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Environmental Impact Assessment in the European Community: Shaping International Norms

William Murray Tabb*

By requiring an environmental impact assessment before a development project begins, a government creates the obligation to conduct an assessment of the potential consequences to human health and the environment. This assessment aids government authorities in deciding the most efficacious manner of pursuing the accomplishment of a project's goal. The international community has begun to recognize the fundamental role that an environmental impact assessment plays in the decisionmaking process for major development projects. Over the last several decades, the European Community has incorporated environmental goals into the original goals of retaining state sovereignty and economic growth. Through a 1997 Directive, the Council of Ministers of the European Community implicitly promised to provide a comprehensive and effective procedure for conducting environmental impact assessments. This Article traces the development of environmental policy and practices, and comparatively examines the newly issued E.C. Directive with reference to the National Environmental Policy Act of the United States.

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I. INTRODUCTION

The recognition of the need for an environmental impact assessment process to evaluate potentially significant effects associated with major development projects has steadily gained momentum in the international community. The historical development of impact assessment practice by the European Community lends insight into the potential future for such procedures as well as highlights some of the inherent difficulties and global ramifications for multinational development projects.

The most significant recent development of E.C. practice with respect to environmental assessment is reflected in the 1997 Directive[1] issued by the European Council.[2] The 1997 Directive sets forth a uniform set of principles and guidelines for the Member States[3] to implement through national legislation.[4] Although the 1997 Directive formally binds only its Member States, it demonstrates a rapidly growing international law normative practice of assessing projects that may pose significant environmental effects. Although the procedures and policies contained in the 1997 Directive represent a step forward in bringing greater clarity to the process of environmental assessment, many important questions remain unanswered and potential difficulties in application exist.

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1. *See* Council Directive 97/11/EC of March 1997 amending Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1997 O.J. (L 073) 5 [hereinafter 1997 Directive].

2. The Council of Ministers is responsible for making and adopting laws that are recommended by the European Commission. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, arts. 145, 155, 298 U.N.T.S. 267 [hereinafter EEC TREATY]. A "directive" sets forth binding obligations for the Member States to which it applies, although it generally leaves the specific form and methodology of implementation to national authorities. This is distinguishable from a "regulation," which has general application to all Member States, and has binding force by its terms and is directly applicable without necessity of implementing legislation. *See id.* art. 189. *See generally* PHILLIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 540-42 (1995) [hereinafter SANDS, PRINCIPLES]; Paul D. McHugh, *The European Community Directive—An Alternative Environmental Impact Assessment Procedure?*, 34 NAT. RESOURCES J. 589, 603-06 (1994).

3. There are 15 members of the European Community: Germany, Belgium, France, Italy, Luxembourg, Netherlands, United Kingdom, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, and Sweden.

4. *See generally* Malcolm Grant, *Implementation of the EC Directive on Environmental Impact Assessment*, 4 CONN. J. INT'L L. 463, 464 (1989); McHugh, *supra* note 2, at 605; Phillippe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511 (1991) [hereinafter Sands, *International Environmental Protection*]; Louis L. Bono, Comment, *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, 156 (1991).

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Part II of this Article will briefly trace the development of environmental policy and practices by the European Community. Part III will provide an overview of the Community Directive issued in 1985 pertaining to environmental assessment. Finally, Part IV will comparatively examine the newly issued E.C. Directive on environmental assessment with reference to the National Environmental Policy Act of the United States. Attention is focused on the issues involving the determination of which projects pose significant impacts on the environment, the development of alternatives to project design and implementation, the circumstances justifying supplementation of an environmental impact assessment, and problems involving public participation in the environmental assessment process.

II. DEVELOPMENT OF ENVIRONMENTAL POLICY IN THE EUROPEAN COMMUNITY

The European Economic Community (EEC) was initially conceived to provide a comprehensive framework to facilitate commerce among the member nations.[5] The European Community traces its roots to the coalescence of three treaties, beginning with the Treaty of Paris creating the European Coal and Steel Community (ECSC) in 1951, with six member countries.[6] In 1957, those six states established the European Atomic Energy Community (EURATOM)[7] as well as the EEC. The Treaty of Rome contained no provisions regulating activities affecting the environment. Rather, these regional agreements were designed to promote the development of an open market economy with free competition.[8] The cornerstone principle was that the member countries would benefit economically and prosper socially by taking measured steps to harmonize their trade practices and eliminate barriers to the "free movement of goods, persons, services and capital."[9] The separate institutional frameworks

5. *See* EEC TREATY art. 2.

6. *See* TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140. The original six-member states were Belgium, France, Germany, Holland, Italy, and Luxembourg.

7. *See* TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167.

8. *See id.* art. 3(c).

9. *Id.*; *see also* art. 2 (stating the EEC aim to "promote the harmonious development of economic activities").

of the ECSC, EURATOM and the EEC were combined through a Merger Treaty in 1965.[10]

Although the Treaty of Rome did not contain specific language dealing with environmental matters, the Council has issued several Directives under the implied general authority of Articles 100 and 235, which increasingly recognize the importance and relationship of environmental issues to the economic activities of the European Community.[11] The basis for using Article 100 for enacting environmental legislation is the recognition of such relationship between economics and environmental matters.[12] Article 235 provides a supplementary basis of authority for action where the Treaty of Rome has not provided the necessary powers to attain the objectives of the Community.[13]

The 1972 United Nations Conference on the Human Environment in Stockholm provided a significant impetus for the expansion of E.C. environmental law.[14] The European Community followed this trend and instituted a series of five-year Action Programmes to provide specific objectives and performance targets for carrying out the broader policies articulated in the EC Treaty, as

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10. *See* TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, Apr. 8, 1965, 4 I.L.M. 776. The resulting components are the Commission, the Council of Ministers, the Assembly (or the Parliament), and the European Court of Justice. The Commission is comprised of 17 Commissioners who hold office for four-year terms. The Commission represents the European Community and acts as the executive agency and coordinator of E.C. policy. The Commission proposes environmental legislation and ensures that the provisions of treaties are carried out. *See* EEC TREATY art. 2.

11. *See* EEC TREATY art. 100. Article 100 provides: "The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market."

12. *See id.*

13. *See id.* 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 a unanimous vote on a proposal of the Commission and after the Assembly has been consulted shall enact the appropriate provisions.

Id.

14. *See Declaration of the U.N. Conference on the Human Environment: Final Documents*, U.N. Doc. A/Conf.48/14 & Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416-69 (1972). Principle 21 declared:

> States [have], in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control [do] not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id. See generally Sands, *supra* note 4.

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amended.[15] The international community seized upon the concept of environmental impact assessment as a basic tool for analyzing in a timely manner the consideration of potential effects on human health and the environment associated with major projects. Principle 17 of the Rio Declaration stated: Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and that are subject to a decision of a competent national authority.[16]

In 1986 the Single European Act (SEA) amended the 1957 Treaty of Rome to include rules explicitly governing environmental protection.[17] One of the significant aspects of the SEA was its recognition of the relationship between environmental factors and a diverse array of economic issues.[18] Article 25 of the SEA added Title VII containing Articles 130R through 130T, which embraced the concept of environmental objectives and priorities for action by the Member States.[19] Article 130R articulates the policy objectives for E.C. action in broad terms relating to environmental preservation, protection of human health and rational utilization of natural resources.[20]

The driving principles to achieve these objectives are that preventive action should be taken, environmental damage should be rectified at the source, and the polluter should pay for the harms caused.[21] Moreover, environmental protection was viewed as an integral component of other E.C. policies.[22] Article 130R(3) specifies

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15. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) I (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]; Council Resolution, 1973 J.O. (C 112) (First Action Programme on the Environment); Council Resolution, 1977 O.J. (C 139) (Second Action Programme on the Environment); Council Resolution 1983 O.J. (C 46) (Third Action Programme on the Environment); Council Resolution 1987 O.J. (C 328) (Fourth Action Programme on the Environment); Council Resolution 1993 O.J. (C 138) (Fifth Action Programme on the Environment).

16. *See Rio Declaration on the Environment and Development*, adopted by the U.N. Conference on Environment and Development (UNCED) at Rio de Janeiro, June 13, 1992, U.N. Doc. A/Conf. 151/26 (vol. I), 31 I.L.M. 874 (1992).

17. *See* SINGLE EUROPEAN ACT, Feb. 28, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506 (1986) [hereinafter SEA].

18. *See generally* SANDS, PRINCIPLES, *supra* note 2, at 546-47.

19. *See* SEA art. 25.

20. *See id.* 130R. Article 130R states:

"Action by the Community relating to the environment shall have the following objectives:

(i) to preserve, protect and improve the quality of the environment;
(ii) to contribute towards protecting human health;
(iii) to ensure a prudent and rational utilization of natural resources."

21. *See id.* art. 130R(2).

22. *See id.*

various factors which should be considered when preparing actions relating to the environment, including both scientific information as well as economic and social issues.[23] The protective measures did not prevent a Member State from adopting more stringent environmental protection measures, provided that they are compatible with the principles of the treaty.[24]

An important contribution of the SEA was its recognition of the relationship between economic issues and environmental protection through authorization of appropriate environmental legislation regarding issues that affect the marketplace.[25] The SEA also embraced the subsidiarity principle, whereby the European Community would undertake action regarding environmental matters only where deemed more effective than if performed at the state level.[26] In a significant departure from previous practice, the SEA provided that environmental legislation for internal market measures could be promulgated with a qualified majority voting, rather than requiring unanimity.[27]

One of the most difficult issues faced by the European Community has been reconciling notions of state sovereignty with the interests of the community *qua* community. This issue presents particular difficulty with respect to environmental affairs since a longstanding international practice recognizes the integrity and freedom of each state to determine its own environmental policy, yet limits the transboundary consequences of its actions on other states. In the European Community, certain restrictions on state autonomy are implicit in the very structure of the community concept, and a measure of yielding to sovereignty exists by virtue of receiving the benefits of community membership. Despite such restrictions, though,

23. *See id.* art. 130R(3), which states that any E.C. action should take into account:

"(i) available scientific and technical data;
(ii) environmental conditions in the various regions of the Community;
(iii) the potential benefits and costs of action or lack of action;
(iv) the economic and social development of the Community as a whole and the balanced development of its regions."

Id.

24. *See id.* art. 130T.

25. *See id.* art. 100A(3), which states that: "The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection." *See also* EEC TREATY art. 36. Article 36 recognized that the "protection of health and life of humans, animals or plants" could affect the elimination of quantitative restrictions among Member States on imports and other measures.

26. *See* SEA art. 130R(4).

27. *See id.* art. 100A.

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environmental policy in the European Community still has balanced the concepts of sovereignty with community interests. In the environmental assessment process itself, such balancing occurs between the recognition of the subsidiarity principle, as well as specifically calling for greater attention to transboundary consequences of major development projects.

Another significant step toward incorporating environmental considerations into the forefront of E.C. policy and decisionmaking occurred with the 1992 Treaty on European Union (TEU), which amended the 1986 SEA.[28] Article 2 of the TEU added the concept of advancing "sustainable and noninflationary growth respecting the environment to the economic goals of the EC."[29] The TEU also included a commitment to develop "a policy in the sphere of the environment."[30]

The TEU essentially restated the E.C. policy on environmental objectives as established in the 1986 SEA, with the addition of "promoting measures at [the] international level to deal with regional or worldwide environmental problems."[31] The emphasis shifted, though, as evidenced by the qualifying statement that E.C. policy should aim at a "high level of protection taking into account the diversity of situations in the various regions of the Community."[32] Moreover, Article 130r specifies that "[e]nvironmental protection requirements must be integrated into the definition and implementation of other EC policies."[33] Contrast this statement with the 1986 version that provided that environmental protection requirements should be a "component" of other E.C. policies.[34] Article 130r(2) added that harmonization measures include, where appropriate, a safeguard clause allowing member states to take

28. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 191) (1992) [hereinafter TEU].

29. *Id.* art. 2. Article 2 set forth the goals of the European Community:

> [T]o promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Id.

30. *Id.* art. 3(k).

31. *Id.* art. 130r(1).

32. *Id.* art. 130r(2).

33. *See id.* art. 130r.

34. *See* SEA art. 130R(2).

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provisional measures for "non-economic environmental" reasons, subject to a Community inspection procedure.[35]

The idea that Member States could adopt more stringent measures as consistent with the purposes of the treaty was carried forward from the SEA.[36] The TEU also included various procedural mechanisms designed to facilitate environmental measures, including qualified majority voting [37] and a co-decision procedure with a more significant role for Parliament, including a legislative veto.[38]

III. ENVIRONMENTAL ASSESSMENT IN THE EUROPEAN COMMUNITY: THE 1985 DIRECTIVE

An important step in the development of an international practice of environmental assessment was the publication of Council Directive 85/337/EEC in 1985 (1985 Directive).[39] The legal authority for issuance of the 1985 Directive comes from Articles 100 and 235 of the Treaty of Rome.[40] The first three Action Programmes (1973, 1977, and 1983) are referenced in the preamble, which stresses that "the best environmental policy consists [of] preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects."[41]

The 1985 Directive affirmed "the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decisionmaking processes."[42] The 1985 Directive also noted the concern that disparities between the laws of the Member States pertaining to environmental assessment procedures designed to evaluate the effects of public and private projects could

35. *See* TEU art. 130r(2). Where costs are disproportionate, article 130s(5) allows temporary derogation and possible financial support from cohesion fund.

36. *See id.* art. 100t.

37. *See id.* arts. 130s(1), 189(c). However, certain areas such as fiscal policy, land-use planning, water resources, and energy use still requires unanimity. *See id.* art. 130s(2).

38. *See id.* arts. 100a(1), 189(b).

39. *See* Council Directive 85/337 of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40 [hereinafter 1985 Directive].

40. *See* EEC TREATY arts. 100, 235.

41. 1985 Directive, *supra* note 39, pmbl.

42. *Id.* The policy underlying an environmental assessment process is:

> [T]he effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

Id.

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"create unfavorable competitive conditions" and thus affect the functioning of the common market.[43]

It applied, with some exceptions, to public and private projects which were likely to have "significant effects on the environment."[44] Further, it employed a bifurcated strategy to address the issue of what factors should trigger the assessment process by identifying certain projects,[45] which were subject to a mandatory assessment process (Annex I)[46] and others subject to an assessment if the Member State determined that "their characteristics so require" (Annex II).[47] The Member State was required to consider the "nature, size and location" of Annex II projects to evaluate whether they should be subject to the assessment.[48] The rationale for separating the projects into groups was to balance the need for consistency in application with the need for mandatory assessment of projects likely to cause the most significant environmental effects.[49]

Some of the projects identified in Annex I included the following: Crude oil refineries, thermal and nuclear power stations, installations for the permanent storage of radioactive waste, integrated works for the initial smelting of cast iron and steel, installations for the extraction and processing of asbestos, integrated chemical installations, construction of highways, railways and airports, trading ports, and waste-disposal installations for the disposal or treatment of toxic waste.[50] Projects identified in Annex II included: Agricultural projects, mining, glass manufacturing, production of pesticides and pharmaceuticals, manufacturing of dairy products, and textiles.[51] In addition, various "infrastructure" projects were included, such as industrial real estate developments, dams, and oil and gas pipeline installations.[52]

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43. *Id.*

44. *Id.* art. 1(1). Articles 1(4) and 1(5) exempt national defense purposes and projects covered by specific national legislation. *See id.* Article 2(3) allows an exemption in "exceptional cases." *Id.*

45. *See id.* art. 1(2) (defining "project" to mean "the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources").

46. Annex I lists projects subject to a mandatory assessment (and that assessment should be "systematic"). *See id.* art. 4(1).

47. 1985 Directive, *supra* note 39, art. 4(2), Annex II.

48. *Id.* art. 2(1). Article 2(1) requires Member States to adopt "all measures necessary" to assess projects likely to have significant environmental effects by virtue of their nature, size or location before consent was given. *See id.*

49. *See id.*

50. *See id.* Annex I.

51. *See id.* Annex II.

52. *See id.*

The basic process placed the burden upon the developer[53] of a public or private project to conduct an environmental assessment and then obtain consent from the competent authority within the relevant Member State.[54] The environmental impact assessment (EIA) is required to identify, describe, and assess the direct and indirect effects of a project on a variety of environmental and human factors.[55] One possible negative aspect of this procedure is that the developer bears responsibility for doing the assessment, yet has a disincentive to uncover environmental impact data that may reflect unfavorably on the design and implementation of the project. One safeguard for securing full compliance with the terms of the 1985 Directive is the responsibility given to Member States to adopt measures necessary to ensure that the developer supplies appropriate information in the assessment.[56] Annex III identifies certain types of information which are to be provided by the developer.[57] The nature of the information is

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53. *See id.* art. 1(2) (defining "developer" as the "applicant for authorization for a private project or the public authority which initiates a project").

54. *See id.* "Development consent" means the decision of the "competent authority" as designated by the State as responsible for performing the pertinent duties, which entitles the developer to proceed with the project. *See id.*

55. *See id.* art. 3. Article 3 provides that the following factors should be considered:

"- human beings, fauna and flora,
- soil, water, air, climate and the landscape,
- the inter-action between the factors,. . . . [and]
- material assets and the cultural heritage."

Id.

56. *See id.* art. 5(1).

57. *See id.* Annex III. Information referred to in Article 5(1):

1. Description of the project, including in particular:
- a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases,
- a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used,
- an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. Where appropriate, an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description ([this description should cover the direct effects of any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project')] of the likely significant effects of the proposed project on the environment resulting from:

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couched in terms of relevance to both the stage of the consent procedure as well as the specific characteristics of the project.[58] At a minimum, the developer must describe the project, identify mitigation measures contemplated, assess the principal environmental effects, and give a "non-technical" summary of the information.[59]

The 1985 Directive briefly addressed the potential transboundary consequences of projects by requiring disclosure of such relevant assessment information to potentially affected states.[60] The Member State in whose territory the project was intended to be carried out was required to forward the information generated under Article 5 to a state which may experience significant environmental effects. The timing of this disclosure was tied to when the territorial state furnishes the data to its own nationals.[61] The information is used "as a basis for . . . consultations necessary in the framework of bilateral relations between [the] Member States on a reciprocal and equivalent basis."[62]

IV. THE 1997 DIRECTIVE: A PROMISE PARTIALLY FULFILLED

A. *Introduction*

In 1997 the Council issued another directive (1997 Directive), which substantially revises E.C. policy with respect to environmental assessment procedures for Member States.[63] The 1997 Directive resulted from the Common Position adopted in 1996 by the Council revising the earlier 1985 Directive.[64] The Preamble to the 1997

- the existence of the project,
- the use of natural resources,
- the emission of pollutants, the creation of nuisances and the elimination of waste; and the description by the developer of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.
6. A non-technical summary of the information provided under the above headings.
7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.

Id.

58. *See id.* art. 5(1)(a).
59. *See id.* art. 5(2).
60. *See id.* art. 7.
61. *See id.* art. 7.
62. *Id.*
63. *See* 1997 Directive, *supra* note 1.
64. *See* Common Position No. 40/96, 1996 O.J. (C 248) 75. The Common Position also refers to the April 2, 1993 report by the Commission calling for provisions to clarify, supplement and improve rules on assessment procedure and apply the 1985 Directive in an increasingly harmonized and efficient manner. *See id.*

Directive calls the assessment procedure a "fundamental instrument" of environmental policy, referring to Article 130r of the TEU and the 5th Action Programme.[65] The implied promise of the 1997 Directive is to provide a comprehensive and effective procedure for conducting environmental assessments for major projects with significant effects on the environment and human health, with particular emphasis to the transboundary consequences of such developments.[66] The 1997 Directive articulates a policy that it is "desirable to strengthen the provisions concerning EIA in a transboundary context to take account of developments at international level."[67] The goal of promoting uniformity with respect to environmental assessment practice is tempered by the subsidiarity principle: That Member States are in the best position to apply criteria in specific instances.[68]

In several respects, the 1997 Directive provides needed refinement of the 1985 Directive both substantively and procedurally. It substantially expands the list of projects, which are deemed to have significant effects on the environment and thus require a systematic assessment.[69] Further, the 1997 Directive grants more flexibility to the Member States by allowing them a choice of determining, through a case-by-case examination or by establishing thresholds, whether certain other projects (Annex II) should be assessed.[70] Additionally, greater clarity is brought to the process as the selection criteria to guide Member States in making discretionary assessment decisions is outlined in a new Annex III.[71]

Although the 1997 Directive shows progress by emphasizing the need for an EIA on the international level and provides more guidance to Member States, several areas of the process remains inadequate. First, one of the principal difficulties inherent in any environmental assessment system is determining which types of projects satisfy the threshold to necessitate preparation of the assessment documentation. The factors that trigger application of the assessment procedure are often imprecise and yield inconsistent results. The 1997 Directive, by employing a two-prong strategy for addressing these threshold considerations, gives the Member State both the guidance and discretion to make such basic decisions as to which projects are

65. *See* 1997 Directive, *supra* note 1, pmbl.
66. *See id.* at 7.
67. *Id.* pmbl.
68. *See id.*
69. *Compare id.* Annexes I, II, *with* 1985 Directive, *supra* note 39, Annexes I, II.
70. *See* 1997 Directive, *supra* note 1, art. 4(2).
71. *See id.* Annex III.

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environmentally "significant."[72] Despite the appeal of that dual structure, however, questions of application exist which go to the heart of the effectiveness of the E.C. framework. In that vein, the 1997 Directive fails to articulate a process for supplementing an EIA in light of new information that could otherwise influence the decisionmaking process. It is vital that an environmental assessment system contain appropriate guidance for determining which circumstances justify supplementation of analysis to take into account significant new information.

Second, the essential aim of an EIA should be to animate and influence decisionmaking through the development of meaningful alternatives to fashioning and through the implementation of a proposed project in a timely manner. Although the 1997 Directive speaks briefly to the concept of developing alternatives, it falls short both in emphasis as well as content and direction.[73] Finally, the role of public participation is bolstered by the revised procedure, yet remains problematic in various respects. In each instance, reference to the procedure set forth in the United States National Environmental Policy Act (NEPA)[74] provides a useful background.

B. Threshold Considerations: Structure and Scope of E.C. Assessment Procedure

The 1997 Directive retains the basic structure of the 1985 Directive in its bifurcated scheme, whereby various public and private projects are specifically allocated under either a mandatory assessment procedure (Annex I) or a discretionary assessment process (Annex II). While both Annexes are considerably broadened in scope, the listing of projects subject to the systematic mandatory assessment procedure is notably increased from nine categories to include twenty-one types of projects. The projects carried forward include: Crude-oil refineries, thermal and nuclear power stations, installations for storage or disposal of radioactive waste, integrated iron and steel works, asbestos extraction and processing facilities, integrated chemical installations, construction of motorways and express roads, inland waterways and ports, and waste disposal installations.[75] Among the additional projects included for assessment under the revised Annex I for mandatory environmental assessment are: Certain nonhazardous

72. *See id.* pmbl.
73. *See id.* art. 5(3).
74. *See* 42 U.S.C. § 4321 (1997).
75. *See* 1997 Directive, *supra* note 1.

waste disposal installations, groundwater abstraction, the transfer of water resources between river basins, waste water treatment plants, commercial extraction of petroleum and natural gas, dams, pipelines, industrial plants for production of pulp and paper, quarries, overhead electrical power lines, and petroleum and chemical storage facilities.[76]

The 1997 Directive also contains significant changes in structure and scope with respect to projects enumerated under Annex II. The list of projects identified under Annex II was increased, although not nearly to the same extent as Annex I. The modified list added irrigation and land drainage projects, installations for harnessing wind power, and manufacturing of ceramic products. Also the list of infrastructure projects was expanded to include groundwater abstraction and artificial groundwater recharge schemes and the transfer of water resources between river basins, which were not otherwise covered in Annex I. A new category was added regarding tourism and leisure, such as ski runs, marinas, holiday villages and theme parks.

The 1997 Directive also gives Member States more options as to implementation of the assessment procedure. Under the 1985 version, projects listed in Annex II were deemed subject to assessment where the Member State determined that their "characteristics so required."[77] The Member State was authorized either to specify certain types of projects or to establish criteria or thresholds to implement this aspect of the 1985 Directive.[78] As revised, with respect to projects listed in Annex II, the Member States are permitted to choose either by a "case-by-case" examination, or by setting thresholds or criteria from which the project shall be made subject to an assessment.[79]

Member States are given more direction, though, as the 1997 Directive contains a new Annex III which contains a comprehensive set of factors to guide the assessment determination. Member States are directed to take into account the characteristics of projects,[80]

76. *See id.* Annex I.

77. 1985 Directive, *supra* note 39.

78. *See id.*

79. *See* 1997 Directive, *supra* note 1, art. 4(2).

80. *See id.* Annex III. "The characteristics of projects must be considered having regard, in particular, to:

- the size of the project,
- the cumulation with other projects,
- the use of natural resources,
- the production of waste,
- pollution and nuisances,
- the risk of accidents, having regard in particular to substances or technologies used."

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location,[81] and potential impact[82] of projects in making their assessment determinations under Article 4(3). Thus, Annex III provides more detailed selection criteria to aid the Member State in evaluating whether certain projects should be subject to an assessment. This advances the goal of more consistent application of assessment procedures, while allowing Member States to retain a measure of discretion consistent with the subsidiarity principle.

C. *The Problem of Significance*

One of the cornerstones of an environmental assessment process is a threshold determination by the appropriate authority that a proposed project is likely to have significant effects on the environment. Proposed projects that fall below this threshold ordinarily will not merit much assessment attention, or none at all. The policies undergirding this methodology are based upon scientific and pragmatic considerations. From an environmental and health

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Id.

81. *See id.* Annex III:

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:
- the existing land use,
- the relative abundance, quality and regenerative capacity of natural resources in the area,
- the absorption capacity of the natural environment, paying particular attention to the following areas:
  (a) wetlands;
  (b) coastal zones;
  (c) mountain and forest areas;
  (d) nature reserves and parks;
  (e) areas classified or protected under Member States' legislation; special protection areas designated by Member States pursuant to Directive 79/409/EEC and 92/43/EEC;
  (f) areas in which the environmental quality standards laid down in Community legislation have already been exceeded;
  (g) densely populated areas;
  (h) landscapes of historical, cultural or archaeological significance.

Id.

82. *See id.* Annex III:

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2 above, and having regard in particular to:
- the extent of the impact (geographical area and size of the affected population),
- the transfrontier nature of the impact,
- the magnitude and complexity of the impact,
- the probability of the impact,
- the duration, frequency and reversibility of the impact.

Id.

standpoint, certain major projects present the greatest potential for degradation or severity of impact on the environment and related human health factors. At the same time, the requirement of "significance" as a threshold barrier is a pragmatic acknowledgement of the limited administrative and economic resources typically available to conduct a detailed study of potential environmental effects. Also, some line must be drawn to avoid administrative overkill of studying even the smallest projects where little would be accomplished by the results of the analysis.

The dilemma, then, is ascertaining which types of projects and circumstances should be selected for environmental assessment because of their particular attributes—beneficial and adverse—that make them environmentally significant. Although the language and role of significance is common to the E.C. system and NEPA, the application and definition are quite different.

NEPA's policy of infusing the consideration of environmental values into the decisionmaking process of the federal government[83] is carried out by various "action-forcing"[84] procedural devices.[85] In NEPA, a "detailed statement"[86] is required for "major Federal actions significantly affecting the quality of the human environment."[87] The

83. *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 143 (1981).

84. 40 C.F.R. § 1500.1(a) (1997); *see* Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 409 n.18 (1976).

85. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). The Court stated:

> NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.

Id. (citations omitted).

86. The detailed statement is the environmental impact statement. See 40 C.F.R. § 1508.11 (1997).

87. 42 U.S.C. § 4332 (2)(C) (1997). It provides in relevant part:

> [A]ll agencies of the Federal Government shall-
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

assessment process contemplates an in-depth evaluation and critical analysis of the potential environmental consequences of proposed agency actions that are expected to have a significant impact on the human environment.[88]

Several crucial concepts are contained within NEPA's mandate. The definition of "significantly"[89] contemplates examination of a wide

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(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

88. *See id.* In *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972), the court stated: "[T]he impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action."

89. 40 C.F.R. § 1508.27 (1997). It provides:

Significantly means:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

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range of factors pertaining to the context and intensity[90] of the project, including uncertain risk factors, short- and long-term effects, and both beneficial as well as adverse impacts. The "effects" considered include direct, indirect, and cumulative impacts, including ecological, aesthetic, historic, cultural, economic, social, and health factors.[91] The focus of the assessment obligation under NEPA is on viewing potential impacts from the perspective of the relationship of people to the environment.[92] Thus, environmental factors are not studied in the abstract but in the context of individuals and society.[93]

Through its compliance with the procedural requirements of the EIS process a federal agency demonstrates that it has appropriately considered and evaluated the reasonably foreseeable environmental impacts of a proposed major action prior to making a decision to undertake that action.[94] The preparation of an environmental impact

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> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id.

90. *See* Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, J., dissenting) (describing the issue of significance as "chameleon-like," turning on the context of the action relative to the setting).

91. *See* 40 C.F.R. § 1508.8 (1997):

> "Effects" include:
>
> (a) Direct effects, which are caused by the action and occur at the same time and place.
>
> (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.
>
> Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

Id.

92. *See* 40 C.F.R. § 1508.14.

93. *See id.* Human environment is defined as:

> *Human environment* shall be interpreted comprehensively to include the natural and physical environment and the *relationship of people with that environment.* This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

Id. (emphasis added) (citations omitted).

94. *See Hanly*, 471 F.2d at 830; *see also* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787 (1976). The Court observed:

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statement should not, of course, be simply "an abstract exercise,"[95] but rather contemplates that agencies take a hard look at environmental values that are affected by their major projects.[96]

Because project proposals are so varied and each situation has its own unique attributes, NEPA presents agencies with a difficult challenge of determining where the line of "significance" should be drawn.[97] NEPA does give a federal agency considerable flexibility in evaluating various factors to determine the significance of a proposed project. Accordingly, the agency retains the discretion to include some projects within the full NEPA procedural process based upon qualitative factors beyond quantitative impacts. Moreover, many federal agencies have adopted certain regulations,[98] which mirror the EC approach and pre-categorize certain types of projects as falling within the EIA umbrella, while others may be categorically excluded.[99]

> NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all other requirements of §102—'to the fullest extent possible,' is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.

Id.

95. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 100 (1983).

96. *See* Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). The Court explained:

> The thrust of § 102(2)(C) is thus that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions. If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of § 102(2)(C) would be lost.

Id.

97. *See* Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987) (noting that NEPA requires agencies to make an almost endless series of judgment calls); *see also* Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975) (stating that the range of projects potentially subject to NEPA was as "broad as the mind can conceive").

98. The Council on Environmental Quality regulations direct federal agencies to establish criteria for classifying project proposals as typically falling within one of three categories:

> (i) Which normally do require environmental impact statements.
>
> (ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).
>
> (iii) Which normally require environmental assessments but not necessarily environmental impact statements.

40 C.F.R. § 1507.3(b)(2) (1997).

99. *See id.* § 1508.4.

The E.C. policy is aligned with NEPA by using a threshold concept that only those projects which are likely to have a "significant" impact on human health and the environment are selected for detailed study. The methodology differs, though, in that the 1997 Directive identifies those projects by categorization while NEPA grants considerable discretion to the applicable agency. Otherwise, "significant effects on the environment" is not defined by the 1997 Directive.[100] Instead, many of the listed projects carry certain quantitative or capacity limitations.[101] Where projects do not meet those size requirements, they may still be subject to assessment under Annex II, depending upon various factors considered by the Member State.[102] Notably, Member States retain the discretion in "exceptional cases" to exempt a specific project partially or completely from the 1997 Directive provided that notice and explanation is given to the public and the Commission.[103] Under the E.C. framework, the size thresholds lend a measure of predictability and uniformity to the EIA process. The discretionary model is also retained as an alternative vehicle for conducting the EIA process.

One of the most important developments in the 1997 Directive is the addition of Annex III, which provides selection criteria to the Member States for evaluating characteristics of projects identified in Annex II that may justify an EIA under the alternate case-by-case or threshold track in Article 4(3).[104] This is a marked improvement over the 1985 Directive, which gave no guidance in making the decision to prepare an EIA for projects listed in Annex II unless the Member State considered that "their characteristics so require."[105] The selection criteria set forth in Annex III encompass a host of variables pertaining to the characteristics, location, and impacts of projects.[106] Former Annex III is shifted to become Annex IV and still provides guidance to

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100. 1997 Directive, *supra* note 1.

101. *See id.* Annex I. For example, pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km; and installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tons or more are covered under the mandatory assessment procedure of Annex I. *See id.* Annex I(16), Annex I(21).

102. *See id.* Annex II(10)(i) (considering oil and gas pipeline installations not otherwise included under Annex I).

103. *See id.* art. 2(3). The concept of "exceptional cases," however, is not defined in the 1997 Directive. This discretion is qualified by a reference to not prejudicing the obligations in Article 7 involving consultation with affected states regarding projects with transboundary impacts. *See id.*

104. *See* 1997 Directive, *supra* note 1, Annex III.

105. 1985 Directive, *supra* note 39, art. 4(3).

106. *See* 1997 Directive, *supra* note 1, Annex III.

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states to carry out the requirement in Article 5 of what information the developer must supply.[107]

In some respects, each system has its advantages and disadvantages. NEPA gives federal agencies considerable flexibility in evaluating various factors to determine the significance of proposed projects. Accordingly, the agency retains the discretion to include some projects within the full NEPA procedural process based upon qualitative factors beyond quantitative impacts. Moreover, many federal agencies have adopted certain regulations which mirror the E.C. approach and pre-categorize certain types of projects as falling within the EIA umbrella, while others may be categorically excluded.[108]

D. *The Problem of Supplementation*

Provision for the supplementation of an EIA in appropriate circumstances can play an important role in the overall effectiveness of the assessment process. Two competing interests are at stake in any supplementation decision. On one side, the decisionmaking authority needs a degree of reliability and finality with respect to decisions already made pertaining to a project. If an assessment process continued indefinitely, it would undermine government efficiency and would slow considerably the pace of project completion.[109] Conversely, because a principal aim of conducting an environmental assessment is to provide meaningful and timely information about the impacts of a proposal so that alternatives can be usefully considered, it would be short-sighted to ignore significant new information which otherwise might influence the deliberative process. Reconciling these opposing interests should turn on a combination of two key factors: The timing of when the information becomes known and the relevance of that information in light of the project purposes and goals.[110]

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107. *See id.* Annex IV.

108. *See* 40 C.F.R. § 1508.4 (1997).

109. *See, e.g.*, Cronin v. United States Dep't of Agric., 919 F.2d 439, 447 (7th Cir. 1990). The court stated:

> As a general rule . . . once an environmental impact statement has been issued for a project, the project can be carried out without the agency's having to issue a new statement for every stage of the project. Otherwise, the project could never be completed. It would be the application to the law of Zeno's Paradox (how can one cross even a finite interval in a finite amount of time, when any interval can be divided into an infinite number of segments each of which must be crossed in turn in order to traverse the entire interval?).

Id. (citations omitted).

110. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989). *See generally* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 10.18 (1st ed. 1984);

In the 1997 Directive, a catch-all category provides for the assessment of changes or extension of projects listed in Annex I or II that already had been authorized, executed, or in the process of being executed, which "may have significant adverse effects on the environment."[111] This is a similar notion to the process of supplementation of an EIS under NEPA in circumstances where the newly generated information may prove valuable in light of remaining decisions pertaining to the project.[112] The 1997 Directive provides little guidance, however, as to the circumstances in which the obligation to conduct assessment is triggered with respect to ongoing projects.

It remains a troublesome question of interpretation as to which "changes or extensions" of projects may give rise to the need for further assessment other than the qualifying phrase of "may have significant adverse effects on the environment."[113] Although the idea of supplementation references both Annex I and Annex II projects, discretion lies with the developer under the terms of the Article 4(2) case-by-case examination or threshold criteria.

The United States Supreme Court, in *Marsh v. Oregon Natural Resources Council*, adopted a "rule of reason" whereby an agency has a duty to prepare a supplemental EIS based upon the "value of the information to the still pending decisionmaking process."[114] The Court further observed that the decision to supplement was similar to the initial determination to prepare an EIS.[115] While recognizing that NEPA itself does not directly address the subject of post-decision supplemental environmental impact statements, the Court followed the interpretive guidance of regulations promulgated by the Council on Environmental Quality (CEQ) that suggested a federal agency may have a duty to supplement a draft or final EIS to take into account significant new circumstances or information relevant to environmental concerns that have bearing on the proposed action or its impacts.[116] The Court reasoned that to do otherwise would eviscerate

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Robert F. Blomquist, *Supplemental Environmental Impact Statements Under NEPA: A Conceptual Synthesis and Critique of Existing Legal Approaches to Environmental and Technological Changes*, 8 TEMP. ENVTL. L. & TECH. J. 1 (1989).

111. 1997 Directive, *supra* note 1, Annex II(13).

112. *See* 40 C.F.R. § 1502.9(c)(2)(ii) (1997).

113. 1997 Directive, *supra* note 1, Annex II(13).

114. 490 U.S. 374.

115. *See id.*

116. *See id.* at 370-72. The CEQ regulation provides, in relevant part:

Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

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the "action-forcing" policy of the Act and essentially ask the agency to put on "blinders" to meaningful new information.[117] Under NEPA, an agency's decision regarding whether to prepare a supplemental impact statement is treated as a factual determination, which receives substantial deference by a reviewing court under the arbitrary and capricious standard.[118]

> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.
>
> (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

40 C.F.R. § 1502.9(c).

Similarly, the Court considered the NEPA implementing regulations by the Corps of Engineers, which provide in pertinent part:

> *Supplements.* A Supplement to the draft or final EIS on file will be prepared whenever significant impacts resulting from changes in the proposed plan or new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action as discussed in 40 C.F.R. § 1502.9(c). A supplement to a draft EIS will be prepared, filed and circulated in the same manner as a draft EIS. . . . A supplement to a final EIS will be prepared and filed first as a *draft* supplement and then as a *final* supplement.

Marsh, 490 U.S. at 373 n.17 (quoting 33 C.F.R. § 230.11(b) (1987)).

117. See Marsh, 490 U.S. at 371-72. The Court stated:

> The subject of post-decision supplemental environmental impact statements is not expressly addressed in NEPA. Preparation of such statements, however, is at times necessary to satisfy the Act's "action-forcing" purpose. NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to "prevent or eliminate damage to the environment and biosphere" by focusing Government and public attention on the environmental effects of proposed agency action. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval. As we explained in *TVA v. Hill*, 437 U.S. 153, 188, n.34 (1978), although 'it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment,' up to that point, 'NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally significant.'

Id. at 370-72.

118. *See id.* at 377. For an illustration of various decisions by federal courts on the issue of supplementation, see *Swanson v. United States Forest Serv.*, 87 F.3d 339, 344 (9th Cir. 1996), which contains a new listing of spring/summer and fall chinook salmon as a threatened species thus changing the legal status of the salmon, but did not constituting a new

Drawing upon the *Marsh* decision and the CEQ interpretation of NEPA, the E.C. assessment process should incorporate a principled approach to requiring supplementation of an EIA in instances involving the discovery of relevant new information or changed circumstances implicated by the project proposal. The supplementation obligation would not be unduly burdensome nor unwieldy, if limited to those instances where it (1) had direct relevance to the environmental concerns raised by the project proposal and its (2) availability to the responsible governmental authority would aid in carrying out the policy of infusing the decisionmaking process with environmental values.[119]

E. The Development of Alternatives

A fundamental premise of any environmental assessment process should be to develop relevant information about the potentially significant impacts of the proposed project in a timely manner. This information could then be evaluated by the appropriate authority in decisions regarding the project. The central goal, which should animate that process and should provide context for critical decisionmaking, is the development of reasonably available alternatives that would achieve the goals of the project. The governmental authority responsible for project direction would then have useful scientific, sociological, and economic data on the environmental effects pertaining to the various alternative measures to guide its deliberation process. Although the alternative ultimately selected may not necessarily be the one with the least significant environmental impacts, at least the decisionmaking process would be improved by access to a range of possible choices. In some instances,

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circumstance necessitating preparation of a supplemental impact statement. *See also* Friends of the Bow v. Thompson, 124 F.3d 1210, 1219 (10th Cir. 1997) (upholding an agency decision not to prepare supplemental impact statement to reflect subsequent reduction in timber sales volume from original proposal); Coker v. Skidmore, 941 F.2d 1306, 1310 (5th Cir. 1991) (noting that an agency was not required to supplement impact statement regarding construction of flood control project levee merely because portions became out of date where no significant new circumstances relevant to environmental concerns existed). *But see* Dubois v. United States Dep't of Agric., 102 F.3d 1273, 1292 (1st Cir. 1996) (noting that the Forest Service acted arbitrarily and capriciously in failing to prepare a supplemental EIS to evaluate an alternative design of the proposed expansion of a skiing facility in a national forest which, due to its size and configuration of activities, entailed substantial changes from previously proposed actions that was relevant to environmental concerns).

119. Some courts have observed that the "new circumstances," which would justify imposition of a duty to prepare a supplemental impact statement, must present a "*seriously* different picture" of the environmental impact of the proposed project from what was originally envisioned. *See* Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996).

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less intrusive measures or mitigation steps may be integrated into the project design.

Although the 1997 Directive speaks briefly to the concept of developing alternatives, it falls short in emphasis as well as content and direction.[120] In the 1985 Directive, the issue of developing alternatives to a project's goal was not given a prominent status. Instead, the only mention of alternatives was in Annex III(2), where it charged the developer in circumstances "[w]here appropriate" to provide "an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects."[121]

In the 1997 revision, the same language is carried forward in the redesignated Annex IV, with the deletion of the qualifying phrase "where appropriate."[122] This change could be potentially significant, particularly in light of the inclusion in the new Article 5(3) of a specific requirement that the developer must disclose.[123] Additionally, the 1997 Directive introduces a procedure whereby the developer may obtain an opinion from the competent authorities on the information to be furnished in the environmental assessment.[124] In that regard, the Member State may require the developer to provide alternatives for the project.[125]

The 1997 Directive fails to emphasize, however, the central importance of identifying alternatives as an *analytical* tool, which would guide the competent authority within the Member State to decide the most desirable method of achieving the purposes of the project in light of environmental impact considerations. Further, the 1997 Directive does not provide clear guidance with respect to the manner and extent of appropriate discussion pertaining to those choices. Finally, unlike NEPA, the E.C. Directive does not contain a provision for considering taking "no-action" with respect to the proposal.[126]

In contrast, in NEPA the identification and analysis of alternatives to a proposed action is considered the "heart" of the entire environmental impact statement process.[127] A comparison of the E.C.

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120. *See* 1997 Directive, *supra* note 1, art. 5(3).
121. 1985 Directive, *supra* note 39, Annex III(2).
122. 1997 Directive, *supra* note 1, Annex IV(2).
123. *See id.* art. 5(3).
124. *See id.* art. 5(2).
125. *See id.* art. 5(2), pmbl.
126. *See* 40 C.F.R. § 1502.14(d) (1997).
127. *See id.* § 1502.14. The federal regulations provide:

approach with NEPA's approach regarding their respective treatment of alternatives provides a useful framework for consideration of that topic in the international environmental assessment process.

The substantive policy of NEPA gives federal agencies considerable flexibility as environmental values are not given priority or precedence over other considerations, and no particular substantive outcome is mandated. The Supreme Court has determined that if a federal agency appropriately considers the adverse environmental effects of its proposed action, it may decide that "other values outweigh environmental costs."[128] A reviewing court will not substitute its judgment for that of the agency regarding the environmental consequences of its actions, provided the decision complies with the procedural requirements.[129] The statute's procedural requirements must be strictly followed, however, to ensure that

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> This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:
>
> (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
>
> (d) Include the alternative of no action.
>
> (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
>
> (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

Id.; *see also* All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992) (noting that the "thorough discussion of alternatives is imperative"); 40 C.F.R. § 102(2)(C)(iii) (1997).

128. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting that "NEPA does not mandate particular results, [it] simply prescribes the necessary process" and that "NEPA merely prohibits uninformed—rather than unwise—agency action").

129. *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976):

> [O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of action to be taken."

Id.; *see also* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980); Swanson v. United States Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996) (noting that courts should not "fly speck" an EIS and hold it insufficient for merely technical or inconsequential insufficiencies).

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agencies appropriately exercise their substantive discretion.[130] Through the process of forcing government agencies to identify and evaluate a range of reasonable alternatives before committing resources to a project, the hope of NEPA is to promote better informed and more environmentally sound decisions.[131]

The requirement that reasonable alternatives must be developed for consideration by the decisionmaking authority also ensures integrity of the process and fidelity to the policy of balancing environmental factors with other interests.[132] NEPA's mandatory disclosure requirements serve to inform Congress, other government agencies and the public about the potential benefits and negative consequences to human health and the environment.[133] An environmental impact statement is more than a disclosure document, however. It is intended to be a comprehensive, analytical tool to assist decisionmakers in making timely and informed choices about the

130. *See* Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm., 449 F.2d 1109, 111 (D.C. Cir. 1971) (stating that procedural requirements demand a "strict standard of compliance").

131. *See* 42 U.S.C. § 4321 (1997). The purposes of NEPA are:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources to the Nation.

Id.

132. *See, e.g., Calvert Cliffs*, 449 F.2d at 1114. Judge Skelly Wright observed: "By compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decisionmaking process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own." *Id.*

133. *See* 40 C.F.R. § 1502.1 (1997). It provides:

> The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

Id.

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proposed project, with the realization of potentially significant consequences to human health and the environment.[134]

The potential environmental effects of the proposal and the alternatives must be presented in a *comparative* fashion.[135] This is important in order to define the issues and also to provide a "clear basis for choice"[136] among the various options by the decisionmaking governmental unit and the public.[137] Under NEPA, a federal agency is required to identify and examine the alternatives necessary to permit a reasoned choice designed to accomplish the stated objectives of the project, as well as to consider taking no action.[138]

The range of potential alternatives that must be considered is not unlimited, however, and must be evaluated by a standard of reasonableness.[139] The "rule of reason" governs both the choice of specific alternatives considered as well as the depth or degree of analysis required.[140] The extent of discussion required is determined by a sliding scale where the less likely that an alternative is to be implemented, the less discussion is required.[141] The level of detail discussing the environmental effects of various alternatives does not need to be exhaustive, but must be sufficient to permit a reasoned

134. *See* Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975) ("[I]t is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.'").

135. *See* 40 C.F.R. § 1502.14 (1997).

136. *Id.*

137. *See* North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1541 (11th Cir. 1990).

138. *See* 40 C.F.R. § 1502.14; *see also* Association of Public Agency Customers, Inc. v. Bonneville Power, 126 F.3d 1158, 1185 (9th Cir 1997).

139. *See* Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) (stating that the agency "need not consider an infinite range of alternatives, only reasonable or feasible ones"); 40 C.F.R. § 1502.14(a)-(c).

140. *See* Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988).

141. *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). The court stated:

> [T]he rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them. Environmental impact statements take time and cost money. Yet an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality. Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities.

Id. (citations omitted).

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choice of alternatives.[142] The alternatives considered must be reasonably available, and those options that are too remote or speculative can be excluded.[143] Such a standard of reasonableness should also be incorporated into the E.C. assessment policy and practice.

An agency must explain its reasoning and provide a factual basis for its refusal to consider reasonably presented alternatives.[144] The agency must go beyond "mere assertions" and show sufficient data and reasoning to evaluate the analysis and conclusions presented.[145] The existence of a viable but unexamined alternative renders an environmental impact statement "inadequate."[146] Similarly, E.C. assessment practice must be more than mere formalism and assertions and must carry supporting documentation with reasoned analysis.

The idea of what constitutes an "alternative" under NEPA has no independent or constant meaning, though, other than its relevance to accomplishing the stated purpose of the project's goals.[147] The scope of a project is shaped by the federal agency's proposal.[148] The stated goal of the project necessarily dictates the range of alternatives that

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142. *See* DuBois v. United States Dep't of Agric., 102 F.3d 1273, 1287 (1st Cir. 1996).

143. *See* Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972).

144. *See DuBois*, 102 F.3d at 1288.

145. *See* Silva v. Lynn, 482 F.2d 1282, 1287 (1st Cir. 1973).

146. *See* Resources Ltd. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1993).

147. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551-54 (1978). The Court stated:

> [A]s should be obvious even upon a moment's reflection, the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.... Common sense also teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.... [T]he concept of "alternatives" is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.... [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Id.

148. *See generally* Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975). *See also* 40 C.F.R. § 1508.23 (1997).

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will be considered as reasonable options.[149] An agency must look at the factors relevant to the definition of purpose, taking into account the needs and goals of the parties involved in the application.[150] A problem potentially arises under NEPA where the objectives of a project are described in such narrow terms that only a certain approach could apparently accomplish the goal, while most options fall outside the parameters of the project.[151] In that situation, NEPA's policy of making the evaluation of various reasonable alternatives a meaningful part of the decisionmaking process is defeated.

One important principle of having an assessment procedure in place is the balancing and integration of environmental factors within the decisionmaking process. Where the Member State plans a significant project, although it is constricted by E.C. policies, the State still retains considerable autonomy by virtue of its sovereignty and the subsidiarity principle. Fidelity to the EIA process allows a measure of objectivity to all major projects initiated in the territory of Member States, partly to counteract the potential for self-interest to cause states to overlook potentially significant adverse environmental effects of those projects.

Under the E.C. approach, project proposals may be generated by public or private interests, in contrast with NEPA, where such proposals solely come through a federal agency. Although a federal agency sets the purpose of the project, judicial review exists to ensure compliance with the procedural directives of the statute, including whether the agency developed and discussed a suitable range of alternatives in a reasonable manner. The stated purpose necessarily dictates the range of which alternatives would be considered feasible and reasonable to accomplish the project's stated goals. In circumstances where that goal is couched in narrow terms, the ultimate direction of the project and selection of a particular course of action may effectively be predetermined. If so, the identification and discussion of choices to achieve the project goal may not be truly comparative nor analytical, but could become merely a bureaucratic exercise in red tape. Such a course of action certainly defeats the purpose of conducting an EIA, whether domestically or

149. *See* City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986) ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.").

150. *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991).

151. *See id.* The project alternatives are derived from the "purpose and need" section of the impact statement. *See* 40 C.F.R. § 1502.13 (197).

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internationally, because the central concept of that process is that a more informed decisionmaker will be able to identify and possibly implement certain actions that may have less environmental degradation than the original project plans. Although neither NEPA nor the E.C. mandate elevation or prioritization of environmental factors over other interests, both implicitly or directly call for at least a balancing of environmental considerations with others. To carry out this essential purpose of NEPA and the E.C. Directive, the party charged with conducting the assessment must make the development and discussion of reasonable alternatives a key part of the assessment process.

F. The Role of Public Participation

The EIA process under the EC framework and under NEPA espouse a significant role for public participation.[152] One rationale for incorporating procedures designed to include public interaction with government decisionmakers throughout the process is that more environmentally sound decisions may be reached by widening the potential sources of relevant information pertaining to a project's design. Also, including a vehicle for public participation potentially enhances public trust of government decisionmaking, reduces litigation challenging actions taken, and serves to coordinate and reconcile various strategies of achieving public interest objectives.[153] Providing for meaningful public involvement in the decisionmaking process, though, may also be problematic for several reasons. Although the outline and principles for such involvement are stated both in NEPA and the E.C. Directive,[154] the specific implementation is left largely to the discretion of the relative governmental units. Interested members of the public may not be presented with opportunities to offer the type of input that they believe would be truly meaningful. In addition, neither system clearly articulates a mechanism for conflict resolution.

NEPA establishes a general framework to provide the means for allowing the public to participate in the on-going process of environmental assessment with respect to proposals generated by

152. *See* 1985 Directive, *supra* note 39, pmbl.

153. *See generally* William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, COLUM. J. TRANSNAT'L L. 337, 343-48 (1995).

154. *See* 1985 Directive, *supra* note 39, pmbl.

federal agencies.[155] The EIS process under NEPA seeks to animate federal agency decisionmaking with consideration of environmental values, while also engaging the public in the process.[156] The wide dissemination of information pursuant to NEPA's mandates allows the public and other governmental agencies to respond to the anticipated consequences of a proposed action in a meaningful and timely manner.[157] The mandate to make available draft assessments to interested members of the public also serves a "larger informational role."[158] It also provides assurance to the public that the agency has considered environmental issues in its decisionmaking process, while also providing a "springboard" for public comment.[159]

The CEQ regulations interpreting NEPA outline specific procedural steps, which are binding on all federal agencies, guiding them through the environmental impact statement process.[160] Although agencies typically have considerable flexibility in determining the manner of compliance with the public participation requirements, they are admonished by the CEQ regulations to make

155. *See* Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983); *see also* 40 C.F.R. §§ 1502.1, 1503.1, 1506.6 (1997).

156. *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 143 (1981). The Court observed:

> The thrust of § 102(2)(C) is . . . that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions. Section 102(2)(C) thus serves twin aims. The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered the environmental concerns in its decisionmaking process. Through the disclosure of an EIS, the public is made aware that the agency has taken environmental considerations into account.

Id. (quoting Andrus v. Sierra Club, 442 U.S. 347, 350 (1979)).

157. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989).

158. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 332-49 (1989). In *Robertson*, the Court stated:

> The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purposes in two important respects. It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Id. (quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983)).

159. *See id.*

160. *See* 40 C.F.R. § 1500.3 (1997).

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"diligent efforts" to involve the public in the NEPA process.[161] The agency is directed to involve other agencies and the general public in

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161. *See id.* § 1506.6. Under this section entitled *"Public involvement,"* agencies shall:

> (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
> (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.
> (1) In all cases the agency shall mail notice to those who have requested it on an individual action.
> (2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.
> (3) In the case of an action with effects primarily of local concern the notice may include:
> (i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).
> (ii) Notice to Indian tribes when effects may occur on reservations.
> (iii) Following the affected State's public notice procedures for comparable actions.
> (iv) Publication in local newspapers (in papers of general circulation rather than legal papers).
> (v) Notice through other local media.
> (vi) Notice to potentially interested community organizations including small business associations.
> (vii) Publication in newsletters that may be expected to reach potentially interested persons.
> (viii) Direct mailing to owners and occupants of nearby or affected property.
> (ix) Posting of notice on and off site in the area where the action is to be located.
> (c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:
> (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.
> (2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).
> (d) Solicit appropriate information from the public.
> (e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.
> (f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal

preparation of an environmental assessment "to the extent practicable."[162]

Draft impact statements are circulated to agencies with jurisdiction or special expertise, and other parties for comment.[163] Following the comment period, the responsible agency prepares a final environmental impact statement,[164] which addresses certain enumerated criteria and responds to comments received.[165] The agency subsequently prepares a record of decision which explains its decisions, including why various alternatives and mitigation measures were rejected.[166]

The 1997 Directive carries forward the principle of public consultation from the earlier version, although the opportunities for engaging public involvement and the categories/types of the information disseminated are notably increased.[167] The 1997 Directive does not mandate any particular manner or methodology for public involvement; rather, the detailed arrangements for the information and consultation is left to the discretion of the Member States.[168]

> agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

Id.

162. *Id.* § 1501.4(b). Comments are solicited from federal agencies with jurisdiction by law and from state and local agencies and Indian tribes. *See id.* § 1503.1(a)(2).

163. *See id.* §§ 1506.10(d), 1503.1, 1503.4. The draft is subject to public and interagency comments for at least 45 days. *See id.* §§ 1503.1, 1503.4.

164. The agency must wait 30 days after notice is filed in Federal Register. *See id.* § 1506.10. The CEQ serves as a clearinghouse to handle and resolve major interagency disagreements. *See id.* § 1504.1-3.

165. *See id.* § 1503.4(a).

166. *See id.* § 1505.2.

167. *See* 1997 Directive, *supra* note 1, art. 6.

168. *See* 1985 Directive, *supra* note 39, art. 6(3). It states:

> The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned:
> - determine the public concerned,
> - specify the places where the information can be consulted,
> - specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models,
> - determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry,
> - fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.

Id.

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The 1997 Directive adds a requirement that Member States must ensure that a determination made by the competent authorities regarding a discretionary assessment, under either the case-by-case examination or the criteria for projects listed under Annex II, is made available to the public.[169] The manner and timing of such disclosure are not specified, however.

Article 6 of the 1997 Directive carries forward a requirement that any request for development consent plus information concerning the project be made available to the public.[170] The 1997 Directive adds a qualification that such information must be made available to the public "within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted."[171] This provision changes the 1985 Directive, which simply stated that such disclosure should occur "before the project is initiated."[172]

The 1997 Directive also modifies Article 7 regarding obligations with respect to projects with transboundary consequences. Article 7(1) states that information shared with an affected state must be sent "as soon as possible and no later than when informing its own public."[173] This obligation is similar to the requirement in the 1985 Directive, except that it amplifies the extent of the information to be communicated and gives the other Member State a reasonable time to decide whether it wants to participate in the EIA procedure.

A new provision in the 1997 Directive requires all Member States involved to arrange for the information to be made available within a reasonable time to (1) the authorities with environmental responsibilities[174] and (2) the public concerned in the territory of the Member State likely to be significantly affected.[175] Also, such authorities and the public must be given an opportunity to express their opinion within a reasonable time before development consent for the project is granted.[176] Such exchanges of information provide a platform for the Member States to enter into consultations regarding the transboundary effects of the project.[177]

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169. *See* 1997 Directive, *supra* note 1, art. 4(4).
170. *See id.* art. 6(2).
171. *Id.*
172. 1985 Directive, *supra* note 39, art. 6(2).
173. 1997 Directive, *supra* note 1, art. 7(1).
174. *See id.* art. 6.
175. *See id.* art. 7(3).
176. *See id.*
177. *See id.* art. 7(4).

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Article 9(1) carries forward the requirement that the competent authorities inform the public of decisions to grant or refuse development consent.[178] The nature of the information required is somewhat expanded from the 1985 version and includes the rationale underlying the decision, along with the mitigation measures contemplated.[179] Article 2 from the 1985 Directive provides that, in "exceptional cases" a Member State can exempt a specific project in whole or in part.[180] If so, the state is given the discretion as to whether to advise the public of the information relating to granting the exemption or of some other form of assessment that might be appropriate.[181]

A key issue in determining the effectiveness of public participation in any assessment process is the nature of the obligation imposed upon the relevant governmental authorities to respond to the information generated through such consultations. The E.C. Directive, even as amended, is virtually silent with respect to what, if anything, the responsible authority must do to incorporate or consider the public input. The only guidance given is the requirement that the results of consultations and information gathered "must be taken into consideration in the development consent procedure."[182] This requirement essentially remains the same from the 1985 Directive.

In some respects, this requirement does too much and too little. It may be perceived as too onerous if viewed as requiring that all input must be considered, irrespective of the value or credibility of the information received. This potentially obfuscates otherwise potentially useful information in a morass of self-serving input. At the same time, the E.C. procedure may not require enough, by virtue of its failure to provide any obligation of what the developer should do in considering the information. In NEPA, this is governed by a "rule of reason" whereby the agency must address the information received

178. *See* 1997 Directive, *supra* note 1, art. 9(1).

179. *See id.* Article 9(1) provides that the following information should be available to the public:

> - the content of the decision and any conditions attached thereto, the main reasons and considerations on which the decision is based,
> - a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

Id.

180. *See* 1985 Directive, *supra* note 39, art. 2(3).

181. *See id.* art. 2(3)(a)-(b). This portion of the 1985 Directive was not affected by the 1997 amendments.

182. 1997 Directive, *supra* note 1, art. 8.

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from outside sources based upon a sliding scale idea of the value of that data to the objective of the project.[183]

The question becomes, then, whether public participation is just a hollow promise. In order for public involvement to be truly meaningful, there must be some specific procedural mechanism to guide the developer and the competent decisionmaking authority to evaluate the comments generated. The difficulty, of course, with public involvement on the international level is that no effective enforcement tool is readily available to force compliance with the requirements of the legislation. Also problematic, though, is the inherent difficulty of determining the proper scope of allowing public discourse regarding a proposed project. In one sense, the public cannot nor should not be allowed to exercise a veto over an international environmental assessment process. Conversely, granting discretion without limits to the Member States to tailor the forum and evaluation of public participation may render the exercise meaningless. The solution must be to build into the equation a notion of reasonableness.

V. CONCLUSION

The international community has recognized the fundamental role of EIA in the decisionmaking process for major development projects. The obligation to conduct an assessment of the potential consequences to human health and the environment aids government authorities in deciding the most efficacious manner of pursuing accomplishment of a project's goals. The assessment instrument, though, does not mandate that any particular choices are selected, or even that mitigation measures necessarily are implemented to alleviate the adverse environmental consequences associated with a project. Despite the principally procedural focus of assessment, whether under an E.C. Directive or NEPA, the implied hope is that timely and meaningful information will lead to better decisions.

The 1997 Directive demonstrates an advance toward generating more complete and useful information. In some areas, though, that directive leaves important issues unanswered, including the determination of what constitutes a significant impact in discretionary situations, the nature of the obligation to supplement the EIA, the central place of developing analytical alternatives, and the role of public participation in the process. The international community

183. *See generally* MANDELKER, *supra* note 110.

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should draw guidance from other well developed assessment systems such as NEPA to fill in the gaps of its process.

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