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ENVIRONMENTAL POLICY IN THE EUROPEAN COMMUNITY: OBSERVATIONS ON THE EUROPEAN ENVIRONMENT AGENCY

David A. Westbrook*

I. INTRODUCTION

The environment is not mentioned in the original texts of any of the Treaties creating the European Communities ("EC").¹ Nevertheless, in the 1970's, the EC began to grapple with environmental problems.² In 1985, the Single European Act established the protection of the environment as one of the EC’s six most important obligations.³ Even after the passage of the Single European Act, the implementation of environmental policy was fitful and increasingly the object of widespread and intense criticism. On November 28, 1989, the environmental ministers of the EC states agreed to create a semi-autonomous institution at Community level to deal

1. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The EEC Treaty has been amended in essential ways by the Single European Act. 30 O.J. EUR. COMM. (No. L 169) 1 (1987). This Note uses "EC," even though the more prevalent Anglo-American usage is "EEC." While the mechanisms for Community action are usually described as economic, the actions of the EC often reflect more complex motives and goals. The European Communities—Coal and Steel, Atomic, and Economic—were conceived in order to prevent war, that is, to transform the nature of European politics. See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169. The EEC treaty expressly contains policy which cannot be considered "economic" in any meaningful sense, most explicitly in part 3, title III, "Social Policy." For an analogous use of language, a U.S. lawyer might recall the range of laws constitutionally justified under the commerce clause. Moreover, central institutions of the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community were fused by the Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), 10 O.J. EUR. COMM. (No. 152) 1 (1967). Thus, as a technical matter, these Community institutions are not founded solely upon the EEC Treaty, even though most of their activities are conducted under the authority of the EEC Treaty. In these circumstances, to indicate that Community politics is "economic," and by implication somewhat removed from other societal questions, would be misleading.
with environmental policy. A Council Regulation of May 7, 1990, formally established the European Environment Agency ("EEA"). Although the Regulation has been promulgated, it will not take effect until a site for the EEA is chosen. This Note describes the proposed agency, reviews the criticisms which the proposal has received, and discusses ways in which the EEA might be realized.

The Regulation is structured around the Council’s recognition of an unmet need for scientific information as a prerequisite for sound environmental policy. The Regulation states:

[Collection, processing, and analysis of environmental data at European level are necessary in order to provide the Community and the Member States with objective, reliable, and comparable information which will enable them to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment.]

The Regulation establishes the EEA, and “aims at the setting up of a European environment information and observation network.” The activities of this network “would be coordinated at Community level by a European Environment Agency.”

On its face, the Regulation establishes the EEA as an information-gathering, not a regulatory, body. To achieve this goal, article 2 of the Regulation enumerates ten specific tasks for the EEA: (1) to establish and coordinate an environmental network, comprised of national environmental institutions, national “focal points,” and “topic centres;” to this end, Member States will
inform the EEA of the main component elements of their national environment information networks . . .”; 11 (2) to provide the Commission and the Member States with objective information for the purpose of framing sound policy; (3) to record, collate and assess data to be used by the Commission “in its task of ensuring the implementation of Community legislation on the environment;” (4) to harmonize methods of measurement; (5) to incorporate European data into international environment monitoring programs; (6) to disseminate information, and to publish a triennial report on the state of the environment; (7) to promote research in the “development and application of environmental forecasting techniques;” (8) to promote research into techniques for assessing environmental costs; (9) to facilitate the exchange of information on environmental damage control technologies; and (10) to cooperate with various European and global organizations. 12

The scale of the EEA is modest, and its structure is relatively simple. The Agency is an institution distinct from the Commission and other Community bodies. In the words of the Regulation, the Agency is a legal person, and enjoys “in all the Member States the most extensive legal capacity accorded to legal persons under their laws.” 13 The Agency’s sixteen-member management board includes a representative of each Member State, two representatives of the Commission, and two scientists chosen by the European Parliament on the basis of their likely contribution to the work of the Agency. 14 The board adopts its own internal procedures 15 and elects a chair from among its members to a three-year term. 16 Most board decisions must be passed by a two-thirds majority. 17

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11. Id. art. 4, para. 2.
12. Id. art. 2, paras. 1–10.
13. Id. art. 7.
14. Id. art. 8, para. 1.
15. Id. art. 8, para. 2.
16. Id.
17. Id. art. 8, para. 3. The exception is the designation of the topic centers. See id. art. 4, para. 5.
An Executive Director, nominated by the Commission and appointed by the Board to a five-year term, runs the daily affairs of the EEA with the assistance of a scientific committee, whose nine members are designated by the management board for a term of four years. The Executive Director submits the EEA budget to the Board, which in turn gives it to the Commission for inclusion in the general budget of the European Community.

The Regulation states that it "shall be binding in its entirety and directly applicable in all Member States." While the Regulation will establish the EEA throughout the Community without further implementation by the Member States, the Regulation will not take effect until a site for the Agency is chosen. To date, every EC State except Luxembourg has made a bid for the EEA.

II. THE EEA IN THE CONTEXT OF EUROPEAN POLITICS

The relationship between the EEA and other political entities which operate within the Community—Member States, other EC organs, and international institutions not founded on Community documents—remains unresolved. The French government gave the EEA much of its early impetus, and responding in part to Europeans' growing environmental concerns, the other Member States have all voiced some support for a European Environment.
European Environment Agency

Despite the general assent to the idea of the EEA, Member States differ in the depth of their support, reflecting their varied positions on the amount of power which the EEA should be granted.26

Although Member States adopt varying positions at the Council level, it would be wrong to think of the debates over the EEA as structured primarily by national interests. Representation in the Council of Ministers is by nation, and is literally the representation of the administration of Member State governments, that is, the national interest as construed by the ruling party. In contrast to the inherently nationalistic tenor of Council discussion, the recent plethora of conferences on the European environment generally has been multinational in scope. In addition, it often has been informed by sectoral concerns, for example, those of lawyers and of the chemical industry. The European Parliament, where politics is based on party color rather than national alliance, hotly debated the EEA, and in the process further demonstrated the insufficiency of a “national interest” analysis of the environmental debate.27 Nonetheless, any environmental policies instituted at Community level will impinge on the domestic legislation of Member States. Consequently, a sensitivity to the tension between the Member States and the Community is required. At present, the Agency has little legal power of its own—that is, it has no direct power to compel action by Member States.28

The relationship between the EEA and other Community institutions is similarly complex. Jacques Delors, President of the European Commission, called for a pan-European environmental agency in his keynote address to the European Parliament on January 17, 1989.29 While agreeing on the need for an environ-

25. For a political overview of the greening of Europe, see Grapin, The Storming of Strasbourg; Europe Gets Greener, WORLDPAPER, Nov. 1989 (LEXIS, Nexis library, Omni file).

26. Great Britain, for instance, has voiced considerably less support for the EEA. See Green Policing, The Times (London), May 16, 1990, at 13 (editorial); see also infra notes 41-42 and accompanying text.

27. See, e.g., 33 O.J. EUR. COMM. (No. 3-386) 112-13 (1990) (Debates of the European Parliament). See also Aldred, Cost of Europe’s “Green” Wave Unclear, BUS. INS., May 14, 1990, at 35; infra notes 62-63 and accompanying text.

28. The fact that the EEA does not possess legal powers is not to be confused with the fact that the Regulation gives the EEA legal personality. Regulation, supra note 5, art. 7. To further complicate matters, while the EEA does not have the power to coerce, it does have legal powers, such as the ability to contract and to indemnify. See id. art. 18.

mental agency, the Commission and the Parliament have since disagreed over its scope. The Parliament would like a regulatory agency, while the Commission maintains that it cannot delegate regulatory powers and that environmental regulations will continue to be promulgated through existing institutional vehicles.

Article 15 of the Regulation mandates cooperation between the EEA and other international institutions concerned with the environment, particularly the United Nations Environment Programme ("UNEP"). The EC is currently party to approximately thirty international agreements on the environment, and it is negotiating more. Presumably, the EEA will have a role in continued cooperation under existing agreements and will figure prominently in whatever new accords are reached.

Looking beyond cooperation, German Foreign Minister Hans-Dietrich Genscher has proposed a pan-European environmental agency as part of a new security system for Europe based on a geometric expansion of the Conference on Security and Cooperation in Europe ("CSCE"):

The aim is a bold design for the future of Europe as a whole. The only element binding the role of Europe at present is the CSCE process. That process must become a framework of stability for the dynamic, traumatic, and in some cases, revolutionary developments in Central and Eastern Europe, including the Soviet Union . . . . What institutions can be established in the CSCE process? . . . a European environmental agency.

The EEA also has considerable support outside the Community. At an environmental conference in Bergen, then Norwegian Prime

Delors stated: "[t]he Commission will propose the introduction of a European system of environmental measurement and verification which could be the precursor of a European environment agency." Id.


32. Regulation, *supra* note 5, art. 15.

33. Grapin, *supra* note 25. The participation of both the EC and the Member States in international environmental accords, for example the Montreal Protocol, has largely unexplored ramifications for international law.

34. Speech of West German Foreign Minister Hans Dietrich Genscher to the American Society of Newspaper Editors Convention (Apr. 6, 1990), *quoted in Fed. News Serv.*, Apr. 6, 1990 (LEXIS, Nexis library, Omni file). CSCE includes the United States, Canada, and all the nations of Europe except Albania.
Minister Jan Syse made proposals similar to Genscher's for the involvement of European Free Trade Association ("EFTA") nations, as well as the Soviet Union and East Europe, in a European environmental agency with extensive regulatory powers.\textsuperscript{35} While the Council Regulation is silent on EEA participation by non-Member States, the Commission proposal for the EEA was never restricted to the European Community. When the Commission first published detailed plans for the EEA, European Community Environment Commissioner Ripa di Meana announced that the EFTA states and several East European states had expressed an interest in participation.\textsuperscript{36} Since then, the Vienna Conference on the environment, attended by representatives of virtually all European states, including the East European states and the USSR, concluded with a call for the creation of a pan-European environmental agency that would establish uniform standards for pollution control and would monitor compliance.\textsuperscript{37}

\textbf{III. CRITICISMS OF THE EUROPEAN ENVIRONMENT AGENCY}

\textit{A. Inappropriate Use of Community Resources}

Four basic criticisms have been leveled against the EEA. Former British Environment Minister Lord Caithness has argued that the EEA will be expensive and will duplicate work done by other agencies, so that it is a waste of Community resources.\textsuperscript{38} After a meeting of EC Member States' environmental ministers, Caithness framed the issue as "whether the job can be done with existing institutions or whether you really need to create a new agency."\textsuperscript{39}

These concerns are unfounded. The EEA is a small organization, in terms of the geographic area, population, and environ-
mental degradation within its purview, so it is difficult to see the Agency as expensive. The claim that the tasks of the EEA are already being fulfilled by other organizations, i.e., that good data exists for the European environment, is unsubstantiated.\textsuperscript{40}

\section*{B. Inappropriate Interference with Member State Sovereignty}

At the Action for a Common Future conference hosted by the Norwegian government in Bergen ("Bergen II"), the United Kingdom forthrightly opposed what it perceived as another intrusion of the EC into the regulatory activities of Member States.\textsuperscript{41} Although less vociferously, Spain has adopted a similar position.\textsuperscript{42} In light of these concerns, the Commission's proposal was modified to give the EEA a less interventionist role.

\section*{C. As Proposed, EEA Resources Are Inadequate to Its Task}

Conversely, the European Parliament threw out the proposed EEA on the grounds that it had no powers to set standards, to

\textsuperscript{40} Clover, Technology: Is Britain Really the Dirty Man of Europe?, Daily Telegraph (London), June 19, 1989 (LEXIS, Nexis library, Omni file). Clover states:

\begin{quote}
Even to attempt to identify the dirtiest nations in Europe is to discover how elusive is accurate, up-to-date or comparable information. Could there not be an advantage, one wonders, for Europe's politicians to keep matters that way? . . . The disgraceful lack of up-to-date European environmental information is at last beginning to be taken seriously by the European Commission.
\end{quote}

\textsuperscript{41} Green Policing, supra note 26, at 13 (stating that "[t]he idea of international 'green policing,' which is at the heart of the plan, has received a dusty response from Mr. David Trippier, the British minister present at Bergen.").

\textsuperscript{42} Euro-Parliament Threatens to Torpedo Environment Agency, supra note 30. British worries over enforcement at the Community level have been aggravated by the long-running controversy over British failure to implement water purity directives. After lengthy negotiations failed, the Commission filed suit in the European Court of Justice. See British Violations of EC Directive on Drinking Water Results in Legal Action, 12 Int'l Env't Rep. (BNA) 480, 480 (1990). In a parallel action, Friends of the Earth has also sued—in domestic courts—to force implementation of the Directive. This is the first time that English courts have allowed an activist group to maintain such a class action, and as such represents a case of procedural importance for the development of environmental litigation in the United Kingdom. See Greens Allowed to Sue Government for Violation of Drinking Water Directive, 13 Int'l Env't Rep. (BNA) 11, 12 (1990). Given the emotive nature of drinking water purity, both suits have caused the government considerable embarrassment, and they have presumably heightened the sensitivity of the British government to Community level regulation.
monitor performance, or to compel compliance; in other words, it was insufficiently interventionist. Reflecting this sentiment, Beate Weber, a Social Democrat from West Germany, stated: “We have inspectors to police competition policy in the Community so why can’t we have inspectors of the environment?” Responding to such positions, and his own sympathies for a European regulatory agency notwithstanding, Commissioner for the Environment Ripa di Meana called for caution: “[T]here may still be some who will say ‘We could have moved more quickly’ . . . [but] the entire history of the Community shows that the only way to make progress is by a gradual approach, in stages.” After heated debate, the Parliament referred the remaining difficulties back to the Committee on the Environment, Public Health, and Consumer Protection.

D. The Community’s Politics Are Inherently Anti-Environmental

While the European Environmental Bureau, a lobbying group based in Brussels, also criticizes the fact that the EEA’s “functions

43. 33 O.J. EUR. COMM. (No. 3-386) 76 (1990) (Debates of the European Parliament).
45. 33 O.J. EUR. COMM. (No. 3-386) 112–13 (1990) (Debates of the European Parliament). Di Meana himself supports regulation at Community level, but does not believe that this is the political moment for such an expansion of Community competence. In his plea to the Parliament, di Meana said: “Sinking the agency today by insisting on doing everything and at once means ignoring the hopes reposed in it by public opinion in the Member States, and puts its future creation in question.” Id. at 112.
46. 33 O.J. EUR. COMM. (No. 3-386) 150–51 (1990) (Debates of the European Parliament). Despite changes wrought by the Single European Act, the Parliament remains primarily an advisory body. See Single European Act, supra note 1. While the Treaty mandates that the Commission and Council seek parliamentary opinion on a wide variety of activities, express parliamentary approval is not legally required for any Community action except the budget. Nonetheless, the Commission is somewhat politically constrained by the opinion of the Parliament, even though the Parliament plays only an advisory function. In this case, the Commission responded to the European Parliament in a number of ways. The original proposal was amended so that the EEA will be examined two years after its inception, with a view to expanding its mandate. Regulation, supra note 5, art. 20. In addition, the European Parliament is allowed to appoint two scientists to the EEA board. Id. art. 8.

Should these changes to the EEA prove insufficient, the Parliament may block the budget of the EEA, but this is unlikely. See Environment Ministers Set Up Agency But Site Location Remains Uncertain, 13 Int’l Env’t Rep. (BNA) 144, 144 (1990).
are strictly confined to the collection and dissemination of environmental information,"\textsuperscript{47} its critique is based on a more fundamental disagreement. The creation of a single market in Europe is designed to generate enormous economic growth. Directorate General XI ("DG XI") of the European Community, the Commission subdivision responsible for environmental policy, acknowledges that the economies of scale that collectively form the single market's most persuasive \textit{raison d'etre} will further burden the European environment.\textsuperscript{48} According to DG XI, no policy to meet this increased burden will be coordinated at Community level. Instead, the Community will continue to set minimum standards, which will be implemented by the Member States.\textsuperscript{49}

In general, a scheme of regulation structured around minimum standards may create a "regulatory ceiling," which prevents the attainment of the policy objectives that the regulation was designed to achieve. Minimum standards give Member States no incentive to require performance higher than that required by other States, since compliance with higher standards is expensive and puts citizens at a competitive disadvantage vis-à-vis their neighbors.\textsuperscript{50} Moreover, since the EEA has been established as a passive, non-regulatory institution, Member State compliance will not even reach the "ceiling" set by the Community.\textsuperscript{51} Finally, should a


\textsuperscript{49} \textit{Id.}

\textsuperscript{50} Id. Under EEC Treaty articles 130t and 100a, Member States may set standards above those set by the EC, provided the higher standards do not conflict with the Treaty. EEC Treaty, \textit{supra} note 1, arts. 130t, 100a. Actions taken by Member States which tend to segregate the EC and thus impede progress toward the single market have often been ruled incompatible with obligations imposed by the Treaty, even where those actions are motivated by legitimate governmental ends. Nonetheless, the EEC Treaty as well as the jurisprudence of the European Court of Justice permit a more proactive policy regarding environmental regulation, even at the cost of a certain anticompetitive effect. \textit{See Commission of the European Communities v. Kingdom of Denmark}, Case 302/86, 1988 Eur. Ct. Rep. 4607 ("Danish Bottle") (placing the environment among the factors established by Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein, Case 120/78, 1979 Eur. Ct. Rep. 649 ("Cassis de Dijon"), and its progeny, which justify derogation from EEC Treaty article 30, in addition to the express derogations created by EEC Treaty article 36).

\textsuperscript{51} Nonetheless, Member States have occasionally set standards higher than those demanded by the Community. \textit{See}, e.g., \textit{Danish Bottle}, Case 302/86, 1988 Eur. Ct. Rep. 4607. Note that regulation is used generally in this paragraph, meaning the implementation of policy and not the legislative device established by EEC Treaty article 189.

\textsuperscript{51} This has traditionally been a problem. "[I]nsufficient regulatory pressures by the EC Council of Environmental Ministers has led Member States to ignore some directives
Member State choose to set a standard above the *de facto* minimum set by the Community, the Member State conceivably might be vulnerable to legal attack in the European Court of Justice due to the anti-competitive effects created by the standard.\(^5\)

These arguments reflect the traditional view of environmental management, which presumes an adversarial relationship between the regulator and actors in the marketplace. This orthodoxy, however, has been challenged. In first proposing the EEA, Jacques Delors linked the Commission's environmental policy to the program that had been sketched out by the Brundtland Report for the World Commission on Environment and Development.\(^5\) The Brundtland Report is the most politically influential statement of the contemporary vision of environmental regulation, in which the (natural) environment and the (human) economy are seen as essentially coterminous recursive systems—systems which are distinguished for analytic purposes only.\(^5\)

### IV. Possible Future Roles for the European Environment Agency

**A. Changes Contemplated by the Regulation**

Under the impetus of so much debate, the EEA will almost certainly become something quite different from the institution formally established by the Regulation. On its face, the Regulation calls for review "after two years, with a view to deciding on further tasks for the Agency."\(^5\) Article 20 lists three areas which the Council, after consultation with the Commission and the Parliament, should particularly consider. First, the agency might be made responsible for the "monitoring of the implementation of

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\(^5\) Given current interpretations of the EEC Treaty, especially article 100a(4), this risk is very small. *See supra* notes 1 & 49.

\(^5\) *The World Comm'n on Env't and Dev.*, *Our Common Future* (1987). Gro Brundtland, former Prime Minister of Norway, chairs the Commission.

\(^5\) Whether or not the contemporary vision will be successful, or merely palliates environmentalists confronted with politically intractable forces such as multinational corporations, developing nations, and bourgeois appetites, remains to be seen. I do not here suggest cynicism; I pose a merely analytic, not a political, possibility.

\(^5\) Regulation, *supra* note 5, preamble, para. 16.
Community environmental legislation." Second, the EEA might influence market signals through a program of labelling "environmentally friendly products, technologies, goods, services and programmes which do not waste natural resources." The Regulation further suggests promotion of the use and transfer of environmentally friendly technologies and processes, both inside and outside the Community. Finally, the Regulation considers that the EEA might undertake the establishment of environmental impact criteria, with a view to the application and/or revision of Directive 85/337/EEC, which obligates Member States to require environmental impact assessments of public and private construction projects and other "interventions in the natural surroundings."

B. The European Environment Agency as Regulatory Body

The proposals expressly contemplated by the Regulation only allude to the real question concerning the EEA: To what extent, if any, will the EEA regulate? From the beginning, the press has speculated. "As initially planned, the agency would not have enforcement powers." Almost a year before the Council promulgated the Regulation, the Commission’s EEA proposal was described as "to some extent modelled on the U.S.'s powerful Environmental Protection Agency.”

56. Id. art. 20. Much Community legislation takes place through directives. A directive is produced by the Commission, passed by the Council of Ministers, usually after consultation with the European Parliament, and is then implemented through the legislative processes of the Member States. Whether or not a Member State has in fact implemented a directive is frequently disputed, hence the suggestion that the EEA monitor implementation. See Haigh, supra note 21, at 617.

57. Regulation, supra note 5, art. 20.

58. Id. The Regulation does not define any of these terms. Most obviously, the Regulation is silent on the extent to which "regulatory" activities will be allowed to distort the free market.


The curiosity of the press is the anxiety of industry. Speaking at a Risk and Insurance Management Society Conference, one analyst noted that "concerns have been expressed by some in industry that such a system will inevitably become a vehicle for international enforcement."62 Another remarked that some "believe that the creation of a benign data-gathering agency is merely the first step on the road toward an environmental enforcement role for the Community."63

These comments, along with the criticisms and proposals mentioned above, presume a bifurcation between regulation and data-gathering. Both proponents and foes of regulation feel it is more active and more intrusive than the current EEA. Data-gathering is seen as passive, to some extent a "scientific" attempt to gauge the state of environmental damage in Europe, rather than a "political" attempt to deal with it. The popular debate has been whether the EEA represents a failure on the part of the EC to confront the ecological crisis, or demonstrates deference to the Member States and the market as more appropriate vehicles of popular sovereignty.

But the bifurcation between regulation and data-gathering may be unwarranted. One way to regulate an activity is for the regulator to require the production of information surrounding the proposed activity. Nominally passive data collection inhibits activities in two basic ways. First, the regulator's review of the information and the decisions surrounding a proposal may reveal that, on balance, the activity is not socially desirable. The regulating agency, or other forces, may then be used in order to prevent execution of the proposal. Second, the production of adequate data and reasoning imposes a considerable cost on the would-be actor. In itself, this cost can act as a deterrent to environmentally questionable activities. This is one of the principal ways in which the U.S. Environmental Protection Agency regulates, most obviously when it requires an Environmental Impact Statement.64 Article 20 of the Regulation already proposes "monitoring the

62. Aldred, supra note 27, at 35 (quoting Michael J. Murphy, analyst at Environmental Strategies Corp., Vienna, Virginia).
63. Id. at 35–36 (statement of Stephen Tupper, attorney with Stanbrook & Hooper, Brussels) (emphasis added).
implementation of Community environmental legislation." \(^6\) "Monitoring" might be conducted through fairly restrictive data collection; producers might be required to go through complex, time consuming, and expensive procedures in order to demonstrate compliance with environmental legislation.

Two facially independent developments lend support to the thesis that the Community will regulate the environment through the provision of information. First, on March 22, 1990, the EC environmental ministers agreed on a Freedom of Information Directive providing public access to environmental information. \(^6\) Like the U.S. Freedom of Information Act, \(^7\) the Directive will give citizens the right to information possessed by public bodies, including information about the activities of private firms. Access to information may encourage regulatory lawsuits which may be a necessary vehicle to improve compliance. Laurens Jan Brinkhorst, who heads DG XI, the directorate for the environment, believes the jurisgenerative aspects of the Freedom of Information Directive provide a necessary vehicle to improve compliance. \(^6\) The European Environment Bureau, however, argues that the Directive does not go far enough and is "clearly inferior to the U.S. Freedom of Information Act." \(^6\)

Second, the Community has proposed strict liability for toxic wastes. \(^7\) The Single European Act made strict liability for environmental harms part of the EEC Treaty, stating that "action taken by the Community relating to the environment shall be based on the principle[s] . . . that the polluter should pay." \(^7\) The proposed directive creates liabilities similar to U.S. principles of joint and

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65. Regulation, supra note 5, art. 20.
68. Role of European Environmental Agency Will Be in Data Collecting and Monitoring, 12 Int'l Env't Rep. (BNA) 477, 478 (1989). Brinkhorst has also commented that the United States can "do much to teach Europe about access to information." Brinkhorst Sees Environmental Agency, Biotechnology Draft as Near-Term Priorities, 12 Int'l Env't Rep. (BNA) 388, 388 (1990). Others feel that "easy access to government-held information will make the incidence of third-party damage actions more likely. As a result, businesses will have to consider strongly whether or not their waste management systems and environmental compliance programs can be improved to avoid exposing themselves to increased liabilities." Aldred, supra note 27, at 35 (quoting Stephen Tupper, attorney with Stanbrook & Hooper, Brussels).
70. See Smith, supra note 51, at 21.
71. EEC Treaty, supra note 1, art. 130r, para. 2.
several liability—the producer may be liable even if not in control of the waste at the time the harm was done. Not surprisingly, the chemical industry opposes the directive. In response to this position, Brinkhorst said he “hope[s] the American chemical companies will provide some wisdom to their European counterparts,” and that the European industry will gracefully accept DG XI’s position.

While control of the information flow will in all likelihood be a tool of the EEA, the Agency might also regulate along more orthodox lines, by mandating certain levels of compliance and then policing behavior. The London Times has argued that “Green police could be as useful, and come to seem as natural a form of cooperation, as Interpol.” Any such direct regulation, however, must overcome two systemic obstacles. Like virtually all Community actions, direct regulation by the EEA would entail enormous political battles over sovereignty. More generally, direct regulation has fallen increasingly out of vogue, largely replaced by more market-oriented (incentive) approaches to social organization. Even a market-based regulatory regime, presumptively more efficient than traditional command-and-control approaches to regulation, would require a vastly expanded role for the EEA.

73. Mackerron & Chynoweth, supra note 72, at 27.
75. As used in this paragraph, regulation means proactive policy management, not the legislative device established by EEC Treaty article 189. A serious discussion of regulatory theory is beyond the scope of this Note. As elsewhere, it is currently fashionable in the Community to conduct policy through, rather than against, the market. See also EC Official Says Fiscal Instruments to See Greater Use for Pollution Control, 13 Int’l Env’t Rep. 151, 151–52 (1990).
76. The Regulation states that the Agency will “make good any damage caused by the Agency.” Regulation, supra note 5, art. 18. This indemnification will take place “in accordance with the general principles in common to the laws of the Member States.” Id. Although this phrase is a recitation of EEC Treaty, supra note 1, art. 215, its familiarity does not make it less open to question. Under current conditions, more than half of Member State environmental legislation results from Community initiatives. Grapin, supra note 25. Moreover, the decisions of the European Court of Justice (“ECJ”) are certainly law common to the Member States. A radical interpretation of the law common to Europe would be that indemnification will take place in accordance with the jurisprudence of the ECJ. One can imagine a regime in which the EEA closes factories, and then pays the damages, shifting the loss to the Community as a whole, as determined in a proceeding before the ECJ, or conceivably, as determined by the Court of First Instance. EEC Treaty, supra note 1, art.
Diplomatic necessity might also expand the competence of the EEA. Conceivably, EC environmental policies would preempt the negotiation of environmental treaties by Member States. To date, this has not happened.\textsuperscript{77} The EEC Treaty states that "[t]he previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."\textsuperscript{78} The Treaty also provides: "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."\textsuperscript{79} Purely national policy cannot solve contemporary environmental problems; an ever-growing number of international agreements struggle with environmental issues. In addition to bilateral and multilateral agreements between states, supranational organizations play an expanding role in the search for global solutions. From the perspective of nations outside the EC, negotiation with the EC is more efficient than parallel bilateral negotiations with individual Member States. Moreover, the EC is increasingly considered the paramount locus of power in West Europe, more important than any of its Member States. In the global context of environmental concerns, the supranational politics of the EC will gradually supplant the diplomacy of Member States.

As environmental and developmental issues become increasingly linked, the position of the industrialized nations will become

\textsuperscript{168a.} Such a fanciful reading would be merely amusing, save for the problem posed by poisonous, bankrupt, yet economically crucial industrial sites in East Europe.

\textsuperscript{77.} For instance, individual Member States and the EC are signatories to the Montreal Protocol.

\textsuperscript{78.} EEC Treaty, supra note 1, art. 130r, para. 5.

\textsuperscript{79.} Id. art. 130t. In the context of fishing rights, individual Member States are precluded from conducting negotiations on fishing rights with non-Member States. See Churchill, Revision of the EEC's Common Fisheries Policy—Part II, 5 EUR. L. Rev. 95 (1980); Koers, The External Authority of the EEC in Regard to Marine Fisheries, 14 COMM. Mkt. L. Rev. 269, 279–80 (1977). A grant of fishing rights by a non-EC State to a Member State gives a competitive advantage to the citizens of the Member State vis-à-vis the fisherfolk of other Member States. Moreover, the existence of the bilateral agreement narrows the scope of negotiation available to the EC. Consequently, the EC could not maintain a consistent internal or external fishing policy, and the bilateral negotiations would be in conflict with the EEC Treaty, which ensures that Member States take "all appropriate measures" to fulfill their Treaty obligations. EEC Treaty, supra note 1, art. 5. While there are obvious differences between pollution control and an extractive enterprise like fishing, the analogy between the negotiation of fishing agreements and environmental agreements, or commercial agreements with environmental aspects, bears thought. Particularly in relations with East Europe and developing nations, pollution control is likely to become a bargaining chip similar to fishing rights. Moreover, for reasons suggested below, the consistency of EC environmental policy is likely to become increasingly important.
more and more politicized. The effectiveness of the European negotiating position will largely depend on the consistency of European environmental policy. The diplomatic requirement of consistent environmental policy will tend to shift regulation from the national to the Community level. Global politics, as well as suffering in the European environment, will compel the EC to adopt an aggressive approach toward environmental problems, which can only mean the EEA will grow.  

80. As a matter of political reality, the legal entity known as the EEA may not grow. The regulatory role this Note envisions for the EEA might be filled by another organization, perhaps DG XI, but nomenclature is of secondary importance. If present circumstances are any guide, the EC will become far more involved in management of the environment than ever before.