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Sovereignty and Subsidiarity  
in EU Environmental Policy

JONATHAN GOLUB

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**JONATHAN GOLUB**

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## ABSTRACT<sup>1</sup>

This paper explores the connection between the subsidiarity principle and national sovereignty in the context of EU environmental policy. In addition to providing an historical account of this connection, the paper suggests that subsidiarity represents a Janus-faced concept capable of either supporting or undermining the legitimacy of EU environmental policy. By developing explicit criteria by which to apply subsidiarity, a number of areas are identified in which existing EU authority could be replaced by exclusively national action or laws which granted states significantly more discretion over environmental decisionmaking. Examples are then presented where this shift of power back to the member states has already been proposed and in some cases already occurred, recasting the balance between national sovereignty and supranational environmental constraints. Throughout the analysis, particular attention is paid to the efforts of Britain, a primary antagonist in the debate, to preserve its sovereignty over environmental policy.

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<sup>1</sup>The final version of this paper is forthcoming in Political Studies.





Political debate surrounding the ratification of the Maastricht Treaty highlighted the perennial difficulty within the European Community of dividing power between member states and supranational institutions.<sup>2</sup> As has often been the case during times of significant change in the Community, actors with seemingly irreconcilable views avoided negotiating deadlock by agreeing upon language capable of bearing multiple meanings. Inclusion of the subsidiarity principle in the treaty simultaneously satisfied those who sought to limit or even reverse the accretion of power in Brussels, and those who favoured reinforcing Community authority.

While the subsidiarity principle will fuel opposing arguments in all areas where diverging visions of the Community's proper trajectory are held, environmental policy does not usually spring to mind as one such area. Indeed, many observers have suggested that pollution control lends itself so much to supranational action, that, by invoking the subsidiarity principle, 'in the area of the environment, it should be easy to substantiate the reasons for Community action.'<sup>3</sup>

In light of this prevailing attitude, this paper has two primary objectives: first, to examine how the subsidiarity principle represents a Janus-faced concept which can be deployed to legitimate EC intervention in the field of environmental regulation or to justify a return to greater national sovereignty; second, to assess the extent to which the subsidiarity principle has already altered the development of EU environmental policy in a manner which shifts power back to the member states.

After a brief conceptual framework, the paper consists of four sections. The first explores the connection between subsidiarity and sovereignty in EC environmental policy before and after the Single European Act. The second

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<sup>2</sup>Throughout this article the terms European Union (EU) and European Community (EC) will be used interchangeably.

<sup>3</sup>K. Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism,' *Fordham International Law Journal* 17 (1994), p. 895.



section, which constitutes the bulk of the paper, examines events since subsidiarity was formally incorporated into the Maastricht Treaty on European Union. The explicit criteria put forward by the Council and Commission to apply subsidiarity is used to clarify the conditions under which each of the concept's two 'faces' should determine the balance between EU authority and national sovereignty. Section three then considers the issue of democratic legitimacy as an important additional, but equally two-faced, criteria for applying the subsidiarity principle. Finally, a fourth section reviews the available empirical evidence. As perhaps the primary antagonist in this debate, the role of Britain occupies a central position throughout the analysis.

### **Conceptual Framework**

Within the multi-level governance of the EU, the concepts of sovereignty and subsidiarity are intimately linked. Sovereignty relates to the relative autonomy of nation states to pursue their chosen policy goals free from outside interference. In practice, particularly in a world of interdependent states many of which choose to participate in a supranational regime, sovereignty is best conceptualised along a stylised continuum. At one end of this continuum state governments enjoy unfettered authority to make or repeal any law they choose, thereby pursuing the widest possible range of policy objectives within their own national borders. As one moves to the other end of the continuum, all power shifts from the state to the higher authority, in this case the EU. The state accepts policy goals, and the choice of instruments to pursue those goals, which are determined exogenously. It may be the case that the state encouraged this shift of power and eagerly accepts these externally generated policies. Alternatively, the state might oppose supranationalism but nevertheless be obliged to suffer the imposition of policies devised externally.

The concept of subsidiarity holds that decisions should be taken at the most appropriate level of government and establishes a presumption that this



level will be the lowest available.<sup>4</sup> When operationalised for a federal or multi-level system of governance such as the EU, subsidiarity provides a useful tool for moving along the continuum of state sovereignty. In its starkest sense, in each policy area subsidiarity allocates decisionmaking authority between the state and supranational level, thereby demarcating the legitimate boundary where state sovereignty ends and EU supranational competence begins.<sup>5</sup> In some cases such clear demarcation is impossible. Therefore a less binary conception is called for, whereby the subsidiarity principle determines the appropriate level of national political discretion exercisable within certain general constraints established supranationally.

Environmental policy provides one of the clearest examples to date of the dynamic connection between subsidiarity and sovereignty. Environmental policy was not mentioned in the original treaty but the Community still gained power over this area. This expansion of Community action into a new policy field, while formally acknowledged and given legal justification in the Single European Act (SEA), was accompanied by inclusion of a subsidiarity principle, thereby forming a permanent link between the two concepts.

### **Subsidiarity Before and After the SEA**

Although not explicitly described as subsidiarity, the concept of allocating authority amongst several levels of decisionmaking has always been

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<sup>4</sup>The philosophical underpinnings of the subsidiarity principle are discussed in K. Van Kersbergen and B. Verbeek, 'The Politics of Subsidiarity in the European Union,' Journal of Common Market Studies 32 (1994), 215-236.

<sup>5</sup>A growing literature explores the diffusion of power away from national governments, particularly towards sub-national actors. While the diffusion debate raises a number of issues directly connected to subsidiarity and the appropriate decisionmaking level for environmental policy, due to space constraints this article focuses exclusively on the division of power between states and the EU. For analysis of the diffusion issue and the continuing role of national governments, see G. Marks, L. Hooghe and K. Blank, 'European Integration and the State,' paper presented at APSA meeting, New York, 1-4 September, 1994, A. Moravcsik, 'Why the European Community Strengthens the State: Domestic Politics and International Cooperation,' Harvard Centre for European Studies, Working Paper Series #52, 1994, J. Golub, 'State Power and Institutional Influence in European Integration: Lessons from the Packaging Waste Directive' Journal of Common Market Studies (forthcoming, September 1996).



present in EC environmental policy. The first Environmental Action Programme (EAP), adopted in 1973, recognised no less than five possible levels of action.

In each category of pollution, it is necessary to establish the level of action (local, regional, national, Community, international) best suited to the type of pollution and to the geographical zone to be protected. Actions likely to be most effective at Community level should be concentrated at that level; priorities should be determined with special care.<sup>6</sup>

It is noteworthy that in drawing distinctions, the first EAP nevertheless highlighted the Community level for concentrated action. The third EAP, adopted in 1983, removed this emphasis, inserting instead a slight presumption against centralised powers: "the Community level should be reserved for those measures which can be most effective there."<sup>7</sup>

A variety of factors suggest that Britain was primarily responsible for the inclusion of a subsidiarity concept in the EAPs. With its particularly strong attachment to national sovereignty and its unique approach to environmental protection, Britain has a long history of treating European integration and EC environmental policy with scepticism.<sup>8</sup> Britain was not entirely happy with the idea of EC environmental policy, which, after all, was never mentioned in the original treaty.<sup>9</sup> Nor were British industries pleased by the prospect of having to alter their traditional methods of pollution control, characterised by dispersal and absorption, in order to meet uniform emission standards proposed by the Commission and suited for the continent.

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<sup>6</sup>OJ C112 20.12.73.

<sup>7</sup>OJ C46 17.2.83.

<sup>8</sup>See J. Golub, British Integration into the EEC: A Case Study in European Environmental Policy (Oxford University doctoral thesis, 1994), W. Wallace, 'What price independence? Sovereignty and interdependence in British politics,' International Affairs 62 (1986) 367-389, W. Wallace, 'Foreign policy and national identity in the United Kingdom,' International Affairs 67 (1991) 65-80, C. Lord, 'Sovereign or Confused? The "Great Debate" about British Entry to the European Community 20 Years On,' Journal of Common Market Studies 30 (1992) 419-436.

<sup>9</sup>See House of Lords Select Committee on the EC, 'Approximation of Laws Under Article 100 of the EEC Treaty,' 22nd Report, 1977-78, House of Lords Select Committee on the EC, 'Environmental Problems and the Treaty of Rome,' 27 July 1979.



As part of this scepticism, the notion of 'selectivity' appeared in the Government's 1972 memorandum 'A Policy for the European Environment'.

*selectivity*: at the Community level effort should be concentrated on work most appropriately done at that level and there should be careful choice of priorities...When it comes to implementation...rather than pursue common legislative or administrative measures, the member states of the Communities should build severally on their existing and well-tried methods of working.<sup>10</sup>

The similarity between selectivity and the subsidiarity provisions contained in the EAPs is striking.

While there is little evidence to indicate that other states made use of the subsidiarity provision in the early stages of EC environmental policy, Britain saw subsidiarity as a mechanism to limit EC power. Subsidiarity was deployed in particular at key moments during the Commission Presidency of Roy Jenkins in order to maintain national control over 'grey areas' of policy which arguably could have been dealt with at Community level.<sup>11</sup>

The 1987 Single European Act incorporated specifically into the new environmental section of the treaty what would later become known and applied more generally as the subsidiarity principle. Article 130R(4) of the SEA held that 'The Community shall take action relating to the environment to the extent to which the objectives...can be attained better at Community level than at the level of the individual member states.'<sup>12</sup>

Inclusion of the subsidiarity principle must be seen within the larger political context surrounding the SEA. In general, the SEA was the product of an intergovernmental bargain between government elites in the large member states, although the shape and timing of this bargain was to some extent

<sup>10</sup>D. Evans, *Britain in the EEC* (London, Victor Gollancz, 1973), p.45.

<sup>11</sup>See M. Wilke and H. Wallace, *Subsidiarity: Approaches to Power-Sharing in the European Community* (London, Royal Institute for International Affairs, 1990).

<sup>12</sup>Before entering the treaty, the subsidiarity principle appeared both in the 1984 Draft Treaty on European Union and in the Dooge Committee Report. In each of these places it was accompanied by the same ambiguity--a recognition of several levels of authority but also a number of justifications for Community action, particularly the size, scale and transboundary effects of pollution.



influenced by the Commission and executives of transnational businesses.<sup>13</sup> The environmental provisions of the SEA constituted a delicate balance between states which favoured legitimating and possibly expanding EC environmental powers, and those seeking to place limits on the previously unbounded Community prerogative. As drafted, the subsidiarity provision reassured each of these camps--it could signal a presumption in favour of national action at the expense of EC power, or, in line with the first EAP, it could generate an implicit acknowledgement that most issues could be solved better at Community level, thereby setting the stage for a further centralisation of authority.

As most member states were comfortable with enhanced EC power in general, and power over environmental questions in particular, the real significance of including the subsidiarity provision in the SEA was its appeal to Britain, a country well known both for its practically unrivalled sensitivity on questions of national sovereignty and its unenviable position as the 'dirty man of Europe'.<sup>14</sup>

Although the Government's faith in the subsidiarity principle as a formal safeguard for British sovereignty and Britain's unique environmental policy style was much less apparent during negotiations over the SEA than in subsequent disputes over the Maastricht Treaty, the inclusion of the principle in Article 130R bears all the marks of British influence. Department of Environment (DOE) and British Permanent Representative (UKREP) officials recall that from the first mention of selectivity in its 1972 memo, right through the drafting of the SEA, the Government frequently invoked the subsidiarity

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<sup>13</sup>See A. Moravcsik, 'Negotiating the Single European Act, National Interests and Conventional Statecraft in the European Community,' International Organization 45 (1991) 19-56, W. Sandholtz and J. Zysman, '1992: Recasting the European Bargain,' World Politics 42 (1989) 95-128.

<sup>14</sup>It is also certainly true, as Steiner suggests, that the German Länder were instrumental in putting subsidiarity on the EC agenda. See J. Steiner, 'Subsidiarity Under the Maastricht Treaty,' in D. O'Keefe and P. Twomey, eds., Legal Issues of the Maastricht Treaty (London, Chancery, 1994).



concept against Community environmental proposals, although at issue were economic considerations and not matters of high principle.

The First Secretary of UKREP during negotiations of the SEA noted that the British, while never launching a broadside attack against the legitimacy of EC environmental policy, 'would from time to time say that [they] did not think that a particular piece of legislation needed to appear before the Council at all. This was sort of the first germs of the subsidiarity idea' (Interview, 15 Jan. 1993). A former Head of the DOE Central Unit on Environmental Protection, who was also active during the period in which the SEA was negotiated, offered a similar view of British strategies, whereby the subsidiarity issue was 'really just being thrown in to object to something [we] did not like...not a matter of high principle but of low cash, basically' (Interview, 3 Dec. 1992).

For the British, subsidiarity represented a fairly small but important aspect of a larger intergovernmental bargain which produced the environmental provisions in the SEA.<sup>15</sup> In its original proposals of 17 September 1985, the Commission placed almost no limitations on Community environmental powers.<sup>16</sup> By 11 November the British had managed to introduce provisions which required all Community environmental actions to take account of scientific and technical data, regional variations in the ability of the environment to absorb pollution, and the potential costs and benefits of legislation. By December the subsidiarity provision had been included as an additional limitation on EC power.<sup>17</sup> All of these amendments gave written form to longstanding British criticisms of various EC environmental proposals. Intergovernmental bargaining exerted so much influence on the SEA's environmental provisions that Commission President Jacques Delors

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<sup>15</sup>See J. Golub, 'British Sovereignty and the Development of EC Environmental Policy,' paper presented at the ECPR Sessions, Bordeaux, 27 April-2 May 1995.

<sup>16</sup>See M. Gazzo, Towards European Union II (Brussels, Agence Europe, 1986), pp. 34-5.

<sup>17</sup>It is important to note that intergovernmental bargaining produced a final text with "a far different concept" of subsidiarity than the one found in the 1984 Spinelli draft. See L. Krämer, EEC Treaty and Environmental Protection (London, Sweet and Maxwell, 1990), p. 72.



complained publicly how 'the text on the environment is simply window dressing...the Commission's initial text was distorted. Now it is a piece that will no doubt be unanimously accepted and everyone will do what he thinks he should.'<sup>18</sup>

In practice, despite British expectations and Delors' trepidation, it appears that as a general rule, after the SEA the subsidiarity provision played little role in limiting the development of EC environmental policy prior to the Maastricht Treaty.<sup>19</sup> The Government's successful deployment of the subsidiarity argument to prevent the 1986 proposal on chromium in water, and to stall adoption of the 1988 habitat proposal only highlights rare exceptions to the rule.<sup>20</sup>

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 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 environmental proposals emanating from the Commission continued to grow rapidly after adoption of the SEA.<sup>21</sup>

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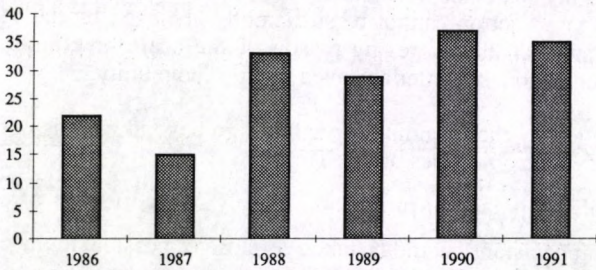
<sup>18</sup>For Delors' comments and the various texts which preceded the SEA see Gazzo, *Towards European Union II*, pp. 87, 101. See also Krämer, *EEC Treaty*, pp. 65-68.

<sup>19</sup>Although never phrased in terms of subsidiarity, one might nevertheless argue that a commitment to retaining policy flexibility and national discretion--evidenced, for example, by a preference for directives rather than regulations--amounts to the same thing and has always been present in Community decisionmaking. See C. Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"', 82 *Michigan Law Review* 82 (1984) 1274- , G. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', *Columbia Law Review* 94 (1994), p. 373.

<sup>20</sup>See House of Lords Select Committee on the EC, 2nd Report (1986-87), House of Lords Select Committee on the EC, 15th Report (1988-89), J. Golub, 'The Pivotal Role of British Sovereignty in EC Environmental Policy,' EUI Working Paper RSC No. 94/17 (Florence, EUI, 1994).

<sup>21</sup>Figures include directives, regulations and decisions.

FIGURE 1 Number of EC Environmental Proposals 1986-1991



Source: Compiled from the Official Journal of the European Communities, using the CELEX database

This would appear to suggest that subsidiarity was either ignored entirely, or, instead of requiring unanimous consent, was applied in a manner dictated by a majority of states which interpreted the concept as a mandate for additional EC power.

### **Subsidiarity and Sovereignty After Maastricht**

Although environmental protection is clearly an established Community goal, none of the various treaty provisions which refer to a high quality of life and high levels of environmental protection actually establish a mandate for a particular level of stringency or style of regulation. In other words, the treaty offers no inherent reason why EU action should always be preferred to national action. Rather, subsidiarity makes clear that national policy choice should be constrained only when EU action is clearly better and more efficient. This section attempts to specify more precisely the proper boundary between the two faces of subsidiarity, thereby staking out the theoretical limits of both national and EU power.

Article 3B of the Maastricht Treaty puts forward the heart of the subsidiarity principle, building on and generalising the provisions formerly contained in Article 130R(4) of the SEA.



In areas which do not fall within its exclusive competence, the Community shall take action...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.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article A of the preamble provides a closely related aspect of subsidiarity, declaring that decisions should be taken 'as close as possible to the citizen.' The subsidiarity principle will apply to all new EU legislation, as well as to existing legislation which will be re-examined in light of the principle.<sup>22</sup> Both the member states and the Commission have expressed their views on how subsidiarity should be operationalised, its implications for EU environmental policy and national sovereignty.<sup>23</sup> According to the Commission, subsidiarity would require it to justify more fully all new proposals, resulting in fewer new EU laws. Subsidiarity would also lead to withdrawal or revision of many current proposals.<sup>24</sup>

The collective position of the member states is summed up in the Annex attached to the conclusions of the December 1992 European Council Summit held in Edinburgh.<sup>25</sup> The Annex suggests several guidelines on how to fulfil the subsidiarity requirement:

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<sup>22</sup>Some lawyers deny that any law adopted prior to the SEA can be re-examined under the subsidiarity principle. See A. Toth, 'Is Subsidiarity Justiciable?' European Law Review 19 (1994) 268-285 and A. Toth, 'A Legal Analysis of Subsidiarity,' in O'Keefe, D. and P. Twomey, eds., Legal Issues of the Maastricht Treaty (London, Chancery, 1994). However, this argument ignores a number of crucial political considerations and is squarely contradicted by the views of other lawyers, as well as by empirical evidence. See J. Steiner, 'Subsidiarity Under the Maastricht Treaty,' in O'Keefe and Twomey, eds., Legal Issues, pp. 49-64.

<sup>23</sup>The 'Interinstitutional Agreement Between the European Parliament, the Council and the Commission on Procedures for Implementing the Subsidiarity Principle', by itself a brief and rather unilluminating document, is found in Agence Europe Documents #1857, 4 November 1993, pp. 3-4.

<sup>24</sup>'European Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle', COM(93)545, 24 November 1993, pp. 3-5.

<sup>25</sup>See A. Duff, ed., Subsidiarity Within the European Community (London, Federal Trust, 1993), pp. 117-130.



- transnational aspects of a problem justify EU action
- preventing market distortion justifies EU action
- clear benefits from the scale or effect of policies justifies EU action
- Community measures must leave as much scope as possible for national decision
- EU action should only cover states affected by a given difficulty, and should not be extended to other unaffected states.

When examined more closely, each of these guidelines reveals the Janus-faced nature of subsidiarity and potentially carves out areas where additional national control over certain environmental issues is justified.

### *Recasting the Balance*

Both the Commission and the Council agree that, under the subsidiarity principle, transboundary pollution justifies Community action. The question then becomes which areas of pollution contain a significant transboundary element and which do not. Community action related to the latter group would require a separate justification. As a matter of distributing political authority and justifying what are often enormously expensive regulations, it simply does not suffice to claim without any further analysis, as do some particularly zealous members of the EP, that 'most environmental problems have a transboundary character which require concerted EU action.'<sup>26</sup>

In fact, a wide range of policy areas involve little or no direct transboundary component. EU laws on noise, for example, have traditionally been aimed at removing trade barriers, and possibly improving general living conditions, not at preventing noise from vehicles or appliances spilling across national frontiers. There is nothing inherently transboundary about noisy products.

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<sup>26</sup>See European Parliament Session Document A3-0380/92, 'Report of the Committee on the Environment, Public Health and Consumer Protection on the Application of the Principle of Subsidiarity to Environment and Consumer Protection Policy,' 23 November 1992.

Waste disposal offers a second significant example of a pollution issue which may fall under EU competence for its intimate connection to the functioning of the internal market, but which often lacks a significant transboundary dimension. EU laws regulating amounts of disposable waste, mandating high levels of recycling or prohibiting methods of domestic disposal constitute restrictions of essentially national practices which by themselves have no clear adverse environmental effects on neighbouring states. While the stringency of national waste disposal laws has an impact on transboundary waste shipments, which will gravitate to the point of lowest disposal costs, this does not create negative environmental externalities needed to justify EC intervention, as the environmental consequences of lax standards are born entirely by the importing state. Quite simply, while many would question the wisdom of a decision by the UK, Spain or any other member state to act as the EU garbage can, such action does not subject neighbouring states to transboundary pollution.

EU laws on environmental impact assessment also fail to meet the transboundary pollution requirement. The environmental implications of building highways, refineries, large agricultural installations and suburban housing projects are local, or possibly regional, certainly not transnational, except in cases where projects are sited on a national border.

Preservation and destruction of habitats, flora and fauna offers one of the clearer cases of EU laws regulating what are basically national matters. Although many bird species migrate, bringing their protection under legitimate EU control as a transboundary matter, nearly half of the species now covered by the celebrated Birds Directive are non-migratory and therefore outside the bounds of EU power. Appeals for EU environmental competence based on the migratory nature of flora and fauna are clearly absurd. To get around the obviously national scope of establishing parks, protecting SSSIs and exploiting natural resources, several authors have suggested that the concept of



transboundary pollution should be expanded to include 'psychic spill-overs', 'preservation spill-overs' or 'heritage' alongside physical and economic externalities.<sup>27</sup> If taken seriously, this would remove all limits on EU action--literally any policy which appealed to the emotional sentiments or sense of European (or human?) heritage of any actor could be imposed on a reluctant member state, a majority of whose citizens may have registered different psychic concerns through their choice of domestic laws.

Even certain aspects of air and water pollution are confined within national borders. Drinking water, for example, often originates from underground reservoirs rather than rivers. Pollution of these reservoirs may stem more from local agriculture and industrial activity than from any external source. In some cases pollution of beaches also results much more from domestic sewage and waste disposal, and from the effects of tourism than from the practices of foreign industry. And while some types of air pollution clearly have transboundary characteristics, others do not; industries located in the centre of large states or along the periphery of the Union might deposit the bulk of their emissions domestically or into the ocean.

The legitimate scope for EU environmental legislation takes on considerably different form once we recognise the limited extent of transboundary pollution. Combining this recognition with the European Council's admonishment at the Edinburgh summit to limit the number of states affected by EU law may generate new regulatory approaches, two of which will be mentioned here. First, it is worth considering how much justification there is to include periphery states within EU environmental regulations which affect production processes. For these states, more than any others, industrial

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<sup>27</sup>See W. Wils, 'Subsidiarity and EC Environmental Policy: Taking People's Concerns Seriously,' Journal of Environmental Law 6 (1994) 85-91, L. Brinkhorst, 'Subsidiarity and European Environmental Policy,' in Proceedings of the Jacques Delors Colloquium, Subsidiarity: The Challenge of Change (Maastricht, European Institute of Public Administration, 1991), R. Stewart, "Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions," University of Chicago Legal Forum (1992), pp. 45-49.



emissions, waste and sewage disposal, as well as agricultural practices have minimal transboundary effects. The British argument that environmental resiliency conferred by extensive tidal waters and favourable winds could be extended to other periphery states. Subsidiarity would therefore call for EU laws aimed at restricting practices only in the central states, leaving periphery states free to pursue their chosen policies.

An alternative but equally novel form of regulation which took account of the previous observations might involve a series of bilateral or multilateral agreements aimed at preventing regional transboundary pollution. This configuration has been referred to by Sir Richard Body as a 'Europe of many circles'.<sup>28</sup> It is not entirely clear what role, if any, the EU would play in such a configuration. Multilateral agreements could take the form of traditional international treaties, but a more likely solution which avoids problems of free riding and incomplete contracting would be to make these agreements under the auspices of the EU, thereby vesting some measure of oversight with the Commission and enforcement power in the ECJ. A Europe of many circles shifts power away from Brussels but does not entirely restore national sovereignty over environmental policy.

To recognise a lack of transboundary effects in each of the above cases is not particularly surprising--EU regulations in these areas often originated not from purely environmental sentiments, but from a fear that unharmonised production processes and investment climate standards would result in market distortion. If these issues of process standards and assessment remain matters of market distortion then they will fall, according to Article 3B of the Treaty, within the Community's exclusive competence, an area untouched by the subsidiarity principle. If, on the other hand, their effect on competition turns out to be minimal, then they will fall under shared competence and thus under

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<sup>28</sup>R. Body, Europe of Many Circles (London, New European Publications, 1990).



subsidiarity--EU action will not be justifiable purely on economic grounds but will require the existence of transboundary effects.

The important issue becomes how to distinguish between EU laws primarily concerned with environmental protection, and those whose main objective is completing the common market. There are strong reasons to believe that in many process standards the main objective, or 'centre of gravity', a term used by the ECJ in its handling of disputes over the proper legal basis of EC legislation, is actually environmental, making the entire subject a matter of subsidiarity.<sup>29</sup>

The argument turns on what constitutes a legitimate competitive advantage. Historically, lax product standards were considered sources of unfair competitive advantage, and states which allowed them were accused of creating pollution havens.<sup>30</sup> States which introduced their own stringent domestic process standards undermined their competitive position, running the risk of having their industries relocate to more favourable conditions, and of losing inward foreign direct investment. In order to prevent a race to the bottom--the 'Delaware effect'--the Commission sought to harmonise process standards and thereby create more uniform investment climates.

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<sup>29</sup>Actions brought against the Council by the Commission and European Parliament have forced the Court to adjudicate between Article 130S and Article 100A as the proper legal basis for various EC environmental laws. In its first ruling, the "titanium dioxide case", the Court annulled a Council decision to base a Directive on Article 130, holding that it should instead have been adopted under the qualified majority voting procedures established in Article 100A. In a more recent ruling--the "Belgian waste case"--the Court refused a request by the European Parliament to annul a Regulation, ruling that the Council had acted properly in basing the legislation on Article 130S. See Case C-300/89 decided on 11 June 1991, and Case C-187/93 decided on 28 June 1994.

<sup>30</sup>It has been argued elsewhere that states which allow lax standards, even if they do attract investment or favour domestic industries, may in fact not be distorting the market but rather harnessing a legitimate competitive advantage. It is not clear that states with extensive coastlines or air flows which disperse pollution over the ocean should not treat these conditions as a natural competitive advantage, just as other states enjoy warm climates, sunshine and a position at the geographical heart of Europe, all of which favour certain crops and reduce various production costs such as energy and transportation. It is equally unclear how to reconcile the central Community objective of unrestrained economic competition with that of seeking a "level playing field". For a discussion of these issues, see Golub, British Integration, R. Stewart, 'Environmental Regulation and International Competitiveness,' Yale Law Journal 102 (1993) 2039-2142, Steiner, 'Subsidiarity under the Maastricht Treaty,' p. 51.



Recently, however, the Commission has expended considerable effort trying to convince people that stringent process standards do not harm competitiveness. Rather, they confer long-term competitive advantages on firms by encouraging them to use resources more efficiently, promoting their positive public image, forcing them to develop more flexible production methods and providing 'first mover' advantages by creating incentives for them to produce and sell technologically innovative remedies for environmental harms.<sup>31</sup> For its part, the unquestionably green European Parliament agreed entirely with the proposition that stringent standards actually promote economic competitiveness.<sup>32</sup> Nor, apparently, do higher standards jeopardise EU firms by adversely affecting international trade flows; available studies deny any connection between the two, mainly because the proportion of overall production costs devoted to environmental protection is negligible.<sup>33</sup>

The result of this new emphasis by the Commission and Parliament on green growth is to make their previous justification for EU action totally untenable--if the Commission is correct, then pollution havens are a misnomer because lax environmental standards actually entail economic competitive disadvantages. States which allow lax standards do not attract foreign investment, encourage industrial relocation or confer savings in production costs upon their own firms. Instead, these states are merely pursuing unwise policies which will undermine their own long-term industrial competitiveness. Their foolhardy decision to do this does not distort the market in their favour and thus does not justify harmonisation of process standards at EU level. Thus, under the subsidiarity principle, there might be no legitimate reason to set EU

<sup>31</sup>See European Commission Communication on Industrial Competitiveness and Environmental Protection, SEC(92)1986.

<sup>32</sup>See European Parliament Document A3-0112/94, Report of the Committee on the Environment, Public Health and Consumer Protection on the need to assess the true costs to the Community of 'non-environment', 23 February 1994.

<sup>33</sup>See European Commission Communication on Economic Growth and the Environment, COM(94)465, reprinted in *Europe Environment* 6 December 1994, D. Vogel, 'The Relationship Between Environmental and Consumer Regulation and International Trade,' Jean Monnet Chair Paper #21, (Florence, European University Institute, 1995).



standards for national production processes or impact assessment rules which dont cause transboundary pollution. Because, as mentioned above, many of these processes create no significant transboundary damage, it appears that under the subsidiarity principle large segments of existing and proposed EU environmental policy should be returned to or reserved for strictly national control.

To summarise the argument so far, there are two instances--transboundary pollution and market distortion--in which subsidiarity clearly serves to legitimate EU environmental action as 'better' than strictly national remedies. However, the frequency with which these conditions obtain is open to more question than many observers care to admit. This provides considerable scope for proponents of greater national sovereignty to invoke the subsidiarity principle against what they see as excessive EU intervention.

It remains then to consider if there are other situations, besides transboundary pollution and market distortion, which meet the subsidiarity principle requirement that action is 'better' taken at EU than national level. It has been suggested by some that EU environmental action is always better than state action because the latter offers no guarantee that any action will be taken, and that all EU citizens should have the right to expect high environmental quality standards wherever they travel in the Union. The former argument is usually accompanied by the claim that whichever level of government will produce the highest environmental standards is by definition better and therefore appropriate. Upon closer inspection each of these arguments has the potential to degenerate into a fiercely anti-democratic tautology by ignoring the very issues underpinning the subsidiarity principle.

## Subsidiarity and Democratic Legitimacy

By bringing decisions closer to the citizen, it might be argued, subsidiarity is designed precisely to allow states and local communities to decide priorities for themselves, possibly ranking concern for growth, employment, lower taxes, or other areas of social expenditure above environmental legislation. The subsidiarity debate forces proponents of integration to address this question of democratic legitimacy when determining the proper allocation of authority for environmental policy. The democratic deficit, which has been widely recognised and commented upon, stems from the relative absence of participation, representation, accountability and legitimacy underpinning the Community policymaking process.<sup>34</sup> In fact, the democratic deficit should come as no surprise, as the original design of the EC was intentionally undemocratic. The post-war fear of the potential consequences stemming from excessive democracy was reflected in the guiding philosophy of functional and neo-functional integration. Functionalism, particularly under the guidance of Jean Monnet, was based on elitism and technocracy, and 'not much concerned about the form of democratic control.'<sup>35</sup>

Subsidiarity forces a rethinking of this philosophy, and ushers in a much larger debate about the democratic legitimacy of the entire EC project than can be adequately explored in this brief paper. However, as a point of departure for this debate, one might start by considering the democratic legitimacy of EU environmental laws when subjected to a subsidiarity test. With its requirement that decisions be taken as close as possible to the people, subsidiarity could be read as a commitment to traditional democratic goals of self-determination and

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<sup>34</sup>See B. Boyce, 'The Democratic Deficit of the European Community', Parliamentary Affairs 46 (1993) 458-477, J. Lodge, 'Transparency and Democratic Legitimacy', Journal of Common Market Studies 32 (1994) 343-368, J. Weiler et al., European Democracy and its Critique: Five Uneasy Pieces, EUI Working Paper RSC 95/11 (Florence, EUI, 1995), K. Featherstone, 'Jean Monnet and the "Democratic Deficit" in the European Union', 32 Journal of Common Market Studies 32 (1994) 149-170.

<sup>35</sup>J. Pinder, 'European Community and Nation-State: A Case for a Neo-federalism', International Affairs 62 (1986), p. 51. See also K. Featherstone, 'Jean Monnet' and E. Haas, Beyond the Nation State (Berkeley, UC Press, 1964), pp.454.



accountability.<sup>36</sup> This would create a presumption for less EC control, and greater reliance on decisions which were 'better' taken on the national level precisely because they were more democratic. Even substantial moves towards greater transparency and empowerment of the European Parliament will not bestow upon Community actions as much democratic accountability as is currently enjoyed by policies adopted within individual member states, each of which boasts the central features of liberal representative democracy: universal suffrage, regular elections, free expression.<sup>37</sup>

Nevertheless, returning to the pro-integration face of subsidiarity, it is possible to identify at least two situations where a strong case can be made to rebut this presumption and establish the superiority of EC laws. First, if advocates of EC environmental policy were to invoke subsidiarity as a justification for EC law despite its dubious democratic legitimacy. This could be done by explicitly weighing the value of democracy against that of some other value, such as upholding individual rights or adhering to a general theory of justice. Under this application of subsidiarity, EC laws which guaranteed minimum environmental standards as a matter of human rights or European citizenship would gain legitimacy as clearly superior to democratically secure but nevertheless inadequate national legislation. Similarly, European standards could be termed 'better' than national action if they more adequately guaranteed sustainable development, a goal derived from theories of intergenerational justice.<sup>38</sup> Instead of balancing democratic goals against other values, proponents of EC integration could follow a second path and develop an explicit theory of democracy by which to legitimate EC environmental policy,

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<sup>36</sup>Bermann, 'Taking Subsidiarity Seriously', p. 340.

<sup>37</sup>See R. Dahl, *Dilemmas of Pluralist Democracy* (New Haven, Yale University Press, 1982), particularly p. 15, D. Held, *Prospects for Democracy*, (Cambridge, Polity Press, 1993), Lodge, 'Transparency'.

<sup>38</sup>E. Weiss, "Our Rights and Obligations to Future Generations for the Environment," *American Journal of International Law* 84 (1990) 190. For a detailed analysis which rejects the ethical foundations of the intergenerational justice argument but which nevertheless embraces some of its conclusions, see B. Barry, *Democracy, Power and Justice* (Oxford, Clarendon Press, 1989).

thereby allowing them to argue that decisions were actually democratically better if taken at the EC level.

A major impediment to resolving the tension between democracy, subsidiarity and integration is that nearly all democratic theory has been developed in the statal context, leaving little room for the democratic legitimacy of supranational decisionmaking.<sup>39</sup> In his recent work, Weiler has made preliminary efforts to develop a model of democracy applicable to international governance such as that found in the EU.<sup>40</sup> Weiler lays the groundwork for a defence of EU laws as products of consociational or neo-corporatist democracy. Although this line of analysis has yet to be developed in detail, such models of democracy which concentrate on pluralism might prove particularly fruitful in the case of environmental policy, where EU institutions and legislation, compared with traditional national structures, often guarantee greater access by diverse and under-represented societal groups such as environmentalists, particularly at the agenda-setting stage of policy development.

By far the most developed theoretical treatment of this matter is found in the recent work of David Held, who provides a valuable starting point for extending democratic theory to the EC level and using it to distribute authority over environmental policy. Held has developed what he calls a 'cosmopolitan' model of democracy which might serve to demarcate EC policy from national policy.<sup>41</sup> At the core of this model lies the contention that global interconnectedness complicates traditional notions of autonomy, consent and accountability. In many situations, policies taken in any one state create or exacerbate what Held calls 'power disjunctures', impacting directly on the ability of other states to guarantee the rights of their citizens to welfare, economic prosperity and environmental quality. In short, global interconnectedness introduces asymmetries between individual policies, the

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<sup>39</sup>Weiler et al., 'Democracy', p. 30.

<sup>40</sup>Weiler et al., 'Democracy', pp. 25-37.

<sup>41</sup>D. Held, Democracy and the Global Order (Cambridge, Polity Press, 1995).



population which consents to their effects, and the inclusivity of the voting population (the *demos*) which legitimates their introduction. Only through international law and a drastic reconsideration of what we mean by constituency are these asymmetries adequately addressed.

In cases of transboundary pollution the model clearly undermines the democratic legitimacy of individual national policies, and lends considerable support to EC, if not global regulation. Similarly, in situations where national environmental standards impede neighbouring states' pursuit of economic prosperity by encouraging investment and job migration to pollution havens, cosmopolitan democracy would suggest that action as close as possible to the citizen should give way to Community standards.<sup>42</sup>

Nevertheless, it does not follow that in all cases the subsidiarity principle justifies EC environmental action as a democratically better alternative to strictly national policy, and even here the two-faced nature of subsidiarity reasserts itself. Held's model allows ample room to argue that in the name of democratic legitimacy the subsidiarity principle requires a transfer of control over environmental protection from EC to national level. Power disjunctures requiring international rectification only occur in cases where environmental issues are transboundary in nature. In other cases, it appears that Held would support national environmental laws which fostered all of the traditional values bound up in liberal representative democracy, and implicit in the subsidiarity provisions of the Maastricht Treaty. If, as noted previously, many types of environmental regulation do not actually involve transboundary issues, pollution havens really do not exist, and competitive advantages do not flow to states with low environmental standards, then proponents of EC regulation are faced with the unenviable task of defending Community laws which lack democratic legitimacy even under a contemporary model which frequently

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<sup>42</sup>Dahl also notes the need to consider the effects of decisions made by any autonomous organisation on the "rights, freedom or welfare" of non-members and the possibility that these matters might justify restrictions on national autonomy. Dahl, *Dilemmas*, p. 93.



identifies the international level as 'the appropriate locus for the articulation of the democratic political good.'<sup>43</sup>

In summing up the continuing importance of democracy in the modern interconnected world, Held himself provides a concise justification for applying the subsidiarity principle in a manner which increases national sovereignty over environmental policy: 'The issues which rightly belong to national levels of governance are those in which people in delimited territories are significantly affected by collective problems and policy questions which stretch to, but no further than, their frontiers.'<sup>44</sup>

### Empirical Evidence

The subsidiarity principle has already made an impact on the distribution of power over environmental policy between the EU and the member states. As mentioned above, we would expect that when operationalised, the subsidiarity principle could potentially produce fewer EU environmental proposals, a removal of some previous as well as pending proposals, and a general shift in EU environmental proposals towards greater national discretion.

#### *Reduction and Withdrawal of EU Proposals*

The Commission itself admitted that the subsidiarity principle had 'already led to a reduction in the number of proposals put forward by the Commission in 1993 compared with previous years.'<sup>45</sup> This reduction only accelerated in the following two years--the total number of Commission proposals from 1992 onwards was as follows:<sup>46</sup>

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<sup>43</sup>Held, 'Democracy', p. 225.

<sup>44</sup>Held, 'Democracy', p. 235; Dahl reaches a similar conclusion about the democratic legitimacy of decisions which produce limited effects. See Dahl, 'Dilemmas', p. 196.

<sup>45</sup>European Commission Report, p. 4.

<sup>46</sup>Although there was a levelling off of Commission proposals as early as 1989, followed by a slight decline through 1991, all of which reveals the influence of factors other than subsidiarity, it is unclear whether the downward trend would have continued, certainly at such a precipitous rate, without the introduction of the subsidiarity principle. The 1992 total



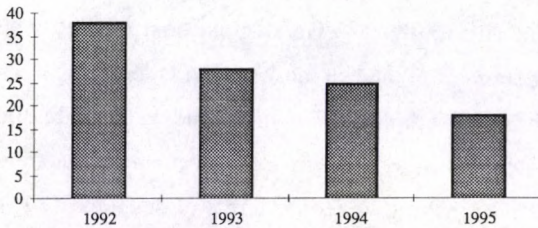
FIGURE 2 Number of Commission Proposals 1992-1995

1992	1993	1994	1995
656	628	533	375

*Source: Compiled from the official Journal of the European Communities, using the CELEX database*

The reduction of Commission initiatives is particularly striking in the area of EC environmental proposals. Compared with the steady growth of environmental proposals after the SEA, as shown in the earlier graph, it appears that the subsidiarity principle has significantly stemmed Commission legislative activity in this area, as revealed in the following graph.<sup>47</sup>

FIGURE 3 Number of EC Environmental Proposals 1992-1995



*Source: Compiled from the Official Journal of the European Communities, using the CELEX database*

Besides reducing its total legislative output, the Commission has also withdrawn or modified a number of environmental proposals. To date it appears that Britain has had the greatest success in preventing Community environmental action, despite fierce resistance from the European Parliament. Britain deployed the subsidiarity argument to secure the removal of several proposals on its 1993 'hit-list', and played an instrumental role in blocking the carbon tax on similar grounds.<sup>48</sup>

had slightly exceeded that of 1991, signalling the possibility of renewed Commission activity.

<sup>47</sup>Figures include directives, regulations and decisions. Current data for 1995 may indicate a slightly higher figure, due to Commission administrative backlog when entering recent data into the CELEX database.

<sup>48</sup>See J. Golub, 'The Pivotal Role,' pp. 31-36, *Agence Europe* 7/8 December 1992.

### *Increased National Discretion*

The intensity/proportionality component of subsidiarity holds that when the EU does take action, it should do so only to the extent necessary. This implies that the EU should adopt instruments which maintain as much discretion as possible at the national level, thereby minimising incursions on national sovereignty and national choice of policy styles. Regulations and other detailed or binding measures should be avoided, whereas framework directives, soft law and voluntary codes should be encouraged.

In practice it appears that this aspect of subsidiarity has already made an impression on the development of EU environmental policy. A considerable degree of discretion and flexibility has been built into Community environmental policies on packaging waste, eco-audits and voluntary action by industry to control pollution.<sup>49</sup> Greater national discretion is also clearly evident in the Commission's recent moves towards replacing a range of existing legislation with framework directives for air and water pollution. Under these frameworks, states will enjoy greater control over standard setting.<sup>50</sup> In each of these cases, decisionmaking under the terms of subsidiarity has consolidated rather than eroded national control over environmental policy.

### **Conclusion**

The primary aim of this paper was to explore how the Janus-faced concept of subsidiarity could be used either to legitimate EU environmental policy or to undermine supranational decisionmaking. Taken in the abstract, subsidiarity justifies EU environmental intervention whenever this is deemed 'better' than strictly national action. But without clear criteria to guide its application, the term 'better', and with it the entire subsidiarity principle, merely

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<sup>49</sup>See 'European Commission Report' and Agence Europe 17 December 1993.

<sup>50</sup>Europe Environment 25 October 1994, 10 January 1995.



degenerates into a rhetorical football. An attempt was thus made to identify the conditions under which each of these two faces should prevail.

There is broad agreement that EC intervention is inherently better than individual national measures when dealing with transboundary pollution or environmental standards which distort economic competition and affect the functioning of the common market. Many types of pollution fall into this category, as do product standards. In all of these cases, subsidiarity provides a powerful justification for continued or expanded EU control over national environmental affairs.

However, a number of considerations, particularly the Commission's recent emphasis of green competitiveness, call into question the actual extent of transboundary pollution and market distortion. If unable to meet these two central criteria, the subsidiarity principle would demand that control over process standards, impact assessment and a range of other environmental issues be returned to national governments, especially for states on the periphery of the Union. Furthermore, even when these criteria are met, subsidiarity implies that EU environmental laws should bind only those states where a specific problem occurs, and that in doing so it should leave as much scope as possible for national discretion over the choice of policy instruments.

Although member states may unanimously decide that the EU should enjoy authority over environmental matters which pose no transboundary or market distorting harms, it remains essential to consider whether the subsidiarity principle may also legitimate a decision to move beyond these categories despite national opposition. It is hard to escape the conclusion that because of their greater democratic legitimacy, a value inexorably linked with the subsidiarity principle, national environmental laws are inherently better than EU intervention. To overcome the force of this argument, proponents of supranational action must identify aspects of EU environmental regulation which make it preferable despite a lack of democratic legitimacy--reasons why

action should not be taken as close as possible to the citizen, as required by the treaty. Alternatively, proponents of integration could capitalise on the Janus-faced nature of subsidiarity and support EU environmental policy as actually more democratically legitimate than national laws, when viewed through a contemporary model of democracy suited to a world of highly interconnected states.

As far as which of the subsidiarity principle's two faces has prevailed in political discourse, available evidence suggests that subsidiarity has already returned a significant amount of sovereignty to the states by curtailing the number of new EU proposals, removing certain proposals from the agenda, and amending others to allow greater national leeway. Britain has been particularly successful in this regard, securing removal and amendment of proposals which the Government has long opposed. The Government's recent success contrasts with its previous failed efforts to deploy subsidiarity as a brake on EU environmental policymaking.





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