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The European Court of Justice and the Environmental Protection Policy of the European Community†

Matthew L. Schemmel*
Bas de Regt**

INTRODUCTION

The institutional mandate of the European Court of Justice (ECJ) is to interpret and apply the Treaties of the European Communities for the purpose of ensuring that the Member States, the Council of the European Communities (Council), the Commission of the European Communities (Commission) and the European Parliament act in conformity with European Community (EC) law.¹ The ECJ also must ensure that Member States comply with the provisions of Council regulations² and implement Council Directives³ in a timely and proper manner.⁴ The ECJ has not been accorded policy-making powers under the Treaties, as the responsibilities for proposing and adopting Community legislation is reserved for the Commission and

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² EEC Treaty art. 189.
³ EEC Treaty art. 189.
⁴ EEC Treaty arts. 169, 170, 173, 177. There are four scenarios for issues of environmental law to come before the ECJ. First, if a Member State fails to comply with environmental protection obligations imposed by EC law, it is the Commission’s responsibility under article 169 to commence proceedings for an infringement of Treaty obligations. EEC Treaty art. 169. Second, in the absence of a Commission action, a Member State may proceed under article 170. EEC Treaty art. 170. Third, issues of EC environmental law may also arise in institutional battles brought pursuant to article 173. EEC Treaty art. 173. Finally, environmental issues also may reach the ECJ on an article 177 reference from cases instituted against a Member State in the National courts. EEC Treaty art. 177.
Council respectively. The ECJ, however, arguably exercises a quasi-legislative power, insofar as some of its most important judgments have been used as a means of filling lacunae in EC law when there is no effective answer to be found in the Treaties or in secondary legislation. In this sense, the ECJ plays an important role in the creation of fundamental EC policies.

There are few areas of EC law and policy that have been shaped and influenced more positively by the jurisprudence of the ECJ than the area of environmental protection. Community environmental policy is "a monument to a pragmatic or flexible approach to the interpretation of the aims of the European EEC Treaty." For example, the ECJ recognized the Community's competence to adopt legislation on matters of environmental protection despite the conspicuous absence of the word "environment" from the original text of the Treaty Establishing the European Economic Community (EEC Treaty or Treaty). The ECJ later went on to declare environmental protection a "mandatory requirement" of Community law.

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5 EEC TREATY art. 189. Article 189 states: "[i]n order to carry out their task the Council and the Commission shall, in accordance with the provisions of this treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions." See also EEC TREATY arts. 100a, 149; The Treaty on European Union and Final Act, tit VII, amended arts. 100a, 189b, 31 I.L.M. 253, 263, 297-298 [hereinafter Maastricht Treaty]. Both the Cooperation and Co-Decision Procedures are designed in part to give the European Parliament a more effective voice in the creation of EC legislation.


Single European Act\textsuperscript{12} case law reveals the ECJ's willingness to look beyond the plain meaning of language in Treaty articles\textsuperscript{13} and EC secondary legislation\textsuperscript{14} to give effect to the Community's environmental protection policies. Thus, Community institutions, Member States, Community citizens, and the lawyers that represent them should expect the ECJ to take a dynamic approach to the interpretation and application of Community environmental laws when ensuring the effectiveness of a Community environmental protection policy.\textsuperscript{15}

A number of the ECJ's "landmark" decisions, some of which specifically address environmental issues and others that indirectly

\begin{quote}
\textsuperscript{12} See generally EEC TREATY (as amended 1986) [hereinafter AMENDED EEC TREATY]; see also 1987 O.J. (L 169) 1.
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\textsuperscript{13} Case 187/87, Saarland v. Minister of Industry, 1 C.M.L.R. 529, 532-543 (1989). In this case the applicants relied on the direct effect of article 37 and brought an action in France's National courts. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY AUTHORITY [EURATOM TREATY] art. 37. Upon an article 177 reference, the ECJ held:

[a]rticle 37 can achieve its purpose only if it is interpreted to mean that it requires the Community to be furnished with the general data concerning a plan for the disposal of radioactive effluents before such disposal is finally authorized. Such an interpretation, which is able to safeguard the necessary effect of the provision, must be given priority in accordance with the Court's settled case law.

EURATOM TREATY art. 37 (emphasis added). Case 187/87, Saarland v. Minister of Industry, 1 C.M.L.R. at 542.
\end{quote}

\begin{quote}
\textsuperscript{14} See Case 359/88, Zanetti 1990 E.C.R. I-1518, I-1518, 1522. The ECJ held that for purposes of Council Directives 75/442 and 78/319, the term "waste" must be broadly construed to include materials that were incapable of being put to an economic "re-use" and also materials that were capable of being recycled or re-used in some way. Id. at 1522. The Italian implementing legislation sought to define "waste" more restrictively, so as to exclude materials that were capable of being recycled or put to some other economic use. See id. at 1519-1520.
\end{quote}

\begin{quote}

the court's case law bears increasing witness to its embarkment on the path of minimalism by sub silentio subscribing to the philosophy that, in the absence of consensus by the actors on the political stage, it is not the role of the court to step in and randomly fill lacunae which appear.

Id. Curtain supports this assertion by citing Case 302/87, European Parliament v. Council (the "Comitology" case), wherein the ECJ ruled that the European Parliament did not have competence to bring an action under article 173. 1988 E.C.R. 5637, 5640. In subsequent jurisprudence, however, Case 70/88, European Parliament v. Council, the ECJ largely overturned "Comitology" and recognized the European Parliament's right to bring an action under article 173 to protect its prerogatives under the Treaty. 1990 E.C.R. 2067, 2073. The ECJ held for the Parliament despite that institution's absence from the plain wording of article 173, thereby exhibiting something quite different from a "minimalist" approach. Id. at 2071-74. The ECJ subsequently reaffirmed, inter alia, the European Parliament's competence under article 173 in Case C-295/90, European Parliament v. Council, 7 July 1992, not yet reported.
\end{quote}
affect Community environmental policy, illustrate this dynamic approach. This article examines some of these decisions and discusses their implications for the continuing development of an effective Community environmental protection policy. Despite Denmark’s and England’s intransigence in ratifying the Maastricht Treaty (Maastricht), its provisions recently have become part of Community law. Thus, at various points, this article discusses Maastricht’s relevant provisions regarding environmental protection.

Part I of this article examines developments in the law of EC environmental protection policy, with an emphasis on the ECJ’s decisions in both Commission v. Council cases (Titanium Dioxide and Waste Directive). The discussion focuses on Treaty articles 100a and 130s, and the battle among the Commission, Council, European Parliament, and Member States to establish a primary legal basis for Community secondary legislation concerning the environment. Part I also considers the ECJ’s role in defining the scope of the European Parliament’s powers under the Single European Act and particularly how the Parliament may use those powers to promote stronger EC environmental protection policies. Finally, Part I also considers the Maastricht provisions on the legal basis of environmental legislation and discusses the potential for future institutional battles before the ECJ.

Part II focuses on the often contentious relationship between the Community’s policy on environmental protection and its policy on economic development. Special attention is devoted to the ECJ’s landmark decision in Danish Bottles. The principles of “sustainability” and “subsidiarity,” as articulated in the Maastricht Treaty also are addressed. Part III provides a brief overview of developments in the

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16 The authors have studied the cases that have been translated into English, Dutch, or French as of July 1, 1993. Some cases have not been reported officially but unofficial translations are on file with the authors.

17 See EEC Treaty art. 236. Article 236 states: “[t]he amendments [to the Treaty Establishing the European Economic Community] shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.” EEC Treaty art. 236 (emphasis added); see also The Road Ahead for Maastricht, Economist, July 31, 1993, at 26.

18 See generally Maastricht Treaty, supra note 5; see also Robert Rice, High Court Rejects Maastricht Challenge, Fin. Times Weekend, July 31/Aug. 1, 1993, at 7.


20 Case C-155/91, Commission v. Council, 17 March 1993, not yet reported (French translation on file with authors).

doctrine of Direct Effect, because a great majority of Community secondary legislation in the area of environmental protection is adopted in the form of Directives. This section focuses on the ECJ's decisions in Foster v. British Gas,22 and Frankovich and Bonifaci v. Italian Republic.23 Finally, this article concludes with an overview of the status of current EC environmental policy and briefly assesses the direction of such policy in light of the ECJ's active approach to interpreting the Treaty and Community secondary legislation.

I. LEGAL BASIS OF EC ENVIRONMENTAL LEGISLATION

A. Before The Single European Act

The Community's secondary legislation must have a legal basis identifiable in an article of the Treaty.24 The ECJ held that the choice of a legal basis must be grounded in objective criteria subject to judicial review.25 And yet, as Ludwig Kramer stated, "Community environmental policy developed and flourished in the absence of explicit powers in the original EEC treaty."26

The combined cases in Commission v. Italy illustrate how the ECJ approved the Council's choice of a legal basis for Community environmental policy, even though there was no explicit reference to the environment in the original EC Treaty.27 The Commission instituted an action against Italy for its failure to implement Directives on detergents and the amount of sulphur in liquid fuels.28 The Council

22 Case C-188/89, 1990 E.C.R. 3343.
24 See EEC Treaty art. 190. Article 190 states: "Regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty." Id.; see also 1979 O.J. (L 268) 1; Barents, supra note 7 at 85. It should be noted that the aim of this paper is not to develop a critique of the ECJ's decisions in this area, but rather to explain these decisions, their reasoning, and their potential implications in the specific context of the Community's developing environmental protection policies. See also Ludwig Kramer, EEC Treaty and Environmental Protection 31-35 (1990) [hereinafter Kramer, EEC Treaty]; Kieran Bradley, The European Court and Basis of Community Legislation, 13 Eur. L. Rev. 379-402 (1988).
26 Kramer, EEC Treaty supra note 24, at 23.
28 See EEC Treaty art. 169. Article 169 states:

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned
selected article 10029 as the Directive’s legal basis.30 Italy argued that it was not clear from the Treaty that the Community had the power to legislate on matters of environmental protection and that the measures at issue were actually international agreements in the form of Directives.31 The Commission argued that the Directives, which were part of a Council program to eliminate technical barriers to trade, were based on article 100 because they had a direct effect on the establishment and function of the common market.32

The ECJ held that basing the Directives on article 100 was indeed proper, reasoning that they were part of a program to eliminate trade barriers.33 But the ECJ also recognized the Commission’s argument that measures concerning the environment may impose burdens on undertakings and thus distort competition in the absence of harmonization of national provisions.34 Kramer argued, “[t]he correct interpretation of the Court’s judgements must therefore be that, if the Community by adopting [environmental] action programmes has documented its political view on the measures that are to be the subject of Community legislation, there is no need for further proof of the necessity for Community action.”35 But regardless of what the Community wants to achieve, there always must be a proper legal basis for Community secondary legislation.36 Thus the ECJ’s decision in Commission v. Italy is of central importance, as it

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EEC Treaty art. 169.

29 EEC Treaty art. 100. Article 100 states: “The Council shall, acting unanimously on a proposal from the Commission, issue Directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.” EEC Treaty art. 100 (emphasis added).


32 Id. at 1106, 1122.

33 Id.

34 Id. For a general discussion of the relationship between legal basis of Community environmental policy and the goal of economic integration, see Owen Lomas, Environmental Protection, Economic Conflict and the European Community, 33 McGill L.J. 504, 510 (1988).

35 Kramer, EEC Treaty, supra note 24, at 3.


The Court noted that the Directives were adopted within the Environmental Action Programme but also that they were adopted under the General Programme for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States,
implicitly invited the Community institutions to develop a more comprehensive environmental protection policy on the basis of article 100.37

B. Legal Basis and The Single European Act

The word "environment" finally appeared in the written corpus of Community law with the adoption of the Single European Act,38 and in particular with the incorporation of Title VII, articles 130r, 130s, and 130t. Perhaps the most significant aspect of Title VII is that it provides an explicit legal basis for the creation of Community environmental legislation.39 The Council subsequently adopted important Community environmental measures based upon article 130s.40 When a piece of secondary legislation is based upon article 130s, it must be adopted by a unanimous vote of the Council.41 The Parliament, however, only needs to be consulted for an opinion on the substance of the measure.42 Member States also retain the power to introduce more stringent national environmental measures than

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38 See Amended EEC Treaty art. 130s.

39 Amended EEC Treaty art. 130r(1). "Action by the Community relating to the environment shall have the following objectives: to preserve, protect and improve the quality of the environment; to contribute towards protection of human health; to ensure a prudent and rational utilization of natural resources." Amended EEC Treaty art. 130r(1).


41 See Amended EEC Treaty art. 130s. "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community," with the exception that "the Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority." Amended EEC Treaty art. 130s.

42 Although the Council may not adopt a measure until it has taken into account the European Parliament's views, where the consultation procedure is required it is in no way legally bound to incorporate those views into the adopted measure, nor is it obliged to substantially respond to them. See Kapteyn et al, supra note 36, at 140-42, discussing the Parliament's 'consultative' function. "The Council itself is not at all accountable to the Parliament for giving effect to the latter's opinions." Id.
those taken pursuant to Title VII, as long as the national measures are compatible with the Treaty. 43

In addition to the new Maastricht provisions, 44 the other possible legal basis for adopting Community environmental measures exists under article 100a, which amended article 100 and is intended to achieve the objectives set out in article 8a, namely the progressive establishment of the internal market. 45 Article 100a clearly was intended to serve as a potential legal basis for Community environmental protection measures. Article 100a(3) states that proposals on "environmental protection" shall "take as a base a high level of protection," while article 100a(4) allows Member States some discretion as to the application of national measures on "protection of the environment." 46 Some of the Community's secondary environmental protection legislation has been based on article 100a. 47 The most significant implications of basing Community environmental policy on article 100a, as opposed to article 130s, are (1) that environmental measures which help achieve the functioning of the internal market may be adopted by qualified majority voting 48 and (2) Parliament must be allowed to "cooperate" with the Council on the substance of that legislation. 49

43 See Amended EEC Treaty art. 130t. "The protective measures adopted in common pursuant to article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this treaty." Amended EEC Treaty art. 130t.

44 See infra sections D & E of Part I of this article.

45 See Amended EEC Treaty art. 100a(1).

By way of derogation from article 100 . . . the Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament . . . adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Amended EEC Treaty art. 100a(1) (emphasis added).

46 Often referred to as the "Thatcher Clause," in reference to former British Prime Minister Margaret Thatcher's insistence that it be included in the text of the Single European Act, article 100a(4) nevertheless limits the Member State's ability to apply national environmental provisions to cases where it can show a major need, i.e. those exceptions, like public security, that are listed in article 36.


48 Amended EEC Treaty art. 100a.

49 Amended EEC Treaty art. 100a; see also Kapteyn et al., supra note 36, at 142. The Cooperation Procedure allows the European Parliament to have two readings of proposed legislation. The Parliament will consider legislation proposed by the Commission and give its opinion by a simple majority vote. The Council then must reach a "common position" on the
Thus, the choice of a legal basis for Community environmental legislation is not a purely academic exercise.

The legal basis of an act [100a or 130s] indicates not only the objective and nature of the measure which the Community can adopt [100a, measures affecting the functioning of the internal market or 130s, measures to protect the environment], but also the procedural requirements for its adoption [100a, the cooperation procedure or 130s, the consultation procedure], the Community institution competent to adopt it [greater Parliament participation under 100a] and, . . . the voting majority in the Council [100a, qualified majority vote, or 130s, unanimity].50

The Treaty does not indicate when article 100a or article 130s should serve as the legal basis of Community environmental policy.

C. The ECJ's Titanium Dioxide Decision

The ECJ addressed this issue in the case of Commission v. Council (Titanium Dioxide).51 In 1983, the Commission presented the Council with a proposed Directive on harmonization of Member State programs for the reduction of waste from the titanium dioxide industry.52 The proposed Directive was based upon articles 100 and 235.53 Subsequent to the Single European Act, the Commission changed the legal basis of the proposed Directive to article 100a.54 The Council, however, rejected article 100a and in its "common position" decided to base the Directive on article 130s.55 The Council consulted the European Parliament pursuant to article 130s and the Parliament, in agreement with the Commission, stated that the Di-

50 Bradley, supra note 24, at 380 (emphasis added by the authors).
51 Titanium Dioxide, supra note 19, at 2878.
53 Id.
54 See Titanium Dioxide, supra note 19, at 2897; see also Council Directive on the Establishment for a Common Procedure to Harmonise the Programs to Diminish and Finally Abolish Pollution Through Waste from the Titanium Dioxide Industry, 1989 O.J. (L 201) 56.
55 See Titanium Dioxide, supra note 19, at 2897; see also 1989 O.J. (C 158) 248.
Directive should have been based on article 100a, not 130s. Nevertheless, the Council ultimately adopted the Directive by a unanimous vote under article 130s. The Commission, with the European Parliament's intervention, brought an action to annul the Directive on grounds that it had been adopted on an improper legal basis.

The Council and Commission agreed that in order to meet the ECJ's mandate that a legal basis must be founded on objective criteria amenable to judicial review, it was necessary to establish the measure's "center of gravity." The "center of gravity" test assumes that a measure may be designed to meet more than one Community objective, but the legal basis should be founded in the Treaty article most compatible with a measure's primary objective. The Council argued that while the Directive sought internal market/competition policy objectives, the primary objective of Directive 89/428 is the reduction and ultimate elimination of pollution caused by titanium dioxide production and therefore should be based on article 130s. Conversely, the Commission and European Parliament argued that article 100a was the proper legal basis. The

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56 Titanium Dioxide, supra note 19, at 2897.
57 1989 O.J. (L 201) 56. As per the requirements of article 130s, the measure had to be adopted by a unanimous Council vote.
58 See Titanium Dioxide, supra note 19, at 2897; EEC Treaty art. 173. Article 173 states:

[j]he Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers.

EEC Treaty art. 173.
60 See Titanium Dioxide, supra note 19, at 2898.
61 Id. at 2898. But see Kramer, EEC Treaty, supra note 24, at 42. "... [D]istinctions according to the main objective of a measure are not really practicable in law and do not provide useful delimitations." Id.

... [I]ndustrial plant and production standards, such as titanium dioxide emission limits, potentially distort competition both within the individual Member States concerned and within the Community as a whole. They do not, however, influence trade or competition outside the Community, and should thus be based on either article 130s or article 100.

Id.; see also Scott Crosby, The Single Market and the Rule of Law, 16 Eur. L. Rev. 451, 459 (1991). "... [W]here the Treaty provides appropriate specific legal bases other than 100a, the former and not the latter must be selected." Id.
Directive’s primary objective was to establish a level playing field for competition between titanium dioxide producers, thereby improving conditions for achieving the internal market.\(^{63}\)

The ECJ scrutinized the language of Directive 89/428\(^{64}\) and found that the provision addressed both the need to reduce/eliminate waste from the titanium dioxide industry as well as the need to harmonize titanium dioxide production so as to improve competitive conditions.\(^{65}\) Thus, rather than having a “center of gravity” or primary objective, the ECJ found that the Directive had a dual, inextricably connected concern for protecting the environment and achieving an effective internal market.\(^{66}\)

Citing its own case law, the ECJ stated that the Directive, which had characteristics of an environmental measure adoptable under 130s and an internal market measure adoptable under 100a, ordinarily would be based on both relevant Treaty provisions.\(^{67}\) The ECJ ruled, however, that the Directive lawfully could not be based on both 130s and 100a,\(^{68}\) because a concomitant reliance on the respective articles would deprive the European Parliament of essential institutional powers granted to them under the “cooperation procedure” in article 100a.\(^{69}\) Under the cooperation procedure, as required by article 100a, the Council only needs to reach a qualified majority vote to adopt the European Parliament’s proposed amendments to the Council’s common position.\(^{70}\) If the Council’s common position is rejected by the European Parliament or the Council wishes to amend the Commission’s second proposal, re-drafted in light of the European Parliament’s amendments, the Council must act unanimously.\(^{71}\) But, as the ECJ noted, if both 100a and 130s were relied upon as the Directive’s legal basis, the Council still would be required to vote unanimously in accordance with article 130s’s requirements, thereby effectively avoiding the European Parliament’s input under the cooperation procedure.\(^{72}\) The ECJ recognized that the cooperation procedure enhanced the European Parliament’s

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\(^{63}\) See Titanium Dioxide, *supra* note 19, at 2898; *see also* Kramer, EEC Treaty, *supra* note 24, at 46–47.

\(^{64}\) See Titanium Dioxide, *supra* note 19, at 2898–2899.

\(^{65}\) See id.

\(^{66}\) Id. at 2899.

\(^{67}\) Id. at 2900, (citing Case 165/87, Commission v. Council, 1988 E.C.R. 5545, 5561).

\(^{68}\) Id.

\(^{69}\) Id.; *see also* EEC Treaty arts. 100a, 149.

\(^{70}\) EEC Treaty arts. 100a, 149.

\(^{71}\) EEC Treaty arts. 100a, 149.

\(^{72}\) See Titanium Dioxide, *supra* note 19 at 2900.
ability to affect the substance of Community legislation and reflected a "fundamental democratic principle" of citizen participation through its directly elected Community institution.\textsuperscript{73} Thus, the ECJ concluded that to maintain the powers extended to the European Parliament under the Treaty, it was necessary to determine whether article 100a or 130s was the appropriate legal basis of the Directive.\textsuperscript{74}

The ECJ, in a characteristically dynamic approach, held that the Council improperly based Directive 89/428 on article 130s and should have selected article 100a as the appropriate legal basis.\textsuperscript{75} The ECJ reasoned based on article 130r(2), that a measure need not be based on article 130s for the sole reason that it contains a concern for environmental protection.\textsuperscript{76} The ECJ also pointed to the language of article 100a(3), which states that measures adopted to achieve the internal market shall take a high level of protection with regard to health, safety, and the environment. Thus, the ECJ concluded that the goal of environmental protection articulated in article 130s could be achieved effectively under article 100a.\textsuperscript{77} Most importantly, the ECJ stated that measures which are required to protect the environment can, in the absence of harmonized national

\textsuperscript{73} Id.
\textsuperscript{74} Id. at 2901.
\textsuperscript{75} Id.; see Derrick Wyatt & Alan Dashwood, European Community Law, 369 (3d ed. 1993).

However, legal bases must not be combined if the procedures which they prescribe are incompatible. Thus the Court has held that it is impossible for an act to be based on Treaty Articles one of which provides for the co-operation procedure, while the other requires the Council to act unanimously after simple consultation of the European Parliament. In such cases, it seems preference should be given to the former legal basis, as providing a reinforced role for the European Parliament on the legislative process, so long as the different objectives of the proposal are capable of being furthered by legislation based on the Article in question.

\textsuperscript{76} See Titanium Dioxide, supra note 19, at 2901; see also Case 62/88, Greece v. Council, 1990 E.C.R. 1900 E.C.R. 1545, 1550. In Greece v. Council, the ECJ held that article 113 (requiring a qualified majority vote) was the correct legal basis for Council Regulation 3955/87 on levels of radiation in agricultural products imported from third countries. Id. at 1551. Greece argued, inter alia, that articles 130r and 130s, possibly with article 235, formed the correct legal basis. The ECJ disagreed, stating:

articles 130r and 130s are intended to confer powers on the Community to undertake specific action on environmental matters. Those articles, however, leave intact the powers held by the Community under other provisions of the Treaty, even if the measures to be taken under the latter provisions pursue at the same time any of the objectives of environmental protection.

\textsuperscript{77} See Titanium Dioxide, supra note 19, at 2901.
laws, distort competition. Therefore, the ECJ determined that a measure like Directive 89/428, intended to approximate national laws in a specific industry and thereby avoid distortions in competition, contributes to the establishment and function of the internal market, and therefore should be based on article 100a. The ECJ subsequently declared the Directive void.

The judgment in Titanium Dioxide exemplifies the ECJ’s dynamic approach to interpreting the Treaty and may contribute to a strengthened Community environmental policy. First, it seems clear that the Commission will seek to base a significant amount of future and pending Community environmental legislation on article 100a. The Commission increasingly may draft its proposals with language that sets out the dual objectives of environmental protection and the avoidance of unfair or distorted competition. The Commission can argue persuasively that a significant number of Community measures intended to protect the environment share the dual aim of achieving the internal market, as even the slightest difference among national laws arguably may distort competition within particular industries. Additionally, in light of Denmark’s, England’s, and Germany’s Maastricht ratification battles, it is significant that the Titanium Dioxide case may extend qualified majority voting in the area of Community environmental policy, as required by article 100a. Qualified majority voting may aid the efficient adoption of stronger environmental policy as it will prevent one or even two large Member States, England and Italy for example, from vetoing tough environmental measures.


It had already been clarified by Court rulings before the entry into force of the Single European Act that environmental provisions could be based on article 100; there is nothing to suggest that the change over to decisions by qualified majority in article 100a has changed this position in any way.

KRAMER, EEC TREATY, supra note 24, at 46-47.

79 See Titanium Dioxide, supra note 19 at 2901.

80 Id. at 2901-2902.

81 But see Case 155/91, Commission v. Council, ¶ 18-22 (not yet reported). It is clear that a Community measure designed to enhance environmental protection only should be based on article 100a where achievement of the internal market is an additional "aim" of the measure, as opposed to a mere "side effect" that results from the measure’s imposition. Id.


83 Maastricht amended both articles 130s and 100a to extend qualified majority voting in most instances, while retaining a unanimous vote in other sensitive areas. Maastricht Treaty, supra note 5, tit. VII, 31 I.L.M. at 263, 286.
Third, the ECJ’s enthusiastic “endorsement” of the cooperation procedure may not only mean greater powers for the European Parliament, but indirectly may result in strengthened Community environmental measures.84 The European Parliament has shown “Green” inclinations. Thus, it may use the cooperation procedure to influence the Council for greater environmental protection measures.85

Finally, as stated above, the power of the Member States to take unilateral action after the Community has adopted an environmental measure is clearer under article 130t than it is under article 100a(4). Thus, the Titanium Dioxide decision represents a diminution in the Member States’ power via the Council.86 Furthermore, the decision is a victory for the proponents of establishing environmental protection standards at the Community level.

D. One Step Up, Two Steps Back?

Common responses to the ECJ’s Titanium Dioxide decision ranged from caution87 to criticism.88 With the recent decision in a subsequent case involving the legal basis of the Community’s amended Directive on waste,89 there is bound to be a flood of new commentary. Arguably, the ECJ’s recent decision in Commission v.

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84 See EEC Treaty art. 100a. But see Barents, supra note 7, at 95, which opines that the choice of article 100a as the legal basis is not based on a primary concern for the European Parliament’s powers.


86 See infra, note 49 and accompanying text.

87 See, e.g., Wyatt & Dashwood, supra note 75, at 372. “It would be premature to conclude from the Titanium Dioxide judgement that any Community measure for the protection of the environment which has a tendency to equalise conditions of competition must, for that reason, be based on article 100a.” Id. at 451.

88 See, e.g., Crosby, supra note 62, at 451.

In Titanium Dioxide, the Court of Justice gave a wide but not all embracing interpretation to article 100a. This judgment, however, does not invalidate but tends to confirm the arguments supporting the thesis that article 100a is being misused. A reversal of this dangerous trend is necessary in the interest of the rule of law and the Community.

Id.

Council (Waste Directive) refines the principles adumbrated in Titanium Dioxide rather than reverses them.90

In Waste Directive, the Commission and Parliament brought an action for annulment91 of the EC’s amended Directive on the elimination of waste.92 The Commission and Parliament invoked the identical arguments they successfully relied upon in Titanium Dioxide to assert that the amended Waste Directive should have been adopted under article 100a as opposed to 130s.93 The Commission and Parliament reasoned that the Directive sought to impose a common arrangement among the Member States for the removal and elimination of waste, and it therefore contained the dual aims of achieving both environmental protection and an internal market.94 As in Titanium Dioxide, the Council argued that the amended Waste Directive was concerned primarily with environmental protection and therefore was based properly on article 130s.95

The ECJ began its decision by reiterating that the choice of a Directive’s legal basis must be based on the objective criterion of content and aim and must be amenable to judicial review.96 In considering the language utilized in the Directive’s preamble, the ECJ determined that it was intended to apply to the removal and elimination of all types of waste regardless of its source, that Member States are obliged to control the removal of waste, and that waste should be eliminated as close to its source as possible.97

The Commission’s argument that the Directive should have been based on article 100a largely hinged on the fact that waste must be considered a “good” in accordance with article 30, and is thus subject to the rules on the free movement of goods.98 But the ECJ concluded that environmental protection is a mandatory requirement of EC law and that in such circumstances limitations of the free movement of goods are allowable.99 Although the ECJ admitted

90Case 155/91 17 March 1993 (not yet reported, available in French).
91Id. ¶ 3.
92See generally Waste Directive, supra note 89.
93Id. ¶ 5.
94Id.
95Id. ¶ 6.
96Id. ¶ 7.
97Waste Directive, supra note 89, ¶ 8. The ECJ specifically mentioned that the Directive did not draw a distinction between domestic and industrial waste. Id. ¶ 10.
98Id. ¶¶ 11–12.
99Id. ¶¶ 13–14. Thus, the ECJ determined that requirements that waste be processed as close to its source as is possible, and that transboundary movement of waste be limited did not violate article 30. Id. ¶ 14.
that some elements of the Directive would have some affect on the functioning of the internal market,\textsuperscript{100} it concluded that this was merely a "side effect" of the overarching goal of establishing an effective system for the processing and elimination of waste.\textsuperscript{101} The ECJ also held that basing a Directive on article 100a is not justified merely because some elements may effect the functioning of the internal market.\textsuperscript{102} Thus, the ECJ held that article 130s was the proper legal basis and dismissed the action.\textsuperscript{103}

The Waste Directive decision is significant for numerous reasons. First, the ECJ has breathed new life into article 130s.\textsuperscript{104} After the decision in Titanium Dioxide, it was unclear whether article 130s would maintain any significance as a potential legal basis for secondary legislation.\textsuperscript{105} But the Waste Directive decision represents a firm acknowledgment that measures which are concerned primarily with environmental protection most likely will be based on article 130s.\textsuperscript{106}

Second, although some commentators may disagree,\textsuperscript{107} the ECJ's decision in Waste Directive has not overruled the reasoning and decision in the previous Titanium Dioxide case.\textsuperscript{108} In Waste Directive, the ECJ is careful to distinguish its reasoning from that employed in Titanium Dioxide and acknowledges that the facts surrounding the two decisions are crucially different.\textsuperscript{109} The factual distinction of the greatest importance is that the Directive interpreted in Titanium Dioxide concerned a very specific type of pollution and a very specific source, namely the titanium dioxide producing industry.\textsuperscript{110} In circumstances where an EC Directive singles out a specific industry and thereby seeks to regulate the production of a specific type of product, the fairness and equality of the competi-

\textsuperscript{100} Id. \textsection 16.
\textsuperscript{101} Id. \textsection 17–19.
\textsuperscript{102} Waste Directive, supra note 89, \textsection 20. The ECJ distinguished its reasoning and conclusion in this case from its reasoning and decision in the Titanium Dioxide case. See id. In Titanium Dioxide, the ECJ held that protection of the environment and maintaining a level playing field for producers of titanium dioxide were dual, inextricably bound aims of the Directive. See Titanium Dioxide, supra note 19, at 2899. In Waste Directive, the ECJ concluded that environmental protection was the single aim of the Directive and that any impact on the functioning of the internal market resulted merely as a side effect of that aim. Waste Directive, supra note 89, \textsection 21.
\textsuperscript{103} Id. \textsection 21.
\textsuperscript{104} Id. \textsection 20–21. See EEC Treaty art. 130s.
\textsuperscript{105} See Titanium Dioxide, supra note 19, at 2901.
\textsuperscript{108} See Waste Directive, supra note 89, \textsection 20.
\textsuperscript{109} Id.
\textsuperscript{110} See Titanium Dioxide, supra note 19, at 2878–2880.
tive business environment is effected immediately and unequivocally. This fact underlined the ECJ's reasoning in Titanium Dioxide, and led the Court to conclude that the aims of maintaining competitive equality in the titanium dioxide industry and enhancing the environment could not be separated, but were in fact dual aims of the Directive.\textsuperscript{111}

In contrast, the Directive interpreted in Waste Directive constituted a general scheme for the processing and elimination of waste without regard to its source.\textsuperscript{112} Further, the ECJ emphasized that the Directive's preamble made explicit reference to the fact that pollution should be processed close to its source and that Member States should place limits on its movement.\textsuperscript{113} Not only are intra-industry competitive pressures left unaddressed in the ECJ's interpretation of the Waste Directive, but by its very language the Directive seeks to place certain limitations on the free movement of goods.\textsuperscript{114} Under these factually distinctive circumstances, it was proper for the ECJ to distinguish its Waste Directive decision from Titanium Dioxide and to conclude that article 130s is the waste Directive's proper legal basis.\textsuperscript{115} In Waste Directive, however, the ECJ left the door open for its reasoning in Titanium Dioxide to be used at a later date and under factual circumstances closer to those present in that case.\textsuperscript{116} The decision is bound to have an effect on the propriety of choice of a legal basis after the coming into force of the Maastricht Treaty.

E. Legal Basis and the Maastricht Treaty

The Titanium Dioxide and Waste Directive cases allowed the ECJ to clarify some questions and ambiguities about the proper legal basis of Community environmental legislation. With the Maastricht Treaty\textsuperscript{117} as a component of Community law, however, there are new, even more vexing questions surrounding the legal basis of Community environmental policy that the ECJ will have to resolve. The Maastricht Treaty substantially amends the language in articles 100a, 130r, 130s, and 130t.\textsuperscript{118} As a result, there are now at least four different ways to adopt secondary Community legislation on the

\textsuperscript{111} See id. at 2901.
\textsuperscript{112} See Waste Directive, supra note 89, ¶ 2, 9, 10.
\textsuperscript{113} See id. ¶ 9.
\textsuperscript{114} See id. ¶¶ 13-15.
\textsuperscript{115} See id. ¶¶ 20-21.
\textsuperscript{116} See id. ¶ 20.
\textsuperscript{117} Maastricht Treaty, supra note 5, tit. VII, 31 I.L.M. at 255-373.
\textsuperscript{118} Maastricht Treaty, supra note 5, tit. VII, arts. 100a, 130r, 130s, 130t, 31 I.L.M. at 263, 286.
environment. First, the procedural structure articulated in article 100a of the Single European Act has been extended to article 130s(1) of the Maastricht Treaty. Consequently, the Commission will be able to draft proposals primarily or even exclusively intended to pursue goals of environmental protection, and in most cases the Council will be obliged to adopt such proposals by a qualified majority vote in cooperation with the European Parliament. If the Waste Directive decision represents a setback for the scope of qualified majority voting in the environmental protection area, the amended article 130s restores its strength.

Second, article 130s(2) of the Maastricht Treaty entails certain “sensitive” areas where Community environmental policy still will be adopted by a unanimous Council vote, in mere consultation with the European Parliament. Arguably, article 130s(2) reflects the Member States’ unwillingness to give up control over what are deemed traditional state functions, i.e. the power to impose taxes, to establish an energy policy, and the powers of eminent domain. Additionally, amended article 130s(3) introduces the concept of a “co-decision” between the Council and the European Parliament on measures concerning the Community’s general environmental action programs. These measures shall be adopted by a qualified majority vote. The co-decision procedure represents a significant strengthening of the European Parliament’s powers, insofar as it allows the Parliament to veto measures it deems unsatisfactory. Before a proposal is vetoed, however, the procedure provides for the creation of a Conciliation Committee, where the Council and an equal number of European Parliamentarians will meet and attempt to reach a consensus.

119 Maastricht Treaty, supra note 5, tit. VII, art. 130s(1), 31 I.L.M. at 286.
120 Maastricht Treaty, supra note 5, tit. VII, art. 130s(1), 31 I.L.M. at 286.
121 Maastricht Treaty, supra note 5, tit. VII, art. 130s(2), 31 I.L.M. at 286. These areas include: 1) provisions primarily of a fiscal nature; 2) measures concerning town and country planning, land use with the exception of waste management, measures of a general nature, and management of water resources; 3) measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply.
123 Maastricht Treaty, supra note 5, tit. VII, art. 130s(3), 31 I.L.M. at 286. This is the Community’s fifth environmental action program. Towards Sustainability: A European Community Program of Policy and Action in Relation to the Environment and Sustainable Development, COM(92)23.
125 Maastricht Treaty, supra note 5, tit. VII, arts. 189B(5),(6), 31 I.L.M. at 297.
The fourth legal basis for Community environmental legislation exists under Maastricht amended article 100a. Article 100a still will require the Council to adopt measures by qualified majority vote, but will replace the cooperation procedure with the co-decision procedure. The incorporation of the co-decision procedure is arguably the Community’s most earnest effort to reduce the so-called “Democratic Deficit.”

The Maastricht amendments ultimately will lead to litigation between Community institutions regarding the proper legal basis of Community environmental protection legislation. Once again, the ECJ will be called upon to interpret the Maastricht amendments. Community institutions should expect the ECJ to continue to interpret them in a way that furthers the effectiveness of the Community’s environmental protection policy.

For example, potentially the Commission and the European Parliament may bring an action against the Council for the annulment of a measure the Council adopts pursuant to the amended article 130s(2), as opposed to 130s(1). Amended article 130s(1) should be relied upon as the primary legal basis for most Community environmental legislation, as the language of 130s(2) states that it is to be used in derogation of the former and only under limited circumstances. The language used to delineate when article 130s(2) may be used is, however, general and unclear. The Council surely will interpret the categories that fall within article 130s(2) broadly, as reliance on article 130s(2) requires unanimous voting, allows Member States to retain veto power, and the Parliament only

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127 Maastricht Treaty, supra note 5, tit. VII, art. 100a, 31 I.L.M. at 263.
128 The “Democratic Deficit” in the European Community stems from the perception that unelected officials, mainly the Commission and the ECJ, have too much power over the shape of EC policy, whereas the directly elected European Parliament has very limited powers. The extension of the European Parliament’s veto power to the great amount of EC secondary legislation that will be based on the amended article 100a significantly increases its institutional powers.
129 See supra note 15, (discussing Case 70/88, European Parliament v. Council, 1990 E.C.R. 2067). If the principles enunciated therein are extended to the hypothetical mentioned above and the Commission agrees with the Council that a certain measure should be based on the amended article 130s(2), Parliament will have standing to protect its prerogatives (the right to cooperate with the Council under amended 130s(1) and not to be merely consulted under amended 130s(2) in an action for annulment).
130 Maastricht Treaty, supra note 5, tit. VII, arts. 130s(1)–(2), 31 I.L.M. at 286.
131 See Maastricht Treaty, supra note 5, tit. VII, arts. 130s(1)–(2), 31 I.L.M. at 286. For example, who determines, and what is the criteria used to determine, whether a provision is “primarily of a fiscal nature?” What are the parameters of “waste management,” and what constitutes a “measure of a general nature?” What is the “general structure” of a Member State’s energy supply? These are all issues that potentially could come before the ECJ.
needs to be consulted. Thus, the Council may attempt to base environmental protection provisions that would be adopted under article 130s(1) on article 130s(2) instead. Arguably, the ECJ would rule in favor of the Commission and/or the European Parliament if they should be confronted with such an action for annulment. The ECJ consistently has held that derogations and exceptions within the Treaty should be construed strictly and applied narrowly.132 Conversely, the ECJ demonstrated its willingness to interpret the Treaty in a way that makes Community environmental policy effective.133 Because article 130s(2) increases the power of a single Member State to veto certain types of secondary legislation concerning the environment, only a strict interpretation of article 130s(2)'s applicability would be consistent with the ECJ's jurisprudence in the area of Community environmental protection policy.

The Commission, in reliance on the ECJ's decisions in Titanium Dioxide and Waste Directive, will continue to rely on the amended article 100a as the legal basis for some of its proposals on Community environmental legislation. Nevertheless, the Council may disagree with the Commission and instead seek to adopt a measure on the basis of the amended article 130s(1).134 Although both articles oblige the Council to act by a qualified majority vote, under the amended article 100a the European Parliament has co-decision rights, and thus a veto power. Under 130s(1), however, the Council only needs to cooperate with the European Parliament.135 If the Council adopts an environmental measure under 130s(1), and the Commission or Parliament subsequently brings an action for annulment, the ECJ will employ a Titanium Dioxide/Waste Directive analysis. The ECJ probably will annul the measure if the challenging party136 can show that achievement of the internal market by reducing distortions in competition is a serious goal and not merely a "side effect."137 Of course, the ECJ will have to refine what level of

132 For example, see the ECJ's jurisprudence in the area of EEC Treaty articles 30-36. The ECJ has insisted that article 36 must be interpreted strictly and does not extend to justifications not mentioned specifically in its language. Case 7/68, Commission v. Italy, 1968 E.C.R. 423.
133 See supra pp. 5, 7, 15.
134 Since an amended Treaty article is a completely new Community measure, legally distinct from its predecessor, the Titanium Dioxide type case may be re-fought before the ECJ in the form of amended article 100a and amended article 130s(1).
135 Maastricht Treaty, supra note 5, tit. VII, arts. 100a, 130s(1), 31 I.L.M. at 263, 268.
136 The European Parliament certainly would join the Commission in such an action. The European Parliament will want to see its Co-Decision rights under the amended article 100a protected and promoted in the same way its cooperation rights under article 100a of the Single European Act were "endorsed" by the ECJ in Titanium Dioxide.
concern a particular piece of legislation must have with regard to establishment of the internal market in order to clear the "side effect" threshold, and thereby be deemed a genuine "aim" of the Directive.

The major battle cry will be sounded when the Commission proposes that a carbon tax, or some other economic instrument aimed at environmental protection should be based on the amended article 100a, and the Council proceeds to adopt the measure under the amended article 130s(2). The Commission may bring an action for annulment arguing that amended article 100a is the appropriate legal basis for measures on carbon taxes and economic instruments that address source and industry-specific pollution. Additionally, such a Directive is necessary because only a harmonization of environmental tax measures will prevent distortions in competition within the common market. The ECJ’s decision in Waste Directive, specifically its distinction of the facts and reasoning employed in that case from the facts and reasoning in the Titanium decision, cuts in favor of the Commission, as such a tax is essentially source and industry specific and a failure to harmonize measures would create a serious distortion in competition with regard to the costs incurred by carbon producers. The Council, on the other hand, will argue that taxes and economic instruments are “measures primarily of a fiscal nature” and therefore must be adopted under article 130s(2).

Both the Commission and the Council have sound reasons for arguing that a proposed environmental tax or other economic instrument should be based on amended article 100a or 130s(2) respectively. It would be disingenuous for the Commission to argue that environmental tax measures are not primarily fiscal in nature and therefore not within the competence of 130s(2). The Commission, however, can make a strong argument that the function of the internal market would be affected directly and significantly by such a measure. Thus, if confronted with a choice between amended article 100a and amended article 130s(2), the ECJ should promote the democratic principles enshrined in the co-decision procedure, and therefore choose amended article 100a. Although the Council will argue that the plain language of amended article 130s(2) un-

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138 The issue was not addressed squarely in Waste Directive. See id.
139 Maastricht Treaty, supra note 5, tit. VII, arts. 100a, 130s(2), 31 I.L.M. at 263, 286.
140 Maastricht Treaty, supra note 5, tit. VII, art. 100a, 31 I.L.M. at 263.
141 Maastricht Treaty, supra note 5, tit. VII, art. 130s(2), 31 I.L.M. at 286.
142 Maastricht Treaty, supra note 5, tit. VII, art. 130s(2), 31 I.L.M. at 286.
doubtedly gives them the power to adopt an environmental tax, the ECJ most likely will interpret the Maastricht amendments in a way that gives effect to the Community’s environmental policy and spurs movement towards democratic accountability. In the case of a carbon tax, the rationale for acting at the Community level should be based on the obvious concerns of maintaining the Treaty’s dedication to a level, competitive economic environment. Thus, it is possible that the ECJ will overlook the clear language of 130s(2) and hold that amended article 100a is the proper legal basis for a carbon tax and for other economic instruments designed to protect and preserve the environment.

II. ENVIRONMENTAL POLICY AND ECONOMIC GROWTH

A. Reconcilable Goals?

As discussed above, a provision of Community law may aim to achieve the goal of environmental protection and the goal of establishing an internal market simultaneously. Thus, arguably, the Community’s environmental and economic concerns are potentially compatible. On the other hand, one can argue that “despite the affinity which exists between them, the mutual interests of economic integration policy and environmental policy do not always coincide, so that progress in integration policy can, as a result, represent a setback for environmental protection.” For example, steady economic growth and increased productivity (constitutionally enshrined as primary goals of the EC) easily could cause harm to the environment, as more factories and more products often create more pollution and waste.

The EC’s first attempts at implementing a policy for environmental protection resulted indirectly from the regulation of competition and the desire to achieve the common market. But achiev-

143 See Titanium Dioxide, supra note 19, at 2898–2899.
144 Lomas, supra note 34, at 507.
145 EEC Treaty art. 2. Article 2 states:

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

EEC Treaty art. 2.
ing environmental protection goals through measures designed to achieve the functioning of the common market exposes a new lacuna in the Community legal structure: what happens when economic and environmental goals conflict? The ECJ filled this gap. Accordingly, when there is a confrontation between the demands of an effective Community environmental protection policy and the fundamental Community doctrine on free movement of goods, the ECJ settles in favor of the environmental policy at issue.

B. Waste Oils and Danish Bottles

In the Waste Oils case, the ECJ held that a Council Directive on the disposal of waste oils, which included provisions allowing Member States to set up a system of zones and permits for the collection and disposal of waste oil, did not contravene fundamental principles of Community law, i.e. free movement of goods and freedom of trade. The ECJ acknowledged that principles of free movement, free competition, and fair trade as fundamental rights are "general principles" of Community law that must be ensured. The ECJ stated, however, that the right to fair trade is not unlimited and may be restricted by measures which pursue an objective of "general interest" to the Community. Despite the fact that the word "environment" was not in the Treaty text at the time of its decision, the ECJ concluded that environmental protection was an "essential objective" of Community policy, and that the Waste Oils Directive sought to ensure that objective in a proportionate and non-discriminatory manner. Finally, the ECJ held that the French

147 See Lomas, supra note 34, at 533.
148 See generally Kramer, EEC Treaty, supra note 24. Kramer’s article provides a more exhaustive analysis of the relationship between the environment and the essential Community provisions on free movement of goods.
150 Id. arts. 5–6.
152 Id. at 548.
153 Id. at 549.
154 Id.
implementing legislation, which prohibited the burning of waste oils outside state approved facilities, was intended to protect the environment and did so without using unnecessarily restrictive methods. The French law therefore was held to be consistent with the aims and scope of the Waste Oil Directive.\(^{155}\)

The decision in Waste Oils illustrates the ECJ’s willingness to promote the aims of environmental protection, despite the plain language of the Treaty. The ECJ, however, did not address specifically the language of article 30, nor did it spell out clearly the test it would utilize in cases where it is confronted with a conflict between the “essential” EC objective of Community environmental protection and free movement principles.

In the Danish Bottles case, the ECJ built on and clarified the approach taken in Waste Oils, while concomitantly vaulting environmental protection into the forefront of Community consciousness.\(^{156}\) Denmark created a compulsory deposit and return system for the re-use of drink containers and included a requirement that only containers which had been approved previously by the national environmental agency could be marketed in Denmark.\(^{157}\) There was an exception for producers to import up to 3,000 hectoliters per year in unapproved containers and foreign producers could “test” the Danish Market with a limited number of unapproved cans.\(^{158}\) The Commission, with the United Kingdom intervening, argued that the Danish system violated article 30.\(^{159}\)

The ECJ held that the bulk of the Danish System was compatible with Community law.\(^{160}\) The ECJ reasoned that a recycling program was a necessary measure to protect the environment and that a compulsory deposit and return system was an essential and proportionate means of implementing the program.\(^{161}\) The ECJ concluded, however, that the pre-approval requirement did have a disproportionate effect despite the 3,000 hectoliter exception.\(^{162}\) Additionally, the ECJ held that any restrictions on trade that resulted from the compulsory deposit and return system did not violate article 30.\(^{163}\)

\(^{155}\) *Id.* at 551–552.


\(^{157}\) *Id.* at 4608–4609.

\(^{158}\) *Id.*

\(^{159}\) *Id.* at 4609; see EEC Treaty art. 30.


\(^{161}\) *Id.* at 4630.

\(^{162}\) *Id.* at 4632.

\(^{163}\) *Id.* at 4630.
The ECJ's decision in Danish Bottles advanced the cause of environmental protection in at least three ways. First, the ECJ declared that environmental protection was a "mandatory requirement" under Community law; thereby in effect limiting the application of article 30.\(^{164}\) The ECJ articulated the doctrine of "mandatory requirements" in the Cassis de Dijon decision, where the ECJ held that in the absence of Community legislation, Member States may adopt measures regarding the marketing of products that result in a restriction on free movement in order to satisfy mandatory requirements "relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defense of the consumer."\(^{165}\) Thus, although environmental protection is not among the derogations to free movement listed in article 36,\(^{166}\) it is not mentioned anywhere in the original EEC Treaty or in the language of Cassis de Dijon,\(^{167}\) the ECJ used the Danish Bottles decision to read environmental protection into the "mandatory requirements" doctrine.\(^{168}\)

Second, the ECJ articulated a three part test to clarify what types of environmental measures lawfully may restrict the fundamental Community provisions on free movement. The ECJ reasoned that: a) the measure genuinely must be intended to protect the environment and not be a disguised restriction on trade;\(^{169}\) b) the measure

\(^{164}\) Id.

\(^{165}\) See generally Cassis de Dijon, supra note 165. But see 24 O.J. (C 309), Answer to Written Question No. 749/81, by Mr. Bonde:

\[^{[1]}\]he list of such requirements is not exhaustive. It will be the responsibility of the Commission when examining individual cases and under the supervision of the Court of Justice, to determine which other mandatory requirements may be taken into consideration. The protection of the environment may, for example, be considered to be a case of this nature.

\[^{[2]}\]d. (emphasis added).


\(^{167}\) Id.
must be indistinctly applicable; and c) the measure must fall within the EC law principle of proportionality. This test will provide certainty for Member States as they strive to develop tough environmental protection policies.

Third, the ECJ's decision strengthens the power of Member States to enact stringent national environmental policies, thereby providing a spur for tougher policies at the Community level. Advocate General, Sir Gordon Slynn concluded that the Danish measures were disproportionate and that other methods could have achieved a "reasonable standard" of environmental protection without seriously impinging article 30. In taking a course of action different from that recommended by the Advocate General, the ECJ implicitly rejected the "reasonable standard" approach and opted for a more effective approach to environmental protection, even at the expense of a fundamental Community policy on free movement. One can argue that the answer to Danish Bottles is to take tougher, more comprehensive action at the Community level. It will be more difficult for Member States to justify taking unilateral action under article 100a(4) or 130t if the Community already has acted under one of those provisions to achieve a high level of environmental protection.

C. Maastricht: Environment and Economic Development

1. Sustainability

The development of a strong European economy was one of the most important forces behind the creation of the EEC Treaty. As noted above, a concern for the environment was not reflected in the original Treaty text. After the word "environment" finally was incorporated by the Single European Act, environmental protection remained a secondary concern to economic development.

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170 Id. at 4629.
171 Id. at 4630.
172 Id. at 4626.
174 See Waste Directive, supra note 89, ¶¶ 13–14. In Waste Directive, the ECJ reaffirmed that waste is a "good" within the context of article 30, but that environmental protection is a mandatory requirement of Community law that can limit the free movement of the waste. Id. The ECJ concluded that the amended Waste Directive did not violate article 30 and its proper interpretation required that waste be processed as close to the place it is produced as possible, thereby limiting to the greatest extent possible the transport of waste. Id. ¶¶ 8, 13, 14.
175 See KRAMER, EEC TREATY, supra note 24, at 34–39, 93–97.
176 EEC TREATY art. 2.
It is arguable that the inclusion of the principle of "sustainability," as articulated in the Maastricht Treaty, raises concern for the environment to the same level as has been accorded to economic development. The purpose of sustainable development is to set the pace of economic growth according to the capacity of the environment to absorb the adverse consequences of that growth, thus sustaining the health of our eco-system. The logical corollary is that if the environment cannot sustain further development appropriately, further development should not be pursued. Arguably, however, most forms of economic development will cause some environmental damage, and hence the line at which it becomes unsustainable is a difficult one to draw. Based upon the approach taken by the ECJ, it most likely will define and apply the concept of sustainable development in a way that provides greater protection of the environment, even where the evidence of actual or potential environmental damage is not 100 percent conclusive.

2. Subsidiarity

In the Danish Bottles case, Denmark adopted legislation in the area of recycling in the absence of a Community measure. The power of a Member State to take unilateral action and pass measures of environmental protection was enshrined in the Treaty by the Single European Act. At first glance, the Maastricht Treaty seems to reaffirm, if not expand, the powers of the Member States to act unilaterally by including the principle of subsidiarity. The principle of subsidiarity requires Community institutions to take action only where the measure cannot be adopted more effectively at a...
national level, and such action must be done in the least restrictive manner.

Without prejudice to other areas of EC law, the principle of subsidiarity should not result in a shift of power away from EC institutions in the area of enacting environmental legislation. The problems of environmental protection cannot be addressed adequately within the rigid system of separate sovereign states.\textsuperscript{184} Subsidiarity really is about protecting sovereignty, but "the notion of sovereignty which underlies the current regime poses insurmountable obstacles when the problems to be addressed are transnational in scope."\textsuperscript{185} Because problems of environmental protection are largely transboundary in nature (pollution does not recognize a nation's sovereign border), there are compelling reasons for developing environmental protection policies primarily at the Community level. The ECJ's approach to the ambiguities and lacunae in EC law almost always results in a decision that strengthens the effectiveness of a Community environmental protection policy. Thus, when the ECJ is confronted with the principle of subsidiarity within the context of Member State and Community environmental protection policy, it is likely to give it a narrow application and rule that the Community institutions, not the individual Member States, are the appropriate bodies for adopting environmental legislation.

III. THE DOCTRINE OF DIRECT EFFECT, AND ENVIRONMENT

Application of the doctrine of "direct effect" is particularly important in the area of environmental protection, as a large majority of EC environmental policy is implemented in the form of Directives.\textsuperscript{186} The ECJ consistently has held that Directives which impose sufficiently precise, clear, and unconditional obligations upon a Member State, without requiring further Member State action, may give rise to rights and obligations that individuals can rely on in actions before their national courts.\textsuperscript{187} Additionally, a Member State may not rely, as against individuals, on its failure to perform obligations


\textsuperscript{185} Sands, \textit{Environment, Community and International Law}, 30 HARV. INT'L L.J. 393, 399 (1989); see also Sperling & Feldman, supra note 184, at 10701.

\textsuperscript{186} See Declaration on Article 100a by the Conference of the Representatives of the Governments of the Member States, 1987 O.J. (L 169) 24.

\textsuperscript{187} See generally Case 41/74, Van Duyne v. Home Office, 1974 E.C.R. 1337. This decision exemplifies the ECJ's dynamic approach to interpreting EC law. The doctrine of direct effect is not mentioned in the Treaty, but rather is created by the ECJ.
which a Directive entails.\(^{188}\) Thus, enforcement of EC environmental legislation may be achieved substantially by individuals and common interest groups bringing actions against Member States, and emanations thereof, before their national courts.\(^{189}\)

An individual may rely on the provisions of a directly effective Directive in bringing an action against a Member State in a national court.\(^{190}\) In *Foster v. British Gas*, the ECJ gave a broad interpretation to what constitutes the "State," and included certain utilities operators.\(^{191}\) The ECJ’s ruling in *Foster* represents a significant development for the enforcement of Community environmental laws, as such a broad definition of the "State" potentially could reach the actions of gas, nuclear, coal, and other energy suppliers, as well as the water companies. For example, an individual that suffers harm from drinking water provided by the State run water authority will be able to bring an action in the national court against that authority if the water is not up to Community standards.\(^{192}\)

A recent ECJ decision raised the possibility that an individual, like one harmed from drinking impure water, may be able to recover damages as a remedy. In the joined cases of *Frankovich and Bonifaci v. Italian Republic*, the ECJ held that individuals who were owed back-pay by their insolvent employer could collect money damages from the State.\(^{193}\) In this case, Italy failed to implement a Directive on the approximation of Member State laws relating to the protection of employees whose employers become insolvent.\(^{194}\) Although the ECJ held that the Directive did not give rise to directly effective rights, it further held that Italy’s failure to implement the Directive infringed EC law, that the applicant’s injury flowed directly from that infringement, and that the applicant therefore was entitled to money damages.\(^{195}\) Although the Treaty does not contain any language about the awarding of money damages, the ECJ concluded

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195 See generally Frankovich, 1991 E.C.R. 5357; see also Case 22/87, Commission v. Italy, 1989 E.C.R. 143, where the ECJ declared that Italy failed to comply with its Community obligations by not implementing the Insolvency Directive.
that the principle of liability of the State for damage caused to individuals by infringements of Community law is inherent in the scheme of the Treaty.\textsuperscript{196}

This decision fills a lacuna in EC law. The ability to award damages when a Member State fails to meet its obligations under EC law essentially provides "teeth" to the ECJ's powers under articles 169 and 170.\textsuperscript{197} Thus, if a Member State fails to implement a Community Directive aimed at environmental protection and an individual suffers harm from exposure to the part of the environment which the Directive was meant to regulate, that individual will have a strong case for collecting damages from the Member State.\textsuperscript{198} The prospect of financial liability will in turn prompt Member States to implement environmental Directives in a timely and proper manner.

CONCLUSION

The net result of the ECJ's jurisprudence has been an increase in Community awareness of environmental issues and an increased effectiveness of Community measures designed to protect the environment. The ECJ's judgments in Titanium Dioxide and Waste Directive clarify some of the controversy surrounding the proper legal basis of Community secondary environmental legislation. The ECJ's decisions will have a generally positive effect on EC environmental policy. Article 100a will remain a viable legal basis for environmental legislation, thus potentially extending qualified majority voting. The ECJ most likely will interpret the new Maastricht legal basis provisions in a manner consistent with its previous jurisprudence, while simultaneously promoting the European Parliament's new co-decision powers with the Council. The ECJ's decisions in Waste Oils and Danish Bottles illustrate a willingness to promote the EC's environmental protection policies, even when they may conflict with another fundamental principle of EC law. Thus, Maastricht's incorporation of the principle of sustainability raises environmental

\begin{footnotesize}
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  \item \textsuperscript{196} Case 22/87, Commission v. Italy, 1989 E.C.R. 143; see EEC Treaty art. 5. The ECJ concluded that one of the Member States' "obligations" under the Treaty included remedying the financial consequences of their own infringement of EC law. Case 22/87, Commission v. Italy, 1989 E.C.R. 143.
  \item \textsuperscript{197} See EEC Treaty arts. 169–171. The ECJ's power under these articles merely is to declare that a Member State has not met its obligations under the Treaty, while the Member State is required to "take the necessary measures" to comply. EEC Treaty arts. 169–171. The language does not evidence any powers of enforcement.
  \item \textsuperscript{198} See Josephine Steiner, From Direct Effects to Frankovich: Shifting Means of Enforcement of Community Law, 18 EUR. L. REV. 3, 11 (1992).
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protection to co-equal status with the EC’s policy on economic integration. On the other hand, Maastricht’s inclusion of subsidiarity is not very significant from the perspective of the environmental protection policy because the inherently transboundary nature of pollution and other dangers to the environment requires the continued development of environmental protection policy primarily at the Community level. Finally, the ECJ’s decisions in Foster and Frankovich will have a profound influence on the way EC environmental policy is enforced. Both cases expand the category of potential Member State defendants in actions brought by individuals before the national courts, and create the possibility of collecting money damages from Member States who fail to implement Community environmental Directives properly.