

Expanding the Effectiveness of the European Union's Environmental Impact Assessment Law

INTRODUCTION

On July 3, 1988, European Union (EU) Directive 85/337/EEC (Directive) came into force and as a result, Environmental Impact Assessment (EIA) became a part of the EU's environmental protection plans.¹ The Directive requires that before consent is given for the development of certain "public and private projects that are likely to have significant effects on the environment," an assessment of those effects must be compiled and considered by the developer and the authority in charge of approving the projects.² By asking decision-making authorities to ponder likely environmental harm before the harm occurs, the Directive promotes a policy of preventing environmental

¹ See Council Directive 85/337 of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40 [hereinafter Council Directive 85/337]; John R. Salter, *Environment and Consumers*, in LAW OF THE EUROPEAN COMMUNITIES 749, para. 8.08 (Lord Hailsham of St. Marylebone ed., 1986). On June 25, 1996, pursuant to the cooperation procedure outlined in Article 189c of the Maastricht Agreement, the European Council issued a Common Position with a view to adopting a proposed directive that would amend Directive 85/337. See generally Common Position No. 40/96 Adopted by the Council on 25 June 1996 with a View to Adopting Directive 96/. . . /EC of . . . Amending Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1996 O.J. (C 248) 75, available in LEXIS, Intlaw Library, Celex File. As of the writing of this Note, the European Parliament had yet to act in regard to the Common Position.

² Council Directive 85/337, *supra* note 1, pmbl. The relevant language of the Directive is as follows:

Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question.

Id. The Directive continues:

For the purposes of this Directive: "project" means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

harm.³ The comprehensive effectiveness of mandating pre-consent environmental impact assessment is undercut, however, because the Directive textually exempts national defense projects from its process.⁴ This Note suggests that the European Union could and should include national defense projects in its EIA law.

Part I of this Note will provide a summarized, chronological evolution of environmental policy in the European Union. Part II will give a description and history of EIA law, including that of the United States, so as to provide a comparative and contrasting point of reference. Part III will propose a way by which the European Union can more fully live up to the preventative approach that it has espoused for environmental protection by requiring environmental impact assessments for national defense projects. This Note concludes that the inclusion of national defense projects in the EU's EIA law would broaden the scope and effectiveness of EIA law and environmental protection generally.

I. HISTORICAL AND LEGAL DEVELOPMENT OF ENVIRONMENTAL IMPACT ASSESSMENT LAW

A. *The Evolution of Environmental Policy in the EU*

The 1957 Treaty of Rome (Treaty), which established the European Economic Community, focused on the creation of a common-trade zone.⁵ Accordingly, the Treaty failed to make any explicit statements regarding policies for environmental protection.⁶ In fact, until 1987,

"developer" means:

the applicant for authorization for a private project or the public authority which initiates a project;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

Id. art. 1(2).

³ See CLUB DE BRUXELLES, EC ENVIRONMENTAL POLICY: A CHALLENGE FOR THE 1990s 2.4 (1990).

⁴ See Council Directive 85/337, *supra* note 1, art. 1(4). Article 1(4) of the Directive states: "Projects serving national defense purposes are not covered by this directive." *Id.*

⁵ See, e.g., TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, *opened for signature* Nov. 23, 1957, pmbl., art. 2, 298 U.N.T.S. 11, 14-15 (entered into force Jan. 1, 1958) [hereinafter EEC TREATY]; Directorate General XI Environment, Nuclear Safety and Civil Protection, Commission of the European Communities, 1 Euro. Community Env'tl. Legis. xviii (1992) [hereinafter EC Env'tl. Legis.].

⁶ See generally EEC TREATY; EC Env'tl. Legis., *supra* note 5, at xviii.

all EU environmental protection legislation was introduced via the general language of one or both of two Treaty articles that only implicitly recognized EU authority over environmental issues in Member States.⁷ Article 100 of the Treaty calls for the harmonization of laws affecting the common market in Member States.⁸ Article 235 authorizes measures that “prove necessary to attain one of the objectives of the Community” absent a specific delegation of authority by the Treaty.⁹ Although the Articles make no explicit reference to environmental issues, they have been used as authority for certain environmental regulations.¹⁰ For example, Article 100’s allusion to issues affecting the common market was used as the authority to develop legislation that regulated product and industry standards across the EU.¹¹

On the heels of the increased environmental awareness that swept the globe in the late 1960s, the European Community initiated the European Community Action Programmes on the Environment.¹² The first of these five-year programmes, covering the years from 1973 to 1977,¹³ established principles and priorities for future environmental policies.¹⁴ The second five-year programme (1977–1981) established a list of eleven principles and actions to be taken in order to move closer to the goal of environmental protection.¹⁵ The list included the deci-

⁷ See EEC TREATY arts. 100, 235; EC Env'tl. Legis., *supra* note 5, at xix.

⁸ See EEC TREATY art. 100; EC Env'tl. Legis., *supra* note 5, at xix.

⁹ See EEC TREATY art. 235; EC Env'tl. Legis., *supra* note 5, at xix.

¹⁰ See EEC TREATY arts. 100, 235; EC Env'tl. Legis., *supra* note 5, at xix.

¹¹ See EEC TREATY art. 100; EC Env'tl. Legis., *supra* note 5, at xix.

¹² See EC Env'tl. Legis., *supra* note 5, at xix. The new environmental awareness is demonstrated by the fact that the United Nations held its first environmental conference in 1972. See *id.*

¹³ See Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment, 1973 O.J. (C 112) 1 [hereinafter First Programme]; EC Env'tl. Legis., *supra* note 5, at xix.

¹⁴ See EC Env'tl. Legis., *supra* note 5, at xix.

¹⁵ See Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States, Meeting within the Council of 17 May 1977 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, 1977 O.J. (C 139) 1 [hereinafter Second Programme]; EC Env'tl. Legis., *supra* note 5, at xix–xx. The eleven principles have been summarized as follows:

1. Prevention is better than cure. This principle has become paramount under the fourth environmental action programme.
2. Environmental impacts should be taken into account at the earliest possible stage in decision-making.
3. Exploitation of nature which causes significant damage to the ecological balance must be avoided.

sion-making tool of environmental impact assessment.¹⁶ The first two Action Programmes had a common theme of protecting human health and the environment by controlling pollution problems.¹⁷ The third five-year Programme (1982–1986) solidly shifted the emphasis of environmental policy from one of pollution control to one of prevention and integration of environmental issues into other European Community policies.¹⁸ Not surprisingly, it was during the era of the Second and Third Action Programmes when Directive 85/337/EEC, an inherently preventative and integrating piece of legislation, was first proposed and then accepted.¹⁹ The Fourth Action Programme (1987–1992) continued the trend of prevention but proceeded further beyond its predecessors by stressing the importance of using stringent environmental standards in regulating the activities of Member States.²⁰

4. Scientific knowledge should be improved to enable action to be taken.

5. The “polluter pays” principle; that is, that the cost of preventing and repairing environmental damage should be borne by the polluter.

6. Activities in one Member State should not cause deterioration of the environment in another.

7. Environmental policy in the Member States must take into account the interests of the developing countries.

8. The EC and its Member States should promote international and worldwide environmental protection through international organizations.

9. Environmental protection is everyone’s responsibility, therefore education is necessary.

10. Environmental protection measures should be taken at the most “appropriate level,” taking into account the type of pollution, the action needed, and the geographical zone to be protected. This is known as the “subsidiarity principle.”

11. National environmental programmes should be coordinated on the basis of a common long-term concept and national policies should be harmonized within [sic] the Community, not in isolation.

EC Env’tl. Legis, *supra* note 5, at xix–xx.

¹⁶ *See id.* at xix.

¹⁷ *See id.* at xix–xx.

¹⁸ *See* Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States, Meeting within the Council of 7 February 1983 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, 1983 O.J. (C 46) 1 [hereinafter Third Programme]; EC Env’tl. Legis., *supra* note 5, at xx.

¹⁹ *See generally* Council Directive 85/337, *supra* note 1.

²⁰ *See* Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States, Meeting within the Council of 19 October 1987 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, intro., pmb., 1987 O.J. (C 328) 1, 1–2, 4, 11 [hereinafter Fourth Programme]; CLUB DE BRUXELLES, *supra* note 3, at 1.7. A “key principle” of the Fourth Programme is “harmonizing environmental standards at Community level adopting stringent levels of protection.” *Id.* A fifth Action Programme was approved by the Council and the Representatives of the Govern-

The evolution of environmental policy in the EU took a crucial step on July 1, 1987 when, in conjunction with the adoption of the Fourth Action Programme, the Community adopted the Single European Act.²¹ The Act, which consisted of amendments to the Treaty of Rome, contained articles that specifically affected environmental policy.²² Article 100A recognized the relationship between promotion of the common market and protection of the environment by authorizing the EU to adopt environmental legislation on the basis that such issues affect the marketplace.²³ Article 130R lays out the objectives of future Community action relating to the environment by formalizing the principles of prevention, subsidiarity, "polluter pays," and most importantly, integration.²⁴ Article 130T reconfirms that individual Member States

ments of the Member States on February 1, 1993. See *Environment, Nuclear Safety & Civil Protection* (visited Dec. 21, 1996) <<http://www.unimass.nl/~egmilieu>>. "Two major principles underpin" the Programme: (1) the continued integration of environmental policies into other EU policy areas and (2) the replacement of command-and-control approaches to environmental regulation with greater shared responsibilities among various actors. *Id.*

²¹ See Single European Act, 1987 O.J. (L 169) 1, 25 I.L.M. 506 (1986) (amending the 1957 Treaty Establishing the European Economic Community) [hereinafter EC TREATY]; EC Envtl. Legis., *supra* note 5, at xxiv.

²² See EC TREATY arts. 100A, 130R–130T; CLUB DE BRUXELLES, *supra* note 3, at 1.2–4; EC Envtl. Legis., *supra* note 5, at xxiv. Article 130R reads, in part, as follows:

1. Action by the Community relating to the environment shall have the following objectives:
 - to preserve, protect and improve the quality of the environment;
 - to contribute towards protecting human health;
 - to ensure a prudent and rational utilization of natural resources.
2. Action by the Community relating to the Environment shall be based on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.
3. In preparing its action relating to the environment, the Community shall take account of:
 - available scientific and technical data;
 - environmental conditions in the various regions of the Community;
 - the potential benefits and costs of action or of lack of action;
 - the economic and social development of the Community as a whole and the balanced development of its regions.

EC TREATY art. 130R; CLUB DE BRUXELLES, *supra* note 3, at 1.2–3. Article 100A reads, in part, as follows: "The Commission, in its proposals . . . on health, safety, and environmental and consumer protection, shall use stringent protection levels as a reference." EC TREATY art. 100A.

²³ See EC TREATY art. 100A; CLUB DE BRUXELLES, *supra* note 3, at 1.4; see also EC Envtl. Legis., *supra* note 5, at xxiv–xxv.

²⁴ See EC TREATY art. 130R.

may enact environmental legislation that is more stringent than, but is compatible with, that of the Community.²⁵

The evolution of environmental policy in the EU from the 1957 Treaty of Rome through the various Action Programmes and to the Single European Act exemplifies the European Community's commitment to a preventative approach to environmental protection.²⁶ EIA law stands as a hallmark of that preventative approach.²⁷ The EU's commitment to the comprehensive prevention of environmental degradation is tested, however, by the limitations of its own EIA law.²⁸

B. *Environmental Impact Assessment Law: A Description and Comparative Study*

1. EIA: A General Overview

The "essential structure" of EIA law is common to all the nations that use it.²⁹ Generally, EIA law is a process intended to minimize or prevent environmental damage that is usually associated with the construction and operation of certain development projects.³⁰ Usually in the form of legislation, regulations and/or administrative processes, EIA law requires that certain development projects, while still in a planning stage, be analyzed in terms of their potential adverse impacts on the environment.³¹ Developers and/or governmental bodies, depending on the particularities of the EIA law in question, must conduct an analysis, or assessment, of the environmental effects of certain projects.³² The public authority responsible for granting or denying consent to the project is asked to take into account the results of the assessment.³³ Again, depending on the particularities of the EIA law in question, provisions are made for public disclosure of the assessments,

²⁵ See EC TREATY art. 130T; CLUB DE BRUXELLES, *supra* note 3, at 1.3.

²⁶ See, e.g., EEC TREATY; EC TREATY; First Programme, *supra* note 12; Second Programme, *supra* note 15; Third Programme, *supra* note 18; Fourth Programme, *supra* note 20.

²⁷ See Council Directive 85/337, *supra* note 1, pmbl.

²⁸ See *id.* art. 1(4).

²⁹ See Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 591 (1991).

³⁰ See, e.g., National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1994); Council Directive 85/337, *supra* note 1, apps. I–II; Robinson, *supra* note 29, at 611 (citing Canada's Environmental Assessment and Review Process Guidelines Order).

³¹ See 42 U.S.C. § 4332(2); Council Directive 85/337, *supra* note 1, app. I.

³² See, e.g., Council Directive 85/337, *supra* note 1, art. 5.

³³ See, e.g., *id.* arts. 6, 8.

as well as for public involvement in the authority's decision-making process.³⁴

The EIA process plays four important roles in protecting the environment.³⁵ First, EIA law gives concrete, practical effect to environmental policy language that is often broad, general and otherwise absent of specific mandates.³⁶ The U.S. Congress, in formulating its declarations of environmental policy, included EIA so as to "insure that the policies enunciated . . . are implemented."³⁷ EIA helps to insure proper implementation of policies by requiring the formulation and submission of written assessment reports, demonstrating an affirmative compliance with the environmental concerns outlined in policy language.³⁸ A second role for EIA is to provide an analytical decision-making tool that "institutionaliz[es] foresight."³⁹ It asks the decision-making authority to look beyond the moment and to incorporate into its decision the possible irreversible future effects a project may have on the environment.⁴⁰ Third, to the extent that EIA affirmatively asks developers and decision-makers to account for the social and economic costs resulting from their actions, EIA forces the internalization of those costs and consequences that might otherwise go unaccounted for.⁴¹ The final role that EIA plays is as a public-awareness measure.⁴²

³⁴ See, e.g., *id.* art. 6.

³⁵ See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: A COURSEBOOK ON NATURE, LAW AND SOCIETY 600 (1991) (one role for EIA is the practical enforcement of broad policy language); Robinson, *supra* note 29, at 591 (other roles for EIA include providing foresight and public awareness); Cary Ichter, Note, "Beyond Judicial Scrutiny": *Military Compliance with NEPA*, 18 GA. L. REV. 639, 641-46 (1984) (another role for EIA is to force authorities and developers to account for the consequences of their actions).

³⁶ See PLATER ET AL., *supra* note 35, at 600; Ichter, *supra* note 35, at 641 n.16; see also 42 U.S.C. § 4331(a) ("[I]t is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technological assistance, in a manner calculated to foster and promote the general welfare.").

³⁷ 115 CONG. REC. 29,085 (daily ed. Oct. 8, 1969). The Congressional Record states:

To remedy present shortcomings in the legislative foundations of existing programs and to establish action-forcing procedures which will help to insure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act.

Id.

³⁸ See Ichter, *supra* note 35, at 641-42.

³⁹ See Robinson, *supra* note 29, at 591, 594.

⁴⁰ See Ichter, *supra* note 35, at 645.

⁴¹ See *id.*

⁴² See Robinson, *supra* note 29, at 594.

Most EIA processes allow for public disclosure of development plans, as well as for public participation in the decision-making process.⁴³ In the words of Professor Nicholas Robinson, "EIA facilitates democratic decisionmaking and consensus building regarding new development."⁴⁴

2. A Comparative Study: The United States' Experience with EIA

The significant history of EIA law began with the passage in the United States of the National Environmental Policy Act (NEPA) of 1969.⁴⁵ Among NEPA's eloquent but broad declarations of environmental policy is a brief section mandating EIA law for certain projects, thus providing a set of teeth with which to enforce the statute's policies.⁴⁶ Section 102(2) of the Act requires all federal agencies to prepare and include an environmental impact statement (EIS) with every recommendation or proposal for "major Federal actions significantly affecting the quality of the human environment."⁴⁷ The importance and

⁴³ See *id.* For example, the Ecological Expertise program in the former Soviet Union allowed citizens to review, require revision, and re-review plans before a hydroelectric facility was built. See *id.*

⁴⁴ *Id.*

⁴⁵ See generally 42 U.S.C. § 4332; see also Robinson, *supra* note 29, at 591.

⁴⁶ See 42 U.S.C. § 4332(2); PLATER ET AL., *supra* note 35, at 599, 602.

⁴⁷ 42 U.S.C. § 4332(2)(C) (emphasis added). The relevant language of § 4332 follows:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

.....

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the

weight of this requirement, as well as the problems inherent in defining its triggering terms, are demonstrated by the fact that the EIS clause has spawned nearly all caselaw brought under NEPA.⁴⁸

Much of NEPA caselaw has dealt with the issue of whether projects involving national defense and national security are subject to compliance with Section 102(2), and judicial review of such compliance.⁴⁹ The environmental, public-awareness and military interests at stake in these cases are reflected by two questions.⁵⁰ First, will compliance and judicial review compromise the confidentiality of matters regarding national security?⁵¹ Second, will compliance and judicial review compromise the ability of the military to proceed with projects, which while detrimental to the environment, are crucial to the defense of the country?⁵² In answering these questions, it is important to note that NEPA calls for EISs from "all agencies of the Federal Government;" the statute does not provide a textual exception for national defense or security projects.⁵³ Despite the clear language of the statute, however, U.S. courts have struggled with the issue and are currently responding in a manner that runs counter to the language and true intent of NEPA.⁵⁴

Most court decisions find that NEPA-based claims against projects involving national defense interests are justiciable.⁵⁵ Early cases, however, were ambiguous in answering questions of whether such projects must comply with NEPA requirements and whether EISs for such projects are subject to judicial review of their legal sufficiency.⁵⁶ For

public . . . and shall accompany the proposal through the existing agency review processes.

Id. Despite the fact that § 4332 seems to be a mandatory, enforceable environmental protection measure, critics argue that in light of the internal processes and pressures of federal agencies, EIA has become "merely procedural" and has failed to produce "substantive results." See PLATER ET AL., *supra* note 35, at 599.

⁴⁸ See *id.*

⁴⁹ See, e.g., *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981); *Romer v. Carlucci*, 847 F.2d 445 (8th Cir. 1988); *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 841 F.2d 946 (9th Cir. 1988).

⁵⁰ See generally *Weinberger*, 454 U.S. 139; *Romer*, 847 F.2d 445; *No GWEN*, 841 F.2d 946.

⁵¹ See generally *Weinberger*, 454 U.S. 139; *Romer*, 847 F.2d 445; *No GWEN*, 841 F.2d 946.

⁵² See generally *Weinberger*, 454 U.S. 139; *Romer*, 847 F.2d 445; *No GWEN*, 841 F.2d 946.

⁵³ See 42 U.S.C. § 4332(2).

⁵⁴ See *id.*; see also, e.g., *Weinberger*, 454 U.S. at 146–47.

⁵⁵ See *Romer*, 847 F.2d at 461 (holding that the court may review EIS for a project involving missiles in silos); *No GWEN*, 841 F.2d at 951 (holding that a complaint against the Air Force for not considering environmental impacts of a certain project was justiciable).

⁵⁶ See, e.g., *McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir. 1971); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 788–89 (D. Me. 1972).

instance, in the early case of *McQueary v. Laird*, the Tenth Circuit Court of Appeals dealt with a NEPA challenge to a military project by claiming lack of jurisdiction.⁵⁷ In another early case, *Citizens for Reid State Park v. Laird*, the U.S. District Court for the Southern District of Maine found that NEPA applies to all federal agencies, including the Department of Defense.⁵⁸ The Court in *Citizens for Reid State Park* refused to require an EIS for the Navy project in question, however, because it found that the plaintiff citizens group had failed to prove that the Navy plans constituted a major project significantly affecting the environment.⁵⁹ Later court decisions often allowed national defense projects to proceed without an EIS or judicial review of an EIS, not because the courts believed that such projects did not have to comply with NEPA, but merely because the courts found that “major” federal action or “significant” effects on the environment—requirements necessary to trigger NEPA⁶⁰—were absent.⁶¹

In cases where major federal actions having significant effects on the environment were found to exist, compliance with NEPA was required despite national security interests.⁶² In *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, for example, the Supreme Court refused to issue an injunction for violation of NEPA,⁶³ but the Court’s rushed decision upheld a Court of Appeal’s finding⁶⁴ that the Atomic Energy Commission did have a “judicially reviewable duty to comply with NEPA requirements in spite of national security considerations.”⁶⁵ In *Progressive Animal Welfare Society v. Department of Navy*, the Western District Court of Appeals of Washington found that the Navy’s plan to use dolphins in a military project was a major federal action with

⁵⁷ See *McQueary*, 449 F.2d at 612. The Court of Appeals noted in dicta that military projects have traditionally enjoyed a certain degree of latitude. See *id.*

⁵⁸ See *Citizens for Reid State Park*, 336 F. Supp. at 788.

⁵⁹ See *id.*

⁶⁰ See 42 U.S.C. § 4332(2)(c).

⁶¹ See *Laine v. Weinberger*, 541 F. Supp. 599, 603 (C.D. Cal. 1982); *Aluli v. Brown*, 602 F.2d 876, 877 (D. Haw. 1979) (holding that yearly appropriation requests to fund military operations did not constitute proposals for major federal action); *United States v. 4519.58 Acres of Land*, 455 F. Supp. 192, 203–04 (E.D. N.C. 1978) (holding that the condemnation of land by the Secretary of Defense for use as a practice bombing range would not significantly affect the environment).

⁶² See, e.g., *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917, 917 (1971); *Progressive Animal Welfare Soc’y v. Department of Navy*, 725 F. Supp. 475, 479 (W.D. Wash. 1989).

⁶³ See *Schlesinger*, 404 U.S. at 917.

⁶⁴ See *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 788 (D.C. Cir. 1971).

⁶⁵ *Ichter*, *supra* note 35, at 652.

significant environmental impact; accordingly, a NEPA EIS was required for the project.⁶⁶ Finally, in *Concerned about Trident v. Rumsfeld*, the Court of Appeals for the District of Columbia found that the Navy's plans for a submarine support facility required compliance with NEPA "to the fullest extent possible."⁶⁷ The court found that the Navy's own internal environmental impact statement was insufficient to fulfill the requirements of NEPA.⁶⁸ In making its decision, the court, citing judicial precedent as well as NEPA's lack of a textual military exception, rejected the Navy's argument that NEPA could "'not possibly apply' to strategic military decisions."⁶⁹ The court stated that the Navy's plans were subject to NEPA requirements despite the project's "serious national security implications."⁷⁰

In 1981, the Supreme Court again addressed the issue of the military's compliance with NEPA's EIA mandate.⁷¹ In *Weinberger v. Catholic Action of Hawaii*, the Court refused judicial review of the Department of Defense's compliance with NEPA in a matter of national security.⁷² The dispute began with the Navy's plan to construct a weapons and ammunition holding facility capable of storing nuclear weapons in Ohau, Hawaii.⁷³ The Navy's internal assessment concluded that the facility would not have significant impact on the environment and as such, a NEPA EIS was unnecessary.⁷⁴ The Navy's assessment, however, failed to include an analysis of the facility's impact on the environment should nuclear weapons actually be stored at the site.⁷⁵ The district court that first reviewed the case found that the Navy had complied with NEPA to the fullest extent possible.⁷⁶

⁶⁶ See *Progressive Animal Welfare*, 725 F. Supp. at 479.

⁶⁷ *Concerned about Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977).

⁶⁸ See *id.* at 830.

⁶⁹ *Id.* at 823.

⁷⁰ *Id.*

⁷¹ See *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146-47 (1981).

⁷² See *id.*; Donald Zillman & Peggy Gentles, *NEPA's Evolution: The Decline of Substantive Review*, 20 ENVTL. L. 447, 518 (1991).

⁷³ See *Weinberger*, 454 U.S. at 141.

⁷⁴ See *id.* at 142.

⁷⁵ See *id.* at 141-42. This was pursuant to Navy regulations which forbid either admitting or denying the possibility that nuclear weapons would in fact be stored. See *id.* at 141 (citing Navy Security Classification Guide for Nuclear Weapons, Navy SWOP 55-1 (1974); Dept. of Navy, OPNAV Instruction 5721.1C (1975)).

⁷⁶ See *Catholic Action of Haw. v. Brown*, 468 F. Supp 190, 193 (D. Haw. 1979), *rev'd*, 643 F.2d 569, 572 (9th Cir. 1980), *rev'd sub nom.* 454 U.S. 139, 147 (1981).

The Ninth Circuit Court of Appeals reversed the decision of the district court, arguing that an EIS was necessary and feasible since it would not necessarily release confidential matters.⁷⁷ Important to the court was the fact that the Navy had already made the nuclear capabilities of the facility public knowledge.⁷⁸ The court went on to suggest a "hypothetical" approach to writing EISs that would protect national security, environmental concerns, and public disclosure interests.⁷⁹ Judge Merrill wrote that under this hypothetical approach, the Navy's EIS must evaluate the hypothetical consequences of storing nuclear weapons at the site but it need not imply that a decision to actually store nuclear weapons had been made.⁸⁰ The court argued that since the public was already aware of the capability of the facility to store nuclear weapons, a hypothetical EIS that discussed the impact of such storage, but not whether it would actually occur, would not reveal anything the public did not already know.⁸¹ Further, it would allow the Navy and the decision-making authority to consider the true and potential costs and consequences of proceeding with the project.⁸² Finally, the Court stated that a hypothetical EIS would assure the public that the decision-making process had fully accounted for the project's externalities and consequences.⁸³

On review, the Supreme Court reversed the Court of Appeals' creative approach to balancing the interests at stake.⁸⁴ The Court, discrediting the Ninth Circuit's notion of a hypothetical EIS, refused to mandate a NEPA EIS because it believed that doing so would reveal confidential matters of national security.⁸⁵ In the majority opinion, Justice Rehnquist outlined the current status of the law regarding military compliance with EIA law in the United States.⁸⁶ He wrote that public policies favoring the protection of confidential information regarding national security ultimately forbids judicial scrutiny of "whether or not the Navy has complied with NEPA 'to the fullest extent

⁷⁷ See *Catholic Action of Haw. v. Brown*, 643 F.2d 569, 572 (9th Cir 1980), *rev'd sub nom.* 454 U.S. 139, 147 (1981).

⁷⁸ See *id.* at 571.

⁷⁹ See *id.* at 571-72.

⁸⁰ See *id.*

⁸¹ See *id.* at 572.

⁸² See *Catholic Action*, 643 F.2d at 572.

⁸³ See *id.*

⁸⁴ See *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 144, 147 (1981).

⁸⁵ See *id.* at 145, 147; PLATER ET AL., *supra* note 35, at 653.

⁸⁶ See *Weinberger*, 454 U.S. at 146-47.

possible.’”⁸⁷ Justice Blackmun, who concurred with the judgment of the Court, was joined by Justice Brennan in stressing that although the Defense Department may disseminate EISs in a manner that protects confidential matters, it is still bound by the obligations of NEPA.⁸⁸

3. A Comparative Study: The European Union’s Experience with EIA

Sixteen years after NEPA took effect in the United States and after five years of consideration in the European Union, Environmental Impact Assessment law was officially incorporated into the statutory framework of the EU on June 27, 1985.⁸⁹ Directive 85/337 mandates EIA for certain projects such as those involving crude-oil refineries, thermal and nuclear power stations, motorway construction and dangerous waste landfills.⁹⁰ It also requires EIA to be performed in conjunction with those other projects that Member States find have a significant effect on the environment due to the projects’ particular characteristics.⁹¹ The specific legal authority for the Directive is derived from Articles 100 and 235 of the EEC Treaty.⁹² The Directive also cites to the first three Action Programmes for their policies of preventing environmental harms at the source rather than trying to counteract environmental degradation once it occurs.⁹³

The procedure called for by the Directive identifies, describes and analyzes the effects a development project may have on humans, fauna, flora, soil, water, air, climate, landscape, welfare and cultural heritage.⁹⁴ The EIA must contain a description of the project in question, an outline of the main alternatives to the project, the reason for choosing the proposed plans, a description of the significant effects the project

⁸⁷ *Id.* at 146 (quoting NEPA).

⁸⁸ *See id.* at 147–48 (Blackmun & Brennan, JJ., concurring). Justice Blackmun argued that the Defense Department’s own regulations state that EISs are to be created with confidential matters included as annexes so that the remaining unclassified sections may be available to the public. *See id.*

⁸⁹ *See* CLUB DE BRUXELLES, *supra* note 3, at 2.4; *see generally* Council Directive 85/337, *supra* note 1.

⁹⁰ *See* Council Directive 85/337, *supra* note 1, art. 4(1), app. I. Annex I of the Directive lists projects that are subject to compulsory EIA. *See id.* app. I.

⁹¹ *See id.* art. 4(2), app. II.

⁹² *See id.* pmbl.; Salter, *supra* note 1, at 758.

⁹³ *See* Council Directive 85/337, *supra* note 1, pmbl.

⁹⁴ *See id.* art. 3; CLUB DE BRUXELLES, *supra* note 3, at 2.5.

will have on the environment, and a description of the measures that must be taken to avoid, reduce or compensate for those effects.⁹⁵ Because developers have the best knowledge of the nature of their proposal, they have the responsibility of gathering the information and compiling the EIA.⁹⁶ The decision-making authorities who have the power of giving consent to the developer's plans have the responsibility of setting standards for approval or disapproval and ensuring that the developers' EIA complies with the law.⁹⁷ Further, they are obligated, by statute, to incorporate the EIA into their decision-making process.⁹⁸ Also, Article 10 of the Directive states that the authorities must respect existing regulations and practices regarding industrial and commercial secrecy.⁹⁹ Finally, the Directive envisions an active role for the public.¹⁰⁰ In addition to supplying the decision-makers with information regarding the impact a project will have on the local environment, the public may have an opportunity to suggest alternatives¹⁰¹ and to pursue judicial action in order to request rescission of consent.¹⁰² Further particularities of public participation and involvement are to be determined by the individual Member States.¹⁰³

4. The "National Defense Project" Exception to Directive 85/337/EEC

The effectiveness of the Directive in preventing environmental harms is undercut by the exception it gives to national defense projects.¹⁰⁴ It is reasonable to infer that this exception reflects two assumptions.¹⁰⁵ The first assumption, explicitly mentioned in the Directive, is that national legislative processes will ensure that defense projects

⁹⁵ See Guiseppe Sapienza, *Environmental Impact Assessment in the European Community*, EUR. ENV'T. REV., July 1988, at 9-10.

⁹⁶ See *id.* at 10-11.

⁹⁷ See *id.* at 11.

⁹⁸ See Council Directive 85/337, *supra* note 1, art. 8 ("Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.").

⁹⁹ See *id.*, art. 10; Sapienza, *supra* note 95, at 11.

¹⁰⁰ See Council Directive 85/337, *supra* note 1, arts. 6(2), 6(3), 9; Sapienza, *supra* note 95, at 11.

¹⁰¹ See Council Directive 85/337, *supra* note 1, arts. 6(2), 6(3), 9; Sapienza, *supra* note 95, at 11.

¹⁰² See William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUM. J. TRANSNAT'L L. 337, 376 (1995).

¹⁰³ See Council Directive 85/337, *supra* note 1, art. 6(3).

¹⁰⁴ See *id.* art. 1(4). "Projects serving national defense purposes are not covered by this Directive." *Id.*

¹⁰⁵ See *id.* pmbl. "Whereas, however, this Directive should not be applied to projects the details

comply with the Directive.¹⁰⁶ No rationale is provided for this assumption except for the implied reasoning that national legislators share the concerns of the Directive and are able to guide national legislation accordingly.¹⁰⁷ The second assumption appears to be that the confidentiality of Member States' national security matters would be compromised if the EU mandated EIA law for national defense projects.¹⁰⁸ Member States may be concerned that applying EIA to national defense projects would violate their autonomy by subjecting their independent security and foreign policy to the investigative eyes of the EU.¹⁰⁹ As such, the Directive leaves such matters to internal, national legislative processes.¹¹⁰

The Commission's decision to exempt national defense projects from the Directive is under increased questioning by Member States and European citizens.¹¹¹ In 1991, for instance, Mr. Diego de los Santos L. Pez of Spain presented a question to the Commission regarding the application of the Directive to a Spanish naval training camp and firing range using live ammunition.¹¹² Although the Commission could not respond with a definite answer, it did say that if the firing range served a national defense purpose, the Directive would not apply.¹¹³ Another instance of doubt being expressed regarding the national defense exception to the Directive was made in response to the French Government's resumption of nuclear testing in French Polynesia.¹¹⁴ The Committee on the Environment, Public Health and Consumer Protection stated that "'it would be most timely and appropriate' if the [Environment] Commissioner were to ask for an environmental impact assessment to be carried out before the tests go ahead."¹¹⁵

of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process." *Id.*

¹⁰⁶ See Council Directive 85/337, *supra* note 1, pmbl.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See, e.g., Written Question No. 362/91 by Mr. Diego de los Santos Lopez (ARC) to the Commission of the European Communities, 1991 O.J. (C 259) 16 [hereinafter Written Question]; *EP Committee Debates Nuclear Testing, Water Policy*, Reuters Eur. Community Rep., July 29, 1995, available in LEXIS, Intlaw Library, Ecnews File [hereinafter *EP Committee Debates Nuclear Testing*].

¹¹² See Written Question, *supra* note 111, at 16-17.

¹¹³ See *id.* at 17.

¹¹⁴ See *EP Committee Debates Nuclear Testing*, *supra* note 111.

¹¹⁵ *Id.*

The Member States, which were instructed to implement the Directive by 1988, have the authority of Article 130T to enact legislation that goes further than the Directive.¹¹⁶ Despite that authority, however, EU leadership has not sufficiently encouraged the Member States to extend EIA law to national defense projects.¹¹⁷ England's Town and Country Planning Regulations 1988, for instance, exempt projects serving national defense purposes from EIA requirements.¹¹⁸ In the absence of a direct mandate or at least the encouragement from the EU to move beyond the minimum requirements of the Directive, the environmental impact of the Member States' defense establishments will continue to go largely unchecked.

II. DISCUSSION

A. *Applying Directive 85/337/EEC to National Defense Projects*

The time is ripe for the EU to expand the scope of its EIA law to include projects relating to national defense.¹¹⁹ Exempting national defense projects causes the EU to fall short of effectively promoting the policies of prevention, integration, and harmonization that the Action Programmes and Directive 85/337 promote.¹²⁰ The substantial size of defense budgets, whether shrinking or not, is indicative of the magnitude of defense projects and the potential effects they may have on the environment.¹²¹ For instance, wildlife and natural settings may be disturbed by aircraft, motorized transport, and explosives testing.¹²² In the United States, an Air Force range encompasses more than half of the Desert National Wildlife Refuge, subjecting the area to "flybys," weapons firings, and strafing of bighorn sheep watering holes.¹²³ Na-

¹¹⁶ See EC TREATY art. 130T; CLUB DE BRUXELLES, *supra* note 3, at 1.3; EC Env'tl. Legis., *supra* note 5, at xxv.

¹¹⁷ See Town and Country Planning (General Permitted Development) Order 1995, S.I. 1995, No. 418, *available in* LEXIS, Enggen Library, Statist File.

¹¹⁸ See *id.*

¹¹⁹ See, e.g., Written Question, *supra* note 111, at 16-17; EP Committee Debates Nuclear Testing, *supra* note 111.

¹²⁰ See Council Directive 85/337, *supra* note 1, pmbl.; EC Env'tl. Legis., *supra* note 5, at xx.

¹²¹ See BARRY M. BLECHMAN & W. PHILIP ELLIS, THE POLITICS OF NATIONAL SECURITY 57 (1990). The United States's defense budget, for instance, is well over 200 billion dollars. See *id.*

¹²² See THE NATIONAL AUDUBON SOCIETY, AUDUBON WILDLIFE REPORT 1987, at 260 (Roger L. Di Silvestro ed., 1987) [hereinafter WILDLIFE REPORT 1987].

¹²³ See *id.* at 260-61. The Desert National Wildlife Refuge is the largest refuge in the 48 contiguous states. See *id.* at 260. Besides being home to the Nellis Air Force Range, the Refuge

tional defense projects may also contaminate the land and air, as well as water supplies, by igniting explosives and producing other solid and gaseous emissions characteristic of military activities.¹²⁴ In addition to these threats, the normal accoutrements and influx that are necessary to equip military bases and run military programs make it clear that requiring EISs for national defense projects is a desirable and necessary step in the effective prevention of environmental degradation.¹²⁵

The absence of an EU mandate requiring EIA for national defense projects places the European environment in a position of unnecessary peril.¹²⁶ The United States' experience has demonstrated that it is possible and advantageous to extend EIA law to projects involving national security.¹²⁷ Further, the rationales behind excluding national defense projects from EIA law are essentially unjustified assumptions.¹²⁸

First, if the EU truly believed that the legislative processes of individual Member States would achieve the objectives of EU directives, there would be no point in issuing enforceable directives and, further, no point in the existence of the trans-national common market itself.¹²⁹ Forcing cooperation and harmonization of law among European nations was at the very heart of the formation of the EU.¹³⁰ The EU's harmonization efforts imply that no one nation's legislative process is to be relied upon to achieve the goals of the Community at large.¹³¹ In the absence of EU mandates that correct for the expected varying

supports the largest existing population of desert bighorn sheep, bobcats, mountain lions, 227 species of birds, and one species of endangered fish. *See id.*

¹²⁴ *See* THE NATIONAL AUDUBON SOCIETY, AUDUBON WILDLIFE REPORT 1986, at 534 (Roger L. Di Silvestro ed., 1986) [hereinafter WILDLIFE REPORT 1986]. The Massachusetts Military Reservation is another example of the impact that military operations have on the environment. *See* Scott Allen, *Cape Base Faces Order to Halt Ammunition Use*, BOSTON GLOBE, Feb. 22, 1997, at A1. "Chemical spills at the reservation contaminate about 6 million gallons of groundwater daily, posing the most serious threat to drinking water in Massachusetts." *Id.* The Reservation is on the national Superfund list of hazardous waste sites. *See id.*

¹²⁵ *See* WILDLIFE REPORT 1987, *supra* note 122, at 260-61. New roads and power lines are examples of such equipment. *See* WILDLIFE REPORT 1986, *supra* note 124, at 534.

¹²⁶ *See* Council Directive 85/337, *supra* note 1, art. 1(4).

¹²⁷ *See, e.g.,* Catholic Action of Haw. v. Brown, 643 F.2d 569, 572 (9th Cir. 1980), *rev'd sub nom.* 454 U.S. 139, 147 (1981); Progressive Animal Welfare Soc'y v. Dep't of Navy, 725 F. Supp. 475, 479 (W.D. Wash. 1989).

¹²⁸ *See, e.g.,* Weinberger v. Catholic Action of Haw., 454 U.S. 139, 146 (1981) (arguing that national defense projects are to be excluded from EIA law because to do otherwise would be to risk national security); *see also* Ichter, *supra* note 35, at 685, 685 n.253 (arguing that forcing national defense projects to comply with NEPA would not risk national security).

¹²⁹ *See* EEC TREATY art. 100.

¹³⁰ *See id.*

¹³¹ *See id.*

results of individual nations' legislative processes, the significance of EU law vis-à-vis Member States' national law is placed very much in doubt.¹³² It is precisely because the individual Member States do not naturally act in harmony with each other and with over-arching EU policies that EU recommendations, directives and regulations are necessary.¹³³

Further, the fact that some Member States may already have regulations in place to force defense projects to account for their environmental impacts should not stop the EU from issuing harmonizing legislation.¹³⁴ The purpose of Article 100 of the 1957 Treaty of Rome was to harmonize certain laws regarding the common market.¹³⁵ The Directive itself states that one of its purposes is to harmonize the law of EIA so as to prevent "unfavourable competitive conditions" among the Member States.¹³⁶ A situation wherein one Member State incurs the costs of mandating its defense establishment to account for environmental impacts while another Member State avoids incurring such costs clearly runs contrary to the harmonization and common market policies of the Treaty of Rome and of the Directive.¹³⁷ That the EU has, in the past, introduced directives which affect pre-existing national law is illustrated by the fact that at the time the Directive was passed, some Member States had already been using EIA as a means of achieving environmental protection within their borders.¹³⁸

The second rationale for exempting national defense projects from the directive—that it would compromise national security—is equally unjustified.¹³⁹ The line of U.S. cases running from *Committee for Nuclear Responsibility*¹⁴⁰ to *Concerned about Trident*¹⁴¹ to *Progressive Animal Welfare Society*¹⁴² and culminating in the Ninth Circuit Court of Appeals' decision in *Catholic Action*¹⁴³ demonstrates that EIA of defense projects is possible and has worked, even in light of national security concerns.

¹³² See EC Env'tl. Legis., *supra* note 5, at x.

¹³³ See generally EEC TREATY; EC TREATY.

¹³⁴ See, e.g., Robinson, *supra* note 29, at 591.

¹³⁵ See *id.* at xix.

¹³⁶ Council Directive 85/337, *supra* note 1, pmbl.

¹³⁷ See EEC TREATY art. 100; Council Directive 85/337, *supra* note 1, pmbl.

¹³⁸ See Robinson, *supra* note 29, at 591. The Dutch and French, for instance, used EIA prior to the promulgation of the Directive. See *id.*

¹³⁹ See Ichter, *supra* note 35, at 685 n.253.

¹⁴⁰ See *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 794-95 (D.C. Cir. 1971).

¹⁴¹ See *Concerned about Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977).

¹⁴² See *Progressive Animal Welfare Soc'y v. Department of Navy*, 725 F. Supp. 479, 475 (W.D. Wash. 1989).

¹⁴³ See *Catholic Action of Haw. v. Brown*, 643 F.2d 569, 571-72 (9th Cir. 1980).

A comparison to the U.S. situation is, of course, limited by the fact that the United States has a common defense system¹⁴⁴ whereas the Member States of the EU largely retain autonomy from the EU with respect to their security and foreign policies.¹⁴⁵ The United States' EIA experience is enlightening, however, in that it indicates that the general confidentiality of national security matters can be maintained while complying with EIA law.¹⁴⁶ In *Concerned about Trident*, for instance, the Court of Appeals for the District of Columbia implicitly found that EIA would not jeopardize the confidentiality or effectiveness of the nation's security policies.¹⁴⁷ Also, Justice Blackmun's concurring opinion in *Catholic Action* stressed that EISs may be constructed so as to avoid any threat of breaching the confidential nature of national security projects.¹⁴⁸ By analogy, the Member States of the EU should feel confident that EIA law will not divulge the secrecy of their national security projects to the public or to other nations.¹⁴⁹ Indeed, there is a means by which the interests at stake—prevention of environmental degradation, confidentiality of national security projects, and public awareness—can be served.¹⁵⁰ These interests are not, as some may assume, antithetical to one another.¹⁵¹

B. *The Proposal*

This Note's proposal begins with the use of a hypothetical EIS, similar to that which was discussed by the Ninth Circuit Court of Appeals' decision in *Catholic Action*.¹⁵² A hypothetical EIA system is an innovative means for achieving a balance between the interests at

¹⁴⁴ See U.S. CONST. art. I, § 8. The U.S. Constitution places exclusive responsibility for national defense in the federal government. See *id.*

¹⁴⁵ See RALPH H. FOLSOM, EUROPEAN COMMUNITY LAW 318–19 (1992). "Transfers of sovereignty over war, peace, military forces, military weapons, and military command" are among the factors that "stand in the way of a Common Defense Policy for the European Community." *Id.*

¹⁴⁶ See, e.g., *Catholic Action*, 643 F.2d at 571–72; *Concerned about Trident*, 555 F.2d at 823.

¹⁴⁷ See *Concerned about Trident*, 555 F.2d at 823.

¹⁴⁸ See *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 148–49 (1981) (Blackmun, J., concurring) (stating that although NEPA must be complied with by all federal agencies, including the Department of Defense, and that classified materials are not exempt from the statute's EIS requirement, EISs may be prepared such that classified materials are not made available to the public while unclassified materials are made available).

¹⁴⁹ See *id.*; *Concerned about Trident*, 555 F.2d at 823.

¹⁵⁰ See, e.g., *Catholic Action*, 643 F.2d at 571–72; *Concerned about Trident*, 555 F.2d at 823; Ichter, *supra* note 35, at 685–87.

¹⁵¹ See, e.g., *Catholic Action*, 643 F.2d at 571–72; *Concerned about Trident*, 555 F.2d at 823; Ichter, *supra* note 35, at 685–87.

¹⁵² See *Catholic Action*, 643 F.2d at 571–72; see also *supra* text accompanying notes 79–83.

stake.¹⁵³ By hypothesizing about proposed plans and discussing the environmental impact of those plans, it would be unnecessary for the military to reveal which plan was actually selected.¹⁵⁴ Any material which the military claimed was confidential could be reviewed by the appropriate court in camera.¹⁵⁵ Courts could use in camera review to decide whether the military's claim to confidentiality was meritorious and if so, whether the EIA was sufficient to satisfy the Directive.¹⁵⁶ Further, under this proposal, any material that the court agreed was confidential would be excluded from a publicly released document.¹⁵⁷

Next, the confidential material would be reviewed by an independent, objective governmental body, acting under a rubric of confidentiality, not unlike a U.S. congressional intelligence oversight committee.¹⁵⁸ After reviewing the material, the committee would compose a recommendation consisting of a brief opinion and numerical ranking that reflects its understanding of the project's environmental impact. The recommendation would not contain any reference to the confidential material that the committee reviewed. The committee would then make its recommendation available to the public and deliver its recommendation to the decision-making authority in charge of granting or denying consent to the project. Neither the public nor the decision-making authority would be made privy to confidential materials; they would have and be able to use, however, an informed review of the project's environmental impact.

It is important to note that the Directive already contains measures that ensure the secrecy of certain materials in the EIA process.¹⁵⁹ Article 10 of the Directive calls for the protection of industrial and commercial secrets.¹⁶⁰ Extending the scope of that article to include the protection of materials relating to national security would be a reasonable justifica-

¹⁵³ See *Catholic Action*, 643 F.2d at 571-72; see also *supra* text accompanying notes 79-83.

¹⁵⁴ See *Ichter*, *supra* note 35, at 688-89.

¹⁵⁵ See *id.* An in camera proceeding is one in which the court's review of the subject matter is conducted in the judge's private chambers so as to exclude public viewing. See BLACK'S LAW DICTIONARY 760 (6th ed. 1990).

¹⁵⁶ See *Ichter*, *supra* note 35, at 689.

¹⁵⁷ See *id.*

¹⁵⁸ See FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947-1989, at 4-5 (1990). Although such committees take on a variety of forms and functions, they share the characteristic of conducting their oversight function in utmost confidentiality. See *id.*

¹⁵⁹ See Council Directive 85/337, *supra* note 1, art. 10.

¹⁶⁰ See *id.*

tion and assurance that the confidentiality of sensitive materials would be maintained throughout the procedure that this Note proposes.¹⁶¹

This proposed EIA system, as applied to national defense projects, would accommodate the various interests at stake. First, it would ensure that the decision-making process accounts for future environmental impacts and therefore more fully gives effect to a policy of preventing environmental harm.¹⁶² Second, the confidentiality of materials would be protected.¹⁶³ As stated, outside of the body issuing the EIS, only an in camera court and an independent, confidential board would learn of those materials. Third, the public-awareness interest would be satisfied in that the public would be appraised of the decision-making process, including the independent board's recommendation ranking, and would be permitted to opine on the project's approval or disapproval.¹⁶⁴

Now is an appropriate time for the EU to expand the scope of its EIA law to include national defense projects.¹⁶⁵ The U.S. model demonstrates that this expansion is possible.¹⁶⁶ Further, factions within the EU seem ready and willing to adopt an expanded EIA law.¹⁶⁷ The call for an EIA of France's nuclear testing by the Committee on the Environment, Public Health and Consumer Protection is indicative of an official desire to apply EIA to defense projects.¹⁶⁸ Also, the 1991 publication of a written question regarding the application of the Directive to military projects is indicative of public concern over the impact that such projects have on the environment.¹⁶⁹ The EU would be wise to amend the Directive so as to include national defense projects in its EIA law.

¹⁶¹ See *id.*

¹⁶² See PLATER ET AL., *supra* note 35, at 600; Ichter, *supra* note 35, at 645.

¹⁶³ See Ichter, *supra* note 35, at 685.

¹⁶⁴ See Council Directive 85/337, *supra* note 1, arts. 6(2), 6(3), 9.

¹⁶⁵ See, e.g., Written Question, *supra* note 111, at 16–17; *EP Committee Debates Nuclear Testing*, *supra* note 111.

¹⁶⁶ See, e.g., *Catholic Action of Haw. v. Brown*, 643 F.2d 569, 572 (9th Cir. 1980), *rev'd sub nom.* 454 U.S. 139, 147 (1981); *Progressive Animal Welfare Soc'y v. Dep't of Navy*, 725 F. Supp. 475, 479 (W.D. Wash. 1989).

¹⁶⁷ See, e.g., Written Question, *supra* note 111, at 16–17; *EP Committee Debates Nuclear Testing*, *supra* note 111.

¹⁶⁸ See *EP Committee Debates Nuclear Testing*, *supra* note 111.

¹⁶⁹ See Written Question, *supra* note 111, at 16–17.

CONCLUSION

EU Directive 85/337/EEC makes EIA law applicable to public and private projects significantly affecting the environment. EIA, which has been utilized throughout the world, signifies a commitment to a preventative approach to environmental protection. In order to be truly effective, however, the Directive's EIA requirement must be extended so as to apply to those national defense projects that are currently exempted from the Directive. An EIA process such as the one proposed by this Note, which is tailored to national defense projects, will give broader, more direct effect to the EIA policies intended to prevent the further degradation of our environment.

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¹⁷⁰ The author wishes to thank Stephanie Harkness and Roger Hayden, Boston College Law School Class of 1996, for editorial supervision in preparing this Note. All errors, of course, are those of the author alone.