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# EUROPEAN ENVIRONMENTAL POLICY AND ITS EFFECTS ON FREE TRADE

NATALIE COLLINS\*

## I. INTRODUCTION

“A healthy economy is dependant upon a healthy environment.”<sup>1</sup> While this statement does not reflect the conventional wisdom that assumed that environmental regulations must hurt the economy, because such regulations cost business and industry money, many economists, politicians, and even heads of industry are beginning to recognize the truth behind this statement. There are several ways in which environmental regulations can benefit trade and industry without losing their power to protect the environment. Economists have long realized on a theoretical level that environmental regulations that internalize the external costs of environmental damage benefit the economy not only by ensuring that the cause of the environmental damage pays the external cost, but also by encouraging greater industrial efficiency and the development of new industry and businesses to meet the demand produced by the regulations.<sup>2</sup> However, government and industry have only recently begun to realize how significant these developments can be to their own economies and businesses. For example, Europe and Japan began regulating energy production during the oil scare in the late 1970s in order to encourage more efficient production.<sup>3</sup> Energy producing industries and industries that require a great amount of energy have a large advantage if they are located in these areas, because that efficiency translates to savings in energy costs.<sup>4</sup> At the same time, these measures benefit the environment

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<sup>1</sup> Margaret Thatcher, former Prime Minister of Great Britain, in a speech to the Royal Society (September 1998).

<sup>2</sup> DAVID W. PEARCE & R. KERRY TURNER, *ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT* 71-73 (1990).

<sup>3</sup> Margaret Brusasco-MacKenzie, *Case Study: Environmental Legislation of the European Community*, in *TRANSNATIONAL ENVIRONMENTAL LAW AND ITS IMPACT ON CORPORATE BEHAVIOR* 180 (Eric J. Urbani et al. eds., 1994).

<sup>4</sup> *Id.*

because greater efficiency in energy production results in less resource consumption and lower pollution levels.<sup>5</sup> As states' economies have become more and more intertwined, governments and businesses have begun to realize that differing environmental standards often become non-tariff trade barriers, either incidental to a true environmental concern, or deliberately, as protectionism in a green guise.<sup>6</sup> Whether such differences in environmental standards affect trade directly, such as outright restrictions on imports, exports, production or consumption, or indirectly by more subtle means of market access, they still result in a negative impact upon trade and the economy.<sup>7</sup>

The European Union ("EU") realized this enviro-economic truth early in its existence. Although the original Treaty Establishing the European Economic Community ("EEC Treaty") did not contain any provisions expressly relating to the environment, member states quickly began to realize that without a common environmental policy, the goal of a common economic market could not be met.<sup>8</sup> The EU began utilizing trade provisions in its treaty to eliminate differing member product standards or restrictions that were environmentally based, and from there has proceeded to develop, maintain, and improve an environmental regulatory system that encourages the EU's original economic purpose,<sup>9</sup> while simultaneously managing to remedy such environmental evils as the once extreme pollution of the Rhine River.<sup>10</sup> The EU's environmental policy has also begun to influence other nations' environmental strategies, not only by serving as an example of how the co-existence of a stronger economy and a cleaner environment may be achieved, but also due to the fact that the EU, with its enhanced environmental influence resulting from the common position of its member states, has begun negotiating for

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<sup>5</sup> See UTE COLLIER, *ENERGY AND ENVIRONMENT IN THE EUROPEAN UNION* (1994).

<sup>6</sup> Martin Coleman, *Environmental Barriers to Trade and European Community Law*, in *ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH* 131-33 (A.E. Boyle ed., 1994).

<sup>7</sup> *Id.*

<sup>8</sup> Alan Butt Philip, *The European Union: Environmental Policy and the Prospects for Sustainable Development*, in *GOVERNANCE AND ENVIRONMENT IN WESTERN EUROPE* 253, 256 (Kenneth Hanf & Alf-Inge Janson eds., 1998); Regina S. Axelrod & Norman J. Vig, *The European Union as an Environmental Governance System*, in *THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW AND POLICY* 72, 74 (Norman J. Vig & Regina S. Axelrod eds., 1999).

<sup>9</sup> See Margaret Brusasco-MacKenzie, *European Community Law and the Environment*, in *ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH*, *supra* note 6, at 71; Robert F. Meagher, *EC Environmental Law*, in *TRANSNATIONAL ENVIRONMENTAL LAW AND ITS IMPACT ON CORPORATE BEHAVIOR*, *supra* note 3, at 151.

<sup>10</sup> Brusasco-MacKenzie, *supra* note 3, at 176.

environmental harmonization at a more international level, in order to gain some part of the free trade advantages derived from environmental harmonization in an even larger market.<sup>11</sup>

As states become increasingly entangled in more global free trade, they will be forced to confront the issue of differing environmental standards, even as they are being forced to deal with environmental problems that are becoming progressively more imperative. To what extent should other states attempt to reach the type of international environmental harmonization present in the EU? This article will attempt to answer that question by examining the development of the EU's environmental law and its relation to trade law, taking a more in depth assessment of the benefits of its system, and contrasting those benefits with the system's flaws.

## II. THE DEVELOPMENT OF THE EUROPEAN UNION'S ENVIRO-ECONOMIC SYSTEM

Originally, the member states of the European Union felt little need to place provisions relating to the environment into their treaties.<sup>12</sup> In fact, the environment was never mentioned in a European Union treaty, except in the context of nuclear radiation, until the entry into force of the EEC Treaty.<sup>13</sup> Article 36 of the EEC Treaty did permit states to regulate imports and exports for "the protection of the health and life of humans, animals, and plants,"<sup>14</sup> enabling states to take some care of their environment without being in violation of their treaty obligations, but nowhere did the EEC Treaty specifically instruct the European Union governing bodies to take any steps regarding the environment.<sup>15</sup> However, as member states introduced more and more environmental measures that had an impact upon imports, exports, and fair competition, the members themselves began to realize that a common market was going to require common environmental policy,<sup>16</sup> and in 1972, the member states asked the EU governing bodies to draft a community environmental policy, resulting

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<sup>11</sup> *Id.* at 177.

<sup>12</sup> Philip, *supra* note 8, at 256.

<sup>13</sup> Brusasco-MacKenzie, *supra* note 9, at 72.

<sup>14</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

<sup>15</sup> *Id.*

<sup>16</sup> PAMELA M. BARNES & IAN G. BARNES, ENVIRONMENTAL POLICY IN THE EUROPEAN UNION 9-10 (1999).

in the First Environmental Action Programme ("First Action Programme").<sup>17</sup>

The First Action Programme introduced many of the principles that guide EU environmental law today. It promulgated the concept of what is now known as the "precautionary principle," the idea that environmental damage should be stopped before it starts, if at all possible.<sup>18</sup> This led to the idea that environmental considerations should be integrated into other community decisions that could have an effect on the environment.<sup>19</sup> The First Action Programme also incorporated the "polluter pays principle" for both preventative and clean-up measures.<sup>20</sup> As a result of these policies, the EU began issuing a great number of environmental regulations.<sup>21</sup> However, because the EEC Treaty had no provisions specifically mentioning the environment or the legal justification for this environmental legislation, it had to be grounded in provisions relating to trade.<sup>22</sup>

The majority of EU legislation on the environment that was passed after the First Action Programme was justified under two main articles,<sup>23</sup> while the European Court of Justice ("ECJ") combined those articles with yet another article to rule against certain actions or legislation by member states.<sup>24</sup> Article 100 of the EEC Treaty states that "[t]he Council, acting by means of a unanimous vote on a proposal of the [European] Commission, shall issue directives for the approximation of such legislation and administrative provisions of the member states as have a direct incidence on the establishment of functioning of the Common Market."<sup>25</sup> This article does not limit the subject material of these directives, so long as the directives directly affect the common market. Therefore, the Council was able to use this article to eliminate differences in environmental policies among states that were causing obstacles to free

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<sup>17</sup> Brusasco-Mackenzie, *supra* note 9, at 73.

<sup>18</sup> First Environmental Action Programme, 1973 O.J. (C 1) 12.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> IDA KOPPEN, THE EUROPEAN COMMUNITY'S ENVIRONMENTAL POLICY: FROM THE SUMMIT IN PARIS, 1972, TO THE SINGLE EUROPEAN ACT, 1987 (1988).

<sup>22</sup> *Id.*

<sup>23</sup> Brusasco-MacKenzie, *supra* note 9, at 74-75

<sup>24</sup> Coleman, *supra* note 6, at 134-35

<sup>25</sup> EEC Treaty, *supra* note 14, at art. 100.

intra-Community trade and competition.<sup>26</sup> Article 235 further elaborates upon the Council's power by stating:

If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.<sup>27</sup>

The statement of the Community's objectives is very broad, including not only "a harmonious development of economic activities," but also "raising of the standard of living,"<sup>28</sup> so that the Council can implement a wide range of measures, including environmental measures under Article 235. While sitting in judgment upon environmental measures passed by member states, in order to determine whether those measures are in compliance with their EU obligations, the ECJ based many of its decisions upon its interpretation of Article 30, which states that qualitative restrictions on imports and all measures having equivalent effect are prohibited between member states.<sup>29</sup> In one case, the ECJ defined "measures having an equivalent effect" as "all trading rules enacted by member states which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade,"<sup>30</sup> which obviously includes such measures as import/export restrictions based on environmental grounds. However, the ECJ has permitted certain restrictions meant to satisfy other mandatory member obligations, so long as they are "necessary in order to satisfy [those] mandatory requirements,"<sup>31</sup> and later identified the environment as one of these mandatory obligations.<sup>32</sup> For a further discussion of this balancing act between legitimate versus protectionist environmental measures, see Section IV of this Note.

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<sup>26</sup> Brusasco-MacKenzie, *supra* note 9, at 74.

<sup>27</sup> EEC Treaty, *supra* note 14, at art. 235.

<sup>28</sup> *Id.* at art. 2.

<sup>29</sup> *Id.* at art. 30.

<sup>30</sup> Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, 852.

<sup>31</sup> Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 662.

<sup>32</sup> Case 240/83, *Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées*, 1985 E.C.R. 531.

Due to the importance attained by environmental during these years of implementing the common market, the next major EU treaty reflected the interconnectedness of the environment to inter-member trade by not only mentioning it, but by creating its own title.<sup>33</sup> The Single European Act ("SEA") contained several provisions that specifically mentioned ways in which the EU was empowered to deal with the common environment. Article 100a says that there should be "a high level of protection" in the fields "concerning health, safety, environmental protection and consumer protection" in any proposals by the [European] Commission for approximations of provisions laid down for the continuing establishment and functioning of the common market.<sup>34</sup> This clearly states the intention that a common environmental policy should not turn into a common lowest denominator policy. Furthermore, it provides that although member states may adopt national measures in seeming non-compliance with 100a harmonizing measures due to the need set out in Article 36, or relating to the working environment, those national measures must first be verified to the European Commission ("Commission") to ensure "that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States."<sup>35</sup>

Article 130r lists objectives for those Community measures that are actually intended to affect the environment; they must "preserve, protect and improve the quality of the environment . . . [and] ensure a prudent and rational utilization of natural resources."<sup>36</sup> It goes on to embody the principles upon which Community action should be based: that preventative action should be taken; that environmental damage should be rectified at the source; "and that the polluter should pay."<sup>37</sup> However, economic needs of the common market are not ignored in this article. Community environmental decision-making processes must not only consider environmental conditions, based on the available scientific and technical data and the potential costs and benefits of both action and inaction, but must also consider the "economic and social development of the Community as a whole and the balanced development of its regions."<sup>38</sup>

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<sup>33</sup> EUROPEAN COMM'N, THE EUROPEAN UNION AND THE ENVIRONMENT 7-8 (1997); see Single European Act, February 17-18, 1986, 25 I.L.M. 506, 515 [hereinafter SEA].

<sup>34</sup> SEA, *supra* note 33, at 512.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 515 (requiring Community actions to also "contribute toward protecting human health").

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

However, the SEA does allow member states to have environmental regulations that are stricter than the environmental measures taken by the Community under Article 130r, thereby making especially sure that community measures do not result in a lowest common denominator environmental regulatory scheme. The SEA states that those stricter measures may not be incompatible with the other goals of the treaty, such as free movement of goods and fair competition, thus maintaining the balance between the environment and trade.<sup>39</sup>

Further developments occurred in the 1990s, beginning with the Treaty on European Union ("Maastricht Treaty").<sup>40</sup> The Maastricht Treaty amended Article 2 of the EEC Treaty to add to the main objectives of the EU not only the "harmonious and balanced development of economic activities . . . [and] a high degree of convergence of economic performance," but also "sustainable and non-inflationary growth respecting the environment."<sup>41</sup> Even more important additions were made to the environmental title created by the SEA. Article 130r was amended to allow the EU to take a role in promoting broader international harmonization of environmental measures.<sup>42</sup> Perhaps more importantly, Article 130s was amended to enable environmental (and other) measures to be passed by a qualified majority of the Council, excepting primarily fiscal provisions, provisions relating to many local land use planning issues, and the energy structure of member states, in contrast to the previous requirement that environmental measures be passed unanimously.<sup>43</sup> In order to prevent fears that this would overreach state sovereignty and undo any provisions that protect against the downgrading of environmental policy to the lowest standard, Article 3 was amended to include and emphasize the importance of the subsidiarity principle, which requires the EU to only take actions in those areas that are particularly suited to resolution at a Community level, and leave those matters that may appropriately be determined at a more local level to the states.<sup>44</sup> The EU continued its strong stance on the importance of a common environmental policy in its most recent modification to the Treaty of Amsterdam, which added a provision requiring that environmental

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<sup>39</sup> See *id.* at 516.

<sup>40</sup> Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 253 [hereinafter Maastricht Treaty].

<sup>41</sup> *Id.* at 256-57.

<sup>42</sup> *Id.* at 285.

<sup>43</sup> *Id.* at 286.

<sup>44</sup> *Id.* at 257-58. See SEA, *supra* note 33, at 8.



protection must be integrated into the definition and implementation of all Community policies and activities.<sup>45</sup>

### III. POSITIVE EFFECTS OF THE EU'S INCREASING ENVIRONMENTAL INVOLVEMENT

Having examined the development of EU environmental law and having noted its genesis in the realization that environmental regulations of member states often created non-tariff trade boundaries, it must now be determined whether the EU's environmental policy has actually had the desired effect upon the EU's trade and industry, or whether the common environmental system has cost trade and industry money without producing any reciprocal benefits.

The following questions will be addressed: Do common standards actually have an appreciable impact on the free flow of goods and the fair competition of all member industries? Do environmental standards invariably end up costing industry money in the long run? Can environmental regulation benefit the common market economy in other ways?

#### A. *Benefits to Free Trade and Competition in General*

Environmental regulations can interfere with the running of the common market.<sup>46</sup> Restrictions that appear to be based on environmental or product quality standards can easily be twisted to restrict foreign imports or to tilt the industrial or marketing playing field.<sup>47</sup> The ECJ recognized this fact and stated that the EU can modify and harmonize any standards that are being used in such a way.<sup>48</sup> How does this forcible harmonization work in practice without overbalancing in favor of either the environment or trade?

One example of such a successful balancing act is the *Danish Bottles* case.<sup>49</sup> In order to better protect its environment, Denmark

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<sup>45</sup> Treaty of Amsterdam, Oct. 2, 1997, 37 I.L.M. 56, 81.

<sup>46</sup> See generally Damian Chalmers, *Inhabitants in the Field of European Community Environmental Law*, 5 COLUM. J. EUR. L. 39 (1998) (discussing environmental regulations effect on the market).

<sup>47</sup> Phillipe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511, 2513 (1991).

<sup>48</sup> See Case 91/79, *Commission v. Italy*, 1980 E.C.R. 1099.

<sup>49</sup> Case 302/86, *Commission v. Denmark*, 1988 E.C.R. 4607.

decided that all soda and beer containers must have a very strict recycling scheme. Oddly enough, Denmark did not consider it necessary to subject the containers of items such as milk and wine, which have few problems from import competition, to the same strict scheme.<sup>50</sup> The scheme required a mandatory deposit and return system for all such containers, and, to ensure as high a rate of return as possible, the containers of the products had to be approved by Denmark's National Agency for the Protection of the Environment ("NAPE"), in order to make it possible that all such containers could be returned to any store that sold such beverages. NAPE limited their approval to approximately thirty types of containers at one time to make sure that the system was workable—a requirement that prevented many non-Danish companies from acquiring access to the Danish market.<sup>51</sup> Despite protest from the Commission, NAPE eventually allowed sales of non-approved products when the producers supplied their own deposit and return system, but only in limited quantities, claiming that because such containers could only be returned to the stores that sold the non-approved product, there would be a much lower rate of return for those containers, and therefore they could not allow many of them to be sold.<sup>52</sup>

The Court found that although a mandatory deposit and return scheme was not incompatible with EU trade obligations, which allow truly environmental regulation and restriction to a certain, equally applied extent, the limitation on the sales of the independent deposit and return system beverages violated free trade because it was both discriminatory and disproportionate to the supposed objective. In other words, the ECJ felt that the independent deposit and return systems would work sufficiently well to protect the environment and meet both Community and Danish environmental goals, but that the extra limitations in quantity imposed by Denmark on independently recycled products went beyond the stated environmental purpose and created nothing more than a trade barrier, and then instructed Denmark to remove the quantitative limit.<sup>53</sup>

Insistence upon the elimination of measures that are only masquerading under the guise of environmental regulation does not just apply to governmental measures. For example, when a Dutch association of chemical storage companies decided to collectively set a fixed "environmental charge" that had to be paid by all customers, the

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<sup>50</sup> *Id.* at 4612.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 4642-44.

Commission objected to this agreement on two related grounds. Not only did such a collective agreement breach Article 85 by giving consumers no chance to shop around and encourage economic competition, but it also violated the environmental objectives of the Community, because by preventing competition, the agreement also eliminated the drive for more efficient and environmentally sound means of storing chemicals. Under pressure from the Commission, the association agreed to eliminate the fixed charge.<sup>54</sup>

The above examples demonstrate some of the ways in which the EU manages to deal with those national environmental standards that are actually not environmentally based at all, without appreciably lowering the true environmental standard of the state in question. This still leaves open the question of whether EU interference in true environmental standards and systems actually brings the same sorts of trade benefits to its members while still refraining from appreciably lowering those standards. One example of such an attempt involves Germany's "Green Point" plan and the EU's subsequent entry into the field of regulating waste packaging.

Several years ago, Germany passed laws requiring all manufacturers selling goods in Germany to recycle packaging in which goods are transported and sold. This requirement applied equally to native and foreign manufacturers, and in all appearances was a genuine environmental attempt to reduce waste. As a result of this ordinance, many German companies united and formed a system for the retrieval of packaging waste from retailers and homes, called the *Duales System Deutschland* ("DSD"). The selling of "green spots" to each participating company funds this program. For each package that a participating country enters into the DSD system, the company pays a certain amount of money and promises that the packages waste will be recycled according to DSD standards, once DSD returns the packaging waste. In return, DSD places a "green spot" upon the package, which assures retailers and homeowners that DSD will be retrieving the waste, and promises consumers that the company involved has promised to recycle the waste in a DSD-approved manner. The German government was so thrilled with the DSD system that it agreed to subsidize the system.<sup>55</sup>

The DSD system worked very well in achieving its intended aim. Unfortunately, it created a few problems in other areas. As time progressed, the DSD system had a large negative impact upon the free flow of goods from member states into Germany. Even if foreign retailers

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<sup>54</sup> Coleman, *supra* note 6, at 165.

<sup>55</sup> BARNES & BARNES, *supra* note 16, at 167.

who were not members of the DSD scheme were willing to do their own retrieval and recycling, retailers would often refuse to stock the items anyway, because it would be more difficult to deal with those packaging wastes than DSD packaging wastes. Consumers would often refuse to buy products without the "green spot" seal of environmental approval. Foreign companies often had a difficult time becoming a member of DSD due to differences regarding what is considered to be acceptable recyclable materials and methods between countries. For example, some countries accept the use of heat from incineration as a form of recycling, but Germany does not.<sup>56</sup>

As the success of DSD grew, other problems appeared. DSD became so successful that it eventually began recovering more waste packaging than there was capacity to recycle it in Germany, so the waste began to be shipped to recycling facilities in other countries. This outward shipment of waste grew and grew until finally, instead of being able to sell the waste to recycling companies, they had to pay the recycling companies to take it. Not only did this get quite expensive, but it also knocked the bottom out of the waste market in the EU as a whole, and Britain and France began complaining that Germany was "environmentally dumping," by making it fiscally impossible for other countries to have their waste recycled.<sup>57</sup> As a result of this upheaval, the EU stepped in to harmonize national waste recovery programs with Directive 92/62/EEC.

This directive required all members to establish return and management systems that comply with certain EU guidelines as to what are considered to be recyclable materials and methods, including reuse, organic recycling and incineration for the production of heat, just as all packaging placed on the common market must abide by certain common guidelines.<sup>58</sup> Furthermore, all packaging across the common market had to be marked to demonstrate the degree to which it has recyclable. The goal of the directive was to achieve a 50% minimum/65% maximum recovery rate, a 25% minimum/45% maximum recycling rate and a 15% minimum rate for recycling of each category of material by July 2001.<sup>59</sup> Member states could recover and recycle more than the maximum rate if they choose, but only if they are capable of handling the excess waste within their own countries.<sup>60</sup> Although the road to implementation has

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<sup>56</sup> Coleman, *supra* note 6, at 158.

<sup>57</sup> *Id.*

<sup>58</sup> BARNES & BARNES, *supra* note 16, at 168.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

been a somewhat bumpy one involving the issuance of more than one Reasoned Opinion to try and bring member states into compliance, the situation appears to have stabilized.<sup>61</sup>

B. *Changing the World by Changing the Market: One Industry's Loss Is Another's Gain*

The above section has dealt with the ways in which EU environmental policies tend to benefit trade and industry as a whole. Nevertheless, not every environmental measure benefits every industry. This fact may be balanced by the fact that these environmental policies create entirely new markets and opportunities to be taken advantage of by other industries.<sup>62</sup> For example, the environmental industry itself is said to be valued at over \$250 billion worldwide.<sup>63</sup> Furthermore, the EU makes use of environmental measures that can be used by existing industries to gain a competitive edge in the new common market.<sup>64</sup> The following section will attempt to explain ways in which trade and industry gain in one sector what they lose in another sector due to EU environmentalism, to end up with an overall balance.

In 1993, the Commission produced a "White Paper" dealing with topics related to industry growth and employment, prompted by a rise in unemployment in the EU due to recession conditions.<sup>65</sup> The Commission did not find that these conditions were caused by increased environmental regulation (among other things). Instead, it found that the recession was a result of continued inefficient overuse of natural and environmental resources, combined with insufficient use of the trained workforce.<sup>66</sup> The Commission felt that this trend could be reversed by increased investment in high-tech, research and development industries, increased implementation of clean (and therefore more efficient and less costly in the long run) technology, and greater development of the infrastructure—

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<sup>61</sup> *Id.*

<sup>62</sup> Jørn Pedersen, *Sustainable Development and the European Jobs Market*, in *THE ENVIRONMENT, EMPLOYMENT AND SUSTAINABLE DEVELOPMENT* 83 (Monica Hale & Mike Lachowicz eds., 1998).

<sup>63</sup> BARNES & BARNES, *supra* note 16, at 152.

<sup>64</sup> Samuel L. Lind, *Eco-Labels and International Trade Law: Avoiding Trade Violations While Regulating the Environment*, 8 INT'L LEGAL PERSP. 113 (1996).

<sup>65</sup> Growth, Competitiveness, and Employment: The Challenges and Ways Forward Into the 21st Century, White Paper, COM(93)700 final [hereinafter Growth, Competitiveness, and Employment].

<sup>66</sup> *Id.* at ch. 2.

all methods that are compatible with, and even encouraged by, environmental regulation and concern.<sup>67</sup> For example, improving the infrastructure causes jobs, both in its construction and maintenance. A better infrastructure makes it more efficient—and therefore less expensive—for industries to transport raw materials and finished products, not only giving them a competitive edge, but also freeing some of their resources for investment in growing high-tech fields. The EU's environmental policy also encourages the improvement of its members' infrastructure, in order to decrease noise pollution and carbon dioxide emissions.<sup>68</sup> This assessment was confirmed by the EU Economic and Social Committee, which agreed that the problems were based upon a deficiency in:

[a] number of aspects . . . namely: the quality of education and training, the efficiency of industrial organization, the ability to bring about constant improvement in the production process, the dynamism of research and development and its industrial application, the availability of competitive infrastructures and services, product quality and the readiness to take account in business strategy of the consequences of social changes (e.g., the field of environmental protection).<sup>69</sup>

If any further doubts remain as to the Commission's assessment that environmental regulation provides opportunities for industrial growth, one need only look at research on the ability of environmental regulation to provide employment, an inevitable symptom of a growing area of industry. In 1997, the Organization for Economic Cooperation and Development ("Organization") published a report on the effects of environmental regulation and employment, and in the report it reached three conclusions.<sup>70</sup> The Organization found: (1) that there was a direct correlation between environmental policy and employment; (2) that this correlation is positive, despite the complaints of some industries to the contrary; and (3) that it is therefore possible for environmental,

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<sup>67</sup> *Id.*

<sup>68</sup> SEA, *supra* note 33, at 10-11.

<sup>69</sup> Growth, Competitiveness, and Employment, *supra* note 65, at 48.

<sup>70</sup> ORG. FOR ECON. COOPERATION AND DEV., ENVIRONMENTAL POLICIES AND EMPLOYMENT 100 (1997).

employment, and growth concerns to coexist.<sup>71</sup> There is a long list of industries and types of employment created by environmental regulation in Europe, both on the regulation and enforcement side, as well as the industry and compliance side.<sup>72</sup> Indeed, the statistics are surprising. An estimate of EU jobs directly supported by environmental expenditure in 1992 was reportedly at 1.2 million (1.3% of EU employment), a number expected to nearly double by the year 2000.<sup>73</sup> It is estimated that there were at least another 200,000 individuals employed in conservation jobs, such as park managers and heritage preservationists, and another 500,000 in "environmental management."<sup>74</sup> The Commission suspects that the inclusion of jobs that were merely "environmentally related" would nearly double that number.<sup>75</sup> Many jobs created in this way are located in areas that need an economic boost to get caught up with the rest of the EU. For example, the contaminated land remediation market was expected to reach four billion ECU in 2000.<sup>76</sup> Not only is this an industry that requires a lot of labor, but it is also frequently located, or at least carried out, in regions suffering from economic depression due to industrial decline.<sup>77</sup>

In the EU, environmental regulation does not only help promote the overall growth of industry by providing economic opportunities in and of itself, it also helps certain industries gain an edge over other industries. Two of the primary ways in which the EU grants this environmental edge involve environmental audits and environmental labels. As early as 1990, the Community Environmental Ministers "acknowledged the value of supplementing existing regulatory instruments . . . by the use of economic and fiscal instruments."<sup>78</sup> Although this understanding was prompted in part by the development of similar procedures on a national level, which gave rise to concern that national practices such as eco-labeling were

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<sup>71</sup> *Id.*

<sup>72</sup> James Medhurst, *The Impact of EC Environmental Programmes and Legislation on Employment*, in *THE ENVIRONMENT, EMPLOYMENT AND SUSTAINABLE DEVELOPMENT*, *supra* note 62, at 49-50.

<sup>73</sup> Monica Hale, *Expansion and Professionalisation of the European Environmental Employment Sector*, in *THE ENVIRONMENT, EMPLOYMENT AND SUSTAINABLE DEVELOPMENT*, *supra* note 62, at 62, 69-71.

<sup>74</sup> *Id.* at 71.

<sup>75</sup> *Id.*

<sup>76</sup> Medhurst, *supra* note 72, at 57.

<sup>77</sup> *Id.* at 56-57.

<sup>78</sup> *Report of the Working Group of Experts from the Member States on the Use of Economic and Fiscal Instruments in EC Environmental Policy*, 14 B.C. INT'L & COMP. L. REV. 447, 448 (1991).

particularly liable to abuse as a mechanism of import restriction and unfair competition, it was also caused by the realization that it would be better to lead the horse of industry to environmentally regulated water than to force it to drink.<sup>79</sup> Eco-auditing and eco-labeling seek to take advantage of the fact that an estimated sixty seven percent of EU citizens wish to take environmental concerns into consideration when they shop, and use this potential market advantage to bribe business and industry into being environmental on their own account.<sup>80</sup>

The concept of an eco-audit has been in place for over two decades and businesses have used them on an as-needed basis to determine compliance with increasing numbers of environmental regulations and to look for ways to save money.<sup>81</sup> Once member states realized that this tendency could be used to influence industry to monitor their own environmental compliance more closely, national eco-audit schemes became more common.<sup>82</sup> Due to concern that differing schemes would enable disguised domestic product bias, the EU decided to develop its own program and invited input of industry as well as policymakers.<sup>83</sup> The resulting regulation targeted certain industrial groups, leaving open the possibility that other groups could be added later.<sup>84</sup> The regulation provided that participation in EU's Environmental Management and Audit Scheme ("EMAS") would be entirely voluntary, that industries would set certain environmental goals for themselves, that industries would have an eco-audit at least every three years to keep track of progress towards those goals, and that the results of the audits would be published and independently verified.<sup>85</sup> Member states were responsible for ensuring that there were independent agencies in place to accredit the companies that verified EMAS audits by 1995.<sup>86</sup> The provision relating to the independent verification was not entirely popular. Member states delayed putting the requisite agencies in place until the Commission finally decided to sue Portugal in the ECJ, and businesses expressed concern that

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<sup>79</sup> David Vogel, *EU Environmental Policy and the GATT/WTO*, in GLOBAL COMPETITION AND EU ENVIRONMENTAL POLICY 142, 149-51 (Jonathan Golub ed., 1998).

<sup>80</sup> *Id.* at 149.

<sup>81</sup> BARNES & BARNES, *supra* note 16, at 190.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Council Regulation 1836/93 of 29 June 1993 Allowing Voluntary Participation by Companies in the Industrial Sector in a Community Eco-management and Audit Scheme, 1993 O.J. (L 168) 1, 2-13.

<sup>86</sup> *Id.*



this would result in valuable corporate information being made public.<sup>87</sup> Despite these hurdles, approximately 900 businesses in the target industries qualified for EMAS by 1997,<sup>88</sup> demonstrating the interest of industry in this kind of procedure.

Eco-labeling works in a similar way. After a proliferation of national eco-labeling schemes prompted by Germany's "Blue-Angel" program, the EU began to develop its own eco-labeling system to encourage a common standard and discourage discrimination.<sup>89</sup> The resulting regulation provided for a voluntary system in which businesses that could demonstrate that the product in question had a reduced environmental impact throughout its entire life-cycle (from creation to recycling) would receive an eco-label that would inform consumers of the product's heightened environmental quality.<sup>90</sup> The EU and member states decide upon standards for meeting the criteria for each type of product.<sup>91</sup> Unfortunately, implementation of this program has been slow, due in large part to the joint and in-depth nature of the determination of the standards. Nevertheless, several industries have expressed a great deal of interest in this concept, proving that its use as an environmental "carrot" could become important.<sup>92</sup> Interestingly enough, the eco-label is theoretically available to non-EU products, and the demand for this label internationally has caused the EU some problems, as this Note will discuss below in Section IV.

Having established that the environment can protect trade while it creates business opportunities and advantages, it is time to take a hard look at the assumption that even those environmental measures that seem to be entirely environmentally-oriented invariably end up costing industry money in the long run. This hypothesis is far from being as universal as one might believe, and an example of the potential falsity of this statement may be seen in the proposed energy tax.

The concept of an EU energy tax first arose in the early 1990s when the EU began advocating an attempt to reduce and maintain carbon dioxide emissions by the year 2010, and the debate has remained

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<sup>87</sup> BARNES & BARNES, *supra* note 16, at 191.

<sup>88</sup> SEA, *supra* note 33, at 16.

<sup>89</sup> Vogel, *supra* note 79, at 150.

<sup>90</sup> Council Regulation 880/92 on a Community Eco-label Award Scheme, 1992 O.J. (L 99) 1, 2.

<sup>91</sup> *Id.*

<sup>92</sup> Vogel, *supra* note 79, at 150-52.

acrimonious ever since.<sup>93</sup> Certain facts are being lost amidst the wails of the high-energy consumption industry. To begin with, carbon dioxide emissions are expected to be reduced by ten percent by 2010 through the use of currently available technology, such as more efficient road transport, an improved infrastructure, more severe regulation of thermal insulation in buildings, and more efficient electrical appliances, which the EU expects to increase as a result of the tax, but will result in less actual tax money being paid.<sup>94</sup> The actual increase in energy cost to industry under either of the two tax methods proposed would only range from six to thirteen percent, an increase roughly equivalent to the increase in cost to the homeowner.<sup>95</sup> Industry is ignoring the probable effects of the two main methods proposed for spending the revenue raised by the energy tax. One of the proposals involves putting that money towards employee social security contributions and thereby reducing an employer's contribution.<sup>96</sup> The other proposal suggests using the revenue to support a readjustment in market interest rates to encourage the flow of capital to industry.<sup>97</sup> In either proposal, industry will regain most of its lost income. While that income will be redirected towards non-environmentally harmful areas, coming in through the back door, the front-end energy tax encourages more efficient use of the resources that produce CO<sub>2</sub> emissions.<sup>98</sup>

#### IV. FLAWS IN THE EU ENVIRO-ECONOMIC PARTNERSHIP

Despite all of the foregoing evidence that the EU does a better job than most international arrangements at managing to simultaneously protect trade and the environment, it is unfortunately not a Panglossian system. While environmental objectives can complement economic objectives in a surprising number of ways, the integration of environmental policy into the EU economic system is still essentially a balancing act, and it encompasses several of the problems that inevitably surface in any balancing attempt. In trying to find the perfect combination of environmental and economic policies, how does the EU ensure that one area is not over-emphasized to the detriment of the other? Similarly, in

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<sup>93</sup> COLLIER, *supra* note 5, at 98-99.

<sup>94</sup> DOMINIQUE GUSBIN ET AL., ECONOMIC EVALUATION OF COMMUNITY OPTIONS TO LIMIT CO<sub>2</sub> EMISSIONS AT THE HORIZON 2005 & 2010: FINAL REPORT 3-4 (1997).

<sup>95</sup> *Id.* at 19-20.

<sup>96</sup> *Id.* at 15.

<sup>97</sup> *Id.* at 15-16

<sup>98</sup> *Id.*

producing a common environmental policy to complement its common market, how does the EU ensure that the common environmental standard actually manages to increase environmental protection, rather than decrease it to the lowest common denominator?

Besides the problems inherent in almost any system that tries to simultaneously achieve multiple related objectives, the EU environmental system has a few specific potential problems that need to be addressed. There are three primary areas that still require substantial attention before the EU's environmental system can reach its full potential for the purposes of assisting trade or protecting the environment. Those areas are implementation, expansion, and prevention of the emergence of non-tariff trade barriers in the broader international arena. Each of these areas presents unique difficulties due to the fact that the EU is a growing amalgamation of separate and independent states, with each state maintaining its own legal and governance system and its own ways of interacting with other states.

Initially, several environmentalists were concerned that the EU environmental policy would be hampered because of its conception as a policy that would benefit trade, fearing that on the occasions when trade and the environment did actually conflict, the environment would be the inevitable loser. After all, EU environmental measures frequently get the necessary support from member states through bargaining, and many of the bargaining chips are not primarily environmental.<sup>99</sup> Moreover, the EU frequently consults with industry and trade groups in its environmental policies, believing that environmental change can be effectuated more easily and efficiently with industry cooperation.<sup>100</sup> Directorate-General XI ("DG XI," the environmental directorate) is greatly influenced in its operations by the other directorates.<sup>101</sup> In theory, DG XI should influence other directorates, especially since environmental protection is now required to be integrated into all other policies. However, DG XI is both newer and smaller than many of the other directorates—a fact that tends to make influence unequal.<sup>102</sup>

Despite these indications that environmental policy in the EU might sink to the bottom of the scale when it comes time to weigh all of the EU's trade-related policies, the result in recent years tends to be quite

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<sup>99</sup> Michael Strubel, *Environmental Policy in Europe: The Greening of Europe?*, in *EUROPE AFTER MAASTRICHT: AMERICAN AND EUROPEAN PERSPECTIVES* 235, 240-41 (Paul Michael Lutzeler ed., 1994).

<sup>100</sup> Axelrod & Vig, *supra* note 8, at 77.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

the opposite. The Single European Act ("SEA") expressed the principle that the level of environmental protection must be high,<sup>103</sup> and that environmental protection must be a part of every EU policy.<sup>104</sup> In addition, it allowed member states to have environmental standards that were stricter than those required, so long as the standards complied with EU obligations.<sup>105</sup> Since the SEA, the European Court has stated consistently that when a member state's provision seems to involve conflict between free trade and environmental protection obligations, priority must be given to the goal of environmental protection.<sup>106</sup> This principle has become so engrained that recent cases have given rise to fears that environmental policy may be separating itself from free trade and overtaking it as a goal of importance.

One case that gave rise to such concerns is the *Walloon Waste Import Ban Case*.<sup>107</sup> In this case, a region of Belgium passed a law banning the storage, tipping, or dumping of waste from either a foreign state or another region of Belgium.<sup>108</sup> The Commission felt that this violated Article 30 of the EEC Treaty, and that the means used (the outright prohibition on foreign waste) could be more narrowly tailored to reach the region's health and safety goals, and was therefore too discriminatory to claim an environmental exception to that Article.<sup>109</sup> This was not the first time that the Commission believed that Belgian regions were failing to comply with various EU obligations in matters involving waste, and the Court had agreed with the Commission in previous cases.<sup>110</sup> However, the Court said that the discrimination against other EU members was justified given the health and environmental risks involved, especially considering the policy preference expressed in Article 130r for eliminating environmental problems at their source.<sup>111</sup> Does this mean that the Court has loosened its requirement from the *Danish Bottles* case that environmental measures must be narrowly tailored so as to avoid conflict with other obligations?<sup>112</sup>

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<sup>103</sup> SEA, *supra* note 33, at art. 100a.

<sup>104</sup> *Id.* at art. 130r.

<sup>105</sup> *Id.*

<sup>106</sup> Strubel, *supra* note 99, at 238.

<sup>107</sup> Case 2/90, Commission v. Belgium, 1992 E.C.R. I-4431.

<sup>108</sup> *Id.* at 4433, art. 1.

<sup>109</sup> *Id.* at 4436-37.

<sup>110</sup> See, e.g., Case 68/81, Commission v. Belgium, 1982 E.C.R. 153.

<sup>111</sup> Case 2/90, 1992 E.C.R., at I-4431

<sup>112</sup> See Case 302/86, 1988 E.C.R. 4607; see also *supra* text accompanying note 49.

Although the *Walloon Waste* case seems to lead to this conclusion, there are some unique circumstances about this case that indicate that it should not be interpreted as broadly as the Court's stance might seem to indicate. The region of Walloon passed this ordinance in response to the contamination of a town in Walloon by foreign toxic waste, and there was a great deal of public sympathy for the Walloon provision.<sup>113</sup> The Court stated in its analysis that Walloon was affected by the unique nature of waste, because the EU and its member states had to comply with the Basel Convention on Dangerous Wastes, which requires self-sufficiency and proximity to origin in the matter of dealing with wastes.<sup>114</sup> The Court had already been forced to send the regional provision back to the drawing board, due to its failure to comply with the EU directive on the transboundary shipment of hazardous waste, making discussion of the provision's possible violation of Article 30 somewhat less relevant.<sup>115</sup> For all of these reasons, it is likely that the *Walloon Waste* case is a narrow, fact-specific case, rather than a judicial revision of the Court's long-standing doctrine as stated in the *Danish Bottles* case.

*Diego Cali & Figli Srl v. Servizi Ecologici Porto di Genova SpA*<sup>116</sup> is another case that may be a cause for possible concern for those who fear that the concept of environmental protection may be divorcing itself from its connection to trade. In *Diego Cali*, the administrative body of Genoa, Italy turned over the administration of its port's environmental quality to a private company, SEPG. SEPG proceeded to charge ships that made use of the Genoese port a fee for pollution surveillance, to help cover the costs of preventative steps for environmental protection.<sup>117</sup> *Diego Cali* claimed that SEPG, a private environmental company that operated for profit, was abusing its dominant market position by charging these fees; that is, *Diego Cali* accused SEPG of violating Article 86 of the EEC Treaty.<sup>118</sup> However, Article 86 only applies to private, commercial activities. It does

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<sup>113</sup> Coleman, *supra* note 6, at 151-152.

<sup>114</sup> Case C-2/90, 1992 E.C.R. at I-4431; *United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of the Basel Convention*, 28 I.L.M. 649 (1989).

<sup>115</sup> Case C-2/90, 1992 E.C.R. at I-4476-77. The court found that the provision violated Directive 84/361 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Wastes.

<sup>116</sup> Case C-343/95, *Diego Cali & Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG)*, 1997 E.C.R. I-1547.

<sup>117</sup> *Id.* at I-1552.

<sup>118</sup> EEC Treaty, *supra* note 14, at art. 86.

not apply to governmental actions for the common good.<sup>119</sup> The Court found that when a government uses a private company to carry out more efficiently one of its goals towards the public interest, such as environmental protection, the private company is for those purposes merely an arm of the government, and Article 86 does not apply to the services the company performs for the public good at the government's behest.<sup>120</sup>

In many ways this is an admirable decision. By basing its determination of competition violations on the function rather than the form of the activity, the Court encourages governments to find the most efficient method of providing environmental protection in line with its EU obligations, even if that method may be through a private company, without losing the ability to internalize previously external environmental costs.<sup>121</sup> However, it does present a couple of potential problems. The environmental industry has surpassed a value of \$250 billion a year in the world market, and this number will undoubtedly continue to grow larger.<sup>122</sup> Even as this growing market proves that environmental protection can have a positive impact on trade, it also provides governments with an ever more valuable incentive to confer advantages, competitive or otherwise, upon national companies at the expense of foreign or multi-national companies, a concern that the Court failed to address in *Diego Cali*. The Court specifically refused to consider whether a tonnage based charge applies to all ships entering the port, regardless of preventative services actually provided, the cargo's ability to pollute, or the presence of pollution surveillance devices on a particular ship, saying that the determination that the activity was actually a government activity made that decision unnecessary.<sup>123</sup> The narrow tailoring of environmental provisions that could result in trade discrimination, as required by the *Danish Bottles* case, would seem to come into play here and require the Court to rule on this matter as well. In factually similar situations, the Commission has determined that such fixed "environmental charges by a company, even with the cooperation of the government, are not only a possible violation of Article 85, but also a violation of EU environmental

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<sup>119</sup> *Id.* at arts. 86 & 90.

<sup>120</sup> Case C-343/95, 1997 E.C.R. at I-1586-76.

<sup>121</sup> Christine Juliet Sohar, *The European Union's Legal Integration: A Case Study of Living up to the Denver Summit of Eight*, 27 DENV. J. INT'L L. & POL'Y 685, 686-88 (1999).

<sup>122</sup> BARNES & BARNES, *supra* note 16, at 152.

<sup>123</sup> Case C-343/95, 1997 E.C.R. at I-1547.

obligations, since this fixed charge eliminates the incentive to develop more efficient and effectual methods of environmental protection."<sup>124</sup>

Despite these recent indications of a potential future problems, the EU seems to have managed to maintain the tightrope of trade and the environment fairly well. This balance will not be meaningful if the process results in the lowering of environmental standards to the least common denominator among member states. Generally speaking, the EU's goal is to bring all states up to the level of one of its most progressive states, but there are several difficulties involved in that process.<sup>125</sup> Environmental standards have to be passed either unanimously or, in some instances, by a qualified majority, in theory enabling a blockade of high standards by those member states that fear that high environmental standards will prevent them from catching up to the more industrially advanced members of the EU.<sup>126</sup> Notwithstanding the existence of a certain amount of compromise, high standards continue to be passed despite this difficulty.<sup>127</sup> This may be partly due to the fact that when compromise is necessary, member states can be very ingenious at finding a method of compromise that does not result in an overall lowering of the standard of environmental quality in the EU.

For example, during negotiations for the reduction of the carbon dioxide emission standards, member states that were already meeting or exceeding the proposed standard agreed to limit their emissions above and beyond the proposed limit to enable less industrially developed states to have extra time to develop and invest in emission reducing ability.<sup>128</sup> The eventual standard remained high and each member state was bound to increase its own current standard.<sup>129</sup> When member states attempt to make use of Article 100a to derogate from an obligation that they do not agree with, the Court insisted that the Commission must have a very good reason for permitting an actual derogation from the standard.<sup>130</sup>

There are many treaty provisions that guard against any downward spiral in the EU environmental standard. Article 130r says that the EU

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<sup>124</sup> Coleman, *supra* note 6; see also *supra* text accompanying note 54.

<sup>125</sup> SEA, *supra* note 33, at 77.

<sup>126</sup> DAMIEN GERADIN, TRADE AND THE ENVIRONMENT: A COMPARATIVE STUDY OF THE EC AND US LAW 88-90 (1997).

<sup>127</sup> *Id.*

<sup>128</sup> Axelrod & Vig, *supra* note 8, at 78.

<sup>129</sup> *Id.*

<sup>130</sup> Coleman, *supra* note 6, at 146-47.

must "improve the quality of its environment."<sup>131</sup> Article 130t states that EU measures "do not prevent any member state from maintaining or introducing more stringent protective measures, provided these are compatible with the treaty"<sup>132</sup>—provisions that were maintained and strengthened by further treaties. All of these precautions help to insure that the standards set by the EU continue to set a high level of environmental protection.

Even if the EU manages to maintain the necessary environmental balance and level on paper, this does not necessarily mean that its problems are over. Although the EU is a governing body, the subsidiarity principle and practicality require that much of the implementation of EU standards be left in the hands of member state governments, where there is a great deal of potential for apathy or outright abuse in the interests of trade discrimination.<sup>133</sup> The EU only allocates one percent of its budget to the environment, as compared to other categories such as agriculture, which receives sixty percent of the budget, although certain portions of those other areas may be environmental to a lesser degree.<sup>134</sup> Similarly, the departments of ecology, nuclear safety, and consumer protection combined have only 300 employees, compared to the 2,000 employees in agricultural policy.<sup>135</sup> The European Environment Agency ("EEA") is not the enforcement equivalent of the American Environmental Protection Agency ("EPA"); it merely exists to collect and organize environmental data for the EU to use in policy, the states to use in implementation, and the citizens for information.<sup>136</sup> The only way in which the EU may force a member state to fulfill its implementation obligations is set forth in Article 169:

If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments. If the State does not comply with the terms of such opinion within the period laid down

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<sup>131</sup> SEA, *supra* note 33.

<sup>132</sup> *Id.*

<sup>133</sup> Robert F. Meagher, *EC Environmental Law*, in TRANSNATIONAL LAW AND ITS IMPACT ON CORPORATE BEHAVIOR, *supra* note 3, at 151, 167-68.

<sup>134</sup> Strubel, *supra* note 99, at 240.

<sup>135</sup> *Id.*

<sup>136</sup> Meagher, *supra* note 133, at 151.



by the Commission, the latter may bring the matter to the Court of Justice.<sup>137</sup>

If the ECJ finds for the Commission, it may impose a duty upon a member state to take remedial measures, or require alteration of a state statute that conflicts with a regulation.<sup>138</sup> Most member states rarely wish to let the matter continue to that point as is evidenced by the 1992 statistics. Out of the 143 Article 169 warning letters sent out by the Commission, only twenty-six of those had to be followed with reasoned opinions, and only nine of those had to be taken before the ECJ.<sup>139</sup> Of the few states that do push the issue to that point, most shape up fairly quickly. Indeed, it is rare when the Commission has to fine a state more than once, if at all, to ensure compliance with an ECJ judgment.<sup>140</sup> The Commission has neither the time nor personnel to allocate to searching out violations, and this inadequacy, combined with the lengthy process, which can in extreme cases take over four years, constitutes an implementation problem.<sup>141</sup>

Even if the notion that a faultily implemented higher standard is better than none is an unacceptable one, there is some evidence to indicate that implementation is beginning to be enforced by another means.<sup>142</sup> Any EU citizen may bring a complaint to the Commission if he or she feels that a member state is not fulfilling its EU obligations, and more and more citizens are availing themselves of this advantage.<sup>143</sup> For example, in 1975, the EU set environmental standards for any waters that were frequently used for swimming.<sup>144</sup> The United Kingdom managed to avoid a great deal of the effect of these standards for some time, by construing the definition of the bodies of water involved so narrowly that only twenty-seven bodies of water were regulated.<sup>145</sup> At last count this number had risen to 400, due to the fact that British citizens knew of the directive and their right to complain to the Commission, and they did in fact

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<sup>137</sup> EEC Treaty, *supra* note 14, at art. 169.

<sup>138</sup> Meagher, *supra* note 133, at 162-63.

<sup>139</sup> Philip, *supra* note 8, at 80.

<sup>140</sup> SEA, *supra* note 33, at 30.

<sup>141</sup> Meagher, *supra* note 133, at 158-59.

<sup>142</sup> Sir Hugh Rossi, *Implementation of the EC Environmental Program by the Member States*, in TRANSNATIONAL ENVIRONMENTAL LAW AND ITS IMPACT ON CORPORATE BEHAVIOR, *supra* note 3, at 203.

<sup>143</sup> Brusasco-MacKenzie, *supra* note 3, at 178.

<sup>144</sup> Rossi, *supra* note 142, at 208-09.

<sup>145</sup> *Id.*

complain to the Commission, as well as to British newspapers with great vim and vigor until the combination of Commission and public pressure forced the British government to come to a more accurate understanding of its obligation.<sup>146</sup> It is not only citizens who have a history of familiarity with environmental rights or are used to the complaint system that turn this option to advantage. To the surprise of many observers, a large number of citizen environmental complaints come from Spain, a country that is generally viewed as giving the environment a low priority, and a country that does not typically contribute so greatly to the number of Commission complaints.<sup>147</sup> This illustrates that information about EU environmental rights does reach the citizens of the less environmentally inclined countries, and that the citizens do feel as though the complaint system and its attendant pressure of public opinion provide a remedy for inadequate implementation that slips past the Commission's attention.

Concerns have been expressed as to whether the expansion of the EU could be harmed by the requirement that incoming members be prepared to meet common EU environmental standards, given the environmental problems that some Central and Eastern European ("CEE") countries have. As differing environmental standards can and do cause trade and competition barriers, harm to expansion would probably have to occur if potential members could not or would not meet the EU's environmental requirements. Fortunately, to date, there has been little sign that CEE countries wish to make the environmental issue a firm sticking point.<sup>148</sup> Most CEE countries realize that their environments needs help, and some even make it a primary issue. For example, at one time the Czech government requested that ninety percent of its EU financial aid be earmarked towards environmental rehabilitation and harmonization.<sup>149</sup> It is, however, perfectly permissible if CEEs do not wish to make the environment their primary focus. The White Paper on entrance into the EU expressly allows CEEs to set their own order of priorities and timetable for a realistic entrance.<sup>150</sup> If a CEE feels that another area should be remedied ahead of its environment during the quest for accession to the EU, it is free to pursue harmonization in that order, so

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<sup>146</sup> *Id.*

<sup>147</sup> Brusasco-Mackenzie, *supra* note 3, at 178.

<sup>148</sup> Jurg Klarer & Patrick Francis, *The European Dimension: Towards Convergence of Environmental Policies*, in *THE ENVIRONMENTAL CHALLENGE FOR CENTRAL EUROPEAN ECONOMIES IN TRANSITION* 27, 36-38 (Jurg Klarer & Bedrich Moldan eds., 1997).

<sup>149</sup> Brusasco-Mackenzie, *supra* note 3, at 181-82.

<sup>150</sup> White Paper Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (95)163 final.

long as harmonization occurs before entry into and unstabilization of the equal costs of production and goods entry of the EU.<sup>151</sup> Furthermore, if CEEs feel overwhelmed by the complexity of the environmental task, Poland and Hungary Assistance for the Reconstruction of the Economy ("PHARE"), is available to all CEEs to provide both financial and technical support.<sup>152</sup> In fact, PHARE has a department that does nothing but provide specialized technical advice and cost-benefit analysis in this area. In addition, the department spends nearly ten percent of its funding budget on CEE environmental projects, as well as an additional fourteen percent on infrastructure, and sixteen percent on public education and health, both of which often contain environmental overlap,<sup>153</sup> and as PHARE becomes more experienced in the kinds of environmental issues facing CEEs, its assistance becomes even more valuable.<sup>154</sup> For these reasons, it appears as though concern in this area is premature.

The above examples seem to suggest that the EU has found ways to adequately address any problems that might affect it on an internal level when trying to use a common environmental standard for both the purposes of free trade and the environment. Member states do not only trade with each other. Concerns exist that the EU will use its environmental standard to erect protectionist, non-tariff barriers against non-EU countries, thus damaging trade in the broader international sense, in a manner similar and familiar to anyone who was a stockholder in Chiquita.<sup>155</sup>

There is some validity to this concern. For example, the EU decided to impose restrictions upon its import and export of ozone depleting substances to a point beyond that required by the Montreal Protocol.<sup>156</sup> As a result, countries that used to export ozone producing substances into the EU, such as the United States and Israel in the case of methyl bromide, are going to suffer from a reduction in trade of that good.<sup>157</sup> Similarly, arguments were made by OPEC countries with respect to the proposed energy tax, claiming that the energy tax was really a method of protecting EU energy producers from foreign competition.<sup>158</sup> It

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<sup>151</sup> *Id.* at 4.

<sup>152</sup> Klarer & Francis, *supra* note 148, at 37-38.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Coleman, *supra* note 6, at 132-33.

<sup>156</sup> 1991 O.J. (L 67) 1; *see also* 1992 O.J. (L 405) 41.

<sup>157</sup> Coleman, *supra* note 6, at 151.

<sup>158</sup> *Id.* at 154.

must be pointed out that the EU is applying these provisions to all countries in a non-discriminatory manner, including its own, and that therefore other countries should be able to balance the decrease in methyl bromide or oil trade by an increase in trade in their substitutes. However, other measures appear to be more discriminatorily motivated. For example, the EU and Brazil entered into a huge disagreement over whether the EU could only award an eco-label to paper produced from recycled pulp (common in Europe), as opposed to paper made from virgin pulp from sustainably managed forests (common in many countries elsewhere). In the end Brazil was forced to back down due to the voluntary nature of the EU eco-label program.<sup>159</sup> Does the EU have any sort of justification for the potential negative effect on broader international trade?

The World Trade Organization ("WTO") sometimes perceives the EU as unjustified in creating this sort of situation. One of the most recent examples of the conflict that the EU has had in attempting to justify its environmental stance before the WTO involves the issue of hormone treated beef. The EU has decided to ban the use of hormone treated beef due to fears that it could have a deleterious effect on human health.<sup>160</sup> Although there is no scientific evidence to suggest that hormone treated beef is in fact a danger to human health, the EU's health and environmental policies require that the EU take preventative steps to deal with problems whenever possible, rather than waiting to see if a problem develops and then dealing with it after the fact.<sup>161</sup> However, when the United States claimed that the EU was violating its General Agreement of Tariffs and Trade ("GATT") obligations by banning the import of hormone treated beef,<sup>162</sup> the WTO agreed.<sup>163</sup> Although the GATT does allow for exceptions from its main provisions on the grounds of human, animal, or plant life,<sup>164</sup> the WTO held that the EU's ban on hormone treated beef did not qualify for the exception, since there was no scientific

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<sup>159</sup> Lind, *supra* note 64, at 138-40.

<sup>160</sup> Leticia M. Diaz, *Hormone Replacement Therapy, or Just Eat More Meat: The Technological Hare or the Regulatory Tortoise*, 27 B.C. ENVTL. AFF. L. REV. 391, 396-97 (2000).

<sup>161</sup> George H. Rountree, Note, *Raging Hormones: A Discussion of the World Trade Organization's Decision in the European Union-United States Beef Disputes*, 27 GA. J. INT'L & COMP. L. 607 (1999).

<sup>162</sup> *Id.*; see General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XI, 61 Stat. A-32, 55 U.N.T.S. 224 [hereinafter GATT].

<sup>163</sup> Rountree, *supra* note 161, at 628.

<sup>164</sup> GATT, *supra* note 162, at art. xx(b), 61 Stat. A-61, 55 U.N.T.S. 262.

evidence that the ban was necessary for preserving human, animal, or plant life.<sup>165</sup> Therefore, the WTO found that the United States would be permitted to increase tariffs on other, unrelated items that it imported from the EU if the EU refused to lift its ban on hormone treated beef (which to date the EU has not done).<sup>166</sup>

Was the WTO correct in holding that the EU should only be allowed to have a high environmental standard in situations widely recognized (and therefore probably also highly regulated in other industrial countries) as harmful, in order to prevent the development of trade barriers that might or might not be truly environmentally motivated? Admittedly, that is the very reason why the EU began to have a common environmental policy.<sup>167</sup> Although the EU decided to eliminate potential trade barriers in disguise by having the common environmental policy, the EU and its member states also remained committed to raising that standard to a high level.<sup>168</sup> This demonstrates that in this sort of situation, the trade problem is caused by unevenness in environmental protection levels, not by the high (or low) levels themselves. This leaves the EU with two main choices that should have an equal effect on this kind of disruption of trade.<sup>169</sup> The EU can either lower its standards until they are equivalent to those of other countries, or it can use its influence, stronger than the influence that any one of its members would have, since it represents the common position of all its members, to bring other countries up to its own high standards.<sup>170</sup> Given these two options it might be difficult to fault the EU for attempting to improve the environment of others instead of degrading its own.

## V. CONCLUSION

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<sup>165</sup> Rountree, *supra* note 161, at 624.

<sup>166</sup> *Id.* at 632.

<sup>167</sup> Coleman, *supra* note 6, at 131.

<sup>168</sup> SEA, *supra* note 33, at 77.

<sup>169</sup> Alexander M. Donahue, Comment, *Equivalence: Not Quite Close Enough for the International Harmonization of Environmental Standards*, 30 ENVTL. L. 363 (2000). Mr. Donahue discusses a third method equivalence, which basically consists of two countries agreeing to act as if their environmental standards are identical, but dismisses it as an inadequate solution for removing the real world problems that unequal environmental standards cause to trade. *Id.* See George William Mugwanya, *Global Free Trade Vis-à-vis Environmental Regulation and Sustainable Development: Reinvigorating Efforts Towards a More Integrated Approach*, 14 J. ENVTL. L. & LITIG. 401 (1999).

<sup>170</sup> Brusasco-Mackenzie, *supra* note 3, at 177.

In conclusion, it seems apparent that disregard for the differences between environmental standards can cause severe problems in the free flow of trade and equal, efficient competition, and that the heightening of such standards to a higher common level may be done without causing as much damage to industry as might have been previously thought. The EU and its members deserve commendation for having realized these essential truths early on in the rush toward a more global market and for setting about these common environmental standards in a positive, balanced way. It is to be hoped that the presence of the EU on the broader international scene will inspire other states to integrate something similar to the EU environmental system into their own multilateral treaties.