A Comparison of Environmental Impact Assessment in the United States and the European Union: The Case Study of Italy

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B.A., B.S., J.D., Candidate for LL.M Degree (Legum Magistur)

October 1, 2003
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Florence, Italy

Thesis submitted for assessment with a view to obtaining the Diploma in Comparative, European and International Legal Studies (Ll.M.)

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I. Introduction

Environmental Impact Assessment ("EIA") is a widely used tool for identifying the impacts associated with an action and forcing a decision-maker to consider those impacts prior to taking that action. EIA had its formal beginnings in the United States in the early 1970s. Since then it has become an international decision-making tool, found in the legislation of over 90 countries, several international treaties, and in the procedures of many international organizations. The European Community adopted EIA procedures in the mid-1980s.

This paper will analyze the growth of EIA, first summarizing EIA practice in the United States, and then paying particular attention to its development in the European Union ("EU"). In analyzing the effectiveness of EIA in the EU, it will attempt to illustrate the general difficulties of implementing environmental law in the EU due to the particularities of the EU political system. It will then look in detail at one EU Member State, Italy, and its experience with the implementation of the EU EIA Directive. The case study of Italy will focus on the many difficulties Italy has had enacting and enforcing environmental laws in general, using the EIA Directive to illustrate these difficulties. Through the example of Italy, the paper will highlight the difficulties of implementing environmental directives at the Member State level and suggest that such difficulties in implementation of environmental directives such as that for Environmental Impact Assessment can result in uneven enforcement across Member States, hence jeopardizing the achievement of uniform economic and environmental conditions within the EU. While a comprehensive comparison of EIA practices in the US and Italy will not be attempted, the US experience will be mentioned frequently to give context to the

discussion. Ultimately, though, the goal of this thesis is to use Italy's experience implementing the EIA Directive to illustrate the challenges of achieving EU environmental policy goals across the EU.

II. An Overview of Environmental Impact Assessment

A. What is Environmental Impact Assessment?

Environmental Impact Assessment (EIA) is defined as a systematic and detailed study of the effects, both adverse and beneficial, that a planned activity may have on the environment.[1] Its value to society is based upon the premise that if a project proponent is required to prepare and consider detailed statements about the impacts a proposed project will have on the environment, the proponent will be more likely to make decisions related to that project that will be protective of the environment.[2] EIA is said to "institutionalize foresight"[3] by forcing the decision-making authority to look beyond the present and incorporate into its decision the possible irreversible future effects an activity may have on the environment.[4] EIA also has political value. It legitimizes decisions of the government in the minds of the people by making their decisions at least appear more informed. It further legitimizes the decisions by empowering the public with the right to participate in the process.

There is no single defined process for performing an EIA, but there are some general principles that can be gleaned from the various EIA regimes around the world.

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[1] Erika L. Preiss, *The International Obligation to Conduct an Environmental Impact Assessment: The ICJ Case Concerning the Gabcikovo-Nagymaros Project*, 7 N.Y.U. Envtl. L.J. 307 (1999).
[2] RONALD E. BASS, ALBERT I. HERSON, KENNETH M. BOGDAN, THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT, Second Edition (2001), at p. 61. [herein, THE NEPA BOOK]
[3] Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. Envtl. Aff. L. Rev. 591, 594 (1991).
[4] Cary Ichter, Note, *"Beyond Judicial Scrutiny": Military Compliance with NEPA*, 18 Ga L. Rev. 639, 645 (1984).

The EIA process commences when someone (an individual, a company, the government) decides to take some action. This action can be a specific development project like the decision to build to a bridge, or it can be "programmatic" in nature, like a local government's adoption of a General Plan. Next, a government decision-maker is identified. This is the body that will oversee the EIA process and that will ultimately be responsible for approving or denying the proposed action. Then there is "Scoping" or "Screening."[5] In this phase, the range of impacts of the action must be identified, paying particular attention to the magnitude of the project and the specific characteristics of the environment likely to be impacted by the project.[6] In general, potential impacts on humans, the environment, flora and fauna, and the economy are considered, though the weight placed on each varies among jurisdictions. Most jurisdictions require some type of public notice during scoping,[7] so as to allow the public to have input as to what things will actually be impacted by the proposed action, and thus to help guide which impacts will be assessed during the formal impact analysis. Typically at this point, a decision is made whether, considering the scope of possible impacts, a full-blown EIA is required.[8]

If a full-blown EIA is required, there are again a set of procedures typically used to carry out the EIA. First, a baseline study of the project area must be conducted (i.e. of the existing environment), in order to have a basis for assessing the new impacts to be

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[5] The CEQ Regulations to NEPA describe scoping as "the range of actions, alternatives, and impacts to be considered in and environmental impact statement." Council of Environmental Quality Implementing Regulations, 40 C.F.R. § 1500 et seq, at 1508.25 (1978). [herein, CEQ Regulations]. EIA professionals often parce these out into two or three separate steps. In either case, each occurs early on in a typical EIA process. The CEQ Regulations were implementing regulations for the NEPA law, passed via Executive Order in 1978.

[6] See Preiss, supra note 1, at p. 313.

[7] Often this notice is provided via newspaper publication, or, as in the United States, in a government register.

[8] In the United States, under NEPA, the procedures described up to this point constitute and Environmental Assessment (EA). From the results of the EA, the agency can conclude a "Finding of No Significant Impact" (FONSI), or decide to conduct an in-depth EIA.

introduced by the project.[9] Next, a range of alternatives to the proposed project are identified. For example, alternatives to a proposed double-decker bridge might be a tunnel, a ferry service, some type of train service, a smaller bridge, or no bridge at all.[10] Then, the potential impacts of each alternative are identified, quantified, and compared to one another. Possible mitigation steps for the impacts are usually considered. At this point, an opportunity is again given to the public and to other government agencies to comment on the analysis and raise any additional concerns.[11] Typically, the preparer of the EIA then supplements the analysis by incorporating the public comment as well as any new information submitted by the project proponent. Finally, the government agency responsible for granting or denying consent to the project is asked to "take into account" the results of the EIA,[12] though the extent to which decision-makers must take the EIA's conclusions into account when making the decision on development consent varies among jurisdictions.

B. Growth of Environmental Impact Assessment Internationally

The birth of EIA was the enactment of the National Environmental Policy Act (NEPA) in the United States in 1969.[13] Signed into law by President Nixon in 1970, it was the first law anywhere requiring an EIA to be performed for major *federal* actions

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[9] Yusuf J. Ahmed & George K. Sammy, Guidelines to Environmental Impact Assessment in Developing Countries, at 9 (1985) (no further citation given).
[10] In the United States, a "No Project" alternative must also be analyzed. CEQ Regulations, supra note 5, § 1502.14. In other words, the decision-maker must answer the question: What are the impacts, good and bad, of doing nothing?
[11] Brian R. Popile, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. Envtl. Aff. La. Rev. 447, 462 (1995).
[12] Howard L. Brown, *Expanding the Effectiveness of the European Union's Environmental Impact Assessment Law*, 20 B.C. Int'l & Comp. L. Rev. 313 (1997).
[13] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq. (1994 & Supp. II 1996). [Herein, NEPA]

"significantly affecting the quality of the human environment."[14] At least nineteen states, the District of Columbia, and Puerto Rico have subsequently enacted environmental policy acts or "Little NEPA's."[15] These acts recognize the fact that many significant projects are proposed which are not federal in nature but that should nonetheless be subjected to an informed decision-making process. Even some large municipalities at sub-state level, like New York City, have adopted their own EIA provisions.[16]

From the United States, EIA gradually spread to other nations. It initially emerged in other developed countries like Canada, France, and Great Britain, but eventually crept into the legal systems of developing nations such as Brazil, Korea, and the Philippines.[17] As of 1995, an estimated 86 countries had adopted some type of EIA procedure.[18] Over time procedures for EIA were adopted by supranational institutions like the European Union in 1985.[19] In the same year, the Agreement of the Association of South-East Asian Nations (ASEAN) on Conservation of Nature and Natural Resources stated that any proposed activities in South-East Asia that may have significant impact on the environment must be assessed before they are initiated.[20]

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[14] NEPA, supra note 13, at § 4332(2)(C).
[15] American Law Institute – American Bar Association Continuing Legal Education, ALIABI Course of Study, SGO26 ALI-ABA197, *"Little NEPA's and Their Environmental Impact Assessment Procedures"*, David Sive, Mark A. Chertok. See also, Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 Nat. Res. & Env't 3, 71 (1995). There are varying numbers of states, depending on the source, but at least two sources confirmed 19 as the total number of states with EIA procedures.
[16] See Bear, supra note 15.
[17] See Preiss, supra note 1, at pp. 315, 316. The Philippines established EIA in 1977, Korea in 1980, and Brazil in 1981.
[18] See Bear, supra note 15, at 71. Other studies estimate that 70% of the nations of the world have some form of EIA legislation. Rio Declaration on Environment and Development: Application and Implementation, Report of the Secretary-General, U.N. Commission on Sustainable Development, 5th Sess., P 94, U.N. Doc. E/CN.17/1997/8 (1997).
[19] Council Directive No. 85/337 of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L175) 40. [Hereinafter 1985 Directive]
[20] *Association of South East Asian Nations Agreement on the Conservation of Nature and Natural Resources*, 15 Envtl. Pol'y & L. 64 (1985).

The concept of EIA has also found its way into international conventions like the 1972 Stockholm Declaration and the 1992 Rio Declaration on Environment and Development, which stated "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse effect on the environment and are subject to a decision of a competent national authority."[21] Other international agreements requiring EIA include, *inter alia*, the United Nations Convention on the Law of the Sea, the Protocol on Envrionmental Protection to the Antarctic Treaty, the 1991 United Nations Convention on Environmental Impact in a Transboundary Context (ESPOO Convention), and the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution.[22]

International organizations have also gotten into the act. The United Nations, through the United Nations Environment Programme (UNEP) has issued non-binding guidelines encouraging the use of EIA and establishing common principles of EIA.[23] Aid organizations like the World Bank, the Asian Development Bank, and the European Investment Bank have required the use of EIA in the recipient country as a prerequisite to releasing aid moneys.[24]

In fact, some scholars and practitioners have recently argued that EIA is so ubiquitous that it has established itself as a "norm of international law."[25] The preceding discussion highlights the presence certain provisions of EIA in nation-states, sub-states,

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[21] United Nations Conference on the Environment and Development: The Rio Declaration on Environment and Development, June 13, 1992, principle 17, 31 I.L.M. 874, 879.
[22] See Preiss, supra note 1, at pp. 317-320 for a good overview of the prevalence of EIA in international frameworks.
[23] See Preiss, supra note 1, at p. 321.
[24] Id., at p. 322.
[25] Id.. See also, Judge Weeramentry's ICJ opinions in Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 92 (September 25), [Herein, Case Concerning the Gabcikovo-Nagymaros Project], and *Nuclear Testing (New Zealand/France)* (1995).

treaties, international aid organizations, non-profit groups, etc. Further support for the contention that EIA is a norm of international law is found in the 1997 International Court of Justice (ICJ) decision in the *Case Concerning the Gabcikovo-Nagymaros Project.*[26]

The case involved a dispute between Hungary and Slovakia about the breach of a bilateral treaty in which the nations had agreed to build a series of coordinated dams and locks along the Danube River.[27] Each nation was responsible for separate aspects of the project along the river, which also served as their border. Slovakia for the most part fulfilled its obligations under the treaty; Hungary did not. Hungary attempted to abrogate the treaty, arguing *inter alia* that as a principle of general international law, additional environmental impact studies needed to be performed before proceeding further with the project. Ultimately the ICJ resolved the case based on language within the original treaty relating to Hungary's obligations to complete the project, and additional treaty language requiring environmental analysis prior to construction. But in a concurring opinion, Justice Weeramantry discussed the importance of conducting an EIA before proceeding further with the project. He built his argument on the principles he had first raised in his dissenting opinion in the *Nuclear Testing (New Zealand/France)* case (1995). J. Weeramantry acknowledged language within the treaty that required a type of EIA prior to commencement of additional work. But he also argued that EIA was a general principle of international law, regardless of whether the treaty required it, stating "environmental law in its current state of development would read into treaties which may reasonably be considered to have an impact on the environment, a duty of

[26] Case Concerning the Gabcikovo-Nagymaros Project, supra note 25.
[27] See Preiss, supra note 3, at p. 307.

environmental impact assessment."[28] Furthermore, J. Weeramantry supported implying such an obligation into a treaty today, even if the international environmental norm did not exist at the time when the treaty was made.[29]

While the opinion of J. Weeramantry is only a concurring opinion, it serves notice to the international community that EIA has become so widely accepted that nations should consider its use mandatory in all endeavors that might result in significant impact to the environment. The many institutions that now utilize EIA as common procedure are further evidence that EIA may come to be considered a norm or general principle of international law. In short, EIA has become an international phenomenon and is perhaps the most widely used tool for ensuring that environmental impacts are taken into consideration before proceeding with an activity. Despite this growing universality, the particular application of EIA principles varies depending on the body applying the law, as will be revealed in the following sections.

III. NEPA and the EU Directive – A Brief Comparison

A. NEPA

1. Background and Overview

As noted, NEPA legislation was created in 1969 around the time of the first Earth Day, and signed into law in 1970. The NEPA law established overarching environmental goals for the United States, established the Council on Environmental Quality (CEQ), and introduced the EIA procedure. Procedurally, NEPA EIA follows roughly the generic EIA process described above in section II(A). NEPA's reach is limited in that the EIA

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[28] Case Concerning the Gabcikovo-Nagymaros Project, supra note 25, at 20

[29] The ICJ majority opinion looked only the norms of 1977 when the treaty was made, and said any norms evolving subsequent to the treaty must be expressly incorporated into the treaty by the parties. Case Concerning the Gabcikovo-Nagymaros Project, supra note 25.

requirement is only applied to projects and activities that are sponsored or significantly funded by the federal government.[30] This does, however, include those private actions which require a Federal approval or permit as a precondition for action.[31] This greatly expands the scope of NEPA by virtue of the fact that practically any new activity, private or public, on federal lands[32] would be subject to NEPA requirements. The goal of the EIA process in NEPA is to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an impact on man's environment."[33] In other words, NEPA strives for an informed, cross-disciplinary approach to decision-making.

NEPA rose up out of the activist aura that pervaded the 1960s. Concern for the environment was growing in response to deteriorating environmental conditions such as the air quality in the Los Angeles basin. These concerns were further fueled by activist literature such as Rachel Carson's *Silent Spring*. Simultaneously, the Vietnam War had sparked in many a general distrust in, if not disdain for the federal government. NEPA directly responded to both the environmental and procedural concerns in that it not only laid out a "National Environmental Policy," but also required the government to open up its decision-making processes to the public. While the substantive findings of an EIA would not be binding on the government (i.e. a finding of adverse environmental impacts would not necessarily be grounds to stop a project), NEPA would at least force the

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[30] NEPA, supra note 13, at § 4332(C).
[31] CEQ Regulations, supra note 5, at § 1508.18 (defining "major federal actions").
[32] The Federal government has at various times in history owned as much as 80% of the nation's lands, and today still holds title to approximately 29% of the total area. http://w3.access.gpo.gov/blm/pls96/part1.html This land in particular is subject to development as the G.W. Bush Administration pushes for new energy opportunities, and as many military bases from the World War II era are in the process of conversion to civilian uses.
[33] NEPA, supra note 13, at § 4332(A).

government to consider the impacts and suggest mitigation for them, with the input and participation of the public. The NEPA statute was supplemented by CEQ implementing regulations in 1978. These regulations helped to clarify what procedures were necessary for EIA and helped standardize EIA procedures among the different federal agencies.[34]

2. NEPA and the Role of the Courts

One distinctive feature of NEPA worthy of separate analysis is the role that the courts play in the process. The role of the courts is notable for two reasons. First is the fact that oversight of NEPA is left to the public citizenry via citizen suit. Secondly, the level of judicial activism with respect to NEPA cases has been significant.

A NEPA EIA has no substantive effect. That is to say, even if the analysis finds that the proposed alternative will have dire adverse consequences, or that another alternative would have less adverse consequences, the federal agency can still approve the project as proposed. The NEPA statute does not authorize either the EPA or the CEQ to bring suit or otherwise prohibit the lead agency from going forward with its proposed action.[35] They are limited to their ability as interested federal agencies to make comments on the EIA.[36] NEPA similarly has no provision for citizen enforcement of its provisions. Even if NEPA did expressly allow for citizen enforcement, the role of plaintiffs would be limited by the fact that they could not challenge the substantive decision of the agency; only procedural aspects of the EIA.[37]

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[34] THE NEPA BOOK, supra note 2, at pp. 7-8.

[35] THE NEPA BOOK, supra note 2, at p. 171. The EPA does play a special role in the EIA process in that it is expressly authorized to make comments on EIAs. CEQ regulations allow any agency with specialized expertise and interest in the matter to comment on an EIA (CEQ Regulations, supra note 5, at § 1503.1). However, the CAA (in § 309, which has nothing to do with air quality) specifically authorizes the EPA the right to comment on any action subject to NEPA requirements.

[36] Id.

[37] This idea is actually not very novel. While one traditionally thinks of environmental citizen suits as being a the result of substantive harms (i.e. X contaminate Y's water supply in violation of the Clean Water

With that backdrop, it wouldn't seem that there would be much of a role for the courts in the enforcement of NEPA. Instead, the courts have become the major interpreters and enforcers of NEPA and the associated CEQ regulations.[38] While NEPA itself had no provisions for citizen suit, the Administrative Procedure Act of 1946 contains the general notion that "[A] person suffering a legal wrong, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial relief thereof."[39] The first important NEPA case extending this concept to NEPA came one year after the statute's enactment. In *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,* the D.C. Circuit decided that NEPA allowed for judicial review of federal agency compliance with the statute, and struck down the Commission's licensing of a nuclear power plant on the basis that it had not sufficiently considered the project's environmental effects as required by NEPA.[40] The decision is important for three reasons: (1) it established the right of NEPA citizen suits; (2) it created a role for judicial review of NEPA procedures; and (3) it showed that NEPA could have a substantive effect on decision-making even when a suit was brought wholly for procedural deficiencies. Later Supreme Court cases created broad notion of standing as related to NEPA suits, requiring only that the plaintiff(s) have aesthetic interests in the lands they seek to protect,[41] and that they had participated meaningfully in the EIA

Act), in fact many environmental citizen suits have to do with procedural matters, such as the EPA's adoption of a rule under the Clean Air Act (see, e.g. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

[38] THE NEPA BOOK, supra note 2, p. 171.

[39] Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat.237, 5 U.S.C. § 702 (1946).

[40] *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission* ,449 F.2d 1109 (D.C. Cir. 1971).

[41] See, e.g. *Sierra Club v. Morton*, 405 U.S. 727 (1992); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U1.S. 669 (1973).

administrative process prior to filing suit (i.e. submitted public comment, etc.).[42] The 1970s saw a rapid growth in number, membership, and influence of environmental interest groups in the United States.[43] Given the Court's liberal notions of standing, this amounted to rapid growth of potential NEPA plaintiffs. Over time, the courts became the main forum for enforcing NEPA's procedural requirements through suits by concerned citizens, environmental interest groups, and state and local government agencies.[44] Since 1971, there have been over 2,000 NEPA cases decided by the federal courts, and countless other suits under state and local EIA laws.

Another reason for the frequency of NEPA lawsuits is that there is little risk for the plaintiffs. Under the American legal system, plaintiffs do not have to pay the opposition's attorney fees and costs if they lose the case. If anything, many American environmental statutes allow for "one way fee shifting", where the defendant has to pay the plaintiff's legal costs if the plaintiff prevails, but the plaintiff does not have to pay if the defendant prevails.[45] While NEPA does not have fee shifting (or any mention of litigation in the statute, for that matter), plaintiffs know that they will not be obliged to pay their opponents costs should they lose the case. Thus even if their case is a sure loser, there might be incentive to file suit because of the possibility to delay the impacts of the project or in some cases even kill it solely due to the time-consuming litigation.

The second interesting aspect of court involvement in NEPA has been the level of judicial activism with respect to the statute. This is attributed at least partially to the fact

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[42] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).
[43] THE NEPA BOOK, supra note 2, p. 171.
[44] In 1997, 56 of the 102 plaintiffs in NEPA suits were public interest organizations or citizen groups. THE NEPA BOOK, supra note 2, p. 173.
[45] This is the so-called "private attorney general" concept, where the citizen is just jumping into the shoes of the prosecutor. Mark Squillace, *An American Perspective on Environmental Impact Assessment in Australia*, 20 Colum. J. Envtl. L. 43, 56 (1995).

that American judges, especially in the federal courts, enjoy a large degree of independence from the government, and are willing to challenge decisions of governmental planners.[46] This activism has been seen primarily at the district and circuit court level. The lower courts established early on that (1) NEPA standing requirements would be interpreted broadly; (2) NEPA applied to decisions of independent regulatory agencies in addition to executive agencies; (3) deference should be had to the CEQ's implementing regulations;[47] and (4) good faith efforts should be made by the agencies to comply with NEPA's full disclosure objectives.[48] As NEPA provides no guidance on the litigation process, lower courts have employed varying standards of judicial review to agency NEPA procedures. While most courts have applied the relatively deferential "arbitrary and capricious" standard found in the Administrative Procedure Act, others have employed the more stringent "hard look doctrine", examining whether an agency took a hard look at environmental consequences before deciding on a proposed action.[49] The interesting thing is that for all the activism in the lower courts, the US Supreme Court has generally interpreted the NEPA statute narrowly. It has sided with the federal agency in each of the twelve NEPA cases that it has heard.[50] Nevertheless, the federal courts have allowed NEPA to evolve into something that is not merely a procedural exercise. Through the courts, public citizens have frequently been able to annul or forestall agency decisions, even if only until procedural errors on the part of the agency

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[46] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 208, Harvard University Press (2001).
[47] President Carter issued Exec. Order No. 11,991, 3 C.F.R. § 123-24 in 1977, calling that the CEQ regulations were to be binding on Federal Agencies. See also, *Andrus v. Sierra Club*, 442 U.S. 347 (1979), for a case upholding the binding nature of the CEQ regulations, noting that they are entitled to "substantial judicial deference."
[48] THE NEPA BOOK, supra note 2, p. 172.
[49] THE NEPA BOOK, supra note 2, p. 180.
[50] See THE NEPA BOOK, supra note 2, at p. 180, for a brief summary of each of the 12 cases.

were corrected. As one Judge has noted: "The ready availability of a remedy helps keep government authorities on their toes. It ensures that there is a public watchdog on regulatory authorities to ensure that they do not fall asleep on the job."[51]

3. Assessing the Success of NEPA

There is an ongoing debate over whether NEPA can be deemed a success.[52] Many environmentalists believe that NEPA has been instrumental in requiring the consideration of environmental impacts of federal actions and informing the decision making process. NEPA has without question resulted in the halting of many potentially harmful projects in instances where concerned citizens were able to sue for procedural deficiencies in the preparation of the EIA. Even where projects aren't completely halted, the ensuing delays can result in more informed, mitigated solutions. Wholly apart from litigation, the assessments themselves have forced the government, in an almost painful, methodical manner to look at alternative solutions. This has no doubt reshaped projects into forms less detrimental to the environment than originally proposed.

There are also many critics of NEPA who point to its high cost of administration relative to the limited beneficial effect it has on the environment. Part of this criticism stems from the fact that NEPA is purely procedural: its findings, even if adverse to the environment, do not dictate a course of action.[53] The accusation is that federal agencies approach NEPA EIAs simply as a mechanistic procedural task that they must satisfy in order to go forward with their project, with little real consideration of findings or impacts contained in the EIA. A straightforward economic criticism has been that NEPA EIAs

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[51] Justice Paul Stein, *Can Review Bodies Lead to Better Decision-Making?*, 66 Canberra Bull. Pub. Admin. 118, 119 (1991).
[52] This section draws heavily from the Erika Preiss article, supra note 1, at pp. 314-315.
[53] See e.g. *Strycker's Bar Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

require too many economic resources, cause unnecessary project delays, stifle economic development, and weaken the United States' competitive position vis a vis nations without comparable EIA legislation. In other words, this is an argument that NEPA has been *too* effective.[54] Finally, in a rather perverse twist, industry groups have begun using the NEPA process as a means of *improving* their competitive position. It used to be that only environmental or citizen groups used the NEPA process to delay or annul federal projects. Today, commercial entitites sometimes use the EIA process to delay the progress of a competitor. Or, recognizing, for example, that a legislative bill on fuel additives is a major federal action subject to an EIA, industry groups will manipulate the EIA process to delay or kill the adoption of such legislation which might otherwise have produced environmental benefits.

For all its critics, there can be no denying that the NEPA EIA process has forced the government to at least analyze the impacts of its projects, and in many cases led it to take actions that have been less detrimental to the environment.[55]

B. European Union EIA Directives and Deviations from NEPA

1. Introduction: Development of Environmental Law and EIA Law in the EU

Before proceeding to a comparison of EIA in the EU and the US, there must be a basic understanding of the context of EIA and environmental law in general within the

[54] See Kagan, supra note 46, at Chapter 10.

[55] See generally, SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM, Stanford University Press (1984), at Appendix E. In a study of the first 9 years of NEPA, Taylor found that 1,052 NEPA suits had been filed. In that same time period, approximately 10,000 EIAs had been filed with CEQ. Of the 1,000 suits, approximately 20% resulted in injunctions against government action. See Taylor's study for additional information on delays caused by NEPA.

EU. By first understanding the evolution of environmental policy making in the EU, one can more fully appreciate the dynamics of implementation at the Member State level.

Originally a group of 6 nations joined by treaty in 1951 to regulate the steel and coal sector, it could not have been foreseen that this community would grow to be a 15 country union regulating such diverse areas as monetary policy, anti-trust, and environmental protection. The regulation of Member States' domestic land use decisions and their impacts on the environment certainly wasn't envisioned. Yet over time, as the benefits of economic and social cohesion became more and more apparent, what was once a 6 nation trading block grew into a powerful economic and social union that today wields power on an international scale. The move towards environmental regulation within the EU was, however, slow. Briefly examining the development of EIA legislation in the EU provides a nice lens by which to trace the gradual development of environmental law in the EU in general. It also places in context the legal status of environmental directives within the individual Member States.

There are often three reasons given to justify the enactment of environmental law by the European Union.[56] The first is driven by geography and science: many, if not most environmental problems are transboundary in nature; soot particles in the air and chemicals in the river do not suddenly disappear at the border. The second justification is the standard "level playing field" argument, under which uniform environmental laws are necessary to ensure fair economic competition between members of the EU. Couched in this justification is the political reality that some business enterprises in those states where there already are environmental laws apply pressure on the EU to pass community

[56] N.S.J. KOEMAN, ENVIRONMENTAL LAW IN EUROPE (1999), from chapter "European Environmental Law: an Introduction", written by Laurens Jan Brinkhorst, at p. 1. [herein, ENVIRONMENTAL LAW IN EUROPE]

wide environmental laws in order to balance competition. Similarly, environmentalists in countries like Italy where it is difficult to pass national environmental laws are able to use the EU as a medium through which to bypass unresponsive national governments. The final justification characterizes environmentalism as a form of natural law. Under this theory, all citizens of the EU deserve some baseline level of environmental protection.[57] As will be seen below, the EU has moved beyond economic balancing arguments and towards the "natural law" concept by identifying environmental protection as one of the fundamental principles of the Union.

While these three justifications help to explain the political inspiration for EU environmental lawmaking, they do not answer the question what is the legal basis of EU environmental law. As indicated above, the foundation for the EC was the creation of an open market economy with free competition.[58] Initially comprised of three separate treaties[59], the Treaty Establishing a Single Council and a Single Commission of the European Communities[60] (herein, EEC Treaty) consolidated the three treaties and set up the basic framework for EU lawmaking.[61] However, nowhere within the treaty was there any language concerning the environment. Initially, environmental legislation was

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[57] Support for this theory is found in some member state constitutions such as Italy, where the State has a duty to protect the health of individuals. Italian Constitution (1948).

[58] TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 140, see art. 2 (stating the EEC goal to "promote the harmonious development of economic activities").

[59] TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167; TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 267. [herein, treaty provisions will be referred to as EC TREATY, and refer to the Treaty as currently amended, unless otherwise noted]

[60] TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, Apr. 8, 1965, 4 I.L.M 776.

[61] Id. This treaty set up the basic institutions of the EU still in existence today, such as the Commission, the Council, the Parliament, and the Court of Justice.

passed with reference to Articles 100 and 235 of the treaty.[62] Both were general provisions. Article 100 provided "The Council acting by means of a unanimous vote on a proposal of the Commission, shall issue directives . . . as have a direct incidence on the establishment or functioning of the common market." Article 235 was a similar "catch all", authorizing the Council to "enact the appropriate provisions" in cases where the treaty had not spoken directly to the matter but where provisions were "necessary to achieve . . . one of the aims of the community."[63] Drawing on the broad language of these two provisions, the Council enacted environmental laws.

However, there was initially disagreement over whether Articles 100 and 235 provided a legitimate basis for the enactment of environmental laws. In a sign of things to come, it was Italy in 1980 that challenged the Council's authority to pass environmental legislation under Articles 100 and 235. Italy had failed to implement Directive 73/404 relating to the biodegradability of detergents. Italy's primary argument was that Article 100 provided no basis for environmental legislation, and that by doing so the Council was in effect amending a term into the EC Treaty. The ECJ was dismissive of the Italian reasoning, instead casting the argument in terms of harmonization and free competition: "Provisions which are made necessary by considerations relating to the environment . . . may be a burden . . . and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted."[64] The general

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[62] For an example of such early legislation, See, e.g. Council Directive No. 67/548 on the Classification, Packaging and Labeling of Dangerous Substances, 1967 O.J. (196) 1, as amended by Council Directive No. 79/831, 1979 O.J. (L 259) 10.

[63] EC TREATY, Art. 235. Article 235 States:
If any action by the community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the community in cases where this treaty has not provided for the requisite powers of action, the Council, acting by means of unanimous vote on a proposal of the Commission and after the Assembly has been consulted shall enact the appropriate provisions.

[64] See generally, *Commission v. Italy*, Case, 91/79, 1980 E.C.R. 1099, 1115.

harmonization principles of Articles 100 and 235 were thus upheld as providing the necessary bases for environmental legislation.

Even having established the substantive basis for passing environmental laws, the move towards EIA in Europe progressed slowly. Building on the momentum created by the 1972 United Nations Conference on the Human Environment in Stockholm[65], the EU in 1973 instituted a series of five-year Action Programmes to identify specific environmental objectives and performance targets for carrying out the broader goals of the EEC Treaty.[66] The Action Programmes were not environmental legislation in and of themselves, but they were symbolic of the growing importance of environmental issues in the EU. The second Programme Resolution, in 1977, could be viewed as the birthplace of EIA in the European Union. The Programme listed 11 guiding principles of environmental law, the second principle being that "Environmental impacts should be taken into account at the earliest possible stage in decision-making."[67]

The original EU EIA Law, Directive 85/337, was premised on the principles of the Action Programmes ("Whereas the 1973 and 1977 action programmes of the European Communities on the environment . . . affirm the need to take effects on the environment into account at the earliest possible stage...")[68], though its substantive legal bases in the Treaty were the general community principles of Articles 100 and 235, mentioned above. The first sentence of the Directive reads "Having regard to the Treaty

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[65] See Declaration of the U.N. Conference on the Human Environment: Final Documents, U.N., reprinted in 11 I.L.M. 1416-69 (1972). The declaration encouraged the idea of identifying impacts of activities on the environment and having responsibility for mitigating those effects.

[66] Council Resolution, 1973 J.O. (C 112) (First Action Programme on the Environment). The Action Programme was subsequently renewed in 1977, 1983, 1987, and 1993.

[67] Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States, Meeting within the Council of 17 May 1977 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, 1973 O.J. (C 112) 1.

[68] 1985 Directive, supra note 19, at Preamble

establishing the European Economic Community, and in particular Articles 100 and 235 thereof."[69] When the Directive was proposed in 1980, England, Ireland, Germany, and France already had EIA laws in place, explaining the preamble statement "Whereas the disparities between the laws in force in the various Member States with regard to the assessment of the environmental effects of public and private projects may create unfavorable competitive conditions and thereby affect the functioning of the common market; whereas, therefore, it is necessary to approximate national laws pursuant to Article 100 of the Treaty . . . Whereas, since the Treaty has not provided the powers required for this end, recourse should be had to Article 235 of the Treaty."[70] The 1985 Directive demonstrates exactly how the EU had broad liberties to issue directives not just in the environmental area, but in just about any area, under the authority of Articles 100 and 235. As long as the objective of the directive related to unfair conditions and the functioning of the common market (Art. 100), and so long as the treaty had not otherwise provided for legislation in this specific area (Art. 235), then the Council could pass legislation as necessary, though at that time it could only do so by unanimous vote (Art. 100).[71]

After 1985, there were important changes to the foundation of the institutions of the EU. In 1986, the European Community signed the Single European Act (SEA).[72] For the first time, the EU treaty contained rules explicitly pertaining to environmental

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[69] 1985 Directive, supra note 19, at

[70] 1985 Directive, supra note 19, at

[71] See McHugh, supra note [ ], at 605 for a description of the legislative history of the Directive. McHugh notes that Britain, France, Ireland, and Germany already had EIA laws in place at the time of the enactment. McHugh further notes that the enactment of the Directive was ostensibly fulfilling one of the goals of Articles 100/235 – "to avoid disparities between the EIA laws in force in several of the member nations which might create unfavorable competitive conditions, thereby directly affecting the functioning of the common market."

[72] SINGLE EUROPEAN ACT, Feb. 28, 1986, 25 I.L.M. 506 (1986). [herein, SINGLE EUROPEAN ACT]

protection. Article 100a ("Harmonization") for the first time recognized the relationship between the environment and the promotion of the common market, authorizing the Council to adopt measures "concerning health, safety, [and] environmental protection."[73] Title VII of the SEA was dedicated to the environment, and contained three articles – 130r, 130s, and 130t.[74] Article 130s outlined the basic environmental policy goals of the European Community: to protect the environment and natural resources, to protect human health, to focus on prevention of harms before they occur, to utilize available scientific data, and to weigh costs and benefits of actions.[75] These guiding principles provided a clear substantive basis for the enactment of EIA legislation. 130r also introduced for the first time to EU law the "subsidiarity" concept.[76] Article 130s identified the necessary legislative procedure for passing environmental legislation, which at that time was a unanimous vote from the Council after consultation with the Parliament (the so-called "Consultative Process"). The final article also introduced an important environmental concept familiar to American environmental law. Article 130t stated "[t]he protective measures adopted in common pursuant to [the environment] shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty."[77] In other words, if a country wanted to introduce

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[73] See SINGLE EUROPEAN ACT, supra note 72, Art. 100a.
[74] See SINGLE EUROPEAN ACT, supra note 72, Article 25
[75] See SINGLE EUROPEAN ACT, supra note 72, Art. 130r, Para. 1-3
[76] Paragraph 4 states the concept: "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." See SINGLE EUROPEAN ACT, supra note 72, Art 130r, Para. 4. While this would appear to place limits on the ability to enact environmental legislation, scholars generally agree that it has placed few practical limits on the EU's regulation of the environment. Turner T. Smith Jr. and Roszell D. Hunter, *The European Community Environmental Legal System*, 22 ELR 10106 (page references not available), (February, 1992). Professor Martin Shapiro also commented that the meaning of the subsidiarity principle is unclear and that its impact has been limited. Comparative Constitutional Law Lecture, University of California, Berkeley, Boalt Hall School of Law, May 1, 2002.
[77] See SINGLE EUROPEAN ACT, supra note 72, Art. 130t

legislation that was more protective of the environment than was an EU directive, or if it already had such laws in place, the EU environmental laws would permit this.[78]

Now that environmental provisions had their rightful place among the expanding aspirations of the EU, there was no need to rely on the general provisions like the old Article 100 and 235 to pass environmental laws. The role of the environment in the EU continued to grow with the amendments to the Treaty passed in Maastricht (1992)[79], Amsterdam (1997)[80], and, to a lesser extent, in Nice (2001)[81]. Concepts such as "sustainable development" and a "high level of protection" of the environment were now among the general principles of the EU. The Treaty's environmental provisions continued to be found in 3 articles, the first laying out the basic environmental goals, the second articulating the legislative procedure for achieving these goals, and the third permitting Member States to adopt more stringent environmental standards. As to the legislative procedure, for most environmental legislation it is the now the Co-decision procedure, though for "measures of town and country planning" and "land use", the unanimous vote of the Council upon consultation with Parliament is still required. The 1997 EIA Amendments, the 2001 SEA for Plans and Programmes, and the 2003 EIA Amendments were all passed using the Co-Decision procedure.

Lastly, mention must be made of provisions for the environment in the Draft Constitution proposed for the EU. The idea of a "Constitution for Europe" was first conceived in December of 2001. A Convention on the Future of Europe was formed, and

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[78] The Clean Air Act in the U.S. provides a comparable example, setting National Ambient Air Quality Standards (NAAQS), but allowing individual states to take measures or set regulations that would exceed the national standards. See Clean Air Act, 42 U.S.C § [ ] (1999).
[79] TREATY ON EUROPEAN UNION (1992).
[80] EC TREATY, supra note 59.
[81] TREATY OF NICE, signed February 26, 2001; ratified October 19, 2002.

that group presented a Draft Treaty Establishing a Constitution to European Council on June 20, 2003 [herein, Proposed Constitution].[82] The Proposed Constitution doesn't introduce any big new concepts relating to the environment, and the basic structure of the 3 environmental provisions remains intact. The environment remains prominent among the principle aims of the EU; the concepts of "environment" or "sustainable development" are found in at least 12 places within the Proposed Constitution.

In the end, there has been a great evolution in the environmental doctrine of the European Union. The move towards expressly making the environment part of the EU agenda commenced with a series of Action Programmes on the Environment starting in 1973. Environmental concerns were originally not even considered to be within the purview of the EU's legislative powers. Later, they came to be recognized, but only as a necessary expedient for the harmonization of the economic community. As certain "green" Member States began regulating the environment, the need to level the playing field so as to protect business in those states from unfair competition (or prevent their migration to the "environmental laggards") became clear. Environmental laws were passed pursuant to the general EU authority to legislate on matters of economic cohesion. By 1987 with the Single European Act, the EU had a Title dedicated to environmental protection. As the Treaty has subsequently been modified in Maastricht in 1992 and Amsterdam in 1997, the environmental provisions have evolved and strengthened. Moreover, environmentalist language has gradually crept into the language of the guiding principles of the European Union, firmly establishing environmental protection not just as an area in which the EU has a right to pass legislation, but also an area in which it has a

[82] DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, adopted by consensus of European Convention, July 10, 2003, at Preface. [herein, Proposed Constitution] See also, Joanne Scott and Jan H. Jans, The Convention on the Future of Europe: An Environmental Perspective (Draft, Summer 2003).

duty to do so. The Proposed Constitution for Europe, if adopted, will maintain these themes since the concepts of environmental protection and sustainable development are to be found throughout the document. We now turn to a detailed analysis of the development of EIA law within the context described above.

2. The 1985 EIA Directive

To review, the EU EIA regime is actually the product of four distinct legislative efforts. The first EIA Directive was enacted in 1985. It was amended in 1997, supplemented in 2001, and amended again in 2003. In tracking the progression of EU EIA law through these four legislative efforts, the EU EIA regime will be contrasted with that of its US counterpart.

Tracking closely with the situation in the US, a strong environmental movement emerged in Europe starting in the early 1970s.[83] Symbolic of this new consciousness was the release by the EU of the First Environmental Action Programme in 1973. Recall tha the second Action Programme, issued in 1977, listed EIA as one of the eleven "guiding principles" of EU environmental policy. Additionally, by 1980, France, England, Ireland, and Germany had already adopted EIA laws. There was a fear in these "greener" countries that the lack of EIA in other Member States could distort economic competition in the community.[84] The Commission first formally proposed EIA legislation in 1980. After a series of twenty drafts, the Commission submitted a proposed EIA directive to the European Council. The 20 drafts needed to pass the legislation is reflection of both the sensitivity of Member States at that time to pass a law that directly regulated domestic

[83] For an overview of the progression of EU environmental law, see ENVIRONMENTAL LAW IN EUROPE, supra note 56.
[84] Louis L. Bono, *The Implementation of the EC Directive on Environmental Impact Assessments with the English Planning System: A Refinement of the NEPA Process*, 9 Pace Envtl. L. Rev. 155, 157 (1991).

land use decisions, as well as the need for unanimity of the Council to pass the legislation. In 1985, Council Directive 85/337/EEC "on the assessment of the effects of certain public and private projects on the environment", was adopted. [herein, 1985 Directive]

Again, the basic steps of EIA described in the overview above (scoping, alternatives, public participation, etc.) were embodied in the 1985 Directive. One significant departure from NEPA was the determination of when EIA would apply to a project. Under NEPA, an EIA is required anytime a federal action significantly affects the quality of the environment. The 1985 EU Directive, on the other hand, simply listed categories of projects to which EIA would apply, and plans and programs were not mentioned. There was one list of projects for which EIA was mandatory (Annex I – primarily large projects like Crude Oil Refineries, Hazardous Waste Facilities, and Highways), and a second list for which EIA would apply only to the extent that "Member States consider their characteristics so require." (Annex II – a variety of projects including the Agricultural, Transportation, and Chemical sectors).[85] As to Annex I, the use of lists seemed limiting. One could imagine large-scale projects with many environmental impacts somehow landing outside of the categories in the list. As to the Annex II list, asking the Member States to employ EIA to projects when they "consider their characteristics so require" was very open-ended, though this conclusion must be tempered in light of three things. First, all EU directives must be sensitive to the sovereignty of the Member States, and this provision afforded necessary discretion to the Member States. Second, as will be discussed in greater detail below, the European Court

[85] 1985 Directive, supra note 19, at Article 4. See also, Annex 1 and Annex II for a listing of affected projects.

of Justice minimized the discretion to be employed as regards Annex II projects by giving an extremely narrow interpretation of the language "where Member States consider that their characteristics so require." Lastly, the 1997 Amendments to the Directive firmed up the language relating to Annex II projects.

Aside from the use of lists, the EU EIA scheme also differed from NEPA in that it only applied to "projects", defined in the Directive as "the execution of construction works or of other installations or schemes, or other interventions in the natural surroundings and landscape."[86] NEPA applies to *any* type of federal action impacting the environment, including legislative actions, plans, or programs. In this regard, the 2001 Directive helped close the gap between NEPA and the EU process by extending the EIA process to certain plans and programmes. The 2001 Directive will be discussed in greater detail below.

3. The 1997 EIA Amendments

In 1997, the EU adopted amendments to the 1985 Directive. Council Directive 97/11 "amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment" [herein 1997 Directive],[87] stated "experience acquired in environmental impact assessment, as recorded in the report on the implementation of Directive 85/337/EEC . . . shows that it is necessary to introduce provisions designed to clarify, supplement and improve the rules on the assessment procedure, in order to ensure that the Directive is applied in an increasingly harmonized

[86] 1985 Directive, supra note 19, at Art 1(2).
[87] Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. L 73/5 O.J. 1997; March 14, 1997. [herein 1997 Directive]

and efficient manner."[8889] Language in the 1997 Directive emphasized the "requirement for development consent"[90] as precursor to commencement of the project, stating clearly in the Preamble that "the assessment should be carried out before such consent is granted."[91] The 1985 Directive had also required that the assessment be performed "before consent is given"[92], but the language in the preamble to the 1997 highlighted and reinforced this point. The 1997 Amendments clarified that the results of the EIA "must be taken into consideration in the Development Consent procedure" and that the agency must provide the public with "the main reasons and considerations on which the decision was based."[93] Under NEPA, the Federal agencies are similarly obligated to consider the contents of the EIA and state in the record their reasons for arriving at their decision, though the conclusions of the EIA are not binding on the decision-maker.[94] By requiring the agency to provide the public with the reasons for its consent decision, but not requiring the agency to alter its decision based on adverse findings, the EU is following a similar approach.

The 1997 Amendments also added projects to the Annex I list of projects for which EIA is mandatory,[95] and firmed up the criteria under which Annex II projects should be subject to EIA requirements. The language "where Member States consider that their characteristics so require" was very ambiguous and had resulted in confusion and wide disparities in practice among the Member States. For example, in Italy, no

[88] 1997 Directive, Preamble at Para. 4.
[89] See Ludwig Kramer, Casebook on EU Environmental Law, Hart Publishing (Oxford 2002). at pp. 151-153, for a discussion of the weaknesses of the original Directive and how subsequent changes addressed those weaknesses.
[90] 1997 Directive, Art 2(1).
[91] 1997 Directive, Preamble at Para. 5.
[92] 1985 Directive, supra note 19, at Art. 2(1).
[93] 1997 Directive, Art 8, 9.
[94] CEQ Regulations, supra note 5, at § 1505.2.
[95] 1997 Directive, Annex I. The categories of projects subject to mandatory EIA increased from 9 to 23.

national measures had been put in place regarding Annex II projects as of 1997; Annex II projects simply weren't part of the EIA process in Italy. The 1997 Amendments attempted to create clearer standards for knowing when Annex II projects were to be assessed, partly in response to ECJ case law (to be discussed below) that had already tackled the issue. The "where Member States consider that their characteristics so require" language from the old Article 4 was completely stricken. The new Article 4 instructed Member States to decide which Annex II projects would be subject to EIA either by (1) doing a case-by-case examination of projects falling under Annex II, or (2) setting thresholds or criteria under which a determination can be made.[96] Member states no longer had the option to simply "specify certain types of projects subject to assessment." Furthermore, the new Article 4 referred Member States to a new Annex III which provided selection criteria to be used in "setting thresholds" or performing "case-by-case examination" for Annex II projects.[97] The new language was a direct response to the confusion in the Member States over how to deal with Annex II Projects, as well as to the aggressive position the ECJ had staked out in this regard.

Again, this problem does not exist under NEPA since NEPA does not use lists to identify which projects are subject to EIA.[98] Instead the focus is on whether the federal action is likely to significantly impact the environment. If the significance of the impact on the environment is unclear, an Environmental Assessment (EA) is first prepared (a "mini-EIA" that briefly reviews impacts and alternatives).[99] Based on the findings of the

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[96] 1997 Directive, Art. 4(2).
[97] 1997 Directive, Art 4(3), referring to Annex III.
[98] It should be noted that most Federal agencies have their own EIA procedures in the form of circulars and guidance documents. These do often establish thresholds for the agency to consider in making its decision to conduct an EIA, but these thresholds have no legal value.
[99] CEQ Regulations, supra note 5, at § 1501.3. CEQ has recommended that EAs be limited to 15 pages. However, over time EAs have become the primary mechanism through which NEPA has been applied, and

EA, a decision is made whether a full-blown EIA is necessary or, conversely, whether there should be a Finding of No Significant Impact (FONSI).[100] In other words, under NEPA, a case-by-case examination is always performed.

Finally, the 1997 Directive brought the EIA process more in line with NEPA by strengthening the language related to alternatives analysis. Whereas the 1985 Directive had suggested in an appendix that alternatives analysis be performed "where appropriate"[101], the 1997 Directive required "an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice."[102] The "where appropriate" language was dropped. This "outline" of alternatives falls well short of the NEPA process, where the alternatives analysis is said to be "the heart of the [EIA]," calling on agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives" and to "[d]evote substantial treatment to each alternative . . . including the proposed action so that reviewers may evaluate their comparative merits."[103] Nonetheless, the EU amendment was a step forward from the scant 1985 alternatives requirement.

In summary, the 1997 Amendments attempted to shore up some of the ambiguities of the 1985 Directive, particularly in regard to which Annex II projects EIA would apply, what should be contained in the EIA, and how the completed EIA should factor into the decision to approve or deny the project.

4. The 2001 SEA Directive

EAs often take many pages in order to determine whether or not a full blown EIA is necessary. THE NEPA BOOK, supra note 2, p. 47.

[100] CEQ Regulations, supra note 5, at §§ 1501.3, 1501.4.

[101] 1985 Directive, Annex III(2).

[102] 1997 Directive, Art. 5.

[103] CEQ Regulations, supra note 5, at § 1502.14.

In 2001, the EU expanded the scope of the EIA process. The 2001 Directive was inspired by the 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Aarhus Convention was a call for sustainable European development by linking public participation to the government decision-making process. The convention has been signed by the European Community and its Member States but has not yet received all necessary ratifications from the EC and the States. In any case the EU is moving forward on the implementation of its provisions. Until 2001, the EU EIA process applied only to "projects." The Aarhus convention took recognition of the fact that certain government decisions, even if not specific development projects, can have environmental impacts.[104] The 2001 Directive responded to this reality, and also served as an equalizing measure due to the fact that several Member States already had assessment procedures for plans and programs

Directive 2001/42/EC "on the assessment of the effects of certain plans and programs on the environment"[105] [herein, 2001 Directive] finally sought to apply the EIA process not just to "projects", but also to certain plans and programs. An assessment procedure distinct from project EIA (a so-called "Strategic Environmental Assessment", SEA) is to be applied to these plans and programs. The 2001 Directive lays out this procedure and describes the contents of a programmatic EIA. Under NEPA, the language for when an EIA is required has always been much broader. The language to the 1969 NEPA statute required EIAs for "proposals for legislation and all other major Federal

[104] See generally, AARHUS homepage, http://www.unece.org/env/pp
[105] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment., C5-0118/2001. (Herein, 2001 Directive).

Actions significantly affecting the quality of the environment."[106] The CEQ Implementing Regulations expressly state that "[e]nvironmental impact statements . . . are sometimes required for broad Federal actions such as the adoption of new agency programs or regulations."[107] Thus, under NEPA, EIAs have always been required for programs and plans (not just projects), so long as the program or plan was likely to have a significant impact on the environment. The 2001 EIA Directive sought to widen the scope of the EIA process, and brought it closer in line with NEPA in this sense.

The 2001 EU Directive is set up much like the "project" EIA Directive. Plans or programs relating to certain listed sectors (agriculture, forestry, energy, transportation, etc.) are required to have an EIA of their likely impacts. For all other plans and programs, the Member States are to determine criteria, based on guidance from the directive, as to when an EIA is required.[108] Thus the scheme for programmatic EIAs differs from NEPA in the same way that it does for project EIAs: the EU relies on lists and criteria established by the Member States to determine when an EIA is necessary, while the US simply determines if the program or plan is likely to have a significant impact on the environment. The deadline for transposition and implementation of the 2001 Directive is June of 2004. Thus at least until next year, the US EIA requirement will have a greater scope than that of the EU.

Assuming for sake of argument the successful implementation of the 2001 Directive, it is difficult to draw conclusions about which EIA system has a broader scope of application. NEPA, which applies to all Federal actions having significant impacts on the environment, and which does not make use of lists or fixed thresholds, would appear

[106] NEPA, supra note 13, at § 4332(C)
[107] CEQ Regulations, § 1502.4(b).
[108] 2001 Directive, Art. 3.

to be broader in scope. However, it cannot be forgotten that NEPA only applies to *federal actions*, or actions requiring a federal permit. For complete coverage, the US system has to count on the various state and local EIA laws that may apply to non-federal actions significantly impacting the environment. The EU Directives apply to projects and, now, plans and programs, be they private or public, and regardless of whether they require national or sub-national approval. In the end it suffices to conclude that the 2001 Amendments greatly enhance the scope of the EIA process in the EU.

5. The 2003 Amendments to the EIA Directive

On May 26, 2003, a Directive was passed requiring a second set of Amendments to the original 1985 Directive. Directive 2003/35/EC "providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC"[109] [herein 2003 Directive] was, like the 2001 Directive on plans and programs, inspired by the Aarhus Convention which the EU signed in 1998. Some clarification should be made as to exactly what the 2003 Directive does. As the title indicates, it has three purposes: 1) to ensure public participation in the creation of certain plans and programmes; 2) to modify or add public participation and access to justice provisions in the 1985 EIA Directive; and 3) to do the same with the 96/61/EC IPPC Directive.[110] It does not modify the 2001 Directive on plans and programmes. In fact, the 2003 Directive expressly states that its provisions on public participation do not

[109] Directive 2003/35/EC "providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC", OJ L 156/17, May 26, 2003. [herein 2003 Directive]

[110] Council Directive 96/61/EC of 24 September concerning integrated pollution prevention and control, OJ L 257, October 10, 1996.

apply to projects listed in Annex I of the 2001 Directive on plans and programmes.[111] The 2001 Directive is about the "assessment of the effects" of certain plans and programs, while this 2003 Directive is about public participation in the *actual creation* of such plans and programs.

Article 3 of the 2003 Directive does directly and extensively modify the 1985 EIA Directive with regard to public participation and judicial access.[112] As to public participation, the 2003 amendments essentially modify Article 6 of the 1985 Directive, which deals with public participation in the EIA process. The amended version generally strengthens the opportunity for public participation provided by Article 6, using such language as "as soon as information can reasonably be provided" and "early and effective opportunity to participate."[113] The Directive on two occasions states that information must be provided to the public within "reasonable time frames" to be fixed by the Member States.[114] One could envision a plethora of case law both within Member States and at the level of the ECJ before such time frames are fully understood. One other important amendment is to Article 9 of the EIA Directive. It is no longer sufficient that agencies provide "the main reasons and considerations on which a decision was made."[115] They must also respond or at least make reference to the concerns raised through the public participation process. This again brings the EU EIA process closer in line with that of NEPA, where agencies have long since been required to respond in writing to comments submitted by the public. In fact, the CEQ Regulations to NEPA require the agency preparing the EIA to "affirmatively solicit comments from those

[111] 2003 Directive, Art. 2(5).
[112] 2003 Directive, Preamble P(11).
[113] 2003 Directive, Art. 3(4).
[114] Ibid.
[115] 1985 Directive, supra note 19, at Art. 9.

persons or organizations who may be interested or affected."[116] Furthermore, the US agency must respond to the comments either by changing the analysis contained within the EIA, or explaining in a statement attached to the EIA why an individual's comment did not warrant a response or alteration.[117] While the 2003 Amendments fall short of this rigor, they do enhance opportunities for public participation, and there is always the possibility that at the Member State level further guarantees will be made to be responsive to public comments.

One of the most striking of the 2003 amendments is the addition of a new article 10a to the EIA Directive, which focuses on judicial access. Prior to the 2003 amendments, the EIA Directive, like NEPA, made no mention of courts or judicial access. Now the operative language requires Member States to "ensure that . . . members of the public concerned . . . have access to a review procedure before a court of law or another independent and impartial body . . . to challenge the substantive or procedural legality of decisions, acts or omissions" taken pursuant to the Directive.[118] There are two important points related to judicial access. First, though access per the Directive must be given to those "having sufficient interest" or "maintaining the impairment of a right," the determination of who constitutes "the public concerned" shall be made "in accordance with the relevant national legal system."[119] Similarly, non-governmental organizations are guaranteed access to the courts, but only those "meeting any requirements under national law shall be deemed to have an interest."[120] This seems to set up an ambiguous requirement: the public must have access to challenge decisions,

[116] CEQ Regulations, 1503.1(a)(4).
[117] CEQ Regulations, 1503.4.
[118] 2003 Directive, Art. 3(7).
[119] Ibid. See also, Art 3(1), defining "the public" and "the public concerned".
[120] Ibid. See also, Art 3(1), defining "the public" and "the public concerned".

but standing is to be conferred on the basis of existing Member State law. It will be interesting to see how broadly the ECJ interprets the provisions on access to courts, considering that national court procedures have traditionally been considered a "domestic" concern in the EU.

The second point to remember with regard to judicial access is that Member States retain the option of setting up administrative panels to hear challenges. This authorization is important since, as we shall see below, some Member States such as Ireland and the Netherlands have already created such forums through which to appeal EIA decisions.

One should recall that in the US, there are no provisions for judicial access within the NEPA statute or the CEQ implementing regulations (and only certain general provisions with regard to public participation). However, recall also that the guarantees provided under the US Administrative Procedure Act, which governs decision-making of all federal agencies, require certain minimum levels of public participation and access to federal courts to appeal all acts of federal agencies. The EU does not have an analogous overarching system, but through directives such as this one and Directive 2003/4/EC "on public access to environmental information,"[121] the EU system roughly approximates the US system, at least in the environmental area.

The 2003 Amendments must be brought into force by the Member States by June 25, 2005.[122]

C. The EIA Directive before the ECJ

[121] Directive 2003/4/EC "on public access to environmental information," OJ L 41, February 14, 2003.
[122] 2003 Directive, Art. 6.

The scheme for EIA in the EU cannot be sufficiently described without discussing the role ECJ has played in its enforcement. In fact the review of the EIA Directives above is nothing more than that: a review of the text of the Directives. The role of the ECJ in enforcing the EIA Directives and in broadening their application has been nothing short of remarkable.[123]

As noted, the US EIA system has been characterized by judicial activism; the federal courts have played a large role in defining the contours of NEPA and the CEQ regulations. In particular the lower courts have often been protective of the environment, though the US Supreme court has been deferential to agency decision-making in each of the 12 EIA cases it has heard. Some defining characteristics of the ECJ imply that it too can play an active role in the EIA process. Like many US courts, the ECJ relies heavily on contextual interpretation, as opposed to literal readings of text.[124] However, the ECJ goes further than US courts in its more open embrace of using policy considerations to arrive at a decision. This so-called "teleological interpretation" pushes the ECJ closer to the role of judicial legislator.[125] Under the teleological method, a court "interprets texts on the basis of what it thinks they should be trying to achieve: it molds the law according to what it regards as the needs of the Community."[126] In the EIA caselaw, the Court has often leaned on the "broad purpose" of the Directive to bolster its legal conclusions. This

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[123] For a comprehensive analysis of the ECJ's EIA jurisprudence, see Aine Ryall, 'Effective Judicial Protection' and the Environmental Impact Assessment Directive in Ireland, Chapter 4 (forthcoming) Doctorate Thesis at the European University Institute, June 2003. Ryall notes that "The Court has taken a concistently rigorous and purposive approach when called upon to interpret the directive."

[124] The ECJ "looks at the words used and considers their meaning in the context of the instrument as a whole. In doing this, it tries to give the provision an interpretation which fits in with the general scheme of the instrument . . . " T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 58 (Clarendon Press, 1981).

[125] Jacqueline L. Smith, *Consideration of Socioeconomic Effects Under NEPA and the EC Directive on Environmental Impact Assessment*, 1992 U. Chi. Legal F. 355 (1992).

[126] Hartley, supra note 126, at 59

approach is consistent with the realities of the EU, where legislative intent is often difficult to decipher. Often, an EU environmental directive is a political compromise between the desire of "greener" Member States to equalize the regulatory requirements across Member States, and the desire of the lower performing nations to maintain the status quo while at the same time securing political victories. In fact, the ECJ rarely looks to legislative intent in the form of an examination of the legislative history as do US courts, in part because discussions of the Council are not public.[127] Because of the peculiar nature of EU politics, the door is left open for the ECJ to play an active role in the development of EU environmental law. As will be described in greater detail below, the ECJ has walked proudly through this door as regards the EIA Directive,[128] interpreting it in a broad manner that has been highly protective of the environment.

In doing so, the Court has relied primarily on the combined language of two articles within the Directive.[129][130] The first is the general statement of Article 1 that "[t]his Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."[131] The second is Article 2, Paragraph 1, which states "Member states shall adopt all necessary measures to ensure that, before consent is given, projects likely to have significant effects on the environment . . . are made subject to an assessment with

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[127] See Ludwig Kramer, Casebook on EU Environmental Law, "Interpreting EC Environmental Law", p. 46 Hart Publishing (Oxford 2002).
[128] It has decided 15 EIA cases in the 15 years since the Directive became effective in 1988.
[129] Note that the above discussion will center primarily upon the 1985 Directive, prior to its being amended by the 1997 Directive. The reason for this is that the court has not yet had opportunity to substantively interpret the 1997 amendments. It has heard only one case involving the 1997 Amendments (*Commission v. Grand Duchy of Luxembourg*, C-366/00, February 19, 2002), which simply said that Luxembourg had failed to fulfill its obligation to transpose the 1997 Amendments.
[130] See Ryall, supra note 123, at Chapter 4, for additional analysis of how the Court has used the language of Article 2(1) to ensure that "the core objectives of the directive are not undermined in practice."
[131] 1985 Directive, supra note 19, at Article 1.

regard to their effects."[132] Under a narrower view, the first could be regarded as a mere statement that the Directive has to do with environmental assessment of projects. Similarly, the second could be read merely to indicate that Member States need to pass laws for carrying out EIA, where applicable. Instead, as will be seen below, the court has used these 2 general statements in tandem to consistently expand the reach and strength of the Directive. The Court's EIA jurisprudence can be roughly broken down into the following 5 categories: Temporal issues, Annex II interpretations, Direct Effect issues, Exemptions/Exceptions to the Directive, and Internal Government issues.

1. Temporal Issues

These cases center basically on Member States failure to meet the deadline for transposing and implementing the requirements of the Directives. Article 12 of the 1985 Directive gave Member States three years to adopt measures implementing the Directive,[133] either by introducing new legislation or altering/augmenting existing legislation.[134] The grace period expired on July 3, 1988. In the first EIA case heard by the ECJ, *Commission v. Luxembourg* (1994),[135] the court swept aside Luxembourg's response to the Commission that a draft Grand Ducal regulation was soon to be adopted, stating flatly that an EIA regulation "was not in force at the time when the period prescribed by the reasoned opinion expired."[136] The court faced a similar issue in the 1996 *Commission v. Belgium*[137] case. Again, prior to the trial and judgment, but after the expiration of the time prescribed in the Reasoned Opinion, the Belgian government had

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[132] 1985 Directive, supra note 19, at Art. 2(1).
[133] 1985 Directive, supra note 19, at Art. 12.
[134] 1985 Directive, supra note 19, at Art. 2(2).
[135] *Commission v. Grand Duchy of Luxembourg*, C-313/93, April 13, 1994.
[136] Ibid, at P(10).
[137] *Commission v. Kingdom of Belgium*, C-133/94, May 2, 1996.

enacted regulations implementing the 1985 Directive. The court noted that it must assess the guilt of the Member State based on "the position in which [it] found itself at the end of the period laid down by the reasoned opinion."[138]

The legal reasoning of the Court in both of these cases (and reiterated in *Commission v. Ireland*, 1999[139]; *Commission v. Luxembourg*, 2002[140]; *Commission v. Spain*, 2002) is not unlike that of the "Mootness" doctrine employed by US Courts in some environmental cases. Under normal circumstances, if the issue in a case has been resolved before trial, the court will abstain from hearing the case since there is no "case or controversy" as required by the US Constitution. If however, the violation in dispute was one "capable of repetition, yet evading review", then the court would hear the case on the merits.[141] In the above EU cases, if a Member State could absolve itself from liability simply by passing or proposing legislation at the last minute, a perverse incentive would be created to delay implementation until the eve of trial. The ECJ instead applied the longstanding case law that the expiration of the Reasoned Opinion must be the cutoff for assessing culpability.

While the *Luxembourg* and *Belgium* cases were rather straightforward applications of the 3 year deadline for transposition of the Directive, the 1994 *Bund Naturschutz v. Freistaat Bayern*[142] case presented a slightly more complex issue, if not a similarly straightforward response from the court. Germany had belatedly passed its EIA

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[138] Ibid, at P(17).
[139] *Commission v. Ireland*, C-392/96, September 21, 1999.
[140] *Commission v. Grand Duchy of Luxembourg*, C-366/00, February 19, 2002. Note that in this case the court was referring to Luxembourg's failure to implement the 1997 Directive, whereas all other case reviewed in this section refer to violations of the 1985 Directive.
[141] This doctrine was developed in the seminal *Roe v. Wade* abortion case in the early 1970s. By the time a dispute on abortion rights actually reached trial, the woman would invariably have already delivered or aborted the child, thus rendering the dispute one "capable of repetition, yet evading review."
[142] *Bund Naturschutz in Bayern e.V. and Richard Stahnsdork and others v. Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshut*, C-396/92, August 9, 1994.

law in 1990. While the law laid down transitional rules for projects initiated after July 3, 1988 but which had not already been notified to the public, it instead exempted those projects which HAD already been notified to the public, but for which no Consent Decision had yet been taken. In the specific case referred to the ECJ by the German national court, the Highway Department had already lodged consent applications for a new road and had notified the public prior to the (belated) 1990 implementation law, but subsequent to the July 3, 1988 deadline imposed by the Directive. The ECJ simply referred to the text of the Directive and pointed out that nothing in the Directive allowed for transitional provisions. "On the contrary, all the provisions in the directive were formulated on the basis that it was to be transposed into the legal systems of the Member States by 3 July 1988 at the latest."[143]

Germany was back before the ECJ again the following year with regard to the timing of transposition. In *Commission v. Germany (1)*,[144] however, the argument was slightly more nuanced. In this case, several meetings between the German government and German power company regarding a planned expansion of a power plant had already taken place prior to the July 3, 1988 deadline for transposition. In addition, per existing German law, the expansion had been formally notified to the government prior to the deadline for transposition of the Directive. However, the formal application for development consent was not lodged until July 26, 1988, a little more than three weeks after the deadline. In what could be viewed as the court's first instance of judicial activism regarding EIA, it ruled that under "the principle of legal certainty", the date of the formal application for consent must be used for the purposes of applying the

[143] Ibid, P(18).
[144] *Commission v. Germany (1)*, C-431/92, August 11, 1995.

Directive.[145] The Court could have also ruled that German national law should be used to ascertain the determinative date (i.e. the date of formal notice of the project to the German government), but instead opted for the legal certainty of the formal consent application as the applicable date.

Three years passed before the timing issue was again before the Court in the 1998 case *Burgemeester v. Noord-Holland.*[146] This Dutch case was closely related to the two German cases analyzed above. Development consent had already been given in 1968 to a plan for constructing a port and industrial zone in Western Amsterdam. The project was later modified in 1979 and 1984, but work never commenced. The basic question was whether, in a case where development consent had already been granted prior to the July 3, 1988 deadline set for implementing the Directive, but where a fresh consent procedure for the same project was initiated after the deadline, an EIA was required. Interestingly enough, the Commission, intervening, argued that a mere "plan" to develop should not be subject to the 1985 Directive, since development consent can only be had where a particular developer is given the right to proceed with the project.[147] The ECJ dismissed this argument by noting that the Dutch court had already determined that approval of the plan constituted development consent. That matter being settled, the court continued with the legal reasoning it had developed in the two German cases, namely that if a fresh application for development consent is made after the July 3, 1988 deadline imposed by the 1985 Directive, this procedure is subject to the constraints of the Directive.[148]

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[145] Ibid, P(32).
[146] *Burgemeester en Wethouders van Haarlemmerliede en Spaarnwoulde and Others v. Gedeputeerde Staten van Noord-Holland*, C-81/96, June 18, 1998.
[147] *Burgemeester*, P(18).
[148] Ibid, P(27).

In 1998 Germany was before the court still a third time for its failure to implement the 1985 Directive (*Commission v. Germany (2)*)[149] Note that it was then 18 years since the Directive was first proposed by the Commission, 13 years since its adoption, 10 years since the expiration of the deadline for transposition, and 1 year after the adoption of the 1997 Directive *amending* the original Directive. This time the issue was slightly different. Germany being a federal system, it had passed a coordinating law at the national level, which required individual entities such as the German Lander to pass their own implementing legislation. Legislation had been adopted by the Lander, but not communicated to the Commission. Germany argued that this was immaterial, since even if such regulation didn't exist or was insufficient, the national provisions were directly applicable. The court's response was again rather technical in nature. It maintained that the text of the Directive (Article 12(2)), required that *all* legislation must be communicated to the Commission, regardless of the precedence of the national provisions.[150] The importance of this holding is not simply that Member States need to send regional legislation to the Commission. It also implies that an overarching national provision does not suffice for successful implementation of the Directive where subnational regulations are necessary, but insufficient or absent. This holding arms the Commission with important precedent for future actions against countries such as Italy and Spain, who have transposed national legislation in a way that requires additional regional legislation in order to have complete implementation. This is all the more true given the historical difficulties these countries have had in securing effective Regional implementation of national laws.

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[149] *Commission v. Germany (2)*, C-301/95, October 22, 1998. Herein, *Commission v. Germany (2)*.
[150] Ibid, P.(21-23).

Commission v. Portugal[151] the following year raised a similar issue with regard to the interface of national provisions in confrontation with Community law. Portugal's 1997 implementing law, like Germany's 5 years prior in *Bund Naturschutz*, was flawed in that it allowed for a transitional period i.e. consent procedures initiated before the law but not decided upon prior to its adoption were exempted from EIA requirements. Portugal took a different legal strategy, however. Rather than argue that the text of the Directive allowed for a transitional period, it instead argued that the principal of legal certainty embodied Article 12 of the Portuguese Civil Code made it impermissible for the government to pass a law that interfered with the legally protected interests, legitimate expectations, and vested rights of its citizens.[152] The Court dismissed this argument by referring to the "settled case-law that a Member State may not plead provisions, practices or circumstances in its own internal legal system in order to justify a failure comply with the obligations . . . laid down in a directive."[153] Again, this holding isn't groundbreaking in and of itself, but it does bear importance for a country like Italy which tends to point to its convoluted legislative or administrative structures in order to justify its failure or delay in enacting community law.

2. Application of Directives to Annex II Projects

Perhaps no single issue has aroused as much controversy or confusion in the Member States as has the application of EIA to Annex II projects. The ambiguous language of Article 4(2), and the not-so-obvious relationship of Article 4(2) with Article 2(1) has caused this issue to be brought before the court on 6 occasions since the adoption of the Directive in 1985.

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[151] *Commission v. Portuguese Republic*, C-150/97, January 21, 1999.
[152] Ibid. P(13, 15, 17)
[153] Ibid. P(21).

It was an additional issue facing the court in *Commission v. Germany (1)*, already mentioned above. The issue was whether a proposed modification to a thermal power station should be treated as part of Annex II or whether it was an Annex I project. Germany's argument was essentially that Paragraph 12 of Annex II, which made modifications to Annex I projects subject to the "optional" EIA procedure, left the discretion in Germany's hands whether it had to subject the modification to an EIA. The difficult issue for the court was that the proposed modification of the thermal plant was actually a 500 Megawatt power station. While it was only a new addition to the existing plant, the 500 MW power station would have fallen into Annex I and been subject to the mandatory Annex I EIA procedure had it been a free standing project. On its face, the Directive was poorly written and ambiguous as to this situation. This was a modification to an Annex I structure, however it was also a large enough addition to fall under Annex I in its own right. The ECJ chose the pro-environmental interpretation, holding that since the new addition was itself on the scale of an Annex I project, it should be subjected to the mandatory Annex I procedure, not the discretionary Annex II process.[154]

The more typical Annex II problem the court has addressed is the previously described language of Article 4 "Projects . . . in Annex II shall be made subject to an assessment . . . where Member States consider that their characteristics so require," and the two options therein to "specify certain types of projects" or establish "criteria and/or thresholds" for determining when a project in the Annex II class is subject to EIA. To the naked eye, this would appear to present the Member States with tremendous discretion as to when and whether to perform EIA for the classes of projects listed in Annex II. Enter the ECJ.

[154] *Commission v. Germany (1)*, P(35).

The Court's first occasion to address the Article 4 issue was in the 1995 *Commission v. Belgium* case. Belgium, supported by intervenor Germany, argued that the plain language of the Directive gave Member States full discretion over the assessment of Annex II projects. They could list projects to be assessed, they could establish criteria, they could establish thresholds, etc. Germany made the point that Article 4 stresses that "Member States" have these two options. Any interpretation requiring case-by-case analysis removes this right from the Member State government and transfers it to the individual decision maker. Both governments pointed out that that most Member States had interpreted the Directive in the same way, and that the Commission had already proposed an amendment to the Directive that would preclude the listing of Annex II Projects subject to EIA as Belgium had done in the present case. Despite all of these arguments and against the plain language of the Directive, the Court held for the environment using a technical legal argument. It stated that within Annex II there were 12 "Classes" of projects, with more specific projects listed for each class. So while a Member State could list specific projects within a "Class" to be subjected to EIA, it could not eliminate ex ante a whole "class" of projects.[155] Under this perverse logic, a Member State could in theory list one subcategory of projects within each of the 12 "classes" of projects as being subject to EIA, require no EIA for all other Annex II projects, and satisfy the requirements of the Directive.

The next Annex II case the court decided is the often-cited *Kraaijeveld* case.[156] At issue in this case was the Government of the Netherlands approval of a zoning plan for the construction of a dyke alongside a Rotterdam waterway. A private citizen whose

[155] *Commission v. Belgium*, supra note 137, P(41).
[156] *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland*, C-72/95, October 24, 1996.

business stood suffer from construction of the new dyke challenged the approval on the basis that no EIA had been performed. The first issue the court had to address was whether such a dyke fell under the Annex II, Paragraph 10(e) category "Canalization ar flood-relief works." It was in deciding this issue that the Court first invoked the overall purpose of the directive to advance its protectionist jurisprudence. Citing the language Article 2(1), the court noted that "the directive is aimed at 'projects likely to have significant effects on the environment . . . The wording of the directive indicates that it has a wide scope and purpose."[157] Accordingly the Court ruled that the approved dyke did fall under the purview of Annex II.

The next Annex II issue the court addressed in *Kraaijeveld* was an extension of the court's holding in *Commission v. Germany(1)*, discussed above. Again, the drafters of the Directive had clearly erred. They indicated in Annex II that modifications to Annex I projects were subject to the constraints imposed on Annex II projects. Howeve they did not address the situation where modifications were made to *Annex II* projects. The absence of such language in Annex II coupled with the existence of a provision for modifications of Annex I projects could plausibly lead one to assume that such modifications are not subject to EIA requirements. In fact Kramer and other scholars have pointed out that the EIA Directive is based on positive lists i.e. projects that are not listed should not come under its scope.[158] The Court however returned to the language i had just used to dispatch of the first issue of the case. It reiterated that "the scope of the directive is wide and its purpose very broad." Given the Directive's stated purpose in Art. 2(1) to require assessment of projects "likely to have significant impact on the

[157] *Kraaijeveld*, supra note 156, at P(30, 31).
[158] Kramer, supra note 89, at p. 49. Kramer gives his interpretation "[w]hat the court probably wanted to express" when it found that the project was covered.

environment," modifications of Annex II projects such as the dyke would also be covered.[159] It is interesting to note that in the amended 1997 Directive, the language of Annex II was changed to cover "[A]ny change or extension of projects listed in Annex I **OR** Annex II."[160]

The final issue addressed in *Kraaijeveld* was the Article 4 issue i.e. the Member States discretion to either use lists or set thresholds/criteria for determining when an Annex II project would be subject to EIA. Recall that in *Commission v. Belgium*, the Court had decided this question on the technical legal basis that while a Member State could conceivably exclude certain Annex II projects from EIA, it could not exclude in entirety any of the 12 "classes" of projects listed in Annex II. *Kraaijeveld* took this reasoning to its logical next step. If a Member State could not exclude an entire "class" of projects from EIA, could it still exclude entire "subcategories" of projects listed within the 12 Annex II classes? In *Kraaijeveld*, the Government of the Netherlands had established criteria, as permitted by Article 4(2) of the Directive, such that dykes like the one at issue in the case were excluded because they were smaller than the thresholds specified by the government. The Commission tried to argue that such thresholds are merely "designed to facilitate examination of projects in order to determine whether they should undergo an impact assessment."[161] The Court rightly pointed out that if the Commission argument held true, then the whole concept introduced by Article 4(2) of setting thresholds to eliminate projects from assessment would be rendered meaningless.[162] However, the Court again returned to its favorite credo from Article

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[159] *Kraaijeveld*, supra note 156, at P(39, 42)
[160] 1997 Directive, Annex II P(13).
[161] *Kraaijeveld*, supra note 156, P(45).
[162] Ibid at P(49).

2(1), namely that such discretion enjoyed by Member States per Article 4(2) is always tempered by the obligation that "projects likely . . . to have significant effects on the environment are to be subject to an impact assessment."[163] Thus where the threshold set by the Government of the Netherlands was likely to eliminate all river dykes from assessment, it was not permissible under the Directive.[164] Thus in *Kraaijeveld*, the court broadened the scope of Annex II in 3 distinct ways, each time relying on the general purpose of the Directive as stated in Article 2(1). It said that the scope of the categories listed in Annex II should be interpreted broadly, that modifications of Annex II projects should also be subject to EIA even in the absence of such language in the Directive, and that any thresholds set by Member States could not exclude entire categories of Annex II projects.

In *Commission v. Germany (2)*, the court finally gave an explicit answer to the question whether entire "subcategories" of projects within Annex II's twelve "classes" could be exempted from EIA analysis. Germany had availed itself of the first option under Article 4(2), that of listing specific types of projects from Annex II that would be subject to EIA. It had listed at least one project (subcategory) from each of the 12 "classes" of projects designated in Annex II. Ostensibly, then, it had complied with the language of the Directive, even taking into account the broad interpretation given it by the Court as described above. The Court predictably saw it in a different way. Noting that the word "classes" had been used in Article 4 both in reference to Annex I and Annex II, and that the categories in Annex I corresponded more closely to the SUB-

[163] Ibid at P(50).
[164] The court did not explicitly stated whether entire subcategories (within the Annex II classes) could be ignored by the Member State EIA law, instead simply stating that in this case the Directive was not fulfilled since all dykes would be ignored.

categories in Annex II, the court concluded that "classes" as used in article 4(2) must refer to the subcategories of Annex II, and not to the 12 broader designations therein, which the Court now instead characterized as "vast field(s) of economic activity."[165] Having already established in *Commission v. Belgium* and *Kraaijeveld* that entire classes of projects could not be excluded from the requirement to carry out an EIA, the Court held that the German law was insufficient.

Owing to the ambiguities of Article 4, the Annex II issue was again before the court in 1999, this time the confused Member State being Italy.[166] The project at issue was an expansion of an existing airport. The expansion of the runway was to a distance of less than 2,100 meters, thus removing it from any mandatory EIA obligations under Annex I of the Directive, but clearly capturing it under point 10(d) of Annex II relating to airfields other than those referred to in Annex I. In Italy, Autonomous Regions and Provinces such as Bolzano are authorized to pass their own EIA legislation for all projects not falling under a National EIA procedure (roughly corresponding to the projects listed in Annex II of the Directive). The Autonomous Province of Bolzano had passed such a law, and under this law the airport extension was analyzed, but only underwent a "simplified environmental assessment." In essence the Bolzano law called for individual examination of Annex II projects by a special panel (called a "Regional Director's Conference"). The Court mostly maintained the "party line" as regards the assessment, reiterating that Bolzano could not exclude entire classes of projects (either through the use of lists or overly stringent thresholds) if such projects were likely to have significant effects on the environment. Here, however, the ECJ determined that the

[165] *Kraaijeveld*, supra note 156, P(31-46).
[166] *World Wildlife Fund (WWF) and Others v. Autonome Provinz Bozen and Others*, C-435/97, September 16, 1999.

"simplified environmental assessment" used to examine the airport expansion may have been sufficient scrutiny for an Annex II project, but that this was for the national court to decide.[167] It was a rare instance where the Court found that the Member State law might be adequate. In sum, the court affirmed that the "case-by-case" method employed by the Bolzano law was sufficient to meet the requirements of the 1985 Directive as regards Annex II. Interestingly enough, at the time *Bolzano* was decided, the "case-by-case" method had already been introduced in the 1997 Directive as one of the options for determining the necessity of EIA on Annex II projects. The Court's interpretation was really an affirmation of the amended law, though the amended law did not apply to the *Bolzano* case.

Commission v. Ireland added a new layer to the Annex II analysis because it actually addressed the substantive and practical aspects of the way in which Ireland had transposed the Directive, and took particular account of the unique geographical conditions in Ireland. Ireland had chosen the second option under Art. 4(2), that of setting thresholds for determining when Annex II projects would be subject to EIA. The Commission argued that the thresholds were set too high, that they didn't take into consideration the possibility that the Annex I project (e.g. peat extraction) might be taking place in particularly sensitive natural setting, and that the thresholds would permit many small projects whose combined (cumulative) effect might be damaging to the environment. In making this argument, the Commission cited actual studies of environmental damage in Ireland from activities such as grazing, peat extraction and land reclamation for which high thresholds had been set. It also cited economic conditions in Ireland such as the prevalence of many small firms likely to do small individual projects

[167] Ibid, P(49).

thus falling below the scrutiny of EIA due to the high thresholds set by the Irish authorities. Here the court again referenced the established case law from *Kraaijeveld, et al* that the Member States discretion under Article 4(2) is always tempered by Article 2(1) requirement that "projects likely to have significant effects on the environment *by virtue inter alia, of their nature, size or location* are made subject to an assessment." (emphasis added) The Court took the argument in a new direction by pointing out that the use of such thresholds by Ireland only took account of size of project, while ignoring its nature and location. It was precisely these considerations that would capture the risks of cumulative effects or harm to particularly sensitive natural areas.[168] The court pontificated further on the concept of "cumulative effects,"[169] though it is again illustrative to note that the concept of "cumulative effects" was not added to the EIA scheme until the 1997 Amendments, where it was noted as one of the characteristics to be considered in assessing criteria and thresholds.[170] The 1997 Amendments took effect in 1999, the year this case was decided.

Again, the relationship between Articles 2(1) and 4(2) is far from clear. Ludwig Kramer notes that the ambiguity of the relationship is borne out by the large number of ECJ cases (five) that attempt to clarify the issue.[171] The Court, probably rightfully, made an interpretation that was consistent with the broad purpose of the Directive, even if it pushed the bounds of honest textual interpretation. Note that under the Court's interpretations of Article 4 above, the first option for Member States under Article 4(2), that of listing projects to be subject to EIA, really is *not* an option, unless the Member

[168] *Commission v. Ireland*, supra note 139, P(64-70).
[169] Ibid, P(76).
[170] 1997 Directive, Annex III(1).
[171] Kramer, supra note 89, at p. 50.

State lists every subcategory within Annex II. It is again worth noting the Commission's response to this in the amended 1997 Directive, where the option of listing projects was removed and replaced by the option of case-by-case examination. In the end the Court's jurisprudence really only tolerates the case-by-case approach, since even the under the alternative of setting thresholds, Member States cannot set thresholds at such a level that might eliminate "whole classes" of projects from analysis or ignore cumulative impacts as seen in the *Ireland* case.[172] It is perhaps in this area that the Court's activism has had the most profound effect on EIA practice in Europe.

3. Direct Effect of the EIA Directives

The Court has been less precise in its EIA jurisprudence regarding "Direct Effect". The issue was first raised before the court in the forementioned *Commission v. Germany (1)* in 1995. Germany argued that the provisions of the 1985 Directive were not directly effective. As one can perceive from the name of the case, the court didn't reach the question of whether the Directive provides for Direct Effect since the case didn't have anything to do with an individual trying to rely on the Directive as against the Member State, but rather involved the Commission's claim that Germany had failed to implement the Directive.

One of the many issues raised in the *Kraaijeveld* decision was the issue of direct effect. The Netherlands court referred the question to the ECJ, essentially asking whether the obligation in the Directive to perform an EIA could be relied on by an individual in a national court as against the Member State. It is established ECJ jurisprudence that in order for an individual to invoke a Directive in a national court, the provisions of the

[172] See Kramer, supra note 89, at pp. 50-51 as support for this conclusion.

directive must be unconditional and sufficiently precise.[173] It seems straightforward enough to say that any provision containing the phrase "where the Member States consider that their characteristics so require" and then leaving it within discretion of the Member States to set thresholds or establish criteria or specify projects, would *not* satisfy the requirements of the direct effect doctrine as it has been defined by the court.[174] The Court, however, again took a pro-environmental stance, and essentially sidestepped the issue of whether there was direct effect, instead noting that "it would be incompatible with the binding effect attributed to a directive [and] . . . the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts."[175] Then the court noted in the abstract that national courts must "ensure the legal protection which persons derive from the direct effect of provisions of Community Law."[176] Rather than going to the next step and deciding whether Article 4 was directly effective, the court simply concluded that national courts were obliged to determine whether the government had acted within the bounds of discretion afforded by the Directive in Article 4.[177]

In its reference to the ECJ in the *Bolzano Airport* case, the Italian administrative court asked whether the Directive was "vertically directly effective."[178] The Court again did not answer the question of whether the Directive was directly effective. It instead repeated its reasoning from *Kraaijeveld* that the effectiveness of a directive would be diminished if individuals could not rely on it as against national authorities in national

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[173] *Becker v. Finanzamt Munster-Innenstadt*, C-8/81, 1982.
[174] See Kramer, supra note 89, at pp. 68-69, acknowledging "it is perhaps doubtful whether these two conditions [unconditional and sufficiently precise] are really fulfilled"
[175] *Kraaijeveld*, supra note 156, P(56).
[176] *Kraaijeveld*, supra note 156, P58, citing *Factorname*, C-213/89, 1990.
[177] *Kraaijeveld*, supra note 156, P(59)
[178] *Bolzano*, supra note 166, P(27).

courts. That being said, national courts were not merely permitted, but had an obligation to take measures to ensure the enforcement of the Directive.[179] The same logic was used in the 2000 EIA case, *Luxembourg v. Linster*.[180] The Court is perhaps acknowledging that the discretionary language of the Directive does not meet the requirements of Direct Effect, and it therefore uses terms like "effectiveness" and "useful effect" to arrive at a result that is protective of the environment.[181] Whatever the technical legal arguments, the end result is clear: citizens can rely directly on the provisions of the Directive when their national governments fail to properly implement it.

4. Article 1 Exceptions from EIA

Article 1 of the 1985 Directive provided two exceptions to the EIA requirements: a national defence exception, and a "legislative" exception. The defence exception is rather straightforward: "Projects serving national defence purposes are not covered by this Directive."[182] The legislative exception is also straightforward, at least on its face, stating "This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process."[183] As we shall see though, the Court found a way to make this second exception more complex, and more difficult to invoke for the Member States.

The *Bolzano Airport* case was the only case in which the ECJ interpreted the national defence exception. The Italian administrative court asked the ECJ to interpret

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[179] *Bolzano*, supra note 166, P(69-71).
[180] *Grand Duchy of Luxembourg v. Berth Linster, Aloyse Linster and Yvonne Linster*, C-287/98, September 19, 2000. The only twist to this case was that the Luxembourg court had been asked to directly apply the Directive as a side-issue in what was otherwise and expropriation/takings case.
[181] See Kramer, supra note 89, at pp. 68-69.
[182] 1985 Directive, supra note 19, at Art. 1(4).
[183] 1985 Directive, supra note 19, at Art. 1(5).

the exception in light of the fact that while the proposed airport would serve both civilian and military purposes, its primary use would commercial. Having no further guidance from the Directive itself, the court created the legal rule that projects whose "principal objective" was commercial/non-defence would fall under the ambit of the Directive. While pro-environmental, this interpretation by the court hardly seems unreasonable or surprising. It should be noted that the 2003 Directive softened the language of the defence exception, stating "Member States *may* decide, on a case-by-case basis . . . not to apply this Directive . . . if they deem that such application would have an adverse effect on these [national defence] purposes."[184] In other words, there will now be presumption that an EIA will be done even for national defence projects. Contrast this with the original language "Projects serving national defence are not covered by this Directive."[185]

The *Bolzano Airport* case also dealt with, however, the legislative exception, since the planned airport extension was provided for in a legislative provision by the Autonomous Bolzano Government. Recall that the legislative exception applies to projects whose details are adopted by a piece of national legislation, "SINCE" the objectives of the Directive are achieved through the legislative process. In other words, the theory is that the legislative process brings out the public debate and discussion of alternatives, etc. that would otherwise characterize the EIA process, thereby abrogating the need for EIA. The *Bolzano* court stretched this into quite another thing. The court said two things were required: (1) the details of the project had to be adopted by a specific legislative act; and (2) the objectives of the Directive, including that of supplying

[184] 2003 Directive, Art. 3(2).
[185] 1985 Directive, supra note 19, at Art. 1(4).

information, "MUST" be achieved through the legislative process.[186] It is difficult to understand logically how the court transformed the word "since" in the Directive to "must." From a policy standpoint, it makes sense, since without this interpretation governments might abuse this exception by proposing all projects in the form of a piece of legislation.[187] But from a strictly textual interpretation, it's hard to see how the court arrived at its conclusion.

Furthermore, the Court stated that the legislative act "must be specific and display the same characteristics as the development consent specified in Article 1(2) of the Directive . . . [including] all the elements of the project relevant to the environmental impact assessment."[188] Again, it is difficult to comprehend how the court came up with these requirements, which are plainly absent from the text of the Directive.[189] If the legislation must display the same characteristics and include all the elements of an EIA, then what is the purpose of this exception anyway? Again, from a policy standpoint the Court's pronouncement makes sense, but its legal reasoning is questionable.

The Court's final pronouncement made much more sense, wherein it basically said the Bolzano legislation was not a final act, since an additional administrative consent procedure was required in order to commence the project. The language of the Directive supports this logic, since the exception requires a detailed "specific act of national legislation," not one that required further administrative steps towards adoption. The amended 1997 Directive did not alter or clarify the legislative exception, which can at

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[186] *Bolzano*, supra note 166, P(56).
[187] See Kramer, supra note 89, at p. 65, "the court referred more to the objectives of the Directive than to its wording, as this wording was not very precise."
[188] *Bolzano*, supra note 166, P(58, 59).
[189] See Kramer, supra note 89, at pp. 65-66 for further analysis of the Court's reasoning. He admits "the requirements for the application of the derogatory provision of Article 1(5) of the Directive appear rather high."

least partly be explained by the fact that the *Bolzano* case was not referred to the ECJ until 1997, and not decided until 1999.

The legislative exception was tackled by the Court again the following year.[190] In this case the Luxembourg Parliament, after public parliamentary debate, adopted an act to build a motorway, though without specifying the exact route of the road. The problem is that the act called upon the Government to adopt further implementing legislation which would identify the exact route. The Court clarified the jurisprudence from *Bolzano*. Recall that *Bolzano* said the legislative act itself, and the legislative procedures, must contain all the characteristics of a normal EIA, even though there was no such requirement to be found in the Directive. The *Linster* Court clarified that instead "the legislature must have available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorizing a project."[191] Even this is not to be found in the text of the Directive. However, this rule of law seems to comport better with the justification offered for the exception ("since" the legislative process would typically meet the objectives of the Directive). The Court also introduced the concept in this case that exceptions to the general objective and field of application of a Directive are to be given a very restrictive interpretation.[192] This comports not only with US standards of legislative interpretation, but also those employed by international bodies such as the International Court of Justice and World Trade Organization's Appellate Body. After stating the above principles of law, the Court said it was for the Luxembourg Court to decide whether the principles had been met in the current case.

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[190] *Luxembourg v. Linster*, supra note 180.
[191] Ibid, at P(54).
[192] Ibid, at P(49).

5. Regional Issues

We have already seen above in the *Belgium (1)*, *Germany (2)*, *Portugal*, and *Belgium (2)* cases how the ECJ has dealt with issues of regionalism/federalism within the Member States. First, it has made the point that particularities of the national legislative processes (for example, the need for regional legislation) and other internal difficulties cannot be used as an excuse for fulfilling Community obligations. Second, in the *Portugal* judgment, the court noted that differences in the national legal regimes, be they constitutional (such as protecting individual rights), statutory, or otherwise cannot be used as a defense to fulfilling Community obligations. The court returned to these themes in its most recent EIA case, *Commission v. Spain*.[193] The case is of particular importance to the Italian case study below because in Spain, as in Italy, both legislative and executive competence in the field of the environment is shared between the State and the regions/autonomous areas.[194] Like Italy, Spain also has autonomous cities with certain legislative and executive competencies.[195] And finally in Spain, as in Italy, implementation of EIA law has been characterized by a plethora of laws, implementing decrees, national laws governing EIA for specific industrial sectors, and various regional laws, not to mention a spotty record of implementation of these laws at the Regional level.[196]

Similar to many of its EU counterparts, Spain ran into trouble with its implementation of EIA for Annex II projects (see review of caselaw above). It attempted to communicate to the Commission its patchwork of legislation from the State, the

[193] *Commission v. Kingdom of Spain*, C-474/99, June 13, 2002.
[194] Ibid, P(9-11).
[195] Ibid, P(12).
[196] Ibid, P(13-16).

autonomous areas, etc., but the Commission was not satisfied that all Annex II projects in all of the country were covered by the legislation. The deficiencies were similar to those encountered by the other Member States, and the court's disposition of the issue was the same: namely that any discretion thought to be had from Article 4(2) of the Directive was tempered by the fact that projects likely to have an impact on the environment must be subjected to assessment, and that none of the 83 subcategories of projects from Annex II could be excluded in entirety from scrutiny.

What bears singling out in this case was the court's pronouncement that "the constitutional division of powers between [national authorities and decentralized authorities] has no effect on the assessment of the infringement. It is for the Member States to ensure that the implementation of their Community obligations by the centralized and decentralized competent authorities is effective."[197] The way in which the court attacked the Spanish attempt was illustrative of what could happen should such a case be brought against Italy. First, it examined all the various pieces of national EIA legislation, and found that neither individually nor in aggregate did they satisfy EIA requirements.[198] Next the Court reviewed the various pieces of regional EIA legislation. To this end, Spain had belatedly presented to the Commission a table which listed, region by region, which Annex II projects were covered by EIA legislation. The court found this evidence insufficient on both a procedural and substantive level. Procedurally, the evidence presented was simply a table created by the Spanish government. The government had not submitted any actual legislation from the various regions. Substantively, even if there were laws consistent with the summary documentation

[197] Ibid, P(28).
[198] Ibid, P(38).

provided, it was clear that not all the Annex II projects were subject to EIA. Having found that the regional legislation did not make-up for the deficiencies already proven at the national level, the court found that Spain had failed to fulfill its obligations under the Directive. Again, this is a lesson for the situation in Italy, where national legislation has been passed calling on the regions to pass implementing legislation for Annex II projects. As we shall see, not all of the 20 regions have managed to do so, thus opening Italy to the possibility of a similar condemnation before the ECJ.[199]

6. Conclusions from the ECJ Jurisprudence

The discussion above reveals a consistent and aggressive broadening of the reach and strength of the 1985 Directive. On the issue of timing, the court was dismissive of Member State attempts to build in "transitional periods" for projects that had already been conceived of prior to enactment of the Directive, and similarly dismissive of Member State claims that forthcoming legislation would soon rectify inadequacies in implementation of the Directive. Without a doubt the court was most active in its analysis of Article 4(2) and the Annex II projects, both in the frequency with which it addressed the issue, and the amount of protection it afforded the environment. Relying on the overall objective of the Directive that every project likely to have an impact on the environment should be subject to an EIA, the Court essentially took away most of the discretion seemingly afforded by Article 4(2) of the 1985 Directive. The fact that the court didn't find much discretion in Article 4(2) carried over in its approach to whether the provision had Direct Effect. The court repeatedly held that in order to maintain the

[199] For an example of an ECJ case against Italy where the non-implementation of a Region was the issue, see *Commission v. Italy*, C-33/90, December 13, 1991. The case involved the Campania Region's failure to properly implement national legislation with respect to waste Directives 75/442 and 78/319. Italy argued that its duties were fulfilled once the national decree was passed, but the ECJ rejected this argument with reasoning similar to that described above.

effectiveness of the Directive, individuals must be able to invoke it in national courts. The court consistently interpreted exceptions to Directive in a narrow fashion, particularly with regard to the so-called "legislative exception." And finally, any excuses put forth by the Member States with regard to their internal political structures, constitutional setting, or geopolitical issues were cast aside as inappropriate defenses to the obligation to implement Community law.

In summary, the Court greatly strengthened the 1985 Directive. Its jurisprudence both shaped (in early years) and reflected (in recent years) many of the amendments adopted in the 1997 Directive. More importantly, the jurisprudence practically eliminated one of the primary differences between the US and EU approach to EIA because it all but forced the Member States to adopt a "case-by-case" approach to screening of Annex II projects.

D. Summary of Differences between NEPA and the EU Directive

Topic	United States	European Union
Responsible Party	Government Agency	Project Proponent
Applies to	All Federal Actions, including plans, programs, and legislation.	Public and Private *Projects*, and specified plans and programs starting in 2004.
Screening	Significant Impact on Environment	Listing of Projects. For Annex II, either case-by-case or listing of thresholds.
Alternatives	"Heart of the EIA"	Just need to outline them
Role of Judicial Review	Active role; Sole means of post-decision enforcement. Lower courts have been active to enforce NEPA; Supreme Court deferential to Agency actions.	Individual "direct-effect" suits and Commission actions before the ECJ for deficient implementation of Directives; ECJ has shown Judicial Activism; varies by Member State for review of individual EIA decisions.
Cost of Litigation	Parties pay their own costs.	Losing party (e.g. the state) pays costs before the ECJ. Varies in Member States.

Ultimate Effect of EIA	Purely an informational tool	Must be considered before giving "Development Consent"

1. Who Prepares the EIA?

Some differences between NEPA and the EU Directive, such as the scope of application (Annex II issue/approach to plans and programs), the emphasis on developing alternatives, and the ultimate effect of an EIA have already been discussed. There are some additional distinctions worth mentioning. The first relates to who is responsible for preparing the EIA. In the United States, it is the relevant government agency that prepares the EIA.[200] This makes sense since NEPA only applies to significant *federal* actions. Typically, the federal agency itself is the project developer. Sometimes, however, an EIA is required for the federal action of issuing a federal permit or license for a private project. In these cases, the private party may "submit environmental information for possible use by the agency in preparing and [EIA]."[201] The public also has input, but ultimate responsibility for completing the EIA remains with the government agency issuing the permit.[202] In the EU, a reverse presumption of responsibility exists. The Directive states "this assessment must be conducted on the basis of appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question."[203]

[200] CEQ Regulations, § 1502.2.
[201] CEQ Regulations, § 1506.5.
[202] See CEQ Regulations § 1502.2 ("To achieve the purposes [of NEPA], **agencies** shall prepare environmental impact statements in the following manner . . ."). See also, § 1506.5(b): an agency can permit an applicant for a Federal license/permit to prepare an environmental assessment (a "mini-EIA" to determine whether a full-blown EIA is required), but even in this case, the agency makes its own evaluation of the environmental issues and takes responsibility for the scope and content of the environmental assessment). Full-blown EIA's are always prepared by the agency, or by a contractor selected by the agency that has no financial interest in the outcome of the EIA (see § 1506.5 (c)).
[203] 1997 Directive, Preamble.

In those cases where the developer is a private entity, the EU Directive seems to institutionalize the possibility of bias, since it's in the private developer's best interest to downplay the significance of environmental effects. It is true that in some cases, US Federal Agencies themselves might have biases for or against a project. However, unlike private project proponents, an agency's political mandate is not based on generating profits, as with a private entity. At least in theory, agencies are accountable to the public and working for the public, thereby diminishing the importance of institutional bias relative to that of a profit-oriented private developer. Others have argued that by putting the control of information and expertise in the hands of the developer, the capacity of the public to influence the process is diminished.[204] Thus, at least as regards private projects, the EU system of leaving the preparation of the EIA to the private developer could be considered a weakness relative to the NEPA.

2. Role of the National Courts

The role of ECJ in expanding the reach of the EIA Directives has already been examined. The role of US courts in enforcing NEPA has also been reviewed. The lower US Federal courts have been active in defending the procedural rights embodied by NEPA, while the US Supreme Court has deferred to the decision of the federal agency in each of the 12 NEPA cases it has heard. Finally, the role of the national courts in the EU's EIA process should be discussed, for they are in essence the equivalent of the lower US federal courts. Their role is crucial to the successful enforcement of the Directive since the ECJ and the Commission can only tackle the broader compliance issues.

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[204] See generally, Maria Eduarda Goncalves, *Technological Change, Globalization and the Europeanization of Rights*, Intl. Rev. of Law Computers & Tech., Vol. 16, No. 3, p. 301-316 (2002).

Prior to the 2003 Amendments (and thus until June of 2005), the Directives themselves had not explicitly defined a role for the national courts in the EIA process. The Directives have always provided a role for public participation, requiring Member States to ensure that information gathered during the EIA process is made available to the public, that the public has an opportunity to comment before the project commences, and that the public is informed of the final decision and the reasons for that decision.[205] However, these mandates are broad, leaving room for variation within individual Member States. The Fifth Environmental Action Programme of the EU calls for the active involvement of NGOs, trade unions, and professional associations in the EIA process.[206] Again, these are generalized calls for action; the level of actual participation depends on the legal institutions and level of environmental activism within the individual Member States.

While the US has seen litigation and the courts at the forefront of EIA enforcement, other alternatives have been employed by EU countries that are generally less focused on litigation in comparison to the US. For example, in the Netherlands, administrative processes have been set up; an independent commission judges the sufficiency of the EIA.[207] In Ireland, since the year 2000, both the project proponent and anyone who made written submissions to the planning authority can appeal EIA decisions to *An Bord Pleanala,* a special board set up to hear such appeals. However, the board cannot resolve disputes on questions of law; thus questions such as the interpretation of

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[205] Kevin R. Gray, *International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement*, Colo. J. Int'l Envtl. L. & Pol'y 83, 123 (2000). 1985 Directive, Art. 6.
[206] The 2003 Amendments also "institutionalize" a role for environmental NGOs in the EIA process.
[207] See Nicholas A. Robinson, supra note 3, at 594.

the directive would be directly reviewed in the courts.[208] The Dutch method is similar; formal two-party litigation plays a small role in the EIA process and other administrative alternatives are more often pursued.[209] In Italy, as will be discussed below, a decision on a project's "environmental compatibility" can be appealed in the administrative courts by those parties directly affected by the decision as well as by specific environmental organizations recognized by the national government. Due to the absence of public hearings, litigation has been extensively (perhaps excessively) put to use in Italy. In England, decisions of the local planning authority can be appealed, first to the Secretary of State for the Environment, and then to the High Court. Nevertheless, litigation in England has been minor at least in contrast to the US, largely because England's implementing legislation employs detailed thresholds and indicative criteria to be utilized during the assessment process.[210] This has been said to minimize the discretion of the EIA authority and correspondingly minimizes the role of litigation. France places more emphasis on ensuring that the procedural requirements of EIA are met. It will defer to the factfinding efforts of the agency so long as EIA procedures were followed, though a decision will be annulled if procedures aren't followed scrupulously.[211] German courts, on the other hand, may find procedural errors with the EIA, but if there is no substantive harm suffered from the error, the court may choose not to annul the decision on

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[208] See generally, Aine Ryall, supra note 123.
[209] Nicholas A. Robinson, supra note 3, at p. 600.
[210] N. HAIGH, EEC ENVIRONMENTAL POLICY AND BRITAIN 355 (2d ed. 1987); see generally, Louis Bono, supra note 84. See Ryall, supra note [ ], for further elaboration on the situation in Ireland and UK, where she refers "to the rigorous manner in which the [English] House of Lords has analysed the basic requirements of the directive", in contrast to the Irish case law which shows "a lack of appreciation of the potential of the EIA process as a tool for environmental protection."
[211] Karl-Heinz Ladeur "Flexibility and 'Co-Operative Law': The Co-ordination of European Member States' Laws – The Example of Environmental Law" in Grainne De Burca and Joanne Scott, Constitutional Change in the EU From Uniformity to Flexibility?, Hart Publishing (Oxford 2000), at pp. 288-292.

environmental compatibility i.e a lack of public participation would only void an EIA if the participation would have changed the outcome of determination.

Again, it is difficult to generalize about the use of judicial review for the enforcement of EIA throughout the EU. One author has asserted generally (1) that in the land use context European businesses are less likely to use the courts as political resources; (2) that US businesses, public interest groups, and local government bodies are more likely to pursue actions against the central government than are continental European nations; and (3) that US developers are more likely to use lawyers at each step in the planning process.[212] The discussion above provides a mere sampling of approaches in several Member States. The examination of Italy below will provide a more detailed picture for at least one Member State.

3. Conclusions

Despite these differences, at the end of the day the basic components of NEPA and the EU EIA Directives are the same. The overarching differences are more a reflection of the differing political situations. In the United States, the NEPA process applies to Federal Agencies. There is no doubting the federal Government's right to regulate the activities of its own federal agencies. In the European Union, there remains the issue of state sovereignty. Member states don't want to be told how and when they can pursue activities within their borders, and they especially don't want to be told how or when to make use of the land within their borders. The result is that the EU's legislation is generally lighter on the details, resulting in variation at the Member State level. As Ladeur puts it "divergent standards of general administrative law concerning

[212] See Jefferey M. Sellers, *Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany, and the United States*, 29 Law & Soc'y Rev 475, 503 (1995). See also, KAGAN, ADVERSARIAL LEGALISM, p. 208-209.

judicial control, discretion, annulment etc. can lead to different versions of uniform European law."[213] In the United States, the CEQ has issued a detailed set of implementing regulations laying out the specific procedures for completing an EIA and the precise contents of the EIA. In the EU, there is simply a broad framework that requires the Member States to fill in the details. For this reason, in the EU there is greater discretion over when EIA is to be applied to a project or how many alternatives must be analyzed, and in what detail. EIA is but one example of how the structure of the EU (and the respect for the sovereignty of its members) requires a less regimented approach to environmental issues.

The EU institutional structure is also different in that there is generally less emphasis on litigation as a tool to enforce EIA laws. Still, individual Member States do provide administrative forums through which to contest EIA decisions, and in some countries where administrative rights are lacking, litigation has been used as the primary means to uphold the Directives. The ECJ provides an overarching forum through which to press implementation of the EIA directives. And while the Directives at least on paper afford Member States much discretion in implementing the Directive, the strong hand of the ECJ has limited that discretion, expanded the reach of the Directive, and generally lessened the differences between the EU and US systems.

Nonetheless, to fully assess the effectiveness of the EU EIA regime, one must understand how it is implemented at the Member State level. The following analysis will first look at the challenges of implementing environmental laws in the EU in general. The subsequent analysis of the implementation of the EIA Directive in Italy will provide

[213] Ladeur, supra note 211, at p. 285.

an in depth picture of the difficulties one Member State has had implementing EU environmental laws.

IV. The Problems Implementing EU Environmental Laws at the Member State Level

A. Introduction: Is there really a problem?

It has long been argued that the EU has suffers from ineffective implementation of environmental directives by the Member States.[214] And the numbers support this assertion. From 1982 – 1997, 25% of all Complaint letters to the Commission were made in the environmental area. And from 1978 to 1999, fully 20% of all ECJ judgments were environmental cases. In 2001, the share of environmental proceedings swelled to over a 1/3 of the total number of complaint and infringement cases.[215] These numbers are all the more striking when one considers that environmental legislation makes up only 3% of all EU legislation![216] The starting point for analyzing the implementation problem is at the EU level, the origin of the legislation. Later by looking at implementation of environmental law in Italy, problems of implementation at the national and subnational levels will be identified.

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[214] *See* TANYA A. BORZEL, ENVIRONMENTAL LEADERS AND LAGGARDS IN EUROPE: WHY THERE IS (NOT) A SOUTHERN PROBLEM, (Ashgate 2003), for an argument that there is NOT an implementation problem. Borzel argues that available statistics on implementation are misleading due, *inter alia*, to inconsistent reporting of infringements by the Commission, uneven enforcement by the Commission, the swath of new environmental legislation in the 1980s and 1990s, and the difficulties new Member States had fulfilling the acquis communitaire in the 1980s and 1990s. While Mrs. Borzel's arguments are interesting, they fail to prove her major contention that there is not an implementation problem, especially in the environmental area. The numbers, at least in a relative sense, show a consistent inability to implement environmental legislation. Moreover, while many of the arguments Mrs. Borzel raises point to reasons to be skeptical of numbers offered by the Commission, if anything the corrected numbers would only reflect *additional* violations not currently captured or reported by the Commission.

[215] Third Annual Survey on the Implementation and Enforcement of Community Environmental Law, January 2000 to December 2001, at p. 6. Offical Publication of the European Communities (Luxembourg 2002).

[216] See Borzel, supra note 214, p. 21.

The most frequently cited reason for the "implementation deficit"[217] is the overarching structure of the EU. It is not a federal system like that of the US where national law generally preempts state law and is binding directly on the states and their inhabitants. In the EU only regulations are directly binding and applicable in the Member States. For Directives, which account for 95% of all environmental legislation in the EU,[218] responsibility for implementation and enforcement falls on the individual Member States.[219] Thus the system starts from a disadvantage in that its effectiveness is heavily dependent upon the good faith of the individual Member States to implement directives.

Directives are binding in terms of the results that they seek, though not as to the means used by the Member States to achieve them.[220] Directives are the most common regulatory form used by the EU to regulate the environment.[221] In a typical environmental directive, the EU lays out the general requirements of an environmental program, the various elements that must be included in such a program, and perhaps some indication of applicable thresholds (e.g. "EIA procedures shall apply to those chemical plants larger than 5 acres"). But it then leaves it to the individual Member States to fill in the details of the program. While Member States are afforded flexibility in implementing directives, they must enact legislation that has the "force of law" within

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[217] See generally, ANTJE C. K. BROWN, EU ENVIRONMENTAL POLICIES IN SUBNATIONAL REGIONS: THE CASE OF SCOTLAND AND BAVARIA, (Ashgate 2001), at introduction, for a summary of the literature on the "implementation deficit."
[218] Borzel, supra note 214, at p. 22.
[219] EC TREATY, supra note 59, Art. 10 ("Member states shall take all appropriate measures, whether general or particular, to ensure fulfillment of obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.")
[220] Ibid.
[221] Jody Meier Reitzes, *The Inconsistent Implementation of the Environmental Laws of the European Community*, 22 Envtl. L. Rep. 10523 (August 1992).

that country. For example, in EC Comm'n v. Belgium,[222] the ECJ found the mere publishing of a government circular by the Member State to be an inadequate implementation of a toxic waste environmental directive. To the contrary, the court said that each Member State must fully transpose the directive into binding national law that meets the requirement of "legal certainty."[223] In this same vein, the court has said that use of administrative proceedings in lieu of an actual law does not suffice for implementation because there would be too much opportunity for inconsistency in application.[224]

There are many reasons the EU might prefer an environmental directive to a Regulation (another possible form of EU regulation that "is binding in its entirety and directly applicable in all states"[225]).[226] First, a directive is politically easier to pass in the Council, in contrast to a regulation that immediately creates obligations. Second, it eases the burden on the Commission and the Council to arrive at concrete answers in a highly technical area such as environmental protection. In such cases, it may be politically and technically advantageous to pass the responsibility on to Member States. Third, Member States may value sovereignty in certain areas that have traditionally been "domestic" matters (e.g. land use decisions); in these cases a directive is a more delicate approach than a regulation. And finally, there is the very practical consideration that some problems, such as environmental issues, are very region-specific. The best approach to an environmental problem in southern Italy is not necessarily the best approach for a

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[222] *Commission v. Belgium*, Case 239/85, 1986 E.C.R. 3645, 51 C.M.L.R. 248 (1988)
[223] Id.
[224] *Commission v. Belgium*, Case 102/79, 1980 E.C.R. 1473, 1486 (1980), condemning Belgium for failing to properly implement 12 directives.
[225] EC TREATY, supra note 59, Art. 249
[226] See Reitzes, supra note 221.

problem in northern Denmark. Directives allow Member States a degree of flexibility to tailor environmental laws to the particular concerns of their geography and society. In this sense, environmental Directives in the EU operate much like many Federal environmental laws in the United States, such as the Clean Air Act which sets air quality targets and allows states some flexibility in achieving them.

Before continuing with a discussion of the difficulties in implementing EU environmental directives, more must be said about flexibility and the advantages of legislation via directive. To reiterate, an environmental law that might make sense due to geographic or climate conditions in one part of Europe might make no sense in another region. Flexibility also allows Member States to integrate a single European law into their various political and administrative systems. For example, a law tailored to the common law legal traditions of Great Britain might mix awkwardly with the legal traditions and administrative setting in Italy. By giving Member States flexibility in the method of pursuing common goals, Directives accommodate cultural, political, geographic and other differences between Member States. In addition, flexibility allows for creativity and innovation at the Member State level; innovative solutions in one Member State can potentially be transferred to the other Member States. This benefit has been observed in the implementation of certain aspects of the United States Clean Air Act.[227]

[227] Some US environmental laws such as the Clean Air Act operate like Directives in that they set general emission standards and then allow the individual states flexibility in achieving the standard. This has resulted in innovation in certain states. From time to time, large, environmentally conscious states have set up more stringent requirements and this has caused a kind of "ripple effect" in other states. For example, when California required cars to meet heightened emission standards, the car makers in Detroit implemented the changes in all states. California was such a big market on its own that it didn't make sense to manufacture one line of cars for it and another for all the other states.

In fact, many scholars on both sides of the Atlantic such as Joanne Scott, Karl-Heinz Ladeur, Eric Orts, Daniel Farber, and Charles Sable have forcefully argued that flexibility is critical to the success of an environmental regulatory system.[228] In addition to the benefits just mentioned above, these authors point to the learning and adaptation that is possible in flexible. Yet even these authors acknowledge a potential downside of flexibility: the discretion afforded the Member States can be abused. For example Farber cautions that the benefits of flexibility will only be realized when there is strong central supervision, clear and enforceable standards, information sharing, and ample opportunity for public input (Scott uses the term "conditional decentralization" to summarize these qualification to the general theory on flexibility).[229] Ladeur also pins the effectiveness of such a system to a strong central authority in the form of an empowered European Environment Agency (see discussion below).[230]

These conditions to the general endorsement of flexibility cannot be ignored in the EU context. The EU does not have a strong central authority to ensure, for example, that EIAs are being carried out properly throughout the EU. The broad procedural mandates of a directive like the EIA Directive could hardly be considered "clear standards"; the rash of ECJ litigation on the EIA provisions is itself evidence of the ambiguities in the language of the Directive. As for information sharing, there is a loose network of EIA centers across the different EU Member States, and the Commission is supposed to report periodically on the implementation of the EIA Directive in the EU. In

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[228] For a good overview of these arguments, see Joanne Scott "Flexibility, 'Proceduralization', and Environmental Governance" and Karl-Heinz Ladeur "Flexibility and 'Co-Operative Law': The Co-ordination of European Member States' Laws – The Example of Environmental Law" in Grainne De Burca and Joanne Scott, Constitutional Change in the EU From Uniformity to Flexibility?, Hart Publishing (Oxford 2000).

[229] Scott, supra note 228, at p. 264.

[230] Scott, supra note 228, at p. 265.

this regard perhaps the qualifications of Scott, et al, are met. But in the end the flexibility arguments are probably better directed to pollution-control efforts such as the IPPC Directive analyzed by Scott. These lend themselves to the setting of clear standards (e.g. emissions standards, ambient air quality levels, etc.), and then allow for flexibility in how the standards are met. Pollution control devices, or other technical pollution control techniques can more easily be transferred to other Member States. Again this has essentially been the experience with the US Clean Air Act, albeit in the context of relatively strong central authority (the EPA). For example, the EPA reserves the right to intervene and act on behalf of a state should the state fail to meet air quality standards. Perhaps more importantly, under provisions of the Clean Air Act it can threaten to withhold Federal Highway Funds in the event of non-compliance. In the EU, a equivalent control mechanism does not exist. The Commission would like to fulfill this role, and is empowered to do so by pursuing actions before the ECJ per Article 226 of the Treaty, but with its limited resources and with the limited mandate of the European Environmental Agency (see discussion below), the EU really doesn't have the institutional oversight called upon by Scott, et al to make flexibility work.

B. Problem of Legislative Misfit

The basic operation of directives and some of their benefits have been described above. Having already reviewed the empirical evidence of the difficulties the Member State have had implementing EU directives, we now return to the analysis of why such problems exist, first looking at these difficulties at the EU level. Later we will examine the difficulties at the Member State level by looking at the situation in Italy.

The actual enactment of legislation appears to be the first obstacle to successful implementation of laws. Whether the legislation is passed via the Codecision method or through Consultation with Parliament and the unanimous vote of the Council, the final legislation is the result of a series of compromises. More environmentally conscious states want laws that will level out environmental protection costs across the EU. Poorer states, primarily the southern states, have other pressing needs, most importantly that of continued economic development. The result is often a compromised piece of legislation, which can result in confusion in implementation at the Member State level, as was borne out in the analysis of ECJ EIA caselaw above.

Then there is the problem of different political and administrative systems. A directive like the EIA Directive may work well in a country that has an established history of public participation in government decision making, but may be extremely difficult to implement in a country where administrative procedures have typically taken place behind closed doors. Even if these "doors" are unlocked, the public may not be sufficiently cognizant or mobilized to open them. Borzel has used the term "high policy misfit" to refer to this problem of mismatch between the EU law and the existing political or administrative systems within a Member State.[231] When there is high policy misfit, there may also be a general distrust of or reticence to implement EU laws, especially on the part of "less green" states that never supported the legislation during the legislative process.[232] Thus the problem of implementation of environmental laws may have its

[231] Scott, supra note 228, generally and at p. 43.
[232] See generally, Antje K. Brown, EU Environmental Policies in Subnational Regions: The Case of Scotland and Bavaria, Ashgate (Burlington 2001) for a discussion of the relationship between attitudes towards EU legislation and the effectiveness of implementation.

origins in the EU lawmaking process itself, well before implementation is attempted "on the ground."

C. Problems of Enforcement via the Commission

Anticipating that not all Member States will always fulfill all of their obligations, the EC Treaty reserves power in the Commission to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied."[233] There are essentially 5 possible violations of EU environmental law. The first is when treaty provisions, regulations, or decisions are not complied with. Since these are directly applicable, it isn't necessary to incorporate them into national law. A violation occurs as soon as a Member State doesn't comply with the treaty provision, decision or regulation. There are then 3 types of violations concerning Directives, which instead require implementation into national law. The first is when no measures are notified to the Commission. The second is when implementing measures have been notified to the Commission, but they do not adequately implement the Directive. Finally, a Member State can be in violation even if it has adequately implemented the Directive into national law, if in practice the law is not being applied in a manner consistent with the Directive. The 5th possible violation of EU law occurs when an infringement has already been determined by the ECJ, and the Member State fails to comply with the ECJ judgment.[234]

Article 226 of the EC Treaty lays out a 6 stage process that the Commission must follow in proceeding for the abovementioned violations relating to Directives. First, the Commission issues a Formal Letter of Notice to the Member State, alerting it of the potential violation and initiating a discourse on the subject. If the Commission is not

[233] EC TREATY, supra note 59, art 211.
[234] See Borzel, supra note 214, at p. 8.

satisfied with the Member State's response to the Formal Letter, it can then issue a Reasoned Opinion to a Member State.[235] The Reasoned Opinion formally lays out the legal justification for the infringement, and sets a time frame by which the Member State must take action to rectify the violation. Then if the state fails to take actions consistent with the Commission's opinion, the Commission can refer the matter to the ECJ.[236] After hearing arguments, the ECJ can then issue a judgment of the Member State's non-compliance with EU law. Until the 1993 Maastricht Treaty, ECJ judgments were not enforceable via penalties or sanctions. Now, Article 228(1) requires states to "take the necessary measures to comply with the judgment of the Court of Justice."[237] If a Member State fails to take the measures prescribed in the judgment, the Commission can again bring the matter before the ECJ.[238] Upon request and with the advice of the Commission, the ECJ can now impose lump sum or penalty payments on the state.[239] Although as of 1999 only 8 cases had reached this final step in the infringement process, the threat is real. Four of the eight cases to reach the final step were environmental cases, and the Commission threatened Germany with fines up to €200,000/day for its persistent failure to properly implement the EIA Directive.[240] And in 2000 when the ECJ issued its first penalty judgment ever under the Article 228 process, and it was an environmental case against Greece for its failure to comply with a waste directive.[241] The Commission has

[235] EC TREATY, supra note 59, Art. 226.
[236] Id.
[237] EC TREATY, supra note 59, Art. 228, Para 1.
[238] Id., Para. 2
[239] Id.
[240] See Borzel, supra note 214, pp. 3, 21.
[241] Commission's Eighteenth Annual Report on Monitoring and Application of Community Law, Environment Chapter, European Community Publications (2001).

frequently cited the Article 228 procedure as a "useful tool" and has applauded its effectiveness at inducing Member States into compliance via the threat of penalties.[242]

While Commission enforcement seems straightforward, in practice it has been difficult to bring Member States into compliance with environmental laws.[243] The threat of penalties under Article 228 has strengthened the system, but problems remain. One problem stems from the lack of adequate information in the hands of the Commission as to when directives aren't being implemented. A second problem is that while Member States may take the necessary steps to enact legislation, there may be little or no actual enforcement of the law. Another related problem is that the Commission has finite resources with which to identify and bring enforcement actions.[244] Short of requiring Member States to send them the enacted legislation, the Commission cannot afford to systematically go out and check the enforcement of all such laws "on the ground."

Recognizing these deficiencies, the EU has used something called the "Complaint System" in order to facilitate Commission enforcement. Under the Complaint System, individuals, or groups of individuals such as environmental advocacy organizations can submit a complaint to the Commission, alleging that a national government has failed to implement a directive or has inadequately done so. The Commission then informs the national government and gives it chance to explain itself. The Commission can then make inspections or request documentation from the Member State. The Commission

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[242] See generally the Annual Surveys on the Implementation and Enforcement of Community Environmental Law.

[243] See Special Report No.3, OJ 1992, C245/1, in which the European Court of Auditors in 1992 concluded that there is a significant gap between the EU environmental laws in force and their actual application.

[244] See Smith, supra note 76, at footnote [64] therein. See also, Kramer, "Die Rechtsperchnung der EG-Gerichte zum Umweltrecth – 1995 bis 1997" (1998) Europaische Grundrechte Zeitschrift, (30 June) 309-321, noting that in spite of the lack of resources, Commission environmental enforcement actions increased by 70% from 1995 – 1997 (a total of 56 judgments rendered in this period).

then has discretion whether to initiate a proceeding against the Member State in the ECJ.[245]

There are at least four weaknesses in the Complaint System as relates to the environmental field. First, grassroots support for environmental causes rarely rises to the level of issuance of a complaint, let alone the level necessary to compel the Commission to initiate a prosecution.[246] In the environmental area, this type of support generally only emerges when a wrong has caused harm that is both significant and concentrated on a discreet group of victims.[247] More typically, the effectiveness of such a system comes down to the level of environmental activism and existence of strong NGOs in the individual Member States. Second, such a challenge by the Commission at the E.C.J. takes substantial time; on average more than three years elapse between the Commission's decision to open a case and a final ruling by the E.C.J.[248] This is a powerful disincentive to potential claimants who are looking for a more immediate response to their situation. Third, there is the institutional reality that the Commission has limited resources and many laws to police.[249] It simply can't respond to every complaint that it receives. And finally, the complaint system does not provide systematic enforcement of environmental laws. It merely puts out the bigger fires after they've started. The complaint system appears to sometimes provide an incentive for Member States to skirt requirements of the environmental directives, hoping instead that the issue

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[245] See Smith, supra note 76, pagination not given ("These complaints should not . . . be confused with legal actions – they amount to nothing more than a means for individuals to notify the Commission of potential Community law violations."

[246] Christel Smets, *Is Belgium Polluting the European Environmental Picture?* (Analysis and Perspective) 13 Int'l Envtl. Rep. (BNA) 180, 184 (Apr. 11, 1990).

[247] Id.

[248] EEC Law: Report on EEC Law in the Member States, Eur. Intelligence, Aug. – Sept. 1991, s3, at 2.

[249] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 24 ("[t]he Commission receives far more complaints then it can deal with, so this route is slow and uncertain. In practice, the Commission will only deal with the most political or extreme cases of infringement.")

will never be raised by an individual complainant. Or that even if it is, the delay in EU enforcement might make non-compliance, with the minor risk of penalties at an unknown time in the future, a more cost effective option than compliance now.

The Commission itself has acknowledged the limitations of the complaint system specifically with regard to the EIA Directive. The Commission estimates that ¼ of all environmental complaints deal with environmental impact assessment.[250] Recalling that in the most recent year for which figures were available, over 1/3 of all complaints had to do with the environment, this implies that over 8% of all EU complaints deal with EIA. Most EIA complaints involve citizens or environmental groups contesting EIA procedures for a specific project i.e. that the EIA was inadequate, or that environmental effects were not taken into consideration during the development consent decision, or that no EIA was performed. The Commission concedes that "[a]s regards complaints about the quality of impact assessments and the lack of weight given to them, it is extremely difficult for the Commission to assess these cases . . . Most of the cases brought to the Commission's attention concerning incorrect application of this Directive revolve around points of fact where the most effective evaluation should rather be ensured at a decentralized level, particularly through the competent national administrative and judiciary instances."[251] Of course, this ignores the fact that if citizens found national institutions to be adequately protective of their interests, they probably would never have gone to the step of making a complaint to the Commission. This is especially true in a country such as Italy, where the EU is often viewed as a more responsive guardian of environmental causes than is the Italian government. In the same report, the Commission

[250] Third Annual Survey, supra note 215, p. 8.
[251] Third Annual Survey, supra note 215, p. 11.

attributes the increasing number of environmental complaints to, *inter alia*, "[t]he organizational difficulties in Member States to ensure full compliance with Community environmental law, arising from their own constitutional and/or administrative structure, since the responsibility of implementation lies often under more than one authority (different ministries, central, regional or local authorities, etc.)."[252] The Commission could have just as well said 'due to the administrative situation in Member States like Italy' and made its report more concise. If the Commission fails to regularly act on such complaints (as it tacitly admits), and some Member States are known to be remiss on their enforcement, who is to ensure that the goals of the Directive are realized across all of the EU?

D. Possibility for Direct Application of EU Directives

Apart from Commission enforcement and the Complaint System, there is another avenue for enforcement of directives under the EU scheme. In certain limited situations, an individual can directly challenge, in a national court, either a Member State's failure to implement a directive or its failure to implement it correctly.[253] These are commonly known as "Direct Effect" suits.[254] The 1994 E.C.J. case *Comitato di Coordimento per la Difesa della Cava v. Regione Lombardia* provides a good example of such a direct effect

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[252] Third Annual Survey, supra note 215, at p. 40.

[253] See generally, *Comitato di Coordinamento per Difesa della Cava and others v. Regione Lombardia and others*, Case C-236/92, 23 February 1994.

[254] As to who may sue whom, the ECJ has also spoken. The court has stated "where a member state has failed to implement adequately a directive . . . a person affected by that conduct may rely on that conduct as against the member state." *Publico Ministers v. Ratti*, Case 148/78, 1979 E.C.R. 1629. These are known as "vertical effect" cases. Conversely, the court has said that directives do not create causes of action for so-called "horizontal effects", or effects as between individuals resulting from directives. "A directive may not of itself impose obligations on an individual and . . . a provision of a directive may not be relied on as against such a person." *Marshall v. Southhampton and South-West Area Health Auth.*, Case 152/84, 1986 E.C.R. 723, 749.

case, and is of particular relevance as it involves the implementation of an environmental directive in Italy. In *Comitato*, group of individuals challenged the siting of a waste tipping facility in the Lombardy Region of Italy. The Italian government had implemented Council Directive 75/442/EEC (a waste management directive) via Presidential Decree No. 915.[255] Plaintiffs argued that decree as implemented only realistically allowed for tipping facilities and effectively ruled out other waste management options such as incinerators, etc.[256] The national court agreed that there was a dispute regarding the proper implementation of the directive, and referenced the dispute to the ECJ for resolution. The ECJ stated the direct effect rule as annunciated in prior cases:

> "[W]herever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditionally and sufficiently precise, those provisions may be relied upon by an individual against the State where the State fails to implement the directive into national law by the end of the period prescribed or where it fails to implement it correctly. A Community provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States. Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms."[257]

The ECJ then examined the specific waste provision in question, and found that "it [does] not display the above characteristics."[258] Essentially, the court characterized the legislation as a "framework" that "does not lay down any particular requirement restricting the freedom of Member States regarding the way in which they organize the

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[255] Decree No. 915 of the President of the Italian Republic of 10 September 1982, Gazzetta Ufficiale della Repubblica Italiana No. 342 of 15 December 1982, p. 9071).
[256] *Comitato,* supra note 253, at Para. 4.
[257] Id., at Paras. 8-10.
[258] Id., at Para. 11. The provision, Article 4 of the Waste Directive, essentially says that Member States must take measures with respect to waste so as not harm water, air, soil, human health, the country side, etc.

supervision of the activities referred to therein . . ."[259] The case presents precisely the difficulty of relying on direct effect suits to force environmental action in the EU. In general, directives (including the EIA Directives) are written broadly so as to provide general principles and broad discretion to Member States in their implementation.[260] Thus at least in theory, the use of direct effect suits as a means of forcing implementation of EU environmental directives is limited.[261]

E. Lack of Overarching EU Environmental Body

Another reason for the implementation deficit may lie in the fact that there is no overarching EU environmental authority to oversee the effective implementation of environmental laws. The stretched resources of the Commission have already been described. It should be emphasized that environmental protection is just one of the many areas for which enforcement responsibility falls to the Commission. One author has asserted that the EU's implementation difficulties are similar the federalism problems the US faced in the 50s and 60s prior to the creation of the U.S. Environmental Protection Agency in 1970.[262] In the 50s and 60s, the United States had established several federal bureaucracies to perform research on air, soil, and water pollution. But their success was generally limited because of conflicts of interest (for instance, lack of independence), as well as the fact that they had no enforcement powers.[263] In the court system, individuals

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[259] Id., at Para. 13.

[260] Note though, that certain clauses within the EIA Directives could be said to have direct effect. For example, the projects listed in Annex 1 clearly require that an EIA be performed. If a member state's EIA law exempted one of these projects, an individual harmed by such exemption could be bring suit to compel state compliance with the directive. See Smith, supra note 76, for a discussion of this and other examples.

[261] But see above discussion in Section [ ] on Direct Effect jurisprudence for the EIA Directive. In certain cases, the ECJ has found ways to circumvent its own Direct Effect jurisprudence.

[262] See Reitzes, supra note 221.

[263] See generally, U.S. Council on Envtl. Quality, 1985 Annual Report 9 (1986)

were largely relegated to traditional tort suits under nuisance or trespass causes of actions in order to press environmental suits.

It was not until the enactment of NEPA in 1969, and the formation of EPA in 1970, that the role of environmental law in the US legal system truly took root.[264] EPA consolidated the administration and enforcement of the various environmental laws in one central authority. Symbolically, EPA came to represent a unified source of environmental protection. While technically sitting within the executive branch, the EPA has become such a large entity that it performs many of its functions independent of strict executive oversight, including research activities, outreach programs, and the exercise of prosecutorial discretion under the environmental laws.[265] The European Union has no analogous champion of its environmental laws. Like the US prior to the formation of EPA, the EU must rely above all on the good faith of the Member State governments to properly implement and enforce the laws. Otherwise, it is up to individuals to bring violations to the Commission, and up to the Commission to decide if it has the time and resources to follow through on the complaint. Unlike the EPA, enforcement of environmental concerns is just one small part of the Commission's overall responsibilities.

The European Environment Agency (EEA) was originally envisioned to be an equivalent to the US EPA and a solution to the longstanding implementation problem.

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[264] Id.

[265] As an intern in the EPA's Region 9 Office of Regional Counsel, San Francisco, this author learned how the Agency operates, particularly with regard to who it decides to prosecute. A tremendous amount of discretion is left in the hands of the individual attorneys. This was true even as the Bush administration was coming into power in 2001.

When established by the Council of Ministers in 1990,[266] the Member States could not reach consensus in favor of granting either enforcement or regulatory powers to the EEA.[267] Thus the EEA's original charge was simply the collecting, processing, and evaluating of data on the environment, and the distribution of this information to the EU.[268] The primary concern was that such an agency would conflict with the "constitutional" role of the Commission in the initiation and enforcement of laws.[269] It is then difficult to even draw comparisons to the US EPA; enforcement and lawmaking are two of US EPA's primary powers. Still, there was hope for an expansion of EEA's powers since the authorizing regulation committed the Council to "decide on further tasks for the Agency . . . no later than two years after the entry in force of this Regulation."[270] To date, no new tasks have been established for the EEA. It remains merely a collector and repository of EU environmental information. Its primary service has been the creation of various reports on the state of the environment in Europe. In summary, it remains to be seen whether the EEA will be used as mechanism by which to improve Member State performance in the implementation of Environmental Directives, or continue to function simply as an environmental data-collection center.

F. Conclusion

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[266] Council Regulation 1210/90 on the Establishment of the European Environment Agency and European Environment Information and Observation Network, 1990 O.J. (L 120) 1. It became operational in 1994 and its office sits (perhaps symbolically) not in Brussels, but in Copenhagen, Denmark.
[267] See, e.g. *Environment Ministers Agree on Plan to Set up European Environment Agency*, (Current Report) 12 Int'l Envtl. Rep. (BNA) 579 (Dec. 13, 1989).
[268] Id., Art. 2 at 2.
[269] Some Member States, especially the United Kingdom, feared the EEA would become a "green police force" outside the control of the other EC institutions. Then EC Environment Commissioner Carlo Ripa di Meana, perhaps easing their fears, said "only the EC Commission will have the power to take any legal action against offenders in the European Court of Justice." *Environment Ministers Set up Agency*, (Current Report) 13 Int'l Envtl. Rep. (BNA) 144 (Apr. 11, 1990).
[270] See Council Resolution 1210/90, supra note [61], Art. 20, at 5.

Due to the peculiarities of the EU institutional setting, the EU has used directives as the primary means to pursue environmental policy goals. Directives are politically easier to enact and also have many benefits due to their flexibility. Notwithstanding these positive aspects, at least four difficulties at the EU level in the implementation of environmental directives have been identified: the compromised EU legislation can be ambiguous and result in 'policy misfit; the difficult burden placed on the Commission to enforce laws with inadequate resources and reliance on the 'complaint system;' and the lack of an overarching central environmental agency to monitor, enforce and pass implementing regulations in the environmental area. Thus successful implementation already faces several obstacles at the EU level. The study of Italy below will show that still greater obstacles exist when it comes to enforcement of environmental directives within individual Member States. Again, when appropriate and in order to give context to the discussion, comparison will be made to the US system.

V. Overview of the Italian Environmental Law System

A. Introduction to the "Italian Syndrome"

> "Italian public administration has often been described as a system that is highly fragmented (where even the simplest action involves several autonomous and uncoordinated agencies), highly legalistic (where the acts of Parliament are extremely detailed and lead to tiresome and complicated proceedings), and highly politicized (where the interventions of political parties systematically disrupt administrative activities)."[271]

> "Italy has, generally a sufficient legal basis for developing a policy for control of pollution and of environmental resource protection . . . the existing regulations do not enforce implementation but could serve as a

[271] Bruno Dente and Rudy Lewanski, *Implementing Air Pollution Control in Italy: the Importance of the Political and Administrative Structure*, in Paul Downing and Kenneth Hanf, International Comparisons in Implementing Pollution Laws, Kluwer-Nijhoff Publishing (Boston 1983).

useful basis for many restoration actions if they were intelligently and seriously applied. Unfortunately, this does not occur."[272]

"Italy's environmental legislation has been developing since the passing of the so-called "legga Anti-Smog" Air Pollution Control Act of 1966, No 615, which, however, was not properly implemented . . . However, as Casati put it, as far as enforcement and implementation are concerned, Italy's environmental law is still in 'children's shoes'. Enforcement is belated and/or competent authorities are not setting sufficiently strict norms to implement the legislation."[273]

"Italy has not met a number of its [environmental] commitments or is not on the way to meet them. Transposition of EU legislation has often entailed significant delays . . . Despite efforts made, the Italian legal framework remains too fragmented and complex . . .There are important disparities in the environmental institutional capacity and the effectiveness of regional and local authorities."[274]

What do the four pieces above have in common? Obviously they highlight some of the commonly identified problems of environmental law in Italy, as found in the academic literature. But what is more revealing is the timing of the statements: The first is from 1983, the second from 1989, the third from 1996, and the fourth from 2003. Is this a case of over-critical academics from other countries giving Italy a bad rap, or is there truly some type of 'Italian Syndrome,' a type of institutional affliction resulting in a consistent and longstanding inability to effectively regulate the environment?

As noted above, there is an academic debate over the existence and extent of the implementation problem in Europe as a whole, both as to environmental laws and in general.[275] A second longstanding debate is whether the implementation problem is concentrated in the southern EU Member States. This theory of a 'Southern Problem'

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[272] Robert Marchetti, *Italy*, in Edward J. Kormondy, International Handbook of Pollution Control, Gower Technical (Aldershot 1989).
[273] Sevine Ercmann, Pollution Control in the European Community: Guide to the EC Texts and their Implementation by the Member States, Kluwer Law International (London 1996).
[274] OECD Environmental Performance Reviews: Italy, OECD Publications (2002). [herein OECD 2002]
[275] See Borzel, supra note 214, at p. 7. The Commission itself, bolstered by scholars (Ehrlerman, Weiler, et al) argue that there is a problem, while others (Keohane, Hoffman, Neyer, Wolf, Borzel) maintain that there is not a problem or that the extent of the problem is exaggerated.

perhaps finds its origins in the persistent stereotypes northern Europeans have of their sister states to the south, and it has been given validation in numerous academic studies. Most famously, the Italian authors La Spina and Sciortino popularized the phrase 'Mediterranean Syndrome' to describe the seemingly systematic inability of southern States to comply with EU environmental law.[276] According to La Spina and Sciortino, 'MS' is characterized by 1) norms of social behavior that condone non-compliance with the law, aversion to public service, and a tendency towards corruption; 2) a fragmented administrative bureaucracy characterized by lack of coordination between administrative structures and a tendency towards clientelism and corruption; and 3) reactive, party dominated politics and an executive branch with strong regulatory powers.[277] La Spina and Sciortino were careful to point out the MS was merely a theoretical model that could not be proven across all four southern Member States. More recently, Borzel and others have argued that the term "Mediterranean Syndrome" is reductionist in nature, an artifact of outdated cultural misconceptions and statistical misinterpretation, and that there is no general "Southern Problem" as regards environmental implementation.[278]

Whatever the merits of these debates, no author or politician has refuted the existence of a genuine problem in Italy with the implementation of EU laws. Even Borzel had to concede that Italy "seem[s] to be more stricken" by Mediterranean Syndrome. She admitted that Italy scored higher on corruption and clentelism indices. She also noted that "only Italy has experienced shifting majorities and short-lived

[276] Antonio La Spina and Giuseppe Sciortino, Common Agenda, Southern Rules: European Integration and Environmental Change in the Mediterranean States. In J. D. Liefferink, P. D. Lowe and A. P. J. Mol, European Integration and Environmental Policy, New York (Belhaven 1993), at pp. 217-236.
[277] Ibid. See also Borzel, supra note 214, at pp. 27-28.
[278] See Borzel, supra note 214, Chapters 1-3, and at p. 29.

governments." She concluded that "[O]nly Italy seem[s] to fit the diagnosis of the 'Mediterranean Syndrome.'"[279] The statistics bear out this conclusion.

By almost any statistical measure, Italy has been the worst performing Member State with regard to implementation of EU law (all areas of law taken together).[280] Even though Italy has the 4th largest EU population, it received the most Formal Letters and the most Reasoned Opinions from 1978 – 1999. It also accounted for the highest share of ECJ infringement proceedings opened in the period from 1983 - 1999 (11.6%). As of the end of 1999, Italy was second only to France in the number of EC proceedings pending against it.[281] Italy is also the only country that has had significant difficulties adhering to pronouncements of the court, having been subject to the most proceedings under Article 228 for failure to comply with ECJ judgments.[282]

With regard to implementation of environmental legislation specifically, the picture is not much better. Statistics from the Commission's Annual Report on Implementation showed that Italy had the worst or second worst transposition rate in every year from 1990 – 1996, and had the worst overall transposition rate from 1990-1999 (82.5% properly transposed). From 1978 -1999 in the environmental area, Italy received the second highest percentage of Reasoned Opinions, the second highest percentage of referrals to the ECJ and the second highest percentage of ECJ Rulings. It was bested only by Portugal as to the first, and Belgium as to the second two categories,

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[279] See Borzel, supra note 214, at pp.27-28.

[280] For the ensuing discussion of Italy's difficulties, see generally Borzel, supra note 214, Chapter 1. Borzel's statistics are primarily drawn from the Commission's Annual Reports on the Monitoring the Application of Community Law, which have been published since 1972. While Borzel points out some changes in the way data has been reported over time, this is not important for the analysis here, which seeks only to show that Italy has consistently been the worst-performing Member State with regard to implementation of environmental law. Only Belgium appears to compete with Italy for the title of "Worst Environmental Performer."

[281] 16th Report on Monitoring Application of Community Law, (July 1999)

[282] See Capria, supra note [ ], at p. 145. Her statistics are only current though 1996.

and only by the smallest of margins. In addition, Italy's percentage of the totals goes up as the stage of enforcement moves further along, showing that Italy is either unresponsive, unwilling or otherwise unable to reach a settlement with the Commission. Considering the fact that, as will be shown, Italy has few environmental laws that do *not* derive directly from EU legislation, these facts paint a poor picture of the state of environmental law in Italy.

It should at least be acknowledged that Italy has recently shown some signs of improvement. Its transposition rate for environmental directives has improved over the last 4 years. Part of this may stem from the *Legge Communitaria*, also known as the La Pergola Act, passed in 1989.[283] According to this law, by January 31st of each year, the Minister for EU affairs must report to Parliament on the status of the implementation of EU laws. Parliament must then pass an omnibus bill by March 31st of each year which attempts to meet outstanding EU obligations, either via Parliament amending or annulling laws, or through delegation to the executive branch (the Government). It appears that the bill has improved Italy's record transposing EC directives. However, such improvement must be observed with caution. Successful transposition merely means that the government has passed a law implementing the Directive and communicated it to the Commission. It reveals nothing about whether the law was properly transposed, is being properly implemented on the ground, or whether the proper institutions are even in place to implement the law. The Italian Government has shown a propensity to simply reproduce the environmental directive in slightly different words and pass this off as

[283] Act No. 86 of March 9, 1989. Antonio La Pergola was the Minister for European Affairs when he proposed the bill to the Italian Parliament. La Pergola later served on the Italian Parliament. He was also the Constitutional Court judge that wrote the 1984 *Granital* opinion which finally accepted the supremacy of EC law over Italian law. He later served as an ECJ judge and subsequently as an Advocate General. See http://www.venice.coe.int/site/members/cv_ita_lap_ant_e.htm for more biographical information.

"transposition." This is especially true when the obligations are met via executive decree rather than through the parliamentary process. This reason for caution is borne out by the numbers: while Italy's transposition rate for environmental directives in 2001 placed it near the EU average, it still had a large number of non-conformity cases, second only to the relatively new Member State Austria.[284] In 2000-2001, it was the Member State subject to the most "own initiative" EIA cases (25).[285] It should also be noted that in typical Italian fashion, the Parliament only managed to pass 2 La Pergola laws between 1992 and 1998 although it was intended to be an annual lawmaking ritual.[286]

At the end of the day, the empirical evidence supports the commonly held belief that environmental laws are not being properly implemented in Italy. While recent efforts have been made to remedy this situation, significant shortcomings remain. Before proceding to explain Italy's difficulties with implementation, something must be said about the history and institutional context in which implementation is being attempted.

B. Environmental Law In Italy

1. History

It is a common misconception that environmental law didn't even exist in Italy until the 1980s. In fact the existence of environmental laws dates back as early as the 1930s, when laws regulating discharges of pollutants into public waters first appeared.[287] In 1966 a first pass was made at an air pollution law, though it wasn't really implemented until the mid 1970s. Then in 1976 a first attempt at a comprehensive law on the

[284] Eighteenth Annual Report, supra note 241.
[285] "Own Initiative" cases refer to those opened by the Commission without prompting from a citizen complaint. Typically they are commenced on the basis of petitions from the Parliament. Report From the Commission to the European Parliament and the Council on the Application and Effectiveness of the EIA Directive (2001).
[286] Adelina Adinalfi, *The Judicial Application of Community Law in Italy (1981-1997)*, 35 Common Market Law Review 1313, 1314 (1998).
[287] Roberto Marchetti, *Italy*, in Kormandy, supra note 272, at p. 199.

"Prevention of Water Pollution" was passed. Known as the "Merli Act", this law persists today as the foundation for Italian water pollution control. Certain regions of Italy also passed pollution control laws in the 1970s, some of which later served as models for national legislation.[288] Thus, there was not a complete vacuum in the realm of environmental law. What is true is that there were no comprehensive environmental laws or institutional structures. What laws did exist were basically responses to public health concerns resulting from pollution, rather than efforts towards an abstract goal of protecting the environment. In addition, these laws suffered the same fate of many EU Directives: they were amended time after time, weakened due to the granting of waivers or easements, or otherwise not enforced at the national or local level.[289] The history of EIA in Italy mirrored the above description as there was no overarching requirement of EIA for proposed projects prior to the mid-1980s, when a law was prompted by the 1985 Directive.

2. Roles and Institutions

Until 1986, Italy did not even have a separate institution within the central government to handle environmental affairs.[290] In 1986, the Ministry of the Environment was established pursuant to Law No. 349 of 8 July 1986.[291] Law No. 349 laid the groundwork for the system of modern Italian environmental law. In addition to setting up the Ministry, it delineated environmental responsibilities between existing national and regional bodies, amended existing environmental statutes so as to be consistent with the new regime, and commanded the Government to pass decrees implementing EU

[288] R. Marchetti, supra note 272, at p. 200.
[289] R. Marchetti, supra note 272, at p. 205.
[290] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 355.
[291] Law No. 349 of 8 July 1986, Establishment of the Ministry of the Environment and Regulation on Environmental Damage, at Art. 1.

directives (the term 'Government' in Italy refers specifically to the executive branch of the government). The Ministry of the Environment was charged with "guaranteeing, *in an organized framework*, the promotion, the conservation and the recovery of environmental conditions . . ."[292] [emphasis added]. Of these goals, perhaps the area in which it has failed most is in creating an "organized framework" for environmental protection. Italy had no environmental "goals" prior to the creation of the Ministry of the Environment, and even if it had had goals, there was no organization or statutory authority through which to accomplish them. At the same time, Italy was under increasing pressure from the EU and other Member States to fulfill their obligations under the EU treaty i.e. to implement EU environmental legislation. The result was a patchwork of different laws and decrees created primarily to satisfy individual requirements of the EU like the EIA Directive. Adopted more to appease the EU, this collection of laws bore little resemblance to the "organized framework" envisioned by Law No. 349.

Even when EU regulations are faithfully transposed into Italian legislation, there is the problem of the actual application and enforcement of the laws. Part of this stems from the way in which EU regulations are transposed. Under the Italian Constitution, Parliament is attributed the power to enact national statutes.[293] But in the environmental area, typically Parliament has only issued broad "framework" legislation in the form of a *legga delega*, which delegates to the Government (executive) branch the responsibility of issuing detailed regulations.[294] The Government typically responds to the delegations via *decreti* (decrees). Decrees can be issued either by the Prime Minister (the President of

[292] Id,, at Art. 2
[293] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at 355.
[294] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 355.

the Government) or the President of the Republic (a largely ceremonial official). In either case, the extent of Government decree-making is strictly limited to that granted by Parliament in the delegation law. Typically the Government cannot alter basic things such as administrative structures, nor can it alter the budget or introduce new types of sanctions not available under existing law.[295] Alternatively, in situations of emergency, the Government can adopt decrees which only remain in force for 60 days, unless ratified by a majority of both houses of Parliament. As a result, Government decrees in either form are often compromised laws, either due to the narrow confines delegated by the Parliament, or to the fact that for emergency decrees to remain in force they must ultimately be approved by Parliament. The final step in transposing EU directives into applicable law is typically left to regional or local authorities, which must transpose the Government decree into local law.[296]

Regions and local governmental bodies also play a sizeable role in Italian environmental law, and, accordingly, in its deficiencies. There are 20 regions in Italy, 5 of which have special autonomy per the Constitution. Each region has its own governing council with certain legislative and administrative capacities, the contours of which are not fully clear, as will be explored further below. Since the national government's attempts to implement EU directives often take the form of a delegation from Parliament to the Government, and then a further delegation from the Government to the Regions, it is often the Regions that pass the operational implementing legislation and take responsibility for enforcement on the ground. As will be seen, this is how the EIA

[295] EUROPEAN ENVIRONMENTAL LAW: A COMPARATIVE PERSPECTIVE, at p. 144, not confirmed.
[296] 8th Annual Report to the European Parliament on the Commission Monitoring of the Application of Community Law, COM(91)321, at 273

Directive was implemented, albeit with significant delays and deficiencies in part due to the multiple tiers of delegation.

The there is a role for the more than 100 provinces (roughly equivalent to US Counties) and 8,000 communes (roughly equivalent to US Cities). As in the US, these institutions typically have only a small role in the actual issuance of environmental regulations. Provinces do have a significant role in EIA as they often are the political body responsible for certifying the EIA and issuing the necessary environmental authorizations for a project to go forward.[297] Traditionally they have shared this role with the regions, although various legislative seesawing has shifted this responsibility back and forth between the state, the regions, and the local level over the past 20 years. Provinces also have some of the responsibility for environmental monitoring and investigation.[298] Communes also can play a prominent role in environmental protection in Italy. Like the provinces, they play a role in the authorization of projects and the issuance of environmental permits. In a departure from the US, though, the individual Mayors of the Communes actually have a leading role in environmental enforcement actions. They can issue injunctions, serve "urgency orders"[299], and bring suit against violators of environmental laws. In the US, these types of prosecutorial responsibilities typically reside in the State or Federal EPAs, not at the municipal level.

Lastly, consistent with the fragmentation found in all areas of Italian law, environmental enforcement is further split among various entities. In addition to the mayors of the municipalities, certain units of environmental enforcement are found in the *Carabinieri* (the State police), the *Corpo Forestale dello Stato* (National Forest Service),

[297] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 357.
[298] See ENVIRONMENTAL LAW IN EUROPE, supra note 56.
[299] These are comparable to a temporary restraining order or temporary injunction in America.

the *Guardia di Finanza* (Fiscal Police), and the *Capitanerie di Porto* (the Port Authority). The US also makes use of various government agencies, especially for monitoring the environment, although in the US the enforcement system is tied together by a relatively strong central environmental authority (EPA) that helps coordinate enforcement efforts and set general policy goals. To date Italy has not enjoyed the same level of coordination amongst the various enforcement agencies.

The history and the institutional setting under which environmental protection operates in Italy is thus characterized by some common themes. Lawmaking, administrative decision-making, and enforcement is spread across a wide array of different bodies, opening up the possibility for overlapping or otherwise poorly defined responsibilities. Similarly, the history of Italian environmental lawmaking has been characterized by sporadic, reactive measures for environmental protection, usually geared towards specific human health concerns or in direct response to EU directives, rather than towards an abstract, comprehensive goal of a healthy environment. As will be seen below, these characteristics have played a role in the difficulties Italy has faced implementing environmental law, including the implementation of the EIA Directive.

C. Environmental Litigation in Italy

1. Overview

The above discussion has focused primarily on the legislative, institutional and administrative structures in place for environmental protection in Italy. Something must also be said about the court systems through which these structures operate. As previously indicated, there was little in the way of Italian environmental law until the rapid enactment of environmental directives by the EU in the 1980s. As Italy began to

implement these directives, there were finally specific laws in place that created causes of action for environmental wrongs. Prior to that, it is not to say that there was no environmental litigation in Italy. Lawyers just had to be more creative.

The Constitution itself provided a foundation for environmental suits. Article 9(2) provides that the Republic shall "protect the landscape," while Article 32 identifies "health as a fundamental right of individuals and as an interest of the public."[300] The Italian Constitutional Court and the Court of Cassation have both affirmed that the term "health" in Article 32 includes the right of the people to a healthy environment.[301] Prior to specific environmental legislation, these Articles were often the vehicle through which Italian citizens could force environmental action on the part of the government, or through which the government could bring actions against individuals in the spirit of protecting public health and landscape. The Criminal and Civil codes were also sources of environmental causes of action prior to the existence of environmental laws; each is discussed in greater detail below.

2. Overview of the Court System

The Italian court system consists of the Ordinary Courts and the Administrative Courts. As all challenges of the EIA process take place in the Administrative Court system, it will be discussed in greater detail in the next section. But first brief mention will be made of the other courts for the purpose of understanding the overall regime. The ordinary courts are divided into criminal and civil courts. Both have courts of appeal. The *Corte di Cassazione* is the court of last resort for the ordinary courts, but it is not exactly equivalent to the US Supreme Court. As in our Supreme Court, it is limited to

[300] Italian Constitution (1948).
[301] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 365.

resolving questions of law. However, a separate *Corte Costituzionale* handles all questions relating to the compatibility of national or regional laws with the Italian Constitution.[302] The Constitutional Court does not decide cases; it can only nullify laws when they are inconsistent with the Constitution.[303] The Constitutional Court has played an active role in the continuing attempt to define the division of environmental powers between the State and the Regions, as will be seen below.

The Italian system differs fundamentally from that of the US in that the criminal courts have always been and remain the primary source of environmental enforcement in Italy, while in the US criminal prosecution for environmental wrongs represents a small percentage of all environmental actions, and didn't really came about until the 1980s. Another difference is that in Italy civil damages can be had in both civil and criminal trials, abrogating the need for a separate, second civil trial as in the US. Owing to the aforementioned absence of environmental laws up until the late 1980s, creative Italian lawyers invoked provisions of the Italian Penal Code of 1930 ("damaging another person's property" or "adulterating or poisoning water")[304] as well as the Italian Civil Code of 1942 (nuisance and trespass) to bring actions in the Ordinary Courts.[305] While the drafters of these provisions probably never intended them to apply to environmental

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[302] See, F. Francioni and M. Montini, "Public Environmental Law in Italy", in R. Seerden and M. Heldeweg, Comparative Environmental Law in Europe: An Introduction to Public Environmental Law in the EU Member States, Metro (Antwerp 1996), at pp. 242-245, for an overview of the Italian court system.

[303] But see William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 Seton Hall L. Rev. 1 (1999) for an interesting review of the way the Constitutional Court has gradually expanded its powers despite being formally restricted to the nullification of unconstitutional laws.

[304] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 361

[305] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 374. Nuisance law is found in Article 844 of the Civil Code, and is largely similar to the concept of nuisance in the US, calling on the judge to weigh the "reasonableness" of the interference with property or person against the benefits accruing to the polluter and society. The justification for damages in civil environmental cases was found in Article 2043 of the Italian Civil Code, which provides that "whoever causes unjust harm to another person, by negligence or willful misconduct, shall compensate the injured person for such harm."

contamination, Italian judges were able to "analogize" them to the environmental wrongs, especially in light of the pronouncements of the Constitutional Court confirming the State's responsibility to protect the landscape and the public's right to a healthy environment. These same legal strategies were used in the United States prior to the enactment of specific environmental statutes in the 1960s and 1970s.

3. Administrative Courts

Administrative Courts play a central role in the EIA process for it is they who have jurisdiction over the appeals of decisions and orders of government agencies of all levels.[306] For example, they would hear a concerned citizen's appeal over the approval to construct a factory next door to his house, or the factory owner's appeal of the denial of such approval. In contrast to the United States, it is not always required for the appellant to "exhaust his remedies" through higher ranking government agencies. More commonly these disputes are heard directly in administrative courts.[307] There are two levels of administrative courts. The courts of first instance are called the *Tribunali Amministrativi Regionali* (commonly referred to as TARs in Italy). Decisions of TARs can be appealed to the *Consiglio di Stato* (Council of State), which is the highest administrative court and whose decisions are final.[308]

An administrative decision can overturned for one of three reasons, which correspond roughly to the United States' standards of review under § 706(2) of the Administrative Procedure Act (APA): (1) a violation of an applicable legal provision

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[306] Legislative Decree 80 of 31 March 1998 gave the Administrative courts exclusive jurisdiction over "disputes . . . involving building and urban planning . . . for purposes of this decree, urban planning refers to all the aspects concerned with the use of territory." Again, for more on this and other issues relating to access to justice, see the 2002 chapter by Zito, supra note [ ].

[307] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 362.

[308] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 362.

(analogous to APA's § 706(2)(d) for procedural deficiencies); (2) a lack of power by the issuing authority to issue the decision (APA § 706(2)(c), in excess of statutory jurisdiction); or (3) *eccesso di potere*, literally translated "excess of power"(APA § 706(2)(a), abuse of discretion). The latter includes cases where the decision was contradictory, based on inadequate investigation of the facts, or characterized by insufficient analysis of the public interests involved. These concepts track closely to the concepts of "arbitrary and capricious" and "substantial evidence" from the US APA. Whatever the grounds for appeal, it must be filed in the TAR within 60 days of notice of the administrative decision.[309]

Administrative Courts are used extensively in Italy to appeal EIA development consent decisions. According one source,

> A large portion of Italy's administrative litigation is concerned with environmental matters. With respect to large of hazardous industrial plants, it is especially rare to find all the political parties, local communities, and environmental organizations in unanimous agreement with a new initiative. The risk of appeal increases significantly when an environmental impact procedure is required, since this procedure attracts public attention and is more likely to generate opposition.[310]

In a recent interview[311], an environmental lawyer claimed "I've never seen a EIA that wasn't challenged in court." She related that for the construction of single "waste to energy" facility in the Campania region of Italy, more than 40 appeals were made to the local Administrative Tribunal! Asked why there were so many different suits, the lawyer cited several reasons. First, the rules on standing in the Administrative Courts are

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[309] Drawn heavily from See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at pp. 363-364; see also, Administrative Procedure Act, 5 U.S.C.A. §551 et seq, supra note 39.
[310] Id. at p. 386.
[311] Interview with an attorney in the Milan office of a large international law firm, August 1, 2003. This attorney, who asked that his/her name be withheld, has practiced extensively in administrative and environmental law in Italy, typically representing developers, but sometimes also working with government agencies. Her comments will be utilized frequently in the passages below. From this point forward, her interview will be referred to as "Interview with Milan Attorney".

extremely liberal. For example, as will be discussed in the next section, in Italy certain recognized environmental groups have the right to appeal administrative decisions without the need to provide any proof of direct interest in the decision.[312] Second, the cost of access to Administrative Courts is negligible. Third, since in Italy there are no public hearings for projects subject to EIA (with the exception of geothermal plants, which are governed by a special EIA law in Italy), the TARs are the only accessible place to fight unwanted development. In that vain, it should be noted that judges in Italy are neither appointed nor elected. Entrance is based on the passage of a rigorous set of examinations, but once accepted, a judge can not be removed for political reasons. Thus a fourth reason for resort to the Courts is that they are the one place where in theory a voice can be heard free of political or economic biases.

Still another reason for frequent recourse to the courts is that they have been extremely receptive to EU EIA legislation. In fact, even where the Italian State or Regions have been remiss in passing proper EIA legislation, the TARs have frequently directly enforced the EIA Directive.[313] It appears that the TARs have served as a protectorate of EIA in Italy, and helped overcome some of the deficiencies found in the legislative or administrative sectors.

4. Standing in General[314]

It is not possible to fully explain the Italian rules of standing for the purposes of this study of EIA implementation in Italy. However, some generalizations can be made and some unique aspects pointed out. The general rule with respect to standing in the

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[312] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 364

[313] Interview with Milan Attorney, supra note 311.

[314] Drawn primarily from ENVIRONMENTAL LAW IN EUROPE, supra note 56, at pp. 360-364. and Orts, supra note. The Orts piece is great current source for information on standing and access to justice in environmental matters in Italy.

Administrative Courts is that the appellant must have a "direct interest" in the decision. In environmental matters, Administrative Courts have generally interpreted direct interest to include those who have suffered direct injury from the administrative decision (i.e. the individual who is subject of the administrative decision as well as other directly interested parties can appeal). Courts have also been liberal in granting to standing to those living in close proximity to the harm, even where direct injury is questionable. In the Administrative Courts, the focus has also more often been on the interests protected by the law, and less on whether the plaintiff in particular has been injured. This standing concept is similar to the US requirement that the plaintiff be in the "zone of interests" the law seeks to protect.

The most interesting aspect of standing in Italian courts is the relative ease with which non-profit environmental interest groups can gain access to the courts. Article 13 of Law No. 349 of 1986 called on the Ministry of the Environment to make a list of "[n]ational associations of environmental protection" or "those present in at least five regions" with a continuous and stated purpose of environmental protection.[315] Once identified, Article 18(5) gives these groups the right to "participate in the trials for environmental damage and appeal in administrative jurisdiction for the annulment of illegal acts."[316] Thus any certified environmental group can intervene in civil trials, and initiate EIA appeal in the Administrative Courts, without even showing direct injury or

[315] Law No. 349 of 8 July 1986, Art. 13(1).

[316] Id., Art 18(5). These groups also enjoy other participatory rights. Up to 15 of these groups can be selected by the Prime Minister to be members of the National Environmental Council, a kind of advisory board to the MoE, with responsibilities like distribution of MoE funds and nomination of regional environmental officials. It should be noted that this right can be abused as has been seen under the Berlusconi reign. In June 2003, he managed to certify 7 new environmental groups per Article 13. However these environmental groups were of a right-wing bent, and now have posts on the National Environmental Council. Giovanni Valentini, "Ambiente, il 'golpe' di Matteoli esautori i dirigenti del ministero", La Repubblica, June 3, 2003, p. 25.

direct interest in the matter. This is in contrast to the legal rule prior to the 1986 Law, similar to the US, which required environmental groups to have members who either were directly harmed or were living in the vicinity of the alleged harm. Moreover, Italian groups needn't have participated during the administrative proceedings they are contesting in order to have standing; in the US such participation is necessary to enjoy the right to later challenge decisions in court.

The notion of standing for NGOs in Italy seems to be broader than that of the US, especially after Justice Scalia's opinion in *Lujan v. National Wildlife Federation.*[317] The notion of standing in the US is based on the constitutional requirement of a "case or controversy." Over the years, the Supreme Court has interpreted this to mean that 3 requirements must be met in order for a plaintiff to have standing: 1) there must be injury in fact to the plaintiff; 2) there must a causal link between the injury to the plaintiff and the action complained of; and 3) the injury must be able to be remedied by a court decision. If an environmental organization wishes to litigate, three further requirements have emerged, that 1) members of the group would satisfy the above 3 requirements; 2) the injuries it seeks to redress are germane to the purposes of the group; and 3) the individual members of the group are not required to be involved in the litigation in order to resolve it.[318] In *Lujan*, the court made standing even more difficult by requiring that the members of the environmental organization must have directly been injured or face certain and imminent possibility of injury which a court decision could redress.[319]

In Italy, instead, if the NGO is one of the groups that has been certified by the Ministry of the Environment, it can challenge government decisions in the Administrative

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[317] *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) [hereinafter Lujan].
[318] *Hunt v. Washington State Apple Commission*, 432 U.S. 333 (1977), and subsequent cases.
[319] See generally, *Lujan*, supra note 317.

Courts. There are no requirements of direct injury to the group or to members of the group. Thus the notion of organizational standing seems broader in Italy. This conclusion must be qualified by two points. First, the Italian courts have sometimes used the post-1986 conception of standing to exclude informal citizen groups from bringing suit, on the basis that they were not one of the official NGOs certified by the government. In other words, a freshly formed "Citizens of Florence" group could not get involved in environmental litigation unless as group they were directly affected by the environmental harm.[320] Paradoxically WWF-Italia could initiate the suit from its headquarters in Rome without ever showing injury to itself or any of its members, so long as it was nationally certified, even if the harm took place in Florence. Instead in the US, if a newly formed local group had members who met the constitutional standing requirements, the group would have standing. A second limiting factor is that some Italian courts, even after the 1986 law, have barred NGOs standing in environmental cases if a sufficient nexus was not found between the injury suffered and the organizational objectives of the NGO.[321] This is consistent with US standing requirements for NGOs.

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[320] Law No. 241 of 7 June 1990 does give non-certified environmental groups the right to participate in administrative proceedings, although this participation does not give them an automatic right to participate in a later trial (unless they had a pre-existing "personalized" interest in the matter). This right of participation is kind of a hollow offer when it comes to EIA, since in Italy there are no public hearings in the EIA process. Participation is only permitted via written submissions. For a excellent and current discussion of standing and access to justice in Italy, see Alberto Zito, et al "Italy", in Jonas Ebbesson (Editors Eric W. Orts and Kurt Deketelaere), Access to Justice in Environmental Matters in the EU, pp. 313-345, Kluwer Law (London 2002). Obviously the discussion above is simplified, and there are more nuanced issues such as the difference between a "right" and a "legitimate interest" and how that affects standing, treatment of collective interests, the issuance of temporary restraining orders, declaratory judgments, review of the administration's failure to act, burdens of proof, evidentiary issues, access to environmental information, etc.

[321] In criminal cases, Article 91 of the Penal Code allows the certified environmental groups to intervene where they "have been officially recognized as having as their purpose to further the interests of those affected by the crime." Italian Penal Code, Art. 91. In one study of cases after the passage of the 1986 Law until 1993, environmental groups attempted to intervene in 25 of 30 environmental criminal cases, and were granted standing 19 times (on two occasions the NGOs were even awarded damages). In the 6 cases in which they were denied standing, the court said that there was not a sufficient nexus between the general objective of the environmental group and the alleged damage suffered. Stefano Nespor, *Liability Litigation*

It is difficult to say which system provides greater access to the courts and greater environmental protection, but it seems that the Italian method makes more sense. These environmental groups exist precisely to defend the environment. If the US courts are concerned about "the vitality of the adversary process" (as some Supreme Court justices have claimed), the antiquated American notions of standing don't make sense in the environmental context. Why would an individual citizen put up a better fight than environmental organization? What difference does it make whether Greenpeace has member living in proximity to the environmental harm? If the court's obsession with a case or controversy is based on the need for a vigorous adversary to aid in the court's understanding of the issues, wouldn't a certified environmental group be as good or better an adversary than an individual citizen? The Italian model, *as a supplement* to the traditional US standing rules, would seem to offer the most in terms of environmental protection. In any case it is clear that the Italian system gives wide access to certified NGOs to challenge EIA decisions in the Administrative Courts. This has been borne out by the numerous challenges to EIA decisions in the Administrative Courts.

5. Application of EC Law in Italian Courts

As will be seen below, the Italian Constitutional Court was late to fully accept the supremacy of EC law (not until the 1984 *Granital* decision). In the years that followed, though, the Italian courts have been extremely receptive to EC law. In fact, they have been instrumental in compensating for the Italian government's consistent failure to properly implement Community Law. This openness to EC Law, combined with the

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in Italy, in Sven Deimann & Bernard Dyssli, Environmental Rights: Law, Litigation & Access to Justice, Cameron May (London 1995).

relaxed standing rules and low costs of litigating in the Administrative Courts, has made up for some of the deficit in implementing Directives like the EIA Directive.

Here we detail some of the general characteristics of the Italian courts' treatment of EC Law.[322] Italian courts have consistently applied EC Treaty provisions and Regulations, rightfully viewing them as "immediately applicable in the Italian legal order."[323] More impressively, the Italian courts have also applied 'general principles' of the European Court of Justice. For example, in applying the EIA Directive to a project where the Region had not yet implemented the law, the Italian court stated that the "delay by national authorities in deciding whether or not to grant a building license violated the Community principle requiring the [national] administration to take relevant measures within a reasonable period."[324] Another general practice of Italian courts has been to interpret Italian statutes in cases of ambiguity so as to conform to EC law. Finally, the courts have generally made liberal use of the reference procedure to the ECJ, especially in more recent years.[325]

Regarding Directives, Italian courts have very frequently given them Direct Effect, applying the standard as articulated by the ECJ (that the directive be sufficiently precise, etc.). The courts have used Direct Effect in 3 ways: 1) as an independent source of law when the government has failed to implement a Directive; 2) to fill gaps when the government has incorrectly or incompletely transposed a Directive, or 3) to trump conflicting national laws on the matter.[326] More remarkably, the Courts have utilized

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[322] The following discussion come almost exclusively from Adinalfi's 1999 piece, supra note 286.
[323] Court of Cassation, sec. I, March 9, 1982, No. 1470.
[324] Reg. Adm. Tr. of Lombardy, sec. I. April 2, 1993, No. 260, as translated by Adinalfi, supra note 286, at p. 1327.
[325] Adinalfi, supra note 286, at p.
[326] Adinalfi, supra note 286, at pp. 1329 – 1330.

Direct Effect both "vertically" (a citizen invoking a Directive as against the Government) and "horizontally" (a citizen invoking a Directive as against another citizen). This use of Directives "horizontally" has occurred both before and subsequent to the ECJ's *Marshall* decision (see footnote 254) in which the ECJ held that Directives need not be given Direct Effect between individual litigants. Even after the Court of Cassation ruled that such practice was not in line with ECJ jurisprudence, many courts continued invoking Directives horizontally, for example by applying Directives "in equity", and through various other legal fictions. This action is all the more surprising since in a civil law system like Italy's, courts are in theory limited to the application of laws – equity should have no place in the legal hierarchy.

So, Italy does have history of using litigation as a tool for environmental action. Up until the mid to late 1980s, environmental actions were based on the Constitution and on old provisions of the Civil and Criminal Codes. Environmental laws enacted in the 80s and 90s provided formal causes of action, and the possibility of both civil and criminal penalties. The criminal courts remain the primary vehicle for environmental enforcement. Certain identified environmental groups have a rather broad license to intervene in or initiate environmental matters. Administrative courts are the primary forum to make challenges to the approval or denial of an EIA, and they have been used extensively due to relaxed standing requirements, the absence of public hearings in the Italian EIA process, and the low cost of proceeding in the Administrative Courts. Lastly, since about the mid-1980s, Italian courts have displayed a very favorable attitude towards EC law. As a result of all of the above, the difficulties the Government has had in

passing and administering Community Law have been somewhat ameliorated by the activism of the Italian courts.

D. Identifying and Explaining the Problems with Italian Environmental Law

The difficulties implementing EU environmental laws across the EU has been illustrated. Explanations for the difficulties in implementation emanating from the EU itself have been offered. A particular and persistent implementation problem in Italy has been documented, both by looking at the EU statistics and by reviewing opinions in the academic literature. Having outlined the political, administrative, and legal structures in Italy, an attempt will now be made to demonstrate the difficulty of implementing EU environmental law within these systems. When possible, specific reference will be made to Italy's difficulties implementing the EIA Directive. Again, the US experience will occasionally be referenced to provide context for the reader. After presenting this overview of the impediments to successful implementation of EU environmental law in Italy, the implementation of the EIA Directives and the current state of EIA law in Italy will be examined.

It is impossible to pinpoint a single reason as to why Italy has had such difficulty implementing EU environmental laws. Some of the explanation lies in history, some in the peculiarities of Italian culture, and much must be attributed to Italy's notorious bureaucratic political and administrative systems. In the following pages, Italy's difficulties are separated into 4 broad groups: Italy's Late Start, its Political and Lawmaking Difficulties, its Convoluted Administrative Structure, and Corruption. Within each group, subcategories of problems will be explored. While Italy's late start with environmental protection and its political situation will be discussed first in order to

follow a logical progression, relatively more time will be spent on the complicated administrative structure since that is an implementation problem with characteristics that can be applied to just about any EU member state. Corruption will then be addressed as it is one of the impediments to effective implementation that is uniquely associated with Italy.

1. Italy's Late Start

At least part of the explanation for Italy's difficulties in implementing EU environmental law can be pinned to its belated attempt to do so. This tardiness can be analyzed on three levels: the belated acceptance of EU law, the belated acceptance of the environment as a political goal, and the belated existence of popular environmentalism in Italy.

a. Belated Acceptance of EU Law

Italy was one of the founding members of the European Community. Presumably then, it would have come to understand the benefits and accept the challenges of community membership at some point during the first 30 years of its involvement in the EU. It has been involved from the start and is exceeded in electoral power only by Germany. Its size and longstanding membership would imply the ability to craft and influence EU policies in ways compatible with its own legal traditions, but this has not been the case. Instead Italy has been slow to accept the precedence of EU law, slow to implement its directives, and ineffective at enforcing EU laws even once transposed into law. Its record of violations before the Commission and ECJ, reviewed above, speaks for itself.

Part of the reason Italy has had difficulties complying with community obligations is the fact that it didn't even accept community law as supreme to national law until 1984, 30 years after joining the EC. The starting point for analyzing this delay is the role of the EC Treaty within Italian law. The EC Treaty was adopted in Italy by a normal parliamentary law, rather than through a constitutional amendment.[327] The Italian Constitutional Court essentially had two choices: treat EC law as treaty law per Article 80 of the Constitution, in which case it would be on a level equal to that of an ordinary statute, and thus subject to the whims of the legislature; or alternatively, treat the EC Treaty as a customary or general principle of international law per Article 10 of the Constitution, in which case it would be supreme to normal parliamentary laws. The Constitutional Court waffled between these two interpretations for 20 years before opting for an entirely different solution in *S.p.A. Granital v. Amminstrazione Finanziaria* (1984).[328] Prior to *Granital*, the Court had accepted the supremacy of EC law in limited cases, with stipulated caveats such as the necessity for the Constitutional Court to first rule on the supremacy of a given EC provision when it conflicted with an Italian law. It had also attempted to limit the instances in which cases were referred to the ECJ, and said that EC principles could not trump fundamental principles of the Italian Constitution.[329] In *Granital*, the Court decided to treat Community law as neither a treaty nor general principle of international law, but rather as that of an external, autonomous legal system, with the consequence that it could not be subsequently modified by Parliament, and that

[327] Act No. 1203, October 14, 1957.
[328] *S.p.A. Granital v. Amministrazione finanziaria*, Judgment No. 170 of June 8, 1984, Corte Costituzionale.
[329] See, Antonio La Pergola, *Italy and European Integration: a Lawyer's Perspective*, 4 Ind. Int'l & Comp. L. Rev. 259 (1994), for good review of the 4 important Italian cases interpreting the position of EC law.

it would be immediately applicable in all national courts.[330][331] This interpretation stands today. If a Community provision is in conflict with a national law, the national law is not annulled or declared unconstitutional; it is simply to be ignored by the courts.[332] Italy was the last of the then 10 Member States to accept the supremacy of EC law. This is the starting point for understanding why Italy has been so slow to adapt EC principles.

With regard environmental directives specifically, the impact of this delayed acceptance is not limited to specific instances of non-application prior to 1984. The fact that the national government and the Constitutional Court resisted the supremacy of Community Law for so long also may have affected the willingness of the State and Regional governments to do their part to secure implementation. In Brown's 2000 study of the implementation of the EIA Directive in Scotland and Bavaria, he concluded that one of the key determinants of successful implementation, especially at the regional level, was the degree of buy-in from the national authorities.[333] If there isn't validation and consistent application of Community norms in the national courts, how can the State and especially the Regional governments (who are already two steps removed from EU lawmaking) be expected to faithfully implement EU laws? The resistance of the Italian

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[330] For a discussion of this case and the role of EC law in Italy in general, see Antonio La Pergola and Patrick Del Luca, *Community law, International law and the Italian Constitution*, 79 Am. J. Int'l L. 598 (1985); Antonio La Pergola, *Italy and European Integration: a Lawyer's Perspective*, 4 Ind. Int'l & Comp. L. Rev. 259 (1994).

[331] The *Granital* decision (supra note 328) was partially based on Article 11 of the Constitution, which said that Italy "shall agree, on conditions of equality with other states, to such limitations of sovereignty as may be necessary to all for a legal system that will ensure peace and justice between nations." This article is titled "Repudiation of War." When the Constitution was ratified in 1948 following WWII, certainly this provision wasn't made with an economic and social union like the EU in mind.

[332] La Pergola, supra note 329, at p. 272. The Constitutional Court has reserved the right to strike down EC provisions that conflict with the basic principles of the Constitution or the inalienable rights of citizens.

[333] See Brown, supra note 217, pp. 214-220 for an analysis of the need to involve subnational governmental units in the EU environmental policymaking process in order to secure better enforcement of EU environmental directives.

Courts to EC law throughout the 60s, 70s and 80s surely delayed the overall willingness of governmental bodies to apply the community norms in good faith.

b. Political Apathy/Emphasis on Economic Development

Mirroring the Italian courts' resistance to EU law has been the government's resistance to EU law, especially EU environmental law. On paper, Italy is a member of the G7 (the seven largest economies in the world) and an economic powerhouse. Nevertheless it has been slow to embrace, from a political standpoint, the various social causes pursued by the EU and its Member States, again despite the fact that it was a founding member of the organization over 50 years ago. This is especially true relative to the importance it places on economic development. One former Minister of the Environment claimed "Environmentalist policy is conceived still, to a large degree, as something external, peripheral and sectoral with respect to the production and consumption processes. Its actions are principally understood as ex-post facto, for repairing damage and reducing destructive and polluting effects."[334]

This apparent dichotomy (a rich nation still desperate for economic development at the expense of social issues) is at least partially attributable to the disparity in economic development between the north and south of the country. Despite longstanding and aggressive efforts from both the State and the EU,[335] the south and north of Italy continue to have widely different socio-economic levels.[336] It follows that the south of Italy has had the most instances of derogation from environmental norms, while the

[334] Minstero dell'Ambiente, 1st National Report on the State of the Environment (1989).
[335] At the EU level, during the 70s and 80s the European Investment Bank made over 3 billion euros in environmental infrastructure loans, and Italy was by far the greatest recipient of such loans. European Investment Bank, *The EIB in 1989*, at p. 5.
[336] OECD Environmental Performance Reviews, OECD Publication Service (Paris 1994), at p. 19. [herein, OECD 1994]

northern regions have more advanced environmental regulatory systems. A second explanation is again one of timing. Italy's rise to economic prominence took place largely during the 1970s,[337] a period when other countries like the US that had huge economic growth in the post-war 1950s were already beginning to focus on post-material issues like the environment. Italy was still focused firmly on economic growth during the 60s and 70s. As the next section on popular environmentalism will show, other social issues dominated the political landscape during the 60s and 70s, further delaying political focus on environmental issues.

Finally in 1987, *i Verdi* (The Green Party) managed to get some seats in the Italian Parliament, thus giving a voice for environmental issues among the competing political interests. Unfortunately *i Verdi* have never held more than 3% of the parliamentary seats.[338] They have also suffered from a lack of leadership and direction and even ran two separate green tickets in some elections.[339] The traditional political parties, on the other hand "have traditionally been allied with economic or business interests and have pandered to consumer interests."[340] While the small number of Greens in Parliament have not been able to wield much power, they have at least forced the major parties to think about environmental issues in the last decade, if only for fear of ceding more seats in the Parliament.

Despite these political advances during the 90s, political support remains firmly in favor of economic development (especially under the current center-right Berlusconi

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[337] OECD 1994, supra note 336, at p.91.
[338] Business Week European Edition, "Q&A: We are Pushing Like Hell", with Green Party European Parliament Member Monica Frassioni, January 27, 2003.
[339] Mario Diani, Green Networks: A Structural Analysis of the Italian Environmental Movement, Edinburgh Univ. Press (Edinburgh 1995), at pp. 39-41.
[340] Geoffrey Pridham and Michelle Cini, *Enforcing Environmental Standards in the European Union: Is there a Southern Problem*, in Michael Faure, et al, Environmental Standards in the European Union in an Interdisciplinary Framework, Maklu (Antwerp 1994).

Government). In this political climate, it is easy to see how environmental legislation has been pushed to the back burner. There is some recent evidence of this aversion to EU environmental law. In 1999 the Commission took action against Italy under Article 10 of the EC Treaty, which requires Member States to cooperate in good faith with Community Institutions, for Italy's failure to cooperate on environmental matters.[341] Then in a 2002 speech to Parliament, Prime Minister Silvio Berlusconi said "this country takes orders from no one, including its European partners." He went on to say that his European policy will tougher and more independent than Italy's had been in the past.[342] Again, if this is the message from the highest level of government, should it come as a surprise that there is ineffective implementation of EU environmental law at lower levels? The inability or unwillingness of the Regions to timely pass EIA laws, discussed in greater detail below, can be traced at least in part to the absence of coherent political support for EC law from the national government, regardless of the political party in power.

c. Belated Emergence of Environmental Movement

By looking at the development of populist environmentalism in Italy, one can get a clearer picture of why the government has been so slow to address environmental issues as just described. A popular misconception is that in Italy there was no environmental activism until very recently. In fact Environmental NGOs have long existed in Italy. In the early 20th century groups existed with a focus on protecting Italy's cultural and artistic heritage. Environmental groups of the modern variety came about somewhat

[341] Commission of the European Communities, 17th Annual Report on Monitoring the Application of Community Law (1999), Environment Chapter.
[342] Melinda Henneberger, "Berlusconi Says Italy Won't Take Europe's Orders", New York Times, January 15, 2002. See also, Henneberger, "Italy Cooling on Europe, and 2 Aides Explain Why", New York Times, February 17, 2002, describing Italy's scaled back vision of European integration, with Great Britain serving as its model of strength but independence.

later: *Italia Nostra* was founded in 1955; the Italian branch of World Wildlife Foundation (*WWF-Italia*) was founded in 1966; the Italian branch of Friends of the Earth (*Amici della Terra*) in 1977; and *LegaAmbiente* in 1980.[343] Other smaller groups with differentiated interests also existed and still exist today. The mere existence of these groups in the early years should not lead to the conclusion that they bore a lot of influence. For various reasons, their ability to influence politics was negligible until the 1990s.

First of all, the various environmental groups rallied around two "camps" throughout much of the 1970s. In one camp there were the preservationists, most notably backed by WWF-Italia, who tended to focus on creating national parks, protecting animals, and preserving the rich artistic and cultural heritage of Italy. In the other camp were the political ecologists, led by *Lega Ambiente*, who were more focused on pollution and industrial activity.[344] Prior to the late 80s, both camps tended to be reactive and event-specific. They rallied and staged protests after major environmental events like the Seveso Dioxin incident[345] in 1976, the decision by Italy to host cruise missiles in the early 80s, and the Chernobyl Nuclear Disaster in 1986 (protests against the use of nuclear power in Italy). The two groups didn't really start to collaborate until the Chernobyl nuclear disaster in 1986 (which happened to coincide with the creation of the Ministry of the Environment in Italy). It was only in 1986 that they began to jointly promote environmental referendum (e.g. referendum for the prohibition new nuclear power plants

[343] Ibid. at p. 202.
[344] Paolo Donati, Media Strength and Infrastructural Weakness: Recent Trends in the Italian Environmentalist Movement, European University Institute Working Paper SPS No. 94/14, at p. 4.
[345] On July 10, 1976 a large amount of dioxin gas escaped from a chemical plant just outside of Milan, badly damaging the surrounding and causing some of the population to evacuate. In a bit of irony, the EU passed a directive in 1982 regulating the storage and use of hazardous substances that came to be known as the Seveso Directive. Italy was later brought before the ECJ for its failure to implement the Directive.

in Italy), oppose development projects, engage in research and information dissemination, and lobby the legislative process.[346] These modern environmentalist tactics were already commonplace in the US and other western States by the time the EU started heavily regulating the environment in the late 1980s. Italian NGO's had to play "catch-up" in a sense as they refined their approach to influencing the Italian government to respond to increasing EU demands.

Wholly apart from the question of NGOs is the question of environmentalist sentiments among the population generally. In the years following the 2nd World War, Italy was focused on transforming itself from a still largely agricultural society to a modern economy. The focus of both politicians (as has already been described) and the people was squarely on economic development. It wasn't until the 1970s that Italy saw a dramatic increase in industrialization and white collar, service oriented jobs. The emergence of a middle class with more disposable income and time enabled an increased post-materialist focus on social issues, and a focus generally on an improved quality of life.[347] [348] However, the "protest" movement in Italy during the turbulent 60s and 70s was focused mostly on social issues unique to Italian society: the heavy class-cleavages that still existed, on the right to abortion, and on the fight for power between the Catholics and the Communists.[349] There wasn't much energy left for environmental protests. Also, prior to the 80s environmentalism remained tied to the general anti-industrialist sentiments held by the still-strong communist/socialist parties in Italy. It wasn't until these groups began to diminish in power in the late 1980s that people of

[346] Donati, supra note 344, at p. 6.
[347] Donati, supra note 344, at pp. 7-8.
[348] Donati, supra note 344, at p. 34.
[349] See generally, Diani, supra note 339.

other political orientations felt comfortable embracing environmental causes without fear or risk of being associated with the communists or socialists.[350] Again, these were problems uniquely found in Italy that slowed the drive towards environmental goals.

There is some disagreement over the level of environmentalism today in Italy. Opinion polls consistently show that concern for the protection of the environment is at or above that of the EU average.[351] However, one official in the Ministry of the Environment described the level of environmental activism in Italy as "Zero". According to her, residents only got involved in the EIA process, for example, when they were personally or financially impacted by an action.[352] Another member of an NGO complained that "there is no committee building. People are resigned to the status quo."[353] An Italian Green Party member in the EU Parliament responding to a question about the public's response to Mafia "eco-crimes", recently said "there's no national reverberation of concern. And there's very little information. Newpaper stories on eco-crimes appear one day, and then there's no follow up . . . There's just such a low level of awareness and a low level of public outrage and frustration."[354] However, another lawyer representing private interests complained of the continuous stream of environmental

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[350] Donati, supra note 344.

[351] OECD 1994, supra note 336, at p. 19. [herein, OECD 1994] See also Rudy Lewanski, "Italy: Environmental Policy in a Fragmented State", 1998, supra note [ ], at p. 135, or Lewanski, "Italy: Learning from International Co-operation or Simply 'Following Suit'", in A. Underdal and Kenneth Hanf, International Environmental Agreements and Domestic Politics, at p. 259, Ashgate (Aldershot 2000). Lewanski points out that while the environmental movement grew throughout the 80s and 90s, this growth did not necessarily translate into willingness to take action or the capability to influence policy-making, which remained low mainly due to the fact that major political parties collect votes through a system of clientelism.

[352] Interview at the Ministry of the Environment, Rome, Italy, with the Director of EIA Programss, July 28, 2003. [Herein, MoE Interview]

[353] Interview with a member of the International Juridicial Organization for the Environment and Development, Rome, Italy, June 30, 2003 [herein. IJOED Interview]. The interviewee wished to remain anonymous. IJOED is a non-profit environmental advocacy group in Rome.

[354] Business Week European Edition, interview with Monica Frassoni, supra note 338.

lawsuits facing her clients, especially EIA suits.[355] It appears that the level of environmentalism may depend on the perspective of the person offering their opinion.

In any case, Italy did witness the emergence of established and active environmental organizations over the course of the late 80s and 90s. Italy regularly tops the list of environmental complaints submitted to the EU Commission, thanks no doubt to the numerous violations for which the citizenry can complain, but also attributable to the activism of its environmental groups. Groups like *WWF-Italia* and *Legambiente* actively make legal claims in environmental matters, and do so jointly. For example, when the Government in 2001 passed the controversial *Legge Obiettivo* (to be discussed in detail below), which streamlines the EIA process for certain infrastructure projects, *i Verdi*, *WWF-Italia*, *Legambiente*, and *Greenpeace-Italia* jointly signed a statement of opposition directed towards the Ministry of the Environment.[356] NGOs have also played something of a role within the Ministry of the Environment, sometimes participating in decision-making processes or being solicited as advisors to the MoE.

Regardless of conclusions as to the level of environmentalism in Italy today, the main point to recognize when looking at the development of environmentalism in Italy is that in most western countries, this evolution took place during the 60s and to some extent the 70s, as opposed to the 70s and 80s as in Italy. Prior to the late 80s, the Italian environmentalists' efforts to lobby the government to create environmental legislation and institutions had only been sporadic, and responsive to specific crises. This further placed Italy at a disadvantage relative to its EU counterparts when it came to the task of

[355] Interview with Milan Attorney, supra note 311.
[356] Legambiente, Appello al Ministro per l'Ambiente ed al Ministro per I Beni e le Attivita' Culturali per Salvare La Valutazione di Impatto Ambientale, Rome (April 10, 2002).

implementing the onslaught of EU environmental legislation in the late 80s as there was not an established citizenry or NGO network to help spur the government along.

2. Political and Legislative Difficulties

In Section 1 above we have reviewed how Italy's relatively late start in accepting EU law, in tackling environmental issues at the political level, and in general environmental activism negatively impacted its ability to implement EU environmental regulations when the EU increasingly started regulating in this area in the mid-1980s. Turning away from history, we now look to current aspects of the political and legislative system that impede successful implementation of EU environmental directives. We will first examine Italy's notorious political volatility, then look at the problem of "Politics of Emergency", and lastly but most importantly we'll examine the complicated Italian legislative process. As these are problems of application, the experiences with the EIA Directive in Italy will be referenced to help illustrate the problems.

a. Political Volatility and the Predominance of Party Politics

Party Politics

Continuing with the theme of the political environment and its influence on the implementation of EU environmental law, we examine another obstacle in Italy: the instability of governments and the susceptibility of the government to party politics. First an example of the volatility during the 1990s is offered. Between 1994 and 1996, a center-right coalition took power (Berlusconi's first term), gave way 7 months later to a technocratic non-partisan party, which was replaced 16 months later by a center left coalition.[357] It is difficult to envision meaningful political strides in any area when the Parliament and Government are changing so frequently. As noted above, in the

[357] Martin A. Rogoff, *Federalism in Italy and the Relevance of the American Experience*, 12 Tul. Eur. & Civ. L.F. 65, 67 (1997).

environmental area typically the Parliament only issues framework legislation. It is up to the Government (executive) branch to issue detailed implementing regulations. The Prime Minister is the head of the Government and gets to appoint his cabinet i.e. he appoints the head of the Ministry of the Environment, the Ministry of Defense, etc.[358] The Government can have a powerful effect on environmental regulation by delaying passage of implementing regulations, passing watered-down regulations, or by passing entirely new decrees wiping away prior law. On a more general level, the Government can drastically affect environmental policy depending on the person it appoints as the Minister of the Environment. Prime Minister Berlusconi did just this during his first stint in office (1994-1995), appointing as the Minister of the Environment a neo-conservative who openly professed his support for nuclear energy, more highways, and hunting in national parks.[359] To the contrary, when Romano Prodi's center left government took power many favorable actions were taken with respect to the environment.[360] More recently, as we will see below, the current Berlusconi Government garnered support for a Parliamentary Act establishing a special, fast-track EIA procedure for large national infrastructure projects. In a change that would have a more global effect, Berlusconi has introduced legislation into the Parliament whereby his Government would appoint a committee to draft a comprehensive environmental law framework, after which the Berlusconi government itself would draft entirely new implementing legislation.[361] There is widespread consensus (and fear) that the overhauled laws would heavily favor

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[358] The Prime Minister and his selected cabinet must then be approved by a majority of both houses of Parliament. Vincenzo Sinisi, et al, *Environmental Law of Italy*, in J. Andrew Schlickman, et al International Environmental Law and Regulation, Butterworth Legal Publishers (Salem 1991).
[359] See Lewanski (1998), supra note 351, at p. 137.
[360] Ibid.
[361] Roberto Ferrigno, A Case Study on the Implentation of EU Environmental Legislation: Italy, European Environmental Bureau Publication, Brussels, March 2003.

business interests. Broad political shifts in this direction signal trouble for the successful implementation of EU environmental directives. More generally, whether the change is in a pro-business or pro-environmental direction, the fact that a change in the administration can result in such drastic changes in the approach towards the environment is itself an impediment to the development of a coherent, long-term environmental strategy.

The effects of sudden and drastic switches in Government policy are also felt lower down the chain within the Government itself. One official in the Ministry of the Environment complained that the whole structure of the EIA department had changed since Berlusconi took power, and that many officials had been let go or forced to find other positions. She also cautioned that the willingness and effectiveness of participation by NGOs in MoE activities was highly dependent on which political party was in power.[362] Berlusconi also recently changed the process under which environmental decisions are made, requiring all major environmental decisions to be directly reviewed by his personally appointed Ministry of the Environment.[363]

It must be acknowledged that in the US, when the executive branch changes over, a similar process takes place whereby new officials are appointed heads of Federal Agencies, including the EPA. The US experience has mirrored Italy's over the past few years. The right leaning Bush administration roll back numerous Clean Air Act implementing regulations and open up protected federal lands to mining and oil exploration. The problem in the US is slightly less exaggerated since (1) political changes in the executive branch occur at most every 4 years; (2) the EPA rulemaking

[362] OECD 1994, supra note 336. MoE Interview, supra note 352.
[363] This change will be examined in greater detail in a later section on the lack of a strong central environmental authority in Italy.

process is arduous and lobbies on both side of the equation heavily participate in the process; (3) due to the civil service patronage system, workers lower down the chain cannot be fired. Even if the policy from the top is subject to change, at least some consistency can be maintained at the actual working level. Lower level employees have much discretion over the cases they choose to prosecute, and thus can maintain some consistency in the face of administrative change.[364] Still, partisan politics in the US, as in Italy, can have a notable impact on environmental protection.

The effects of this political volatility in Italy can be particularly strong in the national EIA process since the judgment of environmental compatibility on a project rests largely in the hands of the Minister of the Environment. Granted this decision is made under the advice and counsel of other Ministries, the involved region(s), and the EIA Commission,[365] but the ultimate decision still rests with the actual Minister, subject to his political preferences and perhaps more importantly those of the Prime Minister who personally appointed him/her. The heads of the other Ministries are also chosen by the Prime Minister, and the members of the EIA Commission are nominated by the MoE, so ultimately the Prime Minister's political preferences are likely to prevail when the decision on environmental compatibility is made. At the local level, the problem of political volatility appears to be the same. One study of the implementation of the EU's Local Agenda 21 (a program that encourages local sustainable development) in Italy found one of the biggest problems of implementing the program was that "[d]ifficulty has been found in making durable choices, in part due to the frequent political changes in

[364] The author was an intern in the EPA's Region 9 Office of Regional Counsel in 2001 when the Bush Administration took office. While there was concern with the overall course the EPA would chart in the coming years, prosecuting attorneys still had discretion over which cases they would try and how they would try them.

[365] Law No. 349 of 1986, Article 6.

local governments . . . whose actions are very often annulled by their successors."[366] Whether at the national or local level, the EIA process and therefore the achievement of the EU objectives in the Directive inevitably suffer if the impartiality of the decisions or the process constantly fluctuates with the political climate.

b. Politics of Emergency

In the discussion of the history of Italian environmental law above, it was noted that during the 60s and 70s, the few environmental laws that were passed were passed were mainly in response to public concerns, and were not part of any strategic approach to environmental protection. It was until 1986, 10 to 15 years after most other western nations, that Italy created a separate Ministry for environmental protection. Even since the creation of the MoE and the recognition of certain environmental goals in Law No. 349 of 1986, environmental legislation has not been adopted with a view to creating an overall regulatory approach to the environment. Instead, isolated legislative acts have been pursued, either in response to pressure from the EU to implement Directives, or in response to domestic or international crises.[367] In the literature, this Italian practice has come to be referred to as "the politics of emergency".

We have already seen above that the Italian environmental movement only tends to mobilize around big issues like as the Chernobyl nuclear disaster, the Seveso dioxin incident, or the rising seas in Venice. The State tends to respond to these emergencies with hasty legislative acts or more frequently, government decrees, rather than taking a calculated approach free from emergency politics.[368] This has resulted in both ineffective

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[366] Grazia Brunetta and Egidio Dansero, Planning Sustainability in Urban Policies: the Italian Perspective After the Aalborg Conference, 6 European Urban and Regional Studies 3, 280 (1999).
[367] See e.g., Rodolfo Lewanski (2000), supra note [ ], at p. 262.
[368] See e.g. OECD 2002, supra note 274, at p. 129.

legislation, and an excessive numbers of laws. As new Governments take power, old laws are either ignored or new laws are passed, sometimes without even repealing the old ones. Even the Ecology Unit of the *Carabinieri*, the primary group charged with the enforcement of environmental laws, complained that "it is difficult to interpret the laws and regulations because there are so many of them and because they stem from so many sources and are often mutually incompatible."[369] If the Ecology Unit can't figure has difficult sifting through the myriad regulations, how can local government bodies expect to apply the laws correctly? How can regulated parties be expected to understand the laws?

The Italian government's response to the Commission's urging to implement EU environmental laws was to initiate a process whereby all EU directives are transposed as part of an omnibus "La Pergola" bill as described above. Clearly such laws are not going to be well conceived if they are simply being pushed through *en masse* to satisfy EU obligations. The body of Italian EIA laws demonstrates well the difficulties implementing EU environmental directives. First of all, the Italian government was criticized for trying to outline the entire EIA procedure in a single article of Law No. 349 of 1986.[370] Though it has contemplated it, the government has never succeeded in passing an overarching EIA law similar to NEPA in the US. Instead it has passed numerous laws, decrees, delegations to the regions, not to mention discipline specific EIA laws for certain types of projects. Between 1988 and 1994, at least 20 different EIA laws were passed at the national level, and these only addressed projects in Annex I of

[369] OECD 1994, supra note 336, at p. 102.
[370] Bernardo Giorgio Mattarella, The Environmental Impact Assessment in Italian Legislation, LLM Thesis, University of California, Berkeley, May 25, 1992, at p. 10.

the EIA Directive![371] The attached table listing Italian EIA Legislation is daunting (See Annex). It lists over 40 different laws, decrees, circulars, etc. governing to EIA in Italy. And the table is by no means complete; it is merely an ad hoc compilation by this author over the course of 2 years of research. If one must first decipher this maze of legislation before going about the business of assessing environmental impacts, clearly there is something lacking in the way the Italian government has approached environmental protection.

c. Complexity of the Legislative Arrangement

Summarizing the discussion of political impediments to implementation to this point, we have seen that Italy has passed environmental laws primarily to satisfy its obligations to the EU, or in response to environmental crises. Moreover, a sea of laws, decrees and circulars tend to control any given area of environmental protection, due in part to partisan politics in Italy and the ease with which a new Government can change the course on environmental matters. Aggravating these problems is a legislative system that requires several delegations, starting at the EU level and often finishing in the local Mayor's office, in order to implement an EU environmental directive.

The delegation problem could be termed the "Telephone Game" effect. In the Telephone Game, a group of school children sit in a circle. The teacher whispers a sentence into one student's ear, and asks the student to whisper it to his or her neighbor. This process is replicated from student to student until the message has made its way all the way around the circle, at which time the teacher asks the last student to repeat the sentence. Even among the brightest of school children, the sentence "Students should help keep our environment clean" inevitably transforms into "Students could clean the

[371] R. Marchetti, supra note 272, at p. 204.

environment" or some other variation upon the original. A message has arrived after some delay, and it bears some resemblance to the original message, but something has been lost in the transfer from student to student. The loss can stem from natural human error or from a deliberate choice by a non-compliant student to alter the message.

Similarly with the implementation of EU environmental directives in Italy, there are numerous transfer points at which the EU message can get lost. For everything to go right, first the EU must pass a logical and coherent directive. Then Italy's parliament must pass a framework *law* delegating responsibility to the Government (e.g. to the Prime Minister/Executive Branch) to create more specific implementing measures. Then the Government, usually with the assistance of the Ministry of the Environment, must issue a *legislative decree* or, alternatively, a *law decree*, itself a framework law delegating more detailed regulations to the Regions. In addition, the Government (through its Ministries) may issue *regolamenti* (regulations) or *circulars*, neither of which is binding law, but which in theory are to be adhered to by the entities to who they are addressed.[372] At this point, the Regions have to enact *implementing laws*. Obviously these laws must implement the substance of the National law/decree/circular/regulation, but they may also need to delineate the balance of procedural responsibilities as between the Region itself, the provinces, and the municipalities. Finally, in most cases it is the municipalities and indeed the Mayor himself that must identify violations of said regulations or otherwise take responsibility for application of the laws. As each "student" delegates responsibility to the next "student", there is the risk of error in transfer, or the risk of deliberate deviation (for political reasons or otherwise) from the mandates of the original EU

[372] For a good general discussion of lawmaking in Italy, see Mary Ellen Sikabonyi, *Italy*, in Dennis Campbell, Environmental Regulation: Its Impact on Foreign Investment, Graham & Trotman (London 1992)

directive. In the end, something of the original EU intent is bound to be lost, and thus the consistent application of the EU's environmental policies is jeopardized. Italy's experience with the EIA Directive demonstrates perfectly the issues raised by the "telephone game". The proliferation of EIA laws has already been mentioned. Later, the numerous delays and difficulties in attaining full implementation of the Directive will be addressed in the description of EIA's legislative history in Italy.

3. Convoluted Administrative Structure

Thus far two major categories of problems affecting Italy's successful implementation of EU environmental directives have been described. The first category related to Italy's relative tardiness in embracing EU law and environmental issues in general. The second major category had to do with the difficulties created by Italy's political system and complicated lawmaking process. We now focus on perhaps the most important category impeding implementation: Italy's convoluted administrative structure. This category is important both because it is such a glaring problem in Italy and because the problem is one that can be readily observed in other Member States, not just Italy. In Italy it is a complex problem that involves the dynamics between the MoE and the rest of the Government, the dynamics between the State and the Regions, the dynamics between the different Regions, and the overall dynamics of an environmental regulatory scheme where all of these entities must mesh within the unique Italian culture in order for the system to work. Each of these dynamics will be dealt with in the following sections.

a. Lack of Strong Central Environmental Authority and Ministry Infighting

The first source of administrative weakness emanates from the power struggle between the MoE and the rest of the Government. As was recounted above, Italy did not even have a centralized environmental authority prior to the establishment of the MoE in 1986. This was in contrast to other Member States like Denmark, Germany, the Netherlands, France, Luxembourg, and the United Kingdom, which had fairly advanced environmental programs prior to the onslaught of EU environmental legislation in the late 80s.[373] Even once established, the Moe has suffered from a lack of resources and a lack of autonomy due to the many competences that it must share with other, more powerful Ministries. Part of the problem lies in history.[374] Before the creation of the MoE in 1986, the few existing environmental responsibilities were handled by Inter-Ministerial Committees. For example, the 1976 Water Protection act was overseen by a committee of representatives from the Ministry for Public Works, the Ministry for the Navy, and the Ministry for Public Health.[375] The regulation of solid waste was controlled by the same committee, but with additional members from the Ministry of Industry, Ministry for Internal Affairs, and the Ministry for Agriculture.[376] One can only imagine the Ministry of Public Health and the Ministry of Industry at the table trying to reach consensus on environmental matters. At one point an Inter-Ministerial Committee for Environmental Protection was created which was supposed to co-ordinate various powers that were dispersed among 16 different ministries.[377] This attempt, like the other Inter-Ministerial

[373] See Smith, supra note 76.
[374] For a good summary of the institutional setting and the relations between the ministries, see Lewanski (1998), supra note 351.
[375] Sinisi, supra note 358, at p. It-8.
[376] Ibid.
[377] See Lewanski (1998), supra note 351, at p. 134.

committees, failed due to continuous gridlock or at best only compromised solutions to environmental problems.

It was on the heels of these failures that the MoE was finally created in 1986. Unfortunately when the MoE was formed, the existing Ministries wanted to "protect their turf". Through their strong lobbying, many environmental responsibilities remained spread about the different Ministries.[378] For example, Ministry of Public Works retained its powers in water management and urban planning; the Ministry of Cultural Affairs retained jurisdiction over particularly sensitive environmental areas; and the Ministry of Health retained the majority of control over air quality issues.[379] Also, the use of inter-ministeral committees that existed prior to the creation of the MoE was institutionalized by the 1986 law that created the MoE. Articles 2, 3, 6, 7 and 8 of the 1986 Law include dozens of provisions requiring the MoE to carry out its work in collaboration with other Ministries. As one author points out "In its original design, the procedure was seen as a tool to strike a balance between the various interests at stake, by means of intervention in the decision-making process by several ministers, each with different priorities. In practice, the most remarkable consequence of the mass introduction of the concerted decision-making procedure has been in most cases a considerable lengthening and a remarkable complication of the administrative procedures, with the result of rendering the pursuit of a consistent policy in the sphere of environmental protection very difficult."[380] The MoE to this day shares many environmental responsibilities with other Ministries,

[378] See OECD 1994, supra note 336, at pp. 27-28, for an overview of responsibilities shared with other ministries, as of 1994.
[379] Clifford Chance, European Environmental Law Guide, London (1992).
[380] F. Francioni and M. Montini, supra note 302, at p. 248.

including some relating to EIA, although the MoE has slowly been consolidating its power over the years.

Another lens through which to see the weakness of the MoE is by looking at the resources available to it, especially relative to the other Ministries. As recently as 1994, the MoE didn't even have a unified office in Rome. Officials were dispersed about 4 different Ministries.[381] While the offices were eventually consolidated, today even the geographic location of the MoE offices belies its role in the Government: while in route to the Ministry for an interview, the cab driver noted that the MoE was "fuori mure", Roman parlance indicating that the office was located outside the ancient walls of the city. Perhaps symbolically, the Ministry of Finance is located in a prominent building precisely in the historical center of the city. As of 1993, the MoE had only 2.8 staff members per million inhabitants, the lowest of any European country. In 1992 the MoE had 164 officials, as compared to 30,000 total officials in the Ministries of Agriculture, Industry, Merchant Marine, Transport and Public Works.[382] The numbers are dated, but the situation has not improved dramatically since the early 90s.[383] The reduction of government ministries from 18 to 12 in 1999 was a step in the right direction, and resulted in more personnel and resources being allocated to the newly named Ministry of Environment and Land Protection [hereinafter it will still be referred to as the MoE or Ministry of the Environment]. Despite the additional resources allocated, the MoE never managed to disburse more than 52% of its allocated funds from 1991-2000.[384] And

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[381] Geoffrey Pridham, *National Environmental Policy-Making in the European Framework: Spain, Greece, and Italy in Comparison*, in Andrew Jordan, Environmental Policy in the European Union: Actors, Institutions and Processes, Earthscan (London 2002).
[382] OECD 1994, supra note 336, at p. 96.
[383] See Lewanski (1998), supra note 351, at pp. 140-141 for a description of the resource problems still existing at the end of the 1990s.
[384] OECD 2002, supra note 274, at p. 123.

allocated funds are $1 billion euro less in 2003 than they were in 2000, reflecting a downward trend that started when the current Berlusconi administration came to power. Earlier this month a member of a non-governmental organization in Rome related "I was at the Ministry of the Environment this morning – it is evident there is a money shortage. (nothing works from the elevators to the photocopy machines). Hopefully it was only today, but they are in a very stressed, overworked situation."[385] An official at the MoE acknowledged the same problem within the EIA department, commenting "I don't even have a printer right now."[386] She also pointed out that the EIA division had recently been split among different offices, and that her and her group were now employees of Price Waterhouse Consultants, on contract to the Government, though in the same offices doing the same work. The lack of resources allocated to the MoE relative to the other Ministries undoubtedly diminishes the role of environmental protection relative to other governmental interests, and more generally impedes the effective functioning of the MoE.

Both the ministry infighting and the lack of adequate resources for the MoE adversely impacted EIA procedures in Italy. The Ministry of Public Works and the Ministry of Industry attempted from the outset to narrow the application of the EIA Directive, first by exerting pressure on Parliament during the legislative process, and later by insisting on a narrow interpretation of the procedures required by the EIA law or the projects to which it was applicable.[387] In addition, EIA law requires the MoE to consult and make its decision of environmental compatibility jointly with the Ministry of Cultural Heritage. If the Ministry in charge of the project disagrees with the decision of the MoE,

[385] NGO Interview, supra note 353.
[386] MoE Interview, supra note 352.
[387] Mattarella, supra note 370, at pp. 68, 70.

it can appeal it to the Council of Ministers (a broader pool of representatives from all the Ministries) for a final decision.[388] The independence of the MoE is severely compromised under this scheme, since it knows that its decisions could ultimately be subject to the approval of all the other (more powerful) Ministries.

Some recent maneuvering with regard to the MoE should be noted. Act No. 300 of 1999 sought to alleviate some of the organizational problems of the Ministry system in general, for example by reducing the number of ministries from 18 to 12.[389] In June 2003 a Presidential Decree was signed by the Berlusconi administration restructuring the MoE into 6 Directorate Generals. Unfortunately prior to this in March 2003, the cabinet head and Minister distributed a circular to all MoE staff requiring that any information relating to any attempt to resolve an environmental issue must first be sent to the Minister's office before final resolution. This measure was criticized as "paralyzing the Ministry, concentrating power in the hands of Minister Matteoli and his Chief of Cabinet, in a dangerous alliance between the political right and administrative functions . . . some joke that [the MoE] should be renamed the 'Ministero degli Affari ambientale" [Ministry of the Business Environment].[390] Moreover, of the $1.7 billion euro allocated to the MoE in the 2003 budget, $1.24 billion is allocated directly to the "Cabinet and Offices of Direct Collaboration with the Minister's Projects." The move in 1999 to reduce the number of ministries from 18 to 12 was a legitimate effort to streamline the administrative bureaucracy, and had the potential to result in a stronger MoE. Regrettably the 2003

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[388] Law No. 349 of 1986, Art 6, Paras. 3-6.
[389] See generally, Vincenzo Ferraro, *The Progress of Italian Administrative Reform in 1999*, 7 European Public Law 10 (2001).
[390] Giovanni Valentini, "Ambiente, il 'golpe' di Matteoli esautorati i dirigenti del ministero", La Repubblica, June 3, 2003, p. 25. Translation by author. All of the above discussion on the reforms in 2003 is derived from this article.

maneuvering to centralize all decision-making in the hands of Berlusconi's handpicked Minister is probably not an effort towards creating a stronger MoE, but rather an effort to ensure that business interests prevail when it comes to environmental issues. It is too soon to tell if either reform has achieved its goal, though interview subjects seemed to think that the MoE was still riddled in bureaucracy, with increasingly less concern for environmental protection under Berlusconi's watch. The regrettable consequences of this with respect to EIA are highlighted below in the discussion of the recent *Legge Obiettivo,* a law that rolls back many existing EIA provisions in Italy.

b. State/Regional Struggle

The role of the Regions in effective implementation of environmental laws cannot be overstated.[391] For example in the EIA context only a small share of all projects fall under the domain of the national EIA procedure which is under the supervision of the MoE. The bulk of the responsibility for implementing the EIA Directive falls to the Regions. From an administrative standpoint, the longstanding struggle for power between the Regions and the State fragments the entire environmental protection system. The Director of the EIA Centre in Milan commented on how the murky division of powers has affected the implementation of EIA laws in Italy:

> "The peculiar way in which EIA has been introduced in Italy is probably due to the fact that a rational and effective settlement of the matter would have entailed the solution of some very knotty but crucial problems like the reform of public administration and the relationships between Roman and common law. For the politicians this is too difficult a task, which is not politically rewarding or, in their opinion, particularly urgent.

[391] See Brown, supra note 217, for a discussion of the importance of "subnational" political entities in the implementation of EU environmental law. Brown compared the implementation of the EIA Directive in Scotland and Bavaria to emphasize how different subnational structures could result in different levels of enforcement on the ground, wholly apart from difference at the Member State level.

Accordingly, they feel it is better to do the minimum required to fulfill the Commission's request . . ."[392]

There has been an ongoing struggle between the Regions and the State as to who has control over environmental regulation. The starting point for understanding the division of powers between the Regions and the State is the Constitution. The Constitution seems to place at least some of the control within the hands of the central government. Article 9(2) provides that the Republic shall "protect the landscape", and Article 32 says that the Republic shall protect "health as a fundamental right of individuals."[393] But Article 117 of the original Constitution also gave the Regions some legislative powers with regard to environmental matters, particularly with regard to land-use planning, public works, and mineral and spring waters, subject to the caveat that this legislation didn't conflict with national interests. Article 118 granted regions the power to set up administrative functions for the legislative rights granted to them by Article 117. All residual powers were impliedly reserved to the State (in contrast to the US 10th Amendment which reserves non-enumerated federal powers to the states). However, the precise contours of these powers were hardly clear from the Constitution. The result has been a seemingly endless stream of legislation, Constitutional Court interpretations, and even a Constitutional amendment in 2001. Some of these "clarifications" addressed the division of State/Regional powers generally, while others focused on specific sectors such as the environment or even more specifically on individual disciplines such as EIA. The resulting confusion has only served to further cloud the development of environmental law in Italy.

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[392] EIA Newsletter 10, Environmental Assessment Within the European Union, Environmental Assessment in Italy, http://www.art.man.ac.uk/EIA/nl10euit.htm (1995).
[393] Italian Constitution (1948).

The Constitutional measures allocating powers to the Regions weren't even given effect until 1968, when a law was passed setting up the Regional Councils.[394] Two Presidential Decrees were issued in 1972 to further implement the devolution process. In 1977, the President of the Republic issued a decree specifying that the regulation of public health, including air, water and noise pollution fell to the regions.[395] Nonetheless some of these powers remained with the state (e.g. air auto emissions), and the degree of delegation to the regions was generally unclear. There was an obvious tension in the Regions when, in 1986, Law No. 349 created the national Ministry of the Environment and vested in it the broad power to determine a national plan for environmental protection.[396] Over time, the Ministry's areas of competence grew, and other laws were passed that consolidated environmental powers in the Ministry. The constitutionality of these laws was challenged several times by the Regions on the grounds that they were in direct contradiction to the Article 117 powers vested in the regions to regulate the environment.[397] The Constitutional Court typically rebuffed these challenges, instead taking a moderate opinion that the environment was a unitary public good of such importance that, at a minimum, national framework laws could be created for its protection.[398] At other times, though, the Court accepted the Regions' contentions that national intervention was unjustified, stating that "regions cannot be denied a constitutional competence in the field of protection of the environment."[399]

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[394] See Rogoff, supra note 357, at p. 75.
[395] Law No. 616 of 24 July 1977, Article 101. See also, Sikabonyi, supra note 372, at p. 357.
[396] Law No. 349, 8 July 1986, at Arts. 1, 2.
[397] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 364.
[398] See ENVIRONMENTAL LAW IN EUROPE, supra note 56, at p. 364.
[399] Italian Constitutional Court, Judgment No. 183 of 22 May 1987. Other judgments include No. 177 of of 18 February 1988, No. 242 of 28 April 1989 and No. 389 of 11 July 1989

Independently of the Constitutional Court's pronouncements, numerous legislative attempts were made throughout the 1990s to better define the allocation of administrative tasks. For instance, in an effort towards administrative efficiency, Act No. 142/1990 allocated many administrative responsibilities in the environmental area to the Provinces.[400] From 1983 to 1997, three Parliamentary Commissions for Constitutional Reform were initiated with a view to restructuring the State/Regional governing structure. Each failed for lack of political consensus, the most recent in 1997 when (then) opposition leader Silvio Berlusconi withdrew his support for the revisions, effectively grounding the reform efforts.[401] Between 1997 and 1999, the four so-called "Bassanini Acts" were passed with the goal of reforming public administration.[402] These were passed via ordinary laws rather than through the more permanent step of amending Article 117 of the Constitution. The most important of the Bassanini Acts was Act No. 59/97, which transferred a significant number of functions from the State to the Regions.[403] Act No. 59/97 listed those administrative matters to be retained by the state, leaving all others to the Regions and Municipalities. Decree 112 of 31 March 1998 sought to implement Act No. 59/97 with specific regard to environmental matters. Under Decree No. 112, environmental regulation was to be delegated to the Regions; however the regulation of matters requiring uniformity throughout the State was to be reserved to the State. The State was also to reserve the powers of policy-making and coordination, as well as the power of intervention when Regions failed to fulfill their obligations or acted

[400] See generally, F. Francioni and M. Montini, supra note 302, at p. 243-244.
[401] Rogoff, supra note 357, at pp. 69-70, 95.
[402] See generally, Cristiano Musillo, *Italian Administrative Reform: Its Completion and Implementation*, 5 European Public Law 3, at 363 (1999).
[403] Act No. 59/97 (Bassanini 1) was modified by Bassanini 3 in 1998, but the changes are not material to this discussion.

against the national interest.[404] Thus the environment was an area of "shared competence", to steal a term from the European Union vocabulary, whose contours weren't clearly defined by the reform laws or the Constitutional Court's pronouncements.

Finally in 2001, Constitutional Law No. 3 was passed, making important modifications to Title V of the Constitution.[405] There are four important "global" changes in the amended constitution. First, Article 117 now lists exclusive and concurrent State powers; all other powers are now presumed to reside in the Regions. In the old version the Regions' legislative powers were enumerated and all others were impliedly left to the State. Second, a new category of "concurrent" legislative powers has been introduced (those for which both the State and Regions can pass laws). Third, it is presumed that all administrative functions reside in the municipalities (the smallest political entity) unless explicitly assigned to the State, Regions, or Provinces. Under the old Article 118, administrative powers were presumed to lie with the Regions in correspondence to their legislative powers listed in the old Article 117, while the remaining administrative responsibilities were reserved to the State. Lastly, the revised Constitution took away from the State the power it formerly had to review the legitimacy of Regional laws. Any challenges now must take place in the Constitutional Court. While falling short of total devolution or the creation of a federal state, the 2001 constitutional reforms definitely increased the powers of the Regions, at least on paper.

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[404] Musillo, supra note 402, at 366.

[405] Constitutional Law No. 3 of 18 October 2001. The law was passed by a solid 64% of the voters, though in a tribute to Italian ambivalence, only 34% of eligible voters participated in the vote for the most significant constitutional reform since the Constitution was adopted in 1948. For a discussion of the constitutional amendment as it relates to environmental law, see Erminio Ferrari, Planning, Building and Environmental Law after the Recent Italian Devolution, 8 European Public Law 3, 357 (2002). Ferrari believes that though the Constitution seems to grant environmental legislative powers exclusively to the state, only time will tell how the division will operate in practice (at p. 364).

So where does environmental protection fall under the new Constitution? Not surprisingly, it is not entirely clear. In Article 117(2), the State is given exclusive legislative power over "(s) protection of the environment, of the ecosystem and of the cultural heritage." However, among the concurrent legislative powers listed in Article 117(3) are "health protection", "land-use regulation and planning", and "promotion of the environmental and cultural heritage." Based on those 3 categories, the Regions could probably justify just about any legislation relating to the environment, in spite the fact that environmental protection is listed as one of the exclusive State powers. Where EIA falls is also unclear. Is EIA considered to fall under the ambit of "land-use regulation and planning", thereby rendering it a Regional competence, or does it fall under the more general State competence to "protect the environment'? Regardless of the answer to this question, it seems entirely theoretical. Most Regions have already adopted EIA laws and administer them for non-State projects. It seems unlikely that this Constitutional amendment will change that reality.[406]

If the above discussion seems complicated for the reader, it has been no less complicated for the State, Regions, and citizens of Italy. The effect in practice of this National/Regional ambiguity has been a type of middle ground, whereby the national government issues broad framework laws for environmental protection and sets policy, and then the Regions enact detailed implementing regulations in response to these delegations. Thus, much like the national government, the regions employ a patchwork system of environmental regulation since they are forced to respond to State requirements, rather than creating a comprehensive approach (at least on a regional level)

[406] See OECD 2002, supra note 274, at p. 149, stating the obvious "It appears that the division of power is not yet clear."

to environmental protection. Instead each region has a multitude of regulations implementing national decrees, and these regulations vary greatly from Region to Region. Additionally, Regions and the State waste time and energy "protecting their turf", especially in the administration of the laws, rather than focusing on the business of environmental protection. Meanwhile, important aspects of an effective environmental regulatory program, such as planning and monitoring mechanisms, efficient data collection, regularly available environmental information and advanced environmental research all suffer due to the uncertain division of power between the State and the Regions.[407] Unfortunately, the issue remains unresolved. As recently as 2002 the Constitutional Court made another attempt to clarify the division of environmental powers, this time in light of the 2001 Constitutional Amendments. The Court's analysis fell on the side of more regional control, but it used the normal caveats and qualifications about the national capacity to set policy, thereby rendering the holding predictably unclear.[408] In the summer of 2003, there were renewed calls for further "devolution" to the Regions or at least a clarification of the existing situation,[409] but at the time of publishing the issue had not yet been resolved by the government. The uncertain division of powers continues to make complete implementation of EU environmental directives difficult.

c. Variation Among Regions

To reiterate, regardless of the legal resolution of the State/Regional struggle for power, significant environmental powers are now vested in the Regions, and in any case

[407] See Pridham, supra note 381, at p. 88. See also, OECD 2002, supra note 274, at p. 31.
[408] Constitutional Court 26 July 2002, No. 407. See Alberta Milone and Carmela Bilizone, La Valutazione di Impatto Ambientale, Casa Editrice (Pienza 2003), for an analysis of the case in relation to the *Legge Obiettivo* (discussed below).
[409] La Repubblica, "Bossi vuole un vertice sulla devolution," p. 9, (July 16, 2003).

the Regions have staked a role by regulating the environment on their own initiative. But the fact that power is now vested in the Regions perpetuates another problem – the existence of widely disparate environmental institutional capacities amongst regional and local authorities.[410] As each Region creates its own implementing regulations and enforcement mechanisms, there is little consistency across Regions. Again, the arguments of Scott, Sabel, Ladeur and others in support of "flexible" EU approaches to environmental protection must be addressed. As discussed above in the context of EU delegation to Member States, these authors assert that decentralization and greater opportunity for tailored actions at the local level result in innovation, learning, and ultimately in better protection regimes. The US system also frequently allows for variation in environmental regimes among the US states, and there are examples where innovative environmental solutions have been achieved in one state and then shared with other states.

Unfortunately these arguments suffer the same shortfalls within Italy that they suffer at the European level. The overarching institutional structures of Italy and the US are entirely different. First of all, in the US environmental statutes like the Clean Air Act and the Clean Water Act are not merely broad delegation statutes like those found in Italy. They are voluminous, and often get into the minute details of environmental protection (something that has been criticized in other contexts). Secondly, the US EPA is a relatively strong administrative agency capable of providing effective oversight over state implementation of national statutes. It can supplement and substitute for the state

[410] OECD Environmental Performance Review (2002), supra note [ ], at p. 114.

with its own enforcement actions where the state is failing in its duties.[411] It also has the "power of the purse" in the sense that it can threaten to cut off funding in the event a state fails to properly implement and administer and environmental statute.[412] It has already been shown however that the Italian Ministry of the Environment is a weak ministry, in absolute or relative terms, and the Italian National Association for Environmental Protection is merely an information repository, just like its European counterpart. Thirdly, due to traditional political and social chasms between the Regions, Italy has not traditionally had the same degree of coordination and sharing of positive experiences amongst regions, a benefit that the "flexibility" model is founded upon.[413] Finally, the United States encompasses such a large geographic area that delegation to, and variation among, the states is probably a necessity. Italy, on the other hand, has a smaller land area than the State of California;[414] it probably doesn't need 20 different Regional versions of the Clean Air Act or 20 different EIA procedures within its smaller geographic area.[415] It might be better served to have one consistent EIA law and then concentrate on integrating "best practices" from other EU Member States.

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[411] It should be acknowledged that Italian Law No. 349 of 1986, Article 8(3) provides a similar right of intervention for the MoE in the case of Regional or Local failure to implement state laws. However, it does not have the power to threaten the withholding of funds, and with the resource problems at the MoE, addressed above, the provision seems to be little threat to non-compliant regions.

[412] See "Conformity Clause" of the Clean Air Act, 42 U.S.C § 7410(c) (1999). The Clean Air Act actually allows for suspension of these funds in the event a state does not have a currently conforming regional transportation plan. The EPA has yet to actually suspend funds, but it has recently used the threat of suspension to provide incentive to act. When Atlanta failed to create a regional transportation plan as required under the act, EPA threatened to withhold federal highway funds. Georgia quickly complied so as not to lose control over the highway funds. See generally, Michael R. Yarne, Note, *Conformity as Catalyst: Environmental Defense Fund v. EPA*, 27 Ecology L.Q. [ ] (2000).

[413] See OECD 2002, supra note 274, at p. 33. The frequency of sharing amongst the northern regions is said to be higher.

[414] Italy's land area is 116,303 square miles; California's is 155,959 square miles. US Department of State website, Italy country profile (2002) http://www.state.gov/countries/ ; California State Homepage (2002) http://www.ca.gov/state/portal/myca_homepage.jsp.

[415] There are 20 Regions in Italy. US Department of State website, supra note [218].

The degree of inconsistency between regions creates confusion for regulated parties whose business extends beyond a single region, and makes oversight of environmental programs very difficult for the already overstretched national environmental authorities. This problem of inconsistency has been noted in the variability of EIA procedures applied from region to region.[416] One lawyer commented that she had had "mostly positive experience in the northern regions where there is a history of environmental administration." To the contrary, she found her experiences in the southern regions to be much different. She attributed this partly to history; in her words there was no history of environmental regulation as well as no tradition of industrial development in the south. And since development in the south is almost always some type of emergency response brought on by EU or State aid, the EIA process is almost always conducted in derogation of EIA norms. Finally, the lawyer pointed out that in many cases, the national authorities had to step in to aid in the EIA process since the Region was not competent to carry it out itself.[417] The wide disparities in the quality of the EIA process places an unnecessary burden on regulated parties, and an unnecessary penalty on citizens in the disadvantaged regions.

d. Institutional Fragmentation and Administrative Bureaucracy

We have just identified the weakness of the MoE, the struggle for power between the State and the Regions, and the variation amongst Regions as contributors to Italy convoluted administrative system. In the literature there is wide consensus that still another factor is at work that relates to the administrators and the administration itself,

[416] OECD 2002, supra note 274, at p. 183.
[417] Interview with Milan Attorney, supra note 311.

wholly apart from these institutional explanations. Only few (English-speaking) authors have attempted to define this problem or determine why it exists; instead it is just a kind of accepted and irrefutable fact. In March of 2003, Roberto Ferrigno, an Italian member of the European Environmental Bureau in Brussels added to the chorus: "The government lacks the political will to fight environmental crime. The local competent authorities are unable to properly enforce existing legislation. The regional agencies responsible for controls are understaffed and underequipped."[418] A wise man once said "If everyone is saying it, it must be true." In the following section we will attempt to define why Italy's bureaucrats have consistently been criticized.

Part of the difficulty in defining Italy's administrative bureaucracy is that there is no single cause or explanation for it. One starting point is the many institutional problems previously alluded to. For example we already know that there are too many actors involved in environmental protection, with ambiguously defined responsibilities and too many laws to enforce. On top of the coordination that must take place between the State, Regions, Provinces, and the various enforcement bodies, there are also other scientific or specialist bodies like the National Association for Environmental Protection, the National Health Institute, and Geological Service which overlay the various political entities. These bodies sometimes act as consultants while at other times they play a primary role in environmental monitoring and enforcement. The general incoherence as to the separation of functions between the various administrative bodies at times results in too many bodies trying to act at once; at other times the result is stagnation and inaction. Even when there is action, it is not always clear which of the multifarious State, Regional, or Local laws is to be applied.

[418] Roberto Ferrigno, supra note 361.

Another important aspect of bureaucratic inefficiency yet to be discussed is rooted more in the administrative culture itself. Historically, Italian administration has been characterized by a failure to meet deadlines, a tendency to make and break promises, a legalistic, closed process, where there is little focus on the actual attainment of results and little (legitimate) interaction with the interested public.[419] As one author put it "in Italy the administrative activity has a tradition of distance, and almost isolation from the people."[420] This rigidity is completely at odds with the organic nature of something like the EIA Directive, again putting Italy at a disadvantage in its ability to implement the directive. Another administrative problem is the frequent Italian practice of granting temporary loosening of standards, delaying deadlines, or granting outright waivers to obligations.[421] Lewanski argues that these practices have created a culture in which the regulated entities feel it's "a bit foolish respect formal obligations and deadlines."[422]

Compounding this difficulty is the fact that EU environmental directives tend to be "rather northern in outlook,"[423] thus creating a misfit with the Italian administrative system from the start. The legal and institutional structures of Italy often aren't compatible with those of the northern Member States, requiring the additional legislative step of modifying institutional structures to properly implement the substantive aspects

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[419] See e.g. Corrado Carrubba, *Participation Experience in Italy*, in Martin Fuhr et al, Participation and Litigation Rights of Environmental Associations in Europe, Peter Lang (Frankfurt 1991). See also, Alessandra Marchetti, *Climate Change Politics in Italy*, in Tim O'Riordan and Jill Jager, Politics of Climate Change: A European Perspective, Routledge (New York 1996), at p. 298. See also, Lewanski (1998), supra note 351, at p. 146. Lewanski also places some blame on the civil servants themselves, claiming that technical competence is unimportant and rarely found in bureaucrats, and that since career advancement is based on seniority, there little incentive for innovative policies or exceptional work.

[420] Mattarella, supra note 370, at p. 52.

[421] See Lewanski (1998), supra note 351, at p. 147. The problem of granting pardons persists today. Italian Green Party member in the EU Parliament recently criticized the Berlusconi administration: "There is no backing to fight eco-crimes at [the] national level, and the center-right government is now issuing pardons for all kinds of crimes." Business Week European Edition, interview with Monica Frassoni, supra note 338.

[422] See Lewanski (1998), supra note 351, at p. 147.

[423] Pridham, supra note 381, at p. 91.

of the directive. This has held especially true with the EIA Directive, since Italy has traditionally had a closed administrative system with little opportunity for public participation.[424] In the scholarship the Italian allowances for public participation in the EIA processes have been roundly criticized. Participation has been variable; absent in some cases and excessive in others. It is alleged that what public interaction does take place is of the 'under the table' variety (see section on Corruption below), which obviously doesn't bode well for a process like EIA which depends on an open, active participatory process for its effectiveness. To the contrary, there are no public hearings during the EIA process with the exception of the EIAs conducted for geothermal plants. One lawyer indicated that Italian authorities were so dissatisfied with the difficulties experienced on the geothermal projects that they are hoping to revoke the public hearing provision even for those projects,[425] a tribute to the entrenched resistance to the opening up of administrative processes. By way of comparison, in America the public hearing is an integral part of most administrative decisions, including EIA processes, even if administrators are not always fond of the process.

Part of responsibility for the ineffective administration also falls on a citizenry that is conditioned to the administrative history described above. Italians citizens aren't *used* to the concept of public participation. In fact instances of public participation generally come about not as some altruistic defense of the environment, but rather when a project is likely to invade some property or other individualized right.[426] About the only participatory aspect that is consistently adhered to on the administration side is the public

[424] In fact the introduction of the EIA Directive in Italy is often credited with inspiring recent Italian efforts to reform its administrative capacities.
[425] Interview with Milan Attorney, supra note 311.
[426] Interview with Milan Attorney, supra note 311. See also Mattarella supra note 370, at p. 53.

notification of the project and EIA, which unfortunately doesn't take place until after the EIA has been completed, thereby depriving the public of the opportunity to guide the analysis. The public has often not been provided with the same technical information as the administration (as required by the Directive), and until recently hasn't even had access to such information upon request. Regarding access to information, Law 349/1986 (the law establishing the Ministry of the Environment) actually states that every citizen has the right of access to environmental information held public authorities, without even having to establish personal interest.[427] Unfortunately, according to at least one study "the right to information . . . on the environment is not widely respected. In fact, in most cases public authorities refuse to release information, relying mainly on a restrictive interpretation of the concept of 'environmental information'."[428] This, coupled with the absence of formal hearings or procedures for submitting comments[429] (both of which are problems of Italian administrative law not limited to EIA), has served to marginalize the effectiveness of public participation.[430] The absence of established public participation procedures partly explains the frequent resort to the Administrative Courts to challenge EIA decisions.

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[427] Law No. 349/1986, at Article 14.

[428] See generally, Mauro Albrizio and Patrizia Fantilli, "Italy", pp. 175-182, in Ralph E. Hallo, Access to Environmental Information in Europe, Kluwer Law (London 1997), and OECD 2002, supra note 274, at p. 171, noting that while the situation has improved at the national level, access to environmental information at the regional and local level is insufficient. It should be noted that Italian Administrative Courts have again been actively helping to enforce these provisions. In Judgment 118/91 of the TAR of Catania, Sicilia, the court ruled that the definition of 'environmental information' is not to be restricted to the state of the environment, but should include all documents relating to specific instances of pollution, enforcement of environmental laws, and administrative activities affecting the environment. Despite the laws regarding access to information and the generally favorable interpretations from the TARs, "enforcing the right has proved difficult because of an inefficient bureaucracy and its traditional secrecy about environmental matters. In fact environmental groups have been forced to appeal the refusal to many times" (Albrizio at p.180).

[429] Under the 1996 Atto di Indirizzo (establishing Regional EIA), public authorities MAY conduct a public hearing if they consider it appropriate. Needless to say the entrenched Italian administration has not often consider it appropriate.

[430] Mattarella, supra note 370, at pp. 49-50.

It is not as though the government is unaware of the administrative difficulties. The previously mentioned Bassanini Acts of 1997 also sought to remedy the administrative lethargy. In addition to delegating administrative powers to the Regions and Municipalities, Act No. 59/97 (Bassanini 1) sought to reduce the number of different administrative agencies to be involved in a given matter and simplify the process of "lawmaking by delegation" described above.[431] Act No. 127/97 (Bassanini 2) contained provisions to improve interaction between the citizenry and the administration, and reduce unnecessary paperwork. Implementation of the Bassanini laws has been predictably slow. For example, Act. No. 59/97 called for the simplification of 112 specific administrative processes; only 5 had been simplified in the 2 years following passage of the Act.[432] In one example of an attempt at simplification, an effort was made to streamline the EIA process and the project approval process in general (Act No. 447 of 20 October 1998). The goal of the law was to consolidate EIA and all other permitting procedures into one combined approval process. Of course, even laws aimed at streamlining must overcome Italy's implementation problems: the law was never carried out in practice and efforts to do so were ultimately abandoned.[433] As one author stated "it will take some time to understand the practical effect of these reforms on the Italian administrative system and bureaucracy, which has traditionally shown itself to be more reluctant than others to open itself to the challenges of the future."[434]

4. Corruption

[431] Musillo, supra note 402, at p. 368.
[432] Musillo, supra note 402, at p. 369.
[433] MoE Interview, supra note 352.
[434] Musillo, supra note 402, at p. 372.

Three major categories of explanation for Italy's difficulties implementing EU environmental directives have thus far been offered. To review briefly, the first had to do with the belatedness of Italy's efforts, the second with the political and legislative climate in Italy, and the third with the crippling administrative bureaucracy. There is one remaining category that must be discussed. Although this category does not lend itself well to conclusions that can be drawn about implementation in all Member States, it cannot be ignored because it undeniably and uniquely affects the operation of environmental law in Italy. This last category is corruption. Corruption can take many forms. The general population most often associates corruption in Italy with the Mafia. The Mafia does have a role to play in environmental problems, but the role of corruption needn't be restricted to the Mafia. There is also corruption that takes place at the political and administrative levels that impairs the proper functioning of the environmental law regime. Each of these forms of corruption will be discussed.

a. The Role of the Mafia

There still exist in Italy episodes of traditional "Mafia" activity which can plague environmental protection. The role of the traditional Mafia and of the "informal economy" remains significant. As recently as 1997, various studies placed the "shadow economy" at between 20% and 36% of GNP. An estimated 37% of the jobs are irregular in some form. Both of these indicators are even more pronounced in the south of Italy.[435] Earlier this year the European edition of Business Week ran a cover story on Italy's Eco-Mafia.[436] According to Business Week, there are over 4,000 illegal dumpsites in Italy,

[435] Serena Vicari, *Naples: Urban Regeneration and Exclusion in the Italian South*, 8(2) European Urban and Regional Studies 103 (2001), at 105.
[436] Gail Edmonson and Kate Carlisle, "Italy and the Eco-Mafia: How billions are made through dumping waste – with little public outcry," Business Week, European Edition, January 27, 2003.

mostly the result of organized crime groups winning bids to haul waste, and then dumping the waste untreated into farmlands and other areas. Amazingly, some of these same groups have apparently changed hats and later won state contracts for cleanup of the unauthorized sites. Obviously if the Mafia is dumping hazardous wastes in some unidentified field, then no EIA is performed, the EIA process fails, and the environment suffers. How can proper analysis of environmental impacts be done when, for example, organized crime controls up to 30% of the waste industry? Italy is not the only country in Europe that can point to cases of illegal dumping, but "[i]t's the direct control of organized crime that makes Italy different," according to an EU official at the European Environmental Bureau in Brussels.[437] The Mafia has a role in the political and administrative corruption described below.

b. Corruption in the Political Ranks

At the political level, the Italian government has long been plagued by corruption. In fact, several interviewees claimed that corruption in the political ranks, rather than "gangs and guns" mafia activity on the street, was the bigger threat to the environment.[438] Corruption in Italian politics came to a head in the early 1990s with the so-called *mani pulite* (clean hands) investigations.[439] The scandal uncovered a widespread system of patronage and clientelism. Large amounts of money had been exchanged for electoral votes or other political favors. Many of these episodes involved the bidding for large public infrastructure projects, some of which had negative environmental impacts and were pointless in economic terms (e.g. highways built in areas with hardly any traffic).[440]

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[437] See Ferrigno, supra note 361.
[438] MoE Interview, supra note 352; NGO Interview, supra note 438.
[439] See Lewanski (1998), supra note 351, at p. 148.
[440] See Lewanski (1998), supra note 351, at p. 148.

In some cases government money intended for environmental purposes was diverted to other uses or to organized crime.[441] In other cases, cash subsidies were distributed on the basis of personal and political relationships.[442] When asked how Italy differs from the rest of the EU, a Italian Green Party member of the EU Parliament recently stated "The difference is the involvement of the Mafia. The moment you have a criminal network involved, it's much more difficult to combat. They exert so much power on local and regional authorities. They obstruct the passing of legislation and the enforcement of law."[443]

Clearly the integrity and effectiveness of a system like EIA is jeopardized if approvals or other favorable outcomes can be bought from politicians with money or votes. The risk is especially acute in the south of Italy, where organized crime is still prevalent and where a large share of development is publicly funded due to the influx of aid from the EU and the Italian State.[444] Reforms have been made, but many still believe there is a problem. One member of an NGO related a story in her hometown. With no notice, an existing bridge that had been functioning perfectly well was torn down and construction started on a new one. The new bridge failed on its first day of use. The Italian military was called in to set up a temporary bridge, which remains functioning today. Later it was discovered that the company that constructed the failed bridge was a fronting company with ties to organized crime. On a much grander scale, there is

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[441] See A. Marchetti, supra note 419, at p. 299. Note that the situation could have been worse. It later came to light that then Minister of the Environment Ruffolo resisted pressures from his own socialist party to collect payoffs for the distribution of environmental projects under his watch. See Lewanski (1998), supra note 351, at p. 141.

[442] Vicari, supra note 435, at pp. 106-107.

[443] Business Week European Edition, interview with Monica Frassoni, supra note 338.

[444] See generally Vicari, supra note 435, for an interesting analysis of the effects of clientelism, political corruption, and organized crime on the democratic process, with particular regard to public development projects. The potential impact on a participatory process like EIA is worrisome.

widespread concern over the potential involvement of organized crime in the construction of a much bigger bridge, the proposed 2 mile span connecting Sicily to mainland Italy over the Straights of Messina.[445] The response to these concerns from the Minister of Transport and Infrastructure Pietro Lunardi is hardly reassuring ("You just have to learn to live with it. Let everyone resolve their own problems as they see fit. The mafia has always existed.").[446] If organized crime groups have ties to politicians and to important public projects, can the integrity of EIA procedures be ensured?

Again, it is difficult to know how widespread this problem is, but every person interviewed for this thesis agreed that corruption existed in the political ranks. One interviewee was aware of threats made to banks and developers, in this case to discourage the construction of a legitimate waste facility where the Mafia was already controlling the waste industry in the area.[447] Another person that suspected the Mafia was illegally dumping near his home had his own soil tests performed when he was unable to obtain information from the local administration. After being threatened, his home was shot at, and a few weeks later he was beaten and had to be hospitalized.[448] With risks like this still a reality, especially in the south of Italy, procedures like EIA that rely on public participation for their effectiveness no doubt suffer. Who is going to participate if there is a risk of being shot or beaten as a result?

c. Corruption in Administration and Enforcement of the Laws ent of the Laws

Unauthorized construction (so-called *abusivismo*) is another problem still prevalent in Italy today that causes the EIA process to suffer. The term *Abusivismo* refers

[445] See generally, Antonio Mazzeo, "Bridge over troubled water", at http://www.justresponse.net/bridge_over_troubled_water.html (July 21, 2002).
[446] Ibid. This quotation is paraphrased from an already paraphrased quote in the referenced article.
[447] Interview with Milan Attorney, supra note 311.
[448] See generally, Business Week, supra note 436.

generally to the unauthorized erection of buildings, intentional breaches of zoning laws and building codes, and unauthorized structural changes to existing buildings. This phenomenon is plainly observable in the south of Italy, where one readily finds examples of half-built structures or misplaced buildings that remain standing nonetheless.[449] *Abusivismo* ties together several of the problems mentioned above. Cultural characteristics that encourage disobedience of the law, economic exigencies that provide pressure to develop, a disinterested public that is more apt to turn its head, and ineffective and insufficient administrative controls, all combine to make *abusivismo* possible. Amazingly, the government has facilitated such acts through the program of *condoni edilizi* during the late 1980s. This system pardoned acts of *abusivismo* in return for payment of a kind of "tithe" to the government.[450] Wrong on numerous levels, this system also plays right into the hands of organized crime units or others who are willing to pay a small price for the money they can ultimately earn through development of a project. The OECD estimates that today some 15 to 20% of buildings are built without permits.[451] Needless to say *abusivismo* paralyzes the EIA process since it is impossible for the government to make a decision on environmental compatibility for a project that it doesn't know exists.

A more general cultural characteristic of Italy that is also found in America and other countries, but not to the same degree is the concept that "it's not what you know, but who you know." As enforcement is often carried out on a very localized level in Italy, there is room for variation and informal agreements. One book offering advice to developers in Italy stated "The importance of good personal contacts cannot be

[449] See Lewanski (1998), supra note 351.
[450] Clifford Chance, supra note 379, at p. 115. This entire *abusivismo* section is derived from this source.
[451] OECD Environmental Performance Reviews: Italy (2002), supra note 274, at p. 114.

overemphasized. The officials actually implementing the laws are crucial 'friends'."[452] A personal anecdote may explain this phenomenon best. This episode was recounted to the author by the owner of new Florentine restaurant. He was attempting to open his outdoor terrace for summer dining, and had taken all the necessary steps to satisfy health and safety codes. However, there remained one insignificant step which neighbors opposed to the terrace were seizing on to delay its opening. The owner of the restaurant was sharing his tribulations with a customer one night when the customer informed him that he had a good friend on the local health board. Apparently this customer enjoyed his meal that night (and perhaps enjoyed a discount). A few days later, the "friend" on the health board granted the necessary approvals and the terrace opened for dining.

Again, this is not to say that such acts of patronage and clientelism are unique to Italy. In America as in most places, it never hurts to have some "friends on the board." However, instances of quid-pro-quo seem particularly ubiquitous in Italian culture. And Italy is uniquely susceptible to such occurrences due to the decentralized, inefficient administrative structure described above. On one level the bureaucracy is too disorganized to prevent such occurrences, and on the other hand it is so disorganized that citizens are almost forced to rely on one another to navigate daily life, rather than await the normal administrative processes.

5. Conclusions on the Impediments to Implementation of EU Environmental Law in Italy

In the preceding sections, numerous explanations for Italy's difficulties in implementing EU law have been explored. It has been stated many times that it is impossible to point to any single source of the problem. Rather it is an accumulation and

[452] Sinisi, supra note 358, at p. It-21.

intermingling of all of the problems discussed above. Some of these problems are general nature and the lessons learned from them can inform implementation efforts in other Member States. Others like corruption and the ingrained cultural aspects of the administrative bureaucracy seem to be uniquely Italian implementation problems. Thus far in the discussion of all of the implementation problems, frequent reference has been made to Italy's experiences with the EIA Directive. The final two sections of this paper will explore these experiences in greater depth, first by looking at the legislative history of EIA in Italy, and then by looking at the current status of the EIA process, including some recent case studies of EIA enforcement.

E. The Legislative History of EIA in Italy

1. Introduction

It is generally acknowledged that Italy's implementation of the EIA directive is incomplete, owing to the transitional nature of the laws on which it is based, the inability of all Regions to pass necessary legislation, and the failure after 20 years to pass a single, consolidated, all-encompassing EIA law. The legislative history is complex. It provides a nice case study of some of the difficulties in the Italian legislative process described above. The discussion will be broken up into two parts – National EIA and Regional EIA. For ease of following, reference can be made to the accompanying chart of all Italian EIA Legislation.

2. Legislative History – National EIA

While several EU nations (Germany, England, France, and Ireland) already had well-developed EIA laws at the time the 1985 Directive was passed, others such as Italy, Spain and Greece did not. In Italy, EIA was more an abstract topic for legal theorists; the

closest the government had come to requiring anything resembling EIA was to order studies done for isolated projects or groups of projects.[453] Consequently, Italy was forced to introduce completely new EIA legislation in order to implement the Directive.[454]

As previously noted, Law No. 349 of 1986 established the Ministry of the Environment and set about the task of creating the institutional structures for environmental protection in Italy. Article 6(1) of Law No. 349 directed the Government to submit to Parliament within six months an outline as to how it was going to implement EU environmental directives.[455] The subsequent paragraphs of Article 6 set up an interim system "[w]hile awaiting the legislative implementation of Community directives on the environment."[456] The interim measures set up a "shortcut" procedure for EIA whereby the project proponent submitted to the Ministry of the Environment[457], the Ministry for Cultural Affairs, and the relevant Region, a "communication" identifying environmental effects of the project and any mitigation steps being taken to alleviate these effects.[458] Notice of the "communication" had to be published in "the most widely-read daily paper of the interested region and in a national paper,"[459] and the public could comment to Ministry of the Environment "in accordance with current laws."[460] The Ministry of the Environment would then "render an opinion on the potential environmental impact"[461] and could order suspension of the project if the project was "fundamentally jeopardizing

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[453] Mattarella, supra note 370.
[454] *Members Seen Using Different Criteria in Implementing Impact Assessment Directive*, 14 Int'l Envtl. Rep. 216 (Apr. 24 1991). [CAN'T find this on Westlaw!]
[455] Law No. 349 of 8 July 1986, Art. 6(1).
[456] Id., at Art 6(2).
[457] Responsibility for administration of the EIA procedure was placed in the hands of a specific General Directorate established within the Ministry of the Environment. EIA Newsletter 10, Environmental Assessment Within the European Union, Environmental Assessment in Italy, http://www.art.man.ac.uk/EIA/nl10euit.htm.
[458] Law No. 349, at Art 6(3).
[459] Id.
[460] Id., at Art. 6(9).
[461] Id., at Art. 6(4).

ecological and environmental needs."[462] The process bore some resemblance to a typical EIA statute, but was very thin on the details. More importantly, it was another 2 years before President of the Council of Ministers identified those projects to which it would apply.[463]

Decree No. 377 of 1988 listed those projects to which the interim EIA procedures were to apply.[464] The list essentially coincided with the large-scale projects listed in Annex 1 of the EIA Directive, for which EIA is mandatory under the Directive. Art 1(4) of Decree 377 threatened the scope of its application by allowing Ministry of the Environment, the Ministry of Cultural and Environmental Property, and the interested Region to jointly decide "the cases to be excluded from said procedure."[465] Article 2(3) basically restated the interim EIA procedures created in Law No. 349 two year earlier, though with slightly more detail. So called "supplementary technical norms" (comprehensive EIA regulations regarding exactly what was to be included in the EIA) were to be issued "within 90 days of the publication" of the 1988 decree.[466]

Amazingly (by Italian standards), these technical EIA requirements were submitted not within 90 days, but a nonetheless respectable 140 days later. The Prime Minister's Decree of 27 December 1988 aimed to clarify "the contents of the studies of environmental impact and their arrangement, the relevant documentation, the activity of judicial inquiry and the criteria for the formulation of the judgment of compatibility."[467] Basically, it sought to explain what had to be in the environmental impact report, how it

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[462] Id., at Art. 6(6).
[463] Decree No. 377 of 10 August 1988. by the President of the Council of Ministers.
[464] Id., at Art. 1(1).
[465] Id., Para. 4.
[466] Id., at Art. 3.
[467] Prime Minister's Decree of 27 December 1988, at Art. 1(1)(a).

was to be arranged, and the process to be used for determining "environmental compatibility."[468] As to the latter, it provided factors that the Ministry of the Environment was to consider in determining whether a "judgment of environmental compatibility" was to be issued, and also required the body to issue an opinion as to why it came to its decision.[469]

All things considered, the Decree of 27 December 1988, when combined with Decree 377 of the same year, provided a fairly complete framework of how EIA was to be performed. From May 1990 to August 1992, the Italian government significantly cluttered the situation by passing at least eleven acts (laws, decrees, etc.) bringing individual categories of projects within the scope of National EIA, and providing special EIA procedures for these categories of projects (e.g. hydroelectricity, geothermal works, hazardous waste facilities, deep sea oil exploration, etc.).[470] However, no major amendments were made to the general EIA process until Decree of the President of the Republic of 11 February 1998 and Decree No. 348 of the President of the Republic on 2 September 1999. These Decrees essentially modified the technical requirements of EIA for specific projects and added some additional projects to those already subject to the two 1988 Decrees, in compliance with the amendments introduced by the 1997 Directive.[471] The two 1988 degrees were originally intended as temporary legislation pending a comprehensive EIA law. However, as no comprehensive EIA law has ever

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[468] Id., at Art. 1(2).
[469] Id., at Art 6(2).
[470] Status of EIA in Italy, http://www.art.man.ac.uk/EIA/If5.htm.
[471] See generally, Decree of the President of the Republic No. 348 of 2 September 1999, "Regulation setting forth technical standards concerning environmental impact studies for certain categories of projects."

been passed,[472] the two 1988 Decrees, as amended, along with the discipline-specific laws, have continued to serve as the basis for EIA in Italy.

It is important to place the state of EIA in context. The EIA procedures described are only applied to very large projects such as highways, large chemical plants, dams, etc. that are listed in Decree No. 377 of 1988. Most of these projects require the administrative approval of a national agency or are otherwise "national" in size and scope. For this reason, the procedures are referred to as the "National EIA" procedures. The 1988 Decrees indicate nothing with regard to all other projects (roughly equating to those in Annex II of the Directive), most of which are likely to be handled on a regional or local basis.[473] It is worth restating that Law No. 349 of 1986 had called for *comprehensive* EIA legislation to be submitted to Parliament within six months. Over the past 15 years, numerous laws have been proposed but none have made it past the first house of Congress; currently no organic EIA law is in place.

3. Legislative History – Regional EIA

To reiterate, the EIA legislation described above applied to projects that corresponded roughly to the projects listed in Annex I of the EU EIA Directive. There was no framework in place for Annex II projects. As a result the Commission opened infraction proceedings against Italy in 1992 and addressed a reasoned opinion to Italy in July 1993 for its failure to properly transpose Annex II of the Directive.[474] It was not until 1994 that the Italian government began taking steps towards establishing EIA at the

[472] Numerous legislative alternatives have been introduced in the Parliament. They range from the simple (consolidating the existing laws into a single law) to the complex (creating a single law that encompasses the 1985 Directive, all amendments, plus provisions for plans and programs and the Regional EIA process).
[473] The projects of Decree 377 were mainly the Annex I projects from the EU Directive, for which EIA was mandatory. The remaining projects corresponded basically to those in Annex II of the EU Directive, for which the Member States were required to establish criteria as to which projects EIA would apply.
[474] Ercmann, supra note 273, p. 543 at footnote 10.

regional level. Law No. 146 of 1994 (the first *La Pergola* law) initiated the process, commanding the President of the Republic to issue decrees implementing EU environmental directives ranging from waste management to asbestos to EIA. Article 40 of this law specifically required a decree setting forth the requirements for Regional EIA.[475] This decree came in the form of the *atto di indirizzo e coordinamento* (act of law and coordination), created by Presidential Decree of 12 April 1996. Recall from the discussion of the EIA Directive that in order to completely implement the Directive, the Italian government had to either (1) make a list of Annex II projects to which EIA would apply, or (2) establish criteria for when EIA would apply to projects falling into Annex II categories.[476] In addition, the government had to establish what EIA procedures would apply to such projects, or at least delegate to the regions the responsibility for doing so. The 1996 Decree required that the Regions perform EIAs for the projects listed in Annex A and B of the Decree. From a schematic standpoint the Decree followed the model of the Directive by making EIA mandatory for certain of the Annex II projects as listed in Annex A, and requiring the Regions to establish criteria for the remainder of the Annex II projects listed in Annex B.[477] The Regional EIA laws were to require the detailed EIA procedures required by the Decree. There were also measures addressing public participation and how EIAs were to be used in the decision to grant development consent. The State had done its job in delegating responsibility to the Regions, but it was still up to the Regions to pass *legge regionale* (Regional Laws) implementing the 1996 Decree.

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[475] Law No. 146 of 22 February 1994, "Setting forth provisions for the fulfillment of obligations stemming from Italy's membership in the European Community." See Article 40 particularly "Concerning arrangements for environmental impact assessment."
[476] See 1997 Directive, Art. [GET ARTICLE CITE HERE]
[477] Thus the Annex II projects from the Directive were further divided into 2 groups. Italy used both of the options available to it under Article 4 of the Directive: lists projects, and establishing criteria.

The delegation of EIA responsibilities to the Regions in 1996 was consistent with a more general trend in Italy in the late 1990s to delegate certain administrative functions, including environmental protection, to the Regions.[478] To this end, Law No. 59 was passed in 1997, authorizing the National Government "to grant functions and tasks to the regions and local agencies, towards reforming public authorities and towards bureaucratic simplification."[479] Legislative Decree No. 112 of 31 March 1998 (known as *Legge Bassanini)* took on the project of transferring environmental responsibilities from the State to the Regions as required by Law No. 59.[480] Articles 34 and 35 of Decree No. 112 delegated to the Regions additional powers in matters of EIA, and specifically transferred certain additional categories of projects from the domain of National EIA to the Regions.[481] As such, the delegation to the Regions in 1996 of the responsibility for drafting detailed EIA implementing legislation was quite consistent with the trend towards decentralization of Italian administrative law in the late 1990s.

However, the Presidential Decree of 12 April 1996 only provided a framework for Regional EIA procedures. It was up to the Regions themselves to enact detailed EIA laws, including the establishment of a "VIA Authority" that would be responsible for issuing the final determination of environmental compatibility for projects subject to VIA.[482] The response of the Regions has been variable. Tired of waiting for the national government to act, nine of the more forward-thinking regions had already introduced EIA

[478] See Section [V(C)(2)] above regarding the historical struggle for power between the Regions and the State.
[479] Law No. 59 of 15 March 1997, at Art. 8.
[480] Unfortunately, one interview subject believed that Decree 112 "had done nothing for the simplification of environmental law." MoE Interview.
[481] Legislative Decree No. 112 of 31 March 1998, at Arts. 34, 35, and 71.
[482] Presidential Decree of 12 April 1996. The Regions were responsible for creating implementing laws within 9 months of its issuance (or adapting existing EIA laws).

laws prior to the 1996 State Decree.[483] These pre-existing laws ranged on the low end from those requiring EIA for a few discrete projects, to those at the high end that even set up SEA procedures for plans and programs.[484] Only the Veneto region had established a comprehensive EIA law that met the standards envisioned by the Directive. The other 8 Regions with existing laws would have to amend them, while the remaining 11 Regions would have to start from scratch.

Weary of the insufficiency or absence of EIA laws in many Regions, the Commission issued a second Reasoned Opinion in 1997, which was supplemented by another Reasoned Opinion on 29 September 1998, asking Italy to "take the necessary measures for placing certain projects listed in Annex II of the [EU EIA] Directive under environmental impact assessment"[485] as "the [1996 Decree] is not self-executing and requires a norm of actualization on the part of the Regions."[486] The Commission was also concerned that "some of the projects in Annex II are not addressed" in the 1996 Decree of delegation to the Regions.[487] The Decree of Council of Ministers on 3 September 1999 sought to alleviate the Commission's concerns by amending and augmenting the list of projects subject to Regional VIA. The Commission dropped its proceedings against Italy when these measures were notified to them (along with the most up-to-date Regional Laws), although the Commission indicated it would be "studying the information provided by Italy in 1999."[488] At this point the State had pretty well exhausted the legislative opportunities available to it; it fell to the remaining

[483] Five of the nine regions with pre-existing EIA laws were the autonomous regions, which are generally more inclined to act on their own that wait for the government machinery to turn its wheels.
[484] Mattarella, supra note 370, at p. 12; EIA Newsletter 13 (1996), Recent EIA Developments Within the European Union, Environmental Assessment in Italy, http://art.man.ac.uk/EIA/nl13ita.htm.
[485] Decree of the President of the Council of Ministers of 3 September 1999, in the Preamble.
[486] See Alberta Milone, supra note 408, at p. 180 for an overview of the Commission actions against Italy.
[487] Ibid., as translated by author.
[488] 17th Annual Report on Monitoring the Application of Community Law (1999), Environment Chapter.

recalcitrant Regions to enact the necessary implementing laws. By 2000, most regions had put in place at least some type of EIA law.

Still, a fourth Reasoned Opinion was issued to Italy in 2000. This time the dispute centered on 5 Regions (Emilia-Romagna, Friuli Venezia Giulia, Piemonte, Veneto, and Tuscany) which had excluded the necessity for EIA in cases where the request for development consent had been made before the Regional Law took effect, or in some cases where development consent had already been granted before the Regional law took effect[489]. This must have felt like EIA 101 for the Commission, as it recalled the early ECJ EIA caselaw requiring Member States to apply the Directive to all projects for which development consent was requested after the July 3, 1988 deadline for transposition, with no allowance for transitional periods. The Regions subsequently made the necessary modifications to their legislation, and the Commission dropped its proceedings in 2001.[490]

There remain today deficiencies in regional implementation. It is true that each of the 20 Regions has some law governing EIA. However 4 Regions (Calabria[491], Campania, Marche, and Sicilia) have only implemented the law via *Delibere della Giunta Regionale* (DGR). DGRs are not true *Legge Regionale* (which have the force of law). Instead, DGRs are a kind of circular. In most cases, they simply state that the EU EIA Directives exist, as well as the 1996 Delegating Decree from the State, and that these laws will be enforced within the Region. No actual transposition of the law ever takes place, and DGRs can be freely derogated from by the government. Two other Regions

[489] See Alberta Milone, supra note 408, at pp. 180-181.
[490] Third Annual Survey, supra note 215, EIA chapter.
[491] Calabria present a very strange case since on 16 Aprli 2002, it passed Act. No. 19 requiring EIA for plans and programs! Thus, it has no EIA law for the Directive that passed in 1985, but has a law implementing the Directive whose deadline doesn't arrive until 2004.

(Lazio and Sardegna) have in place only a *Legge Finanziaria* as opposed to a *Legge Regionale*. A *Legge Finanziara* is analogous to a DGR in that it basically announces that the Community Directives and relevant State EIA laws will be enforced in the Region. A *Legge Finanzaria* also does not have force of law. [confirm exact nature of LF] Each of the 6 Regions is currently considering an official *Legge Regionale*, but until they manage to pass the laws, Italy has technically failed to fully transpose the Directives.[492] It should be noted that at least 2 interview subjects held the belief that the Directives were de Facto enforced in these Regions, mainly due to the citizenry's recourse to the Administrative Courts, which has basically forced the Regional Governments into action.[493] This comports with the prior discussion on the treatment of EU law in Italian Administrative Courts, where it was concluded that the courts have been very keen to apply EU law in the absence of full transposition on the part of the Italian government. The next section will examine in greater detail the situation with enforcement of the Directive in practice.

Above all, one should not lose sight of the fact that Law No. 349 of 1986 called for a *comprehensive* EIA statute to be presented for approval by Parliament within six months. Such a law has been entertained by Parliament over the years, but nothing has been passed to date. Italian practitioners must instead deal with a daunting body of over 40 different laws, decrees and circulars relating to EIA in Italy, not to mention the numerous Regional and local laws![494] This state of affairs clearly puts a strain on the goal of meeting the EU policy objectives contained in the EIA Directive.

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[492] The information on the status of Regional Laws was obtained from the internal materials of the Centro VIA, a non-profit organization in Milan that serves as a professional association for EIA practitioners in Italy. It holds conferences, distributes an annual newsletter, and generally serves as a focal point for lawyers, engineers, politicians, etc. who use EIA in their professions. I also interviewed an official there who wishes to remain anonymous [herein, Centro VIA Interview].

[493] MoE Interview, supra note 352. Centro VIA Interview.

[494] See attached table on Italian EIA Legislation.

VI. Recent Developments for EIA in Italy

The discussion to this point has been intended to lead one to the conclusion that Italy does not have the institutional capacity to implement EU environmental laws like the EIA Directive, thus showing that the policy goals of the EU can be thwarted depending on the situation in an actual Member State. While examples of EIA practice in Italy have been cited along the way, the analysis so far has primarily been at a theoretical or foundational level. The next and final section will move beyond the theoretical and look at the current state of affairs with respect to EIA in Italy.

A. The Status of Implementation

1. Legislative Implementation

It is clear from the discussion above that Italy has not adequately transposed the Directive. National EIA is taken care of by the two 1988 Decrees and the amendments thereafter. The Regions were delegated responsibility for implementing the Directive with regard to Annex II projects. As shown above, they struggled to complete this task, drawing the ire of the Commission in the form of Reasoned Opinions in 1993, 1997, 1998 and 2000. But what is the status of things now? Italy remains in non-compliance due to the fact that 6 Regions still have not passed EIA legislation that has the force of law. The *Giunta Libere* and *Legge Finanziare* in these Regions are most comparable to a circular or temporary law. The ECJ has repeatedly held that such circulars, which are subject to amendment at will by the national administration, do not meet the requirement of legal certainty for implementation of Directives.[495] Italy would seem to be a candidate for Commission proceeding similar to the one resulting in an ECJ judgment against Spain

[495] For an example of such a case involving Italy in an environmental matter, see *Commission v. Italy*, C-95/92, ECR I-3119 (1993).

in 2002. I asked the Director of EIA at the MoE why the Commission was not pursuing an action against Italy, and she responded "gli basta" (it's enough for them).[496] The Commission knows that Italy is technically in violation, but they are satisfied that these Regions are carrying out the EIA process in practice. Given the numerous challenges Italy is facing in implementing environmental Directives (much of the recent attention has focused on the waste problem), the Commission has chosen not fight this battle, at least for now.

Still, the possibility of enforcement actions in the future is possible. The deadline for the 1997 Amendments came and went in 1999. One upside of the fact that most Regions had no EIA law as of 1997 was that when they finally did get around to passing legislation, they passed laws that would comply with the updated Directive. Many regions even included provisions for plans and programs as articulated in the 2001 SEA Directive, which had already been under consideration by the Community at the time the Regional laws were being passed in the late 1990s.

The real challenge for Italy may be the implementation of the 2003 Amendments with respect to public participation and access to justice. Access to justice doesn't appear to be a problem; Italy's Administrative Courts have been very receptive to EIA challenges and to the application of the EIA Directives even in the case of missing or deficient Italian legislation. However, Italy still has no procedure in place for a public hearing during the EIA process (with the singular exception of geothermal plants). According to one lawyer, public participation in Italy at this point essentially amounts to publishing an announcement in a national newspaper that an EIA has been performed,

[496] MoE Interview, supra note 352.

indicating where the EIA can be viewed.[497] The 2003 Directive, however, requires that the public be informed "early in the environmental decision-making procedures . . . and at the latest as soon as information can be reasonably provided."[498] The public must be informed of the request for development consent, the fact that the project will be subject to an EIA, of any currently available information, and from whom/where to get this information. The EU is all but requiring a kind of public hearing, something foreign to the current Italian administrative system. Clearly the current Italian practice of publication in a national newspaper after the EIA has already been completed, but before a decision is made, will not be sufficient. Moreover, per the new version of Article 9 of the Directive, the Italian administration will have to be responsive to public comments when it issues its decision on environmental compatibility; it will not suffice to simply give the reasons the decision was reached. The changes required to satisfy the 2003 Amendments are not simple. It's not a matter of applying EIA law to a few new projects, and making a few cosmetic changes, as after the 1997 Amendments. The 2003 Amendments will require Italy to fundamentally change its administrative procedures. As much as it has preferred to keep these procedures behind closed doors, Italy may soon be forced to further open its EIA process to the public.

2. Enforcement on the Ground

Despite concerns raised above about the 2003 Amendments and the continuing absence of formal *Legge Regionale* in some Regions, a sufficient legal framework for EIA seems to be in place in Italy, at least until the 2003 Amendments come due. There

[497] Interview with Milan Attorney, supra note 311. See La Repubblica, August 6, 2003, for an example of such publication in the national newspaper. The effectiveness is lessened by the fact that the EIA has already been performed. To get the full benefit of the EIA, the public should be able to participate during the EIA's formation, to help guide the process.
[498] 2003 Directive, Art. 3(4).

remains the issue of effective administration of the laws, and all of the problems analyzed above that seem to impede successful implementation. It is difficult to accurately identify "negative occurrences" like the failure to conduct an EIA or the failure to do so properly. They only become apparent when a legal challenge is raised. There is little in the way of statistics on the number of EIA legal claims made annually in Italy, or even the number of EIAs performed (owing in part to the division of EIA competences between the State and the Regions). Commission figures claimed Italy had conducted on average 39 EIAs/year until 1999 (contrast with estimates for Sweden, Greece, Germany and France ranging from 1,000 to 7,000/year).[499] Italy failed to provide the Commission with data after 1999.

One way to estimate how well Italy is complying is by looking at the EU proceedings. While the EU has declined to pursue a global EIA proceeding against Italy, it has not stopped actions on individual projects. A simple "google" search on "Italy and 'Environmental Impact Assessment'" turned up 5 different projects since August of 2001 for which the Commission had initiated proceedings against Italy under the EIA Directive.[500] The Commission's own information reveals at least one other. A Reasoned Opinion was sent in 2000 for the failure to conduct an adequate EIA on a landfill in Spoltare.[501] In the summer of 2001 Italy received a letter of formal notice for the failure

[499] Report from the Commission to the European Parliament and the Council on the Application and Effectiveness of the EIA Directive, 2001. The report cautions the reader to be careful drawing comparisons with these numbers since they reflect reporting from the Member States themselves. Still, the incredibly large difference between Italy and the other Member States is telling, especially given that Italy has one of the largest populations in the EU.

[500] Ibid. The Commission's own materials indicate that a 6th Reasoned Opinion was issued in 2000, though no detailed information could be found for that violation. The same report also indicates that Italy was the Member State subject to the most "own initiative" EIA cases opened in 2000-2001 (25 Cases).

[501] Third Annual Survey on the Implementation and Enforcement of Community Law (2001), supra note 215.

of the Region of Abruzzo to carry out an EIA on a road-building project in Teramo.[502] In March of 2002, the Commission referred the case to the Court of Justice.[503] In August 2002, Italy received second written warnings for failure to perform EIAs on a yacht marina and a waste facility.[504] In December of 2002, Italy received two new formal notice letters.[505] The first involved an inadequate EIA performed on a project to permanently channel water between two lakes. The second involved the failure to carry out an EIA for a 4-lane road the Treviso Region. The fact that an informal search turned up 6 Commission proceedings initiated against Italy for EIA violations in a 2 year period indicates there are still problems of enforcement on the ground.

Another way to measure the effectiveness of the EIA process on the ground is by looking at case studies of the EIA process. In 2000 a case study called "The Effectiveness of Provisions and Quality of Practices Concerning Public Participation in EIA in Italy" was published.[506] The study drew conclusions about EIA in Italy in general, as well as detailed analysis of two EIA procedures (a regasification terminal in Monfalcone and a Fiat industrial waste facility in Verrone). The huge difference in the EIA experiences with the two projects (positive in Verrone and negative in Monfalcone) is representative of the problem of wide variance in EIA procedures across jurisdictions. Some of the general conclusions of the case-study were that (1) the only face to face discussion allowed for in the regional EIA law is between the developer and public. The government decision-making body receives only a summary of these interactions, if they

[502] Crystal Palace Campaign, http://www.crystal.dircon.co.uk/prelease_r63.htm, August 1, 2001.
[503] Press Release from the European Commission DG XI, Environment, Nuclear Safety and Civil Protection, Waterunc.com, http://www.waterunc.com/gb/dg11en61a_2002.htm, March 14, 2002.
[504] Edie.net, http://www.edie.net/news/Archive/5762.cfm, July 19, 2002.
[505] Press Release from the European Commission DG XI, Environment, Nuclear Safety and Civil Protection, Commission Press Room, http://europa.eu.int/rapid/start/cgi/guesten .
[506] Luca Del Furia and Jane Wallace-Jones, Environmental Impact Assessment Review, Volume 20, Issue 4, pp. 457-479 (August 2000).

take place at all; (2) even written comments must be scientific or technical in nature, thereby narrowing the range of actors able to participate; (3) there is no possibility for public comment until after the EIA is published, rendering the public unable to suggest issues for study prior to when analyses are performed; (4) the procedures suffer from many administrative shortcomings such as the existence of numerous administrative bodies with undefined and unbounded competences, overlapping regulations, a general lack of transparency, lack of technical competence on the part of administrators, perceived ties between government and developers, public apathy and belief that they are unable to influence the process, lack of focus on social issues, and difficulties for private persons to access documents. In sum, the study's conclusions on Italian EIA point to nearly all of the problems of Italian environmental law outlined in this thesis. Referring to the two specific case studies above, the authors concluded "the passive approach with [respect] to legal obligations as seen in Verrone has been the more prevalent one to date . . . On the contrary, the proactive approach taken in Monfalcone seems to have promisingly set a precedent in Italy . . . the "metodo Monfalcone" has taken on an identity of its own.[507] In other words, the heart and soul of EIA (active public participation to shape analysis and bring positive change to projects), has been the exception rather than the rule. On the bright side, the experience at Monfalcone represents something to build upon, as both the developer and the public learned that there are benefits to early and active public participation.

A Milan lawyer related another EIA case that once again involved the European Commission. In the early 1990s, the Italian government declared a state of emergency

[507] According to the authors, after the positive interchange between the public and Fiat at Monfalcone, conferences about public participation in EIA were held in Italy to highlight to practitioners some of the benefits of a proactive approach.

for waste. They decided that they needed to rapidly construct several new waste sites, and specifically, waste-to-energy facilities. The new facilities were to be funded in part by the European Investment Bank ("EIB"). The Italian government set up a special commission to oversee the EIA process for these facilities. This commission was to streamline the EIA process do to the alleged urgent need for new facilities. At the direction of the EIB, the Commission got involved. Among their complaints at a specific waste-to-energy facility in the Campania Region was the failure to perform an adequate analysis of alternatives, the inadequacies of public participation, and the general vagueness of the EIA as to environmental impacts. Italy's defense was Article 2(3) of the EIA Directive, heretofore not mentioned in this analysis. Article 2(3) allows a Member State in exceptional cases to exempt a project from the EIA Directive. Before doing so, the Member State must consider if some other form of assessment is appropriate, inform the public of the exemption, and inform the Commission and Member States of the justifications for the exemption.[508] Of course, Italy had done none of these things.

In October 2001 the Commission sent a letter to the Italian government giving it 2 months to make observations on the Commission's allegation the EIA Directive had been violated.[509] The Commission's letter noted that the waste project was covered by the Directive and that the simplified procedure employed by Italian authorities did not satisfy EIA requirements. On a more fundamental level, the Commission noted that Article I(8) of the 1996 *Act of Indirizzo* (Regional VIA Law) permitted the exemption of entire classes of projects when the Italian government declared "state of emergency to protect citizens from an imminent danger or natural calamity", a kind of blanket exemption not

[508] 1985 Directive, supra note 19, at Art. 2(3).
[509] Letter from Margot Wallstrom, European Commission, to Renato Ruggiero, Italian Minister of Foreign affairs, on October 23, 2001.

envisioned under any of the EIA Directive's 3 possible exceptions.[510] Article 2(3) of the Directive allows for such exemptions on a project by project basis, but only after specific procedures are followed, including notice to the Commission and Member States.[511] After some wrangling, the Commission and Italy reached a settlement allowing Italy to go forward with the waste project. According to the Milan lawyer, Italy convinced the Commission that at the most basic level, the Directive had been satisfied since there had been publication of the project in a local paper and the public had been given some (albeit minimal) opportunity to participate. On a more practical level, the Commission realized that a new waste-to-energy facility was probably better than the alternative of unmonitored Mafia disposal that has plagued the Campania Region, even it was to be realized at the expense of EIA formalities. Nonetheless the Commission's notice letter stated that Italy's "Emergency Exception" in the Regional VIA law was in violation of the EIA Directive, leaving open the possibility of future infringement proceedings should the Commission decide to revisit the issue.

While the above is but a sampling of enforcement cases against Italy, it shows that the Commission is staying on top of Italy, both for failed application of the Directive in specific instances, and for overall incompatibility of Italian laws with EIA requirements.

B. *Legge Obiettivo*: Moving Backwards

1. What is the *Legge Obiettivo*?

The most recent development in Italian EIA practice is perhaps the most troubling. On December 21, 2001, the government passed Act No. 443, commonly

[510] Art I (4, 5), national defense and legislative exceptions, Art II (3), exemption for a specific project after notice to Commission and other Member States.
[511] EIA Directive 2(3).

referred to as the *Legge Obiettivo*. The law facilitates one the key elements of the Berlusconi government's plan for economic growth: the construction of 19 "super-projects" and well over 100 other large-scale infrastructure projects (so-called *Grandi Opere*).[512] The law delegated to the Government the responsibility to issue decrees to identify the projects subject to the *Legge Obiettivo*, and to streamline the EIA process for the *Grandi Opere*. In a coincidence that begs the question of collusion, the Government, via the Comitato Interministeriale per il Programma Economico (CIPE) [Inter-ministerial Committee for the Economic Program], issued a decree with the list of 129 *Grandi Opere* on the same day the delegation law was issued.[513] The projects aren't limited to infrastructure, but also include plants deemed to be of "strategic importance", especially in southern Italy. The simplification of EIA procedures for these 129 projects was detailed in Decree 190 of 20 August 2002. There are at least 3 disturbing elements of this law.

First, it will permit the EIA for these projects to be performed when the project is only in the *preliminario* stage. In Italy, there are three defined stages of a project. The first is the *Progetto di Massimo*. At this stage, the project is basically an idea, a 3 or 4 page summary of a proposed development. The second stage is the *Progetto Preliminario*, where the project more well-defined and there are some details about where, when and how it will be realized. The final stage is the *Progetto Definitivo*, where specific details as to the nature, scope and location of the project are known. At this stage, the developer is ready to commence the project. Normally, the EIA is performed at this third stage. This is logical since it is only then that the environmental

[512] Some critics say Berlusconi is not just interested in economic growth, but rather wants to ensure his legacy by having his name attached to projects like Bridge over the Straights of Messina.
[513] Decree 121, 21 December 2001, in actualization of Article 1 of the *Legge Obiettivo*.

impacts can be accurately assessed. Instead, the *Legge Obietivo* directs the EIA to be performed when the project is still a *Progetto Preliminario*. If approval is granted at that point, who is to say the final project won't look different from the preliminary one? Who is to say that environmental conditions in/around the project, or the information pertaining to them, won't change prior to commencement of the project?

The second disturbing element of the *Legge Obiettivo* is that it calls for the entire EIA process, including public participation, to be completed in 180 days. Typically the EIA process for projects of this scale takes at least two years.[514] Under the streamlined process, 90 days are allotted to complete the EIA, 60 days are allotted for public participation, and the CIPE makes a decision on environmental compatibility 30 days later.[515] Are 90 days really enough to prepare an assessment of a project that would be the longest suspension bridge in the world, for example? Are 60 days long enough for all of the interested public to comment on the impacts of a project? Furthermore, the law asks that public participation be limited to "highly qualified executive subjects", and such direct interventions are to be limited "to the minimum necessary to safeguard the quality of the product."[516] Public participation continues to be restricted to the period after publication of the EIA. Even if participation is inappropriately limited in time and scope in this fashion, is 30 days a sufficient period for CIPE to adequately process and respond to public comment before issuing its decision on compatibility? These provisions are fundamentally at odds with the whole concept of EIA, especially in light of the strengthened public participation measures called for in the 2003 Amendments.

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[514] Interview with Milan Attorney, supra note 311.
[515] Internal Documents of Centro Via, supra note 492, and Decree 190 of 20 August 2002.
[516] Decree 190 of 20 August 2002.

The third disturbing element of the *Legge Obiettivo* is the dramatic shifting of responsibilities between the ministries. Under the normal EIA procedure for national projects, the Ministry of the Environment has responsibility for overseeing the EIA report and it issues the final decision on environmental compatibility, taking into consideration the comments from the public, the EIA Commission, and the involved Region(s). Under the streamlined process, the Ministry of Infrastructure and Transport has the leadership role in the preparation of the EIA. The decision on environmental compatibility will be made by CIPE (Commitato Interministeriale per il Programma Economico). This is essentially the group charged with overseeing the Government's economic growth program. They will not receive advice from the normal EIA Commission (a team composed of civil servants), but instead will be "assisted" by a committee of experts handpicked by the Government from a larger list. The role of the MoE and the Regions is limited solely to giving their opinion.[517] It is near impossible to envision a satisfactory decision on environmental compatibility when this much institutional bias is built into the process.

The potential impact of this law is frightening because it reduces the role of EIA for the very projects likely to have the most environmental impacts. The projects subject to this thinned-down procedure are the biggest ones, projects like the bridge from Calabria to Sicily over the Straights of Messina. If a full-scale EIA is performed on no other projects, it should at least be performed on these projects! Still more frightening is a provision tucked into the end of the 2002 Decree which takes back from the Regions the decision on environmental compatibility for certain infrastructure projects and places

[517] See chapter in Alberta Milone and Carmela Bilizone, La Valutazione di Impatto Ambientale, Casa Editrice (Pienza 2003).

it in the hands of CIPE. The Regions and the MoE are only offered the chance to issue an opinion.[518] Moreover, sitting EU President Berlusconi has placed large infrastructure projects at the center of his plan for EU economic growth, to the chagrin of European environmental groups concerned that Berlusconi will "export the Italian model of development" to the rest of Europe.[519] One can only wonder if Berlusconi will attempt to extend the simplified EIA process to the 18 superprojects envisioned for the EU.

2. Responses to the law

Even financial entities have had a cautious response to the *Legge Obiettivo*. A 2003 Standard & Poors report on infrastructure projects in Italy noted that the relaxed approval process was making Italy a more attractive investment market for project financiers. However, the same report noted that the "legislative framework could benefit from further amendment" and that "there is broad scope for environmental objections" to infrastructure projects.[520] It is for this reason that of the more than 100 projects listed in the *Legge Obiettivo*, "only 12 projects have attracted [private] investor interest to date."[521]

The Regions also responded. The Marche, Tuscany and Umbria Regions and the Autonomous Province of Trento made recourse to the Constitutional Court to protest the incompatibility of the 2002 Decree with the newly reformulated Article 117 of the Constitution. Recall that the amended constitution attributes powers to the Regions

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[518] Decree 190/02, at Art. 17. See also, Alberta Milone, supra note [ ], discussing the ramifications of this provision.
[519] See generally, "Decollano le grandi opera Ue", in La Repubblica, July 16, 2003, at p. 16. For an excerpt of the impassioned address environmental groups made to the Berlusconi government on the eve of its assumption of the EU presidency, see "Gli ambientalisti italiani ed europei pongono il 'caso italia' e chiedono al Presidente Berlusconi garanzie sul rispetto per l'ambiente," Greenpeace Italia website, http://www.greenpeace.it (July 2003).
[520] "Italian Highway Concessions: All Eyes on Milan", Standard & Poor's Report (2003) [Internet Source].
[521] Ibid.

unless specifically enumerated to the State in the same article. In particular, public works are not attributed either exclusively or concurrently to the State. The Regions and some experts believe that the new law directly violates this provision by taking from the Regions the decision on environmental compatibility for certain regional infrastructure projects.[522] The outcome of this suit is not yet known.

Predictably, the *Legge Obiettivo* has drawn opposition from environmental groups. In April 2002, a joint-statement of opposition was signed by 9 Italian environmental groups.[523] It was an appeal to the Minister of the Environment not to sacrifice EIA in the legislative decree to be issued pursuant to the *Legge Obiettivo*. Its salient points were 1) that the implementing decree strips the power to decide environmental compatibility from the MoE and puts it in the hands of CIPE; 2) that the EIA is performed when the project is in the *preliminario* stage rather than when it is *definitivo*; 3) that only 60 days are allowed for comment; 4) that the law strips important planning functions from the cities in direct conflict with the Constitutional separation of powers between the State and the localities; and 5) that the law affects the 250 biggest and most important projects to be realized in the near future. In other words, the NGOs raised many of the same concerns outlined above. Furthermore, the joint statement specifically identified two potential violations of the EU EIA Directive: 1) the *Legge Obiettivo* exempts all major infrastructure projects from the full EIA process, whereas Article 2 of the Directive only allows projects to be exempted in exceptional

[522] See Milone, supra note 408, for a discussion of this case and for a general discussion of the compatibility of the *Legge Obiettivo* with Article 117.

[523] "Appello al Ministero per l'Ambiente ed al Ministero per i beni e le Attivita' Culturali per salvare la valutazione di impatto ambientale" (Rome April 10, 2002), co-signed by Italian environmental organizations Promosso di Verdi, WWF-Italia, Legambiente, Italia Nostra, Comitato per la bellezza, Istituto Nazionale di Urbanistica, Greenpeace, Marevivo, Cipra.

circumstances and on a case-by-case basis; and 2) even if a project were to validly exempted, under Article 2 of the Directive, the exemption would have to be notified to both the Commission and the public, neither of which took place under the *Legge Obiettivo*. Despite the objections raised by Italian environmental groups, the implementing decree (190/2002) as issued did not respond to their concerns.

The environmental groups made a strong argument that the *Legge Obiettivo* is in violation of the EIA Directive. Nonetheless there is some confusion among officials at the Italian MoE as to whether the Commission has initiated action against Italy. One employee at MoE was of the belief that the Commission was in the process of addressing a formal letter to Italy. However, the director of legal affairs for EIA at MoE claimed to be unaware of any such action. At least one news source from January 2003 claimed that the environmental group Legambiente filed a complaint with the Commission on October 23, 2002, citing the "incompatibility of the *Legge Obiettivo* with community norms" and asking the Commission to open a procedure in the ECJ. According to this source, on January 21, 2003, the Commission sent a letter to the Italian government acknowledging receipt of the complaint from Legambiente and demanding the Italian government not move forward on any projects while the Commission considered the compatibility of *Legge Obiettivo* with community law.[524]

Legambiente officials were unclear as to what basis the Commission was relying on in ordering the moratorium on *Legge Obiettivo* projects. Wholly apart from the failure to meet EU requirements for exempting projects from EIA, the *Legge Obiettivo* seems at odds with EU EIA Directives with regard to when the decision on environmental compatibility is made, and the degree to which public participation is allowed (although

[524] Ibid.

the latter may not be a violation until the 2003 Amendments to the Directive take effect). There are also potential violations of Community public contracting and procurement laws.

After a series of recent correspondence with members of the Italian Green Party in the EU Parliament as well as with an official in the Commission's DG Environmental Services, it appears that the Commission is not currently pursuing action against Italy for the *Legge Obiettivo's* with respect to the EIA Directive.[525] In the winter of this year, Italian Green Party members sat down with Commission officials in the hopes of devising a strategy to invalidate the *Legge Obiettivo*, but were frustrated by a perceived loophole in the Directive. Since the process defined by the *Legge Obiettivo* only applies to projects in the *preliminario* stage, the Directive is not applicable. Per Article 9, the Directive only controls the process at the point of the granting of development consent, not at any preliminary phase. Given those conclusions, the Commission advised the Italian delegates to pursue actions against individual projects at the time of final approval, as is their right with any other project.

The Commission is still considering an action against Italy with respect to violation of Community public contracting/public procurement laws, so there is still hope that the *Legge Obiettivo* can be stopped or at least slowed down to enable adequate environmental analysis. It remains to be seen whether the Commission and the Italian government can come to agreement or whether the case will proceed to the ECJ. Judging by the way Prime Minister Berlusconi has ingratiated himself to the EU thus far during

[525] This whole paragraph is based on a series of e-mails between the author, Monica Frassoni, Italian Green Party Representative in the EU Parliament, Gianluca Solera, Adviser on Urban and Regional Affairs and Transport, The Green/EFA Group in the EU Parliament, and Marco Onida, Italian Official in the Commission's DG Environmental Services. These communications took place in September 2003.

his reign as EU President, he just might invite such an intervention by the Commission, thereby jeopardizing his master plan for economic recovery.

VII. Conclusion

The use of EIA as a tool for more informed decision-making is now commonplace the world over. From its genesis in the 1969 NEPA statute, EIA has come to be recognized as a universal mechanism for identifying and quantifying the adverse environmental impacts of an activity and incorporating this into the decision-making process. While the European Union first advocated the use of EIA in its 1973 Environmental Action Programme, it had yet to firmly establish the institutional authority to issue legislation concerning the environment. By the 1980s, the European Court of Justice had confirmed the fact that environmental protection bore a relationship to the free competition and harmonization of the European Community. This led to the adoption of the first EIA law in 1985. The Single European Act of 1987 created the modern structure for environmental protection in the EU provided the EU with an express legal basis for passing environmental legislation. Later amendments to the treaties established environmental protection as one of the principle goals of the EU.

While the goals of the EIA laws in the US and EU are largely the same, the method of implementation and the effectiveness of the two systems has differed. On a strictly textual comparison, the EU Directive is not as strong as NEPA and the accompanying CEQ Regulations. However, the interpretations of the ECJ have significantly strengthened the reach of the Directive, as have amendments in 1997 and 2003. Still, the effectiveness of any EU environmental directive is inextricably tied to the peculiar institutional setting found in the EU. At the EU level, achievement of

environmental policies is constrained by a legislative process that can result in ambiguity or "legislative misfit", reliance on an overstretched and under-resourced Commission to enforce directives, and the lack of a strong central environmental authority to tie the system together. Wholly apart from challenges at the EU level, successful implementation of EU environmental directives like the EIA Directive is directly tied to each Member States' capacity to implement the directive. A close examination of the situation in Italy reveals a series of obstacles to successful implementation of EU environmental directives. Among these are (1) Italy's relative delay in accepting the supremacy of EU law and committing itself to environmental goals; (2) the unpredictable legislative and political environment in Italy; (3) the complex web of different laws and administrative bodies without clearly defined roles, resulting in an excessive administrative bureaucracy, and (4) an elevated presence of corruption that disrupts the orderly operation of the law.

These impediments to successful implantation of EU environmental directives have been borne out in Italy's experience with the EIA Directive. The legislative transposition of the Directive was a long and complicated process that arguably remains incomplete. Experience with EIA on the ground, as evidenced through Commission actions, case studies, and various interviews reveals deficiencies in the application of Italian EIA laws. Recently there has been an attempt by the current center-right government to further marginalize EIA procedures in Italy through the passage of the *Legge Obiettivo*, a bill which would streamline the EIA process for hundreds of large infrastructure projects. It is as yet not known whether the Commission will pursue an action against Italy for violation of Community law under the streamlined procedure.

On the positive side, Italian Administrative Courts have proven to be a solid counterweight to the less-than-perfect implementation of the EIA Directive in Italy. This is primarily due to their relaxed standing laws and a willingness to directly apply the provisions of the EIA Directive, even in the absence of Italian implementing laws. Notwithstanding this bright spot, the Italian experience with EIA reveals, in dramatic fashion, the challenges the EU faces in trying to achieve important environmental goals while creating comparable competitive conditions within the Member States. Due to the EU's unique institutional setting and peculiarities within the individual Member States, uniform achievement of EU policy goals like environmental protection remains a challenge.

VIII. Annex: Italian EIA Legislation

Act No. 349/86	8 July 1986	Establishing Ministry of the Environment; Art. 6 requiring implementation of EU directives within 6 months, including a comprehensive EIA Statute; establishing interim procedures for **National VIA**.
Act No. 67/88	11 March 1988	Establishing the Commission for Environmental Impact Assessment.
DPCM No. 377	10 August 1988	Listing projects subject to **National VIA**; provides more detail for interim procedures; promises detailed technical legislation regarding contents of EIAs for said projects
DPCM	27 December 1988	Providing detailed technical requirements of EIAs called for in Decree No. 377 for projects subject to **National VIA**; establishes standards for giving projects a Pronouncement of Environmental Compatibility.
Circular	11 August 1989	Publicity of actions concerning requests for a judgment of environmental compatibility.
Circular	30 March 1990	On the application of EIA to ports and harbor projects.
Act No. 102/90	2 May 1990	On certain projects in regions affected by exceptional atmospheric conditions in July and August 1987.
Act No. 142/90	8 June 1990	On the reform of local authorities, granting them certain powers in the field of VIA.
Circular	12 July 1990	On the application of EIA to certain landfills.
Act No. 240/90	4 August 1990	On state projects for development of transit ports.
Act No. 241/90	7 August 1990	On administrative procedure and access to information.
Act No. 366/90	26 November 1990	On Nuclear Physics lab in Gran Sasso
Act No. 380	29 November 1990	On the padano-venice waterway systems.
Act No. 396/90	15 December 1990	On projects in Rome.
Act No. 9/91	9 January 1991	On the extension of EIA to power line projects.
Circular	8 April 1991	On the judgment of environmental compatibility for certain waste sites.

Decree	22 November 1991	Implementing the procedure for Act 240/90
Decree	November 1991	On provisions for toxic waste plants
Act No. 412/91	30 December 1991	On public finance provisions.
Decree 100	27 January 1992	On provisions for titanium dioxide plants.
Act No. 220/92	28 February 1992	On provisions for oil projects on or near the sea.
DPR	27 April 1992	On provisions for high voltage electrical lines.
Decree 475	1994	Concerning VIA for intermodal transport hubs.
Act No. 36	5 January 1994	On provisions for water-transfer projects.
Act No. 146/94	22 February 1994	Requiring the Government to issue a decree initiating Regional VIA process
DPR 526	18 April 1994	On provisions exploration/extraction of hydrocarbons.
Act No. 206	31 May 1995	On provisions for hydrocarbon extraction in N. Adriatic.
DPR	12 April 1996	*Atto di Indirizzo e Coordamento* providing framework for regional VIA procedures pursuant to Act No. 146/94
Act No. 59/97	15 March 1997	Allocating certain administrative and legislative functions to the Regions.
DPR	11 February 1998	Adding additional projects to National VIA and clarifying the judgment of environmental compatibility.
Decree 112	31 March 1998	Transfers responsibility for certain environmental matters to the Regions, including VIA for certain types of projects.
Decree 348	2 September 1999	Modifying technical standards for projects falling under National VIA, in compliance with 1997 Amendments.
Decree	3 September 1999	Adjusting the categories of projects subject to Regional VIA pursuant to the Decree of 12 April 1996
DPCM	1 September 2000	Delegating to regions VIA for hydrocarbon plants.
Act No. 422/00	29 December 2000	Clarifying that the 1985 Directive applies when development consent was requested prior to March 14, 1999, not amendments
Act No. 443/01	21 December 2001	Legge Obiettivo simplifying VIA procedures for large infrastructure projects (*grandi opera*).
Decree 121	21 December 2001	Listing the *grandi opera* to be subject to simplified VIA.
Act No. 55/02	9 April 2002	Simplifying VIA procedures for thermoelectric plants.
Decree 190	20 August 2002	Decree simplifying VIA procedures per *Legge Obiettivo*.
Various	Various	At least 20 Regional Acts on VIA
Various	Various	At least two provincial acts on VIA from the autonomous provinces of Trento and Bolzano