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The Competitive Implications of European Environmental Regulation for Canada and the U.S.

*Dale E. Stephenson**

I have practiced U.S. environmental law for a decade, and during the last four years, I have started work in the European context, principally with European Community ("EC") matters and privatization issues in Central and Eastern Europe. Consequently, I have developed a clear insight and perspective into the parallels and differences between U.S. and European practice over the past few years. There are certainly some economic and competitive issues which are starting to affect the world marketplace and which are beginning to attract some attention.

As a general matter, it is important to consider the differences between the EC and the North American contexts. The EC has about 340 million people, about thirty-five percent more than are in the United States, packed into a geographic area roughly a quarter of the size. Consequently, Europeans view environmental issues a little bit differently than Americans, and perhaps it is closer to home for them when contamination goes out the smokestack or into the water.

I have also learned that each EC Member State has its own manner of approaching environmental issues. Last year, for example, I met with a European parliament member to discuss a waste disposal directive that was being considered. In describing the views of Member States on that directive, he stated:

Oh, you know how it is. The Germans say, "We already have this under control; our technical people have solved the problem. Why can't the rest of the world get on board with what we've already achieved?" The Dutch will say, "We'll just add another tax, and nobody will create the waste anymore." The Italians will say, "I think we had that kind of waste once, but we lost it." The Greeks will say, "What's the problem? What's the problem?" The English will mumble, "Oh well, it's a situation that poses a serious, serious financial and socioeconomic implication, and we simply must undertake a comprehensive impact analysis and background study before we'll even take any more thought on the matter."

As a background for the topic today, it is important to look at how the systems of environmental regulation have developed in the United

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The following text was compiled from the transcript of the remarks made by Mr. Stephenson at the Conference.

States and the EC. While the United States has been regarded as the model for environmental development for the past quarter century, there are some important differences that are beginning to emerge in the EC.

Environmental regulation in the United States, until about a quarter century ago, constituted primarily public nuisance law and enforcement under the Rivers and Harbors Act of 1899. Some state water agencies and air agencies began to emerge in the 1950s and 1960s, but it really was not until about 1968 or 1969 that a true environmental program began to develop.

The Environmental Protection Agency ("EPA") was created in 1970, and it began by adopting laws, regulations and other materials. The first Clean Air Act was passed in 1970 and consumed a total of forty typed pages. It was a pretty concise document that people could live and work with, which has since gone through several amendments. In the 1990 Amendment, the Act blossomed to 740 pages with all kinds of detailed regulations and materials.

It is fair to say that the EC is on the front end of that development curve. Some of its major liability directives and materials are quite short. The one that has probably brought the most heartburn to multinational businessmen is the directive for civil liability for waste, which is in some ways comparable to our Superfund statute. The EC directive comprises a total of five pages. It says what it says, but does not go into minute regulation of the details.

The aggregate cost to society of environmental programs in the United States, given studies put together by EPA and some private foundations, is now about \$90 billion a year, and I think this is a pretty fair number. Due to the new Clean Air Act and some other things that are coming through, the cost is projected to be about \$155 billion by the year 2000. Think about that in terms of what the U.S. generates. That is about two to three percent of our gross national product — about half of the Defense Department's budget. For comparison, in Europe, probably only the Germans and the Austrians (who are not yet members of the EC) have spending levels in that range.

Over the last fifteen years, U.S. government-directed environmental expenditures have increased from about \$500 per household to about \$1500 per household. That accounts for about one percent of our gross national product. Industry, other kinds of market losses, things like the CERCLA program, liability programs and banking impacts from our environmental scheme account for the remaining 1.7 percent. On balance, the government through taxes pays for about forty percent of the environmental program, while industry picks up the other sixty percent. That is the kind of economic scheme our regulations have created in the United States.

Clearly, the political media focus is drawn to liability schemes like CERCLA to put liability on faceless corporations, pretending that some-

body else is going to pick up the tab. These schemes make industry pay virtually all of the costs. In statutes like the new Clean Air Act Amendments, there has been a general withdrawal of tax-based funding for governmental programs away from the focus which prevailed in the early days of environmental regulation. For example, the Clean Water Act for sewage treatment plants across the country was initially financed with ninety percent federal money and then fifty percent federal money. Most of that money is going or has gone away.

The EC's 340 million people across twelve Member States began creating joint economic cooperation in 1957 when they drafted the Treaty of Rome. The Treaty of Rome said nothing about environmental regulation or controls; it said that the Member States were going to have some common economic goals and were going to take out certain kinds of barriers to facilitate trade with each other. That scheme was created so that regulations or directives could be adopted, and unanimity was required for most determinations.

Some environmental directives did come out in the early days in response to disasters, primarily the Sevaso dioxin incident and things like that. Such directives always cut back to the lowest denominator, because any one of the Member States — whether the United Kingdom, Spain, Portugal or Greece — could always reject it saying, "That's too expensive for my country."

That all changed in 1986 when the EC adopted the Single European Act, which created the so-called 1992 program of economic integration. For the first time, the EC created an article (Article 130S) with an express environmental platform. That platform still required unanimity to get anything pushed through, so the EC got a little more creative. It went back and looked at the fair trade or economic integration provision of the Single European Act. In order to make 1992 a reality, for things that were required for fair trade or economic integration, it allowed a qualified majority to pass on the directives. No longer could one, two or even three Member States reject the proposal. Upon a challenge, the Court of Justice held that the environmental standards are essential to economic integration and that they could be adopted by a qualified majority.

This is where the EC is right now. We have seen a big thrust of environmental directives. Directives are adopted by the Community, and then Member States have a year and a half or two years to pass enabling legislation at the state level to implement them. A few things pass directly as regulations, which are immediately applicable, but primarily, the kind of authority exercised by the EC today is different from the type of national authority we have in Washington, D.C. The EC system is much more diversified. Also, there is now no effective common enforcement authority to govern all of those things at the European level.

The mentality of the Green Party involved in the political process is also a distinct feature of the EC. The Greens are fairly well infused polit-

ically, and they started throwing back things to make directives much more environmentally aggressive. Directives that are being adopted are going to need a couple years to come into place. By and large, the EC is now five to ten years behind the U.S. and Canada in terms of the strength of its program, but it is coming along rapidly. I think almost forty percent of the directives required to achieve EC 1992 are environmental directives, indicating how important the environmental criteria and standards are to integrating the EC.

A tremendous difference in environmental philosophy exists in the EC today, usually viewed along North-South lines. Germany and the Netherlands are environmentally progressive. They have standards that are essentially similar to or exceed the standards that we have in the United States and Canada. Countries in the southern realm of Europe — particularly Greece, Spain and Portugal — are on the low end of the environmental regulation spectrum. France, the United Kingdom and Belgium are nations in the middle of this spectrum — industrialized countries that are starting to get more green in their philosophy now that it is an emerging political view within their own areas.

The Single European Act picked a high level of environmental protection as its standard.

According to the EC Environment Commissioner, the EC has now reached a phase where the environment and the internal market are on equal footing. The new two-stage standards in the program for foundries is an example. It will allow Germany and the Netherlands to plan ahead for more stringent regulation, and will allow countries like Greece, Spain and Portugal, that do not have the same kind of resources, to maintain a lower standard to keep from driving their economies down.

There are a couple of other areas in Europe you must keep in mind. For one, there is the European Free Trade Association ("EFTA"), comprised of seven countries, including Austria, Sweden and some others like that. Austria and Sweden have now applied for this EC membership. We also have the East or Central European countries that are beginning to fold into the economic picture in Europe. Czechoslovakia, Hungary and Poland are all seeking to join the EC when they can come up to those standards, and further off to the East we have former Soviet Union territories with tremendous populations and resources that will or may well get into this economic picture.

EFTA traditionally has sought to have environmental considerations pushed within the free trade structure of the General Agreement on Tariffs and Trade ("GATT"). The EC wants to do those things on its own internally, and there is a turf battle going on right now. From across the Atlantic, it appears that the EC is attempting to make itself a much more competitive place with respect to the environment than we in the United States have managed to be.

I noticed in preparation for the United Nations Conference on Envi-

ronmental Development that was held in Rio de Janeiro this June, where we compared environmental and economic issues in many countries, the Industrial Chamber of Commerce issued this statement which I think fairly accurately describes the big picture:

Until recently most policy makers treated environment and economic development as separate paths. However, the complex interconnections between environment and economics, essentially a seemingly simple decision, may create far reaching and unexpected repercussions. Economic policy, which does not take environmental considerations into account, can certainly cause environmental damage, but environmental policy, which has more economic considerations, has the potential to distort and disrupt economic conditions nationally and internationally to aggravate existing conditions of poverty to delay the effect of importation of the most urgent environmental protection measures.

Finally, we are starting to look at the balance between economics in emerging nations and advanced nations and environmental considerations in one big picture, in which the United Nations is becoming quite a driving force. I think that perhaps the United Nations wants to take this as their next big policy issue to advance the cause of worldwide integration.

What is the bottom line on all this? There are perhaps more emerging questions than definite answers right now. What environmental issues significantly affect economics in the world picture? How much will new programs cost now, and how much will they cost in the future? Who is going to pay for them — the government or the private sector? What does the investment buy you in terms of real environmental protection? Who sets the standard for what you are going to have? Finally, who can force you to pay for it? Are there going to be direct enforcement programs, or indirect influence through consumer choices?

Also, in terms of liability schemes being developed, can I reasonably predict or plan what that liability scheme is going to do for me? Can I get insurance for it? How much will it cost me now and in the future? Who can force me to pay for it — government enforcement, citizen suits, who?

Right now, there is a big discrepancy between the EC generally, with the exceptions of Germany and the Netherlands, and the United States in terms of the amount of money spent on environmental regulations. For example, I think Italy spends about .25 percent of its gross domestic product on environmental controls, as opposed to about 2.7 percent in the United States and in Germany. You can understand what that does to the price of goods if you are going to put that much capital investment and continuing costs into environmental control. Italy has an advantage if it can take the extra 2.5 percent and put it in its own pockets or if it can sell its goods on the world market for that much less because it does not have to invest in the environmental control infrastructure.

You also have the other issue of who is paying the money and spreading it around. There is a dramatic difference between, for example, the United States, where the private/public mix is about 60/40, and Germany, where the private/public mix is about 50/50. Going even further, seventy percent of the money spent in France is public money, and in Japan, the worst example, eighty-seven percent of the environmental control money spent is public money; factories in those nations are not paying money out of their own pockets. To the extent such nations spread these policies across the economy as a whole, key industries that do not have to pay for the costs of add-on environmental controls can sell their products that much cheaper and can have a competitive advantage in the marketplace.

There have been key developments affecting the economics within the EC itself. There are many costs coming up, and they follow the general scheme we have seen in the United States and Canada. There is a comprehensive water law that is starting to have some teeth in it. There is a comprehensive air law, as well as hazardous waste-type laws. A directive has just been adopted by the EC that finally defines what hazardous waste is. Until this year, we had twelve different definitions of what "hazardous waste" was. Such differences create non-tariff trade barriers. When one company can dispose of its waste in its country as a nonhazardous waste, and somebody else has to dispose of the same type of waste at ten times the cost because it is classified as "hazardous" in its country, this is a trade difference. In the country where the waste is classified "hazardous", the waste may also travel to another Member State. The country which classifies the waste as "nonhazardous" will become an environmental dumping zone. That is exactly what was going on. That distinction is being removed right now.

Another area where we see the question of economics is the use of fiscal instruments to support environmental programs in a positive fashion, much like the trading credits concept under the Clean Air Act. There is, for example, a new directive being prepared by the EC commission on carbon dioxide taxes and trading of carbon dioxide costs, and if people can eliminate those kinds of materials over a certain time period, they will pay less tax and can make economic decisions about what those things are going to cost. There is also a new EC directive being drafted on packaging questions. The goal here is, within the next ten years, to make ninety percent of the packaging waste recoverable and let people make their own choices about how they are going to meet that standard. There will be penalties and essentially tariffs for people who cannot meet the standards, but it is an economic-based incentive program.

These fiscal instruments will have economic impacts in the United States and Canada to the extent we want to be trading partners with the EC. If your package is going to go over there and move within the EC, you will have to meet EC packaging standards. Your boxes, materials and wrappings are going to have to be recyclable; you will have to make

arrangements so those materials are recyclable. If you cannot meet the comprehensive standards, your goods will be essentially barred from moving within the EC.

The U.S. computer company Hewlett-Packard provides a good example of dealing with the packaging standard. Hewlett Packard has just redesigned all of its packaging worldwide to make it easier to recycle in Germany, which already has a law like this in place. Recycling is being advanced to a corporate-wide concept, affecting the worldwide management of Hewlett-Packard.

Similarly, laws are already in place in Germany requiring people to make their products recyclable and take them back at the end of their useful life. Therefore, if you want to sell a battery in Germany, and it has a six-year useful life, part of the deal is that you have to take the battery back when the battery is dead.

Volkswagen has gone one step further on a couple of new cars — recyclable cars. At the end of the useful life of a car, Volkswagen takes them back so they can break them apart, separate metals, plastics and other materials and recycle them. It is part of their design process.

When these standards come into place, they will dramatically increase the trade issues for U.S. and Canadian trading partners who want to fall — will have to fall — within those standards to get their products into the market.

There are some other, more subtle things going on in the EC. They are currently working on an eco-label scheme where they want to have consumer market forces judge whether products are accepted or not. For people who are willing to audit their own facilities and then have a board certify that they are an environmentally responsible company, they will have a certification, a little “environment safe” label, that they can put on their product. When people go into the store and see similar products side by side, they can ask if they are willing to pay ten cents more for the one that has the eco-label on it. You might think that most people are callous in this regard, but about seventy-five percent of Germans and about ninety percent of Danes have said they would pay ten to fifteen percent more for a product with an eco-label on it, and Danish and German companies are responding by going after that rapidly.

There is also a directive moving through on environmental auditing for manufacturing facilities. It too is a voluntary scheme, and it has had the same kind of impact. If you comply with the program, you can advertise that you are one of these voluntary auditing facilities that meets government standards, and you can thereby derive whatever public benefit or marketplace benefit that is associated with that distinction.

State aid is also a big issue here. The EC has generally taken a very dim view of state aids restoring the marketplace within the European Community, but the environmental market is one example where it al-

lows them. There was a recent decision in favor of a Belgium chemical company, allowing it to get several million dollars in aid from the Belgium Government and a property tax exemption to put in environmental controls. So, you are going to see distortions occurring when money is moving generally from the tax base and is spread evenly, and when that money is directed to selected industries. If that chemical company can save one, two or three percent on the cost of its product in the world marketplace, there is competitive disadvantage going on here.

The one thing that probably gives people the most heartburn is what the EC is doing in terms of a Superfund-like program. There is a liability for waste directive moving forward in the EC. The EC has done a couple things differently than the United States, and that point was brought home to me when I met with the same member of parliament who I alluded to earlier. He said:

We think it is a good idea to clean up sites, but we drafted this directive, and the directive says there is not going to be any retroactive liability. We are going to make it strict. We are going to make it joint and several. We are going to make you have insurance to take care of these things, but we are not going to make it retroactive, and we are going to give you an absolute defense if you can get it in the gate of a state-licensed facility. That is encouraging good behavior. It is predictable; you can get insurance for that kind of a thing. Insurance costs a whole lot less than the uncertainty of the financial markets you have created in the United States.

All I could say to him was, "You understand U.S. environmental law very well." We know what we have done to our banking system here. The Superfund program — the inability to get insurance, the unpredictability of retroactive liability that goes back fifty or a hundred years — could not be planned for. Whenever that spotlight of Superfund liability lands on a particular company, it can be bankrupt and out of business, and the jobs can be gone. Well, the EC is thinking a little bit more carefully to avoid doing that.

Enforcement will also make a big difference in what is going to happen in Europe. There is currently no big supernational environmental agency. They are still talking about having one, but they are at a stalemate on where to locate it; France wants it in France, and other Member States disagree. I can tell you that when it is created, it will no time soon have the 14,000 employees that the United States Environmental Protection Agency has, and it will not include a bevy of lawyers backing up enforcement. The EC is a long way away from that.

I think you get a little insight into what is going to happen when you look at the civil liability for waste directive. Within that law or directive, the EC is creating direct citizen suit potential, and I think to avoid the political uncertainty and difficulties of creating a supernational enforcement mechanism, maybe they are going back to the early days of environmental enforcement in the United States. They are encouraging

citizens to go ahead and bring those actions directly against Member States that will not implement the laws and against companies who have liability under the laws they create. Once people get used to that litigation mode in Europe — it is not really seen as a very acceptable thing right now — perhaps you can have enforcement at the EC level, but I would not expect it any time soon.

In order to avoid significant distortions in this world marketplace, and particularly between Europe and North America, we are going to need an honest broker who speaks the language of both environmental law and economics. I am not sure if that person exists — given my own nature of not trusting economists any more than my economist brother trusts lawyers — but I am reminded of the story of the Texas sheriff who finally caught up with the Mexican bandit who had robbed several banks:

The sheriff, while holding the bandit at gunpoint, said, "Tell me where you hid the money." The bandit replied, "No hablo Ingles." After a while, this nice Texas lawyer walked up and asked, "You all got a problem here?" The sheriff said, "I want to ask him where the money is, and he only speaks Spanish, and I only speak English. We aren't getting anywhere." The lawyer said, "Well, I think I can straighten this out. I speak both languages." The lawyer translated the sheriff's question, and the bandit said in Spanish that he was not going to tell. The lawyer turned back to the sheriff and said, "He says he's not going to tell you." The sheriff told the lawyer to ask the bandit whether he sees his gun. The lawyer translated and said to the sheriff, "He says he sees the gun." The sheriff said to ask him if he wants to die. The lawyer asked the question, and the bandit responded in Spanish, "All right, all right. I hid the money over by the well. It's all there, and you can go get it." The lawyer turned to the sheriff and said, "He said he's not afraid to die."

Hopefully, in balancing the delicate issues of global environmental protection and international trade we can find a person to broker those issues who is not out to line his own pockets like the sheriff.

