Regulation of Ocean Dumping by the European Economic Community

Daniel Suman

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Regulation of Ocean Dumping by the European Economic Community

Daniel Suman*

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INTRODUCTION

Societies have long considered the oceans as waste space and the dumping of industrial wastes in them as a cheap and easy means of disposal. During the past two decades, however, increasing concern about public and environmental health has led to establishment of comprehensive guidelines and limitations on this practice at the national and supranational levels.

Like other industrialized nations, Western European countries have disposed of their industrial wastes in nearby marine waters. The evolving European Economic Community (the EEC or Community) has targeted marine pollution as a natural area of environmental concern,¹ and Community institutions have subsequently attempted to regulate this practice.

¹ The EEC's First Action Programme in 1973 stated that marine pollution was a serious problem that the EEC should address. 16 O.J. EUR. COMM. (No. C 112) 23 (1973)
This study considers the EEC's treatment of ocean dumping and incineration through an analysis of two proposals submitted by the EEC Commission to the EEC Council in 1976 and 1985. Part I explores Western Europe's ocean disposal practices during the last four decades. Part II describes the international conventions governing ocean dumping and incineration. Part III focuses on the EEC institutions and decision-making process, the perceived need for the proposed EEC regulation, the proposals' relationship to the international agreements regulating ocean dumping, and the internal EEC debate surrounding the proposals. Part IV evaluates the current need for an ocean dumping directive and highlights several ocean dumping policy concerns that may have blocked adoption of the Commission's proposals.

The concluding part searches for the lessons learned about EEC decisionmaking in light of its experience with this proposed legislation. In spite of the EEC's ambitious goals, countries' fear of submerging their national sovereignty to that of the supranational organization can impede Community action. At the same time, the Commission should not focus its energies on areas already satisfactorily regulated by other international fora, but should choose priority areas where EEC action can significantly improve the environment.

I

OCEAN DUMPING AND OCEAN INCINERATION PRACTICES IN WATERS ADJACENT TO WESTERN EUROPE

A. Ocean Dumping

EEC Member States are not strangers to the dumping of many types of industrial wastes in the ocean. Between 1949 and 1982, Western European countries dumped approximately 140,000 tons of packaged low-level radioactive wastes at ten dump sites in the northeast Atlantic Ocean. The United Kingdom dumped the largest amount, with Belgium, the Netherlands, and Switzerland prominently involved. Ocean disposal of organochlorinated compounds was also common in the region until the early 1970's. By that time, the Federal Republic of

in after First Environmental Action Programme].
2. For a discussion of these EEC institutions, see infra notes 93-104 and accompanying text.
4. Id.
5. Organochlorinated compounds include low molecular weight chlorinated hydrocarbons, such as carbon tetrachloride, chloroform, trichloroethane, and 1,1,1-trichloroethylene, as well as aromatic chlorinated hydrocarbons, such as dichlorobenzene, DDT, and PCB's. These compounds are known for their toxicity, stability, bioaccumulation, and persistence in
Germany was dumping approximately forty tons of organochlorinated compounds per month in the Atlantic Ocean. 6 Between 1963 and 1969, the U.K. dumped 38,000 barrels of organochlorinated wastes and 40,000 barrels of cyanide compounds and arsenic. 7 The mood had changed considerably by 1971, however, when the Dutch freighter Stella Maris sailed from Rotterdam with the intention of dumping 600-650 tons of vinyl chloride waste materials in the northern areas of the North Sea. Opposition from Norway, Iceland, Ireland, and the United Kingdom forced the vessel to return to its home port. 8

Today, many materials are still dumped at sea, including dredging spoils, sewage sludge, and industrial wastes. Industrial wastes include acid-iron and alkaline wastes, fish by-products, waste from the titanium dioxide and fertilizer industries, inorganic sludges from sugar refining, coal ash, and scrap metal. 9 Western European countries dumped over 7.5 million tons of industrial wastes into the northeast Atlantic Ocean in 1987, although the annual figure has likely decreased since that time. 10 In the 1980's, the United Kingdom and Ireland contributed the bulk of the 8.2 million tons of sewage sludge dumped in the ocean, usually at sites adjacent to their coasts. 11

B. Ocean Incineration

Commercial ocean incineration began in 1969 with the launching of the German vessel, Matthias I. 12 This practice served a ready European market, and within several years two other ocean incineration ships were fitted, all operating in the North Sea. 13 The materials burned were

---

6. S. Gerlach, supra note 5, at 53.
7. Id.
8. Hayward, supra note 5, at 56.
9. S. Gerlach, supra note 5, at 56.
10. Fretheim, supra note 9, at 75 (suggesting 5.8 million tons of waste materials were dumped in 1986).
11. Thirteenth Annual Report of the Oslo Commission, supra note 9, at 75 (suggesting 5.8 million tons of waste materials were dumped in 1986).
13. Id.
largely organochlorine wastes, which are difficult and costly to dispose of on land and unacceptable for ocean dumping because of their persistence and toxicity. By 1973, the quantity of waste annually incinerated in the North Sea had increased to over 80,000 metric tons, and by the mid-1980's, this number had increased to over 117,000 metric tons. At that time, North Sea ocean incineration accounted for the bulk of wastes burned in the world ocean.

Over eighty-five percent of the Western European wastes were loaded in Antwerp, Belgium, and burned at an ocean site in the North Sea almost equidistant from the United Kingdom, Denmark, and the Netherlands. Germany was the largest source of incinerated wastes; four of the six ocean incineration vessels were registered by Germany. France and Belgium each contributed about 15,000 metric tons of North Sea incinerated wastes in 1986, while other EEC countries' participation in ocean incineration has been minimal.

The end of the 1980's, however, brought a remarkable reversal in ocean incineration practices in the North Sea. Three incineration vessels which had previously operated in these waters, the Vesta, Vulcanus I, and Vulcanus II, ceased operations in 1989-90. By the end of 1990, ocean incineration had effectively terminated in the waters of the northeast Atlantic Ocean and the North Sea. Enhanced concern for marine environmental protection, expressed in international fora, was largely responsible for this phaseout.

15. Office of Technology Assessment, supra note 12, at 196.
16. Ditz, The Phase Out of North Sea Incineration, 1 INT'L ENVTL. AFF. 175, 181 (1989); see also Thirteenth Annual Report of the Oslo Commission, supra note 9, at 57 (approximately 116,000 tons were incinerated in 1986).
17. See Office of Technology Assessment, supra note 12, at 196.
19. Ditz, supra note 16, at 181. About 54,000 metric tons, or 46% of the wastes burned in the North Sea in 1986, were German. Thirteenth Annual Report of the Oslo Commission, supra note 9, at 55.
20. Ditz, supra note 16, at 181. The United Kingdom was responsible for only about 3% of the organochlorine waste incinerated in the North Sea in 1986. Id. Although not a contracting party to the Oslo Convention, Switzerland contributed over 10% of the wastes incinerated in the North Sea in 1986. Id.
22. See id. at 18-19.
23. See infra notes 304-313 and accompanying text.
Recognizing the potentially serious environmental and health problems that could result from ocean dumping and incineration, nations began to regulate these activities in the early 1970's through multilateral conventions. Many EEC Member States, and even the EEC itself, are signatories. Although these international agreements are similar in many respects, they also contain significant differences which cause contradictory obligations for the Member States. Differences extend to the hazardous substances which are regulated, the geographical scope of the agreements, the inclusion of ocean incineration, and the regulatory structures envisioned. Because the proposed EEC ocean dumping legislation attempted to harmonize Member State obligations with respect to these international agreements, it is necessary to consider the agreements briefly.

A. Oslo Convention

The Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo Convention) was signed in 1972. It was the first regional agreement for the purpose of preventing marine pollution caused by dumping of hazardous substances. Thirteen Western European countries adjacent to the northeast Atlantic Ocean and the North Sea signed the accord. Greece, Italy, and Luxembourg are the only EEC Member States that did not sign. The EEC is not a contracting party, but attends the meetings of the Oslo Commission as an observer. Article 4 called on the signatories to harmonize their policies to prevent marine pollution resulting from ocean dumping, which was defined as the deliberate disposal of substances into the sea, except for incidental discharges from ships and aircraft.

25. Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, *done* Feb. 15, 1972, 932 U.N.T.S. 3 (entered into force April 7, 1974) [hereinafter Oslo Convention]. The Convention established the Oslo Commission, which implemented the agreement. *Id.* arts. 16-17. The Oslo Commission receives and reviews contracting parties' records of dumping permits and evaluates the condition of the northeast Atlantic Ocean and the North Sea. *Id.*
26. Signatories were Belgium, Denmark, Finland, France, the Federal Republic of Germany, Iceland, Ireland, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. *Id.* at 14.
29. *Id.* art. 19(1).
The Convention applies to the countries' territorial seas and to the high seas in the northeastern Atlantic and Arctic Oceans, including the North Sea, but not the Baltic and Mediterranean Seas. The Oslo Convention urged each party to enforce compliance within its territorial scope with respect to vessels registered under its flag, vessels loading in its territory materials to be dumped, and vessels engaged in dumping within its territorial sea.

The Oslo Convention introduced the concept of the "black" and "grey" lists for the classification of hazardous materials. Vessels are prohibited from dumping substances listed in Annex I (Black List) if those substances are present as more than trace contaminants. The agreement requires a specific permit granted by national authorities for dumping wastes containing significant quantities of substances from Annex II (Grey List). The substances listed in Annexes I and II appear in Tables I and II, reproduced below. Annex I prohibits dumping of substances which the contracting parties agree may be carcinogenic. Notably, neither annex mentions high- or low-level radioactive wastes. Nevertheless, dumping of materials not specifically listed in the Black or Grey Lists requires approval of the national authorities.

All the dumping restrictions are waived in the event of force majeure, or if the ship's safety or human life is in jeopardy.

Ocean incineration, not treated in the Oslo Convention itself, is regulated by a protocol opened for signature in 1983 and entered into force in 1989 for all thirteen contracting parties. The protocol views ocean incineration as an interim waste disposal technology and encourages states to develop alternative, land based disposal techniques. This protocol obligated the Oslo Commission to meet before January 1, 1990, to

---


31. Oslo Convention, supra note 25, art. 15.

32. Id. arts. 5, 8(2).

33. Id. art. 6. The Oslo Commission defined "significant" as greater than 1% of the total weight of the dumped waste. Boehmer-Christiansen, supra note 27, at 47. Although organosilicon compounds were originally listed in Annex I, in June 1985, the Oslo Commission removed them and amended Annex II to include "persistent toxic organosilicon compounds." Organosilicon Compounds: Dumping Convention Changes, 18 Marine Pollut. Bull. 99, 100 (1987).

34. Oslo Convention, supra note 25, art. 7.

35. Id. art. 8.


37. Id. annex IV, rule 2(2); see also Ditz, Interpretation of Need in US Ocean Incineration Policy, 13 Marine Pol'y 43, 52-53 (1989) (describing alternatives to ocean incineration used by some European nations).
establish a final date to end ocean incineration,\textsuperscript{38} and this has indeed occurred.\textsuperscript{39}

### TABLE I
**SUBSTANCES LISTED IN ANNEX I**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Organohalogens</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Organosilicon compounds</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mercury &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Cadmium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Synthetic materials &amp; persistent plastics</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Crude oil &amp; hydrocarbons</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Acids &amp; alkalis</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Acids &amp; alkalis from the aluminum &amp; titanium industries</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Possible carcinogens</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Chemical warfare materials</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>High-level nuclear wastes</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low-level nuclear wastes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wastes containing trace amounts of any of these substances</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organotin compounds</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Oil-based drilling muds</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compounds which may form organohalogens</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Substances that contracting parties to Oslo Convention agree are carcinogens</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

#### B. London Dumping Convention

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention), signed in 1972 and in force since 1975, is the only agreement regarding ocean dumping which covers all the seas of the world.\textsuperscript{40} Luxembourg is the

\begin{itemize}
  \item \textsuperscript{38} Oslo Convention Protocol on Ocean Incineration, supra note 36, annex IV, rule 2(3); Compaan, supra note 18, at 260.
  \item \textsuperscript{39} \textit{See infra} notes 307-08 and accompanying text.
  \item \textsuperscript{40} Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165, 1046 U.N.T.S. 120, 11 I.L.M. 1291 (entered into force Aug. 30, 1975) [hereinafter London Dumping Convention]. The London Dumping Convention defines "dumping" as the deliberate disposal at sea from vessels,
### Table II

**Substances Listed in Annex II**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Arsenic, lead, copper, zinc, &amp; their compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Beryllium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Chromium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Nickel &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Vanadium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Selenium &amp; its compounds</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Antimony &amp; its compounds</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cyanides &amp; fluorides</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Pesticides &amp; their byproducts not listed in Annex I</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Synthetic organics not in Annex I</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Acids &amp; alkalis not in Annex I</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Containers, scrap metal, &amp; bulky waste</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Substances which may be noxious in quantities in which they are dumped,</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>may reduce amenities, or may endanger humans or marine organisms</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Radioactive waste not covered by Annex I</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Organosilicon compounds</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Tar-like substances</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Persistent toxic organosilicon compounds</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Only EEC Member State which is not a contracting party.\(^{41}\) Although the EEC was not a signatory to the London Dumping Convention, it remains an observer.\(^{42}\) The Convention calls on contracting parties to take all measures and harmonize their policies in order to prevent marine pollution from ocean dumping of wastes which may negatively affect aircraft, or platforms, but does not include disposal incidental to normal operations. *Id.* art. III(1).

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42. London Dumping Convention, supra note 40, 11 I.L.M. at 1292.
human health and the well-being of the marine ecosystem. It also encourages contracting parties to develop regional agreements to prevent ocean dumping.

The London Dumping Convention regulatory structure, like the Oslo Convention, is based on black and grey lists. Ocean dumping of substances specified in Annex I (Black List) is prohibited. In order to dump a substance listed in Annex II (Grey List), an individual must obtain a special permit from the appropriate national authority. Contracting parties must require a general permit before approving the dumping of any material not listed in Annex I or II. Tables I and II, printed below, identify the substances which the London Dumping Convention places in its Black and Grey Lists. Significantly, Annex I lists high-level radioactive wastes, while Annex II extends to medium- and low-level radioactive wastes. The 1980 Amendments to Annex II listed substances not toxic in nature, but which may become harmful if dumped in large quantities. The Convention also permits an exception to the restrictions in the case of force majeure or when it is necessary to protect the safety of humans or vessels. An additional exception applies to vessels entitled to sovereign immunity.

The Convention urges each signatory country to apply the measures which implement the Convention to vessels that country registers or which fly its flag. Similarly, the accord calls on nations to apply regulations to vessels which load the waste material within their territories. Finally, if a contracting party believes a vessel is engaged in dumping, and the vessel is under that State's jurisdiction, it should apply the Convention's measures. Essentially, this final provision covers vessels which are dumping within a contracting party's exclusive economic zone, usually extending two hundred miles offshore.

43. Id. arts. I, II.
44. Id. art. VIII.
45. Id. art. IV.
46. Id. art. IV(1)(a).
47. Id. art. IV(1)(b).
48. London Dumping Convention, supra note 40, art. IV(1)(c).
50. London Dumping Convention, supra note 40, art. V.
51. Id. art. VII(4).
52. Id. art. VII(1)(a).
53. Id. art. VII(1)(b).
54. Id. art. VII(1)(c).
The London Dumping Convention and Annexes were amended in 1978 to include ocean incineration, and these amendments entered into force in 1979. This earliest ocean incineration agreement simply sets operation requirements and criteria for approval of incineration vessels. The Incineration Amendments require contracting parties to consider the practical availability of land based methods of treatment and disposal before issuing an ocean incineration permit, but do not explicitly provide that ocean incineration be phased out.

C. Barcelona Convention

The deteriorating ecological state of the Mediterranean Sea encouraged fifteen countries bordering on the Mediterranean Sea to negotiate and sign the Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention) in 1976 under the auspices of the United Nations Environment Programme (UNEP). The agreement designated UNEP as the secretariat. The contracting parties to the Barcelona Convention intended the agreement to protect the marine environment of the Mediterranean Sea proper. Signatories were to take “all appropriate measures to prevent and abate pollution . . . caused by dumping from ships and aircraft.” EEC Member States, France, Greece, Italy, and Spain, signed the Convention, in force since 1978. The EEC signed the Convention on September 13, 1976.


57. LDC Incineration Amendments, supra note 56.

58. Id. at regulation 2(2). The incineration regulations “shall in no way be interpreted as discouraging progress towards environmentally better solutions including the development of new techniques.” Id.

59. Convention for the Protection of the Mediterranean Sea Against Pollution, done Feb. 16, 1976, 15 I.L.M. 285 [hereinafter Barcelona Convention]. Signatory countries were Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Malta, Monaco, Morocco, Spain, and Turkey. Id.

60. Id. art. 13.

61. Id. art. 1.

62. Id. art. 5.

63. Council Decision of 25 July 1977 Concluding the Convention for the Protection of the Mediterranean Sea Against Pollution and the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, 20 O.J. EUR. COMM. (No. L 240) 1, 2 (1977). The significance of EEC ratification of the Barcelona Convention is clear: the agreement is binding on Community institutions and on all Member States. Treaty Establishing the European Economic Community (EEC), concluded Mar. 25, 1957, 298 U.N.T.S. 11, art. 228(2) [hereinafter EEC Treaty]. Since the Barcelona Convention was implemented by legisla-
One of the four negotiated protocols arising from the Barcelona Convention, the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona Dumping Protocol), specifically regulates ocean dumping. France, Greece, Italy, Spain, and the EEC have ratified or acceded to the Barcelona Dumping Protocol. "Dumping" is defined as "any deliberate disposal at sea of wastes or other matter from ships or aircraft," but does not include disposal incidental to normal operations. The Barcelona Dumping Protocol utilizes the same regulatory structure as the London Dumping Convention and the Oslo Convention: the black and grey lists. Signatories are forbidden to dump substances listed in Annex I (Black List). Table I, printed below, indicates the substances comprising the Black List. Notably, the Black List includes both high- and low-level radioactive wastes, but does not include substances which may be carcinogenic. Annex II (Grey List) specifies hazardous substances that may be dumped only with "a prior special permit from the competent national authorities," (see Table II). An individual may dump wastes that do not contain substances from the Black or Grey Lists only after obtaining a
general permit from the appropriate national authorities. The Barcelona Dumping Protocol does not list ocean incineration, encourage recycling or land based alternatives, or call for a gradual reduction of ocean dumping. Signatory states must apply the Barcelona Dumping Protocol to ships and aircraft which fly their flag, load the wastes in their territorial waters, or dump in areas within their jurisdiction.

D. Helsinki Convention

In 1974, the countries bordering the Baltic Sea adopted the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) in order to abate pollution and protect the marine environment. The Convention covers ocean dumping as well as land based pollution and pollution from ships but does not regulate ocean incineration. The signatories recognized that the Baltic Sea's characteristics demanded a specific regional convention that was more stringent than other international accords, such as the London Dumping Convention.

The Helsinki Convention definition of "dumping" is similar to that in other agreements. It includes "any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms . . . [but excludes] disposal at sea of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, [or] platforms." The Helsinki Convention, however, did not need black and grey lists for dumping because it prohibited this activity altogether in the Baltic Sea. The agreement authorizes dumping under only two conditions: if the safety of human life or the vessel is threatened or if the party has obtained a special permit from the appropriate national authorities to dump dredged materials. The Convention prohibits even

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69. Id. art. 6.
70. Id. art. 11(1).
71. Convention on the Protection of the Marine Environment of the Baltic Sea Area, done Mar. 22, 1974, 13 I.L.M. 544 [hereinafter Helsinki Convention]. Denmark, Finland, the Federal Republic of Germany, the German Democratic Republic, Poland, Sweden, and the USSR were signatories. Id. at 545. The only EEC Member States were Denmark and the Federal Republic of Germany. The EEC was not an observer to the conference that created the agreement. Id. at 544. The Helsinki Convention established the Baltic Marine Environmental Protection Commission to observe the Convention's implementation and to suggest revisions. Id. arts. 12, 13.
72. See id. at 546. The Baltic Sea is very shallow (the maximum depth of the deepest basin being only 210 meters) and connects to the North Sea through very shallow and narrow sounds. H. SVERDRUP, M. JOHNSON & R. FLEMING, THE OCEANS 657 (1970). Wastes are probably not easily removed from the Baltic as a result of this rather restricted circulation.
73. Id. art. 2(3).
74. Id. art. 9(1).
75. Id. art. 9(4).
76. Id. art. 9(2).
special-permit dumping of dredged materials if they contain significant concentrations of substances listed in Annex I or Annex II.\textsuperscript{77}

A contracting State must ensure compliance with the Baltic Sea dumping ban for vessels that fly its flag, load within its territory the substance to be dumped, or dump within its territorial sea.\textsuperscript{78} At the same time, the obligations of the Helsinki Convention were not meant to affect the obligations of the signatories with respect to other international agreements.\textsuperscript{79}

In 1977, the EEC Council approved the Commission's recommendation on opening negotiations to allow the EEC to accede to the Helsinki Convention.\textsuperscript{80} However, one non-EEC signatory to the Helsinki Convention blocked the opening of negotiations for EEC accession.\textsuperscript{81} In this instance, external pressures stifled EEC competence in the marine pollution arena.

\textit{E. Caribbean Convention}

The UNEP convened a conference in 1983 to protect the marine environment of the wider Caribbean region (Gulf of Mexico, Caribbean Sea, and the adjacent Atlantic Ocean). The agreement reached was the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Caribbean Convention).\textsuperscript{82} Signatories included France, the Netherlands, the United Kingdom, and the EEC.\textsuperscript{83}

The Caribbean Convention lacks specifics. Article 6 calls on signatories "to prevent, reduce and control pollution . . . caused by dumping of wastes and other matter at sea from ships, aircraft or man-made struc-

\textsuperscript{77} Id. annex V. Annexes I and II do not correspond to Annexes I and II of the London Dumping Convention, the Oslo Convention, or the Barcelona Convention. Only DDT and its derivatives and PCB's (polychlorinated biphenyls) are listed in Annex I. Annex II includes many of the substances which the other three conventions regulate.

\textsuperscript{78} Id. art. 9(3).

\textsuperscript{79} Id. art. 21.

\textsuperscript{80} Commission of European Communities, Commission Recommendation to the Council Concerning the Opening of Negotiations With a View to the Accession of the European Economic Community to the Helsinki Convention of 22 March 1974 on the Protection of the Marine Environment of the Baltic Sea Area, COM(77)48 at 4-5. The Commission and Council voiced a very expansive view of the Community's power in the area of control of the aquatic environment by suggesting that Member States could not enter into an agreement with non-member states unless the EEC also became a party. Id. The Commission's recommendation to the Council requested that Denmark and the Federal Republic of Germany delay ratification of the Helsinki Convention until the EEC had become a contracting party. Id.

\textsuperscript{81} Explanatory Memorandum Accompanying the 1985 Proposed Directive, supra note 49, at 11. It is unclear which signatory to the Helsinki Convention blocked EEC accession.


\textsuperscript{83} Id.
tures at sea."

The Convention gives no additional guidance, however, regarding ocean dumping: no definition of dumping, no discussion of jurisdiction, no listing of regulated substances. Moreover, the agreement completely ignores ocean incineration.

F. Summary of Conventions

EEC Member States and the EEC itself are contracting parties to several international conventions that regulate ocean dumping and incineration. The London Dumping Convention is the sole agreement that has worldwide application, the others being regional in scope. The agreements' wide geographic scope, different contracting parties, and numerous regulated substances create a confusing mosaic of responsibilities that differ from one EEC Member State to another.

III

EUROPEAN ECONOMIC COMMUNITY (EEC) GOVERNANCE AND ITS EXPERIENCE WITH REGULATION OF OCEAN DUMPING

A. EEC Governance

In order to comprehend the European Community debate regarding ocean dumping and its attempt to regulate this practice, it is helpful first to consider briefly the Community's organization and procedures for adopting legislation.

1. Goals

Twelve Member States, with a combined population of 323.7 million people, currently form the EEC. The 1957 Treaty of Rome, signed by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany, established the EEC and defined its objective as the formation of a single integrated market with free movement of goods, labor, services, and capital. The Treaty also foresaw the creation of a common development policy by Member States and the harmonization of laws in order to avoid competitive distortions. As a result of the Single European Act (SEA), which was signed in 1986 and amended the Treaty of

84. Id. art. 6.
85. A. Roney, The European Community Fact Book 1 (1990). The Member States are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.
86. Treaty of Rome is a popular name for the EEC Treaty, supra note 63.
87. Id. arts. 2, 3.
88. Id.

Rome, the EEC now exercises explicit competence over environmental protection. The SEA also specified December 31, 1992, as the deadline for completing the Internal Market program.

2. EEC Institutions and Consultative Bodies

The EEC is comprised of four institutions: the Council of Ministers, the European Commission, the European Parliament, and the Court of Justice. A number of consultative bodies, such as the Economic and Social Committee, support the work of the four institutions.

The EEC Council is composed of government ministers from the twelve Member States. Council membership changes according to the topic being discussed and includes the twelve appropriate ministers who have responsibility for the particular topic. For example, if environmental issues were being discussed, the twelve environmental ministers (one from each Member State) would form the Council. In most circumstances, the Council must grant the final approval to legislative proposals initiated and presented by the EEC Commission. The Council is often considered a "brake" on momentum toward integration begun by the Commission.

The EEC Commission is the civil service of the EEC and has the special function of initiating Community legislation. As the guarantor of Member State compliance with Community legislation, the Commission may bring a noncomplying Member State before the European Court of Justice. Although they are appointed by Member State governments, the Commissioners have a duty to remain independent and

90. For the text of the EEC Treaty, as amended, see 1988 Gr. Brit. T.S. No. 47 (Cmd. 455) [hereinafter Amended EEC Treaty].
91. Id. arts. 130R, 130S.
93. A. Roney, supra note 85, at 7.
94. Id.
96. Lodge, supra note 95, at 42.
97. Id.
98. Id. Because of unanimous voting requirements in the Council, the least enthusiastic Member State may set the speed of integration. N. Nugent, supra note 63, at 101-02.
99. A. Roney, supra note 85, at 9-11. For a general discussion of the role and organization of the Commission, see Lodge, supra note 95, at 34-41; N. Nugent, supra note 63, at 55-87. The Commission's initiative is limited by the national government's power to refuse to reappoint a Commissioner. Lodge, supra note 95, at 37.
100. A. Roney, supra note 85, at 10; N. Nugent, supra note 63, at 78-82.
101. There are 17 Commissioners. France, Italy, Spain, the U.K., and Germany each
consider issues from an EEC "collective interest" perspective, rather than from their own nation's viewpoint. The Commission's work is managed through administrative departments known as directorates general. Environmental issues are administered by the Directorate General of the Environment, Consumer Protection and Nuclear Safety, otherwise known as DG-XI.

The European Parliament is made up of 518 Members (MEP) who are directly elected by Member States every five years. Some of the major ideological groups have formed transnational parties, including the Greens, which evolved into the Rainbow Group. Representation is weighted according to population. The Parliament's role is not to legislate, but to discuss, evaluate, and amend proposals before the Council votes on them. The Parliament cannot enforce its recommendations. Its permanent working committees are approximately parallel to the Commission's directorates general.

The Court of Justice has jurisdiction over disputes arising from non-compliance with EEC legislation. The Court may interpret the treaties that establish the EEC, as well as municipal legislation that is considered to be incompatible with Community legislation. In its enforcement role, the Court ensures that Member States' laws conform to EEC provisions. The Court's decisions are binding on judicial bodies and individuals in Member States and take priority over any conflicting national legislation.

The Economic and Social Committee (ESC) is a Community consultative body comprised of 189 representatives of trade unions, employers' groups, and professional and consumer organizations from Member States. As a forum of representatives from national and European in-
terest groups, the ESC attempts to further a "social dialogue." The ESC offers opinions on Commission legislative proposals before they are approved or rejected by the Council.114

3. EEC Decisionmaking Process

The Treaty of Rome established four types of instruments to create EEC law and policy: regulations, directives, decisions, and recommendations and opinions.115 Regulations are binding laws directly applicable to Member States without the necessity of implementing municipal legislation.116 Directives are also binding, but defer to the Member States to develop their own implementing legislation.117 Decisions are binding opinions in individual cases and are addressed to a Member State or individual.118 Recommendations and opinions, though politically influential, are not legally binding.119 According to the principle of supremacy of EEC law, binding Community law takes precedence over present and future Member State law.120

The EEC treaties establish two types of decisionmaking procedures: the Consultation Procedure and the Cooperation Procedure. In the Consultation Procedure, the Commission prepares and adopts the proposal and submits it to the Council, which then requests the opinions of the European Parliament and the ESC.121 The draft proposal then returns to the Commission, which has the discretion to amend it and again seek opinions of Parliament and the ESC.122 Subsequently, the Commission submits the amended proposal to the Council, which must act in unanimity if it wishes to adopt the proposal.123

114. A. Roney, supra note 85, at 18.
115. EEC Treaty, supra note 63, art. 189. For a general discussion of these instruments, see Lodge, supra note 95, at 39; N. Nugent, supra note 63, at 144-49; A. Roney, supra note 85, at 19; International Law 100 (G. Tunkin ed. 1986).
116. Lodge, supra note 95, at 39; N. Nugent, supra note 63, at 144-45.
117. Lodge, supra note 95, at 39. Member States, however, have a poor record of implementing EEC environmental directives. Over two hundred infringement procedures have been brought against Member States under the Treaty of Rome, Article 169, for failure to implement Community environmental protection rules. This failure demonstrates a lack of political will to comply with Community obligations. Klatte, The Past and Future of European Environmental Policy, 1 EUR. ENV'T REV. 32, 33 (1986).
118. Lodge, supra note 95, at 39; N. Nugent, supra note 63, at 148.
119. N. Nugent, supra note 63, at 148.
121. A. Roney, supra note 85, at 20-21.
122. Id. The Commission listens not only to the Parliament and the ESC, but also to European and national interest groups in reaching a compromise proposal. Lodge, supra note 95, at 40.
123. A. Roney, supra note 85, at 8 ("The Council of Ministers tries to reach a unanimous decision about proposals and policy presented by the Commission, but if disagreements occur, qualified majority voting is possible . . . for certain matters relating to the completion of the Internal Market — such as the establishment of common standards").
The new Cooperation Procedure, created by the SEA, applies to ten articles of the Treaty of Rome, including those covering: the establishment of the internal market (Articles 100A and 100B), the working environment and worker health and safety (Article 118A), social and economic cohesion (Article 130E), and technological research and development (Article 130Q). This procedure includes strict timetables intended to speed up the legislative process. It also allows the Council to adopt a common position by a qualified majority, grants the Parliament increased legislative powers, and gives the European Parliament and Council a second reading of the proposed legislation. The allowance of qualified majority voting in the Council should facilitate the passage of measures that harmonize and standardize Member States' legislation in order to create and operate the unified market.

4. **EEC Competence in Environmental Protection**

Because the EEC was conceived as an economic institution, EEC environmental protection lacked a firm legal foundation until recently. The bases for environmental protection were Articles 100 and 235 of the EEC Treaty, read together with the preamble and Article 2. These provisions do not mention the environment but were interpreted as providing the possibility of Community environmental protection and harmonization measures if these were directly related to the functioning of the common market. Thus, environmental policy had to be directly linked to trade and industry.

The SEA's amendments to the Treaty of Rome in 1987 for the first time gave the Community explicit competence in the area of environmental protection through the new Articles 130R, 130S, and 130T. European Community environmental action should “preserve, protect and improve the quality of the environment; . . . contribute towards protecting human health; [and] . . . ensure a prudent and rational utilization of natural resources.” The EEC's environmental competence is limited

124. Amended EEC Treaty, supra note 90; see Lodge, supra note 105, at 68-72.
125. A. Roney, supra note 85, at 23.
126. A qualified majority requires 54 votes out of 76 in the Council, divided among the 12 members. Lodge, supra note 95, at 47.
130. N. Nugent, supra note 63, at 210; see Lodge, supra note 128, at 320.
132. Amended EEC Treaty, supra note 90, art. 130R(1).
by the subsidiary principle to objectives that can be better attained by Community action than by Member State action.\textsuperscript{133} Both the Community and the Member States may join international agreements in their respective areas of competence.\textsuperscript{134} This reservation of Member State competence to enter into international environmental agreements may restrict Community competence.\textsuperscript{135} Despite the introduction of the qualified majority vote in the Council for some matters, proposals favoring environmental action may still require a unanimous vote by the Council.\textsuperscript{136} Because the Cooperation Procedure, requiring only a qualified majority vote in the Council, is reserved for harmonization proposals related to the establishment and functioning of the internal market, eligibility for this new procedure may not extend to all environmental proposals.\textsuperscript{137}

The EEC environmental action programmes have recognized the protection of the marine environment as a Community priority. The Fourth Environmental Action Programme (1987-1992)\textsuperscript{138} stressed the importance of combatting fresh water and marine pollution by implementing, inter alia, a previous Council directive on pollution discharged into the Community’s waters.\textsuperscript{139} Additionally, this Action Programme called for a general improvement in the Community’s waters, especially the North Sea and the Mediterranean Sea,\textsuperscript{140} and the implementation of international conventions and protocols to which the EEC is a contracting party.\textsuperscript{141} The Third Environmental Action Programme (1982-

\textsuperscript{133} Id. art. 130R(4); Jacqué, The “Single European Act” and Environmental Policy, 16 ENVTL. POL’Y & L. 122, 124 (1986).

\textsuperscript{134} Amended EEC Treaty, supra note 90, art. 130R(5). The article rests on the doctrine of parallelism which recognizes the EEC’s competence to negotiate with third states and international organizations in areas in which it enjoys internal competence. Lodge, supra note 128, at 325.

\textsuperscript{135} Jacqué, supra note 133, at 124. By allowing Member States to ratify international environmental agreements, the SEA admits that EEC ratification does not accomplish all international environmental objectives.

\textsuperscript{136} See Amended EEC Treaty, supra note 90, art. 130S.

\textsuperscript{137} Id. art. 100A(1). It is possible that the qualified majority vote in the Council could be used to harmonize regulations related to health, safety, environmental protection, and consumer protection; however, if this procedure is used, the regulations will have to be closely linked to the functioning of the internal market. Id. art. 100A(3).


\textsuperscript{140} Fourth Environmental Action Programme, supra note 138, at 2.

\textsuperscript{141} Id. at 24. These international agreements include the Paris Convention dealing with prevention of marine pollution from land-based sources, the Bonn Agreement dealing with pollution of the North Sea by oil and other harmful substances, and the Barcelona Convention
1986) also called for reducing marine pollution by implementing the directive noted above, another directive on waste from the titanium dioxide industry, and a Community action program on the control and reduction of pollution caused by hydrocarbons discharged at sea. The First Environmental Action Programme (1972-76) recognized the dangers of marine pollution because of its ecological consequences, the extent of the practice, the multiplicity of pollution sources, and the difficulty of ensuring compliance with any adopted regulations.

B. The Commission's Proposed Directives Regarding Ocean Dumping and Their Fate within the EEC Institutions and Consultative Bodies

During the past two decades, the EEC has demonstrated interest in regulation of ocean dumping and ocean incineration. In 1976, the Commission submitted a proposed directive to the Council concerning the dumping of wastes at sea (1976 Proposed Directive). The Council, however, shelved the 1976 Proposed Directive several years later. In 1985, the Commission submitted to the Council another proposed directive on ocean dumping (1985 Proposed Directive). This second proposal engendered much internal debate within the EEC and has yet to be accepted. This section of the article analyzes these two proposed directives and traces their fates within the EEC institutions.

I. 1976 Proposed Directive

a. The Proposal

The preamble to the 1976 Proposed Directive cited the disparities between the ocean dumping provisions of the Oslo Convention, the London Dumping Convention, and the [yet to be adopted] Barcelona...
Convention, and suggested that these inconsistencies might "affect conditions of competition and the functioning of the [European] common market." The goal of the 1976 Proposed Directive was to ensure coordinated actions among EEC Member States to implement these conventions. The document envisioned a "uniform system of permits" to regulate ocean dumping.

The 1976 Proposed Directive offered the familiar definition of "dumping," which included the "deliberate disposal of substances and materials into the sea by or from ships or aircraft," but excluded discharges incidental to vessels' normal operations. The proposal also adopted the concept of the black and grey lists used by the Oslo Convention and the London Dumping Convention. Article 4 prohibited the dumping of substances listed in Annex I (Black List).

This list was more extensive than those of either the Oslo or London Dumping Conventions (see Table I) and included high- and low-level radioactive wastes. Annex I did not apply to substances that are "rapidly rendered harmless [sic] by physical, chemical or biological processes in the sea" (i.e., dilution and precipitation), as long as they did not cause edible marine organisms to become unpalatable or endanger the health of humans or domestic animals. Dumping wastes from Annex II (Grey List) required a special permit granted by the competent national authorities (see Table II). The dumping of wastes not listed in Annex I or II, such as sewage sludge, still would require a general permit issued by the competent national authorities.

The 1976 Proposed Directive was to apply to vessels registered in a Member State, vessels loading within a Member State's territory the material to be dumped, and vessels which were or might have been dumping within the waters under a Member State's jurisdiction. Exceptions again existed for vessels enjoying sovereign immunity, in cases of force majeure, and in the absence of land based alternatives. The proposal

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149. 1976 Proposed Directive, supra note 147, at 3. The drafters of the proposed directive cited Article 100 of the EEC Treaty as the authority for this directive. Id.

150. Id.

151. Id. art. 2. This definition is similar to those of the London Dumping Convention, the Oslo Convention, and the Barcelona Convention. See supra notes 25, 40, 59.

152. Id. art. 4.

153. Id. annex I.

154. Id. annex I(B).

155. Id. arts. 5, 6.

156. Id. When considering whether to grant either a special (Grey List) or general permit, a Member State would have to consider the characteristics and composition of the substance to be dumped, the characteristics of the dumping site and method of dumping, and other characteristics, such as possible effects on amenities, marine life, and other uses of the sea, as well as the availability of land-based disposal alternatives. Id. art. 6(3), annex III.

157. Id. art. 3(1). There is no indication whether "waters under a Member State's jurisdiction" applied to the exclusive economic zone or only to the territorial sea of the Coastal State.

158. Id. arts. 3(2), 10, 11(3).
noted that in exceptional cases where a Member State cannot dispose of Annex I materials on land, and ocean dumping is the “only practicable means,” the Commission would be able to authorize the ocean dumping.\(^{159}\)

The 1976 Proposed Directive lacked provisions regulating ocean incineration. Moreover, other than very general language regarding the need to prevent and abate marine pollution, there was no call to terminate ocean dumping by a certain date or to reduce this activity in a stepwise manner.

**b. Fate of the 1976 Proposed Directive**

In accordance with Article 100 of the EEC Treaty, the Council referred the 1976 Proposed Directive to the Economic and Social Committee (ESC) and the European Parliament for their opinions.\(^{160}\) Both organs published their opinions several months later. The ESC approved the 1976 Proposed Directive, but considered it only a minimum first step which would require amendments or further provisions.\(^{161}\) Specifically, the Committee was concerned that the exemption in Annex I.B for substances rendered harmless in the ocean might result in bioaccumulation of certain toxics in the food chain.\(^{162}\) Because of this perceived risk, it recommended eliminating physical processes such as dilution and dispersion from this exemption.\(^{163}\)

The ESC expressed other minor concerns about Annex I of the 1976 Proposed Directive. The Committee claimed that since the list did not include carcinogens, it should not cover organosilicon compounds.\(^{164}\) Other listings should have been more inclusive, for example, the ban on dumping of hydrocarbons should not have been limited to those of petroleum origin, but extended to all sources.\(^{165}\) Similarly, the ESC preferred to eliminate the distinction between aluminum or titanium industries and

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159. Id. art. 11.
160. EEC Treaty, supra note 63, art. 100; see also supra notes 121-23 and accompanying text.
162. Id. at 55-56.
163. Id.
164. Id. at 59. The ESC evidently believed that organosilicon compounds were known carcinogens. However, there is strong evidence that this family of compounds is generally not a threat to the marine environment. See Frye, The Environmental Fate and Ecological Impact of Organosilicon Materials: A Review, 73 THE SCIENCE OF THE TOTAL ENV'T 17 (1988); Tacke & Linoh, Bioorganosilicon Chemistry, in THE CHEMISTRY OF ORGANIC SILICON COMPOUNDS 1143, 1183-85 (1989). But see Nagase, Ose & Sato, Possible Methylation of Inorganic Mercury by Silicones in the Environment, 73 THE SCIENCE OF THE TOTAL ENV'T 29 (1988) (organosilicon compounds in the marine environment may react with inorganic mercury to produce potentially hazardous methylmercury).
other sources of acids and alkalis, and instead distinguish by the quantity of acid dumped.\textsuperscript{166} While the ESC did not disagree with the inclusion of radioactive wastes, it questioned what would happen to low-level radioactive wastes in the interim before the Council decided where to dispose of them.\textsuperscript{167}

The ESC agreed with the jurisdictional application of the 1976 Proposed Directive, although it stressed the difficulty of supervising dumping occurring at a distance from EEC coasts.\textsuperscript{168} In order to avoid evasion of the regulation by ships exporting the wastes to non-EEC countries, the Committee recommended that such exporting operations require notification or registration.\textsuperscript{169}

Later in 1976, the European Parliament adopted a resolution containing its opinion of the 1976 Proposed Directive.\textsuperscript{170} The European Parliament stressed that the proposal should implement the international conventions (London Dumping Convention, Oslo Convention, Helsinki Convention, and Barcelona Convention) at the EEC level.\textsuperscript{171} It called on the EEC to sign and ratify these four agreements and for the Commission to amend Annexes I and II to coincide exactly with the requirements of the four international agreements in their appropriate areas of application.\textsuperscript{172}

Despite the 1976 Proposed Directive's support in the Commission, the ESC, and Parliament, the Council failed to consider it. This first EEC attempt to regulate ocean dumping, implement the international conventions, and harmonize Member State policies died a rather quiet death. Upon submitting its 1985 Proposed Directive, the Commission officially withdrew the 1976 proposal in accordance with Article 149 of the EEC Treaty.\textsuperscript{173}

The Commission later attempted to achieve objectives similar to those of the 1976 Proposed Directive by means of EEC accession to the Oslo Convention. The Council, however, failed to approve the decision authorizing the Commission to begin accession negotiations.\textsuperscript{174} Although eight of the twelve signatories to the Oslo Convention were EEC Member States, the Community itself refused to accede.

\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 57.
\textsuperscript{169} Id. at 57-58.
\textsuperscript{171} Id. at 61.
\textsuperscript{172} Id.
\textsuperscript{173} Explanatory Memorandum Accompanying the 1985 Proposed Directive, supra note 49, at 5; see EEC Treaty, supra note 63, art. 149(3).
\textsuperscript{174} Explanatory Memorandum Accompanying the 1985 Proposed Directive, supra note 49, at 17.
2. 1985 Proposed Directive

a. Antecedents

Despite the Council's failure to adopt the 1976 Proposed Directive, the EEC still recognized the need to harmonize Member State ocean dumping policies in light of the disparate obligations engendered by the international and regional agreements. The European Parliament passed several resolutions calling on the Commission to prepare directives that would harmonize EEC Member State policies with respect to ocean dumping. In 1982, the Parliament requested that the Netherlands, Belgium, and the United Kingdom immediately cease their dumping of nuclear wastes in the northeast Atlantic Ocean. This 1982 resolution also called on the Commission to prepare a directive that would prohibit the ocean dumping of EEC radioactive waste, wherever this activity were to occur.

In February 1984, the European Parliament again prodded the Commission to harmonize international, EEC, and national legislation, thereby guaranteeing effective protection of the North Sea environment. This parliamentary resolution requested that the Commission study the existing loopholes in the conventions already in force and examine the effects of ocean dumping in the North Sea. The Parliament insisted that ocean incineration of dangerous chemicals in the North Sea should cease and, perhaps, be moved to less vulnerable sites in the Atlantic Ocean. Finally, this resolution requested that the Commission propose a new directive on ocean dumping to the Council as soon as possible. The Parliament was adamant that this new proposed directive "not be watered down" in comparison to the 1976 Proposed Directive, and that it incorporate the demands of the 1976 European

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The London Dumping Convention lists high-level radioactive wastes in Annex I, and low-level radioactive wastes in Annex II. London Dumping Convention, supra note 40, annexes I, II. Radioactive wastes are not regulated at all by the Oslo Convention. Oslo Convention, supra note 25, annexes I, II. The directive which the European Parliament encouraged would have been stricter than either of these two international agreements.

176. Resolution on the Storage of Nuclear Waste in the Atlantic by the Netherlands, Belgium and the United Kingdom, supra note 175, at 46.


178. Id. at 136-37.
179. Id. at 138.
180. Id. at 139.
Parliament Resolution\textsuperscript{181} that the proposal effectively implement the international conventions for the EEC Member States.\textsuperscript{182}

The February 1984 European Parliament resolution was followed by a further resolution on ocean dumping in April 1984.\textsuperscript{183} The Parliament expressed its concern about the dumping of chemical and nuclear wastes in EEC waters and the dumping of nuclear wastes in the Atlantic Ocean. The Parliament's suggestion was clear: the EEC must accede to the London Dumping Convention, the Oslo Convention, and the Helsinki Convention as soon as possible and, additionally, encourage all Member States to do so as well.\textsuperscript{184} The resolution's second suggestion was that the Council adopt the 1976 Proposed Directive after it had been tailored to the London Dumping Convention and the Oslo Convention.\textsuperscript{185} The Parliament specified that preventing ocean dumping of radioactive wastes should be central in any proposal and further suggested that proposals take the form of regulations, rather than directives.\textsuperscript{186} The directly elected body hoped that ocean dumping of radioactive wastes would cease after January 1, 1984, while ocean dumping of substances on Annexes I (Black List) of the London Dumping Convention, Oslo Convention, and the 1976 Proposed Directive would terminate after January 1, 1986.\textsuperscript{187} The Resolution also called for imposing maximum concentration and quantity limits on black-listed substances that occur in trace amounts in industrial waste, sewage sludge, or dredged materials.\textsuperscript{188}

In light of these European Parliament resolutions, the 1984 International Conference on the Protection of the North Sea held in Bremen,\textsuperscript{189} and the First European Community Action Programme on the Environ-

\begin{footnotes}
\footnote{181}{Id. For a discussion of the 1976 European Parliament Resolution, see supra notes 170-72 and accompanying text.}
\footnote{182}{Resolution on the Combating of Pollution in the North Sea, supra note 177, at 138-39.}
\footnote{183}{Resolution on the Dumping of Chemical and Radioactive Waste at Sea, supra note 49, at 4.}
\footnote{184}{Id. at 74.}
\footnote{185}{Id. at 75.}
\footnote{186}{Id. For a discussion of the difference between a regulation and a directive, see supra notes 116-17 and accompanying text.}
\footnote{187}{Resolution on the Dumping of Chemical and Radioactive Waste at Sea, supra note 183, at 75.}
\footnote{188}{Id.}
\footnote{189}{The First International Conference on the Protection of the North Sea was held in Bremen in 1984. Belgium, Denmark, the Federal Republic of Germany, France, the Netherlands, Norway, Sweden, and the United Kingdom attended. The goal of the conference was to reach an agreement reducing pollution in the North Sea. Andresen, The Environmental North Sea Regime: A Successful Regional Approach?, in OCEAN YEARBOOK 8, at 378, 382-83 (1989).}
\end{footnotes}
ment,190 the Commission drafted the 1985 Proposed Directive and submitted it to the Council.191 The Commission claimed to have adapted the 1976 Proposed Directive to the modified Oslo Convention and London Dumping Convention, as well as to the Barcelona Convention and the Caribbean Convention, which all differ in the composition of their black and grey lists.192 According to the Commission, the 1985 Proposed Directive would "harmonize the existing laws, regulations and administrative provisions in the Member States to avoid distortions of competition and also to improve the quality of the marine environment and to protect it against pollution."193 The goal was to regulate ocean dumping through a single system of permits, using homogeneous criteria.194 The legal bases for the Commission's Proposed Directive were Articles 100 and 235 of the EEC Treaty.195

b. The Proposal

The 1985 Proposed Directive was much more inclusive in terms of regulated activities and substances than its predecessor. "Dumping" was defined as the deliberate discharge of wastes into the ocean, and extended to emplacement of materials on or in the seabed, interim storage of wastes, and ocean incineration.196 The Commission expressly noted, however, that its proposal did not extend to the dumping or seabed burial of radioactive substances.197

The directive would apply to any material dumped from vessels in "waters within the jurisdiction of a Member State."198 While the direc-

190. First Environmental Action Programme, supra note 1, at 23-24, 31. The Council declared that EEC action should focus on "the approximation of rules on the application of International Conventions [regarding marine pollution], as far as necessary to the proper functioning of the common market and the implementation of this programme." Id. at 24.


195. Explanatory Memorandum Accompanying the 1985 Proposed Directive, supra note 49, at 18. Article 100 of the EEC Treaty permits the Council to issue directives for the approximation of Member State legislation that directly affects the functioning of the common market. Both the European Parliament and the Economic and Social Committee must produce opinions on a proposed directive. Article 235 empowers the Council, acting unanimously on a proposal from the Commission, to act to reach an EEC objective, if the EEC Treaty has not provided the necessary powers. Under Article 235, the Parliament must provide an opinion on the proposed action. EEC Treaty, supra note 63.


198. 1985 Proposed Directive, supra note 148, art. 3. "Waters within the jurisdiction of a
tive would apply to all vessels within a Member State’s waters, its scope would not extend to waters outside the jurisdiction of EEC Member States.

The 1985 Proposed Directive again adopted the now familiar concept of black and grey lists. Article 4(1) prohibits the dumping of substances listed in Annex I (Black List, see Table I).\textsuperscript{199} Dumping of substances from Annex II (Grey List, see Table II) is highly controlled and requires a special permit issued by the competent national authorities.\textsuperscript{200} Radioactive wastes are notably absent from both lists. Other wastes require only a general permit.

The proposal provides three exemptions to the Article 4 requirements: sovereign immunity of vessels,\textsuperscript{201} force majeure,\textsuperscript{202} and the lack of land based alternatives.\textsuperscript{203} This last exemption for Annex I materials appears to be very narrow, and is allowed only “[i]f disposal at sea is the only practicable means of disposing of waste.”\textsuperscript{204}

Article 5 allows ocean incineration of only those substances listed in Annex IV (organohalogen compounds, other pesticides, and, generally, substances that may be incinerated without causing damage to the marine environment), and requires a special incineration permit that would ensure compliance with the procedures set out in Annex IV.\textsuperscript{205}

The 1985 Proposed Directive limits ocean incineration to situations in

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\textsuperscript{199} \textit{1985 Proposed Directive, supra} note 148, art. 4(1).

\textsuperscript{200} \textit{Id.} art. 4(2). The competent national authorities must consider the criteria listed in Annex III before issuing a permit. These criteria include the characteristics and composition of the substance to be dumped, the characteristics of the dump site, and other factors, such as possible effects on amenities, marine life, and uses of the ocean. An additional general factor is the practical availability of land-based alternatives for treatment or disposal. \textit{Id.} annex III.

\textsuperscript{201} \textit{Id.} art. 3(2).

\textsuperscript{202} \textit{Id.} art. 13(1).

\textsuperscript{203} \textit{Id.} art. 14(1).

\textsuperscript{204} \textit{Id.} art. 14(3). One critique of the Proposed Directive is its lack of meaningful standards and definitions for terms such as “practicable.” Is disposal at sea “practicable” if it costs much less than land based disposal methods?

\textsuperscript{205} \textit{Id.} art. 5. Among its many provisions, Annex IV requires that the combustion and destruction efficiencies shall be at least 99.9%. \textit{Id.} annex IV. Based on the great number of similarities, the Oslo Convention Protocol on Ocean Incineration appears to be the basis for Annex IV, which sets out the ocean incineration procedures. \textit{Compare} Oslo Convention Protocol on Ocean Incineration, \textit{supra} note 36, rules 1-10 with \textit{1985 Proposed Directive, supra} note 148, annex IV.
"which practical alternative land based methods of treatment and disposal" are unavailable.206

Unlike its forerunner, the 1985 Proposed Directive would mandate a phase-out of ocean incineration as well as ocean dumping of substances from the Grey List.207 Member States would be required to set a date for the termination of ocean incineration and inform the Commission of their decision by January 1, 1990.208 The competent national authorities could not issue new incineration permits after January 1, 1988, but existing incineration permits could be renewed without an increase in quantity of authorized material until January 1, 1990.209 The proposal sets similar schedules for the special dumping permits of Grey List substances. However, rather than fixing a termination date for the ocean dumping of Annex II substances, Member States would have to reduce by ten percent annually the quantities of waste dumped in 1989.210 This reduction would occur for five consecutive years beginning in 1990, so that by 1995 the quantity of materials authorized for dumping would be half the 1989 level.211

The 1985 Proposed Directive set minimum EEC standards and procedures. It expressly allowed Member States to adopt more stringent provisions and also prohibited ocean dumping and incineration in certain areas.212 The Commission also called on Member States to reduce ocean dumping and incineration by promoting alternative land based disposal methods and recycling.213

c. Fate of the 1985 Proposed Directive in the Commission and the European Parliament

Pursuant to Articles 100 and 235 of the EEC Treaty, the Council requested that the Economic and Social Committee (ESC) and the European Parliament deliver opinions on the Proposed Directive.214 These requests resulted in a substantial debate over the proposal which continued throughout the next three years. As a result of these discussions and the opinions adopted by the ESC and the Parliament (discussed below), the Commission submitted a modified proposed directive to the Council in 1988.215

207. Id. arts. 9(2), 10(3).
208. Id. art. 9(2). The Council would have to act on the Commission's proposal by June 1, 1991. Id. The Protocol to the Oslo Convention stipulates a similar procedure. Oslo Convention Protocol on Ocean Incineration, supra note 36, rule 2(3).
209. 1985 Proposed Directive, supra note 148, art. 10(1)-(2).
210. Id. art. 10(3).
211. Id.
212. Id. art. 19.
213. Id. art. 9(1).
214. EEC Treaty, supra note 63, arts. 100, 235.
The Economic and Social Committee, through its Section for Protection of the Environment, Public Health and Consumer Affairs, adopted its opinion in November 1986.\footnote{Opinion on the Proposal for a Council Directive on the Dumping of Waste at Sea (COM(85) 373 final), CES(86)964 (opinion of the European Communities' Economic and Social Committee).} The ESC generally approved of the 1985 Proposed Directive and highlighted its positive features: provisions to update the Black and Grey Lists, progressive reduction of waste disposal at sea, and preference for traditional and alternative land disposal methods in light of the "polluter pays principle."\footnote{Id. at 3-4.}

The ESC, however, recommended several amendments to the Proposed Directive. It would exempt "oil-based drilling muds and oil from drilling cuttings" from Annex I, because this ban might adversely affect oil prospecting in the North Sea, Member States' balance of payments, and EEC energy supplies.\footnote{Id. at 6.} The ESC preferred an accelerated timetable for reducing waste disposal at sea, and recommended increasing the percentage reduction of ocean dumping above the fifty percent already specified for the period prior to 1995.\footnote{Id. at 7.}

The ESC also pointed out that nontoxic sewage sludge could be subject to the Proposed Directive's fifty percent reduction between 1990-1995, which might create difficulties for some countries.\footnote{Id. at 4.} The reduction scheme pertains to materials listed in Annex II, points 1, 2, 3, and 5.\footnote{1985 Proposed Directive, supra note 148, art. 10(3).} Of these points, only point 5 (substances which are nontoxic in nature but may be harmful or reduce amenities because of the quantities dumped) may be applicable to sewage sludge. Whether the phased reduction would apply to sewage sludge would seem to depend entirely on the quantity dumped at a specific site during a certain period of time. This is an uncertainty that the ESC believed the Proposed Directive should clarify.

The opinion of the European Parliament was more critical than that of the ESC and was influenced by continual communications with the Commission. The Parliament's Committee on the Environment, Public Health and Consumer Protection (Environment Committee) drew up amendments to the 1985 Proposed Directive and prepared a motion for a
parliamentary resolution (Environment Committee's First Report).222 The Environment Committee was generally supportive of the 1985 Proposed Directive, but it submitted amendments that would considerably extend the Directive's scope and clarify its provisions. While many of the Committee's proposed amendments merely attempted to clarify style, others were more substantive. The major concerns were the relationship of the Proposed Directive to international and regional conventions, the inclusion of radioactive wastes in Annex I, and the need for a separate directive for ocean incineration.223

The Environment Committee was adamant about banning ocean disposal of radioactive wastes and proposed amending Annex I to list high-, medium-, and low-level radioactive wastes, as defined by the International Atomic Energy Agency.224 Additional amendments defined "seabed emplacement" as the "disposal of highly toxic and high-level radioactive wastes into the seabed," and included "seabed emplacement" as a practice of "dumping."225 The Committee believed ocean dumping of radioactive waste was unethical, as dumping countries increase health risks to peoples in nondumping countries located adjacent to the dumping sites. These peoples do not enjoy the benefits of the activities that generated the waste, yet they are exposed to the risks.226

Additionally, the Environment Committee wanted the Proposed Directive to implement the existing conventions for the EEC Member States effectively. Rather than being another set of international rules equal to other conventions, it preferred to view the proposal as national legislation that would implement the international conventions.227 To this end, the Environment Committee proposed amendments that would closely link the Proposed Directive to the international conventions. It suggested, for example, that the proposal not introduce another black list, but rather specifically incorporate all the other conventions' black and grey lists into Annexes I and II. Essentially, the Proposed Directive's Annex I would include any substance listed in Annex I of the London Dumping Convention or the Oslo Convention or the Dumping
Protocol to the Barcelona Convention. The Committee proposed similar treatment for Annex II. In this same spirit, the European Parliament suggested an amendment that would prohibit ocean dumping in the Baltic Sea, in accordance with the Helsinki Convention. Tables III and IV of this article track the substances listed in Annexes I and II, respectively, under the label of the Environment Committee's First Report.

The Environment Committee also sought to remove a possible loophole from Article 3 of the 1985 Proposed Directive, which applied the Proposed Directive to waters within the jurisdiction of Member States. By proposing the removal of the limitation to vessels loading in Member State ports or registered in the Member State, the Committee hoped to avoid the interpretation that these vessels might incinerate or dump with impunity in waters outside the jurisdiction of any EEC Member State.

Finally, the Committee recommended that no competent national authority grant a special permit for dumping a substance in Annex II as long as "practical alternative land-based methods of treatment and disposal are available." The 1985 Proposed Directive already included a similar provision with respect to ocean incineration.

The European Parliament's Committee on Legal Affairs and Citizens' Rights (Legal Affairs Committee) also issued an opinion on the 1985 Proposed Directive. This body recommended approval of the Proposed Directive because it would ensure that Member States avoid duplications and incompatibilities with respect to their obligations under international conventions. Most of the Committee's opinion concerns the scope and applicability of Article 3 of the Proposed Directive. Unlike the Environment Committee, the Legal Affairs Committee approved limiting the scope of the Proposed Directive to "maritime waters within the jurisdiction of a Member State." Removing this limitation and attempting to control ocean dumping outside EEC waters, especially within waters that are in the exclusive competence of a non-EEC coastal

228. Id. at 34-36.  
229. Id. at 36-37.  
230. Id. at 11.  
231. Id. at 10, 31. There was some opposition to the Committee's position within the European Parliament. In the parliamentary debates, Mr. De Gucht, Netherlands Member of Parliament from the conservative Liberal and Democratic Reformist Group and rapporteur for the Committee on Legal Affairs and Citizens' Rights, noted that extending the Proposed Directive outside EEC waters did "not square with the principles and practical application of the Law of the Sea." Remarks of Mr. De Gucht, O.J. EUR. COMM. ANNEX (No. 2-342) 126 (Sept. 10, 1986) (Debates of European Parliament).  
232. Environment Committee's First Report, supra note 222, at 32.  
233. See supra note 206 and accompanying text.  
235. Id. at 43.  
236. Id. at 42-43.
TABLE III
SUBSTANCES LISTED IN ANNEX I

<table>
<thead>
<tr>
<th></th>
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<tr>
<td>Organohalogens</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Organosilicon compounds</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mercury &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Cadmium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td>Synthetic materials &amp; persistent plastics</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Crude oil &amp; hydrocarbons</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Acids &amp; alkalis</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Acids &amp; alkalis from the aluminum &amp; titanium industries</td>
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<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Possible carcinogens</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Chemical warfare materials</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>High-level nuclear wastes</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Low-level nuclear wastes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wastes containing trace amounts of any of these substances</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Organotin compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Oil-based drilling muds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Compounds which may form organohalogens</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Substances that contracting parties to Oslo Convention agree are carcinogens</td>
<td>X</td>
<td></td>
<td></td>
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</tbody>
</table>

State, would violate norms of the international law of the sea, according to the Committee.237

The legislative path of the proposed amendments was far from over. A plenary session of the European Parliament considered the Environment Committee's First Report on September 10, 1986. During the debate, DG-XI Commissioner Stanley Clinton Davis made it clear that the Commission would not accept the majority of the amendments proposed

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237. *Id.* at 43. This leaves open the question of whether the Proposed Directive might apply to the flag vessels of a Member State that attempt to dump or incinerate on the high seas.

Many multilateral conventions establish an obligation of a State to prevent dumping of any substance which might be harmful to the environment of the high seas. *UNCLOS III, supra* note 198, art. 210 (each coastal state's territorial sea, exclusive economic zone, or continental shelf); *Oslo Convention, supra* note 25, art. 2 (high seas in the northeast Atlantic Ocean and the Arctic Ocean); *Caribbean Convention, supra* note 82, art. 2 (“Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto”); see B. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION 91-93 (1988).
by the Parliament. The position of the Commission and its spokesperson Clinton Davis remained firm, even after the Parliament voted to adopt the amendments to the Proposed Directive on September 11, 1986. In light of the Commission's intransigence, the Environment Committee's rapporteur requested that the First Report be sent back to the Environment Committee for reconsideration. At a November 6, 1986 meeting, Commissioner Clinton Davis and Commissioner Muntingh, the rapporteur and chairman of the Environment Committee, discussed the differences between the two bodies. In light of this discussion, the rapporteur modified the suggested amendments and submitted a revised report to the Environment Committee, which considered and eventually approved the revised report in March 1987 (Environment Committee's Second Report).

In its First Report, the Environment Committee wanted the Proposed Directive to implement the existing international conventions by inserting explicit references to the international conventions that the proposal would regulate every substance covered in any of those conventions. The Commission, however, considered the Environment Committee's approach too complex. The parties compromised by including, in the new Annex XI, a comparison of the substances regulated by the Proposed Directive and three international accords (London Dumping Convention, Oslo Convention, Barcelona Convention).

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238. Remarks of Commissioner Clinton Davis, O.J. EUR. COMM. ANNEX (No. 2-342) 134-36 (Sept. 10, 1986) (Debates of European Parliament). Commissioner Clinton Davis commented that “the view taken by the Commission is that [provisions governing dumping of radioactive waste at sea] would not be an appropriate way of proceeding.” Id. at 134.

Commissioner Clinton Davis was appointed by the British government. Nevertheless, Clinton Davis, like all Commissioners, had a duty to discuss issues from a Community perspective, rather than from the perspective of the Member State that appointed him. See supra note 102 and accompanying text.


240. Remarks of Rapporteur Muntingh, O.J. EUR. COMM. ANNEX (No. 2-342) 258 (Sept. 11, 1986) (Debates of European Parliament). Rapporteur Muntingh stated that “[t]he Commission ... [was] not acting very honourably in disregarding the wishes of Parliament.” Id.


242. Id.

243. See supra notes 227-29 and accompanying text.

244. Environment Committee's Second Report, supra note 241, at 22.

245. Id. at 16, 21-22. The Second Committee recommended deleting any reference to the MARPOL Convention because this agreement concerns operational discharges from ships, rather than ocean dumping. Id. at 6, 24. Furthermore, the new Annex XI would not include either the Helsinki Convention or the Caribbean Convention, although both of these would be mentioned in the 1988 Modified Proposed Directive and in both the Environment Committee's First and Second Reports. See Amended Proposal for a Council Directive on the Dumping of
**Table IV**

**Substances Listed in Annex II**

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Arsenic, lead, copper, zinc, &amp; their compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Beryllium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Chromium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Nickel &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Vanadium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Selenium &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Antimony &amp; its compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Cyanides &amp; fluorides</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Pesticides &amp; their byproducts not listed in Annex I</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Synthetic organics not in Annex I</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Acids &amp; alkalis not in Annex I</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Containers, scrap metal, &amp; bulky waste</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Substances which may be noxious in quantities in which they are dumped,</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>may reduce amenities, or may endanger humans or marine organisms</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Radioactive waste not covered by Annex I</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Organosilicon compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Persistent toxic organosilicon compounds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

The Environment Committee, however, was not willing to compromise its position with respect to the geographical applicability of the Pro-
posed Directive. While the Commission in Article 3 of the proposal refused to extend EEC jurisdiction to Community-registered ships outside EEC waters, the Parliament remained quite willing to extend the scope. It predicted that no conflicts with third countries would occur because "no self-respecting country will demand from foreign ships that they should start dumping in its territorial waters." Even if conflicts arose, Parliament believed such conflicts would be a minor problem compared to environmental protection.

The Environment Committee also refused to compromise on the dumping of radioactive materials. The Commission had refused to list radioactive wastes in Annex I and argued that it would soon ask the Council for permission to negotiate EEC accession to the London Dumping Convention, whereby a ban on high-level radioactive wastes would automatically follow. The rapporteur for the Environment Committee argued for its inclusion on the grounds that the European Parliament had taken a clear stance against ocean dumping of radioactive wastes, accession to the London Dumping Convention was not certain, and the Dumping Protocol to the Barcelona Convention banned ocean dumping of radioactive waste in the Mediterranean Sea. As a result, the Environment Committee's Second Report continued to request that Annex I list low-, medium-, and high-level radioactive wastes in order to ensure maximum compatibility with international conventions.

247. Id. at 24.
248. Id.
249. Id. at 7, 17, 23-24.
250. Id. at 23.
251. Id. at 23-24. Indeed, as of 1991, the EEC has not acceded to the London Dumping Convention.
252. Id. at 14, 18, 25-26. In the European Parliament debate on September 10, 1986, Mr. Muntingh, Dutch Socialist MEP, noted that the Commission's refusal to include radioactive wastes in the Proposed Directive "look[ed] suspiciously like contempt for Parliament, which has for years urged that a ban be imposed on all dumping of nuclear waste at sea." Remarks of Rapporteur Muntingh, O.J. EUR. COMM. ANNEX (No. 2-342) 127 (Sept. 10, 1986) (Debates of European Parliament).

Parliamentary opposition to ocean dumping of radioactive waste was strong and spanned the political spectrum. The Spanish Socialist MEP Medina Ortega noted that "[a]ny dumping of radioactive waste in the sea is like a loaded gun aimed at our descendants. The resolution we are about to adopt must make it perfectly clear that the use of the sea as a dustbin for radioactive waste endangers the entire human race and may never be permitted for any reason whatsoever.


Irish MEP Mrs. Lemass, from the center-right European Democratic Alliance, stated that "[t]he constituents I represent in Dublin are totally disenchanted with the cavalier manner in which the whole question of nuclear waste is being treated and sidestepped by the Commission [and] the Council." Remarks by Mrs. Lemass, O.J. EUR. COMM. ANNEX (No. 2-342) 129 (Sept. 10, 1986) (Debates of European Parliament). The Irish have had a strong sentiment against nuclear waste because of their dispute with the U.K. over the discharges into the Irish Sea from the Sellafield Nuclear Fuel Reprocessing Plant. Hain, Low-Level Radioactivity in the

The 1988 Modified Proposed Directive, despite integrating eight of Parliament’s amendments, incorporated none of the important recommendations. The Commission failed to alter Article 3 to extend the applicability of the Proposed Directive to non-EEC waters. Nor was the Commission swayed on the issue of radioactive wastes; it refused to modify Annex I. The Commission opted for its original manner of introducing the Black and Grey Lists, without linking them explicitly to the lists from the international conventions. However, it did adopt Annex XI, comparative tables of substances listed in Annexes I and II of the 1988 Modified Proposed Directive and the London Dumping Convention, the Oslo Convention, and the Dumping Protocol to the Barcelona Convention.

d. The Internal EEC Debate Over Radioactive Wastes

As the previous subsection indicated, the recent proposed directive on ocean dumping and incineration followed a tortuous and contentious
path within the EEC. Over two years passed between the Commission’s first draft and submission of a final proposed directive to the Council. A serious difference in approach between the Commission and the European Parliament characterized this period.

The debate concerning the listing of high- and low-level radioactive wastes in Annexes I and II of the 1985 Proposed Directive was a principal source of disagreement between the Commission and the European Parliament. Both high- and low-level nuclear wastes are listed in Annex I of the Barcelona Dumping Protocol, and high-level radioactive wastes appear in Annex I of the London Dumping Convention. Therefore, if the 1985 Proposed Directive was to be all-inclusive, it should have listed both high- and low-level radioactive wastes in Annex I. Oddly, Annex I of the 1976 Proposed Directive included both high- and low-level nuclear wastes. Why was the Commission so intransigent, despite its confrontations with the European Parliament and the recommended amendments of the Environment Committee? To explore this issue, it is necessary to examine the debate concerning ocean dumping of radioactive wastes during the 1970’s and 1980’s.

Since the ocean dumping of nuclear wastes began in the 1940’s, several EEC Member States (the United Kingdom, France, the Federal Republic of Germany, Belgium, and the Netherlands) had dumped low-level nuclear waste into the north Atlantic Ocean, while the governments of Spain, Portugal, Italy, and Ireland were strongly opposed to this dumping. The Federal Republic of Germany and France ended ocean dumping of nuclear wastes in 1970 and expressed doubts about the capability of the international community to regulate this activity. The United Kingdom alone supported this practice through the 1980’s, and even hoped to expand to medium- and high-level radioactive waste.

Britain’s attempts to amend the London Dumping Convention to allow for seabed disposal of high-level radioactive waste failed, and opposition among contracting parties to ocean dumping of even low-level
wastes grew. This occurred in spite of the fact that the London Dumping Convention had legitimized this practice. In 1983, at the Seventh Consultative Meeting of the London Dumping Convention, the contracting parties voted for a temporary moratorium on ocean dumping of low-level nuclear wastes, pending further study. The suspension was continued at the Ninth Consultative Meeting of the Convention in 1985 and the Tenth Consultative Meeting in 1986.

In 1984, after the London Dumping Convention call for a moratorium, Britain suspended ocean dumping of low-level nuclear wastes. The suspension may have been due to domestic politics and the refusal of the National Union of Seamen to staff the disposal vessel. In spite of this suspension, however, the Thatcher government continued to insist on maintaining the ocean dumping option.

The EEC Commission could not possibly have remained isolated from this debate concerning ocean dumping of nuclear wastes. While the Commission was sincere about its 1985 Proposed Directive and hoped for Council approval, it realized that Articles 100, 130S, and 235 of the EEC Treaty required the Council to act with unanimity. Since the British government would not support a ban on ocean dumping of high- and low-level radioactive wastes, inclusion of these substances in Annex I would have been fatal for the passage of the Proposed Directive.

e. Fate of the Proposed Directive in the Council

Three years have passed since the Commission submitted its 1988 Modified Proposed Directive to the Council, yet the Council has refused


269. *Id.* at 120. Arguments against ocean dumping of low-level wastes were based on the "polluter pays" principle, as well as on uncertainties in the health and environmental models, the risks during transport of wastes to dumpsites, and waste irretrievability. *Id.* at 124; Bewers & Garrett, supra note 3, at 114-21.


271. Boehner-Christiansen, supra note 268, at 119-20; Forster, *London Dumping Convention: In the Ranks of Tuscany?*, 16 ENVTL. POL'Y & L. 7 (1986). Denmark, the Federal Republic of Germany, the Netherlands, and Spain supported the resolution for a moratorium on dumping of low-level waste. France and the United Kingdom voted against it, while Belgium, Italy, and Portugal abstained. Boehner-Christiansen, supra note 268, at 120 n.8; see Bewers & Garrett, supra note 3, at 108-9.


273. Boehner-Christiansen, supra note 268, at 120.

274. *Id.*

275. *Id.* at 120, 122 n.15. At a third meeting of environmental ministers of countries bordering on the North Sea, Britain wanted to retain the option of disposing radioactive wastes in the ocean, even though they were not dumping at that time. *Britain Left Isolated on Pollution*, Guardian (Manchester), Mar. 9, 1990, at 1, col. 1.
to adopt the proposal. Similarly, debate on ocean dumping and ocean incineration has disappeared from EEC documents since 1988.276 This result is curious in light of the continued attention that international fora are directing toward ocean dumping and incineration, the EEC’s increasing assertiveness in the environmental arena, its clear competence in this area as a result of the Single European Act, and the forthcoming completion of the Internal Market in 1992. The next section will isolate some factors which explain the Council’s failure to act in this area.

IV

ANALYSIS

A. Role for the EEC Proposed Directive and Arguments for Its Passage

Both the 1976 and 1985 Proposed Directives on ocean dumping attempted to harmonize Member State policies in light of conflicting obligations under the existing international conventions. The Member States’ conflicting obligations result from differences in the substances listed in Annexes I and II, the geographical scope of the conventions, and the signatories. When considered together, these factors create a confusing mosaic of responsibilities for Member States which could cause disparities in economic competitiveness. The differences could have a direct effect on the functioning of the common market.277 For example, if the Italian paint industry disposed its titanium dioxide waste in the Mediterranean Sea, then, all other variables being equal, its production costs might be lower than those of a German paint company that was required to send titanium dioxide wastes to a more expensive landfill. The cheaper Italian production costs would distort competition in the European market for paints, and, therefore, Italian paint might sell for a lower price throughout the Community.

Table I indicates the substances that appeared in the black lists of the international conventions and the two proposed directives. There is a lack of unanimity among the three conventions with respect to organosilicon compounds, crude oils and hydrocarbons, acids and alkalis, possible carcinogens, materials produced for biological or chemical warfare, high- and low-level radioactive waste, and substances which may form organohalogen compounds. The 1976 Proposed Directive took a liberal approach and included all of these substances, except for possible

276. It is impossible to learn of the internal Council of Ministers debate regarding the Proposed Directive on ocean dumping because discussions concerning proposals within the framework of the Council of Ministers are confidential. Letter from J. Vaccarezza, Principal Administrator of the Directorate-General of Environment, Nuclear Safety and Civil Protection, Commission of the European Communities, to Daniel Suman (Nov. 29, 1990).

277. This was one of the principal arguments in favor of the proposed directive. 1985 Proposed Directive, supra note 148, at 24.
carcinogens and substances which may form organohalogen compounds. Similarly, the 1985 Proposed Directive listed most substances targeted by at least one convention, except organosilicon compounds, high- and low-level radioactive wastes, and substances which may form organohalogen compounds. Additionally, the later proposal covered organotin compounds and oil-based drilling muds, categories that were both absent from the international conventions. The failure to list radioactive wastes in Annex I of the 1985 Proposed Directive generated the most controversy, however, within the EEC.\textsuperscript{278} Except for its treatment of radioactive wastes, the 1985 Proposed Directive satisfied the obligations of the international agreements with respect to regulated substances in Annex I.

Table II summarizes the grey lists for the international agreements and proposed directives. Again, the international conventions create a conflicting pattern of obligations. The 1985 Proposed Directive attempts to include all grey list substances from the other conventions, with the exception of radioactive wastes not listed in Annex I.

The geographical scope of the agreements is an additional consideration. The Helsinki Convention covers only the Baltic Sea, while the Barcelona Convention is limited to the Mediterranean Sea. The Oslo Convention applies to the North Sea and the northeast Atlantic and Arctic Oceans, and specifically excludes the Baltic and Mediterranean Seas. The London Dumping Convention applies to the world ocean, with the exception of States’ internal waters. In encouraging regional agreements to prevent dumping, the London Dumping Convention specifies that such agreements should be consistent with it, therefore implying that the standards must be as strict or stricter.\textsuperscript{279}

The Member States that have ratified the international conventions add another layer of complexity to the scheme. Table V indicates the Member States that are signatories or have acceded to the agreements. Because the EEC is a signatory to the Barcelona Convention and its Dumping Protocol, all Member States are bound by its requirements.\textsuperscript{280} Only two Member States (Germany and Denmark) are signatories to the Helsinki Convention.\textsuperscript{281} Italy and Greece are not signatories to the Oslo Convention, but they are bound by the London Dumping Convention.

This overlapping system could create disparities between Member States, as well as confusion. For example, an Italian or Greek ship might dump possible carcinogens or tar-like substances in the high seas of the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{278} See supra notes 249-52 and accompanying text.
\item \textsuperscript{279} London Dumping Convention, supra note 40, art. VIII.
\item \textsuperscript{280} See supra note 63.
\item \textsuperscript{281} Although EEC institutions wanted the Community to become a contracting party to the Helsinki Convention, the Community’s entry was blocked by a non-EEC State. See supra notes 80-81 and accompanying text.
\end{enumerate}
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Oslo Convention area of the northeast Atlantic Ocean. Neither of these
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Protocol to the Barcelona Convention, an Italian ship may not dump
low-level radioactive wastes in Italian waters. However, neither the
London Dumping Convention nor the Oslo Convention prohibits a Bel-
gian ship from disposing of these materials in that country's territorial
sea. A country that used cheap ocean dumping might be able to reduce
the production costs for its industrial goods and gain a competitive ad-

dvantage over a country bound to forego ocean dumping.

The proposed directives attempt to resolve these situations and fill a
perceived Community void in ocean dumping regulation. All Member
States would attempt to harmonize their internal regulations to mirror
Annexes I and II, thus eliminating the competitive advantage that some
States might have over others. By effectively summing up all the interna-
tional conventions and being stricter than any individual agreement, an

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<tr>
<th>State</th>
<th>London Dumping Convention</th>
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States might have over others. By effectively summing up all the interna-
tional conventions and being stricter than any individual agreement, an
ideal directive would satisfy the obligations of each international accord. It would also greatly simplify the regulatory maze for Member States.\footnote{But see Boehmer-Christiansen, supra note 27, at 54-55. Boehmer-Christiansen argues that joint international agreements (Oslo, Helsinki) are more effective than supranational agreements (EEC Directives) because the former are quickly and effectively implemented into national legislation. The “uniform legalistic approach” of the EEC is based on political compromise which causes ambiguity and impreciseness. “[A] measure of distrust towards the ambitious legislators in Brussels now exists. This is not necessarily based on nationalism, but on the fear that the bureaucratic, centralizing approach to European integration ignores and rides rough-shod over the peculiarities, opinions and legitimate interests of regions and communities . . . .” Id. at 55.}

An additional argument for approval of the Proposed Directive is the existence of Community enforcement mechanisms through the European Court of Justice against countries who fail to implement directives by means of municipal laws and regulations. Although international conventions depend on the political will and moral commitment of the contracting parties and usually have very weak enforcement provisions, adoption of the Proposed Directive and resulting legislation would increase EEC assertiveness in the environmental arena and focus attention on marine pollution in the Community Environmental Action Programmes. This is important, not only for environmental protection and elimination of competitive advantage, but also as a symbol of a strong Community environmental policy.

\textbf{B. Arguments Against Adoption of the Proposed Directive}

\textbf{1. Internal Defects of the Proposed Directive}

Certain terms of the Proposed Directive were highly debatable and could have easily engendered opposition from certain Member States, especially from those strongly dependent on ocean dumping and incineration practices or reluctant to submerge their state sovereignty to that of a supranational institution like the EEC.

Member State opposition to the proposed legislation could have been based on the relatively short timetable for the phaseout of ocean dumping and incineration. The Commission forwarded the 1988 Modified Proposed Directive to the Council on January 12, 1988.\footnote{1988 Modified Proposed Directive, supra note 245, at 8.} However, the proposal stipulated that no new ocean incineration permits or permits to dump substances from the Grey List could be issued after January 1, 1988, although existing permits could be renewed without an increase in authorized quantity of waste until January 1, 1990.\footnote{1985 Proposed Directive, supra note 148, art. 10(1)-(2). The 1988 Directive left this provision unchanged from the 1985 Directive. 1988 Modified Proposed Directive, supra note 245, at 9.} The Proposed Directive also foresaw that by June 1, 1991, the Commission and Council would establish a date to terminate ocean incineration.\footnote{1985 Proposed Directive, supra note 148, art. 9(2). The 1988 Directive left this provi-}
legislative proposal called for a ten percent annual reduction between 1990 and 1995 in the quantities of authorized materials dumped. This mandate is quite ambiguous because it could be interpreted as a ten percent reduction in the total tonnage authorized by a Member State, a ten percent reduction in each substance authorized by a Member State, or a ten percent reduction in the authorization of each individual permit.

Regardless of the interpretation that a Member State might give in its municipal legislation, the timetables for the phaseout of ocean dumping and ocean incineration were unrealistically short. After the experience of a two and a half year debate on the Proposed Directive by the Commission, the European Parliament, and the Economic and Social Committee, it seems unlikely that within eighteen months the Commission could have proposed a directive or regulation to fix a date for termination of ocean incineration, modified the proposal in light of parliamentary debate, forwarded the proposal to the Council, and obtained Council approval. The 1988 Modified Proposed Directive at a minimum should have amended the dates of the 1985 Proposed Directive in light of the slowness of the Consultation Procedure.

A relatively rapid phaseout of ocean dumping and incineration requires that, within a matter of years, Member States find alternative land based disposal methods or recycling methods for materials that were formerly dumped into the ocean or burned at sea. Not only is land based disposal more expensive than ocean disposal, but a Member State may also face difficulties in quickly expanding its limited land based capacity to dispose of waste. Because the phaseout may result in a differential burden on certain Member States, States that would have to modify their behavior more drastically might be more reluctant to support the Proposed Directive. For example, because over half of the industrial wastes


288. Ditz, supra note 16, at 180. The incineration of a ton of highly chlorinated wastes in a land based incinerator ranges between $200 and $450, but only costs about $100 in an ocean incineration vessel. Id.
dumped in the North Sea originate in the United Kingdom, this nation might be expected to oppose a rapid reduction in ocean disposal.290

An additional justification offered for not adopting the Proposed Directive is the lack of scientific evidence upon which to base the decision to terminate ocean incineration and ocean dumping of substances listed in Annex II. The policy choice to end these practices centers on the exercise of caution in the face of an unknown danger and the protection of a common resource.291 An alternative school of thought, however, considers the ocean to have a capacity to assimilate wastes without causing damage to the health of the ecosystem or to humans.292 This school


290. The United Kingdom also opposes a ban on ocean incineration though it is not nearly as dependent on ocean incineration as it is on ocean dumping. In 1986, Germany incinerated 53,800 metric tons of its hazardous waste in the North Sea (0.9% of its total production of hazardous waste, and 46% of the total waste incinerated in the North Sea). In the same year, only 3800 metric tons of British hazardous wastes were burned in the same region (0.3% of its total production of hazardous wastes, but only 3% of total waste incinerated in the North Sea). Ditz, supra note 16, at 181-82.

Although Germany might have been expected to display strong opposition to the ocean incineration phaseout and the United Kingdom to approve, this was not the case. Curiously, Germany and the Netherlands developed strong policies that promoted alternatives to ocean incineration. Ditz, supra note 37, at 52-53; see also Williams, A Study of Hazardous Waste Minimization in Europe: Public and Private Strategies to Reduce Production of Hazardous Waste, 14 B.C. Envtl. Aff. L. Rev. 165, 176-79, 190-91 (1987) (discussing legal frameworks governing hazardous waste in Germany and the Netherlands). The German Environmental Agency, under the authority of the national Dumping at Sea Act, has conditioned granting of its two-year permits for dumping or incineration of hazardous waste on potential contributors' search for recycling or alternative disposal technologies. Id. at 177-78. The Netherlands government also encourages alternatives to incineration of the country's hazardous waste. Id. at 178-79; see also Piasceki & Sutter, Alternatives to Ocean Incineration in Europe, in AMERICA'S FUTURE IN TOXIC WASTE MANAGEMENT 67, 74-77 (1987) (discussing German legal framework for ocean burning).

Other countries, such as the United Kingdom, Spain, and Ireland, wanted to keep the ocean burning option available, even though they did not greatly depend on it. Ditz, supra note 37, at 44, 52-53. There are few regulatory or economic incentives to minimize or recycle hazardous wastes in the United Kingdom. Williams, supra, at 182. In a 1987 joint meeting of the Oslo and Paris Commissions, these three countries blocked a proposal to fix 1991 as a termination date for ocean incineration. Ditz, supra note 16, at 177. Their opposition to an ocean incineration ban, however, was ironic in light of their minor dependence on North Sea incineration. Perhaps allocating jurisdiction over ocean incineration to marine authorities rather than hazardous waste authorities explains the United Kingdom position. Id. at 184-86.

291. Although little is known about the long-term effects of ocean disposal on marine ecosystems, the fact that ocean dumping may harm marine life is cited as justification that the practice ought to be avoided. Fretheim, supra note 10, at 248.

Other justifications for termination of ocean dumping are: (1) dumping may affect third countries' legitimate use of the seas, (2) acceptable land-based disposal options such as recycling and new waste-reduction processes exist, (3) monitoring and control of ocean dumping is difficult, and (4) materials disposed in the sea cannot be easily recovered. Id.

292. Goldberg, The Oceans as Waste Space: The Argument, OCEANUS, Spring 1981, at 2,
argues that there is no definitive scientific evidence that ocean dumping and incineration are per se harmful to the marine ecosystem and that there is no reason to ban these activities completely. Because both positions enjoy support from the members of the oceanographic community, policymakers can always find scientific opinion to support their decision.

Another basis for potential opposition to the Proposed Directive is that its Black List covers substances which are not regulated by any of the international conventions on ocean dumping: organotin compounds and drilling muds. Since the Proposed Directive defines "dumping at sea" to be any deliberate discharge into the sea from ships, and "ships" include "fixed or floating platforms and other man-made structures at sea and their equipment," Member States would have to prohibit offshore oil and gas operations from disposing drilling muds into the sea. Not only do the Oslo, Barcelona, and London Dumping Conventions not list "drilling muds," but they also exclude discharges derived from the normal operation of ships, including fixed platforms. This new prohibition on discharge of drilling muds could burden offshore oil platforms in the North Sea and, consequently, nations with a large number of offshore oil platforms.

The Proposed Directive could also be criticized for not including all substances regulated by the other international conventions. The notable example, of course, is radioactive wastes. Given the fact that all EEC Member States (except Luxembourg) are contracting parties to the London Dumping Convention, it was an error to exclude radioactive wastes from the proposed legislation if its goal was to harmonize Member States' obligations. The Commission stated that it might submit a separate proposal for radioactive waste disposal at a later time, but six years after that statement, it has yet to draft such a proposal.


293. For a general discussion of the effects of offshore oil and gas development on the environment, see Menzie, Muddy Issues, OCEANUS, Fall 1983, at 33. During exploration, drilling is performed to characterize the oil and gas reserves. Between 823 and 1,285 tons of drill cuttings per well may be discharged during the exploratory phase. During the development phase even larger quantities of drilling muds and cuttings are discharged. Discharge amounts may range between 9000 and 27,000 tons per platform. Id. at 33-34.


295. Oslo Convention, supra note 25, art. 19; Barcelona Dumping Protocol, supra note 64, art. 3; see also London Dumping Convention, supra note 40, art. III(1) ("platform" is not part of the definition of "ship" but is a category by itself).

296. The United Kingdom and Norway are the major offshore oil producers in the North Sea. FINANCIAL TIMES, 1991 OIL AND GAS INTERNATIONAL YEAR BOOK 534 (1990).

297. See supra note 197 and accompanying text.

II. International Fora Were Sufficient to Regulate Ocean Dumping and Incineration

Ocean dumping and incineration have been subject to extensive regulation for almost two decades, and EEC Member States are parties to at least five of these conventions. While the regulatory maze may be confusing, Member States have not found it terribly problematic to live with multiple international conventions. Both the International Maritime Commission, which serves as the Secretariat for the London Dumping Convention, and the Oslo Commission, which carries out the work of the Oslo Convention, have received praise for their excellent efforts in monitoring ocean dumping and establishing scientific criteria for assessment of the safety of this practice. The EEC Proposed Directive could add an unnecessary regulatory layer in an area already highly regulated. The duplication of EEC efforts might not be justifiable given the effectiveness of the existing international regulatory structures. With the exceptions of organotins and drilling muds, there may be little environmental justification for the EEC proposal.

a. Regional Agreements Are Ideal for Regulating Ocean Disposal

The concept of regional agreements, such as the Oslo Convention (North Sea), Helsinki Convention (Baltic Sea), and Barcelona Convention (Mediterranean Sea) seems logical and flexible, given the different oceanographic conditions of these three seas. The northeast Atlantic Ocean and North Sea are deep bodies of water with rapid circulation and water exchange. Under an "assimilative capacity" approach, regulations regarding waste disposal in these areas could be less strict than in a shallow sea with a slow exchange rate, such as the Baltic Sea. Regional agreements permit riparian states to establish more stringent and regionally specific rules if the oceanographic conditions so demand.

Regional conventions also have another important advantage: they can include all riparian states to a regional sea, and attempt to modify their behavior, which are essential elements for environmental protection of a shared regional resource. Since all of the North Sea states are contracting parties to the Oslo Convention, this agreement should be the

299. See supra notes 24-84 and accompanying text.
301. OSLO AND PARIS COMMISSIONS, supra note 30, at 1.
303. Since the London Dumping Convention applies to the world ocean, this agreement should provide the minimal rules acceptable to all contracting parties. See supra note 40 and accompanying text.
ideal mechanism for North Sea protection. For example, the Oslo Convention, rather than an EEC directive, would be the appropriate mechanism to carry out a prohibition on the discharge of drilling muds into the North Sea. Norway, a non-EEC Member State and the second largest offshore oil producer in the North Sea, is bound by the Oslo Convention, but not by an EEC directive. Similarly, the health of the Baltic Sea will depend on the cooperation of all riparian nations, not only on Germany's and Denmark's regulatory actions.

b. International Agreements Have Been Successful in Regulating Ocean Disposal

The best evidence of the sufficiency of non-EEC international fora is the fact that within a few years the Oslo Convention, the London Dumping Convention, and the North Sea Ministerial Conferences converged to produce many of the regulatory goals of the Proposed Directive with respect to both ocean dumping and incineration. It is unclear what more the EEC's Proposed Directive could have contributed except for the possibility of bringing an action in the European Court of Justice against a Member State for infringement of the Directive and a degree of uniformity to Member States' laws.

i. Ocean Incineration Coalescence in International Fora

Despite the differences in their individual practices, many of the EEC nations are currently united behind the eventual phase-out of ocean incineration. This change resulted from the growing concern that the practice was harming the North Sea environment. Furthermore, no EEC Member State had a substantial economic stake in ocean incineration. Consequently, all Member States could shift to land based burning and waste reduction with relative ease.

The Ocean Incineration Protocol of the Oslo Convention, which was signed in 1983 and entered into force for all contracting parties in 1989, required that the Oslo Commission meet before January 1, 1990, to set a date for termination of ocean incineration. Even before Belgium

304. In the area of ocean incineration and dumping, the international regulatory scheme has moved toward the principle of prevention, even though evidence of injury to the environment is nonexistent or minimal. Third International Conference on the Protection of the North Sea, OCEAN POL'Y NEWS, June 1990, at 1. Of course, the ocean incineration lobby argues that ocean incineration is safe and effective. Nassos, The Problems of Ocean Incineration: A Case of Modern Mythology, 18 MARINE POLLUTION BULL. 211, 213-15 (1987).

305. EEC Member States do not rely heavily on ocean incineration for hazardous waste disposal. In 1986, Belgium burned 1.6% of its hazardous waste in the North Sea, Denmark 0.0%, the Federal Republic of Germany 0.9%, France 0.8%, Ireland 0.0%, Italy 0.2%, the Netherlands 1.7%, and the United Kingdom 0.3%. Spain burned only 100 tons of waste in the North Sea, and none of that waste apparently was produced in Spain. Ditz, supra note 16, at 181-82.

306. See supra text accompanying note 38.
and Spain had accepted the Oslo Protocol on Ocean Incineration, the thirteen signatories of the Oslo Convention agreed in June 1988 to reduce ocean incineration in the North Sea by sixty-five percent before 1991 and terminate this activity in the Oslo Convention area by December 31, 1994.307 The Oslo Commission accelerated these dates two years later. In 1990, during their sixteenth meeting in Reykjavik, the contracting parties decided to end ocean incineration in the Oslo Convention area by December 31, 1991.308

Recently, the contracting parties to the London Dumping Convention have also begun to reevaluate their position on ocean incineration. A resolution adopted at the Eleventh Consultative Meeting in 1988 stated that contracting parties would reconsider ocean incineration practices by 1992 with a goal of terminating the practice by the end of 1994,309 and the contracting parties reconfirmed this schedule at the 13th Consultative Meeting in 1990.310 Several delegations noted that the termination date could be accelerated because ocean incineration operations would have effectively ceased in contracting parties by the end of 1990.311

Similarly, in their third meeting in March 1990, the environmental ministers of countries bordering on the North Sea agreed to a rapid phase-out of ocean incineration.312 The goal of this agreement is to eliminate the export of hazardous waste from one Oslo Convention coun-

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307. Oslo Commission, OSCOM Decision 88/1 of 24 June 1988 on the Termination of Incineration at Sea, reprinted in OSLO AND PARIS COMMISSIONS, supra note 30, at 45. The Oslo Commission's decision followed a similar agreement made by the environmental ministers of the North Sea states at the Second North Sea Conference in 1987. See infra note 312 and accompanying text.

308. Oslo Commission, OSCOM Decision 90/2 of 23 June 1990 on the Termination of Incineration at Sea (June 23, 1990). North Sea States were to have reduced their incineration practices by at least sixty-five percent before January 1, 1991. Id.

309. INTERNATIONAL MARITIME ORGANIZATION, supra note 300, annex 7.

310. REPORT OF THE THIRTEENTH CONSULTATIVE MEETING OF CONTRACTING PARTIES TO THE LONDON DUMPING CONVENTION, supra note 21, annex 2.

311. Id. at 18-19. The Belgian delegation contended that after all ocean incineration vessels had been decommissioned and ocean incineration practices terminated in the Oslo Convention area, the reevaluation procedure need not continue. Id. at 21.


Greenpeace activists launched anti-ocean incineration campaigns to coincide with the second and third North Sea Conferences. In 1987, activists boarded the incineration vessel *Vesta* in order to hang banners and chain themselves to the chimneys, forcing the vessel to return to port before burning. *Battle in the North Sea*, GREENPEACE, Jan.-Feb. 1988, at 21; see also *North Sea Dirt*, GREENPEACE, May-June 1990, at 22.
try with strict ocean incineration regulations to another with lax standards.\textsuperscript{313}

This harmonization of the ocean incineration policies by the North Sea environmental ministers and the contracting parties to the Oslo Convention and the London Dumping Convention has occurred outside the framework of the EEC. The 1985 Proposed Directive called for the 1990 determination of the eventual termination of ocean incineration, which has become a reality in the North Sea for the nine EEC Member States that are also signatories to the Oslo Convention. As a result, the ocean incineration provisions of the Proposed Directive are moot for these states.\textsuperscript{314} Italy, Greece, and Luxembourg, however, remain outside the termination agreement. Either adoption of the Proposed Directive or EEC accession to the Oslo Convention could bring these Member States under the agreement to terminate ocean incineration. This would eliminate any possible comparative economic advantage that they might enjoy.\textsuperscript{315} Similarly, adoption by the London Dumping Convention of a binding ocean incineration termination date would be another route towards harmonizing EEC regulations.\textsuperscript{316} EEC accession to the Oslo Convention or the London Dumping Convention might be less duplicative and more efficient than creation of a new EEC regulatory structure.\textsuperscript{317}

\textit{ii. Ocean Dumping Coalescence in International Fora}

Non-EEC international fora also are reaching agreement on the reduction of ocean disposal of industrial wastes. The Thirteenth Consultative Meeting of the London Dumping Convention generated a nonbinding resolution to terminate ocean dumping of industrial wastes

\begin{itemize}
\item \textsuperscript{313} For example, several years ago a German company avoided the strict German regulatory scheme by exporting its waste to Belgium where it was loaded and burned on a Liberian ship. Williams, \textit{supra} note 290, at 191.
\item \textsuperscript{314} \textit{See supra} text accompanying notes 21-22.
\item \textsuperscript{315} There is no evidence that Greece or Luxembourg register incineration vessels or burn in the Oslo Convention area, however. In 1986, Italy delivered about 4,900 metric tons of waste to Antwerp, Belgium, where it was transferred to an incineration vessel. \textit{Thirteenth Annual Report of the Oslo Commission}, \textit{supra} note 9, at 55; \textit{see also} Ditz, \textit{supra} note 16, at 181.
\item \textsuperscript{316} All EEC Member States, except Luxembourg, are signatories to the London Dumping Convention. \textit{See supra} note 41 and accompanying text. The Eleventh Consultative Meeting of the London Dumping Convention did agree to a nonbinding resolution to terminate ocean incineration by December 31, 1994. Ditz, \textit{supra} note 16, at 194.
\item \textsuperscript{317} \textit{See} Prat, \textit{The Role and Activities of the European Communities in the Protection and the Preservation of the Marine Environment of the North Sea}, in \textit{The North Sea: Perspectives on Regional Environmental Co-operation} 101, 107 (D. Freestone & T. IJistra eds. 1990); \textit{Fourth Environmental Action Programme}, \textit{supra} note 138, at 23 (Commission declared its intention to propose EEC adherence to the London Dumping Convention).
\end{itemize}

EEC accession to international conventions may not always be desired by other states. \textit{See supra} note 81 and accompanying text (Helsinki Convention), note 63 (Barcelona Convention).
by the end of 1995 at the latest. The contracting parties excluded inert materials, such as vitreous slag and scrap metal wastes, and uncontaminated organic materials of natural origin, such as fish offal, from their definition of "industrial wastes." At the Second International Conference on the Protection of the North Sea held in London in 1987, the North Sea environmental ministers agreed as of January 1, 1989, to terminate dumping of all material into the North Sea unless there were no practical land-based alternatives and the dumping state could show the Oslo Commission and the Consultative Meeting of the London Dumping Convention that the materials were harmless and did not threaten the marine environment. As an interim measure, the ministers agreed to phase out ocean dumping of industrial wastes by December 31, 1989. The 1990 Third International Conference on the Protection of the North Sea, however, could not surmount an impasse with the United Kingdom regarding ocean dumping. Unwilling to agree with other North Sea states who wished a more rapid phaseout, the United King-

318. Report of the Thirteenth Consultative Meeting of Contracting Parties to the London Dumping Convention, supra note 21, annex 9. The resolution also encouraged parties to continue to respect regional agreements regarding ocean dumping and to adopt national or regional agreements to end ocean dumping of industrial wastes before December 31, 1995. Id. The resolution was proposed by Denmark, Finland, Iceland, Sweden, Norway, Spain, and Brazil. 13th Consultative Meeting of LDC, Ocean Pol'Y News, Dec. 1990/Jan. 1991, at 6. 319. Report of the Thirteenth Consultative Meeting of Contracting Parties to the London Dumping Convention, supra note 21, annex 9. The resolution defines "industrial wastes" as being generated by manufacturing or processing operations. It excludes inert materials and uncontaminated organic materials and sidesteps the inclusion of radioactive materials pending further review by the London Dumping Convention. Sewage sludge that was uncontaminated by industrial wastes would not seem to be scheduled for termination. Id. 320. Participants to the second Ministerial Conference were the environmental ministers from Belgium, Denmark, France, the Federal Republic of Germany, the Netherlands, Norway, Sweden, the United Kingdom, and the EEC Commission. Ministerial Declaration of the Second International Conference on the Protection of the North Sea, London, 24-25 November 1987, reprinted in 3 INT'L J. ESTUARINE & COASTAL L. 252 (1988) [hereinafter Second Ministerial Conference]. 321. Id. at 256-57; IJlstra & de Jong, North Sea, 3 INT'L J. ESTUARINE & COASTAL L. 246, 248-249 (1988). The declarations of the International Conference on the Protection of the North Sea are legally non-binding and only express the political will of the governments of the North Sea riparian states. Ehlers, The History of the International North Sea Conferences, in The North Sea: Perspectives on Regional Environmental Co-operation 3, 7 (1990) 322. Second Ministerial Conference, supra note 320, at 257. There were no immediate measures to regulate ocean dumping of dredged materials or sewage sludge. IJlstra & de Jong, supra note 321, at 249; Andresen, supra note 189, at 389. A defeated United Kingdom proposal would have allowed dumping of dredged spoil, sewage sludge, and industrial waste if this were the least detrimental alternative for the whole environment when social and economic factors were considered. IJlstra & de Jong, supra note 321, at 429. 323. Measures to Reduce North Sea Pollution Approved by Ministers of Nine Countries, INT'L ENV'T REP., Mar. 1990, at 91.
dom announced it would end ocean dumping of industrial wastes by 1993 and sewage sludge by 1998.\textsuperscript{324} The British position, nevertheless, still complied with the phaseout timetable established by the Thirteenth Consultative Meeting of the London Dumping Convention.

The Oslo Commission adopted all the agreements of the Second International Conference on the Protection of the North Sea and required that countries unable to comply with the agreements must report their noncompliance to the Oslo Commission in a "prior justification procedure."\textsuperscript{325} Dumping of industrial wastes in the North Sea was to cease by the end of 1989 and in other Oslo Convention areas by the end of 1995, except for industrial wastes which lack practical land based alternatives and are harmless to the marine environment.\textsuperscript{326}

iii. Radioactive Waste Moratorium of the London Dumping Convention

In 1983, the Seventh Consultative Meeting of the London Dumping Convention voted for a moratorium on the ocean disposal of low-level radioactive wastes.\textsuperscript{327} The contracting parties have continued this suspension at the annual consultative meetings since 1983 pending completion of a London Dumping Convention review of the political, economic, social, and technical issues related to dumping of radioactive wastes.\textsuperscript{328} Even though this issue has yet to be resolved, the decade-long moratorium on ocean dumping of low-level radioactive wastes, the movement toward termination of ocean dumping of industrial wastes and sewage sludge, the increased public concern for the health of the oceans, and the governments' heightened political will to protect the marine environment, all presage an international prohibition on ocean dumping of low-level radioactive wastes. If this is indeed the case, the EEC's proposed legislation would be anachronistic. In avoiding the issue of radioactive wastes in the Proposed Directive, the EEC attempted to avoid a veto of the proposed legislation, but it also symbolically deferred competence in

\textsuperscript{324} \textit{Id.}
\textsuperscript{325} Oslo Commission, OSCOM Decision 89/1 of 14 June 1989 on the Reduction and Cessation of Dumping Industrial Wastes at Sea, \textit{reprinted in OSLO AND PARIS COMMISSIONS, supra} note 30, at 40-41; \textit{Dutch Government Objects to U.K. Plans to Dump Waste, Sewage Silt into North Sea, INT'L ENV'T REP.,} Feb. 1990, at 59, 60. The United Kingdom has been required to use the "prior justification procedure" on several occasions. \textit{Oslo/Paris Commission, 18 MARINE POLLUTION BULL.} 468 (1987).

The result of the Oslo Convention's procedure has been to switch the burden of proof to the polluter, who must now justify that no harmful effects will result from the dumping. Precaution requires prohibition of dumping even though clear scientific evidence is not available to link ocean dumping to injury of the marine ecosystem. Fretheim, \textit{supra} note 10, at 249.

\textsuperscript{326} See Oslo Commission, \textit{supra} note 325, at 19.
\textsuperscript{327} See \textit{supra} note 270 and accompanying text.
\textsuperscript{328} \textit{REPORT OF THE THIRTEENTH CONSULTATIVE MEETING OF CONTRACTING PARTIES TO THE LONDON DUMPING CONVENTION, supra} note 21, at 30-31; \textit{13th Consultative Meeting of LDC, supra} note 318, at 7.
this area to the London Dumping Convention and demonstrated that perhaps the EEC was not the appropriate mechanism to provide comprehensive regulation of all forms of ocean dumping.

C. U.K. Opposition to the EEC Proposed Directive

The key to understanding the outcome of the EEC Commission's proposed legislation is the opposition shown by the United Kingdom. Prior to preparation of the Proposed Directive, the United Kingdom had expressed a clear intent to maintain the option of ocean disposal of low-level radioactive wastes. The 1983 London Dumping Convention's temporary moratorium on this practice and a 1985 vote to continue the ban were compromises between nations that desired an immediate ban and others, like the United Kingdom, that wished to continue this type of dumping.329 Although the Environment Committee of the European Parliament wanted to amend the Proposed Directive to list high- and low-level nuclear wastes in Annex I, the Commission refused to include radioactive wastes within the scope of the proposal.330 Given the United Kingdom's position and the requirements of the London Dumping Convention and Oslo Convention, a directive prohibiting ocean dumping of all radioactive wastes would have been anathema to the U.K. and would have failed to obtain the unanimity required for adoption by the Council.

In February 1986, the United Kingdom rejected the 1985 Proposed Directive during a House of Commons debate,331 even before it had been evaluated by the European Parliament and Economic and Social Committee and amended by the Commission.332 In bringing the motion that called for the rejection of the Proposed Directive, the U.K. Minister of Agriculture, Fisheries, and Food, John Selwyn Gummer, stated that although the government considered marine environmental protection to be important, it

considers nevertheless that sea disposal may represent the best practicable environmental option for certain wastes; notes the existence of well-established and effective international conventions in this field; and is therefore not convinced that the adoption of this [European] Community instrument is an essential element of environmental protection.333

330. See supra notes 249-52 and accompanying text.
333. House of Commons Debate, supra note 289, at 245.
Gummer made three points in arguing against the Proposed Directive. First, international conventions already in force and to which all EEC Member States (except Luxembourg) are contracting parties regulate ocean dumping effectively.\(^3\) Second, the proposed harmonization of ocean dumping regulations would place the EEC at a disadvantage.\(^3\) Finally, the Proposed Directive would be a direct disadvantage to the United Kingdom.\(^3\) Members of Parliament also stressed that prohibiting disposal of drilling muds would create difficulties for Britain's oil exploration activities in the North Sea.\(^3\) Thus, the Proposed Directive was seen as too restrictive and costly to the United Kingdom without producing a net environmental improvement.\(^3\) Gummer felt that the U.K. "must keep all the options open" until that day when no hazardous waste is produced.\(^3\)

Such an outright attack and rejection of the Proposed Directive, even before it had been finalized, must have dampened the Commission's work. The U.K. position precluded the EEC from extending its competence to this important area of environmental regulation. At the same

\(^{334}\) Id. at 245-46. Since the Oslo Convention and London Dumping Convention were adequate and effective, Gummer noted, there was no need for EEC action. Id. at 245.

\(^{335}\) Id. at 246-47. According to the U.K. government's view, EEC harmonization would ignore the oceanographic differences between the Mediterranean Sea, North Sea, and the northeast Atlantic Ocean, and treat these regional seas equally for regulatory purposes. Moreover, harmonization would be disadvantageous to the EEC Member States vis-à-vis nonmember nations because its strict limits would place them in an uncompetitive position. Gummer considered that "harmonisation is not an end in itself." Id. at 246.

\(^{336}\) The crux of the official U.K. criticism of the Proposed Directive emphasized the disadvantages which it would cause the U.K. The reduction of ocean dumping and phaseout of ocean incineration would be costly and were not determined by a weighing of land and sea disposal options using scientific criteria, environmental impacts, and costs. Id. at 248, 249, 257, 259. The U.K. position with respect to ocean dumping was that the ocean has an assimilative capacity to receive waste. Rather than impose uniform emission standards (UES) like most continental nations, the U.K. preferred to use environmental quality standards (EQS), which are based on specific environmental responses. The UES represent a precautionary measure, while the EQS attempt to determine the endpoint of the assimilative capacity. IJlstra & de Jong, supra note 321, at 246-47.

\(^{337}\) HOUSE OF COMMONS DEBATE, supra note 289, at 251, 256. M.P. Godman noted that the offshore oil "industry is important to the economy . . . of the United Kingdom as a whole. It is essential that oil exploration activities are not too severely constrained." Id. at 256.

\(^{338}\) An additional reason the U.K. government has been reluctant to support the Proposed Directive and other regulation of ocean dumping may have an oceanographic basis. Surface currents in the North Sea flow generally counterclockwise. Thus, wastes dumped in the British sector of the North Sea would tend to be removed from her coasts. Jones, The North Sea Environment: Features and Problems, in THE NORTH SEA: PERSPECTIVES ON REGIONAL ENVIRONMENTAL CO-OPERATION 66, 66 (1990).

\(^{339}\) HOUSE OF COMMONS DEBATE, supra note 289, at 257 (statement of Minister Gummer). Some dissent to the government's opinion was evident in the House of Commons debate. Liberal M.P. Simon Hughes pointed out that a 1985 Report of the Royal Commission on environmental pollution encouraged the U.K. to "play a more positive role in the development of European Community environmental policy." Id. at 252-53.
time, it may have elevated the stature of the international fora that regulated ocean dumping.

British resistance to EEC harmonization and integration has appeared in other environmental issues besides ocean dumping.340 There are, of course, economic, scientific, and policy justifications for the U.K. positions. However, these justifications may be symptomatic of an EEC Member State that is hesitant to surrender its sovereignty and competence in an economic and environmental arena to a supranational organization, such as the EEC.341

V
WHAT DOES THE EXPERIENCE OF THE PROPOSED DIRECTIVE ON OCEAN DUMPING INDICATE ABOUT THE EEC?

The Single European Act (SEA) introduced the Cooperation Procedure, which allows for qualified majority voting in the Council on issues directly relating to the functioning of the internal market.342 The Consultation Procedure, however, requiring unanimous voting in the Council, still applies to Article 130S of the EEC Treaty,343 which was the legal basis for the 1988 Modified Proposed Directive.344 The continued existence of the Consultation Procedure with its unanimity voting requirement stifles the development of the EEC's newly granted competence in the environmental protection arena. The recognized advantages of the Cooperation Procedure (increased speed of the decisionmaking process, increased influence of the European Parliament on legislation, elimination of recalcitrant Member States' veto power in the Council, indirect strengthening of the position of the Commission in the decisionmaking

340. Due to British reluctance to enforce EEC directives, it gained the name of Europe's "dirty man." See, e.g., Lodge, supra note 128, at 320.
341. Subsequent to the rejection of the Proposed Directive, the U.K. position on ocean dumping and incineration has evolved and become more flexible. Nevertheless, this nation has remained one of the most uncompromising and least willing to phase out ocean dumping or ocean incineration. For example, the U.K. is the only EEC Member State that still dumps sewage sludge in the North Sea. Ilsttra & de Jong, supra note 321, at 249. It plans to phase out this activity by 1998. Measures to Reduce North Sea Pollution Approved by Ministers of Nine Countries, supra note 323, at 91. The U.K. has agreed to terminate ocean dumping of industrial wastes by 1993. Id. This date, however, is three years beyond that set by a majority of the environmental ministers from the North Sea states at the 1987 International North Sea Conference. Second Ministerial Conference, supra note 320, at 256-57. Similarly, the U.K. agreed to terminate ocean incineration by the end of 1990 but was the last country to end this practice. Measures to Reduce North Sea Pollution Approved by Ministers of Nine Countries, supra note 323, at 91. Unlike the other North Sea states represented at the Third International Conference of the North Sea in 1990, the U.K. still refused to surrender its option to dump radioactive wastes into the ocean or bury it in the sea bed. Id.
342. See supra notes 124-27 and accompanying text.
343. See supra notes 136-37 and accompanying text.
344. See supra notes 256-57 and accompanying text.
process\textsuperscript{345}) cannot be enjoyed in the environmental protection sector. The solution is the extension of qualified majority voting and the Cooperation Procedure to include the environmental protection arena.\textsuperscript{346}

The EEC has been criticized for its lack of democratic institutions.\textsuperscript{347} Although it is the EEC's only directly elected institution, the European Parliament lacks legislative responsibilities.\textsuperscript{348} Were the Cooperation Procedure extended to environmental protection, the European Parliament's voice in the environmental decisionmaking process would be amplified. The Parliament members' desire to include radioactive wastes in Annex I of the Proposed Directive, for example, represented the concerns of many Europeans about marine pollution and declining environmental quality. Yet the Consultation Procedure essentially nullified these concerns.

Another advantage that would accompany extension of the Cooperation Procedure to the environmental protection sector is that this procedure would establish time limits for different steps in the legislative process. Like the Consultation Procedure, the Cooperation Procedure lacks time limits for the first reading.\textsuperscript{349} However, all steps in the second reading have established time limits.\textsuperscript{350} The proposed directive on ocean dumping and incineration required two and a half years from the time of its origin in the Commission to its final submission to the Council.\textsuperscript{351} After three years, the Council has taken no decision on this matter.\textsuperscript{352} During this time period, outside events have rendered the proposal's details largely irrelevant. An accelerated procedure, with strict time limits for generation of opinions by the European Parliament and the Economic and Social Committee and development of amendments by the Commission, could have avoided these problems. The Cooperation Procedure, which still lacks time limits for the first reading, does not offer a


\textsuperscript{346} See \textit{id.} at 73. Retaining the Consultation Procedure encourages EEC inaction and erodes the EEC's new environmental competence. Davidson, \textit{supra} note 131, at 263.

\textsuperscript{347} The lack of democracy results from the Member States' surrender of responsibilities to the Community without these responsibilities being subject to approval by the European Parliament. The Council can enact a decision over the formal objection of the European Parliament. Corbett, \textit{supra} note 127, at 29.

\textsuperscript{348} For example, the European Parliament's direct power to reject or approve is restricted by the "assent procedure" to treaties of accession or association with third countries. Corbett, \textit{supra} note 127, at 29.

\textsuperscript{349} Lodge, \textit{supra} note 105, at 70.

\textsuperscript{350} \textit{id.}


\textsuperscript{352} Letter from J. Vaccarezza, \textit{supra} note 276 (discussing the status of the Proposed Directive in the Council). Perhaps this timeframe is not too unusual in the EEC legislative context. An average period of two to five years generally passes between submission of a proposal by the Commission and the decision by the Council. Lodge, \textit{supra} note 95, at 47.
complete solution to the problem of delay in the legislative process. Nevertheless, it would be an improvement over the Consultation Procedure.

Had the Cooperation Procedure applied to the proposed directive on ocean dumping and incineration, it is likely that the Council would have adopted a common position by qualified majority in the first reading. The common position probably would have been that of the Commission's proposed directive. In the second reading, the European Parliament might have amended the proposed legislation by absolute majority so that it extended to radioactive wastes. The Commission might then have revised its proposal to include radioactive wastes, and the Council might have adopted the Commission's proposal by qualified majority. Without the possibility of a U.K. veto in the Council, the Community's experience in ocean dumping regulation could have been radically altered.

As a result of the SEA, the Commission changed the legal basis of the proposed directive from Articles 100 and 235 of the EEC Treaty to the new Article 130S. The Commission instead might have used Article 100A as the proposal's legal basis because it requires only qualified majority voting in the Council. This article concerns approximation of Member States' laws whose object is the establishment and functioning of the internal market. However, the connection is indirect. Article 100A would certainly cover product legislation, but its extension to other environmental areas is not clear. Harmonization of ocean disposal regulation relates indirectly to the functioning of the internal market and attempts to eliminate the competitive advantage held by a Member State that practices ocean disposal. Neither the European Parliament nor any Member State proposed an alternative legal basis. Perhaps the proposal's relation to the functioning of the internal market was so indirect that no institution asserted applicability of Article 100A and subsequent use of the Cooperation Procedure. Moreover, by 1988 any supporter of the proposal must have realized that its contents were outdated and irrelevant, as a result of the progress realized by the London Dumping Convention, the Oslo Commission, and the North Sea environmental ministers. Had the Proposed Directive been critically necessary for the protection of the marine environment or been sufficiently related to the functioning of the internal market, the Commission might have attempted to justify the proposal's legal basis under Article 100A. The 1988 Modified Proposed Directive, however, was not a strong test case for determining the Cooperation Procedure's applicability to environmental issues.

353. See supra text accompanying note 256.

354. Kromarek, supra note 131, at 12. The scope of Article 100A in the environmental arena will probably be determined by the EEC Court of Justice. Id. at 12.
The official U.K. rejection of the Community's proposed directive on ocean dumping was based on the belief that these practices were the best practical options available to the U.K. and that regulation in international fora was sufficient. The U.K. position can, however, be viewed from another perspective. In spite of the interest of the Commission and the European Parliament, EEC action in the ocean dumping arena was blocked by the reluctance of one Member State, the United Kingdom, to surrender sovereignty in this area to a supranational organization, the EEC. The sovereignty issue, although often unspoken, underlies the ocean dumping debate.

Throughout the history of the EEC, the U.K. has been a reluctant participant in European integration. British fears originate in a perceived loss of sovereignty, domination by France and Germany, and association in an overly bureaucratic EEC. This position was especially evident during the years of the Thatcher government. In 1988, Prime Minister Margaret Thatcher herself voiced her hostility to "a European superstate exercising a new dominance from Brussels." The British have tended to view the EEC only as an economic community requiring minimal government intervention, rather than an instrument for political union and social harmonization. The British opposition to the ocean dumping directive, which demonstrated this nation's reluctance to voluntarily surrender its national parliamentary sovereignty in this environmental area, is consistent with the U.K.'s relationship to the Community in the 1980's. It is an example of the great difficulty that some Member States experience in relinquishing their sovereignty to a supranational organization, even though this voluntary abandonment of sovereignty

355. See supra notes 331-39 and accompanying text.

356. Heath, Britain: Odd Woman Out, EUR. AFF., Winter 1990, at 85, 88. British reluctance to abandon sovereignty perhaps stems from its parliamentary tradition, its historical freedom from foreign domination, and its self-classification as a first-rate world power. N. Nugent, supra note 63, at 27. In an earlier time, France's de Gaulle was a vocal opponent of surrender of national sovereignty to the supranational organization. To ensure that French sovereignty would not be abandoned, de Gaulle insisted on the primacy of the Council and the principle of unanimity. Hoffmann, The European Community and 1992, FOREIGN AFF., Fall 1989, at 27, 33.


358. Hartley, After the Thatcher Decade, FOREIGN AFF., Winter 1989-1990, at 102, 111-13; Hoffmann, supra note 356, at 40-41. Thatcher presented the SEA to the British Parliament as protective of British sovereignty in essential areas that would retain the unanimity requirement. Id. at 31-32. There is some indication that post-Thatcher Britain will improve its relationship with the EEC. Some observers note that Prime Minister Major is reaching a more acceptable relationship with the EEC and that Britain is taking a more active Community role. See, e.g., Brittan, The British Are Not the Naughty Boys, EUR. AFF., Feb.-Mar. 1991, at 25. Prime Minister Thatcher, after all, was removed by conservative Members of Parliament probably because of her resistance to European integration. They felt that her hostility to European integration would disadvantage the U.K. in the future. Johnson, Why Britain Balks, EUR. AFF., Feb.-Mar. 1991, at 30.
would be compensated by the EEC's increased capacity for international action.359

Such stubbornness in ceding sovereignty can paralyze EEC decision-making and is ironic given the 1992 completion of the internal market. It is a reminder that the development of Community environmental competence may be fraught with more difficulties than had been imagined. Perhaps, as Member States' sovereignties diminish, States will at times react by more strongly protecting their remaining national sovereignty.

Although both the U.K.'s fear of relinquishing its sovereignty and the EEC's decisionmaking procedures contributed to the Community's failure to approve the ocean dumping directive, perhaps the Community's harmonizing efforts may have been misdirected; EEC legislation may not have been the answer. Ocean dumping and incineration were already successfully regulated by international conventions to which Member States were contracting parties. Regional conventions regulating disposal in the Baltic, North, and Mediterranean Seas differed according to the regional oceanographic characteristics. The EEC proposal would have duplicated regulatory efforts and added another layer of regulation to an already confusing field. It might have been wiser if the DG-XI had not invested energy in an area already highly regulated by international fora and had recognized the advantages of regional agreements. In its future activities, the Commission must acknowledge that harmonization for its own sake is not necessarily a worthy objective.

CONCLUSION

By excluding nuclear wastes from the annexes of the 1985 Proposed Directive and the 1988 modification, the Commission subverted its stated goal of complete harmonization of Member State policies in light of disparate international conventions. This position also aggravated tensions between the Commission and the European Parliament and arguably weakened the collective efficacy of the EEC institutions. However, given the opposition of the United Kingdom to regulating ocean incineration and dumping radioactive wastes, perhaps the Commission made a realistic assessment of Member States' policies and submitted the most comprehensive proposal it believed the Council would adopt.

It is not entirely clear why the Council failed to adopt the 1988 Modified Proposed Directive. The proposal would have achieved EEC marine policy by effectively transferring decisionmaking competence from Member State authorities to the EEC bureaucracy. One Member

359. This perspective views the EEC as the force behind loss of national sovereignty. Perhaps the EEC, however, is itself a response to a decline in the national powers of European states in the latter half of the 20th Century. This unity allows them to maintain world influence and economic strength. N. NUGENT, supra note 63, at 323-24.
State, the United Kingdom, demonstrated reluctance to take this step and voluntarily abandon national sovereignty. Harmonization within the European Community had evolved more in the actions of the Commission than in the minds of the political leaders of some Member States.

The prospect for adoption by the Council of an EEC directive regulating ocean dumping and incineration is not bright. During three years, the Council has failed to act. Meanwhile, international agreements continue to coalesce without the directive, effectively obviating its need and making it superfluous, at least for the largest and most industrialized EEC countries. For example, last year the North Sea environmental ministers agreed to a North Sea phaseout of ocean incineration and ocean dumping of industrial waste. Five years ago, the Commission's proposal might have provided important guidance in these areas. Today, were it to be adopted, it would have to be seriously amended and updated. Perhaps the strongest evidence that Community regulation of ocean dumping was unnecessary is the recent advances in ocean dumping regulation in regional fora that include most EEC Member States.

Because not all of the EEC Member States are held to the same ocean dumping and incineration standards, however, arguably there still may be a need for an EEC directive that would be binding on Member States. At least its adoption would have symbolic importance and cement a common EEC policy with respect to one important area of marine pollution and environmental protection. An increasingly integrated Europe requires an EEC that is in the forefront of marine pollution regulation, either through active participation in and accession to international conventions or through promulgation of Community legislation. The Proposed Directive may still be an appropriate vehicle toward this end.