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The Pivotal Role of British Sovereignty in EC Environmental Policy

JONATHAN GOLUB

EUI Working Paper RSC No. 94/17

European University Institute, Florence

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Introduction

Prior to the adoption of the Single European Act (SEA), all European Community environmental policy required unanimous consent within the Council of Ministers, in accordance with the traditional right of veto under the Luxembourg Compromise.[1] Remarkably, even under the terms of unanimous voting, and despite the fact that environmental powers were never mentioned in the original treaty, the Community adopted hundreds of environmental directives before the SEA gave the Community formal competence in this field.

That integration necessarily requires a transfer of power from member states to the Community institutions, in accordance with the treaty, is well understood, and distinguishes the Community from traditional international organisations which lack supranational characteristics. Less understood is how the Community managed to achieve considerable integration in a policy area such as the environment, which was outside the scope of the treaty until 1987.

The development of EC environmental policy appears even more remarkable when one considers that the required unanimous voting and steady expansion of Community powers depended in part on the cooperation of Britain, the supposedly "dirty man of Europe" and a country known more for an almost paranoid attachment to its national sovereignty than for its Euro-enthusiasm. It will be argued in this paper that Britain was to some extent able to preserve its sovereignty by limiting the scope of EC environmental powers and by blocking certain EC environmental proposals. In other cases, where integration did restrict British sovereignty, the remarkable development of EC environmental policy was facilitated by Britain being able to preserve its unique approach to environmental protection during the integration process. I will also suggest that these same British concerns for sovereignty and the preservation of traditional environmental practices played a crucial role in Britain's acceptance of the environmental provisions contained in the Single European Act. The paper then explores how British expectations about the application of the SEA were partly frustrated by subsequent developments in EC environmental policy. In the penultimate section of the paper, the lessons from the SEA period are applied to the Maastricht Treaty. I maintain that focusing on the salient issues surrounding the SEA provides a framework for analysing Britain's acceptance of the environmental provisions in the Maastricht Treaty. This section is more speculative than the analysis of the SEA, and is meant to lay the foundation for further research. The paper

[1]Throughout this paper the term "European Community" will be used instead of "European Union".

concludes with tentative predictions about the character of future Community environmental policy making.

I. The Importance of British Sovereignty

While economists, political scientists and lawyers may attribute various meanings to the term "sovereignty", it has a distinct meaning in the British constitutional tradition--the legal ability of Parliament to make or repeal any law whatsoever, unencumbered by higher legislative authorities or judicial review, free to pursue distinctly British policies.[2] Parliamentary sovereignty marked the end of a long struggle against monarchical domination in Britain. Having reduced the role of the crown in most cases to mere formalities, "sovereignty" resided in Parliament.[3] Complete control over national policy also implied an exclusion of foreign influences.[4] Preoccupation with sovereignty stems partly from Britain's distinctive constitutional history, which politicians sometimes elevate to the point of mythical proportions, and partly from Britain's residual view of itself as a world power.[5]

During debates over British accession to the Community, opponents of membership predicted that integration would jeopardise British sovereignty, place the Government at the mercy of continental states, and result in a deluge of objectionable but nevertheless binding European legislation. Not surprisingly, proponents of Community membership characterised the integration process entirely differently. The Government deployed a variety of arguments to allay fears that membership would entail a loss of British sovereignty. Some of these arguments emphasised procedural safeguards at the national and Community level, others maintained that sovereignty would not be lost, merely "pooled" in order to promote British interests.[6] Behind this rhetorical device lay the tacit hope that any surrender of sovereignty would be compensated for by desirable Community policies which reflected British interests.

Britain is frequently criticised for its continuing propensity to view its relationship with the Community as a threatening zero-sum game, and for its corresponding preoccupation with safeguarding its national sovereignty. In

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[2]Dicey (1885) at 39-40. See Wade (1955).

[3]For a discussion of the various meanings of sovereignty, both classical and contemporary, see Wallace (1991); Bogdanor (1988); Howe (1990); Wallace (1986); Lord (1992).

[4]Wallace (1986) at 382.

[5]See George (1990) at 35.

[6]For an account of these arguments, see Golub (1994) and Lord (1992). See also HMSO (1971); House of Commons (1971, 1972a, 1972b, 1972c, 1972d).

many ways, however, this description accurately describes the development of EC environmental policy. Community competence and institutional rules are set out in the treaty, creating written demarcations between EC and national powers. Interpretation of the treaty remains controversial, but this only proves that there is a struggle to ascertain the proper balance between Community and national authority. Authority rests either with the member states individually, or with the combined member-states acting at Community level, thus creating a zero-sum game. This situation remains regardless of whether integration advances national interests.

II. Britain's Distinctive Approach to Environmental Policy

Britain had an awareness of environmental issues long before its entry into the EC. Britain's conservation movement, led initially by social philosophers like John Ruskin and John Stuart Mill, dates back to the late nineteenth century.[7] This movement sought to preserve the values of traditional England, including its countryside, wilderness, and ancient buildings from the "progress" of industrialisation. Public awareness of amenity issues steadily increased, particularly during the twentieth century.[8] With the world's first governmental environment agency in 1863, the Alkali Inspectorate, the world's first comprehensive air pollution controls in 1956, the Clean Air Act, and the world's first cabinet-level environmental department in 1970, one might consider Britain the original "green" member state. Many observers would claim, however, that these impressive environmental milestones did not constitute an environmental *policy* as such, and certainly not a progressive one.

If the hallmark of a national environmental policy is an active, forward-looking commitment by a government to steadily increasing standards of environmental protection, then Britain had no environmental policy when it entered the Community, and arguably may still lack one to this day. Environmental protection was certainly not an issue dealt with by the national government, but was left to be thrashed out between regulatory bodies and polluters themselves.[9] In the absence of a dispute between these parties, central government often did not even know exactly what environmental policies were being formulated and applied at a grass roots level. This was not seen as a criticism of central government, but "as a vindication of the principle of

[7]See Vogel (1986) at 33.
[8]Ibid. at 34-39.
[9]See Macrory (1989) at 295.

devolved responsibility."[10] Besides devolution, British environmental law was characterised by its flexibility and discretionary nature. Without legalism or rigidity, polluters were obliged to meet only descriptive, qualitative environmental goals, and could count on a cooperative atmosphere between themselves and the regulators.[11] It was understood that government should interfere as little as possible with industry, but should simultaneously try to placate public opinion.[12] The much glorified Alkali Inspectorate, for instance, carried out only three prosecutions between 1920 and 1967.[13] The situation remained the same in later years: while violations of the Clean Air Act averaged 2,500 annually between 1970 and 1974, the number of prosecutions in England and Wales during this period ranged between 50 and 133 per year.[14]

The lack of provisions allowing criminal prosecution in either the Alkali or Clean Air Act, and the minimal financial penalties for industrial non-compliance with pollution-control requirements--the maximum fine is £400--make officials heavily dependent on voluntary compliance.[15] Indeed, prosecution of polluters is regarded not only as a last resort, but as a failure on the part of the regulatory officials: it demonstrates their inability to persuade, educate or disgrace industry into compliance.[16] This relaxed approach to regulation has led many observers to describe the entire system as one of gamekeepers and poachers. For example, "in the 1970s, the Confederation of British Industry actually nominated several members to the boards of Regional Water Authorities."[17] The British record has been described as

> environmental lethargy, apathy or ignorance on the part of successive British governments. Particularly since the second world war, they have proved slow to recognise and understand the environment as a distinct policy area, slow to tighten environmental legislation, unwilling to provide environmental agencies with adequate power or funding.[18]

Certainly domestic environmental policy, let alone international environmental policy, was never high enough up the agenda to become a partisan issue

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[10]Haigh (1984) at 10.
[11]Macrory (1989) at 300; Vogel (1986) at 77.
[12]See McCormick (1981).
[13]McCormick (1991) at 92, citing Scarrow (1972).
[14]Vogel (1986) at 88-90.
[15]Ibid. at 83.
[16]Ibid. at 87 and 90.
[17]McCormick (1991) at 93.
[18]Ibid. at 9.

between Labour and the Conservatives.[19] One would not expect a country with such a relaxed, low profile, and possibly even non-existent environmental policy to react strongly in the face of EC environmental initiatives.

But lurking beneath the surface of this quiet, piecemeal approach, one finds fundamental views of environmental matters that may only be described as an environmental policy. The premise of this policy was, and still is, a definition of pollution which differed fundamentally from continental conceptions of pollution, and which pervaded all sectors of UK environmental policy. Instead of measuring pollution in strictly quantitative terms, through the application of emission standards, Britain has always preferred qualitative and descriptive standards. Meeting qualitative standards involves monitoring the air or water itself, instead of monitoring the source of the pollutant. The reason for this approach is that Britain has a uniquely favourable ecosystem which will absorb a greater quantity of pollutant than will the ecosystems of other EC states.[20] The Government's approach to pollution control, often called dispersal and absorption, takes advantage of Britain's favourable wind patterns, extensive tidal waters and resilient soils. As part of this strategy, the Government and pollution control authorities resist uniform environmental standards and instead encourage industries to site themselves in positions which take advantage of Britain's favourable environmental resiliency.[21] The same quantity of pollutant which might cause damage by accumulating in the Mediterranean or in continental streams, in Britain is neutralised by tidal waters and fast-flowing rivers. Similarly, the same quantity of air pollutant which would hover over continental states and cause domestic or transboundary damage, in Britain is blown into the sea where it is dispersed harmlessly.

Thus for water pollution, the 1951 Rivers Act, in force at the time of Britain's entry into the EC, gave water authorities the power to grant a conditioned consent to the discharge of effluent into rivers in order to maintain the "wholesomeness" of the waters, but provided no specific quality objectives or control methods.[22] For air pollution, the Industrial Air Pollution Inspectorate had to ensure that processes used the "best practicable means" to prevent the escape or render harmless, dangerous or noxious gases.[23] BPM by

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[19]Haigh (1984) at 3; Vogel (1986) at 49.

[20]See Macrory (1989) at 288. "Despite [Britain's] population density and history of industrial development, the natural geographical conditions have been sufficiently resilient to absorb a great degree of pollution."

[21]See Vogel (1986) at 77-8.

[22]Haigh (1984) at 11.

[23]Ibid. at 14.

itself does not involve specific numerical emission standards, but was periodically redefined to update emission standards which would meet an air quality goal. As in the case of water, Britain considered that the air should be treated as a resource, pollution occurring only when a saturation point is reached which causes harm to individuals or the environment.

Nigel Haigh, one of the most experienced observers of EC environmental policy, certainly regarded this UK approach as a deliberate policy when noting how little the UK had contributed to EC environmental endeavours. "The occasions when British legislation or some initiative has shaped Community legislation are fewer than might be expected of a country with such a well established environmental policy."[24] Shaping Community legislation may take the form of proposing environmental initiatives, as Haigh suggests, but might equally occur through resisting initiatives put forward by other member states. This reactionary component of EC policy formation is frequently overlooked, even by Haigh, and constitutes Britain's most significant influence on EC environmental policy. Once one defines UK environmental efforts as a policy, be it a deliberately lax one if judged by certain progressive continental states or environmental pressure groups, Britain suddenly has an interest in maintaining its sovereignty against EC incursions.

III. Erosion of British Sovereignty

Defending British sovereignty could take several forms--denying the EC any competence over environmental matters, blocking specific environmental proposals by deploying a veto in the Council of Ministers, or enshrining British approaches to pollution control in EC legislation. Despite Government assurances to the contrary, the development of EC environmental policy resulted in a noticeable erosion of British sovereignty. Thought of as a zero-sum game between the UK and the Community, EC competence increased markedly since 1972, with an accompanying erosion of British autonomy.

Despite the absence of a clear treaty basis, the EC adopted hundreds of environmental instruments between 1972 and 1987. As the Community gained more and more control over this sector of policy, Britain's ability to promulgate an autonomous environmental policy steadily degenerated. In addition to the proliferating number of directives, the scope of EC environmental policy expanded to include an ever widening range of issues, encompassing water, waste, air, noise, and impact assessment. Under Community legal rules, EC environmental directives took precedence over previous or future UK

[24]Ibid. at 302.

environmental laws. The British Parliament could not amend or repeal these directives, and the final interpretation lay with the ECJ, not with the Parliament or British courts.

Not only did EC proposals encroach on specific UK laws, but Britain's entire approach to environmental policy was partially modified by EC requirements. Britain's traditional reliance on devolved, discretionary, cooperative regulation became more centralised, more legalistic, with more enforceable regulation and specific implementation deadlines. Relations between polluters and regulators changed, as did the relationship between local and central government.[25]

UK sovereignty was also eroded when EC environmental policy went well beyond expected delegations of power to Brussels. Environmental policy is never mentioned in the original treaty, and its development relied initially on broad treaty interpretation of Community objectives as well as frequent invocation of Article 235, the Community's "catch-all" provision. The Community also adopted directives on water pollution, domestic air quality and habitat protection, normally considered strictly national matters, and areas seemingly unrelated to completion of the common market. These directives were therefore viewed with scepticism by the British for being beyond the bounds of the treaty which marked the expected transfer of sovereignty.[26]

However, Britain's loss of sovereignty was tempered. The British veto played a crucial role in retaining a certain amount of UK sovereignty. A number of proposals, particularly in the area of water pollution, were unable to overcome Council opposition, often led by Britain.[27] According to Fiona McConnell, former Head of the International Division of the DOE, Britain often exhibited a strong and blatant defensive reaction to EC environmental initiatives.

> In the early days under the rule of unanimity sometimes we did not even bother hiding the fact that we had no intention of doing anything at all.[28]

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[25]See Haigh (1986). Some authors have argued that the effects of Community membership on the relationship between regulators and polluters in Britain has been surprisingly minimal. See Vogel (1986) at 282.

[26]For a detailed analysis of the proper limits of EC power and the potential erosion of British sovereignty, see House of Lords (1977). See also House of Lords (1979).

[27]Examples include EC proposals on pollution from paper pulp mills, and disposal of waste at sea.

[28]Interview, 21 September 1992.

Additionally, by threatening to deploy their veto, British negotiators were also able to retain a considerable amount of discretion over implementation of environmental directives. Many directives were worded broadly, allowing Britain to choose from a variety of pollution reduction methods, including its traditional dispersal and absorption approach. In the minds of the British negotiators, there was an obvious spirit of the law which underpinned the specific wording. That spirit, they thought, certainly accorded with British practices of voluntary regulation and flexible implementation, despite specific wording to the contrary. Ted Thairs, the primary CBI representative on environmental issues during the 1970s, recalls that even on the bathing water directive which eventually caused such public controversy, the Government believed that the proposal would not entail any significant changes in UK practices.[29] In many of these cases, formal control over an area of environmental policy might have passed from Britain to the EC, but the UK Parliament still retained the ability to make and repeal their own implementing legislation within the broad confines of Community guidelines. In this way, aspects of British Parliamentary sovereignty remained intact. In other cases, when a loss of sovereignty should have been clear from the wording of a directive, DOE officials nevertheless believed that they had prevented an erosion of British autonomy over environmental policy. Each of these factors helps explain why EC directives were able to overcome British scepticism.

Even when British negotiators were unable to block an initiative entirely, they usually managed to water-down environmental directives in accordance with UK economic interests.[30] This lowest-common-denominator effect resulted from the Council's desire to secure unanimous consensus rather than face the possibility of repeated British vetoes. Thus the Government was substantially correct when it assured critics that "pooled sovereignty" would not jeopardise British interests: for Britain, the costs entailed by EC environmental policy have been minimal.[31]

The history of EC environmental policy prior to the SEA was therefore one in which Britain sought, with some success, to retain its sovereignty. Nevertheless, integration did proceed and the Community's environmental powers grew at the expense of British political autonomy. Two factors explain

[29]Interview, 28 August 1992.

[30]Britain's ability to secure favourable provisions throughout a wide range of environmental directives has been thoroughly documented. See Haigh (1992); McCormick (1991); Rehbinder and Stewart (1985); Rose (1990); Media Natura (1990); Guruswamy, Papps and Storey (1983); Sheate and Macrory (1989); Skea (1988); Ramus (1991).

[31]See Lee (1992).

British participation in this growth. First, the "pooling" of sovereignty was rendered fairly harmless because of the need to secure political consensus in Council. Second, the Government could rely not only on the rhetoric of "pooled sovereignty", it could also claim, quite apart from a sensitivity to sovereignty, that integration did not jeopardise British economic interests.

IV. The Single European Act

Prior to the SEA, all EC environmental policy relied for legal justification upon Article 100 and Article 235. Article 100 allowed harmonisation of environmental laws in order to remove trade barriers and complete the internal market. Article 235 allowed the Community to act in any policy area whatsoever provided that consensus existed amongst member states. EC legislation under each of these two Articles required a unanimous vote in Council.

The SEA fundamentally altered the previous nature of EC environmental policy making. For the first time, the Community was given formal powers in the field of environmental policy. Article 100A(3) provided that Community measures adopted by qualified majority vote "concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection." In addition to Article 100A, the SEA included a new section, Title VII, under which Articles 130R-T were devoted exclusively to environmental policy.

Article 130R, which contained the bulk of the Community's new environmental powers, was divided into five sections which set out "objectives," "principles," and things which EC policy must "take account of." Section two provided that "environmental protection requirements shall be a component of the Community's other policies." Section four established what has become known as the "subsidiarity principle,"--the Community may only act if "the [environmental] objectives...can be attained better at Community level than at the level of the individual member states." Article 130S maintained the requirement of unanimity voting in the Council, subject to the possibility that "the Council shall, [acting unanimously] , define those matters on which decisions are to be taken by a qualified majority."

Given Britain's traditional resistance to EC environmental policy and its sensitivity to issues of national sovereignty, the granting of formal environmental powers to the Community and the possible introduction of qualified majority voting appear as surprising developments and require explanation.

It has been argued by some authors that the environmental provisions in the SEA were drafted without controversy. These authors either attribute a remarkable level of consensus to the governments of the member states, or suggest that the issue of EC environmental policy remained uncontroversial because it was never really discussed.

> [T]he Commission might be credited with having quietly slipped some new EC functions, such as environmental and research and development programmes, into the revised treaty. But these were functions that the EC had been handling under indirect authorisation for a number of years, and there was little opposition from member states to extending a concrete mandate to cover them.[32]

To support the existence of a consensus, the claim is made that Britain had undergone significant domestic "greening" in the early 1980s.

It is certainly true that the Government came under increasing pressure to enhance and emphasise its environmental policies, with an increase in green pressure group activity and public concern for environmental issues clearly evident during Thatcher's second administration.[33] Even traditional Tory groups, including the Centre for Policy Studies and the Bow Group, began advocating a stronger environmental agenda, particularly in order to secure votes.[34]

Despite the aforementioned explanations, there exists considerable evidence that the SEA provisions on environmental policy were neither overlooked nor universally accepted. Claims that a unanimous consensus might have existed for drafting some sort of environmental provisions obscures the fact that significant disagreement existed regarding the specific form which the provisions would take. While some member states saw the SEA as an opportunity to "extend a concrete mandate" to existing EC actions, other states viewed treaty revision as an occasion to restrict previously unlimited EC prerogative. Thus the motivation for drafting the new environmental sections of the SEA differed amongst member states.

It will be argued here that adoption of the environmental provisions in the SEA should not be interpreted as a sign that the Government had undergone substantial "greening", nor that it was suddenly willing to sacrifice national

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[32]Moravcsik (1991) at 46. See also Bulletin of the Institute for European Environmental Policy, No. 35, April 1986: "The [SEA] provisions concerning the environment were introduced without any particular problems on the part of Member States."

[33]Robinson (1992) at 25 and 88. See also Owens (1986).

[34]Robinson (1992) at 131-2. See Sullivan (1985); Paterson (1984a, 1984b).

sovereignty in this area. Rather, the Government accepted the SEA partly because it believed that the provisions adequately safeguarded the interests which Britain had been defending since the inception of EC environmental policy in 1972. This section of the paper examines the interpretation attributed to SEA environmental provisions by British officials and the extent to which they felt they had "won" the negotiations. In the following section I explore how British expectations were shattered as alternative interpretations of the SEA guided subsequent development of EC environmental policy.

A. Preserving British Sovereignty: Veto power in Council

Most of the controversy over the environmental aspects of the SEA stemmed from the potential effects of majority voting under Article 100A. States with high domestic environmental standards feared that market liberalisation through majority voting would only exacerbate the previous propensity of the Council to harmonise environmental standards at the lowest common denominator. West Germany therefore proposed that no harmonisation should occur without the assent of every member state whose national environmental standards would thereby be lowered. Such an agreement would prevent the LCD effect, but would amount to a right of veto, precisely the impediment to market liberalisation which Article 100A sought to remove.[35] Denmark expressed similar concerns that majority voting would sacrifice national environmental standards and filed a declaration to the SEA to the effect that Article 100A permits a member state to continue to apply national provisions if EC standards do not adequately safeguard the environment.[36] The legal force of the declaration remains controversial but demonstrates the lack of consensus during the SEA negotiations.[37]

While some member states feared that the SEA would jeopardise high environmental standards, other states expressed completely the opposite concern. Greece, Ireland, and Portugal each fought to secure agreement that EC environmental competence would not result in standards which threatened economic development.[38] As the poorest three EC member states, economic development took priority over potentially expensive environmental policies designed by countries which had already achieved high levels of industrialisation. In fact, Greece, Ireland and Portugal each filed declarations to

[35]See Bermann (1989) at 541.
[36]Eighteenth declaration. See Bermann (1989) at 541.
[37]See Toth (1986).
[38]Lodge (1989) at 323.

the SEA expressing the need to safeguard national interests.[39] These declarations were similar to the one filed by Denmark in that all four sought to exclude certain national standards from EC harmonisation, but the less developed states intended to preserve their own lower environmental standards while Denmark sought to maintain its uniquely stringent environmental standards.

Both developed and developing countries eventually secured protection for their national environmental interests. Article 100A(3) enjoined the Community to seek a "high level of protection" when adopting market liberalisation measures by majority vote, Article 100A(4) allowed member states to "opt-out" from such measures on environmental grounds. It remains unclear whether states can only opt-out in favour of higher environmental standards, which would please Denmark and Germany, or whether states may also opt-out for lower environmental standards, which would satisfy Greece, Ireland and Portugal.[40] In any case, negotiations over and declarations to the SEA reveal significant divergence of opinion regarding the proper role of the EC in environmental policy.

Majority voting was introduced under Article 100A in order to expedite completion of the common market. For most member states the environmental implications of accelerated harmonisation were an afterthought--the new and detailed environmental SEA provisions in Section VII maintained unanimous voting procedure under Article 130S. Many observers would argue that Britain "won" this aspect of the negotiations because UK officials never intended to hasten EC environmental harmonisation with majority voting.

Government claims appear to support the argument that Britain did not expect to lose veto power under Article 100A. Sir Geoffrey Howe, the British Foreign Minister, claimed that "as a last resort the Luxembourg Compromise remains in place and unaffected" by the new voting procedures agreed in the SEA.[41] Christopher Prout, the British Conservative chief whip of the European Democratic Group in the European Parliament also claimed that nothing in the SEA removed the protection of the Luxembourg Compromise.[42] Finally,

[39]See Bermann (1989) at 541. Each of the three declarations identified sensitive national interests other than environmental protection, but the general desire to derogate from EC decisions included a fear of expensive environmental policies.

[40]In its first ruling on the interpretation of Article 100A(4), the ECJ recently cancelled a Commission decision which allowed German regulations on PCP in industrial products which were more stringent than Community standards. See *Agence Europe* (19 May 1994) at 13.

[41]House of Commons (1986b) at 320.

[42]McElhenny (1988) at 68.

Lynda Chalker, Minister for Foreign and Commonwealth Affairs, assured the Commons that

> our special interests are fully safeguarded...There has been no change whatsoever in the so-called Luxembourg compromise. It remains open to us, where necessary, to invoke that compromise to protect a very important national interest.[43]

Chalker initially sought to defuse the issue by emphasising areas where unanimity was still required--tax measures, movement of persons, rights of employees--and the Luxembourg Compromise would surely still apply, but when pressed further she suggested that where majority voting takes place the veto could still be invoked.[44]

Despite Britain's consistent resistance to EC environmental proposals and its reputation as the "dirty man" of Europe, several British officials contended that the right of veto would allow the UK to maintain its own uniquely stringent environmental measures. When Lynda Chalker assured the House of Commons that the Luxembourg Compromise would remain in place, she stressed that unanimous voting meant that "we will continue to be able to protect our high standards of animal and plant health."[45] Chalker was certainly more concerned with the threat of rabies than with general environmental protection, but her assurances seemed to imply that Britain might have national environmental interests which needed protection from majority voting. Geoffrey Howe confirmed that more was at stake than preventing rabies from entering Britain under relaxed health standards. His list of British national interests which would remain protected under the Luxembourg Compromise explicitly included "health, safety, environment and consumer protection."[46]

Even if the Government had little intention of vetoing lax EC environmental measures, rhetoric from Ministers portrayed the limited extent of majority voting under the new SEA provisions as a negotiating victory--securing continued veto power allowed Britain to block either stringent or lax environmental measures and thereby safeguard its sovereignty. Veto power would also guarantee a level of British control over adopted policies. This would ensure that British interests were preserved when sovereignty was "pooled". Taylor described the UK insistence that states retain veto power on

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[43]House of Commons (1986a) at 337.
[44]Ibid.
[45]House of Commons (1986a) at 337.
[46]House of Commons (1986b) at 320.

environmental matters as "cynical", but his condemnation implicitly acknowledges the importance of Government expectations about the security of British sovereignty.[47]

B. Circumscribed EC Environmental Powers

Even if the British negotiators "won" the continuing right to veto a significant amount of EC proposals, there still remained intense criticism from various sources that the SEA represented an unacceptable accretion of EC power at the expense of British sovereignty. The basis of the criticism rested upon the claim that Britain had transferred a limited amount of power to the Community when it joined in 1973, and that the powers ceded to the Community in the SEA went beyond the original transfer.

In some cases the source of the criticism was not unexpected. Enoch Powell, for example, continued his assault on the EC when he warned the Commons that the SEA constituted "a further erosion of the powers of the House, which means a further erosion of the opportunity for the British people to influence the policy and laws under which they live."[48] Powell's primary fear was that EC legislation would bypass the British Parliament even more frequently and on more subjects than previously, further eroding any opportunity for the Commons to scrutinise proposals and question Ministers. Eric Deakins, a veteran Labour MP with experience in trade matters as well as in the DHSS, continued the assault on the SEA, focusing his criticism on the fact that the Prime Minister had accepted enhanced Community powers which marked the beginning of a slippery slope. He claimed that "if we do not stop the rot now, when considering the Single European Act, we shall have more incursions."[49]

Other sources of criticism were less partisan but equally troubled by enhanced Community environmental powers. The Foreign Affairs Committee reported that

> We cannot accept the view of Ministers that many of these new Treaty provisions are "simply updating the Treaties to reflect what is already happening," since it is clear that these additions to Part III of the Treaty

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[47]Taylor (1989) at 13. He might equally have pointed to British negotiating positions taken throughout the 1970s, when the possibility or invocation of a national veto resulted in significant amendments to, or outright dismissal of a variety of EC environmental proposals: sea disposal, titanium dioxide, paper pulp, dangerous substances, bathing water, air pollution.

[48]House of Commons (1986a) at 351.

[49]Ibid. at 359-60. See also House of Commons (1986b) at 346

> represent a not insignificant extension of the legal competence of the Community, particularly in relation to the protection of the environment and health and safety at work.[50]

The Government offered several replies to criticism that the SEA was the thin end of a wedge which would erode all limitations on EC powers. Sir Geoffrey Howe had claimed that the amendments merely updated the treaty, maintaining a static balance of power between the Community and the member states. But other officials went further, maintaining that the environmental provisions in the SEA actually prevented the slippery slope envisaged by such critics as Powell and Deakins by delimiting Community powers.

Britain's acceptance of the SEA environmental provisions depended on avoiding this slippery slope. Government officials characterised the environmental provisions of the SEA as a victory for British negotiators by arguing that more environmental powers existed prior to the SEA, with an eager Court and the indeterminate reaches of Articles 100 and 235. Without the new treaty provisions, EC environmental policy would continue to develop as fast and as broadly as political consensus would allow, particularly through the use of Article 235 which gave the Community unbounded powers.

Far from merely formalising and justifying previously dubious EC powers, it is conceivable that previous criticisms of EC environmental competence were given written form in Article 130R-T. If this were the case, member states had signalled their political consensus to place qualifications upon future Community environmental policy. In addition to any political safeguard to creeping federalism, the Government might rely upon the ECJ to restrict EC environmental powers to fit the explicit objectives of Article 130.[51]

Regardless of whether Article 130 merited such an interpretation, Government officials stressed that the SEA would curtail Community environmental powers. Lynda Chalker assured the Commons that

> What we have done is to establish criteria for [environmental] activities. The criteria stipulate that the Community should take action relating to the environment only to the extent that environmental objectives can be better attained at Community level than at the level of individual member states; that the Community should weigh the potential benefits and costs of action before taking it; and that it should weigh the environmental conditions in the various regions of the Community. What is necessary

[50] House of Commons (1986c) at viii. The Minister referred to by the Report is Sir Geoffrey Howe.

[51] Vandermeersch (1987) at 429.

> in the Mediterranean may not be necessary in the North sea. We will be able to ensure that, where we wish, decisions continue to be taken by unanimity.[52]

Besides the principles of subsidiarity, cost-benefit-analysis and regional diversity, each of which Chalker alluded to, the SEA included other restrictions on Community environmental policy--that scientific and technical evidence must be considered, that the "polluter should pay," and that balanced economic and social development must be maintained throughout the Community.

Not only did these various provisions restrict future EC policies, but each concurred with longstanding British criticisms of previous EC environmental policies and each was included in the SEA as a direct result of British pressure.[53] British negotiators had consistently attacked draft proposals with the charges of inadequate or improper scientific justification, violation of the polluter pays principle, disregard of subsidiarity, and insensitivity to varying national or even regional conditions.[54] That these criticisms were now formally part of the treaty justified Chalker's interpretation of the SEA as a restricted EC mandate for environmental policy, consistent with British concern for its national sovereignty. Thus whether one accepts the qualifications in Article 130R-T as a limitation on previous EC competence, or merely a set of rules to guide increased Community competence, Government officials were able to claim a clear British negotiating victory. William Waldegrave, a senior minister during the SEA negotiations, supports this interpretation of events.[55] He recalls that there was no element of horsetrading when the SEA environmental provisions were drafted; Britain did not use environmental policy as a bargaining chip to secure other economic objectives. Waldegrave's recollections carry considerable weight because, according to him, any such concession would have passed across his desk in the Cabinet office before proceeding to negotiators in Brussels. Rather than a concession, Waldegrave describes the unanimous voting requirements and other provisions contained in Article 130 as restrictions on previous EC powers.[56]

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[52]House of Commons (1986a) at 338.

[53]See Krämer (1990) at 66-7.

[54]See Golub (1994). British industrial organisations have always argued that the PPP is a cornerstone of British environmental policy, that violations of the PPP by continental states contribute to declining competitiveness in UK industries, and that therefore the PPP should constitute a vital component of EC environmental policy if trade distortions are to be avoided. In many cases, officials from the DOE have also advanced this argument.

[55]Opinions attributed to Minister Waldegrave are based on interview material.

[56]Even though Waldegrave's personal statements about a significant British negotiating success accord with other evidence, a close reading of available material reveals the seeds

C. Challenging Conventional Wisdom

Most commentators agree that Britain accepted the SEA because it caused the minimal discomfort while securing tangible benefits. With majority voting restricted to internal market policies, minimal increases in the powers of the European Parliament, and little chance that EC competence would spillover into new fields, the SEA presented an intergovernmental bargain which achieved agreed national interests without sacrificing national sovereignty.[57] And Britain certainly preferred this bargain to one which isolated them or unduly strengthened the Community institutions--a two-speed Europe which excluded Britain was an unacceptable possibility.[58] There is even some reason to believe that Thatcher considered the SEA a complete victory for British interests, and that for her it did not represent any concessions on the part of the Government.[59] Indeed, Thatcher assured the House of Commons that the SEA "does not change anything. If it did, I would not have signed it."[60]

Conventional wisdom holds either that member states were unaware of the SEA environmental provisions, or that the Government underwent significant "greening" during the period 1983-1987 and was thus inclined to support the SEA environmental provisions, or that Britain was forced to accept the SEA environmental provisions in order to avoid being relegated to the lower tier of a two-speed Europe as the other member states, led by a Franco-German alliance, pushed ahead with integration.

However, these explanations for the adoption of the SEA must not be overstated. The Government remained highly critical of EC environmental policy throughout the early 1980s and into Thatcher's second administration.[61] Furthermore, the Government fought for and won significant limitations on proposals for expanded EC environmental competence. To this extent, the adoption of the SEA should not be considered a result of the Commission quietly slipping in some new EC powers, nor evidence of a British *volte face* on environmental policy. Throughout the relaunching of the Community, the Government maintained its opposition to drastically enhanced majority voting

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of doubt. In his evidence to the House of Lords, Waldegrave admitted that the British interpretation of the SEA varied from that of other member states, perhaps foreshadowing the considerable room for adverse developments which is discussed later in this paper. See House of Lords (1986b) at 89.

[57]Moravcsik (1991) at 49. See also Pinder (1987) at 23; Sked and Cook (1990) at 497.

[58]Taylor (1989) at 8.

[59]Sked and Cook (1990) at 498.

[60]Ibid.

[61]See Golub (1994).

in Council, and to significant expansion of EC environmental policy. By 1986, when the SEA was ready for signing, the Government believed that it had successfully negotiated its major objectives: completion of the common market through limited use of majority voting, prevention of majority voting in any area unrelated to the common market (including environmental policy), and clear restrictions on the content and scope of future environmental policy.

V. The Storm After the Calm: Britain's Shattered Expectations

The SEA functioned from 1987 until the ratification of the Maastricht Treaty. During this period the fragility of the consensus which produced the SEA's environmental provisions became blatantly apparent. This section examines what proved to be the two most controversial environmental provisions in the SEA--the subsidiarity principle in Article 130, and the appropriate distinction between Article 130's unanimous voting procedures and the qualified majority voting provisions contained in Article 100A.[62] The subsidiarity principle was meant to determine the division of environmental powers between the Community and the member states, while the proper distinction between unanimous and majority voting determined the extent to which individual member states would lose the ability to veto Community legislative proposals. With the demise of the veto, the Commission effectively gained power over the Council, especially when the Commission was supported by the European Parliament, and individual member states lost power to the collective will of the Council. As the following analysis demonstrates, contrasting interpretation of these two provisions generated considerable controversy within the Community, particularly when Britain's expectations were threatened.

A. Subsidiarity Principle

Article 130R(4) provided that "the Community will take action relating to the environment to the extent to which [its environmental] objectives...can be attained better at Community level than at the level of the individual member states." This demarcation is often referred to as the "subsidiarity principle," reinforcing the notion of the Community as a federal system with limited supranational competence.[63] Both the intention and interpretation of the

[62]Throughout this section, unless otherwise specified, references to Article 100A and Article 130S signify Articles of the SEA prior to modification by the Maastricht Treaty.

[63]The Maastricht Treaty replaced this section of Article 130 with an even stricter subsidiarity clause in Article 3B, which allows the Community to take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member

subsidiarity clause depend on whether one reads Title VII as an expansion of previous EC powers, or alternatively, as British negotiators hoped, a codification or possible delimitation of previous EC prerogative. The subsidiarity clause could signify either the preservation of member state control over the bulk of environmental affairs, or it could equally have served to codify EC powers and signal a commitment by the member states to supranational environmental solutions.[64]

Whether or not the subsidiary clause expands EC powers at the expense of British sovereignty might depend on a majority decision in Council. Whereas unanimously unvetoed policies previously could be regarded as a political decision that an environmental objective was attained better at the Community level, decisions now taken by qualified majority reduce the strength of this assumption. Some authors, such as Haagsma, contend that the subsidiary provision will be satisfied if "at least a qualified majority of the members of the Council apparently found that the pursued objective could be better attained at Community level."[65] Other authors also predicted that the Court would play only a limited role in applying the subsidiary clause, projecting instead a politicisation of the issue.[66]

Ludwig Krämer also doubts that the subsidiary clause will afford Britain legal protection from enhanced Community environmental powers. He contends that "it is scarcely possible to determine in abstraction, before a particular measure comes into force, whether a goal can 'better' be attained at Community level than at the level of the individual member states."[67] If accepted, Krämer's view completely defeats Britain's interpretation of the subsidiarity clause as an *a priori* limitation on EC environmental competence. EC powers would only be open to legal challenge if the subsidiary clause were to have actual legal effect, whereby if "it should emerge, years after the adoption of a directive, that the objectives...could after all have been 'better' attained by national measures, the Court would have to declare the directives invalid...because the Community had not had the necessary powers."[68] Krämer

States..." Many of the issues raised in this section apply equally to the amended subsidiarity provision, which is discussed later in this paper. See also Wilkinson (1992).

[64]Compare Constantinesco (1991) and Krämer (1991). Constantinesco contends that the subsidiarity provision protects national action unless the Commission can prove that an environmental issue is better dealt with at Community level, while Krämer describes the SEA as a mandate for nearly unlimited Community environmental powers.

[65]Haagsma (1989) at 343.

[66]Bermann (1989) at 561.

[67]Krämer (1987) at 666.

[68]Ibid. at 667.

dismisses this possibility as "clearly unacceptable" without further discussion.[69]

The Government could have disputed Krämer's interpretation of the subsidiary provision by arguing that the ultimate decision as to which objectives are better attained at national level could be left with the ECJ. If this were the case, the Court could not only legally guarantee the national domain of states which had been politically outvoted in Council, but could even invalidate unanimously adopted directives if they violated the subsidiary clause. The ECJ could strike down Community actions regardless of their procedural legitimacy, when, in the Court's view, such actions were better taken at the national level. Both of these scenarios could avoid the *post facto* determination of "better" which Krämer feels is impossible. Alternatively, a more disruptive but still plausible judicial function would be for the Court to judge directives as "better" after they had time to operate.

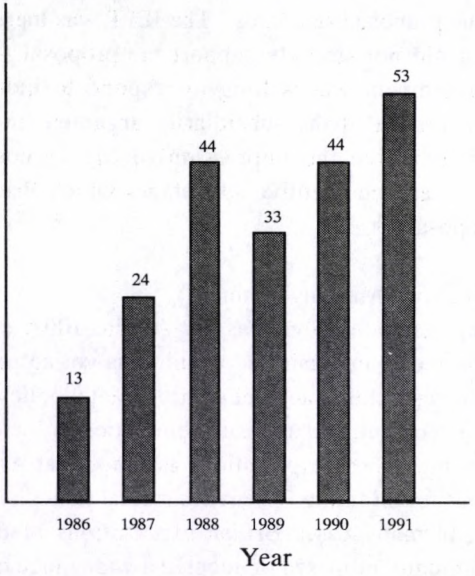
The Government might also have denied the appropriateness of interpreting the subsidiarity provision through a qualified majority vote. If a majority was all that was required in order to justify Community competence, then what was the point of a subsidiary clause? It would serve merely as a weak proviso for minority views in Council, opting-out providing the only real means of protecting what some nations would surely see as their justified national powers under the subsidiary principle.

In practice, despite British expectations, it appears that the subsidiarity provision played little or no role in the development of EC environmental policy subsequent to the SEA. Whereas Britain expected the concept to become justiciable, the ECJ avoided taking an active stance. In line with Krämer's position, the ECJ did not disallow any Commission environmental proposals for violating the subsidiarity principle. Not only did the provision prove useless as legal protection against Community actions, but it seems to have made no impression on the politics of EC environmental integration. One indication of this was that subsidiarity was totally absent as a topic of discussion within the Community and within academic discourse. For example, it appeared only once in the index of *Agence Europe* from 1988-1991, and not at all in the *Social Sciences Index*. There is also no clear evidence that subsidiarity was taken seriously within the Commission or Council as a brake on Community environmental policy. Legislative activity during the years subsequent to the SEA confirms that subsidiarity did nothing to retard the growth of EC environmental policy. As the following chart shows, the number of

[69]Ibid.

environmental proposals emanating from the Commission continued to grow rapidly after adoption of the SEA, and touched every aspect of environmental policy. This would appear to support an interpretation whereby subsidiarity was either ignored entirely, or was dictated by a majority of states instead of requiring unanimous consent.

Number of EC Environmental Proposals 1986-1991[70]



Even without an ECJ ruling on the proper meaning of subsidiarity, and with little apparent political support from other member states, Britain sought to block various EC proposals on the grounds that they violated the subsidiarity principle. One prominent example was that the Government played a major role in blocking EC environmental proposals dealing with species and habitat protection. One of the central arguments put forward by the Government was that habitat protection was a matter best left to individual member states, and certainly not an appropriate area for uniform EC harmonisation.[71]

[70]Compiled from the Official Journal of the European Communities and Haigh (1992).

[71]See House of Lords (1988). Interviews with senior Cabinet ministers and DOE officials confirmed the evidence given to the Lords, that subsidiarity was the primary Government argument.

Another example of Britain's reliance on the subsidiarity principle was the 1986 EC proposal on chromium in water. DOE officials argued that Annex II substances should remain under exclusive control of national governments. In fact, this argument came directly from British industrial groups: in evidence to the House of Lords, the CBI claimed that the chromium proposal violated the subsidiarity principle.[72] At the same time, however, the Institute for European Environmental Policy presented strong evidence that the chromium directive would "hurt" Germany and the Netherlands much more than it would the UK, which already met the proposed standards. The IEEP was therefore astonished that the Government did not strongly support the proposal.[73] The episode reveals that the Government was willing to respond to industrial *fears* of increased costs, and presented the subsidiarity argument in order to avoid legislation which might give the impression of higher costs, despite the comparative economic and competitive advantages which Britain would have accrued from the proposal.[74]

B. Unanimous or Qualified Majority Voting?

By negotiating separate provisions for Article 100A and Article 130, British officials expected to maintain the unanimous voting procedure for EC environmental policy, restrict the range of environmental policy by establishing detailed criteria for its content, and expedite completion of the common market through majority voting. These expectations assumed that Article 130 would become the legal basis for all future EC environmental policy. As the following table demonstrates, in many cases British expectations of the SEA proved accurate, as the Community proposed or adopted a wide range of environmental directives under Article 130S.

Adopted under Article 130S:

87/416	21/7/87	Amends 85/210 on lead in petrol
88/346	16/8/88	Amending 86/85 information system for sea spillage
88/347	16/6/88	Amending 86/280 on dangerous substances
R1734/88	16/6/88	Export/import of dangerous chemicals
88/381	24/6/88	Adding carbon tetrachloride to Rhine Protocol on chemical pollution

[72]House of Lords (1986a) at 23.

[73]Ibid. at 31.

[74]After Maastricht the UK successfully blocked the chromium directive on the grounds of subsidiarity. See p.36.

88/540	14/10/88	Vienna Convention/Montreal Protocol on ozone layer
88/609	24/11/88	Large combustion plants
88/610	24/11/88	Amends 82/501 on major industrial accidents
89/369	8/6/89	Municipal waste incineration
89/427	21/6/89	Amends 80/779 on air quality and nitrous oxides
90/170	2/4/90	Acceptance of OECD decision on transboundary hazardous waste
90/219	23/4/90	Genetically modified micro-organisms
R1210/90	7/5/90	European Environment Agency (notes Art. 130, not specifically Art. 130S)
90/313	7/6/90	Free access to information on environment
90/956	4/12/90	German transitional measures
91/271	21/5/91	Urban wastewater treatment
R594/91	4/3/91	Ozone layer
R563/91	4/3/91	Protection of environment in Mediterranean area
91/598	OJL321 '91	Protection of Elbe
R3907/91	OJL370 '91	Nature conservation
R3908/91	OJL370 '91	Coastal areas
91/676	OJL375 '91	Nitrates
91/689	OJL377 '91	Hazardous waste
91/690	OJL377 '91	Ozone
91/692	OJL377 '91	Implementation information reports

Proposed under Article 130S:

COM(88)381	31/8/88	Habitat protection
COM(88)8	7/1/88	Sea Dumping (Originally proposed under Articles 100/235)
COM(88)624	OJC307 '88	Chromium in sewage sludge
COM(90)9	OJC55 '90	Dangerous Substances (List I)
COM(90)591	OJC17 '91	Export and import of chemicals (prior informed consent)
COM(90)319	OJC209 '90	Environmental statistics
COM(91)28	OJC44 '91	LIFE environment fund
COM(91)268	OJC230 '91	Nitrous oxides
COM(91)431	OJC312 '91	Forests

However, from 1987-1991, Article 130 did not always provide the legal basis of EC environmental policy, and the British reliance on the Luxembourg Compromise was seriously undermined. Whether Britain could veto EC environmental legislation depended entirely on the legal basis of the proposal.

Determining the appropriate legal basis of a directive involves both political and judicial interpretation. The Commission is free to issue proposals under whichever Article it deems proper. The Council then has the opportunity

to ignore the Commission's judgement and adopt the proposal under a different legal basis. Because of the cooperation procedure established by the SEA, the European Parliament had an opportunity to offer amendments to the proposal during a second reading, after the Council had reached a "common position". The cooperation procedure extended the power of the Commission and the Parliament, particularly to influence the eventual legal basis of a directive. Finally, the ECJ retains the ultimate ability to decide the appropriate legal basis.[75] Bradley, Secretary of the Committee on Legal Affairs and Citizens' Rights of the European Parliament, contends that the political element of the legal basis determination does not overwhelm an objective legal interpretation.

> The requirement that the Council must respect its own rules of procedure when adopting legislative measures gives the Member States a further guarantee that their rights will not be overridden by procedural stratagems. The European Court requires such measures to be founded on the correct legal basis or bases which must be justifiable on objective considerations of law and fact, rather than political preference..."[76]

In practice, the ECJ has been called upon to resolve political disputes between the Commission, Council and Parliament over the proper legal basis of Community proposals.

Establishing objective criteria to distinguish the proper ambit of Article 130 from Article 100A proved difficult, with the result that Britain could not predict whether majority or unanimous voting would prevail for different types of environmental policy. For example, given that a separate Title covering the environment had been added to the treaty, would 100A apply only to measures which fell previously under Article 100? Could purely environmental measures, which used to be justified under the broad powers of Article 235, only be passed under Article 130? If so, then the bulk of Community environmental policy, which has some effect on the market, could suddenly be adopted by a qualified majority. The following list of directives adopted pursuant to Article 100A demonstrates the extent to which EC environmental policy developed contrary to British expectations.[77]

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[75] See Bradley (1988).

[76] Ibid. at 401.

[77] In cases where directives on this list expedited completion of the common market by removing trade barriers, it might be said that advancement of British economic objectives offset the erosion of sovereignty entailed by majority voting. Nevertheless, British officials did not expect this erosion when they negotiated the SEA.

Adopted under Article 100A:

88/76	3/12/87	Amends 70/220 on vehicle emissions
88/77	3/12/87	Gas pollutants from diesel engines
88/180	22/3/88	Amends 84/538 on lawnmower noise
88/181	22/3/88	--
88/182	22/3/88	Amends 83/189 on information
88/320	9/6/88	Good lab practice
88/391	16/8/88	Amends 75/442 on waste
88/436	16/6/88	German transitional measures
89/458	18/7/89	--
90/660	4/12/90	--
91/441	26/6/91	--
89/235	13/3/89	Amends 78/1015 on motorcycle noise
89/677	21/12/89	Amends 76/769 on marketing/use of dangerous substances
89/678	21/12/89	--
91/173	21/3/91	--
91/338	18/6/91	--
90/220	23/4/90	Genetically modified organisms
91/157	18/3/91	Batteries containing dangerous substances
91/542	L295	Diesel emissions

The choice of voting procedures placed member states in opposition to one another, as well as pitting the usually environmentally progressive Commission against the more hesitant Council. "Greener" states which favoured stringent common standards, such as Germany, Denmark and the Netherlands, undoubtedly tried to avoid potential vetoes by encouraging the use of Article 100A. More reluctant states, including Britain, Greece, Ireland, Spain and Portugal, sought to retain maximum leverage over any harmonisation efforts by encouraging use of Article 130.[78]

The European Parliament, which had proven its commitment to stringent environmental legislation, also influenced the balance of power between member states and between the Council and the Commission through the new cooperation and co-decision procedures. The European Parliament indicated its belief that all environmental measures mentioned in the fourth EAP should be

[78]For an alternative view, see Koppen (1993). Koppen argues that majority voting produces lax environmental standards, and therefore that the unanimous voting provisions in Article 130 actually offer the best chance for high environmental standards because member states are allowed to opt-out in favour of more stringent unilateral domestic environmental measures. If this prediction proves correct, "greener" member states and possibly even the Commission may in fact eventually discourage the use of Article 100A for environmental policies.

adopted by majority vote, and was somewhat successful in achieving its objective.[79]

Several criteria were suggested for determining which environmental directives should be issued under Article 130 and which under Article 100A. Vandermeersch contended that it is possible to determine which EC measures are intended to affect the common market, and which are concerned purely with environmental matters. In case of doubt, Vandermeersch advocated the use of Article 130S.[80] Ludwig Krämer, on the other hand, advocated extensive use of majority voting under Article 100A and the majority voting provisions of Article 130S(2). He argued that in policy areas where existing directives were adopted under Article 100, future directives should use Article 100A. This would certainly include, but not be limited to, provisions relating to product standards. Krämer also argued that Article 100A should include areas in which environmental directives were based on a combination of Articles 100 and 235 because those directives also had market relevance. He claimed that the only way to combine environmental protection with completion of the market is through majority voting.

> If, therefore, the Community legislator wishes simultaneously to ensure a high level of environmental protection and avoid distortions of competition within the Community, environmental protection measures relating to products or plant must be based on Article 100A. *Thus the more stringent a Community environmental standard is, the more opportune it is to base it on Article 100A to preclude "distortions of competition on environmental grounds".*[81]

The only environmental matters which Krämer placed under Article 130S unanimous voting requirements were ones which had been previously based exclusively on Article 235.

Krämer's interpretation would have subjected nearly all EC environmental policy to majority voting. Examining environmental measures prior to the SEA, one finds that the Community adopted 32 pieces of legislation which were based exclusively on Article 235, out of a total of 230 acts. Of these 32 pieces, 20 dealt solely with Community external environmental policies such as protecting the Mediterranean Sea and restricting international trade in endangered species. In fact, besides facilitating international

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[79] See Krämer (1991) at 91. See also Judge (1993) at 194; Arp (1993); Earnshaw and Judge (1993).

[80] Vandermeersch (1987) at 419.

[81] Krämer (1987) at 686 (emphasis added); See also Koppen (1988) at 62.

conventions, establishing agreements to exchange information, and protecting whales, seals and birds, Article 235 had been used exclusively on only four occasions in three environmental policy areas:

80/372	26/3/80	CFCs
82/795	15/11/82	CFCs
82/884	3/12/82	Lead in air limit value
85/339	27/6/85	Containers of liquid for human consumption

The other 198 pieces of EC environmental legislation were adopted under Article 100, or through a combination of Articles 100 and 235.[82] Thus, under Krämer's interpretation, extremely few decisions would be taken by unanimous decision, a scenario which British officials certainly did not contemplate.

The integration of environmental protection into other Community policies further complicated the question of how to divide Article 100A and Title VII, eroding the clear distinction assumed by British negotiators. Koppen seems to support Krämer's position that Article 100A encompassed any policy which affected the market even remotely, arguing that

> the integration principle entails that whenever environmental considerations come up in other policy contexts, no specific reference is required to Title VII. Environmental measures taken in the context of the realisation of the internal market for instance, can thus be decided on the basis of article 100A only, with circumvention of the unanimity requirement.[83]

While this may be true, one wonders what possible policies would be left under Title VII. If the only measures which would require unanimity were purely environmental, then what could one make of the detailed principles in 130R? How could a policy which impacted pollution at the source and forced the polluter to pay not also affect the market? This confusion was increased by the further language in 130R that the Community shall take account of "environmental conditions in the various regions of the Community, the potential benefits and costs of action or of lack of action, the economic and social development of the Community as a whole and the balanced

[82]It is noteworthy that besides one energy efficiency directive (91/565), Article 235 has served as the legal basis for only one other environmental proposal since ratification of the SEA: the contentious proposal on chromium in water, which was discussed in the preceding section on subsidiarity and appears again later in this paper.

[83]Koppen (1988) at 52.

developments of its regions," all which would seem to affect the market and blur the distinction between Title VII and Article 100A.

The contentious distinction between Article 130 and Article 100A influenced the development of several EC environmental policies. The 1987 directive on vehicle emissions originally did not require catalytic converters when it was first proposed in 1984. The proposal was deadlocked in Council because of Greek and Danish objections until December 1987, at which point it was adopted under Article 100A by a majority vote which overruled the two dissenting states.[84] The directive required catalytic converters, but only for large cars. For small cars, the Council adopted a "common position" in 1988 against catalytic converters.[85] The European Parliament then amended the proposal at second reading in April 1989, pursuant to the new cooperation procedure, and made catalytic converters obligatory. Parliament's amendment could only be reversed by a subsequent unanimous decision in Council, which did not obtain due to objections from Denmark that the directive was still too lax.[86] The amended directive, like the one for large cars, was adopted under the qualified majority voting provision of Article 100A instead of the unanimous voting procedures of Article 130S.[87]

The 1989 directive on titanium dioxide underwent significant development before its eventual adoption under Article 130S and subsequent nullification by the ECJ.[88] The Commission had threatened the member states with the possibility of a majority vote under Article 100A in order to break the deadlock over TiO_2 emissions standards.[89] However, in June 1989, the Council insisted unanimously that the directive should be adopted pursuant to Article 130S. Some states withdrew their previous objections and facilitated a unanimous vote, and the resulting directive offered enormous discretion at the state level over implementation and emission standards. Although the more stringent proposal offered by the Commission might have inflicted serious burdens on poorer or more polluted states, there is the possibility that it could have achieved a majority in Council under Article 100A. That this would have been politically unpleasant for at least some member states is proven by the Council decision to follow Article 130S.

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[84]See Haigh (1989) at 371-2; Haigh (1992) at 6.8-5.
[85]Directive 88/76.
[86]See Lomas (1988) at 531.
[87]Directive 89/458.
[88]Directive 89/428. See Lane (1991).
[89]See Haigh (1989) at 121; Haigh and Baldock (1989) at 48.

Following the Council decision, the Commission and the European Parliament brought action in the ECJ to annul the titanium dioxide directive, arguing that the principal objective of the measure was to remove market distortions and therefore the correct legal basis was Article 100A. The Council responded that the directive was primarily intended as an environmental measure to reduce pollution, and that market harmonisation was only an incidental objective. Consequently, the Council adopted the directive under Article 130S. In its ruling, the Court supported the Commission's interpretation and nullified the directive on the grounds that the Council had used the inappropriate legal basis. In a critical passage, the Court signalled its willingness to accept environmental directives which emanated from Article 100A: "the objectives of environmental protection referred to in Article 130R may be effectively pursued by means of harmonisation measures adopted on the basis of Article 100A."[90] According to Haigh, the basis of the decision was that "the goals of environmental protection and the removal of market distortion could not be prioritised, as they were indivisible."[91] In other words, the Court refused to hold that a directive could be "primarily" an environmental measure or "principally" concerned with the market. Thus Vandermeersch's and Krämer's distinctions between Articles 100A and 130S failed in practice. The practical determination of the appropriate legal basis of a directive and therefore the required voting procedure appeared to have become highly politicised, with the ECJ playing an increasingly active role.

The expanded role of the ECJ presented a substantial threat to British sovereignty by facilitating changes in the EC legislative process and substantive changes to actual EC legislation. In place of the Luxembourg Compromise, which was under the control of member states, determination of the proper legal basis and therefore the extent of majority voting shifted to the Court. With the demise of national veto power, Britain faced the possibility that EC environmental legislation would establish standards well above the lowest common denominator, based on scientific and economic grounds to which Britain objected. It also appeared likely that the Court would determine the legitimate uses of the Article 100A opting-out clause which would have allowed Britain to derogate from majority imposed environmental directives.[92] In addition, the Court has frequently underscored the importance of using the

[90]Case 300/89, *Commission of the EC v. Council of the EC* [December 1991].

[91]Haigh (1992) at 4.9-7.

[92]Moravcsik (1991) at 43. This prediction has proven accurate. See the discussion of Article 100A in the previous section.

proper legal basis for directives, and might also address the legitimate application of the opting-out clause in 130T.[93]

Whether the Court applies a strict legal test to determine the correct legal basis of a directive, or merely bows to prevailing political circumstances, it has consistently adopted an interpretation different from the one proposed by Britain. In two 1988 cases, Britain challenged the Council's use of majority voting to adopt directives on agricultural policy. In each case, the Court refused to accept the British argument that unanimous voting was required.[94] While these two cases did not deal with environmental policy, they demonstrate the threat to British sovereignty from the Court validating widespread use of majority voting under Articles 100A and 130S. As the following table illustrates, the Commission has already issued several contentious environmental proposals under Article 100A.[95]

Proposed under Article 100A:

COM(88)399	OJC295 '88	Hazardous Waste
COM(88)559	OJC319 '88	PCBs and PCTs
COM(89)282	15/9/89	Civil liability for waste
COM(91)219	27/6/91	--
COM(89)548	OJC8 '90	Marketing and use-cadmium
COM(89)575	OJC33 '90	Seventh Amendment (harmful substances)
COM(89)665	OJC24 '90	Marketing and Use of Ugilec and DBBT
COM(90)174	OJC187 '90	Diesel emissions
COM(90)227	OJC276 '90	Existing chemicals
COM(90)368	29/10/90	Boilers (Notes 130R as well as 100A high level of protection)
COM(90)415	OJC289 '90	Waste Shipments
COM(91)7	OJC46 '91	Marketing and Use of PBP ethers
COM(91)51	OJC193 '91	Vehicle Noise
COM(91)102	22/5/91	Landfill
COM(91)154	10/6/91	Sulphur in gas oil
COM(91)240	OJC229 '91	Speed Limits
COM(91)285	6/8/91	Energy labelling (Notes 130R)
COM(91)373	OJC299 '91	PCBs
COM(91)358	OJC317 '91	Titanium dioxide (proposed 10/91)

[93]See Glaesner (1987) at 294; Bermann (1989) at 561; Lomas (1988) at 531 (Denmark opting-out of vehicle emissions directive).

[94]Bermann (1989) at 573. Case 68/86, *United Kingdom* v. *Council of the EC*, 2 *Common Market Law Reports* 543 (1988); Case 131/86, *United Kingdom* v. *Council of the EC*, 2 *Common Market Law Reports* 364 (1988).

[95]Judge maintains that since 1989 half of the environmental directives proposed by the Commission have been based on Article 100A. See Judge (1993) at 195.

In sum, evidence from the period 1987-1991 suggests that British expectations about the application of the SEA's environmental provisions were somewhat misguided. Although the subsidiarity provision potentially afforded Britain protection against expanding EC powers, it played practically no role in EC environmental policy formation. This is due in part to the fact that implementing subsidiarity raised sensitive political questions which were unresolved by the SEA. The ECJ did not disallow Community proposals for violating subsidiarity, nor did the subsidiarity provision result in fewer environmental proposals. Finally, the clear division between Article 100A and Article 130, which was supposed to guarantee a British veto, quickly vanished as environmental directives were proposed and adopted under qualified majority voting. Thus, with only a few isolated exceptions, in practice the SEA proved to offer no legal or political protection for British sovereignty and national interests in the area of environmental policy.

VI. Maastricht

While it is certainly the case that the issues surrounding the Maastricht Treaty were somewhat different from those of the SEA, similar explanations exist for the revisions in EC environmental powers introduced by the Treaty on European Union. It might have been the case that a consensus among states, or political bargaining, allowed enhanced Community environmental powers. Alternatively, one might view Maastricht as the product of coercion, whereby Britain had no alternative but to ratify the Treaty, including the provisions on environmental policy. It should also be considered whether British ratification of the Treaty stemmed from the Government's belief that it had secured a significant negotiating victory. This raises the question of whether the new environmental provisions in the Maastricht Treaty actually extend Community competence, or rather represent an erosion of previous powers. A full assessment of these issues exceeds the scope of this paper, but this section attempts to establish a viable framework for subsequent analysis of the Treaty and its environmental provisions.

A. Explanations for Ratification

Like Moravcsik's discussion of the SEA, Sandholtz explains the Maastricht Treaty as primarily a convergence of national interests.[96] But in addition to domestic political concerns, Sandholtz identifies a number of

[96]See Sandholtz (1993).

contributing factors associated with functionalism and neofunctionalism which Moravcsik discounted in his study. In the case of Britain, for example, Sandholtz argues that the Government shared the general European sentiment of economic austerity and disinflation, but resisted monetary union as a specific mechanism for attaining these goals. Although Sandholtz discusses the role of public opinion towards the Community and towards monetary union, as well as the desire of many states to limit the economic dominance of Germany by binding it to the EC, he fails to identify a motivation behind Britain's eventual ratification of the Treaty. I maintain that, as was the case with the SEA, the Government's decision to ratify the Maastricht Treaty involved attaining concrete British objectives while preventing an erosion of British sovereignty and national interests in whatever form these threats emerged.

Domestic politics goes a long way in explaining Britain's reception of the Treaty. With only a modest legacy of "Thatcherism" as a guiding ideology, debates over monetary union revealed critical divisions within the British Conservative Party. Although Eurosceptics were eventually unable to prevent ratification of the Treaty, they forced John Major to invoke a three-line whip and raise the spectre of resignation in order to gain sufficient support.[97] As part of a desperate campaign to pass a paving motion and then ratify the Treaty, the Government highlighted how Britain could be "at the heart of Europe" without being dominated by Brussels. The campaign consisted in identifying various procedural safeguards for British interests as well as characterising the Treaty as a benign step towards ever closer relations with Britain's European neighbours.

High on the list of safeguards were Britain's opt-outs. By avoiding mandatory compliance with the Social Charter, the Government estimated that Britain would save £14.5 billion.[98] Besides the opt-out from the Social Charter, the Government managed to secure derogation from the third stage of monetary union. Britain's special position regarding monetary union might be termed an opt-out, or perhaps an "opt-in", as the Government retained the ability to join monetary union at a later date.[99] Furthermore, the Government frequently reassured sceptics that foreign and security policy would remain

[97]See Norton (1990); Baker, Gamble and Ludlam (1993a, 1993b, 1994)

[98]Britain's opt-out is contained in the Treaty's "Protocol on Social Policy," OJC224 31.8.92. See Baker, Gamble and Ludlam (1994) at 43.

[99]Britain's opt-out is contained in the Treaty's "Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland," OJC224 31.8.92.

firmly under intergovernmental and therefore unanimous control, in accordance with the three pillar design of the Treaty.[100]

Besides specific safeguards, the Government relied heavily on the argument that the subsidiarity principle would protect British sovereignty and British interests from creeping European federalism. In evidence to the House of Commons Foreign Affairs Committee, an array of top officials from the Foreign Office, including Secretary of State Douglas Hurd, contended that the Maastricht Treaty would make subsidiarity a justiciable issue which member states could rely on to scale back EC powers and legislation.[101] At some points during the ratification process, John Major seemed to rely almost exclusively on this argument as he fought to prevent a fatal party split.[102] A number of authors have suggested that subsidiarity was the word that saved Maastricht, not because there was general agreement on the appropriate trajectory of European integration, but because it is a term capable of bearing a variety of meanings, particularly the desired German and British meanings. Both Germany and Britain, two countries normally on opposite sides of debates over European integration, were able to view the subsidiarity principle as a crucial decentralising measure while simultaneously overlooking the considerable divergence between christian democratic ideology, German federalism and British conservatism which lurked just beneath the surface.[103] Regardless of the impending political difficulties which this tenuous consensus concealed, the flexibility of the subsidiarity principle allowed each member state to claim that its national interests would remain secure.

At a general level, the Government contended that the Treaty was basically neutral and did not encourage an accretion of power in Brussels. In order to quell a fatal backbench revolt which would have prevented ratification, the Government needed to present the Treaty as advantageous to Britain, or at least harmless. Foreign Secretary Douglas Hurd therefore explained that ever closer union could be achieved by enhanced European cooperation, without additional transfers of competence.[104] It is in this general political climate that one must view the Government's acceptance of Maastricht's environmental provisions.

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[100]See House of Commons (1991, 1992).

[101]Ibid.

[102]For a discussion of the Government's invocation of the subsidiarity principle, see Baker, Gamble and Ludlam (1993a, 1993b, 1994).

[103]See Peterson (1994); Teasdale (1993); Van Kersbergen and Verbeek (1994).

[104]See House of Commons (1991) at 4.

B. Britain's View of the New Environmental Provisions

The Government's objective at Maastricht was to limit EC power and avoid expensive obligations, while maintaining maximum national discretion by allowing future participation in monetary union. It is difficult to reconcile these British goals with the proposition that the new environmental provisions in the Maastricht treaty expand EC power. A complete analysis would require a thorough examination of British public opinion towards environmental protection during the period 1988-91, as well as a discussion of the influence of green pressure groups. However, my initial impression is that, as with the SEA negotiations, neither of these factors "greened" the Government to the point of supporting enhanced Community environmental powers. Of course it could be that the environment was used as a bargaining chip by the Government to secure Britain's broader interests. Or it might be the case that the Government was displeased with both the new environmental provisions and the Treaty as a whole but was forced to choose between ratification and effective relegation to the second tier of member states. Each of these possibilities deserves further consideration.

In this section, however, I want to suggest that one might view Maastricht's environmental provisions in a manner similar to those of the SEA--each represented substantial British negotiating victories. In essence, I suggest that Maastricht expands EC environmental powers far less than is generally believed, and might actually signify an erosion of previous EC environmental competence in line with British objectives. The essential changes to environmental policy introduced by the Maastricht Treaty were a strengthening of the subsidiarity provision and an expansion of qualified majority voting. The Government portrayed each of these changes as neutral or positive.

1) Subsidiarity

After the disillusionment of the SEA, one might have expected the Government to shift its focus away from subsidiarity in favour of some other form of protection for British sovereignty. However, during the Maastricht ratification process faith in the subsidiarity principle was proclaimed as often, if not more often, than during debate on the SEA. Near the beginning of 1992, soon after the Treaty on European Union had been signed at the Maastricht summit, the Government made a concerted effort to block a variety of environmental proposals on the grounds that they violated the subsidiarity principle. These efforts were reflected in Vice-President of the Commission Leon Brittan's statement that "environmental policy should be the first target for

subsidiarity" and that powers in this area should be "repatriated"--returned to national parliaments.[105] During the Birmingham European Summit of October 1992, the Government made no effort to disguise its plans to block an EIA proposal on the grounds that it violated the subsidiarity principle.[106] By December 1992 the Government had compiled a list of Community proposals and legislation which, in its opinion, violated subsidiarity. The "hit list" included proposals on packaging, EIA, waste, and water quality.[107] Although prominent British members of the European Parliament strenuously resisted the Government's attempt to limit EC environmental policy, and a number of statements by the Commission sought to moderate its apparent willingness to consider repatriation of environmental powers, ten proposals were withdrawn soon after Britain ratified the Treaty. These included proposals on water pollution caused by wood-pulp mills, dumping of waste at sea, water quality objectives for chromium, and an amendment to the 1976 directive on dangerous substances in water.[108]

The choice of proposals on the list is quite remarkable in that it draws to a close arguments which had been simmering since the earliest days of EC environmental policy.[109] Since 1975 Britain had resisted the paper-pulp proposal as a thinly veiled attempt by continental states to gain a competitive advantage by imposing inappropriate standards on British industry.[110] Similar concerns, along with criticism of the scientific evidence, led Britain to oppose EC actions to limit dumping of waste at sea since a proposal was first put forward in 1976.[111] The chromium proposal represents a more recent British concern; the Government resisted its adoption on the grounds of subsidiarity since 1986.[112] It appears then that the Government placed its faith in Maastricht's enhanced subsidiarity provisions in order to reassure Tory Eurosceptics, and achieved a considerable degree of success in containing the growth of European environmental policy. It should be noted, however, that the

[105]The *Guardian*, 9 July 1992; Brittan (1992).

[106]Peterson (1994) at 122.

[107]See *Agence Europe* (7/8 December 1992).

[108]See *Agence Europe* (2 October 1993). For accounts of EP and Commission statements prior to the withdrawal of these proposals, see *Agence Europe* (15 July 1992 and 20 January 1993). For British accounts of the Community's decision to repeal various water directives, see *The Times*, 12 December 1993; The *Observer*, 12 December 1993.

[109]Britain's ability to block these proposals was noted earlier in this paper. See the discussion on p.8.

[110]See House of Lords (1974); See also reports in *The Times*, 3 December 1976, 5 December 1976, 11 December 1976, 16 June 1977.

[111]See House of Lords (1975, 1985).

[112]See p.23

Government has had less success with its original targets--Community standards on bathing and drinking water. Although the Government will be pleased to see the removal of the dangerous substances proposal, in other areas of water policy the Commission has offered only limited concessions which leave unclear whether power has shifted back to the member states.[113]

The example of EC water directives also demonstrates that the subsidiarity clause may be invoked to secure national political objectives. Near the end of Thatcher's second administration, the Government was preparing to privatise the water industry. In order to make the industry appear more attractive to investors, the Government did everything possible to avoid increased pollution control costs. DOE officials recall that the Government sought repeal of various EC water directives whose enormous implementation costs had recently become apparent. During negotiations for the SEA, and throughout the late 1980s, the Government contended that domestic water quality was strictly a national issue under the terms of the subsidiarity principle. This argument became more insistent as the projected costs of water clean-up mounted, and DOE officials confirmed that the Government expected the Community to repeal the water directives as early as 1990.[114] This prediction was a bit optimistic, but by 1993 British pressure had eventually produced an agreement for repeals.

2) Qualified Majority Voting

Besides amending the subsidiarity provision, the Maastricht Treaty expanded the use of qualified majority voting. As part of this expansion, the new Article 130S empowers the Council to adopt environmental policy in accordance with Article 189c--through qualified majority voting in co-operation with the European Parliament. However, the new Article 130S retains a considerable amount of unanimous voting on environmental policy. Excluded from qualified majority voting are provisions primarily of a fiscal nature, measures concerning town and country planning, most issues of land use, as well as management of water and energy resources. Given that scope for unanimous voting still exists, the choice of legal basis--Article 100A or Article 130S--still remains extremely important. As part of its campaign to ratify the Maastricht Treaty, the Government asserted that expanded qualified majority

[113] See *Agence Europe* (19 February 1994).

[114] For a discussion of water privatisation and the Government's efforts to avoid implementation costs of EC environmental directives, see Rose (1990) at 64-5, McCormick (1991) at 95-8. For detailed accounts of privatisation, see Bowers, O'Donnell and Whatmore (1988) and Bowers et al (1989).

voting would have limited or even beneficial effects.[115] This reassurance also applied to the effect of qualified majority voting on environmental policy. Supposedly, unanimous voting would continue in "sensitive areas" and actions resulting from qualified majority voting would coincide with British environmental objectives.[116]

Another important argument put forward by the Government was that any threat to British interests from an extension of qualified majority voting would be repelled by recourse to the subsidiarity principle.[117] Presumably the Government believes that repatriation of environmental powers will leave very few threatening EC proposals, thereby rendering qualified majority voting harmless. In other words, it makes no difference whether benign environmental directives are passed by unanimous or qualified majority vote. These two arguments worked well together and appeared as effective safeguards for British sovereignty and national interests--EC environmental powers would be curtailed by the subsidiarity test long before a choice of voting procedure, and when a proposal did reach the Council nothing "sensitive" would fall under majority voting.

One final reason why the Government might have accepted the environmental provisions in the Treaty, regardless of whether subsidiarity or qualified majority voting extended Community power, might be that amendments to Article 171 gave the ECJ the ability to levy "penalty payments" on member states for non-compliance with EC environmental law.[118] Because Britain has one of the better records of compliance among member states, court sanctions promote British interests.[119] For many years Government officials have argued that disparate implementation of environmental laws put British firms at a competitive disadvantage compared to continental industry. In interviews, DOE officials and senior members of the Foreign Office insisted that British pressure was the primary force behind the ECJ's recently acquired powers.

Britain's insistence that the ECJ be given the ability to fine member states illuminates an interesting shift in the Government's negotiating position. For many years the Government viewed a strong ECJ as antithetical to democratic

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[115]House of Commons (1991) at 6; House of Commons (1992) at 34.

[116]House of Commons (1991) at 13; House of Commons (1992) at 2.

[117]House of Commons (1991) at 13.

[118]See Wilkinson (1992) at 233.

[119]It has been recognised that the large number of environmental complaints lodged against the UK by the Commission reflects the disproportionate activity of British environmental pressure groups and not necessarily Government non-compliance. See Macrory (1992) and House of Lords (1991).

government and a direct threat to British sovereignty. This attitude stemmed from Britain's traditional constitutional order, in which judicial power conflicts with the supremacy of Parliament. Amendments introduced by the Maastricht Treaty may signal a new willingness on the part of the Government to surrender sovereignty in order to prevent economic competitive disadvantages. Expressed in a more positive light, in accordance with the general thesis of this paper, one might say that the Government came to see enhanced ECJ power as protection for British interests and thus a safeguard of sovereignty.

How then should one view Britain's acceptance of the environmental provisions in the Maastricht Treaty? I have suggested that focusing on the ways subsidiarity and qualified majority voting affect national sovereignty offers a viable framework for future analysis. While these issues were readily apparent during the SEA debate, their applicability to the Maastricht Treaty raises an obvious question: did the British Government make the same miscalculations in 1991 as it did in 1986? In particular, is it not surprising that the Government continued to place its faith in subsidiarity and unanimous voting after each of these safeguards proved of little practical use in the SEA? Has the Government learned nothing from the disillusioning developments in EC environmental policy which succeeded the SEA?

Certainly the potential for miscalculation during the Maastricht ratification is enormous because of the emphasis placed by the Government on the subsidiarity principle and the vision of ever closer union without expanded Community powers. But evidence presented in this paper indicates that the Government's calculations about Maastricht's environmental consequences might not be so inaccurate. The experience from 1987-91 might have generated a shift in attitude whereby other member states adopted a more British perspective of European environmental integration. This would explain why the Government was able to convince the Commission to withdraw a number of environmental proposals. Whether or not the Government will also be able to convince other member states that unanimous voting should remain the norm for "sensitive" environmental proposals remains to be seen.

VII. Conclusions

The previous sections of this paper have argued that the development of EC environmental policy took place in the context of Britain's consistent defence of its national sovereignty and national interests. Because EC environmental policy required unanimous consent prior to the SEA, Britain was able to block a number of Community initiatives and thereby retain the ability

to promulgate its own autonomous legislation. There were practical limits to Britain's veto power, however, and integration steadily eroded UK sovereignty as the Community gained power over environmental policy. Nevertheless, the need to reach a consensus allowed British officials to secure favourable amendments to most EC environmental directives. Some would argue that the ability to safeguard perceived national interests by negotiating these amendments demonstrates the legitimacy of "pooled" sovereignty which the Government advocated at the time of British accession to the Community. For those who support this concept, integration of environmental policy may have resulted in enhanced Community powers, but not an erosion of British sovereignty. More sceptical observers might contend that the notion of "pooled" sovereignty was merely a rhetorical device to reassure opponents of EC membership, and that the Government was willing to sacrifice sovereignty for economically favourable EC policies. In either case, the apparently remarkable development of a policy area outside the scope of the treaty, which required the cooperation of the "dirty man" of Europe, was made possible in part by Britain's ability to safeguard its sovereignty and economic interests.

Britain's pursuit of these same objectives helps explain the adoption of the SEA, which included numerous provisions on environmental policy. Whereas most studies suggest that these provisions were either uncontroversial, or the result of pressure placed on Britain, this paper has argued that in fact British officials were pleased with the SEA environmental provisions and considered them a resounding negotiating victory. The Government did not agree to place environmental policy under qualified majority control, nor did it embrace a general expansion of EC environmental powers. Rather, the Government expected the Article 130 provisions on subsidiarity and unanimous voting to guarantee British sovereignty.

In practice, the Government's expectations about the SEA were shattered by subsequent developments in EC environmental policy. The subsidiarity principle was never applied by the ECJ to invalidate environmental proposals or laws, nor did the subsidiarity provision stem the rapid increase in the number of Community environmental proposals from 1987-91. Furthermore, the clear distinction between Article 100A and Article 130 which the Government expected to preserve the UK veto failed to materialise as Community environmental policy was frequently adopted by qualified majority voting.

The sixth section of this paper suggested a possible framework for analysing Britain's acceptance of the environmental provisions of the Maastricht Treaty which supplanted those of the SEA. I argued that although many of the

issues surrounding Maastricht were different from those which determined the fate of the SEA, the Government pursued similar objectives: maintaining national sovereignty and limiting the scope of EC power. Preliminary assessment of the ratification debate reveals that the Government's claim that the Maastricht Treaty would not undermine British sovereignty applied also to EC environmental policy. The safeguards cited were largely the same as in 1986--the subsidiarity principle and the limited application of qualified majority voting.

The fact that other member states or the ECJ might disagree with British interpretations of these two issues raises important questions about the development of future EC environmental policy. Because this paper has addressed the negotiating position of only one country, any conclusions remain tentative. Nevertheless, the safest prediction one might offer would be that policy making in this field will involve a much greater degree of conflict than was foreseen by most observers when the SEA was ratified, and more than predicted by those who see Maastricht's environmental provisions as a product of a political consensus to enhance EC environmental power. Even if the Government's predictions about the application of the Maastricht Treaty are misguided, the ability of a large member state to disrupt future environmental negotiations should not be underestimated. Britain's determination to maintain its sovereignty, or to secure favourable amendments in exchange for an erosion of sovereignty, will form the context in which future EC environmental decisions are taken. I would suggest that there are two possible directions in which Community environmental policy could develop.

One avenue of development would involve the political isolation of Britain. The Maastricht Treaty provisions on subsidiarity and qualified majority voting could facilitate a significant expansion of EC environmental legislation despite British protests. If this were to occur, Britain would be forced to endure a further and unexpected erosion of its sovereignty. This possibility is particularly likely if continental states share similar interpretations of subsidiarity and qualified majority voting and believe that Britain is somehow reneging on its political or legal commitments. The flexibility of the subsidiarity principle which saved the Maastricht Treaty now threatens to embroil the Community in a heated debate over the legitimate direction of European integration. Some scholars suggest that subsidiarity cannot, or should not be a matter left to the ECJ.[120] These authors also note that the Court could easily use subsidiarity to expand Community powers, much to the dismay of the

[120]See Dehousse (1992); Teasdale (1993).

Government. If continental states reach this same conclusion then one component of the Government's assurance on British sovereignty will prove unfounded. An equally unappealing development would be that Britain's political interpretation of the subsidiarity principle does not find support with other member states, in which case the provision will only serve to legitimate further Community action. Britain's interpretation of subsidiarity will be further threatened as the Community expands to include environmentally progressive states in northern Europe.

A similar isolation may result from qualified majority voting. As examples in this paper demonstrate, the Community took environmental actions by qualified majority vote even before adoption of the Maastricht Treaty. Such actions ran contrary to British expectations and were taken despite British resistance. The new Article 130 establishes qualified majority voting as the normal procedure for EC environmental law. Unless the Government can deliver on its claim that all sensitive environmental proposals will follow unanimous voting, British sovereignty will be seriously eroded. Community enlargement to include relatively green states will only make it more difficult for the Government to argue for unanimous voting.

If other EC states choose not to isolate Britain, EC environmental policy will follow a second avenue of development. This would involve intergovernmental bargaining and unanimous consent similar to the decision-making process which obtained before the SEA. It is not yet clear that a sufficient number of states feel strongly enough about environmental policy to disregard major British concerns. Even environmentally progressive countries might not wish to force EC proposals through against intense British resistance because sovereignty remains a sensitive issue in most member states. For example, Denmark, a country which usually supports stringent environmental policies, also places a high value on its national autonomy as the narrow Maastricht ratification demonstrated. It may therefore prefer to assuage British qualms rather than risk British political retaliation in cases where Denmark fears a loss of its own sovereignty.

This paper has provided some evidence of continued intergovernmental consensus on environmental policy and support for the British interpretation of both the SEA and the Maastricht Treaty. For example, Britain has already successfully deployed the subsidiarity argument in order to gain repeal of various EC environmental proposals. The extensive use of unanimous voting for environmental policy under the SEA's Article 130 and the retention of some unanimous voting in Maastricht's Article 130S also bode well for British

sovereignty. Indeed, as the case of the titanium dioxide proposal reveals, the member states appear eager to resist majority voting if it stems from the Commission's choice of Article 100A as a legal basis for environmental proposals. If majority voting is resisted when suggested by the Commission, it could also be resisted as a source of environmental policy in general. Even with the inevitable increase in qualified majority voting introduced into Article 130S by the Maastricht Treaty, it remains to be seen whether truly controversial proposals will actually avoid the unanimous voting which Maastricht left intact. It also remains to be seen whether, as the Government predicted, the effects of the subsidiarity principle will repatriate enough EC environmental power as to leave only innocuous proposals to qualified majority voting.

Unanimous voting presents Britain, and all member states, with certain pragmatic political limitations--no country has the capacity to veto every proposal which it opposes. These limitations allowed environmental policy to develop prior to the SEA despite British resistance. But the need to reach a consensus in the Council will also determine the shape of future EC environmental policy. With its extreme attachment to political autonomy and its unique approach to environmental policy, Britain will play a central role in this future. The "dirty man" of Europe will seek to preserve its national sovereignty, and when faced with inevitable integration, will do its best to exchange this sovereignty for directives which accord with British economic and environmental interests.

Appendix: Treaty Provisions

Article 235 If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

Selected treaty provisions introduced by the Single European Act:

Article 100A

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8A. The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.
4. If, after the adoption of a harmonisation measure by the Council acting by qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.
   The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

TITLE VII. ENVIRONMENT

Article 130R

1. Action by the Community relating to the environment shall have the following objectives:
   -to preserve, protect and improve the quality of the environment;
   -to contribute towards protecting human health;
   -to ensure a prudent and rational utilisation of natural resources.
2. Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.

3. In preparing its action relating to the environment, the Community shall take account of:
   -available scientific and technical data;
   -environmental conditions in the various regions of the Community;
   -the potential benefits and costs of action or of lack of action;
   -the economic and social development of the Community as a whole and the balanced development of its regions.
4. The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States.

Article 130S The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community.
The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority.

Selected treaty provisions introduced by the Maastricht Treaty on European Union:

Subsidiarity provision, superseding Article 130R(4):

Article 3B In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Article 130S
1. The Council, acting in accordance with the procedure in Article 189c and after consulting the Economic and Social Committee, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 130r.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 100a, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt:
   --provisions primarily of a fiscal nature
   --measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources

--measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.

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