

EUROPEAN ECONOMIC COMMUNITIES—ENVIRONMENTAL
POLICY—LEGAL BASIS AND INTERNATIONAL
IMPLICATIONS OF COUNCIL REGULATION ON THE
SUPERVISION AND CONTROL OF SHIPMENTS OF
HAZARDOUS WASTE

I. FACTUAL BACKGROUND

On February 1, 1993, following two years of difficult negotiations, the Environment Council¹ of the European Community (Community)² formally adopted the Council Regulation on the Supervision and Control of Shipments of Hazardous Waste within, into, and out of the European Community (Waste Shipment Regulation).³ The negotiations began September 19, 1990, with a Commission proposal for a Council Regulation on the control of shipments of waste (Proposed Waste Shipment Regulation).⁴

The Commission based the Proposed Waste Shipment Regulation on Articles 100a and 113 of the EEC Treaty⁵ and submitted it to the Council for consideration. The Council then consulted the Parliament and Economic

¹ The four major institutions of the Community are the Commission of the European Communities (Commission), the European Council (Council), the European Parliament (Parliament), and the European Court of Justice (ECJ). The Council consists of minister-level officials from each Member State in the area at issue (for example, the Environment Council includes the environment ministers of each Member State). AUDREY WINTER ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* 25-39 (2d ed. 1989). See *infra* note 73 (explaining each institution's role in the Community).

² The European Community (EC or Community) consists of: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

³ Council Regulation 259/93 of 1 February 1993 on the Supervision and Control of Shipments of Hazardous Waste within, into, and out of the European Community, 1993 O.J. (L 30) 1 [hereinafter *Waste Shipment Regulation*]. See *Council Formally Adopts Waste Shipment Regulation*, Eur. Rep. (EIS) No. 1832 (Feb. 3, 1993).

⁴ Proposal for a Council Regulation (EEC) on the Supervision and Control of Shipments of Hazardous Waste within, into, and out of the European Community, 1990 O.J. (C 289) 9 [hereinafter *Proposed Waste Shipment Regulation*].

⁵ *Id.* at recital 1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

and Social Committee (ESC),⁶ requesting an opinion on the Proposed Waste Shipment Regulation from both institutions. Following debate on the proposal, the Parliament voted to recommend several changes,⁷ but did not publish its first reading until March 12, 1992.⁸ The ESC, however, published an opinion in substantial agreement with the proposal, but suggested the legal basis be changed from Article 100a to Article 130s.⁹

Unable to reach an agreement with the Parliament,¹⁰ the Commission submitted an Amended Proposed Waste Shipment Regulation to the Council on March 23, 1992.¹¹ Working within the framework of the Amended Proposed Waste Shipment Regulation, the Council came to a political agreement to adopt the Regulation on October 20, 1992 based on Article 130s, instead of the Commission-proposed Articles 100a and 113.¹²

The October 20, 1992, agreement in principle was greeted with mixed reaction,¹³ and the EC Environment Commissioner stressed that the decision

⁶ The Economic and Social Committee (ESC) is a minor Community institution established by Article 193 of the EEC Treaty as a 189-member institution "representing a broad range of professional and labor groups and the general public." WINTER, *supra* note 1, at 39.

⁷ European Parliament, Minutes of Proceedings of the Sitting of Wednesday, November 20, 1991, 1991 O.J. (C 326) 130.

⁸ Legislative Resolution Embodying the Opinion of the European Parliament on the Commission Proposal to the Council for a Regulation on the Supervision and Control of Shipments of Hazardous Waste within, into, and out of the European Community, 1992 O.J. (C 94) 276.

⁹ European Community Economic and Social Committee's Opinion on the Proposal for a Council Regulation (EEC) on the Supervision and Control of Shipments of Waste within, into, and out of the Community, 1991 O.J. (C 269) 10 [hereinafter ESC Opinion].

¹⁰ *European Parliament Votes Waste Disposal Export Proposal Despite Failure to Compromise*, Int'l Env't. Daily (BNA) (Mar. 16, 1992).

¹¹ Amended Proposal for a Council Regulation (EEC) on the Supervision and Control of Shipments of Waste within, into, and out of the European Community, 1992 O.J. (C 115) 4. As used herein, "Proposed Waste Shipment Regulation" refers to 1990 O.J. (C 289) 9, *supra* note 4, as amended by 1992 O.J. (C 115) 4, *supra*.

¹² *Environment: Full Details on Waste Shipments Regulation*, Eur. Rep. (EIS), No. 1806 (Oct. 24, 1992) [hereinafter *Full Details*].

¹³ The French Environment Minister Segolene Royal regarded the agreement as one of the first applications of the Maastricht Treaty's policy of declaring that Community environmental issues take precedence over commercial policy. David Gardner, *Brussels Deal to Curb Toxic Waste Trade*, FIN. TIMES, Oct. 21, 1992. Furthermore, Environment Secretary Michael Howard considered it "a very important step forward in enhancing the environment of the Community." John Carvel, *EC: Toxic Dumping Over EC Borders To End*, GUARDIAN, Oct. 21, 1992.

Nevertheless, Greenpeace International was not pleased with the agreement reached by the

to utilize Article 130s was a special case.¹⁴ Furthermore, in December 1992, a challenge to the Council's authority came when Parliament's Environment Committee chairman announced his Committee's plans to launch legal proceedings in the European Court of Justice testing the Council's power to change the legislation's legal basis.¹⁵

On January 20, 1993, having received the proposal as amended by the Council, the Parliament accepted it in substance, with the hope of having it annulled by the Court of Justice.¹⁶ Parliament approved the Council's changes, but added amendments changing the legal basis back to Articles 100a and 113 of the EEC Treaty.¹⁷

The text of the Waste Shipment Regulation is notable for both its procedural and substantive implications. Procedurally, the Environment Council adopted the Waste Shipment Regulation based on Article 130s,¹⁸ altering the original Commission proposal based on Articles 100a and 113.¹⁹ Thus, the Waste Shipment Regulation takes an exceptional step, ostensibly favoring the environment over the free movement of goods within

Council, criticizing the Ministers for failing to adopt a total ban on exports to developing countries. *EC Environment Ministers' Approval of Waste Regulation Gets Mixed Reception*, 15 Int'l Env't. Rep. (BNA) No. 22, at 699 (Nov. 4, 1992) [hereinafter *Mixed Reception*]. Furthermore, industry leaders voiced concern that the agreement, while limited to the specialized case of waste, could potentially add new restrictions on the free movement of goods. *Id.*

¹⁴ Environment Commissioner Karl van Miert of Germany added that the Commission continues to believe that the provisions in the Regulation concerning shipments to or from non-EC countries continue to require the added "trade policy" provisions. *Mixed Reception*, *supra* note 13.

¹⁵ *Hazardous Waste: EC Parliament Expected to Launch Legal Challenge to Waste Agreement*, Int'l Env't. Daily (BNA) (Dec. 18, 1992).

¹⁶ *Environment: European Parliament Debates Subsidiarity and Waste Trade*, Eur. Rep. (EIS) No. 1830 (Jan. 27, 1993). The European Parliament adopted the report of Karl-Heinz Florenz, a German MEP (No. A3-4/93). *EP Approves Proposal on Toxic and Hazardous Waste Transport*, Eur. Community Rep. (Reuters) (Jan. 22, 1993); *Waste Shipments: Move Towards Legal Action in EC Court of Justice*, Eur. Env't. (EIS) No. 402 (Jan. 19, 1993).

¹⁷ *European Community: Parliament Approves Amended Proposal on Waste Shipments, Reiterates Threat*, Int'l Env't. Daily (BNA) (Feb. 2, 1993). Parliament Environment Committee Chairman Ken Collins noted the adoption did not signify acceptance of the Council's amended legal basis, but was necessary to allow Council passage which enabled Parliament to institute legal proceedings. *Id.*

¹⁸ See EEC TREATY.

¹⁹ See Proposed Waste Shipment Regulation, *supra* note 4.

the common market.²⁰ Substantively, the Waste Shipment Regulation enables Member States to ban imports of waste for disposal,²¹ while providing for an exception granting countries producing small quantities of waste the authority to make agreements to export waste across borders.²² The Regulation further empowers the Community to ratify several important international agreements on the control of transboundary shipments of waste.²³

II. LEGAL BACKGROUND

A. *Legal Foundations for EC Environmental Action*

Environmental concern is not a recent development within the Member States or the Community. Nevertheless, none of the three treaties establish-

²⁰ *Environment: Ministers Agree that Environment Measures Should Take Precedence Over Movement of Goods*, 4 EuroWatch No. 15 (Millin) (Nov. 2, 1992) available in LEXIS, EUROPE Library, AllEur File [hereinafter *Ministers Agree Environment Over Movement of Goods*].

²¹ Waste Shipment Regulation, *supra* note 3, art. 4.3(a)(i).

²² *Id.* at art 4.3(a)(ii)-(iii). This exception was created in order to meet the demands of Greece, Ireland, Luxembourg and Portugal which produce quantities so small that self-disposal is economically unfeasible. *Ministers Agree Environment Over Movement of Goods*, *supra* note 20; *Environment Ministers Agree on Waste Shipment Regulations*, Int'l Env't. Daily (BNA) (Oct. 21, 1992) [hereinafter *Ministers Agree on Waste Shipment Regulations*].

This approach contradicts a recent decision of the European Court of Justice which held that Member States could not prohibit imports of waste. Case 2/90, *Commission v. Belgium*, Judgment of July 9, 1992, 1992 O.J. (C 195) 8. Invalidating a Belgian Executive Order prohibiting the import of out-of-state waste, the Court ruled that the Walloon Republic could not prohibit the import of hazardous wastes under EC law, but could impede general waste shipments if the measures were necessary to protect the environment or public health. *EC Court's Ruling on Waste Imports Poses Problems, Recycling Industry Says*, 15 Int'l Env't. Rep. (BNA) No. 15, at 495 (July 29, 1992).

²³ *Full Details*, *supra* note 12. The Regulation specifically addresses The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, U.N. Doc. EP/IG.80/3 (1989) reprinted in 28 I.L.M. 657 (1989) [hereinafter *Basel Convention*] and the Fourth ACP-EEC Convention Signed in Lomé, Dec. 15, 1989, reprinted in *The Courier: Africa-Caribbean-Pacific-European Community*, No. 120 (Mar.-Apr. 1990) [hereinafter *Lomé IV*].

ing the Community in the late 1950's²⁴ addressed the environment, or what actions may be taken by the Community to ensure the environment's protection and stabilization.²⁵ Thus, initial control over environmental issues remained within the sovereignty of the Member States.²⁶

However, as worldwide consciousness concerning the environment increased,²⁷ the Member States began to formulate a Community environmental policy beginning with the Paris Summit of 1972.²⁸ A draft "Action Programme" designed to harmonize control of environment matters was adopted in 1973²⁹ and subsequently modified in 1977,³⁰ 1983,³¹ 1987,³²

²⁴ EEC TREATY; TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY. These three treaties were merged by the TREATY ESTABLISHING A SINGLE COUNCIL AND SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, 1967 O.J. (152) 1.

²⁵ There is no mention of the term "environment" in any of the documents. Auke Haagsma, *The European Community's Environmental Policy: A Case Study in Federalism*, 12 FORDHAM INT'L L. J. 311, 315 (1989). This is not entirely surprising, however, as environmental concern did not dominate the public conscience in 1957 as it does today.

²⁶ Only two articles in the EEC Treaty can be seen as offering some connection to environmental policy: article 2 (expressing a preoccupation with the quality of life) and article 36 (allowing for the continuation or introduction of the banning or restriction of trade for reasons including public health and the protection of animals and plants). EEC TREATY arts. 2, 36; See S. JOHNSON AND G. CORCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* 12 (1989).

²⁷ This concern was punctuated by the 1972 United Nations Stockholm Conference on the Environment. The Conference drafted a solid declaration of concern regarding global environmental quality and the obligations of the nations, individually and collectively, to take action to preserve and protect the environment. See *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 & CORR. 1 (1972), reprinted in 11 I.L.M. 1416 (1972).

²⁸ National leaders of the Member States met and published the "summit declaration" which expressed their desire that the Community develop an EC environmental policy. Declaration of the First Summit Conference of the Enlarged Community, reprinted in E.C. Bull. No. 10, at 14, 20 (1972). The leaders also declared that "economic expansion should result in an improvement in the quality of life as well as in standards of living and that particular attention should be given to intangible values and to protecting the environment." JOHNSON AND CORCELLE, *supra* note 26, at 12.

²⁹ Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment (1973-1977), 1973 O.J. (C 112) 1.

³⁰ 1977 O.J. (C 139) 1.

³¹ 1983 O.J. (C 46) 1.

³² 1987 O.J. (C 328) 1.

and 1992.³³ Although the program establishes a Community environmental policy, it fails to provide the legal foundation for one.³⁴

1. *Intra-Community Environmental Policy*

a. *The EEC Treaty*

The EEC Treaty of Rome provided no express legal basis upon which to implement environmental initiatives. The Commission therefore enacted measures based upon implied authority found in Article 100,³⁵ Article 235,³⁶ or a combination of the two.³⁷ Article 100 allows the Council to promulgate "directives"³⁸ necessary for the harmonization³⁹ of Member

³³ COM (92)23. See *EC: Council Marks Its Agreement on New Environment Policy*, Agence Europe, Dec. 18, 1992 available in LEXIS, Europe Library, All Eur File; *Environment Council: 5th Action Programme Passes Test by EC Ministers*, Transport Europe (EIS) 24 (Dec 23, 1992).

³⁴ Haagsma, *supra* note 25, at 319.

³⁵ Article 100 grants authority to the Council, "acting unanimously on a proposal from the Commission," to harmonize the laws of Member States in all matters that "directly affect the establishment or function of the common market." EEC TREATY art. 100.

³⁶ Article 235 of the EEC Treaty permits Community action in fields that are not expressly limited in the Treaty. EEC TREATY art. 235.

³⁷ See Bradford Gentry, *Environmental Regulation in Europe: Hazardous Waste and Contaminated Sites*, 10 NW. J. INT'L L. & BUS. 397, 404 (1990).

³⁸ Article 189 of the EEC Treaty provides the Council and the Commission may promulgate "regulations" or "directives" to implement Community policy. EEC TREATY art. 189. The Community also adopts decisions (binding on the parties to whom they are directed) and recommendations or opinions (non-binding views of the Community). *Id.* Directives set out Community goals and objectives broadly, then require national measures in the Member States, within time limits proscribed by the Council for implementation. Conversely, regulations become law throughout the Community as of their effective date. *Id.* Directives, rather than regulations, have generally been used to initiate environmental policy. Dirk Vandermeersch, *The Single European Act and The Environmental Policy of the European Economic Community*, 12 EUR. L. REV. 407, 423 (1987); Tamara R. Crockett and Cynthia B. Schultz, *The Integration of Environmental Policy and the European Community: Recent Problems of Implementation and Enforcement*, 29 COLUM. J. TRANSNAT'L L. 169, 171 n.11 (1991).

³⁹ The EC uses the terms "harmonize" and "harmonization" to indicate the process of achieving uniformity among Member States' law.

State law to permit proper functioning of the common market.⁴⁰ Although Article 100 is inherently economic in nature, the EC utilizes it to pass environmental provisions under the presumption that differing Member State environmental laws might create barriers to trade or impede competition.⁴¹ However, this economic rationale limits the usefulness of Article 100 as a basis for environmental legislation.⁴²

When Article 100 fails to provide adequate support for environmental action, the Community turns to the catch-all phrase of Article 235: "if action . . . should prove necessary."⁴³ The provision explicitly grants the Council discretion to act in areas which the Treaty fails to address, if necessary to further the goals of the Community.⁴⁴ The catch-all implications are limited, however, as Article 235 requires the legislation be enacted "in the course of the common market,"⁴⁵ a connection which is often absent.

Notwithstanding the lack of explicit authority upon which to base environmental measures, the Council's power to enact environmental measures has been recognized since the mideighties.⁴⁶ While the Council initially held only implied authority, as the Community rapidly advanced towards the dissolution of internal frontiers, the environment became an express objective of Community law.

⁴⁰ Article 100 provides:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

EEC TREATY art. 100.

⁴¹ Vandermeersch, *supra* note 38, at 410-11.

⁴² *Id.* at 441.

⁴³ Article 235 provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

EEC TREATY art. 235.

⁴⁴ *Id.* By granting the Commission the implied power to make all laws which are necessary and proper to implement EEC Treaty objectives, this provision is analogous to the "necessary and proper" clause of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 18.

⁴⁵ EEC TREATY art. 235.

⁴⁶ Vandermeersch, *supra* note 38, at 408.

b. The Single European Act

In 1987, the Single European Act (SEA) amended the EEC Treaty, with the aim of achieving a common market by December 31, 1992.⁴⁷ The SEA granted the Community express control over environmental matters by inserting a new "Title VII," referred to as the "Environment Title," which includes Articles 130r through 130t.⁴⁸ Article 130r identifies environmental protection as a major concern of the Community, and enumerates the objectives,⁴⁹ principles,⁵⁰ method of action,⁵¹ allocation of forum⁵² and

⁴⁷ SINGLE EUROPEAN ACT, 1987 O.J. (L 169) 1 [hereinafter SEA]. The SEA grew out of the recommendations made in a 1985 Commission report. See *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85)310.

⁴⁸ EEC TREATY arts. 130r-t (as amended 1987).

⁴⁹ EEC Treaty Article 130r(1) provides:

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

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

EEC TREATY art 130r(1) (as amended 1987).

⁵⁰ Article 130r(2) provides:

Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.

EEC TREATY art. 130r(2) (as amended 1987).

⁵¹ EEC TREATY Article 130r(3) provides:

3. In preparing its action relating to the environment, the Community shall take account of:

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

EEC TREATY art 130r(3) (as amended 1987).

the necessity of international cooperation of environmental policy.⁵³ Additionally, and most notably with regard to the Waste Shipment Regulation, Article 130s establishes the Community's basis for environmental legislative and decision-making power.⁵⁴ Finally, Article 130t reserves the right of each Member State to maintain or introduce more stringent protective measures that are agreeable with the EEC Treaty.⁵⁵

The SEA also added Article 100a to the EEC Treaty. Article 100a addresses the internal market and lists environmental protection as a Community goal.⁵⁶ In addition, Article 100a grants the Community explicit authority to legislate policy in furtherance of the common market objectives and states that when the Commission proposes legislation affecting health, safety, environmental protection, or consumer protection, the legislation must be based on a "high level of protection."⁵⁷ Environmental protection should therefore be considered an integral component of legislation drafted for the internal market.

⁵² EEC Treaty Article 130r(4) provides: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States." *Id.* EEC TREATY art 130r(4) (as amended 1987). This subsection enunciates what is known as the "subsidiarity principle," which appears by to at least one commentator to be a step backwards in Community environmental policy. Vandermeersch, *supra* note 38, at 422-23.

⁵³ EEC TREATY art. 130r(5) (as amended 1987).

⁵⁴ EEC TREATY art. 130s (as amended 1987). Article 130s presents a bifurcated decision-making process. First it provides: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community." *Id.* para. 1. Secondly, once the Council has voted unanimously on what action should be taken, "[t]he Council shall . . . define those matters on which decisions are to be taken by a qualified majority." *Id.* para. 2.

⁵⁵ EEC TREATY art. 130t (as amended 1987). Several Member States which already enforced high environmental standards objected to the SEA's centralized control of environmental concerns for fear that the Community standards would be lower and less effective.

However, the SEA also addressed this concern in article 100a(4) which allows individual states to opt out of a harmonized standard for reasons of environmental protection. The article provides that "[i]f, after adoption of a harmonization measure by the Council . . . a Member State deems it necessary to apply national provisions . . . relating to protection of the environment . . . it shall notify the Commission of these provisions." EEC TREATY art. 100a(4) (as amended 1987).

⁵⁶ EEC TREATY art. 100(a)(3) (as amended 1987).

⁵⁷ *Id.*

2. *External Community Environmental Policy*

While the significance of legislation concerning intra-Community environmental policy has been established, the implications of the policy must not be confined to the Community alone. Just as the legal foundation for internal Community environmental policy has evolved since the original EEC Treaty, so has the basis for external action. The authority to act beyond Community borders is based on both an express provision of the EEC Treaty⁵⁸ and a judgment of the Court of Justice.⁵⁹

Although Article 113 of the EEC Treaty provides exclusive power for the Community to act on matters affecting international trade,⁶⁰ the question remains whether Article 113 is applicable to environmental measures restricting imports or exports.⁶¹ The question of Article 113's applicability to these environmental measures arose in relation to a Commission proposal for Community adoption of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁶² The Commission proposed the legislation on Article 113,⁶³ however, several Member States voiced opposition, contending that the final objective of the proposal was not regulation of international trade⁶⁴ and that basing the legislation on Article 113 would give exclusive powers to the Community.⁶⁵ The Council agreed with these contentions and rejected the Commission proposal by adopting the regulation based on Article 235.⁶⁶

The second source of Community authority for external environmental action is the so-called theory of "parallelism."⁶⁷ The theory states where

⁵⁸ EEC TREATY art. 113.

⁵⁹ Joined Cases 3, 4, and 6/76, *In re Kramer*, 1976 E.C.R. 1279 [1976-1977 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8372 (1976).

⁶⁰ EEC TREATY art. 113. The article provides that it will come into force after the transitional period (which ended December 31, 1969). *Id.*

⁶¹ Haagsma, *supra* note 25, at 329.

⁶² Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085 (1973).

⁶³ Proposal for a Council Regulation on the Implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1980 O.J. (C 243) 16.

⁶⁴ Haagsma, *supra* note 25, at 329.

⁶⁵ *Id.* at 330.

⁶⁶ Council Regulation (EEC) 3626/82, 1982 O.J. (L 384) 1.

⁶⁷ Haagsma, *supra* note 25, at 328.

the Community has the power to act internally, it may also act externally.⁶⁸ The theory is a result of the Court of Justice's ruling on the Community's authority to enter into international commitments, as stated in *Kramer*.⁶⁹

While Article 113 and "parallelism" provide for external Community action, these principles must be used in connection with another legal basis from which the internal powers have evolved.⁷⁰ Thus, the essential focus remains on the internal bases for legislation.

3. Legislative Procedures

Although both Articles 100a and 130s provide an express legal basis, the two cannot be used collectively because of conflicting legislative procedures.⁷¹ The procedure to be utilized is determined by the legal basis of the proposed legislation⁷² and affects the roles of the Community institutions in the legislative process.⁷³ Thus, the choice between the two articles has

⁶⁸ *Id.*

⁶⁹ See *supra* note 59. The Court summarized its conclusion as follows:

[w]henver Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in the connection.

Court of Justice Opinion 1/76, 1977 O.J. (C 107) 4, 12.

⁷⁰ If the international agreement is in an area already covered by a Community measure based on Article 100, the agreement should be based on Article 113 and Article 100. Haagsma, *supra* note 25, at 331.

⁷¹ Case 165/87, *Commission v. Council*, 1988 E.C.R. 5561, para. 11 (where legislation can be based on more than one article of the EEC Treaty, each applicable article shall be included in the legal basis). However, where the applicable articles provide for conflicting legislative procedures, as is the case with Articles 100a and 130s, the collective use is impossible.

⁷² EEC TREATY arts. 100a (prescribing the cooperation procedure for the approximation of laws), 149(1) (prescribing the consultation procedure), and 149(2) (describing the cooperation procedure).

⁷³ The Commission initiates legislative proposals and seeks to ensure the application of existing Community law. EEC TREATY art. 155. The Parliament "advises" by commenting on Commission proposals before a Council decision. *Id.* art. 137. The Council legislates on the basis of Commission proposals and has the authority to pass acts that are binding on Member States. *Id.* arts. 189, 145 (enumerating the objectives of the Council), and 148 (specifying the weighted voting of the "qualified majority" voting procedure). Finally, the Court of Justice ensures that in the interpretation and application of the Treaty, Community

become an important question in the power struggle among Community institutions.⁷⁴

Article 130s follows the original EEC Treaty's consultation procedure.⁷⁵ Initially, the Commission drafts proposed legislation which is referred to the Council for consideration.⁷⁶ The Council then requests opinions from the Parliament and the Economic and Social Committee on the legislation.⁷⁷ Finally, with the Parliament and ESC opinions in hand, the Council adopts the legislation by unanimity.⁷⁸

Conversely, when Article 100a is the legal basis, the cooperation procedure is employed.⁷⁹ Although the initiation of legislation is identical to the consultation procedure in the introductory stages, the cooperation procedure greatly modifies the subsequent stages.⁸⁰

law is observed. *Id.* art. 164. See generally Michael Feeley and Peter Gilhuly, *Green Law-Making: A Primer on the European Community's Legislative Process*, 24 VAND. J. TRANSNAT'L L. 653, 657-67 (1991) (discussing the major institutions of the EC and their role in the legislative process).

⁷⁴ Crockett and Schultz, *supra* note 38, at 177; Turner Smith and Roszell Hunter, *The European Community Environmental Legal System*, 22 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10106, 10108 (Feb. 1992).

⁷⁵ EEC TREATY art. 130s (as amended 1987).

⁷⁶ WINTER, *supra* note 1, at 25-29.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ EEC TREATY art. 100a (as amended 1987).

⁸⁰ Although the cooperation procedure duplicates the initial stages (Commission proposal, Parliament and ESC opinions), upon receipt by the Council, the procedure changes. After the Parliament and ESC opinions, the Council may reach an agreement or common position on the proposal. The common position does not require unanimity, but authorizes qualified majority voting. EEC TREATY art. 148(2).

The proposal, as agreed to by the Council, then returns to Parliament for a second reading. After the second reading, three results may occur. *Id.* art. 149. First, if Parliament approves the proposal on the second reading, the Council shall adopt it in accordance with the common position. *Id.* art. 149(2)(b). Second, if the Parliament proposes amendments to the proposal on the second reading, the Council may adopt it only by a unanimous vote. *Id.* art. 149(3)(c). Third, if the Parliament proposes amendments to the proposal, the Commission may reexamine the proposal, incorporate the amendments it deems appropriate, and send the reexamined proposal to the Council. *Id.* art. 149(2)(d). The Council may then adopt the reexamined proposal by a qualified majority, may modify and adopt the reexamined proposal by a unanimous vote, or may refuse to act. *Id.* art. 149(2)(e)-(f); see WINTER, *supra* note 1, at 43-45.

In basic terms, Article 100a gives Parliament two readings of the proposal and a greater role in the development process,⁸¹ whereas, under Article 130s, Parliament and the Economic and Social Committee (ESC) are afforded only a single opportunity to comment on the proposed legislation.⁸²

As a result of the conflicting legislative procedures, an act of proposed environmental legislation must chose *either* 100a or 130s as its legal basis. Not surprisingly, this choice creates tension when the Council prescribes a legal basis different from that of the Commission and Parliament proposal.⁸³

B. Council's Authority to Alter the Proposed Legal Basis

While the Council is not specifically precluded by the EEC Treaty from altering the legal basis of proposed legislation, the power has been challenged in the Court of Justice.⁸⁴ In the *Titanium Dioxide Case*, the Court resolved a legislative basis dispute between the Commission and the Council, where the Commission proposed a directive under Article 100a.⁸⁵ The Council, despite objections by the Commission and the Parliament, changed the legal basis to Article 130s, and adopted the Directive on a unanimous vote.⁸⁶ The Court, however, concluded the change of the legal basis was improper and annulled the Directive.⁸⁷

According to the Court, the choice of the legal basis cannot depend only on the opinion of a Community institution, but must be based on "objective elements susceptible to judicial control."⁸⁸ Among these elements, the

⁸¹ The Parliament has the power to delay its first reading, thereby delaying the process and the power to reject the common position reached by the Council, and thereby requiring the Council to act unanimously to pass the measure. WINTER, *supra* note 1, at 45.

⁸² EEC TREATY arts. 130s, 235 (as amended 1987).

⁸³ Crockett and Schultz, *supra* note 38, at 177.

⁸⁴ Case 300/89, Commission v. Council, 1991 E.C.R. I-2867 [hereinafter *Titanium Dioxide case*].

⁸⁵ *Id.* para. 1. The Commission proposed Council Directive 89/428, 1989 O.J. (L 201) 56 [hereinafter *Titanium Dioxide Directive*]. Originally, the Commission proposed the directive based on articles 100 and 235 of the EEC Treaty, but modified the legal basis following the adoption of the SEA amendments. *Id.* para. 3.

⁸⁶ *Id.* para. 2. See *Court of Justice Annuls EC Directive on Reducing Titanium Industry Waste*, 14 Int'l Env't. Rep. (BNA) No. 12, at 325 (June 19, 1991).

⁸⁷ *Titanium Dioxide Case*, 1991 E.C.R., para. 25.

⁸⁸ *Id.* para. 10. The Court cited Case 45/86, Commission v. Council, 1987 E.C.R. 1493, para. 11.

Court held, are the purpose and contents of the legislation.⁸⁹ In regards to the Titanium Dioxide Directive, the Court found the purpose and contents concerned both protection of the environment *and* the elimination of disparities in the conditions of competition.⁹⁰ Considering the dual basis inseparable, the Court looked to the primary object of the legislation. Pointing to the combined decision in *Commission v. Italy*,⁹¹ the Court found, in the absence of harmonized measures, Community environmental measures could have a negative impact on industries operating under stricter national standards and could therefore distort trade.⁹² Thus, any measure designed to harmonize Member State environmental law is best initiated under the harmonization provision, Article 100a.

C. The Particular Problem of Transboundary Hazardous Waste Shipments

The European Community regulates transboundary waste for four important reasons: 1) waste management is an economic activity with supranational ramifications;⁹³ 2) the geography of the Community creates obstacles to adequate disposal;⁹⁴ 3) public concern over environmental

⁸⁹ *Titanium Dioxide Case*, para. 13.

⁹⁰ *Id.* para. 13.

⁹¹ Cases 91 and 92/79, *Commission v. Italy*, 1980 E.C.R. 1099, C.M.L.R. (CCH) 8657. This case was the first instance the Court approved the use of Article 100 to regulate environmental measures. *Id.*

⁹² *Id.* para. 8.

⁹³ EEC TREATY art. 2. Article 2 provides the objectives of the Community:

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

Id.

⁹⁴ Waste production in the European Community has risen to a critical point, now estimated at two billion tons of waste annually including twenty to thirty million tons considered hazardous. Furthermore, an estimated ten to fifteen percent of the Community's total waste is exported outside of the originating Member State. *European Community Waste Policy: At the Brink of a New Era*, Int'l Env't. Daily (BNA) (July 30, 1991). In comparison, the United States exports less than one percent of its waste. *Id.*

protection;⁹⁵ and 4) divergent national laws within the Community.⁹⁶

Not surprisingly, a very real fear in the Community is that the abolition of all internal frontiers will greatly weaken controls on waste management, thus increasing the chances of exportation from higher producing States to the cheapest, and probably least safe disposers. As production of waste grows, so grow concerns of "waste tourism" across Europe.⁹⁷ In response to this concern, the Community has developed several waste measures over the past decade.⁹⁸

1. Transfrontier Waste Directive

On December 6, 1984, the Environment Council adopted the first Directive on the Transfrontier Movement of Toxic and Dangerous Wastes (Directive).⁹⁹ The Directive resulted from public reaction to the 1983 *Seveso* incident in which forty-one barrels of highly toxic, dioxin-contaminated waste were transported illegally from Italy to France undetected and

⁹⁵ The general public, not just the environmental groups, has expressed concern over the state of hazardous waste management in the Community. *European Community: Environmental Policy Firmly Anchored in Single European Act*, Brinkhorst Says, 11 Int'l Env't. Rep. (BNA) at 215 (Apr. 13, 1988). In a public opinion poll, Europeans ranked the environment more important than problems of finance, defense, or employment as a Community concern. *Id.*

⁹⁶ Jody Meier Reitzes, *The Inconsistent Implementation of the Environmental Laws of the European Community*, 22 ENVTL. L. REP. 10523 (Aug. 1992); Lawrence I. Sperling and Ira R. Feldman, *The Transboundary Movement of Hazardous Waste: Implementation and Enforcement of Control Regimes in the European Community*, 22 ENVTL. L. REP. 10701, 10702 (Nov. 1992).

⁹⁷ Former Environmental Commissioner Carlo Ripa di Meana expressed concerns that completion of the internal market would become a "tourist visa for waste." Roszell D. Hunter, *Proposed Transfer System Within the European Community*, Int'l Env't. Daily (BNA) (Jan. 16, 1992).

⁹⁸ Sperling and Feldman, *supra* note 96, at 10703-05.

⁹⁹ Council Directive 84/631 of 6 December 1984 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste, 1984 O.J. (L 326) 31 [hereinafter Transfrontier Directive]. See Mary Elizabeth Kelly, Note, *International Regulation of Transfrontier Hazardous Waste Shipments: A New EEC Environmental Directive*, 21 TEX. INT'L L.J. 85, 98-115 (1985) (discussing and analyzing the specific provisions of the Directive).

dumped in a barn in northern France.¹⁰⁰ The Directive established a notice and authorization system for transboundary shipments of hazardous waste involving Member States¹⁰¹ and was amended in 1986 to include shipments of waste by Member States to non-Community countries.¹⁰²

While the Directive contained aggressive timetables for implementation,¹⁰³ the Member States were slow to formally implement it by adopting national laws,¹⁰⁴ and even slower to fully implement the Directive.¹⁰⁵ In 1990, the Economic and Social Committee responded by recommending that all future Community environmental laws be drafted as regulations to avoid delays in implementation.¹⁰⁶

2. *International Agreements*

The development of waste shipment controls within the European Community have paralleled efforts in the international community. The EC measures have followed and addressed initiatives in the Organization for

¹⁰⁰ Ursalla Wasserman, *The Seveso Affair*, 17 J. WORLD TRADE L. 371 (1983). The dioxin waste resulted from an industrial explosion in Seveso, Italy in 1978 and was discovered by members of Greenpeace in a barn in Anguilcourt-le-Sart, France, in 1983. *Id.* A 1984 European Parliament debate regarding hazardous waste noted that the barrels of waste "had crossed the Franco-Italian border—more easily indeed, than a few bottles of Chianti—and were unable to be traced." EUR. PARL. DEB. (1-313) 80 (April 4, 1984).

¹⁰¹ Transfrontier Directive, *supra* note 99.

¹⁰² Council Directive 86/279 of 12 June 1986 Amending Directive 84/631 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste, 1986 O.J. (L 181) 13. As used herein, "Transfrontier Directive" refers to Directive 84/631, *supra* note 99, as amended by Directive 86/279.

¹⁰³ *Id.* Less than one year was given for adoption of the original Directive, and six months was given to implement the amendment.

¹⁰⁴ In 1987, only Germany had adopted legislation, and it only covered intra-Community shipments. By the end of 1988, two of the Member States had still failed to adopt national laws. *The European Commission Proposes Further Reinforcement of Control of the Movement of Waste Within, At Entries to and Exits from the EEC*, EUROPE Sept. 22, 1990, at 12.

¹⁰⁵ As of late 1990, there were proceedings pending in the ECJ against five Member States for failure to implement the Directive. Commission Eighth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law 1990, COM(91) 81.

¹⁰⁶ *Regulations, Not Directives Recommended to Implement Environmental Laws Faster*, 13 Int'l Env't. Rep. (BNA) at 323 (Aug. 8, 1990).

Economic Cooperation and Development (OECD),¹⁰⁷ the United Nations,¹⁰⁸ and the African, Caribbean, and Pacific (ACP) nations.¹⁰⁹

a. OECD Decisions

The Organization for Economic Cooperation and Development (OECD) was formed in 1960¹¹⁰ and includes the twelve member states of the European Community.¹¹¹ Like the EEC Treaty, the OECD's founding treaty did not mention protection of the environment.¹¹² The OECD however, was the first to develop an international initiative on the transboundary movements of waste.¹¹³ In 1984, the OECD Council adopted the Decision and Recommendation on Transfrontier Movements of Hazardous Wastes.¹¹⁴ While the Decision was primitive by today's waste control standards,¹¹⁵ the Decision broke the ground for international agreements controlling transboundary shipments of waste.

In 1986, the OECD Council acted again, adopting the Decision-Recommendation on Exports of Hazardous Wastes from the OECD Area (OECD Export Decision).¹¹⁶ This OECD Export Decision defined wastes,¹¹⁷ and

¹⁰⁷ Decision and Recommendation of the OECD Council on Transfrontier Movements of Hazardous Waste, O.E.C.D. Doc. C(83)180 Final, *reprinted in* 23 I.L.M. 214 (1984) [hereinafter OECD Transfrontier Decision].

¹⁰⁸ Basel Convention, *supra* note 23.

¹⁰⁹ Lomé IV, *supra* note 23.

¹¹⁰ The Convention of the Organization for Economic Cooperation, Dec. 14, 1960, 888 U.N.T.S. 179.

¹¹¹ In addition to the twelve EC Member States, the OECD consists of: Australia, Austria, Canada, Finland, Iceland, Japan, New Zealand, Norway, Sweden, Switzerland, Turkey and the United States. *Id.*

¹¹² *Id.*

¹¹³ Peter D. P. Vint, *The International Export of Hazardous Waste: European Economic Community, United States and International Law*, 124 MIL. L. REV. 107, 130 (1990).

¹¹⁴ OECD Transfrontier Decision, *supra* note 107 (requiring States to control the transfrontier movements of waste and to ensure that the authorities of the country receiving the waste was adequately and timely notified of the shipments). Australia and Greece abstained from the decision. *Id.*

¹¹⁵ The Decision was not binding nor did it specify which wastes were considered hazardous. However, it initiated a notice system for the export of wastes. Vint, *supra* note 113, at 130.

¹¹⁶ O.E.C.D. Doc. C(86)64 Final, *reprinted in* 25 I.L.M. 1010 (1986).

this definition has served as the basis for future international agreements.

b. Basel Convention

In March 1989, following the initiative of the OECD, the United Nations Environment Program (UNEP) drafted an agreement to control transboundary shipments of hazardous and household waste, formally named the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention).¹¹⁸ The European Community supported the UNEP and OECD endeavors from the outset;¹¹⁹ however, the Commission failed in its bid to persuade the Community to swiftly ratify the Basel Convention as a single bloc.¹²⁰ In 1990, in order to show

¹¹⁷ *Id.* The Decision defines wastes as "all materials considered as wastes or legally defined as wastes in the country where it is situated or to which it is conveyed," however, the Decision excepted from this decision radioactive wastes. *Id.*

¹¹⁸ Basel Convention, *supra* note 23. Under its own terms, the Convention enters into force "on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval or accession." *Id.* art. 25, 28 I.L.M. at 676-77. The treaty was ratified by the twentieth signature on February 5, 1992 and has been in force since May 5, 1992. However, with the exception of France, the EC Member States have yet to ratify the agreement. *Id.* at app.

¹¹⁹ In 1987, the Commission proposed unified EC participation in the OECD efforts. Proposal for a Council Directive on the Draft OECD Council Decision Concerning those Hazardous Wastes for Which Transfrontier Movements Shall Be Controlled, COM(87)333 final; Recommendation for a Council Decision Authorizing the Commission, on Behalf of the Community, to Negotiate Within the OECD an International Agreement on the Control of Transfrontier Movements of Hazardous Wastes, COM(87)487 final.

In November 1988, the Council adopted a decision formally mandating the Commission to participate in efforts to negotiate the Basel Convention. *Toxic Waste: Experts Meet to Draft International Convention on Transfrontier Movement of Hazardous Wastes*, Eur. Rep., No. 1447, at 2 (Nov. 11, 1988).

The following month the Council adopted a resolution stressing "the urgency of reaching an agreement or a system at the widest possible international level." Council Resolution 89/C9/01 of 21 December 1988 Concerning Transfrontier Movements of Hazardous Waste to Third Countries, para. 1, 1989 O.J. (C 9) 1.

¹²⁰ Commission Proposal for a Council Directive on the Conclusion on Behalf of the Community, of the Basel Convention, COM(90)362 final (urging simultaneous depositing of instruments of ratification by EC and Member States). France ratified the Convention on its own behalf for two political reasons: to enable the Convention to enter into force and to further its own transboundary waste program. *United Nations Official See Basel Treaty as 'Limping' Into Effect with Limited Support*, 15 Int'l Env't. Rep. (BNA) No. 9, at 275 (May 6, 1992).

their commitment to tackling the problem of hazardous waste, the Council adopted an OECD recommendation to ratify the Basel Convention.¹²¹

c. Lomé IV Convention

Even as the Basel Convention was being concluded, African leaders expressed concern that the Convention did not provide for adequate means to challenge waste being imported into the borders of African Nations.¹²² As a result of this apprehension, none of the thirty-nine African nations represented at the final negotiating session signed the Convention.¹²³

These African nations, accompanied by Caribbean and Pacific nations, sought a prohibition on the transboundary shipment of waste from industrialized nations into their borders.¹²⁴ The sixty-nine nations of the ACP are parties to the Lomé Convention for economic development, assistance, and cooperation between the EC and the ACP.¹²⁵ In consideration of the African nations' concern, the fourth revision of the Lomé Convention (Lomé IV) in December 1989 included a provision prohibiting the export of all hazardous and radioactive waste from the European Community to any ACP state and banning the import by ACP nations of such waste from any country.¹²⁶

III. ANALYSIS

Adoption of the Waste Shipment Regulation by the Council of Ministers provides the Community with a comprehensive plan to control transboundary

¹²¹ Council Decision 90/170 of 2 April 1990 on the Acceptance by the European Economic Community of an OECD Decision/Recommendation on the Control of Transfrontier Movements of Hazardous Wastes, 1990 O.J. (L 92) 52.

¹²² Steven Greenhouse, *U.N. Conference Supports Curbs on Exporting Hazardous Waste*, N.Y. TIMES, Mar., 23, 1989, at A1.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ ACP-EEC Convention of Lomé, Feb. 28, 1975, 14 I.L.M. 595. The first Lomé Convention provided for agreements between the EC and ACP in the areas of: trade cooperation, export earnings from commodities, industrial cooperation, financial and technical cooperation, and provision relating to establishment, services, payments and capital movements. *Id.* Two more conventions followed: Second EEC-ACP Convention of Lomé, Oct. 31, 1979, 19 I.L.M. 327; Third ACP-EEC Convention of Lomé, Dec. 8, 1984, 24 I.L.M. 571 (1985).

¹²⁶ Lomé IV, *supra* note 23, pt. 2, tit. I, art. 39(1).

shipments of waste within, into, and out of the European Community. Notwithstanding the substantive effects of the Waste Shipment Regulation, the Council's use of Article 130s as the legal basis presents the most controversial aspect of the adoption. The utilization of Article 130s is grounded in a desire to further Community environmental protection goals enumerated in Article 130r(1).¹²⁷ However, the change in the legal basis from Article 100a facially conflicts with the Court of Justice's ruling in the *Titanium Dioxide* case. Furthermore, the Council's use of Article 130s raises the question of what implications this decision will have on the development of future environmental policy.

A. *Legal Basis of the Waste Shipment Regulation*

1. *Rationale for Employing Article 130s*

The debate concerning the legal basis of the Waste Shipment Regulation surrounds the proper role of Articles 100a and 130s in formulating Community environmental policy. Article 130s, as the legal basis of legislation, differs from Article 100a in three key respects: 1) voting procedure; 2) objective; and 3) role of the Commission and Parliament in the legislative process. These distinctions, when viewed with regard to the Waste Shipment Regulation, illustrate the need for Article 130s to prevail vis-a-vis Article 100a.

a. *Voting Procedures*

Prior to the SEA, all Community legislation required unanimous voting,¹²⁸ a procedure Article 130s follows.¹²⁹ Although unanimity ensures a consensus within the Council, environmental advocates claim it has the effect of lowering the level of environmental protection.¹³⁰ Arguably, unanimity could lower the level of protection in that requiring all twelve environmental ministers to reach a compromise compels Member States desiring more stringent standards to weaken their positions to ensure

¹²⁷ Waste Shipment Regulation, *supra* note 3, recital 6.

¹²⁸ Article 100a signaled the addition of qualified majority voting into the legislative process. EEC TREATY art. 100a.

¹²⁹ *Id.* art. 130s.

¹³⁰ Vandermeersch, *supra* note 38, at 417.

unanimity.

A comparable lowering of environmental protection is also possible, however, within the qualified majority voting employed under Article 100a.¹³¹ Requiring only fifty-four of seventy-six votes for approval,¹³² the procedure allows passage of legislation even when one or more Member States objects.¹³³ This has the potential effect of allowing larger, more industrialized states to outvote smaller ones because the larger ones have more votes.¹³⁴

The Waste Shipment Regulation includes a compromise allowing smaller Member States to enter into bilateral waste export agreements,¹³⁵ which the environmental advocates might claim lessens its strength. Prior to the compromise, however, the legislation did not have the votes necessary to pass under either voting procedure.¹³⁶ Thus, qualified majority voting would not have strengthened the legislation's level of environmental protection. Therefore, the analysis must focus on the objectives of Article 100a vis-a-vis Article 130s.

b. Objectives of the Waste Shipment Regulation and Articles 100a and 130s

Determining the correct legal basis requires a bifurcated inquiry. First, the objectives of the legislation must be ascertained and, second, the

¹³¹ Article 148(2) provides that the votes of the Member States shall be weighted according to size and importance: Germany, France, Italy and the United Kingdom have ten votes each, Spain has eight votes, Belgium, Greece, the Netherlands and Portugal have five votes each, Denmark and Ireland have three votes each and Luxembourg has two votes. EEC TREATY (as amended 1987). To adopt legislation, fifty-four votes in favor are required. *Id.*

¹³² *Id.*

¹³³ Mathematically, only seven Member States are needed to pass legislation. *Id.*

¹³⁴ As a result of this potential, the SEA also includes Article 100a(3) which provides that: [t]he Commission, in its proposals envisioned in paragraph 1 concerning health, safety, environmental protection, and consumer protection, will take as a base a high level of protection. Vandermeersch, *supra* note 38, at 417. Nevertheless, this ambiguous phrase, "a high level of protection," is capable of resulting in different interpretations. *Id.* at 417-18.

¹³⁵ See *supra* notes 57-65 and accompanying text.

¹³⁶ Before the concession, Denmark, France, Germany, the Netherlands, Spain, and the United Kingdom supported the proposal. However, these six nations account for only forty-six of the fifty-four votes necessary for passage under qualified majority voting. *Ministers Agree Environment Over Goods, supra* note 20; *Ministers Agree on Waste Shipment Regulations, supra* note 22.

corresponding EC Treaty Article must be established. While the scrutiny may seem simple on its face, in practice it has proven to be difficult.

In the *Titanium Dioxide* case,¹³⁷ the Court of Justice addressed this two-step process resolving the proper legal basis for the Titanium Dioxide Directive.¹³⁸ The Court focused on the purpose and content of the Directive to determine which Article best supported its goal.¹³⁹ The Court found the Directive had dual objectives: protection of the environment and equalization of titanium trade competition.¹⁴⁰

Following a determination of the legislation's object, the Court concentrated on the objectives of the Articles at issue. Facially, Article 100a seeks to ensure the completion of the internal market pursuant to the four freedoms of Article 8a.¹⁴¹ Article 100a is to apply when measures "have as their *object* the establishment and functioning of the internal market."¹⁴² By negative implication, Article 100a would not apply when measures merely *affect* the internal market.¹⁴³ Additionally, the efficacy of Article 100a as a legal basis for legislation adopted after December 31, 1992 is questionable.¹⁴⁴

The objective of Article 130s, which must be read with Article 130r and 130t, deals broadly with protection of the environment. Article 130r, in stating the objectives of the Community's environmental policy includes the goal "to preserve, protect and improve the quality of the environment."¹⁴⁵ Article 130r also provides that measures shall be taken as "preventive actions."¹⁴⁶ Furthermore, action must be addressed at the Community level if the objectives can be better attained at the Community level than at the

¹³⁷ 1991 E.C.R. I-2867.

¹³⁸ Titanium Dioxide Directive, *supra* note 85.

¹³⁹ 1991 E.C.R. I-2867, para. 10.

¹⁴⁰ *Id.* para. 13.

¹⁴¹ EEC Treaty Article 8a provides for the free movement of goods, persons, services, and capital. EEC TREATY art. 8a.

¹⁴² EEC TREATY art. 100a(1).

¹⁴³ Vandermeersch, *supra* note 38, at 419.

¹⁴⁴ *Id.* Vandermeersch argues that the provision is a temporary one and when a debate between Articles 100a and 130s arises post-1992, Article 130s should triumph. *Id.* Article 100a was added in 1987 to facilitate the consummation of the internal market and the date has passed for completion. Article 8a prescribed December 31, 1992 as the date for realization of the internal market. EEC TREATY art. 8a (as amended 1987). Thus, the need for measures to expedite the opening of borders is lessened.

¹⁴⁵ EEC Treaty, art. 130r(1)(i) (as amended 1987).

¹⁴⁶ *Id.* art. 130r(2).

Member State level.¹⁴⁷

In the *Titanium Dioxide* case, the Court noted the dual objectives, but found the Titanium Dioxide Directive at issue weighed more heavily on reducing the disparities in trade than on environmental protection.¹⁴⁸ Arguably, the *Titanium Dioxide* case could be limited to its facts because of the Court's fact-specific inquiry,¹⁴⁹ and is thus easily distinguished from the Waste Shipment Regulation.

The recitals to the Waste Shipment Regulation specify preservation, protection, and improvement of the environment¹⁵⁰ and international accord¹⁵¹ as goals of the Regulation, without any reference to economic disparities in waste trade.¹⁵² Although the Waste Shipment might have an effect on internal trade, its fundamental purpose is protection of the environment.¹⁵³ If necessary, the Court of Justice could isolate the purpose and contents of the Waste Shipment Regulation and adjudge them to be fundamentally environmental and within the purview of Article 130s.

c. *Role of the Community Institutions*

In addition to the voting and object disparities, Articles 100a and 130s differ greatly with regard to the roles of the Parliament and the Commission. These differences are embodied in the conflicting legislative processes and the consultation and cooperation procedures.

Although the *Titanium Dioxide* case turned on the objectives of the Titanium Dioxide Directive, the Court appears to have relied more upon the "*element essentiel*" of the Parliament in the cooperation procedure, than on the impact on competition.¹⁵⁴ Thus, the Court held that by changing the

¹⁴⁷ *Id.* art. 130r(4).

¹⁴⁸ Case 300/89, *Commission v. Council*, 1991 E.C.R. I-2867, para. 15.

¹⁴⁹ John T. Smith and Joshua D. Sarnoff, *Free Commerce and Sound Waste Management: Some International Comparative Perspectives*, 15 Int'l Env't. Rep. (BNA) No. 7, at 207 (Apr. 8, 1992). These facts include "strong indications that a major purpose of the Directive was harmonization of competitive conditions among dioxide producers" *Id.*

¹⁵⁰ Waste Shipment Regulation, *supra* note 3, recital 6.

¹⁵¹ *Id.* recitals 1-3.

¹⁵² *Id.*

¹⁵³ This is the position taken by the Council in key environmental measures over the last several years. *Waste: New Trade Regulation Could End Up In The Dock*, Eur. Env't. (EIS) No. 405 (Mar. 2, 1993).

¹⁵⁴ Case 300/89, *Commission v. Council*, 1991 E.C.R. I-2867, para. 19.

legal basis to Article 130s, the Council subverted the Parliament's essential role in the legislative process.¹⁵⁵ This subversion of the democratic process forced the Court to annul the Titanium Dioxide Directive.

The significance of this holding is limited by the realization that the essential role of Parliament is linked to Article 100a and the fulfillment of the internal market. Conversely, the object of the Waste Shipment Regulation, as noted above, is not the internal market, but preservation, protection, and improvement of the environment,¹⁵⁶ and thus participation of the Parliament is not as crucial.

2. *Effect on Future Environmental Legislation*

Although Environment Commissioner Karl Van Miert asserted the use of Article 130s was a "special case" in reaching the compromise text of the Waste Shipment Regulation,¹⁵⁷ the implications of the decision are clearly far-reaching. The Council has repeatedly adopted legislation based on Article 130s that directly contradicts the Commission and Parliament proposals¹⁵⁸ and that has successfully challenged in the Court of Justice. If the Waste Shipment Regulation passes the test, the decision can be seen as precedent for future measures debating the use of Article 130s vis-a-vis 100a.

Although the discussion has focused thus far on the choice between Articles 100a and 130s, the role of Article 113 concerning external trade must not be ignored. The Waste Shipment Regulation, as proposed by the Commission, was based on Articles 100a and 113.¹⁵⁹ Article 113 grants

¹⁵⁵ *Id.* para. 20, citing Case 138/79, *Roquette Freres v. Council*, 1980 E.C.R. 3333, para. 33 and Case 139/79, *Maizena v. Council*, 1980 E.C.R. 3393, para. 34. In *Maizena*, the Court held:

The consultation . . . is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level, the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly.

Id. at 3424.

¹⁵⁶ Waste Shipment Regulation, *supra* note 3, recital 6.

¹⁵⁷ See *supra* note 14 and accompanying text.

¹⁵⁸ *E.g.*, Framework Directive on Waste, Council Directive 91/156, 1991 O.J. (L78) (amending council Directive 75/442/EEC) (currently being considered by the Court of Justice).

¹⁵⁹ Proposed Waste Shipment Regulation, *supra* note 4.

the Community authority to act in the interests of Community external trade policy.¹⁶⁰ Presuming that Article 130s should prevail over Article 100a, the question remains whether Article 113, in connection with Articles 100, 235, or both could serve as an effective legal basis.

Taking the position that Article 113 is the correct legal basis for Trade-Related Environmental Measures¹⁶¹ (TREMs), one commentator asserts that the key objective of the Waste Shipment Regulation is external trade and should have Article 113 as its basis.¹⁶² However, under the theory of parallelism, the Waste Shipment Regulation, as adopted based upon Article 130s, has the authority to act outside the Community. Parallelism embodies the principle that the Community has the authority to act externally, in situations after it has already acted internally.¹⁶³ Thus, the Waste Shipment Regulation based on Article 130s enables the Community to act internally, and correspondingly under parallelism, to enter into international agreements in the transboundary waste field.

B. The Substantive Effects of the Waste Shipment Regulation

Adoption of the Waste Shipment Regulation was necessary to control and supervise waste shipments within and into the European Community Member States and to control waste shipments to and from the Member States to extra-Community States. The impetus for adopting the Waste Shipment Regulation was threefold: first, the desire to come into accord with international agreements;¹⁶⁴ second, the need to replace the prior Transboundary Waste Directive with a Regulation;¹⁶⁵ and third, the concerns re-

¹⁶⁰ EEC TREATY art. 113.

¹⁶¹ The term was coined by Paul Demaret building on the pattern of GATT parlance including TRIPs (Trade-related aspects of intellectual property rights) and TRIMs (trade-related aspects of investment measures). Paul Demaret, *Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community*, THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION 315, 319 (Marc Maresceau ed.) (forthcoming 1993) (on file with the author).

¹⁶² *Id.* at 358, 363-67.

¹⁶³ See *supra* notes 66-68 and accompanying text.

¹⁶⁴ Waste Shipment Regulation, *supra* note 3, recitals 1-3.

¹⁶⁵ *Id.* recital 4; see ESC Opinion, *supra* note 9 (discussing the failure of Member States to act upon prior directives regarding transboundary waste).

With regard to the failure to act upon environmental directives generally, the Council adopted the Declaration of Environmental Imperative. Declaration by the European Council

garding waste control in the common market to ensure a high level of protection of the environment and human health.¹⁶⁶

1. *Effect on European Community Law*

The Waste Shipment Regulation replaces the Directive on the Transfrontier Shipment of Hazardous Waste.¹⁶⁷ Waste between Member States is delineated into three categories: waste for disposal,¹⁶⁸ waste for recovery,¹⁶⁹ and shipments of waste for disposal and recovery between Member States with transit via third states.¹⁷⁰ The Waste Shipment Regulation requires a complex notification procedure¹⁷¹ demanding consent for shipment of virtually all wastes.¹⁷² With respect to waste for disposal, the ability to object to shipments of waste grants Member States the authority, in accordance with the EEC Treaty, to take measures prohibiting generally or partially, or to systematically object to shipments of waste.¹⁷³ However, this authority is limited by an exception allowing bilateral agreements for Member States producing so small a quantity of waste that sovereign disposal is economically unfeasible.¹⁷⁴ The significance of this power to systematically object is that Member States may again create barriers to goods. This power contradicts the Court of Justice's decision in *Commission v. Belgium*¹⁷⁵ where the ability to ban imports of waste was limited to

on the Environmental Imperative, E.C. BULL. No. 6, at 17, 18 (1990); see also *EC Directives Need To Be Backed Up With Other Incentives*, Auditors Say, Int'l Env't. Rep. (BNA) 642 (Oct. 7, 1992) (discussing EC Court of Auditors Report, 1992 O.S. (C 245/1), and concluding that there is a significant gap in environmental rules in force and those in application).

¹⁶⁶ Waste Shipment Regulation, *supra* note 3, recital 5.

¹⁶⁷ *Id.* recital 4.

¹⁶⁸ *Id.* arts. 3-5.

¹⁶⁹ *Id.* arts. 6-10.

¹⁷⁰ *Id.* art. 12.

¹⁷¹ In the case of the above wastes, the notification procedure shall take the form of a consignment note notifying the receiver of pertinent information regarding the shipment. *Id.* In the particular case of waste for disposal and recovery between Member States with transit via third states, the notifier shall send a copy of the notification to the third State. *Id.*

¹⁷² On receipt of notification, in the cases of waste for disposal and waste for recovery, the competent authority of destination has three working days to acknowledge notification, *id.* and has thirty days within which to object to the shipment. *Id.* arts. 4(2)(a), 7(2).

¹⁷³ *Id.* art. 4(3)(a)(i).

¹⁷⁴ *Id.* art. 4(3)(a)(ii)-(iii).

¹⁷⁵ Case 2/90, *Commission v. Belgium*, Judgement at July 9, 1992, 1992 O.J. (C 195) 8.

instances required for the protection of health.¹⁷⁶

2. *Effect on International Agreements*

As the Waste Shipment Regulation's recitals suggest,¹⁷⁷ the extra-community provisions,¹⁷⁸ and most particularly the export provisions,¹⁷⁹ are intended to incorporate into community law the requirements of the Basel Convention,¹⁸⁰ and the Fourth Lomé Convention.¹⁸¹ As adopted, the Community will be able to ratify both conventions as a supranational organization.

a. *Basel Convention*

The Waste Shipment Regulation covers a broader scope of wastes than the Directive,¹⁸² which will allow the Basel Convention to be implemented in the Community. The fundamental emphasis of the Basel Convention is the necessity of "environmentally sound management" in the receiving nation.¹⁸³ Although the intra-community provisions do not fully satisfy this standard,¹⁸⁴ the Waste Shipment Regulation accomplishes this goal of environmental protection within the Community by promoting the "proximity principle."¹⁸⁵

b. *Lomé IV Convention*

The extra-community provisions of the Waste Shipment Regulation are

¹⁷⁶ *Id.*

¹⁷⁷ Waste Shipment Regulation, *supra* note 3, recitals 1-3.

¹⁷⁸ *Id.* arts. 14-24.

¹⁷⁹ *Id.* arts. 14-18.

¹⁸⁰ Basel Convention, *supra* note 23.

¹⁸¹ Lomé IV, *supra* note 23, pt. 2, tit. I, art. 39(1).

¹⁸² Waste Shipment Regulation, *supra* note 3, art. 14(1).

¹⁸³ Basel Convention, *supra* note 23. The Convention defines this to mean "taking all practical steps to ensure that [covered wastes] are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes." *Id.* art. 2(8).

¹⁸⁴ For intra-EC shipments, the proposal omits the Basel Convention requirement that the country of export prohibit export if it has reason to believe the waste will not be managed in a "environmentally sound" manner in the receiving country.

¹⁸⁵ Waste Shipment Regulation, *supra* note 3, art. 4(3)(a)(i).

also sufficient to bring the Community into compliance with the Lomé IV Agreement.¹⁸⁶ In consideration of the African nations concern, the fourth revision of the Lomé Convention, signed in December 1989, included a provision prohibiting the export of all hazardous and radioactive waste from the EC to any ACP state and banning the import by ACP nations of such waste from any country.¹⁸⁷ In furtherance of this Agreement, the Waste Shipment Regulation includes Title IV, Chapter C, "Export of waste to ACP States"¹⁸⁸ which prohibits all exports of waste to ACP States.¹⁸⁹ The Waste Shipment Regulation does not, however, prevent the re-export of waste to ACP States if the ACP State has illegally exported the waste to the Member State.¹⁹⁰ By addressing the ACP States in the Waste Shipment Regulation, the Community has demonstrated its willingness to cooperate in the international control of wastes.

IV. CONCLUSION

The Waste Shipment Regulation provides assurance the Community will protect the integrity of the environment by allowing Member States to systematically reject shipments of waste from other Member States despite pressure to completely eliminate internal frontiers in light of the common market. In choosing to adopt the measure as a Council Regulation, the Community ensures strict implementation of the environmental protection objectives in the Member States and avoids the pitfalls experienced with the implementation of Community Directives.

Article 130s is undoubtedly the appropriate legal basis for the Waste Shipment Regulation with regards to the Court of Justice precedents. By utilizing Article 130s as the legal basis, the Council has again affirmed the objectives set forth in Article 130r(1) of environmental protection within the Community. The corresponding unanimity requirement correctly assures a consensus among Ministers in all actions taken, with only limited opportunity for serious compromise. Furthermore, the content and objectives of the Waste Shipment Regulation are singularly environmental, corresponding to

¹⁸⁶ *Id.* art. 18.

¹⁸⁷ Lomé IV, *supra* note 23, pt. 2, tit. I, art. 39(1) (describing the wastes to which the export prohibition is to apply, as well as shipments between countries).

¹⁸⁸ Waste Shipment Regulation, *supra* note 3, art. 18.

¹⁸⁹ *Id.* art. 18(1).

¹⁹⁰ *Id.* art. 18(2)-(3).

Article 130r-t, and should not be considered as primarily effecting external trade or the common market. By requiring notification and consent upon shipments of waste, the Waste Shipment Regulation safeguards intra-Community shipments to ensure proper disposal of waste as near the source as possible, while allowing for the economic disparities of the smaller states.

In the international arena, the Community has initiated a new era of environmental policy that should provide a successful model for the coexistence of intra-Community and extra-Community environmental protection. Adoption should provide for swift ratification of the Basel and Lomé IV Conventions.

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