

European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection

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[T]he various regional organizations need to do more to integrate environment fully in their goals and activities. New regional arrangements will especially be needed among developing countries to deal with transboundary environmental issues.

—The Brundtland Report¹

INTRODUCTION

As a lawyer actively trying to find theoretically sound and practically effective ways to develop the public international law of environmental protection,² I found Professor Weiler's impressive analysis of the developments in the European Community legal order encouraging.³ The developments Weiler explores point the way toward overcoming the limitations of traditional international legal approaches to environmental regulation. Weiler's discussion creates a solid foundation for this Comment's exploration of how Community environmental law can serve as a model for the rest of the international community with respect to its evolution, its legal nature, and the extent to which it provides participation rights for nonstate actors in the international community.

In Part I of this Comment, I show how Community environmental law generally developed according to the periodic evolution Weiler describes in his article. I will argue that this evolution of a working system of environmental protection involving twelve states suggests how international environmental law might develop in other regions and globally. In Part II, I discuss Community

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1. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 20 (1987).

2. See, e.g., Sands, *Environment, Community and International Law*, 30 HARV. INT'L L.J. 393 (1989); Sands, *European Community Environmental Law: Legislation, the European Court of Justice and Common-Interest Groups*, 53 MOD. L. REV. 685 (1990) [hereinafter *EC Environmental Law*]; Sands & Bedecarré, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban*, 17 B.C. ENVTL. AFF. L. REV. 799 (1990).

3. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

environmental legislation's legal nature. Unlike Professor Weiler, I believe that this legislation is a regional manifestation of international law, and thus a relevant and appropriate model for the development of international rules regionally and globally. Finally, in Part III, I assert that the participation of nonstate actors, including environmental interest groups, in the Community legal order suggests one way in which traditional international environmental law could become more effective and legitimate.

I. THE DEVELOPMENT OF COMMUNITY ENVIRONMENTAL LAW

Professor Weiler identifies three periods in the development of the Community legal order: a *Foundational Period*, from 1958 to the mid-1970's; a *Mutational Period*, from 1973 to the mid-1980's; and the *Single European Act Period*, from the mid-1980's onwards.⁴ The development of Community environmental law closely follows this periodic development. However, given the absence of any express provision concerning environmental protection in the Treaty of Rome,⁵ environmental issues were not themselves the driving force behind the developments during the Foundational Period.

Community environmental law came into its own during the Mutational Period. Although there had been a few, isolated acts of secondary legislation with environmental implications in the earlier Foundational Period,⁶ the 1972 United Nations Conference on the Human Environment in Stockholm⁷ was a major catalyst for the development of Community environmental law. This Conference led directly to Community consideration of environmental matters and an October 1972 Declaration on the Environment by the heads of state and governments of the then nine Community members.⁸ The Community adopted its first Action Programme on the Environment in early 1973.⁹

By 1987, when the Single European Act amendments to the Treaty of Rome¹⁰ came into effect, the Community had already adopted more than 150 acts of secondary environmental legislation;¹¹ and it was into its third Action

4. *Id.*

5. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

6. See, e.g., Council Directive No. 67/548 on the Classification, Packaging and Labelling of Dangerous Substances, 1967 J.O. (196) 1. The directive was originally intended to protect only humans, but was amended in 1979 to provide for a new classification of substances dangerous for the environment. Council Directive No. 79/831, 1979 O.J. (L 259) 10.

7. See U.N. Conference on the Human Environment: Final Documents, U.N. Doc. A/Conf.48/14 and Corr.1 (1972), reprinted in 11 I.L.M. 1416-69 (1972).

8. See S. JOHNSON & G. CORCELLE, THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES 1-2 (1989).

9. 1973 J.O. (C 112) 1.

10. Single European Act, Feb. 28, 1986, 25 I.L.M. 506 [hereinafter SEA], amending Treaty of Rome.

11. For a detailed account of Community environmental law, see N. HAIGH, EEC ENVIRONMENTAL POLICY AND BRITAIN (2d rev. ed. 1989); 51 HALSBURY'S LAWS OF ENGLAND pt. 2 (4th ed. 1986) (law of European Communities); S. JOHNSON & G. CORCELLE, *supra* note 8; L. KRAMER, EEC TREATY AND ENVIRONMENTAL PROTECTION (1990); REHBINDER & STEWART, ENVIRONMENTAL PROTECTION POLICY,

Programme on the Environment.¹² Between 1973 and 1987, the Community adopted an extensive body of substantive environmental rules covering water, air, and noise quality, the control and management of waste and hazardous substances, and the protection of flora, fauna, and countryside.¹³ It also introduced various environmental protection procedures, including environmental impact assessments and mandatory notification to the Commission of certain environmentally harmful activities. The Community also signed a number of international environmental treaties during this period,¹⁴ and its approach to the development of regional rules of environmental protection began attracting the rest of the international community's interest.

Community environmental law during this period was largely motivated by a desire to remove nontariff barriers to intra-Community trade by harmonizing member states' environmental laws.¹⁵ It was thus rooted clearly within the original intent of the Treaty of Rome to regulate trade and competition, rather than to regulate environmental protection as an end in itself. By 1985, however, with a large body of Community environmental rules already adopted, the European Court held that, even absent express reference in the Treaty of Rome, the protection of the environment was one of the Community's "essential objectives" justifying certain limitations on the principle of free movement of goods.¹⁶ The Court stressed that these limitations must not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection."¹⁷ The SEA completed the establishment of environmental protection as an express end in itself.¹⁸

The development of Community environmental law in this period reflects the process of mutation Professor Weiler describes as "expansion"—"in which the original legislation of the Community 'breaks' jurisdictional limits"¹⁹—rather than "extension," "absorption," or "incorporation."²⁰ However, the legal

2 (1985); see also Haagsma, *The European Community's Environmental Policy: A Case Study in Federalism*, 12 *FORDHAM INT'L L.J.* 311 (1989); Sands, *EC Environmental Law*, *supra* note 2.

12. See Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States, Meeting within the Council, of 7 February 1983 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1982 to 1986), 1983 O.J. (C 46) 1.

13. See Sands, *EC Environmental Law*, *supra* note 2, at 687.

14. The first environmental treaty the community joined was the Paris Convention for the Prevention of Marine Pollution from Land-Based Sources. Council Decision No. 75/437, 1975 O.J. (L 194) 5.

15. See, e.g., Council Directive No. 80/778, 1980 O.J. (L 229) 11, 11 (relating to quality of water intended for human consumption: "[A] disparity between provisions . . . in the various Member States relating to the quality of water for human consumption may create differences in the conditions of competition and, as a result, directly affect the operation of the common market . . .").

16. Case 240/83, *Procureur de la République v. Association de Défense des Bruleurs d'Huiles Usagées*, 1985 E.C.R. 531.

17. *Id.* at 549.

18. See *infra* notes 33-39 and accompanying text.

19. See Weiler, *supra* note 3, at 2442.

20. It is arguable that, when the European Court expressly stated that "the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty," Case 302/86, *Commission of the European Communities v. Denmark*, 1988 E.C.R. 4607, 4630, it was giving effect to

basis for the explosion of environmental legislation between 1973 and 1987 was not only Article 235, as Professor Weiler asserts,²¹ but also Article 100.²²

Environmental legislation's rapid expansion supports Weiler's general thesis that, in this period, "the principle of enumerated powers as a constraint on Community *material* jurisdiction (absent Treaty revision) substantially eroded and in practice virtually disappeared."²³ Contrary to Weiler's general assertion, however, in the environmental field the process did not go "largely unnoticed when it occurred";²⁴ rather, it resulted from the direct and express will of all the member states, as manifested in comprehensive Action Programmes on the Environment, from which no member state dissented.²⁵ Nonetheless, with regard to environmental law, Professor Weiler is undoubtedly correct that "its far-reaching consequences and significance were not appreciated at the time."²⁶

Only very recently have some member states felt the consequences of much of the environmental legislation adopted in this Mutational Period. In the late 1970's and early 1980's, the legislative momentum developed a life of its own. It became politically impossible to oppose legislative expansion into other areas, such as environmental impact assessment,²⁷ to ensure the effective application of the earlier environmental legislation.

Significantly, much of the legislation adopted in the Mutational Period, usually in the form of Directives, mandated neither implementation into national law nor compliance with its provisions until very much later.²⁸ Thus, some member states, like the United Kingdom, could support Community environmental legislation, that did not impose significant short-term costs and was supported domestically, without looking to the long-term costs. In this context, the Community was seen "more as an instrument in the hands of the govern-

Professor Weiler's principle of "extension." See Weiler, *supra* note 3, at 2437-38 (evolving "higher law"). Although the Court decided the *Denmark* case in 1988, the case involved Danish legislation adopted in 1978 and amended in 1984, prior to the SEA amendments, see *infra* notes 33-39 and accompanying text, and with no express Community legislation regarding this particular nontariff barrier (a mandatory bottle recycling and deposit-and-return system) adopted and in force.

21. Weiler, *supra* note 3, at 2443-46.

22. Article 100 provides, *inter alia*: "The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market." Treaty of Rome, *supra* note 5, art. 100, 298 U.N.T.S. 11, 54. The European Court of Justice expressly endorsed the use of Article 100 to legislate on environmental matters. See Case 92/79, *Comm'n of the European Communities v. Italian Republic*, 1980 E.C.R. 1115 (maximum sulphur content of liquid fuels); Case 91/79, *Comm'n of the European Communities v. Italian Republic*, 1980 E.C.R. 1099 (detergents).

23. Weiler, *supra* note 3, at 2434-35.

24. *Id.* at 2435.

25. See, e.g., *supra* notes 9, 12 (first and third Action Programmes on the Environment).

26. Weiler, *supra* note 3, at 2436.

27. See Council Directive No. 85/337, 1985 O.J. (L 175) 40 (assessment of effects of certain public and private projects on environment).

28. See, e.g., Council Directive No. 80/778, 1980 O.J.(L 229) 11, art. 19, at 14 (giving member states five years "to ensure that the quality of water intended for human consumption" meets directive's standard).

ments than as a usurping power."²⁹ Consequently, in certain areas, including water quality, the Community adopted Directives establishing standards of protection which were relatively high compared to then-existing standards in some member states. Only now are these decisions returning to haunt these member states.³⁰

Therefore, despite the fact that perceptions of the importance of environmental protection differed greatly among the member states, some of whom were actively trying to hold back the tide, Community environmental law continued to grow as member states negotiated the SEA. The changes the SEA implemented simply added to the momentum of, until then, a relatively discrete area of Community policy. The SEA transformed the somewhat marginal body of environmental policy and law into one of central importance, bringing environmental considerations to bear in previously unimaginable ways on areas of the law including corporations, tax, financial services, broadcasting, and civil procedure.

The SEA's addition of Title VII, on "Environment," to the Treaty of Rome³¹ went beyond mere codification of environmental law. Title VII established a formal and express legal basis for the future development of Community environmental law, effectively bringing all Community activities within the scope of environmental lawmaking.³² The Treaty now provides that Community action shall be preventive,³³ that environmental damage should as a priority be rectified at its source,³⁴ that the polluter should pay for damage,³⁵ and that the Community may participate in international environmental agreements.³⁶ Under this title, all action is to be taken by the Council acting unanimously, unless otherwise agreed by the Council.³⁷ Significantly, where measures are

29. Weiler, *supra* note 3, at 2449.

30. One example is the problem the United Kingdom faces in implementing Council Directive No. 80/778 on drinking water quality. See *supra* note 15. In November 1989, Friends of the Earth, a British environmental group, brought proceedings in the English High Court to challenge the U.K. Secretary of State for the Environment's decision to refrain from making an enforcement order against a water utility alleged to have supplied water whose quality did not comply with Council Directive No. 80/778. Friends of the Earth argued that, despite the Water Act of 1989's incorporation of the directive into English law, the British government could not refrain from enforcing the directive's water quality standards without first obtaining a time extension from the Commission or Council, which it had not done. Notice of Application for Leave to Apply for Judicial Review at 4, *In re* Friends of the Earth, Q.B. Div'l Ct. (Nov. 1989) (on file with author).

31. SEA, *supra* note 10, art. 25.

32. Article 130R of the amended Treaty of Rome provides that Community action related to the environment shall have the following objectives: "(i) to preserve, protect and improve the quality of the environment; (ii) to contribute towards protecting human health; (iii) to ensure a prudent and rational utilization of natural resources." *Id.* art. 130R. On the SEA and the environment, see Haagsma, *supra* note 11; Kramer, *The Single European Act and Environment Protection: Reflections on Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659 (1987); Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 EUR. L. REV. 407 (1987).

33. SEA, *supra* note 10, art. 130R(2).

34. *Id.*

35. *Id.*

36. *Id.* art. 130R(5).

37. *Id.* art. 130S.

taken under Title VII, member states may maintain or introduce "more stringent protective measures compatible with this Treaty."³⁸

The Title VII change gives environmental policy a formal and express status, as well as greater centrality, in the Community order. The Commission, and in particular Directorate General XI (DG XI), which is responsible for environmental policy, now occupies a central and powerful position. DG XI has taken a leading role in setting an ambitious environmental agenda for the next decade, contributing to the "eruption of significant proportions" to which Professor Weiler refers.³⁹

Since 1987, environmental legislation in the Community has become ever more ambitious. One of the SEA's most significant effects has been to encourage the extension of environmental lawmaking into new substantive areas. For example, the Community has passed legislation prohibiting television advertisements which encourage behavior prejudicial to the protection of the environment,⁴⁰ proposed legislation on eco-labelling⁴¹ and on civil liability for waste,⁴² and considered strategies for corporate environmental audits, environmental taxes, and other fiscal measures.⁴³

The SEA has also led to significant changes in Community institutions. The Community has adopted legislation establishing a European Environment Agency and an environmental monitoring and observation network.⁴⁴ The Commission has also sought to improve public access to environmental policy decisionmaking by promulgating a Directive on Freedom of Access to Environmental Information⁴⁵ and establishing a working group to study the harmonization of citizen suit provisions in member states' environmental laws.⁴⁶

However, even after the SEA came into force, environmental lawmaking under Title VII still required unanimous voting, resulting in protracted negotiations and watered down provisions.⁴⁷ Moreover, as the Commission became increasingly ambitious in its environmental program, particularly enforcement

38. *Id.* art. 130T.

39. Weiler, *supra* note 3, at 2455.

40. Council Directive No. 89/552, art. 12(e), 1989 O.J. (L 298) 28.

41. Proposal for a Council Regulation (EEC) on a Community Award Scheme for an Eco-label, COM (91) 37 final (Feb. 11, 1991) (on file with author).

42. Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, COM (89) 282 final, 1989 O.J. (C 251) 3.

43. Report of the Working Group of Experts from the Member States on the Use of Economic and Fiscal Instruments in EC Environmental Policy, Comm'n Doc. X1/185/90 (Sept. 5, 1990) (on file with author).

44. Council Regulation No. 1210/90, 1990 O.J. (L 120) 1.

45. Council Directive No. 90/313, 1990 O.J. (L 158) 56.

46. Letter from Dr. Ludwig Kramer, Legal Advisor at DG XI, to James Cameron, Director of Centre for International Environmental Law (Sept. 21, 1990) (on file with author) [hereinafter Kramer Letter].

47. For a discussion of the protracted negotiations over reductions in sulphur dioxide and nitrous oxide emissions which culminated in lower standards in Council Directive No. 88/609, 1988 O.J. (L 336) 1, see Fraenkel, *The Convention on Long-Range Transboundary Air Pollution: Meeting the Challenge of International Cooperation*, 30 HARV. INT'L L.J. 447, 467 n.147 (1989).

measures, the legislative process slowed down even further as some member states sought to limit the adoption of expensive environmental legislation.⁴⁸

The new Article 100A provides a means to overcome this institutional foot-dragging. For measures "which have as their object the establishment and functioning of the internal market," Article 100A allows qualified majority voting, rather than unanimous voting.⁴⁹ Furthermore, it assures that those measures which relate to the environment "will take as a base a high level of [environmental] protection."⁵⁰ The combination of these two provisions in Article 100A creates, for the first time in the Community's history, the possibility of adopting environmental legislation under qualified majority voting.⁵¹

In this context, it is not surprising that, in September 1989, the Commission proposed that the Directive on Civil Liability for Waste be based on Article 100A, which is primarily concerned with removing barriers to trade, in spite of the Directive's clear environmental objectives.⁵² This decision placed the Commission in direct confrontation with a number of member states⁵³ as well as the Economic and Social Committee, all of which considered the Directive to be more properly based on Article 130S.⁵⁴ This conflict heralds a new round of wrangling in the environmental field, focused on the constitutional basis for environmental measures, and presents further obstacles to the progress of the Commission's legislative agenda.

Professor Weiler's piece provides a helpful approach for understanding the evolution of Community environmental law and, in particular, the "expansion" into areas for which the original Treaty of Rome did not provide. This "expansion" is mirrored in traditional areas of international law, including economic activities such as international trade and development lending.⁵⁵ I turn now

48. The exercise of the environmental "veto," however, was not always due to cost. For example, more than six months after its adoption, the regulation establishing the European Environment Agency had still not entered into force because member states could not reach unanimous agreement on its location. *See A "Green Label" for Europe's Consumer Goods*, N.Y. Times, Dec. 14, 1990, at A6, col. 1.

49. SEA, *supra* note 10, art. 100A(1).

50. *Id.* art. 100A(3).

51. Article 100A also allows a member state to adopt national provisions for environmental protection which are more stringent than the Community's harmonization measures as long as the member state can demonstrate a "major need[]" referred to in Article 36." *Id.* art. 100A(4). This further promotes the adoption of Community standards for environmental protection as member states who desire stricter controls no longer will veto Community proposals they view as too lax.

52. *See supra* note 42. The proposed directive would establish Community-wide rules of strict and unlimited liability for damage to people, property, and the environment caused by waste.

53. *See, e.g.*, HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, PAYING FOR POLLUTION: CIVIL LIABILITY FOR DAMAGE CAUSED BY WASTE, Sess. 1989/90, 25th Report, at 36.

54. Opinion on the Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1990 O.J. (C 112) 23.

55. *See, e.g.*, 27 I.L.M. 1596 (1988) (decision by General Agreement on Tariff and Trade Dispute Settlement Panel on conservation measures as barriers to trade); WORLD BANK, OPERATIONAL DIRECTIVE 4:00 ANNEX A: ENVIRONMENTAL ASSESSMENT, (Oct. 31, 1989); U.N. Economic Commission for Europe: *Draft Convention on Environmental Impact Assessment in a Transboundary Context*, U.N. ESCOR, U.N. Doc. ENVWA/AC.3/R.5/Rev. 1 (July 9, 1990) (on file with author) [hereinafter *U.N. Draft Convention on EIA*].

to consider whether Community environmental law is a part of the broader international legal order, with a view to judging the extent to which Community environmental law and its evolution provide a useful model of environmental protection for the rest of the international community.

II. COMMUNITY ENVIRONMENTAL LAW AS INTERNATIONAL ENVIRONMENTAL LAW

Professor Weiler is concerned with distinguishing the Community legal order from its parent, the traditional public international legal order. Early on, he writes that "the Community's 'operating system' is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and in constitutional principles."⁵⁶

Characterizing the Community legal order correctly is an important task for at least two reasons. First, Community environmental law is the only reasonably comprehensive and effective international (albeit regional) model available to the rest of the international community as it attempts to legislate international environmental law on a global and regional basis.⁵⁷ Second, the Community has itself become an important actor in international environmental lawmaking,⁵⁸ forcing important procedural mutations that may enable other regional groupings to participate more effectively in international fora.⁵⁹

The need to develop international environmental law is now a major preoccupation of the international community. A twenty-year review of the 1972 Stockholm Conference is due to take place in Brazil at the June 1992 United Nations Conference on Environment and Development. Significantly, Community environmental law, one of the most tangible consequences of the 1972 Stockholm Conference, has become a "role model" for participants at next year's Brazil Conference. The question is how "international," and how appropriate, is the Community model?

The Community legal order, including its environmental law, remains a part of the old order of public international law from which it grew. Its approach is rooted in an international agreement, the Treaty of Rome, whose validity and

56. Weiler, *supra* note 3, at 2407.

57. See sources cited *supra* note 2. Other regional integration organizations, including the South Pacific Regional Environment Programme (SPREP) and the Caribbean Community (CARICOM) are considering the Community approach to regional rules of environmental protection. Interviews with Angela Cropper, Special Adviser on Education and Environment, CARICOM, and Paul Holthus, Program Officer, SPREP, in Washington, D.C. (Feb. 7, 1991).

58. See *e.g.*, *supra* note 14 and accompanying text.

59. See, *e.g.*, *U.N. Draft Convention on EIA*, *supra* note 55. The Draft Convention expressly provides for the participation of regional economic integration organizations, *id.* arts. 16 & 17(1), the allocation of responsibilities between each organization and its respective member states, *id.* art. 17(4), and special voting rules for those occasions in which regional economic integration organizations participate at the same time as some, or all, of their members, *id.* art. 18(2).

effect continue to be governed by traditional rules of international law. In the case of *Van Gend en Loos*, the European Court called the Community "a new legal order of international law."⁶⁰ As such, the Community joins other specialized legal orders of international law, such as the European Convention of Human Rights' regional human rights law and the international administrative law that international administrative tribunals apply.⁶¹

The Community legal order is innovative, however, and it has significantly moved the "goalpost" of traditional international law. It extends the scope of possibilities available under international law. One important achievement is the wholesale change in our perceptions of how international law can work as a dynamic and effective force. The Community legal order has done so most notably by granting to nonstate actors rights that they can enforce before national courts and the European Court of Justice,⁶² by applying the doctrines of direct effect, supremacy, and implied powers,⁶³ and by instituting a decisionmaking process based on qualified majority, rather than unanimous, voting. While, as Professor Weiler recognizes,⁶⁴ each of these doctrines existed under traditional international law, the Community legal system and the European Court have given them flesh.

For reasons that are not altogether clear, Professor Weiler wishes to downplay, even deny, the traditional international legal character of Community law. For example, he asserts that the "juridical conclusion is that unilateral withdrawal is illegal,"⁶⁵ a proposition which is not universally supported by traditional international legal canons. If by "unilateral withdrawal" he means a member state's freedom to withdraw without complying with any Community and international legal formalities of withdrawal, then of course he is right. But if he means that, subject to compliance with these formalities, an individual member state categorically cannot unilaterally withdraw, then he is wrong. Although the Treaty of Rome is silent on the question of withdrawal, it, like other international agreements, is subject to the principles of withdrawal set out in the Vienna Convention on the Law of Treaties, which allow for unilateral withdrawal absent an express contrary treaty provision.⁶⁶ In the final analysis, the question of withdrawal would turn on political and economic, and not legal

60. Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1, 2 (emphasis added).

61. See, e.g., *de Merode v. World Bank*, World Bank Admin. Trib. Rep., Decision No. 1, at 12-13 (1981) ("The Tribunal, which is an international tribunal, considers that its task is to decide internal disputes between the Bank and its staff within the organized legal system of the World Bank and that it must apply the internal law of the Bank as the law governing the conditions of employment.").

62. See *infra* notes 71, 79-82 and accompanying text.

63. See Weiler, *supra* note 3, at 2413-17.

64. See *id.* at 2418-19.

65. *Id.* at 2412.

66. For a general discussion on withdrawal from international organizations, see H. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 60-73 (1980); see also Weiss, *Greenland's Withdrawal from the European Communities*, 10 EUR. L. REV. 173 (1985).

considerations, as Professor Weiler notes.⁶⁷ Weiler cannot ignore the legal reality of the possibility of withdrawal in order to support his particular characterization of the Community legal order.

Professor Weiler describes the Community legal order as "a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure."⁶⁸ Whether one believes that state responsibility is a substantive rule of international law⁶⁹ or simply "a general term for all the consequences of wrongdoing,"⁷⁰ it exists in the Community legal order as in any other discrete international legal order. Neither application of Community law in the national courts nor recourse to Article 177 can force a member state to remedy a breach of the Treaty of Rome. Rather, recourse to Articles 169 and 170, which give the European Court of Justice jurisdiction over alleged wrongdoing and breaches of the Treaty of Rome by member states, will provide, at a minimum, attempts at remedies. The European Court has compulsory jurisdiction, and its powers under Articles 169 to 172 in contentious proceedings involving issues of state responsibility are similar to those of the International Court of Justice.

The Community legal order differs from general international law in that the Community allows nonstate actors to trigger action by an independent international actor (the Commission) which then alleges the breach of an international legal obligation (a Community law) before the compulsory jurisdiction of an international court (the European Court). Despite this procedure's weaknesses, which Professor Weiler highlights,⁷¹ it is unique both in its scope and in bringing into the enforcement process members of the international community other than states.

The Community legal order is an important step in the progressive development of international law. It builds upon the historic foundations of traditional international law. As such, the Community's rules on environmental protection constitute a part of international environmental law and can contribute to its progressive development, whether in the Caribbean, the South Pacific, the Americas, or globally.

67. Weiler, *supra* note 3, at 2412.

68. *Id.* at 2422 (footnote omitted).

69. See *Report of the International Law Commission on the Work of Its Thirty-Second Session*, draft art. 1, 35 U.N. GAOR Supp., No. 10, at 59, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2(2) Y.B. INT'L L. COMM'N 1, 30.

70. Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 13 (1988).

71. Weiler, *supra* note 3, at 2420.

III. COMMUNITY ENVIRONMENTAL LAW AND PARTICIPATORY DEMOCRACY: THE ROLE OF ENVIRONMENTAL GROUPS

Space limitations prevent me from considering all of Professor Weiler's important discussion of legitimacy and the Community's democratic deficit.⁷² Therefore, I will concentrate on Weiler's observation that the participation of interest groups in the Community lawmaking process is one of the indicia of the system's legitimacy. In this way, the Community legal order has significantly expanded the participation rights of nonstate members of the international community in the international legal process.⁷³

Professor Weiler observes that the "expansion" of Community legislation into fields such as environmental protection during the Mutational Period "had the effect of squeezing out interest groups representing varying social interests which had been integrated to one degree or another into national policymaking processes."⁷⁴

Pressure groups—or "common interest groups," in Community parlance—and other interested nonstate actors have long been involved in Community environmental law and policy. Even prior to the SEA, Brussels was home to a number of national, regional, and international environmental groups. The legislative lobbying process in which they were involved became increasingly sophisticated by the late 1980's, focusing on the Commission, the Parliament, and individual member states. At this time, environmental groups also became involved in the enforcement process, often notifying the Commission and other member states of breaches of environmental laws.⁷⁵ The SEA then transformed the Community into a "necessary, legitimate, and at times effective locus for direct constituency appeal,"⁷⁶ often replacing the individual member states as the focus of lobbying efforts.

In response to the SEA, the lobbying process has become ever more sophisticated, with groups such as Greenpeace International establishing specialized, Brussels-based units to focus exclusively on influencing the Community's legislative and decisionmaking process. The lobbying process seeks to influence not only legislation and decisionmaking under the jurisdiction of DG XI, but

72. *Id.* at 2466-74.

73. The Community legal order did not introduce the participation of individuals in the international legal process. Both international human rights and international administrative law granted individuals international legal rights and certain possibilities for their enforcement under international procedures. *See, e.g., de Merode v. World Bank*, World Bank Admin. Trib. Rep., Decision No. 1 (1981) (enforcing rights of World Bank staff members). However, the Community legal order did extend the scope of individuals' substantive international legal rights and formalize the procedures for their enforcement before the European Court of Justice and national courts.

74. Weiler, *supra* note 3, at 2453.

75. *See, e.g., supra* note 30 (notification by Friends of the Earth to Commission about United Kingdom's alleged noncompliance with water quality directives).

76. Weiler, *supra* note 3, at 2455.

any legislation on matters of environmental significance, including agriculture, energy, transportation, and fisheries.

Environmental groups have played a major role in integrating environmental considerations into all areas of Community activity. The lobbying process has already achieved significant results, such as the European Parliament's amendment of the Broadcasting Directive to prohibit advertisements which encourage behavior prejudicial to the protection of the environment.⁷⁷ Moreover, the Commission is receptive to legislative suggestions from environmental groups. In July of 1990, it responded to the recommendations of a meeting of academic and environmental group lawyers by establishing a working group on the harmonization of citizen suit provisions in member states' environmental laws. This move was only a precursor to yet wider formal involvement of environmental groups.⁷⁸

Particularly in the enforcement of Community environmental law, the environmental groups are breaking new ground. They have a variety of tools to aid enforcement, including notification of breaches to the Commission,⁷⁹ formal written complaints of breaches, legal proceedings in national courts based upon causes of action founded upon Community environmental law,⁸⁰ and use of Article 177 to enforce Community environmental objectives.⁸¹ None of these methods is generally available to nonstate actors under traditional international environmental law, supporting Professor Weiler's view that the Community legal order's enforcement and compliance procedures "represent[] a quantitative change of such a magnitude that it is qualitative in nature."⁸²

CONCLUSION

European Community environmental law represents the first attempt of any region in the international community to legislate widely on transboundary environmental issues. In seizing jurisdiction over the internal affairs of member states by regulating environmental matters which do not raise *prima facie* transboundary issues, Community environmental law goes even further. It effectively says that the member states of the Community share a single, indivisible environment.

77. See Council Directive No. 89/552, art. 12(e), 1989 O.J. (L298) 28.

78. See Kramer Letter, *supra* note 46.

79. In 1989, DG XI received 460 notifications of alleged violations from individuals or environmental groups. Telephone interview with Dr. Ludwig Kramer, Legal Adviser at DG XI (June 7, 1990).

80. See, e.g., *supra* note 30 (Friends of the Earth suit in British court to enforce compliance with EC directive on water quality).

81. See, e.g., Case 187/87, *Saarland v. Minister for Indus., Post and Telecommunications and Tourism*, 1988 E.C.R. 5013 (environmental groups in Moselle Valley relied on Article 37 Euratom in Article 150 Euratom (analog to Article 177 in Treaty of Rome) reference to obtain judgment from French court regarding dispute over disposal of nuclear power plant radioactive waste).

82. Weiler, *supra* note 3, at 2418.

Although Community environmental law may still rightly be criticized for establishing weak standards in certain areas, it is unmatched as a manifestation of international law in both its substantive and procedural content and in bringing a wide spectrum of the international community into the international legal process. Professor Weiler's discussion of Community law contributes significantly to our understanding of how this legal system took shape, despite the absence of express provisions in the Treaty of Rome, and suggests some of the ways in which it could further evolve. Weiler's analysis also highlights the central role Community law can play in influencing the development of international environmental law in other regions and globally.

