procedure less likely to wear

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123 Bouchardeau, Huguette, *Rapport à Monsieur Michel Barnier, Ministre de l'Environnement*, December 1993, p.5.

124 This was obvious in the early legislation: in certain cases, the EIS was made public *after* the administrative decision concerning the project was taken -- once the danger of the public's active involvement had passed.

An extreme example of this official reluctance regards nuclear policy. Prieur notes that, although France began working with nuclear power in 1956, the French public has had to wait until 1991 for the intervention of Parliament, the expression of the people's will, for a law on nuclear energy; Prieur, Michel, "Les Déchets radioactifs, une loi de circonstance pour un problème de société," RJE 1992, pp.19-47. This takes on renewed significance in light of Chirac's 1995 decision to resume nuclear testing in the Pacific -- a decision on which, it appears, no one was consulted.

125 The Public Inquiry Act is accompanied by a variety of decrees in different fields, however, decree 85-453, containing the common provisions, modifications to the forest, rural, expropriation, civil aviation codes and regulations including that of classified installations, is most relevant to this research.

126 And members of inquiry commissions (*commission d'enquête*).

127 Loi 83-630, article 8; Decree 85-453, article 10.

128 Decree 85-453, article 9.

Cf: T.A. Dijon 26 July 1994 *M. André Morin*, req. no.923995; in which the deliberations of a Departmental Commission were annulled because of it irregular composition; namely the Commissioner of the inquiry's impartiality and independence were contested.

129 Usually projects where no hope exists of passing beneath the threshold and avoiding EIA altogether.

Given the simultaneous application of both the Nature Protection and Classified Installations Acts, several impact assessments could be required by the various provisions applicable, rather than one global procedure. For instance, a nuclear power station may require ten impact studies.

130 Decree 85-453, Article 4.I and II.

out public interest than a succession of inquiries (sig
inquiry procedure less painful for the developer[131]).

The black letter has been respected with regard
whether this Member State used the most appropriate
obligations.

Non-technical summary: As noted above, the absen
violation of Community provisions. This summary is
meaningful to the layman; without it, the public is effectively distanced from the procedure. The issue was addressed only in 1993 (below).

Consultation period: In indecisive terms, it is stipulated that public access to the EIS be taken into account: "the opening hours are fixed in such a way as to allow the largest part of the population to participate, taking account of normal working hours."[132] However "it *may* furthermore include several half-days chosen among Saturdays, Sundays and holidays"[133]: if administrative reluctance combines with respect for days of rest, the working public will almost certainly have difficulty consulting the EIS.

The duration of the inquiry likewise responds to a restrictive logic. The Classified Installations decree[134] adopts the minimum requirement imposed by the statute: Article 3 of the statute requires that the inquiry last not less than one month, not more than two months[135]. The Public Inquiries Decree, Article 40, provides that for classified installations the length of the procedure is one month[136]. Illogically, the more likely the installation is to cause harm (the reason for its classification), the shorter the time of public consultation.

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131 With regrouping possible, dissimulation of the real interests and stakes behind a project may also become easier; Hostiou, RJE 1986, p.8.
132 Decree 85/453, Article 14.
133 Decree 85-453, Article 14 (emphasis added).
134 Article 40 Decree 85-453 modifying article 5 of Classified Installations Decree 77-1133.
135 Unless extended by the commissioner for fifteen days.
136 Unless prolonged by the commissioner.

Filtering the public's opinion: During the inquiry, much more depends on the inquiry commissioner[137] than upon the public. The commissioner is given a large margin of discretion: he can extend the period of the inquiry[138], he is consulted on the days and hours that the public is able to consult the inquiry file[139], he decides whether to hold a public meeting[140], he includes in the file for public consultation only those documents that he "esteems useful to the public"[141]. Although the public's propositions must be noted in a final report, when deciding the authorisation the Administration considers the *commissioner's* conclusions rather than the public's[142]. With so much dependent upon him it is commendable that care has been taken to prohibit his personal interest in the project. But in fact, he need not be personally interested to strip the procedure of substance; he need only be uninspired. Furthermore, since he wields considerable power in the award of an injunction[143], the commissioner's attitude here affects both practical implementation and judicial enforcement of EIA provisions.

Leniènce: The provisions lack stringency concerning the inquiry commissioner's on-site investigations, again in a manner favourable to the developer. The Public Inquiry rules provide that, should the proprietor or occupant oppose the visit, or if the administration has not been able to contact them, the commissioner merely notes this in the inquiry file. Likewise, if the developer refuses to communicate a document "his reasoned response is included in the file."[144] Apparently nothing else occurs, even in the case of classified installations[145]. Certainly, the formulation of these provisions could have been more compliance-inspiring; as provided here,

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137 In order to simplify, subsequently 'commissioner' is used to designate either the *commissaire enquêteur* or the *commission d'enquête.*

138 Decree 85-453, Article 11.1.

139 Decree 85-453, Article 11.2.

140 Decree 85-453, Article 18.

141 Loi 83-630 article 4: "*juge utiles à la bonne information du public.*"

142 Loi 83-630 article 4.

143 Loi 83-630, Article 6: In eventual proceedings, if he has drawn unfavourable conclusions on a project at the inquiry stage, and if one of the arguments advanced seems serious and of such a nature as to warrant the annulment of the decision, then administrative courts seized with a request for interim measures must 'automatically' grant it.

144 "*...sa response motivée est versée au dossier de l'enquête*" Loi 83-630, article 4; also Decree 85-453 article 17.

145 Article 42 Decree adding Article 6 bis to Decree 77-1133.

one cannot see what concrete *dis*incentive the developer encounters in refusing to co-operate. By contrast, the Classified Installations Act states firmly that classified installations inspectors (as opposed to public inquiry commissioners) can visit, at all times, the installations under their surveillance[146], backing this with criminal sanctions[147]. The French regulatory power is more forceful on issues of actual health and safety (access by inspectors) than it is on public participation in the decision-making process (access by inquiry commissions).

Validity of public consultation: It is extremely unfortunate that the inquiry is valid for five years[148]. Prior to the inquiry's expiration, if the project has not yet been commenced, the inquiry's validity may be extended for another five years[149]. Although not strictly in breach of the Community legislation, rules such as this erode its effectiveness: even if the project has not changed during these five or ten years, the public's attitude, the state of scientific and technical information or the environment itself may have significantly evolved.

In sum, aside from the absence of the non-technical summary, technically the public participation obligation of EIA85/337 is fulfilled. However, wherever possible the public's intervention is diminished. Reluctance to involve the public in decision-making has serious implications for implementation of legislation such as EIA and generally, for putting into practice the notion of shared responsibility put forth in the European Commission's Fifth EAP.

2.2.4. Administrative consideration of EIS and results of public consultation prior to granting permission or authorisation :

EIA85/337's obligation that "[i]nformation gathered pursuant to Articles 5, 6, and 7 must be taken into consideration in the development consent procedure," was explicitly included only in the classified installations legislation. However, the implicit purpose of the other legal

146 Loi 76-663, Article 13.
147 Loi 76-663, Article 21.
148 Bouchardeau, p.21; ROMI, *Droit et Administration*, 1994, p.68.
149 Loi 83-630, article 7. The decree simply adds that the competent authority for extending the validity of the inquiry is the one competent for taking the decision for which the inquiry is organised (article 5).

provisions is to do exactly that. It appears difficult to challenge an administrative decision where the EIS and public inquiry have been duly carried out, since neither the national nor Community provisions require that environmental concerns be given precedence over other priorities during the 'administrative consideration'[150].

A potentially important aspect of administrative consideration, EIA Decree 77-1141 enables the minister in charge of the environment to give an opinion on an EIS either of his own initiative or at the initiative of another[151]. However, clearly care was taken not to give the minister in charge of the environment the power to obstruct a project. Neither a specific deadline for the opinion nor the value of the opinion in the authorisation process is mentioned. The potential was further undermined by the Conseil d'Etat's ruling that the opinion had no legal value[152]. Since Community legislation only requires that environment authorities be "given an opportunity to express an opinion" without specifying its weight or when it shall intervene, such an interpretation may be inappropriate but is not in clear violation of EIA85/337.

Usually the authority competent for granting authorisation is the prefect, and therefore the quality of the consideration given environmental concerns varies according to the prefect's 'green' sensibilities[153]. In certain cases[154] the quality of the environmental consideration is likely to be influenced by the fact that the competent authority is the authority interested in advancing the project[155], a clear disadvantage for the usefulness of the procedure[156], yet again

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150 The directive does not give a precise definition of this, stating simply (Article 8) that "Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure."

151 EIA Decree 77-1141, Article 7: "The minister in charge of environment can be seized of his own initiative or at the request of any natural or legal person regarding impact studies. In this eent, he shall give his opinion to the minister among whose attributions figures the authorisation, the approval, or the execution of the foreseen works or land planning."

152 Above, point 1.2.1. *Legitimacy*.

153 Should the risks concern several *départements*, authorisation is granted by the minister in charge of Classified Installations, after an opinion from the Superior Council of Classified Installations; Loi 76-663, Article 5.

154 E.g. the case of oil industry establishments (Decree 77-1133, Article 14), and of installations dependant upon the services and organs of the State (Loi 76-663, Article 27).

155 As seen below, in Spain this is the rule rather than the exception.

156 Prieur, Dalloz 1991, p.416; ROMI, *Droit et Administration*, 1994, p.350.

the Community directive is silent on such matters. Initial authorisations aside, the legislation lays a similar trap concerning the monitoring of the conditions imposed in the authorisation[157]. Yet since the Community rules impose no monitoring obligations, this problem is not relevant to formal implementation.

2.2.5. Other EIA requirements:

Other requirements fulfilled by the national legislation include the public's notification of the decision (EIA85/337 Article 9; EIA Decree 77-1141, Article 6); and safeguarding industrial and commercial secrecy (EIA85/337 Article 10; Classified Installations Act, Article 2.4). As mentioned the pre-existing French legal norms did not fulfil the obligations of EIA85/337 regarding notification of other Member States (EIA85/337 Article 7).

The Ninth Application Report indicates that France was sent an Article 169 letter for incorrect transposition of EIA85/337[158].

2.2.6. Underlying causes and general problems of transposition:

Besides problems arising from the specific obligations to be transposed, other difficulties have arisen, some of which explain the particular shortcomings of the legislation noted above. Most of these are reflections of political ranking of interests, the most pervasive and inevitable problem.

Decree 80-813 of 15 October 1980 *relatif aux installations classées pour la protection de l'environnement relevant du ministre de la défense ou soumises à des règles de protection du secret de la défense nationale:* Article 1 requires that the Minister of Defense exercise the powers usually attributed to the prefect.

However, as most of these projects concern national defense it is difficult to see how the government could proceed otherwise.

157 The inspectors of classified installations are engineers or technicians designated by the prefect on the proposal of the head of the interdepartmental service of industry and mines or, where an agricultural establishment is concerned, on the proposal of the departmental director of agriculture (Article 33, Decree 77-1133). Some expertise is necessary to understand the establishment being inspected, but the departments that propose the inspectors are closely linked to the establishment in question and the inspector may not be genuinely critical of projects' effects on the environment.

158 OJ 1992 C250/154. The action was subsequently dropped.

Hierarchy of political priorities: As in the European Council, a variety of interests must be balanced and frequently environmental interests lose in the exchange. As the Fifth EAP[159] notes, it would require a revolution in thinking on the part of society as a whole to integrate environmental protection in the decision-making processes of other disciplines and prevent this type of occurrence. Nonetheless, despite the occasional clash of interests[160], Parliament's ranking of priorities was not problematic during the adoption of EIA provisions. In fact, at least in the area of EIA, parliamentary debate added to the force of the Act[161].

However, the ranking of priorities emerges elsewhere, such as in the government's unnecessary delay in adopting regulations, differences between the Act and the regulation. A directive that is not capable of direct effect cannot be relied upon in the national courts until it has been transposed. Similarly, delays in the elaboration of a national regulation often mean that the statute, during this time, remains in limbo, unapplied. The administration has considerable discretion concerning the moment at which to issue the decree, unfettered by a precise deadline[162] (the mechanism used in Community directives). Therefore it is indicative

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159 OJ 1993 C138/17 point 35, C138/22, C138/95.

160 For instance the final version, despite discussion in the Assemblée Nationale, did not burden the developer with the need to present alternatives to the original project (Prieur, Dalloz 1991, p.76). The same issue was later included in the proposal for Directive EIA85/337 (OJ 1980 C169/14 at p.16, Article 6(1) sixth indent, debated in the European Council, but failed to make it into the final version there as well. The effect of the same pressures is evident.

161 The government's original project of the Nature Protection Act did not expressly refer to EIS at all; it required simply that public works and planning projects 'respect environmental preoccupations'. During the debate in the Assemblée Nationale a much more detailed text requiring EIS for private as well as public projects was adopted. Several years later one of the more biting elements of the Public Inquiries Act was similarly defended by the Assemblée Nationale, regarding the 'automatic' injunction in Article 6; see Pacteau, Bernard, Note: CE 30 April 1990 *Association Lindenkuppel, M. Meier et Mme Brunner*, LPA 20 February 1991, at p.10; Prieur, Dalloz 1991, p.61.

162 Most authors agree that the administration has the discretion to choose which moment to publish the decree (although it must also exercise diligence, an absence of which will be sanctioned. See Jean-Marie Breton, "L'obligation pour l'administration d'exercer son pouvoir réglementaire d'exécution des lois," 1993 RDP 1749-73 at, p.1755: *L'administration qui n'est pas totalement maîtresse de l'exercice de son pouvoir réglementaire, conserverait toutefois en principe le droit de déterminer le moment où doivent intervenir les mesures d'application de la loi."* See also Hanicotte, R, "Le Juge face aux retards des textes d'application," 1986 RDP 1667 at p.1668, p.1670.

of underlying priorities that regulatory delays are especially common with environmental rules[163] (and affected all three EIA-related regulations[164]).

Most revealing, however, is the delay in the adoption of the Nature Protection Act's decree and the practical consequences of this; voted in July 1976, the applying regulation was not elaborated until fifteen months later and entered into force only three months after that. The *Assemblée Nationale* had tried to forestall the situation in which the EIA procedure would remain unapplied by making Article 2 (elaborating the EIA procedure)[165] sufficiently precise

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163 The Loi Littoral (Coastal Act), 86-2 was voted on 3 January 1986; the decree (of 20 September 1989, modifying article L.146-6 Code de l'Urbanisme) became applicable only three years later. During the gap the T.A. Nice, going against the conclusions of its *commissaire du gouvernment*, decided that in the absence of a published decree, the provision could not be applied (T.A. Nice, 7 April 1988, RJE April 1988, pp.485-86). (And Romi comments that, once adopted, the provision looked suspiciously like the one elaborated by the *Assemblée Nationale*; Romi, RDP 1990 p.1131).

More extreme, the criminal prosecutions foreseen in a statute on waste emissions into waters, passed on 16 December 1964, could not be applied until its *arrêté* was adopted -- nineteen years later, on 7 July 1983 (Prieur, Dalloz 1991, p.714).

164 The Classified Installations Decree was somewhat delayed: elaboration of the decree took more than a year (19 July 1976 to 21 September 1977). Application of the Public Inquiry Act was also hampered; the principal decree trailed it by almost two years (From 12 July 1983 to 23 April 1985) and entered into force only on 1 October 1985 (Decree 85-453, art.43 I), later than the usual entry into force three months after publication.

Although a law on access to administrative documents existed at this time, it did not provide a mechanism for public participation: Loi 78-753, 17 July 1978 sur la liberté d'accès aux documents administratifs.

165 Loi 76-629, Article 2: "Works and planning projects undertaken by a public collectivity or that need an authorisation or a decision of approval as well as urbanism documents must repect environmental concerns.

The studies preliminary to the realisation of planning works or projects that, by the size of their dimensions of the impact on the natural milieu, can harm the latter, must include an impact study that permits the appreciation of the consequences.

A decree of the Conseil d'Etat shall determine the modalities of application of the present article.

It shall note:

On one hand, the conditions under which environmental concerns are tkane into account in the existing regulatory procedures.

On the other, the content of the impact study which shall include, at minimum, an analysis of the initial state of the site and its surroundings, a study of the modifications that the project would engender there and the measures envisaged to eliminate, reduce and if possible, compensate the consequences that are harmful to the environment.

The conditions under which the impact study shall be made public.

An exhaustive list of projects which, by reason of their weak repercussions on the environment, are not subjected to the procedure of impact study.

It shall also determine the conditions under which the Minister in charge of the environment can give his opinion or be called upon to give his opinion on any impact study.

to be directly applicable, both in the opinion of many legal commentators and in light of the general acceptance of the principle of immediate application of laws[166]. Contrary to expectation, it was decided that the statute was not immediately applicable[167]. During the interim, described as "providential" for developers[168] because of the nature of the projects, the Conseil d'Etat accepted as lawful without EIS contested projects[169], among which were three nuclear stations[170], four superhighways, one very high tension corridor, and one quarry. Indeed, it is difficult to perceive such delays as *other* than deferential to other interests[171]. Such lapses contrast sharply with the rapidity with which a rule can be adopted that circumvents protective measures and caters to better defined and more powerful interests[172].

At times political priorities manifest themselves in subtle but meaningful differences between the statute and its applying regulation. National legislation cannot modify the goals

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If a challenge commenced before an administrative jurisdiction against an authorisation or a decision of approval of a project caught by the first indent of this article is based on the absence of an impact study, the jurisdiction seized must accord the interlocutory injunction against the attacked decision as soon as this absence is noted through an urgent procedure."

166 Hanicotte, 1986 RDP 1667 at pp.1672-73; CE 14 March 1980, *Ministère de l'Agriculture*, Rec. p.145.

167 CE 18 May 1977, *Association pour la sauvegarde et l'avenir de la vallée de la Dordogne* Rec. T p.899 or RJE no.4-1977 p.325, p.387; see Prieur, Dalloz 1991, p.61. A variety of other environmental cases exist where the Conseil d'Etat refused to apply the law in the absence of the decree; see Caballero, p.37 note 259.

168 Caballero, p.38; Prieur, Dalloz 1991, pp.60-62.

169 Cited in Caballero, p.38, note 263:

Highways: CE 4 February 1981 *Commune de Nozay;* CE 24 July 1981 *Fédération départementale des syndicats d'exploitants agricoles des Vosges;* CE 9 June 1982 *Comité de Défense de la Basse Vallée de l'Adour;* CE 13 October 1982 *Chiquot et Comité Stop à l'A10.*

High tension line: CE 4 August 1982 *Bagard;*

Quarry: CE 1 July 1982 *Société Carrière Chalumeau;*

Others: CE 23 March 1979 *Canu et Comité intercommunal contre l'implantation d'un aérodrome à Boos;* CE 24 July 1981 *Association pour la défense des intérêts du Sud.*

170 Creys-Malville; of Graveline and Flammanville, respectively, Deecrees of 2 and 12 May 1977; 24 October 1977, and 22 December 1977; Prieur, Dalloz 1991, p.61; ROMI, *Droit et Administration*, 1994, p.50, note 80.

171 In fact Conseil d'Etat rulings tended to excuse the administration for its tardiness; Hanicotte, pp.1668-70; examples of cases in which the CE excused the Ministry in charge of environment for its slowness in preparing the decree include: CE 13 October 1978 *FFSPN*, Rec. T. p.693; CE 26 January 1979 *FFSPN*, Lexis; CE 9 October 1981 *Comité de Liaison des associations de défense opposées au TGV*, Lexis; see p.37.

172 Romi cites in particular the speed with which the *arrêtés* applying legislative exceptions legalising traditional hunting were adopted and published; Romi, RDP 1990 p.1138.

of Community directives. Likewise, it is unlawful for the national decree to modify the goals of the statute. Yet while the European Commission systematically examines that notified legislation is complete and correct, in France it is up to individuals and associations to challenge a decree that deviates from the goals set by the statute. EIA Decree 77-1141 (nicknamed *"un décret d'inapplication"*[173]) was challenged by a well-respected environmental organisation, Friends of the Earth (*les Amis de la Terre*), before the Conseil d'Etat[174]. It was argued, *inter alia*[175], that the imposition of purely financial thresholds for exempting projects misconstrued the intention of the law, which was to subject harmful -- and not just harmful and expensive -- projects to impact study. As noted, this is relevant to the European directive's requirement that projects likely to have "significant effects" be subject to the EIA procedure. By ruling the regulation lawful in its entirety, the Conseil d'Etat preserved the decree's shortcomings.

Admittedly, these are purely national problems since they occurred before EIA85/337 was adopted; however, they give insight into governmental priorities that have continued after the European directive entered into force.

Ambiguity: More technically, ambiguity can present problems in any legislative text. Ambiguous provisions, perhaps unwittingly, leave other interests room for manoeuvre and litigation may arise that might otherwise have been avoided, simply to arrive at an understanding of the text in question.

Difficulties arose on a point the Community has also seen fit to address[176] involving project 'alternatives'. Where EIA Decree 77-1141 stipulates that the EIS include the reasons for

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173 Editorial of Brice Lalonde, *Le Monde*, 16-17 October 1977, p.19.

174 CE 30 January 1985 *Association 'les Amis de la terre'* AJDA 1985, p.238, note J.C. at p.239; Caballero, p.40. The application took seven years to be decided.

175 Other arguments were raised, not relevant to the European legislation, including: that the publication in some cases of the EIS only at the same time as the authorising decision; the decree's fabrication of the impact notice (*notice d'impact*).

176 In the proposed amendments to EIA85/337, Com(93)575, at p.13; see Conclusions, point 2. Lessons learned -- Amendments to the EIA legislation.

which, among the "choices"[177] considered, the particular project was selected[178], the concept of 'choice' is ambiguous[179] and is typically not addressed in practice[180]. Finally, the same sort of vagueness surrounds the inclusion in the EIS of the

> measures envisaged by the developer or applicant to eradicate, reduce and if possible compensate the harmful consequences of the project on the environment, and the estimation of the corresponding expenses[181].

As formulated, the legal value these have is unclear. In fact only if such measures are reproduced in the administrative decision -- a construction permit or industrial authorisation -- are they enforceable and genuinely constrain the developer[182].

No specific sanction foreseen: The failure to foresee specific sanctions encourages the judge to exert only a minimal control[183]. In the case of EIA Decree 77-1141, the failure to include specific sanctions[184] encouraged the Conseil d'Etat to avoid controlling the substance of the procedure and to exert only a control of *erreur manifeste d'appréciation*[185]. The European

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177 *Partis.*

178 Decree 77-1141, Article 2(3).

179 CE 17 June *1983 Commune de Montfort* AJDA 1983, p.436; Prieur, Dalloz 1991, p.76-77.

180 Chapter 5, point 1.2.1. at *Reluctance to modify project.*

181 Decree 77-1141, Article 2(4); EIA85/337 replaces "compensate" with "remedy".

182 Other examples of ambiguity include, for instance, the term *projets d'aménagement* (planning projects) has no precise legal meaning; the legislator has taken the opportunity to avoid systematically subjecting planning documents to EIS; Prieur, Dalloz 1991, p.63,72; Com(93)28, p.65; ROMI, *Droit et Administration*, 1994, pp.63-66.

183 Romi, RDP 1994, p.1210. Although even where sanctions are available they often remain unused or under-used, see Chapter 6.

184 The Nature Protection Act did foresee penalties for other matters covered in the legislation.

185 CE 23 April 1982 *Société pour l'étude et la protection de la nature en Bretagne* Rec. p.684, conclusion Dutheillet de Lamothe RJE 1983, 3. p263; see also ROMI, *Droit et Administration*, 1994, p.59.

In Caballero's view, the Conseil d'Etat's refusal to examine the substance of the impact study "torpedoed the meagre existing control" of the procedure; Caballero, p.38-39. See also Prieur, Dalloz 1991, p.63; Com(93)28/vol.13 pp.90-91. Two of the most striking examples concerned the nuclear station of Flammanville, where the Conseil d'Etat overruled the administrative court of Caen for the latter's close examination of the substance of EISs and its finding that these did not fulfil the decree's requirements; CE 9 July 1982 *Ministre de l'Industrie c. Comité régional d'information et de lutte antinucléaire de Basse-Normandie*, Lexis; CE 9 July 1982 *Ministre de l'Industrie c. Comité départementale de défense contre des lignes à très haute tension d'E.D.F.*

legislation did not address the issue of sanctions; however this offers an illustration of why greater preoccupation with sanctions at Community level might be of use.

The Classified Installations Act did not make the mistake of failing to define penalties; it provides fairly stiff administrative and penal sanctions[186]. The latter were made still stricter in 1985. Furthermore, some care has been taken to foresee other problems of enforcement[187]. Its great shortcoming, however, is that where other penalties may be adequate, the failure of a classified installation to respect the prescriptions imposed in its authorisation -- the most common violation, and one which may have serious physical consequences -- is only a minor offence[188].

2.2.7. Intervention of European Community:

EIA85/337 entered into force three years after its adoption -- three years during which France could have addressed the specific deficiencies mentioned above. France did not, illustrating the reluctance common among Member States to modify existing rules[189]. Subsequently, the Commission's comments on the state of implementation, by Member State, became available[190].

In the French case the Commission found that examination of the pre-existing legislation was difficult but that, in many aspects, the French legislation is stricter, being integrated into a wider planning framework[191]. Although the projects exempted from public inquiry gave rise to concern and criticism within France, the Commission found that "[i]n practice there are virtually no projects subject to EIA in the European legislation that do not require a public

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186 Criminal sanctions: Titre VI (articles 18 to 22-3 modified by loi no. 85-661 of 3 July 1985); administrative sanctions articles 23-25.

187 For instance, third party rights are expressly reserved (Article 8, Classified Installations Act), and both judicial and administrative judges have confirmed the principle that an installation working according to the prescriptions is not thereby discharged of civil responsibility. See ROMI, *Droit et Administration*, 1994, p.356.

188 Article 19, Classified Installations Act; also Decree 77-1133, Article 43.

189 See Chapter 1, point 2.2 at *Inertia*.

190 Implementation of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment; Com(93)28 Vol 13.

191 *Ibid.*, p.82.

inquiry once the threshold is reached"[192]. Still, the Commission agreed with other critics that in some instances the public was informed too late in the decision-making process[193] (although it found that this was not at odds with the directive's requirements)[194]. In other cases apparent discrepancies between EIA85/337 and the French texts exist because of French "resistance to separate the concept of EIA from other planning tools and other environmental protection laws."[195]

The Commission did single out several issues on which it found French legislation wanting. As mentioned above, the evaluation required for land-use plans did not amount to EIA[196] nor did the exemption of "projects for use of uncultivated land or semi-natural areas for intensive agricultural purposes" in French legislation[197] comply with the directive. France was also found at fault regarding Article 5 EIA85/337, referring to the contents of the EIS listed in EIA85/337 Annex III[198]. At the least, Article 5(2) requires the study to include *inter alia* a non-technical summary (item 6, Annex III); indisputably, French legislation did not cover this. The Commission also complained[199] that it did not include item 7 of Annex III[200]. As mentioned previously[201], the clarity of the European directive on this point is relevant, for arguably since this is not listed in the minimum requirements of Article 5(2), it comes under Article 5(1) where Member States apparently have some discretion as to the information supplied[202]. The French legislation does not refer to the impacts on humans, material assets and cultural heritage[203],

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192 *Ibid.*, p.72.
193 *Ibid.*, p.72.
194 *Ibid.*, p.92.
195 *Ibid.*, p.82.
196 *Ibid.*, p.65.
197 *Ibid.*, p.92.
198 *Ibid.*, p.93.
199 *Ibid.*, p.93.
200 Annex III, 7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compling the required information.
201 See Chapter 1, at point 2.5.1. EIA85/337 - *Administrative consideration of the EIS.*
202 They must see to it that the information is supplied "inasmuch as a) the Member States consider the information relevant and b) they consider that the developer can reasonably be required to provide the information."
203 Singled out by the Commission at Com(93)28, p.92.

but these might again be said to come under Article 5(1). The Commission also criticised French legislation[204] because provisions transposing EIA85/337 obligations on administrative consideration were inadequate, and those on notification of neighbouring Member States were non-existent[205].

Response to European criticism: After several years France did modify its legislation to conform with Community requirements. The European directive is cited in the first indent of the preamble to a 1993 regulation on EIS and public inquiries, EIA Decree 1993[206], modifying the earlier rules. Many amendments are straightforward responses to Community criticism. Direct and indirect effects, cultural and material assets are explicitly mentioned in a much more detailed description of the EIS contents, covering the requirements of EIA85/337, Annex III, item 3[207]. The non-technical summary[208] and difficulties encountered by the developer in compiling the information[209] are also included. If the project is likely to have significant effects on another Member State, or if another Member State likely to be affected so requests, the file must be forwarded to its foreign minister[210].

Response to national criticism: In other cases, changes were made answering national critics. The Commission had found that, although the Environment Minister had no power to obstruct a project authorisation, in the event of a his being seized, his "dissuasive effect is not negligible"[211]; by contrast, French internal criticism of the vagueness of this procedure, and of its treatment in the Conseil d'Etat[212] was vociferous. Deadlines have been included detailing

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Although these are referred to in EIA85/337 Article 3, this article, in turn refers to Articles 4 through 11 (therefore 5); again, then, the fact that these are not listed in the minimal requirements of article 5(2) appears to leave this to the Member States' discretion.

204 Com(93)28, p.81.

205 Above, *EIS contents.*

206 Decree 93-245, 25 February *relatif aux études d'impact et au champ d'application des enquêtes publiques.*

207 Decree 93-245, Article 2-I.

208 EIA85/337 annex III, no.6; Decree 93-245, Article 2-II.

209 EIA85/337 annex III, no.7; Decree 93-245, Article 2-II

210 Decree 93-245, article 4, modifying decree 77-1141, article 5.

211 Com(93)28, p.73.

212 Above, 1.2.1. *Legitimacy.*

the eventual intervention of the Environment Minister[213]. Now explicitly the competent authority may not give a decision on the project prior to the expiration of a 30-day period accorded for the opinion of the Minister of the environment. This still does not amount to the power to obstruct a harmful project, but it can be hoped that the administration will more seriously consider an eventual negative opinion or one with conditions attached, or that a court seized with a related issue will consider the environment minister's opinion[214].

Although the Community exerted an overall positive influence, by saying that the financial thresholds appeared to be too low[215] (and that EIAs were too numerous), it may have encouraged an aspect of the legislation much criticised within France. The Commission not only implicitly endorsed financial thresholds but may have encouraged the French to raise them[216]. In the eyes of some, this reduces the value of both the EIA procedure and its reform[217], and as argued above, financial thresholds do not guarantee that "projects likely to have significant effects," will be assessed.

Improved precision: Generally the decree reflects a renewed concern for precision[218] that might positively influence practical implementation. It also reflects lessons learned from experience, as when Article 5 instructs the competent authority to respond *without delay* to requests for information on how to consult the impact study. Greater precision is furthermore used to attack *saucissonnage*: projects divided into different types of works or into time phases

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213 Decree 93-245, article 6, modifying decree 77-1141, article 7.

214 Romi, Raphaël, "Vers une cohérence dans la définition normative des politiques d'environnement? Chronique d'une fin de législature," 109 (1993) RDP 1079 at p.1090.

215 Com(93)28, p.84.

216 The new decree doubles the previous thresholds to 12 million francs for both the EIA and the public inquiries decrees; Decree 93-245, article 3.I, modifying decree 77-1141, article 3C and Decree 93-245, article 3.II, modifying decree 85-453 article 1 III.

Only one project is added to those exempted from study but requiring *notice d'impact* to counterbalance the raised threshold: Decree 93-245, Article 11 adds no. 11 to annex IV of decree 77-1141: "*Travaux d'hydraulique agricole dont le coût total est compris entre 6 et 12 millions de francs.*" (Another project is added to Annex 1 of decree 77-1141, no.22: "*Travaux et ouvrages de défense contre la mer d'une emprise totale inférieure à 2000 mètres carrés*").

217 Romi, RDP 1993, p.1091.

218 For instance it notes that "neighbourhood convenience" (*commodité du voisinage*: of importance in civil jurisdictions; Chapter 8) is affected by "noise, vibrations, odours, light emissions"; Decree 93-245, Article 5.

must include an EIS that covers the totality of the programme[219]. The exemptions from EIA are also generally made more specific. Another advance is that some technical thresholds are lowered[220].

A flaw criticised both internally and by the Commission has been remedied: the exemption for all lots in communes with an approved or published planning document now applies only to lots in communes having, at the date of the deposit of the application, a planning document that has been the object of a public inquiry[221]. The new decree takes specific care to modify the extent of one of the Annex II exemptions expressly to exclude certain projects[222]. These are now also added to Annex III (projects always subject to EIA, whatever the cost of their realisation), which has also been clarified and tightened in many respects[223]. Perhaps most noteworthy is that, in adding five new projects to Annex III, and in the clarification mentioned above in Annex II, the administration did not buckle to the considerable pressure applied by the interests concerned: in particular motorised sports enthusiasts were incensed about the related clause's inclusion among projects always requiring EIA[224] to the extent of holding a series of demonstrations.

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219 Decree 93-245, Article 2, III: "When the totality of the works foreseen in the programme is undertaken in a simultaneous manner, the study must cover the entire programme. When the realisation is staggered in time, the impact study of each phase of the operation must include an appreciation of the impacts of the entire programme."

220 For example: (Annex I, no. 5) the threshold for transportation and distribution of electricity is lowered from 225kV to 63kV.

221 Decree 93-245, Article 9, modifying decree 77-1141, annexe II.

222 "with the exception of - golf areas targetted in Annex III, - open air leisure spaces of 12 million francs and more, - areas conditioned for the practice of sports or motor sports targetted in Annex III...".

223 Decree 93-245, article 10, modifying decree 77-1141, annexe III. For instance the earlier version of no.1 reads: "*Opérations de remembrement rural.*" This becomes "*Opérations de remembrement rural, y compris les travaux connexes.*" (Compare also, no. 2.)

224 Decree 93-245, article 1, adding decree 77-1141, annex III, no.20: "areas conditioned for the practice of sports or motor sports of a total suface greater than 4 hectares."

2.2.8. Summary:

The new decree, which was elaborated "not without resistance"[225], generally makes positive modifications to the formal implementation of EIA. The European Community is certainly the principal impulse behind it, for where the French administration had listened without response to national criticism for over a decade, it appears that only once the threat of Article 169 actions were added from Brussels was the necessary impetus given. The Commission, commenting on the envisaged changes to the French system, indicated that they would "bring French legal provisions in line with the minimum requirements of the directive. In many aspects however, legal provisions go well beyond the minimum requirements, at least in theory."[226]

Not everything has been remedied by the new decree. For instance, the public participation provisions remain much the same, and it can be questioned whether this Member State chose the "most appropriate forms and methods to ensure the effective functioning of the directives"[227]. Generally, however, since the new decree's adoption, the formal implementation in France is adequate, if dispersed across legislative acts.

2.3. Formal Implementation -- LCP:

Where France employed a cut-and-paste approach to make pre-existing legal texts fit the requirements of EIA85/337, the large combustion plants legislation was adopted specifically to implement LCP88/609, making examination of compliance with European measures much more simple (and brief[228]). Earlier legislation had implemented general European industrial air pollution legislation and the LCP *arrêté* (*arrêté du 27 juin 1990 relatif à la limitation des rejets*

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225 Romi, RDP 1993, p.1085.
For completeness it should be noted that a new statute on *installations classées*, Loi 92-646 du 13 July 1992, reforming the act of 19 July 1976, has been passed, which attempts to simplify the complexity of the classified installations regime, but not of much concern for impact assessment.

226 Com(93)28, pp.93-94.

227 Case 48/75 *Royer* 1976 ECR 497,para. 73.

228 The fact that LCP88/609 is much more limited in scope, and involves fewer to-and-fros between involved parties than EIA85/337 makes examination much straightforward.

atmosphériques des grandes installations de combustion), issued directly by the prime minister, transposing LCP88/609, built upon this framework.

As seen[229], the purpose of the directive, as stated in the preamble of LCP88/609 is to monitor and gradually reduce the emissions from new and existing large combustion plants; all new power stations are to be 'low acid'[230].

2.3.1. Problems of Transposition:

Timely transposition: A question that was not applicable to the transposition of the EIA but is relevant here is the timeliness of the transposition: French legislation arrived just under the wire, adopted three days before LCP88/609's deadline expired[231]. Apparently, however, it failed to communicate this to the Commission, for France is cited in the Eighth Application Report as having failed to notify measures[232]. Nonetheless, fundamentally France appears to have met with the Commission's approval, for it has not received particular mention in the Commission application reports following the directive's entry into force for matters of transposition.

Elaboration on the basis of LCP88/609: Many portions of the LCP *arrêté* are simply copied from the directive, using similar, and in some places the actual wording of the Community text. For instance Article 1, outlining the scope of the directive, repeats word for word most of the definitions contained in LCP88/609, Article 2, adding details relevant to the French context such as the number of the concerned installations in the nomenclature of classified installations[233].

One of the Community's justifications for using a directive as a legislative tool -- allowing the Member State to fill in the details in a manner appropriate to its context -- is illustrated in other aspects of the French *arrêté*. Where the European version sketches only general goals

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229 Chapter 1, point 2.5.2. Large Combustion Plants Directive, *Adopted version*.
230 In other words, low emitters of the factors that contribute to acid rain.
231 Article 17, LCP88/609 sets the deadline for adopting national provisions at 30 June 1990.
232 OJ 1991 C338/166. France was sent an Article 169 letter.
233 Other Article 2, LCP88/609 definitions can be found in Article 3 of the French *arrêté*.

regarding the height of the chimney, for instance, the French version is positive in that it tackles achieving these goals with considerable precision. It includes a detailed definition of what is meant by 'chimney height', provisions regarding required studies of dispersion of fumes, the shape of conduits for fumes, et cetera[234].

Differences between European and national provisions: France also used its margin of discretion to develop limit values for emissions. LCP88/609, Annex III, displays limit values on a graphic curve where a 400MW new plant burning solid fuel should emit only 800mg/m3 sulphur dioxide. On the other hand, French legislation expresses these limits in equations[235].

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234 The relevant provision of LCP88/609 is Article 10: "Waste gases from combustion plants shall be discharged in controlled fashion by means of a stack.

The licence referred to in Article 4(1) shall lay down the discharge conditions. The competent authority shall in particular ensure that the stack height is calculated in such a way as to safeguard health and the environment."

The relevant French provisions, Articles 29-32 of the *arrêté*, are

Article 29: Emission to the atmosphere of combustion gases is carried out in a controlled manner through a chimney. The chimney has as object to permit a good diffusion of combustion gases in such manner as to limit the concentration in the air of polluting substances resulting from combustion.

The shape of the fume conduits, notably in the portion closest to the outlet to the atmosphere, is formed in such manner as to favour the maximum ascension of combustion gases to the atmosphere. The contours of the conduit do not present, notably, any angular point and the variation of the section of the conduit nearing the point of outlet is extremely continuous and slow. The end portion of the chimney can include a convergence realised following the rules of art when the speed of emission is higher than the speed chosen for the gases in the chimney."

Article 30: "The height of the chimney (difference between the altitude of the outlet to free air and the average altitude of the ground at the point considered, expressed in metres) is determined, on the one hand, in function with the thermal power of the installation and the level of emissions of pollutants to atmosphere, and on the other, in function with the existence of obstacles likely to impede the dispersion of combustion gases.

It is defined in articles 31 and 32."

Article 31: "A study of the conditions of dispersion of fumes adapted to the site may be carried out by the operator in order to determine the height of the chimney, in conformity with articles 29 and 30.

This study is obligatory for installations with thermal power equal or greater to 100MW.

It is also carried out, whatever the thermal power, in those cases where one of the obstacles defined in Article 36 is a tall building in the sense of Article R.122-2 of the Code of Construction of Habitation (in other words when the lowest floor of the last level is situated at more than 28 metres from the ground)."

Article 32: "In the absence of a study of conditions of dispersion of fumes, the height of the chimney is fixed by Articles 33 to 35 (omitted here)."

235 For example, for a new plant of 400 MW (ie: 300MW < P < 500MW, where P = thermal power), burning solid fuels, the equation is 2400 - 4 P. This translates, in the case of a 400MW plant, to 2400-1600 = 800.

The same result is attained but it can be noted that a Commission lawyer attempting to examine this, might be taken aback to find that each country has developed its own equation in order to produce the same results. Furthermore, another example reveals that the national results are not always exactly identical to the European limits. On the curve for SO_2 concerning new installations burning liquid combustibles, there is a 50mg/m3 difference between the Commission and the French approaches[236]. The Commission must then consider the true effect of a 50mg/m3 sulphur dioxide difference on the atmosphere, and whether this a big enough difference to constitute an infringement; fortunately the Commission has experts which it can consult to help assess the technical implications of discrepancies such as these[237].

A more obvious discrepancy to the non-technically minded is, for example, that Article 8(3) LCP88/609 allows the competent authority in some circumstances[238] to suspend the obligation to respect limit values for a maximum of six months. The French LCP *arrêté* (Article 11) also provides for a six-month suspension, but makes this renewable for another six months, which is not in conformity with the directive.

Another significant discrepancy is that in LCP88/609 "new plant" (Article 2(9)) is defined as those for which the original operating licence was granted on or after 1 July 1987. In the French *arrêté* (Article 3, third indent) new installations are those for which "initial authorisation is later than the date of publication in the Official Journal of the present *arrêté*", that is, 19 August 1990 -- almost three years later than required by LCP88/609. Theoretically then, France has classified fewer installations as "new" than the Commission intended. Here, however, given the principle of non-retroactivity, it is uncertain whether the French authorities could have changed the status, and thereby the obligations (e.g.,

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236 As noted in Annex IV LCP88/609, a 400 MW plant is allowed 1000 mg/m3. Here the relevant French equation is 3650 - 6.5P (where P is thermal power), in other words, 3650 - 2600 = 1050 mg/m3.

237 Commission Letter 21.3.96/XI/005205.

238 If a plant which normally uses low sulphur fuel faces an interruption in supply.

construction requirements[239]), of a French plant two years prior to the date of publication of the relevant legislation. Perhaps Community legislation was not entirely realistic in this provision.

Despite the discrepancies in the national transposition mentioned above, the Commission appears not to have taken action; when asked specifically, unfortunately, the Commission declined to comment[240].

2.3.2. Summary:

With the exceptions mentioned above, France appears generally to have correctly transposed its obligations and to have taken the opportunity given by the use of a directive in order to develop technical specifications and to ensure that these are legally required. Political pressure from industry has been present[241], but apparently from the government's perspective, because of France's reliance on nuclear power, the goals set were not viewed as threatening. Formal implementation can be considered adequate.

2.4. Conclusion:

Major infringements of the two European directives no longer exist in the French formal implementation of the two European rules. However, as seen with the formal implementation of EIA85/337, on occasion the purpose of the rules is subtly undermined and methods less than those "most appropriate" have been selected in the transposition, perhaps not in breach of the formal obligations, but certainly damaging to the "effective functioning of the directives, account being taken of their aims"[242]. In subsequent practical use of the rules, much will depend on the attitude of the individuals involved -- the prefect, inquiry commissioner, 'green'

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239 LCP88/609, Articles 4 (which refers to conditions of construction), 7 (design specifications for new plant), and 10 (ensure stack height is calculated to safeguard health and environment).

240 Commission Letter 21.3.96/XI/005205.

241 See Chapter 5, point 2.2.3.

242 Case 48/75 *Royer* 1976 ECR 497 para. 73; see also Case C-72/95 *Kraaijeveld*, judgment of 24 October 1996, not yet reported, para.55.

developer -- and the tenacity of the public in given instances. The implementation of the LCP rules can be hoped to proceed more smoothly in many ways, in that requirements are less dependent on administrative and public intervention. Much more depends upon the industrial operator and the cost of implementing the legislation, and here, competitors have a marked interest in keeping an eye on each other.

CHAPTER 5: France -- Problems of Practical Implementation

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3. Conclusion:

An administrative context that is neither particularly helpful nor excessively obstructive and an adequate formal implementation of the two legislative texts under consideration provide the backdrop for examining the 'messier' issue of practical implementation. Actions taken to give effect to the national rules transposing Community obligations are investigated, again following first EIA and then LCP.

1. Practical Implementation EIA:

EIA procedures are inserted into larger authorisation procedure concerning, mainly, land planning or classified installations. Experience with EIA procedures in France spans roughly two decades; therefore obtaining information on practical aspects of the procedure is not as problematic as in the case of Spain. No one problem predominates: implementation of the rules unravels through a build-up of malfunctions and opportunities to use discretion. Generally problems appear to surround: the quality of the EIS and the filtering of the public's voice through the inquiry commissioner (as foreseen upstream); and resistance to making the project evolve towards less environmental harm. Also the structure of the administration may have improved but its attitude, frequently, has not. Administrative problems are aggravated by the fact that resources earmarked for the environment are stretched.

1.1. Administrative Guidance:

Regarding implementation, one of the roles of Community institutions is to guide Member States; similarly the State administration's principal role in practical implementation is to guide the agents at the local level responsible for concrete action. Substantive action largely depends on the diligence and commitment of the local authority. There has been a considerable effort on the part of the central administration to clarify aspects of the EIA rules in order to make implementation as effective as possible, to distribute methodological, technical and training materials, to organise seminars and conferences[1], to make cartography resources

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1 Particularly in early phase of the procedure, efforts were made by the *Ecole des Ponts et Chaussées* and the *Génie Rural des Eaux et Forêts.*

available in preparation of EISs[2] (an issue that the Commission later addressed by adding scoping requirements to proposed EIA amendments[3]).

Furthermore, in France administrative circulars, internal administrative documents used to interpret legal provisions, are extremely important tools of the central environment administration to enhance implementation[4]. Circular 93-73[5] is relevant here, clarifying for local prefects and mayors[6] the new elements added to the EIA procedure by Decree 93-245[7] and insisting on the importance of previously existing obligations. Through this circular, the Environment Minister attempts to make the most efficient use of the existing black letter law. His recommendations provide insight into problems of practical implementation that have emerged in the past, one of the most important of which is that local authorities perceive the EIA procedure as an administrative irritation[8].

Enhancing implementation by widening interpretations: The circular attempts to expand interpretations of the legal provisions wherever possible. For example, regarding the newly amended EIS contents (now including indirect and direct, temporary and permanent effects on the environment), it cautions that these must not be interpreted in a restrictive sense and provides a lengthy, encompassing discussion of the types of effects that should be analysed in the study[9]. The circular further stresses meticulousness on the part of local officials in verifying

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2 Part of the mission of the DIREN is to make available cartography and databases useful in the elaboration of an EIS. Even the Public Works Ministry has been helpful in extending Departmental services to small communities who do not themselves have the technical capacity for matters of technical expertise.

3 See Conclusions, point 2.

4 Although the ECJ has repeatedly ruled that administrative circulars are inadequate for transposition of legal obligations, here they are used to supplement the legal measures. Furthermore, the Conseil d'Etat sees circulars as documents which can be judicially reviewed, at least to the extent that they add something of substance to the original legal provision; see Dickson, 1994, p.72. However, the ECJ's stance on circulars is well-founded, both in terms of legal certainty for those later expected to abide by these rules, and because circulars may not be reviewable acts within the systems of all fifteen Member States.

5 Circular 93-73, 27 September 1993.

6 Most of the decisional power lies with the prefect: see Decree 77-1141, Article 6: Classified Installations Act 76-663, Article 5; Public Inquiry Decree 85-453, Articles 12,18.

7 Chapter 4, point 2.2.7.

8 *"Ils la vivent comme une tracasserie administrative."*

9 Circular 93-73, Point 2.2.2. For instance, discussing the contents: "These ideas... are, rather, a means of making explicit and this elaboration should lead authors of EISs to treat in an exhaustive manner, the nature, intensity, span and duration of all impacts of a project."

the EIS and singles out monitoring and follow-up for attention (here going beyond the directive's requirements)[10]; officials are reminded[11] of the various details that are their responsibility in the procedure[12].

Greater clarity: The circular also enhances implementation by discussing the new decree's innovations in order to help thwart attempts on the part of the developer to avoid obligations: for instance, it is made clear that the non-technical summary must not be tucked into the middle of a great stack of technical documents but must be easily identifiable, must synthesise the essential elements of the study, and must be clearly written and comprehensible to the layman[13]. Similarly, the "author's denomination"[14] is clarified[15]: this must include all the participants in the preparatory study that support the final document, and those of the consultants or experts that may have been called upon as well as the drafters of the final document, helping the public to note the authors' interest in the project. Previous problems of implementation are also addressed; for instance, the practice of artificially dividing projects is tackled in detail[16].

Addressing formulation: Formulation, implementation, and enforcement are not separate, chronological phases but rather dynamic phases reacting to and influencing each other. Many elements of circular 93-73 constitute a clear attempt to enhance implementation by attenuating the negative effects of flaws in the legislation itself. Again, instructions here shed light on existing practical problems and hint at the attitude of the authorities in charge of applying the procedure. For instance, regarding the quality of the EIS, it is recommended that, given the

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The discussion of each of the points of the contents includes general indications such as "the environment must not be interpreted in a restrictive sense."

Where modifications of thresholds and criteria in the new decree are broached, again the proposed interpretations are wide; Circular 93-73, point 1.2.3.

10 For example, Circular 93-73, point 1.1.3.; *ibid.*, point 2.1.3.

11 *Ibid.*, Points 4.1. through 4.2.3.

12 *Ibid.*, Points 3.1. through 3.3.3.

13 *Ibid.*, Point 2.2.4.

14 Article 1, EIA Decree 93-245.

15 Circular 93-73, point 2.2.1. (misprinted in the Recueil de Textes Reglementaires: Etude d'Impact sur l'Environnement as 2.1.2.).

16 *Ibid.*, point 1.1.3.

technical nature of an EIS, the developer call upon specialists for all or part of it[17]. (And in creating a new professional market -- specialists in EIS -- lies an occasion to develop Commission hopes for combining environmental protection with employment opportunities[18].) Also, the circular elaborates the exact contents of the EIS (which have presented practical difficulties) one by one[19], adding specifications[20].

Addressing enforcement: With an eye to possible later enforcement actions the minister asks the prefects especially to reiterate in the authorisation the measures foreseen in the study to attenuate the impact of the project on the environment. This is essential: only then are such measures enforceable. Also crucial to a genuinely protective procedure, the local administrations are asked to carry out follow-up verifications on the project's respect of the measures[21].

The Environment Minister has done what he could to limit the impact of enforcement in the courts where this has proved unfavourable to the environment. One element of the EIS contents, the estimation of the costs of measures envisaged to suppress, reduce and if possible compensate the harmful consequences of the project[22], had remained a dead letter simply because, traditionally, it was rarely insisted on by the administration or enforced before the courts[23]. In conformity with the authorities' lenience, developers ceased to include it in the EIS. Also

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17 *Ibid.*, point 2.1.1. In addition, clarifications regarding the author's identity are required.

18 Job creation in the environment sector was stressed, without further detail, in the Fourth EAP, OJ 1987, C328/1.

19 Circular 93-73, point 2.1.3.

20 For instance, the analysis of the initial site must present and justify the choice of locale based on actual investigations of the area and site measures rather than mere documented and bibliographical data. Furthermore the state of initial site must take the factors and "rank them, accentuate their dynamic, and bring out the environmental components most vulnerable to the envisaged works. "

21 Circular 93-73, point 1.1.3.: "I ask you to watch that, where regulations in force permit, the accompanying actions of a project foreseen in the EIS under measures of suppression, reduction and compensation, are repeated in the decision of approval or authorisation of the project, and to have your services carry out controls of the respect of the engagements undertaken. It is also up to you, when necessary, to foresee a follow-up of the realisation or functioning of the installation."

22 Required by Article 2, decree 77-1141.

23 Only after a decade of the procedure's existence did the Conseil d'Etat send a clear message on the issue, when it sanctioned an impact study for absence of evaluation of costs of repairing environmental harm, CE 27 July 1988 *Ministre Délégué chargé de l'environnement et Alberdi*, RJE 1989 p.79.

included in the European legislation[24], it is extremely serious that national authorities, during implementation, are willing simply to ignore a legal requirement. Despite the Conseil d'Etat's lenience on the matter of the EIS contents[25], the circular insists that these contents treat "extensively the nature, intensity, scope and duration of all impacts"[26], and further, that administrative authorities, long accustomed to letting the absence of costs evaluation pass unnoticed, ensure that this is included[27].

Where case-law has left matters unresolved, again the opportunity to make the most of the margin for interpretation is seized. Regarding fragmentation of a project the circular insists that, lacking a clear case-law, it is wise to adhere to an extensive interpretation of what constitutes fragmented realisation, both in order to respect the spirit of the rules and (taking up a theme dear to local administrations) to avoid annulment of administrative measures in the event of judicial review[28].

In sum, the circular gives local authorities a push in the right direction; after this the effectiveness of the procedure is in the hands of the local players involved in the procedure. These are examined as they intervene.

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24 EIA85/337, Article 5(2): "The information to be provided by the developer in accordance with paragraph 1 shall include at least:...

... a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects...".

25 Instances in which the CE accepted incomplete studies: CE 5 June 1981 *Association fédérative régionale de protection de la nature et autres*, req. no. 21.346 et 21.585; CE 9 July 1982 *Ministre de l'Industrie c/ Comité départemental de défense contre les couloirs de ligne à très haute tension*. A Conseil d'Etat commentator approved the rulings at the time as a sign of common sense: *"le juge doit aussi faire preuve de bon sens et ne pas rechercher une perfection illusoire"*; Doctrine, p.591.

26 Point 2.2.2., above.

Also, the Environment Minister attempted to extend the Conseil d'Etat's definitions of *grosse réparation*, which is exempted from EIS, and *modernisation*, not exempted, by offering a more inclusive definition of modernisation; Point 1.1.7.:*"...sont ainsi considérés comme de la modernisation et non de la grosse réparation les travaux qui modifient les caractéristiques des ouvrages existants ou qui augmentent leurs capacités d'exploitation."*

27 See Bouchardeau Report, p.8.

28 Point 1.1.3. "In the absence of a clear jurisprudential trend, it appears wise, both to respect the spirit of the rules and to avoid litigious annulments, to retain an extensive interpretation of the notion of fragmented realisation and to apply this each time that different phases or categories of works, undertaken by the same developer or not, constitute a functional unity and that the main programme has been decided in a certain manner."

1.2. How the procedure unfolds:

Perhaps inevitably, the procedure is complex, passing back and forth among various actors. Generally, the developer draws up the EIS and gives the dossier containing all the legal documents to the prefect[29] who verifies that it is complete and passes it to the president of the administrative court. The latter designates an inquiry commissioner or president of the inquiry commission. After consulting the inquiry commissioner, the prefect[30] sets the date, length and object of the inquiry; the location, days and hours for public consultation; and the times during which the public can consult the inquiry commissioner[31]. In theory the inquiry commissioner is given the dossier prior to the opening of the inquiry to enable him to prepare, to plan visits to the site, to request documents and to consider the possibility of lengthening the inquiry. If the commissioner deems necessary, a public meeting is arranged. At the close of the inquiry, the commissioner issues a report describing the inquiry's progress and the public's observations. In a separate document, the reasoned conclusions of the commissioner are presented and made public[32]. The prefect forwards a copy of these to the president of the administrative court, and in those cases where the deciding authority is not the prefect himself[33], to the authority competent for granting or denying authorisation.

On receiving the file from the inquiry commissioner, the prefect has three months in which to take a decision[34]. Where classified installations are concerned, the initial *arrêté* of authorisation includes the conditions for exploiting the installation, the methods of analysis and measurement to be used, and the methods of intervention in the event of an accident[35]. The

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29 Officially: *commissaire de la République.*

30 Decree 85-453, Article 11.

31 Under some circumstances (for instance in matters of urbanism, Article R 123-11 Code de l'Urbanisme) the mayor sets the above times.

32 Authorisation cannot precede the closure of the public inquiry.

33 As is the case with some classified installations, cf: Article 5, Loi 76-663.

34 After which time his decision is no longer valid: T.A. Nancy, 21 December 1982. There is a possibility that the prefect can lengthen this period with a sufficiently motivated *arrêté*, CE 26 July 1982 *Société Spada;* CE 1 July 1988 *Société Monégasque de Location*, D.A. 88 no. 477, cited in Lepage-Jessua, "Les pouvoirs du préfet au regard des installations classées et les droits de l'exploitant après la loi du 13 juillet 1992," LPA 5 February 1993, p.11. He must also receive the opinions of the municipal council and the Departmental Council of Hygiene.

35 For installations requiring only a declaration, the prefect issues a receipt for the declaration and encloses the general prescriptions applicable. At the request of third parties, additional prescriptions can be included.

prefect must respect other applicable rules and procedures[36], and for installations subject to other rules, such as large combustion plants, the initial authorisation contains these prescriptions[37].

1.2.1. Developer:

The procedure commences with the developer, who must carry out the EIS and present it with the other documents needed in the authorisation application. When a public authority is the force behind a given project it seems to take preparation of the study seriously. Large, public project EISs are more detailed, undertaken by independent consultants and generally of satisfactory quality. Nonetheless, it is indicative of the attitude of developers and public officials alike, that circular 93-73 saw fit to insist that the EIS is neither an 'administrative formality' nor the project's *"justification a posteriori"*, but a tool to help the project evolve towards less environmental harm[38]. (Here national opinion contrasts to some extent with the Commission[39].)

Quality of the EIS: On the other hand, private developers' EISs habitually contain the minimal information required by law and are usually undertaken in-house because of a limited budget (although generally the procedure is not costly[40]). Developers appear to regard this as a corner that can be cut in their search for profitability, rather than a legal *sine qua non* of the project[41]. Unfortunately roughly 70% of projects are undertaken by small, private developers, and for these, the quality of the EIS is often unsatisfactory. For instance, despite a circular of 27

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36 For instance, the new Water Act, 3 January 1992, requires a separate authorisation for water use and emissions to water.

37 As an aside, even installations not listed in nomenclature can be subject to prescriptions by reason of proximity or connexity with a classified installation.

38 Circular 93-73, point. 2.1.2.

39 Which had the impression that "[i]n general the developers and their consultants tend to comply with the legal requirements. In some cases, this is done very formally, in others, these provisions give the opportunity to work out better projects in terms of environmental protections"; Com(93)28, pp.93-94.

40 Introduction, point 4. at *Environmental Impact Assessment directive* and footnote 81.

41 50% of those surveyed considered the EIS as an information tool. 90% considered it as information for the public, and 45% as information for the administration. Only 35% consider it a legal obligation. Com(93)28, p.88, referring to a study regional study of the Nord-Pas de Calais.

September 1985[42] addressing the practice of *saucissonnage*, and rulings condemning it[43], artificial divisions continue to pose problems of implementation[44]. Most French environmental associations consulted by the European Commission felt that smaller private EIS were of an unacceptable standard and responsibility should be transferred to an independent body[45]. Even if not produced in-house, the emerging market of undertakings carrying out EIS does not always produce studies of consistently high quality[46].

Lenience in Conseil d'Etat's rulings has not spurred developers to greater meticulousness in preparation of the EIS. Prieur's suggestion that large nature protection federations and university laboratories be called upon to draw up portions of these studies seems reasonable.

Reluctance to modify project: For the developer, completing the project the way it was initially envisaged is obviously the easiest solution. At times the motivation to build the project, free of imposed modifications, inspires devious solutions. Circular 93-73 is revealing when it alerts local authorities to common practices that undermine the procedure: developers have *inter alia* circumvented financial thresholds by fragmenting the phases of a project, by presenting outdated or incorrect monetary figures, or by excluding taxes or the cost of the real estate in the costs of the project[47].

Given that most developers have little intention of modifying the project, interest in the results of public consultation is non-existent. Indeed, developers have been denounced by associations for presenting at public inquiries only the 'solution' with, on rare occasions, pre-discarded alternatives[48]. Frequently developers prefer to speak with elected officials, or

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42 Le Moniteur, n.41, 11 octobre 1985 textes officiels, cited in Hostiou, RJE 1986, p.7.

43 CE 18 December 1981, *Préfet du Puy-de-Dôme*, D.A. 1982, no.20. CE 21 January *Bayle et autres, Fabrègues et autres.*

44 Chapter 6, point 2.6. Practical Illustration, *Tunnel de Somport.*

45 Com(93)28, pp.89-90.

46 PRIEUR, Dalloz 1991, p.74.

47 Point 1.1.2. on use of financial thresholds: "I ask you to take particular care to ensure that estimates given by the petitioner or developer are neither flawed nor obsolete and that they take into account the totatlity of expenses foreseen for the planning, all taxes included. In calculating the cost of planning, on one hand, one should group the costs of land aquisitions... and on the other, take into account all the phases or parts of the programme, when realisation of the works is fragmented."

48 Bouchardeau Report, 1993, pp.6-9.

discuss matters with technical services rather than the public[49]; when they must approach the public they do so with the attitude of "expert[s] strong in [their] convictions before the ignorant public"[50]. Such a situation encourages neither the public's belief in the objectivity of the local officials nor confidence that its opinions are taken seriously. Where public opinion on a specific project may already be negative, high-handedness on the part of the developer can cause irremediable damage. For instance, regarding the tunnel through the Somport[51], it was known in advance the project would lead to conflict, yet the developer made no effort to consider or negotiate with the public. The consequent outcry was enormous. In sum, it appears that the last thing the developer wants is for the EIA to be used as a tool to promote prevention of environmental harm.

1.2.2. Public:

Stripping the procedure down to its basic elements, the public and inquiry commissioner are next to intervene[52]. Barring the existence of a particularly green or altruistic prefect, willing to refuse authorisation for projects that may provide considerable short-term benefits, the factor on which defence of the environment truly relies is the public (both associations and individuals).

Sense of powerlessness: In France the public has reason to be dissatisfied with the level of participation[53]. To begin, obtaining information can be difficult, in spite of the existing laws on the public right to information (both Community[54], where the Commission has noted problems of conformity[55], and national[56]) and EIA provisions on public consultation. Requests by the public for such things as photocopies, theoretically available at the cost of one franc per

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49 *Ibid.*, p.9.
50 *Ibid.*, p.6.
51 Chapter 6, point 2.6. Practical Illustration, *Tunnel de Somport.*
52 The public is discussed first in part to facilitate comparison with the Spanish chapter.
53 Prieur, RJE 1988, p.403.
54 Directive 90/313 on the freedom of access to information on the environment, OJ 1990 L158/57.
55 Thirteenth Application Report, Com(96)600, p.82.
56 Loi 78-753 on freedom of access to administrative documents

Which obs of conformit

page[57], often encounter a wall of administrative reluctance[58]. Dissatisfaction also stems from the well-founded impression that all the important choices have been taken by the time the public is included in the discussion[59] -- even some developers agree[60]. Since alternatives to the project are not truly considered[61], usually the best that can be hoped for is a environmentally friendly modification of the initial project. Furthermore, meaningful participation might include a right for the public to veto a project; this has not even been considered[62] (and EIA85/337 does not mention the value of the public's input). It is not the public's conclusions, but the commissioner's interpretation of these that are recorded after an inquiry. And even if these are negative, they do not generally impede authorisation.

Extreme reactions: Consequently, public attitudes swing between the extremes of total resignation and outrage. Some inquiries have attracted the interest of not one member of the public. When indifferent, this comes from a conviction that the public could not influence decision-making, an attitude which a former environment minister refers to as 'lucid'; however, "when the stakes of the project are high, this same lucidity provokes revolt and obstruction"[63].

The public moves for projects it considers important, and then, explosively. Such action can have results: the occupation of a site for a projected chemical plant in Marckolsheim, Alsace; demonstrations in Roscoff against a nuclear power station; and peaceful protests against the construction of a military terrain on the plateau of Larzac led to the abandonment of these projects in the early Eighties. Recently the imposition of the high-speed train (*TGV-Méditerranée*[64]) was the target of demonstrations and protests of a scale reminiscent of the

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57 One can 'consult' (read on site) administrative documents or take a photocopy, generally at a cost of one franc per page; Roy, "Je coupe, tu défriches...nous enquêtons," 110 (1995) Combat Nature 22.

58 Bouchardeau Report, pp.5-9; Com(93)28, p.87.

59 Com(93)28, p.88; Colson, RJE 1993, p.228; Bouchardeau Report, 1993, p.9, p.12.

60 Bouchardeau Report, 1993, p.9.

61 Com(93)28, p.86.

62 Hopes were raised during decentralisation by the possibility of having local consultative referenda; Loi du 2 March 1982, Article 1, relative to the rights and liberties of Communes, Departments and Regions. Obstacles have arisen regarding the constitutionality of such referenda, yet the desire to participate meaningfully is illustrated by the fact that unofficial referenda have burgeoned in communes and smaller localities; Prieur, RJE 1988, p.401, p.410, p.414.

63 Bouchardeau Report, 1993, p.9.

64 The matter was the subject of a Parliamentary question (no. E-1880/94): OJ 1995 C36/12.

Seventies nuclear protests[65]; this pushed the Ministry of Public Works to experiment with involving the public in a more general concertation prior to large infrastructure projects[66] involving the public before all the choices are taken[67]. The willingness to experiment is an indication that at least in some areas the reluctance, or wariness with which public involvement in decision-making is now changing -- slowly.

Rise of 'participation sauvage'[68]: The perception may be growing that active protest is more effective in preventing environmental harm than participating in EIA consultation, and quicker than commencing an expensive legal action. In Pau, 1992, regarding the tunnel through the Somport in the Pyrénées, the president of the administrative court's[69] rejection of the application for interim relief provoked popular opposition -- occupation of the site -- that postponed works (at least momentarily). The effort cost the militants some sixty criminal citations and several months in prison[70], but the court later annulled the prefect's declaration of public utility. Protesters could see in this a justification of acting outwith the procedure.

However, if the public acts confrontationally -- instead of participating in consultations, prosecuting illegalities in national courts, or sending complaints to the Commission in Brussels -- the implementation of environmental law collapses (particularly in the many 'lower-stake' projects where public energy wanes). Where the public is an essential ingredient of black letter

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65 Colson, RJE 1993, p.223, see also p.228: the Collège de la Prévention des risques Technologiques is cited as referring to the manner in which the TGV Méditerranée decisions were handled as "*un cas d'école de ce qu'il ne faut pas faire*"; also Bouchardeau Report, 1993, p.9. On the subject of the Seventies nuclear protests; see PRONIER et LE SEIGNEUR, *Génération Verte...*, chapter 2. Various *autoroutes* have also been the subject of protests (*inter alia,* the A85, the A 83, the A14), as well as the construction of TGV Nord station (the subject of a second *recours* before the administrative judge after the first DUP was annulled for insufficience of the EIS).

66 Circular 15 December 1992 known as "circulaire Bianco".

67 The transparency of this concertation is to be assured by a follow-up commission that does not take part in the debate but guarantees that the public's questions receive answers. Experiments with the process carried out for the TGV-Rhin-Rhône, and the TGV-Lyon-Montmélian have not yielded brilliant results (for example, again no documents were handed out beforehand) but it is felt that the original idea deserves to be worked on further.

Colson has proposed an early inquiry once while the project is still being elaborated and another once the choices are more firmly established; a solution which seems ideal, but highly unlikely; Colson, RJE 1993, p.228.

68 Michel Prieur's term for demonstrations, marches, protests, petitions, and occupation of the locality; see Prieur, RJE 1988, p.404.

69 22 October 1991.

70 T.A. Pau, 2 December 1992, note Marie-Laure Lambert, RJE 1993, p. 91 at, p.95.

law, provisions will become meaningless and the procedural rights insisted on at Community level will become irrelevant. It is crucial that efforts be made to retain the interest of the public and restore its faith in the value of legal and administrative procedures.

1.2.3. Commissaire enquêteur/Commission d'enquête:

The go-between for the public and the authorities who must ultimately decide the authorisation is the inquiry commissioner. Often he encounters difficulties; at times he is himself the problem.

Lack of expertise and inflexibility: Typically the commissioner is male, older, a retired administrator[71] and not particularly qualified regarding the subject matter of the project[72] -- in fact he often accepts the appointment over the phone without knowing what type of project is concerned. As a result, he frequently lacks expertise in the substantive area. Having often been in the administration himself, the commissioner is generally not inclined to challenge it. When not from the administration, the commissioner is usually a retired engineer either from the Bridges and Pavements (*Ponts et Chaussées*) or Public Works and risks being overly sympathetic to the developer[73].

In 1987 a National Company of Inquiry Commissioners (CNCE: concerned with training issues[74]) was formed, and remuneration has improved[75]; these have had positive effects on the expertise of inquiry commissioners.

Ambiguous conclusions: Often commissioners, experienced in the administrative safety of avoiding confrontation, couched their conclusions in terms so vague that it was unclear whether these were favourable or not[76]. This problem affected the possibility of obtaining interim

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71 Bouchardeau Report, 1993, p.16.
72 Com(93)28,p.86
73 Bouchardeau Report, 1993, p.10.
74 *Compagnie Nationale des Commissaires Enquêteurs* which after aslow start (being elderly and often having had a prestigious administrative career, commissioners typically failed to see the need to educate themselves in a new field) has had some success.
75 Payment was poor, and it is perhaps understandable that they did not hurl body and soul into the endeavour. The fee is now paid by the developer, at a rate fixed by the president of the administrative court (Loi 83/630, article 8, as modified by Loi 95/101, 2 février 1995 relative au renforcement de la protection de l'environnement, "loi Barnier").
76 Colson, RJE 1993 p.224.

measures[77] and has been improved by provisions in the Loi Bouchardeau requiring them to note clearly whether they are in favour or not[78]. A sizeable problem remains: the opinions noted at the end of an inquiry remain the commissioner's rather than the public's. As long as he respects transparency, he is entirely free in devising his conclusions[79], a fact which occasionally gives the public the impression that its comments are unheeded. (This impression is not always unfounded: one inquiry commissioner stated that the 7000 signed copies of an environmental association's protest letter he had received were of little interest[80]). The public is thus distanced from the procedure -- arguably not the purpose of the Community or national rules.

Obstructed by the administration: When the commissioner carries out his tasks diligently, the administration on occasion obstructs his involvement. Commonly the prefectoral services refuse to give him the dossier before the beginning of the actual inquiry, and he is consequently unable to familiarise himself with the subject matter[81]. He is frequently asked, or required, to be present for *only* the last three days of the inquiry, at which point it is too late to suggest a public meeting or to prolong the inquiry. Further obstructions arise if he insists upon holding a public meeting: one inquiry commission president related that most of his requests were met with administrative objections concerning "risk of litigation"[82]. The practical difficulties of holding a public meeting can reach the absurd. Examples exist of prefects who refuse to assist the inquiry commissioner and who deny use of administrative locales for public meetings. During a public meeting organised by the commissioner one Parisian official felt, after one hour, that the exercise had gone on long enough and turned off the lights to 'encourage' the public to leave; one commissioner was obliged to hold the public meeting in a corridor where a timer system forced them to keep turning the lights back on[83].

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77 An automatic injunction; see below.

78 Colson, RJE 1993, p.224.

79 *Ibid.*, p.229.

80 *Ibid.*, p.229.

81 Bouchardeau Report, 1993, p.6. A sectoral improvement (Loi Paysages) is that, for some projects concerning expropriation, the commissioner/commission must be designated from the outset of the project's elaboration, permitting him/them to decide which investigations to carry out, which documents to request, which individuals to interview.

82 "*...risque de contentieux*".

83 A variety of negative examples exist. However, examples can be cited in both extremes, for instance, another mayor organises expositions and meetings to help the public understand

Recent improvements: In 1995 the Public Inquiries Act was again[84] modified[85]. The major innovation addresses the lack of expertise of the commissioners: a public list of *commissaires enquêteurs* is created in each *département*, by aptitude[86]. Negative conclusions by the commissioner are viewed more gravely: a project of a local authority that has received unfavourable conclusions must now be the object of a discussion by the deliberating body of the collectivity[87]. While technical issues such as these can be addressed legislatively, the prior problem remains: political resistance to these advances was "tenacious and powerful"[88].

The recent amendments accord more with the purpose of the Community provisions and evidence of improvement is that negative conclusions from the commissioner are becoming less rare[89]. Nevertheless, the public's views continue to pass through an intermediary, whose input varies from case to case and whose disposition cannot be affected by legislative means.

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details, and on receipt of an angry letter regarding a project, makes an appointment with the author to discuss it; Bouchardeau Report, 1993, pp.5-15; Com(93)28, pp.86-87 also refers to the effects of differences in attitude of the public authorities.

84 The 1993 Loi Paysages had previously modified provisions: commissioners are designated by a commission that includes two experts on environmental protection and a representative of the external services of the Ministry of the Environment; Colson, RJE 1993, p.225; Bouchardeau Report, 1993, p.17.

85 Loi 95-101 of 2 February 1995 (loi Barnier)

86 The head of the commission composing the list is the president of the administrative court rather than the prefect, and the choice of the commissioner is not limited to the list in the court's own *département* (Article 2 of loi 83-630, as amended by loi 95-101) and where advisable, the president of the administrative court can designate an expert to help commissioners, at the expense of the developer.

87 Article 8 of Loi 83-630, as amended by 95-101.

88 "*...résistances...tenaces et puissantes*"; CNCE, pp.3-4; see also Daniel Ruez, "Assemblée Générale du 1er April 1995: Rapport moral du président, CNCE, p.5."

89 Colson, RJE 1993, p.230; Bouchardeau Report, 1993, p.7.

1.2.4. Competent authority:

For the most part, authorisation is given at the local level by the prefect; in some ways this is the weakest link in the chain of command that begins in Brussels. A variety of problems can arise (although they do not necessarily arise systematically and are therefore difficult to present in order of gravity or frequency) and great variation exists across the regions.

The substance of the exercise is not taken seriously: Between 5000 and 6000 EIAs were undertaken per year prior to the 1993 legislation; these amendments widen further the scope for assessment. Roughly 10,000 public inquiries are carried out each year in France[90]. Rather than become more adept at handling the procedures efficiently, familiarity appears to have bred contempt for the procedure among many local administrators. Certain administrators, upon whom practical implementation of national and Community law hinges, have learned to respect the black letter of the law whilst emptying the procedure of its substance. Local administrations often resent the public's intrusion into a realm that was previously less exposed to scrutiny. "It all takes place as though three of the actors: the administration, developer, inquiry commissioner, preferred that the fourth actor, the public, manifest itself as little as possible"[91].

That competent authorities have at times given the contents of EIS only cursory examination is borne out by the fact that much EIA litigation concerns EISs that do not contain all the required information -- something that could easily be remedied at the local level during administrative consideration of the EIS. Circular 93-73 is indicative when it reminds local officials that control of the procedure is not merely formal; they must also consider the qualitative aspects of the study, the exactness of the facts, the analyses and the conclusions[92].

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90 The discrepancy is explained by the numerous planning documents which required inquiries, but until 1993, no EIS; 50% regard urbanism planning documents (such as the POS, which although it did not require an impact study, required an environment study and an inquiry); 25% relate to classified installations; 25% miscellaneous projects, including large state projects such as roads, railroads. Bouchardeau Report, 1993, pp.2-3:

91 Bouchardeau Report, 1993, p.7.

92 Point 4.1.1.

Furthermore, their *bête noire*, the responsibility of the state in the event that the decision is annulled, is treated at some length[93].

Lack of resources: Even without a certain element of inertia on the part of the prefects and mayors, monitoring by authorities -- that developers are indeed incorporating the prescriptions into their plans, that those exploiting classified installations are doing so in accordance with the conditions in their permits -- is inadequate. Although not required by the European rules, without follow-up, the useful effect of the entire exercise is allowed to come to nothing. The principal cause is that, as at the Community level, the personnel available for practical controls is extremely limited[94]. Oberdorff notes (generally, not just with relation to EIA) that verifications must be carried out concerning both national and Community obligations, requiring a corresponding increase in the personnel of the prefecture. Such an increase has not occurred; specifically high quality jurists are in short supply within the local administration[95]. Visibly a similar tendency exists in Community and national contexts: to over-extend legal commitments without giving the actual tools to carry out the tasks effectively[96].

Administrative presumption in favour of authorisation: Many local authorities are eager to assume in favour of a project, particularly where large public projects are concerned. Indeed, a contributing factor to the lack of rigour in examining EISs is that, where questions of highways or large infrastructure such as a TGV arise, "[n]o elected official demonstrates a critical attitude. It matters little the damages caused to the environment, as long as the infrastructure serves their territory."[97] Obtaining a large project in one's *département* is a way in which to widen the tax base; it is also perceived by the politically ambitious as a personal victory, and

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93 Point 4.1.2.

94 Where classified installations are concerned, staff shortages are still more extreme; below, point 2.2.2. at *lack of personnel and resources.*

95 Oberdorff, RDP 1995, pp.39-40.

96 Recent improvements have been made on a sectoral basis, regarding EIA and waste management (Loi du 13 juillet 1992 déchets); see Romi, RDP 1993, p.1088.

97 Bouchardeau Report, 1993, p.8. See also Romi, RDP 1992, p.1779; and Simon Charbonneau note sous T.A. Bordeaux 22 October 1987 *Association pour la défense du cadre de vie de Génissac c/ Commissaire de la République de la Gironde* RJE 2-1988, p.166: "*Il est vrai que les préfectures ont toujours ménagé nos élus locaux alors même que ceux-ci en prennent souvent à leur aise avec la loi et cela ne date pas de la décentralisation.*"

one which can warrant bending the rules. In rec

administrative authorities from assuming an impl

inquiry[99] and circular 93-73 reminds that projec

submission of the report by the inquiry commiss

problem that is difficult to address by adjusting leg

- need to remind them not to ~~start before~~ give authorisation before end of inquiry Staggering!

In fact, examples of local authorities' disrespect for the law are not rare where environmental rules are concerned, from the Mountain Act[101], to the Coastal Act[102], and

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98 Loi du 6 February 1992 relative à l'administration territoriale de la République.

99 Colson, RJE 1993, p.224.

100 Point 4.1.3.

101 Somewhat lengthy examples are given to illustrate how deep the resentment of environmental rules runs when the latter seem to threaten economic objectives.

T.A. Bastia 24 November 1988, *Association 'U Levante' c/ Mairie de Corte*: Even prior to the 1993 reform of the EIA rules, the POS planning documents were required to respect environmental preoccupations. In 1985 one mayor decided to circumvent provisions in the Loi Montagne in order to build a parking area and welcome centre and carry out landscaping in a fragile area in the upper valley of Restonica, a registered site since 1966. Initially stopped by a negative opinion from the Commission Départementale des Sites (a *huissier* had noted that trying to pass the project off as a 'rehabilitation' where no building had ever existed before was irregular, and that plans included locating the 'welcome' centre in an area at danger of rock falls) in 1987 the Mayor urged the fabrication of a POS that would accommodate his plans. In 1988, a public inquiry was ordered, not for the POS, but for the *modification* of the as-yet unapproved POS, in violation of L.123-4 of the Code de l'Urbanisme (L.123-4, second indent allows an *approved* POS to be modified under certain conditions). Furthermore Article 78 of the Loi Montagne of 9 January 1985 requires that in mountainous areas planning documents take into account the natural risks specific to these zones an array of health- and even potentially life-threatening (e.g., landslides) effects were not considered; see commentary by Romi and Muscatelli, pp.8-10.

Among the accumulation of infringements of various rules, the administrative court of Bastia simply ruled that the changes envisaged could not be considered modifications to a POS, since the area had never been part of a POS, and that the graphic documents presented were irregular. It annulled the administrative deliberation by which the Municipal Council of Corte had approved the modification of the POS.

102 An illustration of the disrespect for environmental rules -- the Coastal Act (*Loi Littoral*), in particular -- is provided by the Mayor of Toulon, who was prevented by this Act from constructing a large sewage station on Cap Sicié, a small outcropping on the coast of the Mediterranean. During a colloquium on the Coastal Act he complained that the statute was poorly adapted to the coast because it does not permit public officials to do what was asked of them: "...to develop tourism, absorb unemployment, face the largest population growth of the country"; (Romi, RDP 1994, p.1201, pp.1205-06; *Combat Nature* August 1993; CE 19 May 1993, *Les Verts Var*). In his opinion, the law did not perform properly precisely because it protected the environment from the ambitions of local officials. Apparently he did not consider as viable the possibility of locating the sewage station in a less picturesque setting.

EIA[103]. When not seeking themselves to divert the application of environmental law[104], such a predisposition encourages prefects and mayors to be lax in requiring developers to fulfil their obligations, thus lax in their own obligations. Not surprisingly, developers co-operate smoothly with both national and local administrators. Although a good working relationship between developer and authorities (praised by the European Commission[105]) is commendable, this can influence the outcome of the authorisation procedure.

Inertia and obstructiveness: This significant problem of the EIA procedure affects mainly matters of public consultation, and is perhaps more symptomatic of general resentment towards sharing decisional power than directed against environmental interests. Generally public inquiries have been criticised for the limited resources accorded them[106]. In spite of the rules providing for public consultation of the EIS the European Commission finds, correctly, that the EIS "does not appear to be as accessible as it should be in practice."[107] Again, regional discrepancies are significant.

Obstructiveness of local authorities can be such that the recent Loi Paysages[108] has subtracted powers concerning public inquiries from the prefect[109] and transferred them to the president of the administrative court[110]. Furthermore circular 93-73 is peppered with reminders to local officials of their duties[111]. Reluctance can exist even between administrations: where several different administrative services are involved[112], authorities are also reminded that each stage of the process must be accompanied by a complete file

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103 See Île de Ré cases in which three annulments of administrative authorisations before administrative judges were ignored by public authorities; Chapter 6, point 2.6, and footnotes 89 and 324.

104 See examples, Bastia and Toulon, in above footnotes.

105 Com(93)28, pp. 85, 87.

106 *Ibid.*, p.86.

107 *Ibid.*, p.95.

108 Loi Paysages, 8 January 1993, Article 21.

109 Previously the prefect authorised meetings at the request of the commissioner of the inquiry. These requests were already very modest, making a refusal all the more grating.

110 Colson, RJE 1993, p.227.

111 On this issue it insists that officials must respond "with all required diligence to any request to consult the study" (invoking as well the statute on free access to administrative documents of 17 July 1978); Circular 93-73, Point 4.1.4.

112 For example DRIRE for electrical lines; DDE for the construction permit.

including the EIS or notice[113]. It seems that even other Member States may have been affected by this secretiveness of local authorities[114].

1.3. EIA Summary:

In sum, although the European Commission appears to feel that public authorities are generally serious regarding EIA[115], the opinion is not widely shared among national sources[116]. The Commission admits that very few projects are actually cancelled because of harmful effects on the environment[117]. (Indeed, EIA rules do not require this.) However, one of the aims of the Community legislation is ostensibly that the projects be modified to be less environmentally harmful. The major problem of practical implementation is that, in most cases, even modification of the project is not seriously considered by the developer, not insisted upon by local authorities, and it is not within the power of the public to demand[118].

Recent legislation has taken steps to improve practical implementation[119]. As in any area, however, circulars and legislative amendments can address the symptoms but cannot affect the underlying attitude. Much remains at the discretion of local authorities and the picture is highly variable across the country. A great deal hangs upon the environmental consciousness and tenacity of the actors: the developer, public, commissioner and prefect. In sum, although the EIA procedure is not systematically emptied of value in France, frequently its effectiveness is chipped away by details, varying with the players' strength of commitment to their diverse interests.

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113 Circular 93-73, Point 4.2.1.

114 *Ibid.*, point 4.2.2.

115 Com(93)28, pp.86-87: "public authorities generally see to it that developers take study seriously."

116 Although perhaps from the Commission viewpoint, by comparison with other Member States, France has not encountered as many problems.

117 Com(93)28, p.88, points out that, of some 5000-6000 projects per year, only about 10 are abandoned because of a poor EIS.

118 And for most smaller private projects EIS comes too late in the process for much modification of the project to take place; Com(93)28, p.88.

119 Mentioned above, that takes out of the hands of local authorities some of the decisions.

2. Practical Implementation: LCP:

The fundamental reason both that France's were among the most stringent of the variable obligations set by LCP88/609, and that France has apparently had fewer problems meeting them is that France provides 70% of its energy needs through nuclear sources. Indeed, France finds itself in the fairly unusual position among Community Member States of being a net exporter of energy.

2.1. Approach:

Information is not as readily available concerning large combustion plants as EIA procedures. However, examination of various sources indicates that practical compliance[120] with the European directive has not presented serious difficulty in the case of this Member State. Although some problems of practical implementation are purely national, other potentially serious problems stem from vagueness in Community legislation[121]. The largest problem appears to be that the influence of industry bars action that could be still more effective in reducing emissions.

Commission: Establishing an exact Commission opinion on the practical compliance with LCP88/609 is ruled out. In response to specific questions concerning the various obligations imposed by LCP88/609[122], the Commission responded[123] that

> Under Commission rules of procedure, the monitoring by the Commission of Member States' implementation of Community directives is subject to rules on confidentiality. The Commission is unable to give information, other than that which is reported in the monthly Bulletin and summarised annually in the General Report, or is made public by way of a Parliamentary question, of infringement cases against the Member States.... Article 16 of Directive 88/609 requires the Member States to report to the Commission, but contains no provisions regarding the publication of those reports or the production of Commission reports.

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120 As opposed to notification of the Commission of compliance, which remains poor.

121 E.g., approaches to classifying plant. As CITEPA indicates, given the permissible manners of classifying plant, the emission limits could apparently be attained by simply juggling plant classification and without any effect on actual emissions; below.

122 Including the Commission's opinion on the dates for defining new plant in the different national measures, the performance of the Member States in the first phase reductions, the second suspension of six months implied by the French legislation, Spanish repatriation of the decision-making concerning different limits (Article 3.4 RD646/1991 compared with Article 3.4 LCP88/609).

123 Letter 21.3.96/XI/005205.

Strictly speaking, indeed Article 16 LCP88/609[124] does not require that the Commission make public its information, and frustratingly, Directive 90/313 on access to information applies to the Member States but not to the Commission[125]. The Bulletins and application reports give almost no detail, indicating simply that in 1990 a letter of formal notice was sent to France[126]; in 1991 the proceedings were terminated[127]. It is disappointing that no more information is forthcoming and that the Commission dismisses the useful pressure for compliance that publicity could exert (if not in this specific case then generally), particularly where other means of enforcement are limited[128].

National Sources: Technical commentary from other sources is relied upon here, such as the two studies carried out by an inter-professional technical centre that mediates between industry and government authorities responsible for controlling air pollution, CITEPA[129].

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124 Article 16.1 requires that Member States inform the Commission of reduction programmes, one year at most after each phase; send synthesis report on implementation of programmes; and forward intermediate reports in mid-phase. Article 16.2 indicates the points concerning which these reports are intended to provide an overall view. Article 16.3 indicates that "the Commission shall organize regular comparisons of the programmes referred to in Article 3(1) with the Member States in order to ensure harmonized implementation of the programmes at Community level. The Commission shall take particular care to ensure that the implementation of the programmes produces the expected results in terms of the overall reduction in emissions and shall, if necessary, make appropriate proposals." It shall not, however, make these public.

125 Directive 90/313, Article 2(b): "'public authorities' shall mean any, public administration at national, regional or local level...".

This, despite a variety of Community declarations on transparency, e.g., the Commission's communication on "Openness in the Community," OJ 1993 C166/4. Annex II point 4, Accessibility of documents, states that a request for a document should be refused where it is necessary to safeguard, *inter alia*, commercial, industrial and financial confidentiality, including intellectual property.

See also Code of Conduct concerning public access to Council and Commission documents. Listed under 'exceptions', ie, reasons to refuse access to information, are *inter alia* "the institution's interest in the confidentiality of its proceedings." This is, apparently, wide enough to include requests for information on the implementation of directives.

126 Bull.EC 9-1990, p.119.

127 Bull. EC 6-1991.

128 See for instance Lopez Ramón in Pardo, p.287: "where other coercive means are lacking, publication of the data concerning emissions is an effective compulsive mechanism for accomplishing international obligations."

129 Centre Interprofessionnel Technique d'Etude de la Pollution Atmosphérique; CITEPA: Inventaire des Emissions de SO2 et de NOx des Grandes Installations de Combustion en France. Jean-Pierre Fontelle, November 1993; study partly financed by the Service de l'Environnement Industriel of the Ministère de l'Environnement, pp.6-7.

The director of CITEPA has also been extremely helpful in answering specific questions.

Actual situation: The situation that emerges is fairly positive. The programme of annual emissions reductions required by LCP88/609, Article 3 has been sent to the European Commission[130]. Complying with the limits set by LCP88/609 has not been difficult; indeed it appears that in the case of NO_x, emissions are below those set in the directive[131]. The 1991 reductions in emissions comply with the ceiling imposed by the directive[132]. The figures indicate a 69% reduction in SO_2 and a 56% reduction in NO_x as compared to 1980[133], despite the fact that 1991 emissions were higher than average[134].

From the European point of view, extremely simple issues remain problematic. Typical of Member State nonchalance towards reporting requirements, the Ninth Application Report pointed out that by 1992 not a single report had been received under Article 16 LCP88/609[135]. At this point reduction programmes and first phase intermediate reports were due.

2.2. LCP Requirements:

Being of a vertical nature, instead of structuring the discussion by procedural interventions, the practical implementation of LCP rules is examined by the requirements the rules entail.

2.2.1. Authorisation:

In order to authorise emissions, the Administration must be able to co-ordinate the local level authorisation with a unified vision of total national emissions. CITEPA carries out inventories of SO_2, NO_x and dust emissions that are then used at national level, where many actors are implicated in order to co-ordinate air pollution policies, and *inter alia*, to apply LCP88/609. The principal national actors at the central level are the Environment Ministry, specifically the Service of Industrial Environment of the Directorate of the Prevention of Pollution and Risks, and within this, the Office of the Atmosphere, Control of Energy and Transport[136]. The Environment Ministry, responsible for developing air quality policy, is

130 Cf: Rémy Bouscaren, Directeur CITEPA, answer to a letter of 6 May 1995.
131 Circular 90/54; CITEPA Inventaire.
132 CITEPA Inventaire, p.28.
133 Ibid., CITEPA notes that the bases for these years are not strictly comparable.
134 Because of poor climatic conditions and the rise in urban heating.
135 OJ 1992 C250/160, not to be confused with the initial reduction programmes.
136 Ministère de l'Environnement, Organigramme, February 1995.

competent to co-ordinate the actions of other ministries likely to have an impact upon air pollution, as well as all actions concerning prevention of major technological or natural hazards[137], such as defining 'special protection zones' within which various sources of pollution can be regulated[138].

At the regional level, authorisations are then accorded pragmatically, in concertation with the industry, using BATNEEC guidelines, and in fact these negotiations are often arduous[139]. In negotiations with industrialists, the prefects have a large margin of discretion, which could give rise to considerable variation in authorised emissions across regions and could leave room for other interests to be satisfied[140]. However, to the dissatisfaction of the energy industry, prefects can and often do justify stricter emissions on environmental grounds, and also because of the proximity of other emitters[141]. Industrialists who feel they could attack the justification for stricter limits are prevented by doing so since the limits are the result of group negotiations[142].

Unified vision/data collection: Accurate scientific data on the state of air quality are essential to implement LCP obligations correctly. In addition to the inventories established by CITEPA, ADEME[143] monitors air quality standards, providing information on air quality, technical information to industries and access to financial assistance[144]. It also supervises research undertakings and manages the tax on air pollution (receiving for this a large percentage of the para-fiscal tax[145]). It shares its task of technical assistance linked to air

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137 Decree 16 April 1992; see also ROMI, *Droit et Administration*, 1994, p.369; Bennett, 1991, p.23; Deruy, 1993, pp.167-68.

138 By joint *arrêté* with the Ministry of Health, signed, if necessary, by the Minister of Transport or Energy; ROMI, *Droit et Administration*, 1994, p.369.

Also, the Conseil d'Etat can, by decree, order the suppression of any installation, classified or not, that gives rise to risks or dangers that the measures listed in the Classified Installations Act have not rectified (Loi 76-663, Article 15); this power is rarely used; Lepage-Jessua, LPA 1993, p.13.

139 Letter Rémy Bouscaren, Director CITEPA, 29 July 1996, N/Réf CT 20365-BR/MG.

140 Furthermore, when asked if the prefects have a clear vision of total emissions, the Director of CITEPA replied that "the prefects have a vision of nothing at all!"

141 Letter Bouscaren, 29 July 1996.

142 *Ibid.*

143 Agency of Environment and Energy Control; see Chapter 4, point 1.3.2. *New National Agencies*.

144 Bennett, 1991, p.23.

145 Below, *Incentive -- lack of political resolve*.

quality surveillance with two other organisms: the Bureau of atmosphere, energy control and transport[146], of the Environment Ministry; and the Central Laboratory of Air Quality Surveillance (LCSQA)[147].

Furthermore, local associations of surveillance and management of the monitoring network exist, accredited by the Environment Ministry and the central laboratories of LCSQA. In 1994, 30 such organisations existed, by 1995, 32[148]. The network that they manage included, in 1993, 797 analysing and 178 collecting stations: of these 294 measured SO_2 (36 more stations were added during the year); 144 measured NO_x (plus 28 during the year), and 71 measured dust (plus six)[149]. The stations are located in industrialised, highly populous areas. Also, the Ministry of Environment, through the DRIRE, co-ordinates a nineteen-station network for monitoring acid precipitation; the costs of maintaining the network are borne jointly by state and local authorities and industry[150]. In short, accurate, representative data are available in this national context, and co-ordination between administrative levels as well as with data collection appears efficient.

2.2.2. Monitoring compliance:

LCP88/609 sets goals to be attained over several years: local officials must therefore police installations and ensure that levels set in the authorisations are respected (and that accidents interruptions in supply are reported to the Commission).

Official Guidance: A circular addressed to the local authorities[151] takes considerable steps to encourage efficient practical implementation of LCP rules. It clarifies various issues, starting

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146 Richert, P., *Rapport sur les évolutions souhaitables pour le dispositif national de surveillance de la qualité de l'air,* Le Bureau de l'atmosphère, de la maîtrise de l'énergie et du transport, 3 mai 1995, at p.81.

147 Laboratoire central de la surveillance de la qualité de l'air.

148 ADEME et le Ministère de l'environnement, *La Qualité de l'air en France en 1993-94: données et références,* pp.24-25 .

149 ADEME, La Qualité de l'air..., p.26.

150 Bennett, p.25-6.

151 Circular 90-54 du 27 June 1990 *relative aux installations classées pour la protection de l'environnement: Installations de combustion.*

with the scope of the directive and transposing *arrêté*[152], and the meaning of several terms. In addition to many technical specifications[153], advice is issued: for instance, the circular twice reminds prefects of their competence to set stricter limits, particularly where justified by climatic conditions. As with EIA procedures, the practice of artificially dividing a project in order to fall below regulation thresholds (in MW) pose difficulties that merit attention:

> In particular, I absolutely wish to avoid seeing built, by sections of less than 50MW, in space or in time, combustion installations of more than 50MW, the pollutants of which would be insufficiently regulated.[154]

Prefects are cautioned particularly to monitor extensions of plant; plants less than 50MW; and (going beyond Community obligations) those between 50 and 100MW, for which the directive in some cases fixes no SO_2 limit[155].

Regarding surveillance, the circular alerts officials to other sources of difficulty. Prefects are encouraged to avoid the "perverse effect"[156] of the 50MW threshold established by the directive, and consider going beyond existing requirements by taking measures to include medium-size installations in their prescriptions (and compliance with the recent Community amendment to LCP88/609[157] should be facilitated). In an effort to encourage precision in application, such points as the differences between 'evaluating' dust emissions (visual) and 'measuring' (gravimetric methods) are highlighted. The circular insists specifically that the prefects can require laboratories[158] to carry out controls, measures, or series of measures if they judge necessary in view of effects on the environment. Finally, the circular for large combustion plants demonstrates a willingness to adjust future implementation by requesting that the

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152 Installations that use combustion for the production of energy, whatever the combustible employed, except for those that re-use the product of combustion directly in their fabrication process. CITEPA also had trouble determining the precise scope of the directive, below.

153 For instance, regarding the types of combustibles and their desulphurisation properties, chimney calculations and dispersion studies.

154 Circular 90-54.

155 Regarding new plant burning solid fuel. This has been modified by Directive 94/66, 15 December 1994 (OJ 1994 L337/83) amending Directive 88/609, affecting new plant with a rated thermal input of between 50 and 100 MW which use solid fuel for which no SO_2 limit was set by LCP88/609.

156 Circular 90-54.

157 Directive 94/66, above.

158 Chosen in accordance with the inspection of classified installations.

prefects forward observations of practical difficulties they encounter to the Secretary of State for the Environment.

Monitoring powers: The inspectors of classified installations, under the authority of the Ministry of the Environment since 1992[159], are competent to monitor the functioning of large combustion plants. The Regional Directorates of Industry, Research and the Environment (DRIRE), monitor control of emissions to air, monitor areas of special protection and keep records of emergency networks[160].

At local level, mayors and prefects also have policing powers. Mayors possess in their communes general policing powers linked with, among other things, public health[161]. Where the risk of grave and imminent danger requires, the mayor is competent to tighten prefectoral prescriptions[162] and, in an emergency, can take all measures of aid and security and can call for the intervention of state services. The principal problem here is that generally mayors are reluctant to use these powers, preferring either to leave it to the state authorities or to prefects and inspectors of classified installations[163].

The widest powers at the local level belong to the prefect; they are responsible for instituting procedures of alert[164]. Specific legislation gives them extraordinary policing powers, exercised on behalf of the State rather than in place of the local authority: these powers exist in the case of classified installations. Discretion exists in using these powers.

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159 Transferred from the Ministry of Industry to the Ministry of the Environment by decree 92-434, 12 May 1992.

160 The ADEME also has a delegation in each region and it has been suggested that they play a greater role; Fontaine, Didier, "Les resposabilités locales dans la lutte contre la pollution de l'air," LPA 14 June 1991, p.6. .

161 Article L.131-1 *et s. Code des Communes.*

162 CE 14 December 1981, Rec Tables, p.639, cited in Colson, Jean Philippe, "La Responsabilité du fait des déchets en droit public français," RIDC 1992, p.124.

163 Fontaine, LPA 1991, p.4.

164 ROMI, *Droit et Administration*, 1994, p.370.

Under certain conditions the prefect also has a power of general police that applies in the communes: by *arrêté motivé* he can substitute himself for the mayor when the public order is threatened. This must take place only after a letter of formal notice addressed to the municipal authority receives no response. Such substitution is illegal in the absence of a failure to act (*carence*) on the part of the mayor and/or in the absence of a threat to public health. T.A. Montpellier, 15 June 1990 *Mairie de Lattes c/ Préfet de Région Languedoc-Rousillon.*

Lack of personnel and resources: This concern goes beyond the domain of air pollution to affect all classified installations. Just as monitoring of practical implementation received attention at Community level fairly recently, only lately[165] has new priority been accorded to inspection of classified installations in France[166]. The inspectors are highly trained engineers and technicians[167] and an initial concern is that, having similar interests, they may in individual cases be pre-disposed towards the interests they are controlling.

However, the worst deficiency here, as at Community level, is the "chronic insufficiency of means of control and numbers of inspectors"[168]. In 1991 there were 553 inspectors of classified installations -- some not even full-time -- which worked out to one inspector for 904 installations[169]. It was suggested that prefects impose methods of 'self-surveillance' on industrials[170]; a similar approach is taken in both the LCP directive[171] and *arrêté*[172]. Once again tasks are heaped onto the local level that, even with diligence, they cannot accomplish effectively. To remedy the situation the political will must be found to increase resources.

2.2.3. Co-operation of Industry:

Cost: In the opinion of industrials this directive poses a problem in terms of cost[173]. Practically speaking, although discontent, they appear generally to have complied with the reductions required[174].

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165 Circular of 11 March 1987, Official Journal 2 May.

166 Although a body of inspectors has existed since 1917, the task was given to part-time agents recruited for the purpose. See PRIEUR, Dalloz 1991, p.426.

167 Or, for matters of agricultural undertakings, veterinarians; Article 33 Decree 77-1133.

168 Colson, RIDC 1992, p.128.

169 PRIEUR, Dalloz 1991, p427.

170 Circular no.2740, 28 March 1988

171 Articles 14 and 15.

172 Articles 17-28.

173 See also CITEPA Inventaire, p.28; Letter, Director CITEPA Rémy Bouscaren, 15 May 1995.

174 CITEPA Letter, 15 May 1995: "the application of this arrêté, in the opinion of industrials, poses a problem in terms of cost. In reality, the application does not appear to pose many problems; the industrials pass either to gas or to fuel-oil BTS and use low NO_X burners. However, the new directive will be probably much more forceful"; see also CITEPA Inventaire, p.28.

Guidance: In the matter of helping plant operators adjust to the requirements of the LCP legislation, CITEPA has issued a technical report specifically about SO_2, NO_x and dust, aimed at combustion plant operators: it examines, in some 200 detailed pages, issues such as techniques of purification, restraints on emission reductions, economic comparisons of emission reduction methods and cost calculations[175].

Incentive -- Lack of political resolve: Industrials were supposedly given 'incentive' to comply through a para-fiscal tax on air pollution[176] imposed on sulphurous oxides, nitrous oxides, chlorhydric acids, non-methane hydrocarburants, solvants and other volatile organic compounds, and dust. Benefiting the Air Quality Agency of ADEME[177] the tax was recently renewed until 31 December 1999[178]; it applies to combustion plants with thermal power equal or greater than 20MW, easily covering LCP88/609 and its later modification. The negotiation of the tax illustrates both the influence of large economic players and the lack of political resolve to impose restraints on industrialists[179]. The tax was to be proportionate to environmental risks at issue[180]. However, to work as an incentive it must be high enough to discourage emissions. In

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175 CITEPA, *Possibilités Technico-Economiques de Reduction des Emissions de SO_2, NO_x et Poussières dans les Gaz de Combustion des Chaudières au Fuel-Oil Lourd,* Convention no. 89.2.18.00.48, 15.1.1990.

176 *Taxe parafiscale sur la pollution atmosphérique.*

177 At least 60% of the tax is used for the prevention reduction and measurement of accidental or permanent pollution. Other uses include development of new technology, finance of monitoring the quality of air, aid to studies and technical and economic projects. A maximum of 6% goes to the technical and financial management of the system; see UIC Lettre du Département Technique, no.17, May 1995.

178 Extended for another five years (until 31 December 1999) by a decree and an *arrêté* of 3 May 1995 (JO 4 May 1995).

It had been originally imposed by decree, 13 May 1981, article 18, and implemented by decree 85-582 and an *arrêté du 7 juin 1985 pour les rejets dans l'atmosphère d'oxydes de soufre et d'oxydes d'azote et prelevée jusqu'au 31 décembre 1989.* Then decree 90-389 and *arrêté* 11 May 1990 (JO 13 mai) renewed the tax until 31 December 1994 and widened its application to include other pollutants.

179 The influence of industrial actors in fixing the rate of the tax was evident. Already complaining about the costs of the directive, they balked at rates to be fixed in latest tax, which had been fixed first at 230F and 215F/tonne emitted for SO_2 and NO_x respectively. Consequently the rates were lowered to 180F/tonne emitted of both SO_2 and NO_x (more strikingly still, rates for volatile organic compounds were reduced from 765F to 180F). Among other things industrialists managed to increase their representation in the committee of management of this tax, to the detriment of the representatives of builders of materials for prevention, reduction and measurement of atmospheric pollution (no longer represented); UIC Lettre du Département Technique, no.17, May 1995. In future as well, therefore, the tax is not likely to have incentive value.

180 PRIEUR, Dalloz 1991, p.126.

the opinion of Rémy Bouscaren, Director of CITEPA, the tax would have to be ten or fifteen times higher to discourage emissions, although it has been useful in resolving the problem of "black spots"[181]. In effect, the industrialists find it less burdensome to pay the tax than to reduce emissions further. Nonetheless, although this might enhance practical implementation further, it appears Community obligations have been met.

2.2.3. Communication to Commission:

Finally, should serious difficulties arise and derogations from the rules be required, these must be communicated to the Commission. Requests to the Environment Ministry for information on whether this has been necessary have gone unanswered[182].

2.3. Problems encountered:

Vagueness of Community legislation: That compliance was not overwhelmingly difficult is not to imply that no problems arose. The CITEPA Inventaire encountered a significant difficulty stemming directly from vagueness in the formulation of the Community legislation[183]. Specifically, the term "large combustion plant" leaves too much room for subjective appreciation[184], even considering the definitions/exemptions indicated in LCP88/609, Article 2(7). The obligations in the European directive could be satisfied by juggling classifications, without any real effect on emissions. The report illustrates that, according to the approach used to classify plants -- by 'establishment', by chimney[185], by boiler (*chaudière*) -- and keeping within the 50MW criterion set by the directive, vastly different results can be obtained, with variations of 5 or 10% more or less of installations being enclosed in the definition. Defined by 'establishment' there are 286 existing French installations concerned by the directive (taken as the basis for comparison, therefore 100%); defined by 'chimney', there are 205 (71.7%); by boiler only 128 are covered (44.8%). To illustrate the importance of this, in 1991, taking an

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181 Intensely polluted areas; Bouscaren, answer to a letter of 6 May 1995.
182 Faxes sent to the Ministry of Environment on 23 September 1996, 31 October 1996.
183 CITEPA Inventaire.
184 Circular 90-54 also addressed this definition.
185 Several may share a chimney or boiler.

'establishment' approach, emissions of SO_2 (in kt) were 587.7; for a 'chimney approach 546.4[186] (93%); and for the boiler approach, 509.3 (86.7%). In other words, simply by choosing a different classification approach, emissions can be significantly reduced (respectively by 7% and 13.3% in the above example).

Another vagueness in the original directive that posed problems for the national authorities in implementation is that LCP88/609 was not explicit regarding certain equipment, such as the incinerators of the petrochemical and oil industry[187]. The CITEPA report suggests that greater clarity in the definition of installations is desirable and that the Commission take care to systematically analyse inventories given by Member States, with a view to ensure that homogenous results are established despite diverse practices in classifying installations[188].

Such issues were not addressed in the amendment to LCP88/609.

National difficulties: Other difficulties that arose were related to technical capabilities at national level and have since been resolved: for instance, many installations could not obtain figures for the entire year of 1990 and CITEPA was forced to make estimates of their emissions[189]. To help with collection of data on specific technical issues, CITEPA recommends[190] that the official form to be completed for the para-fiscal tax be used as an opportunity to collect technical details.

2.4. LCP Summary:

From the picture that can be pieced together, there appears to be little worry in this national context concerning the adequacy of data collection and the capacity to attain emission reductions. The discretion of prefects in according authorisation, which could lead to variation across regions, particularly given the influence of industry, does not appear to pose a problem at present. Regarding the monitoring of ongoing obligations, the situation is far

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186 Margin of error: + or - 4.2.
187 CITEPA Inventaire, p. 11.
188 *Ibid.*, p.26.
189 Consequently it notes that the figures are slightly inaccurate for that year.
190 CITEPA Inventaire, p.26; The types of questions that could be usefully added to it are suggested.

from optimal. Duties are passed among responsible parties: the mayors leave tasks to the prefects, the police leave tasks to classified installation inspectors who are unreasonably few in number. It appears that administrative co-operation between levels and willingness to apply the rules is not undermined by opposition to the obligations imposed.

3. Conclusion:

Given France's positive energy situation and the fact that it affects a limited section of administrative actors, the obligations of LCP88/609 have seemingly not been perceived as overly onerous (although the affected industry has complained of costs). Although room for discretion remains, prefects appear to negotiate limits fairly strictly. Practical compliance seems to have been achieved without excessive difficulty, although certainly problems remain concerning, for instance, insufficiency of inspectors. By contrast the rules on EIA, having wider effects, are at times perceived by local officials as threatening projects that are economically beneficial in the short term, as well as being generally much more troublesome to oversee. This perception plays a significant role in the fact that practical implementation proceeds much less smoothly (recalling that practical implementation is highly variable). The developer is not required by the administration to improve his performance, the public's input is distanced where possible, the inquiry commissioner is occasionally hindered in his duties. Finally the number of cases brought before administrative courts for annulment of the authorisation based upon EIA suggest that the verification of the procedure exerted by local authorities is inadequate. The two examples of legislation suggest that laxity and negative use of discretion are linked to the play of interests involved and the bureaucratic inconvenience caused.

CHAPTER 6: France – Problems of Enforcement:

The purpose of this chapter is to examine the conditions in the jurisdictions (administrative, civil, criminal) in which Community (and obviously national) obligations can be enforced and to investigate the types of difficulties that can hinder attempts to do so. The most intractable problem to emerge is that, at the stage of enforcement, another layer of discretion is added. Frequently those in charge of enforcing obligations do not make use of all the tools at their disposal: an important general note is that, concerning the environment, authorities are much more inclined to persuade than enforce[1].

In France a separate administrative jurisdiction exists and is examined first, using examples predominantly from EIA, while signalling important differences in procedures concerning classified installations (and therefore large combustion plants). Notably here, as opposed to the Spanish context, in the nearly two decades of the EIA procedure's existence a great deal of litigation has arisen -- an indication of the problems that emerge in implementation. Subsequently, civil and penal jurisdictions are investigated, again giving illustrations relevant to the legislation examined wherever possible. Since a LEXIS search revealed no litigation surrounding the French transposition of LCP88/609, it is necessary to discuss hypothetically problems that could arise in attempting to challenge administrative authorisations, to claim for damages caused by the pollution proceeding from a large combustion plant, or to criminally prosecute the operators (legal or physical) of such an installation.

1. Administrative Sanctions:

Before proceeding to a court action, administrative sanctions are available through the prefect for violations of regulations; extremely positive use has been made of these, mostly in the area of pollution from classified installations[2]. A third party may request that the prefect issue a formal notice (*mise en demeure*) to a plant operator. In this manner, far-reaching and immediately applicable measures, similar to those available through the courts can be

1 PRIEUR, Dalloz 1991, p.695.
2 *Ibid.*, p.723; Loi 76-663, Title VII on Administrative Sanctions.

imposed. *Inter alia*[3], the administration can require the operator to deposit a sum equivalent to the works required, to be reimbursed as these are carried out, an efficient method that is more and more frequently used[4]. The sanctions themselves are of course subject to judicial review.

The advantage of administrative sanctions is that they short-circuit lengthy, costly and uncertain court proceedings as well as the possibility that prosecution will be discontinued. Besides the fact that certain sanctions are not much used, the main concern is the possible inertia of the prefect; however, state responsibility can be engaged for failure to act[5]. Finally, if the prefect is unable thus to make the operator respect the applicable rules, one must turn to the courts.

2. Administrative disputes (contentieux administratif):

Occasionally lower courts are quite forward-looking in taking account of European obligations or the particular requirements of environmental protection. More frequently, however, where a positive stance is crucial to give real meaning to enforcing environmental obligations -- regarding interim measures, or using fully the powers conferred upon the judge -- the results are disappointing.

What can be challenged: Concerning EIA, judicial review (*recours pour excès de pouvoir*[6]) seeks not to annul the EIS itself but, by finding an illegality that affects the EIS or the public

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3 Regarding the inobservation of imposed conditions, Loi 76-663, Article 23: "...the prefect can undertake the measures at the expense of the exploitant; or require him to deposit in a public account a sum corresponding to the total of works to be done, which shall be restituted to the exploitant as the measures are carried out; or suspend the functioning of the installation, after opinion from the Departmental Council of Hygiene, until the imposed conditions have been carried out.

Regarding exploitation without authorisation, the prefect can, Loi 76-663, Article 24: "suspend the exploitation of the installation until the declaration has been deposited or the authorisation granted...order the closure or the suppression of the installation...apply the procedures foreseen in Article 23... with an agent of the public force, place seals upon the installation maintained in functioning in infraction of a measure of suppression, closure or suspension, or in spite of an *arrêté* refusing authorisation.

4 PRIEUR, Dalloz 1991, p.428.

5 CE 22 mars 1978 *Brelivet*, RJE 1980, p.45; TA de Caen, 17 octobre 1972 *Syndicat de défense contre la pollution atmosphérique* JCP 1973 II 17351; Colson, RIDC 1992, p.127.

6 Translation: Dickson, 1994, p.72; *excès de pouvoir* is also translated as *ultra vires*, see *Dictionnaire Economique et Juridique*, Navarre, L.G.D.J., third edition 1992.

inquiry and constitutes a formal irregularity[7], to annul the administrative authorisation based upon the EIA. Judgment can neither substitute a legal decision for the illegal one nor order the administration to take a certain decision or adopt a specific attitude.

Concerning large combustion plants, the types of acts that can be challenged are listed in the Classified Installations Act[8] and include the initial authorisation or declaration or the decision not to authorise, as well as the *arrêtés* fixing prescriptions and conditions of authorisation. In this event the powers of the judge are more extensive (below). Furthermore, if the administration ignores requests for administrative sanctions, a third party may commence proceedings for inaction (*carence*)[9]. Litigation in administrative courts may also involve judicial review of other relevant administrative decisions (e.g., imposition of administration sanctions) or an action for compensation[10] for damage caused by a publicly owned classified installation.

2.1. Judicial challenge:

An important difference between administrative enforcement proceedings that affect legislation such as EIA85/337 and legislation such as LCP88/609 is that, since the latter falls under the Classified Installations régime, the judge possesses powers of 'full dispute' (*plein*

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7 *Vice de forme ou de procédure*: (formal irregularity; translation, Dickson, 1994, p.73). An action for *excès de pouvoir* unites the elements of elaboration of the act, its form, its physical presentation. A formal irregularity results from the misunderstanding of the rules fixing the form and procedures of each act. However, a hierarchy of these rules exists and not all violations constitute an illegality. For a discussion of other types of illegality (*incompétence, détournement de pouvoir; violation de la loi*) see Dalloz administratif, 1992, chapter 7, Title IV.

8 Loi 76-663, Article 14 : i.e.: decisions taken in applications of articles 3, 6, 11, 12, 16, 23, 24, and 26 (regarding for instance, authorisation, conditions of installation and exploitation, special prescriptions, a prefectural *mise en demeure*).

9 CE, 22 mars 1978 *Brelivet;* see PRIEUR, Dalloz 1991, p.433.

10 *Recours en indemnité.* Generally, this can appear before an administrative court only *after* a request for compensation addressed directly to the administrative body concerned has received a negative or inadequate response (in which event the court must be instructed within two months) or has received no response (implicit rejection; the court must be instructed within four months); Deruy, Laurent, "France," in Environmental Liabilities and Regulation in Europe, edited by Mark Brealey, International Business Publishing Limited, The Hague, 1993, pp.197-98.

contentieux[11]). Whereas for EIA proceedings the judge is able only to annul the decision, here he can substitute himself for the administration, modify or introduce technical prescriptions[12], or give an authorisation refused by the prefect[13]. He can ask for an expertise[14], visit the site[15], consult administrative organisations, or ask for an opinion of the Superior Council of Classified Installations[16]. He can appreciate the legality of administrative sanctions, aggravate these where he sees fit, apply a variety of sanctions himself[17], and issue a formal notice to the Administration to elaborate and impose special prescriptions[18].

Another peculiarity is that, where the operation of classified installations is at issue, the legality of the issue is appreciated, not in light of the provisions in force on the date on which the administrative decision was taken, but in light of the provisions in force on the date of the judgment[19]; the plant operator is expected to keep up to date regarding applicable legislation. However, when the authorisation procedure is attacked, legality is appreciated by the rules applicable on the date the challenged decision was taken[20].

Generally a two-month time-bar from the notification or publication of the regulatory act exists, or from the notification of the individual if an individual decision is at issue[21]. Third

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11 In the same manner as Electoral disputes or disputes involving buildings 'menacing ruin' (*édifices menaçant ruine*) are subject to *plein contentieux*. For Classified Installations, the distinct contentious regime is traditional, and was elaborated by the Conseil d'Etat in application of the decree of 15 October 1810 relating to insalubrious, incommodating or dangerous workshops, modified by the loi du 19 décembre 1917.

12 CE 27 novembre 1957, *Ville de Meudon*, Rec,. p.924; CE 3 février 1967 *Société des forges de Chelles*, Rec., p.825; CE 9 octobre 1981 *Association de défense des sites de Sainte-Radegonde*, req. no.4006. See Encyclopédie Dalloz, Contentieux administratif, p.6: as far as actual closure of the installation is concerned the jurisprudence is not definitive.

13 If EIS and public inquiry are regular. See CE 16 octobre 1957, *Ministre de l'Industrie et commerce c/ Soc. Les Tanneries de la Seine*, Rec., p.532; CE 11 mai 1988, *Comité de Défense du site de Kervoazou*, req 66.490; 66.575. Even for installations requiring only a declaration T.A. Toulouse 18 juin 1986 *Association pour la Sauvegarde de l'Environnement de Bourret*, req. 84 246.

14 CE 14 mai 1948 *Courtial* Rec., p.210.

15 CE 27 janv. 1978 *Cadoux et autres.*

16 (*Conseil Supérieur des Installations Classées*) CE 7 nov. 1984 *SICA du Val de Gennes.*

17 See, for instance, Lepage Jessua, LPA 5 février 1993, p.14.

18 TA Toulouse 21 février 1986 *Marty.*

19 CE 6 février 1981 *Dugenest* D. 1982.308, note Prieur. See commentary PRIEUR, Dalloz 1991, p.741; Colson, RIDC 1992, p.126; Encyclopédie Dalloz, Contentieux administratif, p.5: it is noted, however, that this solution has not been clearly supported by the Conseil d'Etat.

20 CE 27 février 1981 *Ets Maurice David* (Rec.p.114).

21 Dalloz administratif, 1992, pp.186, 208. If, during the two-month period, the applicant has formed a *recours hiérarchique* or *gracieux*, then in case of rejection, a new two-month period begins to run from this rejection; see also Article 14, loi 76-663.

parties[22] are treated generously: because of the types of dangers posed, they are given four years from the publication or billing (*affichage*) of the decision in which to take legal action[23].

Finally, it is not obligatory to first make an administrative appeal (*recours administratif*[24]) before commencing judicial proceedings. In spite of the theoretical advantages administrative appeal offers, the administration is likely to confirm its earlier decision and the odds of success are slim[25].

2.2. Disposition of the Administrative Courts:

Whereas procedural rules often present the toughest obstacles to judicial protection of the environment, in France, the attitude of the highest administrative court was itself an important obstacle and particularly affected the enforcement of EIA rules. The discipline of environmental law is "...a new area in which recent juridical rules, as much at the international level as at the national level, are shaking up the hierarchy of society's traditional values."[26] Particularly during early years the Conseil d'Etat resisted this 'shake-up'. Although this pre-dates the European directive, the case-law has left a negative legacy that affects European rules as well.

Position of Community law in national system: First, a brief reminder of the Conseil d'Etat's stance towards Community law is useful. It had long been a cause of Community concern[27] and indeed, only with *Nicolo*[28] was the primacy of the EC Treaty over national law, even

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22 Described as "physical or legal persons, associations, communes and associations of communities".

23 An important limitation is that third parties who have acquired, leased or constructed in the area of the installation after the billing or publication of the *arrêté* of authorisation or prescription cannot bring a case: Article 14, loi 76-663. There are also subtleties to be considered, for instance prefectural *arrêtés* prolonging the time period for treating an authorisation request can aggrieve the applicant but not third parties; however, the latter can use any irregularity in the prolongation to attack the final decision.

24 The *recours administratif* includes both the *recours gracieux* (asking an administrator to reconsider his decision) or the *recours hiérarchique* (asking the administrator's superior to reconsider the administrator's decision).

25 Dalloz administratif, 1992, p.177.

26 Prieur, "Pas de caribous au Palais Royal" RJE 2-1985 p.137 at pp.140-41.

27 This issue arises in the second practical illustration given, below.

28 CE Ass. 20 octobre 1989 *Nicolo*.

subsequent, accepted. Later this primacy was recognised for Community regulations[29]. Applicants cannot usefully rely on a Community directive against an individual decision[30]. Specifically regarding directives, the compatibility of a French regulatory act with a Community directive can be questioned and an interested party can ask the government to transpose a Community directive or to abrogate or modify a text incompatible with a directive[31]. Furthermore, a directive can be indirectly invoked by raising an *exception d'illégalité* against the regulatory text on which the individual decision that is challenged is based[32].

Early case-law -- presumption in favour of project: The Conseil d'Etat's attitude was initially a significant problem of enforcement that continues to bear consequences because of the rulings' demonstrative value. Early jurisprudence indicates a prejudice in favour of economic and governmental interests. Between 1977 and 1982, of 58 cases concerning EIA, two were resolved in a manner favourable to the environment[33]. *Le Monde* was provoked to write[34] "[t]he CE systematically finds against those who complain of the inadequacy of impact studies," and the CE appeared to consider the EIA procedure as a "nest of contention"[35]

The CE initially refused to examine seriously the contents of an EIS[36]. When it did examine the EIS, its approach was lax, failing to insist that a document be clearly labelled an environmental impact study, failing to require the separate treatment of the points listed in

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29 CE 24 septembre 1990 *Boisdet*.

30 CE 22 décembre 1978 *Cohn Bendit* Rec, p.524, a claimant "can never usefully rely upon a Community directive to support a challenge directed against an individual decision." However, the requirement to interpret in the light of Community directives is accepted: CE ass. 28 février 1992 *SA Rothmans International France et SA Philip Morris France*, Rec. p.80; RFDA, 1992.425.

31 CE ass. 3 février 1989 *Alitalia*, Rec. p.44.

32 CE 8 juillet 1991 *Palazzi*, Rec. p.276, AJDA 1991.827.

33 Caballero, p.37.

34 *Le Monde* 2 September 1982, p.27.

35 Caballero, "Le Conseil d'Etat, ennemi de l'environnement?," RJE 1-1984 p.3, at p.37.

36 Caballero, p.38.

EIA decree 77-1141[37], or even that they be separated from the explanatory note on the project[38]. The public's participation was thus made more difficult.

The developer was rarely required to remedy his poor performance. Although an EIS was required to present a 'serious analysis' (proportional in depth to the importance of the project[39]) of the four elements listed in the decree, the CE accepted EISs that contained significant omissions[40]. Further, it censured an administrative court for finding an incomplete EIS insufficient[41] on the basis that the omissions were not "determining". The necessity of a new inquiry, in the event of changes in the project, was kept to a strict minimum[42].

The bias of the CE, both judge and government counsel, was most blatant in its support of nuclear projects[43] at a time when the general atmosphere surrounding nuclear issues was

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37 CE 9 juillet 1982 *Ministre de l'Industrie.*

Article 2, decree 77-1141: An analysis of the initial state of the site; an analysis of the effects on the environment; the reasons for which the project was chosen; and the measures to attenuate the negative effects as well as the costs of doing so.

38 CE 5 juin 1981 *Association fédérative régionale de protection de la nature,* Req. nos 21.346 and 21.585; Cf: even the commentary in the Doctrine section of AJDA was mildly critical, p.590.

39 Doctrine, pp.590-91; on proportionality, see CE 14 octobre 1988 *Commune de Saint-Vrain,* CJEG 1989, p.189 conclusions Stirn.

40 E.g., CE 5 juin 1981 *Association fédérative régionale de protection de la nature,* req. no.21.346: the EIS for a road deviation that omitted any reference to the impact on fauna was considered sufficient.

41 CE 9 juillet 1982 *Ministre de l'Industrie c/ Comité départemental défense contre les couloirs de lignes à très haute tension,* Rec., p.277. The description of the initial site did not mention the classified sites, historical monuments or leisure areas; and the costs of the measures to lessen the impact on environment were missing. See also CE Doctrine, p.590.

42 For instance, in the event of project modifications a new inquiry was not needed unless they modified "the general economy of the initial project" (*"portent atteinte à l'économie générale du projet initial"*, Sect. CE 20 mai 1966 *Dame Veuve Pouvillon,* Leb. p.355); affected the importance and the intention of the project (CE 4 mai 1979 *Département Savoie* Leb. p.185); or were substantial or important (CE 25 mai 1978 *Mme Bayret,* Leb, p.239; CE 23 avril 1982 *Association des propriétaires et exploitants sarthois et autres,* req. no. 24.011. An idea about what was considered 'important' was given by a much-criticised decision: CE 14 décembre 1981 *Association des amis des sites du Vexin français et autres,* req. 24.922, 25.146; 27.123; see comments Doctrine, AJDA, p.588-89).

43 CE 9 novembre 1979 *Association pour la défense du littoral Flandre-Artois,* Rec. T. p.759; CE 11 janvier 1980 *Comité régional d'information et de lutte antinuclaéaire de Basse-Normandie,* Rec. T. p.926; CE 11 janvier 1980 *Société civile groupement agricole des falaises de Flamanville,* Rec. p.7; CE 8 janvier 1982 *Comité d'action socialiste de la moyenne Vallée du Rhône,* Rec.T. p.684: cited Caballero, p.38.

Romi, RDP 1990, p.1140; also see Prieur's comment (Prieur, "Pas de caribous au Palais Royal, 1985 RJE 137 at 142): "The vice president of the Conseil d'Etat has clearly admitted this: nuclear policy was not paralysed because the judge imposed guarantees for the construction of nuclear power stations thanks to his role of counsel."

strained. In sum, before the CE "the odds of the environment [were] inversely proportional to the interests in question"[44].

More recent case-law: The Conseil d'Etat's attitude is evolving[45], and EIA85/337 may receive more effective treatment than was previously the case for national EIA rules. An EIS that is contradictory or contains uncertainties is now considered 'not serious'[46]. The responsibility of the State has been acknowledged in the matter of a mere impact 'notice' (required of certain projects falling below the full EIA threshold)[47]. Moreover, the CE has been more open to challenge in nuclear matters; it even sought the opinion of the ECJ before annulling several administrative orders authorising the disposal of radioactive waste that were not in accordance with Article 37 of the Euratom treaty[48]. Nevertheless, the effects of the earlier negative case-law are still perceptible in some ways.

Lower Administrative Courts: Lower administrative courts have consistently taken a more daring stance in defence of the environment. Before the CE had annulled any administrative act for an illegality involving the EIS the administrative courts had annulled several[49] (some of which the CE overturned). At times these annulments were on grounds not recognised by the CE: for example, an EIS that treated some, but not all of the four elements listed in Article 2, EIA decree 77-1141 was found insufficient[50], and it was ruled that an EIS dating from six years prior to the authorisation no longer took account of changes of circumstances in fact or in law[51]. After

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44 Caballero, pp.41-42: during the first years of enforcement of EIA rules, the rare victories for environmentalists involved relatively minor projects.

45 It annulled an authorisation for insufficiency of the EIS for the first time in 1983; CE 10 juin 1983 *André Decroix*, Rec., p.255. Such annulments have become more frequent since: CE 7 mars 1986 *Ministre de l'industrie c/ FLEPNA*, Rec., p.66 RJE, 1986, p.281; CE 9 déc. 1988 *Entreprise de dragage et de travaux publics*, RJE 1989, p.187; CE 13 avr. 1988 *OPHLM du Var*, Rec., p.909.

46 CE 4 mai 1988 *Sauveur Cardoso*, Quot. Jur. 31 December 1988, note R. Romi.

47 CE 31 mars 1989 *Madame Coutras*, above.

48 See J.P. Colson, "Gravelines, Cattenom, Tchernobyl et les autres," RJE 1986 p.161; cited in Romi, RDP 1990, p.1141.

49 T.A. Montpellier, 19 mai 1981 *Association des pêcheurs et conchyliculteurs du quartier de Port Vendres*, RJE 1981.4, p.326; T.A. Rouen, 26 juin 1981 *Renaudeau d'Arc*, Rec., p.534; T.A. Caen 12 janvier 1982 *Comité départemental de défense contre les couloirs de lignes à très haute tension*, RJE 1982.3, p.313; T.A. Limoges, 1 février 1983 *FLEPNA* RJE 1984, p.150.

50 T.A. Poitiers, 21 oct. 1981 *Caillaud*, Rec., p.828.

51 T.A. Bordeaux, 22 octobre 1987 *Association pour la défense de Génissac*, RJE 1988, p.163; see note Charbonneau, p.166.

the adoption of the European directive, some lower courts, interpreting in the light of EIA85/337, ruled that the EIS must also include those elements contained in the European directive but not yet mentioned in the French texts[52]. The attitudes of lower administrative judges have been positive enough to warrant political challenge to limit their power[53].

Although lower courts have been fairly meticulous in annulling an administrative authorisation where the EIS is inadequate or the procedure flawed, this is not the case regarding classified installations. As seen, the judge has extensive powers (*plein contentieux*). However, in practice these powers are unused. The major problem in administrative litigation involving classified installations is simply that the judge very rarely uses these powers[54].

2.3. Interim measures – Sursis (Interlocutory injunction):

One of the first hurdles faced by those who attempt to enforce environmental rules is to obtain interim protection. Although procedural matters concerning the award of interim measures are in theory governed by national rules, the ECJ has issued decisions that imply an element of Community supervision: it is a Community goal that Member States impose "conditions which are uniform so far as the granting of such relief is concerned."[55] Among the Community criteria for granting interim relief are the existence of a prima facie case (*fumus boni juris*); that the main application not be pre-judged, and that the applicant be able to demonstrate urgency, usually by showing that he will suffer serious and irreparable harm. A balance of the interests at stake is also implied[56]. As per *Factortame*[57], national courts are

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52 Prior to their amendment. For instance: T.A. Strasbourg, 2 août 1989 *Province de Hollande septentionale et autres c/Etat* RJE 1-1990, p.125 at p.127: without specifically citing the European directive, the judgment mentions transboundary effects, an element only included in the European legislation: "*que le contenu de l'étude d'impact ... ne peut se limiter aux seuls effets sur l'environnement à l'intérieur du territoire français des travaux et aménagements projetés...*". See also T.A. Pau, 2 décembre 1992, below which refers expressly to the European directive.

53 Romi, RDP 1994, p.1204; see conclusions of this chapter.

54 Encyclopédie Dalloz, Contentieux administratif, p.6; Caballero, p.31.

55 Case C-143/88, C-92/89 *Zuckerfabrik Süderdithmarschen v Hauptzollamt Itzehoe et al*, 1991 ECR I-415, I-534, para. 26.

56 For Community criteria, Chapter 3 at 2.1. *Time and interim measures.*

57 Case C-213/89 *Factortame* 1990 ECR I-2433 at para.23: "...Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of

obliged to grant interim measures in order to protect rights claimed by the parties under directly effective provisions of Community law, even if they must set aside national legislative provisions to do so. Various types of interim measure (mainly in the form of injunction) are available in France, at times more easily than at Community level.

Customary law injunction (sursis de droit commun): The interlocutory injunction (*sursis à exécution*[58]) available under customary law[59] is generally the principal form of interim relief available (the one which would be applied for in a case involving classified installations, if the challenge involved neither the EIS nor the public inquiry) and the most difficult to obtain. Here conditions are very similar to Community criteria. First, the existence of a serious argument for the annulment of the decision is required, and secondly, the risk of damage that is difficult to repair[60]. However, given the non-suspensive effect of an action before an administrative court[61], the conditions for the award of interim relief are narrowly construed and have been progressively restricted[62]. The Conseil d'Etat, furthermore, added what seemed to be a third criterion for the common law injunction: the discretionary power of the administrative judge. Even when the first two conditions were present, the judge was not obliged to pronounce in favour of the injunction[63] -- arguably this should no longer be the case, since *Factortame* requires national judges to set aside such obstacles where they affect Community rights. Practically, the customary law injunction is rarely obtained, particularly where a classified installation is involved, since the harm caused by the execution of an administrative

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national law must set aside that rule"; more generally, see Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* 1978 ECR 629, para. 24.

58 As translated by Dickson, 1994, p.81.

59 The nearest translation available for *droit commun*. It is now accepted that customary law can be used to supplement statutory provisions; Dickson, 1994, p.12.

60 "*Un moyen sérieux d'annulation et le risque d'un préjudice difficilement réparable.*" See Prieur, RJE 1991, p.27; Doctrine, p.591; "irreparable" damage is sometimes seen, and Article L.10 nouveau du Code des tribunaux administratifs et des cours administratifs d'appel mentions the concept of "*conséquences irréversibles*".

61 Stemming from the presumption of legality attached to an administrative decision.

62 Cf: J-J. Gleizal, "Le Sursis à exécution des décisions administratives, Théorie et politique jurisprudentielle," AJDA 1975, p.382.

63 CE 13 février 1976 *Association de sauvegarde du Quartier Notre Dame à Versailles*. See comments by Babadji, Ramdane, "Le Sursis à Exécution pour absence d'étude d'impact, RJE 3-1992, p.313.

decision in matters of classified installations is rarely considered 'difficult to remedy'[64]: environmental costs appear to be underestimated in favour of more immediate industrial and economic gains[65].

However, French rules regarding EIA and public inquiry offer possibilities of interim relief not foreseen at Community level[66].

Nature Protection Act injunction: In recognition of the importance of prevention specifically where the environment is concerned, an "atypical injunction"[67] was introduced as early as 1976 in the EIA legislation. Dispensing with the conditions for a customary injunction, an 'automatic injunction', independent of the administrative judge's discretion[68], is available against an administrative authorisation as soon as it is noted that an EIS is absent from the file on which the administration's decision was based[69]. With time, the inclusion of an EIS, however poor, has become habitual, and accordingly the 'automatic' nature of this injunction has diminished. In spite of contrary recommendations[70], in order to maintain the usefulness of this provision

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64 Encyclopédie Dalloz, Contentieux administratif, p.3.

65 See cost/advantage discussion in CE 28 mai 1971 *Ville Nouvelle Est;* CE 25 juillet 1975 *Syndicat CFDT des marins pêcheurs de la rade de Brest* 1976 RJE 63.

However, recently lower administrative courts have been more willing to grant interim relief; Hanicotte, "Les sursis...," p.1587.

66 Besides the two injunctions discussed below, a law on decentralisation, Loi 82-213 2 mars 1982, gives local officials the opportunity to request urgency measures, dispensing with the need to prove irreparable damage, and the court must decide within 48 hours. The usefulness of this for environmental purposes is limited, since the Conseil d'Etat (Ordonnance 15 décembre 1982 *Commune de Garches*) requires a 'liberty' to be at risk, and the environment is not considered a Constitutionally protected liberty.

67 Babadji, 1992, p.315.

68 "*Il ne peut donc faire usage du pouvoir de libre appréciation qu'il s'est reconnue même lorsque les conditions d'octroi sont réunies* (He cannot therefore make use of the power to freely appreciate that he has recognised for himself even when the conditions for obtaining (interim relief) have been united)" Doctrine, p.591. CE Ass. 13 février 1976 *Association de sauvegarde du quartier Notre Dame,* Lebrun, p.100; AJDA 1976, p.302; CE Ass. 2 juillet 1982 *M. Christian Huglo et Mme Corinne Lepage-Jessua* AJDA 1982, p.657.

69 Nature Protection Act, Article 2: "If a challenge ... is founded on the absence of an environmental impact study, the court seized with the request grants the application for a *sursis* as soon as the absence is noted with an urgent procedure."

This injunction represents a shift in emphasis in what is perceived as the 'general interest': from protecting the general interest by allowing the administration to carry out its decision (the premise for the customary law injunction); to protecting the general interest, in this case the environment, by preventing the administrative decision from being carried out hastily; for further comments, see Babadji, 1992, p.320.

70 "...the absence of an impact study invoked by the law must be regarded as a material absence and not a juridical absence (*'l'absence d'étude d'impact' évoquée par la loi doit être regardée comme une absence matérielle et non comme une absence juridique*)"; Doctrine, p.592.

many lower courts[71] have interpreted the concept of 'absence' to include not only physical but legal absence. Where the document does not treat the elements listed in Decree 77-1141[72], it is deemed to be absent. The CE has remained evasive in the event that the EIS covers some but not all of the listed elements[73].

Public Inquiries Act injunction: Again derogating from customary conditions for injunction, the Public Inquiries Act, Article 6[74], introduces a third type of injunction. Negative conclusions of the inquiry commissioner are considered to foreshadow doubt as to the value of the works undertaken[75]. Therefore, if the conclusions are negative, and if one of the arguments raised is serious and of such a nature as to justify the annulment of the decision the injunction is, again, 'automatic'.

Debate here centres on the circumstances under which the commissioner's conclusion can be considered unfavourable. In a 1989 ruling the Conseil d'Etat upheld on appeal[76] an administrative court which had found that favourable conclusions assorted with conditions that were subsequently unfulfilled were to be looked upon as unfavourable. Once the conclusions

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Hanicotte argues that a judge of interim measures can only note the material absence of an EIS; to note the judicial absence would be to prejudge the substance of the case; Hanicotte, "Les sursis...," p.1590.

71 T.A. Besançon 29 March 1990, *Commission permanente d'études et de protection des eaux du sous-sol et de cavernes de Franche-Comté c/ Préfet du Territoire de Belfort* RJE 1991, p.207; where the sursis was accorded because the inadequacies of the initial analysis of the site were deemed "*suffisamment criante*" (sufficiently glaring) as to justify the acknowledgement of the 'absence' of the EIS; and T.A. Rennes, 25 août 1989 *Henri Moreaux et Denis Jouon des Longrais*, RJE 1990, p.113, where the sursis was granted on the basis of the EIS's summary and imprecise nature; T.A. Pau, *Association agréée de pêche de la Gaule Paloise*, req. no.3136-89.

72 Article 2, i.e.: an analysis of the initial site; an analysis of the effects on the environment; the reasons for which, among the alternatives, the project has been chosen; the measures considered to diminish the effects on the environment and an estimation of the corresponding costs.

73 Cf: CE 28 septembre 1984 *Rondeau et Chemouny*, RJE 1984, p.330; CE 12 février 1990 *Fédération départementale des associations agréées de pêche et de pisciculture des Hautes-Alpes*; see comments in Babadji, p.329.

74 Article 6: Administrative jurisdictions seized with a request for interlocutory injunction of a decision taken after the unfavourable conclusions of the inquiry commissioner or commission of inquiry shall allow this request if one of the arguments invoked in the application appears, at the stage of instruction, serious and of a nature to justify the annulment."

75 Pacteau, p.10.

76 CE 13 March 1989, *Commune de Roussillon* req. 92-144.

are deemed unfavourable, the application must be granted without further appreciation on the part of the judge[77].

Although the legislative framework for obtaining interim relief is favourable (at least where EIA is required), cautionary comments must be made. Although Article 186EC refers to "any necessary interim measures", the interim relief contemplated in France is generally only the suspension of the administrative decision. And because of the presumption of legality attached to an administrative decision, even if an association has obtained injunctive relief, the president of the Contentious Division (*Section du contentieux*) can use the power conferred on him[78] to suspend the administrative judgment according the injunction[79]. An 'injunction of the injunction' (*sursis au sursis*) has been accorded in cases regarding EIA[80]. (Notably, a similar provision exists at the European level[81].)

Slowness: The worst problem concerning interim relief is the slowness with which the decision to grant it or not is made, which as Hanicotte points out, contrasts suspiciously with the speed of construction. As with the Leybucht Dikes case at Community level, often an application for interim relief becomes without object by the time it is considered[82]. In this national context the situation is worsened by the fact that no real time limit exists for the court

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77 In this regard, the Conseil d'Etat (CE 30 avril 1990 *Association Lindenkuppel* LPA 20 février 1991, note Pacteau) notes that reference to "the circumstances of the case" is superfluous.

The *Loi Barnier* has further amended this to state more clearly that an injunction is also available automatically where a decision was taken without the public inquiry being held; Article 6 of loi 83-630, as amended by 95-101.

78 By Article 23, decree 28 november 1953, (decree 12 mai 1980 confers on adjunct president of the section du contentieux). See conclusions de M. Jacques Biancarelli, CE ass. 2 juillet 1982 *Huglo et autres* 1982 AJDA p.658.

79 The decree conferring this power was challenged -- unsuccessfully -- in 1982; CE 2 juillet 1982 *Huglo et autres*, conclusions Biancarelli: suspension of a *sursis* is not even considered a true jurisdictional action (*véritable fonction juridictionnelle*), but "merely taking a provisional action that makes live again, for a time, the effects of an administrative decision that has itself been temporarily suspended."

80 For example the effects of a judgment T.A. Bordeaux were suspended that had given a *sursis a exécution* against a prefectoral *arrêté* authorising the extension of a quarry on the basis of the last line of Article 2, Loi 10 juillet 1976 (ordonnance du 30 août 1978 *Société Sud-Ouest Matériaux et autres*, req. no.13.784 et 13.889); more recently one was accorded in a case concerning a sand quarry and wetlands; CE 6eme and 2eme Sous-sec., 30 juin 1995 Sablière de Millières, req. no.157848, suspending the injunction given on 31 March 1994.

81 Rules of Procedure of the ECJ, Article 87.

82 CE 10 octobre 1980, *Syndicat d'initiative de Criel-sur-Mer*. See comments, below, regarding the slowness of decisions on injunctive remedies.

to decide[83]. Therefore the lenience of conditions for award of interim relief can easily be thwarted in practice. Furthermore, the CE has also rejected applications for *référé* and *constat d'urgence* procedures[84] to counter this slowness.

Theoretically, then, there is no discrimination either against Community rules or environmental rules and in fact the legislative framework favours environmental interests. However, the use made of discretion means that in practice the results of applications for interim relief in environmental situations are usually disappointing[85].

2.4. *Locus standi*:

The Community has been consistent in urging national governments to provide the most generous approach to establishing standing as possible (while not opening the floodgates itself[86]). In the French context an individual applicant must have an interest in obtaining the annulment of the challenged decision; it must have an effect on his personal situation, which will improve if the decision disappears. This can be a material or moral interest[87], a personal interest[88], or a public interest. Interest must be sufficiently important ("*suffisamment important*"). Notably, the attempt to have the right to the environment recognised as a fundamental freedom that would then warrant the same protection as other fundamental

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83 Although Urbanism Code Article L.421-9 (second indent) mentions one month, no penalty is attached to letting this delay lapse and it is, in fact, rarely respected; Hanicotte, "Les sursis...," p.1585. Moreover, the Conseil d'Etat estimates that it would be harmful to attach sanctions to passing the one month deadline; Conseil d'Etat, "L'Urbanisme: pour un droit plus efficace," p.110.

84 *Référé*: the president of the administrative court can order measures to facilitate the instruction, notably expertises. *Constat d'urgence:* the president of the administrative court is empowered to obtain, not an expertise, but the acknowledgement that the facts risk disappearing before the action opens. For the former, CE 18 juin 1980, *Comité départemental de protection de la nature de Saône-et-Loire*, Rec. T. p.802; for the latter, CE 1 juin 1979, *Commune de Lattes*, Rec. T. p.803.

85 Hanicotte, "Les sursis...," p.1591.

86 See Chapter 3, at point 2. Article 173 and Legal Title.

87 For ex: the faithful have an interest in the celebration of their cult, CE 8 février 1930, *abbé Dehard*.

88 Though not necessarily exclusively personal.

freedoms (including access to justice for anyone whose environmental rights were affected) has failed[89].

Where collective interests are concerned, one problem is that the Conseil d'Etat has not taken a firm stance: the CE often rejects[90] or accepts[91] the application on the merits, without pronouncing on the issue of standing.

As for the lower courts, on the whole, rules of standing in administrative proceedings have been interpreted very tolerantly[92]. Legally constituted associations can defend their own interests or the collective interests listed among the organisation's goals in their founding statute[93]. Some legislation requires that the organisation exist for a specific (and occasionally

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89 Regarding the famous Île de Ré project. In a fourth case concerning this bridge, the Fondation Cousteau and nine other associations raised the argument of a *voie de fait*, an extremely serious sanction of the administration on the grounds of a grave irregularity and harm to a fundamental liberty, which brings the administration before a judicial judge. In the event, the Tribunal des Conflits, 25 janvier 1988, found that "the pursuit of the works despite the annulment of the declaration of public utility, although this would harm the environment, has not infringed a fundamental liberty."

Similarly in Spain, debate surrounds the establishment of a subjective right to environment; this, too, has failed.

90 CE 26 juillet 1985 *Affaire Union Régionale pour la défense de l'environnement, de la nature, de la vie et de la qualité de vie en Franche Comté (URDEN)* Req. no.35024. *Commissaire du gouvernement* Marc Dandelot, AJDA 20 December 1985, p.741. The lower courts have on occasion used the same strategy, for example: T.A. Paris, 12 décembre 1984 *Association Greenpeace c/ Secrétaire d'Etat auprès du Premier ministre chargé de l'Environnement et de la Qualité de la vie et S.A. Moulin rouge*, where the application is rejected "*sans qu'il soit besoin de statuer sur la recevabilité de la requête*".

91 Recently, more applications have succeeded, also "without there being a need to pronounce on standing; e.g. CE 29 juin 1990 *Fédération départementale des chasseurs de la Dordogne et de l'Union nationale des fédérations départementales des chasseurs*, RJE 1991, p.49. Ex: The first article of the judgment itself states that the Fédération and the Union's applications are admissible, without going into details.

92 Dalloz administratif, 1992, p.206.

BONELLO, Y-H, and FÉDIDA, J-M, *Le Contentieux de l'environnement*, P.U.F., Que sais-je?, Paris, 1994, at p.61; even an undeclared association's standing has been accepted, and more surprising still, a dissolved association, since the case had commenced prior to its dissolution.

The court is usually more strict in allowing standing where construction permits are concerned than for other regulatory decisions; Dandelot, AJDA 20 dec 1985 p.741. This is borne out by the Loi Bosson, an attempt to limit litigation in the area of challenges to construction permits.

Nonetheless, the application of an association (Truites, Ombres, Saumons) explicitly listing protection of rivers and aquatic habitats in its founding statute was inexplicably declared inadmissible to challenge a prefectoral authorisation for changing the course of a river that would affect a Ramsar-protected wetland; TA Caen, 6 décembre 1994; see Romi, R. "Politiques publiques d'environnement: nouveaux développements législatifs," 1995 Revue de Droit Public 765 at 771, note 12.

93 For example in the case T.A. Bordeaux 22 octobre 1987 *Association pour la défense du cadre de vie de Génissac c/ Commissaire de la République de la Gironde* (RJE 1 1988, p.163)

excessive) period of time prior to the date of the events being challenged[94]. Geographical proximity can also be a determining criterion[95]; having a geographic range too broadly defined can be detrimental to establishing an interest[96]. In the area classified installations, the standing of associations can also be estimated in light of the importance of the inconveniences caused by the installation[97].

Generally, title to act in administrative proceedings for approved associations is not particularly problematic[98] in this Member State.

2.5. Administrative responsibility:

Another issue relevant to the effectiveness of enforcing Community obligations in the national context surrounds the circumstances under which the State can be held liable for its actions.

State responsibility can be linked to a flawed authorisation procedure for a project or classified installation: the prefect must respect rules of competence, must oversee administrative procedures, and must check that the proposed installation is compatible with planning documents[99] and other rules that may apply[100].

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concerning an insufficient EIS, the judge was obliged to examine the issue in depth: the goals of the association in question are defined very specifically to include a variety of domains: quality of life, urbanism and public works projects, the environment and all types of pollution. The association was registered and had existed for at least six years before the date of the event challenged. Geographical proximity was considered.

94 E.g., Classified Installations Act, Article 22-2 requires that associations have existed for five years prior to the occurrence of the events.

95 See also CE 8 février 1957 *Augier*, Rec., p.96; CE 26 juillet 1985 *Ministre de l'Environnement*, req. 61242.

96 CE 26 mai 1976 *SOS Paris*, Lebon, p.280.

Also a federation of associations cannot act where the attacked decision concerns only one of the represented associations; CE 15 janvier 1986, req. 48271. It can intervene or join the action of one of its members, however.

97 CE sect. 4 décembre 1964, *Ministre de l'Industrie c/ Syndicat de défense des intérêts des quartiers des Arciveaux et autres*, Rec., p.614.

98 Guillaume, "Le contentieux des installations classées," Encyclopédie Dalloz, Contentieux administratif, p.3.

99 Art.R.123-31 Code de l'Urbanisme. This is measured not by the law applicable on the date the permit was delivered but by the legislation in force on the day of judgment: Colson, RIDC 1992, p.126; PRIEUR, Dalloz 1991, p.597.

100 E.g., the authorisation for installations that risk contributing to air pollution must respect special protection zones.

A procedural mistake is sanctioned only where the procedure is essential (as are EIS, public inquiry, and even an impact 'notice'). For instance, by depriving the public of the chance to voice its concerns, the failure to conduct a public inquiry constitutes an administrative transgression (*faute administrative)* that can activate state responsibility[101]. If the authorisation is annulled for a formal irregularity it remains unresolved doctrinally whether compensation is accorded[102]. Concerning substance of the EIS, both excessive leniency or severity in the initial authorisation can be sanctioned. Article 8, EIA85/337[103] is here given substance: the State can be held responsible for issuing a project authorisation based on poor verification of the EIS[104] if direct damage to the petitioner or a third party has occurred. The fault of the victim which led the Administration to make a mistake may relieve the Administration entirely or partially of responsibility. In practice the responsibility of the State has been engaged in the matter of a mere impact 'notice': the CE found that the State, by authorising a hydro-electric work on the basis of an insufficient impact notice, had engaged its responsibility, which in the event was divided between the negligent operator and the State[105].

More relevant to LCP88/609[106], State liability can be engaged by failure to carry out supervisory and inspection obligations[107]. Generally the persistence of nuisances attributable to the failure of the authorities to ensure the respect of applicable legislation or their failure to prescribe the necessary precautions[108] can constitute simple negligence (*faute simple*[109]), or in the case of "imminent and grave danger", gross negligence (*faute lourde*[110]). Numerous powers

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101 CE 20 janvier 1989 *Ministre Délégué chargé de l'environnement c/ Arbet* Req. no. 83.623.

102 PRIEUR, Dalloz 1991, p.87.

103 Requiring the information gathered to "be taken into consideration in the development consent procedure."

104 T.A. Grenoble, 8 juin 1984, *Michallon*, RJE 1984, p.240; CE 31 March 1989 *Madame Coutras* RJE 4-1989, p.455.

105 The state was condemned to pay 75,000F with interest as its part of the shared responsibility: CE 31 March 1989 *Madame Coutras* RJE 4-1989, p.455; see comments, Colson, RIDC 1992, p.127.

106 Since EIA85/337 does not require monitoring.

107 CE, 22 mars 1978 *Brelivet*, RJE 1-1981 p.45; see PRIEUR, Dalloz 1991, p.433.

108 T.A. Caen 17 octobre 1972, *Syndicat de défense contre la pollution atmosphérique*. See Colson, RIDC 1992, p.127; Deruy, 1993 p.196.

109 Translation Deruy, 1993, p.196; CE 29 novembre 1963, *Sieur Ecarot*, Rec. p.597.

110 *Péril grave et imminent*, CE 23 octobre 1959 *Doublet*, Rec. 540, RDP 1959, p.802 note Waline; p.1235 conclusions A Bernard.

are accorded the prefect[111], and the administration can be held responsible should he fail to use them to make nuisances disappear[112]. It is positive that the inaction of inspection services[113], or action taken too slowly[114], can also constitute a simple negligence that engages the responsibility of the State. Where an omission of the administration is alleged, liability is, logically, fault-based.

The State may be held liable for damage proceeding from public projects and installations, if damage is abnormal and unusual. Here liability is without fault[115]: rather than proving fault, the abnormality of the damage in view of the features of the area (*troubles anormaux de voisinage*, below)[116] must be demonstrated.

Judicial discretion: A difficulty encountered in attempting to establish State liability is that the case-law leaves unclear the period after which the authorities' inaction becomes sufficiently blame-worthy[117] to engage state responsibility[118]. As Colson says, "[n]ot all illegalities in this area constitute fault, and every fault does not necessarily entail the responsibility of its author"[119]. Furthermore, in the area of classified installations, judges are

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111 See, for instance, Articles 23 and 24, Classified Installations Act.

112 CAA de Paris 29 décembre 1989, *M. et Mme. Chavasse*, no.89 P.A.O. 1811 CPEN p.8507, "if the prefect retains the choice of means to use in order to ensure the execution of the law, he is required, in the absence of exceptional circumstances, to take those measures sufficient to put an end to an irregular situation. Thus, the fact for the prefect to have failed to take all the measures at his disposal to eliminate the disturbance provoked by a workshop of photoengraving is of such a nature as to engage the responsibility of the State"; see Deruy, 1993, p.198.

The judge who acts in place of the administration must respect the same formalities as the prefect; CE Sect. 15 décembre 1989, *Ministre de l'Environnement c/ Soc. Séchinor*, RJE 1990, p.243. In the event of damageable consequences, however, his decisions do not generally engage the responsibility of the State; Colson, RIDC 1992, p.129.

113 Besides positive *fautes* the Conseil d'Etat has accepted adminsitrative omissions (*faute d'omission*) as *fautes de service*; CE 27 janvier 1988, AJDA 1988, p.352, note J. Moreau. See Dalloz administratif, 1992, pp.236-37.

114 Dalloz administratif, 1992, pp.237; Colson, RIDC 1992, pp.122-24.

115 Under a regime established by Loi 28 pluviôse An VIII. Regarding air pollution, for example the state has been held strictly liable in the laying of tarmac, CE 11 octobre 1972 *Ministère de l'Equipement c/ Judeaux*; in the operation of garbage incineration, CE 22 juillet 1977 *Association de communes de la conurbation de Caen*; and for odours from a garbage dump, CE 3 juillet 1970, *Commune de Dourgne*.

116 Deruy, 1993, p.196.

117 "*Fautive*" translated by Deruy (Brealey, 1993) as "fault-based".

118 Encyclopédie Dalloz, Contentieux administratif, pp.2-3; Colson, RIDC 1992, p.128; Deruy, 1993, p.198.

119 Colson, RIDC 1992, p.127.

not overly eager to condemn the administration[120]. Finding the State liable is even more problematic when the administration has acted, but inappropriately, since the issue becomes one of appreciating the quality of the administration's intervention.

Again, on paper the situation favours effective enforcement of environmental rules; again, the use of discretion, particularly regarding available powers, is often disappointing.

2.6. Practical illustration -- Tunnel du Somport:

An important ruling[121] illustrates many problems of practical implementation and enforcement discussed separately above, and the influence of EC environmental law -- as well as of EC transport projects -- in France. It also illustrates the reality and the limits of using the EIA procedure to defend environmental interests.

The project concerns an access road to a tunnel to be dug under a Pyrénéen mountain (the Somport), and the construction of a highway in Spain as part of a European project linking Pau, France, to Saragossa, Spain. The towns are already linked by the RN134 in France and the N330 in Spain. Furthermore a railway tunnel[122], unused for two decades, already exists through the Somport pass: at 470 million francs, its rehabilitation was estimated to cost twelve times less than the super-highway[123]. Artificial division of the project was a problem: although the publicity materials vaunted the Pau - Saragossa link, the EIS covered, essentially, only 1300 metres of the access road to the tunnel[124].

An application for interim measures was rejected[125], despite what appeared to be flaws serious enough (in light of the administrative court's subsequent ruling) to qualify as a legal absence of the EIS and therefore obtain an 'automatic' injunction[126].

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120 *Ibid.*; See also ROMI, *Droit et Administration*, 1994, p.441 for instance: "...it is not the judge's habit to easily recognise that the administration's transgressions constitute fault...Most frequently, gross negligence (*faute lourde*) is required, whether the judge says so or not...".

121 T.A. Pau 2 décembre 1992 *France-Nature-Environnement, Jean Pierre Bergès et autres c/ Préfet de Pyrénées Atlantiques.*

122 The Oloron-Canfranc tunnel.

123 Rodes, pp.52, 53. The powerful road lobby forestalled this option; it had fabricated a study to discourage reopening of the existing rail tunnel before launching the project.

124 Although it mentions four kilometres of the project in general terms.

125 See Chapter 5, point 1.2.2. *Rise of 'participation sauvage'.*

126 Above, point 2.3. *Nature Protection Act injunction.*

The Declaration of Public Utility necessary for the project was challenged by several associations[127]. One of the associations' arguments raised the issue of artificial division of the project. Even accepting the EIS's limitation to the tunnel's access road, the associations further invoked the violation of the Community directive: the project's indirect effects (required by the European directive[128] but absent from the French rules until the 1993 amendment) were neglected in the EIS. The associations also argued that the EIS did not take into account the international effects of the project in Spain[129].

Noting that the case-law of the CE is unclear[130], the *Commissaire du Gouvernement*[131] found the *'saucissonnage'* alone sufficient to "taint with illegality" the administrative authorisation. However, more importantly, the *Commissaire* referred directly to Article 7 of the European directive, explaining that the French rules were silent on the matter of transboundary effects[132]. Because the requirement exists in EIA85/337, the *Commissaire* found that, at the least, a link between Spanish and French EISs was required[133]. Furthermore, the *Commissaire* agreed that at least one important indirect effect, again required by the European legislation, is missing from the EIS contents: no mention was made of the ten-fold[134] increase in traffic the project would entail in the classified Aspe valley[135] and the consequences of this on the safety and well-being of the local population, the pollution in the area and the effects on

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127 One association, Mon Terroir, was eliminated because its objectives ("the defense of interests and the quality of life of its members") were too general to have a link to the decision being challenged.

128 EIA85/337, Article 3, point 4 of annex III.

129 Arguments concerning the an internal transport law and two other *vices de procédure* invoked by the applicants are not discussed here.

130 Rey (p.282) refers to judgments both allowing and sanctioning project divisions. He then refers to a T.A. judgment (Strasbourg) sanctioning such divisions, illustrating once again that the courts of first instance are more adventurous on environmental issues.

131 Jean-Louis REY.

132 He notes that, since an earlier CE decision, rejecting the need for a transfrontier study, preceded the European directive it was unlikely that this jurisprudence could be maintained, RFDA 9(2) March-April 1993, p.279.

133 Article 7, EIA85/337 requires a Member State, if it is "aware that a project is likely to have significant effects on the environment in another Member State" to forward the information gathered pursuant to Article 5 to the other State to serve as a basis for any necessary bilateral consultation.

134 It was estimated that lorry traffic over twenty years is expected to go from 100 per day to more than 1000 per day; The external services of the Ministry of Public Works put this figure at 800 per day.

135 Classified as a ZNIEFF (*zone naturel d'intérêt écologique floristique et faunistique*).

local fauna, such as the Pyrénées bear[136]. Noting the discrepancy between the European and French legislation, the *Commissaire* proposed two solutions to the court. After discussing the jurisprudence of the Conseil d'Etat on the direct effect of Community law[137], as well as the potential direct effect of the provision in question, he suggested a direct application of EIA85/337. Alternatively, in keeping with the *von Colson* doctrine he proposed that the court interpret the French legal text in the light of the European rules.

Choosing the latter option, the Court found that after 3 July 1988 (EIA85/337's entry into force) there was cause to interpret French provisions in the light of the Community text. The Declaration of Public Utility for the construction of the Somport tunnel and access road was annulled.

At one point Madrid, Paris and Brussels were reportedly considering the rehabilitation of the railway tunnel[138], a move which would have been in keeping with the Commission's sustainable transport strategy[139]. However, applying a typical "*fait-accompli*" strategy[140], works on the new tunnel began anyway in June 1993[141], although a new Declaration of Public Utility was accorded only in October 1993[142] -- and this, despite tens of thousands of letters of protest[143]. As Saule says, "it is a sumptuous gift that the State is getting ready to make to the road lobby, although the Aspois and the majority of Béarnais wish for the reopening of the

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136 Reynes, Alain, "Réconcilier l'ours et les bergers," 110 (1995) Combat Nature 17.

137 See above, point 2.2, Disposition of the Administrative Courts: *Position of Community law in national system.* Since an applicant cannot rely on a Community directive against an individual decision (cf: CE 22 décembre 1978 *Cohn Bendit*) the Commissaire du Gouvernement notes that the DUP is not an individual act but rather an act "d'espèce" cf: CE Ass. 14 février 1975 *Epoux Merlin, or Commune de St Egrève,* RDP 1988, p.564.

138 The Spanish part of the railway is still in use, see Michel Rodes, "Vallée d'Aspe: Le chemin de fer de Canfran: les chances d'une réouverture," Combat Nature, no.108, February 1995, p.551, at p.53.

139 Com (92)46: Green Paper on the Impact of Transport on the Environment: A Community strategy for 'sustainable mobility'.

140 Point 5, below.

141 Mentioned in "Howl for wolves as Alpine tunnel threatens valley," *The Observer,* 25 August 1996, p.16: about another situation in which "the national authorities "seem touched by motorway madness under pressure from carmakers and public works lobbies."

142 Saule, G. "Manifestons le 22 mai 1994 pour protéger la vallée d'Aspée, 105 (1994) Combat Nature 8.

143 Saule, p.8.

[existing] Oloron-Canfranc railroad...which would be ten times less expensive than the cost of only the tunnel."[144]

2.7. Summary:

Repeatedly it is seen that where the legal framework is generally positive, other pressures work against giving full effect to environmental rules during enforcement. Nonetheless, lower courts have at times been seen to interpret the rules in the manner most favourable in an environmental situation: regarding interim measures, for instance[145], or interpreting in light of the European directive. Yet where associations have been tenacious and administrative judges of the first degree have been supportive, their victories are often of little practical effect (which may discourage future applicants): once the procedure is regularised, and occasionally even when this has yet to be done[146], the project is undertaken as planned. Indeed, Community EIA rules require only that procedures be respected.

3. Civil Jurisdiction:

Community environmental obligations can also be enforced in civil courts -- a difficult route that nevertheless holds considerable potential. The threat of civil liability could be a useful mechanism for encouraging the auto-enforcement of legal obligations: the polluter who may be called upon to pay later is more likely, of his own initiative, to be meticulous in observing obligations. This is especially essential when, as seen, administrations are typically neither adequately equipped nor sufficiently inspired to monitor rules efficiently. Responsibility for damage to the environment is usually non-contractual (*responsabilité délictuelle* and *quasi-*

144 Saule, p.9.

145 Despite reluctance on the part of the CE, considering an EIS to be 'absent' when if fails to cover all the elements listed in the contents, deeming the *commissaire enquêteur*'s conclusions to be negative, if they contain conditions that are subsequently unfulfilled.

146 See practical illustration, above; also point 5. Executing the judgment, below.

délictuelle[147]). Civil prescription is ten years, not from the time that the damage occurred but from the time that it manifested itself[148].

Often a civil offence also constitutes a penal offence. Since the civil jurisdiction must abide by the penal decision, if a civil court is asked to judge the same facts it must suspend judgment until the penal decision has been rendered (although it can order interim measures during this time[149]).

Bringing a suit in a civil court against a private person (natural or legal) for environmental damage is a mined territory -- as Despax phrased it, a "steeple-chase"[150]; here difficulties are examined more or less as they arise.

3.1. Interim relief:

As always, trying to halt the damage at least until the dispute can be resolved is a concern particularly relevant to the environment. The judge of *référés*[151] can be seized at any hour, on the basis of Civil Code Article 809[152], to prevent "imminent damage" or to make a "manifestly illicit disturbance" cease. Works undertaken without EIA or without a construction permit, for example, would qualify as "manifestly illicit". Despite the fact that the possibility exists, applications for interim relief are very rare before civil jurisdictions. And if such an application is made, Bonello and Fédida point out that the issue of interim relief depends upon the attitude of the judge; interim relief is not easily granted in civil jurisdictions.

147 The distinction is that *quasi-délictuelle* responsibility is engaged where no harmful intention exists; Goubeaux, p.429. In fact, generally the distinction is not insisted upon and is not useful to pursue here.

148 Civil Code, Article 2270-1: "Non-contractual civil liability actions are time-barred after ten years, counting from the manifestation of the harm or its aggravation"; see also Goubeaux, p.430.

149 Civil Code, Article 809; Code de procédure pénale, Article 5-1, rédact. loi 8 juillet 1983.

150 DESPAX, *La Pollution des eaux et ses problèmes juridiques*, Litec, 1968, p.791.

151 See footnote 84, above.

152 Article 809: "The president can always...'even in the presence of serious opposition', prescribe in a *référé* the conservation or restoration measures necessary either to prevent an imminent damage or to make a manifestly illicit disturbance cease."

3.2. *Locus standi* and collective interests:

The character of damage defines the legal title to make a claim (*qualité pour agir*). The applicant must justify damage, which must be certain and direct[153], to a legitimate, individual right. Legitimation for individuals who have suffered a loss, material or moral, in their property or person poses no particular problem. In the event of co-property the syndicate is allowed to act where the harm has been suffered by each co-owner[154]; an association, composed of the victims of a prejudice[155], has standing in order to obtain a collective compensation (this presents a problem where each member of the association is not individually affected).

The worst problem is that the environment is almost by nature a collective interest and is almost always eliminated at this initial hurdle[156]. Regarding collective interests too diffuse to be broken down into individual interests, and things belonging to no one (*res nullius*), direct and personal injury cannot be established; therefore, neither can standing[157]. Without targeting them specifically, such requirements affect environmental interests adversely because of the nature of environmental harm.

Two principal problems are seen to impede the progress of collective interests in civil courts: challenge surrounds not only the issue of who is entitled to claim, but also who should properly be compensated. Advance could be made on both issues by entitling registered associations[158] to make a claim and by addressing the object of the action. The issue of who should receive compensation would diminish in importance if, rather than monetary compensation, only

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153 Discussed below.

154 BONELLO and FÉDIDA, 1994, p.13.

155 *Ibid.*

156 It would seem that, although Community rules could be adversely affected, Community law is not particularly helpful here: see for instance Case 158/80 *Rewe-Handeslgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* 1981 ECR 1805, para.44 "...it must be remarked first of all that, although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law...". This has evolved in other areas, however.

157 Martin, RIDC 1992, p.73-75; BONELLO and FÉDIDA, 1994, p.31.

158 Rather than the State: systematically entitling the State to act would result in difficulties where the State's enterprise is the cause of the damage, or where installations important to the State and following State policy are. The Commission finds itself in a similarly difficult situation regarding pursuit of breaches involving Structural Funds.

preventive and restorative remedies (as well as compensation for trial costs) could be sought in such cases. At present, however, as a means of upholding Community environmental rules that may confer collective interests, French civil jurisdictions are inadequate[159].

3.3. Certain harm:

The traditional requirement that harm be "certain" causes other potentially useful judicial actions to fall by the wayside: such requirements are awkward where environmental harm is alleged and in apparent conflict with the Precautionary Principle[160]. It is well-known that scientific uncertainty surrounding environmental harm is reflected in legal difficulties in distinguishing between what constitutes environmental harm[161] and what grade of deterioration or damage must be tolerated. Further, environmental harm often takes years to manifest itself as "certain." Where harm is certain and the action can proceed, scientific doubts concerning, for instance, the capacity of the natural world to regenerate itself affect the compensation given: as Martin states "between the incalculable and the non-existent there is but a step which our market-based society easily and frequently takes[162]."

Although a future (i.e. strongly probable) loss can also be compensated[163], future environmental harm is scientifically all the more difficult to demonstrate. Bonello and Fédida suggest modifying the relevant juridical interpretation, by "asserting that the prejudice is neither future nor uncertain, but already irreversible in its process, even if the effects are not yet observed."[164] Although unlikely to be readily accepted, the suggestion's simplicity is attractive[165]. Uncertain harm becomes certain once the contributing causes are set in motion,

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159 See PRIEUR, Dalloz 1991, p.733; Martin, RJE 1982, p.51.

160 It would be more appropriate to require a disturbance to cease before harm is 'certain'.

161 Martin, G., "Notion de responsabilité en matière de dommages écologiques," in *Droit et Environnement: Propos pluridisciplinaires sur un droit en construction*, Presses Universitaires d'Aix-Marseille, 1995; see also Com(93)47, p.10.

162 Martin, G., "Réflexions sur la définition du dommage à l'environnement: le dommage écologique 'pur'," in *Droit et Environnement: Propos pluridisciplinaires sur un droit en construction*, Presses Universitaires d'Aix-Marseille, 1995.

163 Goubeaux, pp.431-33.

164 BONELLO and FÉDIDA, 1994, p.40.

165 Admittedly, it leaves uncertainties: e.g., financial calculation of compensation, the state of scientific certainty.

lessening the burden on the applicant who need only prove the contributing causes. However, adapting the legal requirement to fit an environmental situation seems unlikely at present.

Where future harm can be considered certain, jurisprudence on occasion tries to assimilate future harm to the loss of an opportunity. Martin notes that this is inadequate, both because in the French context, loss of opportunity is subjected to strict tests and above all, because reparation does not seek to compensate the final damage but rather the chance of future gains lost[166].

3.4. Direct damage -- causation:

Again traditional legal requirements are poorly adapted to the nature of environmental damage: the 'steeple-chase' resumes with the difficulty of establishing a causal link between the polluting behaviour and damage to the claimant[167]. Indirect damage is not normally accepted[168] yet environmental damage is commonly indirect. Frequently a probability is the most that can be established. At times this problem seems intractable[169].

Discussions of ways in which to relax the strict causal link often come to nothing, as the Community has also been forced to recognise. Causation was one of the problems discussed in the Green Paper on Remedying Environmental Damage[170]. The Commission was also compelled to remove the terms "overwhelming probability of the causal relationship" from the Community proposal for a directive on liability for waste: probability -- even 'overwhelming' -- did not

166 Martin, "Réflexions...," 1995, pp.120-21.
167 Com(93)47, pp.10-11.
168 PRIEUR, Dalloz 1991, p.735; Martin, RIDC 1992, p.71.
169 For example, one case involved a fish farm located downstream from an agricultural undertaking that dumped a product into the river. The fish died. Various expert valuations established that the fish deaths were linked to a product from the group of dithiocartamates and that the agricultural undertaking used such a product. However, used in the recommended doses, the product contained guarantees for fish life. Since nothing proved that the farmers had exceeded recommended doses, or that they used a more toxic product from the same group, a direct causal link was not established and they were not found liable; Civ.2. 22 octobre 1980, inédit, cited in Martin, RJE 1982, p.51. Ruling of the Cour d'Appel de Paris confirmed by the Cour de Cassation. Possibly, the causal link was not established because responsibility was sought on basis of fault: possibly "responsabilité du fait des choses" (below) would have been a better choice of foundation. Arguably a 'negative' approach (absence of other causes) to causation would have been appropriate, below.
170 Com(93)47 final, p.10-11.

appear stringent enough[171]. At the national level as well, advance is slow. However, in France an encouraging sign was given by some lower courts: "[i]n many instances, in fact, the case-law had admitted that, no other cause appearing relevant, it was necessary to decide that the pollution was at the origin of the damage."[172] It has even been suggested that solutions available concerning nuclear accidents be expanded[173]. Once again the lower courts are more adventurous than higher courts: the *Cour de Cassation* has only recognised a 'negative'[174] approach in one case of damage caused by supersonic aircraft[175].

3.5. Responsibility[176]:

One of the choices confronting the victim is whether to seek liability on the basis of fault or not. In the French context several approaches are available, and the applicant must take care to maintain the same foundation of liability throughout the hierarchy of appeals[177]. Unfortunately, the judges tend to take a restrictive approach with regard to the foundations most frequently used in environmental matters. Where a restrictive approach is taken, it would be useful to discern whether this is because the foundation is perceived as too favourable to the

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171 Original proposal for a Council Directive on civil liability for damage caused by waste, Article 4:(6); OJ 1991 C192/6 at p.13.

172 Martin, RJE 1982, p.51, citing, e.g., TGI Albertville 26 août 1975 JCP 1976.II.18304. A polluter was unable to give a reasonable explanation for the death of the bees of an apiculturer, therefore the waste of fluoride substances were regarded as the true cause of the damage.

173 A presumption of cause exists also concerning nuclear accidents: Article 10, of Loi du 30 octobre 1968, institutes a presumption for bodily harm noted after a nuclear accident. Were such an accident to occur, the government must present, by decree, a list of illnesses that should thus be presumed to have been caused by the accident. As Martin suggests (RIDC 1992, p.71-72) this solution, already used in the area of work-related illnesses, could be widened to apply to other types of environmental legislation.

174 I.e., no other cause appearing relevant.

175 Civ. 12 octobre 1971 JCP 1972.II.17044.

176 Specifically on the matter of EIA, the project developer is liable in civil law for damage linked to the project just as the plant operator is for harm done by the installation. The fact that damage may have been foreseen in the EIS does not release the developer from eventual responsibility. Should a third party be called upon to draw up the EIS, he is responsible only towards the developer, as for any research contract. The EIS is, after all, submitted by the developer.

177 The Cour de Cassation found that responsibility without fault invoked for the first time before it was a new argument and therefore inadmissable; Cass.civ.III, 12 oct 1978, RJE 1979,2, p.13.

victim, a problem that is difficult to address; or whether this is due to judicial timidity in taking a stronger stance, which might eventually be encouraged from the European level.

Fault-based liability: The approach provided in articles 1382[178] and 1383[179] of the Civil Code requires fault, which the claimant must prove. Fault is the blameable conduct or illicit act, which a prudent individual would not have taken in the same circumstances (an element of subjectivity is thus injected which varies over time and circumstance); negligence or blameworthy imprudence[180] are also considered faults and entail an obligation to repair[181].

This approach presents advantages[182]. The violation of an administrative rule would be enough to prove fault[183] (although fault can exist even where the polluter has respected administrative rules). Failure to take advantage of technological developments in order to minimise disturbance can also constitute fault: the operator has chosen a means of exploitation that causes prejudice to another[184]. Furthermore, if fault is demonstrated, the judge may be more inclined to find the threshold of tolerable damage has been crossed[185]. If fault-based responsibility is established, the victim may obtain damages and interest, as well as cessation of the *illicit* activity. Nonetheless, fault-based liability is mainly sought in matters related to urbanism[186]: in general environmental matters the victim rarely chooses this approach[187].

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178 Article 1382, Code Civil: "Any event whatsoever of a person that causes harm to another, obliges the person by whose fault the harm occurred to repair it."

179 Article 1383, Code Civil: "Each individual is responsible for the harm he has caused, not only through his action, but also by his negligence or by his imprudence."

180 "*Une négligence coupable*" or "*imprudence fautive*", referring to the behaviours discussed in Articles 1382 and 1383, Code Civil, and not the English tort of negligence.

181 Cass. civ., 7 décembre 1960, Bull., p.510; Cass. civil, 16 juillet 1969, D. 1970, Somm., p.47.

182 Furthermore, if the victim fails to prove fault under Article 1382, the victim can try again on the basis of Article 1384 without the fear of the exception of *res judicata* being raised; Civ. 5 mai 1941, D. 1941.I.107.

183 PRIEUR, Dalloz 1991, p.732.

184 BONELLO and FÉDIDA, 1994, p.17.

185 It has been argued that, if fault is argued, the victim need not demonstrate "abnormal" (*troubles anormaux de voisinage*) prejudice; others argue that case-law does not clearly support this conclusion. For the former, G. Viney, note sous Civ.1re, 27 mai 1975, D.1976, 318; for the latter Martin, RIDC 1992, p.68.

186 BONELLO and FÉDIDA, 1994, p.16.

187 See comments, PRIEUR, Dalloz 1991, p.731; Martin, Gilles J., "La Responsabilité civile du fait des déchets en droit français," RIDC 1-1992, p.65 at p.68.

Presumed liability -- 'Responsabilité du fait des choses' (responsibility for things in one's care): Victims more frequently seek liability based upon Civil Code Article 1384[188], which stipulates that one must answer for the damage caused by persons or things in one's care. The victim must prove that the damage proceeds from the thing in the guardian's care, that this 'thing' is the generating cause' (*cause génératrice*) of the harm. Once it is established that the thing has contributed to the damage, according to a formula established by the Cour de Cassation in the 1950s[189], the thing is presumed to be the generating cause of the harm. The burden of proof then shifts to the guardian of the thing, who may attempt to break the causal link (e.g., by demonstrating the unforeseeability or the inevitability of the harm).

It has been argued that this type of responsibility is, in principle, difficult to apply to pollution[190] (although a chemical industry has been found to be the 'guardian' of the gas it emitted[191], this foundation is perhaps more suitable for waste-related damage, since waste is more easily qualified as a 'thing in one's care' than other types of pollution[192]). Nevertheless, a possible advantage in choosing this foundation, in effect a type of strict liability, is that it requires neither fault nor abnormal inconvenience. Unfortunately, precisely because of this, judges have been reluctant to find responsibility for pollution for things in one's care, perhaps because they find it too favourable for victims[193].

Strict liability -- Responsibility for 'troubles anormaux de voisinage' (abnormal disturbance of the neighbourhood): The path most consistently chosen by victims in environmental matters, strict liability presents the main advantage that the victim need not establish proof of fault or negligence on the part of the polluter, but rather a causal link between the polluter's action and

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188 Article 1384, Code Civil: "One is responsible not only for the harm caused by one's own actions, but also for that which is caused by the action of persons for whom one must answer or the things which are in one's care."

189 "For the application of article 1384, first indent, of the Civil Code, the inanimate object must be the cause of the harm; but from the moment that it is established that it contributed to the realisation of the harm, it is presumed to be the generating cause, unless the guardian can bring proof of the contrary"; Cour de Cassation consistent rulings, cited in BONELLO and FÉDIDA, 1994, p.20.

190 PRIEUR, Dalloz 1991, p.731.

191 Civ. 17 décembre 1969, Bull., p.261; also concerning machinery noise, Cass. civ., 8 March 1978, D. 1978, p.641.

192 Martin, RIDC 1992, p.68.

193 PRIEUR, Dalloz 1991, p.732.

the damage[194]. As the Commission has indicated, it "provides incentive for taking measures to prevent damage occurring in the first place."[195] Compensation can be accorded for harm even where precautions were taken and the legislation was respected. Where strict liability is not already provided in the legislation[196] it can be sought for 'abnormal disturbance'.

This dominant principle in the area of civil liability for environmental damage comes from a case of industrial pollution brought before the Cour de Cassation over 150 years ago[197]: the fundamental idea is that some 'normal' inconvenience must be tolerated in an industrial society. However, beyond a certain threshold, which varies according to neighbourhood (ex: residential or industrial) and related to the duration and gravity[198] of the disturbance, the inconvenience or damage is judged to be 'abnormal' and reparation is admissible[199]. 'Abnormality' can be attached to the damage, the trouble or the inconvenience[200]. Appreciating what is 'abnormal' is subjective and generally judges apply this restrictively.

A major obstacle here is the controversial defence of pre-occupation, embodied, since 1980, in Article L.122-16 of the Housing Construction Code (CCH[201]): if the victim's lease or

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194 Obviously, compensation cannot be based on the faults committed; Civ. 27 octobre 1982, J.C.P. 1984.II.20152.

A possible drawback is that civil liability without fault cannot coincide with criminal responsibility, which supposes a fault; Goubeaux, p.441.

195 Com(93)47, pp.7,17.

196 See, for instance, Article L.142-2 Civil Aviation Code; Civil Liability for Nuclear Energy (loi 30 octobre 1968; modified Loi 16 juin 1990); Marine Pollution (Brussels Convention 19 November 1969, Loi 77-530 26 mai 1977).

197 Cass. Civ., 27 novembre 1844, S. 1844.1.211: "If one cannot fail to consider that the noise caused by a factory that reaches a degree that is intolerable for the neighbouring properties is a legitimate cause for compensation, one cannot, on the other hand, consider that any type of noise caused by the exercise of an industry constitutes damage that can give rise to compensation."

198 The concept of 'gravity' remains subjective, despite attempts to distinguish characteristices (e.g. the disturbance need not be 'excessive', but simply abnormal: M. Bergel, cited in BONELLO and FÉDIDA, 1994, p.23).

199 PRIEUR, Dalloz 1991, p.732; Martin, G, "Droit civil de l'environnement," RJE 1-1982, p.46; Deruy, 1993, p.191.

200 PRIEUR, Dalloz 1991, p.733.

201 Article L.122-16, Code de la Construction et de l'Habitation: "...the harm caused to occupants of a building by the disturbance due to agricultural, industrial, artisanal or commercial activities does not entail a right to reparation when the construction permit accruing to the exposed building was requested, or the authentic act noting the transfer of property or the undertaking of the lease were established subsequent to the existence of the activities giving rise to the harm, once these activities are exercised in conformity with the legislative or regulatory dispositions in force and they have been pursued in the same conditions."

construction permit was obtained after the existence of economic activities giving rise to nuisance or damage, and these activities are carried out according to legal dispositions and have continued in the same conditions since the victim's arrival, the damage does not give rise to a right to compensation[202]. Making specific reference to L.122-16 CCH, the polluter can invoke the fact that the victim acquired his property at a lower price because of his proximity to the source of the nuisance[203]. The justification for the theory of pre-occupation is that the victim has thus already obtained a form of reparation.

The theory has been harshly, and rightly, criticised for bolstering the polluter's right to harm while punishing the victim by blaming the damage to which he has been subjected on his own, rather than on the polluter's, behaviour[204]. It also fails to consider that scientific evaluation of the harm may have evolved. The more the latter is exposed to nuisance, the less he is compensated. The theory was born of bureaucratic convenience, and Article L.122-16 CCH was intended to limit litigation. It has failed[205]. Pre-occupation stands as a barrier to a case-by-case examination of abnormal disturbance and where this affects a Community right should arguably be set aside[206]. In sum, for now the outcome of arguing abnormal disturbance is uncertain, and the case-law is unclear.

Increased European emphasis on strict liability might generally encourage judges to be less restrictive in applying foundations that they now appear to consider too favourable to the victim[207].

Administrative authorisation: The Commission has indicated that where a polluting activity was authorised and the polluter complied with the authorisation, "there may be

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202 On the other hand, the polluter cannot successfully invoke the victim's past tolerance (Civ. 2e, 9 janvier 1975, Bull, civ.II, no.17, p.14); the polluter cannot rely upon the victim's pre-occupation of the area if the *'troubles'* have augmented in intensity since the victim's arrival (Civ. 2e, 4 juillet 1984 *U.I.E. c/ Dupuy*, inédit, cited Martin 1985, p.41) or if the polluter's activities were not pursued in the same conditions (Civ. 3,e 22 février 1984, *Willems c/ Alepee et autres*, inédit, cited Martin 1985, p.41).

203 Civ., 30 janvier 1985, *S.A.N.A.M. c/ Nicolle*, inédit, cited Martin 1985, p.41.

204 PRIEUR, Dalloz 1991, p.733; see also Martin, RIDC 1992, p.72.

205 Martin, RJE 1982, p.46, and 1985, p.41.

206 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* 1978 ECR 629, para. 24; Case C-213/89 *Factortame* 1990 ECR I-2433 at para.23.

207 Pre-occupation is considered to avoid that reparatio unjustly enrich the victim.

reasons for holding the public authority -- and ultimately the taxpayer -- responsible for ensuing damage."[208] However, absolving the polluter completely where the activity was authorised may encourage him to disregard the actual effects of his activities; sharing responsibility between the administration and the polluter is more in keeping with the Polluter Pays and Preventive Principles, and encourages both parties to heed the environmental effects of the enterprise.

In France authorisations are accorded without prejudice to the rights of third parties (*sous réserve du droit des tiers*)[209]. Even if all administrative obligations are met, "the rights of victims cannot be put in question solely because the Administration has approved or authorised a practice or behaviour."[210] The drawback is that administrative authorisation does limit the remedies available[211].

Joint or Joint-and-several liability: If, as is frequent with environmental harm, the causes of harm are multiple, the issue of whether liability should be joint or joint-and-several is a concern. From an environmental perspective, joint-and-several liability appears the preferable solution. The victim's burden is eased by not having to bring several cases against each polluter. Frequently degrees of participation in environmental damage are impossible to determine[212]; this difficulty is avoided with a joint-and-several solution, since each polluter is liable for the entire amount. The damage is more likely to be covered, and the reparatory mission of civil action to be accomplished, even given the eventual bankruptcy of one of the polluters. Furthermore, it is the solution increasingly opted for at Community level[213]. However, it must be acknowledged that (as the Commission indicates) its adoption could lead to a 'deep pocket effect' and judicial congestion, as responsible parties then try to recover from each other[214].

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208 Com(93)47, point 2.1.5. ii, p.9: as the Commission points out this would also provide incentive for full disclosure.

209 E.g., Classified Installations Act, Article 8.

210 Martin, RIDC 1992, p.66; PRIEUR, Dalloz 1991, p.433.

211 The civil judge cannot order the cessation of a lawful activity; below.

212 See HL Select Committee on European Communities, Third Report, Session 1993-94, "Remedying Environmental Damage," with evidence, p.17, point 52.

213 Com(93))47, Green Paper on Remedying Environmental Damage, pp.17-19; also strict liability is chosen in the proposed directives on civil liability for damage caused by waste (OJ 1991 C192/6) and on the Landfill of Waste, Article 14 (OJ 1991 C190/1).

214 Com(93)47, p.8, point.2.1.4.

Although it may ease difficulties of proving of the proportion of responsibility in the first instance, such difficulties may merely be postponed to a later proceeding, as polluters judicially pursue each other (which still presents an advantage for the original victim).

In France, victims are technically able to pursue the most solvent of the responsible parties *in solidum*[215]. (A civil party before a penal jurisdiction can seek reparation *in solidum* only insofar as all parties have been tried in criminal court and condemned[216].) Unfortunately, courts can be very severe in allowing this only where the damage is strictly indivisible and in practice the tendency is towards joint liability[217]. Here, the rules themselves do not adversely affect environmental interests, however, judicial interpretation limits the use of the most favourable solution.

3.6. Other Remedies (*réparation*):

Compensation: Compensation is the remedy most widely sought and accorded, and certain problems relate specifically to this. Where harm proceeds from a lawful activity, the victim is entitled only to compensation for the damage suffered, not to cessation of the activity[218] (although recent jurisprudence does seek to limit the disturbance where possible, below).

Should the action pass the obstacles discussed above, fixing the amount of compensation for an environmental loss that is outwith the market structure -- determining the value of "the loss of a species or of a picturesque landscape"[219] -- is a well-known difficulty[220]. Judges are

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215 Code Civil, article 1382.36: "Each of the responsable parties of the same harm must be condemned to repair it in its totality, without it being necessary to take account of the sharing of responsability to which the judges of the substance have proceeded between the responsable parties, which affects only the reciprocal relations of the latter and not the extent of their obligations towards the harmed party. It is so even if one of the responsable parties has remained unknown."

Code Civil, article 1384.33: "The guardian of a thing that has been the instrument of harm, except where a completely exoneratory event of *force majeure* has been established, in his relations with the victim, is held for total reparation except in the case of eventual recourse against the third party who contributed to the production of the harm."

216 PRIEUR, Dalloz 1991, p.734.

217 See comments, Martin, RIDC 1992, p.71. For instance, air traffic noise was held to be divisible: T.G.I. Paris, 13 juillet 1977; CA Paris, 19 mars 1979.

218 BONELLO and FÉDIDA, 1994, p.9.

219 Com(93)47, p.11.

220 Although new methods for economic valuation of environmental goods are being developed; Pearce, "Toward...", 1991; PEARCE, MARKANDYA, BARBIER, 1989.

reluctant to rely on theoretical exercises of assigning 'market value' to environmental goods[221]; unfortunately, courts often conclude that such elements required no reparation, and usually accord only symbolic reparation[222]. Civil law is at a loss (not only regarding *locus standi*) to deal with issues of a wider 'pure ecological loss'[223] such as might affect the Habitat or Birds directives.

Cessation of activity: Where the disturbance is unlawful[224], the judge can and must[225] order the defendant take the necessary measures to make the disturbance cease (*à faire cesser le trouble*). The victim can request cessation of the harmful activity only where this activity is illicit. Unlike in Spain, where judges have taken a more flexible approach[226], in France ordering the cessation of a *lawful* activity (which nonetheless causes a disturbance) is not an option. The classic formula[227] (an 'auto-limitation'[228] dating from the last century) views this as an invasion of the Administration's attributions and contrary to the separation of powers[229]. It would be tantamount to ruling on the legality of the administration's decision, which has deemed the activity to be useful to the collectivity, (even if it disturbs certain individuals who will be compensated[230]). The same argument that has been proposed in the Spanish context could be applied here: that administrative authorisations are granted without prejudice to third party rights and therefore ordering cessation of the activity where this is found to disturb a third party should be within the competence of the civil judge.

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221 BONELLO and FÉDIDA, 1994, p.45; Martin, "Réflexions...," 1995.

222 Martin, RIDC 1992, p.73; two recent exceptions come from the correctional court of Rennes, 17 octobre 1990, awarded 10,000F in one recent decision, 10F per junked car in another; Martin, RIDC 1992, p.75.

223 Martin, "Réflexions...," 1995.

224 Martin, RIDC 1992, p.74.

225 Cass. civ. II, 12 févr. 1974 JCP 1975, II 18106, note Despax.

226 In Spain, ordering the cessation of a lawful but disturbing activity is viewed as the logical extension of ordering compensation: it would be paradoxical to order compensation for a "tolerable" activity, and illogical to allow an "intolerable" activity to continue. See Chapter 9, point 4.7. at *Cessation of harmful activity, adoption of corrective measures.*

227 Cass. civ., 26 mars 1873, DP 1873.I.353: "Ordinary courts are competent either to determine the compensation owed to the harmed third party, or to prescribe the measures required to make the prejudice cease, provided that these do not contradict the measures prescribed by the administrative authority in the general interest"; cited by BONELLO and FÉDIDA, 1994, p.11.

228 PRIEUR, Dalloz 1991, p. 735.

229 Deruy, 1993, p.192.

230 BONELLO and FÉDIDA, 1994, p.9.

However, even where the activity is lawful, by creatively interpreting the formula, some judges recognised their own power to restrict an abnormally troubling activity to certain hours or to certain locations; this has since been approved by the Cour de Cassation[231]. Moreover, the case-law leaves ambiguities[232], and therefore possibilities, and since the Classified Installations Act stipulates that authorisations are given without prejudice to third parties[233], on at least one occasion the judge has ordered an authorised polluting establishment to close down[234]. Generally however, civil judges are extremely reluctant to impinge upon the prefect's authority, and do not prescribe such measures, preferring to remain in the domain of reparation rather than prevention of harm. A useful tool of environmental protection is set aside.

Remise en état des lieux (Restoration of the site): The most interesting remedy from an environmental perspective, restoration, presents the shortcoming that it is not always materially possible. Also courts habitually lack the resources to follow the works adequately and consequently avoid ordering them[235]. A civil judge, if requested, may occasionally allow the victim to carry out the reparative works at the polluter's expense. Although it would then appear to be a remedy of a mixed nature (since the polluter pays a form of compensation not for the harm but for the works to repair it) in this manner the restoration of the site is more surely attained.

In its report on civil liability, the Commission envisages the problem of the financial burden of reparation becoming too great a burden for undertakings[236]. In view of the difficulties inherent in obtaining civil remedies for environmental damage, it seems that for the time being, industries are not likely to be overwhelmed by the burden of compensation and reparation.

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231 Cass.civ.I, 18 avril 1989, Bull.Civ. no.158.
232 Deruy, 1993, 192; Martin, RIDC 1992, p.74.
233 Article 8.
234 Cour de Cassation Civ.2 20 octobre 1976.
235 Gilles Martin et Prieur XXX.
236 "...costs of restoring particular damage might be shared more broadly, with other sectors or by taxpayers in general"; Com(93)47, p.20.

3.7. Compensation funds/Insurance:

The Commission has rightly estimated cases where attempting to establish civil liability is usually fruitless[237]. Here a joint compensation mechanism is preferable[238]. This option has been investigated, although not extensively, in France. An example is the French fund for noise, created in 1973, which compensates those living near Paris airports for noise pollution and is financed by all the companies using those airports[239]. Although a wider use of such funds should be encouraged, it is difficult to see such a solution being applied to pollution of a more dispersed nature, such as acid precipitation.

The Commission points out that not all insurers cover pollution-related damage, and they may limit coverage of accidents to "sudden events", excluding the slower degradation from such things as leakages over time[240]. Indeed, French insurance policies for professional civil liability cover "events which are independent of the intentions of persons, causing damage of a 'sudden, fortuitous and unpredictable nature'."[241] The option of additional insurance against the consequences of non-accidental pollution is available for operators of polluting installations. An insurance pool also exists: Assurpol. Liability from nuisance arising fortuitously (and not necessarily suddenly) is covered, as are expenses of limiting the consequences of a disaster, where the operator has incurred these expenses with the agreement of the insurer or by complying with measures imposed by authorities[242].

3.8. Summary:

As seen, various difficulties are encountered because the existing tests for civil actions are unsuited, by nature, to environmental interests. The most serious problem is that interests of a collective nature are discarded from the outset; it seems unlikely that the suggestion as to how

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237 That is: where damage is unbounded or latent, for cumulative acts or incidents, where liable parties are unidentifiable, where there is no basis for liability, where no causal link can be established, or where no party with legal title to bring the action exists.

238 Com(93)47 p.24.

239 Com(93)47, pp.22-23.

240 Com(93)47, p.12.

241 Deruy, 1993, p.193. Also, damage due to non-compliance with administrative rules is not covered.

242 *Ibid.*, p.193.

this could be addressed (by modifying the remedy sought) will be accepted soon. Occasionally, furthermore, options exist that could help address problems that arise in the remaining cases[243], and yet remain unused or are restrictively interpreted[244]. Where possible, a break from traditional approaches towards interpretations more suitable for particularly environmental issues, or towards more innovative solutions, could possibly be encouraged from the Community level.

4. Criminal Jurisdictions: Traditionally, it has not been considered within the Community's competence to require Member States to criminalise infringements of Community law[245]. Nevertheless, Member State power *not* to criminalise infringements is restricted in those cases where similar national infringements would receive criminal sanctions (assimilation principle)[246]. Both EIA85/337 and LCP88/609 could be the subject of criminal proceedings in France, and here the worst problems appear to arise because, for a combination of reasons, the available mechanisms are inadequately used.

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243 See above, certain harm, new economic methods to attach value to environmental goods.

244 E.g. in not interpreting foundations of liability seen as too 'favourable' to the victim restrictively, in ordering more than symbolic reparation, in order remedies other than compensation, in resorting to new methods of calculating environmental losses.

245 See for instance, Case C-240/90 *Germany v Commission* 1992 ECR I-5423: in which Germany challenged the validity of Commission provisions, alleging that the exclusions that were required "constituted penal sanctions which neither the Council nor the Commission had the power to impose"(para.17) This divide over issues of competence in criminal matters could be subject to change, however. Notably, in this case the ECJ ruled that the exclusions satisfied (para.18) "the sole condition imposed...in order to come within the powers of the Community, namely that the measures contemplated should be necessary to attain the objectives of the common agricultural policy." (Although it further stated that there was "no ground in the present proceedings to express a view on the Community's powers in the penal sphere.") More to the point, in this case, A.G. Jacobs pointed out that, although Community law "in its present state" did not confer on the Community criminal powers, "that would not in itself preclude the Community from exercising, for example, powers to harmonize the criminal laws of the Member States if that were necessary to attain one fo the objectives of the Community." Also, although cooperation in criminal matters was relegated to a separate pillar of the TEU, Community involvement has not been definitively excluded (cf: Article K9 TEU). For a discussion of Member States' continued strong opposition to Community interference in criminal law matters, see Swart, B., "From Rome to Maastricht and Beyond" in *Enforcing European Community Rules: Criminal Procedures, Administrative Procedures and Harmonization*, eds., Harding, C and Swart, B., Dartmouth Publishing, 1996.

246 See Case 68/88 *Commission v Greece* 1989 ECR 2965, para.24 requiring "...that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which... make the penalty effective, proportionate and dissuasive." Although the ECJ has not yet taken as active a stance in criminal matters as it has in civil remedies, it appears here to leave the door open in this domain should it, in a later case (and depending upon the political climate), find it necessary to require action going beyond "assimilation" in order to secure effective deterrence.

4.1. Infractions: Given the principle of legality -- there can be no infraction or punishment that is not foreseen by law[247] -- Parliament delimits the framework of major offences and their penalties[248]. Three basic categories of infraction exist: serious offences include *délits,* which are tried before a correctional court (*tribunal correctionnel*[249]), and the graver of the two, *crimes* (tried before the *cours d'assises*). Minor offences, *contraventions*[250], are contained in regulations and tried before a police court (*tribunal de police*[251]). The periods of prescription for the public prosecution (*action publique*) for *contraventions, délits,* or *crimes* are respectively one, three and ten years[252]. Where the offence is continuous, as with many instances of pollution, the prescription runs from the time the infraction ceases[253].

Concerning EIA and LCP examples: The EIA procedure may lend itself less well to criminal acts than the running of a large combustion plant, yet these can still arise, for instance, involving the intentional falsification of an EIS. In this event EIA legislation foresees no specific penalty[254], but Penal Code Article 153[255] applies, sanctioning faults committed in administrative documents. As for large combustion plants, criminal liability for classified installations, based upon Title VI of the Classified Installations Act, does not require actual harm to the environment to have occurred[256]. Other rules can be relevant; for instance, regarding air pollution, the non-consultation of the administration on projects or installations of

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247 Article 111-3 Nouveau Code Pénal.

248 See, for instance, SOYER, JEAN-CLAUDE, *Droit Pénal et Procédure Pénale,* Librairie Générale de Droit et de Jurisprudence, 9th Edition, Paris, 1992 at p.17.

249 See appendix.

250 Article 466 Code Pénal amended L.85-835 of 7 août 1985; *contraventions* themselves are divided into five categories.

251 See appendix.

252 Code de Procédure Pénale, Articles 7,8,9; see comments SOYER, p.21.

253 BONELLO and FÉDIDA, 1994, p.111.

254 Subsequent environmental rules do, e.g. Loi 12 juillet 1977 on control of chemical products, Article 10.

255 Article 153 Code Pénal: "Whoever has counterfeited, falsified or altered permits, certificates...or other documents delivered by public administrations with a view to acknowledge a right...or accord an authorisation shall be punished by imprisonment of six months to three years, and with a fine of 1500F to 20,000F.

The attempt shall be punished as the actual *délit.*

The same penalties shall be applied:

1. To he who has used such counterfeited, falsified or altered documents...".

256 PRIEUR, Dalloz 1991, p.711.

important thermal units would also constitute an infraction[257] as would failure to observe prescribed measures in special protection zones[258]. The most typical infractions relating to classified installations are exploiting without authorisation[259], violating the rules imposing conditions of exploitation[260], exploiting the installation in infraction of a measure of closure or interdiction or suspension[261], obstructing inspection[262]. (Furthermore, certain sectoral laws[263] provide for "paper-offences" -- *délits-papiers* -- for the failure to fill out the correct administrative forms: these receive the same punishment as physical harm to the environment.)

Material and moral elements: The material element required in criminal prosecution consists of the infringement, by act or omission, of one of the diverse legal or regulatory provisions[264]. The risk, embodied by the violation of the safety level determined in the administrative regulation, is incriminated rather than a concrete result that would be too difficult to prove[265] (e.g.: having 'contributed to acid rain'). Although an attempt to commit a crime[266] is considered equivalent to the crime, the attempted *délit* is punishable only if so provided in specific dispositions[267] (such as for falsification of administrative documents). Attempted *contraventions* are not punishable.

Important in opening access to justice for victims in environmental matters, the requirement of intention has been relaxed. Although normally a criminal infraction cannot exist without intention (*élément moral, dol criminel*), environmental infractions usually fall into a category

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257 Article 13-6 decree, 13 mai 1974; see PRIEUR, Dalloz 1991, p.708.

258 Article 13, decree, 13 mai 1974.

259 Classified Installations Act, Article 18, exploiting without a declaration (article 43, decree 21 septembre 1977). Penal jurisdictions are competent to interpret nomenclature and are not bound by the administration's interpretation of installations requiring authorisation.

260 Non-respect of the prescriptions of ministerial and prefectural *arrêtés* (articles 43-2 through 43-8 of decree 21 septembre 1977.)

261 Classified Installations Act, Article 20.

262 *Ibid.*, Article 21.

263 For instance, the Loi sur déchets (modified by Loi 13 juillet 1992), compare Articles 24.6 (actual dumping) and article 24.1 and .3 (failure to complete forms).

264 PRIEUR, Dalloz 1991, p.711; SOYER, p.78; BONELLO and FÉDIDA, 1994, pp.110-11.

265 Robert, J.H., "Le problème de la responsabilité et des sanctions pénales en matière d'environnement," 65 (1994) RIDP, 947 at pp.954-55.

266 If the execution has been commenced and in the absence of an exonerating desistment; Article 2, Code Pénal.

267 Article 3, Code Pénal; this is the case for, e.g. falsifying administrative documents.

of non-intentional infractions, *contraventions* and *délits d'imprudence*[268]. The moral element is considered to be simply that the perpetrator was neither insane nor coerced[269]. The logic of this stems partly from a tradition of protecting public health without regard for the good faith or ill will of the violator[270]; concern for good faith reappears at the time of sentencing[271].

Physical or legal persons: The director of the company has a duty to monitor and to act in order to preserve the area in which he exercises his activities in the collective interest of society. Consequently, the director, the intellectual or moral author of the infraction, is generally inculpated. Since, as potentially with LCP88/609, often pollution has a corporate, industrial cause, an important recent development is that the Code Pénal has been modified (applicable since 1 March 1994[272]), to allow legal entities (except the State itself[273]; including foreign legal persons), to be found criminally liable for damage to persons and property for acts committed in the interest of the legal person[274]. Responsibility of a legal person does not exclude responsibility of physical persons[275]. The fines that can be imposed upon these are five times greater than those imposed on individuals[276], ten times more in the event of recidivism. Other types of penalties are also available: dissolution of the firm, limitation of the firm's

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268 Articles 319-320, R.40-1,4 Code Pénal.
See also nouveau Code Pénal: Article 121-3: which qualifies negligence and imprudence that endanger another as offences.

269 SOYER, pp.100-101, points 163-64.

270 Bouloc, B., "La responsabilité pénale des entreprises en droit français," RIDC 2-1994, 669-81; Robert, p. 955.

271 BONELLO and FÉDIDA, 1994, p.112.

272 Lois 92-683; 684; 685; 686, of 22 juillet 1992, JO 23 July 1992, p.9857. See Deruy, 1993, p.181; Dickson, 1994, p.99.

273 The reason for excluding the State itself is the difficulty of identifying who should properly represent the State -- the President, the prime minister.... This exclusion does not include 'emanations of the State', which may be found criminally liable.

274 Article 121-2 Nouveau Code pénal: "*...les personnes morales...sont responsables pénalement, selon les distinctions des articles 121-4 à 121-7, et dans les cas prévus par la loi ou le règlement, des infractions commises pour leur compte par leurs organes ou représentants*" (...legal persons...are criminally responsible, according to the distinctions of articles 121-4 through 121-7, and in the cases foreseen by laws or regulations, for infractions committed on their behalf by their organs or representatives).

275 Article 121-2, third indent: "*La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques, auteurs ou complices des mêmes faits...*"; Nouveau Code pénal; see comment Bouloc, p.677; BONELLO and FÉDIDA, 1994, p.109-11.

276 Articles 131-38 Code Pénal.

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The following obstacles chip away at the usefulness of criminal prosecution of environmental offences.

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270 Bouloc, B., "La responsabilité pénale des entreprises en droit français," RIDC 2-1994, 669-81; Robert, p. 955.

271 BONELLO and FÉDIDA, 1994, p.112.

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276 Articles 131-38 Code Pénal.

277 Dickson, 1994, p.107; Deruy, 1993, pp.181-82.

4.2. Civil parties to penal prosecution:

The role of the citizen regarding criminal infractions is to denounce, setting the public prosecution in motion. However, where the criminal offence gives rise to damage, the possibility of participating as a civil party[278] to a criminal prosecution exists.

One practical advantage of such participation is that it forces the *parquet*[279] to act[280] -- indeed, is often "the only means of overcoming the inertia of the public prosecutor."[281] Another problem is then encountered: since at present nothing requires associations to apply compensation that they may receive to repairing the harmed interests, most courts interpret Article 2 of the Code de Procédure Pénal, requiring that the civil party suffer a direct and personal prejudice to have legal interest, very restrictively. Certain exceptions exist[282], notably in the matters of urbanism[283] and classified installations[284]. Otherwise, however, the civil action of associations is rarely admissible[285]. Again, this problem seems to stem from justifiable concern about how compensation shall be used; taking action to restrict the remedy sought, rather than to restrict admissibility, appears a preferable solution.

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278 Inadmissible where the violation is a minor offence: Article 85, Code de Procédure Pénal.

279 See appendix.

280 SOYER, p.200.

281 PRIEUR, Dalloz 1991, , pp.114-15, p.715.

282 Consumers, (Loi 5 janvier 1988), and associations against racism, sexual violence, and child abuse (Articles 2-1 through 2-8, Code de Procédure Pénale). The actions of professional unions is also less difficult.

283 Articles L.160-1 and L.480-1, Urbanism Code.

284 The Classified Installations Act includes such a derogation: associations that have been active for at least five years from the date of the events (Article 22-2 loi 76-663 added by loi 85-661) are entitled to be civil parties to criminal procedures, and can thus challenge infractions relating to Articles 3,4,5,6,7, and 18: these treat, respectively: authorisation, renewal of authorisation, procedures of authorisation, *arrêtés* with conditions of exploitation, *arrêtés* for certain categories of installations, and exploiting without authorisation).

285 The logic is that if the protected interest is very large, it is hard to distinguish from the general social interest and therefore the action of the public prosecution should be enough to satisfy it. If the interest of the association is narrow, many more than its members may be affected; see SOYER, pp.211-12, points 423 and 424; see critical remarks PRIEUR, Dalloz 1991, p.716.

Spanish judges have been much more avant-garde on the issue of allowing associations to participate as civil parties, see Chapter 9, point 5. at *Participation of associations in criminal actions.*

4.3. Lack of resources: A fundamental perception -- therefore difficult to address -- of that which can be considered 'criminal' affects the allocation of limited resources in criminal proceedings.

Noting infractions: This familiar problem obstructs, first, pursuit of criminal infractions. An offence can be recorded either by judicial police or classified installation inspectors. The police are, however, poorly equipped, both technically and in terms of manpower, to deal with problems of natural environment and pollution. Pollution must be spectacular for judicial police to intervene; normally they leave environmental matters to the inspectors of classified installations[286]. These inspectors, in turn, have fewer coercive powers and are unreasonably few in number[287]. In fact, the task often remains unaccomplished.

Pursuing infractions: After the infraction has been noted, the same problem causes infractions to be weeded out of the prosecution process. Much as the Judicial Service of the Commission, the public prosecutor (*parquet* or *magistrature debout*[288]) is overwhelmed by the number of incriminations, and tends to use its discretion to discontinue pollution-related prosecutions, "public order not appearing to be sufficiently disturbed"[289]. As at Community level, although statistics exist on condemnations in environmental cases, transparency is lacking on the number of discontinued prosecutions and out-of-court settlements.

Proving infractions: One of the advantages of criminal jurisdictions is that more stringent means and wider powers of investigation are at the disposal of the public authorities in the search for proof. The drawback is that the judge is not obliged to order complementary measures of instruction if the proof brought by the victim is insufficient[290]. In practice, it is rare that the

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286 PRIEUR, Dalloz 1991, p.71; Fontaine, LPA 1991,p.4; BONELLO and FÉDIDA, 1994, p.121.

287 Chapter 5, point 2.2.2. *Lack of personnel and resources.*

288 See appendix.

289 PRIEUR, Dalloz 1991, p.714; see also Deruy, 1993, p.187.
Because of overwhelmed courts, techniques are being developed to expedite matters for certain environmental offences, such as the payment of a "fine stamp" -- *timbre d'amende* -- for the first four classes of contravention involving national parks; Art. L.241-20 Code Rural.

290 Cass. crim.22 mars 1960, D. 1960, 689.

court will consent to use its limited resources in environmental matters. an efficient option is thus discarded[291].

4.4. Piecemeal response to environmental infractions:

The necessary legal element for criminal prosecution of environmental offences is usually not in the Penal Code but dispersed among various administrative regulations. This dispersion is a significant problem which may influence whether criminal sanctions are sought for infringement of Community rules at all. A certain wariness concerning administrative rules (widely considered 'verbose' and 'vague') exists in criminal jurisdictions[292] and criminal authorities are hesitant to wade through dispersed administrative provisions[293]. Rather than developing a coherent approach in this area, legislative response has been reactive[294], "intense, [and] frequently disorderly."[295] A general provision for an environmental offence in the Penal Code might help address this problem[296]. However, priorities emerge in treating the issue: although two proposals have been made for statutes criminalising pollution as such (which would apply to a wider range of Community rules), neither has been accepted or even discussed in parliament.

4.5. Reluctance to use stricter penalties:

Community law requires that remedies "be such as to guarantee real and effective judicial

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291 M-J Littmann-Martin, "Droit pénal de l'environnement: apparence redoutable et efficacité douteuse," Justice, Syndicat de la magistrature 1988, no. 122, p.26; Cass. crim. 23 juin 1987, Rev.sc.crim. 1988, p.323, obs J-H Robert, cited BONELLO and FÉDIDA, 1994, p.115.

292 Robert, p.954.

293 As a result, the few 'autonomous' penal rules (in which the criminal behaviour and sanction are contained in the same penal text, rather than those in which the text contains only the sanction and refers to administrative rules for the description of the behaviour. Example in the Louis XIV tradition of protecting forests and rivers for hunting, are available in the Forest Code and the Rural Code), tend to be more relied upon in criminal jurisdictions for repression of pollution than administrative provisions; Robert, pp.953-54.

Robert refers also to the concern of the *parquet* in relying on administrative provisions, of finding its efforts thwarted by some formal irregularity on the part of the Administration.

294 PRIEUR, Dalloz 1991, p.706; see generally Albertini, 1993, p.838.

295 Littmann-Martin, Marie-José, "Le droit pénal des déchets en France," RIDC 1-1992, p.184.

296 PRIEUR, Dalloz 1991, p.719.

However, Spanish experience with such a criminal provisions illustrates that this does not always remedy this type of difficulty, particularly where the criminal provision refers to administrative rules; see Chapter 9, point 5.1.

protection" and "have a real deterrent effect"[297]. The Seveso incident revealed the gross inadequacy in terms of deterrence of sanctions initially foreseen in the Classified Installations Act; these were tightened by the statute 85-661 of 3 July 1985, a new *délit* was created, financial penalties were raised[298], and a wide array of sanctions was placed at the judge's disposal[299].

It remains that initial penalties are usually light[300] and have little 'deterrent effect'. The non-respect of the legal dispositions imposing conditions of exploitation, the most frequent infraction, remains a *contravention*, no matter how serious the failure[301]. The fact that harsher penalties are not applied for the first infraction tends to lower the value of the initial conviction[302]. Light fines are regarded as a relatively inexpensive permit to pollute. This could encourage operators to wager against the likelihood of being caught at all, and to avoid taking the necessary preventive measures until required to do so by a first conviction for a minor offence.

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297 Case 14/83 *Von Colson* 1984 ECR 1891, para 23; see also Case 79/83 *Dorit Harz* 1984 ECR 1921; Case 177/88 *Dekker* 1990 ECR I-3941.

298 Sanctions were raised from the initial 2000F to 30,000F to the present two months to one year in prison or a fine from 2000 to 500,000 F, or both, although notably the lower limit is the same.

299 Article 18, Loi 76-663, added by law 85-661: exploiting without authorisation: emprisonment from 2 months to 1 year or a fine from 2000 to 500,000F, or both. The court can prohibit the use of the installation, and can require the rehabilitation (*remise en état des lieux)* of the area within a period to be determined by the court. In this event the court can either adjourn the announcement of the decision and give an injunction of rehabilitation with an *astreinte* (a payment by day of tardiness).

Continuing the exploitation of an installation without conforming to the prescriptions in the formal notice shall be punished by prison from 10 days to six months +/or a fine from 2000 to 500,000F. Use of the installation can also be prohibited and violation of this is punishable by up to two years in prison, fine of 20,000 to 1,000,000F or both; Article 20, Loi 76-663.

Another sanction for major offences is publication of the decision of condemnation in the press, at the expense of the condemned; Article 22-1, Loi 76-663. The cost of this should not surpass 500,000F. See for instance, Cour d'Appel de Lyon, 6 juillet 1989 *Groupe Ain-Nature FRAPNA c/ Charveriat Jocelyne.*

The most effective sanction is the order for the restoration of the site (*remise en état des lieux*) Article 19, Loi 76-663, added by law 85-661. The correctional court may either directly order the site to be restored or require that the operator forfeit a sum of money equivalent to the works to be carried out to a public accountant, to be reimbursed as the works are completed.

Furthermore, the Penal Code, Article 43-2, allows for substitute penalties such as professional interdiction for a maximum of five years; see comments Littmann-Martin, RIDC 1992, p.204. See also ROMI, *Droit et Administration*, 1994, p.354.

300 Decree 77-1133, Article 43 establishes fines from 600F to 2000F. See PRIEUR, Dalloz 1991, p.716; Littmann-Martin, RIDC 1992, p.206; BONELLO and FÉDIDA, 1994, p.123-24.

301 The possibility of cumulation with infractions in other codes is not excluded, and of fines being applied per *contravention;* Littmann-Martin, RIDC 1992, p.208, note 58.

302 Except to provide the basis for the offender to be considered a recidivist.

When the offence is more serious it is occasionally not dealt with as such. The non-execution of works ordered as a sanction by the police court raises the qualification of the infraction to a *délit*[303]; so does recidivism. However, examples exist where the aggravation to a major offence was not retained, rather, the offence was "contraventionalised"[304].

Criminal judges have been reluctant to use the most innovative[305] and effective sanctions at their disposal. Although sufficient penalties exist, they are rarely applied and the link between enforcement difficulties becomes evident. Recently a few decisions prohibiting use of the installation have been noted, nevertheless courts almost never directly order site-restoration works to be carried out at the expense of the operator[306] because they lack technical knowledge and the personnel to undertake the necessary follow-up, because total restoration is 'impossible'[307], or even because the remedy "does not appear to elicit the enthusiasm of the criminal judges who prefer to opt for proven solutions"[308].

As for imprisonment, the popular perception -- both of industrial operators and of many judges -- is that even where imprisonment is a possibility, it will be reserved for *other* than environmental offences: i.e., for the 'true marginals'[309]. As Littmann-Martin has noted, the role of the criminal judge is that of supporting the administration that cannot make its rules respected. However, criminal judges "acquit themselves half-heartedly of [the] chore, the significance of which sometimes escapes them"[310]. Since the problem appears linked to the judges' sense of legitimacy regarding criminal penalties and environmental matters, and since

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303 Also, obstructing inspection is punishable by 10 days imprisonment +/or 2000 to 100,000F fine (Article 21). During the suspension of functioning the exploitant must pay salaries of his personnel (Article 25). See also article 43 of the decree.

304 See Littmann-Martin, RIDC 1992, p.207, citing examples in the area of waste.

305 See footnote 299 above.

306 Deruy, 1993, p.181; Littmann-Martin, RIDC 1992, p.205; Courts are equally reluctant to issue orders for the adjournment of the penalty with an injunction to undertake restoration works, which also require follow-up.

307 Although frequently it is true that restoring the site completely is impossible, this does not mean that a serious attempt to restore is as closely as possible to its original state should be ruled out.

308 Littmann-Martin, RIDC 1992, p.205.

309 Robert, p.956; see also Littmann-Martin, M-J, "Droit pénal de l'environnement," RJE 2-1982, p.160.

310 Littmann-Martin, RIDC 1992, p.210; see also Prieur's comments (PRIEUR, Dalloz 1991, p.706) on areas of water, waste and classified installations.

the EC is theoretically unable to intrude in the area of criminal sanctions, addressing this issue from Community level appears problematic except to continue generally to emphasise the importance of enforcement of environmental norms.

4.6. Summary:

As Littmann-Martin points out, criminal prosecution of environmental offences is more effective in theory than in practice[311], which brings only 'mediocre results'[312]. First, despite certain advances, it is difficult to bring matters to the stage of a judgment: the most common infringements are considered mere *contraventions*; police tend to shift responsibilities onto rare inspectors; the public prosecution is overwhelmed. And secondly, if a court decision is reached the results are disappointing: stricter penalties are rarely applied. It appears that the various actors of the criminal system are agreed not to waste their army on what they view as a losing battle: such fundamental perceptions are difficult to alter. Improvement here could focus on encouraging civil participation to apply pressure to the *parquet*; this itself entails improving access of civil parties to criminal proceedings.

5. Executing the judgment:

In the event that an environmental applicant has successfully pursued the steeple-chase until a favourable judgment is reached, the phase after a first court decision can be as troubled as those preceding. Member States may delay execution of an ECJ judgment until such time as it suits their agenda[313]; so in France, execution of a judgment is not infrequently delayed until other interests have been satisfied. This problem is extremely serious in that it indicates, not just the low priority of environmental matters, but also a lack of respect for the rule of law.

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311 M-J Littmann-Martin, "Droit pénal de l'environnement: apparence redoutable et efficacité douteuse," Justice, Syndicat de la magistrature 1988, no. 122, p.26.

312 BONELLO and FÉDIDA, 1994, p.102.

313 See Chapter 3, point 3.

Although not limited to environmental situations, the problem is not uncommon here and the worst offender is the Administration[314].

> In fact, there are no means of forced execution against the administration; if it defaults, individuals cannot coerce it...everything rests here on the conscience of public authorities, whose good faith is presumed, perhaps with an excess of optimism. Practice reveals, unfortunately, cases of inexecution, above all in matters of disputes of annulment.[315]

As Tercinet has said, in administrative matters, respect for *la chose jugée* often loses to the principle of separation of the active administration and the judge, and the absence of means of execution against public persons[316]. The authority of the judge and respect for the law are undermined, extremely serious in an *état de droit*.

> ...it can seem inadmissible that in a State ruled by law the respect of the judge or of *res judicata* are not imposed from the outset.... certain local officials, determined to realise a planning project whatever the cost, seek to evade not only legality but that which has been judged.[317]

When a private party defaults on execution of a court decision (*défaut d'exécution*), the members of the Section of report studies of the Conseil d'Etat[318], again too few, use both telephone and letters to press for execution[319]. The procedure of *astreinte*, condemning a party to a payment per day of inexecution, is a lengthy[320] procedure seemingly strewn with as many obstacles and delicate interpretations as the original case (since it can concern only *in*execution, not delay in execution; it can concern only the decision issued, not the irregular modification of the court's decision)[321]. As for the destruction of an illegal construction, one must begin a new procedure before the judicial court. Morand-Deviller comments "[w]hat ferocious determination, what respect for the law and the judge must in this event animate the associations of environmental defence."[322]

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314 See Morand-Deviller, "A propos des affaires du lac de Fabrèges et du col du Somport, chose jugée et fait accompli," LPA, 20 June 1990, p.12 at pp.16-17: "*Les ruses et l'inertie de l'administration.*" Dalloz administratif, 1992, pp.192-95.

315 Dalloz administratif, 1992, pp.192-93.

316 Tercinet, 'Vers la fin de l'inexécution des décisions juridictionnelles par l'Administration?"; in KAHN-FREUND, LÉVY, RUDDEN, p.168.

317 Morand-Deviller, LPA 1990, pp.13,16.

318 *Section des études du rapport du Conseil d'Etat.*

319 Members of the section meet regional presidents of TA and Administrative Courts of Appeal, and prefects, at times threatening exposure in the annual public report.

320 Requiring several months after the six-month period the administration is allowed to execute the judgment, Morand-Deviller, LPA 1990, p.18.

321 See Morand-Deviller, LPA 1990, p.18.

322 Morand-Deviller, LPA 1990, p.18.

Illustrations of evading court rulings are not rare[323]. As seen with the Tunnel du Somport project, work commenced prior to the adoption of a new expropriation document. It seems that even with the force of a court decision behind environmental protection, the presumption -- that the procedure will be regularised eventually -- falls in favour of developer. For this reason, economic actors are often unmoved by a first judgment against them and are able, for whatever reasons, to continue as planned. Indeed, on occasion even the final judgment against them has little effect; by then the project is usually finished. In one notorious project (Île de Ré), despite various annulments of authorisations by an administrative court[324], the first cars were able to start using an illegal 2.9 km bridge in June 1988 -- a few months after the Conseil d'Etat confirmed the earlier annulments of the lower administrative court[325].

6. Conclusions:

Community environmental rules are inserted into national enforcement machinery that is plagued by an accumulation of difficulties and discretionary situations, beginning with the fact that authorities prefer to persuade rather than enforce. Once the choice has been made go before the courts, environmental applicants must contend with procedural rules ill-suited to environmental protection. As in a war of attrition, many actions are eliminated before a decision is reached. Often, where the actual rules may not disfavour environmental interests or where potential solutions exist, the willingness to apply them appears to be lacking. Determining which portion of this unwillingness can be attributed to deeply rooted perceptions regarding environmental issues, or mere lack of judicial audacity when faced with relatively new issues (and unfavourable case-law by the CE) could be instrumental in addressing this

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323 Certain notorious examples include the Pont de l'Île de Ré (Morand-Deviller, "Le Pont de l'Île de Ré et le juge," LPA 23 September 1988, p.5) and the Lac de Fabrèges (Morand-Deviller, LPA 1990, p.xx).

324 T.A. Poitiers, 3 juillet 1985: Déclaration d'Utilité Publique annulled; T.A. Poitiers, 24 juin 1987, the second DUP was annulled (and work on the bridge continued in spite of the fact that the DUP on which these works were based had been twice annulled); T.A. Poitiers, 16 décembre 1987, the administrative authorisation was itself annulled.

325 CE 8 mars 1988 *Département de la Charente-Maritime*, req. 90.453, AJDA July-August 1989, pp.487-88.

problem. At present court decisions, if reached, often fall short of that which is needed to give force to environmental law: remedies available on paper are discarded in practice.

A possible way of avoiding at least some of the shortages of personnel and disinclination to use available tools is to emphasise the prospect of civil liability. This might inspire private parties to apply environmental rules more assiduously to themselves through fear of having to pay compensation, rather than the (greatly less motivating) fear of being 'caught' by authorities. At present, however, such hopes founder on the significant obstacles present in civil jurisdictions; perhaps favourable solutions could be encouraged from Community level[326]. In short, Community environmental rules fall victim to the same lack of rigour and lack of judicial audacity as national environmental rules.

The major problems of enforcement do not have a Community source and would exist without Community intervention. In fact today, the most disturbing trend in France is that, even where rules could efficiently protect the environment, economic and industrial actors deploy all the political forces at their disposal to modify them[327]. Where modifying the legislation fails, attempts have been made to limit litigation[328] that may hinder economic actors. Where judges

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326 Conclusions, point 3.1, at *civil liability*; see general Commission statements, Com(95)600, point 43, p.13.

327 E.g. the protective elements of the Coastal Act have been called into question. Similarly, the Mountain Act (*Loi Montagne, Loi 85-30 du 9 janvier 1985,*) is so resented by local authorities and developers that administrative judges hesitate to rely upon it (Chapter 5, footnotes 101 and 102); Parliament considered amending it to make it not more, but *less* protective. During the voting of a project on the fiscality of local authorities (29 June 1991) a provision was adopted "surreptitiously" modifying one of the cornerstones of the *Loi Montagne* (*Loi 85-30 du 9 janvier 1985,* a law for the protection of fragile mountain areas): the prohibition of construction on the shores of high altitude lakes. (On this occasion, the Conseil Constitutionnel rose to the challenge, declaring the amendment devoid of any link with the text under discussion. Consequently the procedure for its adoption was irregular; Romi, RDP 1991, pp.1097-98.

328 See Article L.122-16 CHH, above.

The Loi Bosson (8 décembre 1993) exludes the possibility of contesting urbanism plans or rules more than six months after their adoption on the basis of *vices de forme ou de procédure* (the category into which challenges on the basis of faulty or inadequate EIS or inquiry would fall). Furthermore, it is insisted that this does not harm the citizens right to have illegal decisions annulled, although commentators heatedly disagree.

Art. L.600-3 Urbanism Code (Loi 9 Feb1994), introduces a procedural limitation. Failure to respect this formality renders the recourse inadmissible, without possibility to regularise.

See Ricard, Michel, "Les vices de forme et l'Etat de droit," Etudes Foncières, no.62, March 1993, p.10-11; Romi, RDP 1994, p.1201-6; Romi, Raphaël, "La Loi Bosson; un écocide parlementaire," 1994 Ecologie Politique, no. 9, 101 at p.103; Combat Nature, no. 108 Feb 1995, p.67.

do enforce protective provisions, developers and local authorities practice a policy of *fait accompli*, rushing to finish the project before a decision can be rendered, or modifying land-planning documents in order to avoid interim measures that have been ordered[329].

Indeed, whatever the shortcomings of Community environmental rules, a strong argument in favour of Community involvement in environmental law is illustrated. The Community can exert a restraining influence on national attempts to modify and weaken rules that are potentially effective. National legislation is no longer dependent only upon shifts in Parliamentary majority; procedures can be altered and diminished only in so far as this does not conflict with Community-imposed norms[330]. The Community, for its part, perhaps because of the input of fifteen Member States in adopting legislation, is not as buffeted by the political shifts seen at the national level, where one Parliamentary majority's work is undone by its successor.

329 Morand-Deviller, *op.cit.*,; see also Chapter 5, footnotes 101 and 102.

330 An illustration of this is provided by the French Water Act, which was shielded from Parliamentary tampering precisely because the norms were largely imposed by the European Community; Romi, RDP 1994 p.1208.

UNIT II: SPAIN

CHAPTER 7: Spain – Upstream Context and Formal Implementation

1. Upstream Issues -- The Spanish Context

In addition to characteristics mentioned in the Introduction[1], two essential differences with the other Member State examined here must be noted at the outset. First, the Spanish Constitution of 1978 includes a reference to environment, a factor which is rich in potential if somewhat disappointing in actual returns. Secondly, administrative fragmentation is compounded by the division of Spain into seventeen autonomous territorial entities, the *Comunidades Autónomas* (autonomous communities, hereinafter CA); the administrative context therefore provides a rather disjointed backdrop for the implementation and enforcement of Community environmental law in this Member State; against this backdrop, formal implementation is reviewed.

1.1. Constitutional Reference: an unrealised potential

Adopted in the wake of the Stockholm Conference, Spain's 1978 Constitution elevates the environment to a constitutionally protected value:

> Article 45.1: Everyone shall have the right to enjoy an environment suitable for personal development and the duty to preserve it. 2. The public authorities, relying on the necessary public solidarity, shall ensure that all natural resources are used rationally, with a view to safeguarding and improving the quality of life and protecting and restoring the environment. 3. Anyone who infringes the above provisions shall be liable to criminal or, where applicable, administrative penalties as prescribed by law and shall be required to make good any damage caused.[2]

The text refers to a *derecho* -- right -- and is included in Title I, Constitution 1978: of fundamental rights and duties (*De los derechos y deberes fundamentales*); still, it is not listed in the chapters on rights and freedoms but rather in the third chapter "Of guiding principles of social and economic policy (*De los principios rectores de la politica social y económica*). It therefore does not enjoy the protection accorded to fundamental rights and only an extremely progressive interpretation could consider that it constitutes a directly enforceable "right to environment"[3]. However, by placing duties upon both public powers and citizens the Constitutional reference delivers certain concrete benefits.

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1 At point 5. The Choice of Member States.

2 Translation by ECHR, López Ostra v. Spain (41/1993/436/515).
Unless otherwise noted, the Spanish has been translated by the author and should not be taken as authoritative. Where legislation or case-law is cited, the original Spanish text is provided in an appendix.

3 Real Ferrer, 1994, p.323.

Duties imposed upon public powers: As Article 53.3[4] of the Constitution clearly spells out, the inclusion of the environment among the guiding principles is intended to shape the creation of legislation, the realisation of policy by public powers, and the judicial enforcement of environmental norms, echoing Article 130r(2) EC[5]. Thus the effects of the reference should be discernible in the three corresponding stages of this research: transposition, practical implementation and enforcement. The juridical value of the guiding principles has been consistently supported by respected Spanish jurists[6] and by the jurisprudence of the Constitutional Court, which insists that "the public powers are obliged to facilitate their adequate application"[7]. It is the duty of public powers generally[8] to see that the "right to enjoy an environment suitable for personal development" informs positive legislation: the constitutionality of other laws with respect to the guiding principle can be brought by ordinary courts before the Tribunal Constitucional[9]. Article 45 (theoretically) limits other policies, which cannot have as purpose the irrational use of natural resources[10]. Public powers must further ensure that the execution of public policy and judicial practice are guided by the principle: the fact that frequently they fail to do so does not diminish the nature of the duty imposed upon them.

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4 Constitution 1978, Article 53.3: "The recognition, respect and protection of the principles recognised in the third Chapter shall inform positive legislation, judicial practice and the actions of the public powers. They can be invoked before ordinary jurisdictions only in accordance with the dispositions of the law that develop them."

5 Although not as clearly stipulated as the requirement that "environmental protection requirements must be integrated into the definition and implementation of other Community policies"; Article 130r(2) EC.

6 For example, García de Enterría. However, some writers caution against attaching too great an importance to the guiding principle; Baño León, pp.614-15.

7 "*...adecuado ejercicio los poderes públicos vienen obligados a facilitar,*" Sentencia de Tribunal Constitucional (STC), 32-1983, fundamento jurídico 2; STC 18-1982, fundamento jurídico 6.

The Tribunal Supremo (see appendix) has not hesitated to found its judgments on the guiding principles maintaining that these have a "[n]ormative value and bind the public powers, each in their respective sphere, to make them effectively operative"; Sentencia del Tribunal Supremo (STS), 9 May 1986; see Real Ferrer, 1994, p.324.

8 Article 53.3, Constitution 1978, above.

9 Constitution 1978, Article 161.1. The possibility of "*interposición del recurso de inconstitucionalidad*" is available for three months starting from the publication of the law or similar norm (Ley Orgánica 2/1979, 3 October, del Tribunal Constitucional, Art. 33); after this time only its application to a concrete case can be challenged, not its entry into force (Article 163 Constitucion 1978).

For the Tribunal Constitucional, see appendix.

10 Pérez Moreno, Popnencias, p.102.

The principle of "collective solidarity", mentioned here, has significance for both Spanish citizens and for relations between administrative authorities[11]. The various separate administrations at State, CA and local levels are required to assist and co-operate with each other when requested: refusal is permitted only where the administration is incapable of lending assistance or when to do so would gravely affect the administration's own activities, and must be communicated detailing reasons[12].

Duties imposed upon citizens: Although those legally obliged to undertake the tasks necessary to attain the objectives of Article 45 are clearly the public powers, citizens are expected to support the public powers' efforts, again in the spirit of public solidarity[13]. It falls upon individuals to collaborate with authorities in supervising the rational use of natural resources, to denounce harmful activities and to have recourse to courts to solicit protection or repair of environmental harm[14].

Limitations of the constitutional reference: Despite its importance this reference has limitations. Undeniably, as formulated, it is ambiguous[15] and appears to include all that which is "suitable for personal development"[16]. Formulated thus, it cannot be directly invoked before ordinary courts, but rather, as Article 53.3 indicates, "in accordance with that disposed in the laws developing

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11 Constitution 1978, Article 2: "The Constitution is founded on the indissoluble unity of the Spanish nation, the common and indivisible motherland of all Spaniards, and recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed and the solidarity between all of these."

See also, Article 156, Constitution 1978; Sentencia Tribunal Constitutional, 64/1982.

12 Ley de Régimen Jurídico de las Adminstraciones Públicas y del Procedimiento Administrativo Común (LRJPAC), Article 4 (in appendix).

See comments, GARCIA URETA, 1994, p.165.

13 GARCIA URETA, 1994, p.163; Real Ferrer, 1994, p.322.

14 Other Constitutional articles may be relied upon by individuals indirectly to protect indirectly the environment, for instance through protection of the citizen's right to privacy and the inviolability of the home. See ECHR, *López Ostra v. Spain* (41/1993/436/515); Baño León, pp.621-22 (referring to Articles 15; 17 and 18 and 19; see Chapter 9, point 3.1. at- *Right).*

15 Although some may interpret more narrowly, based on natural resources mentioned in Article 45.2, it seems untenable to propose two interpretations -- one narrow, one more general -- for Article 45. It appears more reasonable to accept the wider, and more imprecise, of the two. Real Ferrer, 1994, p.320-21; see also GARCIA URETA, 1994, p.162.

16 Article 45, Constitution 1978. Although this is mitigated by reference to 'natural resources, Opinions vary as to what this includes: see ROSA MORENO, 1993, p.151 notes 601,602 and 603; Real Ferrer, 1994, p.321 note 6.

it"[17]. The public powers, then, are obliged to use the constitutional principle for the benefit of the citizens, but the latter are not entitled, based upon only this, to demand a concrete environmental standard.

Further limitations arise in the light of other societal values. Already Article 45 is based upon human utility rather than an inherent value attached to the environment: human quality of life is to be protected and improved, the environment simply defended and restored[18]. Even "rational use" is still grounded in the idea of that which is useful; it seems to justify subordination of environmental to economic concerns when the 'development of the individual' is deemed to be better served by economic than by environmental priorities.

Moreover, tension between economic and environmental objectives exists at Constitutional level[19]. Article 45 does not state that the environment is a priority superior to others, but simply that it must be used rationally, defended and restored. Modernisation and development of all economic sectors, particularly agriculture, livestock, fishing and craftsmanship are also given constitutional status[20], as is the principle of economic equilibrium (seeing to it that no region is socially or economically favoured over the others[21]). In particular, no authority can adopt rules that impede the free circulation of goods and the movement of people throughout the Spanish territory[22]; a distinct resemblance to the conflict that can exist at Community level between environment and 'economic freedoms' is evident. Therefore, as Baño León points out, with or

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17 As Baño León says, "the Constitution is not a substitute for the legislator", p.613; see also Real Ferrer, 1994, p.325; GARCIA URETA, 1994, p.165-66.

18 DE VEGA RUIZ, José Augusto, *El Delito Ecológico*, second edition, Editorial Colex, 1994, p.21; GARCIA URETA, 1994, pp.160-61; ROSA MORENO, 1993, p.152.

19 GARCIA URETA, 1994, p.161; ROSA MORENO, 1993, p.152; Baño León, p.619.

20 Constitution 1978, Article 130: "Public powers shall see to the modernisation and development of all economic sectors, and in particular, agriculture, livestock, fishing and craft-making, in order to place at the same level the standard of life of all Spaniards."

21 Constitution 1978, Article 138.1: " The State guarantees the effective realisation of the principle of solidarity consecrated in Article 2 of the Constitution, overseeing the establishment of an adequate and fair economic balance between the diverse parts of the Spanish territory...".

22 Constitution 1978, Article 139.2: "No authority shall adopt measures that directly or indirectly obstruct the free circulation and establishment of persons and the free circulation of goods throught the Spanish territory."

without a Constitutional reference, the legislator will always have to strike a balance between ecological and other public and private interests[23].

Unrealised potential: Certainly, much remains to be gleaned from this constitutional article. Untapped potential exists for practical implementation: the reference may be general, but as García Ureta notes, logically, this duty should lead to the introduction of mechanisms facilitating the obligation[24]. It could be considered to provide a constitutional basis for the access to information and access to justice so emphasised at the Community level, a justification for sacrifices that may be necessary (environmental taxes, for instance)[25], and support for the polluter pays principle ("...make good any damage caused")[26]. Furthermore, "collective solidarity" may eventually be interpreted to refer to ideas gaining popularity since the Brundtsfield commission and the Rio Conference, such as the rights of subsequent generations[27], and serve as a basis upon which to introduce concrete measures. In enforcement, Article 45.2 could help to ground arguments centring on the preventive principle (since the public powers must 'protect'), if not the precautionary principle. Furthermore, Article 45.3 is perhaps on the verge of important consequences for establishing legal interest[28].

1.2. Territorial and Administrative Structures:

Spanish implementation of Community (and national) environmental law is greatly

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23 Baño León, p.618-19; STC 64/1982, 4 November on conflict between Article 45 and other Constitutional values.

24 GARCIA URETA, 1994, p.163; see also Constitution 1978, Article 9.2, Below, footnote 179.

25 Real Ferrer, 1994, p.322.

26 Pérez Moreno, Alfonso, "Instrumentos de Tutela Ambienta," in *I Congreso Nacional de Derecho Ambiental: Ponencias*, Sevilla, 1995, at p.104.

27 Real Ferrer, 1994, p.322; a recent judgment by the Tribunal Supremo refers to the duty that this generation has to leave a clean and habitable world for future generations, STS 30 November 1990; (decision reproduced in DE VEGA RUIZ, 1994, pp.63-97 at p.87).

28 Chapter 9, footnote 44.

affected by two-fold fragmentation: the division of Spain into seventeen Autonomous Communities (CA), each with its own governmental departments and competences; and the fact that, on any one level (State or CA) environmental competences are sprinkled among ministerial departments.

1.2.1. Territorial Divisions:

During the elaboration of the Constitution, the territory was divided into 'pre-autonomous entities' corresponding generally to historical regions, which have become the Autonomous Communities. Limitations of competence operate in both directions. The CA (and other territorial entities) enjoy the autonomy to manage their own interests[29] within the limit of the competences reserved for the State, which is guarantor of the general interest; the State is justified in intervening to defend the general interest (for instance, if a CA takes a decision in environmental matters that produces effects beyond its territory) but must respect the competences of the territorial entities[30].

In certain ways, the Spanish State resembles a microcosm of the EC. In both there exist: potential conflicts of concurrent competence; powers of the smaller entities to adopt additional norms provided they do not undermine generally applicable rules; the potential clash between economic freedoms and protection of the environment; the capacity of the larger entity to issue harmonising legislation applicable across the smaller autonomous bodies[31]. Problems similar to those between the Community and the Member States can therefore be expected to emerge at times within the Spanish State. For example, subsidiarity-type tensions surface occasionally as various bodies attempt to pull competences into their sphere.

The regions of Spain have their own ambitions with regard to membership in the European Community. In view of the strong regionalism, dissatisfaction exists with representation of the

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29 Constitution 1978, Article 137.

30 DOMPER FERRANDO, 1992, pp.140-42.

31 Constitution 1978, Article 131.1: The State, through law, can plan the general economic activity in order to address collective needs, to balance and harmonise the regional and sectoral development and stimulate growth and income of wealth and its more just distribution.

regions at the European level: European norms affect areas that are the competence of the CA, "and yet, the person who sits and votes in the Council is a representative of the State Government."[32] Another dimension of political tension is thus added to the problem of implementation and enforcement of Community environmental rules in Spain: regional and local authorities, on whom the performance of the rules depends, would prefer to participate in European decision-making on a separate basis from the State[33]. Particularly where implementation requires considerable effort, European Community rules can be seen as imposed upon them by the central State against their will.

The Spanish Constitution does not establish powers definitively. Keys to the definition of spheres of competence lie in the Constitution, in the CAs' founding Statutes of Autonomy (which serve almost as constitutional documents, and lay claim to specific lists of competences[34]), and lastly in State legislation relevant to specific subjects or circumstances[35]. The CAs are divided into two groups: those with full autonomy, limited by powers reserved for the State, and those still moving towards full autonomy.

Diversity of competence in CA regimes -- adoption of additional rules or executive powers: The power to adopt basic legislation, *inter alia* legislation transposing Community rules, is reserved, "like it or not,"[36] for the State (*Cortes Generales*[37] and the Government). The first-level CA[38] have a power reminiscent of Article 130t EC: they are competent, through their Legislative Assemblies, to adopt

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32 Gutierrez Espada, p.172.

33 *Ibid.*, pp.172-73.
Although regional representation in the Council is permitted, the Spanish Comunidades Autónomas do not enjoy the position of, for example, the German Lander. Spain's Constitution clearly reserves international relations within the exclusive competence of State (Article 149.1.3).

34 Legislative and executive -- never judicial; Rubio Llorente, p. 132.

35 DOMPER FERRANDO, 1992, pp.137-39.

36 "...*guste o no*"; Rico Gómez, J.I.,"Las Competencias autonómicas de desarrollo legislativo en materia de protección del medio ambiente y espacios naturales protegidos: El caso de la Comunidad Autónoma de Castilla y León," 127 (1992) Revista de Administración Pública 325 at p.325.

37 See appendix.

38 With founding statutes of autonomy adopted under Article 151.2 of the Constitution:The País Vasco; Catalunya; Galicia; Andalucía. Autonomous Communities founded under Article 143 Constitution: Asturias; Cantabria; La Rioja; Murcia; Valencia; Aragón; Castilla-La Mancha; Canarias; Extremadura; Islas Baleares; Madrid; Castilla-León. Navarra obtained autonomy via a special procedure alluded to in the *disposición adicional 1.a de la Constitución*."

additional protective norms developing the State's basic legislation[39]. Legislative competences have been extremely varied, even between CAs of this first level; where one statute of autonomy mentions a general, all-encompassing power, another can be very precise[40].

The second-level CA[41] have executive competences that are also immensely diverse. They were offered a choice of two 'menus'[42] available in the Constitution, and their statutes figure on a spectrum of competence between those listed in Article 148[43], which they can assume, and those reserved for the State in Article 149[44]. Those executive competences not assumed in these Statutes, are reserved for the State[45]. An examination of each statute is therefore necessary to determine which subject areas have been claimed by the various CAs[46].

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39 This maximal level of autonomy was reserved principally for Andalucía and for autonomous communities based on separate nationalities (País Vasco, Catalunya and Galicia).

40 Thus for example, the País Vasco claimed in its initial statute the legislative development in matters, simply, of "environment and ecology"; Article 11.1.a Ley Orgánica 3/1979, 18 December. Catalunya's Statute is more specific, claiming exclusive competence in "woodlands, forest exploitation and services, livestock paths and pastures, protected natural areas and special treatment in mountain zones in accordance with the dispositions of Article 149.1.23 of the Constitution"; Article 9.10, Ley Orgánica 4/1979, 18 December. Catalunya's Statute further claims the competence to develop and execute basic State legislation in protection of the environment (Article. 10.6) and to the power to execute State legislation in "Maritime salvage and industrial and contaminating wastes dumped into the territorial waters of the State that correspond to the Catalán coast" (Article 11.10).

41 The statutes of which were adopted pursuant to Article 143, Constitution 1978.

42 Rubio Llorente, p.131.

43 Constitution 1978, Article 148: "The Autonomous Communities can assume competences in the following matters... 3) Organisation of the territory, urbanism and housing...9) management in matters of environmental protection)."

44 Constitution 1978, Article 149: "The State has exclusive competence in the following matters...23) basic legislation in matters of environmental protection, without prejudice of the capacity of the Autonomous Communities to establish additional norms of protection. Basic legislation on woodlands, forest exploitation and livestock paths."

45 Constitution 1978, Article 149.3: "Those matters not expressly atributed to the State by this Constitution can correspond to the Autonomous Community, by virtue of their respective Statutes. The competence for matters that have not been assumed by the Statutes of Autonomy shall correspond to the State, whose norms shall prevail in case of conflict over those of the Autonomous Communities, in all that is not attirubted exclusively to their competence."

46 Extremadura, for example, claims exclusive competence in "hunting, river and lake fishing, aquaculture, and protection of the ecosystems in which these activities are developed" (Article 7.8, Ley Orgánica 1/1983, 25 February); competence to develop (although this was probably overstepping its powers) and execute legislation in "woodlands and forest exploitation, with special reference to the juridical regime of neighbouring woodlands in common hands, communal woodlands, livestock paths and pastures, the regime of the mountainous zones (Article 8.2)" and executive competence in protection of the environment, including industrial and contaminating wastes dumped into water (Article 9.2). Another community, Baleares, "*con dudoso apoyo constitucional* (with dubious constitutional support";

Thus, implementation of legislation is mainly in the hands of the CA, whether of first or second level[47]. Also, the designation of second-level CA is actually temporary[48], until gradually all the competences not reserved for the State have been assumed[49], usually in a fragmented and sectoral manner not conducive to coherent action[50]. Finally, differences in competences to adopt additional legislation existed when rules concerning LCP and EIA were adopted. Since then, those CAs that had not yet assumed competence to adopt additional environmentally protective norms received such powers through Ley Orgánica 9/1992[51].

The 'exclusivity' of domains of competence that can be claimed by the CA as opposed to those reserved 'exclusively' for the State, is relative: there can be no draconian separation of the two domains[52]. This is particularly true in environmental matters because the Constitution, statutes of autonomy and other laws often take a piecemeal, sectoral approach. The demarcation of attributions in one element -- fresh water, for instance -- does not always coincide with the

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MARTÍN MATEO, I-1991, p.262) attributed to itself "Additional norms of environmental protection. Protected natural spaces. Ecology." (Article 11.5, Ley Orgánica 2/1983, 25 February) -- in spite of being constituted on the basis of Article 143 of the Constitution.

47 See generally Rubio Llorente, p.130-31; GARCIA URETA, 1994, p.169-75; Rico Gómez, p.325-27; LOPEZ BUSTOS, pp.71-78; MARTÍN MATEO, I-1991, pp.259-264.

48 These autonomous communities can only assume initially such competences as are enumerated in Article 148.1, Constitution 1978. If not claimed at that time, a possibility to reform the statute exists five years after its approval, at which point additional Article 148.1 competences can be assumed, always within the limits of those enumerated in Article 149.1; see Article 143.3 Constitution 1978; Rico Gómez, p.328.

A significant problem, too vast to be investigated here, is that many of the *first* rank autonomous communities also see their status as temporary. Although they have assumed all the competences not reserved for the State, they still claim not only a reinterpretation of their Statutes, but above all a transfer of those competences still held by the State; Rubio Llorente, pp.131-32.

49 Furthermore, the government has the power to transfer and delegate competence (Article 150) which has been used to attribute to two autonomous communities (Canaries and Valencia) competences without approval by referendum, and in a few other cases to harmonise competences held by the various communities.

50 To illustrate, Aragón, has assumed functions and services in environmental matters (Real Decreto 3504/1983, 14 December); in land planning and environmental studies (Real Decreto 3316/1983, 2 November); in architectural heritage, control of the quality of life and housing (Real Decreto 699/1984, 8 February); in nature conservation (Real Decreto 1410/1984, 8 February); in matters of provision, channelling and defense of the banks of rivers (Real Decreto 1598/1984, 1 August); in matters of Vexatious Activities (*actividades molestas*) agriculture, urbanism and housing (Real Decreto 299/1979, 26 January).

51 Transferring powers of the State's exclusive competence to the Autonomous Communities; Manzana Laguarda, 1994, p.10724; GARCIA URETA, 1994 p.169-70.

52 DOMPER FERRANDO, 1992 pp.147-49; GARCIA URETA, 1994, p.169.

powers and functions in related issues -- for example, emissions of certain industries into water[53]. Also, even if claimed by a given CA, the powers revert to the State if more than one CA is affected[54].

In fact, despite the decentralising rhetoric, the State is reluctant to relinquish power to the CAs and municipalities[55]. Local authorities lose competences in favour of more specific texts that designate agents of the state[56], and generally decision-making powers tend to gravitate towards the State's greater resources. The fundamental justification given by the State for repatriation of decision-making powers is that the centre is better equipped than local entities to exercise these competences. Such re-centralisation is perhaps beneficial where LCP-type legislation is concerned, as this requires a vision of State emissions as a whole. The same tendency is, however, negative with a procedure such as EIA, where local realities are a critical part of the decision to be taken.

Consequences for applying Community rules: Community environmental rules are grafted upon a system of dividing competence that is both ambiguous[57] and of a "diabolical complexity"[58]. Whereas environmental administration is generally an area of considerable administrative fragmentation and confusion, Spanish territorial divisions further cloud the waters. Even internal observers find it difficult to delineate, within the range of seventeen possibilities, which competences are held by each CA at any point in time[59]; the dilemma is more intractable from the distance of the European Commission. The development of each CA's list of competences needed to be followed in order to determine when a CA was authorised to adopt additional protective norms developing the State's basic legislation; or when the CA had only executive competences and the state legislation was the only applicable norm. Since LO 9/1992, giving all CAs power to adopt additional norms, this issue has become one of verifying whether or not each CA has used

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53 DOMPER FERRANDO, 1992, pp.159-60; Muñoz Machado, p.323.

54 DOMPER FERRANDO, 1992, p.163.

55 MARTÍN MATEO, I-1991, pp.264-65; LOPEZ BUSTOS, pp.87-90.

56 As LOPEZ BUSTOS points out, p.87, a proliferation of ways for the State to penetrate local competences exists, through *Gobernadores civiles, Delegados territoriales*, etc. This bears a similarity to the French situation, where prefects are *Commissaires de la République*.

57 *Ibid.*, p.72.

58 "*...diabólica complejidad*"; Rubio Llorente, p.130.

59 LOPEZ BUSTOS, pp.76-77,79; MARTÍN MATEO, I-1991, pp.261-66.

that power, and if so, how it has done so. In formal implementation, Community law then passes through a double filter, as it were, of both State and regional legislation[60]. The fact that harmonisation is elusive within this Member State bodes ill for harmonisation across the European Community.

In the Spanish context, discord can emerge regarding Community rules not only between European Community and Member State, but also between this State and the CAs[61]. In relations with the European Community, Member States tend not to dispute supremacy[62], but rather whether the Community had competence to act at all. Within Spain challenge tends also to surround the issue of competence, yet in the Spanish context one cannot assume that State law has supremacy over legislation issued by the CAs[63]. Rather, as sustained by the Tribunal Constitutional[64], one must examine each act to determine if each entity has acted within its respective attributions[65].

In practice, it is difficult to deny[66] that the State has competence to dictate norms applying European Community law, even in areas where all the competence has, in theory, passed to the CA[67]. The responsibility conferred upon the Government and *Cortes Generales* by Article 93[68], to

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60 In practice, of course, this is more complex. The competence of a CA to dictate the legislation developing a directive is not automatic: other titles (for example, ensuring the basic conditions of equality, Article 149.1.1) or circumstances (necessity, urgency) may confer this task upon the State; see also DOMPER FERRANDO, 1992, pp.145-46.

61 In fact conflicts are not unusual: see for instance, the Statutes of Baleares Art 11.5; and Madrid Art 27.10, MARTÍN MATEO, I-1991, p.262. See generally Rico Gómez, *op.cit.*, on the competence of Castilla y León to adopt additional protective norms in the area of protected natural areas (Ley 8/1991, 10 May).

62 Which applies within the sphere of Community competence.

63 The competences of the State and CAs are of different types rather than hierarchical. If this were not the case, the 'autonomy' would be illusory; see comments LOPEZ BUSTOS, p.72; DOMPER FERRANDO, 1992, pp.162-163; Rico Gómez, p.333; Fuentes Bodelón, p.80.

64 "Conflicts must be resolved by virtue of the principle of competence to determine which matters have remained constitutionally and statutorily conferred upon the legislative organs of the autonomous communities and which correspond to the Cortes Generales of the State," STC 5/1981, 13 December, cited Rico Gómez, p.333; see also Rubio Llorente, p.133.

65 MARTÍN MATEO, I-1991, p.259; LOPEZ BUSTOS, p.72; Rico Gómez, p.333.

66 Although some do indeed deny this; see Rubio Llorente, p.36.

67 One such area is agriculture, a domain with an enormous impact on the environment.

68 Constitution 1978, Article 93: "It is for the Cortes Generales or the Government, according to case, to guarantee the accomplishment of those treaties and resolutions emanating from international or supranational orgnisations...."

ensure the fulfilment of international or supranational obligations, is usually considered sufficient to issue rules that will serve in the eventual failure to do so on the part of the CA[69].

1.2.2. Environmental Administration:

The difficulty reported by the Commission[70] in monitoring application of environmental rules is further borne out by the complexity of the Spanish administrative situation.

Prior to the Sixties, the structure of Spanish ministries was vertical; neither much co-ordination between them existed, nor much concern for environmental matters. When action related to the environment was taken, a sectoral approach was adopted and commissions were established to tackle specific problems, not very effectively[71]. However, the Stockholm Conference in 1972 promoted a more unified vision of environmental issues in Spain, and a Delegated Commission for the environment[72] (which was never noted for its success) was created to co-ordinate initiatives on specific issues such as pollution; the Inter-ministerial Commission of Environment (CIMA)[73] was designed to be the working organ of the former[74]. In 1977 a new department was established within the Ministry of Public Works and Urbanism (MOPU[75]): the General Directorate of Territorial Action and Environment[76].

As in France, the environment was allocated to a subordinate department within the ministry of a potential competitor. The environment's rank within the ministry was the subject of a good deal of experimentation[77]. In 1991 MOPU was restructured[78] to integrate the Transport Ministry

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69 Rubio Llorente, pp.136-67, citing Ortega Alvarez, L., "El artículo 93 como título de competencia concurrente para los supuestos incumplimientos autonómicos de las obligaciones comunitarias," REDA 1987; and PEREZ TREMPS, P., *Comunidades autónomas, Estado y Comunidad Europea*, Madrid, 1987.

70 Eighth Application Report, points 32-33, pages 271-72.

71 LOPEZ BUSTOS, pp.41-42.

72 *Comisión Delegada del Gobierno para el Medio Ambiente.*

73 Comisón Interministerial de Medio Ambiente. Both Commissions were created by Decree 888/1972, 13 April.

74 It has since been eliminated (Real Decreto 1327/1987, 16 October) although nothing was immediately created to take its place.

75 *Ministerio de Obras Públicas y Urbanismo.*

76 *Dirección General de Acción Territorial y Medio Ambiente*, Article 5.c, Real Decreto 1558/1977 4 July.

77 LOPEZ BUSTOS, p.43. When MOPU was reorganized, a Subsecretariat of Land Planning and Environment was created (Article 1.1 RD 754/1978) containing a General Directorate of Environment (Articles 33.2.a and 48 -52 of Real Decreto 754/1978).

into the structure. Only in the early Nineties was the environment elevated to the rank of State Secretariat for Water and Environment Policies[79]. Its commitments were widened, and an attempt was made to group activities and competences into functional areas.

In its latest ministerial incarnation the Environment has been elevated to ministerial status, though still without succeeding in divorcing its potential competitors: the Ministry of Public Works, Transport and Environment (MOPTMA[80]). The principal environmental organ, the State Secretariat of Environment and Housing[81] (although again, environment and housing are often at odds) is responsible for elaborating and co-ordinating basic legislation in matters of environment and industrial pollution, and for overseeing its application; co-ordinating between the ministries and the CAs; and organising relations with the European Community and other international organisations[82].

Unfortunately the battle to obtain coherence in environmental administration is not over: significant problems remain, the first being that environmental competences are still not grouped within one ministry.

Administrative fragmentation: Efficiency of implementation and enforcement of environmental rules, Community or national, is sorely tested by the fact that government bodies implicated in environmental administration at State level are many[83]. Usually environmental matters are

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In 1990, the environment was elevated to the rank of Subsecretariat (Secretaría General de Medio Ambiente) and was responsible for proposing and carrying out environmental objectives and policies and to coordinate the functioning of MOPU's attributions, with specific attention to its European Community and international commitments (Real Decreto 199/1990 16 February, Article 1.1 and 1.2).

78 Real Decreto 576/1991, 21 April 1991.

79 *Secretaría de Estado para la Políticas del Agua y el Medio Ambiente*, restructured by Real Decreto 1316/1991, 2 August.

80 *Ministerio de Obras Públicas, Transportes y Medio Ambiente.*

81 *Secretaría de Estado de Medio Ambiente y Vivienda.* Within this are General directorates of Water Quality, Coasts, Information and Environmental Evaluation, Environmental Policy, and for Housing, Urbanism and Architecture, as well as the National Institute of Meteorology: Organigrama, July 1995, MOPTMA.

The environmental departments have been restructured still more recently by RD 1894/1996, 2 August 1996; see García Ureta, "Current Survey: Spain," 1996 Environmental Liability CS96.

82 Specifically relevant to this research, it also undertakes the realisation of EIS for public works and the analysis of meteorological data in order to adopt a climate policy.

83 MARTÍN MATEO, I-1991, pp.252-54; LOPEZ BUSTOS, chapter IV; Manzana Laguarda, "Residuos industriales: aspectos jurídicos de un problema irresoluto," (1994) 51 Revista General de Derecho 10715, at p. 10723.

entrusted to bodies whose basic priorities are often neither environmental nor environmentally friendly, making it easier where conflict arises to overrule environmental goals in favour of economic concerns.

Almost all ministries have some environmental competence, and although attempts to regroup them have been made, environmental powers remain dispersed among the Ministries of Health and Consumer Affairs; Agriculture, Fisheries and Food; Industry and Energy[84], Economy and Finance; Education and Science; and the Interior[85]; and the predominant ministry, MOPTMA[86]. Thus scattered, the environment is often considered a secondary issue[87] and even within these ministries competences are not grouped coherently but dispersed throughout various sub-directorates[88]. Also, a sectoral approach still predominates, and the environment administration is frequently fragmented into its natural elements (atmosphere, water, energy, sanitation, natural resources, natural areas).

The two directives examined in this research illustrate the fragmentation. Competences regarding EIA have been grouped principally in MOPTMA and the Institute for Nature Conservation (ICONA[89]), although EIA legislation affects the activities of almost all the other

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84 Since Real Decreto 135/199, 20 June and Real Decreto-Ley 5/1995, 16 June; previously it had been the Ministry of Industry, Commerce and Tourism.

85 Ministerios de Sanidad y Consumo; Agricultura, Pesca y Alimentación; Industria, Comercio y Turismo; Economía y Hacienda, Educación y Ciencia; Interior.

86 This alone includes the General Directorate of Environmental Policy (responsible for natural resources planning; coordination with competent organs of CA, EIA) containing five general subdirectorates: Analysis, Statistics and Data Banks; Planning and EIA; Regulation and institutional relations; Waste; and Protection of the Atmospheric Environment.

Moreover, within MOPTMA "there exists a whole constellation of organs linked or related to the State", not enumerated here; see LOPEZ BUSTOS, p.67-68.

87 A contrario, Martín Mateo finds that, although fragmentation is a problem, the fact that the environment is included in the Ministry of Public Works can be an advantage; MARTÍN MATEO, I-1991, p.251; this would be more likely to constitute an advantage were measures of environmental protection considered more a tool for improvement and less an obstacle to economic goals.

88 For example, the Ministry of Agriculture, Fisheries and Food contains General Secretariats concerned with various agricultural, maritime fishing, and nature matters (The autonomous Spanish Institute of Oceanography is linked to one): all of these secretariats have competences linked to environmental protection. Most importantly, ICONA -- the National Institute for Conservation of Nature) is linked to this Ministry.

89 *Instituto para la Conservación de la Naturaleza*, which is obligatorily contacted when a project authorised at State level may affect conservation of flora, fauna, natural protected areas or forest (Real Decreto 1131/1988, Article 13).

Ministries. As for LCP, principally the Ministry of Industry and Energy (MINER[90]) oversees, *inter alia*, installation of new plants, modernisation of existing ones and development of methods for reducing polluting emissions[91]. Within this, the General Directorate of Energy's Centre of Energy, Environmental and Technological Research (CIEMAT[92]) is particularly concerned with the problem of forest residues (for example, acid rain). Also MOPTMA's General Sub-directorate of Environmental Protection is in charge of monitoring and control of atmospheric pollution[93].

Fragmentation at level of CAs[94]: As execution of the Community legislation is ultimately in the hands of the CAs, these too have a considerable role to play; yet these administrations are as susceptible to change and fragmentation on a sectoral and functional basis[95] as those at the central level. Catalunya is the main exception; its government approved the creation of a Department (*Consejería*[96]) of Environment in February 1991. A few other CAs have also tried to assemble environmental functions into one agency. Extremadura, with an Environment Agency linked to its Department of Public Works, Urbanism and Environment, provides another positive example, yet even here not all competences are united; some remain linked to the Department of Health and Consumer Safety[97].

More typically throughout the CAs, the environment is situated in a department subordinate to Public Works, Transport, Urbanism, Land Planning or a combination of these. For instance, in Aragón, the organ principally concerned with environmental protection is the Regional Service of Environment within the Directorate General of Urbanism in the Department of Land Planning, Public Works and Transport; however, the Departments of Agriculture, Livestock and Mountains;

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90 *Ministerio de Industria y Energía.*

91 Although the *Ministerio de Sanidad* has certain general powers.

92 *Dirección General de la Energía, Centro de Investigación Energética, Medio Ambiental y Tecnológica.*

93 Article 6.7, Real Decreto 1361/1991, 2 August; and the National Meteorological Institute has been incorporated into this ministry. See MARTÍN MATEO, I-1991, p.253-55; MARTÍN MATEO, II-1992, p.303; LOPEZ BUSTOS, p.56; Sanz Sa, p.425.

94 The sources for the regional structures are MARTÍN MATEO, I-1991, pp.263-266 and LOPEZ BUSTOS, Chapter V. They should be considered only on an indicative basis; as the structures are prone to rapid change, accuracy is fleeting.

95 MARTÍN MATEO, I-1991, p.264; LOPEZ BUSTOS, p.78.

96 The equivalent of a ministry on the regional level.

97 Via the Health and Consumer Safety's Regional Commission of Vexatious, Insalubrious, Noxious and Dangerous Activities.

Industry, Commerce and Tourism; and Health, Social Welfare and Work hold environmental competences as well. A consultative organ also exists, the Environment Commission[98]. And Aragón is not the most extreme case[99]. "As can be observed, total dispersion"[100].

Thus, to trace the implementation and enforcement of environmental rules and policies implies a paper chase through administrative structures that, dispersed once at the national level, are splintered once more at the level of the CAs. Furthermore, competences for certain issues[101] lie with the municipalities[102], and difficulties arise here as well.

Co-ordination: Efficiency of administrative activity in an area so fragmented supposes adequate co-ordination between bodies entrusted with an environmental mission. Unfortunately, in spite of the various 'reforms', attributions remain dispersed and ministerial co-ordination is insufficient[103], a factor which the European Court of Auditors had correctly noted was one of the main problems behind controversial use of European Structural Funds[104]. For instance, the Inter-ministerial Commission of Environment, intended to co-ordinate ministerial initiatives, was always "inoperative"[105]. The lack of co-ordination takes on a territorial dimension[106] and in practice, external agencies of the central administration have difficulty co-ordinating endeavours at the local level[107].

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98 Decree 190/1988, 20 September.

99 In Galicia, for instance, environmental responsibilities are distributed among the General Directorate of Environmental Quality (Dirección General de Calidad Medioambiental) within the *Consejería* of Land-Planning and Public Works; the General Directorate of Mountains and Natural Environment within the *Consejería* of Agriculture, Livestock and Fishing; the General Directorate of Historial and Monumental Heritage within the *Consejería* of Culture and Youth (Consejería de Cultura y Juventud; Dirección General del Patrimonio Histórico y Monumental); the General Directorate of Shellfish Farming and Aquaculture within the *Consejería* of Fishing, Shellfish Farming and Aquaculture; and the *Comisión Gallega de Medio Ambiente*, linked to the *Consejería* of the Presidency and Public Administration (Consejería de la Presidencia y Administración Pública).

100 "*Como se aprecia, total dispersión*"; LOPEZ BUSTOS, p.80.

101 Ley Reguladora de las Bases del Régimen Local (LRBRL), 2 April 1985, Article 26.1(d), Article 86.3.

102 LRBRL, Article 25.2.f.

103 MARTÍN MATEO, I-1991, p.250-51; Manzana Laguarda, 1994, p. 10723; DOMPER FERRANDO, 1992, García Ureta; LOPEZ BUSTOS, Rubio Llorente.

104 Court of Auditors Report 3/92, p.C245/7 at point 1.15.

105 "*Inoperante*"; MARTÍN MATEO, I-1991, p.252.

106 Rubio Llorente, p.137.

107 Also, a variety of peripheral organisations or external services of the various ministries still exist, a few Direcciones Provinciales that still exist, but their role is largely irrelevant since most of their functions have been taken over by CA; Letter of 22 December

Fragmentation of powers and inadequate co-ordination foster a disjointedness in administrative initiatives at all levels, and lead to duplications of certain activities and lacunae in other areas[108]. Furthermore, political competition is evident:

> Each one of these (ministerial departments) has systematically seen to it that it is endowed with norms applicable to each sector, to widen and develop those existing, increasing its particularities to the extreme of making it practically impossible [to have] a unified perspective[109].

The rapidity and frequency of administrative change, as seen with MOPTMA, compounds the confusion. Worse, it appears that change is often precipitous, as with the elimination of body responsible for inter-ministerial co-ordination -- a crucial task, given the situation -- before a replacement had been foreseen[110].

Indeed it appears that much administrative reshuffling, "the weather-vane plan"[111], is more to do with political shifts than rationalisation of commitments in the environmental area. Again the State-level pattern is repeated at CA level, where environmental organs are in constant evolution and it is "impossible to establish the basic organic structure"[112]. Again, variations exist across CAs[113].

1995, Luis Más García, Subdirector General de Planificación Energética y Medio Ambiente, MINER.

108 Rubio Llorente, p.133; LOPEZ BUSTOS, p.96; GARCIA URETA, 1994, p.171.

109 LOPEZ BUSTOS, p.48.

110 The pattern of ill-advised change was repeated in the suppression of another mechanism for co-ordination of initiatives. Initially within MOPT there existed a *Secretaría General del Medio Ambiente* with links to a variety of Directorates General; this has been eliminated, "and with it disappears a fundamental mechanism for the co-ordination that is so necessary"; LOPEZ BUSTOS, p.51, p.63, note 72; MARTÍN MATEO, I-1991, p.25.

111 "These brusque alterations or interruptions...have always come from the continuous reforms improvised by the change of the head of the Ministery or simply of the environmental organisation in question, that seem to be the means by which the arrival of a new official is marked; they are most frequently realized -- the reforms -- without a firm and appropriate criterion and have only resulted in a 'dance' of organs, on occasion of short duration, and that, concretely, have not served the proposition of building an environmental Administration that efficiently protects the environment. The weather-vane plan has been realised, constantly changing the direction to follow"; LOPEZ BUSTOS, p.60.

112 LOPEZ BUSTOS, p.79; for instance, see also MARTÍN MATEO, I-1991, p.342, who lists CA organisms in the area of classified activities "without pretension of exhaustivity".

113 For instance, in the manner and the efficiency of pollution control; LOPEZ BUSTOS, p.77.

It has been suggested that the Commission would find its monitoring tasks easier if it were able to contact a local authority directly[114]; certainly some improvement needs to be made on the current procedure[115]. However, in the Spanish context it is likely that the Commission would waste considerable time and energy tracking down the appropriate local authority itself. Finally, fragmentation and the rapidity of change do nothing to aid the citizen who wishes to participate in environmental protection, or who seeks to register a complaint; although citizens are entrusted with assisting the public powers in their environmental tasks, in specific situations which public power to assist is far from clear.

Lack of resources and power: Public expenditure in environment as a percentage of total public expenditure[116], in 1987, was 1.78; by 1990, it had risen to 2.20; and in 1992 was 2.39[117] -- therefore proportionally greater than that spent at the European level (which appears logical, since implementation and enforcement are mainly in the hands of Member States), as well as that spent in France[118]. In 1987 23% of the total expenditure was for personnel; in 1990, 20.39% and in 1992, 19.80%[119]. This is still insufficient evidently; MOPTMA does not have agents in the field to "impose environmental discipline"[120] where it is most required. "The Administration on many occasions, above all in the local sphere, does not possess the technical and human means necessary to exercise efficiently and diligently its powers of intervention and monitoring in the activities with an impact on the environment."[121] As seen, constitutionally the majority of

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114 Cf: Richard Macrory, "The Enforcement of EC Environmental Law Against Member States," presentation during the conference "The Impact of EC Environmental Law in the United Kingdom," London, 3 November 1995.

115 Whereby everything passes through the Member State representation in Brussels, with all the delays this implies (see Chapter 2, point 2.3. Limits to Commission powers).

116 Regarding the classification as "investment in environment", see for instance, the Court of Auditors report OJ 1992 C245/14.

117 Ministerio de Obras Públicas, Transportes y Medio Ambiente, Dirección General de Política Ambiental, *Gasto público en medio ambiente en 1991 y datos comparativos 1987 - 1991*, serie estadísticas, 1994, p. 282 (Monografía MOPTMA).

118 See chapter 4, point 1.3. Reform.

119 Monografía MOPTMA, p.290.

120 LOPEZ BUSTOS, p.49. MINER, in charge of implementing large combustion plants legislation, also relies on Provincial Directorates in each province, depending organically on the Delegate of the Government in the CA in which the provinces lies, and depending functionally on the Civil Governor of the Province; Letter of 22 December 1995, Luis Más García, Subdirector General de Planificación Energética y Medio Ambiente, MINER.

121 Beltrán Aguirre, p.298.

concrete actions fall to the CAs and municipalities, yet the inadequacy of resources is even more marked here[122]. Furthermore, variations between CA are enormous, ranging between the extremes in public expenditure of 7,311 pesetas/inhabitant in Asturias and 28,362 pesetas/inhabitant in Baleares[123].

1.3. Summary:

The consequences of the situation described here can be expected to flow downstream, affecting the efficiency with which the public powers, both State and Autonomous, tackle the tasks of formal and practical implementation and enforcement. Generally the situation is characterised by fragmentation, confusion, and a great potential for clash between priorities, both in terms of constitutional goals and administrative divisions. The returns of the constitutional reference remain limited at present. The rapid change and fragmentation indicate that, despite being enshrined in the Constitution, environmental matters are of low priority, suggesting somewhat obviously that it will be difficult to muster the political will to redress subsequent difficulties.

2. Problems of Formal Implementation/Transposition:

Within the context described above, attention shifts to the transposition of Community obligations into national rules. Of particular concern is the manner in which public powers have made use of their margin of discretion in transposing Community obligations.

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122 Amounts for CA personnel, and goods and services are not even double those at the central level, although concrete actions are largely in their hands. Figures for 1991 (in thousand pesetas): total public expenditure 107,541,966 on personnel; 137,240,299 in goods and services; 242,215,017 in real investments. For the central administration the same figures are 14,319,045 (personnel); 5,324,573 (goods and services) and 71,040,293 (real investments). For the CA, 22,529,868 (personnel); 6,560,838 (goods and services); and 94,200,354 (real investments); Monografía MOPTMA, Table 1.3, p.16.

At times local budgets are strained enough that associations between close localities are created to pay for basic services in areas such as sanitation, et cetera; LOPEZ BUSTOS, p.90,94.

123 Monografía MOPTMA, p.13.

2.1. Types of legislation

Organic Laws (*leyes orgánicas*) are those acts directly specified by the Constitution; approval, modification or suspension must be voted by absolute majority of the Congress[124], and power to adopt organic laws cannot be delegated to the Government. Acts voted by *Cortes Generales* are *leyes* (statutes). The power to adopt norms with the rank of statute can be delegated to the Government; an act thus adopted is a legislative decree (*real decreto legislativo*). *Decretos* (regulations) are acts drawn up by the regulatory power, the government.

In order for Spain to meet the many obligations it faced upon entering the Community, the government was empowered[125] for a period of six months to adopt norms with the rank of "*ley*" (statute, act) regarding a series of matters included in an Annex. Real Decreto Legislativo 1302/1986 was adopted in this manner to fulfil the requirements of EIA85/337[126].

Provisions transposing EIA85/337 and LCP88/609 were enacted specifically to transpose European legislation and are less fragmented across legislative acts than the French transposition. The principal texts are: for EIA85/337, Real Decreto Legislativo 1302/1986[127] on environmental impact assessment, and Real Decreto 1131/1988[128] for the execution of RDL 1302/1986. CA measures[129] are mentioned where appropriate, rather than systematically analysed. The main text implementing LCP88/609 is Real Decreto 646/1991[130] establishing new norms on limitation

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124 *Congreso de los Diputados*, in appendix.

125 Ley 47/1985, 27 December 1985.

126 Approved by the *Consejo de Ministros* on 28 June 1986, it was published on 30 June -- the last day of the six-month delegation of Ley 47/85; Fuentes Bodelón, p.74. Problems arose with EIA: no express reference was made to previously existing EIA-type rules. The government's power to modify or derogate from these was contested. The Consejo de Estado stated that the Disposición Adicional in the RDL's accompanying regulation (RD1131/1988), which mentions the previous legislation, could be considered a "clarifying disposition" (Consejo de Estado, Dictamen 59.269 MM, p.18; cited GARCIA URETA, 1994, p.220) of the existing legislation.

127 Real Decreto Legislativo 1302/1986, *de 28 de junio, de evaluación de impacto ambiental*.

128 Real Decreto 1131/1988, *de 30 de septiembre por el que se aprueba el Reglamento para le ejecución del Real Decreto Legislativo 1302/1986*.

129 List provided in Chapter 2, footnote 19.

130 Real Decreto 646/1991, de 22 de abril, *por el que se establecen nuevas normas sobre limitación a las emisiones a la atmósfera de determinados agentes contaminantes procedentes de grandes instalaciones de combustión*.

of atmospheric emission of certain contaminating agents proceeding from large combustion plants; no CA has adopted developing legislation[131].

2.2. Formal Implementation -- EIA85/337:

Although examples of rules containing early elements of EIA exist[132]; these were "precarious and of little significance"[133] and not coherent enough to be used in transposition of EIA85/337[134]. Despite such precedents (which continue in force), Environmental Impact Assessment was a new procedure in Spain imported through Community legislation[135].

Comparison between Community and Spanish legislation is easier than that observed in the French context. Spain based its legislation on the European model and the result, as expected, more closely follows the European requirements without being distributed over various Acts and regulations. The comparison reveals that the most serious problems surround the conflict between economic and environmental priorities, even more evident here than in France; and the

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131 Letter of 10 January 1996, Luis Más García, Subdirector General de Planificación Energética y Medio Ambiente, MINER.

132 Various rules contained elements of EIA, and are mentioned in the Preamble of Real Decreto Legislativo 1302/1988.

However, the Regulation on Vexatious, Insalubrious, Noxious and Dangerous Activities (hereinafter, Vexatious Activities Regulation, Decreto 2414/1961) is considered the precursor of EIA legislation, both because it contained a preventive emphasis and more specifically because it required that any applicant for an authorisation include a technical project and descriptive memorandum detailing the characteristics of the activity, its potential repercussions on environmental health and the corrective measures proposed (Article 29). Nonetheless the description of the activity was more emphasised than the evaluation of its effects. An extremely brief period of public participation was included (Art 30.2.a); see comments Fuentes Bodelón, pp. 78-80; MARTÍN MATEO, I-1991, pp.309,320; GARCIA URETA, 1994, p.193-215; ROSA MORENO, 1993, pp.143-48, p.205.

One sectoral rule links both areas of legislation studied here, EIA and air pollution: Ley 38/1972 *de protección del ambiente atmosférico,* Decree 833/1975, Orden 18 October 1976 on prevention and correction of industrial atmospheric pollution; setting up a system of licences and of air pollution monitoring stations. The law attempted to introduce an evaluation procedure and conditioned authorisations on administrative prescriptions.

Importantly, the Order (Articles 8 and 45) contains a positive point that, regrettably, was not taken up in subsequent EIA legislation: the Ministry of Industry could require the preparation of an EIS *to be prepared by an independent centre on atmospheric pollution,* enhancing the quality of the EIS.

133 Fuentes Bodelón, p.69; and, as ROSA MORENO (1993, p.148) points out regarding the environmental aspects of these: "their non-fulfillment in the daily chores of urbanism was total."

134 Fuentes Bodelón, p.80.

135 GARCIA URETA, 1994, p.223.

fact that, as in France, a strong tradition of administrative secrecy impedes public participation. A problem particular to Spain is the lack of harmonisation across CAs.

The transposing legislation for EIA was adopted late, on 20 July 1988, roughly two weeks after the European limit (3 July 1988) had passed. Therefore authorisation requests made after 3 July 1988 but prior to 20 July 1988 without an EIA should have been refused; it remains uncertain whether those requests initiated prior to 3 July 1988 but accorded after the directive's deadline passed required an EIA[136].

Real Decreto Legislativo (RDL) 1302/1988, the Spanish EIA Act, is a concise document containing ten articles, two additional dispositions, and one annex. Many of its shortcomings can be attributed to its accelerated, six-month elaboration[137] and are addressed in its regulation, Real Decreto (RD) 1131/1988, which provides greater detail. The regulation is composed of four chapters: the first contains general dispositions; the second treats the evaluation of impact and its contents; the third discusses the EIA with transboundary effects; and the fourth concerns monitoring and responsibility. An additional disposition refers to the earlier legislation containing elements of EIA. A first annex provides definitions of 30 terms used in the legislation and a second annex specifies (actually adds) more projects 'included' in the Annex of RDL1302/1986. The EIA procedure is thus to be inserted into a much larger authorisation procedure, such as the procedure for Vexatious Activities[138].

2.2.1. The projects covered (EIA85/337, Article 4, Annexes I and II):

The Spanish legislation does apply to both public and private projects likely to have important repercussions, included in an annex that contains a positive list of twelve projects: the nine foreseen in the European legislation and three of the 80-odd projects from EIA85/337 Annex

136 Case C-396/92 *Bund Naturschutz in Bayern v Friestaat Bayern* 1994 ECR I-3717; see discussion Chapter 3, point 1.2.

137 Fuentes Bodelón, p.76.

138 *Reglamento de Actividades Molestas, Insalubres, Nocivas y Peligrosas*: Regulation on Vexatious, Insalubrious, Noxious and Dangerous Activities, Decreto 2414/1961, 30 November (Vexatious Activities Regulation).

II (RDL 1302/1986, Article 1, *Anexo*[139]). An initial comment is that, as in France[140], not much is made of the concept of projects likely to have 'significant effects' in the Community legislation[141] -- a casual approach that is generally followed in the CAs[142].

However, from the Community point of view the largest problem in the entire Spanish transposition concerns Annex II projects, those projects that EIA85/337 requires be subjected to EIA "where Member States consider that their characteristics so require"[143]. This Member State simplified its approach by considering that all but a few of the eighty-odd Annex II projects did not warrant even the elaboration of criteria for submission to the EIA procedure. The Directive's Annex was thus nicknamed "the criterion for that which is never evaluated"[144]. Although some CAs' legislation elaborate criteria for EIA85/337 Annex II projects[145], most CAs have not further developed the deficient State list. The result is that harmonisation within this Member State and across the Community is undermined. Also, since generally no criteria to determine whether an EIA should be carried out have been adopted, the majority of Annex II projects escape the EIA procedure. The State's approach has not been modified in subsequent legislation[146]; a draft bill

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139 These cover EIA85/337 Annex I projects, which must always be subject to EIA, as well as (10) large dams, (11) afforestation when this entails risk of serious negative ecological transformation, (12) open-cast mining of bituminous coal, lignite or other minerals. Notably, these are not always adequate. For instance, number 10 gives no indication of the point at which a dam is considered 'big'.

140 Chapter 4, 2.2.1. Projects Covered *Financial thresholds.*

141 EIA85/337, Article 2(1).

142 Also, generally the regulation's definitions restrict the application of EIA85/337; GARCIA URETA, 1994, pp.223,27.

143 EIA85/337, Article 4(2). See Ninth Application Report, p.154; ROSA MORENO, 1993, p.171.

144 "*...el criterio de que nunca se evaluen*"; Gonzalez Alonzo, cited GARCIA URETA, 1994, p.229.

145 Or have added criteria that practically include some Annex II projects: Catalunya, Galicia, Valencia have added agricultural projects for example, which suits the characteristics of the regions. Valencia also amplifies the national list of projects in that which concerns zoology and energy.

The Canaries have adopted criteria related to finance, location, and type of project and furthermore envisage three types of study of varying depth.

Madrid's legislation has defined two types of study and includes a number of Annex II projects.

See Fuentes Bodelón, p.84-85; GARCIA URETA, 1994, p.237; MARTÍN MATEO, I-1991, p.325; Com(93)28, p.234.

146 For example, the *Ley de conservación de espacios y especies protegidas* (Conservation of Protected Areas and Species Act), 27 March 1989, attempts to amplify the list of activities of the RDL 1302/1986. However it is frankly insufficient with regard to EIA85/337 Annex II projects referring to the natural environment; Fuentes Bodelón, pp.90-91.

amending the Spanish EIA legislation exists, but as of winter 1996-97, the parliament was still in the process of adopting the relevant legislation[147].

Further difficulties arise concerning project exemptions. Article 3.a of the regulation stipulates that the European Commission must be informed of projects exempted from EIA, exceptionally, by the *Consejo de Ministros*[148], as required by EIA85/337, Article 2(3)c[149]. A problem remains, stemming from the territorial structure of Spanish government: some CA have also made provisions to exclude projects approved by their *regional* legislative assemblies[150], adding another administrative level at which projects can be exempted from the Community legislation -- in essence, diminishing unilaterally the effect of Community law in certain regions under certain circumstances[151]. Even if this possibility remains theoretical for the moment, it is debatable whether the second-tier exemption is in conformity with the provisions of Community law[152]. The issue has apparently not elicited much attention either from national or Community sources.

Certain elements -- most urgently the Annex II projects -- must be addressed before the Spanish rules can be considered to conform to Community obligations regarding projects covered by EIA85/337. Despite the gravity of the situation, the infringement continues to be tolerated by the Commission[153].

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147 García Ureta, A., "The E.C. Environmental Impact Assessment Directive before the European Court of Justice," 5 (1997) Environmental Liability 1 at p. 3 note 24-25.

148 Noted in the RDL's Additional Disposition (*Disposición adicional segunda*). The Consejo must give a reasoned accord that includes provisions in order to minimise the environmental impact of the project, and making this public.

149 Not surprisingly, considering the Commission's complaints concerning obtaining information from Member States, EIA85/337's requirement to communicate certain information (e.g. concerning exempted projects) was neglected in the RDL although remedied subsequently in the regulation.

150 For instance, the Canarias and Valencia; see GARCIA URETA, 1994, p.239.

151 And in fact, without notifying the central government. Presumably however, since the LRJPAC, Article 10 (which specifically mentions notification of Community institutions) applies, the Commission would be notified of such an exemption.

152 Other examples of incongruities exist: Article 1(5) of the Directive provides for exemptions from the EIA process for projects especially approved by Parliament. In the area of water, public works of great interest or affecting more than one CA are necessarily approved by an act of Parliament (*ley*) and incorporated into the Plan Hidrológico Nacional (Article 44 de la Ley de aguas); ROSA MORENO, 1993, p.198.

153 A reasoned opinion was sent in 1992 Bull.EC 12-1992, p.180; since then, however, the yearly application reports make no mention of a referral to the ECJ.

2.2.2. Environmental Impact Study (Article 5.2 EIA85/337):

The minimal required contents of the EIS have been transposed (RDL1302/1986, Article 2) closely following the guidelines in EIA85/337, Article 5(2), with the addition of an unspecified[154] 'environmental monitoring programme' (*programa de vigilancia ambiental*, RDL Article 2.1.e). A factor that has potential to improve EIS quality is that in the Spanish context the developer's subjectivity in drawing up the EIS is somewhat tempered by the fact that an environmental authority examines it and can request more information. (Although it is optimistic to rely on this occurring in practice, since understaffed administrative units wish to avoid delays[155].)

Moreover, the Spanish authorities have used the margin of discretion afforded by the use of a directive to go beyond present European requirements[156] concerning the preliminary contact between the administration and the developer. RD1131/1988, Article 13 stipulates that the person requesting an authorisation must communicate this intention to the environmental authority, and give that organ a "memorandum/summary" (*memoria-resumen*) describing the principle characteristics of the project. The environmental authority then has ten days in which it 'can' contact other persons, administrations and institutions for their observations. With the answers of the other parties contacted (which must reply within 30 days) the environmental authority gives the applicant initial information, as well as its view of the most significant features to be taken into account in the EIS (RD1131/1988, Article 14). This initial contact has the potential to be extremely beneficial for EIS quality, since the developer is given important hints on which aspects the environmental authority foresees as problematic. (Actual practice indicates that for now this potential remains unfulfilled[157].)

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154 RD1131/1988, Article 11: where it speaks of the content of the *Programa de vigilancia ambiental*: simply says "it shall establish a system that gaurantees the accomplishment of the indications and means, protective and corrective, contained in the impact study". The developer prepares the monitoring programme; GARCIA URETA, 1994, p.330. As ROSA MORENO says (1993, p.239),"*Raquítico pronunciamiento que no exterioriza, en modo alguno, la magnitud de este documento* (miserly statement that in no way reveals the magnitude of the document)."

155 Chapter 8, point 1.7, at *Delay*.

156 EIA85/337, Article 5(3). However, "scoping" provisions are foreseen in the proposed amendment to EIA85/337; see Conclusions, point 2. Lessons learned-- Amendments to the EIA legislation.

157 See Chapter 8, point 1.4. *Reluctance to modify project*.

Authorities also made positive use of their margin of manoeuvre in describing the contents of EIS. RD1131/1988, Article 7 provides an outline of the EIS that is a great deal more detailed than in the directive. It indicates that the EIS must include :

> Description of the project and its activities; an examination of technically viable alternatives and a justification of the adopted solution; an environmental inventory and description of the key ecological or environmental interactions; identification and evaluation of the impacts, both in the proposed solution and its alternatives; establishment of protective and corrective means; a programme of environmental monitoring; a summary document[158].

An explanatory article is then devoted to each of these elements. To illustrate, the summary document (*Documento de síntesis*), further elaborated in RD1131/1988, Article 12, must contain:

> a) The conclusions related to the viability of the proposed realisation.
> b) The conclusions related to the examination and election of the various alternatives.
> c) The proposal of corrective means and the environmental monitoring programme, both in the phase of execution of the proposed activity as in its functioning.
> The summary document must not exceed twenty-five pages and shall be drafted in terms that are accessible to general understanding.
> The informational or technical difficulties encountered in carrying out the study shall be indicated, specifying the origin and cause of such difficulties.[159]

In effect, regarding the EIS, the Spanish transposition has gone further in positively influencing practical implementation than the Community legislator required.

2.2.3. Public consultation (Articles 6.2 and 6.3 EIA85/337):

By contrast, the Spanish transposition of the public consultation obligations illustrates the manner in which, without breaching formal requirements, Member States can utilise the margin of discretion left by the Community directive to render certain elements almost meaningless. A serious deficiency of Spain's formal implementation of EIA85/337 lies in the inadequacy of the public participation provisions, which has been particularly criticised by national commentators[160]. Yet although the European Commission has recognised this inadequacy[161], it

158 Original language version in appendix.
159 *Ibid.*
160 Aguilar, p.227; GARCIA URETA, 1994, p.272; ROSA MORENO, 1993, pp.172-73; MARTÍN MATEO, I-1991, p.327.
161 Com(93)28, p.238.

has apparently chosen not to take Article 169 action in this regard[162]. The only actor likely to fulfil the preventive purpose of EIA85/337 is distanced.

The public's input has been minimised. RDL1302/1986 makes half-hearted mention of 'public participation' in the preamble, stipulating only that the EIS be submitted to a "stage of public information as provided in the relevant legislation" (i.e., the sectoral legislation applicable to the specific type of project). If none is foreseen in that legislation, the environmental authority submits it to the 'public information stage'[163]. The regulation's provisions (Articles 15 and 17[164]) do not adequately compensate the RDL's brevity. As García Ureta says, "one must make an effort to infer that the public has the right to participate in the evaluation procedure"[165]. Several aspects of the national rules lead to the conclusion that this Member State has failed to use the methods most appropriate to implement the procedural right embodied in the Directive.

Vagueness of "public information": The Spanish legislation fails to indicate what type of involvement is implied by a "public information stage", nor does it specify the conditions under which the dossier can be examined, or photocopies can be obtained. No provision is made for a public meeting. Greater precision regarding the form and content of public consultation could reasonably be expected[166]. Vagueness and lack of guidance in the State provisions invite regional

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162 Indeed, the Commission's discretion in enforcement is perhaps understandable in this instance, since, although it can be argued that the methods used are less than those most appropriate, the European legislation does not lay down a clearly enforceable obligation.

163 RDL1302/1986, Article 3: "1. The impact study shall be submitted, within the applicable procedure for the authorisation or realisation of the project to which it corresponds, and jointly with this, to the stage of public information and other reports established during the same. 2. If such stages were not foreseen in the above-mentioned procedure, the environmental organ shall proceed directly to submit the impact study to a period of public information and to claim the reports that in each case it considers opportune. "

164 The EIS must be submitted "to the stage of public information" within the appropriate authorising procedure (Article 15). Also (Article 17), if no stage of public information is foreseen in the relevant substantive authorisation procedure, the environmental organ shall submit the EIS to public information for thirty days; it can request such information as it deems appropriate.

When the authorisation of the project is within the competence of the State, the public information stage is announced in the *Boletín Oficial del Estado* (Official Journal). Before drawing up the Declaration of Impact, the environmental organ shall communicate to the developer/applicant the aspects of the EIS which should be completed (twenty days period) after which it shall draw up the Declaration.

165 GARCIA URETA, 1994, p.308.

166 For instance, the French provisions on the matter are extremely precise, down to the notebook with non-removable pages, signed by the enquiry commissioner, in which the

variation: in some CAs, the EIS is submitted to scrutiny separately from other documentation regarding the project[167]. (Again the complexity of the Commission's verification task is noted, as is the detrimental effect on harmonisation.)

Time allocated for consultation: To fail to provide a period of public participation would render the procedure void[168]; however the length of this consultation varies according to the authorisation procedure into which the EIA is inserted. For instance the Vexatious Activities Regulation, under which classified activities fall, provides an extremely short period for public participation: regardless of the seriousness of the activity at issue, the time period is always, implacably, ten days, for "a butcher shop as for a chemical plant"[169] -- or for a large combustion plant[170]. For other authorisations, the period varies. Water legislation provides a period of between 20 days and two months; thus a water project may require a longer period of consultation than the 30 days stipulated for a nuclear project[171]. (Again, some CAs have modified the provisions: Aragón[172], establishes a period of 30 days if the substantive procedure establishes less.) A further problem is that, as in France, the consultation hours generally coincide with working hours.

Publication of the announcement of public consultation: Despite the suggestions of EIA85/337[173], the Spanish legislation requires the announcement of the period of public information to be published in only the Official Journal, or the Autonomous Bulletin. Although strictly speaking 'accessible' to the public, confining the announcement of the event to official sources, in effect,

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public notes its comments; Public Enquiries Decree 85-453, Article 15; Classfied Installations Decree 77-1133, Article 7.

167 Decreto 50/1991 Article 16 Cantabria; Articles 4.1 Ley 2/1989 and Article 14 of the regulation, Valencia; GARCIA URETA, 1994, p.271, note 147).

168 STS 14 October 1977.

169 "*...una carnicería como de una planta química*"; Castanyer Vila, cited by GARCIA URETA, 1994, p.295. Nonetheless, it is very positive that the municipal authority must send personal notification to the immediate neighbours of a proposed location, particularly given the fact that public consultation is announced only in the State and CA Official Bulletins.

170 Which figures in the nomenclature of the Vexatious Activities Regulation, clasificación decimal 511.

171 GARCIA URETA, 1994, p.271.

172 Decreto 118/1989 article 3.

173 EIA85/337, Article 6(3) suggests that Member States "specify the way in which the public may be informed, for example by bill-psoting within a certain radius, bpulication in local newspapers, organisation of exhibitions with plans, drawings, tables, graphs, models...".

excludes that portion of the public that fails to scan regularly the Official Journal[174] -- a point which needs little elaboration. The above complications regarding public participation may be dead issues; the public may never know of the project's announcement at all, and therefore details of the time allocated, or the absence of public meeting are irrelevant.

The lack of concrete obligation in the Community legislation is largely at the root of the inadequacy of the national provisions[175]. In sum, without violating the rules:

> The Spanish EIA legislation side-steps these commitments and follows the formalism of the norms that manage the substantive procedures, maintaining the inefficient traditional ritual regarding the communication of its opening[176].

Examination of a potentially incomplete study: Finally, if the public finds out about the project, and indeed shows up, it may in some cases examine an incomplete study. Although the possibility exists for the environmental authority to request more information, the legislation allocates no further time for the public to look over the completed and more informative study.

Public participation in conflict with tradition of administrative secrecy: A deep-rooted tradition of administrative secrecy, embedded in the system during Franco's regime[177], lies beneath the Spanish authorities' use of their discretion to restrict public participation. Although the system has progressed considerably towards openness, Spain's government remains "characterised by *dirigiste* administrations which do not co-operate with interest groups in a formalised way."[178] Constitutional Articles 9.2[179], 23.1[180] and 105b[181] give citizens the right to participate in public

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174 In another context (but relevant here), García de Enterría and Tomás Ramón Fernández comment that expecting citizens to read the Boletín Oficial "is something which lowers the limit of that which is reasonable and, for this, cannot seriously be supported"; p.529.

175 See comments in Chapter 1, point 2.5.1. EIA85/337, Final version- *Public consultation* .

176 MARTÍN MATEO, I-1991, p.328

177 GARCIA URETA, 1994, p.294; Sánchez Morón, M, "El derecho de acceso a la información en materia de Medio Ambiente", in *I Congreso Nacional de Derecho Ambiental: Ponencias*, Sevilla, 1995, at p.61

178 Aguilar, p.227.

179 Constitution 1978, Article 9.2: "It is for the public powers to promote the conditions so that liberty and equality of the individual and of groups in which the individual is integrated is real and effective, to remove the obstacles that impede of make difficult their fullness, and to facilitate the participation of all citizens in political, economic, cultural and social life".

180 Constitution 1978, Article 23.1: "Citizens have the right to participate in public affairs, directly or through the medium of representatives freely elected in periodical elections by universal suffrage."

181 Constitution 1978, Article 105: "Shall be regulated by statute a) the audience of citizens directly or through the organisations and associations recognised by law, the procedures of elaboration of administrative dispositions that affect them. b) The access of citizens to

activities and require the Government to facilitate this participation. However, the right to participate must be implemented by the legislator and it is no accident that the mandate of Article 105.b Constitution 1978 was one of the last Constitutional provisions to receive implementing treatment[182]. In practice Spain has not managed to overcome a pervasive and general malaise where public involvement is concerned[183]. As in France, it seems this deficiency does not target only environmental interests; as it happens, however, the effects are particularly damaging for the application of environmental law, which closely depends on the public's ability to obtain information and act as defensor[184].

A general administrative rule on access to information (LRJPAC[185]), passed in 1992, partially addressed the deficiency of the EIA transposition but took a more restrictive approach than the Community guidelines indicated, and was not in conformity with Community directive 90/313 on access to environmental information[186]. Article 37.7 LRJPAC[187] requires the right of access to

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procedures of elaboration of administrative dispositions that affect them. b) The access of citizens to administrative archives and registers, except in that which affects the security and defense of the State, the verification of crimes and the privacy of individuals". See also Constitution 1978, Article 129.

182 The Supreme Court had ruled out the direct applicability of this article (STS, 16 October 1979), which meant that 'legislative inactivity' was truly problematic for the exercise of this right. Piecemeal development did take place, regarding for instance the electoral regime (Ley Orgánica de Régimen Electoral General, Article 41), public statistics (Ley de la Función Pública Estadística, Article 13) computerised personal data (Ley Orgánica de Regulación del Tratamiento Automatizado de los Datos de Carácter Personal), et cetera, but a general provision was adopted only in 1992: LRJPAC, Article 37 (discussed in this section, below). The latter is restrictive in scope; Sánchez Morón, p.61-63.

183 For instance, the tradition of administrative secrecy is very pronounced in the preparation of urban documents. The Ley del Suelo foresees the use of newspapers for announcing periods of public participation. However, no State or CA legislation foresees use of methods other than the official bulletins; GARCIA URETA, 1994, p.306,p.310.

184 The government has made few attempts to set up organisms to involve the public in environmental decision-making (Aguilar, p.236-37).

185 Harsh (and deserved) criticism of the LRJPAC is provided by García de Enterría, "Un punto de vista sobre la nueva ley de régimen jurídico de las administraciones públicas y de procediminto adminsitrativo común de 1992," 130 (1993) RAP 205.

LRJPAC, Article 37 defines, in ten paragraphs, the right of access to archives and registers. For example, Article 37.8 allows individuals to obtain copies of the documents whose examination is authorised by the State.

186 For example, by using the term '*interés directo*', the provision seems to attempt to exclude collective or 'diffuse' interests, of obvious relevance to environmental associations, allowed longer time periods for the Administration to answer and referred only to Spanish citizens; GARCIA URETA, 1994, p.303; Sánchez Morón, pp. 61-64.

187 LRJPAC, Article 37.7: "The right to access shall be exercised by individuals in such a way that the efficiency of the functioning of public services is not affected."

information to be exercised in such a way that administrative efficiency is not affected: as formulated, it appears that the smooth functioning of the administration is elevated above the right to participate. The situation has only recently been remedied with Statute 38/1995[188], adopted specifically to remedy deficiencies in the Spanish transposition of directive 90/313. The right to participate can be directly enforced in court[189], although given the time required[190] this is usually too late to ensure the exercise of procedural rights.

2.2.4. Administrative consideration of the EIS and the results of the public consultation prior to granting permission or authorisation (Article 8, EIA85/337):

EIA rules notified to the Commission must provide that administrative consideration be given to both the EIS, and the (problematic) public input before granting authorisation. Two administrative authorities are involved in the authorisation process: the organ competent to authorise the particular project, as determined by the project's substance (the substantive authority); and the environmental authority. The environmental authority is the body exercising environmental functions within the administration of the substantive authority (RDL Article

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Fortunately, limits exist to what can be sacrificed in the name of administrative efficiency and the Tribunal Supremo has redressed the balance of both concerns: "administrative efficiency is a good juridically protected *although of inferior rank than fundamental rights* (emphasis added)"; see also Constitution 1978, Article 20.1: "Are recognised and protected, the rights, d/ to communicate or receive freely truthful information by any means of diffusion".

188 Ley 38/1995, de 12 de diciembre 1995 derecho de acceso a la información en materia de medio ambiente. The preamble mentions directive 90/313 and expressly acknowledges that the earlier Spanish legislation failed to meet Community obligations. For instance, only Spanish national were given access, the Administration was given three months to reply where the Community rules only allowed two. Many of these problems are remedied, although the Statute still contains ambiguities. For instance, the Administration can refuse information where this regards goverment activities (at all levels) *not* subject to administrative law (Article 3.1.a); it would be extremely interesting to know which these are exactly. Furthermore, application can be rejected by Administrative silence (Article 4.2) always a problem where administrators are not assiduous in their duties to begin with.

189 Both according to the Spanish Constitution (below) and given the fact that directive 90/313 on access to environmental information and EIA85/337 arguably confer a directly effective right to participate.

Constitution 1978, Article 53.2: "Any citizen can claim the enforcement of the liberties and rights recognised in Article 14 and in Section 1 of Chapter 2 before ordinary courts through a procedure based on the principles of preference and brevity and, eventually, by appeal before the Constitutional Court...."

190 See Chapter 9, point 3.4. Duration of judicial action.

5[191]). On the basis of the EIS and the results of public consultation it draws up a Declaration of Environmental Impact (hereinafter, Declaration), determining "the conditions necessary to adequately protect the environment and natural resources" (RDL Article 4.1[192]), which it then forwards to the competent authority[193].

The significance of the Declaration, an innovation of the Spanish legislation, is clarified in the regulation: Article 18.1[194] provides that the Declaration, "based only on environmental effects", shall determine the "benefit" of carrying out, or not, the project[195]; it shall list the conditions necessary to adequately protect the environment and resources. These conditions must form a "coherent whole" with conditions imposed by the substantive organ's authorisation (RD1131/1988, Article 18.2); and shall include prescriptions related to the follow-up of the project, in conformity with the 'monitoring programme' (RD1131/1988, Article 18.4). Subsequently, the Declaration must be adapted in light of scientific and technical progress, unless the effects are such that a new Declaration is required[196].

As formulated, the innovation of the Environmental Declaration appears positive and indeed surpasses Community requirements: theoretically the decision of the environmental authority is *not* subordinate to the decision of substantive authority, but rather binding upon it[197]. Conflicts between the two are to be submitted to arbitration by an outside body, the *Consejo de Ministros* (if the project is authorised at State level) or the equivalent organ of the CA (if the project is authorised at CA-level)[198]. The wording of RD1131/1988, Article 18.1 implies that the

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191 RDL1302/1986, Article 5: "that which exercises these functions in the public administration where the substantive competence to accord the authorisation resides."

192 RDL1302/1986, Article 4.1.

193 The latter then weighs the environmental effects with all the other considerations.

194 RD1131/1988, Article 18.1: "The declaration of environmental impact shall determine, by only the environmental effects, the benefit or lack thereof of carrying out the project, and in the affirmative case, shall fix the conditions in which it should be carried out".

195 This gives the Declaration more force than announced by the RDL, which requires only that the Declaration include the conditions necessary to adequately protect the environment and natural resources -- seemingly taking as given that the project would be authorised.

196 RD1131/1988, Article, 18.3: "The conditions to which the first paragraph of this article refer shall be adapted to innovations brought by scientific and technical progress that alter the authorised activity, unless because of the impact on the environment a new Declaration of impact becomes necessary."

197 MARTÍN MATEO, I-1991, p.331.

198 RDL1302/1986, Articles 4.2, 6.2.

environmental authority can halt authorisation of a project: it *shall determine* the utility of carrying out the project and, *if* it finds in the affirmative, fix the conditions of environmental protection[199]. The implication is that in the negative case, fixing conditions would be pointless since the project would not be undertaken. Furthermore, Article 27[200] specifically states that the conditions imposed by the Declaration shall have the same value and efficiency as the conditions in the project authorisation[201].

The potential of the above provisions is immediately undermined, unfortunately. The environmental authority lies *within* the administration concerned with the authorisation of the project. The environmental authority itself is not an autonomous body, but rather attached to the administration that is generally pre-disposed in favour of the project[202]. In fact, negative environmental Declarations have (with one regional exception) never been issued.

2.2.5. Other EIA85/337 Requirements:

Other obligations imposed by EIA85/337 are covered relatively well by the Spanish legislation. These include the notification of other Member States likely to be significantly affected by a project[203]; the public's notification of the decision[204]; the safeguarding of industrial and commercial secrecy and the public interest, within the limits of relevant national regulations[205].

2.2.6. Important inclusions in the Spanish transposition:

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199 For instance, Rosa Moreno views it as a sort of 'authorisation of environmental impact'; ROSA MORENO, 1993, p.274; see also GARCIA URETA, 1994, p.260: "it is possible that the Environmental Declaration is the most important factor to be taken into account, despite its analysis in conjunction with other considerations."

200 RD1131/1988, Article 27: "Value of the environmental conditions. For all purposes, en especially regarding surveillance and follow-up of the fulfilment of the Declaration of Environmental Impact, the conditions of the latter shall have the same value and effect as the rest of the conditions of authorisation."

201 By contrast, in France the conclusions of the *commissaire* are seen as foreshadowing doubts as to the value of the project in the event of judicial proceedings, but until recently lacked the power to stall commencement of the works prior to such proceedings, i.e., prior to the enforcement stage, at which point it may be too late.

202 The practical consequences are seen below.

203 EIA85/337, Article 9, covered in RDL Article 4.3.

204 EIA85/337, Article 7, covered in RDL Article 6.

205 EIA85/337, Article 10, covered in RDL Article 8.

The transposition contains a variety of provisions that are not strictly required by EIA85/337 that support later implementation and enforcement efforts. For instance, the substantive organ must monitor respect for the Declaration's requirements, and the environmental authority can demand information and carry out necessary verifications[206]. RDL1302/1986 stipulates that, if a project requiring EIA is commenced without having completed the procedure, it "shall be suspended"; however, the automatic nature of this appears mitigated by the addition of "at the request of the environmental organ"[207]. In addition, certain problems witnessed in the French legislation are not particularly troublesome here[208], such as the issue of sanctions[209].

2.2.7. Underlying causes, and general problems of transposition:

A variety of forces have influenced the formal implementation. The most important of these are the clash between short-term economic benefits and long-term protection of the environment, and the tradition of administrative secrecy. Nonetheless, other factors also contribute to downstream problems, such as the variation between legislation across CAs, and ambiguities and logical inadequacies in the State legislation.

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206 RDL1302/1986, Article 7.

207 RDL1302/1986, Article 9.1. "If the execution of a project of those obligatorily submitted to the stage of environmental impact assessment is undertaken without the accomplishment of this requirement it shall be suspended, at the request of the competent environmental authority, without prejudice to the responsibility to which this may give rise. 2. Thus, the suspension can be accorded when concur any of the following circumstances: a) the dissimulation, falsification or malicious manipulation of data in the evaluation procedure. b) the failure to accomplish or transgression of the environmental conditions imposed for the execution of the project."

208 The delay in the adoption of the regulation of application (not to be confused with the delay in adopting the basic text of the Spanish transposition, RDL 1302/1986) apparently did not have a significant effect on enforcing the rules.

Nor did differences between the Act and regulation pose a problem. The regulation is not permitted to modify the scope of application of the higher norm: Dictamen del Consejo de Estado de 5 de diciembre de 1989. Here however, variations between the RDL and its regulation serve generally to bring it more in line with European requirements (see discussion ROSA MORENO, 1993, p.197; GARCIA URETA, 1994, pp.325) and have not been challenged.

209 By contrast with France, where specific sanctions were not originally foreseen, RDL Articles 9 and 10 discuss the issues of penalties, which include successive coercive fines, and restitution as disposed by the Administration. As an aside, these are significantly less than those initially envisaged; Fuentes Bodelón, p.75.

Hierarchy of priorities: Most of the above problems -- for example, the reluctance to widen application of EIA to Annex II projects -- have an underlying economic cause. It will be difficult to muster the political will to address problems stemming from fundamental perceptions. The formal implementation of the Spanish EIA legislation illustrates the tug-of-war of economic and environmental priorities[210] in its preamble, which announces that the procedure is to cause minimum disturbance to economic activity and to take place "without other stages than those strictly required by procedural economy and those necessary for the protection of general interests"[211]. The regulation's preamble further 'sells' the procedure: "...far from being a brake on development and progress, [EIA] supposes and guarantees a more complete and integrated vision of proceedings in the medium in which we live, greater creativity and ingenuity, increased social responsibility..."[212]. This is, as García Ureta points out, "a wee bit optimistic."[213]

The reasons behind official reluctance regarding the EIA procedure could not have been more plainly spoken, nor the procedure more effectively damned, than in a statement by the Minister of Public Works and Urbanism cautioning against "obsessive" application of EIA. He pointed out that where other Member States have finished accumulating infrastructure, Spain, coming from a crisis:

> cannot stop thinking of the necessity to expand economic, industrial and other activities. For this reason, we cannot make of the necessity to incorporate the value of the environment a straight-jacket, or an impediment to economic growth, to investment, to development of the regions with more difficulties and needs [214].

He further asserted, in a somewhat contradictory manner, that Spain had "perfectly" fulfilled its obligation and that no other Member State had included the Annex II list[215] (forgetting, apparently, that the ECJ has made it clear that a Member State may not rely on the failure of another in order to justify its own). Furthermore, the Commission disagrees: in its Ninth

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210 Seen also at the Constitutional level; above, point 1.

211 "without other stages than those strictly required by procedural economy and those necessary for the protection of general interests."

212 The procedure is to be completed 'without unnecessary delay.

213 "...*un tanto optimista*"; GARCIA URETA, 1994, p.224.

214 Congreso de los Diputados, Comisión de Industria, Obras Públicas, Servicios, 4 May 1988, pp.9474 and 9476; cited GARCIA URETA, 1994, p.232.

215 Cortes Generales, Diario de Sesiones del Congreso de los Diputados, Comisión de lindustria, Obras Públicas y Urbanismo, III Legislatura, no. 145, Martes 23 de Junio de 1987, p.5375; cited GARCIA URETA, 1994, p.232.

Application Report it points out that deficiencies in Spain's transposition still exist, particularly regarding Annex II and despite the initiation of infringement proceedings[216].

Lack of harmonisation: In France certainly regional variations exist, particularly as a function of the prefect's attitude. In Spain, however, the lack of harmonisation takes on quite another dimension, and allusions have previously been made to variations across CA.

Regarding formulation of EIA rules, CA intervention has been a welcome addition at times; the CAs' legislation 'developing' the State norm provides a chance to clarify it. For instance, the national legislation leaves uncertainties as to which organ, substantive or environmental, is competent to suspend a project[217]; Valencia's legislation states that the environmental authority must give an account to the Consell, which will decide the interim relief, making it clear that the substantive authority is not implicated[218]. Furthermore, CA legislation can make national provisions more stringent: to illustrate, Galicia and Valencia provide for suspension of the project if severe or critical impacts result, even if legal dispositions have been observed[219]. Where national legislation may be insufficiently strict, CA legislation can tighten provisions; e.g. Madrid's legislation extends the causes of suspension to include failing to facilitate the data requested and the obstruction of administrative inspectors[220].

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216 Ninth Annual Report on Monitoring the Application of Community Law 1991, OJ 1992 C250/1, at C250/154. In the Twelfth Annual Report on Monitoring the Application of Community Law 1994, the Commission notes that there are still problems with the transposing measures for EIA85/337 in Greece, Italy, Spain and the United Kingdom; Com(95)500 final, p.60.

217 RDL1302/1986, Article 9.1, above.

218 GARCIA URETA, 1994, p.349.

219 Galicia: Decreto 442/1990 Artículo 7.1 cited GARCIA URETA, 1994, p.344; Valencia: Ley 2/1989, 3 March, Article 7, cited MARTÍN MATEO, I-1991, p.334.

220 Ley 10/1991, Art. 30.6.

Other examples of CA legislation being stricter than the State provisions include:

- Whereas the State legislation indicates simply that the environmental authority can request information regarding follow up of the environmental conditions it imposed, Madrid's legislation (Article 23) and the Canarias' (Article 32) state clearly that the environmental authority is empowered to send inspectors (in Madrid's case, without warning); GARCIA URETA, 1994, p.342.

- The quality of the EIS is addressed in some CA by requiring the study to be carried out by qualified professionals who must sign the document; Baleares, Decreto 4/1984, anexo I, para.4.7; Valencia, Decreto 162/1990, Article 15.

Nonetheless, where one CA may improve State provisions, not all will. Moreover, the State legislation is not always improved by CA development[221]. A parallel with the Community can be drawn: where the larger entity (Community or, in this case, the State) justifies legislative vagueness with the argument that the smaller entity must fill in details as appropriate, too often the smaller entity (Member State or, in this case, CA) simply does not[222].

The result, of course, is a state of implementation that is highly variable across the CA. Such variation is serious from a Community perspective, since one of the driving forces behind Community environmental policy and legislation is that economic players face a 'level playing field' and have the same restrictions and costs imposed upon them. Given the lack of harmonisation within this Member State, the EC's goal of harmonisation across all Member States seems unrealistic. While it is not suggested that the goal of establishing equitable economic conditions across the Community be abandoned, Community decision-makers must be aware of what can realistically be achieved.

Ambiguity: Ambiguity is a problem at times encountered in the Spanish transposition. Occasionally it is born of too encompassing a definition: for instance, so many effects are included in the content of EIS (Article 6[223]), that "...it is a tool for evaluating the sector, not only environmental but natural, social and economic"[224]. Confusion is then amplified by the

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221 For instance, Martín Mateo sums up the Canaries' legislation as an "inviable and tautological text of impossible practical application, and responding to wandering theoretical premises"; MARTÍN MATEO, I-1991, p.336.

222 Any attempt to justify inadequacies of the State legislation by pointing out that the developing legislation of the CAs remedy the disregards the fact that prior to Ley Organica 9/1992 not all CAs were empowered to issue developing legislation; and that now, not all CAs will make appropriate use of this power.

223 RD1131/1988, Article 6 requires that the evaluation include "at least, the estimation of effects of human population, fauna, flora, vegetation, *la gea*, the ground, the water, the air, the climate, the countryside and struction and function of ecosystems present in the area foreseeably affected. As such, it must include the estimation of effects that the project, work or activity has on the elements that compose the Spanish Historical Heritage, on the social relations and the conditions for public peace, such as noise, vibrations, odours, light emissions and that of any other environmental impact derived from its realisation".

Furthermore Article 10, referring to the factors in Article 6, requires that "positive effects be distinguished from negative effects, temporary from permanent, simple from cumulative and sinergetic, direct from indirect, reversible from irreversible, recuperable from irrecuperable, regular effects from those of irregular appearance, and continuous from discontinuous...."

224 ROSA MORENO, 1993, p.223.

production of a list so vast of effects to be contemplated (RD1131/1988, Article 10) that one can doubt both its actual application and the extent to which it is enforceable. For instance Article 10 (sixth indent) requires that "the procedures used to know the degree of social acceptance or rejection of the activity, as well as the economic implications of its environmental effects" be indicated in the EIS. Where already the idea of public participation is approached with reluctance and parsimony, it would require a great deal of determination on the part of the courts to annul an authorisation because of one detail concerning public participation, i.e.: that the EIS on which authorisation was based failed to indicate the procedures used to know the degree of public rejection of the project.

Although many terms used in RD1131/1988, Article 10 are subsequently defined in the annex, this does not always dissipate ambiguity: in areas that appear highly subjective, some definitions appear to assume an objective standard, such as between 'severe environmental impact'[225] and 'critical environmental impact'[226].

More limited ambiguities[227] also exist: e.g., the 'environmental monitoring programme,' mentioned everywhere, is nowhere described, neither in form nor content[228]. Although the inclusion of such a programme appears to advance practical implementation by setting up some sort of schedule of surveillance, in reality little guidance is given.

Inadequacies and logical flaws: Reflecting poor drafting rather than lack of priority of environmental issues, this problem can nonetheless create difficulties of interpretation. For example, the RDL1302/1986(Article 10.1) requires that where an "alteration of the physical reality" (*una alteración de la realidad física*) has occurred, the developer must proceed to restitution

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225 "That for which the recuperation of the sectors conditions requires the use of protective and corrective means and that which, even with such means, the recuperation requires a lengthy period of time."

226 "That of which the magnitude is greater than the acceptable threshold. With this, a permanent loss of the quality of environmental conditions is produced without possible recuperation, including with the adoption of protective and corrective means".

227 Those looked at here do not constitute an exhaustive list. For instance, a variety of ambiguities surround the actual projects listed in the RDL's annex, such as, in the category of large dams, from which point should a dam be considered 'large'; when afforestation can be considered to entail risk of serious negative ecological transformation.

228 Although Article 18.4 requires the Declaration of Impact to include the relevant prescriptions "in conformity with the environmental monitoring programme" without explaining what this programme is.

as disposed by the Administration ; since there is little point in carrying out a project with no physical results, one can wonder how this could be enforced[229].

2.2.8. EIA Summary:

In the Spanish transposition, at times the margin of discretion has been used in a manner which goes beyond Community requirements and, were the provisions to be used correctly, could be extremely positive[230]. The fact remains that, in other instances, this Member State's discretion in formal implementation has been used to devastating effect: the exclusion of most Annex II projects, the submission of the environmental authority within the administration concerned by the project, the almost total dismissal of the public's voice. Against this black letter background, a dent has been put in practical implementation that is possibly irremediable.

2.3. Formal Implementation of LCP88/609:

Pre-constitutional legislation concerning atmospheric pollution exists[231], yet the requirements it imposes are lax: at the time, public opinion strongly favoured that industrial environmental regulation be less strict in less-industrialised countries[232]. (This continues to be a common argument today, where particularly labour unions fear that the costs of environmental legislation will force Spanish factories to dismiss personnel or close down[233].) Therefore, the need to meet Community-imposed obligations has been the main force behind adequate regulation of

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229 Also, if judged "only on environmental effects" (above), one can wonder if any project would be authorised.

230 For instance, introducing a "monitoring programme," extending the initial contact between the developer and the environmental authority, et cetera.

231 The framework of air pollution control is contained in Decreto 2107/1968; Ley de Protección del Ambiente Atmosférico de 1972 (38/1972), of 22 December, controlling emissions of certain substances, etablishing a network of monitoring stations and providing for Polluted air zones to be declared in emergencies; and the latter's decree, number 833/75 of 6 February 1975 (which was considerably late, given that the law foresaw the elaboration of the decree within one year); MARTÍN MATEO, II-1992, p.298, note 12; Bennett, p.19).

232 MARTÍN MATEO, II-1992, pp.298-99.

233 Double, Mary Beth, "Spain Confronts Environmental Issues," 113 (1992) Business America 5, at p.6.

atmospheric pollution[234]. Spain's economic situation[235] contributes to a general resistance and delays in the transposition of European directives regarding atmospheric pollution[236].

The Spanish energy situation is critical in that Spain has difficulty meeting growing demands and energy is used inefficiently. These factors obviously affected the attitude Spain brought to the Council negotiations of LCP88/609[237]. The costs to Spain of the agreed version are, in the end, significantly lower than in the proposed version[238]. Several derogations were agreed: one specifically for Spain, and others because of the protests of both Spain and the United Kingdom[239]. Although the objective of LCP88/609 is to reduce emissions from existing plant and see that new power stations are 'low acid', the general ceilings and reduction targets listed in Annexes I and II take the specific circumstances of Spain[240] into consideration[241].

Real Decreto 646/1991 is the text notified to the Commission, and essentially copies the directive. The same basic structure is reproduced: a preamble, eighteen articles, and nine annexes. In addition, the Spanish text contains a transitional disposition (*disposición transitoria*)[242]. The preamble notes the two principal modifications to the Spanish approach to atmospheric pollution: global maximum emissions (the 'bubble'[243] concept), which did not exist in Spanish legislation, and different specific limits for new installations.

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234 VALERIO, 1991; Bennett generally; MARTÍN MATEO, II-1992, p.298-99.

235 Introduction, point 5. *Economic strength.*

236 MARTÍN MATEO, II-1992, p.xx.

237 Chapter 1, point 2.5.2. Large Combustion Plants Directive.

238 See Chapter 1, point 2.1. at *Consideration of costs.*

239 For instance, new plants burning indigenous solid fuel that would have to use excessively expensive technology may exceed the limit values in Annex III (Article 5(2) LCP88/609); Until December 1999 Spain may authorise new power plants, burning imported solid fuels, to meet a sulphur dioxide emission limit value of 800mg/Nm3 as opposed to the 400mg/Nm3 foreseen in Annex III; and, burning indigenous solid fuels, to reach only a 60% rate of desulphurization rather than 90% (Article 5(3). Other derogations are possible in case of "unforeseen reasons" (Article 7) and "malfunction of breakdown of the abatement equipement" (Article 8).

240 And various other Member States, for instance Portugal, Greece and Ireland were allowed to increase total SO_2 emissions during all three phases.

241 For obligations imposed by LCP88/609 see Chapter 1, point 2.5.2. *Adopted version.*

242 Below.

243 Nigel Haigh gives a definition: "In essence, an imaginary bubble is drawn around a given area (in our case, a country) and a limit put on the total amount of pollution from any source allowed to enter into that bubble"; Haigh, "New Tools...", 1989, p.31.

2.3.1. Problems of transposition:

Timely transposition: LCP88/609 entered into force on 30 June 1990[244]; the Spanish regulation was adopted on 22 April 1991, almost a year late. Moreover, the programmes of reduction were to have been drawn up and forwarded to the Commission no later than 31 December 1990[245]; the transposition had not been adopted in time to meet this deadline either.

Little development of the Community directive: The Real Decreto covers the Directive's provisions by reproducing the obligations it contains, article by article, and almost[246] word for word, unquestioningly. Herein lies the principal problem of its transposition: generally the Spanish text "suffers from a large poverty of juridical expressiveness, which it takes from the directive itself that it translates with excessive and unnecessary literalness..."[247].

It bodes ill for practical implementation that the Member State's discretion was not used to add precision and to tailor the legislation to the specific Spanish situation. Were the text of LCP88/609 extremely precise, this would not be a problem. However, details that were meant to be filled in by Member States are simply left ambiguous. For instance, Article 10, (of both LCP88/609 and the Real Decreto) provides that the chimney must be constructed "in such a way as to safeguard health and the environment"[248]. As seen, the French provision had given considerable detail on the required specifications for chimneys and relevant studies[249]. By merely reproducing the text of the directive[250], the Spanish legislation gives no indication of which measures are considered to 'safeguard health and environmental requirements'; actual technical characteristics are not indicated. Again, this implies lack of harmonisation both within Spain and

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244 LCP88/609, Article 17(1).

245 LCP88/609 Article 16(1).

246 The principal difference is that where the Directive includes obligations of the Commission, the Spanish legislation simply omits this, and includes them in a general provisions subsequently, Real Decreto 646/1991, Article 16.

247 MARTÍN MATEO, II-1992, p.354.

248 "*de forma que se salvaguarde la salud humana y el medio ambiente.*"

249 Chapter 4, point 2.3.1. at *Elaboration on the basis of LCP88/609.*

250 LCP88/609, Article 10: "Waste gases from combustion plants shall be discharged in controlled fashion by means of a stack.

The licence referred to in Article 4(1) shall lay down the discharge conditions. The competent authority shall in particular ensure that the stack height is calculated in such a way as to safeguard health and the environment."

RD646/1991, Article 10, repeats the Community formulation word for word.

across the Community: in this instance, French industries face precise requirements that their Spanish counterparts do not.

In fact, technical indications were not officially available until late December 1995, when an Order of MINER[251], establishing the systems and methods for measuring the emissions of large thermoelectric stations[252], was adopted in order to develop the national LCP legislation. It contains practical clarifications as well as technical specifications -- such as formula for calculating concentrations given various conditions of humidity, excess oxygen, et cetera; parameters that must be included; indices of desulphurisation. It is very encouraging, for example, that where continuous measurements are required the fourth disposition stipulates that a certificate of accomplishment of European norms, established by a 'collaborating organ in environmental matters,' be given to the competent authority[253]. The valuable guidance it offers would have been welcome in 1990, when the European norm entered into force; one can question the practical effect of the legislation prior to the Order's 1995 appearance.

Furthermore, where the Spanish legislator has copied the Directive's starting date for installations to be classified as "new plant" (Article 2(9)), the question of practical difficulties associated with retroactivity and changing the status of a plant prior to publication of the act arises. For instance: 'new plant' are required to construct their chimneys following certain specifications, apparently indicated by the competent authority. Unfortunately, plants that receive the initial exploitation authorisation between 1 July 1987 (the date by which new plant are defined in LCP88/609, reproduced in RD646/1991, Article 2.10) and the date of the transposing

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251 Order of the Ministry of Industry and Energy (Orden 27977) of 26 December 1995 for the development of RD 646/1991, which transposes Directive 88/609 EC.

252 The most pressing, since 90% of the emissions come from large combustion plants. Another Ministerial order was being drawn up for oil refineries; Letter of 22 December 1995, Luis Más García, Subdirector General de Planificación Energética y Medio Ambiente, MINER.

253 MINER Order, 26 December 1995, fourth disposition: "Operators of thermoelectric plants must measure continuously and show justification of fulfilment of European Norms (EN) of the European Union applicable to them, according to the previous section, by certification sent through an entity collaborating on environmental matters.

This certificat must be sent and presented to the competent authority before the end of six months from its opening, and afterwards, at least every three years.

For thermoelectric plants which opened prior to the promulgation of this Order, the certificate to which reference is made in the previous paragraphs smust be sent and presented, for the first time, within one year of the entry into force of this Order...".

legislation (22 April 1991) will not have discovered their classification as new plant, or the chimney requirement, until the date of publication of RD646/1991 (25 April 1991) -- by which point, presumably, the chimney has been built. Reproducing the exact date here carries negative consequences for the plant operators' legal certainty; they could not reasonably be expected to be aware of their classification prior to publication of the national text. A further observation is that, across the Member States the definition of "new plant" is not uniform. Between the two examined here already differences are apparent: France has used the date of entry into force of its *arrêté* as the starting point for such classification[254], Spain uses the Commission's starting point, 1 July 1987.

Discrepancy between the European and Spanish legislation: On the rare occasions where the Spanish authorities have used their discretion, this is in debatable conformity with the Directive. In keeping with the impression that, when not merely recopying, the Spanish legislation seeks to keep the Commission as little involved as possible, a difference exists between LCP88/609 Article 3(5) and Real Decreto Article 3(4). In case of an unforeseen change in energy needs, the Spanish legislation provides that "the organ where substantive competence for the authorisation of installations resides shall determine the modifications of the ceilings of emissions and/or the dates that figure in Annexes I and II of this Real Decreto, which must be communicated to the EEC Commission"[255]. In the Spanish text, the power to take the decision has shifted to the Spanish authorities, who must then communicate their decision to the Commission, although the wording of the Directive clearly indicates that it is the Commission that decides the values and then communicates these to the Member States[256].

A provision of purely national origin[257] departs definitively from the Community text: the final "transitional disposition"[258] implies that until the dispositions of the directive are completely

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254 27 June 1990.

255 Original language version in appendix.

256 Article 3(5) "...the Commission, at the request of the Member State concerned, and taking into account the terms of the request, shall take a decision to modify, for that Member State, the emission ceilings and/or the dates set out in Annexes I and II and communicate its decision to the Council and to the Member States. "

257 See comments MARTÍN MATEO, II-1992, p.354; VALERIO, 1991, p.97.

258 "Those thermoelectric plant that burn coals of low quality, those that are existing large combustio plants in the meaning of this Real Decreto, shall continue fulfilling the levels

implemented, existing plant shall at least follow the general disposition of Decree 833/1975, although this is not clearly stated. Emission levels set by the General Directorate of Energy[259] are alluded to, which opens the possibility "that these may be more generous than those of Decree 833/1975"[260]. Indeed, the Ministry of Energy has, in practice, issued individual authorisations unlawfully allowing higher emission values than provided in the legal provisions in force[261].

Regarding both discrepancies the Commission again has apparently not decided to take action[262].

2.3.3. LCP Summary:

Closely concerning Spain's critical energy situation, LCP88/609 was transposed late, giving no technical details, and apparently in order to keep the Community's input and even awareness to a minimum. The fact that Spain was given various concessions in emissions ceilings does not mean that it had no obligations, yet the transposition indicates that Spain does not intend to make the considerable effort required to meet these.

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of emission specified for SO_2 and dust, with reference to gases in actual conditions of emission, that in each case have been determined by the Directorate General of Energy...."

259 *Dirección General de la Energía.*

260 MARTÍN MATEO, II-1992, p.354.

261 Sentencia de la Sala II del Tribunal Supremo, 30 November 1990; Chapter 9, point 5.2.

262 Article 169 proceedings regarding LCP88/609 were terminated in 1991; Bull.EC 12-1991, p.155.

2.4. Conclusions:

It is evident, from both political comments and the negotiations that took place at Community level, that in this Member State, both Community directives examined here were perceived as serious threats to economic development. Accordingly opportunities (occasionally left unintentionally[263]) have been seized to minimise this threat and possibly bureaucratic inconvenience. Incidentally, effectiveness of the provisions has been minimised as well (for instance, by playing down the public's input, the one actor involved in the procedure that is likely to try to direct the project towards less harmful alternatives). At times transposition seems to hold valuable potential (creation of monitoring programmes, the theoretically binding opinion of the environmental authority); this is undermined however. In other instances the very fact that the margin of discretion left by the European norm has *not* been used to adapt the rules to national technical situations foreshadows a laxity regarding meeting obligations. Where considerable political opposition exists regarding obligations imposed by the Community, this will be difficult to overcome and it seems unlikely that the situation shall improve during practical use of the rules. Furthermore, the Commission appears to be passive in requiring Spain to take its obligations more seriously.

263 E.g., the phrasing of EIA85/337 regarding Annex II projects.

CHAPTER 8: Spain – Problems of Practical Implementation

Spain Practical Ch 8

In a fragmented and confusing administrative context, on the basis of formal implementation that, despite certain positive features, plays down elements that might cause economic inconvenience, practical implementation further empties the rules of their substance.

1. Practical Implementation -- EIA:

Examining the sparse available data on practical implementation it becomes clear that generally EIA rules are poorly implemented in practice and have not attained the minimal

goal of requiring environmental effects of projects to be seriously considered -- still less of encouraging the modification of projects to attenuate environmental damage. The Commission was not incorrect in finding that "taking account" of the environment means little more than including the Declaration of environmental impact in the project authorisation[1], indeed, if the environmental Declaration is elaborated at all[2]. The evidence available both from national and Community sources sustains the hypothesis that practical implementation is where Spain experiences the greatest difficulty.

As noted, practical implementation is extremely difficult to investigate and to verify. In the Spanish context the problem is accentuated by the scarcity of practical data. A good deal of Spanish material exists describing and analysing black letter provisions or actions before the courts, yet little documentation focuses on the complex stage between the adoption of legislation and eventual litigation, during which the procedure unfolds in reality and many problems emerge[3]. A helpful MOPTMA Memorandum[4] contains a valuable but extremely brief reference to Spanish experience with the EIA procedure. Otherwise, information is to be gleaned from various sources, generally in the form of comments made as an aside. The available evidence on the actual situation is examined here, as well as problems specifically related to the procedure.

1.1. Magnitude of the problem:

Problems arise in this Member State that are similar in nature but seemingly worse in degree than those seen in France. In France, a few very large projects stand out for violating EIA rules and creating an enormous scandal (for instance, the Tunnel du Somport). In Spain one is spoilt for choice regarding large projects that violate EIA rules, even considering that fewer projects are submitted to EIA under the national law in force[5]. Furthermore, difficulties do not necessarily arise regarding the quality of an existing study or the artificial division of projects

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1 Com(93)28, p.238, p.242.

2 Below, point 1.7. at *Delay*; see also T-585/93, *Greenpeace and others v Commission*.

3 Significantly however, national sources discuss the legislation and judicial proceedings in a manner indicating that the potential of the law has not been tested, or is not adequately secured in practice, and that administrative performance is poor.

4 MOPTMA, *Medio Ambiente en España 1992*, "Evaluación de Impacto Ambiental," pp.205-210.

5 The exclusion of the majority of Annex II projects is recalled.

into units small enough to fall beneath thresholds, as in France, but rather because no study has been carried out at all, an even more flagrant violation of the rules. The Commission receives a large number of complaints from Spain, concerning mainly EIA, and regional access to information[6].

Examining the sheer number of infrastructure projects remaining to be carried out (e.g., the construction of 92 dams, below), it becomes evident that the fact that industry and development have done less damage in Spain (when compared to more industrialised Member States) is not viewed as a natural advantage to be preserved[7], but rather as an economic void to be filled with haste. The rush to bridge economic gaps causes public concern at the national level, which members of the European Parliament are able to address insofar as Community funds are implicated and/or Community rules are violated. Question 78 by Mr. Bandrés Molet, for instance, provides an illustration both of the quantity and types of projects underway and of the public's concern:

> The Commission has granted Spain a total of PTA 127 billion under the Structural Funds to finance the country's Regional Development Plan. There has been a public outcry by various social, ecological and other groups against the adverse effect which the projects in question may have on the environment. Among the projects are the construction of a number of high-speed rail links (TGV), the creation of eucalyptus plantations in Galicia and Andalusia, urban development along the coast, open-cast mines, 92 new dams, river-channelling projects and many others. In light of all the above, and of Council Directive 85/337 of 27 June 1985 on environmental impact assessment, can the Commission give details of projects forming part of Spain's Regional Development Plan which are to be financed by the Community and does the Commission know which environmental impact studies must be carried out, under Community legislation, in respect of these projects?[8]

As an aside, in this instance the Commission replied *inter alia* that it did not have "at present, detailed knowledge of all the individual projects which might be carried out as part of these programmes..."[9], illustrating the inadequacy of Commission verification of Community-funded projects alluded to previously[10]. Although the Commission's response is

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6 Sanchis Moreno, F., "Spain," in *Access to Environmental Information in Europe: the Implementation and Implications of Directive 90/313/EEC*, HALLO, R., Ed., Kluwer Law International, London, 1996, pp.242-47; also Eleventh Application Report, pp.72,74.

7 And one which may produce economic benefits in terms of costs of clean-up and restoration saved.

8 Question 78, H-603/89, Mr. Bandrés Molet, Parliamentary Debates Session 1989-90, No.3-385, pp.199-200.

9 Debates of the European Parliament no.3-385/199-200, 17.1.90.

10 Chapter 1, point 3. Decision-making in other areas -- Integration of environmental protection into other Community policies.

insufficient, the underlying problem is national: the Commission would not need to be so vigilant if Member States were not so eager to avoid their obligations.

The data available at the Community level indicate both the failure of national authorities systematically to apply the implementing legislation, and the Commission's distance from the Spanish reality. For instance, the Commission[11] stated that "...in practice it is virtually impossible for projects part-financed by the ERDF to infringe the guidelines laid down by the Directive."[12] It added that "to date no project in Spain has given rise to the need for the recovery of undue payments as a result of failure to comply with Community measures on the environment"[13]; although it has been alleged that at this time, on at least one occasion[14] the Commission should have suspended funding to a Spanish project.

To some degree, the Spanish and Community authorities share responsibility for the poor state of practical implementation of Community EIA rules. Discipline that is lacking from within the Member State is not insisted on from external sources -- not even where Community funding is involved.

1.2. How the procedure unfolds:

With some regional variation[15], the EIA begins with the 'scoping process', expanded in the Spanish context from the original mention in EIA85/337. The developer presents a memorandum/summary of the project's principal characteristics to the environmental authority enabling the latter to collect relevant information from other administrative bodies and give it to the developer, indicating which aspects the authority sees as deserving special attention[16]. The developer carries out the study and it is submitted, with the request for

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11 Given the date, possibly as yet unaware of the abundant evidence compiled by the Court of Auditors. See Court of Auditors Report 3/92. At approximately this time also the Commission was involved in preliminary procedures of an action brought by Greenpeace and eighteen other applicants regarding Community funding of two power stations in the Canaries despite the absence of EIAs. The Commission had received complaints to this effect; see T-585/93, order of the Court of First Instance, 9 August 1995).

12 In response to written question 596/91 (OJ 1992 C102/2).

13 Written question E-1197/93 (OJ 1994 C371/2-3).

14 See Chapter 3, point 2.1. Practical Illustration: T-585/93.

15 Regional differences exist, see examples in Valencia, Catalunya, Aragón, Castilla y León and Navarra, Baleares; GARCIA URETA, 1994, p.269 note 140.

16 Bodelón, p.75; GARCIA URETA, 1994, p.265; ROSA MORENO, 1993, p.244.

authorisation, to public consultation. On the basis of the above[17], the environmental authority draws up the Environmental Declaration, which cannot be excessively abstract[18], and presents this to the substantive authority (i.e.: given the substance of a project, the organ competent to authorise it). The substantive authority decides whether to issue the authorisation and, if so, incorporates the conditions contained in the Declaration. Should conflict arise between the two organs, the *Consejo de Ministros* or the CA's *Consejo de Gobierno* is, in theory, called upon to resolve it[19].

Again, problems with the procedure are examined as the actors involved intervene, after a brief mention of general efforts of the administration to help the procedure run more smoothly.

1.3. Administrative Guidance:

Prior to the initiation of any one procedure, by publishing a collection of sectoral guides, *Guías Metodológicas sobre Evaluación de Impacto Ambiental*[20], MOPTMA has tried to orient the application of the legal texts. Some CA Agencies have produced similar works[21]. Although the approach is different, these address similar issues that the administrative circular did in France. Designed to be an "orienting complement" to the legal texts, the Guides provide extremely useful clarification[22] and, where legal provisions were too sketchy, help fill these out[23].

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17 That is, the EIS, the authorisation request, technical documents, results of public consultation. Should the environmental authority consider that more information is required of the developer, it 30 days in which to request more information. Unfortunately, as noted above, no provision is made for public examination of the EIS thus completed. To compare, in France, the commissaire enquêteur is theoretically able during his preliminary contacts, to request more information that is included in the file for public examination (if the developer agrees to furnish it).

18 Consejo de Estado, Dictamen 52.269/MM, p.10; cited GARCIA URETA, 1994, p.257.

19 GARCIA URETA, 1994, p.262.

20 For instance, separate guides exist for roads and railroads; dams; power stations, open-cast mining, toxic waste installations, airports, chemical plants, reforestation, et cetera; Letter received from Luis Peñalver Cámara, Jefe del Area de Coordinación Institucional, MOPTMA, Dirección General de Información y Evaluación Ambiental, 13 October 1995.

21 Canarias has also published EIA guides on quarries, golf courses, and urban developments Com(93)28, p.240.

22 For instance, the *Guides* specifically avoid language that is too technical, include graphic illustrations, and are consciously not so prolific as to discourage the reader. For example, chapter 5 of the guide designed for roads and railroads covers the impacts to be foreseen very thoroughly, devoting separate sections to, for instance, the description of changes to be taken into account for the physical medium (air quality, noise, climate, geology and geomorphology, surface and ground water, soil, flora, fauna, countryside). It proceeds to

Drawback: While of undeniable aid for the developer and the administrator, the general shortcoming is that, in Spain, this guidance is offered on a purely voluntary basis[24]. Whilst it is encouraging that the Guides are in demand and well-received[25], whatever contribution they can offer to proper implementation is wholly dependent on the good will of those using them. The text itself recognises that many of its suggestions to rationalise and resolve the implementation problems of EIA have been ineffective -- "have remained in the ink-well."[26] No action can be taken if the recommendations are ignored. Because in the French context administrative circulars have judicial value[27], the European Court of Justice's insistence that Community norms be transposed by means other than circulars and unenforceable texts did not seem particularly relevant in terms of justiciability there (although still valuable in terms of legal certainty and uniformity across the Community). In the Spanish context, however, the same insistence is both relevant and necessary.

1.4. Developer:

The first stage of the procedure is the developer's elaboration of the EIS. The most serious problems are linked: the EIS is usually of very poor quality, and the developer is determined not to modify his project. Given the second, it seems reasonable that he does not devote much energy to preparation of a study, the purpose of which is to investigate modifications.

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discuss impacts to the socio-economic medium, the various indicators of impacts, and the criteria and methodology for evaluating them, with the same detail; Monografías de la Dirección General de Medio Ambiente, *Guías Metodológicas sobre Evaluación de Impacto Ambiental, 1 Carreteras y Ferrocarriles*, MOPU, 1989, p. 15.

23 Specifically, for example, the purpose of the "monitoring programme", included in the legislation without elaboration, is discussed. It is to include fixing objectives (identifying affected systems, types of impacts, defining what the indicators of these impacts are); collection and analysis of data (by whom is still not specified); interpretation of the data; and it stresses the importance of "*retroalimentación*", or feedback that modifies the initial objectives; *Carreteras y Ferrocarriles...*, p.39-41.

24 It is recalled that in France similar guidance was contained in circulars, official instructions to the prefect.

25 *Carreteras y Ferrocarriles...*, p.9; Com(93)28, p.240.

26 "*...habrán quedado en el tintero*"; *Carreteras y Ferrocarriles...*, p.8.

27 The French Conseil d'Etat accepts the judicial review of circulars insofar as they add to the substance to the original legal provision; see Chapter 5, point 1.1. Administrative Guidance.

EIS Quality: Despite a fairly strong formal transposition of this element, only an estimated 20% of EISs submitted by developers are of an acceptable quality[28]. Many factors are incorrectly analysed, particularly interaction of elements[29]. Judging by other commentary, the Commission assesses the situation fairly:

> The more common deficiencies are: poor description of the project; lack of accuracy in the selection of significant variables for the particular case; excessive attention paid to trivial points which are easy to deal with; lack of consideration of activities associated with or induced by the project (quarries, dumping sites, temporary roads); routine use of evaluation techniques which are frequently unsuited to the task; lack of reference to and/or implementation of monitoring and control; mitigation measures considered in a very general ways, without proper definition in technical and economic terms. One of the more frequent and critical deficiencies is the absence of the non-technical summary, which is a mandatory requirement, strictly defined in the legislation.[30]

The MOPTMA memorandum adds that the developer fails to focus on significant effects, that generally scientific rigour is absent (corroborating the Commission's statement that studies are carried out with little or no fieldwork)[31] and that, not only are the various dimensions of the corrective and mitigating measures incorrectly anticipated, the economic costs of these measures and the implementation of the 'monitoring programme'[32] are not foreseen[33] -- perhaps foreshadowing the attention that the developer intends to give these factors later.

Reluctance to modify project: The attitude witnessed in France on the part of the developer manifests itself here, too. Project authorisation is usually sought only once the developer has taken the essential choices concerning the project, normally on economic and technical grounds. The determination to continue with the project in its original form impedes, first, serious consideration of project alternatives: for example, when selecting a route for a railway or highway, developers might go through the motions of including a minor variation through the same corridor of the planned route, but they fail to consider the choice of another corridor[34]. Secondly, later inclusions -- for instance, modifications suggested during the public participation process -- are also disregarded. With few exceptions[35], the EIA process is

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28 Com(93)28, p.239.
29 GARCIA URETA, 1994, p.331.
30 Com(93)28, pp.239-40.
31 *Ibid.*, p.240.
32 An innovation of the national legislation.
33 MOPTMA, Memorandum, pp.208-209.
34 *Ibid.*, p. 208; Com(93)28, p.237.
35 The Commission has noted that RENFE and ENRESA (national railroads and nuclear industry) do make considerable effort to carry out the procedure efficiently Com(93)28, pp.238-

perceived as a bureaucratic exercise to be endured, rather than a tool for helping the project evolve towards less environmental harm. This attitude inspires the same type of manoeuvre witnessed in France: for instance, artificial division of the project is also a problem here[36].

Thus the overwhelming precision of the RD1131/1988 regarding EIS contents[37] comes to very little in practice. Although these deficiencies originate with the developer, it must be emphasised that the administrators whose task it is to verify that the black letter law is observed are implicated. Again indications of priorities are evident.

The developer himself faces problems: given the inadequate state of environmental data available in Spain, it appears the initial 'scoping' contact between the developer and environmental authority has not yet attained its potential. The developer often must start from zero and compile himself the necessary data concerning the original site[38]. Certainly, administrative procedures that are unusually slow compound the organisational pressures and time constraints the developer faces. Nevertheless, the difficulties they face fail to justify the poor quality of the EISs produced.

1.5. Public Involvement:

Next to intervene in the process is the public, and notably in the Spanish context, public involvement in environmental protection is significantly less than the European average[39], an initial obstacle that is extremely difficult to address. Should individuals wish to voice their opinion, a significant problem is that often a non-technical summary of the project is missing from the file[40], rendering the EIS inaccessible to the layman. However, the main problem

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39; see also ROSA MORENO, 1993, p.231 citing Mercedes Pardo "Entra en vigor el Real Decreto sobre Evaluación del Impacto ambiental. Medir la huella" en Revista MOPU, num.353, 1988 pp.37-38; Jorda i Sanuy, "Aspectos ecológicos de la autopista del Garraf", Revista O.P. 1990, p.67.

36 European Parliament question 103 Debates of the European Parliament No. 3-409/224, 9.10.91, concerning the construction of a section of the trunk road linking A6 with Castile. Highway between Pinar de las Rozas and Pozuelo which runs from Boadilla road (M516) to the Aravaca Pozuelo for which no EIA carried out; see also Com(93)28, pp.239-40.

37 Chapter 7, point 2.2.2. Environmental Impact Study.

38 For example, developers have encountered administrative secretiveness when requesting relevant cartography; ROSA MORENO, 1993, pp.226-27; see also Com(93)28, p.237.

39 Only 0.4% as opposed to 4% of the adult population; Introduction, point 5. *Public involvement.*

40 Com(93)28, pp.239-40.

concerning public involvement is that the public's access to information remains severely restricted and, next, the results of the public participation are, for the most part, neither assimilated into the project through the Declaration or through modifications to the original project by the developer[41].

Lack of power: As mentioned, various concrete obstacles concerning consultation are embedded in the national implementing legislation[42]. Furthermore, the individual's exercise of the procedural right to participate proceeds with extreme difficulty: 80% of requests for information receive no reply; 15% receive a reasoned refusal; and in only 5%, information is received[43]. Moreover, if the citizen is denied information, there is little that he can do quickly to resolve the problem[44].

Also problematic are the less tangible difficulties the public encounters in the initial procedure. As in France, the public's impression that all the important decisions concerning the project have been taken prior to public consultation is not mistaken. Discussing the purpose of EIA, the Secretary General of Environment in 1991 indicated that "in many instances, the evaluation of the projects arrives too late, when the principal alternatives of greater environmental interest have been already taken and cannot be corrected."[45]

Apathy: Again as in France, at times public administrations complain that they get little response from the public[46]. It is difficult to say whether this is because of widespread indifference, simple lack of awareness of particular consultations[47] or, as in France, if this is another consequence of the perception that participation is futile anyway. Although environmental protests are not unheard of[48], here environmental concern does not seem to have

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41 MARTÍN MATEO, I-1991, p.328.

42 Gathering awareness of the commencement of public consultation, hours during which the EIS is available for consultation, the possibility of obtaining photocopies.

43 Sanchis Moreno, *op.cit.*, p.243.

44 Sánchez Morón, p.64; even Article 4.1. of Ley 38/1995 on access to environmental information indicates that requests for information can be rejected by administrative silence.

45 Domingo Ferreiro Picado, "Más vale prevenir que curar", El País 5 June 1991, p.16; ROSA MORENO, 1993, p.179, note 728. Even the official *Guides* to the procedure recognise this practical reality; *Carreteras y Ferrocarriles...*, p.8.

46 Com(93)28, p.238.

47 Chapter 7, point 2.2.3. at *publication of the announcement of public consultation.*

48 ROSA MORENO, 1993, p.204; MARTÍN MATEO, I-1991, p.325; VALERIO, 1991, p.100 (speaking only of protests; apparently nonviolent).

fuelled extreme reactions (except, of course, in the País Vasco where apparently heated protests have taken place[49]).

Public involvement should not stop after the consultation process: Article 45, Constitution 1978, indicates that the public is expected to aid and encourage the public powers in their task of protecting the environment. Indeed, the Commission also relies on monitoring by private actors (complaints). Here that implies some measure of awareness on the part of the concerned public on how the projects, once authorised, comply with the environmental conditions imposed upon them. Unfortunately, in reality it appears that there is little the public can do to goad the various authorities into action, or worse, surmount their obstructiveness[50].

1.6. Environmental Authority:

The environmental authority is next to intervene in the process. On the basis of the usually poor EIS and inadequate public consultation, it is called upon to draw conclusions on the impact of the project, from an environmental perspective. In this it fulfils a similar role as the *commissaire enquêteur* in France: in spite of differences in duration and quality of intervention[51], they both examine available documentation and the results of public consultation. Certain differences are pertinent, however. In theory the Spanish Declaration is more significant than the *commissaire's* conclusions[52]. The Declaration is an administrative act[53], theoretically binding upon the substantive authority[54].

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49 MARTÍN MATEO, I-1991, p.159; García Ureta (personal correspondence) refers to heated protests concerning, inter alia, the construction of an express road to link Guipuzcoa and Navarra, the 'Autovía de Leizaran'; the construction of a waste disposal site near Bilbao; and a road to link Madrid and Valencia to run through 'Las Hoces de el Cabriel', an area recently designated as a nature reserve (under Act 4/1989, article 14) .

50 The *López Ostra* Case, European Court of Human Rights Judgment of 9 December 1994, ref. 41/1993/436/515 illustrates the administrative obstructiveness; below, at footnote 118.

51 The Spanish environmental authority is present more consistently throughout the procedure and, theoretically at least and possibly in practice, its intervention is of greater value.

52 At least until recent modifications: a project of a *collectivité territoriale* that has received unfavourable conclusions must now be the object of a discussion by the deliberating body of the collectivity: Article 8 of Loi 83-630, as amended by 95-101.

53 There is some debate as to the characteristics of the Declaration. It is an *acto motivado* (a reasoned act). Debate surrounds whether this is a final administrative act (*acto resolutorio*), or an act of a phase (*ácto de trámite*); an operative authorisation (*autorización operativa*) or a declaration of will (*declaración de voluntad*); see ROSA MORENO, 1993, pp.271-277; GARCIA URETA, 1994, p.278-81; MARTÍN MATEO, I-1991, pp.331-33. The Consejo de Estado, Dictamen 52.269/MM (cited GARCIA URETA, 1994, p.259) has ruled that it is an autonomous act

The main difficulties with the environmental authority's intervention concern its autonomy[55], particularly when confronting internal pressures, its use of discretion, and its lack of resources. Also problematic are technical issues concerning administrative silence.

Internal administrative pressure: As formulated, Spanish EIA legislation seemed to give the environmental authority considerable power to decide whether a project should go forward; if conflict arises between the substantive and environmental organs, an outside body arbitrates[56]. Practically, however, as of 1996 not one instance of conflict forwarded to an exterior body at national level for arbitration had been noted[57]. The environmental authority is usually situated within the administration of the substantive organ[58], in principle because the former is then in a better position to understand the project's characteristics. Just as within the European Commission, the Legal Service often finds itself reining in an overly eager DG-XI[59], so can it easily be imagined that where the environmental authority takes a very pro-environment stance, the main administration applies pressure on it to modify its position. Martín Mateo cautions that the Declaration cannot go so far as to prohibit the establishment of new installations that fulfil legal emission standards and requirements: "this is not a blank cheque written out to the environmental authorities"[60]. If this is indeed the case, it constitutes a blow to the power of the environmental organ.

Worse still, if the main administration undertakes the EIA exercise in order to authorise its own project, a certain lack of objectivity regarding environmental consequences is inherent in the procedure: the administration is both *juez y parte*[61]. In practice, it is harder to see the

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belonging to the principal procedure ending with a final act. Even if it were an *ácto de trámite,* according to García de Enterría and Ramón Fernandez, "the fact that an 'act of a phase' cannot be challenged, upon which the distinction has originated, is a simple rule of order, it is not an absolute material rule."

The issue is not further investigated here: the essential point, for this research, is that it is susceptible to judicial review.

54 ROSA MORENO, 1993, p.272; MARTÍN MATEO, I-1991, p.331; GARCIA URETA, 1994, p.257.

55 Com(93)28, p.243.

56 RDL1302/1986, Articles 4.2, 6.2.

57 Although this may have occurred in one regional case in Valencia; Com(93)28, pp.239, 243; confirmed in correspondence with Dr. García Ureta, in 1996.

58 RDL1302/1986, Article 5.

59 Chapter 3, point 1.1. at - *Lack of accord within the Commission.*

60 MARTÍN MATEO, I-1991, p.332.

61 Literally, both judge and an interested party; see, e.g. GARCIA URETA, 1994, p.263.

effects of the Declaration on public projects than on private[62]; and environmental concerns tend to "cede dangerously before the requirements of ministerial or autonomous departments with direct competence over large public works"[63]. The environmental authority here is frequently not disposed to impede the projects proposed by its colleagues[64].

In this situation, once again the effects of the environmental organ's lack of independence are carried downstream and monitoring is simply abandoned: the Commission indicates that this is "patently the case for State highways."[65] As Rosa Moreno says, the hope that the monitoring programmes attain their potential does not seem to be the result intended by the administration, "but rather the reverse."[66]

Discretion: The absence of a Declaration invalidates the procedure[67]. Barring that, it would be extremely difficult to obtain the annulment of a Declaration on the grounds that the conditions it imposed were disproportional (i.e., its contents were insufficiently[68] protective[69]). The environmental authority retains the discretion to draw the conclusions it sees fit[70]. Although its discretion is subject to judicial review, the environmental authority commonly does not treat equally all the aspects it is theoretically required to consider in elaborating the Declaration[71]. An example is that certain crucial elements, such as the corrective measures foreseen or the reference to alternatives, are frequently simply designated

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62 ROSA MORENO, 1993, p.275.

63 Baño León, 1996, p.626.

64 The situation varies according to administration: for instance, some public developers (RENFE and ENRESA (network of railways and national Enterprise of Radioactive wastes) do attempt to take their obligations seriously, while others such as MOPT, Roads Directorate stand out because they do not; Com(93)28, pp.238-39.

65 Com(93)28, p.240-41.

66 "*...sino más bien lo inverso*"; ROSA MORENO, 1993, p.275.

67 And traditionally provoked the *nulidad relativa* (nullity which may only be claimed by a party in interest). In the 80s such a text is considered "a requirement of significant consequence for the validity of the act". The Tribunal Supremo has taken a more innovative stance; the omission of such an "*informe preceptivo*" (indispensible report) entails the *nulidad radical* (the absolute or fundamental nullity): SSTS 12 April 1983, 15 November 1983, 20 April 1985, 21 March 1986; see also ROSA MORENO, 1993, p.282.

68 Or even excessively, if the applicant is the developer.

69 MARTÍN MATEO, I-1991, p.332.

70 RD1131/1988, Article 18.1, above -- this, in spite of the requirement that it take account of the public's observations, the technical studies and the developer's EIS; see also GARCIA URETA, 1994, p.256-58; ROSA MORENO, 1993, p.276-80.

71 Moreover, in practice, the elements to be considered are frequently treated distinctly, without interaction between them; MARTÍN MATEO, I-1991, p.328; GARCIA URETA, 1994, p.275.

with reference to "another source", or "by reference"[72] -- are not actually given in the EIS itself. Where in France similar deficiencies have been (eventually) remedied in the courts, in Spain, as yet, an authorisation based on an EIA with such deficiencies has not been invalidated for as much[73]. Thus the preventive spirit of the Community legislation (and of its transposing legislation) is diluted to a series of disjointed exercises of little relevance to the environment.

Failure to use available tools: An offshoot of internal pressures and of the environmental authority's discretion is its failure to use the tools available to it. It is very disappointing that, on the occasions where the legislator has provided tools for effective implementation or enforcement, they are commonly ignored in practice. For example, it is *extremely* rare for environmental authorities to issue negative Declarations. By 1993, at national level only one negative Declaration had been issued, only one project (a limestone quarry) was not authorised[74]. Furthermore, Article 18.3 RD1131/1988[75] implies that a Declaration can be revoked if, because of the impact on the environment or new scientific and technological developments, more appropriate conditions for environmental protection can be fixed. However, since already authorities are reluctant to issue negative Declarations, it seems optimistic to expect them to revoke a Declaration that has been issued. More administrative determination is required to 'overturn' an earlier administrative decision, and to stop an actual activity, than to prevent such an activity from commencing in the first place.

Administrative presumption in favour of authorisation: Administrative inefficiency or lack of strictness with an uncooperative developer can set into motion administrative rules that tend to presume in favour of project authorisation despite environmental consequences. Furthermore, where normally procedural rules are neutral with regard to environmental interests (even if in fact they affect such interests adversely) it appears that here an exception has been made to the normal situation, particularly favouring economic interests.

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72 ROSA MORENO, 1993, p.280, note 1063.
73 *Ibid.*, p.280.
74 The CA had also issued a few negative Declarations.
75 RD1131/1988, Article 18.3, cited Chapter 7, footnote 196.

Within thirty days of receiving the completed study, the environmental authority may request additional information from the developer[76]. Administrative procedure indicates that, when the developer is requested to provide information or corrections[77], "if this is not accomplished, he shall be deemed to have abandoned his petition and this will be archived without further stages, with the effects foreseen in Article 42.1."[78] By contrast with these general provisions, the developer receives a more specific and lenient treatment regarding EIA than in other administrative procedures[79]. In keeping with the idea announced in the EIA regulation's preamble that the EIA procedure is not to constitute a brake on progress and development, Article 17, RD1131/1988[80] indicates that, if the information/corrections are not provided within twenty days the environmental authority shall proceed with the Declaration anyway. The situation may vary between CA[81] but normally, with or without the additional information, the Declaration is drawn up. It is illogical to expect the developer to exert himself to furnish what may be incriminating details if there is no negative consequence for failing to do so[82]. Simply by waiting out the administrative request, it is likely that the authorisation will go ahead as planned.

On the other hand, if the environmental authority fails to issue the Declaration, the EIA regulations are silent on the consequences. In the absence of a declaration, Article 43.2

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76 RD 1131/1988, Article 17.

77 Within ten days according to Article 71.1, LRJPAC; nevertheless, the more specific provision, Article 17 RD1131/1988, accords twenty days for completion to be carried out.

78 LRJPAC, Article 71.1. Article 42.1 LRJPAC requires the administration to expressly resolve solicitations, except for procedures that have been renounced or abandoned.

79 In the more general administrative framework it appears to be up to the administration to decide how serious the omission or error is: LRJPAC,Article 92.2 provides that "caducity cannot be for simple inactivity of the interested party if the necessary information/corrections are not indispensible for elaborate a resolution. Such inactivity shall have for effect no more than the loss of the right to the phase referred to."

80 RD1131/1988, Article 17: "[the environmental authority] shall communicate to the developer those aspects which, in a given case, must be completed, fixing a delay of twenty days for the fulfillment, *after which it shall proceed to formulate the Declaration of Impact within the delay established by Article 19*" (emphasis added).

81 In Aragón, for example, if the additional information is not provided within one month, the project's documents are archived without prejudice to opening a new EIA procedure (Decreto 148/1990, Article 4); however, in Catalunya only 10 days are allowed, after which the environmental authority determines the declaration of impact anyway (Decreto 114/1988, Article 4.2); -- *"lo que está en sintonía con el Reglamento estatal"*; GARCIA URETA, 1994 p.276, note 178, pp.284-86.

82 This parallels the French situation where in case of the developer's refusal to cooperate, the *commissaire* "notes it in the file".

LRJPAC[83] applies, which provides that silence indicates the presumption of a positive resolution -- a possibility that presents obvious problems for the Community legislation and the environment. García Ureta argues[84] logically that such an interpretation would go against the spirit of RDL1302/1986 Article 4 (and the less forceful Article 8, EIA85/337[85]), which requires, in the event of a positive decision on the part of the environmental organ, that the conditions for realisation of the project be fixed. These essential conditions would be absent if administrative silence were interpreted as a positive response, and the preventive intent of EIA85/337 would be reduced to nothing. Furthermore, the legislation requires that the Declaration be published, patently impossible if none is issued. As compelling as these arguments are, it occurs in practice that projects are authorised without Declarations[86]; this undeniably cannot be considered an "appropriate" means of fulfilling Community obligations.

Lack of resources: The familiar problem of insufficient resources is quite marked in the Spanish context[87]. Thus although procedural law requires that the substantive and environmental authorities co-operate, the means are lacking for carrying out such co-operation. For both the substantive and environmental authorities, the EIA procedure and subsequent monitoring of the project's environmental compliance suffer from the lack of personnel generally, and more specifically, of qualified experts and pluri-disciplinary teams of evaluators[88]. Again the importance of this must be stressed, for the practical effect of the legal rules often comes down to the human operatives[89]. Ultimately responsibility is shifted

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83 LRJPAC, 43.2: "When procedures initiated by virtue of solicitations formulated by interested parties are not resolved within the time period, can be understood as approved the following suppositions a) solicitations for concessions of licenses and authorisations of installation, transfers of amplification of undertakings of work centres... c) In all cases, those soliciations in which the applicable norms do not establish that these will not be approved without express resolution."

84 GARCIA URETA, 1994, pp.284-86.

85 Article 8, EIA85/337: "Information gathered pursuant to Articles 5,6, and 7 must be taken into consideration in the development consent procedure." Whether 'taking into consideration' entails the fixing of conditions is admittedly uncertain.

86 For instance, Unelco commenced the construction of two power stations in the Canary Islands prior to the issue of the two relevant Declarations of Environmental Impact (T-585/93 Order of 9 August 1995, paragraphs 3-6); see also Com(93)28, p.237.

87 E.g. Com(93)28, p.242.

88 MOPTMA, Memorandum, p.208; Com(93)28, p.241-42.

89 E.g. in another national context, Cross, G., "Enforcement of Environmental Rules: the UK Experience," in *Enforcing European Community Rules: Criminal Procedures, Administrative Procedures and Harmonization*, Dartmouth Publishing, 1996.

down to the local authorities where the absence of necessary technical and of human means is especially acute[90].

1.7. Substantive Authorities (Central and Local):

Finally the Declaration is submitted to the authority responsible for granting permission or authorisation. At times the EIA procedure unfolds at State level[91] although more frequently at the level of the CA[92].

Delay: Completing the procedure poses organisational problems[93]. The whole process is of an "odious slowness"[94] and figures provided by MOPTMA give cause for deep concern: between 1989 and 1992, of 312 EIA procedures undertaken at State level, 97 Declarations of environmental impact were published (i.e. 31% of those applied for), 215 were still being processed (68.9%). And this is an improvement: by the end of 1991, 292 projects had been submitted, yet only 29 Declarations published (9.9%); 263 authorisation requests (90%) still awaited resolution[95]. The quality of the procedure is undermined by the delays, as no one is willing to ask for necessary expertises for fear of further drawing out the process[96]. The effect on Community law is significant since it appears that the provisions of EIA85/337 are at times simply by-passed: "... sectoral authorities complain about delays in project authorisations, or

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90 Beltrán Aguirre, p.298, although he points out that the problem of *'desidia'* (indolence) should not be ignored; also Baño León, 1996, p. 626.

A Tribunal Supremo ruling (STS 25 April 1989) stated that it is the obligation of local authorities to include in their budgets the means to put an end to the situation that was threatening the applicant's the right to an adequate environment (in appendix). Positive consequences of the ruling depend on the resources generally available and whether when, for instance, personnel is lacking, manpower is first substracted from environmental activities.

91 The centralising effect of certain administrative competences, on which a variety of sources have commented negatively (MARTÍN MATEO, I-1991, p.330; GARCIA URETA, 1994, p.253-54; ROSA MORENO, 1993, p.244) have augmented tensions between region and centre. From the Community perspective, internal divisions of power are not of concern. However, it is relevant for practical implementation of EIA that the power to take decisions that ultimately have serious environmental consequences, is subtracted from the level where awareness of site, and local situations and characteristics are greater, and placed at a level where important factors are reduced to abstractions on paper.

92 MOPTMA, Memorandum, p.208.

93 It is recalled that Spain does not have the same extensive experience with the procedure that France does.

94 "*...odioso lentitud*"; ROSA MORENO, 1993, p.181.

95 MOPTMA, Memorandum, p.207-10; Com(93)28, p. 235.

96 ROSA MORENO, 1993, p.180.

even *go ahead without the Declaration of Environmental Impact*"[97] (emphasis added). It is difficult to discern whether this is simply a result of an administration that is overwhelmed or, more intractably, because the procedure is considered of little importance.

Complexity: The entire procedure is very complex, somewhat inevitably in such a context. Several factors aggravate the complexity. The national legislation left the specification of substantive and environmental authorities to the CA, which in turn did not specify exactly which organs are involved in the procedure. Moreover, a variety of authorisations and licences may be required for a given project, and the substantive and environmental authorities are not the only administrative bodies involved in the process. Three types of authorisation are generally required[98]: the main authorisation[99], the authorisation for the activity[100], and the licence from the municipal authority regarding the use of the land[101]. The plurality of administrative actors involved engenders a variety of difficulties both during the authorisation process and, further downstream, for monitoring the project's compliance with environmental conditions.

Where several EIAs are required, the reduction of duplications is not provided for[102] (except, rarely, where specified in CA legislation[103]). However, common wisdom is that only one environmental Declaration is needed, inserted into the substantive procedure[104]. Still, co-

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97 Com(93)28, p.237.

98 GARCIA URETA, 1994, p.242. For an installation such as a nuclear power plant, obviously other authorisations are also required. One authorisation cannot be binding upon another; STS Sentencia 3 November 1975.

99 From the authority competent in the substantive area for execution of the project.

100 Vexatious Activities Regulation; Decreto 2414/1961.

101 Where a municipality (*ayuntamiento*) has adopted a land-use plan (*plan de ordenación urbana*) this must be respected by the various authorities: Ley del Suelo, Article 134; for instance, Dangerous Activities must be carried out 2000m from the nearest urban centre. Furthermore, conflict can arise between authorising bodies, complicating and drawing out the procedures.

102 The Disposición Adicional of Real Decreto 1131/1988 makes an attempt to address the issue, with reference to some of the earlier legislation that contained elements of EIA prior to the existence of RDL1302/1986; however, the approach is piecemeal and does not foresee a variety of cases that may arise.

103 For instance, Ley 11/1990 Canarias provides that "The obligation to carry out an impact evaluation shall exempt from the obligation of another or others of an inferior category, when these are concurrent for the same project of activity."

104 The subsequent but necessary procedure linked with classified installations, which must be maintained particularly with respect to local competences, is "emptied of substance, given the assumption of the previous declaration of impact"; ROSA MORENO, 1993, p.289. Some CA have resolved the problem of duplication in their developing legislation, with the consequence of course, that harmonisation is disturbed.

ordination is almost non-existent with regard to certain sectoral procedures (such as toxic and dangerous waste dumping) with the occasional result that parallel studies are carried out, emphasising the need for co-operation between ministerial or CA departments[105].

Administrative inertia, obstructiveness: Of course, insufficient funds and personnel, the complexity of relations between authorities, and the relative[106] inexperience with the EIA procedure[107] contribute to an administrative inertia (*entorpecimiento*[108]) of monumental proportions. This is the most widely cited problem of practical implementation generally[109] and it would require an equally monumental determination (that is visibly lacking) to address this issue. As in France, the substance of the exercise itself is not taken seriously; the entire procedure was initially regarded as a valueless bureaucratic exercise to be gotten out of the way[110]. Although environmental considerations are not the only elements not properly considered[111], lack of attention to detail is particularly evident where questions of public participation and coherence of the various procedural elements are concerned. The immediate result is that the value of the procedure is diminished: the authorities take an "undemanding"[112] attitude towards the exercise and little interaction takes place between the various elements considered[113].

More than inaction, administrative obstructiveness often affects public participation, first, with the procedure; not only is the public barely invited to the consultation process[114], it is "not a common practice to provide copies of these documents for purchase."[115] (Alternatively, in a few exceptional cases, copies have been provided at enormous cost[116].)

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105 ROSA MORENO, 1993, pp.290-92

106 As compared to France.

107 GARCIA URETA, 1994, pp.276,331.

108 "...numbness"; ROSA MORENO, 1993, p.181.

109 ESTEVAN BOLEA, 1991, p.184; ROSA MORENO, 1993, pp.177-85; MARTÍN MATEO, I-1991, p.199; Beltrán Aguirre, p.298; GARCIA URETA, 1994, p.331; Manzana Laguarda, 1994, p.10728; Baño León, 1996, pp.620, 624, 627; Jordano Fraga, p.472; Esteve Pardo, p.620.

110 MOPTMA, Memorandum, p.208.

111 ROSA MORENO, 1993, p.183.

112 GARCIA URETA, 1994, p.331.

113 Com(93)28, p.238; MARTÍN MATEO, I-1991, p.328; MOPTMA, Memorandum, p.208.

114 See Chapter 7, point 2.2.3. at *Publication of the announcement of public consultation:*

115 Com(93)28, p.238.

116 In one instance, after a year's delay information was provided for the fee of approximately ECU 3750. This was perceived as a means of discouraging participation; Sanchis Moreno, *op.cit.*, p.244.

Second, where the public attempts to involve the authorities in the subsequent functioning of the plant the administration has shown itself to be obstreperous, citing the length of judicial proceedings to discourage public action[117]. Where judicial decisions have been rendered, the administration has been known to suspend judicial orders for closure of plants that do not comply with environmental rules[118].

Article 45 of the Spanish Constitution requires citizens to help the administration in its duty to protect the environment: in sum, the process becomes one of "forcing the administration to carry out its duties"[119].

Failure to monitor: A variety of sources indicate that in reality little monitoring takes place[120]. Monitoring is principally in the hands of the substantive organ[121]. The local administration is competent to control activities and establish later modifications with an eye to technical and scientific progress[122]. The environmental organ, co-operating with the

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117 Chapter 9, point 3.4. Duration of judicial action.

118 The European Court of Human Rights has been called upon to rule on the Spanish government's failure to act in the *López Ostra* Case, Judgment of 9 December 1994, ref. 41/1993/436/515; the case illustrates the extent of administrative obstructiveness. See also García Ureta, Agustín, "López Ostra v Spain: Environmental Protection and the European Convention on Human Rights," 1995 Environmental Liability 81.

The facts of the case concern a family (and indeed an entire neighbourhood) that were adversely affected by an *unlicenced* waste treatment plant very close to their home. The release of gases and treatment of water contaminated with chromium brought on health problems (vomiting, nausea, allergies). Notably, in the course of national proceedings on the same matter brought by other members of the family, judges twice ordered the plant operations to be shut down (administrative judge on 18 September 1991; Criminal judge on 13 November 1991). Twice execution of these orders was suspended by the administration, which lodged appeals.

In this instance, the European Court of Human Rights noted that authorities had first, failed to protect rights embodied in the European Convention on Human Rights (Article 8, regarding protection of private family life and the home); secondly, authorities had resisted judicial remedies that had been ordered; and thirdly, they had prolonged the unlawful situation.

Such obstructiveness is even more striking in light of the fact that a) the plant was operating without a licence and, b) the plant's emissions were known to exceed the legal limits (report by the National Toxicology Institute).

119 MARTÍN MATEO, I-1991, p.199; see also ROSA MORENO, 1993, p.296.

120 Com(93)28, p.241; MOPTMA, Memorandum, p.208; ROSA MORENO, 1993, pp.285-92; GARCIA URETA, 1994, p.263.

121 Real Decreto 1131/1988, Article 25.1: "The follow-up and monitoring of the execution of that which is established in the Declaration of Environmental Impact belongs to the organ competent by reason of the material, empowered to accord the authorisation of the project. Without prejudice to it, the administrative organ of the environment can request information on the matter, as well as to carry out the investigations necessary to verify said execution."

122 MARTÍN MATEO, I-1991, p.322, referring to the Ley de Régimen Local, which declares local authorities competent for protection of the environment (Article 25.f, Ley 7/1985); STS 12 December 1977.

substantive organ, is also authorised to verify that the conditions included in the authorisation are carried out correctly[123]; again, co-ordination between authorities is problematic[124]. In sum, it appears that the authorisation of a project is regarded, somewhat like a ship that has left port, like the starting point of a journey that is of little concern to those in the authorising administration.

The value of the EIA procedure depends greatly upon monitoring and feedback (*retroalimentación*) regarding the initial environmental conditions imposed and this, as Rosa Moreno points out, is the "weak flank of actual evaluation systems."[125] The results of the EIA are ignored in practice. Consequences of the European directive's failure to include provisions on monitoring are notable here: failure to monitor undermines the purpose of the environmental Declaration, and the entire procedure that went into its elaboration. Nonetheless, even the proposed amendments to EIA85/337 decline to address the problem[126].

1.8. Summary:

Keeping in mind that the number of EIAs carried out is greatly reduced as a result of the Annex II exclusions, the procedure's useful effect is dismantled by the interventions of the various actors. The public is often unaware or not motivated enough to contribute to the procedure, or considers that its input will be disregarded. The developer rigidly sticks to original plans; alternatives are not seriously put forth. The environmental authority is in such a position that it never issues a negative Declaration, and corrective measures -- indeed the purpose of the exercise -- are often not noted in the authorisation, but included in "another source". Finally, the substantive authorities are, at best, uninterested, particularly where public projects are concerned; at worst, efficiently obstructive. The whole process is of exaggerated length and comparatively few environmental Declarations have been issued: works are frequently commenced without an environmental Declaration, an illegallity that

123 Real Decreto 1131/1988, Article 25.1, above.

124 MOPTMA, Memorandum, p.208; Domper Ferrando, "Las licencias...", pp. 120-22; ROSA MORENO, 1993, pp.285-92. As García Ureta says, "[i]t is not difficult to imagine that the most frequent consequence is the duplication of controls on the same project or activity (if such controls are carried out)"; GARCIA URETA, 1994, p.263.

125 ROSA MORENO, 1993, p.293.

126 See Conclusions, point 2. Lessons learned-- Amendments to the EIA legislation.

the authorities, apparently, make little effort to redress. Breakdowns in practical implementation seem due to attitudes so deeply ingrained as to be almost intractable; assiduous enforcement might at least demonstrate that legal consequences are attached to such attitudes.

2. Practical Implementation -- LCP

2.1. Approach:

Assessing the practical implementation of RD646/1991, implementing LCP88/609 is still more difficult than assessing the practical implementation of the EIA measures. Vertical in nature, it concerns mainly the energy industry. Therefore, it is of less concern to the public, or even academics, than EIA procedures and information regarding practical implementation of LCP88/609 is difficult to obtain.

Commission: It is recalled that the Commission declined to answer specific questions concerning the compliance of France and Spain with LCP requirements[127]. Little is unearthed by referring, in turn, to the EC Bulletins which merely indicate that in 1990 a letter of formal notice was sent to Spain[128] for failure to inform measures. The proceedings were terminated in late 1991[129]. Apparently, with reference to LCP88/609, no proceedings concerning correct and complete transposition or concerning practical implementation have been commenced[130].

National Sources: In light of the pessimistic views put forth by the few national authors concerned specifically with large combustion plants[131], the information obtained from helpful national authorities[132] regarding Spanish compliance appears rather optimistic,

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127 See for instance, Chapter 4, point 2.3.1. at *Differences between European and national provisions.*

128 As well as the FRG, Greece, France, Ireland, the Netherlands, the United Kingdom, and later Portugal, Belgium, Greece; Bull.EC 9-1990, p.119, Bull.EC 12-1990, Bull.EC1/2-1991, p.136; Bull.EC 10-1992.

129 Bull EC 12-1991, p.155.

130 Although apparently, communication of compliance with the various obligations was, as of 1994, extremely poor -- not only in Spain but in most Member States -- and this is in itself, an infringement; see also Ninth Application Report, at p.160.

131 For instance, VALERIO, 1991, and ESTEVAN BOLEA, 1991.

132 Letter of 22 December 1995, Luis Más García, Subdirector General de Planificación Energética y Medio Ambiente, MINER.

particularly since the latter seem to equate the elaboration of 'necessary reports' with practical compliance:

> The necessary reports related to emission ceilings for existing installations (authorised prior to 1 July 1987) for both the first and intermediate phases (between 1988 and 1993 and between 1993 and 1998) have been drawn up, in which it is observed that Spain has complied with the objectives established in the Directive 88/609 for the total existing installations[133] in 1993 and it is foreseeable that it will comply with these in years 1998 and 2003."[134]

In a subsequent letter, MINER failed to mention whether the first-phase goals had actually been met. Certain factors (below) and indeed non-official national sources indicate that some scepticism is justified.

2.2. LCP88/609 requirements:

Spain was given concessions regarding new plant until 1999: first phase reductions for existing plant (1993) are 0% for SO_2 emissions (Annex I) and a 1% increase in emissions of NO_x is allowed[135]. The requirement is deceptive: the baseline year taken for calculating emissions was 1980[136]; however, Spanish SO_2 emissions peaked after 1980. Therefore even to meet the "0 reduction" of the first phase required a substantial actual reduction of emissions[137], and

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133 It is recalled that Spain was given a derogation for new plant, LCP88/609 preamble, Article 5(3).

134 "*...se han elaborado los preceptivos informes, establecidos en esta Directiva, relativos al cumplimiento de los topes de emisión para las instalaciones existentes (autorizadas con anterioridad al 1 de julio de 1987), tanto de la Primera Fase (año 1993), como de la intermedias (entre 1988 y 1993 y entre 1993 y 1998), en los que se constata que España ha cumplido los objetivos establecidos en la Directiva 88/609 CEE para el global de las instalaciones de combustión existentes en el año 1993, siendo previsible que cumpla el resto de los mismos de los años 1998 y 2003.* "

135 Annexes I and II: Spain is not required to reduce its 1980 (baseline) SO_2 emissions at all in the first phase, and only by 24% and 37% respectively in the second and third phases; its NO_x emissions are allowed to increase by 1% in 1993 and must be reduced by 24% by phase 2 in 1998.

Paradoxically, within Spain the time periods fixed in LCP88/609 have been criticised for being generally too long; environmental deterioration in Europe requires methods both more rapid and efficient, and Spain's deadlines are even longer; ESTEVAN BOLEA, 1991, p.407. VALERIO, (1991, p.106) regards the relaxing of European standards in the Spanish case, as a "feeble favour" to have done Spain, concerning the requirements of efficiency and in the search for cleaner technologies; thus Spanish air is allowed to continue "*ensuciándose*" (dirtying itself) by burning high-sulphur coal. This is perhaps a realistic attitude: although Spain is able to impose stricter levels upon itself, it is highly unlikely that it would do so without European pressure.

136 At which time Spain was the fifth largest emitter of SO_2 in the world, with 2,938 million Kilotonnes/year; VALERIO, 1991, p.98.

137 VALERIO, 1991, pp.98-99; ESTEVAN BOLEA, 1991, p.396.

was thought by some national sources to be "almost certainly impossible"[138] (particularly since energy demand has grown about 20% from 1980 to 1992[139]). "Adjusted" to accord with the emissions of 1987 (during LCP88/609 negotiations), the necessary reductions are 21% in 1993; 40% in 1998; and 50% in 2003[140]. Even the concessions made to Spain during the negotiations of LCP88/609 may have been insufficient given the Spanish situation.

LCP88/609 introduces a bubble concept into Spanish atmospheric law: since the goal is to obtain an overall reduction of emissions, a global vision of emissions is required. In turn this supposes administrative co-ordination and a unified approach to managing the information that must be collected at local level, but interpreted and used centrally to give authorisation with a view of the whole. The authorities must not only issue the licences but also monitor subsequent compliance, communicating difficulties to the Commission. Industry, for its part, must sink considerable investment into the technology necessary to reduce emissions.

2.2.1. Authorisation:

On the basis of the emissions information, central authorities must decide how to allocate emissions and incorporate these into authorisations in order to comply with the legislation. Furthermore, although it may seem an obvious point (but one which, as shall be seen below[141], requires attention) the authorisations that are accorded must comply with the limits foreseen in the legislation.

Co-ordination of roles: As seen, the Spanish LCP legislation did not elaborate upon the European norms and therefore does not indicate the roles played by the various authorities. The LCP rules are imposed upon a "varied normative mosaic"[142] of pre-existing atmospheric pollution rules[143]. Nonetheless, while certain authors recommend generally a clearer delimitation of powers[144], the situation as regards LCP at least, seems sufficiently clear.

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138 ESTEVAN BOLEA, 1991, p.396; VALERIO, 1991, p.99.
139 VALERIO, 1991, p.99.
140 MINER Letter, 25 June 1996; ESTEVAN BOLEA, 1991, p.396.
141 Chapter 9, point 5.2.
142 López Ramón, Fernando, "Regimen jurídico de la protección del aire," in *Derecho del Medio Ambiente y Administración Local*, ed. José Esteve Pardo, Editorial Civitas, Madrid, 1996, p.290.
143 Such as the Air Pollution Act 38/1972 and RD 1975, and Vexatious Activities Regulation 2414/1961 of 30 November. Furthermore, the catalogue of activities that

Municipalities generally have extensive powers regarding practical implementation of rules concerning atmospheric pollution control[145]; these powers have been eroded by concurrent competences of the CA and State[146]. The municipality issues the industrial licence[147]. However, an authorisation from the central MINER imposing emission limits (after the EIA procedure overseen by MOPTMA in the case of new plant)[148] is necessary. Generally concerning industrial authorisations, the main uncertainty surrounds which is to be considered the principal procedure[149], the binding opinion of the competent ministry or technical body, or the municipal licence.

Although administrative co-ordination presents occasional difficulties regarding EIA-related procedures, here visibly the State has ensured that it has tighter control (notably over emission authorisations and, below, information). Evidently where the link to industry and energy is so strong, administrative coherence is a more prominent concern. A step toward coherence was taken with the establishment of provincial directorates of MINER, in each Spanish province, functionally dependent upon the civil governor (*gobernador civil*[150]), the

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potentially contaminate the atmosphere (Annex of regulation of 1975 in application of Article 33 Ley 38/1972) is not coordinated with Vexatious Activities, yet problems are avoided since latter is not an exhaustive list; López Ramón, 1996, pp.295-96; MARTÍN MATEO, II-1992, pp.315-16; The latter urgently needs updating; Domper Ferrando, 1996, p.135.

144 Domper Ferrando, 1996, p.135.

145 The municipality declares polluted air zones (only after the issue of a binding report by AC technical body), issues ordenances for the protection of health and the environment (Article 25.2.f LBRL, Article 9.1 Ley 38/1972): however some of the most significant local measures have been annulled for contradicting State provisions (STS 12 November 1984 Tribunal del Consejo Regional de Asturias -- Ordenanza de Avilés). The Comisión Provincial de Servicios Técnicos has power to modify partially or totally such ordenances (Point 5, Circular for the instruction of the Vexatious Activities regulation). See generally López Ramón, 1996, p.295, p.292n8; Bennett, pp.20-21)

146 See generally Domper Ferrando, 1996, pp.99-135; also López Ramón, 1996, p.292-96; STC 149/1991 4 July, *recurso contra Ley de Costas.*

147 Art 29 et seq., of Vexatious Activities; MARTÍN MATEO, II-1992, p.312; MINER Letter, 25 June 1996.

148 After a binding report by the appropriate Autonomous technical body or the *Comisión Provincial de servicios técnicos;* MINER Letter, 25 June 1996; Domper Ferrando, 1996, pp.121-22.

The State authorizes electrical installations that supply more than 1 CA or energy transport leaves the CA (Constitution 1978, Article 149.1.22); this is the general situation, as the Constitutional Court has acknowledged, since networks are linked. MARTÍN MATEO, II-1992, pp.304-305.

149 López Ramón, 1996, p.296, p.298. Furthermore, Article 3.4, Ley 38/1972 prohibits that the municipal licence of opening (*del apertura*) be denied for reasons of protection of atmosphere when the applicable levels of emission or inmission are respected. However where EC requires a standstill, this cannot be rigidly enforced.

150 Appointed by the Minister for Internal Affairs.

State representative. Each Provincial director provides a link between MINER and the CA administration[151].

Unified vision/Data Collection: Accurate information on which to base authorisation levels is essential. Gathered throughout the different CA, the data must be processed and co-ordinated at a central level, in order to "avoid the mistakes caused by decisions based on fragmentary and static analytical procedures that have not permitted to perceive the lateral negative effects on other parts of the whole."[152] Concerning actual data collection, a regional perspective was emphasised in Spain, and the National Network of Vigilance and Forecasting of Atmospheric Pollution[153], established a system of data collection based upon climatic and geographic regions[154]. These do not necessarily match administrative lines[155].

The Ministerial Order of 26 December 1995, adopted specifically in order to achieve homogenous and comparable data, provides for MINER to receive information on power stations' emissions independently from, and without prejudice to the powers of the CA authorities[156]; it began receiving this information during 1996. A similar order is being elaborated regarding large combustion plants in the oil refining industry. When adopted, this will give MINER direct access to information regarding 90% of the combustion plants in the country. Prior to the adoption of such provisions, the main difficulty concerning co-ordination of information between the CA authorities and the Central administration was apparently the delay the Central Administration faced in receiving information from the CAs[157]. As seen, these will now be by-passed.

Regarding measurements of levels of atmospheric pollution, a national source wrote in 1991 that 465 stations monitored SO_2, and 151, NO_x[158]. MINER reports that in 1995, 702 manual

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151 MINER Letter, 22 December 1995.

152 ESTEVAN BOLEA, 1991, p.332.

153 *Red Nacional de Vigilancia y Previsión de la Contaminación Atmosférica,* required by Ley 38/1972 and RD 833/1975, Article 6.

154 Related to economic level, industrial activity, demographic density, climatic conditions -- all of which are logical from the perspective of atmospheric pollution.

155 MARTÍN MATEO, II-1992, pp.311,321.

156 Ministerial Order of 26 December 1995; the sixth provision requires that information must be sent monthly to the Central Administration where continuous measurements are required, and each trimester, where continuous measurements are not required.

157 MINER Letter, 25 June 1995.

158 These were also established in order to comply with the Long Distance and Transboundary Pollution Convention; Sanz Sa, p.426.

and 408 automated stations measured SO_2; 325 automated (and almost no manual) stations monitored NO_x, and 710 manual and 287 automated stations monitored dust particles. Here, an enormous discrepancy is noted between the information given by the national sources and that noted in the Commission's Eighth Application Report[159], which lists fifteen air monitoring stations in Spain, without indicating what types of emissions they monitor. It is positive that stations designed especially for monitoring large industrial concentrations are located near them.

It seems that data collection is adequate: as a cautionary note, it has been alleged that the information obtained from the stations is unreliable[160] due to the conversion from manually operated to automated stations. The conversion is proving more difficult than thought at first since the responsible authority, the Ministry of Health "wishes to place the stations in the hands of the autonomous communities, which lack the funding needed for modernising and maintaining the network."[161]

2.2.2. Monitoring compliance:

The power to monitor and control is also basically in the hands of the municipality[162], although the CA and the civil governor can also exercise such functions[163]. (Where specified in other legislation, other organs may also have competence to monitor.) The Autonomous authorities then remit this information to the central Administration. Likewise regarding sanctions[164], mayors have basic competence; the CA have competence where the mayor has failed to act, after his notification[165] (or where the mayor cannot impose the amount of a

159 Com(91)321, p.292.
160 Bennett, p.62, p.111, p.199.
161 *Ibid.*, p.62.
162 Vexatious Activities, Articles 6, 24, 26.2; MARTÍN MATEO, II-1992, p.312;
163 Vexatious Activities, Articles 9 and 37.
164 The possible sanctions include: fines, temporary withdrawal of licence for duration of sanction; definitive withdrawal of licence; Article 38, Vexatious Activities.
165 Otherwise the imposed sanctions are null; Articles 37, 39, Vexatious Activities; STS 30 June 1975, Ar. 3465; cf: Domper Ferrando, 1996, p.125.

specific fine); and the civil governor can also require 'exercise of due responsibility by negligent municipal authorities'[166] (although what exactly this means is not specified[167]).

Next, practical implementation of LCP rules requires that the industry operators monitor emissions. As seen, MINER has reported that it has not encountered difficulty in obtaining data, implying that industry operators are indeed carrying out these obligations. The administration must then verify compliance.

Lack of resources/expertise: Regarding administrative vigilance in monitoring compliance of large combustion plants, problems arise that are extremely similar to the EIA situation. The local administrations lack resources[168]; technical expertise is scarce; and monitoring is undertaken sporadically if at all. "[I]n the end, it is impossible to carry out the periodic or continuous controls foreseen in the laws."[169] There is a breakdown in the essential function of monitoring compliance[170] and, consequently, a "generalised lack of compliance and [a] tolerant impotence of agents of control."[171] This is the main problem with atmospheric pollution control: after the adoption of rules, the operators responsible for their application appear to be left to their own devices.

2.2.3. Co-operation of Industry:

The co-operation of the industry concerned is another crucial factor if implementation of vertical (sectoral) legislation such as LCP88/609 is to be useful.

Industrial costs: By contrast with EIA-type legislation, where the costs of carrying out the procedure are relatively small, LCP88/609 adds another dimension -- that of crippling costs upon the affected industry -- to practical implementation. Lack of resources then entails not only the familiar difficulties of the administrative services called upon to verify

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166 "*...exigir la debida responsabilidad a las autoridades municipales que fuesen negligentes*"; Article 9, Vexatious Activities.

167 Domper Ferrando, 1996, p.127.

168 MARTÍN MATEO, I-1991, p.273: other agencies involved pass monitoring responsibilities to their few available agents, with the result that the attention given the issue is insufficient. Nevertheless, occasionally it appears the excuse of lack of resources is mere rent-seeking in the case of some large municipalities; Domper Ferrando, 1996, pp103-4.

169 MARTÍN MATEO, I-1991, p.273; Bennett p.199; see also Double, M.B., p.6.

170 Manzana Laguarda, 1994, p.10728.

171 MARTÍN MATEO, II-1992, p.312.

implementation, but the industry that must purchase, construct, and install costly technology and equipment to meet the legal obligations. LCP88/609, and its Spanish transposition are the most expensive pieces of environmental legislation in force in Spain[172]. The government is sensitive to the impact of its implementation on the energy sector (which already faces an extremely high level of indebtedness[173]) and the fact that, by affecting the supply of energy, it could also significantly effect the rest of Spanish industry[174]. The investment costs vary between 5% and 36% of the total cost of the installation, and the annual operation costs vary between 5% and 32% although in Spain generally the higher costs apply because of the poor quality coal[175]. Therefore it is fundamental to evaluate all the alternatives, starting with the possibility of not desulphurising but rather reducing the hours that the stations function, also the option of mixing carbons and combustibles[176]. Facing such costs and knowing that administrative verification is unreliable, it can be questioned whether plant operators would be motivated to comply with strict obligations.

Official guidance Prior to the recent MINER Order[177] containing technical specifications and calculations that were lacking in the LCP regulation, no official guidance existed. However, industry operators could have access to information relating to the methods, technologies and their costs for reduction of emissions via 'on line' computer programme. The *Programa BRISA* is available after payment of a subscription fee and offers recent information concerning, inter alia, the latest methods and technologies as well as the associated costs; the addresses of the technological engineering and equipment vendors is also provided[178].

Incentive: By contrast with France, no tax exists on the national level to add incentive to meet the legal obligations[179]. Indeed, given the difficult Spanish situation it is possible that

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172 For a discussion of costs see Chapter 1, point 2.1. at *Consideration of costs,* especially footnote 41.

173 VALERIO, 1991, p.106. Also, despite the fact that its own nuclear industry provides some of its energy needs, Spain continues to struggle to meet demand and has purchased 1000 MW/year nuclear energy from Electricité de France, and may increase its purchase to 2000MW.

174 However, since 1972 industry has been urged to consider reduction of emissions as a part of production costs; López Ramón, 1996, p.291.

175 ESTEVAN BOLEA, 1991, p.406.

176 For descriptions of other technical processes, see ESTEVAN BOLEA, 1991, pp.406-407.

177 Order of the Ministry of Industry and Energy of 26 December 1995.

178 MINER Letter, 22 December 1995.

179 However, some CA have imposed environmental taxes that are applicable to a wide range of industries, and among these, combustion plants; MINER Letter, 22 December 1995.

such a tax would function not as an incentive to reduce emission, but as a disincentive to applying the legislation.

2.2.4. Communication with Commission:

Transmission of information to the Commission is the responsibility of the central State[180]. However, authorisation for such derogations as those provided in Articles 6 and 8 of LCP88/609 is in the Autonomous authority's hands. To the knowledge of MINER, no derogation has yet been made and therefore no information has been forwarded to the Commission[181].

2.2.5. Uncertain practical compliance:

An initial observation is that since the Spanish legislation arrived late[182], an obvious consequence for practical implementation is that no obligations from LCP88/609 were placed upon Spanish industry (at least private operators[183]) until April 1991. MINER has notified that, despite the 21% actual decrease in SO_2 emissions required in the first phase, it has not been necessary to reduce the hours of functioning, and no authorisation has been revoked for lack of compliance. It does not mention whether the required reductions were attained. Scepticism concerning Spain's ability to attain in practice the goals imposed by LCP88/609 is heightened when Spain's precarious energy situation is considered[184].

Scepticism is also warranted by the fact that the Ministerial Order that completes the extremely vague national LCP regulation was adopted only recently. Given the general situation in Spain, it seems optimistic to hope that practical implementation has proceeded smoothly in the absence of necessary technical specifications and requirements.

Furthermore, compliance with the limits established in environmental legislation is not the Ministry of Industry's first priority; fulfilling the needs of industry, and of energy production, are. This somewhat obvious point is illustrated by the fact that the General

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180 SSTC 172/1992 29 October, 329/1993 12 November; Manzana Laguarda, 1994, p.10724.
181 MINER Letter, 25 June 1996.
182 Real Decreto 646/1991, of 2 April 1991.
183 Since Directives are addressed to Member States and cannot create responsibilities for private actors; C-91/92 *Paola Faccini Dori v Recreb Srl*, 1994 ECR I-3325.
184 VALERIO, 1991, pp.104-107.

Directorate of Industry[185], disregarding applicable legislation, has in the past issued resolutions 'authorising' emissions many times greater than the limit allowed in other atmospheric pollution norms[186] (albeit prior to the entry into force of LCP legislation). Visibly, in some instances administrative resolve to abide by the legislation is lacking.

2.2.6. Summary:

Generally Community directives on atmospheric pollution have had a strong impact in Spain[187], entailing marked differences in control practices and introducing requirements that would not exist otherwise. Here Community law serves also to bolster application of international obligations imposed by the Geneva Long-Range Transboundary Air Pollution Convention[188]. In Spain LCP88/609 has laid the groundwork for future reduction of emissions. Still, in this Member State, it seems that actual results are insufficient. As one source pointed out regarding another Community air pollution directive, "one need only refer to certain requirements of Directive 75/442 to note the distance of its provisions from the actual reality of our country."[189] Fundamentally, as Aguilar has noted, because of the low political priority of the environment, the interests of government and industry coincide substantially: "neither public nor private actors have felt compelled to enforce or to abide by environmental regulation respectively"[190].

3. Conclusions:

On the basis of rules that were transposed to cause minimal disturbance to economic forces, practical implementation of both texts is extremely problematic. Regarding EIA, the public is

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185 Sentencia de la Audiencia Provincial de Barcelona, 20 February 1988 (Sección 3).
Sentencia de la Sala II del Tribunal Supremo, 30 November 1990 (judgment reproduced in DE VEGA RUIZ, 1994, pp.63-97).

186 E.g. for dust 2000mg/Nm3 as opposed to 500mg/Nm3 provided in Decreto 833/1975. Furthermore, the subdirector of Territorial Services of Industry in Catalunya affirmed, and therefore authorities were aware, that in fact emissions were never below 3458mg/Nm3, more than nine times the lawful limit; see Chapter 9, point 5.2.

187 As in Greece, Italy, and Portugal; Bennett, p.199.

188 López Ramón, 1996, pp.286-87, 289; see ESTEVAN BOLEA, 1991.

189 Manzana Laguarda, 1994, p.10728.

190 Aguilar, p.236; see also MARTÍN MATEO, II-1992, p.312, who discusses the ability of large industrial actors to influence the fixing national levels of pollution.

generally less motivated than in France, and more effectively distanced from the proceedings. The developer, as in France, is not obliged by the Administration to correct his errors. The environmental authorities, if ever inclined towards strictness, are overshadowed by the substantive authorities; the latter, in turn, are usually within the Administrative structure that promotes the projects under consideration, and cannot be expected to be objective. The entire procedure is excruciatingly slow, and frequently construction begins without awaiting the environmental Declaration. The LCP rules demonstrate similar tendencies: it is considered that the Spanish energy industry can ill-afford to comply with its obligations. Although the interventions of the administration appear better organised, they are also apparently overly tolerant of failure to comply. Unofficial sources indicate that practical compliance, even with "0" reductions in the first phase, is impossible.

Difficulties in practice are the most difficult not only to monitor but to address. This is particularly true given that administrative actors are lax in their duties, and tolerate violations -- in practice seem determined not to endanger projects and industrial activities perceived as essential. The Commission has no 'agents' in the Member States with which to tackle such problems efficiently.

CHAPTER 9: Spain – Problems of Enforcement

Against a fragmented administrative backdrop in which environmental administrators have seemingly little true independence or authority, rules have been transposed in order to minimise potential disturbance to economic forces. Practical implementation has been lax and, as always, wherever administrative actors are called upon to intervene inactivity is a central

problem[1]. Although this section concerns principally actions before the courts, it must be recognised that many judicial actions could be avoided if the Administration were less lethargic both in its monitoring duties and in using administrative sanctions. In view of the preceding weaknesses, efficient enforcement is all the more essential.

Authors generally agree that, regarding enforcement, the environment is a poorly protected juridical good[2]. A multitude of problems discourage recourse to the courts or, once judicial action has been commenced, reveal the poor suitability of procedural rules to environmental situations. In broad terms, at this stage the most serious problem, common to civil and administrative jurisdictions, appears to be that once an environmental problem affects the many rather than the few, establishing standing is a hurdle that many applicants never surmount. Slowness of judicial action regarding administrative disputes, runs a very close second. The picture is not entirely negative, however: if an environmental matter reaches the stage of consideration of its merits, it appears that judges (at least in all three divisions of the highest court) make strong efforts to interpret and adapt procedural rules in order to take account of the particularities of environmental protection.

In Spain, unlike in France, no separate jurisdiction exists for Administrative and judicial disputes; these are heard in certain divisions (*salas*) of the 'ordinary' courts. Administrative, civil and penal jurisdictions are examined in this order, giving examples applicable to EIA and LCP, where appropriate and possible[3].

1. Which Jurisdiction?:

Determining which jurisdiction is most appropriate may confuse the applicant trying to choose the path that will yield more favourable treatment. In Spain administrative court

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1 See, for instance, SSTS 7 November 1990, 30 November 1990 mentioning administrative inactivity; Beltran Aguirre, pp.292,297; MARTÍN MATEO, I-1991, pp.197,199; Jordano Fraga, p.472.

2 "*...es un bien poco protegido*"; Blasco Esteve, 1996, p.629.

3 Finding concrete illustrations presents difficulties: Spanish cases involving environmental issues are relatively few; DE VEGA RUIZ, 1994, p.49; ROSA MORENO, 1993, p.301-302, particularly in criminal and civil jurisdictions.

actions (*contencioso-administrativo*) are not strictly separated from civil disputes. A first choice arises as to which jurisdiction to apply to, administrative or 'ordinary'. An administrative dispute, is "an action between parties, one of which is always the Public Administration..."[4]. Conversely, civil courts have jurisdiction where conflict arises between natural or legal persons.

Less clear-cut is the distinction between civil and administrative jurisdictions in certain cases involving the Administration. Civil jurisdictions prevail over administrative in those cases where the Administration does not act in its governing capacity[5] (although such cases have been heard both in civil and administrative courts[6]). For example, in the case of harm caused by a public sewage facility, civil jurisdiction prevails over administrative[7]. If a choice arises between civil and administrative jurisdictions, the preferred path is through civil courts, because the duration of procedure is usually less, and a more helpful concept of what is considered harm exists[8]. The Supreme Court (TS, *Tribunal Supremo*), recognising that most environmental legislation is administrative in essence, has commented on the attractive pull of civil jurisdictions[9].

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4 Technically, the contentious administrative procedure is "articulated on the same bases as the ordinary civil process, from which it is separated only by its condition of challenge resulting from the requirement of a previous act, which constitutes the point of reference around which the demands of the parties revolve"; GARCIA DE ENTERRIA, EDUARDO and TOMAS RAMON FERNANDEZ, *Curso de Derecho Administrativo II*, 2nd edition, Civitas, Madrid, 1986, p.525.

The defendent (*parte demandada*) can also be the person who obtained a right from the challenged act (Art.9.1.b) of LJ; which confers upon them the right to act in defense autonomously on same level as Administration; DE ENTERRIA, and RAMON FERNANDEZ, p.528.

5 STS, 3 December 1987: "Civil jurisdiction enters into play even in those issues derived from acts in which the Administration does not act as a power in the exercise of *ius imperium*."

6 STS 23 March 1983, in which the Administrative division of the TS refers to cases in civil courts condemning the Administration to compensation; see MARTÍN MATEO, I-1991, p.165.

7 See STS 12 December 1980: "...in this tangential zone between common and administrative contentious jurisdiction, one must distinguish between those matters that link private property to its protection, of unquestionable civil character, and those which affect general or public interests, of unequivocal administrative nature, aspects which are properly separated..."; comments in MORENO TRUJILLO, E., 1991, pp.233,242,272-73; Blasco Esteve, 1996, pp.642-43; Cabanillas Sánchez, 1990, pp.89-90.

8 Navarro Mendizábal, I.A., "La Incidencia de la acción negatoria en la defensa del medio ambiente como complementario de la responsabilidad civil," *I Congreso Nacional de Derecho Ambiental*, Comunicaciones, ed., Cima Medio Ambiente, Valencia 1996, p.481.

9 STS 12 December 1980: "according to the doctrine of this Division (of the Court), the ordinary jurisdiction is the fount or root of all the others and for this has *vis atractiva* in

An illustration of the choice between jurisdictions is given in the context of disputes arising from the establishment or functioning of large combustion plants: on the one hand, the Administration has the power to impose sanctions[10], the legality of which can be examined by the administrative judge. On the other hand, civil courts are competent to hear cases concerning damage caused to a third party and further, to adopt corrective measures in order that contaminating emissions cease[11].

Another choice can arise between administrative and criminal jurisdictions. The line delimiting the criminal offences from administrative infractions is one of gravity of the threat or damage, a vague concept indeed[12] (which has been applied to damage from large combustion plants[13]). Where it is felt that this threshold has been crossed, criminal courts systematically prevail[14].

In sum,

> the criminal jurisdiction is competent when a crime has been committed, ...the contentious jurisdiction is for the cases in which the harmful act constitutes an administrative infraction, and ... in the latter supposition the jurisdiction competent for resulting damage.... is the civil; the result is duplications and interferences leaving the field subscribed to continuous conflicts of jurisdiction.[15]

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doubtful cases). See also STS 16 January 1989 treating an alleged lack of jurisdiction in case concerning atmospheric pollution; commentary MARTÍN MATEO, I-1991, pp.163-65; MORENO TRUJILLO, E., 1991, pp.272-74.

10 Article 15 Ley de Protección Ambiente Atmosférico.

11 See below, point 4.7.

12 Below, point 5.1, Article 347-bis: *vagueness of tests.*

13 Below, point, 5.2.

14 Jordano Fraga, p.471; see below.

15 *Ibid.*, p.471.

2. Administrative Sanctions:

The legislator[16] extends the power to impose administrative sanctions to the Administration[17]. However, use of these powers is consistently disappointing[18]. The legislation studied here provides for administrative sanctions. The EIA regulation[19] lists three types of sanctionable conduct: absence of a Declaration, a fairly frequent problem; failure to comply with imposed conditions, probably the most common infraction[20]; falsifying, hiding, or manipulating data. The sanctions include: "indefinite"[21] suspension; restoration[22]; successive coercive fines[23]; or the Administration can carry out the necessary works itself, at the charge of operator[24]. In the case of an industrial installation such as a large combustion plant a variety of administrative sanctions are applicable: those sanctions related to EIA procedures, those included in the Vexatious Activities regulation[25], and in air pollution legislation[26].

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16 Administrative infractions and their corresponding sanctions can be created only by laws approved by Parliament, although an exception is made for preconstitutional rules, such as the Vexatious Activities Regulation; LRJPAC, Articles 127.1, and 129.1. For instance, a frequent problem of local ordenances is that they fail to mention which law they are intended to develop, thus the infraction they create and sanctions they impose are *"huérfana(s) de coberatura legal"* (orphans of legal cover); see Trayter Jiménez, p.568, pp.552-60.

17 Jordano Fraga, pp.466-67.

18 DE VEGA RUIZ, 1994, p.134.

19 RD1131/1988 Article 28.

20 GARCIA URETA, 1994, p.343.

21 The RDL proposal had included a "temporal or definitive" suspension: the distinction was dropped in favour of 'indefinite': Consejo de Estado, Dictamen 52.269/MM p.14 cited GARCIA URETA, 1994, p.344.

22 Article 10.1, RDL1302/1986. It is extremely positive that the regulation includes both physical and biological restoration (Article 29.1). Unfortunately, the regulation fails to indicate which authority, environmental or substantive, prescribes these, giving rise to some uncertainty regarding this crucial point; compare GARCIA URETA, 1994, p.345 and ROSA MORENO, 1993, p. 300-301.

23 Of 50,000 pesetas each, although the Government had proposed fines of up to 15 million ptas: the Consejo de Estado viewed this as not within the ambit of the Directive: Dictamen 49.291/FF, p. 22; cited GARCIA URETA, 1994, p.347.

24 See also articles 96 - 100 LRJPAC.

25 Vexatious Activities, Article 38 provides for fines, close or cessation of the activity, revoking the licence which the Gobernador Civil of the province imposes when the amount is too high for the mayor to impose. fines imposed by local mayors (up to 100,000 ptas) provincial governors (up to 250,000 ptas, Industry Ministry (fines over 250,000 ptas). In the event of repeated offences the facility in question may be closed down by the authorities.

26 Article 12 of Ley 38/1972, RD 833/1975.

Were these to be used, they would provide a cost-effective and, above all, speedy way to deal with many environmental problems. Unfortunately, they are rarely used in practice[27]. This is in part due to administrative passivity. As seen, the Administration rarely monitors compliance with requirements of environmental rules; it follows logically that it rarely imposes administrative sanctions for infractions noted during the process of monitoring.

Reluctance to use administrative sanctions is also attributable to a more technical difficulty: the legal principle *non bis in idem,* as embodied in Article 133 LRJPAC[28], impedes the duality of administrative and penal sanctions[29]. (Both administrative and penal sanctions are however compatible with civil liability[30].) The Constitutional Court has ruled that the administrative jurisdictions are subordinate to the penal[31]. In other words, where the possibility arises that the facts/situation can be considered a crime under the Penal Code, the administration must communicate this to the penal judge and cannot act until the penal judge has pronounced on the matter[32].

A sizeable problem is posed, even where the Administration might discover the infraction and wish to impose an administrative sanction. Since the principal provision of the Penal Code[33] is very widely constructed, administrative sanctions are avoided for fear that they

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27 See below.

28 LRJPAC Article 133: "Concurrent sanctions. Those facts which have been sanctioned criminally or administratively, in cases in which the subject, facts and basis are deemed identical, cannot be sanctioned."

LRJPAC Article 137.2: "Those facts declared proven by firm judicial penal resolutions shall bind the public authorities with respect to sanctioning procedures that they substantiate."

29 The Constitutional Court has ruled (STC 77/1983, 3 October) that the same facts cannot give rise to both administrative and penal sanctions; comments in DE VEGA RUIZ, 1994, pp.34-35.

See further, Trayter Jiménez's comments on the potential unconstitutionality of Article 41, Vexatious Activities Regulation (adopted prior to the Constitution) which permits double sanctions (administrative and penal) for the same illicit facts; p.560.

30 Rodríguez Ramos, p.78.

31 STC 77/1983, 3 October.

32 SSTS 23 December 1959; 23 May 1986; see Trayter Jiménez, p.577; Jordano Fraga, p.468. Furthermore, the Administration must respect the facts as accepted by the criminal courts; STC 20 January 1987, Ar.256.

33 See below, point 5.1, Article 347-bis: *delito ecológico.*

would then be paralysed '*in eternum*' in favour of criminal procedures[34]. A potentially swift and efficient remedy yields few results in practice[35].

3. Administrative disputes (*Contencioso Administrativo*):

Judicial experience with EIA-related cases is minimal:

> ...on the one hand, still judicial practice with respect (to EIA) is lacking in our country and, on the other, the jurisdictional control of Declarations of impact stirs up a series of material and formal obstacles that stem either from the nature of the administrative act of evaluation itself or from the diffuse character that environmental interests represent[36].

Although these obstacles do not discriminate against Community law particularly, judicial enforcement of Community (and national) norms is not always adequate. A judge can annul the administrative act, although he cannot substitute his own act and decide "where a road should pass, or a nuclear station, or a waste treatment plant"[37]. Without going this far, the judge is able to take measures to rectify a harmful situation, for example, to modify the prescriptions imposed on the functioning of an installation. Formal difficulties are examined below.

What can be challenged: Challenges before the administrative judge are likely to involve a formal irregularity in the authorisation, violation of urban planning rules[38], or the legality of the activity itself. EIA legislation provides that the Environmental Declaration has the "same value as the authorisation"[39], and therefore the Declaration alone could be challenged by those prejudiced by it[40] (although it would normally be challenged with the authorisation incorporating it). Concerning the stringency of imposed conditions, it is recalled that although

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34 Trayter Jiménez, p. 578.
35 DE VEGA RUIZ, 1994, p.134.
36 ROSA MORENO, 1993, pp.301-302.
37 ROSA MORENO, 1993, p.167.
38 Which presents advantages concerning standing.
39 RD1131, Article 27.
40 MARTÍN MATEO, I-1991, p.331; in Aragón this is expressly provided for: Decreto 118/1989, Article 8: The declaration of environmental impact shall be reviewable in administrative courts, either through challenge to the act of decision or authorisation in which it is integrated, or directly when the declaration is itself the act of decision.

the administrative use of discretion is subject to judicial control, materially it is difficult to challenge an authorisation on the grounds that the conditions imposed were inappropriate[41].

3.1. *Locus standi*:

Restricted access to justice for the defence of collective interests due to procedural inflexibility[42] is a serious problem of judicial protection of environmental norms before administrative (and civil) courts. Familiarity with the debated terms is useful to understanding the problems of establishing *locus standi*.

- *Right*: Constitution Article 24.1[43] expressly states that all persons have the right to obtain effective control by the courts of the exercise of their rights and legitimate interests. In no case is the inability to defend these rights (*indefensión*) acceptable. Article 45, as seen, refers also to a "right to an adequate environment", and it may therefore seem that a collective 'right' should be enforceable before the courts. In fact, in justifying the applicant's standing in a much celebrated case, the TS appeared to try to link standing more closely to Article 45 of the Constitution (although this is far from a direct application of that article)[44].

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41 ROSA MORENO, 1993, p.303; MARTÍN MATEO, I-1991, p.332.

42 Baño León, 1996, p.627; Blasco Esteve, 1996, p.629.

43 Constitution 1978, Article 24.1: "All persons have the right to obtain effective control by judges and courts in the exercise of their rights and legitimate interests, without, in any instance the inability to defend these rights arising."

44 The case has been the subject of much commentary, (STS 25 April 1989, Ar.3233). The TS overturned the decision of the Audiencia Territorial de Palma de Mallorca (Recurso 56/86, 24 December 1987) that had declared inadmissible, for lack of title, the application of Don Gabriel P.S. challenging the municipality's accord concerning dumping of waste waters. The health of the applicant's family had been affected by the latter.

Drawing a link with Article 45, the TS stated that, "since Article 45 of the Constitution confers upon 'all' the right to enjoy an environment adequate for the development of the individual, establishing, further, the duty of public powers to protect, defend and restore the environment, to deny the legitimation of don Gabriel P.S. is to deny the obvious. ...those precepts contained in the third chapter, Title 1 of the Constitution, despite their lying beneath the rubric of 'guiding principles of social and economic policy' do not constitute mere programmatical norms whose effectiveness is limited to the field of political rhetoric and useless semantics, proper to demogogical affirmations..." (*fundamenta de derecho tercero*, emphasis in original).

The TS found that the applicant clearly had standing and overturned the earlier sentence. Perceptively, Baño León (*op.cit.*, pp.617-18) has commented that the applicant in this case easily had standing under traditional criteria: the applicant was a resident of the municipality (Ley Básica estatal de Régimen Local, 2 April 1985, Article 26 entitles residents

However the Constitutional Court has held that the catalogue of fundamental rights includes *only* those in Section 1 Chapter II[45], of the Constitution[46], which are individual and anthropocentric[47]. Therefore, although the TS frequently refers to a 'right to environment'[48], this is generally in *obiter dicta*: its decisions are limited to applying positive law. Use has been made of other Constitutional articles that have indirectly addressed environmental problems, yet these imaginative solutions are only applicable where such individual rights such as privacy, liberty and security are concerned[49].

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to demand services of sewage); the dumping by the administration affected his individual interests (the hygienic situation of his family); the fact that the disturbance caused to the applicant was "modest" does not disturb his legal title. Nevertheless, the Audiencia Territorial had considered his application inadmissible; it is therefore still more notable that in reversing the lower court's decision, the TS does not discuss the traditional bases of legal title. Rather, it refers to Article 45 and 'right to an adequate environment' (although it does reinforce this subsequently by discussing rights of neighbours as provided in the LBRL). At the least, the judgment is a reminder to the courts that the Constitutional reference to environment must be seriously considered in the issues they are called upon to resolve.

45 *De los derecho fundamentales y de las libertades públicas;* Of fundamental rights and public liberties.

46 STC 161/1987, 27 October; see also Blasco Esteve, 1996, p.629; Jordano Fraga, p.472.

47 MARTÍN MATEO, I-1991, pp.144-45.

48 SSTS 16 October 1978, 30 April 1979; Martín Mateo, "Jurisprudencia ambiental del Tribunal Supremo español des el cambio político," 108 (1985) Revista de Administración Pública 187; MARTÍN MATEO, I-1991, p.153.

49 For example, as relied upon in a national case exhausting local remedies prior to *López Ostra v. Spain* (41/1993/436/515), before the ECHR. Furthermore, a restrictive approach has been taken to the special procedure for providing accelerated defense of fundamental rights (in Ley 62/1978), to both admissibility and object of the action; Baño León, 1996, p.625.

Various fundamental rights protected by the Constitution (as translated by the ECHR) were relied upon:

Article 15: "Everyone shall have the right to life and to physical and psychological integrity, without being subjected to torture or inhuman or degrading punishment or treatment under any circumstances. The death penalty shall be abolished except where it is provided for by military criminal law in time of war."

Article 17.1: Everyone has the right to liberty and security..."

Article 18.1"The right to honour and to private and family life and the right to control use of one's likeness shall be protected. 2. The home shall be inviolable. It may not be entered or searched without the consent of the person who lives there or a judicial decision, except in cases of flagrant offences. ...."

Article 19: Spanish citizens shall have the right to choose freely their place of residence and to move around the national territory...."

- *legitimate interests*: The idea of direct, personal interest[50] as a requirement of standing has ceded to the wider concept[51] of legitimate interest[52], direct and possibly indirect[53]. Legitimate interests that are protected by legislation can have a personal character, or can be common. Common interest is composed of various individual interests. When a member of a group supports a personal interest he simultaneously supports the interest of the group[54]. With legitimate interests -- even common -- an individual element remains.

Insistence on the individual nature of the interests defended is the principal problem surrounding legal title, although administrative courts are less strict than civil. To limit title to those holding legitimate interests is still restrictive in an area such as the environment, where collective interests predominate. Associations, better equipped to make claims than the individual[55], do at times face problems establishing legitimate interest. It would perhaps be more helpful if, as in France, legally registered associations were allowed to defend the interests listed in their founding statute[56]. Nevertheless, restriction of standing to those demonstrating legitimate interests cannot be judged inadequate from the EC perspective, since

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50 Ley de Procedimiento Administrativo, Article 23: "*intereses legítimos, personales y directos*"; STC 14 February 1983. This consisted of the personal utility that the applicant had in obtaining his claim, the benefit he received or harm he ceased to suffer (which could be putative; STC 1 September 1988) by the annulment of the act (SSTC 27 February 1980; 11 June 1982; 10 May 1983; 10 February 1987; also, direct interest is derived by the fact that the relationship of the actor to the challenged act or disposition is not distant, derived, or indirect: STC 22 October 1966). Interest can be moral or material (STC 11 October 1976), but simple interest in legality is insufficient (ROSA MORENO, 1993, p.305; MARTÍN MATEO, I-1991, p.190-95; Manzana Laguarda, 1991, p.4703,4713).

51 Manzana Laguarda, 1994, p.10732.

52 See Ley Orgánica del Poder Judicial, Article 7.3, below; Manzana Laguarda, 1991, p.4709.

53 STC 62/1983, 11 July, STC 60/1982, 11 October; see also STC 257/1988 22 December; STC 93/1990, 23 May.

54 "... those in which the satisfaction of the common interest is the manner to satisfy all and each one of those composing the society, therefore it can be affirmed that when one member of the society defends a common interest, he defends simultaneously a personal interest that may or may not be direct..."; STC 62/1983 11 July; see also Manzana Laguarda, 1991, p.4709, and 1994, p.10732; ROSA MORENO, 1993, p.307.

55 ROSA MORENO, 1993, p.305; MARTÍN MATEO, I-1991, p.190; Manzana Laguarda, 1991, p.4713.

56 Perhaps with conditions regarding the length of time they have been in operation, geographic area; see Chapter 6. point 2.4.

the EC also remains attached to an 'individual' element of interest (as in Article 173 EC); and has also refused to extend legal title to include interests of a less individual nature[57].

- *'Diffuse' or collective interests (intereses difusos):* The concept of 'diffuse' interest (and the possibility of 'popular action') is especially current in academic commentary on judicial protection of the environment. Diffuse interests possess various characteristics. Not to be confused with common interests, they are more than a sum of identifiable individual interests[58]; a new collective dimension is added, transcending the individual. Above all, procedural difficulty in their defence is a characteristic: most ordinary judicial channels are not available for their protection[59]. In fact, the concept of diffuse interests

> is perhaps no more than a tool that will disappear once it accomplishes its function of sounding the alarm before the legislative and judicial lack of protection in which certain juridical materials of supreme social interest find themselves[60].

The concept is secure for the present, despite the existence of legislative foundations (besides Article 9.2 of the Constitution[61]) for wider protection of diffuse interests, specifically mentioning the ability to invoke 'collective' interests[62]. This would require legislative

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57 See Chapter 3, point 2.1. Practical Illustration; see also Case T-219/95R *Danielsson and others v Commission*, 1995 ECR II-3051; Case C-131 *Arnaud and others v Council* 1993 ECR I-2573; Case T-475 *Buralux and others v Council*, decision of 17 May 1994 (appeal rejected); Case T-117/94 *Rovigo v Commission* 1995 ECR II-455 (appeal C-142/95).

58 Individual, subjective rights are not at issue; the problems surrounding diffuse interests would disappear if subjective rights could be invoked.

59 MARTÍN MATEO, I-1991, pp.183-85; ROSA MORENO, 1993, pp.304- 307; MORENO TRUJILLO, E., 1991, pp.283-85; Gil-Robles, p.171.

60 ALMAGRO, *Protección procesal de los intereses difusos*, cited MARTÍN MATEO, I-1991, p.184.

61 Constitution, Article 9.2: "It is for the public powers to promote conditions so that liberty and equality of the individual and of the groups in which [the individual] belongs are real and effective, to remove the obstacles that impede or make difficult its fullness and to facilitate the participation of all citizens in political, economic, cultural and social life".

Article 9.2 is not insisted on here as a foundation for the protection of diffuse interests because the reference to 'groups in which the individual belongs' can easily be considered to refer to the concept of common interests, above.

62 For instance, Ley Orgánica del Poder Judicial (LOPJ): Ley 6/1985) Article 7.3 disposes: "The Courts and tribunals shall protect rights and legitimate interests, both individual and collective... For the defense of the latter, shall be recognised the legitimation of corporations, associations and groups that are affected or are legally entitled for their defense and promotion." The legislator is to define the rules for recognising this legitimation.

development, which has since taken place for consumers[63] but is still lacking regarding environmental matters -- "which is highly significant given the time that has passed"[64].

'Popular action' (*acción popular*), where title to act is conferred upon all those who hold the right that is prejudiced (and is available in certain cases[65], a fraction of which concern EIA projects[66]), is again the subject of much national commentary as a potential channel through which to defend diffuse interests[67]. It is not supported here since it is not available in other EC Member States[68] and is, at present, unrealistic given the general Spanish situation.

However, a variety of sound arguments[69] support wider access to justice, particularly for not-for-profit associations and groups[70]. Considerable pressure for wider access to courts has

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Also, the Constitutional Court, (referring to the constitutionality of an autonomous -- País Vasco -- rule giving legal title to consumers associations), found that the extension of legal title to (consumer) associations required a State law; STC 71/1982, 30 November.

63 Ley 26/1984, 19 July, General para la defensa de los consumidores y usuarios.

64 MARTÍN MATEO, I-1991, p.191; see also, Real Ferrer, 1994, p.326, note 29.

65 Popular action has been made available sporadically before administrative courts, via legislation on land use, historical sites, and coasts; Article 8.2 Ley 16/1985, 25 June Patrimonio Histórico Español; Article 109 Ley 22/1988, 28 June, Costas; Article 304, Ley del Suelo, RDL 1/1992, 26 June. See also *acción pública vecinal,* Ley Reguladora de las Bases de Régimen Local.

66 For example, on grounds such as that the project's site was assigned another purpose in urban plans, since the Land-Use Act (*Ley del Suelo*) allows for popular action, at which point, possible problems could arise concerning such issues as being time-barred....

As for large combustion plants, the hope that popular action is available in cases of air pollution appears mistaken: Although some argue that the Atmospheric protection rules (RD 833/1975, Article 16) pave the way for an *acción popular*, this is, in Martín Mateo's opinion, deceptive: in reality the citizens role is reduced to denouncing violations or petitioning the Administration for action; p.201; see also Gimeno Sendra and Garberí Llobregat, pp.190, 194.

67 ROSA MORENO, 1993, p.308; Gimeno Sendra and Garberí Llobregat, pp.193-94; Baño León, 1996, p.615-16; Jordano Fraga, p.465; Real Ferrer, 1994, p. 325-36.

68 Krämer, JEL 1996, pp.13-14.

69 For instance, Sendra and Llobregat point out that, although included in Chapter III title 1 of the Constitution, Article 45 states that "all" (*todos*) have a right and duty (*derechodeber*), not only individuals with a personal juridico-material relation to a specific Administrative act; Gimeno Sendra and Garberí Llobregat, p.193-94. (Importantly for the European dimension, unlike other rights in Chapter 1 of the Constitution, Article 45 does not refer to Spaniards only -- presumably then this includes non-citizens).

Regarding EIA and challenged projects, GARCIA URETA (1994, p.315) points out that, where more possibilities exist to analyse the project in previous stages, the less the likelihood that the authorisation will be taken before the courts. See also Real Ferrer, pp.326-27, note 29.

70 MARTÍN MATEO, I-1991, p.186; Gimeno Sendra and Garberí Llobregat, p.193-94.

been applied, both by academics and the courts[71]. A general Environment Act ("*la deseada*"[72]) dealing with such issues remains "often announced, often deferred."[73]

The Spanish situation illustrates the disarray of traditional legal systems before new non-individualised rights and their consequent failure to adequately protect related interests. In this case, the problem is not only one of legal adaptation; it appears also to contain an element of political choice.

> This leads one to think that the reasons for said negation are of a political order, and founded on irrational fears. It should be recalled that injustice (in this case, not to accept the existence of the right to enjoy an adequate environment) is always more de-stabilising than the hypothetical outsized economic cost of living in compliance with the norms.[74]

Besides difficulties of access to justice, judicial disputes encounter various other obstacles, the most intractable of these is probably the overall slowness of judicial machinery.

3.2. Interim Relief:

Interim measures are obtained only with difficulty. A case before the administrative jurisdiction does not halt the effects of the contested act unless the court specifically so decides[75]. Petitions for interim measures have been inadequately treated: common -- even general -- practice has been to reject applications by using printed forms concerning general points of doctrine in which only the dates of the application must be filled[76]. When not

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71 Using an *effet utile* type argument, the TS has authorised a wide interpretation of the concept of legal title in order that the judicial control and the prohibitions on the incapacity to defend (*indefensión*) stipulated in Constitution Article 24.1 be given effect; STS 24 June 1989.

A few cases and a growing body of doctrine gave consideration to participation in the public consultation stage of EIA procedures in order to attribute legal standing in subsequent litigation. The legislator explicitly ruled this out with the LRJPAC, which first, makes abundantly clear that "appearing in the stage of public information does not authorise, of itself, the condition of interest (Article 86.3)," and secondly reiterates the need for developing legislation where diffuse interests are concerned (Article 31.2).

72 "...the desired one"; MORENO TRUJILLO, E., 1991, p.221.

73 Manzana Laguarda, 1991, p.4712. Many Spanish authors comment on its tardiness: see for instance, Díez-Picazo Giménez, p.449; Jordano Fraga, p.472, Rodríguez Ramos, p.83.

74 Jordano Fraga, p.472.

75 LRJPAC (1992), Article 111.1: "The commencement of any action, except in those cases where a provision establishes the contrary, shall not suspend the execution of the challenged act"; STC 22/1984, 17 February.

76 GARCIA DE ENTERRIA, *La Batalla...*, pp.162-63, 176.

actually using printed forms, the decisions have often been reasoned with only vague standard formula[77].

Wide criteria, restrictive approach: The conditions for obtaining interim relief, in this case, suspension, have been provided in the Law on administrative disputes (LJCA): "A suspension shall be accorded when the execution (of the act) would cause harm or damage that is impossible or difficult to repair,"[78] recalling the Community's criteria for proving urgency. As a guideline this is obviously vague and wide. In applying it, courts[79] have tended to weigh the interest of the applicant against the public interest proclaimed by the Administration, an extremely subjective exercise, given that the Administration claims to act always in the public interest[80].

Following from this, in practice a restrictive approach to granting suspensions has been adopted[81]. Especially where an installation such as a large combustion plant is concerned, it would be illusory to hope for effective control of environmental damage by obtaining interim relief, given the relative weight of the public interests involved[82] (keeping in mind that energy production tends to be a more immediate, easily defined interest than concern for the environment).

New criteria?: Off-handed practices (printed forms rejecting applications) have now been denounced by a 1990 judgment of the TS, in many respects a leading case[83]. The High Authority insists that a specific and reasoned reply is essential; without this the decision is arbitrary and prohibited by Article 9.3 of the Constitution. The judgment also clearly espouses what is

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77 García de Enterría notes that this is perhaps born of the vagueness of Article 122 LJCA; *ibid.*, p. 163.

78 Article 122.2 LJCA: "The suspension shall be issued when the execution would cause harm or prejudice that is impossible or difficult to repair."

79 Basing themselves upon the Exposición de Motivos of the LJCA and Article 7 of Ley 62/1978, 26 December, on Jurisdictional Protection of Fundamental Rights; commentary, GARCIA DE ENTERRIA, *La Batalla...*, pp.163,175.

80 *Ibid.*, pp.163-65.

81 GARCIA URETA, 1994, p.319.

82 Baño León, 1996, pp.627-28.

83 Auto de la Sala 3.a del TS de 20 December 1990 (Sección 5.a, ponente F. González Navarro) "the need to resort to judicial action in order to be recognised as being right should not be a source of harm for the party who is right."

arguably a general principle of law[84]: *periculum in mora* or as AG Tesauro has phrased it "the need to have recourse to legal proceedings to enforce a right should not occasion damage to the party in the right."[85] Such criteria may be better adapted to environmental situations. Rather than basing the decision on a balance of the public's against the applicant's interests, or the possibility of harm that is impossible to repair, the TS states that the criterion should be that of *fumus boni iuris*, the appearance of good law and the risk that judicial control of the issue might be frustrated by the time the decision is handed down[86]. It insists on the *appearance*: "[t]his appearance, even being only that, is enough in an interim procedure to authorise the provisional protection requested."[87]

A right to interim measures, based on Article 24 Constitution, is clearly established:

> ...but this Supreme Court must add that the narrow limits of Article 122 of the Law regulating this jurisdiction must today be understood as widened by the express recognition of a *right to effective judicial control* in the Constitution (article 24), a right which *implies*, among other things, the *right to an interim control*...(emphasis in original)[88].

Alluding to Community Law, the TS widens the possibilities of interim relief available from suspension of the administrative act to "whatever measure is necessary to ensure the effectiveness"[89] of the judgment, including positive measures. Soon after this judgment, the

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84 Accepted, for instance, by Italian and German jurisdictions.
This line of reasoning was previously discernable in SSTS 27 February 1990 (628/1988 Aranzadi 1523); 20 March 1990 (2580/1986 Aranzadi 2243); GARCIA DE ENTERRIA, *La Batalla...*, pp.167-74.

85 Case C-213/89 *R v Secretary for Transport, ex parte Factortame* 1990 ECR I-2433, p. I-2456, point 18.

86 See GARCIA DE ENTERRIA, *La Batalla...*, pp.172-180; Chinchilla Marín, pp.173-177.

87 Auto de la Sala 3.a del TS 20 December 1990 (Sección 5.a, ponente F. González Navarro); see also STS 17 January 1991: "the appearance of good law must be the determining basis in the ensemble of elements of interim measures".

88 STS 20 December 1990: "However this Supreme Court must add that the narrow limits of Article 122 of the Law regulating this jurisdiction must be today considered to be widened by the express recognition of the right to an effective judicial control in the Constitution itself (article 24) which implied, among other things, the *right to a preventive control.*"

89 STS 20 December 1990: "Our national law -- and on the occasion of its inevitable insertion in the Community system -- harbours in its breast this right to preventive control, that the latter inserts in the former. This, seen from the other side, signifies the duty that both the Adminsitration and the Courts have to accord those preventive measures necessary to ensure the full effectiveness of the final act (administrative resolution or, as it happens, judicial)."

Superior Court of Justice[90] of the País Vasco made the first known application of positive interim measures. It imposed a certain conduct[91], in a move judged to have "blown into the air...old dogmas"[92], including the presumption of validity of administrative acts.

However, where the courts have tried to widen criteria for interim relief, the legislator acts to restrict this trend: subsequently, the LRJPAC further elaborated criteria for suspension of an administrative decision[93]. Article 111[94] re-emphasises a balance of interests -- the public's and possible third parties against the applicant's -- and the possibility of harm that is difficult or impossible to repair as the criteria on which to base the decision. LRJPAC, Article 136[95] does allow for consideration of the possibility that judicial control would be made fruitless by the duration of the case -- where this is foreseen in the norms regulating sanctions.

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90 See appendix.

91 The inscription of the claimant company in a register of Societies of Regulatory Inspection and Control, an inscription which the Administration had previously refused.

92 Auto de la Sala de lo Contencioso-Administrativo del Tribunal Superior de Justicia del País Vasco, 21 March 1991. García de Enterría points out that "the automatic presumption of validity from which administrative acts benefitted, even those purely presumed by silence, without the possibility for judges to ask explanations on the significance of these acts in a case, however enigmatic or arbitrary they seemed, the limitation of the action to the judgment on a matter already concluded and not on a living behaviour, that continues and is still relevant once the proceedings have commenced; all of these old dogmas have been blown into the air...because of a rigorous and strict application of the norm specifically applicable in the situation, Article 24 of the Constitution"; GARCIA DE ENTERRIA, *La Batalla...*, pp.213-17.

93 Apparently applicable also to applications during the administrative appeal, prior to the judicial phase; LRJPAC, Article 111.1 refers to "*cualquier recurso*", any recourse. See also Sánchez Morón, 1993, p. 334.

94 LRJPAC, Article 111.2. "Notwithstanding that disposed in the previous paragraph, the organ competent to resolve the recourse, after consideration, sufficiently reasoned, of the prejudice that the suspension would cause to the public interest or to third parties and the harm cause to the applicant as a consequences of the immediate effect of the challenged act, can suspend of its own initiative or at the request of an applicant, the execution of the challenged act, when certain of the following circumstances are present: a) that the execution could cause harm impossible or difficult to repair, b) that the challenge is founded on any of the causes of full nullity foreseen in Article 62.1 of this Law."

The causes of full nullity (*nulidad pleno*) foreseen in Article 62.1 LRJPAC, includes violation of rights and liberties protected by the Constitution, those dictated by an incompetent organ, *excès de pouvoir*, of impossible content, that constitute a penal infraction or are a consequence of one, or dispensing with established legal procedure (for example, authorisation given without a Declaration of impact)

95 LRJPAC, Article 136: "Measures of a provisional character: When this is foreseen in the norms that regulate the sanctioning procedures, measures of a provisional nature can be issued after a reasoned agreement in order to ensure the effectiveness of the final resolution that could be issued."

An area of uncertainty is created -- will this factor be systematically considered, as implied by the judgment, or only in cases where rules specifically mention this, as provided in the LRJPAC? While the rule does not target environmental interests, the use that can be made of it in environmental situations can be extremely problematic[96].

More positively, the LRJPAC maintains that rejection of an application for suspension must be sufficiently reasoned. Also, an "immensely important"[97] inclusion is made that could help prod the authorities to act, at least regarding interim measures: if, thirty days after the request for suspension has been delivered to the competent body, the latter has not dictated an express resolution, the challenged act is to be understood to be suspended, without need for requesting further certification[98].

Nonetheless, in practice, obtaining interim relief remains 'a battle'[99], in which judges have proven to be more useful allies than the legislator[100]. It remains that, in given instances, where European environmental rules require the protection of such measures their purpose may not be attained.

3.3. Need for an Administrative act:

This procedural issue has unfortunate consequences where environmental interests are at stake, making it difficult to combat the Administration's passivity in matters of, for instance, monitoring imposed conditions (such as required by LCP88/609[101] and in the national transposition of EIA85/337). An action before administrative courts must commence with a

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96 Another restrictive inclusion is that an "injunction of the injunction" is available: LRJPAC, Article 111.3: "When drawing up the suspension those precautionary measures that may be necessary to ensure the protection of the public interest and the effectiveness of the challenged resolution can be adopted". Similarly, see Article 138.3 LRJPAC. For critical commentary, see Chinchilla Marín, p.181.

97 Sánchez Morón, 1993, p. 335; Chinchilla Marín, p.182.

98 LRJPAC, Article 111.4.

99 Cf: GARCIA DE ENTERRIA, E., *La batalla por las medidas cautelares: Derecho Comunitario europeo y proceso contencioso-administrativo español*, Civitas, Madrid, 1992.

100 Chinchilla Marín, p.182.

101 LCP88/609, Article 31(1).

specific administrative act[102]; the Administration's omissions are therefore inadequate to commence an administrative court action, unless some sort of act is adopted[103]. As Martín Mateo notes, "recourse to procedural devices of presumption of acts by way of interpreting silence provide, without doubt, some relief but are not a satisfactory solution for situations that require energetic and rapid responses..."[104]. If no notification is received from the Administration within three months[105] of the petition being lodged, it is esteemed to have received a negative answer and recourse can be had to the courts[106].

3.4. Duration of judicial action:

Article 24.2 of the Constitution requires that justice be available "without undue delay"[107]. Yet typically the length of time necessary to obtain a judicial settlement in Spain is so long that, as one source says, it "no longer has anything to do with efficient control". This extremely serious difficulty[108] can render the recourse to administrative judges meaningless. In fact, the European Court of Human Rights has condemned Spain regarding the excessive length of judicial action, because Spain's Constitutional Court found no violation of the Article 24

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102 Similar problems have hindered enforcement actions at Community level, see Case T-461/93 *An Taisce*, Chapter 3, footnote 124.

103 A third party can request the Administration to revise the conditions of authorisation and to introduce stricter requirements (SSTS 17 December 1956; 22 November 1963; 9 December 1964). This may not motivate the Administration to act, and adds nothing to the quest for legal standing; however, should the Administration fail to act, this administrative 'refusal' will constitute the dismissal of a petition, providing an administrative act which can then be challenged.

104 MARTÍN MATEO, I-1991, pp.197-98; see also ROSA MORENO, 1993, p.296.

105 With in addition, twenty working days for "certification", which is "incomprehensibly required even in the case of negative silence"; García de Enterría, "Un Punto de vista...", p.208.

106 LRJPAC, Article 119.3: "After a period of three months from the commencement of the extraordinary recourse of revision without there being adopted a resolution, shall be understood as dismissed, and expedited the passage to the administrative dispute jurisdiction".

The LRJPAC has shortened the waiting period: before the LRJPAC, the Administration had three months in which to respond to a petition. After this time expired the period for a denunciation of the delay (*denuncia de mora*) began to run; only after *another* three months did the Administration's silence have procedural meaning; Article 94 Ley de Procedimiento Administrativo. See Navarro Mendizábal, p.481, citing Sosa Wagner; MARTÍN MATEO, I-1991, p.200 note 216.

107 Constitution, Article 24.2: "Thus, all have the right to ... a public process without unnecessary delay...".

108 Baño León, 1996, p.627; see also Gimeno Sendra and Garberí Llobregat, p.190.

requirement in a case that took five years and two months to resolve[109]. (This is of course, more frustrating since interim measures are difficult to obtain.)

First, before a matter can be brought before a court (not to mention the slowing effect of the courts' caseload once it gets there) enforcement actions are hindered by delays. The requirement to appeal first within the administration is, by contrast with France and most other Member States, not optional[110]. This has been very harshly criticised[111] for impeding access to courts for four months, at which time the administrative act has possibly exhausted its effects, and practically making a request for interim measures pointless. Arguably, where the application of Community law is adversely affected, such a rule must be set aside, as per *Simmenthal*[112] and *Factortame*[113]. Furthermore, the period before action was time-barred was extremely short (fifteen days) and failure to apply within this time also ruled out subsequent recourse before an administrative judge, since this was a required first step[114]; to challenge an administrative act required hawk-like vigilance. The LRJPAC has somewhat modified the requirement of prior administrative appeal (it is no longer obligatory in all cases, the time-bar for appeal has been

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109 Unión Alimentaria Sanders, S.A., 7 July 1989. The ECHR, Article 6, refers to a reasonable time period for judicial action.

110 The Ley de Procedimiento Administrativo of 1958 required this systematically. See comments Manzana Laguarda, 1991, p.4702; Sánchez Morón, M., "Recursos Administrativos," in *La Nueva Ley de Régimen Jurídico de las Administraciones públicas y del Procedimiento Administrativo Común*, editors Leguina Villa, J., and Sánchez Morón, M., Editorial Tecnos, Madrid 1993, pp.322, 336.

111 Notably by respected jurist García de Enterría, who points out that, particularly in light of Articles 24 and 106.1 of the Constitution, the Administration is thus given an illegitimate advantage; García de Enterría, "Un Punto de vista...", pp. 209-10.

LRJPAC Articles 107 and 109 make exceptions for certain acts, for example against which no hierarchical superior exists (Article 109 c). Ministries, such as the Secretary of State. See Sánchez Morón, 1993, p.340.

112 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* 1978 ECR 629, para. 24 "...a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."

113 Case C-213/89 *R v Secretary for Transport, ex parte Factortame* 1990 ECR I-2433 at para.23; the obligation to set aside obstacles to the exercise of Community rights applies to other areas as well, and arguably its potential in certain circumstances remains untested. For instance, with regard to time limits, see Case C-208/90 *Emmott* 1991 3 CMLR 894, para. 24.

114 Sánchez Morón, 1993, pp. 321-22.

lengthened to one month[115]), yet where required, it continues to constitute an unfortunate loss of time[116].

Secondly, while delay might be due to neutral issues surrounding an excessive case-load and the requirement of prior administrative appeal, it is apparently not uncommon for the Administration to use the well-known problem of extremely slow justice to its advantage in order to come to some arrangement with the complainant:

> ...which throws upon those administrated the tremendous burden of judicial challenge, the end of which is delayed for four, or seven, or ten years. This abuse is each time more frequent, it must be said and we all know it. With a certain habit, the Administration says to the affected [complainant] that it is possible that they are right, and even that they are right (which is an expression of cynicism, if not of that virtually unapplied offence that prevarication constitutes), but that it will be many years before the courts recognise it, which is why [the complainant] would do better to come to some agreement with the Administration...[117]

Applicants must be truly fearless, under such circumstance, to take on the Administration. García de Enterría makes the essential point that, more and more frequently, would-be applicants dismiss the idea of judicial challenge as futile because of the duration of the case, and this social cost is never accounted for in evaluating the judicial system. A problem which may have arisen because of neutral factors, is used in a manner detrimental to environmental interests. In such a situation, the Commission's reliance upon individuals to have recourse to national judges to uphold Community law is unrealistic in practice.

By contrast with the length of time a matter takes once before a court, a short time-bar is provided for judicial recourse (one month)[118].

3.5. Administrative Responsibility:

Article 139 LRJPAC[119] outlines the principles of responsibility, stipulating that individuals have the right to be compensated by the public authorities for any harm done to a

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115 LRJPAC, Article 114.2.
116 LRJPAC, Article 117, gives the Administration three months to resolve the issue.
117 GARCIA DE ENTERRIA, *La Batalla...*, p.166.
118 Manzana Laguarda, 1991, p.4702.
119 LRJPAC Article 139: "Principles of responsability. 1. individuals shall have the right to be compensated by the corresponding public administration for all harm they suffer in any of

goods or rights, if the damage was due to the normal or abnormal functioning of public services[120]. Where the administration is found responsible, liability is strict[121]. Where various administrative actors are responsible, responsibility is joint-and-several[122]. Concerning administrative responsibility[123], harm must be individualised and 'economically calculable', the type of procedural requirement that is always a stumbling block in environmental protection[124].

An ambiguous situation arises where, by act or omission, the Administration has contributed to environmental harm. As seen, administrative authorisation does not shield from responsibility. However, it is logical to assume the Administration is also at fault where harm occurs as a result of an authorised activity[125]. Ruis Balle makes a valid point that, on the one hand:

> ...if it is essential that the prejudiced third party have the right to be compensated in all cases of harm to his property, on the other hand, it does not seem just that the polluting agent assume, without more, the totality of the responsibility derived from the harm when he could have acted in good faith, in strict compliance with the law and regulations applicable to the industrial activity and having all the required administrative authorisations[126].

Arguments for sharing responsibility between Administration and polluter are all the more logical because, where the operator was authorised, often pollution could have been avoided had the Administration monitored the functioning of the installation and revised administrative conditions accordingly.

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their goods and rights, except in those cases of *force majeur*, provided that the harm is the consequence of the functioning, normal or abnormal, of the public services."

120 The public authoritiy determines the amount, which can be judicially reviewed; cf Article 130.2 LRJPAC.

121 Article 40 Ley de Régimen Jurídico de la Adminsitración del Estado; Article 45 de la Ley de Régimen Local.

122 LRJPAC Article 140.

123 LRJPAC Article 139.2: "In any case, the alleged harm must be actual, economically calculable, and individualised with relation to a person or group of persons."

124 Furthermore, in EIA-related cases, theoretically both the environmental and the substantive authorities participate in the calculation of damages (GARCIA URETA, 1994, p.260, 264) with all the problems of lack of real autonomy and conflict of interest that this implies.

125 And where the harmful activity is covered by EIA legislation, under national EIA rules, the Administration has a *duty* of vigilance.

126 Ruis Balle, p.488; also Beltrán Aguirre, pp.297-98.

Indeed, it seems untenable that the Administration should 'benefit' from its failure to carry out its legal duty of vigilance by not having to participate in compensation. Furthermore, one of the most intractable failures of environmental protection would be addressed if the Administration were simply to carry out its duty of vigilance. Shared responsibility would be a valuable incentive for the Administration to do so[127].

On the other hand, the Commission has indicated that, where the activity was authorised, it favoured holding the Administration (and ultimately the taxpayer) responsible[128]. It is argued here that exonerating the polluter completely might encourage a certain measure of carelessness on his part once authorisations had been complied with[129].

3.6. Summary:

Incremental improvements[130] have been made and an apparent willingness exists on the part of administrative judges, once a matter is before them, to interpret in order to give meaning to the rules (for example, in matters of interim relief[131], standing[132]). Nonetheless, the problems of standing and, above all, the intimidating effect of delays in obtaining justice, and the Administration's willingness to use this to its advantage mean simply that, frequently a proceeding is abandoned before a judge examines the merits. Administrative judicial control is often an inadequate means to uphold environmental rules.

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127 Indeed, a recent ruling by the Tribunal Supremo seems to open the way for co-responsibility of the Administration, at least where express fault of the Administration is an issue; see Practical Illustration, below.

128 Com(93)47, point 2.1.5. ii, p.9.

129 See Chapter 6, point 3.5. at *Administrative authorisation.*

130 E.g., shortening the period of delay before the administration's inaction can be brought before the courts.

131 Above, point 3.2. at *New criteria?:* and e.g. the Superior Court of Justice of the País Vasco footnote 92, above.

132 STS 25 April 1989, footnote 44, above.

4. Civil Procedures:

One methodological difficulty that colours the outcome of research is that environmental disputes are relatively rare[133].

4.1. Diffuse interests:

Despite the protection of legitimate interests[134] and the interpretative efforts of the courts to keep up with the rhythm of society[135], the legislative void concerning representation of collective interests has not been covered by jurisprudential constructions[136]. In the Spanish civil context, even more so than administrative, this protection is inadequate[137]. As in France, collective environmental harm can be protected only insofar as it happens to coincide with individual interests; no civil case-law exists concerning defence of collective interests independently of property or person[138]. The defence of "diffuse" interests would require that traditional criteria for standing be abandoned; neither the Código Civil nor the Law on Civil Procedure[139] have done so[140]. Again, it is hoped that the awaited general law on the environment will develop the representation of collective interests[141], perhaps for certain accredited groups.

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133 MORENO TRUJILLO, E., 1991, p.218; Cabanillas Sánchez, 1990, p.98.

134 Article 24, Constitution; Article 7.3 LOPJ: "The courts shall protect rights and legitimate interests, individual as well as collective, so that in no case inability to defend these arises. For the defense of the latter, the legitimation of corporations, associations and groups that are affected or are legally entitled to for their defense and promotion shall be recognised."

135 Blasco Esteve, 1996, p.642; MORENO TRUJILLO, E., 1991, p. 199,201; MARTÍN MATEO, I-1991, p.193.

136 MARTÍN MATEO, I-1991, p.190; Díez-Picazo Giménez, pp.449-51.

137 Cabanillas Sánchez, 1990, p.98; Gil-Robles, pp.168-69; MARTÍN MATEO, I-1991, p.177-78; MORENO TRUJILLO, E., 1991, p.202-203; Also recognised by the Jueces, Fiscales y Abogados del Estado, who proposed that the inadequacy lead to interpretations less "entorpecedoras" of access to Courts, in the Conclusiones de las Jornadas Sobre Medio Ambiente, Poder Judicial no.4 special; cited by MORENO TRUJILLO, E., 1991, p.292; this hope remains unfulfilled at present.

138 Cabanillas Sánchez, 1990, p.98.

139 Ley de Enjuiciamiento Civil.

140 MORENO TRUJILLO, E., 1991, p.285.

141 In Spain, a good deal of commentary exists regarding the possibility of developing some form of 'popular action'. It is noted that, in other national contexts (E.g. the United States) the possibility to bring a class action has been raised, in which a representative acts on behalf of a collectivity, the members of which have been affected by an identical harm and where the causal link is the also same. In the Spanish context it often argued that this type of action could be adapted to protect diffuse environmental interests. Nonetheless in Spain, class action -- or

Were EC legislation to require that Member States provide access to justice for "common interest groups or associations which have as their object the protection of nature and the environment"[142], it might force Spain to accept a wider legitimation of collective interests in specific sectors. Nonetheless, at present, in this context, the focus has not strayed from the individual[143] and the issues and cases examined here reflect this.

4.2. Interim Measures:

Certain civil remedies can be preventive and obtaining interim relief becomes relevant. Opting for a *periculum in mora* criterion, Article 1428 of the Law on Civil Procedure authorises the adoption of "whatever measures are necessary to ascertain the effectiveness of the ruling"[144]. Unfortunately in civil jurisdictions the problem of cost makes interim measures unlikely to be obtained[145]: a down-payment is required in order to obtain interim measures (a cross undertaking in damages), amounting to some percentage of the value of the harm that the interim measure could cause to the defendant[146]. Without openly discriminating, the rule nevertheless has unfortunate consequences where poorly funded associations apply for interim relief: the larger the industrial or commercial project or interest, the less likely that the environmental applicant in any given case will be able to afford these.

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some form of 'popular action' -- though widely called for, is not yet widely available; Cabanillas Sánchez, 1990, p.98; Blasco Esteve, 1996, p.645-46; MARTÍN MATEO, I-1991, pp.178-79; MORENO TRUJILLO, E., 1991, pp.286-93, p.289 note 119.

142 Amended proposal for a Council Directive on civil liability for damage caused by waste, OJ 1991 C192/6.

143 MARTÍN MATEO, I-1991, pp.177-78; MORENO TRUJILLO, E., 1991, pp.282-93; Díez-Picazo Giménez, pp.449-50; Jordano Fraga, p.468; ROSA MORENO, 1993, p.305.

144 *"...que fuesen necesarias para asegurar la efectividad de la Sentencia que en el juicio recayere"*; see GARCIA DE ENTERRIA, *La Batalla...*, p.173-75. Although, apparently in practice judges tend more to balance interests; Sendra and Llobregat, p. 197.

145 Sendra y Llobregat, p.197.

146 Recommendations have been put forth to exclude such a payment for certain applicants, including environmental organisations.

4.3. Insufficient time prescription:

The time-bar in civil actions is extremely short: one year 'from when the aggrieved discovered the harm'[147]. Comparison with France (civil prescription is ten years[148]) would seem to provide a justification for Community harmonisation in this area. When civil responsibility emanates from an environmental offence condemned in a criminal court, the time bar is fifteen years[149]; however, the one year time-bar applies when the criminal case had not ended in a condemnation[150].

In an effort to counteract the inadequate time-prescription, and with the support of academic opinion, the courts have on occasion considered that time runs from the point at which harm is fully verified[151]. A period of fifteen years has been suggested, since harm may manifest itself after many years[152].

4.4. Harm:

To be recoverable, damage must meet certain criteria, which themselves present obstacles regarding environmental situations. As in France, harm must be individualised; once again, many environmental cases cannot proceed beyond this point. It must also be certain[153]; problems surrounding scientific certainty are well-known. Continuous damage can be compensated[154]. No

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147 "*...desde que lo supo (el daño) el agraviado*"; Civil Code: article 1968.2.
However, when inmissions cause cause harm to human health the action is imprescriptible, since health is one of the imprescriptible goods or rights of personality; Article 1902 Civil Code; STS 16 January 1989; Cabanillas Sánchez, 1990, p.88.

148 Chapter 6, point 3.

149 Civil Code Article 1964.

150 Jordano Fraga, pp.467-68.

151 Cabanillas Sánchez, 1990, p.100; for instance, Sentencia Audiencia Territorial de Oviedo, 31 March 1987.

152 Jordano Fraga, p.472; see also Blasco Esteve, 1996, p.647.

153 Although this can include harm that is certain to occur in future; STS 16 January 1989: the Court ordered the owner of steel works and a lime oven to pay compensation for the damage that would be caused until the imposed corrective measures were verified.
Usually damage to mere expectations not recoverable in Spain; Blasco Esteve, 1996, pp.638-39.

154 STS 5 April 1989.

reparation is available for pollution which is 'tolerable', implying no abuse or antisocial use of a right[155], a subjective criterion indeed.

4.5. Proof/Causation:

As always in environmental matters, causation is an issue that is technically complicated to prove, given that damage can appear years after the causing event, can accumulate over years, can have multiple authors[156].... The Civil Code spells out clearly that the victim must provide proof of the causal link, and the defendant shall bring forth those circumstances that might break the link[157]. While inverting the burden of proof might advance environmental claims, this would clash with the presumption of innocence in the Spanish Constitution[158].

Moreno Trujillo argues that in almost all cases, the economic and financial inequality between the polluter and the victim is flagrant, and the situation would be more equitable if the causal link were proven by a Council of certification of damage[159], as in Japan. Although the point is certainly valid, it would require considerable political determination to create and train such a body, and is perhaps not realistic at present.

However, the TS has shown itself to be lenient in considering the particularities of environmental situations. Three elements can break the causal chain: *caso fortuito* and *force majeure;* an act of a third party[160]; the guilt of the victim. These elements have been interpreted restrictively[161]. Furthermore, it once appeared that the TS was immovable in

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155 Article 7.2 Civil Code refers to abuse or antisocial use of a right; regarding that which is tolerable see CABANILLAS SANCHEZ, A., *La Reparación de los Daños al Medio Ambiente*, Aranzadi editorial, Pamplona, 1996, pp.59,63, 79-80.

156 Which may of itself place strain on the causal link: STS 19 June 1980, a much criticised ruling, which exonerated one defendant simply because it was deemed that others also contributed to the harm; see CABANILLAS SANCHEZ, 1996, p.84-86.

157 Article 1214 Código Civil.

158 Article 24.2, footnote 107, above.

159 MORENO TRUJILLO, E., 1991, p.251, taking up the ideas of DESPAX, M., *Droit de l'environnement*, Litec, Paris, 1980, who in turn bases the suggestion on Japanese experience.

160 Logically this provokes concurrent causes, and the burden of proof falls upon the defendant, who is arguing a third party's responsibility; Blasco Esteve, 1996, p.636.

161 For instance, with regard to *force majeure*: STS 14 February 1944; a power station argued natural forces caused harm; the Court ruled that the power station, by extracting sands, had weakened the natural defenses of the site.

requiring a high standard of proof, i.e., "full certainty" (*plena certeza*)[162]; rulings were often overturned on appeal, because the causal link was found to have not been proven with full certainty[163]. However, it has relaxed the full certainty requirement[164], and seems now to espouse a theory of adequate cause (*causalidad adecuada*)[165]:

> the cause is that which, even with the concurrence of others, is the adequate and determining cause of the harmful event, in relation to the circumstances of the case and common sense[166].

More strikingly, in keeping with the tendency to objectivise responsibility, it has found that the fact of an accident was sufficient to justify the conclusion that, highly probably, the defendant was negligent and this negligence caused the accident (*res ipsa loquitur*)[167]. A similar result as responsibility without fault has been produced. As Cabanillas Sánchez says, the TS takes a "realistic" stance[168]; such recognition of the specific nature of environmental problems is helpful in giving meaning to attempts to make the polluter pay for environmental harm.

4.6. Responsibility:

A variety of issues arise regarding responsibility, whether this should be fault-based or strict; whether, if proven, it should be joint or joint-and-several; what the Administration's part in responsibility should be.

However, guilt of the victim has led to a reduction in compensation; for instance, STS 17 March 1981: the Tribunal Supremo held that although the dust from the nearby industry was the cause, the compensation was reduced because the care taken by the farmer was below average in matters of pruning trees and controlling insects.

162 Considered "indispensable": SSTS 28 June 1979; 29 June 1980.

163 CABANILLAS SANCHEZ, 1996, p.84.

However, the TS has also held that determining the causal link is a matter exclusively for the sentencing court's appreciation. STS 13 June 1988: "Once the muddying of the waters and dumping of concrete or pollution is shown, the judge does not presume but rather affirms that this is the cause of the trouts' deaths"; see Cabanillas Sánchez, 1990, p.95; MORENO TRUJILLO, E., 1991, p.250.

164 SSTS 30 December 1981; 14 July 1982.

165 MORENO TRUJILLO, E., 1991, pp.246-47; Blasco Esteve, 1996, pp.636-37; CABANILLAS SANCHEZ, 1996, pp.85-86.

166 STS 14 July 1982; also STS 19 Dec 1992.

167 STS 31 January 1986; Blasco Esteve, 1996, p.634; Cabanillas Sánchez, 1990, p.92.

168 CABANILLAS SANCHEZ, 1996, p.88.

Towards strict liability: Responsibility is essentially for *culpa*[169], as indicated in Article 1902 of the Civil Code: "He who by action or omission causes harm to another, where fault or negligence intervene, is obliged to repair the harm caused."[170] The requirement of unlawfulness (*antijuridicidad*) is essential for the existence of civil responsibility[171], which poses problems notably of proving fault or negligence (although at times strict liability is stipulated in legislation[172]). Despite this, responsibility is steadily evolving towards a more objective concept[173].

Although the Civil Code remains based on the idea of fault, courts have "resorted to multiple shadings and subterfuge in their understandable eagerness to protect those who suffer harm from a distant source"[174] so that remedy can be required for even lawful behaviour causing harm. In keeping with the movement of social opinion and trends at Community-level[175], both doctrine and jurisprudence increasingly tend to make the polluter pay for the damage he causes. Unlawfulness is seen not only in illicit actions, but also in legal behaviours

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169 Blasco Esteve, 1996, p.634-45; MORENO TRUJILLO, E., 1991, pp.200-201.

170 Original language version in appendix.

171 Cabanilla Sánchez, p.93; MORENO TRUJILLO, E., 1991, pp.203, 227.

172 E.g. in the nuclear domain (Ley de Responsabilidad civil en materia de energía nuclear, 29 April 1964) and in keeping with the Community rules, concerning toxic waste (Ley de Residuos Tóxicos y Peligrosos, 1 May 1986); Ley de Caza, Article 33.5

173 Such as that expressed in Article 1908.2 of the Civil Code: "Owners shall answer for damage caused by... excessive fumes that are harmful to persons or property (however, Civil Code Article 1908.1 and .4 do make reference to 'due diligence' and 'adequate precautions'). See MORENO TRUJILLO, E., 1991, pp.226-45; MARTÍN MATEO, I-1991, p.166-69; Cabanillas Sánchez, p.90-92; Blasco Esteve, 1996, pp.634-36.

174 MARTÍN MATEO, I-1991, p.169.

The reference to a distant source contrasts with responsibility towards one's neighbours, as in Civil Code Article 590, which prohibits construction near a neighbour's or intervening wall of such things as sewers, ovens, vapour-powered machines, factories that are dangerous or noxious, without keeping within regulated distances. Faulting regulatory provisions, necessary precautions, after expert opinion, must be taken "in order to avert *all harm* to the neighbouring estates or buildings (*a fin de evitar* todo daño *a las heredades o edificios vecinos*) (emphasis added). Articles 590 and 1908.2 facilitate strict liability in, for instance, industrial neighbourhoods; MARTÍN MATEO, I-1991, p.171; CABANILLAS SANCHEZ, 1996, p.73. Pointedly Moreno Trujillo comments that pollution is not a neighbourhood phenomenon; MORENO TRUJILLO, E., 1991, p.204.

175 Com(93))47, Green Paper on Remedying Environmental Damage, pp.17-19; also strict liability is proposed in the directive on civil liability for damage caused by waste (OJ 1991 C192/6) and in the Directive on the Landfill of Waste, Article 14 (OJ 1991 C190/1). See also MORENO TRUJILLO, E., 1991, pp.238-245, who notes that *culpa* is more appropriately required in criminal offences; CABANILLAS SANCHEZ, 1996, pp.69-79.

carried out without due diligence[176]. Even if diligence has been exercised and harm occurs, the assumption is that the diligence was insufficient: "mechanical compliance with the regulations" is insufficient when "reality demonstrates that the adopted methods yielded no result"[177]. The general principle *alterum non laedere* has been violated. Diligence must measure up to the specific circumstances[178]. The TS has repeatedly ruled that:

> "unlawfulness...is not eliminated with the supposition that an action is in conformity with the norms but rather is included in the default to the general mandate of acting with diligence with respect to nearby goods that are juridically protected... even in the cases where an industry functions according to the precautions noted in the regulations, its exercise must maintain the respect due another's property in such manner as to compensate abnormal harm caused from this lawful exploitation. Thus, rather than on the unlawfulness of act, which is to a point not contrary to law, the obligation to compensate is based on the requirement of commutative justice that he who has defended his interest to the detriment of another's rights, although authorised, must compensate he who had to endure the disturbance or lessening of his right to property[179].

In short, compliance with regulations does not shield from responsibility[180]. Licenses are granted without prejudice to third party rights[181], and abuse or antisocial use of a right[182] must be compensated[183]. Nor does the fact that an economic activity is pursued in favour of a social interest constitute a viable defence: even such activities (referring expressly to a thermoelectric plant, "notwithstanding its interest for the national economy") cannot be allowed to harm or lessen rights of individuals without fair compensation[184]. Here the trend towards objective responsibility is explicit: the TS refers to "compensation dispensing with all

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176 MORENO TRUJILLO, E., 1991, 232-34; CABANILLAS SANCHEZ, 1996, pp.79-83.

177 STS 14 May 1963. See also SSTS 17 May 1981, 16 January 1989.

178 STS 3 December 1987; Audiencia Provincial de Granada, 8 February 1990, and as a rigourous application of Article 1104 Civil Code (extracontractual responsibility) suggests; MORENO TRUJILLO, E., 1991, pp.233-34.

Furthermore, the TS has ruled that the possible responsibility of the designer of industrial installation, or the engineer in charge of materials does not rexclude the direct responsibility of the owner of an installation; SSTS 23 June 1913, 27 October 1993; CABANILLAS SANCHEZ, 1996, pp.94-96.

179 STS 17 May 1981. See MORENO TRUJILLO, E., 1991, p. 233-34; Blasco Esteve, 1996, p.635; Cabanillas Sánchez, 1990, p.93; Ruiz Balle, p.487; see also STS 3 December 1987.

180 SSTS 22 November 1960; 18 January 1961; 14 May 1963; 19 February 1971; 22 December 1972; 12 December 1980; 27 September 1985; 3 December 1987; 19 June 1994.

181 Article 12, Reglamento de Servicios de la Corporaciones Locales, 17 June 1955

182 Article 7.2 Civil Code.

183 STS 16 January 1989; Blasco Esteve, 1996, p.635; Cabanillas Sánchez, 1990, p.90.

184 "...*justo contravalor*"; STS 12 December 1980; Cabanillas Sánchez, 1990, p.91; MORENO TRUJILLO, E., 1991, p.242.

ideas of fault to treat responsibility with an objective note"[185]. Nonetheless, some courts limit objectivisation to easing the burden of proof (above).

Mancomunicad or solidaria: If, as is common, there are multiple causes of damage, and if the causal link is proven, the type of responsibility that should be attached must be decided: joint (*mancomunidad*) or joint-and-several (*solidaria*). The issue has not been definitively settled[186], although for reasons previously discussed, joint-and-several liability is generally preferable from an environmental perspective[187]. Occasionally the legislator has resolved the issue, and both Community and Spanish legislators have tended to opt for joint-and-several[188]. Although case-law can be found espousing both, here also the courts tend to opt for the environmental solution: more recent and numerous examples exist for joint-and-several[189].

4.7. Other Remedies:

Generally three types of remedy are available[190]. Much as in France, the remedy that is least useful to the environment *per se*, compensation, is most relied upon. Prevention of damage and rehabilitation are very much the exception.

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185 STS 12 December 1980.

186 In Spain opinion has been divided as to which, joint or several, is the rule and which the exception. It has been argued that Articles 1137 and 1138 of the Civil Code, which seem to indicate that joint responsibility is the rule, apply only to contractual situations.

187 See Chapter 6, point 3.5. -- *Responsibility: Several or joint-and-several.*

See also MORENO TRUJILLO, E., 1991, p.215, taking up the arguments of de Angel Yagüez; CABANILLAS SANCHEZ, 1996, p.90.

188 The Hunting Act, provides an interesting example. Article 33.5: "If the author of the harm caused to persons is not noted, all the members of the hunting party shall respond jointly and severally". And the Mining Act, Article 81: "Shall be responsible for the harm and prejudices that are caused all holder or possessors of mining rights recognised in this law".

Other examples include: Urban Waste Ley 20/86, 14 May; Reglamento Montes, Decreto 485/1962, Article 15.1,15.2; Nuclear Ley 25/1964 29 April, Article 52.2; Nuclear Risks regulation 2177/1967, 22 July, Article 20; see MORENO TRUJILLO, E., 1991, pp.222-23; Blasco Esteve, 1996, p.647.

189 *Mancomunidad* was favoured in SSTS 23 March 1921; 21 June 1946; 19 February 1959. *Solidaria* was favoured in: SSTS 23 December 1903, 2 March 1915; 25 March 1957; 20 May 1959 (pp.210) as well as in 24 December 1941; 14 February 1964; 20 May 1968; 26 October 1971; 15 October 1976; 8 May 1986. Doctrine on the issue is also divided; MORENO TRUJILLO, E., 1991, pp.210, 216, 220; Blasco Esteve, 1996, pp. 632-33.

190 Obviously, the fact that where harm is not individualised, remedy is unavailable in civil courts remains a sizeable problem.

Compensation: Compensation is supposedly a remedy of 'last resort', used only when reparation *in natura* and removal of the cause of harm are not possible[191]. However, costs and interpretations of 'impossibility' are pivotal and compensation appears to remain the most commonly used remedy. It has the inherent deficiency of being applicable only after damage has occurred and of doing nothing practical to repair it[192]; familiar problems of attaching economic value to the environment also arise.

Cessation of harmful activity, adoption of corrective measures: This is clearly provided in some sectoral legislation[193]. Where the legislation has not so provided, it is harder to construe from the Civil Code[194] but courts have made considerable efforts to arrive at this result. In an early case the TS held that the cessation of the activity was logical, given that it would be paradoxical to order reparation in the form of compensation for a tolerable act; it has since reiterated this reasoning[195]. The competence of civil courts to order corrective measures *post damnum* has been specifically upheld[196]. The TS ruled that "the protection of civil rights...must also be extended, once harm has occurred, to those measures of prevention that reasonably impede further proprietary harm"[197]. Unlike in France, this is not perceived as an

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191 CABANILLAS SANCHEZ, 1996, p.103.

However, a section of doctrine insists that compensation alone is the purpose of civil action; see comments Díez-Picazo Giménez, p.450.

192 Baño León, 1996, p.628; Jordano Fraga, pp.179-208.

193 Ley de Aguas, 29/1985, 2 August, Article 45; Ley del Suelo, Article 236.

194 Blasco Esteve, 1996, p.641-42; however, Article 7.2 Civil Code, prohibiting abuse or antisocial use of a right, can be useful.

195 STS 23 December 1952. In the same vein, see SSTS 5 April 1960; 14 May 1963 (in which the question was raised for controlled activities, where the Administration has duty of vigilance and a possible conflict of competence presents itself: the TS reiterated that it would be paradoxical to order compensation for a tolerable act); STS 12 December 1980.

196 STS 16 January 1989, with reference to "compensation for the harm and, where appropriate, the adoption of measures to avoid and end it, both aspects within the competence of civil jurisdictions."

197 Challenging the measures ordered by a civil court, the defendant argued that only the Directorate of Mines was competent to order such measures; STS 5 April 1960; see also SSTS 3 December 1987; 16 January 1989.

This has occasionally been taken up by lower courts, e.g.: Audiencia Territorial Oviedo: 3 November 1978, specifically from an environmental viewpoint: "...such measures are fully justified to obtain -- within the technological awareness of the time -- a diminution of the environmental degradation and the harmful results that this produced in the property of individuals." See MORENO TRUJILLO, E., 1991, pp.270-75.

invasion of the Administration's attributions, but rather as a logical consequence of a legal claim against an unlawful act[198]. It is not unusual for civil courts to impose measures to prevent damage from reoccurring[199]. Although civil courts cannot revise the granting of a licence, they are required to intervene in those cases where imposed conditions are unfulfilled or inadequate[200].

The difficulty here is that such a remedy can be ordered to prevent *further* damage from occurring, to prevent harm that is foreseeable on the basis of harm already produced. Some damage must have already been sustained before this remedy can be requested. Moreover, as with any risk, the risk of further disturbance must be proven before the judge objectively in terms of probability.

- *Acción negatoria* (the Spanish term is used as no English translation is available): Preventive control becomes more important where an economic remedy is irrelevant[201]. This action, available to a proprietor to shield his property from disturbance, appears to be little used in practice[202]. Originating in Roman Law, *acción negatoria* was played down during the expansion of industry, in favour of liability mechanisms more favourable to owners of industrial resources (such as fault-based responsibility). However, as other interests gain importance, the concept of *acción negatoria* is enjoying a resurgence, at least

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198 STS 14 May 1963.

As Cabanillas Sánchez mentions, it should not be seen as an invasion of the administrative domain also because authorisations are accorded without prejudice to third parties; CABANILLAS SANCHEZ, 1996, p.111.

It has also been established that the civil judge can revise the appraisal of interests made by the Administration; STS 12 December 1980.

199 SSTS 17 March 1981, 23 September 1988; also STS 16 January 1989 (concerning atmospheric pollution), compensation and preventive measures were ordered: "requiring in all cases, the compensation of the harm, and where appropriate the adoption of measures to avoid or end it, both aspects within the competence of the civil order of jurisdiction."

200 STS 20 March 1989; Cabanillas Sánchez, 1990, p.90.

201 Navarro Mendizábal, 1996, p.479; Cabanillas Sánchez, 1990, p.96.

202 MARTÍN MATEO, I-1991, p. 173; Coderch y Santdiumenge, "La acción negatoria: Comentario a la Sentencia del Tribunal Supremo de 3 de dicienbre de 1987," 1988 Poder Judicial, 117, at p. 124 .

in academic opinion[203], and presents definite advantages where environmental interests are at issue.

The aims of this action are twofold: first the cessation of the illegitimate disturbance[204] and, secondly, abstention from the disturbing activity[205]. The differences between normal civil action for cessation and *acción negatoria* seem to be[206] that while the former aims also at compensation, *acción negatoria* strives to prevent. Also, while the normal civil cessation action is based only on existing harm, in keeping with the Preventive Principle *acción negatoria* does not require that a disturbance have caused harm, but rather that an illegitimate disturbance exist[207]: "the danger of damage is in itself damage."[208] The purpose of the action is "to avoid that this harm be caused through the paralysis of activities that cause illegitimate disturbance, potentially harmful to the environment."[209] Another significant advantage of *acción negatoria* is that the time prescription is much longer than usual: thirty years[210].

Restoration of the site: Once damage has occurred, the most environmentally useful remedy is that the responsible party "be obliged to repair the harm caused", as can be inferred from Article 1902 of the Civil Code. Though theoretically possible, as in France it is not used in practice[211]: issues of the cost or rehabilitation, or 'impossibility' consistently intervene.

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203 Coderch y Santdiumenge, p.120. Also Catalunya has adopted a law: Ley 9 julio 1990, on *acción negatoria, inmisiones servidumbres y relaciones de vecindad.*

204 Disturbance must be of human origin, continuing, illegitimate.

205 Coderch y Santdiumenge, p.123-24.

206 Here it must be noted that while many authors cite the need not to confuse *acción negatoria* with the regular action for cessation in civil liability, few provide a clear account of the difference between the two, and in fact are often content to cite each other. More usefully, Coderch and Santdiumenge (p.123) indicate that "One must distinguish the action for cessation from that of civil responsibility....While the former is directed at obtaining the *contrarius actus* of the disturbance, this one is, by contrast, a compensatory action."

207 See Navarro Mendizábal, 1996, p.482; also Cabanillas Sánchez, 1990, p.96.

208 Cabanillas Sánchez, 1990, p.96; Civil Code Article 590, establishing the possibility to prevent the cause of harm, must be interpreted extensively in all its aspects.

209 Conde Pumpido "La responsabilidad civil por daños al medio ambiente" cited Navarro Mendizábal, 1996, p.482.

210 Since it falls within the ambit of Article 1963 Código Civil, as opposed to Article 1968.2 fixing the one-year limit; CABANILLAS SANCHEZ, 1996, pp.117-18.

211 Blasco Esteve, 1996, p,640; MORENO TRUJILLO, E., 1991, p.275.

Furthermore, the Constitutional court has recognised that, practically, restoration of a site cannot always be complete and total; Sentencia TC 64/1982, 4 November, concerning mining.

Specifically the predominance of economic and industrial development over environmental interest, despite the declarations of the Constitutional Court regarding the harmonious conjunction of these, has not been altered in practice[212]. One small exception is that rehabilitation was ordered for a contaminated well. Significantly this was more for the environment as such than for the well's usefulness[213].

Occasionally sectoral legislation provides for reparation *in natura*[214]. Often, however, a loophole is left softening the obligation: for example, the phrase 'insofar as possible'[215]. A similar tendency is visible at Community level, for instance in the extensive exception in the proposed directive on civil liability for waste[216]. This provides that the plaintiff *cannot* seek "reinstatement of the environment" where "the costs substantially exceed the benefit arising for the environment from such reinstatement, and other alternative measures to the reinstatement of the environment may be undertaken at a substantially lower cost." How to measure the "benefit" to the environment, where "environment" is typically not attached a market value, is unclear. The dissuasive role that a stronger obligation might have played is abandoned.

4.8. Summary:

Within limits imposed mainly by the legislator, the TS has tried to ensure that civil procedural rules offer meaningful protection where environmental issues are raised; lowering the burden of proof; progressing towards more objective responsibility; addressing technical issues such as those concerning the time-bar by taking a lenient view on when the time-bar

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212 See, for instance, MORENO TRUJILLO, E., 1991, p.276.

213 "...be [the waters] or not drinkable, whether or not they are consumed in fact by the personnel of the farm and the livestock of the applicant"; STS 23 September 1988.

214 Ley de Aguas 1985, Article 110; Ley de Costas 1988, Article 95; Ley Basica de residuos toxicos y peligrosos, Article 19.1.

215 Ley 4/1989 27 Marzo, conservación de Espacios naturales y de la Flora y la Fauna Silvestres, Article 37.2; without prejudice to penal and administrative sanctions: infractor shall repair harm caused or reparation insofar as possible.

216 Amended proposal for a Council Directive on civil liability for damage caused by waste, OJ 1991 C192/6, Article 4(2) at C192/13.

begins to run. Protection remains inadequate concerning collective interests. However, it appears that, at least once a matter reaches the highest court, procedural problems are approached with flexibility.

5. Criminal Procedures:

Dissatisfaction with the almost total lack of penal protection[217] of the environment led to the introduction in 1983 of an ecological offence (*delito ecológico*), Article 347-bis of the Penal Code[218]. With this, a variety of conducts previously punishable only by administrative sanctions could be prosecuted[219] including various infringements of obligations stemming from Community environmental rules (although the Community cannot require criminal penalties, these must be applied where similar infringements of national provisions would be criminally sanctioned[220]). Still more recently, the Penal Code was modified[221], and two new titles were added: Title XVI on offences related to organisation of the territory and the protection of the historical heritage and the environment[222], and Title XVII of offences against collective security[223]. The new provisions entered into force six months after publication[224], on 25 May 1996. Offences committed prior to the date of publication are judged on the basis of Article 347-

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217 Prior to the creation of Article 347-bis, dispersed provisions existed in the Penal Code (for example, concerning fires). Exceptionally, other rules provide for criminal prosecution: for example, Nuclear energy Act 25/1964, 29 April articles 84-90; Hunting Ley 1/1970, 4 April, Articles 41-45; Fishing with explosives, Ley 31 December 1946.

218 In the section on "offences against public health and the environment" (*De los delitos contra la salud pública y el medio ambiente*). Other articles were relevant to the environment, e.g., Articles 507 on hunting and fishing; Articles 346, 347, 348-bis, on fires.

219 DE VEGA RUIZ, 1994, pp.19-20; Rodríguez Ramos, 1995, p.79; a few other offences could be punished in criminal courts, including forest fires, nuclear risk and the violation of safety rules of dangerous substances.

220 See Chapter 6, point 4.

221 By Ley Orgánica 10/95, 23 November.

222 Chapters III and IV specifically address offences against natural resources and the environment and offences related to the protection of flora and fauna.

223 Títulos XVI *De los delitos relativos a la ordenación del territorio y la protección del patrimonio histórico y del medio ambiente* and XVII *De los delitos contra la seguridad colectiva*.

224 BOE 24 November 1995.

bis[225]. In this section the earlier provision and experience with it are examined. The new provisions are then discussed, although it is yet too early to judge their performance.

Experience of criminal courts with environmental cases is extremely limited. Regarding Article 347-bis (ecological offence), from its entry into force in 1983 until 1995, three cases only reached the Supreme Court[226]. Therefore, uncertainties left by the texts are frequently not clarified through judicial interpretations. This scarcity of cases further suggests that, as in France, a combination of factors marginalises recourse to criminal jurisdictions -- uncertainties surrounding Article-347-bis itself, lack of forces to note infractions or to provide expert testimony. Also, as Misol Sánchez notes, for a law to be effective, social awareness is needed: this is a fundamental problem in the Spanish context, with the result that infringements, "even the most serious, can remain practically unpunished"[227].

Civil parties to penal prosecution: An initial point is that standing is not an issue in penal prosecutions: a claim can be rejected by a criminal court only if the grounds for action do not constitute a penal infraction[228]. By contrast with other jurisdictions, popular action is expressly allowed in criminal prosecutions[229], and it parallels that of the prosecuting authorities.

Anyone who is criminally liable is also civilly liable[230], yet it long remained uncertain whether associations could participate as civil parties[231]. In 1993 the Tribunal Supremo, in strong terms, allowed the legitimation of environmental associations as civil parties for

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225 Seventh final disposition of LO 10/1995.

226 SSTS 30 November 1990, Ar. 9269; 11 March 1992, Ar.4319; 5 October 1993, Ar. 7694. Examples of criminal cases based on other provisions have also reached the TS, for instance, STS 1 April 1993, Ar. 9165, concerning a violation of the Hunting Act.

227 Misol Sánchez, p.586; see Introduction, point 5; Chapter 8, point 1.5.

228 Gil-Robles, p.170.

229 Articles 100 and 270 of the Ley de Enjuiciamiento Criminal (LECrim); comments Gimeno Sendra and Garberí Llobregat, pp.192-96.

230 Article 19, Penal Code; Rodríguez Ramos, 1995, pp.78-79.

231 SSTS 30 November 1990, Ar. 9269; 11 March 1992, Ar.4319; STS 5 October 1993, Ar. 7694 did not pronounce on the issue. Jordano Fraga, p.469, note 9.

environmental 'goods'[232]. The case concerned a challenge, brought by FAPAS[233], to the decision of an Audiencia Provincial[234] that absolved an infraction of the Hunting Act with regard to the death of a brown bear. Annulling the ruling of the lower court, the TS stated that:

> It cannot be understood that the accusation of FAPAS had not found legitimation to bring before the Court the compensatory claim to which reference has been made. The death of the bear can give rise to corresponding civil compensation... in the case studied, a juridical good has in effect been sacrificed, not of one person but of concrete societies ... We find ourselves, therefore, before a good in which the human collectivity finds itself interested. Civil liability can perfectly be postulated by anyone of those exercising the criminal action[235].

With this positive move[236], the threat of civil liability for collective environmental harm is, ironically, possibly more significant in criminal courts than in civil (although cost issues may discourage participation[237]).

5.1. Article 347-bis (ecological offence):

Article 347-bis provides[238]:

> "Shall be punished with the penalty of *arresto mayor*[239] and a fine of 175,000 to 5,000,000 pesetas, he who, contravening the laws and regulations that protect the environment, provokes or realises directly or indirectly emissions or dumping of any kind, in the atmosphere, the soil, or surface or maritime waters, which puts in grave danger the health of persons, or can gravely prejudice the conditions of animal life, woods, natural spaces, or useful plantations."

The conditions under which the penalties are aggravated are listed in the next paragraphs of the same article:

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232 STS 1 April 1993 (Ar. 9165).

233 *Fondo Asturiana para la protección de los Animales Salvajes* (Asturian Fund for the protection of Wild Animals).

234 In appendix.

235 STS 1 April 1993 (Ar. 9165).

236 Although the ruling has been criticised with regard to other elements; see Jordano Fraga, p.470.

237 Below, *Lack of resources.*

238 Penal Code, Article 347-bis. (Article 348, concerning the aggravation of penalties if a death occurs, is not discussed here.)

239 Penal Code, Chapter III, Article 30 on *penas graves* (serious penalties):
Arresto mayor: imprisonment of between 1 month and 1 day, and six months;
prisión menor : imprisonment of between 6 months and one day, and six years;
prisión mayor : imprisonment of between 6 years and one day and 12 years;
reclusión menor: imprisonment of between 12 years + one day, and twenty years. if a death occurs because of the above offences.

> The penalty of a superior grade shall be imposed if the industry functioned clandestinely, without having obtained the required authorisation or administrative approval of its installations, or if it had disobeyed the express orders of the administrative authority of correction or suspension of the contaminating activity or if it had given false information regarding environmental aspects of the same or had obstructed the inspecting activity of the Administration.
>
> The superior penalty shall also be imposed if the acts previously described create a risk of irreversible or catastrophic deterioration.

Vagueness of tests: A basic problem affecting recourse to criminal courts is that the tests for establishing an ecological offence are both clouded by uncertainty and difficult to meet. Article 347-bis makes no mention of subjective elements; theoretically the offence can be the result of *dolo* or culpable negligence[240]. The ecological offence refers to 'concrete danger' (*delito de peligro concreto*): for an act to be qualified as an ecological offence, actual pollution that is, furthermore, in violation of administrative rules to the atmosphere, ground or waters, must have occurred[241]. The reference to "laws and regulations" gives rise to complications, both in terms of constitutionality[242] and, seemingly of more practical importance, clarity[243].

Much hinges upon the 'gravity' of the resulting danger: this essential, but juridically indeterminate[244] concept serves as the barrier separating administrative from penal infractions. Even surpassing administrative limits, if the pollution is not serious enough to generate a "grave danger," it cannot be prosecuted as an ecological offence[245]. The pollution must endanger collective human health rather than of only one person[246], or the conditions of animal life or useful plantations. The TS has tried to better delineate the concept of

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240 See Rodríguez Ramos, 1995, pp.84-85; DE VEGA RUIZ, 1994, p.26, who discusses the uncertainty of whether *dolo* is required, but later points out (p.29) that STC 27/1990 refers to a sentence of an Audiencia Provincial which ruled on the basis of a 'negligent' (*culposo*) offence; Misol Sánchez, pp.588-89, notes that elsewhere in the Penal Code infractions that, through imprudence constitute a fault, with malice constitute a crime.

241 DE VEGA RUIZ, 1994, pp.24, 103-104; Varela Agredo, J.A. "El Delito ecológico: El proyecto de Código Penal de 1994," *I Congreso Nacional de Derecho Ambiental*, Comunicaciones, ed., Cima Medio Ambiente, Valencia 1996, pp.282-83; Rodríguez Ramos, 1995, pp.80-81; Misol Sánchez, p.590.

242 De Vega Ruiz refers to the fact that, while criminal law is generally elaborated in Leyes Orgánicas and modified by acts with the rank of statute, Article 347-bis is 'blank law' that refers to other legal texts of inferior rank. The constitutionality of this has been debated; DE VEGA RUIZ, 1994, pp.30-31.

243 Below, *Diversity of administrative texts*.

244 Varela Agredo, 1996, pp.281-82; DE VEGA RUIZ, 1994, pp. 103-104; Misol Sánchez, p.589.

245 Varela Agredo, 1996, p.283.

246 STS 11 March 1992, Sala II; DE VEGA RUIZ, 1994, p.25.

gravity[247]: the upper limit (as in the aggravated offence of the second paragraph), is the risk of irreversible or catastrophic deterioration[248]; the violation of administrative rules that does not threaten human health or animal life would fall beneath the lower limit, under which administrative sanctions should be applied. What exactly can be considered 'irreversible' or 'catastrophic' is nebulous and leaves room for subjective interpretation[249] (although the TS has been generous in its interpretation[250]).

Lack of resources: As seen, lack of qualified staff impedes surveillance of industrial and economic activities. The "Justice Administration, lacking the means, and in many cases, the interest"[251] regularly fails to investigate and prosecute; thus a variety of ecological offences simply pass unnoticed, an initial failure in the enforcement process. Debate also arises between administrative organs as to which is called upon to intervene[252].

The Spanish system presents an advantage, similar to that proposed at Community level[253]: a popular accuser is able to prosecute a criminal offence, even if he is not the victim[254]. However, those wishing to initiate a criminal action also face difficulties related to funding and personnel, which highlight the economic inequality between the popular accuser and the industrial enterprise. To begin, lawyers with expertise in environmental matters are usually employed by the polluting enterprise[255]; the environmental lawyer rarely seeks poorly remunerated[256] employment with environmental associations -- "not to say never"[257]. The

247 STS 11 March 1992.
248 For the offence to be aggravated, further conditions are examined, below.
249 Rodríguez Ramos, 1995, p.86.
250 By taking into account the costs of rehabilitation in order to determine that which is 'irreversible'; below, Practical Illustration.
251 Aedenat, p.3.
252 DE VEGA RUIZ, 1994, pp.34,57: Co-ordination between administrative and criminal authorities concerning such issues as interim relief also presents problems.
253 Dr. Krämer proposes amending Article 169 EC to enable parties other than the Commission to move to the judicial phase of infringement proceedings; see Conclusions, point 3.1. at - *Centralised enforcement.*
254 Constitution 1978, Article 125; LECrim, Articles 100 and 270.
255 "...despite their appearances at environmental conferences."
256 As noted in the Introduction, (point 5, *Public involvement*) only a very small proportion of environmental organisations are able to remunerate personnel at all.
257 Viader Pericas, p.289; Gimeno Sendra and Garberí Llobregat, p.197.

participation of popular accusers (*acusador popular*) may be discouraged by the uncertain[258] requirement of a financial down-payment[259]. Next, during the instruction of a case, the nature of the danger or risk to the environment must be ascertained by expert testimony[260]. However, the public prosecutor lacks the technical experts and therefore declines to accept the burden of providing the expert valuation. Recourse must be made to private experts for costly multi-disciplinary studies[261], leading to the paradoxical situation in which judges often accept valuations furnished with the help of the industry under investigation[262]. Furthermore, it has occurred that the popular accuser was left to pay a substantial bill[263]. Certainly such prospects discourage participation in criminal judicial actions.

Diversity of administrative texts: In France, criminal authorities hesitated to turn to the dispersed administrative texts; the fact that a provision exists in the Spanish Penal Code does not completely remedy this type of problem. 'Blank penal law' (*ley penal en blanco*) requires recourse to various administrative provisions for punishable conduct[264], and similar problems of tracking down provisions and cross-references arise, since a vision of the entire body of

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258 The Law on Criminal Procedure (LECrim), Article 280 indicates that a downpayment (*fianza*) can be required; Article 281 LECrim provides for possible exemptions for those prejudiced by the offence. Sendra and Llobregat (p.196) argue logically that with a collective good such as the environment "society" is prejudiced and therefore should be exempted.

259 Gimeno Sendra and Garberí Llobregat, p.195; the possibility to exonerate environmental organisations exists; Articles 280 and 182 LECrim.

260 Viader Pericas, pp.287-88.

261 Although a literal reading of the LECrim indicates the accuser should not face this cost; see Article 463 LECrim.

262 Viader Pericas, p.288. The administration must be more flexible in covering the honoraria for the testimony, making the duty to collaborate with the administration of justice possible; Varela Agredo, 1996, p. 283; see also Aedenat, p.38.

263 After various associations dropped out of a *querella* (criminal action) against a power plant because an agreement was reached (although a lower court had already noted that that emissions had surpassed the 'already excessively benign and tolerant limits' in the legislation with 'devastating' effect), one popular accuser, armed with a report costing 2,750,000 pesetas (plus 412,500 in VAT) continued to attempt to reach a judgment. Eventually the case was dimissed and he was condemned to pay the expenses (Auto 9 February 1995, confirmed 20 February 1995).

264 DE VEGA RUIZ, 1994, pp.42-46.

administrative rules is necessary[265]. Furthermore, gaps persist in administrative rules; certain areas remain untreated by the legislator[266].

Possible diversity across the CAs complicates the situation: criminal responsibility may be provided for differently in the autonomous rules, and variation exists concerning legal and illegal levels of pollution[267]. Controversy as to whether this violates the constitutional principle of equality in application of penal law is unresolved[268].

Sanctions: Although the preparatory works had foreseen higher penalties[269], those adopted in Article 347-bis were criticised for their lenience ("absurd"[270], "miserly"[271]). As in France, they were easily supported by a polluting industry. The penalties were later significantly raised; some still consider them too low[272]. A remaining problem is that, as in France, even where prison is possible, the penalty almost always takes the form of a fine.

According to the second paragraph of Article 347-bis, it appears that only industries are susceptible to receive the aggravated punishment. This has been criticised since many other commercial conducts, such as agricultural undertakings, are capable of causing significant pollution yet it is uncertain whether these can be considered industries[273]. Furthermore that to which "acts previously described"[274] in the second paragraph of Article 347-bis refers is uncertain; whether an offence, once aggravated according to paragraph two, can be again aggravated should it be deemed "irreversible" or "catastrophic" is unclear[275].

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265 Misol Sánchez, p.587.
266 *Ibid.*, p.591.
267 Rodríguez Ramos, 1995, p.83.
268 Varela Agredo, 1996, p. 283; Misol Sánchez, p.594.
269 Earlier projects for penal code foresaw *inter alia* six months to four years prison, disqualification from profession or public office (three years); DE VEGA RUIZ, 1994, p.17.
270 Misol Sánchez, p.594: she points out that certain recent rules provide administrative fines that were higher than those possible under Article 347-bis.
271 Jordano Fraga, p.469, note 9.
272 Aedenat, p.3.
273 Rodríguez Ramos, 1995, p.86; DE VEGA RUIZ, 1994, p.27.
274 *...los actos anteriormente descritos.*
275 Infraction of Article 347-bis is punishable by *arresto mayor* and 175.000 to 5.000.000, aggravation in second paragraph *prisión menor* and fine of 5.000.001 or more; with possible (and again he notes that this is uncertain) accumulation in third paragraph, *prisión mayor* and 7.500.001 to 11.250.000; DE VEGA RUIZ, 1994, pp.26-27; Rodríguez Ramos, 1995, p.85; compare with Misol Sánchez, p.594.

5.2. Practical illustration: Sentencia de la Sala II del Tribunal Supremo, 30 November 1990:

One case highlights both the laxity of administrative actors, if not their bad faith, in a situation relevant to LCP88/609 (although LCP88/609 was not in force when the action was initially brought), and the stance of the highest national court in dealing with ecological offences. The case also has an important demonstrative value, yet only certain points are examined here. A challenge was made to the decision of the Audiencia Provincial[276] de Barcelona, of 20 February 1988, condemning X, the director of a large combustion plant (La Central Térmica de Cersc, property of FECSA) for an offence against the environment[277]. The appeal was brought before the TS, on one hand by FECSA and the accused, X, and on the other, by four individual accusers.

The facts, as established by the Audiencia Provincial, are as follows: the power station had operated since 1966 using high-sulphur lignite as combustible. Since 1980 it had been directed by X. The fumes it emitted were highly charged with SO_2. After 1985[278] it was noted that emissions exceeded 9000mg/Nm3 and were thus greatly in excess of legal norms[279]. However, the lower court had decided that the emissions of solid particles had not been proven to be greater than 500mg/Nm3. One of the individual accusers challenged this fact, pointing out that a statement from the Sub-director of Territorial Services of Industry of the Generalitat de Catalunya stated that the concentration of solid particles was never below 3458mg/Nm3 -- more than nine times that authorised in Decree 833/1975 (500mg/Nm3. To compare standards, LCP88/609 Annex VII sets a limit of 100mg/Nm3[280]). The TS notes that FECSA itself, in a

276 In appendix.

277 The *Audiencia Provincial de Barcelona* condemned the accused for an offence against public health and the environment, and had sentenced him to one month and one day of *arresto mayor*, with a fine of 30,000 pesetas (or *arresto substituario* of fifteen days). The accused was also ordered to pay compensation for the land privately owned.

278 Until 1985 the exact composition of the fumes was not controlled.

279 Specifically, Ley 38/1972, 22 December; and Decreto 833/1975, 6 February 1975.

280 For plants with a thermal capacity of over 500MW; for those below 500MW the limit is 50mg/Nm3.

communication to the meteorological service of Catalunya[281] estimated that its solid particles emissions had been approximately 2000mg/Nm3. The TS accepts these arguments and modifies the facts to take account of this.

The emissions provoked the acid rain that caused the die-back of approximately 30,000 hectares[282] of surrounding woods. Although the objective effect on human health, livestock and water courses could not be determined, the pollution was deemed to be "grave" and to present a "grave and potential danger" for surrounding vegetation.

One argument raised by the accused illustrates the striking disregard of public authorities for the letter of environmental law. The accused brought forth two resolutions from the Directorate General of Industry[283] that 'authorised' emissions of SO_2 up to 12,500mg/Nm3, levels superior to the norms in force. The accused therefore contended that the transgression of norms required by Article 347-bis was not present. The TS observes that the Audiencia Provincial was justified in doubting the validity of the resolutions, which do not legitimise the conduct of the accused. The TS notes that X was aware of the legal limits and "at no time put into motion those mechanisms necessary to interrupt the polluting emissions or to reduce their intensity to levels tolerated by the affected surroundings, by installing corrective apparatus."[284] Thus an important warning is given to industries functioning with permits that authorise emissions exceeding the limits defined in the legislation.

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281 Of 16 May 1986; the company register notes the same.

282 As controlled by ICONA.

283 The first dated 2 August 1985, the second 24 July 1987.

284 The TS points out that, in continuous communications between the Central and Autonomous Administration, their "permissiveness and excessive tolerance" could lead the director of the power station to think the emissions were authorised, notwithstanding his awareness of the legal limits in force. (Also, since the TS used records provided by the director to modify facts, it would be paradoxical to qualify his behaviour as obstructive.) It is interesting that the TS expressly notes the possible shared responsibility of the Administration. Although pursuing the matter in this instance would violate principles of effective judicial control, since the Administration was not a party to this dispute and had had no occasion to answer the accusation, strong terms are nonetheless used to indicate that the Administration must be answerable not only for express violations (now reinforced in the new Penal Code, Articles 320 and 329), but also for failure to carry out its duty of vigilance, on which effectiveness of environmental rules depends.

The TS also gave a generous interpretation into what can be considered "catastrophic". The lower court had not accepted the aggravation of the penalty provided for Art 347-bis for irreversible and catastrophic harm. The Tribunal Supremo did, stating that, in interpreting the second and third paragraphs of Article 347-bis

> '...the [lower] court aligns itself with a concept of irreversibility that is excessively literal, considering that with the actual level of technology it is always possible to return from the state of deterioration to the state prior to the degradation. judging that human knowledge knows no limits to repair ecological harm.
>
> Such an affirmation does not concur with the spirit and content of the provision that elevates the penalty according to the intensity of the harm caused and the extent of the affected zone...
>
> ...the expanse affected allows us to affirm that the necrosis and clorosis described in the proven facts can reach the characteristics of catastrophic given its entity and effects, all this without prejudice that an extremely costly action renovating the affected mantle of earth and substituting it, by proceeding to the plantation of new tree species that, in the very long term, can restore ecological balance to the area, provided that the functioning of founts of pollution is stopped.[285]

Shedding light on that which can be termed "irreversible" or "catastrophic", the TS indicates the offence can be aggravated, notwithstanding the advanced state of human knowledge, and pragmatically focuses on the practical consideration of the cost of reversing the damage. This is a more effective criterion, which brings the actual likelihood of restoration, rather than hypothetical, costly and unlikely possibilities, into the evaluation.

The TS annuls a portion[286] of the decision and condemns X, as the author of an offence against public health and the environment, to eight months of *prisión menor*, and a fine of 1,400,000 pesetas[287]. Significantly for the purpose of encouraging public participation, the TS also included the costs to the individual accusers, which the lower court had excluded[288].

It is not scientific to extrapolate from one example; however, this judgment seems to indicate that norms that have been poorly implemented by both the Administration and the private actor will nonetheless receive meaningful, pragmatic treatment before the highest court. Although it is inefficient to ensure the effect of environmental rules only after litigation, in the final resort, the obligations imposed by environmental rules are here taken seriously.

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285 STS 30 November 1990.
286 It maintained most of the proven facts as established by the Audiencia.
287 With suspension from public office and of his right to vote.
288 Noting that they had been useful in supplying inspections and technical reports.

5.3. New provisions:

The penal provisions that entered into force in May 1996 are in part the result of a campaign by various environmental associations[289]. Despite certain shortcomings, a variety of new offences are elaborated[290], increasing potential recourse to criminal courts on issues regarding *inter alia* Community Law. For example, Article 330[291] makes it a criminal offence to cause grave harm to a protected area, opening the possibility that violations of, for instance, the Birds or Habitats Directives or harm caused by Structural Funds projects that are not checked at Community level[292], may be penalised at national level[293]. Furthermore, the criminal liability of the administrator[294] is included in Article 329[295]; it is likely that, for actions such as those seen in the case examined above ("knowingly[296] authorising illegal activities"), the administrator would now have to answer criminal charges.

Articles 325 and 326 of the new Penal Code most closely reprise the earlier Article 347-bis. Article 325 of the new Penal Code reads:

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289 Particularly through the Council on Assessment of the Environment (*Consejo Asesor de Medio Ambiente*) of MOPTMA. Of the amendments they suggested, Parliament accepted twenty.

290 For instance the "urbanism offences", proposed and refused in 1983 version, have been adopted -- this is extremely important, given the harm caused by urbanism.

The *delitos urbanísticos* are provided in Article 319 (those carrying out unauthorised constructions), Article 320 (public authorities knowingly authorising illegal constructions).

291 Article 330: "Whoever, in a protected natural area, gravely harms any of the elements that have serve in its qualification, shall incur the penalty of prison from one to four years and a fine of twelve to twenty-four months."

292 See Chapter 1, point 3. Decision-making in other areas -- Integration of environmental protection into other Community policies, and Chapter 3, footnote 124.

293 Article 338 refers to the aggravation of offences to protected natural spaces. It also refers to Articles 319 (above); to harm to flora (Articles 332 and 333); hunting and fishing offences (Articles 334, 335, and 336); the illegal actions of public authorities (Articles 320, 329); the setting of forest fires (Article 353); and pollution of the environment (Articles 325, 328).

294 Which had been struck from the final version of Article 347-bis; DE VEGA RUIZ, 1994, p.17.

295 New Penal Code, Article 329: 1. "The authority or administrator who, knowingly, favourably informs the concession of manifestly illegal licences, that authorises the functioning of industries or polluting activities to which the previous articles refer or who, during inspections has silenced the infraction of laws or normative dispoitions of a general character that regulate them shall be punished with the penalty established in article 404 of this Code and, furthermore, with that of prison from six months to three years or of a fine from eight to 24 months)".

296 Although obviously proving an action was 'knowingly' undertaken presents difficulties.

> Shall be punished with the penalty of prison from six months to four years, a fine of eight to twenty-four months[297] and barring from profession or office for a period from one to three years he who, violating laws or other provisions of a general environmentally protective nature, provokes or carries out directly or indirectly, emissions or dumping, radiation, extractions, excavations, land-shifting, noises, vibrations, injections or deposits, in the atmosphere, the soil, the subsoil, or surface, subterranean, or maritime waters, with an impact, including in transboundary areas, as well as captation of waters than can gravely harm the balance of natural systems. If the risk of grave harm is to the health of humans, the penalty of prison shall be imposed in its superior half.[298]

Many of the previous uncertainties persist. Reference is still made to dispersed administrative texts. The idea of 'gravity' remains the barrier between criminal offences and administrative infractions; the notion is still subjective and unclear[299]. However, Article 325 significantly widens behaviours which can be qualified as offences[300]; the physical elements listed are also wide, covering basically everything (as did Article 347-bis, arguably) but adding "subsoil" and "subterranean waters" for clarity. Furthermore, where human health has been harmed the penalty of prison "in its superior half" is required. From a Community perspective, it is important that transboundary harm is specifically qualified as a criminal offence. However, a possible drawback is that the phrase can "gravely harm the balance of natural systems", instead of "can gravely prejudice the conditions of animal life", is perceived as more stringent a test[301].

Article 326[302], regarding aggravation of offences, is roughly the same as before, though more clearly stipulated. Confusion surrounding possible accumulation of aggravation has been

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297 Article 50 of the Penal Code establishes a system of daily quotas that are translated into pecuniary sanctions: paragraph 4: "The daily quota shall have as a minimum two hundred pesetas, and as a maximum, fifty thousand. For the purposes of calculation, when the period is fixed in months or years, months shall be understood to have thirty days and years, three hundred sixty".

298 New Penal Code, Article 325.

299 Aedenat, p.5.

300 By introducing radiations (reference to be made to Law 25/64 on Nuclear Energy), noise (which apparently is not covered by national, but by local rules, which raises questions of Constitutionality), extraction and excavation, *aterramientos* (harmful activities to the land, including terracing), deposits, injections (introducing pressurised gases or liquids), vibrations.

301 Aedenat, p.12.

302 Article 326: "The penalty of a superior grade shall be imposed, without prejudice to the fact that other provisions of this Code can apply, when in the commission of any of the facts described in the previous article concurs with any of the following circumstances:

a) if the industry functioned clandestinely, without having obtained the required authorisation or administrative approval of its installations

eliminated. The principle new element is the inclusion of illegal extraction of waters among aggravated offences, a problem particularly relevant to Spain's geographic characteristics. Point b) regarding disobedience of orders, apparently excludes orders of a judge or court by its express reference to the *administrative authority*[303]; this is specifically unfortunate since execution of judgments presents considerable difficulties. Also, certain matters remain unclear, as before, such as that which can be considered "industry". However, it is positive that at least the lower limit of the aggravated penalty has been raised[304].

Moreover, point c) appears to refer to *any* falsification or dissimulation of information. Unlike the other indents, no public authority is mentioned. Aedenat[305] suggests that this could apply to information requested by a third party or even emitted voluntarily by the undertaking[306]; thus it appears that criminal sanctions are available to protect the individual rights of Community Directive 90/313 and national legislation[307].

The provisions are too recent to judge their practical effect, yet an effort seems to have been made to broaden the protection of environmental rules before criminal judges.

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b) if the express orders of the administrative authority of correction or suspension of the activities qualified in the previous article have been disobeyed

c) if information regarding environmental aspects of the same has been falsified or hidden

d) if the inspecting activity of the Administration has been obstructed

e) if a risk of irreversible or catastrophic deterioration has been produced

f) if an illegal extraction of waters in a period of restriction has been carried out. "

303 Aedenat, p.15.

304 Calculating on the basis of Article 70 of the new Penal Code the penalty for Article 326 is from four to six years. Article 70 indicates that the superior penalty is calculated starting with the maximum penalty attached by law to the offence under discussion, and augmenting this by half its quantity. The result is the maximum aggravated penalty. In Article 325 the maximum penalty is four years, therefore for Article 326 the penalty is from four to six years.

305 Asociación Ecologista de Defensa de la Naturaleza.

306 Aedenat, p.15.

307 Ley 38/1995, 12 December 1995 derecho de acceso a la información en materia de medio ambiente.

5.4. Summary:

Indeed, as one source phrases it, "[t]he situation and attitude both of the Justice Administration and of the Environment Administration do not allow for much optimism."[308] Attempting to obtain criminal sanctions for infringements of Community environmental directives in criminal courts can be problematic (as for national rules). Again, some of these reflect the attitude of the administration and the public prosecution, which has shown little sensitivity towards environmental issues[309]. For instance, generally at regional level, while the directors of small and medium enterprises may be made to appear before the criminal judge for pollution-related offences, there is a noticeable reluctance to pursue more powerful industrial actors. Viader Pericas points out that the mega-enterprises responsible for pollution greater than the combined emissions of all the SMEs are not even brought to the stage of oral proceedings[310].

However, certain technical difficulties have been addressed, by wider and seemingly stronger provisions in the new Penal Code. Furthermore, the willingness demonstrated by the judges to interpret provisions in order to make possible the maximum protection of environmental rules once a matter is before them is a very positive sign. Notably criminal judges appear to be much more forward-looking than in France.

6. Enforcing judgments:

In Spain, as in France, executing a judicial decision can present problems. The Administration has been notoriously lax generally in executing specifically administrative judgments that were unfavourable to it[311]. Due to the length of time required for an administrative matter to reach a decision at all, and the relatively few environmental cases

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308 Aedenat, p.3.
309 *Ibid.*, p.3.
310 Viader Pericas, p.288.
311 Domínguez Luis, J.A., "Notas en torno a las ideas de seguridad jurídica, justicia y bien común," no. 80, Curso 1991-92 Revista de la Facultad de Derecho de la Universidad Complutense de Madrid 259, pp.113-117; see also Navarro Mendizábal, 1996, p.481; NIETO GARCIA, A., *La Organización del desgobierno*, Ariel, Barcelona 1984; cited in Domínguez Luis, pp.134-35.

available for consideration, it is uncertain whether this is worse concerning environmental cases. Certainly the environment has been affected by such tactics: two judicial decisions to shut down a waste plant operating without licences were suspended by the Administration[312].

The earlier LJCA[313] attempted to address the general problem of non-execution by according to the sentencing court certain coercive power and by providing for the personal and direct, civil and criminal responsibility of Administrative agents who delayed the fulfilment of such obligations. The situation did not improve remarkably:

> The system in force of executing administrative judicial sentences has not proven more efficient, and the frequent controversies raised before the administration for non-fulfilment or partial and defective fulfilment of condemning decisions of administrative courts are good proof of this[314].

Article 117.3[315] of the Constitution now makes it the responsibility of the courts to see that the judgment is executed; the Administration has the positive duty to collaborate with due diligence[316], and the negative duty to abstain from any impediment to carrying out what the judicial organ has disposed. It is for the sentencing court to determine the reasons for which a decision is materially or legally impossible to execute (*inejecutabilidad*)[317]; as well as the point at which, and under which conditions, this impossibility is noted[318].

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312 The *López Ostra* Case, Judgment of 9 December 1994, ref. 41/1993/436/515 offers an illustration; see Chapter 8, footnote 118.

313 LJCA, Article 10.

314 Domínguez Luis, p.114; see also García de Enterría y otros, "La ejecución de sentencias condenatorias de la Administración," 209 (1987) Revista de Documentación Administrativa; Piñar Mañas, "Sobre la ejecución de sentencias contencioso-administrativas: la sentencia TC de 12 de noviembre de 1985," 1986 Poder Judicial.

315 Article 117.3: "*El ejercicio de la potestad jurisdiccional en todo tipo de procesos, juzgando y haciendo ejecutar lo juzado, corresponde exclusivamente a los juzgados y tribunales* .... (The exercise of jurisdictional power in all types of procedures, judging and ensuring the execution of that which has been judged, belongs exclusively to the courts...)"

316 Constitution 1978, Article 118; see also SSTC 12 October 1985; 22 September 1989; Domínguez Luis, p.118.

317 Also the possibility exists for the judicial organ to substitute the content of the decision by another 'equivalent' intervention once the presence of such circumstances that impede the execution of the original decision are determined; SSTC 29 June 1983; 7 June 1984; 22 September 1989. Here financial compensation, so poorly adapted to environmental situations, seems the obvious alternative.

318 STC 25 September 1985; Domínguez Luis, p.120.

Uncertainty stems from the fact that two rules in force, LOPJ, LO 6/1985, 1 July 1985 and LJCA (portions of which continue in force), give rise to certain conflicts of interpretation. A

However, the Organic Law of Judicial Competence, in an article widely considered to be unconstitutional[319], allows the government "only for reasons of public utility and social interest, declared by the Government, to expropriate rights recognised in the face of the Public Administration in a firm sentence prior to its execution."[320] As García de Enterría has said this is effectively an unlimited widening of grounds for suspending judicial sentence[321]. At issue is the guarantee of a fundamental right to effective judicial control[322]. Notwithstanding, the government can decide

> "not from objective juridical criteria but from the fluctuating stance of that which is convenient or not convenient, opposing the principle of legality used by the judge in all his decisions and that of political opportunity that constitutes the basic foundation of the decisions of the power."[323]

Given that the government generally views the tension between environment and economy as a zero-sum game[324] , executing condemning decisions in environmental matters can easily be perceived as inconvenient.

Whatever the exact modalities of determining execution, the fact remains that non-execution is a common and serious problem. Nieto García refers to non-execution as "the great weapon of the administration... In the face of all the truly forceful declarations of laws and the Constitution, and in the face of orders, at times categorical, of courts and including the Constitutional Court, it is a fact that, when the Administration does not want to, it does not carry out rulings"[325]. As the Constitutional Court has stated: "[t]he insincerity of the hidden

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doctrinal minority gives more emphasis to the LJCA, which indicates (Article 105) that the government can decide that which is impossible to execute; Domínguez Luis, p.118-20.

319 LOPJ Article 18.2; although the Constitutional Court did not pronounce; Domínguez Luis, p.130.

320 "*...sólo por causa de utilidad pública o interés social, declarada por el Gobierno, podrán expropriarse derechos reconocidos frente a la Administración Pública en una sentencia firme antes de su ejecución.*"

321 Cited Domínguez Luis, p.131.

322 Effective control by the courts of rights and legitimate interests, Article 24.1 Constitution, above footnote 43.

323 Domínguez Luis, p.120-21.

324 See generally Aguilar, *op.cit.*; Cini, Porter, Pridham, *op.cit.*

325 NIETO GARCIA, A., *La Organización del desgobierno*, Ariel, Barcelona 1984; cited in Domínguez Luis, pp.134-35.

disobedience of the administrative organs"[326] threatens not only the juridical system in general, but also the integrity of the rights of the citizens[327]. Such a situation is incompatible with an *état de droit*[328] and undermines all the preceding efforts concerning implementation and enforcement

7. Conclusions:

As seen in previous chapters, prior to enforcement the administration's handling of implementation of environmental norms is very poor. During enforcement a wide array of procedural problems emerge, most of which do not discriminate against environmental interests specifically, but happen to affect these very seriously. The most striking of these is the requirement that interests be somehow "individualised" in order to be defended[329]. Other difficulties more visibly reveal underlying priorities, such as the administration's willingness to play upon the unreasonable length of judicial proceedings to discourage judicial action[330].

Importantly, and perhaps because of an awareness of the previous flaws of implementation, judges seem more disposed to give meaning to the environmental norms they are called upon to protect, and could be valuable allies in enforcing Community environmental obligations. A willingness to adapt the rules to defence of the environment, a recent addition to juridically

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326 STC 28 October 1987.

327 STC 15 July 1987: "During the stage of execution problems related to a fraudulant or simulated execution of the judicial decision can arise, and in that case must be resolved, in the measure that they imply an effective inexecution of the sentence, and repel the effectiveness of the judicial control, through action of this nature, and successively and indefinitely throws upon the affected the burden of commencing new actions and recourse in order to obtain the complete satisfaction of the rights and interests that have already been recognised by judicial decision."

328 Domínguez Luis, p.135.

329 Other examples include the requirement of financial downpayments, the requirement to exhaust administrative appeals.

330 Also where personnel and financial resources are stretched, environmental issues are less strongly enforced than others.

protected goods, has been demonstrated in administrative[331], civil[332] and criminal[333] court divisions. Perhaps the fact that judicial treatment of environmental issues is recent is an advantage in that progress is a matter of filling a void rather than overcoming an existing body of negative case-law[334].

The positive approach taken by the courts in limited, specific cases is not enough to counteract the difficulties that have hindered implementation of the norms from the point of transposition onward; nor to prevent the administration from once again intervening to diminish the effect of environmental rules once judgment has been made. Nevertheless, it seems to indicate that progress at the enforcement stage is more practicable and less dependent on a factor as intangible as the 'attitude' of the administration.

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331 E.g. STS 25 April 1989, above, footnote 44.

332 For instance, relaxing the full certainty requirement and finding negligence in the mere fact of an accident, leaning towards strict liability, and joint-and-several liability.

333 For instance, regarding civil participation of associations in criminal procedures, giving consideration to the likelihood and costs of reparation in determining that which is "catastrophic and irreversible."

334 Cf: Conseil d'Etat, Chapter 6, point 2.2 at *Early case-law -- presumption in favour of project*.

Conclusions

1. What has emerged?:

Among the problems that emerge throughout the stages examined previously it is difficult to discern a pattern across the different Member States studied, and applicable to both legislative texts traced. The phenomenon of non-compliance is, as seen, undeniably complex. Nonetheless it seems that the problems that have emerged can be placed under two broad headings: those problems that concern the poor adaptation of legal rules to environmental situations on the one hand, and on the other, those problems that are rooted in the low political priority accorded to environmental issues. The first category of problems could be addressed, often without too much difficulty, where the will to treat the issues can be found. The second category remains intractable precisely because the underlying problem is that the will to resolve the problems is absent.

The first group, problems stemming more from the poor adaptation of legal rules or administrative situations to environmental issues, does not discriminate specifically against environmental issues. Examples of such problems include, for instance, the fact that no deadline exists for granting interim measures in France, with the result that these are frequently without object by the time they are considered. Similarly, the Spanish requirement to request administrative review of a decision prior to making a judicial application is poorly adapted to environmental situations, where speed is essential. Legal tests for an action to proceed -- for instance, that harm be certain, that direct causal links be established, that the prejudice

suffered be individualised -- are also poorly suited to environmental matters. Yet these rules apply to environmental issues as they do to any other. As it happens, however, the consequences in environmental matters are very serious. To take a different example, when called upon to provide information or to co-operate with the public, administrators are rarely reputed to co-operate smoothly in any area of administrative activity: the public's intervention is generally viewed as an unwelcome intrusion. However, here the effect is serious: environmental law and particularly procedural rules such as EIA85/337 depend upon the public's vigilance and ability to intervene.

An issue such as establishing standing to bring a legal action illustrates the bridge between the two categories of problems: the problem of standing is rooted in the fact that legal traditions have historically developed in connection with the protection of property and individual interests, and are poorly adapted to the defence of collective interests. However, the fact that environmental priorities are extremely low where economic interests risk being inconvenienced, or doubts concerning who should appropriately receive compensation for harm to a collective good, can translate into a situation where the criteria of legal title to make a claim are more harshly applied to environmental associations than in other situations: as seen in Case T-585/93 *Greenpeace and others v the Commission*[1], the criteria were applied as they had been developed three decades previously.

Situations such as this spill over into the second, more serious category, which concerns those problems that stem principally from the fact that environmental issues are accorded low political priority. Disturbing the economic forces that lie at the root of the environmental harm is actively avoided; a short-term vision of economic gain is allowed to prevail over a longer view of the economic and even social costs related to environmental deterioration. As seen, environmental rules can be implemented relatively efficiently where they are not perceived as being contrary to political and economic interest. In France LCP88/609 was not perceived as a serious threat to energy policy[2] and its practical implementation appears to have proceeded

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1 Chapter 3 at point 2.1. Practical Illustration: T-585/93, *Greenpeace and others v Commission*.

2 Since energy is supplied to a great extent through nuclear sources.

fairly smoothly: unlike in Spain where the requirements of LCP88/609 are seen to threaten not only the energy industry but also industries that require considerable energy. Frequently, the odds that rules that are perceived as cumbersome or threatening will be implemented by "the most appropriate forms and methods" diminish as the discretionary opportunities multiply. The effects of this accumulate and are compounded as the next layer of discretion is added.

Clear statements of fundamental priorities have been visible, in terms of resources and power accorded, in the three administrative contexts seen here. All three are unreasonably understaffed. Again, although lack of personnel and financial resources is a frequent complaint in any area of administrative or legislative intervention, the degree to which it is problematic here is particularly severe[3]; certainly environmental expenditure does not meet environmental costs[4]. Only occasionally have other policies[5] incurred such general resentment, if not the opposition, of economic forces. Even by comparison to other policies it has been seen that the resources given to environmental protection are unreasonably scant.

In terms of authority of environmental administrations, deficiencies were also noted in all contexts: DG-XI has always had difficulty imposing its authority as an equal, where its interests may clash with those of other DG's or Community policies: for example, in effect the Community has made a general statement of priority and given an indication of DG-XI's comparative lack of authority by avoiding to review the integration of environmental protection in the programmes financed by the Structural Funds. A similar abandonment of vigilance would be unheard of in the area of the internal market[6]. Furthermore, the Legal Affairs Unit's ability to initiate prosecutions of environmental offences in an atmosphere free from political considerations appears to have been restricted by its relocation to DG-XI's Directorate B.

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3 Chapter 1, points 1, 2.1-2; Chapter 4, points 1.2.1 and 1.2.5; Chapter 7 point 1.2.2.

4 Com(92)23 vol.III The State of the European Environment, at p.82: figures for Germany, one of the more environmentally conscientious of the Member States, place environmental expenditure in 1990 at 2.2% of the GDP, while costs of environmental damage are estimated at 6% GDP. Relevant figures are not available for other Member States.

5 For instance, women's rights in the workplace gives a possible illustration.

6 Chapter 1, at point 3. Decision-making in other areas -- Integration of environmental protection into other Community policies.

Similarly the Spanish environmental administration is disjointed on various administrative levels, and frequently attached to the administration of a competitor (despite improvements in recent years). Where environmental authorities are called upon to make decisions affecting other interests, they do not possess the autonomy necessary to carry out this mandate effectively.

The French administrative context was until recently very similar: understaffed, fragmented and frequently subordinate to the administration of competitors. The relative value of environmental authorities was indicated when the Conseil d'Etat endorsed the common view at the time: that the Environment Minister's opinion had no legal value[7]. The French context illustrates that where the political will can be found, some progress can be made: the environment administration has recently been rationalised. Treatment of the Environment Minister's opinion indicates also that positive change, when made, will frequently be minimal: although it is now stipulated that the Environment Minister's opinion must be awaited, there is nothing to indicate that it must be heeded.

The effect of low priority can be perceived in the multitude of decisions implied by each stage of development and application of environmental rules; such effects are highly variable and not systematic. At certain stages it is appropriate for political and economic considerations to affect law, particularly when the rule is being formulated. Despite the fact that this may lead to awkward or ill-suited legal rules, this is the stage at which, as a matter of general policy, environmental and other interests are appropriately weighed.

As seen, however, political priorities find room to manoeuvre in a manner less appropriate during formal implementation of environmental rules. Rules can be transposed to minimise inconvenience to economic actors, to play down the power of environmental authorities or of the public, or can be delayed so that other interests may be satisfied first. Inconvenient portions are not implemented, such as the elaboration of criteria for submitting Annex II projects to EIA in Spain, or are in some way diminished. For instance, regarding EIA one of the tools for taking account of the general interests and potentially for encouraging the project's evolution towards

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7 Chapter 4, at point 1.2.1. *Legitimacy and Clarity of Mission.*

less environmental harm (always assuming that "taking the environment into account in the decision making process" implies considering the imposition of conditions to minimise harm in accordance with the Prevention Principle) was the consultation of the public. The Community directive made certain suggestions but left considerable discretion on this matter. Both Member States examined here found methods of distancing the public or of diluting its input: Spain, by keeping the public uninformed; France by filtering its input through Commissioners of inquiry, whose dedication to their duties may vary[8].

Practical implementation in particular falls victim to low priority at national level. Notably practical implementation is also the area where the Community cannot control the Member States' practical performance. Generally, the number of problems and disputes that arise over EIA rules highlights the inadequacies of administrative verification of the EIS: at best this demonstrates a lack of meticulousness on the part of the administrators where such issues are concerned; at worst a predisposition in favour of authorisation so strong as to make a mockery of the rules. To take another example, in Spain a too literal transposition of LCP obligations means that, regarding practical implementation, no indication whatsoever is given as to how to meet Community obligations; arguably this indicates that there was little intention of doing so. Also, at this stage weaknesses of the original Community legislation or the national transposition are exploited, as with the Annex II difficulties. Moreover, whatever positive elements existed in the legislation often remain unused or are emptied of substance; thus in Spain, although the possibility to issue binding environmental declarations exists, in practice negative declarations have not been issued.

It is common knowledge that economic and industrial interests are better defined and more powerfully expressed than environmental[9]. In fact, that a procedure such as Environmental Impact Assessment should be so plagued by problems of implementation stemming from low priority is an indication of the depth of the resistance to incorporating environmental

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8 And for instance, may choose to ignore 7000 letters of protest; see Chapter 5, point 1.2.3. at *Ambiguous conclusions*.

9 Particularly given all the problems associated with public consultation, the means by which the wider interest is articulated.

protection, for in this case the goals set are timid: the procedure is neither costly[10], nor is there much risk that it will seriously alter the progress of the project in question.

The difference between merely technical and procedural problems and problems of political priorities are perhaps most evident during enforcement. Moreover, the importance of effective enforcement increases due to the lapses and deficiencies of the previous stages; this is the last chance for the purpose of the rules to be ensured. Innovative solutions have been proposed to address specific problems associated with the judicial defence of environmental interests (for instance, the use of newly developed economic methods of determining the cost of environmental damage; considering as-yet unrealised harm 'certain' for the purposes of civil courts once the harmful elements have been set in motion). That these remain unused is perhaps due more to hesitation on the part of judges to 'break rank' rather than to the low priority of environmental issues[11]. On the other hand, occasionally the solution is readily available and does not involve breaking new ground, and yet in environmental situations is not used because of fundamental perceptions surrounding environmental defence. For instance, the greater powers of investigation available in criminal procedures will not be used in environmental cases. Or, as seen in France, where environmental legislation provides for severe penalties such as imprisonment, these are typically avoided for environmental offences[12]. Where remedies exist that are particularly well-suited to environmental problems, such as restoration of the site, these are very rarely ordered; courts avoid the inconvenience and the use of resources (for follow-up) that ordering such remedies implies. The perception of that which is important enough to merit using a less convenient but more effective solution cannot be easily addressed by adjusting a legal rule.

If enforcement procedures have functioned appropriately, it is extremely damaging to the effectiveness of environmental rules when, in the final instance, they are opposed by political forces that are perceived to succeed: Ripa di Meana's shortened stay as commissioner could be

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10 Introduction, point 4. at - *Environment Impact Assessment directive.*

11 Although this hesitation may be stronger where the issue is perceived as of low priority.

12 In Spain, although imprisonment has indeed been ordered, the cases that make it to the stage of a judgment are so rare as not to permit to establish a trend.

cited as an example, as could Dr. Krämer's abrupt transfer in 1994[13]. The non-execution or administrative suspension of court decisions, problematic in all three contexts examined, is another, as is the use of the appeal process in order to establish a *fait accompli*. Rules that have been losing effect throughout formal and practical implementation, despite the fact that they may have been upheld in court, are often no longer relevant by the end of the enforcement process. Such cases imply an immense waste of the resources of both the court and the applicant association/individual; discourage future applicants from embarking on an attempt to seek judicial defence of environmental rules; and impair the respect for the rule of law, at least where environmental law is concerned.

The Fifth Action Programme was absolutely correct in stating that it would require a revolution in the thinking of society as a whole to resolve issues of low priority[14]. However, lessons can be learned and improvements are possible, especially where the problems are of a more technical nature.

2. Lessons learned -- Amendments to the EIA legislation[15]:

The study of problems of implementation and enforcement can give indications not only on how to formulate provisions in a manner that will be effective, but also more generally on what issues must be carefully addressed in order to achieve the purpose for which the legislation was adopted. Particular care must be taken not to leave discretion unwittingly, as with Annex II EIA85/337, and to use language that imposes clear and enforceable legal obligations. (As shall be seen, however, recent instruments use language that is less, rather than more enforceable[16].)

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13 Chapter 3, at point 1.1. - *Conciliation and political pressure*, footnote 46; see also Chapter 4, point 1.1, and footnote 12 for an earlier, similar example.

14 OJ 1993 C138/13. See Introduction, footnote 32.

15 Although an amendment has been made to LCP88/609, this is of a technical nature (to reduce the threshold of combustion plants concerned by the legislation) and did not include tightening definitions (see chapter 5, point 2.3. Problems encountered). The amendment is not further investigated here.

16 Below, point 3.

Again the EIA rules offer an example: the Commission, somewhat understating the case, has recognised that there have been "practical difficulties in implementing the Directive owing to occasional differences in interpretation between the Member States and the Commission. The latter has on several occasions found that Member States are failing to apply the Directive in its entirety."[17] It proposed amendments to resolve the confusion left in the earlier text, at times treating ambiguities that the ECJ was also compelled to address during enforcement proceedings[18]. As shall be seen, the proposed amendments, and the version finally adopted[19], frequently do not measure up to the problems identified.

The proposal was extremely defensive -- a necessity after the 1992 Edinburgh Summit. Pre-empting criticism as well as emphasising the Commission's new commitment, it makes several references to the cost-benefit profile of the proposal[20], to investment, and to the Subsidiarity principle[21]. A sizeable section is devoted to "the impact of the proposal on businesses"[22]. Again the vision of that which is truly important surfaces: despite the integration requirement in Article 130r(2) EC, legislative proposals in other areas typically do not include sections justifying their impact on the environment.

Projects covered: The most significant problem regarding projects caught by EIA85/337 was that Annex II projects often systematically escaped the procedure. Typically, Member States exempted entire categories; as seen, in Spain, it is more accurate to say the Member State exempted the entire Annex. The main element of concern is to clarify in the legislation the requirements for subjecting Annex II to assessment[23], which the ECJ has had to address

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17 Com(93)575 Proposal for a Council Directive amending Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, p.2.

18 Com(93)575; see Com(95)720 for the amended proposal.

19 Directive 97/11 amending Directive 85/337, OJ 1997 L73/5.

20 To which section 2, pp.5-6 of the proposal is devoted.

21 Com(93)575, point 3, p.6; Although no mention is made of the appropriate level of administration; rather, the text simply reassures that the new provisions "do not alter the actual scope of the Member States' obligations under the directive".

22 Com(93)575, pp.22-24.

23 Although in the initial comments the Commission also mentioned the situation seen in France: too many EIA procedures for relatively minor projects. It is noted that, although the Commission may feel that too many projects are subjected to assessment in certain Member States (including France), Article 130tEC as well as Article 13 of the original EIA85/337, allows Member States to take stricter measures.

after litigation[24]. The margin of discretion has been restricted by the amending legislation: it is now stipulated[25] that reference be made to a new Annex III for the criteria for subjecting Annex II projects to assessment, a considerable step towards improving the coherence of the procedure across Member States and towards ensuring that projects likely to have "significant effects" on the environment are subjected to assessment. Annex III outlines with greater precision the elements that must be considered, the project characteristics and location of the project, in determining whether EIA is required[26].

Lessons learned in enforcement have also been applied. For example in Annex I, the term 'integrated chemical installations', which had caused practical problems earlier[27], is clarified; as is the phrase 'modifications to projects'[28], which had been an issue in Article 169 enforcement proceedings[29]. Other categories are also added to the projects covered[30].

In sum, regarding projects covered by the legislation the adopted modifications are occasionally positive, although retaining certain exemptions (projects subject to parliamentary approval) appears difficult to justify[31] and the addition to Annex II of Annex

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24 Case C-133/94 *Commission v. Belgium*, judgment 6 May 1996, para.39.

25 Directive 97/11 Article 1(6) modifying EIA85/337 Article 4(3).

26 For instance, the location of the project must be considered with particular attention to wetlands; coastal zones; mountain and forest areas; nature reserves and parks; areas already classified under Member States' legislation; areas in which the environmental quality standards laid down in Community legislation have already been exceeded; densely populated areas; landscapes of historical, cultural or archaeological significance.

27 Case C-133/94 *Commission v. Belgium*, 1996 ECR I-2323, para.24; see Chapter 1, at point 2.5.1. *Adopted version - Projects covered.*

28 Defined in proposed Article 1 as: "any restructuring of a project which affects it substantially or any substantial change in the conditions of execution or operation of a project"; certainly some room for manoeuvre remains.

29 Case C-431/92 *Commission v Germany*, 1995 ECR I-2211, paras.34-36.

30 Installations for the reprocessing of irradiated nuclear fuel, and temporary storage of radioactive waste have been added to Annex I. Acknowledging the potential damage of recreational activities a new category is also added to Annex II, 'tourism and leisure'. Also in Annex II, agricultural projects are restructured for the sake of clarity.

It has been considered that these do not cover all those that might have been usefully added. For commentary and suggestions for additional amendments to Annex II projects, see Sheate, W.R., "Amending the EC Directive (85/337/EEC) on Environmental Impact Assessment," 1995 European Environmental Law Review 77, at pp. 81-82.

31 See Sheate, 1995, p.81.

I projects "undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years" is extremely worrisome[32].

Quality of EIS: Having noted that one of the problems of practical implementation was that usually only the minimum information listed in Article 5(2) is supplied in the EIS, without reference to the more complete information in Annex III, the Commission here introduces the concept of 'scoping'[33]: providing access to information or data held by any authority. As the Commission had indicated in its proposal[34], the costs of introducing scoping provisions, if carried out effectively, "will be more than offset by savings at later stages in the development consent process." While this may indeed be so, it is interesting that the legislation focusses upon this issue at all when, at least in the two national contexts studied, preliminary contact posed little problem: in France co-operation between developer and authorities was good, and Spain, legal provisions surpassed Community rules (although practical difficulties did arise).

Provisions on scoping are an oblique means of addressing the poor quality of the EIS. The root problem, the fact that the developer prepares the EIS, is not addressed by the new legislation: no provision requires the verification of the EIS quality by an independent professional body. (Notably, the Commission's goal of job creation and training personnel, reiterated in the proposal, would have been thus advanced[35].) Still less is an impartial body required to draw up the EIS. Admittedly, given the current atmosphere it is unlikely that such a provision would have been acceptable to the Member States. Nonetheless, the general quality of the EIS will probably continue to be variable, and frequently poor, despite the new provisions.

As for specific elements of the contents of the EIS, the proposed language of Article 5(1), instead of requiring that the annexed information be provided where Member States

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32 Annex II, point 13; It can be questioned if any effort to restore the site afterward will be required.

33 Directive 97/11 Article 1(7) modifying EIA85/337 Article 5(2); see also Com(93)575, p.3.

34 Com(93)575, p.6.

35 *Ibid.*, p.6: "the Commission has already initiated a programme of technical assistance to that end in conjunction with the Member States."

"consider" it relevant or that the developer may reasonably be required to provide it, required the information "in so far as: (a) the information is relevant....; (b) and the developer may reasonably be required to gather" it. Unfortunately, the final version repeats the original vague wording[36]. Moreover, as seen, a stumbling block during practical implementation was that in neither country studied did the developer really consider alternatives to the original project. An amendment made to Annex IV regarding the information to be supplied was ostensibly intended "to make the examination of the main alternatives to the project compulsory."[37] However, the final version reads: "An outline of the main alternatives studied by the developer..."[38], avoiding stating peremptorily "the developer shall study alternatives. What is required in the event that the developer studied no alternatives is unclear.

Public consultation: A change to Article 6(2)[39] is intended to ensure that the public is consulted before authorisation is accorded rather than merely before construction on a project begins. As seen however, this was far from being the only problem concerning public consultation. Particularly given the Community's emphasis on public participation, it is disappointing that no effort has been made to address the modalities of public consultation: to note the public's comments directly, rather than to filter them through an inquiry commissioner; or to require the Member States to announce the period of public consultation in a manner more appropriate than burying it in the official journal. If indeed the purpose of the EIA rules is to apply the preventive principle, this is unfortunate: the public's input, that could possibly encourage the prevention of environmental harm, can continue to be played down without infringing the provisions. Environmental authorities are also explicitly given an opportunity to express their opinion, although at what stage of the process is unspecified[40].

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36 Directive 97/11 Article 1(7) modifying EIA85/337 Article 5(1).

37 Com(93)575, p.13.

38 Directive 97/11 Article 1(7) modifying EIA85/337 Article 5(3) and Annex IV, point 2.

39 Directive 97/11 Article 1(8) modifying EIA85/337 Article 6(2).

40 Directive 97/11 Article 1(8) modifying EIA85/337 Article 6(1).

Consideration of EIS and public consultation prior to granting authorisation: An amendment to Article 8 adds more precisely that "The results of consultations and the information gathered pursuant to Articles 5, 6, and 7 must be taken into consideration in the development consent procedure." It is difficult to see how a duty as unspecified as 'taking into consideration' could be enforced: any authority will argue that this was precisely what it had been doing. A more stringent duty could have been added: for example, that *independent* environmental authorities be more systematically called upon to give an opinion (*prior* to authorisation, see above), the legal value of which is specified[41]; or that where environmental authorities oppose authorisation, an impartial review of the opinions of competent and environmental authorities be undertaken[42]. As it is, the new provision is not likely to advance the prevention of environmental harm sought by the directive.

As modified, Article 9 makes a helpful contribution to the ability of associations and individuals to monitor conditions and encourages their vigilance. Authorities are now required to publish the decision, its contents and conditions, as well as the "reasons and considerations on which the decision is based", omitting "where the Member States' legislation so provides". It further adds "a description, where necessary, of the main measures to reduce and, if possible, offset the major adverse effects."[43]

A crucial addition to EIA procedures would have been the insistence on monitoring any conditions imposed in authorisations -- by competent authorities, rather than once again relying on individuals and associations. As seen[44], without this, such conditions tend not to be complied with. Nonetheless, no provision in the amendments requires the authorities to monitor compliance with the conditions imposed in the authorisation. This is still less

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41 EIA85/337 Article 6(1) had provided that: "Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent...". No indication is given of the value of this opinion.

42 As seen in Spain, the effectiveness of this depends upon the autonomy of the environmental organ.

43 Directive 97/11 Article 1(10) modifying EIA85/337 Article 9(1).

44 Chapter 5, point 1.2.4. at *Lack of resources*; Chapter 8, point 1.7. at *Failure to monitor.*

explicable given the Community's obligations arising out of the Espoo Convention[45] and the fact that the Commission apparently recognised the necessity of such measures[46]. The provisions for notification and involvement of other potentially affected Member States were greatly expanded by the amending legislation. However, with regard to adapting Community provisions to the monitoring requirements of the Espoo Convention, the Commission considered, in its proposal "that there is no need... to adapt the Community Directive... by providing for systematic monitoring of the circumstances in which the development consent decision was taken and the proposed corrective measures so as to avoid, reduce or offset the adverse effects on the environment."[47] The new Directive adds nothing to the existing provisions in this regard.

Despite certain improvements, the principal issues that needed to be addressed, concerning monitoring eventual conditions of authorisation, improving public consultation, and ascertaining the quality of the EIS, have been left untouched by the March 1997 amendments[48].

3. Challenges: To improve the effectiveness of the Community's legal protection of the environment, various actions are necessary. Environmental protection is a complex, inter-disciplinary area, and some improvements depend upon the intervention of other

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45 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, OJ 1992 C104/7; Proposal for a Council Decision concerning the conclusion on behalf of the Community of the convention on environmental impact assessment in a transboundary context OJ 1992 C104/5, Article 7 on Post-project analysis.

46 Com(93)575, p. 4: the Commission notes the usefulness of a provision concerning "monitoring the effects on the environment due to the implementation of the project" (whether this includes monitoring conditions imposed in the authorisation is unclear). The Commission admits that "imposition of such monitoring would have a beneficial effect when it comes to implementing the project by enabling the competent authorities and the developer to take the necessary measures to soften or compensate for the impact at the earliest possible stage...".

It had even recognised the necessity of monitoring when proposing the original 1985 directive (article 11, OJ 1980 C169/14), although this was taken out by the Council.

47 Com(93)575, p.4. It goes on to indicate that "Before submitting specific proposals it (Commission) intends to examine in greater depth the costs and benefits of such adaptation and its compatibility with the subsidiarity principle".

48 See forthcoming articles by W.R. Sheate, The Environmental Impact Assessment -- A Small Step Forward?" European Environmental Law Review, autumn 1997; and Nigel Haigh, ENDS Report August 1997.

disciplines[49]. For instance, accepting the fact that decision-makers take decisions on the basis of utility, methods of attaching a price to use of the environment so that environmental costs can be incorporated into decision-making must urgently be developed; these are questions for economists rather than lawyers and legislators. However, seeing that this environmental cost is indeed paid, preferably by the polluter, is a matter for the legal discipline[50].

From the Community perspective, improvements to the effectiveness of environmental rules, and specifically their implementation and enforcement, can be made by addressing the more technical problems -- necessarily, by their diverse nature, in a piecemeal manner. For instance, allowing access to information without having to prove an interest[51] and imposing time limits on national administrations for the provision of environmental information[52], were important advances in making the public's involvement in environmental regulation meaningful (although this cannot actually improve the administration's attitude). Since the Community seems recently more willing to intervene in the conditions for obtaining interim measures[53], it would be helpful if it were to encourage the development of harmonised delays for deciding questions of interim protection. In addition, on the sensitive issue of criminal sanctions, on the occasion of a Member State challenge regarding Community intervention, the ECJ recently seemed to take a wider view of what is within the

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49 And perhaps on changes of approach among environmentalists as well. For instance, it would be useful if environmental associations were to clarify and rationalise their approach to certain issues. The immense scope of environmental causes evoked when speaking of environmental protection can cloud the important issues: it would be helpful to prioritise environmental issues, and to distinguish serious problems -- the daily, enormous loss of human life due to lack of water suitable for drinking, the loss of a species -- from volatile and relatively minor issues that tend to catch the media's attention. Furthermore, some environmental organisations have relegated themselves to the sidelines through a stubborn adherence to unrealistically costly standards and goals (*Financial Times*, 2 August 1993 "High Costs of Going Green"). Nonetheless, this is not a question to be examined here.

50 Certainly internalisation of costs can also be encouraged by economic and voluntary instruments. However, given the political situation, proposals for economic incentives could meet the same fate as the abandoned Proposal for a Council Directive introducing a tax on carbon dioxide emissions and energy; Com(92)226; OJ 1992 C196/1.

51 Directive 90/313, Article 3(1).

52 Directive 90/313, Article 3(4).

53 Chapter 3, point 1.2. at *Time and interim measures.*

Community's competence to require[54]. Therefore, more specific reference to sanctions and penalties in Community directives could help ensure that adequate penalties at national level are attached to infringements; at present this is often not the case[55].

Ultimately, for real improvement in implementation and enforcement of Community environmental rules, the more intractable problems rooted in low priority[56] must be addressed. Any discussion of resolving these must begin by acknowledging that there is a strong element of wishful thinking here, yet complete pessimism can only exclude answers. Rather than discussing whether a 'top-down' or a 'bottom-up' approach is preferable, it is here accepted that these approaches are not mutually exclusive and that the need to act on all levels is urgent. A variety of possibilities exist, some involving tools that are already in place or are slowly developing, others that would involve significant changes (and here the possibilities of the IGC are not to be ignored). The Community must simultaneously encourage use of options available at grass-roots level, by emphasising the role of the public and associations, and encourage a top-down approach by demonstrating its willingness to apply seriously such requirements as the integration of environmental protection to other policies, or transparency, to itself.

An absolutely primordial requirement is that the administration in charge of environmental rules be given the power and resources to act effectively. It defies logic to expect that, by heaping further tasks upon an inadequately supported administration, the effectiveness of the rules will improve. However, vast changes in proportioning of the budget are unlikely in the immediate future; and because of this lack of resources and power, it seems that difficulties will persist at both Community and national levels in

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54 Case C-240/90 *Germany v Commission* 1992 ECR I-5423.

55 In fact the Commission has indicated that it is "considering the introduction of a standard clause on sanction in EU environmental legislation following a memorandum by the French Presidency"; Com(95)642, p.108.

56 And which are perhaps evolving slowly as new generations of decision-makers enter positions of authority.

monitoring implementation. At present it may be more logical to try to rationalise and improve the coherence of the existing instruments before taking more tasks on board.

Three areas are concentrated upon here, briefly: enforcement, integration and meeting political challenges. One manner of consolidating results of existing rules is to prioritise enforcement, to ensure that at least in the final instance, the rules are treated seriously. Obviously difficulties in implementation affect the enforcement process, nonetheless improvements are possible. Specifically civil liability is emphasised, as a tool both for giving effect to the polluter pays principle and for alleviating the public authorities' burden of monitoring. Also, since most environmental degradation has an economic source, it is essential that the duty to integrate environmental protection be supported. Finally political challenges must be met, or at least separated from the implementation and enforcement of the law. A choice must be made between the positive political image fostered by adopting environmental rules, and the damage done to the credibility of Community environmental law that comes of allowing implementation and enforcement to remain so poor. Unfortunately, in many areas it is already apparent that the will to meet the challenges is lacking.

3.1. Stricter enforcement:

The Commission preference for preventive measures and for resolving disputes amicably -- through negotiation, package meetings[57], et cetera -- rather than making costly, time-consuming applications to the Court is both a well-known and in many ways well-founded policy[58]. Emphasising exchange of information networks such as IMPEL and the EEA are also important initiatives[59]. However, resentment of the costs and inconvenience associated with environmental rules permeates many levels of action and will not be overcome by encouragement and negotiation only.

At present, the likelihood that offenders will be deterred by the prospect of enforcement, either at Community or Member State level, is insufficient[60]. At Community level, in 1994 environmental infringements counted for 25% of all infringements of Community law registered, yet only three cases were referred to the ECJ for failure to notify, and one referral was made regarding the conformity of national implementing measures[61]. A more specific example concerns Annex II projects in Spain: a reasoned opinion was sent in 1992, yet a referral to the ECJ had still not been made in early 1997[62], although Spain had still not adopted relevant provisions. Almost a decade has passed[63] during which this substantial violation of EIA85/337, with immense practical consequences, has been tolerated. Generally, at Community level and in Spain, the number of environmental cases that make it to judgment are very few; in France, although the numbers may be greater, the results are frequently unsatisfactory. With environmental matters as elsewhere, "in the ultimate

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57 Mentioned again in the Thirteenth Application Report (Com(96)600, p.81.

58 See Chapter 3, point 1.1. at - *Conciliation and political pressure.*

59 See Chapter 2, point 3.2. Creation of information sources; see also Com(95)624: Progress Report on Implementation of the Fifth Environmental Action Programme.

60 This has seemingly been forgotten since the Fourth EAP, which identified, *inter alia,* the need to initiate infringement procedures against delinquent Member States; Section 2.2 on Implementation of Community Directives.

See also PE 116.085, 1988, at p.16; Collins and Earnshaw, p.233, expressing concern that conciliation is used occasionally where enforcement proceedings are more appropriate.

61 Com(95)500 final, Twelfth Application Report, p.59 points 1.2. and 1.3.

62 García Ureta, A., "The E.C. Environmental Impact Assessment Directive Before the European Court of Justice," 5 (1997) Environmental Liability 1 at p.3 note 24,25.

63 Since the entry into force in 1988 of EIA85/337

instance one can think that the polluter shall weigh the cost of compliance with the norms against the probability of being sanctioned for non-compliance"[64]. In the ultimate instance, all the parties involved realise that the threat of enforcement is small regarding environmental infringements.

It is submitted that prevention and negotiation aimed at amicably resolving disputes cannot be effective without a serious threat of enforcement; to make this prospect real, enforcement actions must be more energetically pursued. It must be demonstrated that the "stick in the cupboard" will indeed be used. Furthermore, the various stages of implementation and enforcement are not strictly separate but influence each other: as the prospect of enforcement proceedings is gradually taken more seriously, this will bolster the incentive to reach amicable settlements.

Admittedly, an individual vision is not enough. An occasional victory in an isolated case cannot counteract the accumulation of problems of implementation, and of enforcement itself, that have undermined environmental rules up to this point. Even in the individual case concerned, the ruling frequently arrives too late to be more than symbolic and for the goal of environmental protection to be served. However, despite limitations regarding what can be expected of enforcement, judicial decisions can encourage the evolution of social interests and perceptions. Stricter enforcement, at both national and Community levels, must be stressed if environmental rules are to achieve their purpose.

One of the Community's great advantages lies in its two-tier enforcement system, in the possibility to enforce rules at Community level and within the national legal system. The Community must be willing to play to its advantages, and it appears that national judges are relatively more willing allies than national administrators[65]. Furthermore, at the enforcement stage more than during transposition and practical implementation, certain

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64 ESTEVAN BOLEA, 1991, p.339.

65 For instance, certain French administrative judges (and notably the Conseil d'Etat's earlier negative attitude has somewhat evolved), and Spanish judges generally seem disposed to make interpretations of existing rules in order to give them meaning in an environmental context. Where judges are unwilling to take a stronger stance, this may be more due to lack of audacity than to low priority of the environment.

problems stem more from poor adaptation of procedural rules that do not discriminate against environmental concerns than from low priority. The Community can encourage the treatment of these.

Decentralised enforcement: To ameliorate decentralised enforcement of environmental rules the Community must continue to support the efforts of environmental associations and individuals on the one hand, and national judges on the other.

Absence of effective enforcement confirms the suspicions of citizens and environmental associations that participation in such procedures as EIA, and generally, monitoring compliance with environmental rules and attempting to secure their judicial protection, is costly and futile. As seen[66], the public quickly tires of exerting itself when it perceives its cause to be doomed in advance. The Community must continue to see that information can be obtained: for instance, complaints regarding Directive 90/313[67] must be of particular concern. Here, the Community must also be seen to be willing to apply to itself the requirements of transparency and co-operation with the public, an issue which remains problematic[68]. Not only should existing means be emphasised, the Community must consider placing new tools in the hands of its allies, and perhaps be more willing to stress the input of individuals in procedural rules, and to consider increasing their power: as seen, such issues received disappointing treatment in the proposed EIA amendments. Above all, access to justice in environmental matters -- rather than simply access to justice for consumers, which has received attention in recent years[69] -- must remain an issue at the top of the Community environmental agenda.

Regarding the ability of national courts to uphold Community environmental rules, it may seem evident that the Community must take specific care in formulating legislative

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66 Chapter 5; point 1.2.2. at *Extreme reactions*; Chapter 8, point 1.5. at *Apathy*.

67 Still numerous, according to the Thirteenth Application Report, p.82 at point 1.5, particularly regarding Germany, France, and the Netherlands.

68 Bates, Stephen, "Secretive EU institution forced to go public about not being open," *The Guardian*, 27 November 1996.

69 Com(96)13 final, "Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market."

texts, to use language that is clear, precise and enforceable, yet this appears to be presenting increasing difficulty[70]. Despite the limitations of the enforcement process, precedents set by the ECJ not only give would-be defenders of the environment important tools on which to rely, they can encourage initiative on the part of national judges. As mentioned, the failure of national courts to use the means at their disposal is possibly due to lack of judicial audacity[71]. In such cases, the judges may be susceptible to Community influence. For instance, ruling that environmental interests cannot be subordinate to economic, or that economic interests cannot be taken into account when making certain decisions (as in the Santoña Marsh[72] or the Lappel Bank[73] cases) will not alter the reality of decision-making; nonetheless this supports the seriousness of environmental goals and provides valuable grounds for judicial review. Attempting to limit the possibility for administrative discretion and insisting on scientific rather than economic criteria[74] are crucial factors in redressing the balance of interests, not so that administrative presumptions systematically favour environmental considerations, but at least so that they do not continue to favour systematically economic considerations.

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70 Below, point 3.3.

71 For instance, in using innovative economic methods for assigning market value to environmental goods where compensation is at issue.

72 C-355/90 *Commission v Spain* 1993 ECR I-4272: para.17: "The Spanish Government takes the view that the ecological requirements laid down in that provision must be subordinate to other interests, such as social and economic interests, or must at the very least be balanced against them." Para 18: "That argument cannot be accepted. It is clear from the Court's judgment in Case C-57/89 Commission v Germany 1991 ECR I-833 that, in implementing the directive, Member States are not authorized to invoke, at their option, grounds of derogation based on taking other interests into account."

73 C-44/95 *Regina v Secretary of State for the Environment ex parte Royal Society for the Protection of Birds* (Lappel Bank) 1996 ECR I-3805, para. 31: "a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constructing a general interest superior to that represented by the ecological objective of that directive."

Admittedly the ECJ seems to take away with one hand what it gives with the other: in para.39 it notes that it is possible for "Member States to adopt, for imperative reasons of overriding public interest and subject to certain conditions, a plan or a project adversely affecting an SPA and so made it possible to go back on a decision classifying such an area by reducing its extent...".

74 C-355/90 *Commission v Spain* 1993 ECR I-4272: para.26: "...Although Member States do have a certain margin of discretion with regard to the choice of special protection areas, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the directive, such as the presence of birds listed in Annex I, on the one hand, and the designation of a habitat as a wetland area, on the other."

- *Civil Liability:* Any strategy that aims to reinforce the decentralised enforcement of Community law must, more concretely, reinforce civil liability for environmental harm. The Community declared its interest in civil liability for environmental harm for many years in general statements[75] and began to lay the groundwork with specific legal texts[76]. (However, the main hope for action in this area, a proposal on civil liability for waste[77], has lain dormant since 1991.) The Community must encourage the resolution of the debate launched with its Green Paper on Civil Liability for environmental damage. Establishing a general approach to civil liability for environmental harm could produce benefits from several perspectives: it would give effect to the polluter pays principle embodied in Article 130r(2). Lack of harmonised rules in this area encourages forum shopping for Member States where rules are more lax[78] (thereby providing the necessary justification for Community intervention) and possibly distort competition[79]. Development of a Community-wide approach to civil liability would ensure that environmental interests are not the last to receive treatment in an eventual academic movement to unify European private law[80]: Betlem suggests the adoption of an EC Regulation (which would require no

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75 Starting with such texts as the Fourth EAP OJ 1987 C328/15 at 2.5.5, which speaks of the "better definition of responsibility (including the possibility that the polluter should assume extended liability...)" and encourages the "coordination of instruments".

76 For instance, the 1984 Council Directive 84/631 on the supervision and control within the EC of the transfrontier shipment of hazardous waste; OJ 1984 L326/31, Article 11(3) commits the Council to determining the conditions for implementing the civil liability of the producer in case of damage.

77 Proposal for a Council Directive on Civil Liablity for Damage caused by waste; OJ 1989 C251/3; Amended proposal OJ 1991 C192/6.

78 Betlem, G., "Environmental Liability," in *Towards a European Civil Code,* Hartkamp *et al* editors, Ars Aequi Libri, Martinus Nijhoff Publishers, London 1994.

79 Industry argued that this was not the case, in all probability to avert Community intervention; the Community officials were unconvinced by their arguments; Report of joint European Parliament/ EC Commission hearing on 3,4 November 1993 on civil liability.

80 It is acknowledged that political feasibility of this is problematic. Nonetheless, see generally DEWITTE, B and FORDER C., *The Common Law of Europe and the Future of Legal Education*, Kluwer, Maastricht, 1992; HARTKAMP A.S., *et al, Towards a European Civil Code,* Hartkamp *et al* editors, Ars Aequi Libri, Martinus Nijhoff Publishers, London 1994; Landbo, Ole, "Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?" 40 (1992) American Journal of Comparative Law 573; Reimann, M., "American Private Law and European Legal Unification -- Can the United States be a Model?" 3 (1996) Maastricht Journal 217; van Gerven, "The Case-law of the European Court of Justice and

Member State elaboration) on civil liability for environmental harm[81]. However, the reason for which emphasising civil liability is strongly supported here is that, as seen, many problems arise in practical implementation because the administration has neither the resources nor the initiative to monitor carefully compliance with environmental rules: improved mechanisms for civil liability would help to remedy a great deal of the problems of practical implementation and ease the burden of an overworked and under-supported administration, by encouraging auto-application[82]. (Of course, certain negative effects must also be expected and, if possible, avoided[83].)

As McIntyre comments, "civil liability is an issue where the devil is very much in the detail."[84] Certain issues would need to be emphasised: notably, many of these issues concern adapting legal rules to environmental issues. The debate has already been engaged, it is simply a matter of continuing to promote "greener" options[85]: for instance, strict rather than fault-based liability, joint-and-several rather than joint responsibility[86], and mainly, reparation for 'pure' environmental damage (rather than only to property interests or where

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National Courts as a Contribution to the Europeanisation of Private Law," 1995 European Review of Private Law 367.

81 Which could then be inserted as is into a European Civil Code; Betlem, pp.333-44.

82 The preventive principle, Article 130r(2), would thereby also be given effect.

83 For instance, increased awareness of risk of lender liability can lead to a restriction on the development of contaminated land, with the result that, unless the public sector helps, such sites remain untreated. This also leads to an increase in pressure for the development of 'green fields', or uncontaminated areas. The costs of borrowing is higher where risk is higher; again the site is more likely to remain untreated. Finally, since lender liability can be incurred from having "knowingly permitted" the contamination, this may lead to the removal of environmental clauses from loan applications, et cetera, in order that the lending institution may claim to have known as little as possible; see Rowan-Robinson, J., Theron, C., and Ross, A., "Policing the Environment: Private Regulation and the Role of Lenders," 4 (1996) Environmental Liability 114-18.

In particular the American experience with CERCLA could provide a useful indication of areas to approach with caution; Sidley & Austin, "United States Environmental Law Developments Affecting Lenders in 1995," 2 (1996) Journal of International Banking Law 49-61.

84 McIntyre, O., "European Community Proposals on Civil Liability for Environmental Damage -- Issues and Implications," 1995 Environmental Liability 29, at p. 31.

85 Many of which would be in keeping with the Lugano Convention; see Martin, G., "La Responsabilité civile pour les dommages à l'environnement et la Convention de Lugano," RJE, 2-3/1994.

86 Although on this matter, the Lugano Convention is unclear, and the joint-and-several solution appears to apply only where the damage is indivisible (Articles 6.2 and 6.3 Lugano Convention); see commentary, Martin, "La Responsabilité civile..." 1994, pp.129-30.

human health is affected)[87]. However, what is most urgently needed is wider access to justice for representatives of collective interests. Environmental groups would also need to modify their stance somewhat, perhaps by acknowledging that qualms about who should be entitled to receive compensation for damage to a collective good are justifiable. It is unrealistic to demand, as in the Spanish situation, an *actio popularis*. Nonetheless, by adjusting the remedy sought (restorative rather than financial), or by accepting that duly registered associations can be given standing to claim for collective interests, advance can be made. Finally, the point of the exercise is to remedy environmental harm, rather than to undermine economic actors or drive them into bankruptcy: as McIntyre suggests, limitations of liability and defences[88] would need to be carefully determined, and it would be necessary to establish compensation funds where civil liability cannot be determined[89].

Once an actual financial cost is attached to harmful behaviour and exacted from the polluter, a significant step will have been taken in training the business mentality to include environmental calculations in management decisions, and consequently in alleviating the verification burden of administrative actors.

Centralised enforcement: Despite Commission preferences for a non-confrontational approach to ensuring compliance with environmental rules, Community-level enforcement must itself be improved in order to be more effective and to be so perceived. Again, the Community must maintain the advantages that it already has and encourage the use of tools

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87 Martin, "La Responsabilité civile..." 1994, pp.124-25.

88 McIntyre suggests (p.30) *inter alia* an Act of God defense and the defense of having complied with administrative authorisations. The latter is not supported here, specifically given the laxity of administrative actors, seen throughout this work, when according authorisations and their inadequate follow-up of environmental restrictions imposed in authorisations. Moreover, to exonerate the polluter entirely encourages laxity on his part once he has complied with minimal administrative requirements. Also, the exoneration of the polluter if scientific knowledge at the time did not confirm the danger of the activity, as provided in the Lugano Convention, is dubious. It is in contradiction with the precautionary principle, and Martin points out that the polluter should be exonerated only if nothing in the debate at the time permitted doubt concerning the environmental danger to arise; "La Responsabilité civile..." 1994, p.131.

89 McIntyre, 1995, pp.33-35, 37; Martin, "La Responsabilité civile..." 1994, p.129.
Here again, however, the American experience is instructive: it has been found that much of the trust fund has been eaten away by litigation over liability rather than in actual clean-up of the sites; Rowan-Robinson, J., Theron, C., and Ross, 1996, p.115.

that are already in place, such as the complaints procedure. Complaints received at Community level[90] must be treated with care; this has not been the perception of associations in recent years[91], and the number of complaints has fallen[92].

Furthermore, as seen, regarding infringement proceedings DG-XI can find itself at odds with the various other Community departments and policies, or find itself the target of political efforts by Member State representatives. It is necessary to alleviate political pressure on the enforcement procedure. Discussions regarding possible amendments to the Treaty on European Union provide an opportunity not to be missed. In this regard, Dr. Krämer makes an interesting suggestion, supported here for the most part[93], which could help bypass both the Commission's discretion in enforcement, as well as the difficulties of meeting the Article 173 test for legal title. He suggests that Article 169 be reworded to read:

> 1. The Commission is obliged to start proceedings under Article 169, where it considers that a Member State failed to fulfil an obligation, and to issue a reasoned opinion. 2. The letter of formal notice and the reasoned opinion shall be published. 3. Where a group, acting in the public interest, has asked the Commission to bring a matter, for which a reasoned opinion has been issued, before the Court of Justice and the Commission has failed to do so within ninety days after receipt of that request, that group shall be entitled to bring that matter before the Court. 4. The European Parliament and the Council shall determine the details of the procedure and in particular the conditions, with which a group shall comply in order to be considered to act in the public interest.

As at Member State level, pressing for an *actio popularis* at Community level is not considered reasonable. Yet the proposed wording leaves less to the Commission's choice and opens a route for approved associations to challenge the Commission's inertia. In this manner the Commission would no longer be the only actor empowered to (or responsible for) bringing infringements to the ECJ, a role which it cannot be expected to fulfil impartially

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90 Whatever the shortcomings of the procedure; Chapter 2 point 2.4 at - *Individuals and groups or associations*.

91 For example, of the non-governmental organisations responding to a questionnaire, all believed that external political pressure played a part in the outcome of their complaints; Williams, R., pp.364-65.

See also comments recognising the inadequacy of EU action; Com(95)642, p.108.

92 Thirteenth Application Report, p.81, point 1.4.

93 Perhaps a term less forceful than 'obliged' would be appropriate at point 1, especially since another group would be entitled to bring an action, and since retaining some element of Commission discretion is probably desirable.

where its own decisions are under dispute. This solution, applicable to all areas of Community policy, would be particularly useful regarding environmental issues.

3.2. Integration of environmental protection into other policies:

Again, significant advance could be made by using the tools that are already in place: in this case the requirement embodied in Article 130r(2), that environmental protection be integrated into the definition and execution of other Community policies. Given that most environmental problems can be traced to an economic activity, it is imperative that the Article 130r(2) be emphasised. Unfortunately, the ECJ seems willing to relegate Article 130r(2) to the position of mere policy determination. It has stated that "...Article 130r is confined to defining the general objectives of the Community in the matter of the environment[94]." It is ironic that this requirement, introduced at the same time and in the same Treaty article as the Subsidiarity principle, should be thus dismissed, while on the other hand, Subsidiarity has both been elevated to Article 3B of the Treaty and is being allowed to undermine Community environmental initiatives[95]. This imbalance should be addressed.

In preparation for the Inter-Governmental Conference, the European Parliament consulted the Member States on environmental issues. Germany, supported by Finland, made the interesting suggestion that integration of environmental protection should not be tucked into the Environmental Title, but should be added to an Article applicable to the entire Treaty[96]. This has been taken up in the Dublin II, general outline for a draft revision of the Treaties[97]. Indeed, its position in the Environmental Title, precisely where its application is somewhat redundant, is ill-suited to its purpose: namely that it guide the elaboration of

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94 Case C-379/92 *Criminal Proceedings Against Peralta* 1994 ECR I-3453, para.57.

95 Below, point 3.3.

96 Briefing on the European Environmental Policy and the 1996 Intergovernmental Conference, PE 165.967, at pp.9,12,17.19.

97 Conference of the Representatives of the Governments of the Member States, Brussels 5 December 1996, Conf. 2500/96: The European Union Today and Tomorrow, Adapting the European Union for the Benefit of its peoples and preparing for the future -- A general outline for a draft revision of the Treaties, Dublin II, which proposes a new Article 3d in the TEC.

other Community policies. The point is one to retain, even if environmental matters are not a topic of discussion at the IGC[98], since integration of environmental protection is a means of introducing the topic of environment during the discussion of other policies.

As a matter of general policy, the true long-term economic costs of failure to integrate environmental protection[99] -- the simple fact that clean-up is more expensive than prevention -- must be underlined. And first, the Community must itself be seen to give substance to the requirement. As a minimum, it is in no way excessive to require the Commission to stop funding projects that violate Community environmental policy and rules[100]. As Krämer suggests, EIA should be mandatory for Community co-financed projects -- "and the assessment would have to be a serious one."[101] The Commission must stop viewing such demands as impractical or unreasonable[102].

More actively, the integration of environmental protection could be reinforced. Competition policy illustrates that environmental requirements could be incorporated theoretically without much difficulty. Apart from the generation of new instruments[103], the tools for integrating environment into competition already exist. Effective competition[104] leads to efficient allocation of resources -- which could include natural resources if the

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98 Which would be a serious indicator of governmental priority.

99 Started to in 5AP OJ 1993 C138/96-97 "failure to make these investements (on which future generations depend) could ultimately put whole regions and ultimately civilization itself out of business."

100 Krämer, JEL 1996, p.8.

101 *Ibid.* p.8; to this effect see also the Dublin II, Outline for a draft revision of the Treaties, proposed Declaration to the Final Act, p.50.

102 For instance, recently the Commission indicated that: "The requirement ... to make projects on tourism financed by the Structural Funds subject to environmental impact assessments (EIA) runs counter to the EIA Directive of 1985 and the provisions included in the Structural Funds Regulations of 1993"; Com(96)648 final, Amended proposal for a European Parliament and Council Decision on the review of the European Community Programme of policy and action in relation to the environment and sustainable development "Towards Sustainability", p.3. To state that this "runs counter" is strong language, particularly since tourism projects are among the proposed additions to the amended EIA legislation.

103 Particularly economic instruments, environmental taxes and levies, which are apparently being increasingly used in the Member States; European Commission, The Week in Europe, 30 January 1997, WE/04/97.

104 See generally Jacobs, R., "EEC Competition Law and the Protection of the Environment," 1993/2 LIEI 37-67; and Com(93)162 final XXII, Report on Competition Policy.

polluter pays principle were ruthlessly applied (and costs thereby internalised)[105]. The draconian rules that guard effective competition themselves provide for exemptions into which environmental considerations could be made to fit[106]. Jacobs makes the interesting point[107] that ecological benefits should be considered among the criteria for Article 85(3)[108] exemptions; that the 'ecological record' of a product is part of its immaterial value[109]; and that even if the product is physically not distinguishable from another similar product, its quality is higher if it was produced in an environmentally sound manner or if its disposal is less environmentally harmful[110]. Ecological improvements in the long-term should be considered progress that allows consumers a fair share. Conversely, the Article 130r(2) requirement that the environment be integrated would dictate that block exemptions for agreements that potentially meet conditions for exemption, but which cause significant harm to the environment, be withdrawn (individual exemptions could then be considered)[111].

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105 The Commission puts forth that the effectiveness of the polluter pays principle "depends in particular on the proper operation of the price mechanism, which ought to translate into costs the negative effects of a particular process on the environment"; Com (93)162 final, p.48. To function, of course, such ideas do also depend on the development of economic valuators for environmental goods.

106 Practices prohibited under Article 85(1)EC may be exempted under Article 85(3) if they contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit" and if, simultaneously, they do not impose restrictions that are "not indispensable", or offer the possibility of "eliminating competition in respect of a substantial part of the products in question".

107 Jacobs, R. pp.50-59.

108 Article 85(3): "The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

-any agreement or category of agreements between undertakings;
-any decision or category of decisions by associations of undertakings;
-any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not

a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives

b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

109 Much as prestige has been recognized to be of immaterial value in fashion and perfume (Commission Decision 92/33 of 16 December 1991, *Yves St. Laurent parfums* OJ 1992 L12/24 at 31-32).

110 A cradle-to-grave approach endorsed by the Commission in the Eco-label scheme.

111 Jacobs, R. pp.59-60.

With similar logic, the environment should be considered in the application of Article 86 EC. More formidable in that no exemptions are permitted, Article 86 flatly prohibits abuse of a dominant position. Nonetheless, environmental considerations could influence the decision to qualify a firm's practice as 'abusive'[112]. Finally, mergers and concentrations that benefit the environment should for this reason be viewed with more leniency by the Commission[113].

The ideas exist: it becomes a matter of mustering the will to take a more active stance. The Commission itself agrees that the "mechanisms of competition have an indispensable role to play in facilitating dynamic developments such as the adaptation of the productive system to environmental requirements."[114] Disappointingly, however, it goes on to state that "agreements which restrict competition continue to be prohibited by Article 85(1) even if the parties invoke environmental protection in order to justify them."[115] Although the logic of incorporating environmental protection into decisions concerning breach of competition rules appears sound, again the vision of what needs to be done has preceded the political will to do it.

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112 For instance, a dominant firm that demands higher (environmental) quality products from its supplier does not abuse its position, it integrates environmental concern; nor is a higher price that genuinely reflects environmental costs abusive; Jacobs, R. p.63.

113 Jacobs, R. p.65.

114 Com (93)162 final, XXII Report on Competition Policy, at p.41.

115 *Ibid.*, pp.47-8.

3.3. Distancing politics from law:

As noted, at certain stages the interaction of politics and law is not only inevitable but appropriate, as during the formulation of norms. However, it has been seen that in other stages the intrusion of politics can be excessive. Efforts must be made to distance politics from the application of the law, for instance, to see that those entrusted with enforcing the law are not simultaneously called upon to fulfil political functions. The intrusion of politics detracts from the results achieved by implementation of the rules, of course, but also from the respect for the obligatory nature of these rules. Again this complaint, valid in the application of law in many areas, is particularly severe in degree where environmental rules are concerned. At present one of the most serious challenges to Community environmental law is being articulated in terms of "subsidiarity."

The principle of subsidiarity[116] attempts to organise concurrent competences among various levels of authority, attributing to each level those powers that it can most appropriately exercise. The principle was introduced to the Environment Title of the Treaty by Article 130r(4)[117] of the SEA, although similar notions had existed, without academic stir, since the elaboration of the first EAP's principle 10[118]. Subsidiarity's application was

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116 The concept is born of the notion that "it would be unjust and socially harmful to withdraw from the lower groupings and confer on a larger entity those functions which the former can well perform themselves"; Papal Encyclical "Quadregesimo Anno," Pope Pious XI, 15 May 1931, cited in Constantinesco, V. "Who's Afraid of Subsidiarity?" 11 (1991) *Yearbook of European Law* 33 at pp.34-35. See also Communication of the Commission to the Council and Parliament, of 27 October 1992, "The Principle of Subsidiarity," Bull.EC 10-1992, pp.116-126; Krämer, L. "The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law," 24 (1987) *CMLRev* 659, p.665; Judge, D., "'Predestined to Save the Earth': the Environment Committee of the European Parliament," in *A Green Dimension for the EC?*, Judge, D., ed., 1993, at p.208-9; Golub, J., "Sovereignty and Subsidiarity in EU Environmental Policy," European University Institute, EUI Working Paper RSC No.96/2.

117 Article 130r(4) EEC: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures."

118 First EAP, C112/7: "In each different category of pollution, it is necessary to establish the level of action (local, regional, national, Community, international) that befits the type of pollution and the geographical zone to be protected should be sought.

Actions which are likely to be the most effective at the Community level should be concentrated at that level; priorities should be determined with special care."

extended to the entire Treaty by the Maastricht amendments[119]; Article 3b EC requires the Community to take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States". A clear shift has taken place in the burden of proof: the Commission must now demonstrate that legislation meets the requirements of subsidiarity and supply a written justification of each new piece of legislation, as seen in the proposed EIA amendments.

Member States have used subsidiarity to challenge Community competence and to repatriate competence in certain areas of Community law. At the Edinburgh Council, in the wake of British, Danish and French doubts in approving the Maastricht Treaty, the challenge posed by the principle was made more explicit and a resolution was put forth to revise certain pieces of legislation[120]; 'hit lists' of legislative texts to be scrapped were drawn up[121].

This in itself is not negative; as seen, sometimes the quality of the adopted legislation requires its clarification or revision. However, two factors concerning subsidiarity spell trouble for Community environmental policy and law. First, it was extremely noticeable that environmental law was a main target of the move to revise and to abandon pieces of legislation[122]. Secondly, the debate concerning revision of existing law or the validity of new policy initiatives does not involve the effectiveness of action at one or the other

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119 Article 3B: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas that do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

120 Commission report to the European Council on the adaptation of Community legislation to the subsidiarity principle, Com(93)545, pp.15-17, p.24.

121 As Albert Weale points out, "environmental directives have been high on the British government's list of measures that it thought prime candidates for elimination by application of the principle of subsidiarity"; Weale, A., 1995, p.22; see also Golub, 1996, p.10; Wurzel, JEPP 1996, pp.285-86; Francioni in Markesinis, pp.220-21.

122 European Council of Edinburgh Presidency Conclusions, *Europe* no. 5878 Sunday/Monday 13/14 December 1992; Com(93)545 European Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle; see also Golub, 1996, p.10.

administrative levels or the appropriate form of legal rule[123], as the definition of subsidiarity would imply. Rather, as Collier indicates, a Member State's interpretation of subsidiarity "will invariably be based on political expediency rather than environmental needs"[124]. In fact, Golub reports[125] that a former head of Britain's Department of Environment Central Unit on Environmental Protection indicated that in terms of British strategy, the subsidiarity principle was "really just being thrown in to object to something [we] did not like...not a matter of high principle but of low cash, basically."

The European Parliament, months after the Edinburgh Summit, was prompted to demand

> that the Commission uphold the interests of the environmental improvement of the Community as a whole and strongly resist attempts to undermine that principle by inappropriate definitions of subsidiarity which seek merely to repatriate legislative responsibility to the nation states and which are based on narrow or nationalistic considerations.[126]

The effect of the political challenge, put most emphatically by the United Kingdom[127] has been, first, to decrease Community legislative activity generally, but most strikingly in the area of environment[128]. To illustrate, a 1976 Directive on discharge of dangerous substances[129] requires that further directives on specific substances ("daughter directives") continue to be elaborated: activity here has come to a total standstill and no proposal has been tabled in five years[130]. On a more general basis, not one new piece of environmental legislation was adopted in 1995. Where environmental legislation has been adopted since the Edinburgh Summit, this is more due to concern for effects on the internal market rather than for environmental protection. For instance, between Maastricht and 1995, six directives were

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123 Directives are considered to uphold the subsidiarity principle by leaving a large margin of discretion to the national authorities regarding choice of implementing measures.

124 Collier, *op. cit.*, p.136.

125 Golub, 1996, p. 7.

126 European Parliament, Resolution on Subsidiarity, environment and consumer protection, OJ 1993 C42/40 at point 12.

127 Weale, 1995, pp.20-24; Krämer, "Recent Developments...", London Conference, 1995 (above).

128 Golub, 1996, p.22.

129 OJ 1976 L108/41.

130 Krämer, "Recent Developments...", London Conference, 1995 (above).

adopted and eleven proposed regarding chemicals, because of the impact regulation can have on the competitive position of the concerned industries. By comparison, only one directive was adopted in the area of nature conservation[131]. Again, a decrease in legislative activity is not entirely negative[132]. One could argue that it is necessary to consolidate first the *acquis* of the previously adopted environmental rules, to ensure that these are effectively applied before adopting other measures[133].

However, the second, more serious, consequence of the challenge framed in subsidiarity terms, and of the Commission's new-found timidity must be viewed as quite negative: environmental goals that have been set since the Summit are still more ambiguous and less enforceable than previously. The political atmosphere is being allowed to dilute the quality and above all the precision of the legal standards. For instance, the proposed Directive for Ecological Water Quality[134] (intended to replace the shellfish waters legislation) has been criticised[135] for avoiding actual figures and adopting a procedural approach that allows Member States to define their own targets. Thus, Article 8 requires Member States to "ensure that the measures and practices required under the integrated programmes are legally binding on natural and legal persons, both public and private". On the other hand, Member States can choose in certain sectors not to use legally binding instruments at all but rather to

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131 *Ibid.*

132 Although a selection of environmental problems remain to be addressed through legislation. Golub validly cautions against overly facile insistence that environmental problems are by nature transboundary and therefore justify Community intervention; Golub, 1996, pp.10-13.

133 Furthermore, it has been argued that "it will almost always be possible for the Court, if it wishes, to find grounds for upholding the [challenged] measure"; HARTLEY, T.C., *The Foundations of European Community Law,* second edition, Clarendon Law Series, 1988, p.217. However, this fails to reassure: if the Commission continues to avoid proposing rules, or if legislation continues to be snuffed out while in the proposal stage it seems unlikely that the occasion will present itself for the ECJ to uphold such rules.

134 Com(93)680 final; OJ 1994 C222/6.

135 Krämer, "Recent Developments...", and Mr. David Freestone, "The Impact of Subsidiarity," Conference: *The Impact of EC Environmental Law in the United Kingdom,* London, 3 November 1995; Cross, Gerry, "Enforcement of Environmental Rules: the UK Experience," in *Enforcing European Community Rules: Criminal Procedures, Administrative Procedures and Harmonization,* eds., Harding, C and Swart, B., Dartmouth Publishing, 1996. This is not an isolated example: the proposed framework directive on quality of air has also been criticised for failing to fix precise standards, setting instead umbrella-type goals.

use (Article 8(2)) "economic instruments designed to encourage natural persons and public and private undertakings to comply with the provisions of this Directive." The Commission has argued in the past that "[t]he main choice where subsidiarity is concerned is between binding and non-binding measures"[136] yet here it appears paralysed by the debate and unable to make this fundamental choice. As David Freestone emphasises[137], such general terms and obligations are completely unenforceable by conventional means. They pose entirely new problems related to policing the effectiveness of the measures. The recently proposed Integrated Pollution Prevention and Control Directive (IPPC)[138] also uses similarly loose phrasing and indeterminate goals (e.g. the undefined 'high level of protection', Article 8) which Freestone points out are virtually impossible to police[139].

Recently proposed rules demonstrate that political resentment of Community intervention has overshadowed the lessons taught by implementation and enforcement. This challenge is particularly unsettling in that it affects not isolated individual instances or breaches, but rather the basic quality of Community environmental legislation. Given present political hesitations regarding European integration, the willingness to defend environmental law is lacking, since this is the Community's youngest and far from strongest policy area. However, subsidiarity-termed arguments overlook the fact that, were it not for Community intervention, only certain Member States would have a body of environmental rules. Where a few Member States might indeed be better equipped to regulate the environment, all Fifteen would have to be before Community intervention could be justifiably abandoned for reasons of subsidiarity. Many would not adopt environmental legislation, and such arguments tend to forget that the result would be not only greater environmental deterioration but also, what is perhaps more significant from this perspective,

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136 Bull. EC 10-1992, p.123.

137 Freestone, "The Impact of Subsidiarity," (above).

138 OJ 1993 C311/6; amended: OJ 1995 C165/9.

139 Freestone, "The Impact of Subsidiarity," (above); cf: Mr. Richard Macrory commented that such ideas idea of self-executing legislation were a promised land, i.e. unattainable; Richard Macrory, "The Enforcement of EC Environmental Law Against Member States," Conference: *The Impact of EC Environmental Law in the United Kingdom,* London, 3 November 1995.

distortion of the highly prized internal market. It is ironic that no serious challenge regarding the need for environmental rules was made in the absence of a Treaty foundation, yet now that a solid Treaty base exists, the pressure applied by a few Member States threatens to erode the tenuous *acquis communautaire* in this domain[140].

140 This may be partly explained by the fact that, now that unanimous voting has largely been replaced by qualified majority voting, the content of the rules is less firmly in the grip of Member States.

4. Final comments:

Despite previous inadequacies and the many challenges facing it, the Community still has an important role to play. As seen, much of the legislation would not exist in these Member States at all without Community intervention[141]. Community environmental goals, once adopted, are less likely to sway with the push and shove of the arrival and departure of political majorities in national legislatures; Community-wide rules rein in the ability of national majorities to lessen the goals set at Community level[142]. Finally, international commitments are given the force of national law through the Community's intervention in the national legal orders.

In the worst case, it would be less damaging to stop issuing Community-wide environmental rules than to succumb to political challenge and issue rules of dubious quality, which are then inadequately monitored and enforced. Yet obviously, rather than bailing out of a worthwhile and necessary programme, it would be better still to continue to issue Community legislation, ensuring that high standards[143] are maintained and that adopted rules are specific enough to be monitored and enforced. Maintaining Community environmental standards in other policy initiatives must be encouraged.

And once rules exist, it must be known that, in the ultimate instance, their violation will indeed be sanctioned, either at Community or national level. To act otherwise fundamentally diminishes environmental law: it contributes to a widespread view that environmental law is somehow less 'mandatory'[144] than other areas of law and undermines the small amount of respect the area has gained in the two-and-a-half decades of its existence. Legitimacy of Community law also ebbs as a whole if it appears that its environmental rules are meaningless or that they can be violated with impunity.

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141 In Spain, EIA was introduced at the Community's initiative, in France and Spain, LCP measures were thus adopted.

142 See Chapter 6, point 6. Conclusions.

143 Cf: the 'high level of protection', Article 130r(2); and Article 100a(3).

144 Tenth Application Report 1992 (Environment Offprint) p.4.

The Community cannot allow itself to be swayed by every adverse political breeze. At minimum, it cannot collapse on crucial issues such as the verification of compliance and enforcement of rules to which it has already committed itself. On the contrary, since for the most part the tools for reinforcing the effectiveness of Community environmental law exist, the Community must demonstrate a willingness to use them, and to apply them first to its own initiatives. The Commission has stated that "the credibility of the industrialised world including the Community, from the viewpoint of developing countries will be commensurate with the extent to which it puts its own house in order"[145]. It is submitted that the Community's credibility in the eyes of its own Member States is also at issue.

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145 Fifth EAP, OJ 1993 C138/12.

Problems of Implementation and Enforcement of EC Environmental Law at Community and Member State Levels -- France and Spain as case studies

Appendices

France

The legislative body is composed of the ***Assemblée Nationale,*** elected by direct universal suffrage, and the ***Sénat,*** elected by indirect vote to ensure territorial representation (senatorial seats are divided among the *départements*). The two assemblies deliberate separately as a rule, although provisions allow for common debate under certain circumstances.

The ***Conseil d'Etat*** (Council of State) is the advisory body (below).

The ***Conseil Constitutionnel,*** created in 1958, has certain electoral duties and pronounces on the conformity of organic laws with the Constitution, as well as laws referred to it by the President, the Prime Minister or the President of either the *Sénat* or the *Chambre des Députés* (as the Assemblée Nationale is also known). There is no appeal against its decisions.

Administrative Courts

The courts of first instance with jurisdiction in administrative disputes (*contentieux administratif*), are the ***tribunaux administratifs,*** each of which takes the name of the town in which it is seated.

The ***Cours Administratives d'Appel,*** were created in 1989; most appeals of administrative disputes now go to one of the five Cours Administratives d'Appel (in Paris, Bordeaux, Lyon, Nancy and Nantes).

The ***Conseil d'Etat*** was created in "l'An VIII" (1799) to advise the government on issues of law-making, and developed into a court as ministers grew accustomed to heeding its conclusions, especially in matters to do with complaints from private individuals against the administration. It continues to exercise a dual role of advisor to the government and judge. Five of its divisions conduct advisory work; the sixth, *la section du contentieux,* which is divided into 10 *sous-sections,* hears disputes. The Conseil d'Etat can be a court of first instance for judicial review of *décrets* and other administrative decisions, in matters reserved for it because of their importance; an appeal court for the administrative courts, or a court of last instance for appeals to have a decision struck down on a question of law (facts can no longer be at issue). It is also a court of appeal and of last instance for several specialist courts.

The ***Commissaire du gouvernement*** is a feature of administrative jurisdictions; s/he independently proposes a solution from the point of view of the law.

Judicial System (civil and criminal)

Courts of first degree: In criminal matters, police courts (***tribunaux de police***) deals with *contraventions,* minor offences. The ***tribunaux correctionnels*** deal with more serious offences (*délits*); a tribunal correctionnel is a division of the ***Tribunal de grande instance,*** which also has civil divisions. The *Cour des Assises* (composed of three judges and a jury of nine lay persons), hears the most serious violatios, *crimes.*

Courts of first degree: In civil matters, ***Tribunaux de grande instance*** have replaced the earlier ***tribunaux de première instance***, since 1958. The president of a *tribunal de grande instance* has jurisdiction to make provisional orders on summary procedure.

Civil and criminal courts share the courts of second degree, the ***Cours d'Appel***. The *chambres correctionnels* hear appeals from the *tribunaux de police* and the *tribunaux correctionnels;* other chambers hear appeals, subject to *de minimus* rule, from civil courts.

Seated in Paris, the ***Cour de Cassation*** is a court of third instance, and has the responsibility to ensure uniformity in application of the law throughout the French territory. It is composed of six chambers: one distinct criminal chamber, and three civil chambers. (The remaining two are the commercial and financial chamber, and the social chamber.) An appeal (*pourvoi*) can be made against the decision of any court on grounds of violation of enacted law or the general principles of law; it cannot review fact. It cannot substitute its own decision for that which it examines; rather, if it considers the decision to be affected by a violation of the law, it sets it aside and refers the case back to a court of the same order and degree.

The ***Ministère Public*** (public prosecution) is an institution common to criminal and civil procedure. Agents accredited to a court constitute the ***Parquet***. Agents of the prosecution, having the same training as judges, are known as the *magistrature debout* (the standing magistracy) as opposed to the judges on the bench, the *magistrature assise* (the seated magistracy). A *procureur de la République* (Procurator of the Republic) is attached to a tribunal de grande instance and can give instructions to his assistants, who include the *avocats généraux*. The *Procureur général,* attached to a *Cour d'Appel,* receives his instructions from the Minister of Justice.

Spain

The representative body is referred to as the **Cortes Generales**, bicameral parliament composed of a Congress of Deputies (***Congreso de los Deputados:*** proportional representation) and a Senate (***Senado:*** territorial representation). Although the Senate has the power to veto or amend legislation, Congress may overrule the Senate decision; the primacy of Congress is thus preserved.

The Autonomous Communities also have legislative assemblies, elected by universal suffrage, and a Governing Council, the president of which is elected by the Assembly, from among its members.

The **Consejo de Estado** (Council of State) is the highest consultative body for assessment of the government and the administration in legal matters.

The **Tribunal Constitucional** (Constitutional Court), is the supreme authority in the interpretation of the Constitution; it rules on the constitutionality of certain acts, hears appeals on the unconstitutionality of law, and regulations with the force of law. It also hears appeals for the protection of constitutional rights. Judges may submit issues of unconstitutionality to this court whenever a rule before them appears unconstitutional. There is no appeal against its rulings.

Judicial System: Various criteria exist on which jurisdiction is assumed: the subject matter of the litigation or the value of the claim; the functional jurisdiction, based on the different phases of the proceedings; and territorial jurisdiction.

Juzgados de paz (justices of the peace courts, with non-professional judges) are appointed in some small municipalities without a court of first degree. They are the lowest courts within the system, possessing jurisdiction in certain civil cases (e.g. matters regarding a value of less than 8000 pesetas) and criminal cases of minor importance.

Courts of first degree: The ***Juzgado de Primera Instancia e Instrucción,*** with both civil and penal jurisdiction, are courts of first instance for most civil matters; the Courts of instruction hear only criminal cases. In each province, a ***Juzgado de lo Contencioso-Administrativo,*** a lower administrative court exists.

Courts of second degree: ***Audiencias Provinciales,*** Provincial courts, with both civil and penal jurisdiction, are courts of first instance in certain criminal matters (appeals of which are heard by the *Tribunal Supremo*), or can hear appeals against criminal judgments of a *Juzgado* (above); they are appeal courts against civil judgments given at first instance.

Tribunales Superiores de las Comunidades Autónomas (the superior courts of the Autonomous Communities) have civil, penal, and administrative divisions (*salas*). They are the highest courts in matters reserved expressly for the autonomous regions (for example, housing and welfare, roads, industry).

The ***Tribunal Supremo,*** the highest court with jurisdiction for all of Spain, is competent in all matters except those reserved for the jurisdiction of the Constitutional Court. The court of final instance (except in certain cases, where it is a court of first instance in civil or criminal actions against highest public officials), it is composed of five divisions (*salas*). The first division decides appeals (*casación*) in civil matters; the second division hears appeals and other remedies in penal matters; the third division decides remedies against administrative acts, and has jurisdiction for those remedies for which the *Tribunales Superiores* are not competent (the other divisions hear labour and military matters).

The ***Ministerio Fiscal*** (Public Attorney's Office) promotes justice and defends legality, bringing the charges in penal cases; it also intervenes to defend those persons who lack the capacity or legal representation to defend themselves in court.

Appendix B – Cited rules and case-law: original language version

FRANCE:

Nature Protection Act -- Loi 76-629, du 10 juillet 1976 relative à la protection de la nature

Loi 76-629, Article 1: *La protection des espaces naturels et des paysages, la préservation des espèces animales et végétales, le maintien des équilibres biologiques auxquels ils participent et la protection des ressources naturelles contre toutes les causes de dégradation qui les menacent sont d'intérêt général.*

Il est du devoir de chacun de veiller à la sauvegarde du patrimoine naturel dans lequel il vit. Les activités publiques ou privées d'aménagement, d'équipement et de production doivent se conformer aux mêmes exigences.

La réalisation de ces objectifs doit également assurer l'équilibre harmonieux de la population résidant dans les milieux urbain et ruraux.

Loi 76-629, Article 2: *Les travaux et projets d'aménagement qui sont entrepris par une collectivité publique ou qui nécessitent une autorisation ou une décision d'approbation ainsi que les documents d'urbanisme doivent respecter les préoccupations d'environnement.*

Les études préalables à la réalisation d'aménagements ou d'ouvrages qui, par l'importance de leurs dimensions ou leurs incidences sur le milieu naturel, peuvent porter atteinte à ce dernier, doivent comporter une étude d'impact permettant d'en apprécier les conséquences.

Un décret en Conseil d'Etat précise les modalités d'application du présent article.

Il fixe notamment:

D'une part, les conditions dans lesquelles les préoccupations d'environnement sont prises en compte dans les procédures réglementaire existantes;

D'autre part: Le contenu de l'étude d'impact qui comprend au minimum une analyse de l'état initial du site et de son environnement, l'étude des modifications que le projet y engendrerait et les mesures envisagées pour supprimer, réduire et, si possible compenser les conséquences dommageables pour l'environnement;

Les conditions dans lesquelles l'étude d'impact sera rendue publique;

La liste limitative des ouvrages qui, en raison de la faiblesse de leurs répercussions sur l'environnement, ne sont pas soumis à la procédure de l'étude d'impact.

Il fixe également les conditions dans lesquelles le ministre chargé de l'environnement pourra se saisir ou être saisi, pour avis, de toute étude d'impact.

Si une requête déposée devant la juridiction administrative contre une autorisation ou une décision d'approbation d'un projet visé à l'alinéa 1er du présent article est fondée sur l'absence d'étude d'impact, la juridiction saisie fait droit à la demande de sursis à exécution de la décision attaquée dès que cette absence est constatée selon une procédure d'urgence.

Classified Installations Act -- Loi 76-663 du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement

Loi 76-663, Article 14: *Les décisions prises en application des articles 3, 6, 11, 12, 16, 23, 24, et 26 de la présente loi peuvent être déférées à la juridiction administrative:*

1. Par les demandeurs ou exploitants, dans un délai de deux mois qui commence à courir du jour où lesdits actes leur ont été notifiés;

2. Par les tiers, personnes physiques ou morales, les communes intéressées ou leurs groupements, en raison des inconvénients ou des dangers que le fonctionnement de l'installation présente pour les intérêts visés à l'article 1er, dans un délai de quatre ans à compter de la

publication ou de l'affichage desdits actes, ce délai étant, le cas échéant, prolongé jusqu'à la fin d'une période de deux années suivant la mise en activité de l'installation.

Les tiers qui n'ont acquis ou pris à bail des immeubles ou n'ont élevé des constructions dans le voisinage d'une insallation classée que postérieurement à l'affichage ou à la publication de l'arrêté autorisant l'ouverture de cette installation ou atténuant les prescriptions primitives ne sont pas recevables à déférer ledit arrêté à la juridiction administrative.

***Loi 76-663, Article 18**, added by law 85-661 **(Sanctions pénales):** Quiconque exploite une installation sans l'autorisation requise sera puni d'une peine d'emprisonnement de deux mois à un an et d'une amende de 2000F à 500 000F ou de l'une de ces deux peines.*

En cas de récidive, il sera prononcé une peine d'emprisonnement de deux mois à deux ans et une amende de 20 000F à 1 million de francs ou l'une de ces deux peines.

En cas de condamnation, le tribunal peut interdire l'utilisation de l'installation. L'interdiction cesse de produire effet si une autorisation est délivrée ultérieurement dans les conditions prévues par la présente loi. L'exécution provisoire de l'interdiction peut être ordonnée.

Le tribunal peut également exiger la remise en état des lieux dans un délai qu'il détermine.

Dans ce dernier cas, le tribunal peut: a) soit ajourner le prononcé de la peine et assortir l'injonction de remise en état des lieux d'une astreinte dont il fixe le taux et la durée maximum; les dispositions de l'article 19 concernant l'ajournement du prononcé de la peine sont alors applicables; b) soit ordonner que les travaux de remise en état des lieux seront exécutés d'office aux frais du condamné.

***Loi 76-663, Article 20 (Sanctions pénales):** I. Quiconque exploite une installation en infraction à une mesure de fermeture ou de suspension prise en application des articles 15, 23 ou 24 de la présente loi ou à une mesure d'interdiction prononcée en vertu des articles 18 ou 19 sera puni d'une peine d'emprisonnement de deux mois à deux ans et d'une amende de 20 000F à 1 000 000F ou de l'une de ces deux peines.*

II. Quiconque poursuit l'exploitation d'une installation classée sans se conformer à l'arrêté de mise en demeure d'avoir à respecter, au terme d'un délai fixé, les prescriptions techniques déterminées en application des articles 3, 6, 7, 10 ou 11 sera puni d'une peine d'emprisonnement de dix jours à six mois et d'une amende de 2 000F à 500 000F ou de l'une de ces deux peines.

Sera puni des mêmes peines quiconque poursuit l'exploitation d'une installation sans se conformer à un arrêté de mis en demeure pris en application de l'article 26 par le représentant de l'État dans le département sur avis du maire et du conseil départemental d'hygiène.

***Loi 76-663, Article 22-1 (Sanctions pénales):** added by loi 85-661: En cas de condamnation pour infraction aux dispositions de la présente loi ou des règlements et arrêtés pris pour son application, le tribunal peut ordonner, aux frais du condamné, la publication intégrale ou par extraits de sa décision et éventuellement la diffusion d'un message, dont il fixe explicitement les termes, informant le public des motifs et du contenu de sa décision, dans un ou plusieurs journaux qu'il désigne, ainsi que son affichage dans les conditions et sous les peines prévues, suivant les cas, aux article 51 et 471 du code pénal, sans toutefois que les frais de cette publicité puissent excéder le montant maximum de l'amende encourue.*

***Loi 76-663, Article 22-2, (Sanctions pénales):** added by loi 85-661: Toute association régulièrement déclarée depuis au moins cinq ans à la date des faits, se proposant par ses statuts la sauvegarde de tout ou partie des intérêts visés à l'article premier de la présente loi, peut exercer les droits reconnus à la partie civile en ce qui concerne les faits constituant une infraction aux dispositions de la présente loi ou des règlements et arrêtés pris pour son application et portant un préjudice direct ou indirect aux intérêts collectifs qu'elle a pour objet de défendre.*

Loi 76-663, Article 23 (sanctions administratives): *Indépendamment des poursuites pénales qui peuvent être exercées et lorsqu'un inspecteur des installations classées ou un expert désigné par le ministre chargé des installations classées a constaté l'inobservation des conditions imposées à l'exploitant d'une installation classée, le préfet met en demeure ce dernier de satisfaire à ces conditions dans un délai déterminé.*

Si, à l'expiration du délai fixé pour l'exécution, l'exploitant n'a pas obtempéré à cette injonction, le préfet peut:

Soit faire procéder d'office, aux frais de l'exploitant, à l'exécution des mesures prescrites:

Soit obliger l'exploitant à consigner entre les mains d'un comptable public une somme répondant du montant des travaux à réaliser, laquelle sera restituée à l'exploitant au fur et à mesure de l'exécution des travaux; il est, le cas échéant, procédé au recouvrement de cette somme comme en matière de créances étrangères à l'impôt et aux domaines;

Soit suspendre par arrêté, après avis du conseil départemental d'hygiène, le fonctionnement de l'installation, jusqu'à exécution des conditions imposées.

Loi 76-663, Article 24 (sanctions administratives): *Lorsqu'une installation classée est exploitée sans avoir fait l'objet de la déclaration ou de l'autorisation requise par la présente loi, le préfet met l'exploitant en demeure de régulariser sa situation dans un délai déterminé en déposant suivant le cas une déclaration ou une demande d'autorisation. Il peut, par arrêté motivé, suspendre l'exploitation de l'installation jusqu'au dépôt de la déclaration ou jusqu'à la décision relative à la demande d'autorisation.*

Si l'exploitant ne défère pas à la mise en demeure de régulariser sa situation ou si sa demande d'autorisation est rejetée, le préfet peut, en case de nécessité, ordonner la fermeture ou la suppression de l'installation. Si l'exploitant n'a pas obtempéré dans le délai fixé, le préfet peut faire application des procédures prévues à l'article 23 (3e et 4e alinéas).

Le préfet peut faire procéder, par un agent de la force publique, à l'apposition des scellés sur une installation qui est maintenue en fonctionnement soit en infraction à une mesure de suppression, de fermeture ou de suspension prise en application de l'article 15, de l'article 23 ou des deux premiers alinéas du présent article, soit en dépit d'un arrêté de refus d'autorisation.

Public Inquiries Act -- Loi 83-630, 12 juillet 1983 relative à la démocratisation des enquêtes publiques et à la protection de l'environnement

Loi 83-630 article 4: *Le commissaire enquêteur ou le président de la commission d'enquête conduit l'enquête de manière à permettre au public de prendre une connaissance complète du projet et de présenter ses appréciations, suggestions et contre-propositions.*

Il peut recevoir tous documents, visiter les lieux concernés, à l'exception des lieux d'habitation, après information préalable des propriétaires et des occupants par les soins de l'autorité compétente, entendre toutes personnes dont il juge l'audition utile et convoquer le maître d'ouvrage ou ses representants ainsi que les autorités administratives intéressées.

Sous réserve des dispositions du dernier alinéa de l'article 2 de la présente loi, le maître d'ouvrage communique au public les documents existants que le commissaire enquêteur ou le président de la commission d'enquête juge utiles à la bonne information du public. En cas de refus de communication opposé par le maître d'ouvrage, sa réponse motivée est versée au dossier de l'enquête.

Le commissaire enquêteur ou la commission d'enquête se tient à la disposition des personnes ou des representants d'associations qui demandent à être entendus.

Le rapport et les conclusions motivées du commissaire enquêteur ou de la commission d'enquête sont rendus public. Le rapport doit faire état des contre-propositions qui auront été produites durant l'enquête ainsi que des réponses eventuelles du maître d'ouvrage, notamment aux demandes de communication de documents qui lui ont été adressées.

Loi 83-630, Article 6: *"Les juridictions administratives saisies d'une demande de sursis à exécution d'une décision prise après des conclusions défavorables du commissaire-enquêteur ou de la commission d'enquête, font droit à cette demande si l'un des moyens invoqués dans la requête paraît, en l'état de l'instruction, sérieux et de nature à justifier l'annulation.*

EIA Decree 77-1141 – Décret 77-1141 du 12 octobre 1977

Décret 77-1141, Article 1: *...Les préoccupations d'environnement sont prises en compte par les documents d'urbanisme dans le cadre des procédures qui leur sont propres. "*

Décret 77-1141, Article 2: *Le contenu de l'étude d'impact doit être en relation avec l'importance des travaux et aménagements projetés et avec leurs incidences prévisibles sur l'environnement.*

L'étude d'impact présente successivement:

1. Une analyse de l'état initial du site et de son environnement, portant notamment sur les richesses naturelles et les espaces naturels agricoles, forestiers, maritimes ou de loisirs, affectés par les aménagements ou ouvrages;

2. Une analyse des effets sur l'environnement, et en particulier sur les sites et paysages, la faune et la flore, les milieux naturels et les équilibres biologiques et, les cas échéant, sur la commodité du voisinage (bruits, vibrations, odeurs, émissions lumineuses), ou sur l'hygiène et la salubrité publique;

3. Les raisons pour lesquelles, notamment du point de vue des préoccupations d'environnement, parmi les partis envisagés, le projet présenté a été retenu;

4. Les mesures envisagées par le maître d'ouvrage ou le pétitionnaire pour supprimer, réduire et, si possible, compenser les conséquences dommageables du projet sur l'environnement, ainsi que l'estimation des dépenses correspondantes.

Décret 77-1141, Article 7: *Le ministre chargé de l'environnement peut se saisir de sa propre initiative ou à la demande de toute personne physique ou morale des études d'impact. Il donne alors son avis au ministre dans les attributions duquel figure l'autorisation, l'approbation ou l'exécution de l'ouvrage ou de l'aménagement projeté.*

Classified Installations Decree 77-1133, Décret 77-1133 du 21 Septembre 1977

Décret 77-1133 , Article 43 *(Décret no. 86-1289 du 19 décembre 1986, art.6): Sera puni de la peine d'amende prévue pour les contraventions de la 5eme classe;*

1. Quiconque aura exploité une installation soumise à déclaration sans avoir fait la déclaration prévue à l'articles 3 de la loi du 19 juillet 1976; 2. Quiconque n'aura pas pris les mesures imposées en vertu de l'article 26 de la loi du 19 juillet 1976 sans qu'ait été pris, en raison de l'urgence, l'avis du maire ou du conseil départmental d'hygiène; 3. Quiconque aura exploitée une installation soumise à autorisation sans satisfaire aux prescriptions prévues à l'article 7 de la loi du 19 juillet 1976 et aux articles 17 et 18 du présent décret; 4. Quiconque aura exploité une installation soumise à déclaration sans satisfaire aux prescriptions générales ou particulières prévues aux articles 28, 29 et 30 du présent décret; 5. Quiconque aura omis de procéder aux notifications prévues aux articles 20 (1er alinéa) et 31 (1er alinéa) du présent décret; 6. Quiconque aura omis de faire la déclaration ou la notification prévue à l'article 34 du présent décret; 8. Quiconque aura omis de fournir les informations prévues aux articles 35 et 36 du présent décret; 9 Quiconque aura omis d'adresser la déclaration prévue à l'article 38 du présent décret.

Public Inquiries Decree -- Décret 85-453 du 23 avril 1985

Décret 85-453, article 1.II: *En cas de réalisation fractionnée d'une même opération, l'appréciation des seuils et critères mentionnés à ce tableau tient compte de l'ensemble de l'opération.*

EIA Decree 1993 -- Décret 93-245 du 25 février relatif aux études d'impact

Décret 93-245, article 1 *adds to the earlier decree: Le deuxième alinéa de l'article 1er du décret du 12 octobre 1977 susvisé est complété ainsi qu'il suit: "Dans tous les cas, la dénomination précise et complète du ou des auteurs de l'étude doit figurer sur le document final".*

Décret 93-245, Article 2, I *adds: to Article 2 "Une analyse des effets directs et indirects, temporaries et permanents du projet sur l'environnement, et en particulier sur la fuane et la flore, les sites et paysages, le sol, l'eau, l'air, le climat, les milieux naturels et les équilibres biologiques, sur la protection des biens et du patrimoine culturel et, le case échéants, sur la commodité du voisinage (bruits, bivrations, odeurs, émissions lumineuses) ou sur l'hygiène, la sécurité et la salubrité publique.*

II *: Une analyse des méthodes utilisées pour évaluer les effets du projet sur l'environnement mentionnant les difficultées éventuelles de nature technique ou scientifique rencontrées pour établir cette évaluation.*

Afin de faciliter la prise de connaissance par le public des informations contenues dans l'étude, celle-ci fera l'objet d'un résumé non technique."

III*: Lorsque la totalité des travaux prévus au programme est réalisée de manière simultané, l'étude d'impact doit porter sur l'ensemble du programme. Lorsque la réalisation est échelonnée dans le temps, l'étude d'impact de chacune des phases de l'opération doit comporter une appréciation des impacts de l'ensemble du programme.*

Décret 93-245, Article 9, *modifying decree 77-1141, annexe II: ... à l'exception: - des terrain de golf visés a l'annexe III, - des bases de plein air et de loisirs d'un montant de 12 millions de francs et plus; - des terrains aménagés pour la pratique de sports ou loisirs motorisés visés à l'annexe III.*

LCP arrêté -- arrêté du 27 juin 1990 relatif à la limitation des rejets atmosphériques des grandes installation de combustion

Arrêté du 27 juin 1990 *relatif à la limitation des rejets atmosphériques des grandes installations de combustion et aux conditions d'évacuation des rejets des installations de combustion.*

Arrêté du 27 juin 1990, Article 29: *Le rejet vers l'atmosphère des gaz de combustion est effectué de manière contrôlée, par l'intermédiaire d'une cheminée. Celle-ci a pour objet de permettre une bonne diffusion des gaz de combustion de façon à limiter la teneur de l'air en produits polluants résultant de la combustion.*

La forme des conduits de fumée, notamment dans leur partie la plus proche du débouché à l'atmosphère, est conçue de façon à favoriser au maximum l'ascension des gaz de combustion dans l'atmosphère. Les contours des conduits ne présentent notamment pas de point anguleux et la variation de la section des conduits au voisinage du débouché est très continue et très lente. La partie terminale de la cheminée peut comporter un convergent réalisé suivant les règles de l'art lorsque la vitesse d'éjection est plus élevée que la vitesse choisie pour les gaz dans la cheminée.

Arrêté du 27 juin 1990, Article 30: *La hauteur de la cheminée (différence entre l'altitude du débouché à l'air libre et l'altitude moyenne du sol à l'endroit considéré exprimée en mètres) est déterminée, d'une part, en fonction de la puissance thermique de l'installation et du niveau des émissions de polluants à l'atmosphère, d'autre part, en fonction de l'existence d'obstacles suceptibles de gêner la dispersion des gaz de combustion.*

Elle est définie dans les articles 31 et 32.

Arrêté du 27 juin 1990, Article 31:*Une étude des conditions de dispersion des fumées adaptée au site peut être réalisée par l'exploitant afin de déterminer la hauteur de la cheminée, conformément aux articles 29 et 30.*

Cette étude est obligatoirement réalisée pour les installations de puissance thermique supérieure ou égale à 100 MW.

Elle est également réalisée, quelle que soit la puissance thermique, dans le cas où l'un des obstacles définis à l'article 36 est un immeuble de grande hauteur au sens de l'article R.122-2 du code de la construction et de l'habitation (c'est-à-dire dont le dernier plancher bas du dernier niveau est situé à plus de 28 mètres de sol).

Arrêté du 27 juin 1990, Article 32: *En l'absence d'étude des conditions de dispersion des fumées, la hauteur de la cheminée est fixée par les articles 33 à 35.*

Civil Code

Code Civil, Article 809: *Le président peut toujours (Décr. no.87-4344 du 17 juin 1987) 'même en présence d'une contestation sérieuse', prescrire en référé les mesures conservatoires ou de remise en état qui s'imposent, soit pour prévenir un dommage imminent, soit pour fair cessser un trouble manifestement illicite....*

Code Civil, Article 1382: *Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer....*

Code Civil, Article 1382.36: *Chacun des responsables d'un même dommage doit être condamné à le réparer en totalité, sans qu'il y ait lieu de tenir compte du partage des responsabilités auquel les juges du fond ont procédé entre les diverses responsables, qui n'affecte que les rapports réciproques de ces derniers et non l'étendue de leurs obligations envers la partie lésée. Il en est ainsi même si l'un des responsables est demeuré inconnu.*

Code Civil, Article 1383: *Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.*

Code Civil, Article 1384: *On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.*

Code Civil, Article 1384.33: *Le gardien de la chose qui a été l'instrument du dommage, hors le case où il établit un événement de force majeure totalement exonératoire, est tenu, dans ses rapports avec la victime, à réparation intégrale, sauf son recours éventuel contre le tiers qui aurait concouru à la production du dommage.*

Code Civil, Article 2270-1*: Les actions en responsabilité civile extra-contractuelle se prescrivent par dix ans à compter de la manifestation du dommage ou de son aggravation.*

Code de la Construction et de l'Habitation, Article L.122-16:*"...les dommages causés aux occupants d'un bâtiment par des nuisances dues à des activités agricoles, industrielles, artisanales ou commerciales n'entraînent pas droit à réparation lorsque le permis de construire afférant au bâtiment exposé à ces nuisances a été demandé ou l'acte authentique constatant l'aliénation ou la prise du bail établi postérieurement à l'existence des activités les occasionnant dès lors que ces activités s'exercent en conformité avec les dispositions législatives ou réglementaires en vigueur et qu'elles se sont poursuivies dans les mêmes conditions."*

Code Penal

Code Pénal, Article 153: *"Quiconque aura contrefait, falsifié ou altéré les permis, certificats,...ou autre documents délivrés par les administrations publiques en vue de constater un droit...ou d'accorder une autorisation, sera puni d'un emprisonnement de six mois à trois ans et d'une amende de 1500F à 20,000F.*

...La tentative sera punie comme le délit consommé.

Les mêmes peines seront appliquées:

1. A celui qui aura fait usage desdits documents contrefaits, falsifiés ou altérés..."

Décret 71-94, Article 3 regarding the minister of environment's use of external services from other ministries*"peut en tant que de besoin, faire appel aux services et organismes placés sous l'autorité d'autres ministres et provoquer les inspections qu'il estime nécessaires".*

EIA Circular

Circulaire 93-73, point 1.1.2. *on use of financial thresholds: "je vous demande de veiller tout particulièrement à ce que les estimations annoncées par le pétitionnaire ou le maître de l'ouvrage ne soient pas erronées ou obsolètes et qu'elles prennent bien en compte la totalité des dépenses prévues pour l'aménagement, toutes taxes comprises. Dans le calcul du coût de l'aménagement, il convient, d'une part, d'englober le coût des acquisitions foncières (...), d'autre part, de prendre en compte toutes les phases ou parties du programme, lorsque la réalisation des travaux est fractionnée."*

Circulaire 93-73, point 1.1.3.: *Je vous demande de veiller à ce que, lorsque la réglementation en vigueur le permet, les actions d'accompagnement du projet prévues dans l'étude d'impact au titre des mesures de suppression, de réduction et de compensation soient reprises dans la décision d'approbation ou d'autorisation de l'ouvrage et de faire contrôler, par vos services, le respect des engagements pris. Il vous appartient également, lorsque cela s'avère nécessaire, de prévoir un suivi de la réalisation ou du fonctionnement de l'ouvrage....A défaut de ligne jurisprudentielle claire, il paraît sage, à la fois pour respecter l'esprit des textes et pour éviter des annulations contentieuses, de retenir une interprétation extensive de la notion de réalisation fractionnée et de l'appliquer chaque fois que les différentes phases ou catégories de travaux, engagées ou non par le même maître d'ouvrage, constituent une unité fonctionnelle et que le principe du programme a été décidée de façon certaine.*

Circulaire 93-73, Point 2.2.2. discussing the contents: *"Ces notions...constituent plutôt une explicitation dont l'énoncé doit conduire les auteurs de l'étude d'impact à traiter de manière exhaustive la nature, l'intensité, l'étendue et la durée de tous les impact d'un projet."*

Jurisprudence:

Tribunal des Conflits, *25 janvier 1988: "la poursuite des travaux malgré l'annulation de la déclaration d'utilité publique, alors même qu'elle nuirait à l'environnement, n'a pas porté atteinte à une liberté fondamentale."*

CE 22 décembre 1978 *Cohn Bendit Rec, p.524, a claimant "ne pouvait jamais utilement se prévaloir d'une directive communautaire à l'appui d'un recours dirigé contre une décision individuelle."*

CAA de Paris 29 décembre 1989, *M. et Mme. Chavasse, no.89 P.A.O. 1811 CPEN p.8507, "si le préfet conserve le choix des moyens à employer pour assurer l'exécution de la loi, il est tenu, en l'absence de circonstances exceptionnelles, de prendre les mesures adéquates pour mettre fin à une situation irrégulière. Ainsi, le fait pour le préfet de ne pas avoir pris toutes les mesures dont il dispose pour faire disparaître les nuisances provoquées par un atelier de photogravure est de nature à engager la responsabilité de l'Etat."*

Cour de Cassation, *consistent rulings: "Pour l'application de l'article 1384, alinéa 1 du Code civil, la chose inanimée doit être la cause du dommage; mais du moment où il est établi qu'elle a contribué à la réalisation du dommage, elle est présumée en être la cause génératrice, sauf au guardien à en rapporter la preuve contraire."*

Cass. Civ., 27 novembre 1844, *S. 1844.1.211: "Si on ne peut méconnaître que le bruit causé par une usine lorsqu'il est porté à un degré insupportable pour les propriétés voisines soit une cause légitime d'indemnité, on ne peut considérer d'un autre côté, que toute espèce de bruit causé par l'exercice d'une industrie comme constituant le dommage peut donner lieu à une indemnité."*

Cass. civ., 26 mars 1873, DP 1873.I.353: *"Les tribunaux ordinaires sont compétents soit pour fixer les indemnités dues aux tiers lésés, soit pour prescrire les mesures propres à faire cesser le préjudice, pourvu qu'elles ne soient pas en opposition avec celles prescrites par l'autorité administrative dans un intérêt général."*

SPAIN

Constitución 1978

Constitución 1978, Artículo 2: *La Constitución se fundamenta en la indisoluble unidad de la Nación española, patria común e indivisible de todos los españoles, y reconoce y garantiza el derecho a la autonomía de las nacionalidades y regiones que la integran y la solidaridad entre todas ellas.*

Constitución, Artículo 9.2: *Corresponde a los poderes públicos promover las condiciones para que la libertad y la igualdad del individuo y de los grupos en que se integra sean reales y efectivas, remover los obstáculos que impidan o dificulten su plenitud y facilitar la participación de todos los ciudadanos en la vida política, económica, cultural y social.*

Constitución, Artículo 15: *Todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes. Queda abolida la pena de muerte, salvo lo que puedan disponer las leyes penales militares para tiempo de guerra.*

Constitución, Artículo 17.1: *Toda persona tiene derecho a la libertad y a la seguridad. Nadie puede ser privado de su libertad, sino con la observancia de lo establecido en este artículo y en los casos y en la forma previstos en la ley.*

Constitución, Artículo 18: *1. Se garantiza el derecho al honor, a la intimidad personal y familiar y al a propia imagen. 2. El domicilio es inviolable. Ninguna entrada o registro podrá hacerse en él sin consentimiento del titutlar o resolución judicial, salvo en caso de flagrante delito.*

Constitución 1978, Artículo 20: *1. Se reconocen y protegen los derechos:...d) A comunicar o recibir libremente información veraz por cualquier medio de difusión....*

Constitución 1978, Artículo 23.1: *Los ciudadanos tienen el derecho a participar en los asuntos públicos, directamente o por medio de representantes, libremente elegidos en elecciones periódicas por sufragio universal.*

Constitución, Artículo 24.1: *Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión. 2. Asimismo, todos tienen derecho ... a un proceso público sin dilaciones indebidas...*

Constitución 1978, Artículo 45.1.*Todos tienen el derecho a disfrutar de un medio ambiente adecuado para el desarrollo de la persona, así como el deber de conservarlo. 2. Los poderes públicos velarán por la utilización racional de todos los recursos naturales, con el fin de proteger ye mejorar la calidad de la vida y defender y restaurar el medio ambiente, apoyándose en la indispensable solidaridad colectiva. 3. Para quienes violen lo dispuesto en el apartado anterior, en los términos que la ley fije, se establecerán sanciones penales o, en su caso, administrativas, así como la obligación de reparar el daño causado.*

Constitución 1978, Artículo 53.2: *Cualquier ciudadano podrá recabar la tutela de los libertades y derechos reconocidos en el artículo 14 y en la Sección 1era del Capítulo segundo ante los Tribunales ordinarios por un procedimiento basado en los principios de preferencia y sumariedad y en su caso, a través del recurso de amparo ante el Tribunal Constitucional...*

Constitución 1978, Artículo 53.3: *El reconocimiento, el respeto y la protección de los principios reconocidos en el Capítulo tercero informarán la legislación positiva, la práctica judicial y la actuación de los poderes públicos. Sólo podrán ser alegados ante la jurisdicción ordinaria de acuerdo con lo que dispongan las leyes que los desarrollen.*

Constitución 1978, Artículo 93: *... Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los organismos internacionales o supranacionales...*
Constitución 1978, Artículo 105: *La ley regulará: a) la audiencia de los ciudadanos, directamente o a través de las organizaciones y asociaciones reconocidas por la ley, en el procedimiento de elaboración de las disposiciones administrativas que les afecten. b) El acceso de los ciudadanos a los archivos y registros administrativos, salvo en lo que afecte a la seguridad y defensa del Estado, la averiguación de los delitos y la intimidad de las personas.*
Constitución 1978, Artículo 125: *Los ciudadanos podrán ejercer la acción popular y participar en la Administración de Justicia mediante la institutción del jurado en la forma y con respecto a aquellos procesos penales que la ley determine, así como en los tribunales consuetudinarios y tradicionales.*
Constitución 1978, Artículo 130: *Los poderes públicos atenderán a la modernización y desarrollo de todos los sectores económicos y, en particular, de la agricultura, de la ganadería, de la pesca y de la artesanía, a fin de equiparar el nivel de vida de todos los españoles.*
Constitución 1978, Artículo 138.1 : *El Estado garantiza la realización efectiva del principio de solidaridad consagrado en el artículo 2 de la Constitución, velando por el establecimiento de un equilibrio económico, adecuado y justo entre las diversas partes del territorio español ....*
Constitución 1978, Artículo 139.2: *Ninguna autoridad podrá adoptar medidas que directa o indirectamente obstaculicen la libertad de circulación y establecimiento de las personas y la libre circulación de bienes en todo el territorio español.*
Constitución 1978, Artículo 131.1: *El Estado, mediante ley, podrá planificar la actividad económica general para atender a las necesidades colectivas, equilibrar y armonizar el desarrollo regional y sectorial y estimular el crecimiento de la renta y de la riqueza y su más justa distribución.*
Constitución 1978, Artículo 148.1: *Las Comunidades Autónomas podrán asumir competencias en las siguientes materias:...3) Ordenación del territorio, urbanismo y vivienda...9) La gestión en materia de protección del medio ambiente....*
Constitución 1978, Artículo 149: *El Estado tiene competencia exclusiva sobre las siguientes materias: 23) Legislación básica sobre protección del medio ambiente, sin perjuicio de las facultades de las Comunidades Autónomas de establecer normas adicionales de protección. La legislación básica sobre montes, aprovechamientos forestales y vías pecuarias.*
Constitución 1978, Artículo 149.3: *Las materias no atribuidas expresamente al Estado por esta Constitución podrán corresponder a las Comunidades Autónomas, en virtud de sus respectivos Estatutos. La competencia sobre las materias que no se hayan asumido por los Estatutos de Autonomía corresponderá al Estado, cuyas normas prevalecerán, en caso de conflicto, sobre las de las Comunidades Autónomas, en todo lo que no esté atribuido a la exclusiva competencia de éstas. El derecho estatal será, en todo caso, supletorio del derecho de las Comunidades Autónomas.*

EIA Act

RDL1302/1986, preamble: *...sin otro trámites que los estrictamente exegidos por la economía procesal y los necesarios para la protección de los intereses generales....*

RDL1302/1986, Artículo 3.1. *El estudio de impacto ambiental será sometido, dentro del procedimiento aplicable para la autorización o realización del proyecto al que corresponda, y conjuntamento con éste, al trámite de información pública y demás informes que en el mismo se establezcan. 2. Si no estuviesen previstos estos trámites en el citado procedimiento, el órgano ambiental procederá directamente a someter el estudio de impacto a un periodo de información publica y a recabar los informes que en cada caso considere oportunos.*

RDL1302/1986, Artículo 4.1: *...en la que determine las condiciones que deban establecerse en orden a la adecuada protección del medio ambiente y los recursos naturales.*

RDL1302/1986, Artículo 5: *...el que ejerza estas funciones en la Administración Pública donde resida la competencia sustantiva para la realización o autorización del proyecto.*

RDL1302/1986, Artículo 9.1. *Si un proyecto de los sometidos obligatoriamente al trámite de evaluación de impacto ambiental comenzara a ejecutarse sin el cumplimiento de este requisito será suspendido, a requerimiento del órgano ambiental competente, sin perjuicio de la responsabilidad a que hubiera lugar.*

2. Asimismo, podrá acordarse la suspensión cuando concurriera alguna de las circunstancias siguientes: a) La ocultación de datos, su falseamiento o manipulación maliciosa en el procedimiento de evaluación. b) El incumplimiento o transgresión de las condiciones ambientales impuestas para la ejecución del proyecto.

EIA Regulation

RD1131/1988, preamble: *...lejos de ser un freno al desarrollo y al progreso, supone y garantiza una visión más completa e integrada de la actuaciones sobre el medio en que vivimos, una mayor creatividad e ingenio, mayor responsabilidad social....evitando dilaciones innecesarias.*

RD1131/1988, Artículo 6: *La evaluación de impacto ambiental debe comprender, al menos, la estimación de los efectos sobre la población humana, la fauna, la flora, la vegetación, la gea, el suelo, el agua, el aire, el clima, el paisaje y la estructura y función de los ecosistemas presentes en el área previsiblemente afectada. Asimismo, debe comprender la estimación de la incidencia que el proyecto, obra o actividad tiene sobre los elementos que componen el Patrimonio Histsórico Español, sobre las relaciones sociales y las condiciones de sosiego público, tales como ruidos, vibraciones, olores y emisiones luminosas, y la de cualquier otra incidencia ambiental derivada de su ejecución.*

RD1131/1988, Artículo 7: *Contenido -- Los proyectos a que se refiere el artículo 1. deberán incluir un estudio de impacto ambiental que contrendrá, al menos, los siquientes datos:*

Descripción del proyecto y sus acciones.
Examen de alternativas técnicamente viables y justificación de la solución adoptada.
Inventario ambiental y descripción de las interacciones ecológicas o ambientales claves.
Identificación y valoración de impactos, tanto en la solución propuesta como en sus alternativas.
Establecimiento de medidas protectoras y correctoras.
Programa de vigilancia ambiental.
Documento de síntesis.

RD1131/1988, Artículo 11: *... El programa de vigilancia ambiental establecerá un sistema que garantice el cumplimiento de las indicaciones y medidas, protectoras y correctoras, contenidas en el estudio de impacto ambiental.*

RD1131/1988, Artículo 12: *El documento de sintesis comprenderá en forma sumaria:*

a) Las conclusiones relativas a la viabilidad de las actuaciones propuestas.
b) Las conclusiones relativas al examen y elección de las distintas alternativas.
c) La propuesta de medidas correctoras y el programa de vigilancia tanto en la fase de ejecución de la actividad proyectada como en la de su funcionamiento.

El documento de síntesis no debe exceder de veinticinco páginas y se redactará en

términos asequibles a la comprensión general.

Se indicarán asimismo las dificultades informativas o técnicas encontradas en la realización del estudio con especificación del origen y causa de tales dificultades.

RD1131/1988, Artículo 17: *...comunicará al titular del proyecto los aspectos en que, en su caso, el estudio ha de ser completado, fijándose un plazo de veinte días para el cumplimiento, transcurrido el cual, procederá a formular la declaración de impacto en el plazo establiecido en el artículo 19.*

RD1131/1988, Artículo 18.1: *La declaración de impacto determinará, a los solos efectos ambientales, la conveniencia o no de realizar el proyecto, y en caso afirmativo, fijará las condiciones en que debe realizarse.*

RD1131/1988, Artículo 18.3: *Las condiciones a que se refiere el apartado 1 de este artículo deberán adaptarse a las innovaciones aportadas por el progreso científico y técnico que alteren la actividad autorizada, salvo que por su incidencia en el medio ambiente resulte necesaria una nueva Declaración de Impacto.*

RD1131/1988, Artículo 25.1: *Corresponde a los órganos competentes por razón de la materia, facultados para el otorgamiento de la autorización del proyecto, el seguimiento y vigilancia del cumpliimiento de lo establecido en la Declaración de Impacto Ambiental. Sin perjuicio de ello, el órgano administrativo de medio ambiente podrá recabar información de aquéllos al respecto, así como efectuar las comprobaciones necesarias para verificar dicho cumplimiento.*

RD1131/1988, Artículo 27: *Valor del Condicionado ambiental. -- A todos los efectos, y en especial a los de vigilancia y seguimiento del cumplimineto de la Declaración de Impact Ambiental, el condicionado de ésta tendrá el mismo valor y eficacia que el resto del condicionado de la autorización.*

RD1131/1988, Annex 1: *Impacto ambiental severo -- Aquel en el que la recuperación de las condiciones del medio exige la adecuación de medidas protectoras y correctoras, y en el que, aún con esas medidas, aquella recuperación precisa un período de tiempo dilatado. Impacto ambiental crítico -- Aquel cuya magnitud es superior al umbral aceptable. Con él se produce una pérdida permanente de la calidad de las condiciones ambientales, sin posible recuperación, incluido con la adopción de medidas protectoras o correctoras.*

LCP Regulation -- RD646/1991 por el que se establecen nuevas normas sobre limitación a las emisiones a la atmósfera de determinados agentes contaminantes procedentes de grandes instalaciones de combustión.

RD646/1991, Artículo 3(4)*...el órgano donde resida la competencia sustantiva para la autorización de las instalaciones, determinará las modificaciones de los topes de emisiones y/o las fechas que figuran en los anexos I y II de este Real Decreto, que habrán de ser propuestos a la Commission de la CEE.*

RD646/1991, Artículo 10: *La explusión de gases residuales de las instalaciones de combustión deberá realizarse de forma controlada por medio de una chimenea.*

La autorización contemplada en el artículo 4 establecerá las condiciones de expulsión de dichos gases. En particular, la Administración competente se encargará de que la altura de la chimenea se calcule de forma que se salvaguarde la salud humana y el medio ambiente.

RD646/1991, disposición transitoria: *En las centrales térmicas que quemen carbones de baja calidad, los grupos que sean grandes instalaciones de combustion existentes a los efectos de este Real Decreto, continuarán compliendo los niveles de emisión, que en cada caso hayan sido determinados por la Dirección General de la Energía....*

MINER Order, 26 December 1995, *fourth disposition: Los titulares de la centrales termoeléctricas que deban medir en continuo deberán justificar el cumplimiento de las Normas Europeas (EN) o de las Normas UNE que les sean aplicables, según el apartado anterior, mediante certificación expedida por una entidad colaboradora en materia de medio ambiente.*

Este certificado deberá ser expedido y presentado a la autoridad competente antes de los seis meses después de su puesta en marcha, y en lo sucesivo, al menos cada tres años.

Para las centrales termoeléctricas puestas en marcha con anterioridad a la promulgación de esta Orden, el certificado a que se hace referencia en los párrafos anteriores deberá expedirse y presentarse, por primera vez, en el plazo de un año desde la entrada en vigor del presente Orden....

Autonomous rules:

Aragón *Decreto 118/1989, Artículo 8: La declaración de impacto ambiental será revisable en vía administrativa, bien a través de la impugnación del acto de decisión o autorización en el que se integre, bien directamente cuando la declaración es sí misma el acto de decisión.*

Catalunya *Ley Orgánica 4/1979, 18 December, Artículo 9.10: Montes, aprovechamientos y servicios forestales, vías pecuarias y pastos, espacios naturales protegidos y tratamiento especial de zonas de montaña, de acuerdo con lo dispuesto en el número 23 del apartado 1 del artículo 159 de la Constitución.*

Canarias *Ley 11/1990: La obligación de realizar una evaluación de impacto eximirá de la otra u otras de inferior categoría, cuando estas resulten concurrentes para el mismo proyecto o actividad.*

LJCA, Artículo 122.2: *Procederá la suspensión cuando la ejecución hubiese de ocasionar daños o perjuicios de reparación imposible o difícil.*

Law on the Juridical Regime of Public Administrations and of Common Administrative Procedure -- Ley de Régimen Jurídico de las Adminstraciones Públicas y del Procedimiento Administrativo Común (LRJPAC)

LRJPAC, Artículo 4: *1. Las Administraciones Públicas, en el desarrollo de su actividad y en sus relaciones recíprocas deberán:...c) Facilitar a las otras Administraciones en la información que precisen sobre la actividad que desarrollen en el ejercicio de sus propias competencias, d) Prestar, en el ámbito propio, la cooperación y asistencia activas que las otras Administraciones pudieran recabar para el eficaz ejercicio de sus competencias....3. La asistencia requerida sólo podra negarse cuando el Ente del que se solicita no esté facultado para prestarla o cuando, de hacerlo, causará un perjuicio grave a sus intereses o al cumplimiento de sus propias funciones. La negativa a prestar la asistencia se comunicará motivadamente a la Administración solicitante. 4. La Administración General del Estado, las de las Comunidades Autónomas y las Entidades que integran la Administración Local deberán colaborar y auxiliarse para aquellas ejecuciones de sus actos que hayan de realizarse fuera de sus respectivos ámbitos de competencias.*

LRJPAC, Artículo 37.7: *El derecho de acceso será ejercido por los particulares de forma que no se vea afectada la eficacia del funcionamiento de los servicios públicos....*

LRJPAC, Artículo 43.2: *Cuando en los procedimientos iniciados en virtud de solicitudes formuladas por los interesados no haya recaído resolución en plazo, se podrán entender estimadas aquéllas en los siguientes supuestos: a) solicitudes de concesión de licencias y*

autorizaciones de instalación, traslado o ampliación de empresas o centros de trabajo....c) En todos los casos, las solicitudes en cuya normativa de aplicación no se establezca que quedarán desestimadas si no recae resolución expresa.

LRJPAC, Article 71.1: *...si así no lo hiciera, se le tendrá por desistido de su petición, archivándose sin más trámite, con los efectos previstos en el artículo 42.1.*

LRJPAC,Article 92.2: *No podrá acordarse la caducidad por la simple inactividad del interesado en la cumplimentación de trámites, siempre que no sean indispensables para dictar resolución. Dicha inactividad no tendrá otro efecto que la pérdida de su derecho al referido trámite.*

LRJPAC, Artículo 111.1: *La interposición de cualquier recurso, excepto en los casos en que una disposición establezca lo contrario, no suspenderá la ejecución del acto impugnado....2. No obstante lo dispuesto en el apartado anterior, el órgano a quien competa resolver el recurso, previa ponderación, suficientemente razonada, entre el perjuicio que causaría al interés público o a terceros la suspensión y el perjuicio que se causa al recurrente como consecuencia de la eficacia inmediata del acto recurrido, podrá suspender de oficio o a solicitud del recurrente, la ejecución del acto recurrido, cuando concurra alguna de las siguientes circunstancias: a) Que la ejecución pudiera causar perjuicios de imposible o difícil reparación. b) Que la impugnación se fundamente en alguna de las causas de nulidad de pleno derecho previstas en el artículo 62.1 de esta Ley. 3... Al dictar acuerdo de suspensión podrán adoptarse las medidas cautelares que sean necesarias para asegurar la protección del interés público y la eficacia de la resolución impugnada. 4. El acto impugnado se entenderá suspendido en su ejecución si transcurridos treinta días desde que la solicitud de suspensión haya tenido entrada en el órgano competente para decidir sobre la misma, éste no ha dictado resolución expresa, sin necesidad de solicitar la certificadión que regula el artículo 44 de esta Ley. ...*

LRJPAC, Artículo 119.3: *Transcurrido el plazo de tres meses desde la interposición del recurso extraordinario de revisión sin que recaiga resolución, se entenderá desestimado, quedando expedita la vía jurisdiccional contencioso-administrativa.*

LRJPAC Artículo 136: *Medidas de carácter provisional: Cuando así esté previsto en las normas que regulen los procedimientos sancionadores, se podrá proceder mediante acuerdo motivado a la adopción de medidas de carácter provisional que aseguren la eficacia de la resolución final que pudiera recaer.*

LRJPAC Artículo 137.2: *Los hechos declarados probados por resoluciones judiciales penales firmes vincularán a las Administraciones Públicas respecto de los procedimientos sancionadores que substancien.*

LRJPAC Artículo 133: *Concurrencia de sanciones. No podrán sancionarse los hechos que hayan sido sancionados penal o administrativamente, en los casos en que se aprecie identidad del sujeto, hecho y fundamento.*

LRJPAC Article 139: *principios de la responsabilidad. 1. los particulares tendrán derecho a ser indemnizados por las Administraciones Públicas correspondientes, de toda lesión que sufran en cualquiera de sus bienes y derechos, salvo en los casos de fuerza mayor, siempre que la lesión sea consecuencia del funcionamiento normal o anormal de los servicios públicos. 2. En todo caso, el daño alegado habrá de ser efectivo, evaluable económicamente e individualizado con relación a una persona o grupo de personas.*

Civil Code

Código Civil, Artículo 1902: *El que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, está obligado a reparar el daño causado.*

Código Civil, Artículo 1908.1. *Por la explosión de máquinas que no hubiesen sido cuidadas con la debida diligencia, y la inflamación de sustancias explosivas que no estuviesen colocadas en lugar seguro y adecuado. 2. Por los humos excesivos que sean nocivos a las personas o a las propiedades. 3...4. Por las emanaciones de cloacas o depósitos de materias infectantes, construidos sin las precauciones adecuadas al lugar en que estuviesen.*

Código Civil, Artículo 1214: *Incumbe la prueba de las obligaciones al que reclama su cumplimiento, y la de su extinción al que la opone.*

Penal Code

Código Penal, Artículo 50.4: *La cuota diaria tendrá un mínimo de doscientas pesetas y un máximo de cincuenta mil. A efectos de computo, cuando se fije la duración por meses o por años, se entenderá que los meses son de treinta días y los años de trescientos sesenta*

Código Penal, Artículo 347-bis: *Será castigado con la pena de arresto mayor y multa de 175.000 a 5.000.000 de pesetas, el que contraviniendo las Leyes o Reglamentos protectores del medio ambiente, provocare o realizare directa o indirectamente emisiones o vertidos de cualquier clase, en la atmósfera, el suelo o las aguas terrestres o marítimas, que pongan en peligro grave la salud de las personas, o puedan perjudicar gravemente las condiciones de la vida animal, bosques, espacios naturales o plantaciones útiles.*

Se impondrá la pena superior en grado si la industria funcionara clandestinamente, sin haber obtenido la preceptiva autorización o aprobación administrativa de sus instalaciones, o se hubiere desobedecido las órdenes expresas de la autoridad administrativa de corrección o suspensión de la actividad contaminante, o se hubiere aportado información falsa sobre los aspectos ambientales de la misma o se hubiere obstaculizado la actividad inspectora de la Administración.

También se impondrá la pena superior en grado si los actos anteriormente descritos originaren un riesgo de deterioro irreversible o catastrófico.

En todos los casos previstos en este artículo podrá acordarse la clausura temporal o definitiva del establecimiento, pudiendo el Tribunal proponer a la Administración que disponga la intervención de la empresa para salvaguardar los derechos de los trabajadores.

Nuevo Código Penal, Artículo 325: *Será castigado con las penas de prisión de seis meses a cuatro años, multa de ocho a veinticuatro meses e inhabilitación especial para profesión u oficio por tiempo de uno a tres años el que, contraviniendo las Leyes u otras disposiciones de carácter general protectoras del medio ambiente, provoque o realice directa o indirectamente emissiones, vertidos, radiaciones, extracciones o excavaciones, aterramientos, ruidos, vibraciones, inyecciones o depósitos, en la atmósfera, el suelo, el subsuelo, o las aguas terrestres, marítimas o subterráneas, con incidencia, incluso en los espacios transfronterizos, así como las captaciones de aguas que puedan perjudicar gravamente el equilibrio de los sistemas naturales. Si el riesgo de grava perjuicio fuese para la salud de las personas, la pena de prisión se impondrá en su mitad superior.*

Nuevo Código Penal, Artículo 326: *Se impondrá la pena superior en grado, sin perjuicio de las que puedan corresponder con arreglo a otras preceptos de este Código, cuando en la comisión de cualquiera de los hechos descritos en el artículo anterior concurra alguna de las circunstancias siguientes:*

a) que la industria o actividad funcione clandestinamente, sin haber obtenido la preceptiva autorización o aprobación Administrativa de sus instalaciones

b) que se hayan desobedecido las órdenes expresas de la autoridad administrativa de correción o suspensión de las actividades tipificadas en el artículo anterior.

c) que se haya falseado u ocultado información sobre los aspectos ambientales de la misma.

d) que se haya obstaculizado la actividad inspectora de la Administración.

e) que se haya producido un riesgo de deterioro irreversible o catastrófico.

f) que se produzca una extracción ilegal de aguas en período de restricciones.

Nuevo Código Penal, Artículo 329: 1. *La autoridad o funcionario público que, a sabiendas, hubiere informado favorablemente la concesión de licencias manifiestamente ilegales que autoricen el funcionamiento de las industrias o actividades contaminantes a que se refieren los artículos anteriores, o que con motivo de sus inspecciones hubieren silenciado la infracción de Leyes o disposiciones normativas de carácter general que las regulen será castigado con la pena*

establecida en el artículo 404 de este Código y, además, con la de prisión de sies mese a tres años o la de multa de ocho a venticuatro meses...
Nuevo Código Penal, Artículo 330: *Quien, en un espacio natural protegido dañare gravemente alguno de los elementos que haan servido para calificarlo, incurrirá en la pena de prisión de uno a cuatro años y multa de doce a veinticuatro meses.*

Ley Orgánica del Poder Judicial *(LOPJ): Ley 6/1985) Artículo 7.3: Los Juzgados y Tribunales protegerán los derechos e intereses legítimos, tanto individuales como colectivos, sin que en ningún caso pueda producirse indefensión. Para la defensa de estos últimos se reconocerá la legitimación de las corporaciones, asociaciones y grupos que resulten afectados o que estén legalmente habilitados para su defensa y promoción.*

Hunting Act (Ley de Caza) Article 33.5: *...si no consta el autor del daño causado a las personas, responderán solidariamente todos los miembros de la partida de caza.*

Mining Act (Ley de Minas) Article 81: *"...será responsable de los daños y perjuicios que se ocasionen todo titular o poseedor de derechos mineros reconocidos en esta ley.*

Congreso de los Diputados, Comisión de Industria, Obras Públicas, Servicios, *4 May 1988, pp.9474 and 9476: "...no puede dejar de pensar en la necesidad de expansionar sus actividades económicas, industriales y de otro tipo. Por tanto no podemos hacer de la necesidad de incorporar el valor medioambiental un corsé o un impedimento para crecer económicamente para invertir, para desarrollar las regiones con más dificultades y más carencias".*

Case-law:

Constitutional Court -- Tribunal Constitucional

STC 62/1983 11 July *...aquéllos en que la satisfacción del interés común es la forma de satisfacer el de todos y cada uno de los que compone la sociedad, por lo que puede afirmarse que cuando un miembro de la sociedad defiende un interés común sostiene simultáneamente un interés personal, que puede o no ser directo...*
STC 5/1981, 13 December *...de resolverse en virtud del principio de competencia para determinar qué materias han quedado constitucional y estatutariamente conferidas a los órganos legislativos de las Comunidades Autónomas y cuáles corresponden a las Cortes Generales del Estado.*
STC: 15 July 1987: *"...en el trámite de ejecución puede plantearse, y en su caso deben resolverse, problemas relativos a una ejecución faudulenta o simulada del fallo judicial, en la medida en que impliquen un incumplimiento efectivo de lo sentenciado, pues repele a la efectividad de la tutela judicial que, mediante actuaciones de aquella naturaleza, pueda arrojarse sucesiva e indefinidamente sobre el afectado la carga de promover nuevas acciones o recursos para obtener la satisfacción completa de sus derechos e intereses reconocidos por sentencia firme."*
STC 28 October 1987: *"...la insinceridad de la desobedencia disimulada de los órganos administrativos".*

Tribunal Supremo

STS 5 April 1960: *"...la protección de los derechos civiles... también debe extenderse, llegado el menoscabo, a las medidas de prevención que razonablemente impidan ulteriores lesiones patrimoniales...".*
STS 14 May 1963: *"No puede excusar de responsabilidad al causante de un daño, el haber cumplido formulariamente todos los requisitos reglamentarios a que viene obligado, cuando la realidad se impone demonstrando que las medidas adoptadas no dieron resultado".*
STS 12 December 1980: *"...indemnización prescindiendo de toda idea de culpa por tratarse de responsabilidad con nota de objetiva."*

STS 12 December 1980: *...en esta zona de tangencia entre la jurisdicción común y la contencioso-administrativa hay que distinguir entre lo que es materia que atañe a la propiedad privada y a su protección, de incuestionable carácter civil, y lo que afecta a los intereses generales o públicos, de inequívoca naturaleza administrativa, aspectos que es preciso separar*

STS 12 December 1980: *...según la doctrina de esta Sala, la jurisdicción ordinaria es fuente o raíz de todas las demás y por ello tiene vis atractiva en los casos dudosos...*

SSTS 17 March 1981, 23 September 1988; 16 January 1989; *"...exigiendo, en todo caso, el resarcimiento del daño y en su caso la adopción de medidas para evitarlo o ponerle fin, ambos aspectos competencia de la jurisdicción del orden civil."*

STS 17 May 1981: *"...la antijuricidad...no se elimina al presuponer un acto conforme a las normas sino que se integra por faltar al mandato general de diligencia al actuar frente a bienes ajenos jurídicamente protegidos...aún en los casos de funcionamiento de una industria previas las precauciones señaladas en los Reglamentos, su ejercicio ha de guardar el debido respeto a la propiedad ajena, de modo que debe indemnizar a los perjudicados por los daños anormalmente derivados de esa explotación permitida, radicando entonces el deber de indemnizar, más que en la antijuridicidad del acto, que hasta cierto punto no sería contrario a Derecho, en la exigencia de justicia conmutativa de que aquél ha defendido su interés en perjuicio del derecho de otro, aunque autorizado, ha de resarcir a quien hubo de soportar la perturbación o menoscabo de su derecho de propiedad...".*

STS 14 July 1982 *"...que señala como causa aquélla que, aún concurriendo con otras, sea la decisiva y la determinante del evento dañoso, en relación con las circunstancias del caso y el buen sentido".*

STS 17 February 1984: *...la eficacia de la Administración es un bien jurídicamente protegido aunque es de rango inferior a los derechos fundamentales.*

STS 9 May 1986: *...los principios rectores tienen valor normativo y vinculan a los poderes públicos cada uno en su respectiva esfera, a hacerlos eficazmente operativos.*

STS 3 December 1987: *...la jurisdicción civil entra en juego incluso en las cuestiones derivadas de actos en que la Administración no actúa como poder en el ejercicio del ius imperium.*

STS 23 September 1988: *"...sean o no potables, y se consuman o no de hecho por el personal de la finca y los ganados del actor."*

STS 25 April 1989, Ar.3233: *Como el artículo 45 de la Constitución reconoce a 'todos' el derecho a disfrutar de un medio ambiente adecuado para el desarrollo de la persona, estableciendo, además, el deber de los poderes públicos de proteger, defender y restaurar el medio ambiente, negar la legitimación de don Gabriel P.S. es negar lo evidente. ...los preceptos contenidos en el capítulo tercero del Título I de la Constitución, pese a girar bajo la rúbrica de 'principios rectores de la política social y económica' no constituyen meras normas programáticas que limiten su eficacia al campo de la retórica política o de la inútil semántica propia de las afirmaciones demagógicas.*

STS 25 April 1989 *el Ayuntamiento tiene que cumplir lo que se le ha solicitado, lo que implica además, la obligación de incluir en sus presupuestos, si fuese necesario, las partidas, para realizar las obras que sean adecuadas para poner fin a la situación actual de atentado al derecho del recurrente a un medio ambiente adecuado".*

STS 30 November 1990: *"El procesado en ningún momento puso en marcha los mecanismos necesarios para interrumpir la emisión contaminante o reducir su intensidad a módulos tolerados por el entorno afectado, instalando aparatos correctores....*

"...el Tribunal se alinea con un concepto de irreversibilidad excesivamente literal considerando que en el actual nivel tecnológico siempre es posible volver desde el estado de deterioro a que se llega al estado anterior a la degradación, estimando que el concocimiento humano no conoce límites para reparar los daños ecológicos.

Tal afirmación no concuerda con el espíritu y contenido del precepto que eleva la pena en función de la intensidad del daño causado y la extensión de la zona afectada, adjetivando el daño como catastrófico o irreversible, cuando el proceso acumulativo de los efectos degradantes

del medio ambiente afectan sensiblemente a los bienes protegidos .... la extensión afectada nos permite afirmar que la necrosis y clorosis de que se escribe en el hecho probado puede alcanzar los carácteres de catastrófica en cuanto a su entidad y efectos, todo ello sin perjuicio de que una acción costosísima que renovase el manto de tierra afectado y lo sustituyese por otro procediendo a la plantación de nuevas especies arbóreas que, a muy largo plazo, pudieran devolver el equilibrio ecológico a la zona, siempre que se interrumpiese el funcionamiento de las fuentes de la contaminación."

STS 20 December 1990: *"La necesidad de servirse del proceso para obtener razón no debe volverse en contra de quien tiene razón...Pero este Tribunal Supremo debe añadir que los estrechos límites del artículo 122 de la Ley Reguladora de esta jurisdicción tienen hoy que entenderse ampliados por el expreso reconocimiento del derecho a una tutela judicial efectiva en la propia Constitución (art. 24), derecho que implica, entre otras cosas, el derecho a una tutela cautelar".*

STS 20 December 1990: *Nuestra Derecho nacional -- al margen, incluso, de su inesquivable inserción en el sistema comunitario -- alberga ya en sus seno ese derecho a la tutela cautelar, que está inserto en aquél. Lo que, visto por su envés, significa el deber que tienen tanto la Administración como los Tribunales de acordar la medida cautelar que sea necesaria para asegurar la plena efectividad del acto terminal (resolución administrativa o, en su caso, judicial".*

STS 17 January 1991: *"la apariencia de buen derecho ha de ser la base determinante en la configuración de las medidas cautelares".*

STS 1 April 1993 (Ar. 9165): *"No puede entenderse que la acusación de FAPAS no se halla legitimado para llevar al Tribunal la pretensión indemnizatoria a que se ha hecho referencia. La muerte del oso puede dar lugar a la indemnización civil correspondiente... en el caso estudiado se ha sacrificado efectivamente un bien jurídico, no de una persona individual, pero sí de sociedades concretas ... Nos hallamos, pues ante un bien en el que la colectividad humana se halla interesada. La responsabilidad civil era perfectamente postulable por cualquiera de los ejercitantes de la acción penal."*

AT Oviedo: 3 November 1978, *"...esas medidas que se encuentran plenamente justificadas para conseguir -- dentro de los conocimientos tecnológicos del momento -- una disminución de la degradación del Medio Ambiente y de los resultados dañosos que ésta produce en las propiedades de los particulares...".*

CASE LAW ANALYSIS

Access to Justice on Environmental Matters — a case of Double Standards?

Greepeace and Others v Commission of the European Communities

(Court of First Instance of the European Communities, First Chamber, J. L. Cruz Vilaca, President, A. KaloOgeropoulos and V. Tiili 9th August 1995)

Order

The Court made the following order on admissibility:

Factual Background to the Dispute

1 On 7 March 1991, on the basis of Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund (OJ 1984 L 169, p 1, 'the basic regulation'), as amended by Council Regulation (EEC) No 3641/85 of 20 December 1985 (OJ 1985 L 350, p 40), the Commission adopted Decision C (91) 440 granting the Kingdom of Spain financial assistance from the European Regional Development Fund ('the ERDF') up to a maximum of ECU 108,378,419, for infrastructure investment. The project concerned was for the building of two power stations in the Canary Islands, on Gran Canaria and on Tenerife, by Unión Eléctrica de Canarias SA ('UNELCO').

2 The Community finance for the construction of the two power stations was to be spread over four years, from 1991 to 1994, and to be paid in yearly tranches (Articles 1 and 3 of, and Annexes II and III to, the decision). The financial commitment for the first year (1991), for ECU 28,953,000 (Article 1 of the decision), was payable on the defendant's adoption of the decision (Annex III, paragraph A1, of the decision). Subsequent disbursements, based on the financial plan for the operation and on the progress of its implementation, were to cover expenditure relating to the operations in question, legally approved in the Member State concerned (Articles 1 and 3 of the decision). Under Article 5 of the decision, the Commission could reduce or suspend the aid granted to the operation in issue if an examination were to reveal an irregularity and in particular a significant change affecting the way in which it was carried out for which the Commission's approval had not been requested (see also paragraphs A20, A21 and C2 of Annex III to the decision).

3 By letter dated 23 December 1991, Aurora González González and Pedro Melián Castro, the fifth and sixth applicants, informed the Commission that the works carried out on Gran Canaria were unlawful because UNELCO had failed to undertake an environmental impact assessment study in accordance with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p 40) and asked it to intervene to stop the works. Their letter was registered as No 4084/92.

4 By letter dated 23 November 1992, Domingo Viera González, the second applicant, sought the Commission's assistance on the ground that UNELCO had already started work on Gran Canaria and Tenerife without the Comisión de Urbanismo y Medio Ambiente de Canarias (Canary Islands Commission for Planning and the Environment, 'CUMAC') having issued its declaration of environmental impact in accordance with the applicable national legislation. That letter was registered as No 5151/92.

5 On 3 December 1992, CUMAC issued two declarations of environmental impact relating to the construction of the power stations on Gran Canaria and Tenerife, published in the *Boletín Oficial de Canarias* on 26 February and 3 March 1993 respectively.

6 On 26 March 1993, Tagoror Ecologista Alternativo ('TEA'), the eighteenth applicant, a local environmental protection association based on Tenerife, lodged an administrative appeal against CUMAC's declaration of environmental impact relating to the project for the construction of a power station on Tenerife. On 2 April 1993, the Comisión Canaria contra la Contaminación (Canary Islands Commission against Pollution, hereinafter 'CIC'), the nineteenth applicant, a local environmental protection association based on Gran Canaria, also brought administrative proceedings against CUMAC's declaration of environmental impact relating to the two construction projects on Gran Canaria and Tenerife.

7 On 18 December 1993, Greenpeace Spain, an environmental protection association responsible at the national level for the achievement at local level of the objectives of Stichting Greenpeace Council ('Greenpeace'), the first applicant, a nature conservancy foundation having its head office in the Netherlands, brought legal proceedings challenging the validity of the administrative authorizations issued to UNELCO by the Canary Island Regional Ministry of Industry, Commerce and Consumption.

8 By letter of 17 March 1993 addressed to the Director General of the Commission's Directorate-General for Regional Policies ('DG XVI'), Greenpeace asked the Commission to confirm whether Community structural funds had been paid to the Regional Government of the Canary Islands for the construction of two power stations and to inform it of the timetable for the release of those funds.

9 By letter of 13 April 1993, the Director General of DG XVI recommended that Greenpeace 'read the Decision C (91) 440' which, he said, contained 'details of the specific conditions to be respected by UNELCO in order to obtain Community support and the financing plan'.

10 By letter of 17 May 1993, Greenpeace asked the Commission for full disclosure of all information relating to measures it had taken with regard to the construction of the two power stations in the Canary Islands, in accordance with Article 7 of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p 9), which provides: 'Measures financed by the Funds or receiving assistance from the EIB or from another existing financial instrument shall be in keeping with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning ... environmental protection.'

11 By letter dated 23 June 1993, the Director General of DG XVI wrote as follows to Greenpeace: 'I am unable to supply this information since it concerns the internal decision making procedures of the Commission ... but I can assure you that the Commission's decision was taken only after full consultation between the various services of the concerned.'

12 On 29 October 1993 a meeting took place at the Commission's premises in Brussels between Greenpeace and DG XVI, concerning the financing by the ERDF of the construction of the power stations on Gran Canaria and Tenerife.

13 13 On 21 December 1993, the applicants brought an action, registered at the Court of First Instance as Case T-585/93, seeking annulment of the decision alleged to have been taken by the Commission to disburse to the Spanish Government, in addition to the first tranche of ECU 28,953,000, a further ECU 12,000,000 in reimbursement of expenses incurred in the construction of two power stations in the Canary Islands (Gran Canaria and Tenerife). That decision was alleged to have been taken between 7 March 1991, when Decision C (91) 440 was adopted, and 29 October 1993, when the Commission, at the abovementioned meeting with Greenpeace, whilst refusing to provide Greenpeace with detailed information regarding the financing of the construction of the two power stations in the Canary Islands, confirmed that a total of ECU 40 000 000 had already been disbursed to the Spanish Government pursuant to Decision C (91) 440.

14 By separate document lodged at the Registry of the Court of First Instance on 22 February 1994, the Commission raised an objection as to admissibility under Article 114 of the Rules of Procedure. The applicants submitted their observations on that objection on 10 May 1994.

15 On 30 March 1994, the Kingdom of Spain sought leave to intervene in support of the Commission. By order of 8 June 1994, the President of the Second Chamber of the Court of First Instance granted the Kingdom of Spain leave to intervene in support of the Commission. The intervener lodged its statement in intervention on 13 July 1994. The applicants submitted their observations on the statement in intervention of the Spanish Government on 27 September 1994.

16 By decision of 25 July 1991, the Court of First Instance referred the case to a chamber of three judges.

Forms of Order Sought

17 In their application, the applicants claim that the Court should:
- declare void the decision adopted by the defendant between 7 March 1991 and 29 October 1993 to disburse to the Kingdom of Spain ECU 12,000,000 or such other sums pursuant to its Decision C (91) 440, in reimbursement of expenses incurred by the Kingdom of Spain in the construction of two power stations (on Gran Canaria and Tenerife): and
- order that the defendant pay the applicants' costs in the action.

18 The Commission, in its objection as to admissibility, contends that the Court should
- declare the application inadmissible; and
- declare the applicants liable for its costs.

19 The intervener contends that the Court should:
- declare the application inadmissible; and
- order the applicants to pay the costs.

20 The applicants, in their observations on the objection as to admissibility, claim that the Court should:
- require the Commission to produce all the supporting documents, as defined by Article 38(2) of Commission Regulation 86/610/EEC, Euratom, ECSC of 11 December 1986 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ 1986 L 360, p 1), relating to the expenditure of funds pursuant to Decision C (91) 440;
- require the Commission to give a full account of the manner in which it has disbursed funds under Decision C (91) 440, in particular the dates of the commitment, valida-

tion, authorization and pavement of each disbursement under Decision C (91) 440 and the amounts of each such disbursement;

— dismiss the objection as to admissibility; and

— declare that the Commission is liable for the applicants' costs relating to that objection and that Spain is liable for the applicants' costs in replying to its statement in intervention.

Pleas in Law and Arguments of the Parties

21 The Commission puts forward two pleas in law challenging the admissibility of this application, the first concerning the nature of the act in question and the second the applicants' lack of *locus standi*.

The plea of inadmissibility concerning the nature of the act in question

22 The Commission submits that the procedure laid down for the implementation of Decision C (91) 440 cannot involve the adoption of a decision capable of being challenged in annulment proceedings under Article 173 of the EC Treaty, since the implementation of an ERDF financing decision does not take place by means of formal acts. In the Commission's view, an analysis of the provisions of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p 1, 'the Financial Regulation'), last amended by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 (OJ 1990 L 70, p 1), shows that when an ERDF financing decision is taken, the legal requirements for the commitment of the expenditure in question are considered to have been met. The payment of part of the ERDF assistance is thus no more than the administrative consequence of the original commitment decision—in the present case, Decision C (91) 440.

23 The Commission submits that the applicants cannot thus seek annulment of the payment made pursuant to Article 51 of the Financial Regulation without challenging the legality of the original commitment, namely Decision C (91) 440. Therefore, having failed to challenge Decision C (91) 440 within the prescribed period, the applicants are out of time unless the Court decides that implementation of the financing decision, Decision C (91) 440, does constitute a decision within the meaning of Article 173 of the Treaty.

24 The applicants submit that, if one looks at the substance and not the form of an act in order to determine whether it constitutes a decision within the meaning of Article 173 of the Treaty (Case T-83/92 *Zunis Holding and Others v Commission* [1993] ECR II-1169), the four stages provided for in the Financial Regulation for the disbursement of Community funds—commitment (Articles 36 to 39), validation (Articles 40 to 42), authorization (Articles 43 to 50) and payment (Articles 51 to 53)—must be regarded as acts which can be reviewed by the Court under Article 173 of the Treaty. They add that it is apparent from Article 1 of Decision C (91) 440 that the decision to authorize commitments for each subsequent year is not automatic but depends both on the financial plan and on the progress in the implementation of the operation.

25 The applicants further stress that in the implementation of Decision C (91) 440 the Commission was under a dual obligation to 'monitor' compliance by the Kingdom of Spain with Community environmental policy, in particular with Directive 85/337, and to refuse to disburse further funds in the event of a failure to comply with that policy. They conclude that since the Commission was or should have been aware that the use of the funds was, in this case, contrary to Community environmental policy, it was obliged under Decision C (91) 440 to refuse to pay the amount in issue, of the order of ECU 11,000,000 to 12,000,000.

The plea of inadmissibility concerning the applicants' lack of locus standi

26 The Commission submits that the applicants are not directly and individually concerned by the contested decision. It stresses that since the contested decision concerns only the release of a tranche of ERDF financing, the legal position of the applicants, whose interests relate solely to environmental protection, cannot be directly affected. They cannot, therefore, claim to be affected by the contested decision in the same way as the addressee, the Spanish Government. Nor are the applicants individually concerned by the contested decision, since it concerns only the relations between the Commission and Spain and confers no rights and imposes no obligations with regard to third parties.

27 The Commission further argues that neither the second applicant Domingo Viera González, nor the fifth applicant, Aurora González González, should be recognized as having *locus standi* on the sole ground that they had submitted complaints to the Commission. It adds that the relevant legal rules governing its relations with the Member States, which provide the framework in which the contested decision was adopted, do not confer any subjective rights on individuals, who thus have no *locus standi* either under Articles 173 and 175 or under Article 169 of the EC Treaty.

28 Finally, the Commission considers that the present action should not have been brought before the Community courts but before the national courts, which alone can rule on the question whether the grant of planning permission for the two power stations in the Canary Islands was lawful with regard to Directive 85/337.

29 The applicants consider that they are directly concerned because the contested decision leaves the Spanish Government no discretion as to the use of the funds advanced from the ERDF (Case 62/70 *Bock v Commission* [1971] ECR 897 and Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207).

30 In order to establish that they are individually concerned, the applicants submit, primarily, that all individuals who have suffered or potentially will suffer detriment or loss as a result of a Community measure which affects the environment have standing to bring an action under Article 173 of the Treaty and, in the alternative, that all individuals who have suffered or potentially will suffer 'particular' detriment or loss as a result of such a measure have that standing.

31 They add that the requirement that in order to establish *locus standi* an applicant must show that he is affected in the same way as the addressee of a decision is not borne out by the case-law of the Court of Justice and cite, in that regard, its judgements in the field of State aids, recognizing that competitors of beneficiaries of aid have standing to bring an action under Article 173 of the Treaty although their interests are not affected in the same way as the addressee of a decision, which is the Member State concerned (Case C-198/91 *Cook v Commission* [1993] ECR I-2487).

33 The applicants ask the Court to adopt a liberal approach on this issue and recognize that, in the present case, their *locus standi* can depend not on a purely economic interest but on their interest in the protection of the environment, abandoning the approach adopted in the past in cases concerning purely economic interests.

33 In support of that argument, the applicants rely on Community policy and case-law in relation to environmental protection, the Community's international commitments in that field and the relevant law and practice of the Member States and of other countries, in particular the United States of America; in that connection, they produce as an annex to their application a report drawn up in 1992 by the Institute for Applied Ecology, entitled 'Access to Justice, Final Report'. That report, according to the

applicants, shows that in every Member State individuals who can establish sufficient interest may bring legal proceedings against administrative decisions alleged to have been taken in breach of environmental rules. Moreover, a majority of Member States also allow environmental associations which are sufficiently representative of the interests of their members or which have been subject to some formal accreditation or registration to bring such actions.

34 On the basis of those considerations, the applicants maintain that they have each suffered particular and special harm as a result of the acts and omissions alleged against the Commission and thus, in a case relating to the environment, they meet the criteria for *locus standi* under Article 173 of the Treaty.

35 The applicants submit that the construction of the power station on Gran Canaria thus causes harm to:

- the applicant Domingo Viera González, a local resident and secretary of the Castillo del Romeral association of fishermen, inasmuch as it will adversely affect the livelihoods of local fishermen;
- the applicant Pablo Guedes García, a local resident and farmer, inasmuch as it will adversely affect the livelihoods of local farmers and the area concerned, which produces the largest tomato crop on the Canary Islands;
- the applicant José Ignacio Trojaola Chávez, who is employed in the tourist industry, inasmuch as it will adversely affect the residents' health, the tourist industry, fishermen and farmers;
- the applicant Aurora González González president of the Aurora Sánchez Bolanos residents' association, inasmuch as it will have a detrimental effect on the quality of life of local residents;
- the applicant Pedro Melián Castro, a local residential taxi driver, inasmuch as it will harm the environment and damage the tourist industry;
- the applicant Caridad Sánchez Artiles, a local resident and doctor, inasmuch as it will have detrimental effects on residents' health; and
- the applicant José Juan Melián Melián, a local resident and head teacher at the Castillo del Romeral infants' school, inasmuch as it will harm the environment and have detrimental effects on children's education.

36 The construction of the power station on Tenerife will cause harm to:

- the applicant Carmen Guadalupe Gómez Castro, a local resident who bought a house in the area for the benefit of her health because she suffered from serious breathing problems, inasmuch as it will have an adverse affect on her health;
- the applicant Clara Donate Hernández, a local resident and farmer, inasmuch as it will have detrimental effects on her health and on her farm land;
- the applicant Balbina Martín Espínola, inasmuch as it will adversely affect her health;
- the applicant José Hernández Morín, a trade unionist in the Canary Island Workers' Union, inasmuch as it will have an adverse effect on the livelihood of workers in the tourist sector;
- the applicant Germán Peña Hernández, a local resident and representative of the Los Abrigos de Granadilla de Abona residents' collective, inasmuch as it will have an adverse effect on the health of residents and the livelihoods of those employed in the tourist and farming sectors;
- the applicant Antonio Cabrera Expósito, a local resident and Granadilla town hall counsellor for the environment, inasmuch as it will have detrimental effects on the environment, on tourism, on farming and on health;
- the applicant Valentín Hernández Vaquero, who is in charge of the service for preventive medicine in a local hospital, inasmuch as it will have detrimental effects on the health of local residents;

- the applicant Peter Reinhard, a local resident, inasmuch as it will have a detrimental effect on windsurfing which is the reason he came to live on Tenerife; and
- the applicant Julio González Domínguez, an ornithologist, inasmuch as it will have a detrimental effect on local flora and fauna and in particular the local bird population.

37 As regards the *locus standi* of the applicant associations (Greenpeace, TEA and CIC), the applicants point out that the relevant case-law of the Court of Justice appears to deny standing to such organizations only where their members are not themselves individually concerned by the Community measure challenged. Where one or more members of an association are entitled to bring annulment proceedings, therefore, the association representing their interests should also be so entitled.

38 The applicants consider that those two conditions are met in the present case by the first, eighteenth and nineteenth applicants, namely Greenpeace, TEA and CIC. They explain that Greenpeace, whose head office is in the Netherlands, has legal personality and that its object, under Article 2 of its bylaws, is 'promoting the conservation of Nature'. In addition, of the 61 828 members of Greenpeace Spain, which is responsible at the national level for the achievement of Greenpeace's objectives at a local level (see paragraph 7 above), 1266 are resident in the Canary Islands and many of those are individually concerned by the contested decision. TEA is an environmental association governed by Spanish law and based on Tenerife; Article 2 of its statutes provides that its aims are, *inter alia*, to promote, encourage and support studies on nature and the environment in general, and many of its 154 members are also individually concerned by the contested act. Finally, CIC, also an association with legal personality governed by Spanish law, based on Gran Canaria, has as its aims the protection and defence of historical, cultural, natural, scenic, ecological and environmental values and heritage.

39 In the alternative, the applicants submit that the representative environmental organizations should be considered to be individually concerned by reason of the particularly important role they have to play in the process of legal control by representing the general interests shared by a number of individuals in a focused and coordinated manner (Opinion of Advocate General Lenz in Case 297/86 *CIDA and Others v Council* [1988] ECR 3531, point 15).

40 The applicants also reject the Commission's argument that the present action is subsidiary to proceedings brought in the Spanish courts, stressing that it seeks judicial review of acts of the Commission, taken in breach of the relevant Community rules, and not of acts of the Spanish authorities.

41 Finally, the applicants submit that the Commission's argument to the effect that the admissibility of an action for annulment depends on whether the applicant acquires subjective rights as a result of the contested act is unsupported either by the wording of Article 173 or the case-law of the Community courts.

42 The Spanish Government, as intervener, draws a distinction between the *locus standi* of the applicant associations—Greenpeace, TEA and CIC—and that of the applicants who are natural persons.

43 As regards the *locus standi* of the applicant associations, it maintains that, having regard to their position in relation to the contested decision, none of them possesses the characteristics which would enable it to be assimilated to the addressee of that decision and submits that the Court of Justice has held that an association or organization set up to defend the collective interests of a category of persons cannot be considered to be directly and individually concerned by a measure affecting the general interests of that category (Joined Cases 163 and 17/62 *Confédération Nationale des Producteurs de Fruits and Others v Council* [1962 ECR 471).

44 As regards the *locus standi* of those of the applicants who are natural persons, the Spanish Government stresses that none of them claims any financial interest which might have underlain the adoption of the contested decision and thus enable them to be placed on the same footing as the Kingdom of Spain. Furthermore, the fact that some of the applicants had submitted complaints to the Commission in relation to this matter is not sufficient to give them *locus standi*, since it is settled law that the Commission has no obligation to initiate Treaty-infringement proceedings against a Member State (Case 87/89 *Sonito and Others v Commission* [1990] ECR 1981, paragraph 6).

Findings of the Court

45 Under Article 114(3) of the Rules of Procedure, the remainder of the proceedings on the objection as to admissibility is to be oral unless the Court decides otherwise. In the present case, the Court considers that it has sufficient information from the documents before it and has decided that there is no need to open the oral procedure.

46 The Court will examine first whether the applicants have *locus standi* to bring an action, before considering whether the act which they are challening constitutes a decision within the meaning of Article 173 of the Treaty.

47 In doing so, the Court will consider first the *locus standi* of the applicants who are private individuals and then that of those which are associations.

The locus standi of the applicants who are private individuals

48 It has been consistently held that persons other than the addressees may claim that a decision is of direct concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed (Case 25/62 *Plaumann v Commission* [1963] ECR 95, Case 231/82 *Spiker v Commission* [1983] ECR 2559, Case 97/85 *Deutsche Lebensmittelwerke and Others v Commission* [1987] ECR 2265, Case C-198/91 *Cook*, cited above, Case C-225/91 *Matra v Commission* [1993] ECR I-3203, Case T-21/93 *Air France v Commission* [1994] ECR II-333 and Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica' v Commission* [1994] ECR II-361).

49 Before considering whether the conditions laid down in that line of authority are met in the present instance, it is appropriate to examine first the merits of the applicants' argument that when determining the admissibility of their action the Court should free itself from the restrictions those authorities impose, which are that third-party applicants must establish that they are affected by the contested measure in the same way as the addressee of the decision, and concentrate rather on the sole fact that they have suffered or potentially will suffer detriment or loss from the harmful environmental effects arising out of unlawful conduct on the part of the Community institutions. As noted above (see paragraphs 30 and 32), the applicants stress here that their interests affected by the contested decision are not economic, as has been the case in almost all the judgments delivered in relation to Article 173 of the Treaty, but of a quite different kind, relating to environmental and health protection.

50 The Court observes that whilst the abovementioned line of authority comprises judgments given mostly in cases concerning, in principle, economic interests, it is none the less true that the essential criterion applied in those judgments—in substance, a combination of circumstances sufficient for the third-party applicant to be able to claim that he is affected by the contested decision in a manner which differentiates him from all other persons—

remains applicable whatever the nature, economic or otherwise, of those of the applicants' interests which are affected.

51 Consequently, the criterion which the applicants seek to have applied, restricted merely to the existence of harm suffered or to be suffered, cannot alone suffice to confer *locus standi* on an applicant, since such harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as the addressee of a decision, in accordance with the case-law cited above. That conclusion cannot be affected by the fact, put forward by the applicants (see paragraph 33 above), that in the practice of national courts in matters relating to environmental protection *locus standi* may depend merely on their having a 'sufficient' interest, since *locus standi* under the fourth paragraph of Article 173 of the Treaty depends on meeting the conditions relating to the applicant's being directly and individually affected by the contested decision (see paragraph 48 above).

52 The applicants' argument that their *locus standi* in this case should be assessed in the light of criteria other than those already set down in the case-law cannot, therefore, be accepted.

53 It must therefore be considered whether the applicants are in this instance individually concerned by the contested decision by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the addressee of that decision.

54 The applicants are sixteen private individuals who rely either on their objective status as 'local resident', 'fisherman' or 'farmer' or on their position as persons concerned by the consequences which the building of two power stations might have on local tourism, on the health of Canary Island residents and on the environment. They do not, therefore, rely on any attribute substantially distinct from those of all the people who live or pursue an activity in the areas concerned and so for them the contested decision, in so far as it grants financial assistance for the construction of two power stations on Gran Canaria and Tenerife, is a measure whose effects are likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned.

55 The applicants thus cannot be affected by the contested decision other than in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation (Case 231/82 *Spiker*, cited above, paragraph 9, and Case T-117/94 *Associazione Agricoltori della Provincia di Rovigo and Others v Commission*, order of 21 February 1995, not yet published in the ECR, paragraph 25).

56 Nor can the fact that the second, fifth and sixth applicants have submitted a complaint to the Commission constitute a special circumstance distinguishing them individually from all other persons and thereby giving them *locus standi* to bring an action under Article 173 of the Treaty. No specific procedures are provided for whereby individuals may be associated with the adoption, implementation and monitoring of decisions taken in the field of financial assistance granted by the ERDF. Merely submitting a complaint and subsequently exchanging correspondence with the Commission cannot therefore give a complainant *locus standi* to bring an action under Article 173. As the Court of Justice has held, although a person who asks an institution, not to take a decision in respect of him, but to open an inquiry with regard to third parties, may be considered to have an indirect interest, he is nevertheless not in the precise legal position of the actual or potential addressee of a measure which may be annulled under Article 173 of the Treaty (Case 246/81 *Lord Bethell v Commission* [1982] ECR 2277).

57 It follows that the circumstances on which the applicants rely are not sufficient to differentiate them from all other persons and thus distinguish them individually in the same way as the addressee of the decision.

58 The claims of the applicants who are private individuals must therefore be held inadmissible.

The locus standi of the applicant associations

59 It has consistently been held that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned for the purposes of the fourth paragraph of Article 173 of the Treaty by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually (Joined Cases 19 to 22/62 *Fédération Nationale de la Boucherie en Gros et du Commerce en Gros des Viandes and Others v Council* [1962] ECR 491; Case 72/74 *Union Syndicate v council* [1975] ECR 401; Case 60/79 *Producteurs de Vins de Table et Vins de Pays v Commission* [1979] ECR 2429; Case 282/85 *DEFI v Commission* [1986] ECR 2469; Case 117/86 *UFADE v Council and Commission* [1986] ECR 3256, paragraph 12; and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others v Commission*, judgment of 6 July 1995, not yet published in the ECR, paragraphs 58 and 59). Furthermore, special circumstances such as the role played by an association in a procedure which led to the adoption of an act within the meaning of Article 173 of the Treaty may justify holding admissible an action brought by an association whose members are not directly and individually concerned by the contested measure (Joined Cases 67, 38 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125).

60 The three applicant associations, Greenpeace, TEA and CIC, claim that they represent the general interest, in the matter of environmental protection, of people residing on Gran Canaria and Tenerife and that their members are affected by the contested decision; they do not, however, adduce any special circumstances to demonstrate the individual interest of their members as opposed to any other person residing in those areas. The possible effect on the legal position of the members of the applicant associations cannot, therefore, be any different from that alleged here by the applicants who are private individuals. Consequently, in so far as the applicants in the present case who are private individuals cannot, as the Court has held (see paragraph 58 above), be considered to be individually concerned by the contested decision, nor can the members of the applicant associations, as local residents of Gran Canaria and Tenerife.

61 Since one of the conditions required for an action brought under Article 173 by an association to be admissible is not met in this case, it must be considered whether the exchange of correspondence and the meeting which took place between Greenpeace, one of the three applicant associations, and the Commission with regard to the financing of the project for the construction of two power stations in the Canary Islands constitute special circumstances such as to give it *locus standi* to bring an action as an association, as in the *Van der Kooy* and *CIRFS* judgments, cited above.

62 In the present case, unlike the *CIRFS* case, the Commission did not, prior to the adoption of the contested decision, initiate any procedure in which Greenpeace participated; nor was Greenpeace in any way the interlocutor of the Commission with regard to the adoption of the basic Decision C (91) 440 and/or of the contested decision. Greenpeace cannot, therefore, claim to have any specific interest distinct from that of its members to justify its *locus standi* (*CIRFS* and *Van der Kooy*, cited above).

63 Furthermore, the correspondence which took place between Greenpeace and the Commission and its subsequent meeting with members of the Commission's staff were for purposes of information only, since the Commission was under no duty either to consult or to hear the applicants in the context of the implementation of Decision C (91) 440 (see paragraph 56 above). Greenpeace's approaches to the Commission cannot, therefore, give it *locus standi* to bring an action under the fourth paragraph of Article 173 of the Treaty.

64 It follows from all the foregoing that neither the applicants who are natural persons nor those which are associations are individually concerned by the decision alleged to have been adopted by the Commission between 7 March 1991 and 29 October 1993 to disburse to the Kingdom of Spain a sum of the order of ECU 11,000,000 or 12,000,000 as ERDF assistance in reimbursement of expenses incurred in the construction of two power stations in the Canary Islands (Gran Canaria and Tenerife).

65 Consequently, without there being any need to consider whether a decision capable of being challenged in an action under Article 173 of the Treaty exists in the present case and whether the applicants are directly concerned by the contested decision, the application must be declared inadmissible.

Costs

66 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs.

67 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in proceedings are to bear their own costs. The Kingdom of Spain shall therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

1. The application is dismissed as inadmissible.
2. The applicants shall jointly and severally bear the costs.
3. The Kingdom of Spain shall bear its own costs.

Analysis by Nicole Gérard*

1. Introduction

It is widely recognised that the application of environmental law suffers because modern legal systems have been constructed around the idea of property, a framework into which environmental law fits with great difficulty. Fundamental legal perceptions must change before adequate protection of environmental values can be obtained in courts of law. Since it set an environmental agenda in the early 1970s, the European Community has burdened itself with a body of secondary legal obligations in the environmental domain and has modified the Treaty to include an Environment Title. Despite these advances, the above order by the Court of First Instance demonstrates that enforcement of Community environ-

* The author would like to thank Mrs Christine Boch and Dr Robert Lane for their helpful comments on an earlier draft.

mental law has not evolved in accordance with stated Community Policy, its secondary legislation or Articles 130r-t of the Treaty. This commentary attempts to illustrate why, from an environmental law perspective, the decision is particularly disappointing and to seek possibilities for future evolution.

As seen, the case involves the Commission decision (C(91)440 7 March 1991), taken under the Regional Funds, to accord Spain a maximum of Ecu 108,578,419 for the construction of two electric power stations in the Canary Islands, on Grand Canary and Tenerife. The project was undertaken by Unelco (Unión Eléctrica de Canarias, SA). Importantly, soon after the funds were authorised the Commission received complaints: that the works on Grand Canary had commenced illegally,[1] without the Environmental Impact Assessment required by Directive 85/337;[2] and[3] that Unelco had undertaken the construction without the Environmental Declaration required by national legislation implementing the Community directive in question.[4] Various national level actions were undertaken concerning the project: administrative review was sought of the Declarations issued after the works had commenced, in violation of national rules;[5] and Greenpeace Spain began judicial proceedings to challenge the validity of the administrative authorisation accorded to Unelco.[6]

At Community level, the Article 173 action brought by Greenpeace and eighteen other applicants sought to annul the Commission decision allocating a further Ecu 12,000,000, on top of the initial 28,953,000, to reimburse Spain for the construction of the two power stations. The decision at issue was taken between 7 March 1991, the date on which C(91)440 was adopted, and 29 October 1993, the date of the meeting during which the Commission implied that Ecu 40 million had been allocated in application of decision C(91)440. The applicants argued[7] that the Commission was under the double obligation to ensure that Spain respected Community environmental policy, specifically Directive 85/337; and, in the case of violation of the policy, to refuse to allocate funding. The applicants further requested that the Court order the Commission to release the documents relating to the funding.

[1] Letter of 23 December 1991, from Mrs Aurora González González and Mr Pedro Melián Castro (5th and 6th applicants).

[2] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment 85/337/EEC, OJ 1985 L175/40.

[3] Letter of 23 November 1992, from M. Domingo Viera González, second applicant.

[4] The relevant national organ (Comisión de Urbanismo y Medio Ambiente de Canarias) issued the declarations in question on 26 February and 3 March 1993, more than a year after the Commission received the first complaint that the works had been commenced. Theoretically the project should have been suspended at this point: Real Decreto Legislativo 1302/1986 (the basic legislation transposing the Community directive), Article 9, stipulates that, if a project requiring Environmental Impact Assessment is commenced without having completed the procedure it 'shall be suspended' ('*será suspendido*'); however, the automatic nature of this appears mitigated by the addition of 'at the request of the environmental organ'.

[5] Tagoror Ecologista Alternativo, a local association based in Tenerife, began administrative recourse against the declaration of CUMAC relating to the Tenerife power station on 26 March 1993. On 2 April 1993, Comisión Canaria contra la Contaminación, another local association, introduced another administrative action against the Declaration of CUMAC relating to both declarations.

[6] On 18 December 1993. This did not prevent the Commission from arguing (paragraph 28) that the case should have been brought not before the Community courts but before the national courts, since they alone could pronounce on the legality of the authorisation. The applicants refuted this (paragraph 39) by pointing out that this action (as opposed to the various national actions) was aimed at the judical review of Commission's acts adopted in violation of Community rules, not the review of acts adopted by Spanish authorities.

[7] Paragraph 25.

Several arguments were put forth.[8] In fact, however, the matter centred on the plea of inadmissibility (*locus standi*) raised by the Commission and whether the applicants were directly and individually concerned by the challenged decision, as required by Article 173. The Court of First instance examined the issue of admissibility prior to examining whether the challenged act was a decision in the sense of Article 173.[9]

The Court began by invoking the *Plaumann*[10] formula, developed three decades ago in the context of the common market. It considered the applicants' invitation to distance itself from the earlier case-law and concentrate on whether the applicants can be considered to be 'individually concerned' since they have undergone or may undergo a prejudice or a specific loss because of the measure. The applicants made two extremely important arguments for qualifying the *Plaumann* tests, according to which the applicant must establish that he has been affected in the same manner as the person addressed. First, the applicants noted that, in matters of state aids (citing case C-198/91 *Cook/Commission* 1993 Rec at I-2487) the legal interest of the competitors of recipients of state aids has been recognised.[11] Second, they pointed out that their interest cannot depend solely on economic interest, but rather, on their interest in protecting the environment. However, the Court summarily stated that although the case-law was indeed developed in relation to economic interests, the criteria established by that case-law '. . .remains applicable whatever the nature, economic or otherwise, of those of the applicants' interests which are affected'.[12] The logic behind the assumption that the case-law remains applicable, although the context and interests involved are not applicable, is unexplained. The Court then found that, since the earlier case-law was applicable, the criteria proffered by the applicants was insufficient to establish title and interest

> since such harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same was as the addressee of a decision, in accordance with the case-law cited above.[13]

The Court concludes that title to make a claim must be examined in light of established case-law,[14] namely, to determine whether the applicants may be individually concerned because the decision at issue 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[15] Against this test, the local residents, fishermen, farmers, ornithologists, the individuals with health problems (and admittedly, one windsurfer) are found to be not distinguishable from any other local resident, fisherman, farmer. They therefore lack legal interest

[8] See paragraphs 22, 23, 25, 28 and 39.

[9] Practically, it is difficult to see what else the act could be considered and how else the Court could proceed. Logically, however, it is awkward that, without deciding whether the challenged act could be considered a decision, the Court proceeded to apply the strict Article 173 criteria as though this had been assumed.

[10] Case 25/62 *Plaumann* 1963 ECR 95. The formula is discussed below.

[11] Paragraph 31.

[12] Paragraph 50.

[13] Paragraph 51.

[14] Paragraph 52.

[15] Case 25/62 *Plaumann and Co : Commission* 1963 ECR 95 at 107.

to make a claim.[16] Nor was the fact that certain applicants had previously forwarded complaints to the Commission sufficient to consider them individually concerned.[17] The standing of individual applicants was thus ruled out.

Next, examining the legal title and interest of the associations, the Court recalled that, again according to case-law, associations defending collective interests cannot be accepted as having interest in light of Article 173 of the Treaty. They cannot be considered to be more individually affected than the individuals of which they are composed. Since in this instance the individuals have been ruled out, so were the three associations.[18]

Finally the Court examined whether the correspondence between Greenpeace and the Commission regarding the financing of the projects could 'constitute special circumstances such as to give it locus standi to bring an action as an association'.[19] Since the association entered into dialogue with the Commission only after the challenged decisions were taken (i.e., once Greenpeace discovered the alleged breach of Community law, rather than before such a discovery) it could not be considered to have an interest.

As a result, the action was dismissed and the applicants ordered to pay the costs.

2. *The Court's Approach to Locus Standi*

The applicants' case foundered on the question of *locus standi*.[20] The question of what was a reviewable act—whether the Commission decision to continue funding was in fact a decision in the sense of Article 173 and therefore susceptible to judicial review—was left unanswered. The grounds for review—the violations of Directive 85/337 on the part of Spain and the Commission's failure to suspend funding in accordance with Article 130r(2)—are also unresolved. The Court's decision, defining the approach to similar situations in future, has grave consequences. To begin, the Court seems to endorse the paradoxical situation by which the more people[21] adversely affected by Community decisions and breaches of Community law by Community institutions, the less chance they have of being heard. This for the simple reason that they are too numerous to be considered 'individually' concerned.

The underlying problem is that concepts of individual interest are fundamentally antithetical to the environment. Environmental interests, by nature, are collective, concerning the many rather than the few. The Court here says, in essence, that environmental interests of a natural or legal person cannot ever usefully be invoked against a Community decision because they will not meet the test for

[16] Paragraphs 54 and 55.
[17] Paragraphs 56 and 57.
[18] Paragraph 60.
[19] Paragraph 61.
[20] Apparently the Court of First Instance considers the case to be so 'manifestly inadmissible' (Cf. Article 111, Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991, OJ L136/1 at 20) that it issues a reasoned order, rather than a judgment.
[21] For example, the 1266 resident members of Greenpeace, the 154 members of the Tenerife-based TEA, not to mention the European taxpayer who has put Ecu 40 million towards an allegedly illegal project.

admissibility. Held up against this, the Commission's own emphasis on access to justice for environmental associations in the Fifth Action Programme[22] seems naive or even ingenuous.

In fact the problem is not so much the test as embodied in Article 173 as the Court's interpretation of it. At paragraph 50 the Court recalled that:

> It has been consistently held that persons other than the addressees may claim that a decision is of direct concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same was as the person addressed.[23]

As mentioned, environmental interests, being collective, cannot ever distinguish the claimant from 'all other persons'. The Court stubbornly adheres to the language of *Plaumann*, despite the fact that the Treaty has evolved to include environmental obligations, despite its own recognition that the circumstances under which this test was developed do not apply here,[24] and finally, despite the fact that the case-law has evolved.

Here, the Court treats previous case-law as binding. Theoretically, however, the Court may depart from its own case-law[25] and indeed has on occasion departed from earlier rulings. Furthermore, the case-law surrounding Article 173 has been an area where the Court has shown itself particularly inclined to take an active role in interpretation. The considerable evolution has concerned the areas of which type of act can be challenged;[26] against which institution the action can be directed;[27] standing for semi-privileged applicants;[28] standing for non-privileged applicants in the areas of anti-dumping,[29] competition,[30] and (as invoked by the applicants) state aids.[31]

As early as 1986, in *Cofaz*,[32] the European Court of Justice accepted individual concern of the third parties because they had played a role in the procedure investigating a possible violation of Community rules, and because 'their position on the market is significantly affected by the State aid which is the subject of the contested decision'.[33] The comments of Advocate General VerLoren van Themaat are relevant. Referring to the effect of aid that may be incompatible with the common market, he comments that '[w]here competition is distorted

[22] 'Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped;' OJ 1993 C138/82.
[23] Paragraph 48.
[24] Paragraph 50.
[25] See, for example, Edward and Lane, *European Community Law: An Introduction*, second edition, Edinburgh 1995, at 54, paragraph 132.
[26] Case 22/70 *Commission v Council* 1971 ECR 263; Case C-39/93P *Syndicat Français de l'Express International (SFEI) v Commission* 1994 ECR I-2681.
[27] Case 294/83 *Parti Ecologist 'Les Verts' v European Parliament* (1987) 2 CMLR 343.
[28] Case 302/87 *European Parliament v Council ('Comitology')* 1988 ECR 5615; C-70/88 *European Parliament v Council ('Chernobyl')* 1990 ECR I-2041.
[29] Case 239/82 and 275/82 *Allied Corporation v Commission* 1984 ECR 1005; Case 262/82 *Timex Corporation v Council and Commission* 1985 ECR 840.
[30] Case 26/76 *Metro-SB-Großmärkte GmbH and Co KG v Commission* 1977 ECR 1875.
[31] Discussed below.
[32] Case 169/84 *Cofaz v Commission* 1986 ECR 391.
[33] Paragraph 25.

in that manner, undertakings which are accorded favourable treatment and their competitors are automatically concerned to the same extent; the disadvantages for the latter are the counterpart of the advantages conferred on the former'.[34] This is further supported by other rulings.[35] In *Cook*,[36] those with interest are defined as those 'affected in their interests' by the aid, 'notably the competing undertakings and professional organisations'. In fact, the Court of First Instance has itself accepted a relaxation of the *Plaumann* test.[37]

Furthermore, the case-law developed in the wider context of Community law is applicable here. In application of Article 5 EC,[38] the Court has consistently held that

> any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.[39]

Unfortunately for the outcome of the present case, the Court failed to apply to itself the obligation to set aside rules that would obstruct the application of Community law.

It is the duty of the Court of Justice to 'ensure that in the interpretation and application of this Treaty the law is observed'.[40] On the present occasion the rigidity of the Court of First Instance concerning the arbitrary and inappropriate barrier of 'individual concern' and its failure to set aside obstructive technical rules resulted in a sizeable two-fold violation of Community law[41] being tolerated. The judicial control of the use of European funds that is so urgently required was denied. This is especially ironic when one recalls the dynamic pro-environment stance adopted by the Court at a time when no Treaty foundation for such a position existed. Prior to the adoption of the Single European Act and its Environment Title the Court ruled both that 'environmental protection . . . is one of the Community's essential objectives'[42]

[34] 169/84 *Cofaz v Commission* 1986 ECR 391 at 403.

[35] See also Case 323/82 *SA Intermills v Commission* 1984 ECR 3809, paragraphs 5 and 16; Case C-225/91 *Matra v Commission* 1993 ECR I-3203, see particularly the opinion of Advocate General van Gerven at I-3221-26.

[36] Case C-198/91 *Cook c/ Commission* 1993 Rec at I-2487, paragraph 24: '*Les intéressés, au sens de l'article 93, paragraphe 2, du traité ont été définis par la Cour comme les personnes, entreprises ou associations éventuellement affectées dans leurs intérêts par l'octroi de l'aide, c'est-a-dire notamment les entreprises concurrentes et les organisations professionnelles.*'

[37] T-2/93 *Air France v Commission* 1994 ECR II-323, paragraphs 44 through 48; Case T-435/93 *ASPEC*, judgment of 27 April 1995, at paragraph 64.

[38] Article 5 EC: Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

The shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

[39] C-213/89 *R v Secretary of State for Transport, ex parte Factortame and others (No 2)* 1990 ECR I-2433, at paragraph 20; see also 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* 1978 ECR 629 at paragraphs 22 and 23.

[40] Article 164.

[41] Spain's violation of the EIA directive 85/337; and the Commission's failure to ensure that the integration requirement in Article 130r(2) EC and the requirement in the Structural Funds in regulation 2052/88 were respected.

[42] Case 240/83 *ADBHU* 1985 ECR 531 at paragraph 13.

and that 'protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty'.[43] Today, although Article 130r(2) gives the Court Treaty authority for a dynamic interpretation, the Court appears to be no longer willing to take such a positive stance. One can detect the effects of a change in the Community's political atmosphere, evident in a general retreat on environmental issues since the Edinburgh Summit in 1992.[44]

3. *Future Options and Developments*

The question arises whether anything can be done, at Community level[45] to remedy the present situation. An appeal can be (and has been[46]) made to the European Court of Justice on points of law.[47] Still, in the absence of interim measures,[48] by the time a decision is reached, almost certainly the power plants will be completed. Although such an action would be valuable in terms of legal precedent, in this particular instance the benefit to the environment of the Canary Islands would be nil.

An action under Article 170, whereby one Member State can bring another before the Court for a violation of Community law, is, practically, out of the question.[49]

Alternatively, the Commission could initiate Article 169 enforcement proceedings against Spain for its breach of the Environmental Impact Assessment Directive 85/337. However, in order to bring a case the Commission's Environment Directorate, DGXI, must proceed with the agreement of the Commission's Legal Service (*Service Juridique*), which handles the technical aspects of the Article 169 procedure for all the DGs. Given its excessive workload, it attempts to pursue infringements that are relevant to several Member States, where the questioned behaviour is more systematic; it is reluctant to pursue isolated infringements.[50] Furthermore, if the Environment Directorate General wished to pursue the breach it must have, not only the accord of the *Service Juridique*, but also that of the other Directorates-General, including DGXVI, the Directorate involved in this case. It seems likely, then, that such an endeavour would

[43] Case 302/86 *Commission v Denmark (Danish Bottles)* 1988 ECR 4607 at paragraph 9.

[44] Cf: Council of Edinburgh Presidency Conclusions. Europe no 5878 Sunday/Monday 13/14 December 1992 at 1. Since this time, a variety of environmental obligations have been reviewed and amended, and the Community has become markedly more hesitant in proposing and adopting environmental legislation. When it has adopted new environmental rules, it has opted for broader, less specific and arguably less enforceable standards; Cf: 'The Impact of EC Environmental Law in the United Kingdom.' conference held 3 November 1995, particularly comments made by Dr Ludwig Krämer, 'Recent Developments in EC Environmental Law', and David Freestone, 'The Impact of Subsidiarity'.

[45] National-level action has been undertaken: see paragraphs 6 and 7 of this decision.

[46] Case C-321/95P.

[47] EC Treaty Article 168a(1) and Statute of the Court of Justice articles 49–54.

[48] The award of which is extremely unlikely given the advanced state of the project. Cf: Case 57/89R *Commission v Germany* 1989 ECR 2849: interim measures were refused in part because 'a large part of the works had already been completed' (paragraph 17).

[49] Article 170 has almost never been used. Furthermore in an area concerning Community funds, it is unrealistic to hope that one Member State will blow the whistle on another; since at one point all Member States benefit from such aid, a certain amount of solidarity concerning its potential misuse is to be expected.

[50] This is not to say that one isolated infringement will never be pursued.

founder on the tensions between Commission directorates and their different—and at times, conflicting—areas of Community policy.[51]

A more general question concerns the possibility of shifting the Court's focus in future. Even the *Plaumann* decision, in a portion that is rarely cited, suggests that the test could be relaxed:

> The provisions of the Treaty regarding the right of action of interested parties must not be interpreted restrictively; where the Treaty is silent a limitation in this respect may not be presumed.

Could it not then also be argued, that aid given through the European Regional Development Fund is not so different in effect from aid given by the State, as in the cases referred to above? The applicants are not affected in the sense of economic competition, but they are adversely affected in terms of competition for limited natural resources. To borrow the words of Advocate General VerLoren van Themaat in *Cofaz*, it could be argued that the disadvantages for the environmental associations and the individuals arguing in this case are the counterpart of the advantages conferred, in the form of a grant made under the Regional Funds, upon Unelco. Even if, as VerLoren van Themaat suggests,[52] admissibility were limited to those who had earlier submitted complaints to the Commission, the present case could have proceeded to discuss the grounds for review, since three applicants had formulated complaints. Moreover, it seems reasonable to argue that this condition might also be relaxed, for as Advocate General Tesauro points out in *Cook*,

> It appears completely illogical to subject the right to act to the condition that the applicant have taken part in the preliminary administrative procedure, simply because the third party, the applicant, could have been in total ignorance of the fact that the preliminary procedure had been commenced by the Commission.[53]

Indeed, the Court's focus is not the only element which can be criticised in this case. The attitude of the Community institutions as a whole should be re-examined. Several aspects of the Commission's conduct are worthy of note, beginning with its failure adequately to verify the conformity of the Spanish project with Article 130r(2) of the Treaty[54] or Article 7 of Regulation 2052/88 on the functioning of the Structural Funds.[55] It is unfortunate indeed that the Commission not only did not suspend aid of its own accord once it had been notified of the alleged violations of Community law (which it is empowered to do by Article 5 of decision C(91)440), but chose instead to allocate a further Ecu 12 million. Furthermore, when Greenpeace requested information relating to the measures the Commission had taken regarding the conformity of the Spanish construction with Regulation 2052/1988, the Commission responded that the requested information concerned the internal decision-making procedures of the Commission and could not be provided. Thus, in spite of repeated Commission calls for greater transparency,[56] the Commission drew the curtains tighter when it came to revealing information related to the funding of these projects.[57] The Commission's reassurance that its 'decision was taken only after a full consultation between the various services of the concerned'[58] is hardly comforting; the Court of Auditors has found that 'the Community departments are seldom aware of the exact details of the individual operations funded by the structural instruments as decisions are essentially taken at national or regional level and, in many cases, during the execution of the programmes'.[59] Obviously in this instance the Commission's actions fell short of its assurances, since it has spent Ecu 40 million on a project that violates Community environmental law.[60]

The case generally raises several issues that are critical to the effective enforcement by Community institutions of environmental law. Repeatedly the Community has emphasised to Member States the importance of taking a flexible approach to issues such as *locus standi* and access to environmental information. As illustrated here, however, the Community institutions expect a certain standard of behaviour from the Member States regarding *locus standi*, access to environmental information, and the set aside of rules obstructing the effective application of Community law, that they appear unwilling to apply to themselves.

The adequate enforcement of environmental law before courts of law, both Community and national, requires a fundamental change in traditional legal thinking. Institutional resistance and a tendency to allow economic interests to override other, less quantifiable interests, must be overcome by factors more reliable than political palaver; concrete evolution on the issue of standing at in Community Courts would provide an excellent starting point. For instance, the Court could bring itself to consider that environmental interests are interests *sui generis*, which warrant an innovative approach and a considerable element of flexibility. Generally, a return to the innovative and active stance that the Community was once willing to take is in order, lest it lose what benefits have been thus far accrued by its environmental policy.

[51] For instance, the fact that a case was brought against Denmark's high-level environmental policy in the first place illustrates that DGXI lost the internal Commission dispute to the Internal Market DG.

[52] 169/84 *Cofaz v Commission* 1986 ECR 391 at 405.

[53] Case C-198/91 *Cook c/Commission* 1993 Rec at I-2487, I-2512 (in the absence of an official translation, the citation has been translated by the author and should not be taken as authoritative). His hypothesis is supported by Advocate General van Gerven in *Matra*, at I-3225, note 14.

[54] The relevant portion of Article 130r(2) read '. . .Environmental protection requirements shall be a component of the Community's other policies' when the initial decision was adopted, and 'Environmental protection requirements must be integrated into the definition and implementation of other Community policies' after Maastricht was ratified.

[55] Regulation 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (which is applicable, *inter alia*, to the European Regional Development Fund) OJ 1988 L185/9, at L185/13. Article 7(1): 'Measures financed by the Structural Funds or receiving assistance from the EIB or from other existing financial instruments shall be in keeping with the provisions of the Treaties with the instruments adopted pursuant thereto and with Community policies, including those concerning the rules on competition, the award of public contracts and environmental protection.'

[56] See, for example, Communication 93/C 166/04, OJ 1993 C166/4.

[57] Paragraph 11. Perhaps this tendency to guard its own secrets will be affected by the decision adopted pursuant to Case T-194/94 *John Carvel and Guardian Newspapers Ltd v Council*, judgment of 19 October 1995, in which the Council was condemned for having a similar attitude towards revealing internal information.

[58] Paragraph 11.

[59] Court of Auditors Report OJ 1992 C245/7. Furthermore, the report found that '[a]t the national level the Court [of Auditors] checks did not establish that the reform of the Funds had brought about any appreciable progress in procedures designed to give more attention to environmental problems in the drafting of programmes', at C245/13 (specific examples listed: C245/15-16).

A more recent report, Special report no 4/94 of the European Court of Auditors 'The Urban Environment', reveals that there has been little improvement in co-ordination between departments and regarding checks for conformity with other EC policies.

[60] It is presumed here that the projects fall within the scope of Directive 85/337; the mere absence of an environmental impact assessment is a violation of the Directive.

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