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Title
Policy Paper 53: European Legal Integration and Environmental Protection

Permalink
https://escholarship.org/uc/item/799928k5

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Publication Date
2000-06-01

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CONTENTS

List of Tables

EUROPEAN LEGAL INTEGRATION AND ENVIRONMENTAL PROTECTION

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Introduction

This paper examines how the European Court of Justice (ECJ) has operated to expand the integration project and has done so by serving as a forum for transnational political action by domestic and supranational policy actors. In particular, I study this integrative dynamic through the evolution of environmental protection policy in the European Union (EU).[1] The purpose of this analysis is to reveal how the Court's construction of supranational norms operates to fuel the integration process, and often in opposition to national government preferences. The data presented in this analysis pertains to Article 234 (ex Article 177) of the European Community (EC) Treaty. By studying this process, I am able to reveal not only the role of the Court in creating European environmental laws, but the integral role that both national judges and private litigants (individuals and interest groups) play in deepening integration. This study focuses specifically on the environment policy sector, yet provides a general framework for examining the case law in subsequent policy areas, with the purpose of providing a more nuanced understanding of European integration.

In the last forty years, we have witnessed the evolution of an unprecedented form of supranational governance in western Europe. The European Court of Justice has played a powerful role in this transformation. The Court's activism in the 1970s is now widely accepted as having transformed the Treaty of Rome, an international treaty governing nation-state economic cooperation, into a "supranational constitution" granting rights to individual citizens (Lenaerts 1990; Mancini 1991; Stone 1995; Stone Sweet and Brunell 1998a; Weiler 1981 and 1991).

An earlier draft of this paper was presented at *The Future of Europe*, IGCC/MacArthur Scholars Research Seminar, 12–13 April 1999, Washington, D.C. An earlier version of this paper appeared in the *Journal of European Public Policy* (see Cichowski 1998).

[1] I use the term EU consistently throughout this paper to refer to both present day institutions and activities, and also those occurring prior to the Treaty of European Union (1992) under the auspices of the European Community.

The EC Treaty stands today as the backbone of a supranational legal regime governing not only transnational free trade issues, but domestic environmental protection standards. The ECJ's role in this transformation poses a unique puzzle for scholars and policy experts engaged in questions of European policy integration. *Can nation-states retain full control over supranational policy outcomes once they construct and empower supranational institutions?* The answer remains the subject of serious contention between scholars and practitioners interested in understanding the impact of the ECJ on European integration.

This study is of particular interest to practitioners examining European policy-making as it reveals new avenues and arenas for citizen participation in the process. The recommendations in this study are consistent with recent studies demonstrating and promoting the powerful role that both supranational institutions and transnational actors have in the integration project (Alter 1996 and 1998; Burley and Mattli 1993; Cichowski 1998; Mattli and Slaughter 1995 and 1998; Stone Sweet and Brunell 1998a,b; Stone Sweet and Caporaso 1998). Furthermore, environmental protection presents an interesting test case. This sector reveals the unintended consequences of ambiguous or lowest common denominator European policy positions and also the inherent conflicts between "new" EU policy areas and the internal market. Process tracing enables me to test not only the impact of national government preferences on the Court's judicial decisions, but also the effect that private citizens and national courts have on European policy integration. The Article 234 (ex Article 177)[2] procedure allows (and in some cases requires) national judges to ask the ECJ for a correct interpretation of EU law if it is material to the resolution of a dispute being heard in a national court. Scholars and policy experts alike now recognize the importance of this procedure, as it was primarily through the Court's Article 234 case law that the Treaty was "constitutionalized." Furthermore, Community-wide awareness of this procedure has also escalated as Article 234 references now comprise the majority of the Court's case load (Stone Sweet and Brunell 1998a).

This paper contributes to a growing body that strives to create a more nuanced understanding of both European integration and the larger processes of international policy-making (for example, Sandholtz and Stone Sweet 1998; Stone Sweet and Sandholtz 1997). In particular, this study demonstrates how the ECJ operates to expand the integration project by serving as a forum for transnational political action by domestic and supranational policy actors. I study this integrative dynamic through the evolution of environmental protection in the European Union. My purpose is two-fold. First, I examine the evolution of the Court's Article 234 case law in this policy sector, focusing on outcomes. In particular, I evaluate whether the policy preferences of national governments have significantly impacted the Court's decisions. Second, I examine the extent to which the tensions embodied in EU environmental policy have facilitated a dynamic relationship between the Court, private litigants (including interest groups) and national courts, leading to the expansion of supranational policy competence. Specifically, I am interested in determining the extent to which the policy process operates outside the reach of national government control.

Policy Context and Theoretical Perspectives

The following section develops a set of hypotheses that will guide the empirical analysis presented in this paper. First, I will review the state of environmental policy in the European Union, bringing attention to the two main tensions characterizing this policy sector. In the second part, I review the current theories of legal integration in order to highlight their main issues of contention regarding the Court's role in European policy integration. From this examination, I develop a set of testable hypotheses derived from a modified neo-functional theory.

EU Environmental Policy

Despite an enthusiasm for a European-wide environmental protection plan, EU environmental policy poses a challenge to the goals of the single market and the varying national environmental goals (Vogel 1993). Because of this, EU environmental policy has embodied a set of conflicting tensions:

1. the development of EU environmental protection standards versus the preservation of free trade policies; and
2. the creation of unified Community environmental standards versus preserving a member state government's national environmental standards (Demiray 1994: 73).

[2]Article 177 will be referred to by its new number, Article 234, throughout the rest of the article.

Stated simply, the tensions involve competing European policy priorities—developing environmental protection or preserving internal market policies—and the ultimate location of policy-making competence, either at the national or supranational level.

The first tension is typified by the conflicts that arise when the transposition of an EU environmental law, such as one to establish a waste disposal scheme, creates a barrier to those individuals, such as waste collectors, who transport their goods across member state borders. An example of the second tension is the conflict that arises when a member state, such as the Netherlands, implements an EU wildlife protection law in a stronger manner compared to other member states. While the EU law allows such strict national interpretations, ultimately the policy competence is shifted entirely to the supranational level as conflicts arise from these varying national transpositions.

The origins of EU environmental policy are not traceable to a rule set out in the Treaty of Rome. The original three treaties lacked any mention of the "environment," an unsurprising fact, as ecological sensibilities were not commonplace in 1957. However, with a growing awareness of environmental degradation in the 1970s, member state governments realized there was a need to safeguard the environment at the European level. As a result, through a series of directives and programs, environmental protection emerged as a policy area for the Community despite the absence of a constitutional basis. The tension between supranational and national policy competence was evident in these initial policy debates. Environmental directives and regulations required unanimous approval in the Council and, as a result, generally included provisions permitting stricter national policy. The legal basis for Community environmental protection remained weak and ambiguous. Furthermore, this policy area was conceived in economic terms, in which the need for supranational environmental policy was evaluated in terms of the functioning of the common market. However, these policy decisions failed to resolve the inherent conflict that would arise between stricter environmental protection standards and the Community's goal of removing barriers to free trade (Demiray 1994). As we will later see, this absence of a resolution in Community legislation does not inhibit, but rather provokes, the Court to construct a balance through its judicial decisions.

With the adoption of the Single European Act (SEA) in 1987, the Community amended the Treaty to include environmental protection: Title VII, Articles 130r through 130t and Article 100a of the Treaty (now Articles 174–76 and Article 95 under the Treaty of Amsterdam). The SEA required national laws and practices to be viewed in light of environmental ramifications. When feasible, member state governments must promote higher levels of environmental protection. The SEA also introduced qualified majority voting pertaining to the harmonization of national laws and established the structure for qualified majority voting within the Environmental Title (yet this remained merely a structure as Title VII still required unanimity voting).

The Maastricht Treaty in 1992 did not fundamentally change the SEA's environmental provisions, but instead re-emphasized their importance. Maastricht directs that environmental concerns "must be integrated into the definition and implementation of the Community's other policies" (Article 174, ex Article 130r). However, this provision does little to explain how member state policy-makers can reconcile the tensions between environmental protection and "other policies," especially those relating to the internal market. In addition, the Maastricht Treaty requires that "Community policy on the environment shall aim at a high level of protection" (Article 174, ex Article 130r). Thus, these amendments did little to solve the supranational and national policy competence conflict and instead, reaffirmed the tension. Title VII illustrates the EU's reach for community-wide environmental policy but at the same time preserves national government authority over environmental protection (as evidenced by Articles 95(4), ex 100a(4), and 176, ex 130t).

Finally, the Amsterdam Treaty in 1999 introduced the co-decision procedure in the area of environmental protection. This had the effect of further aligning Article 175 (ex Article 130s) with Article 95 (ex Article 100a), although the unanimity clause is still applicable to some areas. However, generally these changes strengthened the legal basis for Community environmental protection. The Amsterdam Treaty also added the concept of "sustainable development" into EC law. Scholars have argued that this formal inclusion "signals the commitment to ensure a prudent use of natural resources in order to take the environmental and economic interests of future generations, as those of the present ones, into account" (Krämer 1999, 7). The vague definition of sustainable development laid out in the Treaty perhaps embodies a Community ideal, yet falls short of providing precise legal instruments to implement this goal.

Today the European Union has adopted over 200 pieces of secondary legislation involving environmental protection. While this is a positive step to-

ward the creation of a comprehensive EU environmental program, the implementation of and commitment to such laws remains fragmented across member states (Chalmers 1999). Vague policy prescriptions and lowest-common-denominator policy decisions have enabled member state governments to interpret and implement these policies in accordance with their own national policy goals. Furthermore, it has also sometimes led to the non-enforcement of these transposed rules. The empirical analysis in this paper examines the unintended consequences of this ambiguity and the Court's impact on these outcomes.

Theories of Legal Integration

The theoretical debates surrounding European legal integration provide us with general expectations of how the Court functions to construct European policy. From these theories, I will develop a set of hypotheses pertaining to the conflicting pressures embedded in EU environmental policy. In particular, these hypotheses predict the general pattern of environmental litigation and the factors affecting the Court's judicial decisions.

The importance of the ECJ in the integration project is widely known and accepted by scholars, yet the dynamic surrounding the Court's activism remains contentious. The theoretical debates focus on who controlled this process. Specifically, what role have the Court, transnational society, and the member state governments played in integrating European policy sectors? Did ECJ judicial decisions consistently embody the policy preferences of member state governments or did the judicial outcomes reflect an independent integrative dynamic driven by the Court acting together with private litigants and national judges? These questions are answered quite differently by neo-functionalists and intergovernmentalists. Their central points of contention revolve around institutional autonomy and the impact of member state government preferences.

Mattli and Slaughter (formerly Burley) argue that the EU's supranational legal system results from a dynamic interaction between supranational and national judges and litigators (Burley and Mattli 1993; Mattli and Slaughter 1995). They claim that the "primary mechanism" expanding European law is the Court's ability to co-opt national judges and lawyers. This interaction creates a "community of actors above and below the state" which drives the integration project forward (Mattli and Slaughter 1995: 186). They assert that this dynamic operates autonomously from national government control to the extent that the Court has created a legal system which is often not in their interests. Furthermore, they argue that the Court acted autonomously throughout the construction of the European legal system. This is evidenced by the Court systematically ruling in opposition to member state government interests while constraining their ability to retaliate against these adverse rulings (Mattli and Slaughter 1995). These propositions are consistent with a neo-functional model of integration.

Similarly, Stone Sweet provides empirical evidence of the importance of transnational actors and the autonomy of the ECJ in the construction of the European legal system (Stone Sweet and Brunell 1998a; Stone Sweet and Caporaso 1998). His theoretical model is generally consistent with the modified neo-functional theory developed by Stone Sweet and Sandholtz (1997). The theory predicts integration in terms of three independent factors: transnational exchange; transnational litigation; and the production of Euro-rules. As the scope of European legislation widens, the avenues for transnational exchange are expanded. This expansion has led to an increase in legal disputes and ultimately provided the basis and opportunity for judicial law-making. Together these variables introduce an integrative dynamic which explains integration in terms of the autonomy of the Court, and the importance of national courts and private litigants in the integration project (see Stone Sweet and Brunell 1998a). In particular, this model is helpful in explaining the pattern of environmental litigation as it deals directly with the repercussions and conflicts that arise from the expansion of Community policy.

On the issue of autonomy, intergovernmentalists paint a considerably different picture of legal integration. Garrett argues that although the ECJ may seem to be acting against member state government interests, its jurisprudence actually reflects the preferences of powerful member state governments (Garrett 1995; Garrett, Kelemen, and Schultz 1998). Furthermore, Garrett argues that one can not reject intergovernmental accounts of European legal integration when powerful member state governments protest, but then subsequently accept ECJ decisions. Garrett offers no systematic evidence to support his conclusions, yet explains this outcome in terms of the "broader benefits" a member state gains through integration (Garrett 1995: 180). Similarly, Moravcsik argues that the ECJ's autonomy is most accurately understood in terms of its relationship as an agent of the member state governments (Moravcsik 1995 and 1998). His framework evaluates autonomy not in terms of the Court acting independently, but instead

evaluates how far the ECJ can extend the reigns of constraint that bind it to the member state governments. He acknowledges that the ECJ possesses considerable power, yet maintains that this power (or ability to act "autonomously") is "explicitly or implicitly" delegated by member state governments and thus can be retracted (Moravcsik 1995: 625).

The significance of member state government preferences is implicit in the above discussion of ECJ autonomy. Neo-functionalists generally argue that the interests of member state governments, while integral to the integration project, do not consistently constrain the Court. Burley and Mattli (1993) argue that the Court utilizes European law as both a "mask and a shield" to enable the Court to advance its own agenda. While the Court is subjected to the constraints imposed by the EU legal doctrine and legal reasoning, it utilizes these constraints to help hide and protect its integrative activism. Furthermore, Stone Sweet empirically demonstrates that national government preferences are not the significant factor driving the legal integration project (Stone Sweet and Brunell 1998a; Stone Sweet and Caporaso 1998). One must look to litigation generated by transnational society and the structure of European law to understand this integrative dynamic. Stone Sweet provides evidence that the Court consistently "functions not to codify the preferences of dominant member states, but to construct transnational society" (Stone Sweet and Caporaso 1998: 42).

Intergovernmentalists argue that the Court's case law serves to codify the policy preferences of the dominant member state governments. This is implicit (if not explicit) in the principal-agent frameworks they use. Garrett finds that the "decisions of the European Court are consistent with the preferences of France and Germany" and if they were not, the member state governments would have diminished the Court's power and reconstructed the European legal system (Garrett 1992: 556–59). These national preferences present a significant, if not dominant, position in an intergovernmentalist explanation of legal integration.

Predicting Environmental Article 234 Litigation

These opposing understandings of European legal integration provide a set of testable hypotheses upon which I can study the Article 234 process. This analysis will utilize a set of hypotheses derived from a modified neo-functional theory to predict the dynamic governing Article 234 environmental litigation. The following expectations are an elaboration of previous research generated from this theory[3] (see Stone Sweet and Brunell 1998; Stone Sweet and Caporaso 1998). In particular, I am concerned with how the Court and transnational society reacts to the inherent tensions in this policy area. I utilize variables emphasized by this theory, that of transnational society, both exchange and litigation, and the Court's autonomous law-making capacity. I expect the litigation to generally follow a predictable pattern:

1. Litigation will involve national environmental laws which present an obstruction to free trade. These include both national and EU environmental protection laws;
2. I also expect Article 234 references to attack national environmental norms which enshrine least integrative positions in comparison to other member states (either weaker or stronger implementations);
3. Finally, in the absence of a legal framework for balancing free trade and environmental priorities, I expect the ECJ to construct a balance for the Community when presented with a conflict. In constructing this supranational framework, I would also expect the Court to dismantle inconsistent national policy when given the opportunity and, in general, rule more favorably toward supranational laws which already embody integrative norms.

Generally, I expect the interaction between litigants, national courts, and the ECJ to lead to the expansive development of European environmental policy. Consistent with a modified neo-functional theory, I would also generally expect this dynamic to operate independently of member state government preferences and thus often in opposition to these preferences. As evidenced in previous research, the ambiguity and fragmentation inherent in EU policy has triggered a dynamic of litigation which has inevitably empowered both private litigants (including interest groups) and the ECJ (Stone Sweet and Brunell 1998a; Stone Sweet and Caporaso 1998). The Court has functioned to resolve these ambiguities and in doing so has shifted the authority over certain national policies away from member state government control. The following analysis of the environmental protection sector will allow us to empirically test this

[3]For the sake of brevity, the theoretical basis for these hypotheses will not be further elaborated in this paper. Please see Stone Sweet and Brunell 1998a for a detailed explanation of the factors underpinning this theory.

dynamic against the assumptions of intergovernmentalists.

Methodology

The data utilized in this analysis includes all Article 234 environmental litigation from 1976 (the first case) to 1998.[4] The Article 234 procedure, as mentioned earlier, involves the ECJ clarifying the compatibility of a national law with European law. The national court sends a 'reference,' a question or set of questions, asking for an interpretation of EU law, often in reference to its transposition into national legislation. Formally, Article 234 does not enable the ECJ to directly rule on the compatibility of national rules with EU law. However, the practical reality of the ECJ's interpretation of EU law, in a context determined by national legislation, is often a determination of the validity of these national laws (see de la Mare 1999). The ECJ's response is delivered in the form of a 'preliminary ruling' and must be applied by the national judge to resolve the dispute. Integral to this procedure are 'observations,' which are written briefs filed by the Commission and the member state governments (regardless of whether the case originates in their legal system) stating how they believe the case should be decided.

I coded the data in the following manner. The references were all coded by country of origin and EU law pertaining to the case. After examining all of the Court's judgments included in the time period of this study, I coded the rulings into two categories:

1. either the Court had accepted a national rule or practice as consistent with EU law; or
2. it was declared to be inconsistent with EU law.

The written observations were also coded into two categories:

1. either an observation was successful, or
2. unsuccessful at predicting the ECJ's final ruling.

For example, consider a case involving the compatibility of a French environmental law; if the British government filed an observation stating the French law was compatible with EU law and the ECJ ruled that it was incompatible, then the British observation would be coded as unsuccessful. The first measure gives us a general picture of whether the Court functions to preserve national policies or develop supranational policy. And together these two measures reveal the impact of member state government preferences on ECJ rulings.

I am also interested in how the outcomes of ECJ rulings differed when the litigation involved national laws, nationally implemented (or transposed) EU laws and both EU environmental and free trade laws. The environmental Article 234 cases followed three patterns. The ECJ is asked to decide whether:

1. a national environmental law is compatible with an EU environmental law;
2. a member state government's implementation of an EU environmental law is compatible with the intentions of European environmental policy;
3. a member state government's implementation of an environmental EU law is compatible with EU free trade laws.

Each case is coded in terms of one of these outcomes. This will give us an indication of whether the ECJ favors the development of European laws over national laws. This analysis will also reveal which member state governments are being targeted by environmental litigation. Important questions will be raised: Are their environmental laws too strict or too weak in comparison to the European norms they are meant to enshrine? Or are their domestic environmental practices barriers to free trade?

Data Analysis

Table 1 details the EU laws that were invoked in these Article 234 cases. This gives us a general picture of which laws are being subjected to litigation over time. The majority of cases pertain to the Waste Framework Directives (Council Directive 75/442, later amended by 91/156), the Wild Bird Directive (Council Directive 79/409), and free movement articles of the Treaty (Articles 30–36). This pattern of

[4]These data are taken from a larger set which includes all of the Article 234 references from 1961 to mid-1998. See Stone Sweet and Brunell 1998a,b).

Table 1. European Union Laws Invoked in Article 234 References in the Environmental Policy Area, 1976–1998

EU environmental laws	Total references
Dangerous Substances	
CD 67/548	1
CD 79/831	1
CD 79/117	1
CD 76/769	2
CR 3093/94	1
Total	6
Environmental Impact Assessment and Consumer Information	
CD 85/337	4
CD 90/313	2
Total	6
Nature Conservation	
CD 79/409	6
Total	6
Noise Pollution	
CD 80/51	1
CD 83/206	1
Total	2
Waste	
CD 75/442	13
CD 75/439	4
CD 76/403	1
CD 78/319	3
CD 91/156	31
CD 91/689	7
CR 259/93	11
Total	70
Water	
CD 76/464	3
CD 78/659	1
CD 80/778	1
Total	5
Other EU Laws	
Article 30-36 (free movement of goods)	9
Article 102 (economic and monetary policy)	5
1968 Convention on Jurisdiction	1
Fishing Interim Measures	6
CR 554/81, 1569/81, 1719/80, 2527/80, 3305/80, 1177/79, 2897/79, 541/80	

Note: Total references column denotes the number of times an EU law is invoked in Article 234 proceedings.

CD = Council Directive CR = Council Regulation

Source: Data provided by the European Court of Justice.

litigation is not surprising. While waste management has stood as a considerable priority for Community legislators, the Waste Framework Directives offered a general rather than specific definition of waste (the results of unanimity voting) which led to inconsistent transpositions and introduced uneven burdens on competition (Chalmers 1994). As a modified neofunctional model would predict, litigants attacked the domestic transpositions of these directives to the extent that these rules served to obstruct free trade. This ambiguous definition also led to varying national interpretations as to what constituted waste. The liti-

gants in these cases demanded a clarification of these European norms and in effect initiated the progressive development of European waste policy.

The Wild Bird Directive (Council Directive 79/409) introduces a similar dynamic. The birds protected under this directive are clearly defined, but the directive allows a stricter implementation by individual governments (a compromise which was essential for a unanimous vote). Member state governments implementing a strict version of this directive were often simultaneously constructing barriers to free trade. These countries were then subjected to litigation which led to the clarification of the European law. The balance between environmental and free trade priorities remains ambiguous at the Community level, and such directives have given the Court the opportunity to develop a case law which constructs such a framework. Environmental interest groups have exploited the ambiguities in this directive to force stricter protection laws in legal systems which possess weak interpretations of the directive.[5]

Table 2 provides a general picture of how this litigation has developed cross-nationally and by the EU laws invoked in the cases. This demonstrates not only which countries are receiving the bulk of the litigation, but which EU laws are continuously the subject of litigation. Immediately, one is drawn to the numbers associated with Italian Article 234 references involving the EU waste directives. Sixty percent of all references involved the waste directives and out of these, eighty percent originated from Italian courts. These cases were the subject of criminal proceedings brought against individuals involved with the management, treatment, and disposal of waste. The Italian government has been criticized for its delinquent im- plementation of EU waste laws (Guittieres and Sikabonyi 1997). These criticisms were largely a result of the Italian government's failure to bring into force a series of waste management proposals. Furthermore, there were significant conflicts embedded in these proposals over enforcement responsibilities (federal versus Italian regional authorities). This litigation asked for a clarification that was currently lacking in both the EU waste directives and the Italian interpretation of these laws.

Have ECJ rulings generally preserved national laws, or do these decisions favor the construction of supranational norms? Table 3 provides an overview of the Article 234 reference pattern by the Court's rulings. I find that clearly the bulk of these cases, 87 percent, are divided between questions asking the Court to decide on the compatibility of a national environmental law with a European law or whether an environmental directive was transposed correctly. These data also reveal a Court that does not hesitate to dismantle national laws when given the opportunity. In cases where a national law was in question (18), the Court found the national practice to be inconsistent with European law in 72 percent of these cases. The data also reveal that the Court is far less likely to alter a transposed directive than an original national law. In cases where the Court is asked whether a transposed directive is compatible with a European law (15), the Court finds these transpositions inconsistent in only 13 percent of these cases. The Court was asked in five cases to balance EU environmental protection and free trade norms, and in 60 percent of these cases the Court rules in a direction which favors free trade laws. These data reveal a Court which has generally looked skeptically at national environmental policy, and more favorably toward integrative Community free trade priorities.

Between 1976 and 1998, the ECJ made 38 environmental Article 234 preliminary rulings. From the data in Table 4, we can see that of these decisions, the Court declared violations (the national practice was inconsistent with EU law) in 19 (50 percent) of the cases. The ECJ considered the lawfulness of French practices in 10 rulings, declaring violations in 4 (40 percent). Aggregating results from litigation involving "powerful member state governments" (France, Germany, Italy and the UK), the Court declared violations in 12 (48 percent) of the decisions. These data give some preliminary indication that those national legal regimes that enshrine the least integrative rules will be attacked by Article 234 references. Together France and Italy received over half of all the litigation in this policy sector. This is not surprising. France has historically favored intergovernmental cooperation rather than an integrative Community policy on the environment and thus its administrative practices embody this non-integrative position (Demiray 1994). Similarly, while Italy tends to agree to rather strict Community measures in the Council, they do so with the intention that they will not have to fully implement the EU laws (Rehbinder and Stewart 1985). This pattern also holds when

[5]See case 435/92 [1994] ECR 65 and case 10/96 [1996] ECR 6775.

Table 2. Article 234 Environmental References by Country and Sector, 1976–1998

	Total references	Env. assess./ information	Dangerous substances	Nature	Noise	Waste	Water	Other	Free movement goods
Belgium	4			1		2		1	
Denmark	2					1		1	1
France	10			2		4		4	3
Germany	6	3	1		1	1			1
Italy	50	1	2	1		43	3		1
Netherlands	15	2	1	2		4	2	4	3
Sweden	1	1							
United Kingdom	4			1			1	2	
Totals	92	7	4	7	1	55	6	12	9

Source: Data provided by the European Court of Justice.

Table 3. Pattern of Article 234 Environmental References by Judicial Outcome, 1976–1998

	Reference pattern			
Judicial outcome	National environmental law versus EU law	Transposition of directive	EU environmental law* versus EU free trade law	Total cases
Inconsistent with EU law	13	2	3	18
Consistent with EU law	5	13	2	20
Total cases	18	15	5	38

*The judicial outcome for these cases is read as either "inconsistent with EU free trade law" or "consistent with EU free trade law."

Source: Data compiled from the *European Court Reports.*

looking at legal systems that possess stricter environmental laws. Almost one quarter of the references attacked Dutch laws as a result of strict environmental codes which cause obstructions to free trade. These data confirm the hypothesis that litigants will attack national legislation that functions as a hindrance to free trade. Also, to the extent that a member state possesses least integrative environmental norms (weaker or stronger implementations of EU laws), I find that these legal systems are subjected to Article 234 litigation.

The findings also reveal that the Commission's observations predicted ECJ rulings far better than did observations filed by member state governments. The data presented in Table 5 reveal that the Commission's success rate is 97 percent, as 37 observations predict the direction of the final ruling. The United Kingdom's rate of success was much lower in comparison at 27 percent. Similarly, French preferences only predict ECJ judicial decisions 45 percent of the time. It is interesting to note that while Italy's success rate is high (70 percent), in 3 of its observations the Italian Government actually filed an observation which stated it believed their national law was inconsistent with EU law (government preferences in all other cases take a stance to defend or preserve national law) and the ECJ concurred. In general, the findings presented in Tables 4 and 5 bring into question claims that the preferences of the most powerful member state governments constrain the Court in a systematic manner. The findings are also congruent with the view that the EU's supranational institutions operate to push the integration project forward.

Process Tracing

These data reinforce theoretical predictions which argue that the preferences of powerful member state governments do not generally constrain the Court's judicial outcomes. The patterns of environmental

Table 4. Judicial Outcomes Pursuant to Article 234 References in the Environmental Policy Area, 1976–1998

	Consistent with EU law	Inconsistent with EU law	Total
Belgium	1	3	4
Denmark	1	0	1
France	6	4	10
Germany	0	1	1
Italy	6	5	11
Netherlands	4	4	8
United Kingdom	1	2	3
Total	19	9	38

N = 38

Note: Outcomes were coded as "consistent" if the ECJ declares the national rule or practice as consistent with EU law, and "inconsistent" if the ECJ declares the rule or practice to be inconsistent with or in violation of EU law. Formally, Article 234 does not enable the ECJ to directly rule on the compatibility of national rules with EU law. However, the practical reality of the ECJ's interpretation of EU law, in a context determined by national legislation, is often a determination of the validity of these laws (see de la Mare 1999).

Source: Data compiled from the *European Court Reports*.

references and the subsequent judicial rulings reveal the Court's active participation in the integration project. These data gave us a general picture of the dynamic driving this litigation. To understand more precisely how this litigation developed and how the Court addresses the two tensions inherent in this policy sector, I rely on the content of the case law. In the first set of cases, the Court balances two policy priorities: environmental protection and free trade. The second set of cases examines how the Court rules when confronted with a conflict between supranational and national policy competence.

Environmental Protection Versus Free Trade Policy

The Court first dealt with the tension between environmental and free trade priorities in the *Inter-Huiles* case.[6] The plaintiffs in the case, a group of 14 French waste oil collectors, brought an action before a French

Table 5. Member State Government Observations and Judicial Outcomes Pursuant to Article 234 References in the Environmental Policy Area, 1976–1998

	Successful	Unsuccessful
Belgium	1	3
Denmark	2	0
France	9	11
Germany	2	1
Italy	7	3
Netherlands	7	3
United Kingdom	3	8
The European Commission	37	1

Note: Observations were coded as "successful" when their argument, to the effect that the national rule is consistent or inconsistent with EU law, agrees with the ECJ ruling and "unsuccessful" when their argument, to the effect that the national rule is consistent or inconsistent with EU law, disagrees with the ECJ ruling.

Source: Data compiled from the *European Court Reports.*

French Tribunal charging that another group of waste collectors was operating in violation of the French law implementing Council Directive 75/439. This waste oil provision allows national authorities to create zones for the disposal of waste. The defendant countered these charges by claiming that the French waste collection system presented a restriction to the import and export of waste oil. The Court concurred and ruled that the French law, which prohibited the export of waste oils to a disposal center authorized by another member state government, violated the free movement of goods provision of the Treaty. The Court reaffirmed the Community's commitment to environmental protection, but warned "such a right does not automatically authorize the governments of the Member States to establish barriers to exports" (Paragraph 11). The Court upheld free trade norms by ruling that the French scheme was over burdensome to accomplish the stated environmental goals of the directive. This case typifies a series of waste rulings in which the Court systematically dismantles national environmental regulations that create an obstruction to transnational exchange.[7]

A subsequent ruling reveals a Court that will not blindly dismantle all environmental regulations that come in conflict with free movement priorities. Instead the Court develops a proportionality test for balancing these decisions. Even before the SEA, the

[6]Case 172/82 *Syndicat National des Fabricants Raffineurs d'Huiles de Graissage and Others* v. *Groupement d'Intérêt Économique "Inter-Huiles" and Others* [1983] ECR 555.

[7]Case 295/82 [1984] ECR 575, case 380/87 [1989] ECR 2491, and case 37/92 [1993] ECR 4947.

ECJ ruling in the *ADBHU* case[8] held that the protection of the environment was "one of the Community's essential objectives" which may justify certain limitations of the free movement of goods principle provided they do not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection" (Paragraph 13 and 15). The case involved an action brought by the French Public Prosecutor against an association which defends the interests of manufacturers, dealers, and users of stoves and heaters utilizing fuel oil and waste oil. The association was charged with promoting the burning of waste oil, an objective which was argued to be contrary to the French law which transposed Council Directive 75/439. The association objected and argued that this waste oil disposal scheme obstructed the basic meaning enshrined in the principles of freedom of trade, free movement of goods, and freedom of competition.

The Court reaffirmed the importance of the free movement principles, and declared that the directive must be interpreted in "light of those principles." However, the ECJ revealed that these principles could be limited by others. The test can be stated as: (1) for environmental protection to obstruct the free movement of goods, it must constitute a fundamental Community goal—a requisite the ECJ had no problem finding;[9] and (2) that the principles of proportionality and non-discrimination are observed, if restrictions of free movement are necessary. Similar to the *Inter-Huiles* case, the ECJ re-emphasized that the directive was not intended to obstruct intra-Community trade, however it did allow for the creation of a zoning system whose goals could not otherwise be achieved. The Court ruled in favor of the French zonal system, and found that to the extent it did restrict trade, it was not discriminatory nor went "beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection" (Paragraph 15). This case reveals that the ECJ will permit restrictions on intra-Community trade that are non-discriminatory, narrowly tailored, and proportional to the goal sought.

The ruling in *ADBHU* reveals the Court's calculated incorporation of environmental priorities into a supranational context, even before this was decided by member state governments at the same time it re-emphasized free movement priorities. In paragraph 12 of the judgment, the ECJ observed "that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community, provided that the rights in question are not substantively impaired." The last part of this wording seems to imply environmental interests are important, yet remain of secondary importance. Furthermore, scholars have also observed that this ruling emphasized the superiority of free trade norms, even when more strict environmental regulations are needed or desired by a member state (see Jans 1995). As mentioned earlier, the original waste directives were vague provisions. The Court did not hesitate to clarify these provisions and in doing so progressively expanded EU competence in this policy area.

The Court continues this line of expansive rulings in an Article 234 reference which targets a national environmental law possessing stricter standards of bird protection than the regulations found in other member states. The Court's position is exemplified in a case originating in the Netherlands, *Gourmetterie Van den Burg*.[10] The reference originated from a Dutch appellate court in which the plaintiff was appealing the charge that he had wrongfully imported a bird species that was protected by the Dutch law implementing Council Directive 79/409. The plaintiff argued that the Dutch interpretation of the EU law presented an obstruction to the free movement of goods. Since Article 14 of the directive permits stricter implementation, the legal question revolved more particularly around whether the Netherlands' preventing the importation and consumption of a wild bird, a grouse, lawfully hunted in the United Kingdom was simply too strict. In short, the ECJ ruled that a member state government cannot extend its laws to protect species falling outside the concerns of the directive and particularly when that species fell within another member's territory. While the directive originally allowed for the stricter implementation of environmental protection, the Court does not hesitate to amend this right if it infringes too deeply on free trade.

National Versus Supranational Policy Competence

The previous cases dealt with environmental issues in a free trade context and revealed the Court dismantling national obstructions to the free movement of goods. These cases also illustrated that the Court operates to balance environmental protection and

[8]Case 240/83 *Procureur de la République* v. *Association de Défense des Brûleurs d'Huiles Usagées* [1985] ECR 531.

[9]The ECJ found that "the directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives. . . . " (Paragraph 13).

[10]Case 169/89 *Criminal Proceedings against Gourmetterie Van den Burg* [1990] ECR 2143.

trade issues, while replacing national laws. The following cases examine how the Court rules when confronted with a conflict between supranational and national policy competence. While this tension is also prevalent in the first set of cases, Court's participation in expanding supranational policy competence is revealed more clearly in the Article 234 references which pertain solely to the tension between national (this includes transpositions of EU law) and EU environmental policies.

Handelskwekerij GJ Bier v. *Mines de Potasses d'Alsace*[11] presents an ECJ ruling which has had considerable influence on future environmental litigation in the Community. This case brings into question the issue of jurisdiction in environmental litigation. The case involves the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the 1971 Protocol governing its interpretation by the ECJ. Article 5(3) of the Brussels Convention confers jurisdiction in matters "relating to tort, delict or quasi-delict" on the courts of the place "where the harmful event occurred." By way of an Article 234 reference from the Appellate Court of the Hague, the ECJ was asked to interpret the "where the harmful event occurred" clause. The defendant in the case allegedly discharged 10,000 tons of chloride every twenty-four hours into the Rhine River. The ECJ ruled that Article 5(3) "must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it" (Paragraph 24).

This progressive interpretation of Article 5(3) not only reversed the original Dutch court decision, it expanded the jurisdiction intended by the Brussels Convention. This ruling enables victims of transboundary pollution to choose the jurisdiction in which they want to bring tort; either in the country in which the damage was suffered or the country in which the event giving rise to the damage occurred. As member states possess varying rules regarding right of standing, environmental protection, legal costs, and time delays, legal scholars argue that this ECJ ruling allows the possibility of forum shopping for interest groups wishing to bring proceedings against polluters (Sands 1990).[12] The Court's ruling empowered both supranational norms and transnational activity and in doing so diminished member state government control over environmental policy decisions.[13]

The final case included in this study provides an understanding of the Court's current position and aggressive role in positive integration in the area of environmental policy. The ECJ has progressively developed and continues to expand the scope of the main waste directives: Council Directive 75/442 and Council Directive 78/319. In the *Zanetti* cases,[14] an Italian Magistrates Court asked the ECJ to decide whether "waste" as defined by Directive 75/442 included reusable materials. The case involved the prosecution of road haulers, who were transporting used hydrochloric acid for reuse in the production of ferric chloride. They were transporting the material without permission from the regional administration. The Italian waste disposal system resulted from implementation of the waste directives, and it included mandatory authorization to transport waste.

While agreeing that the substance was hazardous, the defendants claimed it was not waste, as they had no intention of abandoning it, and therefore they could not be prosecuted under the Italian law. The Court did not concur. Instead, the ECJ found that "substances and objects which are capable of economic re-utilization" are included within the meaning of waste as defined in Article 1 of Directive 75/442 (Paragraph 13). The significance of this ruling lies in the Court's expansive definition of "waste," which now widens the jurisdiction of materials subject to EU environmental law.

Rulings such as the *Zanetti* case will be welcomed by environmental interest groups, as they widen the scope of material subjected to EU regulation. Groups are given a new legal basis to pursue stricter environmental protection through national courts. Scholars agree that the *Zanetti* cases indicate that the ECJ will not shirk from taking a wide and purposive approach to the interpretation of EU environmental legislation, even when the outcome is costly for member state governments (Sands 1990; Chalmers 1994). This case also exemplifies how directives possessing vague norms will inevitably be subjected to litigation and the Court's progressive rulings. The Court shifts the policy authority away from member state governments regardless of the

[11]Case 21/76 *Handelskwekerij GJ Bier* v. *Mines de Potasses d'Alsace* [1976] ECR 1735.

[12]The ECJ has since clarified its interpretation of eligibility on long-arm jurisdiction, stating that it is only available to victims of direct harm. See Sands 1990.

[13]While torts are not (directly) aimed at government policy, rather at the behavior of private parties, judicial rulings can have the effect of changing the national rules governing behavior more generally.

[14]Joined cases 206 and 207/88 *Vessosso and Zanetti* [1990] ECR 1461 and case 359/88 *Zanetti and others* [1990] CR 1509.

national costs that may occur due to the ruling. Yet, this ruling did not offer a final resolution to the conflicts arising from the EU waste directives and Italian practices. Instead, it is was merely the beginning.

Since 1987, Italian national courts have sent 43 Article 234 references to the European Court of Justice asking for a clarification of these European waste laws. As earlier mentioned, these Italian references compose virtually half of all Article 234 references in the area of the environment. The original Waste Framework directive, 75/442, was an attempt by the Community to construct a system of integrated waste management. Yet as the *Zanetti* cases demonstrated, this system was highly problematic since it lacked a uniform definition of waste. In particular, it revealed the tension between the question of what is a "waste" and what is a "good." The Zanetti rulings represented the Court's first attempt to resolve this conflict by expanding and clarifying the concept of waste in Community law. Subsequently, Community legislators amended the original Framework directive and adopted Council Directive 91/156 which borrowed the Court's expansive definition of waste. While the materials that now fall under Community management has been greatly expanded, the original waste/good conflict still persists. This tension led to the subsequent Italian cases involving 91/156. The Court is subsequently given the opportunity to bring greater clarity to Community waste laws. Scholars have argued that this cycle of litigation continues to expand the scope of Community competence in waste management, and the remaining ambiguities around the concept of waste will elicit further litigation and clarification in the policy sector (Cheyne and Purdue 1995; Purdue 1998; Van Calster 1998; Van Rossem 1998).

Overall, the case law in this analysis reveals that the Court has yet to develop a concrete analytic framework for dealing with integration of the economic market and environmental protection. However, this Article 234 analysis offers evidence that the Court will take quite seriously arguments which push for stronger environmental protection, but will still weigh them against the overall influence this protection has on the free movement of goods. Generally, the Court does not hesitate to shift the control over environmental protection away from national competence even when a decision is costly to member state governments. The Article 234 process in general and the behavior of the Court in particular has operated in a predictable pattern. The expansive logic of the Court has created an integrative dynamic. Ultimately, this integrative dynamic has diminished member state government control in the area of environmental protection, including its relation to economic priorities, while simultaneously preferencing national judges, transnational actors, and supranational institutions.

Conclusions

The European Court of Justice acts to fuel the European integration process. The judicial outcomes and case law of the Court in the policy area of environmental protection reveal this dynamic. Litigants are continually asking national judges to evaluate domestic policies in terms of supranational law. The relationship between national courts and the ECJ leads to the creation of new European laws. This construction of supranational policy ultimately undermines national control over particular policy decisions. The Article 234 case law fuels this expansive process, as we see national legal systems whose laws are now not in conformity with these new European laws subject to litigation until their national laws are shifted upward. Testing a modified neo-functional model against the claims of intergovernmentalists, I find that the empirical evidence strongly supports the former.

The environmental Article 234 litigation in this analysis illustrates this dynamic. First, litigants disproportionately target national environmental laws which obstruct transnational activity. The Court is systematically being asked to void national environmental regulations in favor of European free trade priorities. The Court responded in two ways, both of which expanded supranational authority. Judicial rulings either actively dismantled national environmental regulations which presented a clear obstruction to free trade; or the rulings led to the construction of a supranational legal framework to balance environmental protection and economic interests. The tension between environmental protection and free trade remains unresolved in secondary legislation, yet the Court acting together with private litigants did not hesitate to construct such a balance. Second, the case law reveals that member states possessing weak or strict implementations of EU law became the target of Article 234 references.

Third, the Court rules in a way that requires national legal systems to amend domestic law in a direction that ensures the expansive development of supranational environmental norms. EU environmental policy embodies a tension between national and supranational environmental protection goals, yet when confronted with this conflict the ECJ generally shifts the policy authority away from member state governments. The ECJ's interpretation and expansive

reconstruction of the waste directives provides a clear example of this. Finally, this analysis has revealed that, time and time again, the ECJ is clearly informed of the preferences of powerful member state governments, yet does not hesitate to act in opposition to these interests. These preferences can not explain the expansive logic that characterizes the Court's behavior.

This paper provides empirical evidence that brings into question claims that national governments can completely control international policy outcomes. Furthermore, this study serves to bring to the forefront of regional integration discussions interactions between transnational actors, national judges, and the European Court of Justice. These relationships serve to construct a legal framework that opens the door to those who have been traditionally closed out of EU decision making. It also provides a new arena for individuals, who have exhausted domestic legal routes, to challenge or participate in contentious national debates. Private litigants and environmental interest groups have become integral components in the process of European integration. Although many of these interest groups have yet to be clearly developed at the supranational level, I would expect them to increasingly utilize the ECJ as their transnational strength is multiplied through this litigation process. These societal actors may not be actively pursuing European integration *per se*, but as the expansive dynamic predicts, the unintended consequences of their actions have a direct impact on the construction of supranational policy and the deepening of integration.

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