ARTICLES

THE MIRAGE OF EC ENVIRONMENTAL FEDERALISM IN A RELUCTANT MEMBER STATE JURISDICTION

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INTRODUCTION

For purposes of this study of European environmental federalism, I will posit the existence of a Member State called the Reluctant Jurisdiction (RJ).[1] The "reluctance" refers to the fact that this notional state is less than enthusiastic in its application of European environmental law. An underlying premise of the analysis is that the question of whether European environmental federalism is working, or can work, must be tested against the political, economic, and judicial reality in the RJ.[2] For the most part, RJs are countries that became Member States of the European Community (EC) before they had developed their own indigenous traditions of environmental protection. Often, the lack

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[1] The term "federalism" has two distinct and nearly opposite meanings. In the United States, for instance, it refers to a balance between national and state power which favors the retention of as much state control as possible. Within the European Union (EU), however, the term refers to the ongoing process of integration that leads towards a kind of European "superstate," at the expense of Member States' national institutions. In the environmental context the same dichotomy holds true. In the U.S. academic literature, environmental federalism refers to a sharing of responsibilities between the two levels of government for environmental protection. In the European context, environmental federalism would tend to indicate a pre-emption of control by European Community institutions.

[2] The success or failure of a federal, or centralized, legal initiative must be evaluated in terms of its effect on reluctant units of the federation. Enthusiastic jurisdictions would likely create similarly stringent measures on their own. Where a federal instrument raises the general level of environmental protection, or adds new protection, such action is only logical to the extent that is it based on a consensus that some constituent parts of the whole (in the EC context, certain Member States) would not have achieved similar levels on their own.

of indigenous environmental protection was due to comparatively late industrial development; many environmental problems can be traced to large infusions of capital following integration into the EC.[3]

There is much debate as to whether EC institutions, having involved themselves so deeply in the creation of environmental legislation, have a further obligation to ensure a uniform, EC-wide level of environmental law application or enforcement. Since the fundamental compliance obligations rest with the individual Member States, it could be argued that Member State enforcement-related failings are not the responsibility of the Community per se—blame for national laxity rests squarely upon the Member States themselves. Consistent with this view, decisions of the European Commission to act against Member States for non-implementation are selective, and largely unreviewable.[4] The Commission does not, as a matter of policy, take action against decisions of the national courts, even when the decisions clearly fail in their application of EC environmental law.[5] In the event of egregious national failures to implement a European environmental directive, the European Commission may initiate legal action in the Court of Justice,[6] but this procedure is limited to instances in which the Commission has been provided signifi-

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[3] While this study takes Ireland as a focus, similar problems in environmental policy may be seen in southern Member States of the EU. *See* James J. Friedberg, *Views of Donana: Fragmentation and Environmental Policy in Spain*, 3 COLUM. J. EUR. L. 1 (1996-1997).

[4] For a general discussion of the difficulties related to attaining *locus standi* to question a decision of the Commission before the European Court of Justice, see Case C-321/95 P, Stichting Greenpeace Council (Greenpeace International) v. Commission, 1998 E.C.R. I-1651.

[5] *See generally*, JAN JANS, EUROPEAN ENVIRONMENTAL LAW 143-50 (1995).

[6] Article 226 (ex 169) of the Treaty Establishing the European Community reads:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its comments.
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> If the State does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, O.J. (C 340) 3 (1997), art. 226 (ex art. 169) [hereinafter EC Treaty]. Note that this treaty established a new numbering system for the Treaties of the European Communities. In this Article the new numbers as codified in the consolidated version will be followed by the former numbers in parentheses.

cant and cogent evidence by a citizen source within the non-complying Member State.[7] The Commission does not conduct environmental "investigations," and is extremely cautious in its approach to the Member States upon the receipt of a citizen complaint.[8] Typically, the Commission is induced to act only in those instances where the harm from the national abuse is so serious as to outweigh the required "legal capital" and political consequences of pursuing action before the Court of Justice.[9] Thus, even blatant failures by national courts to apply European environmental directives can go unaddressed by the Commission.

A major structural problem within the European environmental system is that, although the EC maintains important and demanding environmental policies and produces substantive environmental directives,[10] and the Court of Justice provides many inspirational pronouncements in its interpretation of said policies and directives, these legislative and judicial goods are not fully "delivered" into the RJ. It is often assumed by outside academic commentators that the policies, directives, and pronouncements of the Court of Justice are "available" to citizens of the Member States.[11] As well developed as European environmental law is *conceptually*, it is hopelessly flawed *procedurally*. Thus, while the belief persists that EC environmental law can ultimately be enforced by citizen plaintiffs against their own national govern-

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[7] *See* JANS, *supra* note 5.

[8] *See id.* at 146-50.

[9] This takes into account the probability of success in the Court of Justice.

[10] Such directives have been produced with decreasing frequency.

[11] *See*, *e.g.*, Richard J. King, *Regional Trade and the Environment: European Lessons for North America*, 14 UCLA J. ENVTL. L. & POL'Y 209 (1995-1996). King states:

> Community legislation once adopted becomes the law of the Member States. The ECJ's development of the doctrines of direct effect and supremacy, together with the Community's system of judicial review, has had the effect of constitutionalizing Community law, nullifying the capacity of Member States to selectively apply elements of the *acquis communautaire* or to disregard decisions of the ECJ. More specifically, the fact that national courts play a significant role in the implementation of Community law forces governments of Member States which deviate from Community legal norms to defend their conduct before their national courts or the ECJ (at the request of the Commission or a national) on legal grounds. By making the conduct subject to legal review and reasoning, Member States cannot simply disregard elements of Community law unless the reasons for doing so are legitimate. Also, having the Community's legal rules adopted by national courts will likely be more successful at making governments comply with their decisions.

Id. at 240-41 (footnotes omitted).

ments, in many cases, and most cases within RJs, this is simply not true.[12]

Whether driven by a general desire for the centralization of policy-making or a sincere desire to protect the environment, or some combination of the two, much attention has been given to environmental protection at Community level. Even before environmental matters explicitly appeared in the EC Treaty in 1986, the Court of Justice recognized that environmental protection was an "essential" objective of "general interest" to the Community.[13] The court made this declaration in response to a challenge of EC-level environmental legislation, the promulgation of which preceded the recognition of legal competence over the area.[14]

In the intervening years, the Court of Justice has not hesitated to accord environmental principles autonomous status in the Community legal order, even where these principles have threatened the primacy of sacred Community concepts such as the free movement of goods.[15] Moreover, the court has scrupulously upheld Member State obligations with regard to complete and accurate implementation of environmental directives. It has rejected Member State arguments and excuses premised on the practicalities of national law and politics, and it has consistently required genuine compliance.[16]

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[12] This belief may persist because many of the critiques of Community environmental law may be too abstract to be of assistance to litigants. *See*, *e.g.*, Damian Chalmers, *Inhabitants in the Field of European Community Environmental Law*, 5 COLUM. J. EUR. L. 39 (1988-1989).

[13] Case 240/83, Procureur de la Republique v. Association de défense des brûleurs d'huiles usagées, 1985 E.C.R. 531, 549.

[14] *See id.* It was not until the Single European Act amendments (effective 1987) to the EC Treaty that express provisions on environmental protection were included under Article 130. *See* JANS, *supra* note 5, at 1-44. Prior to that time, environmental legislation was based on Article 100, concerning harmonization of laws with respect to the establishment of an internal European market, or Article 235, a general provision allowing for legislation not related to an explicit Treaty provision, but otherwise necessary to attain a Community objective. *See id.* The earliest Community legislation on an environmental matter dates from the late 1960s; the first EC Action Program on the Environment dates from 1973. *See id.* at 1-7. Further amendments to the Treaty in 1992 made majority voting by the Council, rather than unanimity, the norm in the creation of environmental legislation. *See id.* at 1-44.

[15] *See*, *e.g.*, Case 302/86, Commission v. Denmark, 1988 E.C.R. I-4607; Case C-2/90, Commission v. Belgium, 1992 E.C.R. I-4431.

[16] Across a wide range of environmental directives, the Court of Justice consistently has required complete and accurate transposition and implementation by the Member States, and has refused to allow any "special pleadings" by the Member States to interfere with these general requirements. *See*, *e.g.*, Case 92/

Based on these cases, international and Community commentators have tended to exaggerate the effectiveness of European environmental federalism. Correspondingly, they have ignored profound structural defects in the corresponding mechanisms of enforcement.[17] The recent accession to EC membership by such environmentally "enthusiastic jurisdictions" as Austria and Sweden may only exacerbate the existing disuniformity in enforcement across Member States. These enthusiastic jurisdictions may resist explicit centralized directions with respect to the protection of their national environments.[18] Should this lead to

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79, Commission v. Italy, 1980 E.C.R. 1115, 1115 (stating that "Member States are obliged to ensure the full and exact application of the provisions of any directive"); Case 291/84, Commission v. Netherlands, 1987 E.C.R. 3483 (requiring completeness and precision in the implementation of environmental directives).

17 *See* David Baldock & Edward Keene, *Trade and the Environment: Incorporating Environmental Considerations in Common Market Arrangements*, 23 ENVTL. L. 575 (1993). In their article, Baldock and Keene conclude:

> There is a danger that the creation of a common market can generate new environmental costs both internally and in the wider environment. Yet the common market's own institutions may have no authority or capacity to address these issues and initiate appropriate policies. However, within the EC, the empowerment of new regulatory authorities, and the widening of the issues over which they have influence, has been a characteristic feature of the political process that has accompanied development. This pattern may be repeated elsewhere, if on a more modest scale. The interdependency that is accelerated by common market arrangements may help to strengthen those authorities best placed to deal with problems, such as the environment, which have a strong international element.

Id. at 604-05; *see also* Kenneth M. Lord, *Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice,* 29 CORNELL INT'L L.J. 571 (1996). He says:

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

Id. at 599 (quoting A. David Demiray, *The Greening of Free Trade*, 7 EMORY INT'L L. REV. 293, 300 (1993)). *See* King, *supra* note 11, at 234 (writing that "[t]he EC has been the only [Regional Integration Arrangement] to achieve any success in harmonizing its Members' environmental (and other regulatory) standards.").

18 *See, e.g.*, Roger Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L. L.J. 1092 (1995). Goebel writes that "[i]n the environmental field, the accession negotiations revealed that their present standards were usually higher than

dilution of the already vague language utilized in most EC environmental directives, enforcement in the RJs will become more difficult—and the effectiveness of European federalism even more exaggerated.

There has been little empirical analysis of the problems faced by citizen enforcers in RJ states within the EC. Likewise, little study has been done of the enormous gulf between, on the one hand, the intentions expressed in the myriad of environmental directives and the rhetoric of the Court of Justice, and, on the other, the extraordinarily inefficient machinery available for applying (or attempting to apply) these directives and pronouncements of the Court of Justice in national courts.[19] This study seeks to address the scarcity of such work in the academic literature.

A. *A Failed Paradigm: The National Court Applying European Community Environmental Law*

The genesis of environmental law in the European context is often presented in terms of a successful supranational mythology:[20] the effects of a common market can only be addressed by

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those of the Community. In order to preserve the transitional derogation for their present rules, the three States are apt to lobby for new and higher Community environmental protection rules." *Id*. at 1116. Goebel does not point out that their higher standards can lead enthusiastic jurisdictions to resist Brussels dictating their methods of implementation.

[19] Problems of enforcement have been identified in the academic literature, but virtually no commentators have gone so far as to suggest that the environmental legal system in Europe is hopelessly flawed and must be overhauled. For a critical perspective on the Community environmental law system, see Cliona J. M. Kimber, *A Comparison of Environmental Federalism in the United States and the European Union*, 54 MD. L. REV. 1658, 1666 (1995):

> Substantial non-compliance with environmental measures by member states paradoxically works in favor of the agreement of states to environmental measures. States may agree to Commission proposals for the purpose of securing the goodwill of other Member States, safe in the knowledge that implementation of these measures can be delayed and minimized.

Kimber goes on to distinguish the American system: "federal institutions in the U.S. responsible for regulating the environment are, for the most part, interacting with relatively similar legal and administrative systems in each state. It is easier, therefore, for the U.S. to engage in central regulation than it is for the E.U." *Id*. at 1669; *see generally*, LUDWIG KRÄMER, *Deficits in Application of E.C. Environmental Law and its Causes*, *in* FOCUS ON EUROPEAN ENVIRONMENTAL LAW (2d ed. 1997) (describing problems in transposition and application by Member States across various sectors of European environmental law).

[20] *See, e.g.*, King, *supra* note 11.

Community instrumentalities; with the completion of the Single Market Programme,[21] the need for a uniform level of environmental compliance across Europe becomes increasingly obvious.[22] While the European political elite might be loathe to admit it, the process of "bootstrapping" environmental law onto the grandiose economic experiment has brought forth a system which clumsily straddles the characteristics of both national and international environmental law. While ostensibly based on the clear lines of authority and enforcement found in nation states, European environmental law, at least in the RJ, suffers from the inaccessibility problems of international environmental law.

The mistaken assumption that legislative and judicial rhetoric result in practical implementation is hardly unique to the EC legal regime. However, it is in the non-economic, "humanistic" areas of European competence that this disjunction is most acute. Community institutions, led by the Commission, presumably take action in such areas as environmental protection on the premise that they are capable of successfully "delivering" appropriate substantive policies to citizens across the Member States; whether this is true is a question of "competence."[23] However, it may be that a situation has developed in RJs in which neither the Member State nor the Community is truly "competent" in

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[21] The Single European Act of 1986 added Article 14 (ex 7a) to the EC Treaty:

> The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. . . .
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> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

EC TREATY, art. 14 (ex art. 7a).

[22] *See, e.g.*, JAN JANS, EUROPEAN ENVIRONMENTAL LAW 1-65 (1995) (describing generally the development of an environmental protection regime within the framework of EC law).

[23] Here, the term "competence" is used in the ordinary sense and not in the federal pre-emption sense. *See* Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection,* 7 DUKE ENVTL. L. & POL'Y F. 225. Sarnoff writes:

> Federal environmental regulation may be warranted where federal regulatory power exists because: (1) it is more efficient than state regulation at achieving specified goals; (2) it regulates pollution across state borders; (3) it prevents states from reducing social welfare in response to competition for industry; (4) it more properly takes environmental interests into account than state political processes; and (5) it codifies moral rights.

Id. at 230.

that neither maintains control over the implementation of accepted EC environmental standards.

Ironically, it was in the early and foundational judicial doctrines of supremacy and direct effect that the Community purported to distinguish itself from mere "international" or cooperative arrangements among nations.[24] In the EC, valid Community laws would trump disharmonious national laws, and citizens would be able to enforce provisions of Community law in national courts charged with guaranteeing these rights.[25] Just as the new system coerced, it also deigned to give; obligations were imposed on Member States and corresponding rights were held out as capable of enforcement within their respective legal regimes.[26]

It is not sufficiently appreciated, especially outside Europe, that the enforcement of Community law depends upon the willingness of the *national* courts to accept the role of *European* courts. In the environmental context, national courts are expected to digest the new directives and to (1) contemplate necessary changes within the national legal regime, including structural and procedural changes, and (2) refer any questions as to this relationship to the Court of Justice.[27] To the extent that it

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[24] *See* PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES AND MATERIALS 163-212, 255-94 (2d ed. 1998).

[25] *See* HJALTE RASMUSSEN, THE EUROPEAN COURT OF JUSTICE 116-25 (1998).

[26] The early Court of Justice was famous for asserting legal relationships and principles for which there was no constitutional basis, a disjunction that later became obvious in the environmental realm. In what has become the Community's legal anthem, the Court of Justice stated in Case 26/62, Van Gend En Loos v. Nederlandse Administratie Der Belastingen, 1963 E.C.R. 1, 12:

> The objective of the EC Treaty . . . implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. . . . It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights. . . . The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

[27] Article 234 (ex 177) of the EC Treaty reads:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
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> (a) the interpretation of this Treaty;
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> (b) the validity and interpretation of acts of the institutions of the Community . . .;
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> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

is expected that this will occur, the Community law regime has demonstrated a stunning structural naivete. The national court is expected to enthusiastically assist an environmental plaintiff in sanctioning a national authority for failing to fully implement a European environmental directive. It is further assumed that the national court will accept the notion that European environmental directives can alter the existing national balance (or imbalance) between property interests and the rights of public interest plaintiffs. In assessing whether reality has met expectation, it must be asked whether national courts in RJs have shown such a willingness. If the level of willingness to refer European law questions under Article 234 (ex 177) is in fact very uneven across the various Member States jurisdictions of Europe, this cannot be seen as equitable.

The issue here is not only the endemic problem of economically disadvantaged, or otherwise unequal, litigants in public interest disputes (such as, the citizen versus the state; the residents' group versus McDonald's). Plaintiffs wishing to invoke European environmental law face handicaps beyond those faced by other public interest plaintiffs under the European regime. Where economically or socially disadvantaged groups invoke European social legislation before national courts, they at least enjoy the advantage of a silent army of persons similarly situated. Numbers can act as a substitute for other kinds of power, as when EC law provides a welfare benefit of some kind, which the

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> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
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> Where any such a question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EC TREATY, art. 234 (ex art. 177).

In theory, national courts against whose decisions there is no judicial remedy under national law are obliged to refer questions of Community law to the Court of Justice, unless previous decisions of the Court of Justice have already dealt with the questions, or where the correct application of Community law is so obvious that there is no reasonable doubt about how the matter should be resolved (the judicially crafted *acte clair* doctrine). *See* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 280-85 (4th ed. 1998). Regarding the *acte claire* doctrine, Hartley writes, "If there is no doubt as to the meaning of the provision, it is argued, there can be no 'question' on which a decision is necessary: all the court has to do is to apply the provision." *Id.* at 283.

citizen "army" is unlikely to relinquish.[28] While national courts may initially resist the full application of EC law in these areas, the natural interest of key social groups makes it nearly impossible for the courts to refuse co-operation indefinitely. However, the relatively small constituency for environmental concerns, combined with the lack of clarity in European environmental law, substantially marginalize environmental plaintiffs.[29]

This paper will demonstrate, through a case study of environmental enforcement in a representative RJ, that there is little, if any, redress for persons denied the right to full application of European environmental law by national courts. The question posed is whether the mixed competence and mixed responsibility scheme makes sense in the environmental context, given the inherent conceptual weaknesses of environmental law. Consideration is given to the proposition that the Community institutions should either engage fully and forcefully in a commitment to environmental application, or remove themselves entirely from the field of environmental protection. Since it is highly unlikely that the Community could take this latter step without threatening the fabric of the Single Market, there is only one viable course of conduct: immediate legislative action at the Community level to eliminate the existing hiatus between aspiration and enforcement in European environmental law. Urgent academic attention should be given to devising changes in the structure of delivering environmental law substance throughout the EC, particularly the possibility of creating European regional environmental courts.

I
Peculiarities of Environmental Law Generally, Problems Specifically European, and the Folly of Subsidiarity as an Enforcement Concept

Environmental law is perhaps the most problematic and counter-intuitive area of substantive law when viewed in the context of our modern legal systems and values.[30] Where a tight

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[28] *See, e.g.*, Case 43/75, Defrenne v. Sabena, 1976 E.C.R. 455 (regarding the criteria for direct effect of a directive in the context of eliminating pay discrimination between male and female workers in the EC).

[29] *See generally* Martyn Day, *Shifting the Environmental Balance*, *in* Public Interest Perspectives in Environmental Law 184, 188 (David Robinson & John Dunkley, eds., 1995) (focusing on *locus standi* issues).

[30] *See, e.g.*, Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark*

nexus between the environmental and public health concerns is not widely perceived, environmental protection is more like a religious or philosophical conviction than a modern "legal right." The tangential relationship of a plaintiff to a "protected interest" in environmental law means that where substantive environmental legislation is created, if it is to be effective, the ultimate means of enforcement should be absolutely, indeed anomalously, clear.

Environmental law will not be taken seriously by decision-makers in the absence of third-party enforcement mechanisms for those instances in which the system fails to operate in good faith.[31] While "environmental protection" in the abstract is of interest to most people, as a political subject matter it suffers from grave enforcement deficits. These deficits can only be redressed by compensatory clarity in legislative drafting which unequivocally provides for citizen enforcement.[32] The process of drafting EC environmental directives has yet to yield such clarity. In Europe, the ultimate content of environmental legislation is not the result of a compromise between organized citizen groups and an inert political, propertied class, as might be the case in a single country jurisdiction. Rather, it is the result of a process of reciprocal compromise among more and less enthusiastic Member States.[33]

Thoughts on the Possibility of Law Reform, 44 VAND. L. REV. 1209 (1991); Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1969-1970); Christopher Stone, *Should Trees Have Standing?: Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); *see also* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347 (1998); Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994).

[31] *See* Plater, *supra* note 30; *see also* Kathleen C. Becker, Bennet v. Plenert*: Environmental Citizen Suits and the Zone of Interest Test*, 26 ENVTL L. 1071 (1996) (positing a test for locus standi in the environmental context based on the question: whom did the legislature have in mind to enforce provisions of the statute?).

[32] *See* ÖKO-INSTITUT EV. (INSTITUTE FOR APPLIED ECOLOGY) (1992), DRAFT PROPOSAL FOR A COUNCIL DIRECTIVE CONCERNING ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS, *reprinted in* Martin Fuhr et al., *Access to Justice: Legal Standing for Environmental Associations in the European Union*, *in* PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW, *supra* note 29, at 72, 72-107; *see also* Thomas Ormond, *"Access to Justice" for Environmental NGOs in the European Union*, in ENVIRONMENTAL RIGHTS: LAW, LITIGATION AND ACCESS TO JUSTICE 71-86 (Sven Deimann and Bernard Dyssli eds., 1992).

[33] *See* Richard Macrory & Ray Purdy, *The Enforcement of EC Environmental Law Against Member States*, *in* THE IMPACT OF EC ENVIRONMENTAL LAW

In national jurisdictions, the legislative process normally includes discussions of likely future effectiveness; those forces lobbying for passage of the legislation are vigilant with regard to the capability of the law as written to provide for enforcement. Ironically, in the creation of European environmental legislation, such enforcement mechanism issues tend to be ignored in favor of the promulgation of directives that provoke minimum disruption from RJs or other Member State forces which might be opposed to environmental micro-management by Brussels.[34]

Environmental law is part of a general restitution offered by industrial society to an environment damaged by the familiar culprits of modern economic activity. This is obviously true in Europe, where the integration of economies led to the concept of Europe-wide environmental standards.[35] Standards were implemented on this scale for essentially two reasons: (1) to level the competitive playing field, and (2) to restrain the worst effects of cross-border intensification of economic activity.[36] Yet, in any jurisdiction, environmental protection as a legal subject matter does not enjoy a firm legal basis, and is far from being grounded in well-established notions of private interests, cases and controversies, or property rights.[37]

Given the nature of electoral politics, the influence of corporate constituencies, and the diffuse and disorganized nature of the environmental lobby, one is faced with enormous inertia in any legal system as it reacts to environmental litigants. At best, such litigants, apparently representing a core of individuals willing to sacrifice themselves in the service of a non-majoritarian cause, enjoy the vague and unfocused sympathy of the general public. Altruism and self-sacrifice are not the philosophical concepts around which modern law has developed, and such litigants inevitably challenge the traditional tendency of courts to facili-

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IN THE UNITED KINGDOM 27-50 (Jane Holder ed., 1997) (writing, at 46, that "[t]he quality of draftsmen of Community instruments is a constant complaint, though not all the blame can be put on the Commission; Member States still make last minute late night compromises in Council with apparent little thought for the ambiguities created.").

[34] *See id.* at 27-50.

[35] *See* David Baldock & Edward Keene, *Incorporating Environmental Considerations in Common Market Arrangements*, 23 ENVTL L. 575 (1993).

[36] *See id.* at 584-605.

[37] For an example of a view summarizing the rise of and theoretical flaws in environmental activism in one jurisdiction, the United States, see Delgado, *supra* note 30.

tate the exercise of property rights.[38] Thus, because of the "counter-intuitive" nature of environmental law generally, and its properties of social restitution without a reliable lobbying base, the law available to protect the environment is only effective to the extent that it is extremely clear, and unambiguous in its enforcement mechanisms.

Does European environmental law meet this test of effectiveness? It is impossible to judge accurately the level of effectiveness by reference to the behavior of enthusiastic Member State jurisdictions and the pronouncements of the Court of Justice. Because of the disparate approaches across the EU, the functioning of European environmental law must be analyzed with respect to the most reluctant quarters of the union. In this analysis, one must (1) confront the issue of the appropriateness of the ubiquitous concept of "subsidiarity" in the environmental context,[39] and (2) evaluate the impact of the continuing independence of national courts in environmental enforcement.

A. *"Federal" Pre-emption and Subsidiarity*

The concept of pre-emption in European, as well as American, law is a highly complicated and uncertain matter. In the environmental law context, the stringency of the rules relating to the establishment of the Single Market, combined with the prominent role of the Community institutions in generating new environmental directives, has virtually assured that a certain amount of Member State-level activity in this field will be slowed.[40] This

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[38] *See* Plater, *supra* note 30, at 994-1008.

[39] In particular, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994). Bermann's enthusiasm for the concept of subsidiarity, and his tendency to connect it across the board with positive social, cultural and economic values, fails to differentiate the effects of subsidiarity on different areas of law. This Article maintains that subsidiarity has a decidedly negative effect in areas where there is inherent vulnerability, such as the environment. It is obvious that the United States would hesitate to return to its own version of "subsidiarity" in the area of civil rights or the environment, for instance. *See also* Denis Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537 (1996); Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616 (1994).

[40] While the subsidiarity principle pulls the Member States in the direction of more control over their own internal environmental regimes, the power of Community level review over such national measures, in the light of common market rules, pulls in the other direction. As the precise spheres of competence in the environmental area are unclear, less enthusiastic jurisdictions will be un-

is especially true in RJs where there is little national tradition of environmental protection. Certain Member States will come to expect that most standards and requirements will derive, as a matter of course, from Brussels. If this were to happen, these Member States may cease their generation of national environmental protection.

So what competence does the EC have in environmental matters, and what powers are retained by Member States to create peculiarly national environmental law?[41] Prior to the establishment of an express legal basis in the EC Treaty, environmental legislation had been created, and the Court of Justice had ruled environmental protection as an important Community concern.[42] The first explicit environmental provisions, complete with a specific subsidiarity requirement, were brought into the Treaty with the Single European Act amendments (effective 1987).[43] Article 176 (ex 130) allows the Member States to maintain or introduce more stringent protective measures than those required by Community legislation, as long as they are compatible with the Treaty, and notified to the European Commission.[44] Depending upon how established their national environmental law traditions are, the Member States now tend to look to Brussels for an indication of what they "must" achieve in

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likely to pursue significant environmental initiatives on their own. *See generally* Isabelle Martin, *The Limitations to the Implementation of a Uniform Environmental Policy in the European Union*, 9 CONN. J. INT'L L. 675 (1994).

[41] The United States has been experiencing a prolonged debate as to whether environmental protection is best left to the states or to the federal government. It should be said, though, that there is no school of thought in the United States that advocates federal law with *purely* state enforcement. This is because of the right of citizens to proceed to federal court. In this sense, any analogy with the situation in the EU is misplaced. Readers should imagine a system of U.S. federal environmental law without federal courts to get an idea of the dilemma experienced by NGOs in Europe. For a representative discussion of the view that environmental protection in America can be safely left to the states, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). For a rationalistic rebuttal to Revesz's argument, see Daniel C. Esty, *Revitalising Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

[42] *See* JANS, *supra* note 5, at 1-7.

[43] These provisions were further refined with the Maastricht Treaty in 1992, after which subsidiarity became a general Community law principle under Article 5 (ex 3b) of the Treaty. *See* EC TREATY, art. 5 (ex art. 3b).

[44] *See id.* art. 176 (ex art. 130t).

environmental protection.[45] While Members are still free to create environmental legislation of their own, in the RJs the EC, through this informal process, becomes the most important source for environmental laws.

In basic terms, federal pre-emption means that when matters are of national (indeed, supranational) concern, as opposed to local in character, federal laws pre-empt or take precedence over conflicting state laws.[46] In many areas of European law, Member States and the Community share competence, with the Community gradually asserting dominance on a directive-by-directive basis. In RJs, a less formal version of pre-emption has led to Member State inertia in environmental protection matters. Still, *formal* European pre-emption is incomplete in two ways. First, Community environmental legislation itself is incomplete, the result being that certain glaring omissions in Community law may never be filled. Second, the misleading doctrine of subsidiarity has caused confusion concerning the relationship between substantive European law and enforcement in Member States.

It will be the contention of this study that where the Community believes that subject matter can be better handled at Member State level, it should allow the states to control that particular field. But where the Community purports to pre-empt a subject matter by creating a directive, the directive should avoid ambiguity in basic content and ensure that enforcement is not singled out for "subsidiarity" status when the underlying subject matter is not.[47] Put another way, subsidiarity has no role once the Community has acted to create substantive legislation. Subject matter regulation and means of enforcement are inextricably linked.[48] In no area is this more true than environmental law,

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[45] *See generally* Martin, *supra* note 40. The situation may be analogized to "new federalism" in the United States whereby the federal constitution provides for a base level of rights upon which individual states may create *more protective* rights.

[46] *See* BLACK'S LAW DICTIONARY 1177 (6th ed. 1990) (defining pre-emption as a "[d]octrine adopted by U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws pre-empt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.").

[47] For an argument as to the importance in the American context of continued enforcement of national environmental laws by federal entities such as the EPA, see Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373 (1996).

[48] This matter does not seem to be well covered in the literature, even though it is widely acknowledged that Community environmental law enjoys

where even under the simplest and most straightforward system, enforcement is bound to be conceptually problematic. While the very concept of subsidiarity first appeared in tandem with the environmental matters newly included in the EC Treaty, in many ways subsidiarity is uniquely unsuited to the effective application of environmental law.[49]

Subsidiarity is justified on the grounds that decision-making will be kept "close to the people" of Europe.[50] As this paper will show, enforcement weakness masquerading as subsidiarity does not bring decision-making "closer to the people". Proximity does not enter into the equation. The point of analysis is whether enforcement mechanisms exist at all. In those jurisdictions where national authorities are eager, citizens can expect a high rate of compliance—even nuanced implementing regulations—at the national level. But in the RJ, subsidiarity means nothing where enforcement simply does not occur. Decision-making is neither near nor far in such a scenario.[51] Thus, subsidiarity ought to remain a threshold question relating only to subject matter competence. Once Community competence has been established (through inclusion of a power in the EC Treaty or legislative action, or both, at the Community level), all aspects of the new Community law ought to be placed firmly within the Community regime, including means of enforcement.[52]

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only partial application and enforcement in the Member States. Commentators appear to attribute this to a problem in the Member States themselves and individually, rather than to a fatal flaw in the Community environmental law system qua system. *See* Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L.J. 846, 879-80 (1993).

49 *See generally* Lenaerts, *supra* note 48; Marquandt, *supra* note 39.

50 In reality, subsidiarity is a reaction to fears of growing federalism in the EC. As such, it is a political expedient meant to assuage the Community's anti-federal forces.

51 Fuhr et al., *supra* note 32, at 77, write:

> The legal situation varies widely between the Member States of the EC. These disparities in access to justice tend to lead not only to different standards of environmental protection in the Member States but also to unequal conditions of economic competition. It is thus also in the interest of the establishment and functioning of the Internal Market that the legal provisions of the Member States concerning administrative and judicial review in environmental matters should be approximated.

52 The problematic relationship between environmental law and subsidiarity has obviously not gone unnoticed. *See* Laurens Jan Brinkhorst, *Subsidiarity and European Community Environment Policy: A Panacea or a Pandora's Box?*, 8 EUR. ENVTL. L. REV. 18 (1993). While Brinkhorst recognizes the difficulties posed by the introduction of subsidiarity, he nevertheless applauds the

Forcing environmental protection into the subsidiarity paradigm is enormously troublesome. It has been observed that subsidiarity as an anti-centralizing doctrine is meant to comfort the national state for its loss of power.[53] The addition of environmental matters to the body of Community concerns in the 1980s might have been threatening to certain Member States. It is thus understandable that subsidiarity might have seemed an appropriate safeguard against increased costs and demands of the center against the constituent States. However, environmental protection requires strong and unambiguous institutional power governing enforcement. Subsidiarity provides the RJ with a perfect excuse for non-compliance within the EC, just as "states' rights" has in the United States in similar debates over federal prerogatives.

B. *Defective Drafting of Directives*

The variety of environmental problems, created by disparities in economic maturity and national sensibilities, found across the Community has been offered as a justification for heavy reliance on broad and fairly abstract directives: each jurisdiction should be allowed to find its way towards proper and harmonious application within the national territory.[54] Unfortunately, the result is often legislative language that is so vague as to be nearly unusable.[55] Non-governmental organizations (NGOs) and others with a particular environmental interest may feel confi-

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notion of "decentralization" behind the subsidiarity concept. "The main shortcoming [of Community environmental legislation] . . . is that frequently the enforcement and implementation of Community environment policy measures by the Member States is inadequate and uneven. This is a serious problem for the Community. Shared responsibility or subsidiarity requires that everyone plays their part." *Id.* at 21.

[53] *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); *see also* Marquardt, *supra* note 39, at 617-18 (arguing that subsidiarity is in fact ill-suited to acting as the "defender of national sovereignty" in its emphasis on technical efficiency alone).

[54] *See generally* KRÄMER, *supra* note 19, at 120-23.

[55] *See* Fiona Gaskin, *The Implementation of EC Environmental Law*, 2 REV. EUR. COMMUNITY & INT'L ENVTL. L. 335 (1993). Gaskin writes in a diplomatic vein:

> The clarity of EU environmental laws is intimately connected with Member States' subsequent compliance with them. In the past, such clarity has frequently been found wanting. In part, this may be attributed to the need to find compromises among various national positions, which often complicates the drafting process. However, another important factor is that drafting is largely concentrated in the hands of administrators with

dent of their understanding of the Directive's various provisions. However, the task of successfully conveying the rationale of their positions to a reluctant and preoccupied national court is an imposing task. Unlike environmental legislation in the United States,[56] European environmental directives are silent on the issue of citizen enforcement and other key application matters.

The hesitancy to tackle enforcement issues at the Community level is exemplified by the inability to create a directive on access to environmental justice, a possibility first examined by the EC a number of years ago.[57] Such a simple step would have removed many of the obstacles faced by public interest litigants in their attempts to enforce European environmental law within the RJs.[58] Even if such a directive were passed, however, every substantive directive ought to make clear the necessary consequences within national law of non-compliance by national authorities. For instance, it is natural that citizen enforcers wish to rely upon provisions of European law to challenge decisions by national authorities via judicial review in the national courts. But the national courts may reject the view that failure by the national authorities to comply with obligations imposed by a European directive is fatal to a decision reached in compliance with national legislative requirements. This is especially likely where the national system grants enormous deference to national decision-makers in environmental and planning matters. In such a case, the national court is able to decide the scope, significance, and relevance of the obligations imposed by the directive. This leaves the rights of the would-be citizen enforcer at the complete discretion of the national court. Even where there are clearly outstanding issues of European law to be answered, nothing in the existing regime can force the national court to refer such a question to the Court of Justice under Article 234 (ex 177) of the Treaty—although theoretically required to do so.[59] Once the na-

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very little input—and frequently too late—from the legal unit in the European Commission's Directorate-General for Environment (DG XI).

Id. at 336.

[56] On the importance of citizen suit provisions in U.S. environmental statutes, see Jack D. Shumate, *Citizen Enforcement Suits: Will an Old Tool Take on New Importance?*, 24 N. KY. L. REV. 55 (1996).

[57] *See* Ormond, *supra* note 32.

[58] *See* Fuhr et al., *supra* note 32, at 96-107.

[59] *See* EC TREATY, art. 234 (ex art. 177).

tional court finds that it does not need the Court of Justice's view on a particular question, the matter rests.

C. *Myths of EC Law Effectiveness*

At least from the time of *Flaminio Costa v. ENEL*,[60] it was the clear intention of the Court of Justice that the European Community function not like a group of nations, but as a supranational entity, with direct lines of central authority and possessed of full law-making power.[61] Domestic law was to give way to Community law. In *Costa*, the court set out the terms of the new legal hierarchy: where Community law conflicted with national law, the national court would have to give effect to the Community law:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.[62]

Despite this pronouncement, there are no safeguards to ensure that Community law governs in reality, especially in non-"economic integration" areas. There is a sense that the Court of Justice presides over an ethereal legal empire, focused on the symmetry of divine forms. Would-be environmental litigants in RJs know this judicial construct of "impossibility" is fictional. If anything, Community enthusiasm for the retention of national differences in legal approaches has become pronounced in the areas of public interest law where it is least appropriate. It may

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[60] Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585.

[61] For a discussion about myth-making in European Community law generally, see EUROPE'S OTHER: EUROPEAN LAW BETWEEN MODERNITY AND POSTMODERNITY (Peter Fitzpatrick & James Henry Bergeron eds., 1998); PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (1992). In the former collection, see especially James Henry Bergeron, *An Ever Whiter Myth: The Colonization of Modernity in European Community Law*, 3-26.

[62] *Flaminio Costa*, 1964 E.C.R. at 593-94.

be that the Community does not have the necessary conviction in these areas, or that environmental questions in particular do not constitute a core preoccupation of the Community elites as a whole, quite apart from the goodwill and dedication of Directorate-General XI.[63]

Typically, a variety of interest groups make identifiable inputs into the national legislative drafting process. In the case of environmental law, business and industry federations would be competing with citizens groups and NGOs for representation of their interests within the terms of the legislation. Regardless of the inequality in such a struggle, its terms would be familiar to interested observers. In the case of EC legislation, as indicated above, the legislative dilution comes largely as a response to negative reactions by Member States.[64] These Member State representatives are under no obligation to advertise their own negotiating position to interested national citizens. Such mandatory consultation would be a more appropriate means of implementing the stated goal of subsidiarity than leaving the enforcement section of Community directives blank. It is no accident that without such a process one is left with ambitiously conceived directives, completely lacking in means of practical implementation. The concept of subsidiarity often provides the means of papering over these legal cracks.

Furthermore, it is not typically acknowledged that the lack of the typical legislative process surrounding the development of Community environmental law causes a reflexive hostility when these laws land, in their final incarnation, in the midst of unconditioned national regimes. When, as in the case of environmental directives, the assumptions contained in the directives concerning limitations on the exercise of private property rights conflict with long-standing national elite attitudes towards the freedom and power of propertied interests, it is likely that the national legal regime will find ways of resisting the externally imposed changes.

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[63] Directorate-General XI is the section of the European Commission charged with monitoring the implementation of European environmental law across the Community.

[64] As pointed out by Chalmers, *supra* note 12, there is lobbying of the Community institutions by industry pressure groups concerned about the content of environmental legislation. But the more inscrutable resistance comes from Member States themselves who fear being bound to new environmental laws at Community level, yet whose negotiating position in the Community context is scarcely accessible to their national public.

Since this in essence creates an incentive for traditionally powerful parties to evade the terms of the new environmental law coming from without, environmental pressure groups and litigants may be left in a worse state than without any European legislation. In one sense, European environmental law is a fig leaf both for the Commission, which can blame lack of national action on the national authorities, and the national government, which can create the impression of being in "full compliance" with European law, despite the fact that national courts and the Court of Justice may be far apart on key interpretive matters.

II
IRELAND AS AN RJ

Ireland may be studied as one example of an RJ—a state where little environmental law and little industrial development existed before EC entry in 1973.[65] Since that time, many environmental directives have found their way into Irish legislation and regulations, yet they have had little impact in the Irish courts, which remain fixated on their own national standards and conception of judicial review.

It may be that, as with social legislation, environmental legislation should be the end product of a long national battle. Without this process, the new legislation would appear "dropped in" from above, and provoke a greater degree of resistance than otherwise would have been present. Government spokespersons and mainstream commentators emphasize Ireland's supposedly superior record on implementation of these new laws.[66] How-

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[65] *See generally* YVONNE SCANNELL, ENVIRONMENTAL & PLANNING LAW (1995).

[66] *See, e.g.*, *id.* (describing the functioning of the environmental impact assessment directive in Ireland). Referring to the national thresholds for so-called Annex II projects whose assessments are only carried out in the event the specific project is likely to have significant effects on the environment, Scannell writes:

> Much can be said about these thresholds or criteria. Environmentalists argue that they are too lenient; developers sometimes take the opposite view. A cursory comparison with the thresholds and criteria adopted in other Member States, however, indicates that the Minister has subjected far more projects to mandatory EIA than many other Member States and that the thresholds triggering the obligation to submit environmental impact statements are comparatively low in Ireland for most projects.

Id. at 294 (footnote omitted). Two key points are rarely raised in Irish commentary. First, there is a major difference between simply "submitting an impact statement" along with the application for a development and carrying out

ever, European environmental law is not being applied with any great rigor, nor is there current legal debate regarding reconciliation of domestic substantive and procedural laws with EC directives.

Serious planning and environmental law of a domestic variety are all but non-existent in Ireland.[67] Moreover, there is a strong tradition of deference to property rights that does not yield easily to European incursions. A national court within the EC that is determined to evade the full implications inherent in the directive can do so with relative ease. That this issue has not been confronted by the European institutions is a matter of Community political diffidence towards the Member States. European *realpolitik* militates against EC-level oversight of the implementation of environmental directives.[68]

What follows is an analysis of the application of two important and ambitious directives, the Environmental Impact Assessment (EIA) Directive[69] and the Habitats Directive,[70] within the

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a genuine environmental assessment. Second, the national courts have consistently refused to become involved in the application of the EIA Directive in Ireland.

[67] In the land use context, see Sara Dillon, *Vulnerable Landscapes and the Inadequacy of the Irish Planning Acts*, 18 DUBLIN U. L.J. 102 (1996).

[68] *See* Martin, *supra* note 40 (discussing the problem of Community-level oversight and enforcement). Martin states:

> There has been some discussion, yet no concrete proposal, on whether it would be appropriate to give competence to Community inspectors to control enforcement of EC environmental legislation in the Member States. There are also discussions on whether the European Environmental Agency could be conferred enforcement powers. The task of the European Environmental Agency, which was created in 1990, but began to function only recently, is presently to collect information on the state of the environment in the European Union. The task of the Environmental Agency may be redefined in two years, and it might cover enforcement actions. The role of the Commission and/or the European Environment Agency in enforcement of EC environmental legislation would not be, however, a complete substitute for Member State's enforcement actions.

Id. at 702.

[69] Council Directive 91/11/EC of 3 March 1997 amending Directive 85/337/EC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1997 O.J. (L 073) 5 [hereinafter 1997 Directive]; Council Directive 85/337/EC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 30 [hereinafter EIA Directive].

Since all the Irish case law, and all pronouncements to date of the Court of Justice, deal with the 1985 version of the EIA Directive, this study will be confined to an examination of those provisions. Although the 1997 changes to the EIA Directive did require Member States to take certain issues into account

RJ of Ireland.[71] As will be seen, those seeking the invocation of the directives in enhancing environmental protection have encountered insurmountable obstacles.

A. *The Environmental Impact Assessment Directive in Ireland*

EIA law has its conceptual roots in the National Environmental Policy Act (NEPA),[72] promulgated in the United States in 1970.[73] NEPA was intended to enhance protection of the human environment by requiring official decision-makers to take potential adverse effects on the environment into account during the decision-making process.[74] In fulfilling its intention it has generated important environmental litigation.[75] While NEPA created

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when making the numerical determination regarding thresholds or, alternatively, to conduct a project by project determination of whether there were likely to be significant effects, these amendments in no way provided a remedy for plaintiffs in RJs who ask their national courts to ensure that procedures required by the Directive have been followed.

As will be shown, the Irish courts have been consistently unwilling to assume the role of examining whether or not an EIA should have been carried out but was not. It is nearly unthinkable that an Irish court would invalidate a permission for such a reason. Invalidation on these precise grounds has occurred in only one case, and it involved a failure to honor the national thresholds far less for a reason such as the inadequacy of an EIS. *See* Shannon Regional Fisheries Board v. An Bord Pleanála, 1993 No. 281 J.R., (Ir. H. Ct. Nov. 17, 1994) (Transcript) (LEXIS, Irelnd Library, Cases File).

[70] Council Directive 92/43/EC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 O.J. (L 206) 7 [hereinafter Habitats Directive].

[71] It is not my intention to suggest that Ireland is the only RJ in Europe, nor the worst RJ. However, it is a jurisdiction wherein the role of the environmentalist is particularly precarious, and where the deference of the national courts towards both administrative decisions and propertied interests, is deeply entrenched.

[72] 42 U.S.C. §§ 4321-4347 (1994).

[73] For a comparison between NEPA and Europe's EIA Directive, see William Murray Tabb, *Environmental Impact Assessment in the European Community: Shaping International Norms*, 73 TUL. L. REV. 923 (1999).

[74] *See* 42 U.S.C. § 4331.

[75] There have been a number of relevant pronouncements on NEPA by the U.S. Supreme Court. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390 (1976). The Court declared:

> Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

Id. at 410 n.21 (citations omitted). As will be shown *infra*, the Irish courts have refused to involve themselves in the basic question of whether the decision-

an essentially *procedural* requirement, it was an act with ambition.[76] In the United States, agency decisions challenged on NEPA grounds were treated from the earliest days as eminently reviewable.[77]

Similarly, EIA law is a highly significant, if limited, type of environmental law.[78] Although it is well-recognized that EIA law does not ensure environmentally sound decisions even after

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maker has in fact taken the "hard look"; *see also* Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980). The Court declared:

> In *Vermont Yankee Nuclear Power Corp. v. NRDC*, we stated that NEPA, while establishing "significant substantive goals for the Nation," imposes upon agencies duties that are "essentially procedural." As we stressed in that case, NEPA was designed "to insure a fully informed and well-considered decision," but not necessarily "a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency."

Id. at 227 (citations omitted). *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989).

The important point here is that the U.S. courts will review the record to see whether the agency has honored its obligation to consider the environmental effects identified in the environmental impact study. It is also crucial to understand that in a not inconsiderable number of cases, the U.S. courts have invalidated permission as a natural consequence of failure to honor these procedural obligations.

[76] *See* PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 596-655 (1992) (writing at 596 that "NEPA is a broad stop-and-think, disclose-to-the-public administrative law. . . . Its operative terms require agencies to contemplate the context and consequences of their actions before acting. . . . Public disclosure is NEPA's complementary mandate. . . ."). Section 102 of NEPA, which contains the principal obligations, requires that the relevant agency carry out a systematic assessment of potential environmental impacts and that alternatives to the proposal be considered. *See id.* at 598.

[77] *See, e.g.*, *supra* note 75 (citing notable U.S. Supreme Court cases involving NEPA).

[78] The preamble to the Directive states that it is European policy to prevent the creation of pollution at the source, rather than trying to counteract ill effects ex post, and also to take environmental matters into account at the earliest possible stage across the Community. All projects, public and private, likely to have significant effects on the environment fall within the ambit of the Directive. *See* EIA Directive, *supra* note 69, preamble, at 30-32, .

The Directive states that development consent for such projects is to be granted only after prior assessment of the likely affects. *See id.* Under the European scheme, it is the developer who provides the information on effects to the decision maker, although this information may be supplemented by the relevant authorities and by interested members of the public. *See id*.

Article 2 of the Directive states: "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects." EIA Directive, *supra* note 69, art. 2, at 33.

numerous environmental problems have been properly identified, the assessment process itself has brought about a procedural revolution in the methodology of decision-making. EIA law, as originally conceived, does give procedural guarantees, even though it stops short of providing judicial review of the ultimate decision on whether or not to allow a particular project.

For EIA law to have practical effect, it must allow for review of the procedures culminating in a particular development decision. Failure to produce an Environmental Impact Study (EIS), or to carry out an environmental assessment on the part of the relevant decision-makers, must render the decision itself void. Otherwise, EIA law is merely an unenforceable guideline for the decision-maker, with ultimate compliance within the unencumbered discretion of the decision-maker.

The Irish courts have virtually never applied the European EIA Directive.[79] It can be assumed that the EIA Directive was

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Article 3 sets out exactly what the assessment must describe and assess. *See id.* art. 3, at 33-34. Included on this list are the effects on humans, fauna and flora, water, air, the landscape and the cultural heritage. *See id*.

Article 4 is the problematic and legally difficult part of the directive. It indicates the classes of project subject to an EIA. *See id.* art. 4, at 34. Projects listed in Annex I must be made subject to an assessment. *See id*. art. 4(1), at 34. These are all large projects with per se effects on the environment, such as oil refineries, power stations, motorways, toxic waste sites, etc. *See id.* Annex I, at 39. Article 4(2) complicates matters. This provision states that projects of the classes listed in Annex II shall be made subject to an assessment "where Member States consider that their characteristics so require." *Id.* art. 4(2), at 34. It continues:

> To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to10.

Id. Annex II includes a wide variety of project types, such as agricultural developments, extractive industries, manufacturing, infrastructural developments, dams, marinas, as well as urban developments, hotel complexes, and waste disposal sites. *See id.* Annex II, at 40-44.

In implementing the Directive, Ireland has followed a similar model to the U.K., in that for Annex II projects it has tended to establish numerical size thresholds above which EIAs are considered necessary. *See* Irish Implementing Regulations European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349), and European Communities (EIA) (Amendments) Regulations, 1994 (S.I. No. 84); *see also*, Local Government (Planning and Development) Regulations, 1994 (S.I. No. 86).

[79] In the earliest Irish case on the EIA Directive, *Browne v. An Bord Pleanála*, [1989] I.L.R.M. 865 (Ir. H. Ct.), the High Court, while determining that the directive could not be implemented in national law through a mere circular letter, also made a number of statements which foreshadowed a persistently

intended to allow citizens within Member States to call upon their national courts to invalidate decisions when the requisite process was not followed.[80] In Ireland, although public interest plaintiffs have predictably proceeded to the national court to ensure the full application of the Directive, the national courts have responded with apparent bewilderment and hostility. The Directive has been treated for all practical purposes as unenforceable in the Irish courts.

Considering that the EIA Directive needed to be coherent and enforceable across the EC, its contents are oddly silent on the issue of enforceability. Given its stated purpose, one could infer from the scheme of the directive that failure of the Member State to comply with the obligations of the directive would be fatal to an official decision.[81] Additionally, one could also infer that any interested person or party with sufficient interest in the environment should be able to enforce the Directive's terms.[82] Unfortunately, the Irish courts have instead folded the Directive back into the terms of national standards of review generally applicable to administrative decision-making on environmental issues. Even though the standards are notoriously deferential, the courts have neither analyzed the relationship between traditional standards of review and the content of this new environmental

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negative approach taken by the Irish courts to the EIA Directive in later years. The High Court in *Browne* declared that the Planning Appeals Board cannot be held responsible for a failure of the State to implement the directive, "if failed they have." *Id.* at 874. The *Browne* court further makes the determination that "there is no justification for the basic premise relied upon by the applicants which is that the need for an Environmental Impact Statement with specific information is a condition precedent to a valid application for planning permission." *Id.* at 875.

[80] *See* Fuhr et al., *supra* note 32, at 76. Fuhr states:

> Rights of members of the general public or of public interest groups to the correct implementation of environmental law do exist in the legal systems of some Member States and partly already in EC law. Apart from procedural rights guaranteed by EC Directives, such as the right of the public to participate in proceedings for environmental impact assessment and freedom of access to information on the environment, the ECJ has confirmed in recent judgments that EC law also confers substantive rights in certain areas of environmental protection. . . . In addition, in the *Factortame* case, the ECJ emphasised that national courts are under a duty to set aside any national legal provision which might prevent, even temporarily, EC rules from having full force and effect.

Id. (footnote omitted).

[81] The Preamble to the Directive evidences an effort at prevention, rather than a reactionary intent. *See* EIA Directive, *supra* note 69, preamble, at 30-32.

[82] *See id.* preamble, arts. 6, 9, at 30-32, 35-36.

law. Even more surprising, nor have they allowed reference of any related question to the European Court of Justice.

As the ultimate court, the European Court of Justice's pronouncements regarding EC environmental directives are of obvious importance. Unfortunately, when faced with the opportunity to rule on the EIA Directive, the court has said the right things, but in a manner so vague as to be virtually unusable by environmental plaintiffs in the Member States. Through completion of this study, the Court of Justice had dealt with the EIA Directive in three principal cases.[83] Of these, *Kraaijeveld BV v. Gedepudteerde Staten van Zuid-Holland* is the most relevant to this analysis because it addressed the question of whether a citizen can rely on Article 4(2) of the directive in the "sub-threshold" situation[84] in order to challenge a decision of the relevant national authority before the national court.[85] It was also the controlling case at the time of the Irish litigation discussed below.

Kraaijeveld involved a conflict between the Dutch government and a Dutch citizen (Kraaijeveld) who challenged a decision to allow a particular development. The Commission and Kraaijeveld argued that Member States' size thresholds were only designed to facilitate examination of a proposed project for the purpose of determining whether it should undergo an EIA—while leaving in place the fundamental obligation imposed by Article 2(1) of the Directive;[86] thus, all projects likely to have significant effects on the environment had to be assessed. The

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[83] *See* Case 431/92, Commission v. Germany, 1995 E.C.R. I-2189; Case 133/94, Commission v. Belgium, 1996 E.C.R. I-2323; Case 72/95, Kraaijeveld BV v. Gedepudteerde Staten van Zuid-Holland, 1996 E.C.R. I-5403. Two cases have recently been handed down: Case C-435/97, World Wildlife Fund (WWF) v. Autonome Sektion fur die Provinz Bozen (Sep. 16, 1999) (1999 ECJ CELEX LEXIS 1966) and Case C-392/96, Commission v. Ireland (Sep. 21, 1999) (1999 ECJ CELEX LEXIS 2607). For a discussion of *Commission v. Ireland*, see *infra* Part III.

[84] This situation occurs in the case of an Annex II project that does not reach the size threshold set by the national authorities that would guarantee an assessment being carried out. *See* EIA Directive, *supra* note 69, Annex II, at 40-44.

[85] In *Kraajeveld*, a plan by a Dutch local authority to reinforce certain dykes was adopted without an environmental assessment being carried out. *Kraaijeveld*, 1996 E.C.R. at I-5439-41. The changes brought about by the plan would have led to a situation where the plaintiff company would be cut off from a navigable waterway. *See id.* Kraaijeveld brought an action in the national court seeking annulment of the decision. A key issue was the fact that there had been no EIA carried out pursuant to the EIA Directive. *See id.*

[86] *See id.* at I-5420-21.

Dutch government argued that projects falling below its threshold were *per se* not likely to have significant effects on the environment and that it was within the discretion of the national authorities to make that determination.[87] Thus, the Court of Justice was required to determine whether the action of the national authorities could be challenged in cases where significant environmental effects allegedly were associated with such projects, and yet the national authorities had set the thresholds in a way as to exclude such projects. Essentially, the court was asked to define the limits of residual national discretion granted to Member State authorities in setting thresholds under Article 4(2) of the directive.

The Court of Justice rendered a decision for the most part favorable to the Commission.[88] The court declared:

> [A]lthough . . . Article 4(2) of the directive confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment . . ., the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment.[89]

Further, the Court of Justice stated that when a Member State sets a threshold, its discretion is exceeded "unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment."[90] With respect to invocation of the directives before the national court, the court declared:

> [I]n particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of

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[87] *See id.* at I-5420.

[88] The court did not, however, go as far as Kraaijeveld and the Commission had hoped. The Commission argued that the existence of thresholds did not relieve the national authority of the obligation to examine each project to see if it was likely to have significant effects, and thus require an assessment to be carried out. *See id.* at I-5448-49.

[89] *Id*. at I-5450.

[90] *Id.* at I-5451. This is a telling example of the opacity of much European case law. To whom will the Member State authorities ever be asked to demonstrate this, and under what circumstances?

> Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive.[91]

The pronouncement seems to demand that the exercise of national discretion under Article 4(2) be analyzed, however the Irish courts have refused to engage in such an exercise. Opponents of the full application of the directive in Ireland have seized upon two phrases within the *Kraaijeveld* decision to question whether it is in fact applicable in cases where applicants are challenging individual decisions to grant permission.[92] Challenges to individual permissions would seem to be the most obvious form of legal action under the EIA Directive. The Court of Justice could have used clear language that would have indicated to national courts that they are required to consider individual challenges to permissions for development and to evaluate the

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[91] *Id*. at I-5452

[92] First, the question as formulated by the Dutch court to be referred to the European Court of Justice under Article 234 (ex 177) read as follows:

> Must Article 2(1) and Article 4(2) . . . be interpreted as meaning that where a Member State in its national implementing legislation has laid down specifications, criteria or thresholds for a particular project covered by Annex II in accordance with Article 4(2) . . ., but those specifications, criteria, or thresholds are incorrect, Article 2(1) requires that an environmental impact assessment be made if the project is likely to have "significant effects on the environment. . .?

Kraaijeveld, 1996 E.C.R. at I-5440-1. Opponents have seized on this in their maintaining that the Irish thresholds were not "incorrect," and thus that the Kraaijeveld case did not apply. It seems clear that "incorrect" here can only refer to the tendency of the thresholds in question to exclude projects that should not be excluded. Second, the court stated:

> In a situation such as the present, it must be accepted that the Member State concerned was entitled to fix criteria relating to the size of dykes in order to establish which dyke projects had to undergo an impact assessment. The question whether, in laying down such criteria, the Member State went beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project. It depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State.

Id. at I-5450-51. This sort of ambiguity facilitates interpretations of the Court of Justice's language that are not consistent with the expressed intent of the Directive. For example, a national court could understand the Court of Justice to be implying that no challenge to an individual project can precipitate an examination of whether the Member State authorities properly exercised their discretion under Article 4(2) of the Directive.

exercise of decision-maker discretion in the light of the Article 2(1) obligation.[93]

In the RJ context, where national courts are likely to be looking for reasons to dismiss an action, anything less than complete clarity concerning the rights of citizens to seek enforcement of an environmental directive will likely prove fatal to the action. Even allowing for the disharmony between the traditional language of the common law and the leaner, more nuanced language of the Court of Justice, the court's coyness in identifying the precise nature of the review Member State courts are required to provide under a given environmental directive is puzzling.

For the most part, Irish courts have simply refused to engage the EIA Directive, to analyze the procedures of national authorities in the light of the directive's obligations, to ascertain whether they are in fact defective, and to refer any question related to the directive to the European Court of Justice. In nearly all Irish cases involving the directive, courts have expressed concern for the potential hardship to those wishing to proceed with the development as an apparent reason for not fully applying the terms of the directive. Whether sincere or not, the Irish courts have adopted the general position that the directive does not add much, if anything, to the existing national planning procedures. Even the most sophisticated arguments proffered by applicants relying on the doctrine for judicial review are left largely unacknowledged.

Article 2 of the EIA Directive sets out the basic obligation on Member States to "adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects."[94] The requirement seems clear. It seems equally clear that in the event a decision is challenged on the grounds that the relevant authority has failed to subject a project to assessment, it might fall on the court to determine whether the alleged environmental effects are likely to rise to the level of

[93] Although the Court of Justice did offer some clarity in *World Wildlife Fund*, it was too late for the *Lancefort* plaintiffs, described below. Also, it is far from clear that the national court would have found any differently in Lancefort had *World Wildlife Fund* been decided at the time.

[94] EIA Directive, *supra* note 69, art. 2, at 33.

significance. This is a determination that the Irish courts have never made. Since Article 4(2) of the directive allows Member States to set thresholds over which the EIA will be mandatory in national law, the difficult cases arise in the so-called "sub-threshold" situation: the national threshold is not met, yet the litigants[95] maintain that the development will cause significant effects on the environment.[96]

Reception of European environmental law in Ireland is characterized by extraordinary conceptual problems. While judicial review is the main vehicle available to applicants seeking to challenge decisions involving failures to fully apply European environmental law, in 1992, the Irish legislation governing reviews in the planning or environmental context was amended to severely restrict access to such prospective applicants to the courts.[97] As if the new time limits and other procedural hurdles were not enough, the Irish courts referred to these legislative changes as an indication that their attitude towards judicial review in the planning and environmental realm should be particularly severe.[98]

The Irish courts have chosen not to acknowledge, much less to resolve, the serious conflict between the demands of the EIA

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[95] Litigants are often supported by well-documented expert analysis.

[96] *Kraaijeveld* involved just such a sub-threshold situation, in that the national threshold excluded projects of the type to which Kraaijeveld objected. *Kraaijeveld*, 1996 E.C.R. at I-5403.

[97] *See* Local Government (Planning and Development) Act, No. 14 (1992), § 19(3B)(a) (requiring that applications be filed within two months and granting leave for review only on finding by the High Court of "substantial grounds for contending [the] decision").

[98] *See, e.g.*, K.S.K. Enterprises, Ltd. v. An Bord Pleanála, [1994] 2 I.R. 128, 135. The court declared:

> From these [1992 Planning Act amendments], it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety on the basis for that decision.

Id. at 135. This doctrine should also be seen in the context of the more general deference of the Irish courts towards administrative decision-making in Ireland. In *O'Keeffe v. An Bord Pleanála*, the court stated that "an opinion expressed by the Planning Appeals Board within its decision-making process cannot be challenged unless it is an opinion which no reasonable planning appeals board could have reached." O'Keeffe v. An Bord Pleanála, [1993] 1 I.R. 39, 60.

Directive, especially in the light of *Kraaijeveld*, and the extreme deference traditionally shown by the national courts to planning and environmental decision-makers. While Irish law places great emphasis on the needs of developers[99] (even allowing them as notice parties to argue against the full application of the EIA Directive in the judicial review context[100]) the EIA Directive itself nowhere allows for the consideration of private interests in determining the applicability of the doctrine's provisions.[101] It would seem the Irish courts are obligated to refer these and other questions involving the relationship between national legal traditions and the requirements of Community environmental law to the Court of Justice under Article 234 (ex 177); yet, there have been no references from Ireland on European environmental questions, despite a significant volume of litigation in recent years based on the environmental directives.

In addition to these conceptual hurdles, litigants are discouraged by the existing Irish costs rule. Public interest organizations in Ireland face the terrifying prospect of having to bear the litigation costs of both parties in the event they do not prevail in court.[102] These are costs that such groups can ill-afford to bear. The chilling effect of this rule on the development of public interest law in the jurisdiction is clear; furthermore, the rule creates an even more contradictory situation given the substantive and mandatory additions to environmental law via European legislation. The rule discourages the very parties meant to benefit from the various environmental directives promulgated. Where new rights are created through European environmental directives, can the Irish costs rule be sustained?[103] A full and thorough examination of such issues could cause a profound alteration in the

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[99] *See, e.g.*, *K.S.K. Enterprises*, 2 I.R. 128; *O'Keeffe*, 1 I.R. 39.

[100] *See* Local Government (Planning and Development) Act, No. 14 (1992), § 19(3B)(a)(ii).

[101] The Irish courts may also have felt justified in this approach because of the attitude taken by the English courts in the early days of EIA litigation in the United Kingdom, although the English courts are now widely acknowledged to be taking a more progressive view. *See* William Sheate, *From Environmental Impact Assessment to Strategic Environmental Assessment: Sustainability and Decision-Making*, in THE IMPACT OF EC ENVIRONMENTAL LAW IN THE UNITED KINGDOM, *supra* note 23, at 267, 267-82.

[102] *See* The Rules of the Superior Courts, 1986 (S.I. No. 15), Order 99, rule 1.

[103] *See* Chris Hilson, *Community Rights in Environmental Law: Rhetoric or Reality?*, *in* THE IMPACT OF EC ENVIRONMENTAL LAW IN THE UNITED KINGDOM, *supra* note 23, at 51, 51-68.

balance between property interests and the NGO sector in Ireland. This seems to be studiously avoided wherever it threatens to appear.[104]

The Irish response to challenges based on the EIA Directive has been to immunize the relevant decision-makers against the scrutiny required by the Directive. Since the Irish courts have maintained the view that it is for the relevant authority to decide whether the information provided by the developer is sufficient, whether or not there are likely to be significant effects on the environment, and to decide ultimately the proper legal nature of its own decision-making procedure, the Directive has become a nullity with respect to development applications. This refusal to review, a legal posture inconsistent with European environmental law, is grounded in Irish views towards property rights and administrative discretion.[105]

The Irish courts have proven themselves remarkably impervious to the logic of the substantive directives and the statements of the Court of Justice interpreting the environmental directives. Irish law severely constrains environmental plaintiffs. This is dramatically demonstrated in the tendency of the Irish courts to literally refuse to analyze the actions of the national administrative bodies in the clear light of the EIA Directive.[106] Indeed, as will be shown in the following discussion of the relevant Irish case law, the Irish courts have failed to demonstrate a willingness to understand the nature of the national discretion to be exercised under Article 4(2) of the directive. This discretion must be exercised properly and within the logical limits dictated by the directive and the Court of Justice's interpretation thereof. In effect, the courts have allowed the entire burden and authority for interpreting and applying the directive to fall on the administra-

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[104] *See id.* at 58-68 for a discussion of the problem of national procedural hurdles to exercising Community law rights relating to the environment.

[105] The *Browne* court stated that the EIA provisions are "mandatory" in that the developer must provide the information sought; however, "it is solely for the planning authority to determine upon the sufficiency of an environmental impact study." Browne v. An Bord Plenála, [1989] I.L.R.M. 865, 875-76 (Ir. H. Ct.).

[106] *See, e.g.*, *id.* at 876 ("[O]nce it is shown that the planning authority . . . had jurisdiction to deal with the application before them, then the question of the rights and wrongs of the application was a matter for them. Any other approach would be to turn an application for judicial review into a further appeal.").

tive decision-maker, with no meaningful role for the courts.[107] For example, in *Max Developments Ltd. v. An Bord Pleanála,* the High Court found the determination of whether national thresholds were exceeded, thus triggering an EIA, was to be made by the Planning Board, and that any error as to mixed questions of law and fact was unreviewable and "within jurisdiction" of the Board.[108] The consistent approach of the courts has been to remain uninvolved with the fundamental terms of the directive—even though such involvement should logically follow from each and every sub-threshold challenge.[109] It is apparently assumed in Ireland that the legal tendency to exercise extreme deference towards official decision-makers can be validly transposed onto the substance of European environmental directives, even when this leads to an illogical legal situation—i.e., the virtual non-application of the objectives of directives, and the impossibility of judicial enforcement. The following cases demonstrate that this situation is all too real for environmental plaintiffs in Ireland.

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[107] In *Shannon Regional Fisheries Board v. An Bord Pleanála*, 1993 No. 281 J.R. (Ir. H. Ct. Nov. 17, 1994) (Transcript) (LEXIS, Irelnd Library, Cases File), the only case where failure to carry out an EIA was found cause to invalidate a planning permission, *national* thresholds per Article 4 of the Local Government (Planning and Development) Regulations of 1990, were also exceeded. The High Court did not explain why it invalidated the permission on this ground. It would seem that the court simply treated the mistake as a violation of domestic planning law of sufficient seriousness to undo the permission. *See id.*

[108] Max Developments Ltd v. An Bord Pleanála, [1994] 2 I.R. 121, 127. See also RGDATA, Ltd. v. An Bord Pleanála, 1996 No. 42 J.R. (Ir. H. Ct. April 30, 1996) (Transcript) (LEXIS, Irelnd Library, Cases File), where it was shown that in fact the Board had not ordered an EIS because of a clearly erroneous belief that the development did not meet the national size thresholds making an EIS mandatory. The High Court declared that "there is no evidence of a substantial remediable error by the Board." *See id.*

[109] *But cf.* EAMON GALLIGAN, IRISH PLANNING LAW AND PROCEDURE 171 (1997). Of the *RGDATA* case, Galligan writes:

> Whilst it is not explicit in his judgment, . . . Barron J. refused leave in this case because any error made by the Board (if such there was) was made within jurisdiction. Article 56(1) [of the 1994 Irish Planning Regulations] enables the Board to form an opinion as to whether an EIS is required and it would seem that such an opinion cannot be challenged unless it is an opinion which no reasonable planning appeals board could have held.

Id. at 172. Galligan does not attempt to explain how this can be reconciled with the requirements of the Directive.

1. *Lancefort v. An Bord Pleanála*

a. *General Background*

This complicated and high profile case ended in tragedy for the environmental group that took it. Well-researched, and with a high public profile, it offered a clear challenge to the national court to apply EC environmental law, or explain why not. In December of 1996, the Planning Appeals Board (Board) granted permission to develop a massive hotel development at a site of enormous architectural prominence in Dublin's city center, across from Trinity College and the old house of Parliament. The plan involved the demolition of a number of "listed" buildings (earmarked for protection under the city development plan), the retention of the facades of certain other historic buildings, and the fusing together of the whole under a new roof that would extend the height of the whole approximately one-and-one-half stories.[110] Conservationists called the application one of the worst in Dublin's modern history, because of its potential to damage the city's architectural heritage.[111]

Despite the best efforts of conservationists appearing at the oral hearing, the Board decided to grant permission for the development. Shortly thereafter, a group of persons, several of whom had been directly involved in opposing the development, came together to form a limited company named "Lancefort" and decided to proceed with a legal action challenging the grant of permission. Their main cause of action was under the European EIA Directive.[112] Interestingly, it was discovered that when

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[110] Lancefort, Ltd. v. An Bord Pleanála, [1998] 2 I.L.R.M. 401. For the principal decision of the High Court, *see* Lancefort, Ltd. v. An Bord Pleanála, 1997 No. 49 J.R. (Ir. H. Ct. Mar. 12, 1998) (Transcript, on file with author).

[111] *See, e.g.*, Frank McDonald, *Developers Could Now Build Offices on Hilton Hotel Site*, IRISH TIMES, Oct. 31, 1997, at News Features 14, *available in* LEXIS, World Library, Itimes File (quoting Michael Smith).

[112] Article 3 of the Directive states that an environmental impact assessment will "identify, describe and assess . . . the direct and indirect effects of a project on the following factors: —human beings, fauna and flora, —soil, water, air, climate and the landscape; —the inter-action between the [aforementioned] factors . . ., —material assets and the cultural heritage." EIA Directive, *supra* note 69, art. 3, at 33-34. Annex III, which sets out the information to be covered where an assessment is to be carried out, includes "a description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors." *Id.* Annex III, at 45.

Ireland implemented the EIA Directive, the authorities did not include reference to the "architectural and archaeological heritage," even though these elements of the environment are clearly within the scope of the directive.[113]

The High Court granted Lancefort Ltd. *locus standi* on the basis of the long-standing record of its constituent members as champions of the environment and of building conservation. Nevertheless, the High Court dismissed the EIA cause of action,[114] failing to acknowledge the existence of any European law point.[115] Since the Irish Supreme Court's evasion of European environmental law was based on a more involved, sophisticated analysis, its judgment demands closer scrutiny.

The majority judgment was written by Justice Ronan Keane,[116] who managed to create a legal labyrinth from which the environmental plaintiffs, hoping to rely on European environmental law, could find no exit. Unfortunately, the issues in the case had been narrowed over the course of the proceedings, and the European law aspects were left less well-defined. For instance, whereas Lancefort began by presenting a broad and coherent argument attacking Ireland's failure to fully transpose the

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[113] *See* European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349).

[114] Justice Catherine McGuiness of the High Court emphasized that the developers, as Notice Parties, had argued that there was a rebuttable presumption that the acts of a public authority such as the Appeals Board were valid. *See Lancefort*, 1997 No. 49 J.R. at 22. "The onus of proof in establishing that An Bord Pleanála did not consider the question of EIA [pursuant to the Irish regulations], and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant. That burden of proof, it seems to me, has not been fully discharged." *Id*. And further:

> It is obvious that the individual members of the Applicant company deeply disagree with the decision made by An Bord Pleanála. . . . Even if this Court were to be satisfied, as was stated in *O'Keeffe v An Bord Pleanála*, that the case against the decision made by An Bord Pleanála is much stronger than the case for it, the Court cannot permit judicial review proceedings to become what is, in essence, an appeal against the decision of the Bord.

Id. at 41.

The High Court demonstrated either a misunderstanding of the Directive or an unwillingness to apply it. The applicants did not ask the court to involve itself in the ultimate decision, but rather in the decision-making process, a commonplace aspect of review under environmental impact assessment legislation in many jurisdictions. *See id.* at 12-13.

[115] *See id*. at 41. ("I do not consider that there is any basis for this court to embark on an Article [234 (ex 177)] reference.").

[116] *See Lancefort*, 2 I.L.R.M. at 425.

EIA Directive and the further failure of the Board to consider that an EIA was necessary when dealing with the "built environment,"[117] the "mistransposition" argument was set aside, leaving a truncated argument far easier for the court to dismiss. At the same time, the eagerness of the court to ignore plain questions of European environmental law is unlawful under the Community system, even though this type of unlawfulness is without remedy under the European legal regime.

In *Lancefort*, the question with which the applicants were left[118] was paraphrased as follows:

> Do the 1985 Directive and Article 56(2) of the 1994 planning regulations require An Bord Pleanála—in relation to an Annex II development which does not exceed the size limit specified in relation to that class of projects—to consider the question whether the development would be likely to have significant effects upon the environment which would necessitate the carrying out of an EIA and the submission of an environmental impact statement and is the Board obliged to record its decision on such a question in a manner which is susceptible to judicial review?[119]

The question of whether or not the Board "ought to have considered" the question of an EIS is only meaningful in the larger context of the intentions and purposes of the Directive, but the *Lancefort* opinion shows that "requiring an EIS" is, in the Irish court's formulation, just a way for the Board to gain more information for itself when it so desires. It is not an obligation on the national authorities to assess potential damage to the environment based upon the EIS. Such legal misrepresentations by national courts create almost insurmountable barriers for environmental litigants seeking to rely on provisions of European environmental directives.[120] In essence, the Irish court did not

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[117] Here, the term refers generally to non-naturally occurring infrastructure or architecture. In particular, the term covers "material assets, including . . . architectural . . . heritage" referred to in Annex III. EIA Directive, *supra* note 69, Annex III, at 45.

[118] In planning and environmental matters, appeal to the Supreme Court from the High Court is not a matter of right. Points of appeal must be certified by the High Court as having "particular public importance"—even though such points were dismissed by the same court.

[119] *See Lancefort*, 2 I.L.R.M. at 429.

[120] *But cf.* William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUM. J. TRANSNAT'L L. 337, 376 (1995) ("Whether or not these challenges [in national forums] are

review the mixed question of law and fact before it: Should an environmental impact assessment have been carried out? If the court will not conduct such a review, then the Directive is not treated as law.[121]

b. *The* Locus Standi *"Concoction"*

Lancefort was ultimately decided on *locus standi* grounds, but not on a theory of *locus standi* in the environmental context that has ever been seen in Ireland.[122] Indeed, the hybrid *locus standi*/merits doctrine devised by Justice Keane is already showing its potential deleterious effects in the world of Irish environmental litigation.[123] Justice Keane did not deal with *locus standi* in the specific context of European environmental directives. Carefully presenting a face of legal reasonableness, he stated:

> [T]he [legal] authorities reflect a tension between two principles which the courts have sought to uphold: ensuring, on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies do not escape scrutiny by the courts because of the absence of indisputably qualified objectors and, on the other hand, that the critically important remedies provided by the law in these areas are not abused.[124]

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successful, complaints can be filed with the EC Commission which can bring an action against the Member State for not implementing or applying EC law.").

[121] It is important to note that Justice Keane in his judgment continues to use the phrase "require an EIS," and never extends the implications of the case by referring to the taboo notion that the authorities *carry out* an EIA.

[122] *See* Garret Simons, Lancefort Ltd. v. An Bord Pleanála, 5 IRISH PLAN. & ENVTL. L. J. 4, 131 (1998). Simons states:

> It is submitted that the approach of the majority of the Supreme Court confuses the distinct issues of standing and the merits of the case. . . . The courts are normally unwilling to enter into any consideration of the planning merits of an impugned decision; generally, the courts confine themselves to ensuring that the proper statutory procedures have been followed. It is thus somewhat surprising to find the Supreme Court entering into a consideration as to whether or not an alleged breach of the prescribed procedure would have affected the outcome of the planning process. To find such remarks made in the context of a determination of the preliminary issue of standing is even more remarkable.

Id. at 133 (footnotes omitted).

[123] *See, e.g.*, Murphy v. Wicklow County Council, 1998 No. 25 J.R. (Ir. H. Ct. Mar. 19, 1999) (Transcript, on file with author).

[124] *Lancefort*, 2 I.L.R.M. at 434. The "legal authorities" are not named by Justice Keane.

As for the latter problem, courts have dealt with the "dangers of giving free rein to cranks and busybodies."[125] Relying on analogies to constitutional challenges, the court noted that where an impugned act affects all citizens equally, there is an obvious need for what the Justice called a "reasonably generous approach."[126] A severely restrictive approach, he said, would defeat the public interest in ensuring that official bodies obey the law.[127]

One can only speculate about the gap between this rhetoric of public spirited generosity and the judgement to come, a judgement far from generous to the environmental applicants. It is possible that, despite the Victorian harshness of the Irish costs rule in public interest litigation,[128] the court nevertheless did not wish to appear to be privileging financial and development interests. It is also possible that the court wished to deflect attention from its complete unwillingness to apply European environmental law, as discussed below.

The court went on to review a familiar litany of legislative restrictions placed on applicants for judicial review in planning and environmental matters from the time of the 1992 amendments to the Planning Acts.[129] It is striking that the court dwelt on the intention of the national legislature, and not at all on the intentions behind the directive.[130] The proposition that national procedures and European substantive law are entirely separate is legally untenable.

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125 *Id.*

126 *Id.*

127 *See id.*

128 Even in public interest litigation, courts generally award costs to the prevailing party.

129 *See Lancefort*, 2 I.L.R.M. at 435. Justice Keane declares:

> [The Oireachtas has] made plain its concern that, given the existence of an elaborate appeals procedure which can be invoked by any member of the public and the determination of the issues by an independent board of qualified persons, the judicial review procedure should not be availed of as a form of further appeal by persons who may well be dissatisfied with the ultimate decision, but whose rights to be heard have been fully protected by the legislation. The courts are bound in their decisions to have serious regard to that concern.

Id.

130 As indicated already, the Irish courts also consistently refuse to separate the concepts of review of proper decision-making procedures from review of the ultimate planning decision. *See supra* text accompanying notes 97-114.

With regard to *locus standi*, the starting point for analysis is Order 84, Rule 20(4) of the Rules of Superior Courts, which governs judicial review under the Planning Acts. This rule states, "'The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter.'"[131] From this point, Justice Keane began a journey that may ultimately prove fatal to the cause of the EIA Directive in Ireland. He devised a novel theory of "*locus standi* mixed with the merits of the case"[132] as if this were the most natural approach. Under this theory, two issues arise in determining whether a person has sufficient interest in the matter to which the application relates.[133] The first issue is whether *locus standi* should be determined as a threshold issue, at the leave stage, or if leave is granted, whether it should be determined along with the substantive application for relief. The second issue is the degree to which the merits of the applicant's case should be considered by the court in the standing determination.[134]

Of course, these are not the usual preliminary considerations with regard to environmental *locus standi* in any jurisdiction.[135] Justice Keane elected the second of the two considerations mentioned above, a choice that ultimately allowed him to dismiss the case without facing the European legal issues. In the vast majority of cases, *locus standi* is a threshold issue to be determined in relation to the applicant's degree of interest in the subject matter at hand. There are countless cases and commentaries on the problem of *locus standi* in the environmental context in virtually every jurisdiction where environmental litigation occurs.[136] Typically, the question of *locus standi* can easily

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131 *Lancefort*, 2 I.L.R.M. at 435.

132 *See id*. at 433-44.

133 *See id.* at 436-42.

134 *See id.* at 436.

135 *See* Simons, *supra* note 122 (discussing Justice Keane's unorthodox methodology).

136 In U.S. journals alone, there are hundreds of major articles in which *locus standi* is either the principal topic, or an important secondary topic. *See, e.g.*, Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of* Lujan v. Defenders of Wildlife, 22 COLUM. J. ENVTL. L. 169 (1997); Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141 (1994); Robert B. June, *Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761 (1994).

be separated from the merits of the case. Indeed, the question must be separated from the merits of the case.

Under the Irish national "scheme," to which Keane so persistently refers, the High Court must determine whether there is an important issue at stake before the judicial review goes forward. Justice Keane acted on the assumption that *Lancefort* was the sort of case that did not allow for *locus standi* to be determined at the outset, as a threshold matter.[137] He invoked the 1981 House of Lords decision in *Inland Revenue Commissioners v National Federation of the Self Employed*[138] as the sole authority for this proposition, although *Inland Revenue* is highly distinguishable from *Lancefort*. Although Justice Keane indicated that *Lancefort* was a case that demanded that *locus standi* be considered in light of the merits of the substantive case being made out,[139] with regard to *Lancefort's* subject matter, the EIA Directive had already been litigated in front of the Court of Justice,[140] and in several national jurisdictions within the EU. There was no justification for invoking the *Inland Revenue locus standi* test in *Lancefort*, as the *Lancefort* facts could not be analogized to the problem of taxpayers attempting to challenge a decision of tax authorities concerning other taxpayers, as was the case in *Inland Revenue*. Indeed, Justice Keane himself did not attempt to explain why *Lancefort* fell within the *Inland Revenue* exception.[141]

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137 *See Lancefort* 2 I.L.R.M. at 436-38.

138 Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd., [1982] AC 617 (holding that the question of *locus standi* should be considered together with the merits of the application).

139 *See Lancefort*, 2 I.L.R.M. at 437.

140 *See* Commission v. Germany, [1996] 1 C.M.L.R. 196, 206 (declaring that the nature of the obligation imposed by the EIA Directive on Member States was clear and unequivocal, and thus by implication appropriate for direct effect).

141 The Irish Supreme Court's use of this case from the House of Lords, and the distorting effect of that use on the application of environmental law in Ireland, must not go unanalyzed. In fact, *Inland Revenue* was a case that demonstrated a substantial generosity towards *locus standi*; the Irish court attempted to make the judgment appear in the opposite guise.

In *Inland Revenue,* a group of disgruntled taxpayers applied for judicial review of a decision by the Revenue Commissioners not to collect back taxes from another group of taxpayers. In other words, the applicants for judicial review were seeking an order of mandamus to force the revenue authorities to do their duty and repeal a tax amnesty offered to a certain class of taxpayers. Given the fact that the legal freedom of taxpayers as a general class to seek relief concerning a decision of the tax authorities not of direct and obvious concern to the taxpayer plaintiffs is a tenuous proposition in any jurisdiction, the House of Lords showed a *generosity* in saying that it was necessary to look

Justice Keane's interpretation of *Inland Revenue* was that in that case "the House of Lords took the view that, save in simple cases, the question of *locus standi* should not be determined until the substantive application is heard, since the question should not be considered in the abstract, but rather in a particular legal and factual context."[142] However, the relevant point in *Inland Revenue* was that the challenge was to the alleged unlawful failure of the Revenue Commissioners to collect taxes from third parties. The *locus standi* asserted was based upon the fact that the applicants were themselves taxpayers. Under such circumstances, it is readily understandable that a court would need to hear more about the substance of the allegations before deciding whether there had in fact been sufficient injury to the interests of the plaintiffs to grant them *locus standi*. The *Lancefort* facts cannot be neatly sorted into the *Inland Revenue* paradigm. The Court of Justice itself had spoken on the specificity of the EIA Directive's obligations.[143] *Kraaijeveld* also made clear the right of the public to seek national court analysis of the exercise of Member State discretion with respect to these obligations.[144] The Supreme Court was not only incorrect in its use of *Inland Revenue*, but its approach was contrary to established Community law.

As indicated, Justice Keane's mixing of "merits" and *locus standi* had not occurred in Ireland in the environmental context prior to his ruling. An unfair result follows from an approach which allows the court to cast a *cursory* look at the "merits," and deny the applicants standing in the event that the court does not like the particular case. This transposition of the particular *Inland Revenue* standard onto Irish environmental litigation is exceedingly dangerous for future environmental applicants

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further at the merits of the allegation before deciding whether or not the applicants had *locus standi*. *See generally Inland Revenue*, [1982] AC at 617.

With regard to the EIA Directive, the Court of Justice itself had already asserted the specific nature of the obligation of Article 2, thus making that provision appropriate for direct effect, meaning that it could be relied upon by members of the public in national court. Further, the EIA Directive's intent is to grant procedural rights to the public.

142 *Lancefort*, 2 I.L.R.M. at 436.

143 *See Commission v. Germany*, 1 C.M.L.R. at 206.

144 *See* Case 72/95, Kraaijeveld BV v. Gedepudteerde Staten van Zuid-Holland, 1996 E.C.R. I-5403.

bringing actions under Community law.[145] The European legal regime ought not permit a national court to misuse legal precedent so as to prevent environmental applicants from relying on European environmental law provisions—provisions which in this case had already been deemed suitable by the Court of Justice for reliance by citizens in their national courts.[146]

Justice Keane went on to acknowledge the *World Development Movement* case of 1995, one of the most generous public interest *locus standi* cases in the English language.[147] He noted that "the tendency in England has been to treat the requirement of a sufficient interest as being met where the applicant has established unlawful conduct on the part of a public body, even though the conduct in question may not have affected any private interest of the applicant."[148] But then he cautioned that the allegations were of irregularities involving overseas aid to a hydroelectric plant in Malaysia. As in *Inland Revenue*, "[i]t was accepted . . . that it was unlikely that any other responsible challenger would emerge if standing was denied to the applicants and that the allegations, if made out, would establish a clear breach of an important duty or a default in a significant area by public bodies."[149]

A number of points must be made here. First, the political questions raised in *Inland Revenue* and *World Development Movement* are notoriously hard to litigate, and are often dismissed as being beyond the jurisdiction of any court. They are far more obscure in subject matter than the *Lancefort* case,

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[145] It could only appear compelling to those who do not know the English case in question, or the subsequent history of the development of *locus standi* for public interest plaintiffs in the U.K., since in fact the principle had the effect of liberalizing, not constricting *locus standi* considerations.

[146] *See* Hilson, *supra* note 103, at 54 (citing Ludwig Krämer, *The Implementation of Community Environmental Directives Within Member States: Some Implications of the Direct Effect Doctrine*, 2 J. ENVTL. L. 39, 52) ("[S]ome environmental directives. . . clearly give personal rights to the citizens. The Environmental Assessment Directive 85/337/EC for example provides the 'public concerned' by a project covered by the Directive with certain rights in terms of consultation and the provision of information." (footnote omitted)).

[147] R v. Secretary of State for Foreign and Commonwealth Affairs, *ex parte* World Development Movement, [1995] 1 All E.R. 611. In *World Development*, plaintiffs were granted standing in spite of the highly political nature of the actions they were challenging—the fair and proper use of the State's international development funds. *See id.* at 620.

[148] Lancefort, Ltd. v. An Bord Pleanála, [1998] 2 I.L.R.M. 401, 437.

[149] *Id.*

which involved questions of EIA law commonly reviewed by courts. Second, Justice Keane seemed to say that the EIA questions did not involve matters of breach of important public duties. This is an unsustainable position, in light of the European directive. Third, it was clear that had Lancefort not proceeded with its case, no other applicant would have appeared. Lancefort, Ltd had taken up the case at the last possible moment allowed by procedural rules, and the costs rule in Ireland, as noted, is a great *dis*incentive for public interest groups to take such cases at all because of the potential for having substantial costs awarded against them.[150] As with the plaintiffs in *World Development*, if Lancefort Ltd. had failed to take the case to court, the case would not have been brought at all.

c. *Skirting the European Law Issues*

The Irish Supreme Court proceeded to treat European law issues with stunning disregard. With regard to *locus standi*, Justice Keane stated that "[i]t is also the case that the requirements of national law as to standing may in some instances have to yield to the paramount obligation on national courts to uphold the law of the European Union."[151] He acknowledged that *Kraaijeveld* was of "some relevance."[152] Justice Keane pointed to paragraph 61 of the *Kraaijeveld* decision, where the Court of Justice stated:

> If [the State's] discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the member state, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.[153]

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150 The Supreme Court recently directed Lancefort, Ltd. to pay costs for the High Court case and for the hearing on costs. *See* Lancefort, Ltd. v. An Bord Pleanála, Ruling of the Court on Costs, Dec. 2, 1999 at 6-7 (transcript, on file with author).

151 *Id*.

152 *Id*. Since the *Kraaijeveld* case is the clearest instruction to the national courts to date with regard to the EIA Directive, it is of more than "some relevance." It is of more relevance to the analysis than the intentions of the Irish Parliament in drafting its planning laws.

153 Case 72/95, Kraaijeveld BV v. Gedepudteerde Staten van Zuid-Holland, 1996 E.C.R. I-5403, I-5453, cited in *Lancefort*, 2 I.L.R.M. at 438.

But Justice Keane concluded that this aspect of the Court of Justice's reasoning was inapplicable to the *Lancefort* facts. He said that "[i]n this case, there is no question of the State having exceeded the discretion conferred on it by Articles 2(1) and 4(2) of the Directive by defining the threshold or criteria in such a manner as to exempt in advance a particular class of projects referred to in annex 2 from the requirement of an EIA."[154] He continued with the following problematic statement:

> Not merely has no attempt been made by the State to exempt in advance any of the classes of projects specified in annex 2 from such a requirement: it has been at pains to reserve to the competent authorities [i.e., the Board] a power to require an EIS in any case where they are of the view that the project, although below the relevant threshold, will have a significant effect on the environment.[155]

Such a declaration is of little relevance as Lancefort was not even making the argument attributed to it. The applicants challenged the exercise of discretion in that a project with manifest significant effects on the environment was not subject to an assessment. Moreover, the court saw the EIA law as primarily "conferring a power" on the Board to require an EIS when it wished; the court was silent as to the *obligation* on the Board to carry out an EIA.

In a calculated pre-emption of possible censure of the judgement, Justice Keane asserted that a denial of *locus standi* would not affect the exercise of Community law rights in Ireland.[156] In

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[154] *Lancefort*, 2 I.L.R.M. at 438. The court did not explain why there was in this case no question of the State having exceeded the discretion allowed under the directive. Beyond this, Justice Keane proceeded to confuse the *Kraaijeveld* case with the earlier Case 133/94, Commission v. Belgium, 1996 E.C.R. I-2323, so as to imply that Lancefort's complaint was that the Irish State had eliminated an entire class of projects from Annex 2. *See Lancefort*, 2 I.L.R.M. at 437-38. This was clearly not the argument raised. Rather, the applicants argued that the threshold was set such that the majority of projects of a certain class escaped assessment. On careful reading, the *Lancefort* facts are very similar to the *Kraaijeveld* facts.

[155] *Lancefort*, 2 I.L.R.M. at 438.

[156] *See id*. Justice Keane stated:

> There is thus no question of the application by the national court of its rules as to standing resulting in a failure by the court to ensure that the relevant principles of European Union law are applied in the State, as happened, for example, in the United Kingdom when it was sought to rely on the doctrine of parliamentary sovereignty as precluding the enforcement of community law in that jurisdiction: see *R. v. Secretary of State for Transport, ex p. Factortame* (Case C-213/89) [1990] ECR I-2433.

this sense, the court benefited from the appearance of having dealt with the merits, while not having done so.[157]

d. *Applicants for Review Blamed for the Failures of the Appeals Board?*

Moving toward the final issues, Justice Keane stated that the invalid permission claim rested on the "alleged failure of the board to consider whether an EIS was required in the circumstances of the present case."[158] The reductionist nature of this formulation has already been made clear. Justice Keane proceeded to imply that the applicants deliberately withheld mention of the EIA question during the administrative appeal hearing, assumedly so that they could bring the judicial review proceedings.[159] It is worth noting that the court never posed this question directly to the applicants.[160] In reality, the conservationists had discovered the inclusion of "architectural heritage" in the EIA Directive (and consequent mistransposition of the directive into Irish regulation) only some weeks after the planning decision had been made.[161] However, regardless of the conserva-

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Id.

[157] Purporting to have eliminated the European law points, the court then returned to the question of national *locus standi*. Justice Keane rejected what he called the "Notice Party's view" that a company of this sort, without assets, trying to evade court costs, was not bona fide. He referred to the fact that the High Court had determined the company to be composed of sincere and serious people. Nonetheless, the court implied that an indefinable cloud continued to hang over the group, since they were incorporated after the challenged decision was made. *See id.* at 438-39. Justice Keane stated:

> At the same time, it can hardly be disputed that, since the appellant was not even in existence at the time the decision which is challenged was made, its interest in the subject matter of the proceedings is somewhat tenuous, if indeed it can be said to exist at all.

Id. at 439. The precise relevance of this factor to the overall analysis is not made clear.

[158] *Id.*

[159] *See id.* at 439-40.

[160] Justice Keane stated, *id.* at 439-40:

> It must be assumed that some at least of those present were aware, at least in a general sense, of the circumstances in which an EIS and EIA were required. In the particular case of Mr. Smith and junior counsel representing An Taisce, no explanation was given at any stage of these proceedings as to why the objection was not taken until the application was made for leave to issue the present proceedings.

[161] More seriously, the Supreme Court failed to distinguish between the obligation on a participant in an administrative hearing to bring forward all factual information at his or her command, and the obligation of public bodies to make decisions according to procedure set out in law, including European law. The

tionists' actual knowledge, the EIA Directive imposes obligations not on those citizens electing to participate in administrative hearings, but on all relevant emanations of the State. The relevant relationship is that between the court and the decision-maker. In spite of that fact, the court has shifted to the citizen applicant the legal responsibility to inform the Planning Appeals Board of its obligations under the Directive. Apart from the unfairness of this position, the court did not formally attempt to determine whether the applicants had in fact known about the inclusion of "architectural heritage" in the EIA Directive at the time of the administrative hearing.

The court refused to treat the EIA issue as anything more than the decision-maker "eliciting information"—and did not even allude to the idea of procedural rights.[162] The court also assumed that the applicants were obliged to show in advance what the assessment would have yielded:

> Whether, as a matter of law, the board was obliged to consider exercising its undoubted power to require an EIS is a separate issue. Assuming that it was under such an obligation and failed to consider whether an EIS should be required, it has not been shown that this had the slightest adverse effect on the attainment of the objectives of the directive and the regulations which implemented it in this State.[163]

The court's position is contradictory at best. How could the objectives of the directive not be thwarted if the decision-maker failed to carry one out where it was required? Was the court saying that the national "planning process" is the same thing as an environmental impact assessment? The Court of Justice would not agree with that position.[164] The Irish courts continue to fold European environmental law into the terms of Irish planning

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court appears to be stating that citizens have an obligation to inform official bodies of the laws governing the decision-making process, or forfeit the right to challenge the legality of those decision-making procedures. *See id.* at 439-44.

[162] Justice Keane declared:

> Neither the High Court nor this Court were at any stage given any indication as to the respects in which it was alleged that the assessment carried out by the Board of the development, in this case as part of the planning process, failed to elicit data relevant to an assessment of the effects on the environment of the development.

Id. at 440.

[163] *Id*.

[164] *See* Commission v. Germany, [1996] 1 C.M.L.R. 196, 210-16 (examining the German process to see if it actually duplicated in each detail the requirements of the EIA Directive).

law, even when this renders the content of a directive ineffective.[165] Privileging development interests, the Irish courts transpose these values onto European directives, even when such values conflict with the explicit text of the particular directives.

The court summed up:

> An examination of the merits of the case, accordingly, leads me to the conclusion that, if there has been any irregularity in the manner in which the board discharged its functions, it could not possibly be regarded as constituting an abuse of power or a default in procedure sufficiently grave to justify affording *locus standi* to a body such as the appellant.[166]

The essence of this idea is that identification of a breach of the EIA Directive would not be "sufficiently grave" to grant *locus standi* to a group of conservationists with an extensive track record in this area. However, adherence to the terms of the Directive demands that any established breach of the Directive should lead to an order by the court to re-run the decision-making process so that an environmental impact assessment can be carried out.

Finally, aware that the United Kingdom is tending towards a more liberal conception of *locus standi* for environmental groups, the judge brought up a 1994 Greenpeace case,[167] where that group challenged the grant of a license to reprocess spent nuclear fuel. While the substantive challenge was rejected, the English court upheld Greenpeace's *locus standi*.[168] Justice Keane made a disparaging comparison between that case and the Lancefort challenge, displaying a worryingly personalized approach to the important European law questions involved.[169] Although partic-

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[165] *See Lancefort*, 2 I.L.R.M. at 440 ("[I]t is perfectly clear that the requirements of the planning legislation ensured that the public had access to the detailed plans lodged with the application for permission."). This implies that access to plans is the equivalent of an EIA.

[166] *Id.*

[167] R. v. Inspectorate of Pollution *ex parte* Greenpeace, [1994] 4 All E.R. 329 (Q.B. 1993).

[168] *See id.*

[169] *See Lancefort*, 2 I.L.R.M. at 441. Justice Keane wrote:

> The contrast between a concern based on a failure by the operator of such a plant to engage in a process of public consultation before beginning the discharge of radioactive waste with the stated concern of the appellant in the present case as to the absence of an EIS, in a case in which there has been an exhaustive and searching process of public consultation culminating in an oral hearing attended by the alter ego of the appellants, hardly requires emphasis.

ular Justices on the Supreme Court may not value "architectural heritage" or include it in a private definition of "environment," the directive makes clear that within the EC "architectural heritage" *is* part of the "environment,"[170] the protection of which is the principal objective of the directive. The Supreme Court's final word was that "when the legal and factual merits of that issue [accepted as substantial by the High Court] are analysed, it is clear that this was not a case in which the appellant should have been recognized as having *locus standi* to mount such a challenge."[171]

There has never been an instance in EC legal history in which a national court was sanctioned for failure to apply European law. The fiction that national courts will always act as European courts for the purposes of applying Community law is not sustainable. The Irish court, in a case like *Lancefort*, was of course aware that no Community sanction would be brought to bear against it, and that the applicants would find themselves without recourse following the national court's refusal to either apply the European law or refer the relevant questions to the Court of Justice. Nowhere is the hiatus between the environmental rhetoric of the European Court of Justice and practical implementation more pronounced.[172]

Id.

[170] *See supra* note 112 and accompanying text.

[171] *Lancefort*, 2 I.L.R.M. at 442. The court is careful to indicate that there "may" be instances where incorporated bodies such as the applicants will be entitled to *locus standi*. Justice Keane wrote: "It is, understandably, a matter of concern that companies of this nature can be formed simply to afford residents' associations and other objectors immunity against the costs of legal challenges to the granting of planing [sic] permissions." *Id.* at 442. This statement displays the often reactionary nature of the Irish legal establishment's views on property and why the full implications of European environment directives are so strenuously resisted in the Irish courts. The fact of incorporation by a not-for-profit body, the judge says, "should not of itself deprive them in every case of *locus standi*." *Id.* A very recent decision of the European Court of Justice makes explicit the right of persons to rely on the provisions of the EIA Directive before the national court and the duty of the national court to interpret whether the national authorities have rightly decided whether a project is "likely to have significant effects on the environment." *See* Case C-435/97, World Wildlife Fund (WWF) v. Autonome Proviniz Bozen, para. 1 (Sep. 16, 1999) (1999 ECJ CELEX LEXIS 1966).

[172] Some months after the *Lancefort* judgment, the European Commission, acting on complaints by Lancefort and other conservationists, moved towards taking legal action against Ireland on precisely the same grounds as those raised by Lancefort in its national legal action. *See* Letter from G. Kremlis, Head of Legal Unit I, Directorate-General XI, European Commission, to Sara Dillon,

The *Lancefort* judgement may provide an ongoing rationale for the national courts to refuse to apply European environmental law by denying *locus standi* whenever an environmental plaintiff attempts to raise EIA matters.[173] As *Lancefort* is a Supreme Court precedent, and the current leading *locus standi* case in the environmental field, many future environmental litigants will likely be affected by it. Complaints to the European Commission about the failures of national courts, as opposed to other national institutions, to apply European law are entirely ineffective. The Commission will not move against national courts, such action being too politically charged to contemplate. It is clear that the European legal regime is, in this context, a fundamental failure.

Lecturer, Faculty of Law, *University College Dublin* 1 (Nov. 25, 1998) (on file with author). The Commission stated its view that Ireland had failed in its duty to apply the EIA Directive to the architectural heritage and "that the provision for EIA in the Irish legislation for hotel complexes in existing urban areas is not accompanied by the necessary interpretation and administrative practice to make it systematically effective. . . ." *Id.* at 2. The letter concluded that the Directive's required results had not been met because Ireland had not taken the necessary measures. *See id.* By the time of the letter, the Commission had formally notified Irish authorities of these views. *See id.* at 1. At the time of this writing, negotiations on this matter are still in progress between the Commission's DG XI and the Irish authorities.

[173] As an early indication of the negative ripple effect on the application of European environmental law in Ireland, see the High Court judgment in Murphy v. Wicklow County Council, 1998 No. 25 J.R. (Ir. H. Ct. Mar. 19, 1999) (Transcript, on file with author). In this case, the applicant challenged a decision to allow a road-widening scheme through old-growth forest. *See id.* at 1-16. A number of issues were raised, including the question of the adequacy of the EIS relied upon. *See id.* at 33-47. The Glen of the Downs judge, trying to distinguish this case from *Lancefort* in order to allow *locus standi* to the applicants, stated:

> [T]he appeal "on the merits" in *Lancefort* was confined to a single issue, namely, the absence of an EIS which, in the particular circumstances of *Lancefort*, the Court could not regard as a particularly serious matter. . . .[I]n the present case . . . some five different points are raised in the Judicial Review, some of which I may say at this stage certainly have merit. . . . [I]t seems to me that the thrust of the decision in *Lancefort* goes to a case where a single point only is raised and where considerations of locus standi and the merits of that one point are inextricably woven together.

Id. at 21-22.

The judge further followed the negative *Lancefort* precedent by saying that the applicants were harmed by not having raised the impact assessment issue at the administrative hearing. He stated: "That finding seems to me to have certain inescapable consequences for the Applicant in the instant case insofar as any attack on the EIS is concerned. . . ." *Id*. at 23. European law in this way becomes unenforceable. *See* id. at 17-32.

2. *The Kill Dump Case:* McNamara v. Kildare County Council and Dublin County Council

This long-running legal drama began when Dublin County Council (since sub-divided into smaller councils) applied to Kildare County Council for permission to create a municipal superdump of sixty-four hectares in that neighboring county, near the small village of Kill. The dump was planned as the largest municipal dump in Ireland, and would have involved heavy vehicles passing in and out of the site on an almost constant basis.[174]

Kildare County Council refused permission on twenty-nine grounds; however, the Board overturned this decision, against the recommendation of its own inspector. Permission was subject to twenty-six conditions. Among the grounds raised by the applicants for judicial review, a community group in the Kill area, were that the EIS was defective and failed to comply with statutory requirements and that the conditions set down with the Board—and left as matters for future agreement between the two county councils—represented an abdication of responsibility of the Board.[175] The applicants argued that these grounds rendered invalid the Board's decision.

Judicial review applications in the environmental context must be brought within a strict two-month statute of limitations.[176] In *McNamara*, an affidavit was provided to the applicants by a hydrogeologist and submitted to the court after the time limit had run. The affidavit declared that the proposed removal of four million tons of gravel (as per one of the twenty-six conditions) would interfere with an aquifer serving other properties in the vicinity.[177] The hydrogeologist claimed that the interference was not referenced in the EIS, and that this information should have been considered by the Board. The counter-argument considered by the High Court was that, while the applicants had made a *general allegation* of the inadequacy of the EIS, this more *specific information* was not something that could have

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[174] *See* McNamara v. An Bord Pleanála, [1996] 2 I.L.R.M. 339, 344-45 (Ir. H. Ct.). After the case was decided, rules came into force to the effect that both conventional planning permission and a license by the Environmental Protection Agency are required for such developments. *See* Waste Management (Licensing) Regulations, 1997 (S.I. No. 133), §§11-14.

[175] *See McNamara*, 2 I.L.R.M. at 340-41.

[176] *See* Local Government (Planning and Development) Act, No. 14, § 3B(a)(i) (1992).

[177] *See McNamara*, 2 I.L.R.M. at 348.

been inferred from the more general allegation, and thus was out of time with respect to the two-month limit.[178]

Justice Barr, of the Irish High Court, reviewed the rationale behind the 1992 planning amendments: the necessity for speed and finality in the planning process.[179] In emphasizing the fact that the developer must be made aware within a short time of the nature of the challenge to the decision,[180] the court declared that the "applicant is not entitled to rely on a general complaint about the EIS as an umbrella to justify subsequent specific allegations not notified as grounds within time."[181] The relevant case law, Justice Barr said:

> clearly implies that the obligation on the applicant includes not merely informing the developer within time that his planning permission is being challenged, but also within the requisite time scale making him aware of the specific grounds for the proposed challenge so that he may know the case he has to meet.[182]

Once again, there was no discussion of the purpose of the EIA Directive, or the rights of the local citizens under European law. In this case, the issues impacted upon public health and the quality of life in the most direct manner, but the court made no move towards referring any question concerning the two-month rule and the purposes of the EIA Directive to the European Court of Justice.

In a manner typical of the Irish courts in environmental matters, the High Court judge dismissed the substantive case without ever analyzing it, or committing himself to any clear statement of the law. Justice Barr wrote:

> I should add that if each of these grounds of objection . . . had been made by the applicant within the prescribed time limit, I would not have been disposed to accept his case on any of them. . . . [I]t is unnecessary to review the arguments which have been advanced on his behalf in that regard. Suffice it to

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178 *See id.* at 349.

179 The court quoted from *K.S.K. Enterprises, Ltd. v. An Bord Pleanála*, [1994] 2 I.R. 128, 135, where the Chief Justice affirmed that it was legislative intent to "greatly. . . confine the [opportunities]" of applicants in the planning context, so that persons who had obtained a planning permission could be certain they were able to act on it expeditiously. *See McNamara*, 2 I.L.R.M. at 348-49.

180 *See McNamara*, 2 I.L.R.M. at 349-50.

181 *Id*. at 351.

182 *Id*. at 352.

> say that I regard the contrary case submitted on behalf of the board in its written submissions as being well-founded.[183]

The High Court denied McNamara certification to appeal these findings to the Supreme Court. With this in mind, McNamara attempted to convince the High Court to allow a reference to the European Court of Justice.[184] He argued that the High Court cannot make itself the court of last resort and also refuse a 234 (ex 177) reference. Not surprisingly, the High Court emphasized the aspect of "close co-operation" between national courts and the ECJ in the 234 (ex 177) scheme.[185] The High Court maintained that this scheme is for the "benefit" of the national courts,[186] but it failed to acknowledge the fact that Article 234 (ex 177) is also, in theory, supposed to guarantee important rights of access to justice for European citizens. In this case, the High Court insisted, since the case had already been decided, it was "patently no longer pending."[187]

The applicant appealed this particular point to the Supreme Court,[188] attempting to obtain an order referring the European law questions to the Court of Justice.[189] The Supreme Court noted that where a national court is a final court and where such a European law question arises, there is no discretion on the part of the court as to whether the question should be referred.[190] But the Supreme Court stated that the High Court was correct in finding that there was no further case "pending" before the High Court for the purposes of which a preliminary ruling of the Court of Justice could have any relevance.[191] Justice Keane stated that since the applicant did not make this argument during the hearing itself, "it is again unnecessary to express any concluded opinion as to whether, in the event of that course being taken while the case was at hearing . . . the court would be obliged to refer the question of European Union law for a preliminary ruling."[192]

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183 *Id*. at 353.
184 *See McNamara v. An Bord Pleanála*, [1998] 3 I.R. 456 (Ir. H. Ct.).
185 *See id.* at 457-60.
186 *Id*. at 456.
187 *Id*. at 457.
188 For the Supreme Court's ruling, see *McNamara*, 2 I.L.R.M. at 313.
189 *See id.* at 317.
190 *See id.* at 318-19.
191 *See id*. at 319.
192 *Id.* The Irish courts are clearly not following the requirements set down by the Court of Justice in Case 283/81, *CILFIT v. Ministry of Health*, 1982 E.C.R. 3415 with respect to Article 234 (ex 177) references. The 234 (ex 177)

Justice Keane provided further support for the position he had taken, stating that there is a "further difficulty in the path of the applicant."[193] He was "satisfied that no question of European Union law has been identified in the present case which could, in any event, have properly been the subject of a reference, either by the High Court or this Court, for a preliminary ruling pursuant to Article [234 (ex 177)]."[194] If the interpretation offered by the Irish courts is correct, it is unclear what benefit the European Court of Justice is to European citizens—at least those located in RJs.

3. McBride v. Galway Corporation

This complex case revolved around a local resident's argument that the local authority for Galway City was required to provide an EIS with its application to build a large sewage treatment plant at a scenic location in Galway Bay.[195] The case in-

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reference procedure is not strictly voluntary. The Court of Justice stated in *CILFIT* that reference is not required only if:

> the correct application of Community law. . . [leaves] no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

Id. at 3430. And further:

> Article [234 (ex 177)] . . . is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.

Id. at 3431. The Irish courts freely state that there is no Community law issue, even when such issues are clearly being raised before them; they also fail to mention the fact that Article 234 (ex 177) imposes an *obligation* on them as national courts.

193 *McNamara*, 2 I.L.R.M. at 319.

194 *Id.*

195 Galway had long been desperately in need of adequate sewage treatment. As one of Europe's fastest growing cities during the 1980s, the situation of phenomenal growth in the absence of sewage infrastructure was utterly unsustainable. A long-running battle involved the question of where a sewage treatment plant should be located. Official preference was for an island in Galway Bay, with significant environmental and visual impacts.

volved two ministers of government, two separate EISs, and a long-running battle between organs of state and environmentalists opposed to the location of the plant.[196] Both the EIA Directive and the Habitats Directive[197] were invoked by the applicants for judicial review.

Interestingly, Judge Quirke, of the High Court, failed to comprehend basic European law. Citing relevant case law of the Court of Justice concerning the direct effect of the EIA Directive, Justice Quirke made the following statement:

> What distinguishes the [*Kraaijeveld*] decision from the instant case is that in *Kraaijeveld* the Member State had " . . . in its national implementing legislation . . . laid down specifications, criteria or thresholds for a particular project covered by Annex II in accordance with art. 4(2) of the Directive . . . "and it was held by the Court that insofar as the implementing legislation was inconsistent with the provisions of art. 4(2) E.I.A. Directive of 1985, the latter had direct effect and could be relied upon by an individual before a national court.[198]

Justice Quirke continued:

> There was no attempt by the Court in *Kraaijeveld* to determine whether or not the provisions of art. 4(2) of the E.I.A. Directive of 1985 appeared "[. . .]unconditional and sufficiently precise" to be relied upon by an individual against the State "where the State fails to implement the directive in national law by the end of the prescribed period" rather than "where it fails to correctly implement the Directive".[199]

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[196] McBride v. Mayor, Aldermen and Burgesses of Galway, [1998] 1 I.R. 485 (Ir. H. Ct.). For the Supreme Court opinion, see [1998] 1 I.R. 517.

[197] The Habitats Directive is discussed *infra* at Part II.B.

[198] *McBride*, 1 I.R. at 509.

[199] *Id. But cf.* Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337, 1348, where the court stated:

> It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.

It is basic to Community law that whether or not the provisions of a directive can be invoked before national courts—that is, whether they have direct effect—flows from the nature of the directive and the provision in question. If the provision is sufficiently precise, then it does not matter whether the directive has been implemented improperly or not implemented at all. The High

Justice Quirke asserted that where the Member State failed to implement the Directive in national law by the end of the prescribed period, Article 4(2) "discloses that it would be virtually impossible to apply the provisions thereof with any precision."[200] The High Court's understanding was that, whereas the Court of Justice clearly stated that the provisions in question have direct effect in situations where the failure of Member States to implement directives fully and accurately is in question, the same provisions do not have direct effect when the State has not implemented the Directive at all.[201]

On appeal, the Supreme Court displayed a more sophisticated approach—which yielded the same result. The Irish Supreme Court has repeatedly demonstrated that the most effective judicial technique in such cases is to create the impression that there is in fact no European law question.[202] Justice Keane showed that he does understand the doctrine of direct effect, and that it applies to all emanations of the State—where, that is, there has been an actual breach of the requirements of a relevant directive. But, he wrote, "in this case, the respondent, although undoubtedly an organ of administration, cannot be regarded as being in breach of any requirement of the Directive during the relevant period."[203] The Supreme Court found that the ministers concerned properly considered the contents of the environmental impact statements, as well as the comments of objectors.[204] Yet, the decision is non-responsive to the arguments proffered by the applicants. They wished to challenge the permission on the

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Court's formulation in *McBride* would create an enormous incentive for Member States not to implement directives at all.

200 *McBride*, 1 I.R. at 509.

201 The reasoning is illogical. For comment on states' resistance to EC directives and the role of national courts, see generally, CRAIG & DE BURCA, *supra* note 24, stating at 188:

> Under the Treaty, many important areas of Community policy rely for their practical realization on the proper implementation of Community directives. If States are failing or refusing to implement such measures, those Community policies will suffer. Thus the Court's inclination has been to encourage national courts, especially at the suit of aggrieved individuals who have become aware of the provisions of a directive in their favor, to enforce the provisions of the directive directly, even in the absence of its domestic legislative implementation.

202 *See, e.g.*, Lancefort, Ltd. v. An Bord Pleanála, [1998] 2 I.L.R.M. 401; McNamara v. An Bord Pleanála, [1996] 2 I.L.R.M. 339.

203 *McBride*,1 I.R. at 528.

204 *See id*. at 533.

grounds that the sequence of events did not allow for full consideration of all environmental effects of the project in question. Whereas the High Court banished the applicants by saying that the European law raised did not apply, the Supreme Court (without alluding to the legal errors of the High Court) countered by saying that all aspects of the directive had been complied with.

4. O'Nuallain v. The Right Honourable The Lord Mayor Aldermen and Burgesses of Dublin

Over the summer of 1999, a surprising judgment was delivered by the High Court in a case involving an EIA argument.[205] The dispute surrounded a competition held for the construction of a "Millennium Monument" on Dublin's O'Connell Street, to replace a landmark pillar that had been destroyed in the 1960s. The project would have involved the spending of a relatively small amount of public money, in the region of three million Irish pounds, or 3.75 million U.S. dollars. Competitors were informed that their designs would be required to have a vertical, contemporary emphasis, but also "'relate to the quality and scale of O'Connell Street.'"[206] The competition was initiated by the Lord Mayor of the city, decided upon by an independent panel, put before the planning committee of the City Council, and ultimately authorized by the City Manager.[207] The applicant for judicial review was one of the losing competitors. He argued that the winning design, a massive steel needle, with height enormously in excess of the surrounding buildings, did not conform to the competition guidelines, and that an EIS should have been submitted for the project.[208]

While the judgment in this case was short and to the point, it is striking in that the judge seemed to have no difficulty reviewing a question that mixed law and fact: Would this development be likely to have significant effects on the environment, and if so, would it require an EIS? Justice Smyth pointed out that the Directive required that the cultural heritage be taken into account.[209] Dublin Corporation argued that it was within their discretion to decide whether or not an EIS was necessary, but

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[205] 1999 No. 154 J.R. (Ir. H. Ct. July 2, 1999) (Transcript, on file with author).
[206] *Id*. at 4 (quoting from the design parameters for the competition).
[207] *See id*. at 1-6.
[208] *See id*. at 6-9.
[209] *See id*. at 14.

Justice Smyth emphatically rejected this.[210] Without reference to those courts that have avoided this European Law issue, Justice Smyth stated:

> [T]here is an obligation on decision-makers to require the carrying out of an Environmental Impact Statement[[211]] in accordance with the Directive if a particular project is likely to have significant effects on the environment by virtue of its nature, size and location, notwithstanding the fact that this particular project falls below the threshold established in the 1989 Regulations . . . .[212]

Justice Smyth then came to an independent determination that the project "is likely to have significant effects on the environment."[213]

The case may not seem significant if not placed firmly in the context of *Lancefort*. It is implausible that both the *Lancefort* High Court and Supreme Court were unaware of the full implications of the EIA Directive and that *O'Nuallain* shows sudden judicial enlightenment. It would appear that where the project involved a comparatively small amount of public money, and did not involve the rights of important property interests, the court had little trouble applying the EIA Directive in a manner that had been strenuously avoided in earlier cases. This contrast has disturbing implications for the administration of justice and the application of European environmental law in Ireland.

5. *Summary: Exercising Environmental Rights Under the EIA Directive in an RJ*

The EIA Directive has been said to grant important procedural rights of participation to European citizens.[214] Exercise of these and other environmental rights depend upon the good faith application of environmental directives by the national courts. The Irish courts have displayed no willingness to overturn permissions for development projects where flaws in the application of the directive have appeared. There is apparently little judicial curiosity in Ireland about the meaning of the EIA Directive, or about the proper consequences of its misapplication.

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[210] *See id*. at 15.

[211] It is to be assumed that the judge intended this to be read as environmental impact assessment.

[212] *O'Nuallain*, 1999 No. 154 J.R., at 15.

[213] *Id*.

[214] See Hilson, *supra* note 103.

International scholars on European Community law and environmental law must realize that their praise for the lofty standard of Community environmental law is misplaced[215] and that only a fundamental democratization of access to environmental justice can bring reality on the ground in line with the ringing pronouncements of the European Court of Justice. An excess of academic attention has been paid to the abstract pronouncements of the Court of Justice with respect to the obligations of the Member States. Not enough has been paid to the extraordinary basic systemic failures in "delivery" of those pronouncements to the Community's citizens who go before national courts in RJs.

B. *The Habitats Directive in Ireland*

Thus far, the Habitats Directive[216] has only been invoked as "background music" by environmental plaintiffs in Ire-

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[215] For authors enthusiastic in their praise of the development of European environmental law, see, for example, Kenneth M. Lord, *Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice*, 29 CORNELL INT'L. L.J. 571 (1996); Matthew L. Schemmel & Bas de Regt, *The European Court of Justice and the Environmental Policy of the European Community*, 17 B.C. INT'L & COMP. L. REV. 53 (1994).

[216] Articles 2 and 3 of the Habitats Directive contain the fundamental obligations of Member States. Article 2(2) states that "[m]easures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest." Habitats Directive, *supra* note 70, art. 2(2), at 10. Article 3(1) demands that there be established "[a] coherent European ecological network of special areas of conservation [SACs]," with the title of "Natura 2000." *Id.* art. 3(1), at 10. This is to maintain and, where appropriate, restore the listed habitats and species found in the annexes to the Directive. *See id.* This network is to include the Special Protection Areas (SPAs) designated by Member States under the terms of the Wild Birds Directive, Directive 79/409/EC of 2 April 1979 on the Conservation of Wild Birds, 1979 O.J. (L 103) 1 [hereinafter Wild Birds Directive].

Article 4 of the directive sets out its methodology, to be implemented through Member State action. Member States must rely on the criteria set out in Annex III (Stage 1) and scientific information, and based on this create a list of sites indicating the relevant Annex I and Annex II habitats and species. *See id.* art. 4, at 10.

Annex III criteria include considerations of how representative a given site is, and its restoration possibilities, among other factors. *See id.* Annex III, at 37. This list is ultimately transmitted to the European Commission. *See id.* (Ireland, along with several other Member States, has been strikingly late in carrying out this process.) The Commission then, in agreement with the Member States, establishes a draft list of sites of Community importance, which is in turn

land.[217] The European Court of Justice has not interpreted the Habitats Directive to any extent.[218] There is, however, debate over whether the Court of Justice's pronouncements with respect to the Wild Birds Directive can be applied to the Habitats Directive.[219] Although the underlying premises of the two directives are similar, the issue has yet to be resolved.

The arrival of the implementing regulation of the Habitats Directive in Ireland[220] has been met with enormous disappointment. While political resistance to this Directive has been strong in many parts of Europe, in Ireland, farming, tourism and commercial interests and their legal apologists have proven especially successful in discrediting it,[221] and ensuring that national authori-

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adopted according to procedures set out in Article 21 of the directive. *See id.* art. 21, at 14-15.

It is crucial to note that the directive distinguishes between priority and non-priority sites. Article 1(d) of the Directive defines priority habitats as those which are "in danger of disappearance. . . for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2." *Id.* art. 1(d), at 8.

217 *See* Irish Wildbird Conservancy v. Clonakilty Golf & Country Club, 54 MCA/1995 (Ir. H. Ct. July 23, 1996) (Transcript) (LEXIS, Irelnd Library, Cases File); McBride v. Mayor, Aldermen and Burgesses of Galway, [1998] 1 I.R. 517. While the main argument in McBride centered on the EIA Directive, arguments relative to the status of Mutton Island as a protected area under the Habitats Directive and the Wild Birds Directive were also raised. Among other comments, Justice Keane wrote for the Supreme Court that "it is . . . clear that the obligations arising under art. 6(2) and (3) of the Habitats Directive and applicable to the Mutton Island area as a Special Protection Area classified pursuant to the Birds Directive were imposed on the Member States and not on the respondent." *Id.* at 535. The respondents in this case were the urban authorities of Galway. It is striking that such a restrictive view is still being taken of the obligation imposed on national authorities.

218 The Court of Justice has only stated that the directive must be fully implemented in national regimes. *See* Case C-329/96, Commission v. Hellenic Republic, 1997 E.C.R. I-3749.

219 *See, e.g.*, Wouter P. J. Wils, *The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive*, 6 J. ENVTL. L. 219 (1994).

220 European Communities (Natural Habitats) Regulations, 1997 (S.I. No. 94 of 1997).

221 For examples of the heated social debate over habitat protections in Ireland, see, for example, Gordon Deegan, *Snail Is Safe at New Golf Site, Says Duchas*, IRISH TIMES, Mar. 3, 1999, at Home News 6, *available in* LEXIS, World Library, Itimes File; *Farmers Attack Higgins over Role in New EU Conservation Measures*, IRISH TIMES, Nov. 20, 1996, at Home News 9, *available in* LEXIS, World Library, Itimes File; *Farmers Seek to Conserve Land Rights*, IRISH TIMES, Jan. 6, 1997, at Home News 2, *available in* LEXIS, World Library, Itimes File; Frank McDonald, *Eastern Bypass Back in Favour for Dublin City*

ties adopt a highly "flexible" approach to the Directive's demands. The ambiguous attitude of the European Commission towards Member State discretion under the Directive has done little to bolster the cause of full application of the directive in this RJ.

Whether or not the European Court of Justice ultimately decides that there is a major interpretative distinction to be drawn between the nature of Member State obligations under the Wild Birds Directive and the Habitats Directive, it is clear that these two instruments function along similar conceptual lines. Both require that legal decisions be made according to primarily biological and scientific criteria.[222] Both require that species and habitats be preserved through specific actions that protect the areas where the relevant species are found. Under the Wild Birds Directive, Member States must establish Special Protection Areas (SPAs).[223] Likewise, under the Habitats Directive, Special Areas of Conservation (SACs) must be established.[224] Both require modification of human behavior within the protected zones.[225] In this sense, it is difficult to see why the Court of Justice would interpret the nature of obligations under the Habitats Directive in a manner significantly different from that of the Wild Birds Directive. The main political question surrounding the Habitats Directive in Europe is whether the European Commission will yield to Member State resistance by accepting a significant minimum of protected sites, rather than virtually all sites indicated by the relevant scientific criteria. The former approach by the Commission would have the effect of enlarging the role of

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Council Gives Conditional Support to Motorway Plan, IRISH TIMES, Mar. 3, 1999, at Home News 8, *available in* LEXIS, World Library, Itimes File; Kevin O'Sullivan, *Bypass Row More Than a Tale of a Snail*, IRISH TIMES, Apr. 22, 1999, at Home News 2, *available in* LEXIS, World Library, Itimes File; Lorna Siggins, *Farmers Fear They Are Losing Out to Conservation*, IRISH TIMES, Feb. 9, 1998, at Home News 2, *available in* LEXIS, World Library, Itimes File; Lorna Siggins, *Prospecting in Connemara Approved Despite Environmental Objections*, IRISH TIMES, July 12, 1999, at Home News 4, *available in* LEXIS, World Library, Itimes File.

222 The Court of Justice has addressed the role of scientific criteria with respect to the Wild Birds Directive. *See, e.g.*, Case C-3/96, Commission v. Netherlands, 1998 E.C.R. I-3031; Case C-355/90, Commission v. Spain, 1993 E.C.R. I-4221.

223 *See* Wild Birds Directive, *supra* note 216, art. 3, at 3.

224 *See* Habitats Directive, *supra* note 70, art. 6, at 11.

225 *See generally* Margaret Rosso Grossman, *Habitat and Species Conservation in the European Union and the United States*, 45 DRAKE L. REV. 19 (1997).

Member State discretion. In turn, the potential for judicial applicability of the Habitats Directive in the national courts would be severely curtailed.

Since the Wild Birds Directive also relies on a system of Member State designation of habitat protection for wild birds, with the objective of maintaining this aspect of the "Community heritage," there is justification for assuming that the Court of Justice will treat the Habitats Directive in somewhat analogous terms, at least on certain key points. With regard to the Wild Birds Directive, the court has established general principles. First, with regard to the designation of suitable territories for protection under the Wild Birds Directive, Member States may not invoke grounds of derogation based on any criteria other than ecological interests.[226] Second, while Member States enjoy a degree of discretion in designating areas for protection, the classification of these areas is "subject to certain ornithological criteria determined by the directive."[227]

The court has said that Member States are not authorized to take account of economic requirements when designating an SPA.[228] However, now that the sites protected under the Wild Birds Directive are subject to the standards found in Article 6 of the Habitats Directive, economic requirements stemming from an imperative reason of overriding public importance may be taken into account at a stage later than that of boundary designation.[229] In an important addition to its jurisprudence on bio-diversity, the court has also said that Member States are obliged to classify as SPAs all sites which, under ornithological criteria, appear to be the most suitable for conservation of the species in question.[230] In light of this holding by the court, at least all priority habitats should be protected by Member States under the imperatives of the Habitats Directive. Otherwise, the word *priority* is without meaning.

From the moment Ireland promulgated its implementing regulations for the Habitats Directive in 1997, Irish land-owning

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[226] *See id.* at 1993 E.C.R. at I-4276-77.

[227] *Id.* at I-4278.

[228] *See Commission v. Spain*, 1993 E.C.R. I-4221.

[229] *See* Case C-44/95, R. v. Secretary of State for the Environment, *ex parte* Royal Society for the Protection of Birds, 1996 E.C.R. I-3843.

[230] *See* Case C-3/96, Commission v. Netherlands, 1998 E.C.R. I-3031, 3071.

interests[231] have exerted strong political pressure to reduce the impact of the regulations on activities in proposed SACs.[232] It is part of the logic of the directive that the most suitable sites, certainly the priority sites, should be earmarked for restricted human activity.[233] The European Community made generous provisions for sharing the economic burden with Member States in this regard,[234] and the Irish implementing regulations sensibly restricted compensation to those persons who had made ongoing use of any particular land for five years or more, except in special cases where the denial of compensation is deemed unjust by the Minister.[235] It is important to note that the Directive states that the "polluter pays" principle has *only limited application* in the context of nature conservation.[236] For this reason, funding is made available to Member States for the purposes of softening the blow associated with changing land use patterns in designated areas.

As soon as Irish land-owning and commercial forces became aware that European law would have an effect on land use questions in Irish territory considered of interest to Europe under the Habitats Directive, the two-part refrain of "constitutional challenge" and "compensation" became ubiquitous in Irish environmental law circles. If all landowners in designated areas were to

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231 The land-owning interests referenced include agricultural, tourism, commercial and residential sectors.

232 *See supra* note 221 (providing examples of the public debate regarding habitat protection).

233 *See* Habitats Directive, *supra* note 70, art. 6, at 11.

234 The preamble to the Habitats Directive states:

> Whereas it is recognized that the adoption of measures intended to promote the conservation of priority natural habitats and priority species of Community interest is a common responsibility of all Member States; whereas this may, however, impose an excessive financial burden on certain Member States given, on the one hand, the uneven distribution of such habitats and species throughout the Community and, on the other hand, the fact that the "polluter pays" principle can have only limited application in the special case of nature conservation;
>
> whereas it is therefore agreed that, in this exceptional case, a contribution by means of Community co-financing should be provided for within the same limits of the resources made available under the Community's decisions. . . .

Id. preamble, at 7-8. The co-financing concept is spelled out more concretely in Article 8 of the Directive. *See id*. art. 8, at 11-12.

235 *See* European Communities (Natural Habitats) Regulations, 1997 (S.I. No. 94), § 20(6), (7).

236 *See* Habitats Directive, *supra* note 70, preamble, at 7-8.

be compensated for prospective restrictions on land use brought about by the Habitats Directive, the directive would prove short-lived. However, because the Irish courts had in the past found national protective designations to be unconstitutional,[237] and because of the undeveloped nature of Irish land use law,[238] there was a great hope among developers and landowners that the directive could either provide large amounts of compensation to land owners (a "windfall" approach to habitats regulation), or that the march of the directive could be stopped by a constitutional challenge to the directive's implementation in Ireland.

Environmental groups made a strong case against the need to compensate those who lodged applications for *new* developments in proposed SACs, as opposed to compensation for those who would be forced to alter their existing land use patterns.[239] The controversy raised the interesting problem of the relationship between the adoption of laws necessitated by Community membership, and well-established Irish property rights.[240] From the environmental point of view, certain scientifically based designations were unquestionably required by Community membership, and thus there ought to be no question of compensation for new development applications adversely impacting upon the environmental integrity of a particular site.[241]

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[237] *See* MacPharthalain v. Commissioners of Public Works, [1994] 3 I.R. 353 (ruling protective designations made on the basis of scientific testimony alone were unconstitutional as they lacked the procedural safeguards of notice and opportunity to object to the scientific testimony proffered).

[238] *See* Dillon, *supra* note 67, at 107-11.

[239] *See* Friends of the Irish Environment, *Circular Letter No. 1 Re: Compensation in Special Areas of Conservation* (visited Feb. 29, 2000) <http://ourworld.compuserve.com/homepages/tonylowes/circ1.htm>.

[240] These rights are established by the very national judicial system that would be called upon to uphold Community law not consistent with those rights.

[241] Article 29.5 of the Irish Constitution states:

> No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by the institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

IR. CONST. art. 29.5. This means that the question of precisely what is "necessitated" by Community membership becomes of the greatest importance. *See* Meagher v. Minister for Agriculture and Food, [1994] 1 I.R. 329, 357-60 (discussing Ireland's obligations under Directive 85/358/EC, which supplemented

However, other forces were at work to undermine the environmental effectiveness of the directive's operation in Ireland. The first of these forces came from a political establishment responding to pressures from influential constituents. The second force at work emanated from the legal establishment, part of which remained convinced that the Irish implementing regulations for the Habitats Directive could be proven unconstitutional. While such a challenge has not yet been brought before the Irish courts, given the courts' record on matters of European environmental law, it is not unthinkable that the national regulations could be found to be an unconstitutional infringement of individual property rights, notwithstanding the fact that such a finding would be in conflict with Ireland's EC obligations.[242] An Irish court would be highly unlikely to refer any such questions to the Court of Justice, on grounds that only an Irish court can interpret the Irish Constitution.[243]

The Irish implementing regulations, in line with the intention behind the directive, make clear that objections to inclusion on the national "candidate" list of designated sites can only be based upon scientific evidence.[244] This was intended to eliminate the possibility of political pressure being brought to bear for reasons remote from the purposes of the directive. Nonetheless, the Irish government created an "appeals body" to hear such complaints, confining its jurisdiction to cases involving owners or occupiers unhappy with inclusion on the list.[245] The body, not enshrined in law, includes representatives from business, indus-

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an existing directive concerning the prohibition of substances related to hormonal and thyrostatic action).

[242] *See* YVONNE SCANNELL ET AL., THE HABITATS DIRECTIVE IN IRELAND 47-49 (1999) (example of an Irish academic looking to the American case *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to uphold the proposition that compensation should be provided for loss of prospective rights to develop property protected under the requirements of the Habitats Directive). For a contrary view of the importance of *Lucas*, see Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1437 (1993) (arguing that "[t]he case is not so far reaching as its rhetoric suggests"); *see also* David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 392-99 (1995).

[243] *See* JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 268 (1987).

[244] *See* European Communities (Natural Habitats) Regulations, 1997 (S.I. No. 94), § 5(1).

[245] The established "Appeals Advisory Board" has no statutory basis; s*ee generally* SPECIAL AREA OF CONSERVATION APPEALS ADVISORY BOARD, INFORMATION LEAFLET.

try, and the Civil Service. It is not composed of scientists alone. Its deliberations and decisions are not published or publicized. The government says that the conclusions of this body are "advisory only," and that ultimate responsibility for decisions on whether or not to change designation boundaries rests with the Minister.[246] Although this practice is clearly inconsistent with the terms and underlying intent of the Directive, the European Commission has taken no action.[247]

The potential for Commission action under Article 226 (ex 169) is often a principal incentive for Member State authorities in an RJ to apply the terms of an environmental directive. The European Commission has apparently given indications that if Member States achieve fifty percent priority designation, that will be sufficient.[248] If Member State authorities believe that Commission action will be pre-empted by achieving fifty percent priority designation, they have little incentive to concern themselves with the demands of NGOs, a group far less powerful than business and agricultural interests.[249] There is an unmistakable

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[246] According to officials in the Heritage Service, the appeals body hears arguments put forward by the scientists in the Heritage Service and the landowning interests and makes a recommendation to the Minister as to whether to maintain the boundary or alter it according to the interests of the appellant. *See* Interview with Peadar Caffrey, Official of National Parks and Wildlife Service (May 1999) (notes on file with author).

[247] *See* Case C-3/96, Commission v. Netherlands, 1998 E.C.R. I-3031, 3059-60 (clarifying that the relevant criteria for designation of sites under the Wild Birds Directive must be scientific (specifically, ornithological) criteria); Case C-355/90, Commission v. Spain, 1993 E.C.R. I-4221, 4278-79.

[248] The Commission has denied that the 50% rule represents official policy. It has conceded that in the event 50% designation of priority sites is not reached in any particular Member State, this "sets the alarm bells ringing." *See* Interview with European Commission Official (Apr. 1999) (notes on file with author). It is unclear why alarm bells would not be set off by a 60% designation. Apart from the fact that this policy seems to be at odds with the Court of Justice's conclusions in *Commission v. Netherlands*, it also implicitly indicates that the directive does not have direct effect, and is essentially incapable of judicial enforcement. This places NGOs in Member States in a legally impossible situation, as they would have no clear basis for complaining of a failure to designate by the Member State authorities.

[249] There have been astonishing instances of official approval by the national wildlife authorities of "boundary changing" in what had been considered priority sites (according to the criteria of the Habitats Directive), in a manner that has coincidentally accommodated extensive tourism developments. The most famous of these is the planned Doonbeg golf course. *See generally* Friends of the Irish Environment, *Doonbeg Index* (last modified Feb. 27, 2000) <http://ourworld.compuserve.com/homepages/tonylowes/doonbeg.htm>. What had been planned as a coherent network of vegetated sand dune SAC comprising

sense in Ireland that even if the state fails to protect sites satisfying the scientific criteria for "priority" designation, there will be no adverse repercussions: the state will not be held accountable.

The charge has been made that the Directive itself is difficult and impenetrable. In fact, it is quite comprehensible and reasonably straightforward, so long as the emphasis remains on the objective scientific criteria underpinning the scheme. Certain legal commentators have, as noted, encouraged the idea that the Irish implementing regulations are open to constitutional challenge.[250] The argument that the Habitats Directive should not be seen to preclude Irish landowners from obtaining payment when they are stopped from proceeding with certain developments in designated areas has been fully developed, and will in all likelihood be

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more than 370 acres in the west of Ireland came out of the process with only 51 acres protected. *See* Friends of the Irish Environment, *Comment on Additional Material Supplied by Developer to Council* (visited Feb. 29, 2000) <http://ourworld.compuserve.com/homepages/tonylowes/doonbeg9.htm>. Arguing that the dune system had been too "degraded" to warrant protection as extensive as had been thought appropriate earlier, the National Parks and Wildlife Service's chief sand dunes expert went so far as to appear at a news conference with the designer of the course. A key point was that earlier scientific studies indicated that the sand dune system as a whole met the criteria for designation as a "priority" site. *See id.* There later arose plans by a semi-state company and a group of American investors to develop the site as a golf course complex. *See* Friends of the Irish Environment, *Affairs of the Nation: In the Bunker with George Mitchell*, THE PHOENIX MAGAZINE, Feb. 11, 2000, <http://ourworld.compuserve.com/homepages/tonylowes/doonphnx.htm>. (Despite what is believed by some to be a violation of Community law, the complex will be partially funded by the EU.)

[250] *See generally* SCANNELL ET AL., *supra* note 242. Professor Scannell's main point is that the Irish implementing regulations go beyond what is "necessitated" by the Habitats Directive and are to that extent open to challenge. She makes a number of questionable assertions in this regard, including:

> The Habitats Directive left a number of matters of principle and policy to the State's discretion, including the degree of public participation, if any, to be allowed in reaching a decision to permit operations or activities, the nature and form which notification to, and consultation with, landowners should take, the circumstances in which it may be considered necessary to maintain or develop features of the landscape which are of major importance for wild fauna and flora and whether or not to provide compensation.

Id. at 38 (footnotes omitted). It is clear that, even under the narrow Irish legal standard for identifying "policy" indirectly invoked by Professor Scannell (namely, that administrative policy may go no further than to give "effect to principles and policies which are contained in the statute itself," see, for example, *City View Press v. An Chomhairle Oiliuma*, [1980] 1 I.R. 381, 399) the Habitats Directive does in fact contain policy. What the directive leaves to the Member States is a degree of discretion in *manner of implementation,* as long as the objectives of the directive are fulfilled.

ruled upon by the national courts.[251] Such charges have made more uncertain the role of the Habitats Directive in Irish land use planning. Fear of legal and political challenge has had a stifling effect on the determination of national and local authorities to apply fully and rigorously the terms of the directive, assuming such determination ever existed.

The Habitats Directive illustrates the fact that, once it is plain that the European system cannot require the adoption of an environmental directive in its totality, national motivation in an RJ to fully and completely enforce such a directive is lost. National stonewalling, despite Court of Justice pronouncements to the contrary, is ultimately rewarded.

III
COMMISSION V. IRELAND: BELATED CLARITY FROM THE COURT OF JUSTICE

The European Court of Justice recently handed down an important decision with respect to Ireland's setting of thresholds under the EIA Directive.[252] In an action taken under Article 226 (ex 169) of the Treaty, the Commission argued before the court that Ireland had violated the EIA Directive in its transposition and exercise of discretion under Article 4(2). The Commission alleged that Ireland had set absolute numerical thresholds for certain Annex II projects below which no Environmental Impact

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[251] *See* SCANNELL ET AL., *supra* note 242, at 139-64. Scannell writes:

> It is. . . submitted that, since the protection of a European site is not a specified ground for denying compensation under the 1990 [Irish Planning] Act, a refusal of planning permission on the ground that a project would adversely affect such a site [i.e., a "European site" under the Irish implementing regulations], would not be a refusal for a reason which excludes the payment of compensation.

Id. at 153. Professor Scannell criticizes environmentalists who attempted to head off a wave of compensation claims by emphasizing the compulsory nature of the obligations under the Habitats Directive. She does not resolve the question herself as to how the Directive could in fact stand if numerous persons were to be compensated in a prospective way for inability to develop land in ways that had not been underway before the introduction of the directive. If such general compensation were to be made available, this would have an inevitable chilling effect on site designations, or a liberalizing effect on planning permissions, even where this was undesirable in terms of the directive's objectives. Professor Scannell had invoked the U.S. standard after *Lucas*, however, even *Lucas* requires that the land have no more productive value at all before compensation is due.

[252] Case C-392/96, Commission v. Ireland (Sep. 21, 1999) (1999 COURT OF JUSTICE CELEX LEXIS 2607).

Assessment need be conducted. The Commission argued that sub-threshold projects—not subject to an assessment under the Irish Regulations—could have significant effects on the environment, and that under Article 2(1) of the Directive, should trigger an environmental impact assessment. Further, the Commission argued that Irish legislation fails to take into account the cumulative effect of smaller projects, and that a number of these projects, none of which individually exceeds the threshold, may when taken together have significant environmental effects.

The Court of Justice agreed that the establishment of thresholds under which many projects with potential environmental effects escape assessment was an abuse of discretion under the Directive.[253] The court declared that a "Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive."[254] The court went on to state that "[e]ven a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration."[255] And further that "a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size."[256]

The court also agreed with the Commission with respect to the cumulative effect of smaller projects on the environment. The court stated that discretion would be exceeded where "a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects."[257] That would lead to a situation where "all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive."[258]

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[253] *See id.* para. 66, 72.
[254] *Id.* para. 65.
[255] *Id*. para. 66.
[256] *Id*. para. 67.
[257] *Id*. para. 76.
[258] *Id.* para. 76.

The Court of Justice, in comparatively clear and unequivocal terms, made clear that the Irish authorities had exceeded the discretion provided them under the directive, and that their manner of setting thresholds had allowed projects having significant effects on the environment to go unassessed, in contravention of the directive's objectives. It remains to be seen whether this decision will contribute to a greater willingness on the part of national courts to treat European environmental law questions with honesty and rigor. It needs to be pointed out that an action like this, brought by the Commission against the Member State, does not put all things right. The Court of Justice did finally shed some light on issues that were central to *Lancefort*, but as has been shown, the national court remains free in a real sense to continue to ignore such statements of the Court of Justice. The clarification did not come about through an Article 234 (ex 177) reference, but through one of the relatively few, and very long-term, cases brought by the Commission itself before the Court of Justice to try and force Member State compliance with environmental directives. The Court of Justice only gave this judgment after the *Lancefort* applicants had gone down to defeat. Costs were duly awarded against them; the national court was not swayed by the fact that the Commission was at the early stages of proceedings against Ireland on the EIA-related architectural questions raised by Lancefort. In other words, while more welcome than the hopelessly opaque language of *Kraaijeveld*, the Court of Justice's statements in *Commission v. Ireland* offer no protection against the procedural and structural weaknesses of the European environmental regime set out in this study. Until sanctions are brought to bear against the national court, the distance between the national court and the ECJ will not begin to close.

IV

Conclusion: Necessary Legislative and Judicial Steps at Community Level: Linking Remedies with Rhetoric

So long as substantive legislation continues to emanate from the Community, leaving enforcement of the legislation to the goodwill of national institutions does not keep decision making "closer to the people." Such a system will inevitably lead to inequality of access to environmental benefits. The system is not cured by the ability of the Commission to go through the cum-

bersome process of bringing legal actions against the Member States, only to have the Court of Justice make ringing pronouncements of no ultimate utility to plaintiffs in their national forums.

Genuine "decentralization" in the Community would entail granting citizens the right to proceed to the Court of Justice, or a regional Community court, directly against their own Member State authorities. The Community has not justified the absence of such a mechanism. It is clear that subsidiarity in the environmental context, presented under the guise of "democracy," inevitably leads to the exclusion of citizens from the centers of power and authority.

A. *What Is to Be Done: Practical Demands*

At present, European environmental law enjoys an inflated reputation for fairness and effectiveness. Clear legal steps must be taken to eliminate the gap between the intent informing the many environmental directives, and the hopelessly weak enforcement mechanisms available to interested parties throughout the Community. These steps will be politically costly, but are unquestionably necessary. "Enthusiastic states" must realize that they have little to lose from a more stringent procedural approach, and that the citizens of RJs are penalized by excessive enforcement "decentralization."

If the Community as a whole is serious about the uniform application of its environmental law, the following legal and political innovations are required as a matter of urgency.

1. *Establishment of European Regional Environmental Courts*

The European legal system has always displayed an enormous deference towards national courts. While the political rationale for this display of deference is understandable, failure to acknowledge that national courts often fail to assume their role as "European" courts undermines the effectiveness of the system as it is supposed to function. European regional environmental courts would be more familiar with Community environmental law, would have no reluctance to apply it, and would not be inclined to avoid facing up to Community law in environmental problems. The theory that national courts are acting as co-operative European courts where Community law questions arise remains a simple *theory*.

2. *Involvement by the European Environmental Agency or Other Arm of the Community in Citizen Enforcement Actions in the Member States*

To date, the EEA has acted in an information-gathering capacity. However, it could be more useful were it granted powers to act in a monitoring and enforcement capacity (i.e., as a party capable of taking Member State authorities to court in any court within the European Community). While political resistance could be expected to this enforcement "mobility," such a role for the EEA could go far to eliminating the current barriers to citizen enforcement in RJs.

3. *Immediate Promulgation of the Access to Environmental Justice Directive*

The European Community cannot continue to send substantive environmental directives into the Member States, unreinforced by necessary enforcement mechanisms. If adopted, the proposed directive on "access to environmental justice" would, in a clear and efficient manner, at last eliminate the hurdles of national rules on *locus standi* and litigation cost assessment. The current convoluted relationship between the Community and its Member States in this regard would be remembered as a period of legal illogic and obscurity.

4. *Creation of Automatic Recourse in the Event the National Court Refuses to Apply a Community Environmental Directive, or to Acknowledge Community Law Issues Raised Before It*

The non-involvement of the Community regarding whether the national court is acting as a "European court" for the purposes of interpreting Community environmental law must end. Likewise, the Community institutions must take on the problem of refusals by the national court to refer important questions of Community environmental law. Since the Commission does not refuse to involve itself (however selectively) when national administrative authorities refuse to implement Community law, its reluctance *vis a vis* national courts is an obvious symptom of political avoidance. To indulge this weakness has a detrimental effect on citizens and their environments in the Member States.

B. *Summary*

The arguments presented in this study hold true whether one is in favor of a constriction or an expansion of the so-called European "superstate." The difficulties identified are separate from the question of whether one is, as a philosophical matter, anti- or pro-federalist in the European sense. The unworkable situation described above has no exact equivalent in U.S. environmental federalism. The crux of the European problem is the dislocation, with respect to Community Environmental directives, of substance and enforcement mechanisms. This dislocation leads to an impossibility to rely on European environmental law by citizens in RJs. It is likely that all Member States display RJ symptoms in certain contexts. However, some Member States are consistently RJs with regard to the environment, while others are not. There is an urgent need to cease academic discussion of European environmental law in the purely abstract, and to insist upon specific legal innovations that will make it possible to invoke and enforce substantive environmental legislation that has already been promulgated at Community level.