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Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice

Kenneth M. Lord*

Introduction

In the European arena, the amount of effort and attention devoted to the issue of environmental protection has increased dramatically over the past twenty-five years. While the public's desire to reduce transboundary pollution is a strong impetus for this increased political attention, concern over the potentially deleterious effect of environmental regulation on trade has also helped to force the issue into the limelight.

Although the pace has been slow, the general trend within the European Community (EC) is towards a harmonization of environmental regulations between the member states. One of the primary reasons for this movement is that the absence of a coordinated effort to deal with environmental issues could result in a fragmentation of the internal market. Unfortunately, disparate levels of application and enforcement of EC environmental law by the member states is hindering the harmonization effort. The actions of the European Court of Justice (ECJ) will play a role in determining whether the promise of a harmonized obligation to protect Europe's natural environment will become a reality. Because the ECJ is empowered to interpret treaties and resolve disputes, its role in this process will be pivotal.

This Note presents analyses of the cases relating to the protection of the environment that have come before the ECJ and the role that the court

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2. Id.
5. Id.
29 CORNELL INT'L LJ. 571 (1996)
has played in the development of the EC’s environmental program. Part I is a brief overview of the European Community, including its evolution, political structure, and the sources from which its law arises. Part II focuses on the role and jurisprudence of the ECJ within the EC. Part III includes a discussion of those treaty provisions that have particular relevance to the issue of environmental protection. Part IV provides a chronological compendium of selected environmentally-relevant cases heard by the ECJ. This compendium illustrates both the process by which the trade-based European Economic Community initially obtained competence over social matters and the evolution of the ECJ’s approach with respect to the competing interests of trade and environmental protection. In addition, it provides an overview of the “common law” obligations relating to environmental protection presently in force in the Community. Part V of this Note addresses more specifically the jurisprudence of the ECJ, as well as the court’s roles in the Community’s acquisition of competence over environmental matters and in the movement towards harmonization. It also provides a discussion of the reasons why the court’s efforts at harmonization have been only partially successful.

The primary purpose of this Note is to demonstrate the profound effects of a principal underlying axiom of the EC—that European integration and the concomitant benefits of an internal market can only be realized through the harmonization of certain peripherally-related social matters. Most significantly, this axiom provided the impetus by which the judges of the ECJ have been able to manipulate their role as defenders of the common market in order to promote the movement toward harmonization of environmental law within the Community.

I. Evolution of the European Community

In 1951, six European states signed a treaty in Paris for the purpose of establishing an economic union known as the European Coal and Steel Community (ECSC). Six years later, the same countries signed two additional treaties in Rome. One created the European Atomic Energy Community (Euratom) which, it was hoped, would lead to the development of sources of atomic energy and reduce the member state’s dependence on

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7. In 1993, the original title, “European Economic Community,” was officially discarded in favor of “European Community” (EC), a term which had, in practice, been in use since 1986. The term “European Union” (EU) was also adopted in 1993 to refer to new common policies introduced by the Treaty on European Union. See infra notes 77-92 and accompanying text. The term “EC” remains valid for policy matters addressed by the community treaties prior to 1993, while the term “EU” applies only in the context of new common policies. E.g., Jens Rosenkvist & Laurent M. Campo, Recent Legal Developments of the European Community, 4 DUKE J. COMP. & INT’L L. 189, 189-90 (1994).

imported energy sources.\textsuperscript{9} The other was the European Economic Community (EC) Treaty, also known as the Treaty of Rome.\textsuperscript{10} The objectives of the member states in forming the European Economic Community included the elimination of trade barriers between member states and the creation of a framework for the establishment of a stronger common market.\textsuperscript{11}

In practice, the three communities are not and never have been completely independent of each other.\textsuperscript{12} Since their formation, they have been served by a single judiciary, the European Court of Justice, and by a single legislature, the European Parliament.\textsuperscript{13} In 1967, the member states merged the previously-separate executive institutions of the communities into a single Commission and a unified Council.\textsuperscript{14} Since that time, the political institutions established under the original EC Treaty have controlled the three communities.

The European Community is not simply a confederation of states subscribing to one set of economic treaties.\textsuperscript{15} Rather, it represents a developmental stage in the move towards European unity and is more accurately


\textsuperscript{11} D. LASOK & J.W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 14-16 (1987). The six original states included the Federal Republic of Germany, Belgium, France, Italy, Luxembourg, and the Netherlands. Id. Denmark, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland, and Sweden have subsequently joined them. Richard C. Visek, Implementation and Enforcement of EC Environmental Law, 7 GEo. INT'L ENV'TL. L. REV. 377, n.15 (1995). In the next few years, Hungary, Poland, the Czech Republic, and Slovakia are also expected to join the EU. Id.

\textsuperscript{12} LASOK & BRIDGE, supra note 11, at 17-18.

\textsuperscript{13} Id. at 17. The European Parliament is comprised of 626 representatives who are popularly elected by the citizens of the EU. EC TREATY, supra note 10, art. 137; Visek, supra note 11, at 360. Initially, the Parliament only served an advisory role; however, in recent years its power has been expanded to include the abilities to propose, amend, and veto certain types of legislation. Id. The European Court of Justice functions as the supreme judicial authority on matters of Community law. EC TREATY, supra note 10, arts. 171-73. It is empowered to interpret the Community treaties, review the legality of Community acts, consider possible breaches of Community law by the other Community institutions, answer questions of Community law from the member state’s national courts, and determine whether member states are fulfilling their Community obligations. Id. at 382-83.

\textsuperscript{14} Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 4 I.L.M. 776 [hereinafter Merger Treaty]. The European Commission, which consists of twenty-one commissioners appointed by individual member states, serves a quasi-executive role. Visek, supra note 11, at 381-82. The Commission bears the responsibility of drafting, implementing, and enforcing Community law. Commissioners are expected to act in the general interests of the EU, rather than in the interests of their own countries. The European Council, which consists of one representative from each member state, is the EU’s primary legislative body, although it also serves in an executive capacity with respect to the Community’s general economic policies. Id. at 379. In contrast to commissioners, Council members act on instructions from their respective governments. Id.

\textsuperscript{15} LASOK & BRIDGE, supra note 11, at 29.
described as a quasi-federal system, with the modified EC Treaty acting as its constitution. A fundamental element of the system is that Community law is binding on the member states, can be applied by both the member states' national courts and the ECJ, and is often applicable to individuals and corporations. Significantly, it also prevails over national law in the event of a conflict.

There are four sources of Community law. First, the member states may create Community law in the form of treaties or similar agreements. The most prevalent source of Community law is Community legislation, which includes the regulations, directives, and decisions adopted by the Council or the Commission. "General principles of Community law" constitute a third source. These are collectively a form of common law arising primarily from Community treaties and the legal systems of the member states. International agreements with non-member states constitute the final source of Community law.

II. The Role of the ECJ

The ECJ's primary function is to interpret and properly implement the treaties establishing the European Community in order to ensure that both the member states and the branches of the Community government comply with Community law. It is also empowered with a number of subsidiary functions, including the ability to hear challenges brought against the EC by private persons affected by Community acts and the responsibility to decide actions brought by member states, the Commission, or the Council "on grounds of lack of competence, infringement of an essential procedural requirement . . . or misuse of powers."

16. Id. at 28-29. Although the legal systems of the Community and the individual member states exercise a great deal of mutual influence over each other, they do not yet constitute a unified and coherent legal system such that would define a federal state. Id.
18. Usser, supra note 8, at 3.
20. Id. at 98-106.
21. Id. at 107. Regulations are general statements of Community law that apply directly to every member state and citizen of the EC. That is, they have a "direct effect" upon EC citizens. Regulations are rarely used to address environmental concerns. EC TREATY, supra note 10, art. 189. Directives, on the other hand, are the principal legislative tool of the Community. They mandate a result to be achieved by the member states, but leave the mode of implementation up to the discretion of the individual state. Directives are commonly used for environmental matters. Cliona J. M. Kimber, A Comparison of Environmental Federalism in the United States and the European Union, 54 Mo. L. Rev. 1658, 1675 (1995). Finally, decisions, or general rulings, are generally issued by the Commission upon discovery of a violation of Community law. They only bind the party at which they are aimed. See, e.g., Michael Scott Feeley & Peter M. Gilhuly, Green Law-Making: A Primer on the European Community’s Environmental Legislative Process, 24 Vand. J. Transnat’l L. 653, 667-68 (1991).
22. Hartley, supra note 17, at 137.
23. Id.
24. Id. at 165.
26. EC TREATY, supra note 10, art. 173.
The ECJ may exert authority over other Community institutions through four principal types of action. These include the action for annulment, the action for failure to act, the plea of illegality, and the action for damages.\textsuperscript{27} Articles 173 and 174 of the EC Treaty provide for the action for annulment and empower the court to declare Community acts void if successfully challenged by qualified parties.\textsuperscript{28} Under article 175, the court may address any action brought against either the Council or the Commission for a violation of the EC Treaty by omission.\textsuperscript{29} However, because the ECJ tends to defer to the other branches when they properly exercise their authority, these challenges are rarely successful.\textsuperscript{30} A defendant appearing before the ECJ may challenge a Community regulation under which he is being prosecuted by invoking the plea of illegality.\textsuperscript{31} If the challenge is successful, the regulation can no longer serve as the basis for the complaint, although it will not be annulled.\textsuperscript{32} Finally, under the EC Treaty, the ECJ may award monetary damages pursuant to successful claims of a non-contractual nature against the Community.\textsuperscript{33}

The Court of First Instance (CFI) has been attached to the ECJ since 1989.\textsuperscript{34} As its name suggests, the purpose of this court is to hear and adjudicate certain types of actions first, subject to a right of appeal to the ECJ on certain points of law.\textsuperscript{35} These classes of action are dictated by the Council.\textsuperscript{36} When the CFI was established, the Council conferred it with jurisdiction only over staff and competition cases, as well as coal and steel cases arising from the ECSC Treaty.\textsuperscript{37} In 1993, the Council extended the jurisdiction of the CFI to include all direct actions brought by private parties against Community institutions.\textsuperscript{38} Although the CFI has had little impact on Community environmental law, the Council is expected to expand its role as the caseload of the ECJ continues to increase.\textsuperscript{39}

The EC Treaty did not explicitly grant a policy-making role to the ECJ. Nevertheless, one of the ECJ's distinctive characteristics is that its decision-making is often founded on policy considerations.\textsuperscript{40} There are three general policy objectives underlying the decisions of the judges of the ECJ: strengthening the federal elements of the Community; increasing the scope and effectiveness of Community law; and enlarging the powers of Commu-

\begin{thebibliography}{9}
\bibitem{27} Usher, \textit{supra} note 8, at 89.
\bibitem{28} EC Treaty, \textit{supra} note 10, arts. 173-74.
\bibitem{29} EC Treaty, \textit{supra} note 10, art. 175.
\bibitem{30} Bermann \textit{et al.}, \textit{supra} note 4, at 114.
\bibitem{31} EC Treaty, \textit{supra} note 10, art. 184. The term "regulation," as used here and throughout the remainder of this Note, refers to its plain meaning and not specifically to official Community regulations, which are rarely used in EC environmental matters.
\bibitem{32} Bermann \textit{et al.}, \textit{supra} note 4, at 118.
\bibitem{33} EC Treaty, \textit{supra} note 10, arts. 178 & 215.
\bibitem{34} Usher, \textit{supra} note 8, at 43.
\bibitem{35} EC Treaty, \textit{supra} note 10, art. 168a (as amended 1987).
\bibitem{36} Id.
\bibitem{37} Bermann \textit{et al.}, \textit{supra} note 4, at 73.
\bibitem{38} Rosenkvist & Campo, \textit{supra} note 7, at 191.
\bibitem{39} Id.
\bibitem{40} Hartley, \textit{supra} note 17, at 86.
\end{thebibliography}
In other words, the court's guiding tenet is the promotion of European integration. Because it often uses such policy considerations to fill gaps in Community law, the ECJ often functions in a quasi-legislative capacity and has significantly contributed to the creation of Community doctrine.

III. The Community Treaties and Environmental Protection

A. Relevant Provisions of the EC Treaty

Several provisions of the original EC Treaty, although expressly concerned with trade, have aided the establishment of Community competence over environmental matters. The development of an environmental program pursuant to these provisions provides "an excellent example of how the EC has grown to encompass areas not originally contemplated and how that growth has been supported by the Court of Justice." Article 30 is the free trade provision of the EC Treaty. It prohibits the imposition of quantitative restrictions on imports by member states, including any "measures having [an] equivalent effect." It affects environmental regulations adopted by individual member states because such regulations often have deleterious effects on intra-Community trade. If strictly enforced, article 30 would significantly hinder attempts by individual member states to protect the environment.

The EC Treaty, however, contains a public welfare exception to its free trade requirement. Article 36 states that "[t]he provisions of articles 30 to 34 shall not preclude prohibitions or restrictions on imports . . . on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures . . . ; or the protection of industrial and commercial property." Nevertheless, article 36 explicitly forbids the use of such prohibitions or restrictions as "disguised restriction[s] on trade." Thus, article 36 allows individual member states to promulgate environmental regulations under certain circumstances despite an adverse "equivalent effect" on intra-Community trade.

Prior to 1987, articles 100 and 235 of the EC Treaty provided the basis for Community-produced environmental regulations. Article 100 directs the Council to issue directives for the purpose of harmonizing those laws.

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41. Id.
42. Id.
44. E.g., BERMANN ET AL., supra note 4, at 1102.
45. Id. at 1101.
46. EC TREATY, supra note 10, art. 30.
47. E.g., Demiray, supra note 3, at 294-95.
48. EC TREATY, supra note 10, art. 36.
49. Id.
50. See case and discussion infra notes 96-107 and accompanying text.
51. BERMANN ET AL., supra note 4, at 1102.
of the member states that "affect the establishment or functioning of the common market."52 This harmonization requirement has been used to promote common policies in a number of fields that directly or incidentally affect the market, including social affairs, transportation, and environmental protection.53 Article 235, the implied powers or "elastic" provision of the EC Treaty, is more general in scope but more restricted in application.54 It enables the Community to take actions not specifically provided for in the Treaty, but only if necessary for the purpose of pursuing a stated treaty objective.55 Both provisions require unanimous approval by the Council for the passage of a directive.56

Although the Community implemented its "First Action Programme on the Environment" in 1973,57 it had not yet explicitly recognized environmental protection as an element affecting "the establishment or functioning" of the common market.58 As a consequence, the Council initially promulgated environmental directives mainly under article 235, the implied powers provision, and limited the use of article 100 in such matters.59 However, by the late 1970s, the member states had generally accepted environmental regulation as being intrinsically related to the economic stability of the common market.60 With this acceptance, the article 100 harmonization requirement came to be the primary justification for these directives.61


With the member state's adoption of the Single European Act (SEA) in 1987, the EC Treaty was amended to include several articles that explicitly address environmental protection.62 Article 130r proclaims the Community's environment-related objectives and lists some of the factors to be con-

52. EC TREATY, supra note 10, art. 100.
53. BERMANN ET AL., supra note 4, at 429.
54. EC TREATY, supra note 10, art. 235.
55. Id. See also HARTLEY, supra note 17, at 111-19 (discussing the procedural limitations on the invocation of article 235).
56. Vizek, supra note 11, at 386.
57. E.g., Julie A. Harms, Note, The European Community's Development of an Environmental Policy: The Treaty of European Union, 6 TUL. ENVTL. L.J. 397, 400-01 (1993). There has since been a continuous sequence of such "Action Programmes," each lasting from three to eight years. In these programs, the Community sets a series of specific principles and objectives. Id. at 400-03. The Fifth Action Programme started in 1993 and extends until 2000. During this period, the EC plans to implement pollution reduction programs in five areas--industry, transport, energy, tourism, and agriculture--and work toward solving certain environmental issues in developing countries. Id. at 405-06.
58. EC TREATY, supra note 10, art. 100.
59. BERMANN ET AL., supra note 4, at 429.
60. See cases, infra notes 108-16, in which the ECJ found that environmental regulation by the EC is singularly justifiable under article 100.
61. Id.
62. See EC TREATY, supra note 10, Title VII (as amended 1987).
sidered when preparing environmental initiatives. Article 130s establishes the procedure for adopting Community environmental rules. The SEA maintained the requirement of unanimous Council approval, which is perhaps the most significant procedural obstacle to the adoption of such rules. However, it also confers upon the Council the power to unanimously decide that certain types of measures may be passed by a qualified majority vote. The third provision, article 130t, grants member states the authority to adopt more stringent protective measures than those adopted by the Community.

The SEA added another provision to the EC Treaty, article 100a, which provides an alternative legal foundation for environmental regulation by the Community. Like article 100, article 100a requires the harmonization of those laws of the member states that affect the functioning of the internal market. As a consequence, article 100a largely supplanted the function of article 100. However, it also avoids some of article 100's defects. There are two significant differences between article 100 and article 100a. First, article 100a eliminates the unanimity requirement and allows the adoption of Community directives by a qualified majority vote of the Council. Second, article 100a makes the legislative process more democratic by providing the European Parliament with a more active role.

The partial elimination of the unanimity requirement represented a significant step in the evolution of the Community's environmental policy. The adoption of new directives is often a matter of dispute in the Council and the unanimity requirement slowed the process considerably. The source of disagreement was usually economic, with less economically developed countries tending to oppose strict environmental regulations because of their cost of implementation. Thus, the option to use article 100a as the legal basis for the adoption of proposed Community environmental regulations significantly improves the likelihood of passage. The EC Treaty places no restrictions on the use of articles, so the Council is

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63. EC TREATY, supra note 10, art. 130r (as amended 1987). Specifically, the article lists the Community's objectives as the preservation, protection, and improvement of the quality of the environment; making a contribution towards protecting public health; and ensuring a "prudent and rational" utilization of natural resources. Some of the factors deemed relevant to environmental regulation include the availability of scientific data, the environmental conditions of the various regions of the Community, the potential costs and benefits of action or inaction, and the economic and social development of the Community as a whole. Id.
64. Id. art. 130s.
65. Id.
66. Id.
67. Id. art. 130t.
68. Id. art. 100a.
69. Id.
70. BERMANN ET AL., supra note 4, at 43-44.
71. EC TREATY, supra note 10, art. 100a (as amended 1987).
72. Id. See also BERMANN ET AL., supra note 4, at 439-40.
73. BERMANN ET AL., supra note 4, at 1102.
74. Id.
free to utilize article 100a as the basis for environmental legislation as long as Parliament participates in the approval process.

The adoption of the SEA demonstrated the Community's commitment to environmental protection and broadened the Council's authority to promulgate environmental regulations. However, the SEA's failure to address the EC's role in implementing and enforcing those regulations has resulted in significant functional differences between the member states over environmental matters.

C. The Treaty On European Union and the Enlargement of Community Powers

In 1993, the member states adopted the Treaty on European Union (TEU), also commonly referred to as the Maastricht Treaty. Like the Single European Act, the TEU did not replace the three original treaties of the European Community, but rather amended them to strengthen the Community. Most significantly, the TEU superimposed the newly-formed European Union on the EC's existing political framework. In the process, it ushered in the next stage in the movement toward European unity by conferring EU citizenship status on the nationals of member states and establishing a common Community currency.

The TEU implemented both substantive and procedural changes in environmental policy. Substantively, the TEU strengthened article 130r by directing that environmental protection requirements "be integrated into . . . other Community policies." It also amended article 130s to provide financial support to member states that are unable to bear the costs of implementing environmental measures. Finally, it amended article 130s to enable the Council to temporarily exempt particular member states from the requirements of regulations when compliance would impose "costs deemed disproportionate for the public authorities of a Member State." These provisions were intended to encourage individual member states to implement existing environmental directives and to be more amenable to the promulgation of new environmental regulations.

76. Id. at 181-82.
78. Rosenkvist & Campo, supra note 7, at 189-90.
79. Id.
80. TEU, supra note 77, art. 8. Union citizenship does not replace a person's national citizenship, but merely supplements it.
81. TEU, supra note 77, art. 109e-m; Hartley, supra note 17, at 8-9. The United Kingdom and Denmark have refused to accede to the approval of a common currency and are therefore not obligated to adopt the "European Currency Unit," or "ecu." Id.
82. Because it routinely takes several years for any given dispute to come before the ECJ, the court has not yet heard an environmental case under the auspices of the TEU.
83. TEU, supra note 77, art. 130r.
84. TEU, supra note 77, art. 130s.
85. Id.
86. Visek, supra note 11, at 388.
One of the more significant procedural changes was the amending of articles 100a and 130s. These amendments made the process of adopting new directives more democratic by enlarging the role of the popularly-elected European Parliament. With respect to article 100a legislation, Parliament was given the powers of co-decision, allowing it to prevent the passage of proposed regulations under certain circumstances. For article 130s legislation, the requirement of unanimous passage by the Council was largely eliminated and replaced with the cooperation procedure. Under this procedure, only a qualified majority of the Council is necessary to approve proposed regulations from the Commission. Approved proposals are then sent to Parliament, which can accept, amend, or reject them. If Parliament rejects a proposed directive, the Council may only adopt it by a unanimous vote.

Significantly, the TEU also created a procedure by which the ECJ may impose fines on member states for failure to comply with its judgments. This represents the first punitive mechanism by which the EC can actively enforce its regulations in the face of obdurate behavior by a member state.

IV. Jurisprudence of the ECJ

Although the Council began promulgating directives concerning environmental protection in 1973, the Community's competence over such matters was not directly challenged before the ECJ until 1980. However, the court's holding in a slightly earlier case, Cassis de Dijon, was profoundly influential and demands inclusion in this compendium. There are two types of cases presented herein. The first type of case was intended to significantly influence human activities having a direct or indirect impact on the biosphere. The second type include those, like Cassis de Dijon, that examined or impacted the authority of the Community or the member states to address environmental matters.

A. The Establishment of Competence—1979-1980

1. Cassis de Dijon (1979)
In the landmark Cassis de Dijon case, the ECJ established a balancing test subsequently used to analyze disputes arising from the omnipresent ten-
sion between economic maximization and public welfare, including environmental protection.\textsuperscript{96} One of the primary arguments in \textit{Cassis de Dijon} focused on the article 36 public health exception to the EC Treaty prohibition against restrictions on the free movement of goods between member states.\textsuperscript{97} The ECJ required that each member state give effect to the others' national laws by marketing goods lawfully marketed elsewhere in the Community, unless a national marketing restriction is necessary to safeguard "mandatory requirements" such as the public health.\textsuperscript{98} To determine whether the mandatory requirement exception applied, the ECJ formulated the "rule of reason" test, in which it weighs the goals of a member state's regulation or a Council directive against its impact on trade before rendering a decision.\textsuperscript{99} The ECJ has since used the "rule of reason" approach when balancing public welfare concerns against the economic policies of the Community.\textsuperscript{100}

\textit{Cassis de Dijon} arose in 1979 after the Federal Republic of Germany had mandated a minimum alcohol content of 25\% for fruit liqueurs and prohibited the importation or sale of alcoholic beverages that fell below this minimum.\textsuperscript{101} The dispute was referred to the ECJ when importers of the French-manufactured Cassis de Dijon liqueur challenged the restriction as violative of article 30, which guarantees the free movement of goods between Community members.\textsuperscript{102}

Germany forwarded two defenses. The first was that the restriction was necessary to protect the public health, and thus permissible under article 36, because lower-proof beverages purportedly foster a tolerance towards alcohol more easily than those with a higher alcohol content.\textsuperscript{103} The second defense was that the producers of lower proof beverages gain an unfair competitive advantage because these products are subject to a proportionally lower tax rate.\textsuperscript{104}

Neither defense persuaded the ECJ. It considered the health argument to be unjustified because much of the higher proof alcohol sold in Germany is diluted prior to consumption.\textsuperscript{105} Furthermore, it felt that any market advantage gained by the manufacturers of low proof beverages could be overcome by less burdensome means, such as a requirement that alcohol percentages be clearly displayed for the consumer.\textsuperscript{106} Applying the "rule

\textsuperscript{96} See \textit{supra} notes 46-50 and accompanying text for a discussion of article 30 et seq.
\textsuperscript{97} \textit{Cassis de Dijon}, 1979 E.C.R. at 662-63.
\textsuperscript{98} Id. These "mandatory requirements" include "the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer." Id.
\textsuperscript{99} Id. at 664.
\textsuperscript{100} See, \textit{e.g.}, \textit{Waste Oils I, II, III}, infra notes 130-49 and accompanying text. In these cases, the court broadened the "rule of reason" approach to apply in environmental protection cases as well. Id.
\textsuperscript{101} \textit{Cassis de Dijon}, 1979 E.C.R. at 660.
\textsuperscript{102} Id. at 661.
\textsuperscript{103} Id. at 662-63.
\textsuperscript{104} Id. at 663.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 664.
of reason" test, the court held that the German government's concerns failed to outweigh the prohibition's negative impact on the free movement of goods.107

2. Italy Detergents108/Sulphur Content of Fuels109 (1980)

The first direct challenge to the EC's jurisdiction over environmental matters came in 1980, after the Italian government failed to comply with two Council directives—one requiring all detergents to be biodegradable110 and another fixing a maximum allowable sulphur content for liquid fuels.111 The ECJ consolidated and decided these cases on the same day. Although the Italian government claimed not to be disputing the validity of the directives, in each case it questioned the Community's authority to issue such environmental regulations.112

The ECJ rejected the Italian government's argument on multiple grounds. First, the court concluded that the directives had two purposes—protection of the environment and the elimination of trade barriers between member states resulting from dissimilar regulations.113 On this latter ground, the court found both directives valid per se under article 100 of the EC Treaty.114 Perhaps more significantly, the ECJ found that environmental provisions by the EC are singularly justifiable under article 100. The court reasoned that in the absence of harmonized Community environmental regulations, fair market competition between the member states might be "appreciably distorted."115

The holdings in these cases were critical for two reasons. First, they unequivocally established the EC's authority to regulate environmental matters within the Community. Second, they established this authority under article 100, which empowered the Council to adopt such regulations, but only upon a unanimous vote by the Council Members.116

B. Fixing Policy and Extending the Community's Jurisdiction—1981 to the Present


Following the ECJ's adoption of a balancing approach in Cassis de Dijon, it was unclear when member states could invoke the public welfare exception

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107. Id.
116. EC Treaty, supra note 10, art. 100.
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of article 36 to restrict intra-Community trade. However, the court's subsequent holding in the *Plant Protection Products* case demonstrated that the effectiveness of article 36 had not been undermined.

The dispute began in 1979 when a private Dutch company, Frans-Nederlandse Maatschappij Voor Biologische Producten B.V., was fined by a Dutch court for selling and delivering a plant protection product not yet approved for use in the Netherlands. The company appealed the sentence, arguing that because the same product had been tested, found to be safe and approved for use in France, the EC Treaty prevented the Netherlands from prohibiting its use on public health grounds. The Dutch court referred the issue to the ECJ.

The ECJ held that, in the absence of a specific Community rule to the contrary, a member state could require approval of a product for the purpose of protecting the public health, even if it had been previously approved by another member state. However, in order to reduce the impact on the free movement of goods, the ECJ prohibited authorities in an importing state from unnecessarily requiring the duplication of tests already conducted in another member state.

2. *Italy Directives (1981)*

Approximately one and one-half years after the *Detergents* and *Sulphur Content of Fuels* cases, the Italian government again appeared before the ECJ for failing to comply with Council directives concerning the protection of the environment. In this instance, directives concerning waste oils disposal, drinking water quality, waste disposal, bathing water quality, and polychlorinated biphenyls (PCBs) and polychlorinated terphenyls (PCTs) disposal were involved. The cases were joined for the purposes of the court.

This time, the Italian government neither questioned the EC's authority over environmental matters nor disputed that it had failed to fulfill its obligations. Rather, it pleaded that the implementation of the directives had simply been delayed because of complications inherent in Italy's parliamentary process. The ECJ rejected this defense, stating that "a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives."

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118. See supra notes 95-107 and accompanying text for a summary of *Cassis de Dijon.*
120. Id. at 3282.
121. Id. at 3290-01.
122. Id. at 3291-92.
124. Id.
125. Id. at 3383-84.
126. Id. at 3384.
127. Id.
128. Id.
Two aspects of the Italy Directives case exemplified the growing authority of the EC to issue and enforce environmental regulations. First, Italy did not challenge the Council’s authority to issue environmental regulations, despite the tenuous connection between some of its actions, such as the regulation of the quality of bathing water, and intra-Community trade. Second, the court continued to reduce the number of defenses available to member states for failing to comply with Community environmental directives. This followed the trend established by the court in the Cassis de Dijon, Detergents and Sulphur Content in Fuels cases.129


In contrast to Italy’s repeated failures to comply, it was France’s attempted compliance with Community environmental regulations that brought it before the ECJ. Pursuant to a 1975 Council directive requiring that member states take affirmative measures to ensure the safe disposal of waste oils, France enacted legislation requiring delivery of such oils to an “approved collector” for proper disposal.133 By implication, the legislation prohibited the export of waste oils to other member states.134

The issue in Waste Oils I was referred to the ECJ when the Groupement d’Intérêt Economique “Inter-Huiles” argued before a French court that the legislation constituted an impermissible restriction of trade under article 30 et seq. of the EC Treaty.135 The ECJ, reasoning that “the environment is protected just as effectively when the oils are sold to an authorized disposal or regenerating undertaking of another member state as when they are disposed of in the Member State of origin,” held that France could not organize a system that effectively prohibited the export of waste oils.136

In Waste Oils II, the ECJ considered a subsequent argument by the French government that in practice its legislation did not restrict the export of waste oils to other member states.137 The French government supported this claim with the fact that France was the leading Community exporter of waste oils to other member states.138 The ECJ rejected this defense and affirmed its holding in Waste Oils I, stating that the French legislation was impermissible because it would create doubts about an exporter’s “legal

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129. See supra part IV.A.1-2.
134. Id. at 564.
135. Id. at 564. Of particular relevance was article 34, which prohibits all measures having an effect equivalent to quantitative restrictions on trade. EC TRATY, supra note 10, art. 34.
138. Id.
In *Waste Oils III*, another group opposed to the French system, the Association de Défense des Brûleurs d’Huiles Usagées, questioned the validity of the EC directive. They argued that the directive undermined the principles of freedom of trade, free movement of goods, and freedom of competition embodied in the EC Treaty because it empowered member states to control the movement and disposal of waste oil. The ECJ rejected this argument, stating that "the principle of the freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community . . ." However, the court indicated that any such limits on intra-Community trade must "neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection." After characterizing environmental protection as "one of the Community's essential objectives," the court held that the directive was not "incompatible with the fundamental principles" of the EC Treaty.

The *Waste Oils* cases were significant for a number of reasons. The ECJ effectively extended the "rule of reason" balancing approach by applying it to environmental protection regulations. Together with *Cassis de Dijon*, these cases also firmly established that neither a member state law nor a Community environmental regulation may interfere with intra-Community trade unless three conditions are met: (1) the interference must be motivated by a legitimate need to protect the environment; (2) the interfering regulation must not be discriminatory; and (3) the negative effect on intra-Community trade must not exceed that which is necessary to achieve the environmental protection objective. Finally, by affirming environmental protection as a fundamental objective of the Community, the court recognized that environmental protection constitutes a justification for restrictions on the free movement of goods that is separate and independent of article 36.


Three years after the *Plant Protection Products* case, the ECJ faced similar questions in a criminal case again referred to it from a Dutch court.

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139. Id. at 507.
141. Id.
142. Id. at 549.
143. Id.
144. Id. at 549-50.
145. See supra notes 95-107 and accompanying text for a summary of *Cassis de Dijon*.
148. Id.
151. Id.
The defendant in this case was the owner of a chain of supermarkets that imported apples from Italy. The apples had a residue of the pesticide vinclozoline on them, a substance Dutch law only permits in small quantities on specific fruits and vegetables.

The Dutch government brought criminal charges against the defendant. In his defense, the defendant contended that the Netherlands' prohibition of the marketing of such apples was contrary to article 30 because they were legally marketed in Italy. The Dutch government responded that the prohibition was necessary to protect the public health and thus permissible under article 36.

Concluding that vinclozoline posed a legitimate health concern, and that the relevant EC regulations did not address its use, the ECJ ruled that member states could freely regulate its presence in foodstuffs. Thus, despite free trade considerations, the court was unwilling to compel a member state to allow the importation of a fruit or vegetable tainted with the residue of a pesticide not regulated by the Community.

Although the Pesticides case only directly addressed public health, the court's holding was nevertheless relevant to environmental protection. In concert with the Plant Protection Products holding, the court's decision empowered individual member states to invoke the public welfare exceptions to the free trade requirement on the grounds of environmental protection. This exception may even be invoked by one member state when another has previously waived the same exception, as long as there exists an arguable threat to the public welfare and the negative impact to free trade is minimized as much as possible. However, the Pesticides Court emphasized that when there is an applicable Community directive, it overrules a member state's authority to invoke this exception.


These are only three of a series of cases that arose from the alleged failure of various member states to comply with a 1979 Council directive intended

152. Id. at 3264.
153. Id. at 3266-67. Interestingly, the apples over which the criminal charges were brought contained only 1.0 mg/kg of the pesticide, while other fruits, such as strawberries, could legally contain up to 10.0 mg/kg. Id. at 3265-67.
154. Id. at 3277. Although the defendant's argument was addressed by the court as presented, it is noteworthy that the Italian government submitted a statement indicating that, in fact, vinclozoline is not authorized for use on apples in Italy. Id. at 3269.
155. Id. at 3279.
156. Id. at 3280.
157. Id.
158. See supra notes 117-22 and accompanying text for summaries of the Plant Protection Products case. In its 1983 Sandoz decision, the ECJ determined that the burden of proof in establishing the legitimacy of such a threat lies with the member state invoking the public welfare exception. Case 174/82, Crim. Proc. Against Sandoz BV, 1983 E.C.R. 2445, 2464.
to protect wild birds.\textsuperscript{163} The justification for the directive was that “effective bird protection is typically a transfrontier environment problem entailing common responsibilities for the Member States.”\textsuperscript{164}

The court focused on two issues in \textit{Wild Birds I}—the power of member states to derogate from the 1979 directive and the effectiveness of Belgian hunting laws in meeting the directive’s requirements.\textsuperscript{165} In concluding that Belgium failed to fulfill its Community obligations, the ECJ stated that although a directive need not be enacted into national law verbatim, national legislation must ensure “the full application of the directive in a sufficiently clear and precise manner.”\textsuperscript{166}

In \textit{Wild Birds II}, the Italian government conceded that its extant legislation did not fully comply with the Council’s directive, but argued that the Commission’s complaints of noncompliance were unjustified because legislation implementing the directive was under scrutiny by the Italian Parliament.\textsuperscript{167} The ECJ rejected this defense, stressing the specific failings of the Italian law in force at that time.\textsuperscript{168} In finding that the Italian government had failed to fulfill its obligations, the court again emphasized the need for “faithful transposition” of Community law into national law, particularly in cases when “the management of the common heritage is entrusted to the Member States in their respective territories.”\textsuperscript{169}

In \textit{Wild Birds III}, the European Commission charged that the Federal Republic of Germany had failed to properly modify its national law pursuant to the directive.\textsuperscript{170} The Commission complained that while German law properly allowed an exception to the prohibition against the deliberate killing of certain birds or the destruction of their nests or eggs for “the normal use of the land for agricultural, forestry or fishing purposes,” it did not limit this exception to those situations where no other satisfactory means of protecting these birds existed.\textsuperscript{171} The German government responded that its use of the word “deliberate” presupposed that the exception only extended to unintentional acts, and thus fulfilled its obligation under the directive.\textsuperscript{172} The ECJ rejected this argument, finding the German legislation inadequate on the ground that “normal use” of land should


\textsuperscript{163} \textit{E.g., Wild Birds I}, 1987 E.C.R. at 3029. The Council directive required member states to implement measures designed to protect listed birds from hunting or other disturbances and to prohibit the sale of those birds, whether alive or dead. Id. at 3030. Other cases include Case C-339/87, Commission v. Neth., 1990 E.C.R. I-851 and Case C-169/89, Crim. Proc. Against Gouetterie Van den Burg, 1990 E.C.R. I-2143. \textit{See infra notes} 214-21 and accompanying text.

\textsuperscript{164} \textit{Wild Birds I}, 1987 E.C.R. at 3059.

\textsuperscript{165} \textit{Id.} at 3033.

\textsuperscript{166} \textit{Id.} at 3060.

\textsuperscript{167} \textit{Wild Birds II}, 1987 E.C.R. at 3077.

\textsuperscript{168} \textit{Id.} at 3098-3106.

\textsuperscript{169} \textit{Id.} at 3097.

\textsuperscript{170} \textit{Wild Birds III}, 1987 E.C.R at 3506-07.

\textsuperscript{171} \textit{Id.} at 3516.

\textsuperscript{172} \textit{Id.} at 3517.
not be equated with unintentional damage to the life and habitat of birds. By describing wildlife management as an environmental problem and upholding each provision of the directive, the ECJ again effectively endorsed the expansion of the Community’s domain over environmental issues. As in the Italy Directives case, the connection between the regulation of wild birds and intra-Community trade was not readily apparent, yet none of the defendant states challenged the validity of the directive. This acquiescence demonstrates the extent to which the authority of the Community over environmental matters had by then been established. Furthermore, these cases also demonstrate the high level of scrutiny practiced by the Commission and the court when reviewing the member state’s efforts to incorporate EC environmental directives into their national legislation.


On the same day that the ECJ issued its decision in Wild Birds III, it decided the Groundwater Directive case. Each of these opinions demonstrated the limited discretion available to member states when implementing Community environmental directives.

In 1979, the Council issued a directive requiring member states to adopt measures preventing the discharge of certain hazardous substances into groundwater. The Commission brought the Dutch government before the ECJ for failing to implement the directive into its national law. The Netherlands responded that it had expressly implemented part of the directive and that other legislation effectively implemented much of the remainder. It further argued that it had delayed the full incorporation of the directive and was redrafting pending legislation in the interest of protecting the public health. This redraft, it claimed, was made necessary by an urgent need to accommodate the remediation of several serious cases of soil contamination.

In holding against the Netherlands, the ECJ first concluded that it cannot take account of measures adopted by a member state after commencement of a Community action against it. The court reiterated the rule that verbatim implementation of a directive is unnecessary, but concluded that a member state cannot meet Community obligations by adopting pro-

173. Id. at 3517-18.
174. Id. at 3503.
175. See supra part IV.B.2.
177. Id. at 3484.
178. Id.
179. Id. at 3486-87.
181. Id.
182. Id. at 3498.
visions so vague that they do not give effect to the directive with sufficient precision or clarity to "satisfy fully the demands of legal certainty." \(^{183}\)

7. **Danish Bottles (1988)\(^{184}\)**

In 1988, the ECJ decided whether a law passed by a member state for the purpose of protecting the environment remains valid if the public health is not threatened, yet the law negatively impacts intra-Community free trade.\(^ {185}\) The Danish government had imposed a deposit-and-return system requiring all containers for beer, mineral water, and soft drinks to be packaged in specific government-approved, reusable containers.\(^ {186}\) The Danish government allowed the use of certain non-approved containers, but only for quantities of less than 3000 hectaliters per year of a product, and only if the distributor set up an independent deposit-and-return system.\(^ {187}\) The purpose of the legislation was to protect the environment by conserving resources and reducing waste.\(^ {188}\)

The Commission argued that the Danish system violated the article 30 free trade requirement because it amounted to a quantitative restriction on trade.\(^ {189}\) The Commission reasoned that the system placed an undue burden on importers because compliance required the establishment of an infrastructure for the collection, sorting, storing, and transport of the containers, as well as other administrative difficulties.\(^ {190}\) In addition, the Commission argued that the system was contrary to the principle of proportionality and therefore violative of the EC Treaty because a sufficient level of environmental protection could be achieved by less restrictive means, such as mandating the recycling of non-reusable containers.\(^ {191}\)

The Danish government countered that ECJ caselaw called for a balancing of interests and concluded that in this instance the interest in environmental protection outweighed that of free movement of goods.\(^ {192}\) The government calculated that the adverse effects of the Danish system on intra-Community trade were slight and that the alternative remedies discussed by the Commission would be significantly less effective at protecting the environment.\(^ {193}\)

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183. Id.
185. Id.
186. Id. at 4608-09.
187. Id. at 4609.
188. Id. at 4615.
189. Id. at 4610.
190. Id.
191. Id. at 4610-11. The "principle of proportionality" means that a governmental action must be both reasonably related and proportional to the public good intended. The ECJ accepted this principle as an inherent part of EC law in 1970. Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- Und Vorratsstelle För Getreide Und Futtermittel, 1970 E.C.R. 1125 (commonly referred to as Solange I).
192. Danish Bottles, 1988 E.C.R. at 4614-15. This discussion of a "balancing of interests" refers to the "rule of reason" approach established in the Cassis de Dijon case. See supra notes 95-107 and accompanying text for a summary of that case.
The ECJ was largely unconvinced by the Danish government's reasoning and determined that the requirement that producers use only approved containers was “disproportionate to the objective pursued” and therefore unnecessarily disruptive to the article 30 requirement of free trade. However, the court also concluded that the deposit-and-return aspect of the Danish system was necessary to achieve the goal of environmental protection and therefore was not disproportionate. Thus, such a deposit-and-return system would not violate the EC Treaty, even if it adversely affected intra-Community trade to some degree.

In this case, the ECJ sanctioned interference with intra-Community trade by a member state for the sole purpose of protecting the environment. However, it also placed limits on that interference. For example, such interference is not permissible where there is an existing Community rule relating to the product or activity in question. In addition, by invoking the principle of proportionality, the ECJ imposed a requirement that the state's action be proportional to the public good sought to be achieved. There are two prongs to this proportionality requirement. First, the negative impact on free trade must be limited to that which is “justified by the pursuit of the objective of environmental protection.” Second, the benefits gained must outweigh the adverse effect on trade.


In the following year, another waste-related case came before the ECJ. An Italian community, Cinisello Balsamo, prohibited the distribution or sale of non-biodegradable plastic bags, except for those intended for the collection of waste. Several producers of plastic products brought an action against the municipality, claiming that this prohibition violated Community law.

The Italian court referred several questions to the ECJ, including whether member states could prohibit the sale or use of certain waste products in the light of Council directives limiting the disposal of those products. In answering these questions, the court focused on the purpose of

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194. *Id.* at 4632.
195. *Id.* at 4630.
196. *Id.*
197. *Id.* at 4629.
198. *Id.* at 4629.
202. *Id.*
203. *Id.*
204. *Id.* at 2513-14. The plaintiffs raised another argument, but it was neither referred to nor addressed by the ECJ. They argued that the prohibition was not justified by a need to protect the environment and was therefore violative of the article 30 guarantee of free trade. *Id.* at 2515-16. The remaining questions were largely procedural and therefore are not discussed here.
the directives, rather than their actual language.\textsuperscript{205} It concluded that the directives were intended to prevent the production of waste, and that limitations on the sale or use of products such as plastic containers were conducive to the attainment of that goal.\textsuperscript{206} Therefore, no right to sell or use such products existed and the municipality’s prohibition did not violate Community regulations.\textsuperscript{207}

The \textit{Plastic Bags} case demonstrates the court’s teleological jurisprudence with respect to such disputes. Rather than taking a formalist or strict constructionist approach to the interpretation of directives, the ECJ considered their underlying purpose in rendering a decision. This is characteristic behavior for the ECJ—even when the language of a directive seems clear, the court still prefers to consider the “spirit, general scheme, and context of the provision.”\textsuperscript{208} By doing so, the court has vested itself with the power to mold EC law to satisfy the perceived needs of the Community. One consequence of this approach is that a directive often has a more comprehensive effect and application than might be suggested by a strict interpretation of its language.

9. \textit{The Leybucht Dikes (1989)}\textsuperscript{209}

In \textit{The Leybucht Dikes} case, the ECJ had the opportunity to set forth guidelines for how to proceed when protecting the environment arguably results in a threat to human safety.\textsuperscript{210} However, because the court’s review of the facts indicated that the alleged adverse effect on the environment was negligible, it never truly addressed this important issue.

In 1985, the Federal Republic of Germany approved a project for the enlargement and strengthening of a dike in the Leybucht, a bay classified by the government as a “special protection area” because of its importance as a “nesting, feeding and staging area for various species of . . . birds.”\textsuperscript{211} In 1989, the Commission submitted an application to the court requesting interim measures to suspend this construction.\textsuperscript{212} The Commission had concluded that the project violated a Council directive requiring the protection of wild birds.\textsuperscript{213} The German government acknowledged that the construction might disturb the protected birds, but claimed that a new dike was vital because the existing dikes were no longer adequate to protect the land and its inhabitants from violent storm tides.\textsuperscript{214}

\begin{itemize}
  \item \textsuperscript{205} \textit{Id.} at 2515.
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} \textit{Id.} at 2515-16.
  \item \textsuperscript{208} Joxerramon Bengoetxea, \textit{The Legal Reasoning Of The European Court Of Justice} 233 (1993).
  \item \textsuperscript{209} Case 57/89R, Commission v. F.R.G., 1989 E.C.R. 2849, 2852 [hereinafter \textit{The Leybucht Dikes}].
  \item \textsuperscript{210} \textit{Id.}
  \item \textsuperscript{211} \textit{Id.} at 2851.
  \item \textsuperscript{212} \textit{Id.}
  \item \textsuperscript{213} \textit{Id.} at 2850.
  \item \textsuperscript{214} \textit{Id.} at 2852.
\end{itemize}
In recognition of the fact that the Commission had delayed its application until the project was nearly two-thirds complete, the court focused its attention only on the forthcoming phase of construction.\textsuperscript{215} It first considered that the distance between the work area and the breeding area was no less than it had been during the previously completed work.\textsuperscript{216} Although statistics on the Leybucht bird population indicated that it had fallen since 1984, most of this reduction had occurred before the start of the project.\textsuperscript{217} Thus, the court found that there was little evidence to support the Commission's claim that the final phase would have a significant impact on the birds.\textsuperscript{218} The court also rejected a suggestion by the Commission that the project would indirectly affect the birds by attracting more tourists.\textsuperscript{219} Therefore, the ECJ concluded that there existed no substantive reason to grant the Commission's request for interim measures.\textsuperscript{220}

10. \textit{Red Grouse} (1990)\textsuperscript{221}

In 1990, a Dutch court referred a question to the ECJ regarding whether the use of trade measures by one member state in an effort to protect environmental concerns in another member state violates the modified EC Treaty.\textsuperscript{222} The court concluded that such measures do indeed violate the Treaty.\textsuperscript{223}

The Netherlands Vogelwet (law on birds) protected certain species of wild birds by prohibiting their possession, sale, transport, import or export.\textsuperscript{224} These protected species included the red grouse, a bird that is plentiful in the United Kingdom but not indigenous to the Netherlands.\textsuperscript{225} The defendant, Van den Burg, was criminally charged for having imported, kept, and sold several specimens of red grouse.\textsuperscript{226}

The defendant responded that the Vogelwet's protection of a bird not found in the Netherlands and lawfully marketed in another member state (the United Kingdom) violated the free trade provisions of the EC Treaty.\textsuperscript{227} The Dutch government argued in turn that bird protection was necessary for the preservation of Community heritage and was therefore a cross-frontier issue.\textsuperscript{228}

\textsuperscript{215} Id. at 2855.  
\textsuperscript{216} Id.  
\textsuperscript{217} Id.  
\textsuperscript{218} Id. at 2855-56.  
\textsuperscript{219} Id. at 2856.  
\textsuperscript{220} Id.  
\textsuperscript{222} Id.  
\textsuperscript{223} Id. at I-2164.  
\textsuperscript{224} Id. at I-2146.  Even though the Council had previously issued a directive for the same purpose, the Vogelwet was permissible because the directive allowed member states to introduce stricter protective measures than provided for under EC regulations.  
\textsuperscript{225} Id. at I-2147.  
\textsuperscript{226} Id. at I-2146.  
\textsuperscript{227} Id. at I-2147.  
\textsuperscript{228} Id. at I-2150.
Taking into consideration that the red grouse is neither endangered nor a migratory species protected by Community law, the ECJ agreed with the defendant. The implication of this holding is that in the absence of a community regulation, one member state may not limit intra-Community free trade in order to protect an environmental concern in another member state.


Following the adoption of the Single European Act, there were two primary EC Treaty articles under which the Council could adopt directives for the purpose of protecting the environment—articles 100a and 130s. In this case, the Council had passed a directive intended to harmonize rules throughout the Community concerning the reduction of pollution caused by titanium dioxide waste. It acted under article 130s, which governed environmental legislation and required a unanimous vote for passage. The Commission asked the ECJ to annul the directive, arguing that the Council should have acted under article 100a, which addresses matters concerning the European single market, gives the European Parliament a stronger role in the passage of legislation, and only requires a qualified majority vote.

The ECJ found the directive to be concerned with both environmental protection and market harmonization. From the language of the Single European Act, the court then determined that while article 130s was exclusively intended to address environmental protection, article 100a is more appropriate for the harmonization of environmental regulations. Therefore, the court held that the directive should have been based on article 100a and granted the Commission’s request for annulment.

The significance of the *Titanium Dioxide* case is not simply procedural. Had the ECJ found that article 130s was the appropriate basis for such a directive, it would have undermined Parliament’s newly elevated role and minimized the democratic component of the EC legislative process. Instead, the court appeared to give preference to those EC Treaty articles

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229. Id. at I-2164.
231. See supra notes 62-76 and accompanying text for a discussion of the relevant sections of the Single European Act.
233. Id. See also Usher, supra note 8, at 71.
234. *Titanium Dioxide*, 1991 E.C.R. at I-2871. When adopting the Single European Act, the member states gave Parliament a stronger legislative voice by introducing a "parliamentary cooperation" procedure which applied to article 100a, but not to article 130. In *Titanium Dioxide*, the Council had intentionally circumvented this new procedure by adopting the directive under article 130s. See Bermann et al., supra note 4, at 84-85.
236. Id. at I-2901.
237. Id.
238. Usher, supra note 8, at 71.
that enhance the democratic role of the Parliament. In addition, the holding established that environmental concerns could be addressed by the Community even in the absence of a unanimous vote by the member states because the specific requirements of article 130s do not usurp the more general requirements of article 100a.


For the purpose of protecting the environment, the Region of Walloonia, Belgium, adopted a decree prohibiting the import of waste from other member states or other regions of Belgium. The Commission concluded that the decree violated both Council directives concerning the disposal and transport of waste and article 30 et seq. of the EC Treaty ensuring the free movement of goods.

In its decision, the ECJ came to several significant conclusions. First, it found that Council directive 75/442, which sets forth certain requirements concerning the disposal of waste, does not prohibit an absolute ban on the import of wastes. However, the court did find that directive 84/631, which is aimed at controlling the transfrontier shipment of hazardous waste, does prohibit such a ban. The court also found that waste, whether recyclable or not, falls under the aegis of the EC Treaty provisions on the free movement of goods. Nevertheless, it held that Community regulations do not prohibit member states from banning the import of waste when the influx is so great that it constitutes a threat to the environment.

In applying these findings to the Walloonia decree, the court found that because the region has only a limited capacity to handle waste, a genuine threat to the environment existed. For this reason, the court held that the import restriction, although violative of article 30 of the EC Treaty, was justifiable under the article 36 public welfare exception, except with respect to hazardous waste. Since import regulations on hazardous materials were controlled by directive, rather than the EC Treaty, the court found that the article 36 exception did not apply and that Belgium had failed to fulfill its Community obligations in that regard.

The ECJ has been criticized for the Imports of Waste decision because of its failure to apply the Cassis de Dijon "rule of reason" proportionality

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239. Id. at 72.
241. Id.
242. Id. at 15-16.
243. Id.
244. Id.
245. Id.
246. Id.
247. Id.
248. Id.
249. Id.
Specifically, the argument is that the court, in considering the Walloon ban, should have weighed the burden on intra-Community trade against its environmental benefits. Calling this failure a "serious omission," one commentator emphasized the likelihood that alternatives existed that would have allowed Walloon to fulfill its environmental objectives while minimizing the burden on trade.

The Imports of Waste case illustrates the primary practical difference between free trade requirements imposed by the EC Treaty (to which exceptions are expressly permitted) and obligations imposed by directive. Specifically, member states are less likely to be exempted from an obligation imposed by a directive. In Carlo Tedeschi v. Denkavit Commerciale, for example, the ECJ held that member states could not invoke article 36 to justify a failure to comply with a directive because the Council presumably considers the public welfare when promulgating directives. Likewise, in Imports of Waste the court accepted Belgium's article 36 public health argument with respect to the EC Treaty's free movement of goods requirement, but rejected the same argument with respect to the Council directive (i.e., the intra-Community movement of hazardous waste). This demonstrates the ECJ's recognition that general EC Treaty requirements, which are necessarily vague, must retain some flexibility in their application, while directives, which have specific applicability and are intended to harmonize the Community, will only be effective if they bind all member states equally.

V. The ECJ's Effort at Harmonization

A. The Purpose of Harmonization and the Teleological Approach of the ECJ

The success of European integration depends to a large extent on the harmonization of those member state laws that affect the common market.

251. Id.
252. Id.
253. Case 5/77, Carlo Tedeschi v. Denkavit Commerciale s.r.l., 1977 E.C.R. 1555, 1576-77. This dispute involved an alleged violation of a Council directive by the Italian Government, which had stopped the importation of feeding-stuffs with a potassium nitrate content exceeding a certain level. The directive fixed maximum permissible levels of certain substances in feeding-stuffs and prohibited marketing restrictions on them. Although the court ultimately found that Italy had not violated the directive because the directive contained a provision allowing member states to adopt temporary provisions to protect animal or human health, the court remarked that "Where... Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health... recourse to article 36 is no longer justified." Id.
254. Imports of Waste, 21 The Proceedings of the Court of Justice and Court of First Instance of the European Communities, at 15-16.
255. E.g., EC TREATY, supra note 10, art. 3g (specifying the establishment of a system "ensuring that competition in the internal market is not distorted" as an essential Community activity).
The member states, as a consequence of a natural desire to improve the welfare of their citizens, regularly promulgate national laws that afford better consumer safety or more effective environmental protection. These actions are permitted under article 36 of the EC Treaty, but they often prove to be effective barriers to intra-Community trade when they prevent the sale of products that do not conform to certain requirements.256 Such barriers effectively partition the internal market by making it difficult for manufacturers to market throughout the Community.257 In addition, these barriers diminish the benefits of free competition and limit the choices available to consumers.258 The primary reason that the Community needs to harmonize certain types of law, then, is to strengthen the internal market while protecting the interests of consumers and the general public.259

In addition to the concern that disparities in national environmental laws will weaken the internal market, the EC has provided two other reasons for regulating matters concerning environmental protection.260 First, because the ultimate goal of the EC Treaty is to improve the living conditions of European citizens, the Community’s mission encompasses the protection and improvement of the environment.261 Second, because of the transborder nature of pollution, the Community is in the best position to effectively solve environmental problems.262

The ECJ often molds EC law to satisfy the perceived needs of the Community.263 The court accomplishes this by considering the goal or goals of each provision in question, as well as considering the context of its application, rather than limiting its interpretation to the provision’s explicit language.264 For example, in the Plastic Bags case, the ECJ looked to the purpose of a directive that facially only applied to waste materials and determined that it permitted a restriction on the sales of plastic products.265 Similarly, in The Leybucht Dikes the court focused on the potential impact of a construction project rather than the language of the directive and therefore refused to stop the project.266 Occasionally, the court has

256. BERGMANN ET AL., supra note 4, at 428.
257. Id.
258. Id.
259. Id.
261. Id.
262. Id.
263. BENGOEITXEA, supra note 208, at 98-101.
264. Id. at 233-34. In Defrenne II, a former airline employee brought an employment discrimination suit under article 119 of the EC Treaty, which guarantees equal pay for equal work. The court stated that the issue of the provision’s direct effect must be interpreted “in light of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty.” Case 43/75, Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena, 1976 E.C.R. 455, 471.
265. See supra notes 201-8 and accompanying text for a summary of the Plastic Bags case.
266. See supra notes 209-20 and accompanying text for a summary of The Leybucht Dikes case.
even ignored the plain language of the EC Treaty to achieve a fundamental Community purpose. By adopting this malleable approach, which is referred to as the "teleological method of interpretation," the ECJ has been able to expand its role by engaging in a significant amount of judicial activism and reshaping Community law into a more coherent body.

The teleological method of interpretation is the primary means by which the ECJ has attempted to harmonize Community environmental law. Initially, the court paved the way for harmonization by using this method to impose a general requirement that the member states recognize each other's laws. Later the ECJ acquired jurisdiction over environmental matters and expanded that jurisdiction. Since then, the court has attempted to balance competing interests such as intra-Community trade and environmental protection, and member state sovereignty and harmonization of EC environmental law. In the sections that follow, these steps will be addressed in turn. This Note concludes with an assessment of the reasons as to why the ECJ's goal of environmental harmonization has not yet been fully realized.

B. The Concept of Mutual Recognition

The Community's initial method of harmonizing Community law was to create uniform legislation through its regular legislative process. Because this proved to be unacceptably slow, the ECJ took the initiative in the 1979 Cassis de Dijon case and adopted a new approach. Through an approach to harmonization known as "mutual recognition," the court effectively required that the member states give recognition to each other's national laws affecting the internal market. It accomplished this by invoking the article 30 requirement of free trade to require that goods and services legally produced in one member state be authorized for sale or use in all other member states. However, because the ECJ has allowed exceptions for mandatory requirements such as protection of the environment and the defense of the consumer, its new approach is not one of "pure" mutual recognition.

There have been, or will be, several consequences to the ECJ's use of the teleological method of mutual recognition. One is that the amount of

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267. Hartley, supra note 17, at 86.
268. Id. at 85. Rather than limiting its role to "interpretation," however, the court's approach is perhaps more accurately described as "decision-making on the basis of judicial policy." Id.
269. Bengoetxea, supra note 208, at 234.
270. See infra notes 273-79 and accompanying text.
271. See infra notes 280-91 and accompanying text.
272. See infra notes 292-324 and accompanying text.
274. Id.
276. Id.
277. E.g., Hertig, supra note 273, at 177-78.
legislation at the Community level will probably decrease, yet the national laws of the member states will not threaten the establishment of the internal market as much as they might in the absence of the teleological method. Another is that subsequent Community legislation has incorporated the concept of mutual recognition, and the EC need now only harmonize the base-level requirements for goods and services marketed throughout the Community. Finally, it paved the way for harmonization of environmental laws.

C. Establishment of the Community's Jurisdiction Over Environmental Matters

The Community's claim to competence over environmental matters was largely motivated in its early stages by a need to remove nontariff barriers to intra-Community trade. Thus, in the 1970s the environmental movement within the EC was rooted within the purposes of the EC Treaty, the regulation of trade and competition, rather than being grounded directly in a policy intended to protect the environment.

When this tenuous posture was challenged by the Italian government in the Detergents and Sulphur Content of Fuels cases, the ECJ nevertheless upheld the Community's jurisdiction over environmental matters. The ECJ applied the teleological method to article 100's harmonization requirement in order to mate environmental regulation to the fundamental Community principle of promoting fair market competition between member states.

The Detergents and Sulphur Content of Fuels cases concerned instances of transboundary pollution. However, by substantiating the existence of a symbiotic relationship between trade and the environment, the court effectively created the foundation for the establishment of the Community's competence over most environmentally-related activities, not just those having cross-border effects. Although the Community initially found it difficult to justify an environmental policy absent a demonstrable effect on intra-Community trade, the barriers to such policies eventually collapsed. For example, subsequent Council directives concerning the quality of bathing water and the protection of wildlife survived the...
court's scrutiny as falling within the aegis of the Community's jurisdiction over environmental matters even though the relationship between these activities and transborder environmental effects or trade is not readily apparent. By the mid-1980s, there were virtually no jurisdictional limitations on the Council's ability to issue directives concerning environmental matters.287

Environmental protection provides perhaps the best example of the potential effects of the court's teleological method and its policy of increasing the scope and effectiveness of Community law. The EC Treaty originally contained no reference to the environment or its protection. Nevertheless, the court definitively expanded the Community's sphere of influence to encompass such matters.288 Once the blessing of the ECJ was given, the Community "effectively bootstrapped an environmental policy from an economic foundation."289

The establishment of the Community's competence over environmental matters was only the second step in the harmonization process. The Community adopted environmental protection as a fundamental interest and superimposed it over previously established economic interests.290 Because the environmental interest fell outside the framework of the EC Treaty before it was amended in 1987, it was not initially clear how the tension between the competing interests and sovereigns would be resolved.291 As will be demonstrated, it fell to the ECJ to strike the necessary balance.

D. Balancing the Tension Between Trade, Sovereignty, and Environmental Protection.

The next steps in the process of harmonization are to implement a uniform set of environmental regulations throughout the Community and to enforce them in a uniform fashion. For a variety of reasons, these steps have not yet been completed. One reason stems from the federal structure of the EC and the need to balance the interests of competing sovereigns. Another stems from the inherent tension between two of the essential functions of the Community—economic maximization and environmental protection.

The EC uses the directive as its principal legislative form in substantive matters.292 Nearly all environmental actions by the Community have been imposed by directive. Although a directive mandates the achievement of a result, it leaves the form and method of achievement to the member states.293 Thus, the main role of implementing and enforcing environmental directives falls upon the individual member states, rather than the Com-

287. Feeley & Gilhuly, supra note 21, at 679.
289. Demiray, supra note 3, at 300.
290. Id.
291. Id. at 298-300.
292. See, e.g., Feeley & Gilhuly, supra note 21, at 677-78.
293. Id.
munity. The Community’s role in the process is to formulate policy and oversee compliance with directives. In the absence of an overriding Community regulation, the member states are free to promulgate their own environmental regulations, as long as they comply with other elements of the EC Treaty. Most of the environmental cases that are brought before the ECJ deal either with the promulgation or proper implementation of environmental directives, or with actions by a member state that are intended to protect the environment but allegedly impose an impermissible burden on intra-Community trade.

1. Independent Actions by Member States

Despite the successes of the Community in establishing the concept of mutual recognition and in obtaining competence over environmental matters, its environmental policy is relatively limited in scope and the member states retain considerable influence over such matters. Indeed, some member states, particularly Denmark and Germany, continue to pursue independent environmental protection programs without waiting for direction from the Community. Such actions periodically interfere with the economic objectives of the EC Treaty. Conversely, economically-motivated or public welfare-motivated actions by the member states periodically impinge on the environmental requirements imposed by the Community. In such instances, the ECJ must balance these competing interests while continuing the movement toward harmonization.

Following Cassis de Dijon, a stronger indication of the ECJ’s policy concerning the concept of mutual recognition and a member state’s freedom to impinge on the free market came in the Plant Protection Products and Pesticides cases. In each of these, the ECJ allowed a member state to require separate approval of products already approved for use in another member state if the requirement was imposed for the purpose of protecting the public health. The ECJ adopted the position that in the absence of a Community effort at harmonization, legitimate public welfare concerns outweigh a negative impact on intra-Community trade, even if there is strong evidence that these concerns are unfounded.

In Danish Bottles, the ECJ augmented the policy it adopted in the Plant Protection Products and Pesticide cases. It did this in two ways—by explic-
ity applying that policy to an environmental protection case and by developing a test to determine when member states might lawfully invoke the exception to the requirement of mutual recognition, or otherwise burden intra-Community free trade. Specifically, the court established that such burdens are permitted only in the absence of a harmonizing rule when the negative impact on trade is both minimized and outweighed by the benefit gained. In addition to providing some guidance to the member states, the purpose of the test was to maximize the total benefit—either economic or environmental—to the Community without any apparent preference concerning the nature of that benefit.

Although the ECJ's position in these two cases favors the maximization of the benefit to the Community as a whole, it also strengthens the power of the member states to enact environmental policies that restrict the internal market. On its face, this appears to contradict the court's fundamental policies of enlarging the Community's power and encouraging harmonization of Community regulations. However, in each case, the court emphasized that its holding applied only in the absence of applicable Community law. Therefore, it is likely that the court intended to spur the Community into enacting more stringent and comprehensive environmental regulations, rather than empower member states with the ability to circumvent the Community's fundamental economic objectives.

As a consequence of this balancing approach, the ECJ has not provided bright-line rules, but rather vague guidelines, and it will still be necessary for the court to proceed on a case-by-case basis. Although the protection of the public health is clearly an overriding concern of the ECJ, it is not yet particularly clear how far the court will go in allowing member states to burden intra-Community trade for the purpose of protecting the environment in the absence of Community regulations.

2. The Promulgation and Implementation of Council Directives

Following the establishment of the Community's competence over environmental matters in the Detergent and Sulphur Content of Fuels cases, the ECJ addressed the implementation of Council directives relating to environmental protection in Italy Directives. In that instance, the ECJ simply enforced its policy of strengthening the Community's power by rejecting the Italian government's defense that implementation of a series of directives had been delayed by complications inherent to its legislative process.

302. See supra notes 194-200 and accompanying text.
304. E.g., Danish Bottles, 1988 E.C.R. at 4629.
305. Schemmel & de Regt, supra note 43, at 78.
306. Demiray, supra note 3, at 318.
307. See supra notes 108-16 and accompanying text for a summary of those cases.
308. See supra notes 123-29 and accompanying text for a summary of the Italy Directives case.
The court’s holdings in *Waste Oils I* and *Waste Oils II*, on the other hand, dealt with the proper implementation of an environmental directive, rather than with a failure to implement one.\textsuperscript{310} In *Waste Oils I*, the ECJ affirmed the Community’s need to protect the environment but warned that this need “does not automatically authorize the . . . Member States to establish barriers to exports.”\textsuperscript{311} Instead, the court, applying its teleological jurisprudence, looked to the purpose of the directive and determined that the Council did not intend for it to result in the creation of such barriers.\textsuperscript{312} In addition, the court suggested that because a burden on free trade was unnecessary to achieve the objectives of the directive, any such burden was impermissible.\textsuperscript{313} Thus, the court appeared to indicate that a burden on trade for the purpose of protecting the environment, even under the guise of a Council directive, would be permissible only if it was both necessary and in concert with the Council’s intent.

The court’s decisions in the first two *Waste Oils* cases, while requiring the minimization of the burden on free trade, avoided the more specific and difficult question of how to balance the Community’s competing interests of trade and the environment. In *Cassis de Dijon*, the court, by adopting the “rule of reason” approach, had established the necessary framework for balancing such interests.\textsuperscript{314} The court’s first application of this framework to a Community environmental action came in *Waste Oils III*, where a private party argued that a Council directive allowing member states to control the movement and disposal of waste oil contravened the economic and free trade principles of the EC Treaty.\textsuperscript{315} The ECJ, in upholding the validity of the directive, indicated that it would permit restrictions on intra-Community trade that are not discriminatory, do not extend “beyond the inevitable restrictions . . . justified by the pursuit of the objective of environmental protection,”\textsuperscript{316} and are proportional to the goal sought.\textsuperscript{317}

The adoption of a balancing approach to resolve the inherent tension between environmental protection and economic interests had several implications. Most importantly, it unequivocally established that the ECJ, through the application of its own jurisprudence, raised environmental protection to the same level of significance in the Community as the fundamental economic objectives upon which the EC Treaty was founded. This, in turn, enlarged the powers of the Community to encompass social matters outside of the scope of the EC Treaty and allowed it to continue moving unimpeded towards the objective of harmonizing environmental regulations within each of the member states.

The ECJ’s push for harmonization is also illustrated in the *Wild Birds*
cases,\textsuperscript{318} Groundwater Directive,\textsuperscript{319} and Imports of Waste,\textsuperscript{320} which all demonstrate the reluctance of the court to grant the member states any flexibility with regard to the full application of Community environmental directives. These cases demonstrate that when the Council has already balanced the appropriate considerations during the course of promulgating a directive,\textsuperscript{321} member states have almost no freedom either to deviate from the directive’s requirements\textsuperscript{322} or to delay its implementation.\textsuperscript{323} Such inflexibility on the part of the ECJ is essential to the harmonization process—it maintains the integrity of the Community’s environmental program and prevents the fragmentation of the internal market that could result from uncoordinated environmental protection efforts by the member states.\textsuperscript{324} Thus, the court’s strict position concerning the implementation of environmental directives by member states appears to have its foundation, at least in part, in its general goal of strengthening the Community.

3. Summary of the ECJ’s Balancing Approach

Pursuant to its goal of promoting European integration, the ECJ has used the teleological method to elevate the legal status of environmental protection within the Community and has since attempted to harmonize Community environmental legislation while balancing several competing interests. The court has implicitly or explicitly formulated several rules to guide this balancing. In the absence of a Community regulation, member states may restrict trade out of concern for the public health. However, such restrictions are only permissible for the purpose of protecting the environment if the benefit outweighs the cost. If a Community regulation exists, the ECJ requires that both the directive and the member state’s mode of implementation be non-discriminatory, proportional to the good sought to be achieved, and narrowly tailored. In addition, each member state must implement directives within a reasonable time and in such a manner as to give them full effect, while minimizing the burden on intra-Community trade.

\textsuperscript{318} See supra notes 160-75 and accompanying text for summaries of the Wild Birds cases.

\textsuperscript{319} See supra notes 176-83 and accompanying text for a summary of the Groundwater Directives case.

\textsuperscript{320} See supra notes 240-54 and accompanying text for a summary of the Imports of Waste case.

\textsuperscript{321} E.g., Wild Birds I, 1987 E.C.R. at 3060.

\textsuperscript{322} Id. The only exception, which the court applied in the Imports of Waste case, is that member states may deviate from the requirements of a directive if compliance would result in a genuine threat to the public well-being. Imports of Waste, supra notes 240-54 and accompanying text.

\textsuperscript{323} See Wild Birds II, supra notes 167-69 and accompanying text; Italy Directives, supra notes 123-29 and accompanying text; Groundwater Directive, supra notes 176-83 and accompanying text.

\textsuperscript{324} E.g., BERMANN ET AL., supra note 4, at 1102.
E. The Efficacy of the ECJ's Effort to Harmonize Community Environmental Law

Despite the ECJ's efforts to harmonize the member state's environmental laws, and even though the EC has greatly influenced environmental matters within its confines, there is not yet any significant degree of Community-wide uniformity with respect to environmental regulation. There are three primary reasons that the goal of harmonization has proven to be elusive.

The first reason stems from the fact that most of the environmental legislation in the EC is passed in the form of directives, which leave the manner of implementation to the discretion of the individual member state. Although the ECJ has recently made an effort to police the implementation process, the member states often either manipulate directives' requirements to suit their individual needs or delay the process of implementation altogether.\(^{325}\) This leads to functional differences in the regulation of environmental matters between member states and reduces the degree of harmonization.\(^{326}\) For example, most well-developed countries, such as Germany and the Netherlands, have already implemented strict environmental standards pursuant to Community directives and assumed the concomitant economic burdens.\(^{327}\) However, some of the less-developed southern countries, such as Portugal and Greece, have delayed implementation of these directives in order to give their industries a competitive edge.\(^{328}\)

Another primary reason for the EC's failure to harmonize Community environmental law is that it has been relatively unsuccessful in monitoring member state enforcement of their implementing national laws.\(^{329}\) Each individual state is responsible for the enforcement of the statutes it adopts pursuant to EC directives. While the Community has some legal authority to regulate the enforcement of these statutes, it suffers from a lack of resources to devote to the effort.\(^{330}\) Therefore, not only can implementing

\(^{325}\) Visek, supra note 11, at 394; Harms, supra note 57, at 410-11. Although article 171 of the TEU now empowers the ECJ to impose fines on member states for failure to comply with Community law, the court must go through a prohibitively long and complex procedure before it can take such an action. E.g., Cliona J.M. Kimber, A Comparison of Environmental Federalism in the United States and the European Union, 54 Md. L. Rev. 1658, 1680 (1995). For this reason, perhaps, the court has never imposed a fine on any of the member states, despite the fact that they routinely fail to transpose environmental directives into national law in a timely manner. Visek, supra note 11, at 394.

\(^{326}\) Harms, supra note 57, at 410-11.

\(^{327}\) Id.

\(^{328}\) Id.

\(^{329}\) Visek, supra note 11, at 399; Feeley & Gilhuly, supra note 21, at 671. It is noteworthy that the ECJ has never decided a case dealing with a member state's failure to adequately enforce a national statute adopted pursuant to an environmentally-related Council directive.

\(^{330}\) Feeley & Gilhuly, supra note 21, at 671. In 1990, the Council created the European Environmental Agency. This agency is charged with gathering available data and analyzing the extent to which the member states are complying with EC environmental regulations. However, it lacks the power to enforce regulations or even to actively investigate suspected violations. Kimber, supra note 316, at 1684.
statutes vary between countries, but so can the degree to which they are enforced.\textsuperscript{331}

The final reason behind the EC's failure to harmonize the Community's environmental legislation is that it has failed to establish an overarching substantive methodology—it merely reacts to events rather than creating a framework with which to predict them.\textsuperscript{332} Neither the ECJ's caselaw, which is limited in volume and vague in content, nor the amended EC Treaty provides unequivocal substantive guidance for the proper balancing of the Community's competing interests and goals.\textsuperscript{333} The ECJ's affinity for balancing stems from a desire to maximize the total benefit to the Community and retain some flexibility for the court; however, balancing methods are inherently vague.\textsuperscript{334} As a consequence, in the absence of a specific Council directive, the member states are given inadequate guidance concerning the regulation of environmental matters.

Thus, while the ECJ continues to base its decisions in policies that promote European integration, such as harmonization, member states largely remain free to enforce EC environmental law in any manner of their choosing.\textsuperscript{335} One reason for this stems from the EC's past failure—and the European Union's continuing failure—to provide unambiguous substantive guidance to the member states concerning how to balance the Community's competing interests of environmental protection and economic maximization.\textsuperscript{336} Another reason stems from the unfortunate reality that the Community's executive and judicial branches do not yet have effective monitoring and enforcement mechanisms at their command.\textsuperscript{337}

Conclusion

Many of the actions of the European Court of Justice relevant to the evolution of the Community's environmental policy can best be explained in light of the court's fundamental goals of strengthening the Community and promoting European integration. The European Community quickly realized the need to harmonize certain subsidiary social matters, particularly environmental regulation, in order to protect the internal market by preventing disparate burdens on intra-Community trade. When the Community legislative process proved too sluggish, the judges of the ECJ, initially charged only with protecting the fundamental economic objectives of

\footnotesize{\textsuperscript{331} Id. Compounding the problem is the fact that some of the member states do not have the resources to fully implement and enforce Community law. The EU is making some effort to provide financial assistance to those countries, but the problem may become exacerbated if Eastern European countries become member states. Visek, supra note 11, at 400.}

\footnotesize{\textsuperscript{332} Demiray, supra note 3, at 296.}

\footnotesize{\textsuperscript{333} Id.}

\footnotesize{\textsuperscript{334} E.g., Danish Bottles, 1988 E.C.R. at 4630 (imposing the nebulous requirement that the environmental benefits gained by a member state's action must outweigh the adverse effect on trade).}

\footnotesize{\textsuperscript{335} Feeley & Gilhuly, supra note 21, at 671.}

\footnotesize{\textsuperscript{336} Demiray, supra note 3, at 296.}

\footnotesize{\textsuperscript{337} Kimber, supra note 325, at 1678-85.}
the EC Treaty, used the teleological method to bootstrap competence over environmental matters as well. By adopting this teleological approach, the court vested itself with the power to mold the law to satisfy the perceived needs of the Community. Rather than merely interpreting EC law, the judges of the court became policymakers as well.

Within only a few years, the Council and court, working in concert, constructed a sound procedural mechanism for addressing environmental concerns. Nevertheless, in the absence of unequivocal substantive guidance from the newly-formed European Union coupled with an adequate enforcement mechanism, the Community's intertwined goals of a successful internal market and an effective, uniform level of environmental protection will remain elusive.