

TROUBLE IN PARADISE: MAINTAINING THE EU IDEAL FOR ENVIRONMENTAL POLICY IN EASTERN EUROPE

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I. INTRODUCTION

“[We were] under the sway of the destructive belief that man is pinnacle of creation, and not just a part of it, and that therefore everything is permitted. . . . We are still destroying the planet that was entrusted to us, and its environment.”¹ - President Vaclav Havel of the Czech and Slovak Federated Republic²

Twenty-first century Krakow, Poland bustles with tourists and vendors. No one notices the faceless statues that haunt the little streets stemming out from the *Rynek Główny*, the Grand Square.³ Melted by acid rain, they linger as survivors of industrialism. As time passes, the ideas of industrialism do as well, but the times in Eastern Europe are also alive with change. Today, the empowered vestiges of former Yugoslavia and former Soviet Union are independent, thriving nations seeking to transform their governments and rejuvenate their land. The

¹ William K. Reilly, *The 1991 Bellagio Conference on U.S. – U.S.S.R. Environmental Protection Institution: International Cooperation on the Environment: The Cleanup of Eastern Europe*, 19 B.C. Env'tl. Aff. L. Rev. 501, 501-02 (1992).

² See Julian Borger, *Vaclav Havel, Former Czech President, dies aged 75*, THE GUARDIAN, Dec. 18, 2011, <http://www.guardian.co.uk/world/2011/dec/18/vaclav-havel-dies>. Václav Havel was a dissident playwright who led the Czechoslovakian “velvet revolution” and was one of the fathers of the east European pro-democracy movement that led to the fall of the Berlin wall. He was the first post-Communist Czechoslovakian president. See Julian Borger, *Vaclav Havel, Former Czech President, dies aged 75*, THE GUARDIAN, December 18, 2011, available at <http://www.guardian.co.uk/world/2011/dec/18/vaclav-havel-dies>.

³ *Dark Past, Bright Future: Environmental Cooperation in Central and Eastern Europe and the New Independent States (EPA 160-K-98-002)*, ENVIRONMENTAL PROTECTION AGENCY INTERNATIONAL PROGRAMS, <http://www.epa.gov/oiamount/regions/Europe/darkpast.htm> (“The covers of environmental magazines and journals no longer feature soot-covered faces of children in the Black Triangle or the faceless statues of Krakow’s monuments, dissolved by acid rain.”).

most publicized of these changes is that Eastern European countries have made strides to join the European Union (EU).⁴

Ten Central and Eastern European (CEE) nations have joined the EU in the last decade.⁵ The conditions for joining the EU are scrupulous and expansive, covering everything from: election rules, food product labels, and battery disposal. CEE states who are newly inducted into the EU are currently striving to successfully implement the complete extent of collected EU law. Eastern Europe has long lagged behind the west in environmental policy.⁶ Extreme industrialization and widespread deregulation over the last century produced many areas with environmental degradation.⁷ The idea is that by adopting European environmental policy, Eastern European states can cash in on European Union (EU) financial support, while simultaneously improving environmental conditions.⁸

⁴ *Clean Up or Clear Out: The European Union is Telling Eastern Applicants to Get Greener*, THE ECONOMIST, Dec. 9, 1999, <http://www.economist.com/node/327069> (“The European Commission may tolerate a short transition period. But the EU will not tolerate slackers. Its businesses are not prepared to put up with competition from companies with lower environmental costs—and EU citizens, at a time of high emotion over food safety, are in no mood to compromise on matters of human health.” *Clean Up or Clear Out: The European Union is Telling Eastern Applicants to Get Greener*, THE ECONOMIST (Dec. 9, 1999), <http://www.economist.com/node/327069>.)

⁵ See Christopher Hope, *Eight More Eastern European countries could Join the EU by 2018, President of Romania Says*, THE TELEGRAPH, June 6, 2011, <http://www.telegraph.co.uk/news/uknews/immigration/8560109/Eight-more-Eastern-European-countries-could-join-EU-by-2018-President-of-Romania-says.html>, (There are currently twenty-seven members of the EU (soon to be twenty-eight with the entry of Croatia). That number could increase substantially in the next decade. “We are looking at the extension. May be it is not the right moment in this crisis to discuss but it is clear that both countries are supportive for western Balkans integration. . . . That will be 35, maybe by 2018 or 2020 when this process will be finalised.” President Basescu said that the expansion was dependent on EU countries hit by economic crisis. President Basescu also said “It will depend on very much on how Europe left the crisis period.”)

⁶ Margareta E. Kulesa, *Environmental Effects of EU Enlargement – Short-term Gains and Medium-term Losses?* INTERECONOMICS, 284 (2002).

⁷ *Id.* at 285; see also *Clean Up or Clear Out*, *supra* note 5 (contending on the other hand, “[T]he Slav lands are actually doing better than the EU in some respects. Household waste, per easterner, is about half the EU’s average. More of eastern farms are organic. And despite its rash of black spots, the region still has swathes of pristine wilderness where the wolf and the bear, long virtually extinct in the west, still roam free.”).

⁸ Kulesa, *supra* note 6, at 286.

After years of work, Eastern Europe skirts the periphery of this idealistic environmental recovery. But in 2015, the largest mass refugee migration⁹ reached a peak with hundreds of thousands of migrants traveling through Turkey, across the Mediterranean to Greece, and through the Balkans into Europe. The EU ideal of solidarity slips in the face of this humanitarian emergency. Hungary closed its borders to Serbia to avoid more immigrants. The EU rallies for forced quotas of refugees per country. Ultimately, Eastern Europe has been severely criticized for its reluctance to welcome refugees into their countries. While Germany has liberally received over 800,000 migrants, there are no welcome banners in Eastern Europe. Indeed, Hungarian Prime Minister Viktor Orban has called the wave of migrants “a German problem.”¹⁰

German Chancellor Angela Merkel has countered that: “If Europe fails on the question of refugees—if this close link with universal civil rights is broken—then it won’t be the Europe we wished for.”¹¹ “It would be a disaster for Europe to go down that way,” says Francois Crépeau, the United Nation’s special rapporteur on the human rights of migrants. “It would be a disaster for the [European Union] because they would renounce one of their greatest achievements.”¹²

Eastern Europe has been criticized as an image of hypocrisy, “revealing themselves to be intolerant, illiberal, xenophobic, and incapable of remembering the spirit of solidarity that carried them to freedom a quarter-century ago.” Particularly since 2004, when Eastern Europe began joining the EU, they have “benefited from massive

⁹ Migrant Crisis ‘a German problem’ – Hungary’s Orban, BBC NEWS (Sept. 3, 2015), <http://www.bbc.com/news/world-europe-34136823> (For the sake of clarification, the term migrant is defined in the Oxford English Dictionary as “one who moves, either temporarily or permanently, from one place, area, or country of residence to another”. A refugee on the other hand, is, according to the 1951 Refugee Convention, any person who “owing to a well-founded fear” of persecution is outside their country of nationality and “unable” or “unwilling” to seek the protection of that country. To gain the status, one has to go through the legal process of claiming asylum.).

¹⁰ *Id.*

¹¹ Eddy, Melissa, *Angela Merkel Calls for European Unity to Address Migrant Influx*, NEW YORK TIMES (Aug. 31, 2015), http://www.nytimes.com/2015/09/01/world/europe/germany-migrants-merkel.html?_r=0.

¹² See Rosenthal, Max, T, *How the Refugee Crisis is Wreaking Havoc on the European Union*, MOTHER JONES, Sept. 3, 2015, <http://francoiscrepeau.com/how-the-refugees-crisis-is-wreaking-havoc-on-the-european-union/>.

financial transfers in the form of European structural and cohesion funds. Today, they are unwilling to contribute anything to resolve the greatest refugee crisis facing Europe since World War II.”¹³

In 2015, the European Union was on the verge of disaster. Greece defaulted on its loan to the IMF, confessing an economic truth: European leaders have been sleepwalking through a forest of landmines.¹⁴ Policies of austerity and incentives to induce behavior are outdated and single-minded. Severe austerity (reducing government debts through spending cuts and tax boosts) leads to prolonged stagnation in the economy.¹⁵ A contracting economy can lead to backsliding. Has the “EU Experiment” failed?¹⁶

Nobel Prize winning economist Paul Krugman stressed this in 2013 when he publicized an International Monetary Fund (IMF) report that apologizes for economic austerity policy recommendations that caused steep downturns in economies. The report went so far as to demonstrate that “the more drastic the austerity (measured by calculating spending cuts and tax increases as a percentage of GDP), the greater the economic downturn.”¹⁷

Today, the threats have changed. The Greek government agreed to financial reforms in exchange for another bailout. Talk of a euro exit dissipated. The conversation in Europe is now dominated by the astronomical rise in the number of migrants trying to enter the continent.¹⁸ According to Frontex, the EU’s external border force, approximately 885,000 refugees entered Europe through Greece in

¹³ See Gross, Jan T., *Eastern Europe’s Crisis of Shame*, PROJECT SYNDICATE, Sept. 13, 2015, <https://www.project-syndicate.org/commentary/eastern-europe-refugee-crisis-xenophobia-by-jan-gross-2015-09?barrier=true>.

¹⁴ See *The Sleepwalkers*, THE ECONOMIST, May 25, 2013, <http://www.economist.com/news/leaders/21578386-euro-zone-desperately-need-boost-no-news-bad-news-sleepwalkers>.

¹⁵ See Bill Lee, *The European Union: A Failed Experiment*, HARV. BUS. REV., (2013), <https://hbr.org/2013/06/the-european-union-a-failed-ex>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Rosenthal, Max J., *How the Refugees Crisis is Wreaking Havoc on the European Union*, MOTHER JONES (Sept. 3, 2015), <http://www.motherjones.com/politics/2015/08/how-migrant-crisis-wreaking-havoc-on-european-union>.

2015.¹⁹ In the same year, another 900,000 refugees entered through other channels.²⁰

The concern is logical: overpopulation in an area generally causes depletion of resources, including forests, water, wildlife, and fuel. During mass migration, host nation infrastructure is not prepared for sanitation needs, the influx of vehicles and air pollution, food shortages, land shortages, and increases in unemployment.²¹

The research in this article first appeared in the *European Energy and Environmental Law Review* in 2015. However, the problems facing Eastern Europe have transformed in the last two years. This second edition has been tailored to address the new Eastern Europe. An Eastern Europe that is still attempting to implement and adopt EU law in the midst of a refugee crisis. In Section II, will explore the transposition of EU law into Eastern European nations. First, it will expound on the evolution of the EU in relation to the changes that have occurred in Eastern Europe over the last fifty years. From that point, the article will demonstrate how the EU uses membership candidacy to encourage rule transformation in Eastern Europe. Namely, the article will explore the environmental legislative conditions that Central and Eastern European (CEE) states must adopt in order to be eligible for EU membership. Section II considers the types of policies, regulations, and laws transposed; the various organizations, networks, and programs assisting rule transposition; as well as the degree of success and compliance.

The crux of Section III involves the potential for environmental law regression, or “backsliding,” as well as approaches to prevent political waning of environmentalism during refugee migration. This section will explore the current situation in Eastern Europe and the characteristics of the Environmental Acquis that make it more or less susceptible to “backsliding.” Because it is costly, requires outside financing, public participation, and secondary obligations like enforcement, many believe

¹⁹ Frontex, *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, (2016), <http://frontex.europa.eu/trends-and-routes/eastern-mediterranean-route/>.

²⁰ *Id.*

²¹ See Marcin Zaborowski, *Why Eastern Europe’s resistance to refugee quotas is not ‘selfish,’* THE GUARDIAN, Sept. 16, 2015, <http://www.theguardian.com/commentisfree/2015/sep/16/eastern-european-migrants-refugees-selfish>.

that environmental law is doomed to regression.²² Ultimately, this article first concludes that CEE adoption of EU law is on the fringe of detrimental backsliding and while rule adoption is volatile as the global economic crisis persist, environmentalism is unique. It affects the day to day health of every person in a region, regardless of citizenship. Those characteristics, as demonstrated in Section III, may serve as a conduit for maintaining environmental policy in the face of political backsliding in Eastern Europe.

Currently, priorities have shifted from policy progression to simple survival for the people and infrastructure of Eastern Europe. As a result, Environmental laws in Eastern Europe are more prone to backsliding. Further, environmental policy and planning is critical to provide people with livable and sanitary land space, drinkable water, breathable air, and fuel. Consequently, the focus should be shifted from “the resources refugees deplete or even destroy” to “the positive impacts of the refugee influx are realistic and how can we facilitate their achievement.”²³ This shift in perspective could be imperative in preventing backsliding of environmental law in Eastern Europe.

II. WHOSE LAW IS IT ANYWAY? EU MEMBERSHIP AS AN INCENTIVE TO TRANSFORM ENVIRONMENTAL LAW IN EASTERN EUROPE

The EU has assumed the immense responsibility of transforming the entirety of Europe. Symbolizing the success in embracing a “fraternity between nations.” On December 10, 2012, the EU was awarded the Nobel Peace Prize in “recognition of six decades of peace, reconciliation, democracy, and human rights” in all of Europe.²⁴ The Norwegian Nobel Committee announced that its decision was based on the stabilizing role the EU has played in transforming “most of Europe

²² Georges Kremlis and Jan Dusik, *The Challenge of the Implementation of the Environmental Acquis Communautaire in the New Member States*, INTERNATIONAL CONFERENCE FOR ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 1 (2004), http://www.inece.org/conference/7/vol1/Kremlis_Dusik.pdf.

²³ David Keane, *The environmental causes and consequences of migration: a search for the meaning of ‘environmental refugees.’* 16 GEO. INT’L ENV’T L REV 7 (2004).

²⁴ *Nobel Peace Prize Awarded to European Union*, EUROPA.EU, last visited Dec. 12, 2012, http://europa.eu/about-eu/basic-information/eu-nobel/index_en.htm.

from a continent of war to a continent of peace.”²⁵ EU membership is now “possible for several Central and Eastern European countries, thereby opening a new era in European history. The division between East and West has to a large extent been brought to an end. . . [leading to] reconciliation in the Balkans.”²⁶ Thus, EU actions to assist struggling neighbors, is truly a commanding and challenging endeavor, and one that should be granted the leeway of unfolding time, in assessing its degree of success.

The European Union promulgates a profusion of regulations, legislation, agency standards, and policies, all of which embody the EU purpose of supporting balance and equality within the entire European community. Over the last two decades, established members of the EU have embraced a new but similar role, championing the “reformation” of Eastern Europe.²⁷

The transformation of the east is in reality simply an extension of EU pursuits. That is, the EU has been expanding since it was established, always inducing neighboring nations to unite under one interdependent body. After over fifty years of expansion, the EU has emphatically established arguably one of the most organized, scrupulous, and exhausting compilations of law the world has ever confronted.

Currently, Central and Eastern Europe are both adopting environmental laws but they are moving on several other parallel tracks as well.²⁸ Specifically, the new member states have simultaneously transitioned from autocracy to democracy, from centrally planned economy to free and international market, and from isolated “developing” nations to active members of global international policy coordination.²⁹

²⁵ *Nobel Peace Prize for 2012*, THE NORWEGIAN NOBEL COMMITTEE, last visited Dec. 12, 2012, http://nobelpeaceprize.org/en_GB/laureates/laureates-2012/announce-2012/.

²⁶ *Id.*

²⁷ Hristina Stevanović Čarapina, *The Western Balkans Environmental Programme: Review of Policy Integration and Capacity Development Need Assessment Studies*, UNDP MONTENEGRO (2009).

²⁸ Janos Zlinszky, Marco Martuzzi and Joel A. Tickner, The World Health Organization Regional Office for Europe, *The Precautionary Principle: Protecting Public Health, the Environment and the Future of our Children*, 169 – 74 (2004), http://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf.

²⁹ *Id.* at 177.

A. EVOLUTION OF THE EU AND EASTERN EUROPE

1. *A Brief History of the EU*

In the beginning, with visions of peace and diplomacy, six countries created the European Union. For followers of “europeanization,”³⁰ the European Union (EU) ameliorates political discord and advances the most integrated regional market. Indeed, with all the tools of democracy, social services, and a mounting share of the global economy, the EU continues to add members to its ranks.

On March 25, 1957 Belgium, France, Germany, Italy, Luxembourg, and the Netherlands signed the Treaty of Rome, intending to institute a system which would inhibit France and Germany from ever again going to war against each other.³¹ To create a system of governance that strives to make war between European nations unthinkable is “surely one of the greatest achievements of the human spirit since the American Constitution.”³² The European Community, as it was called then, opened its membership to the United Kingdom, Ireland, and Denmark in 1973, intending to introduce democracy into its governance system. From that point, Greece joined in 1981, and Portugal and Spain in 1986. Each state had to wait “until the Colonels had been thrown out in Greece and the dictators Franco and Salazar had gone [from] Spain and Portugal.”³³ The original Treaty of Rome³⁴ never required democracy, but the Maastricht Treaty of 1991³⁵ mandated it.

In Copenhagen in June 1993, the European Council laid down, for the first time, the criteria it would apply to decide on the acceptability of candidates for membership. It specified that:

“[M]embership requires that the candidate country has achieved the stability of institutions guaranteeing democracy, the rule of law, human

³⁰ See MERRIAM-WEBSTER ONLINE DICTIONARY (2012), <http://www.merriam-webster.com/dictionary/europeanize> (noting since 1844, Europeanization has been defined as: “to cause to acquire or conform to European characteristics.”).

³¹ Ambassador John B. Richardson, *The Road to a Unified Peaceful Europe: Keynote Address* 1 Loy. U. Chi. Int’l L. Rev. 5, 6 (2003), <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=1+Loy.+U.+Chi.+Int%27l+L.+Rev.+5&srctype=smi&srcid=3B15&key=9d734c80e3814b33c588862b6e1f98b9>.

³² *Id.* at 5.

³³ *Id.*

³⁴ See Richardson, *supra* note 31, at 1-2.

³⁵ *Id.* at 2.

rights, and respect for and protection of minorities, a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."³⁶

The vision for enlarging the EU was not simply to put the economies of these countries 'back on their feet.'³⁷ Enlarging the EU builds up democratic institutions, encourages the development of uniform society and judicial systems, and ensures a specific rule of law holds sway.³⁸

2. Eastern Europe

The term "Eastern Europe" is often used to refer to all European countries which were previously communist. The concept of the "Iron Curtain" itself separated Soviet Eastern Europe from the West throughout the Cold War. Thus, the boundaries of Eastern Europe are abstract social constructs that fluctuate depending on the context and the source. This paper will include the following countries under the umbrella term of "Eastern Europe": Greece, Albania, Montenegro, Former Yugoslav Republic of Macedonia, Bulgaria, Serbia, Kosovo, Bosnia and Herzegovina, Croatia, Slovenia, Austria, Hungary, Slovakia, Ukraine and Crimea, Romania, Republic of Moldova, Belarus, Lithuania, Latvia, and Estonia.

As the Iron Curtain fell, the west watched with anticipation to see what life was like on the other side. Indeed, they shared many

³⁶ European Council in Copenhagen, Conclusions of the Presidency, (21-22 June 1993, SN 180/1/93) 12.

³⁷ *Basic Information on the European Union*, EUROPA.EU, last visited Dec. 12, 2012, http://europa.eu/about-eu/basic-information/index_en.htm, (noting the EU was formed originally as an economic union, it has evolved substantially in terms of supporting developing nations around Europe: One of its main goals is to promote human rights both internally and around the world. Human dignity, freedom, democracy, equality, the rule of law and respect for human rights: these are the core values of the EU. Since the 2009 signing of the Treaty of Lisbon, the EU's Charter of Fundamental Rights brings all these rights together in a single document).

³⁸ See Richardson, *supra* note 31, at 1 (stating: "[t]oday, I want to suggest to you that when ten countries sign their treaties of accession to the European Union. . . they will not just be the latest members of a club. They will be part of a historic process of the first peaceful unification of Europe in human history, a process not only of elimination of frontiers, but also of the spread and deepening of a set of values. . .).

characteristics with their eastern counterparts: (1) tired of their governments, (2) hard working, and (3) raised families. However, the former Soviet Bloc was marred by certain political and economic perspectives that were ultimately detrimental.

Indeed, the CEE surrounding regions attract much attention from the EU because they are marked by such significant social, political, and economic differences, as compared to the existing members.³⁹ Central and Eastern European states enjoy significantly less national income with which to invigorate any social or political reform. Indeed, out of the current twenty-seven EU states, the original western member states record per capita GDPs between 5% and 250% above the EU average.⁴⁰ Simultaneously, no CEE state breaks the EU GDP per capita average.⁴¹ In fact, Bulgaria, Romania, Latvia, Lithuania, Estonia, and Hungary all live off of incomes that are almost half of any western EU state.⁴² World Bank reports estimate that it will take many decades for CEE states to reach the EU's current average GDP per capita.⁴³

B. EU MEMBERSHIP AS AN INCENTIVE

1. Environmentalism

The Copenhagen Criteria for accession sets forth the adoption of the common rules, standards and policies that make up the body of EU law.⁴⁴ The directives, regulations, decisions, and recommendations must

³⁹ Ketherine Krause, *European Union Directives and Poland: A Case Study*, 27 U. Pa. J. Int'l Econ. L. 155 (2006).

⁴⁰ *GDP per Capita in the Member States Ranged from 45% to 274% of the EU27 average in 2011*, EUROSTAT NEWSRELEASE, June 20, 2012, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-20062012-AP/EN/2-20062012-AP-EN.PDF.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Krause, *supra* note 39.

⁴⁴ *Accession Criteria (Copenhagen Criteria), Summary of EU Legislation*, EUROPA.EU, http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm (noting to join the EU, new Member States must achieve three objectives: (1) Political stability guaranteeing democracy and human rights; (2) Functioning market economy subject to competitive pressures; (3) Acceptance of the Community Acquis. Additionally, Any country seeking membership of the European Union (EU) must conform to the conditions set out by Article 49 and the principles laid down in Article 6(1) of the Treaty on European Union. Relevant criteria were established by the

be integrated into the law of each candidate state and enforced before membership is possible.⁴⁵ Furthermore, more environmentally advanced nations insist upon the fulfillment of all European environmental quality standards and production process standards, regardless of the costs imposed.⁴⁶ Otherwise, an uneven playing field in the EU Common Market would create competitive disadvantages in the economy.⁴⁷

Environmental concerns, of course, were not the reason CEE states sought EU membership. Rather, environmental progression was more a welcomed consequence of membership. But environmental policies do play a clear role in the body of EU law and the accession process.

2. Rules of Enlargement

Over the last two decades, the EU has plucked CEE neighboring states from their nationalist separatism and offered them special membership into the EU. The accession of new states joining the EU is referred to as EU Enlargement while the inculcation of European standards and regulatory practice into the governance systems of states like CEE is known as Europeanization.⁴⁸

Not surprisingly, Europeanization of outside states has occurred largely through the mechanism of enlargement.⁴⁹ Candidate states of CEE have engaged in accession processes into the EU since the fall of the Soviet Union. Accession itself culminated in May of 2004⁵⁰ when

Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995).

⁴⁵ Kulesa, *supra* note 6, at 285.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ London School of Economics, European Institute and Department of Government, James Hughes, Gwendolyn Sasse, and Claire Gordon, *The Ambivalence of Conditionality: Europeanization and Regionalization in Central and Eastern Europe*, ECPR Joint Sessions Turin, (Mar. 22-27, 2002).

⁴⁹ See THE ENLARGEMENT OF THE EUROPEAN UNION (Marise Cremona ed., 2003); EU ENLARGEMENT: A LEGAL APPROACH (Christophe Hillion ed.); Marc Maresceau, *Pre-Accession*, in THE ENLARGEMENT OF THE EUROPEAN UNION (Marise Cremona ed., 2003); Wojciech Sadurski, *Accession's Democracy Dividend: The Impact of EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe*, 10 EUR. L. REV. 371 (2004).

⁵⁰ Amichai Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?* 12 COLUM. J. EUR. L. 383 (2006).

eight new states achieved membership and the EU now spans from Portugal to Estonia.⁵¹

Eventual accession, however, is an arduous task symbolized by the oft-cited “requirement that they comply with and effectively implement over 180,000 pages of the *Acquis communautaire*.”⁵² In preparing for accession, candidate states develop democratic political rule and European legal alignment through the conduit of reform-oriented technical and financial assistance, as well as partial inclusion in EU programs and agencies.⁵³ Thus, CEE states are actually integrating into the EU system far before formal accession.⁵⁴

As a consequence of the transformation of former Soviet nations, enlargement as a mechanism for policy reform has been hailed as the great success of “Europe’s transformative power.”⁵⁵ Indeed, membership in the EU generally reinforces and incentivizes democratic transition and socio-economic conformation into European norms.⁵⁶ The condition of membership into the EU is notably CEE state adoption of the *Acquis Communautaire*,⁵⁷ the comprehensive mechanism of systematic integration and policy uniformity.⁵⁸

3. *The Acquis Communautaire & the Environmental Acquis*

a. Big Picture Developments

The instrument of EU Enlargement is the general accession framework, the *Acquis Communautaire*, namely the entire corpus of institutional, legal, political, social, and legislative achievements of the existing EU.⁵⁹ The *Acquis* originates from Articles 2 and 3 of the EC Treaty⁶⁰ as well as Court of Justice decisions and the EU’s institutional

⁵¹ Ketherine Krause, *European Union Directives and Poland: A Case Study*, 27 U. PA. J. INT’L ECON. L. 155 (2006) (noting in 2007, Bulgaria and Romania joined the EU, totaling ten New Members over the last decade).

⁵² Magen, *supra* note 50, at 386.

⁵³ *Id.*

⁵⁴ *Id.* at 387.

⁵⁵ Tanja A. Borzel, Anna Fernandez, and Nuria Font, *Coping with Accession to the EC: New Modes of Environmental Governance*, Annual Convention of the American Political Science Association, 1 (2010).

⁵⁶ *Id.*

⁵⁷ *Id.* (contending there are 581 Environmental Directives).

⁵⁸ Hughes, *supra* note 48, at 1.

⁵⁹ *Id.*

⁶⁰ *See Accession Criteria*, *supra* note 44.

legal obligations.⁶¹ Inherently, the Acquis captures even the general policies and internal values of the EU⁶² as well as the administrative capacity to implement and enforce them.⁶³

The Acquis implemented today is very different from the transposed EU laws integrated in Greece, Spain and Portugal over twenty years ago. The Acquis doubled in size during that time, not to mention the more recent development of a single European Market, a Common Currency, and the Common Security Policy. In fact, the Acquis, which centers on conditionality, has been developed specifically for Eastern Enlargement.⁶⁴

The massive framework encompassed in the Acquis is broken down into a variety of specific legal and legislative measures that comprise EU regulations and directives.⁶⁵ Indeed, the body of European law focused on the environment is referred to as the “Environment Acquis” and is the second largest thematic body of legislation, only after agriculture.⁶⁶ In order to better integrate sections of the law, the Environment Acquis is compartmentalized into broad “Framework Directives.” Each Directive is comprised of specific binding quality and technical standards, as well as discretionary objectives and suggestions.⁶⁷ Candidate states must meet each standard in order to be eligible for accession into the EU.⁶⁸

b. Structure and Policy

The Environmental Acquis, the EU’s environmental legislation, comprises a number of recommendations, communications and other policy documents to understand EU environmental policy.⁶⁹ The directive topics are divided into nine sections, each divided again into

⁶¹ *Id.*

⁶² Krause, *supra* note 39.

⁶³ *See Accession Criteria*, *supra* note 44.

⁶⁴ Borzel, *supra* note 55, at 2.

⁶⁵ Krause, *supra* note 39.

⁶⁶ The World Bank, *Why Adopt the Environmental Acquis?* (last visited Dec. 5, 2012), <http://siteresources.worldbank.org/INTECAREGTOPENVIRONMENT/Resources/511168-1191448157765/Chapter1.pdf>.

⁶⁷ *Id.*

⁶⁸ *See Accession Criteria*, *supra* note 44.

⁶⁹ *Environmental Software Services*, The Environmental Acquis (last visited Dec. 10, 2012), <http://www.ess.co.at/REGULATIONS/Acquis.html>.

two parts. First, the white paper legislation is the original legislation covered in the European Commission's "White Paper on Preparation of the Associated Countries of central and Eastern Europe for Integration into the Internal Market of the Union."⁷⁰ The Non-White Paper legislation are newer rules implemented after the 1995 White Paper.⁷¹

The Environmental Acquis includes an array of framework directives focusing on different aspects of environmental law: (1) Horizontal Framework; (2) Air Quality Directive; (3) Waste Management Directive; (4) Water Quality Directive; (5) Nature Protection Directive; (6) Industrial Pollution Control and Risk Management; (7) Chemicals and Genetically Modified Organisms; (8) Noise from Vehicles and Machinery; (9) Nuclear Safety and Radiation Protection⁷²

Standards under each Framework Directive are broad in scope, encompassing diverse legislation initiatives. Under the Air Quality Directive, standards address: (1) local and transboundary effects for greenhouse gas and carbon emissions from traffic; (2) fuel quality control; (3) particulate and lead emissions; (4) emission trading; (5) ambient ozone effects; and (6) industry emissions.⁷³ Waste management focuses on reducing and minimizing wastes, proper handling and disposal, and hazardous substances.⁷⁴ Water Quality Directives aim to protect supplies from contamination, manage river basins, control industrial pollution, as well as ensure clean drinking and bathing water, and fish water.⁷⁵ The Horizontal Directive focuses on environmental impact assessments, access to information, public participation, and environmental liability. Other directives focus on ecosystems and wild animals, genetically modified organisms, renewable resources, pollution prevention, combating climate change, animal experiments, asbestos, noise control, and nuclear safety.⁷⁶

⁷⁰ Environmental Software Services, *supra* note 69.

⁷¹ Environmental Software Services, *supra* note 69.

⁷² Environmental Software Services, *supra* note 69.

⁷³ The World Bank, *supra* note 66, at 2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ European Investment Bank

<http://www.eib.org/projects/topics/environment/epe/documentation/environmental-Acquis/index.htm?lang=en>. (noting the key EU environmental directives making up the Acquis are: Waste Framework (1991); Integrated Pollution Prevention and Control (1996); Air Quality Framework (2000); Urban Waste Water (1998); Water Framework (2000); Large Combustion Plan (2001); European Emission Trading Scheme (2003);

Although this article explores the challenges in long-term implementation and adoption of the Environmental Acquis, it is important to note that there are serious challenges in ensuring that the fifteen previously established Member States fully adopt the Environmental Acquis (EA).⁷⁷ The Directives in the EA allow “some latitude” and “leeway” to complete transposition, however ignoring deadlines and perpetually delaying transposition will not long be tolerated by the EU Environment Commissioner.⁷⁸

C. OTHER MECHANISMS FOR IMPLEMENTING ENVIRONMENTAL LAW

The EU has established a number of organizations, programs, and networks in order to support new Member States in Environmental Acquis adoption and implementation. Their operations range from funding, to planning, to organizing judiciary awareness.

1. Organizations

a. The Regional Environmental Reconstruction Programme (REReP)

The Regional Environmental Reconstruction Programme (REReP) provides a framework for reforming sustainable environmental protection on a regional level in the Balkans.⁷⁹ The Programme embraces four goals: institution building, civil society, support to existing regional mechanisms, and reducing environmentally caused health threats.⁸⁰ The Program has a two-fold operation of ensuring

Natura 2000, Habitat(1992) and Birds (1979); Environmental Impact Assessment (1997); Public Access to Environmental Information (1990); Directives related to the implementation of the Aarhus Convention, including access to environmental information (2003 and 2004); Environmental Management and Audit Scheme (EMAS) (2001)).

⁷⁷ Caroline Jackson, *Where to Now? A Look at Likely New Developments in EU Policy on the Environment*, 37 INTERECONOMICS 298, 298 (2002), http://econpapers.repec.org/article/sprintere/v_3a37_3ay_3a2002_3ai_3a6_3ap_3a298-299.htm.

⁷⁸ *Id.*

⁷⁹ European Commission, International Environment Issues, *Candidate and Potential Candidate Countries*, (last visited Dec. 10, 2012), http://ec.europa.eu/environment/enlarg/enlargement_en.htm.

⁸⁰ *Id.*

political commitment on one hand, while also implementing the action through seminars and workshops.⁸¹

Regional Cooperation is important in an area like the Balkans, in which the countries are each interdependent yet completely unique from one another. Each state exists in a completely singular cultural framework, with its own attitude, language, and history. Simultaneously, the states all depend on one another to keep their shared rivers clean, to prevent dangerous waste from effecting one another, and to keep toxic particulate matter from the common atmosphere.

b. Regional Environmental center for Central and Eastern Europe

The Regional Environmental Center for Central and Eastern Europe (REC) endeavors to assist economic and political transition in central and Eastern Europe.⁸² REC is an international facilitator, mediator and enabling institution for environmental stakeholders.⁸³

c. European Union Forum of Judges for the Environment

Judges in the EU aiming to promote the enforcement of national, European, and international environmental law established a forum to raise knowledge within the judicial sector.⁸⁴ The European Union Forum of Judges for the Environment allows judges to convene, sharing experiences of the implementation of EU environmental law.⁸⁵

d. The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)

The European Union established an informal network of environmental authorities in Member States, as well as acceding and candidate states in the European Union Network for the Implementation

⁸¹ *Id.*

⁸² Janos Zlinszky, *The Precautionary Principle: A Central and Eastern European Perspective*, Marco Martuzzi and Joel A. Tickner, The World Health Organization Regional Office for Europe, *The Precautionary Principle: Protecting Public Health, the Environment and the Future of our Children* 169 – 74 (2004), http://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf.

⁸³ *Id.*

⁸⁴ *The EU Forum of Judges for the Environment*, (last visited Dec. 8, 2012), <http://www.eufje.org/>.

⁸⁵ *Id.*

and Enforcement of Environmental Law.⁸⁶ The IMPEL works to improve implementation and enforcement of EU legislation at all levels of pre-accession and transposition of the Acquis.⁸⁷

e. The Environmental Compliance & Enforcement Network for Accession (ECENA)

The Environmental Compliance & Enforcement Network for Accession (ECENA) serves South Eastern Europe candidate countries by assisting and providing support to environmental enforcement authorities.⁸⁸

f. The Instrument for Pre-Accession Assistance (IPA)

External assistance hails from a variety of sources at all stages of the accession process. Pre-accession assistance is implemented through the Instrument for Pre-Accession Assistance (IPA), providing assistance in institution building, political criteria priorities, enhancing administrative and judicial capability, and assisting alignment with the Acquis communautaire directives.⁸⁹ The IPA program was established to strengthen the ability of candidate countries to move forward into membership, ensuring full compliance post accession.⁹⁰

d. Substance of the Environmental Acquis

“Nature appears less and less to us like the dreadful power that men were struggling to master at the dawn of this century, but like a precious and fragile structure that must be protected so that the earth remains habitable for humankind.”⁹¹ Indeed, by embracing such a paradigm, the

⁸⁶ *About IMPEL*, EUROPEAN UNION NETWORK FOR THE IMPLEMENTATION AND ENFORCEMENT OF EUROPEAN LAW, <http://impel.eu/about/> (last visited Dec. 10, 2012).

⁸⁷ European Commission, *supra* note 79.

⁸⁸ *About ECENA*, ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT NETWORK FOR ACCESSION, <http://ecena.rec.org/about.php> (last visited Dec. 10, 2012).

⁸⁹ *Instrument for Pre-Accession Assistance (IPA)*, EUROPEAN COMMUNITY RESOURCES, 73 (last visited Dec. 10, 2012), http://www.euroresources.org/fileadmin/user_upload/PDF_country_and_Programme_profiles/ec5.pdf.

⁹⁰ *Id.*

⁹¹ Georges Pompidou, *Speech On The Environment*, February 28, 1970 (Marie Rennard & Gilles d'Aymery, trans.) (Jan Baughman, ed.)

EU developed the following Environmental Directive Frameworks expecting faithful adherence by all EU members, old and new.

1. Horizontal Framework

The Horizontal Framework focuses on ensuring timely and effective environmental information reporting by agencies.⁹² The Framework also provides the guidelines for publishing required Environmental Impact Assessments for projects that will affect the environment.⁹³

2. The Air Quality Directive

The purpose of the Air Quality Directive is to provide the framework for managing ambient air quality in the European community.⁹⁴ The Directive includes standards for emissions from motor vehicles and diesel engines, the lead content of petrol, and the sulphur content of liquid fuels.⁹⁵ However, the Air Directives are not specific or precise standards. Rather, they offer new objectives to assess air quality, provide information to the public, and the system for implementing maintenance programs.⁹⁶ The Directives do however face a lack of reporting to the regulating commissions.⁹⁷

The health consequences of exposure to polluted air include chronic conditions such as lung cancer, respiratory disease, and cardiopulmonary disease.⁹⁸ However, these can be prevented. For example, prevention can occur by reducing the use of low quality (high

<http://www.swans.com/library/art17/xxx145.html>. (“Georges Pompidou was the second president of France’s Fifth Republic, is widely acknowledged as the best president France ever had in the past sixty years, with the exception of the Général de Gaulle. This speech, given at the Chicago French Alliance during a 1970 trip in the USA, is essentially devoted to the environment. Forty-one years later, that speech is viewed as quite prophetic...”).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ European Commission, *The Benefits of Compliance with the Environmental Acquis for the Candidate Countries, Part B: Air Quality Directives*, 75-77, http://ec.europa.eu/environment/enlarg/pdf/benefit_b.pdf (last visited Dec. 9, 2012).

⁹⁵ Environmental Software Services, *supra* note 69.

⁹⁶ European Commission, *supra* note 79, at 85.

⁹⁷ *Id.*

⁹⁸ *The smog in London during the year 1952 has been attributed with over 4,000 deaths*, EUROPEAN COMMISSION, *supra* note 79, at 85.

sulphur) fuels, such as lignite, and unleaded fuels, countries can reduce chemical smog and dangerous particular matter in the atmosphere.⁹⁹

In many former Soviet Bloc nations, environmental problems are rooted in an historic legacy of a centrally planned economy, a focus on heavy industrialization, and inefficient and wasteful resource use.¹⁰⁰ After the economic collapse in the 1990s, the necessary environmental investments were too costly to be undertaken. Thus, many transitioning countries need EU financing to even implement needed environmental protections.

Degraded air quality in Serbia is a serious problem caused by ambient concentrations of soot, particulate matter, and SO₂ from burning low quality coal in power plants.¹⁰¹ The total annual damage caused by air pollution and the costs of greenhouse gas emissions is estimated to amount to approximately 5.5% of GDP.¹⁰²

3. *The Waste Management Directive*

The aim of the Waste Management Directives is to: (1) create a system of record keeping; (2) regulate waste handling; (3) manage treatment and disposal at existing and new sites; and (4) improve and upgrade waste treatment technology.¹⁰³ This section addresses: landfills; packaging waste; incineration of waste; hazardous waste; disposal of waste oils; sewage sludge and soil; batteries and accumulators; disposal of PCBs and PCTs; and titanium dioxide. In the waste management sector, lack of adoption of management plans is the most typical problem as well as the operation of illegal landfills.¹⁰⁴

The Hazardous Waste Directive is particularly important for Eastern European nations, littered with large industrial factories that have long been unaccountable for their toxic waste. The directive

⁹⁹ *Id.* at 92.

¹⁰⁰ Goteborg University, School of Economics and Commercial Law, *Serbia Environmental and Climate Impact Analysis* (2008) <http://www.sida.se/Global/Countries%20and%20regions/Europe%20incl.%20Central%20Asia/Serbia/Environmental%20policy%20brief%20Serbia.pdf>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Environmental Software Services, *supra* note 69.

¹⁰⁴ European Commission, *The Benefits of Compliance with the Environmental Acquis for the Candidate Countries, Part D: Waste Management Directives*, 231 (last visited Dec. 9, 2012), http://ec.europa.eu/environment/enlarg/pdf/benefit_d.pdf.

focuses on the handling of hazardous wastes and administrative regulations of labeling, recording, monitoring and controlling the management of hazardous waste.¹⁰⁵ The Directive contends with contamination and accidental exposure as well as cleanup operations in local populations.

Hazardous waste was quite common in past decades and management techniques and as industry controls are a relatively recent development. In 1998, a study conducted on Romania indicated that about 51,500 tons of all hazardous wastes (such as heavy metal sludge, petrol and pharmaceuticals) were dumped on urban landfills, subject to significant runoff and accidental exposure.¹⁰⁶ Indeed, the hazardous waste disposal system lacked the resources for effective management.

More than half of the hazardous waste in Eastern European states is waste oil that gets integrated into water supplies and ecosystems.¹⁰⁷ The Hazardous Waste Directive seeks to manage waste oil disposal, increase regeneration, and limit emissions of pollutants.¹⁰⁸ Although individual countries' governments have been slow in adopting regeneration systems, companies in candidate nations like Turkey have taken matters into their own hands. Specifically, oil producers have formed a self-regulated association for the management of used oils on a regional basis. Therefore, transforming environmental policy hinges on such environmental and social awareness.¹⁰⁹

4. *Water Quality Directive*

The Water Quality Directive focuses on health and access to safe water, aquatic resources and fisheries, biodiversity and ecosystems, and social uses of public water areas. Legislation targets: urban wastewater, nitrates, dangerous substances to aquatic environments, mercury discharges, HCH discharges, bathing water, drinking water, surface water, ground water, fish water, and shellfish water.¹¹⁰

Forty percent of the rural population of eastern European new member states did not have their wastewater treated as of 2009, while

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 238.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Environmental Software Services, *supra* note 69.

the rate was eighteen percent in urban areas.¹¹¹ Such polluted waters significantly impacts ecosystems and health. Drinking water is often contaminated with lead and pesticides.

In terms of the water directive, the most common issues relate to “secondary obligations” such as designating protected zones, adoption of pollution reduction programmes, or construction of sewage and wastewater treatment systems.¹¹² Additionally drinking water problems still occur in areas of Eastern Europe.

Many Eastern European nations face major risks to water quality, including lack of sewage treatment, incomplete sewage networks which contain leakage, and industrial wastewater discharges.¹¹³ Furthermore, high bacteria levels, heavy metals, and industrial pollutants have created ambient pollution in waterways while low oxygen levels have led to eutrophication.¹¹⁴ Water quality monitoring systems made available to local authorities are in general undeveloped and poor.¹¹⁵

5. Nature Protection Directives

The Directives included under Nature Protection include: habitats protection, wild birds, skins of seal pups directive, endangered species regulations, import of whales, protection of the Antarctic, protection of forests against atmospheric pollution, and protection of forests against fire.¹¹⁶

The Habitats Directive lists conservation sites, provides the criteria for selecting such sites, identifies species in need of protection, and lists prohibited means of capturing and killing in habitats and fisheries.¹¹⁷ The primary natural resources in the West Balkans¹¹⁸ are agricultural land, forests, water resources, and biodiversity.¹¹⁹ These resources are

¹¹¹ The World Bank, *Why Adopt the Environmental Acquis? 7* available at <http://siteresources.worldbank.org/INTECAREGTOPENVIRONMENT/Resources/511168-1191448157765/Chapter1.pdf> (last visited Dec. 5, 2012).

¹¹² Environmental Software Services, *supra* note 69.

¹¹³ The World Bank, *supra* note 66, at 7.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Environmental Software Services, *supra* note 69.

¹¹⁷ *Id.*

¹¹⁸ Including Bosnia and Herzegovina, Kosovo, Moldova, Macedonia, Slovenia, Croatia.

¹¹⁹ The World Bank, *supra* note 66, at 6.

significant contributors to local economies. However, little land is actually protected. In Bosnia and Herzegovina, .05 percent is protected; 4.3 percent in Kosovo; 5 percent in Serbia; and 7.5 percent in Macedonia. The EU minimum requirement for protected land is 15 percent.¹²⁰

In Bosnia and Herzegovina and Kosovo, for example, forests are deeply threatened by deforestation and excessive illegal cutting, which contributes to soil erosion, loss of flood control, and threatened ecosystems.¹²¹ Enforcement and monitoring are weak and underfunded, dictated in large part by the haphazard housing needs of refugee and migrant populations, causing ineffective territorial planning.¹²² In spite of this, most parks in Bosnia and Herzegovina, Albania, and Kosovo still lack management, infrastructure, and sustainable conservation tools.¹²³

Transposing environmental regulations to countries in the midst of political, economic, and social change raises certain challenges.¹²⁴ The most common problems in nature protection are nonconformity of transposing legislation, insufficient designation of Natura 2000 sites, incorrect assessment of plans and projects affecting the protected sites, and breaches of requirements for strict protection of species.¹²⁵

6. *Industrial Pollution Control and Risk Management*

The Framework for regulating industrial pollution control and risk management governs air pollution from industrial plants, large combustion plants, control of major accident hazards, as well as regulation on ECO-labels and consumer products that use polluting substances.¹²⁶

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ This is especially true in the areas of nature protection, water and air quality, waste management, and environmental impact assessment.

¹²⁵ European Commission, *The Benefits of Compliance with the Environmental Acquis for the Candidate Countries, Part E: Nature Protection Directives*, 296 (last visited Dec. 9, 2012), http://ec.europa.eu/environment/enlarg/pdf/benefit_e.pdf.

¹²⁶ Environmental Software Services, *supra* note 69.

7. *Chemicals and Genetically Modified Organisms*

To govern chemicals and genetically modified organisms, the Acquis framework addresses: animal experiments, laboratory practices, inspections, use of genetically modified organisms, asbestos, packaging and labeling of dangerous substances, testing of biodegradability, regulations on Ozone depleting substances, and transport of dangerous goods by road.¹²⁷

8. *Noise from Vehicles and Machinery*

Regulations on noise control cover: motor vehicles, construction plant equipment, subsonic aircraft, compressors, generators, concrete breakers, and hydraulic excavators.¹²⁸

9. *Nuclear Safety and Radiation Protection*

To address nuclear and radiation safety measures, the Acquis framework regulates the imports of agricultural products following the Chernobyl Accident, shipments of radioactive waste, radiation protection of patients and outside workers, and maximum permitted levels of radioactive contamination of food following radiological emergencies.¹²⁹

III. BUCKLING DOWN IN THE BALKANS: ALTERNATIVES TO PREVENT BACKSLIDING AND INSPIRE PARTICIPATION

It is often cited that the presence of refugees compounds the already prevailing economic, environmental, social and political difficulties in countries like those in Eastern Europe, already suffering from unstable economies and politics. Proponents of closed borders stated that refugees compete with the local citizens for scarce resources such as: land, water, housing, food and medical services.¹³⁰ Over time,

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Social and economic impact of large refugee populations on host developing countries, Executive Committee of the High Commissioner's Programme Standing Committee, UNITED NATIONS HIGH COMMISSIONER'S REPORT, 6 (1997), www.unhcr.org/3ae68d0e10.html.

their presence leads to more substantial demands on natural resources, education and health facilities, energy, transportation, social services and employment.¹³¹ They may even cause inflationary pressures on prices and depress wages.

Of course, the competing argument is that refugees also transfer personal skills, education, and wealth to the host country which they migrate to. An economic stimulus may be generated by the presence of refugees and can lead to the opening and development of the host regions.¹³² This stimulus takes place through the local purchase of food, non-food items, shelter materials by agencies supplying relief items, disbursements made by aid workers, the assets brought by refugees themselves, as well as employment and income accrued to local population, directly or indirectly, through assistance projects for refugee areas.¹³³ The presence of refugees also contributes to the creation of employment benefiting the local population, directly or indirectly.¹³⁴ Indeed, Part II of this paper concludes that the very qualities that are ‘challenges’ for successful rule adoption, are imbued with the potential to shield environmental law from backsliding.

In 2004 and 2007, ten Eastern European nations joined the EU in the Union’s largest integration to date. The new members prepared agencies, implemented rules, and organized infrastructure to adopt the 180,000 pages of the law that governs Europe.

Years after the massive Europeanization, the logical concern is now whether new member states will be able to continue developing the rules they had adopted in anticipation of EU membership.¹³⁵ The EU

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Inquiries and studies on eastern enlargement have changed as concerns change. In the mid and late 1990s, studies largely focused on either descriptive accounts of nations or sought to account for different Member States’ enlargement preferences and the EU’s decision to assume the risks and costs of expansion. *See, e.g.*, Enlarging the European Union: Relations Between the EU and Central and Eastern Europe (Marc Maresceau ed., 1997); *see also* Recreating Europe; and Handbook on European Enlargement: A commentary on the Enlargement Process (Andrea Ott & Kirstyn Inglis eds., 2002); *see* Frank Schimmelfennig & Ulrich Sedelmeier, *Theorizing EU Enlargement: Research Focus, Hypotheses, and the State of Research*, 9 J. EUR. PUB. POL’Y 500 (2002) (containing an excellent critical review of the state of the literature on enlargement until 2002).

accession incentives were crucial in driving initial reforms.¹³⁶ Currently, CEE nations are in the “post-accession” stage, in which each CEE nation works towards their own benchmarks for each aspect of the Acquis.¹³⁷ During this stage, the monitoring process is intensified while new member states work towards benchmark goals.¹³⁸

However, the challenge of integration only escalates. New membership brings stricter laws and deadlines for adopting them. Moreover, with the high costs and difficulty of maintaining effective rule transformation, countries may naturally “backslide,” or allow their rules to regress. Regression can occur within the entire Acquis or only specific directives, such as democracy or environmentalism.

In 2007, the Freedom House Nations in Transition report declared political, democratic backsliding in Eastern Europe and many foreign affairs experts have argued the same.¹³⁹ US Secretary of State, Hillary Clinton warned the international community in December of 2012 of this critical possibility as Eastern European nations become targets for “re-Sovietization” by Russia.¹⁴⁰ If nations fall short implementing some directives, many fear a “snowball” effect for other directives.¹⁴¹

¹³⁶ See e.g., Heather Grabbe, *Europeanization Goes East: Power and Uncertainty in the EU Accession Process*, in THE POLITICS OF EUROPEANIZATION, 303. In the late 1990s and 2000s, many studies focused on incentivizing reform using EU membership as the carrot that would lure Eastern nations to transform politically and economically; *contra Europe Goes East*, 15 J. DEMOCRACY (2004); see also Thomas Christiansen et al., *Fuzzy Politics Around Fuzzy Borders: The European Union’s ‘Near Abroad,’* 35 COOPERATION & CONFLICT 389, 410 (2000); see also Simon Hix, *The Study of the European Union II: The “New Governance” Agenda and its Rival*, 5 J. EUR. PUB. POL’Y 38 (1998)).

¹³⁷ Eli Gateva, *Post-Accession Conditionality: Support Instrument for Continuous Pressure?* Kolleg-Forscherguppe, The Transformative Power of Europe, Eli Working Paper, 8-10 (2010) available at http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_18.pdf.

¹³⁸ *Id.*

¹³⁹ Philip Levitz and Grigore Pop-Eleches, *Why No Backsliding? The EU’s Impact on Democracy and Governance Before and After Accession*, 3 (2009), http://www.princeton.edu/~gpop/PL_GPE_EU%20backsliding_CPS.pdf.

¹⁴⁰ **At rights meeting, Clinton warns of efforts to ‘re-Sovietize’ in Russia, neighboring countries**, THE WASHINGTON POST, Dec. 06, 2012, http://articles.washingtonpost.com/2012-12-06/world/35638886_1_human-rights-post-soviet-turkmenistan.

¹⁴¹ See Alina Mungiu-Pippidi, *Is East-Central Europe Backsliding? EU Accession is no “End of History,”* 18 J. OF DEM. 1, 5-7 (2007), available at <http://chefdemunca.ro/sar/amp/data/dox/academic/papers/Is%20East->

On the other hand, more recent studies suggest that post-accession is a bumpy road, marked with some backsliding as well as compliance.¹⁴² Furthermore, the pattern of non-compliance among new member states arguably mimics the backsliding that occurs in existing member nations in fluctuation.¹⁴³ Indeed, some have argued that compliance is even stronger in new member states than in old members.¹⁴⁴

Ultimately, it appears that long term compliance of the entire Acquis, as in the political directives and means to effective democracy, hinges on continued financial assistance.¹⁴⁵ The Environmental Acquis on the other hand, has other features other than financial assistance that could stimulate compliance.

One other challenge to environmentalism is that it is more common in higher income nations.¹⁴⁶ However, where a transitioning country has long suffered from environmental degradation that severely degraded public health leaving a toxic legacy for decades, perhaps vigorous environmentalism is possible. Just such a movement could ameliorate the corruption that sparks backsliding. The following sections will demonstrate how environmentalism in particular generates unique issues of backsliding as well as particular methods to prevent it.

Central%20Europe%20Backsliding.pdf. (This paper will not explore the backsliding effect of other directives or policies, such as democratization or judicial structure since they are outside the area of scope of the paper. However, it deserves mentioning that Scholars who argue that Eastern Europe is certainly backsliding point to the difficulties in Hungary in 2006. That is, opposition to the prime minister blocked a major bridge and tried to bring down the government through an insurrection on the streets. Scholars also note the weak majority governments' inability to cooperate with unstable minorities. Moreover, CEE citizens are very critical towards their governmental institutions. Indeed, two thirds of the voters complain of corruption and weak rule of law, perceiving their governments as unfair.)

¹⁴² Levitz, *supra* note 140.

¹⁴³ Falkner, G., & Treib, O., *Three Worlds of Compliance or Four? The EU-15 Compared to New Member States*, 46 J. OF COMMON MARKET STUDIES, 293, 313 (2008).

¹⁴⁴ Sedelmeier, U., *After Conditionality: Post-Accession Compliance with EU law in East Central Europe*, 15 JOURNAL OF EUROPEAN PUBLIC POLICY 806, 825 (2008).

¹⁴⁵ Andrea Krizsan, *From formal adoption to enforcement. Post-accession shifts in EU impact on Hungary in the equality policy field*, European Integration Online Papers, 13 (2009) <http://ideas.repec.org/a/erp/eiopxx/p0188.html>.

¹⁴⁶ *Id.*

A. EFFECT OF REFUGEE MIGRATION ON THE ENVIRONMENT

The sudden influx of a population of people in a given area inevitably creates an immediate and massive demand for scarce natural resources such as land, fuel, water, food and shelter materials, with long-term implications on their sustainable re-generation.¹⁴⁷ The influx can also cause the spread of disease, contamination of local ground water, deterioration of roadways, and the weakening of public services, such as health, education and water facilities.¹⁴⁸

It is the concept of environmental carrying capacity of the hosting country that underlies the notion that refugee influxes cause environmental degradation.¹⁴⁹ However, refugees are frequently blamed for environmental degradation for which they are not primarily responsible.¹⁵⁰ In general, environmentalists cite the following threats caused by migration influxes: depletion and pollution of water sources, deforestation, long term depletion of aquifers, increased use of detergents, pesticides, and other chemicals, land availability, lack of appropriate sanitation, overuse of non-renewable resources, food scarcity, degradation of roads, and air pollution caused by increased fuel usage.¹⁵¹

But many frequently miss the other side of this argument. When a host-refugee relationship is cooperative and organized, then benefits may flow from both sides.¹⁵² Host governments, like those in Europe, have not tapped into the environmentally positive potentials of refugee assistance. In the issue of environment, the focus should be shifted from “what resources do refugees deplete or even destroy” to “what positive impacts of the refugee influx are realistic and how can we facilitate their achievement.”¹⁵³ The shift in perspective could be imperative in preventing backsliding of environmental law in Eastern Europe.

¹⁴⁷ Social and economic impact of large refugee populations on host developing countries, Executive Committee of the High Commissioner’s Programme Standing Committee, UNITED NATIONS HIGH COMMISSIONER’S REPORT, 6 (1997), www.unhcr.org/3ae68d0e10.html.

¹⁴⁸ *Id.*

¹⁴⁹ Keane, David, *The environmental causes and consequences of migration: a search for the meaning of ‘environmental refugees*, 16 GEO. INT’L ENV’T L. REV., 7(2004).

¹⁵⁰ *Id.* at 21.

¹⁵¹ *Id.*

¹⁵² *Id.* at 29.

¹⁵³ *Id.* at 30.

B. OTHER CAUSES AND SYMPTOMS OF “BACKSLIDING”

1. *Lack of Conditionality in the Post-Accession Stage*

When adoption and implementation of EU rules is rewarded with membership into the EU, the effectiveness of conditionality inevitably deteriorates after the incentive of membership is achieved.¹⁵⁴ However, once acceded into the EU, new member states lose their incentive to maintain challenging laws while simultaneously transitioning every other aspect of governance. Theoretical models outline four stages of accession, each with distinctive conditions, effective rewards and threats, and incentives: (1) Pre-negotiation Stage; (2) Negotiation Stage; (3) Accession Stage; (4) Post-Accession Stage.¹⁵⁵ Typically, CEE states in the first three stages are enthused and motivated by a number of different incentives. However, in the post-accession stage, the only working incentive remaining is financial rewards, as demonstrated in the following table.¹⁵⁶

*Table 1: Stage-Structured (EU Enlargement) Conditionality Model*¹⁵⁷

Stages	Conditions	Incentive Structure		Monitoring
		Rewards	Threats	
Pre-negotiation	-Conditions for applying for membership (conditions of accession);	Accession advancement rewards: -Providing membership perspective;	Explicit threats: Financial sanctions Implicit threats	Regular Progress Reports

¹⁵⁴ Gateva, *supra* note 138, at 8-10.

¹⁵⁵ Although this article focuses primarily on incentives and policies in the post-accession stage, the pre-negotiation, negotiation, and accession stages are important in terms of comparison. The pre-negotiation stage starts with the formal agreement of the European Council on the membership perspective of the potential candidate country and ends with the start of the accession negotiations. The accession stage includes the signing of the Accession Treaty and its ratification and it is characterized by thorough examination of the would-be-member's compliance with EU conditions. The fourth stage refers to the period after the accession of a candidate country to the EU.

¹⁵⁶ Gateva, *supra* note 138, at 8-10.

¹⁵⁷ *Id.* at 10.

	-Conditions for opening Accession Negotiations; -Additional (country specific) conditions.	-Signing Association Agreement; - Implementing Association Agreement; -Granting Candidate country status; -Opening Accession Negotiations. Financial rewards	(delays of the accession advancement rewards)	
Negotiation	-Copenhagen criteria; -Opening benchmarks (conditions for opening chapters); - Closing benchmarks (conditions for closing chapters); -31/35 chapters; -Areas of serious concern- highlighted in the monitoring reports.	Accession advancement rewards: -Opening chapters; -Closing chapters; -Credible membership perspective; -Completion of Accession Negotiations; -Signing Accession Treaty. Financial rewards	Explicit threats: Financial sanctions Implicit threats (delays of the accession advancement rewards)	Regular Progress Reports
Accession	-Copenhagen criteria; -Areas of serious concern – highlighted in the monitoring reports.	Accession advancement rewards: - Accession Financial rewards	Explicit threats: Preventive and remedial sanctions: -Internal Market Safeguard Clause; -JHA	

			Safeguard Clause; -Super Safeguard Clause; -Additional clause(s).	
Post-accession	-Benchmarks – individual country specific conditions.	Financial rewards	Explicit threats: Preventive and remedial sanctions: -Economic Safeguard Clause; -Internal Market Safeguard Clause; -JHA Safeguard Clause.	Progress Reports Interim Reports

According to the previous table, the key weakness of post-accession conditionality is the incentive structure. “After accession, the EU is “stripped” of its attractive *accession advancement rewards* and can only rely on *explicit threats* to induce compliance.”¹⁵⁸ Whether the EU develops more sophisticated incentives to compete against political corruption remains to be seen. Beyond financial rewards and sanctions, this paper explores alternative methods and existing circumstances that may combat backsliding.

2. What Triggers Backsliding?

Nations like CEE are particularly vulnerable to maintaining rule transposition since their entire political regime and economy are in transition.¹⁵⁹ Communities, politicians, civil servants, all face too many

¹⁵⁸ Sedelmeier, U., *After Conditionality: Post-Accession Compliance with EU law in East*

Central Europe, 15 JOURNAL OF EUROPEAN PUBLIC POLICY 806, 825 (2008).

¹⁵⁹ Janos Zlinszky, *The Precautionary Principle: A Central and Eastern European Perspective*, Marco Martuzzi and Joel A. Tickner, THE WORLD HEALTH ORGANIZATION REGIONAL OFFICE FOR EUROPE, THE PRECAUTIONARY PRINCIPLE: PROTECTING PUBLIC

demands simultaneously when so many variables are in flux.¹⁶⁰ Rapid change has occurred in social values, political expectations, ownership patterns, national institutions, stakeholders and partners, goods available, as well as social and employment statuses.¹⁶¹ Maintaining the new changes in the environmental policies of such nations is not particularly hopeful since providing support for more urgent policies will often take precedence. In CEE nations, the workload and risk involved in the immense array of policy tasks is enormous while the financial, technical, regulatory, and human resources for implementation are limited.¹⁶²

In terms of the environment, however, many would argue that a regulatory structure is indeed “urgent.” Hidden minefield bombs, radioactive dumping, and sloppy record-keeping make Eastern Europe an environmental travesty. But realistically, the money, infrastructure, and resources to maintain permanent environmental protections is in short supply. Furthermore, most of these countries were left with deep foreign debts as they transitioned out of communism, then into the conflict of Yugoslavia. The accumulating debts have in fact increased since those turbulent times.¹⁶³ Only with generous bilateral and multilateral financial and technical assistance programs are CEE nations able to implement new laws.¹⁶⁴

Only twenty-five years ago, these new EU members were bankrupt and famished. Since then, they have reshaped their economies and societies, gaining membership in the EU and NATO.¹⁶⁵ Foreign investment still pours in as CEE was anticipated to be the textbook model of successful integration. However, concern is now mounting over the stabilization of the new member states and whether their integration efforts will backslide in the face of economic and political pressure.¹⁶⁶

HEALTH, THE ENVIRONMENT AND THE FUTURE OF OUR CHILDREN 170 (2004), http://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 171

¹⁶² *Id.* at 173

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Alina Mungiu-Pippidi, *Is East-Central Europe Backsliding?* 18 J. OF DEMOCRACY 8, 13-4 (2007), <http://chefdemunca.ro/sar/amp/data/dox/academic/papers/Is%20East-Central%20Europe%20Backsliding.pdf>.

¹⁶⁶ *Id.* at 14.

The new member states face another situational obstacle affecting the entire world: the global financial crisis. Indeed, due to the global crisis, the post-accession challenges continue under more strained circumstances than before.¹⁶⁷ Furthermore, the environmental regulations in place are particularly vulnerable to budget cuts and economic tension. In fact, nations excise strong resource preservation laws and costly habitat protection policies when national income suffers.¹⁶⁸

3. *Symptoms & Consequences*

Whether backsliding in environmental policy is actually occurring in CEE is not certain. However, holistically there appears to be some reform slowdown among new member states, especially compared to the speedy and incentivized progress during pre-accession.¹⁶⁹

a. Backsliding of the General & Universal Acquis

If the first condition for effective rule transfer involves the credibility of EU conditionality, then the benefits of integration¹⁷⁰ become imperative for the integration process to succeed.¹⁷¹ The second condition of effective transposition is the domestic costs of rule

¹⁶⁷ Attila Agh, *Post-Accession Crisis I the New Member States: Progressing or Backsliding in the EU?* 2 STUDIES OF TRANSITION STATES AND SOCIETIES 74, 75 (2010), http://www.tlu.ee/stss/wp-content/uploads/2010/06/STSS-vol2-agh-lk_74-95.pdf.

¹⁶⁸ *Id.*

¹⁶⁹ Levitz, *supra* note 140, at 6.

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Amichai Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?* 12 COLUM. J. EUR. L. 383 (2006), (citing Milada Anna Vachudova, *The Leverage of International Institutions on Democratizing States: Eastern Europe and the European Union* (EUI Working Papers, RSC No. 2001/33, 2001) (arguing that “[i]t is the substantial benefits combined with the enormous requirements of membership that set the stage for the EU’s leverage on the domestic politics of aspiring member states”); Karen Smith, *Western Actors and the Promotion of Democracy, in Democratic Consolidation in eastern Europe—Volume II: International and Transnational Factors* 31, 37-38 (Jan Zielonka & Alex Pravda eds., 2001). Smith notes that: “[T]he East European countries have not all been offered the same benefits. Essentially two zones have developed. The first has been closely tied to the West and included in the queue for EU and NATO membership, while the second has been much less connected. Conditionality has more of an effect on “recalcitrant” countries in the first zone, less on those in the second); *id.* at 37-38. (contending the effect has been particularly pronounced in the case of Slovakia and Turkey).

adoption.¹⁷² CEE states have confronted this challenge in various ways that include: strategic policy making, EU assistance, as well as working with Non-governmental organizations, international organizations, and outside national governments. Unfortunately weak state capacities tied up in political and economic transitioning have caused CEE states to face tremendous implementation costs to pursue environmental directives.¹⁷³

Therefore, it would appear that once a CEE state has achieved accession, EU incentives and benefits remain necessary to ensure continued rule transfer. However, CEE states that are recently embedded in the EU system have not yet demonstrate backsliding, environmental rule adoption has not deteriorated, and the EU continues to hold new Member States to the same high standards.¹⁷⁴

Even without the powerful incentive of EU membership, the CEE states may experience a slowdown in reforms, but perhaps not a genuine backlash. Indeed, scientific communities continue to publish data¹⁷⁵ addressing current environmental issues and policy recommendations to improve domestic legislation.

Backsliding will likely vary from country to country. Studies demonstrate that while Lithuania, Hungary, and Slovenia readily transposed EU legislation to domestic law, the process was much less effective in Bulgaria, the Czech Republic, and Romania. Thus, there are substantive problems with the practical side of implementation which positive conditionality does not ameliorate. The study determined that transposition failure is predominantly related to the degree of trade with the EU, bureaucratic capacity, and pre-accession policy alignment.¹⁷⁶

¹⁷² Costs of rule adoption also include political stability and readiness to comply, population respect and compliance with the domestic government, as well as ability for the population to speak out on disfavor and rallying for legislation reform. Thus, political rights and civil liberties actually have acted as important tools to implement policy change in CEE states.

¹⁷³ Tanja A. Borzel, Anna Fernandez, and Nuria Font, *Coping with Accession to the EC: New Modes of Environmental Governance*, ANNUAL CONVENTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION, 1 (2010).

¹⁷⁴ Levitz, *supra* note 140, at 1-3.

¹⁷⁵ *Id.*

¹⁷⁶ Christoph Knill and Jale Tosun, *Post-Accession Transposition of EU Law in the New Member States: A Cross Country Comparison*, POST ACCESSION COMPLIANCE IN THE EU'S NEW MEMBER STATES, (Frank Schimmelfennig and Florian Trauner, eds) 13 EUROPEAN INTEGRATION ONLINE PAPERS (EIOP) 18 (2009).

b. Potential Backsliding of the Environmental Acquis

To regress environmental regulations would be “in contradiction with the rights of future generations, the paradigm of sustainable development proclaimed by the state in Rio in 1992 and reaffirmed in Rio twenty years later. . . .”¹⁷⁷

In 1972, at the UN Conference in Stockholm, nations agreed that the instrument of ecological policy change is environmental law, both national and international.¹⁷⁸ Through environmental law, the countries could abate pollution and preserve biological diversity.¹⁷⁹

The challenges to maintaining environmental law in Eastern Europe must be acknowledged in order to combat regression.¹⁸⁰ In one respect, due to political corruption, environmental deregulation is a tangible threat.¹⁸¹ Moreover, environmental deregulation is particularly elusive since it can take a number of different political forms. For example, the nation could refuse to adhere to universal environmental treaties or boycott their implementation.¹⁸² Another deregulating action could occur in intentionally regressing directives through revision.¹⁸³ A state could also change procedures on the pretext of simplification in order to curtail the rights of the public.¹⁸⁴ Since numerous methods of regressing environmental law are available to politicians, the burden of maintaining strong policy rests on judges, environmental lawyers, and the general public.¹⁸⁵

¹⁷⁷ Michel Prieur, *Non-Regression in Environmental Law*, 5 S.A.P.I.E.N.S. 1 (2012).

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.* at 2-3.

¹⁸⁰ *Id.* at 4.

¹⁸¹ Eli Gateva, *Post-Accession Conditionality: Support Instrument for Continuous Pressure?* Kolleg-Forschergruppe, The Transformative Power of Europe, Eli Working Paper, 8-10 (2010), http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_18.pdf. Progress reports in 2009 concluded that “important deficiencies remain in judicial practice both at the level of the prosecution and at the level of the court”.

¹⁸² Prieur, *supra* note 178, at 3.

¹⁸³ *Id.* at 3-4.

¹⁸⁴ *Id.* at 4.

¹⁸⁵ *Id.* at 3 (noting there are many different categories of conditionality based on the desired result and a chosen combination of conditions, incentives, rewards, and threats. For example: “Membership conditionality (Smith 2003, 2004), accession conditionality (Grabbe 2002, 2006), enlargement conditionality (Hughes et al. 2004), Acquis conditionality (Grabbe 2002; Schimmelfennig/Sedelmeier 2004), democratic conditionality (Pridham 2002; Schimmelfennig et al. 2003; Schimmelfennig/Sedelmeier

Another challenge to resist backsliding in environmental law is the global economic crisis, which has led to speeches that call for fewer legal environmental obligations that “hinder development” and inhibit “poverty reduction.”¹⁸⁶ Indeed, a common “excuse” for the failure of implementing environmental protection is the lack of economic resources.¹⁸⁷ However, greater democratization would in part shift control over wealth, ultimately diminishing corruption.¹⁸⁸ Thus, it is important to recognize the above mentioned arguments on political backsliding in the CEE since environmental politics are dependent on democratic politics.

Furthermore, the mentality towards complicated technological legislation is a persistent challenge in environmental regulations. The overwhelming scope of environmental standards is arguably too complex and difficult for non-specialists to understand.¹⁸⁹ Thus the intricacy of regulations, which gives them teeth in the real world, ultimately encourages less restrictive “simpler” environmental laws.¹⁹⁰

C. PREVENTION & SOLUTIONS

This section sets forth that by framing environmentalism in terms of human rights and preventing environmentally caused harms to public health, CEE nations may be able to tap into powerful public participation by both refugees and the local population. Such action could fuel its own social promulgation of the Environmental Acquis. In particular, public activism could incite media accountability, judiciary activism, and municipal government accountability which would all assist in transforming environmental policy.

It appears that citizens are in support of Europeanization, integration, and implementing laws that affect their own well-being.¹⁹¹ However, despite citizen support, many CEE nations have an often

2004) and political conditionality (Smith 1998) are some of the categories of conditionality defined in the theoretical literature on European integration.”).

¹⁸⁶ Prieur, *supra* note 178, at 3.

¹⁸⁷ Stephen Stec, *Ecological Rights Advancing the Rule of Law in Eastern Europe*, 13 J. ENVTL. L. & LITIG. 275, 289 (1998).

¹⁸⁸ *Id.*

¹⁸⁹ Prieur, *supra* note 178, at 4.

¹⁹⁰ *Id.*; see also Jacques Rupnik, *Is East-Central Europe Backsliding? From Democracy Fatigue to Populist Backlash*, 18 J. of Democracy, 4 (2007).

¹⁹¹ Mungiu-Pippidi, *supra* note 142, at 15.

corrupt political atmosphere,¹⁹² thus incentives are vital to externally transform law and policy. Enlargement is nearly miraculous as an incentive, but “quite sluggish and ineffective” as an assistance process.¹⁹³

But hope is not lost. Although traditional incentives such as funding and rewards will be necessary as new Member States move into the post-accession phase, environmentalism self-generates unique incentives that are very personal for CEE states. Backsliding can be combated by embracing environmentalism on the “smaller scale,” such as public activism, media accountability, judicial activism, municipality authority, implementing a public trust doctrine, and concern for community public health.

Eastern European nations have long suffered from severe environmental degradation, and they have not forgotten it. The people understand pollution within the context of their day to day lives. Therefore, although traditional incentives are important for continued rule implementation, a shift in the people’s mindset, empowering them to hold their government accountable, could ameliorate political corruption that affects the Environmental Acquis. Arguably, it is the Environmental Acquis that so directly affects the health of the citizens of CEE nations, that awareness and empowerment could indeed transform environmentalism on national scales.

1. Traditional Methods of Incentivizing Rule Adoption

a. Financial Assistance

Strings attached to funding that comes from the west requires effective transparency, opportunities for public participation, and requirements concerning application, evaluation, management, and reporting procedures.¹⁹⁴

Although conditional financial assistance is extremely effective to incentivize rule adoption, it is also directly contingent on the state of the economy. In times of financial downturns, investments in environmental quality characteristically suffer as governments detract resources, shifting to focus on more urgent needs and national priorities.¹⁹⁵ Thus,

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Zlinszky, *supra* note 28, at 174.

¹⁹⁵ *Id.* at 175.

where established EU members have significantly higher incomes than new EU members, the laws promulgated will be significantly more demanding for the countries with lower incomes to dedicate to “less urgent” policies. Since the EU is bound in the heterogeneity of its members,¹⁹⁶ less wealthy developing nations are subject to the same environmental regulations as wealthier countries.

However, the EU has not watered down required environmental regulations yet, even in the face of the recent economic downturn. Rather, the EU continues to seek environmental quality equally in both old and new member states.¹⁹⁷ The rationale is often given within a framework of perceiving the EU as an overarching political subject in which the welfare of all citizens is the focal point.¹⁹⁸ Thus, they identify as a more holistic entity rather than a group of countries harmonizing regulation for the sake of a larger common market.¹⁹⁹

At the same time, another reason for maintaining high standards is that many environmental problems have transboundary effects on neighboring countries.²⁰⁰ Furthermore, if different countries had different environmental policies, cost differentials in the market would promote transferring pollution producing activities from countries with stringent regulations to less protected countries with looser environmental policies.²⁰¹ Such a process would devastate the environments of countries with the greatest economic vulnerability.

b. Alternative Leverages

In post-accession, alternative leverages replace and counterbalance the already achieved incentive to join the EU. Alternate leverages include accession advancement rewards, technical remedial and preventative sanctions, as well as psychological benefits of complying.

¹⁹⁶ See *Basic Information on the European Union*, EUROPA.EU, http://europa.eu/about-eu/basic-information/index_en.htm (last visited Dec. 12, 2012).

¹⁹⁷ Lorenzo Pellegrini and Reyer Gerlagh, *Are EU's Environmental Policies too Demanding for New Member States?*, Dutch National Science Foundation (NOW) Contract Research, <http://www.sme-environment.org/EuropeanEnvironment%5B2%5D.pdf>.

¹⁹⁸ *Id.* at 8.

¹⁹⁹ This perspective is indicated in the Maastricht treaty.

²⁰⁰ Pellegrini, *supra* note 198, at 12.

²⁰¹ *Id.*

One type of alternative leverage is “linkage,” which refers to the greater dependence on EU aid and trade as well as the greater exposure to the West. Linkage is often defined as “the density of ties (economic, geographic, political, diplomatic, social, and organizational) and cross-border flows (of capital, goods and services, people, and information) between particular countries.”²⁰² Linkages augment direct incentives inducing a feeling of expectations.²⁰³

A variation on linkage is the sense of “peer pressure” that occurs in the sense of desiring to be part of the EU “club.” That is, people adjust their country’s standards so as not to be singled out as laggard with regard to reform.²⁰⁴

2. *Instigating Public Participation to Empower Rule Adoption*

a. Public Participation and Activism

The protection of the natural environment must from now on be one of our primary concerns. . . . It follows that the role of public policymakers cannot but expand because it is up to them to pass the laws and decree the interdictions. But the implementation of these laws cannot be left to the discretion of civil servants or technicians alone. In a realm in which the daily life of people directly depends, it becomes necessary, more than anywhere else, that citizens take control and participate effectively in the organization of their existence.²⁰⁵

Indeed, the call for citizen outcry rang true in 1970, just as it does today. Public opinion and grassroots activism may be a source for greater environmental regulation opportunities in Eastern Europe. Public opinion shifts market demand as well as political development. Should populations in eastern European nations amplify concerns for environmental protection, the sentiment will resonate in the way policy makers respond.²⁰⁶

²⁰² Philip Levitz and Grigore Pop-Eleches, *Why No Backsliding? The EU’s Impact on Democracy and Governance Before and After Accession*, (2009), http://www.princeton.edu/~gpop/PL_GPE_EU%20backsliding_CPS.pdf.

²⁰³ *Id.* at 7.

²⁰⁴ *Id.*

²⁰⁵ Georges Pompidou, *Speech On The Environment Chicago*, (Feb. 28, 1970), <http://www.swans.com/library/art17/xxx145.html>.

²⁰⁶ Krista Harper, *Wild Capitablism: Environmental Activism and Postsocialist Political Ecology in Hungary*, University of Massachusetts Anthropology Department Faculty Publication Series, 81 (2006)

Environmentalism in Eastern Europe differs from ideological perspectives in higher income western nations. Specifically, environmental concerns focus on the most pressing issues impinging on individual health or well-being. For example, public pressures have occurred for clean water, waste disposal, and clean air. The Gallup Health of the Planet study demonstrated that the people of lower income nations identified sewage, water quality, and air quality as the most serious environmental problems.²⁰⁷

A promising option to deter backsliding is to foster and strengthen the people's own devotion to environmentalism.²⁰⁸ The public's concern for the environment must be strengthened to successfully influence environmental policies.²⁰⁹

b. Public Health

Public health is directly tied to the health of the environment.²¹⁰ Thus, to protect the health of its citizens, countries must face the importance of implementing environmental policies that address pollution and environmental causes of health decline. At the end of the 1980s, the process of examining and monitoring the adverse effects of the environment on the health of the population began in Eastern Europe. The movement of environment and health policy includes both the direct pathological effects of chemicals, radiation, and some biological agents as well as the effects on health and well-being of the: physical, psychological, social, and aesthetic environment. The World Health Organization launched the European Environment and Health

http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1080&context=anthro_faculty_pubs.

²⁰⁷ Russell J. Dalton, *The Greening of the Globe? Cross-national Levels of Environmental Group Membership*, 14 ENV'T'L POL. 441 (2005), <http://www.socsci.uci.edu/~rdalton/archive/green.globe.pdf>.

²⁰⁸ Margareta E. Kulesa, *Environmental Effects of EU Enlargement – Short-term Gains and Medium-term Losses?* INTERECONOMICS, (2002) (citing Cf. K. Thews: *Politiktransfer: Phänomen zwischen Policy-Lernen und Oktroi. Überlegungen zu unfreiwilligen Umweltpolitikimporten am Beispiel der EU-Osterweiterung*, 25 ZEITSCHRIFT FÜR UMWELTPOLITIK & UMWELTRECHT, 173-201 (2000)).

²⁰⁹ *Id.* at 185.

²¹⁰ Helen Albert, *Decreased Air Pollution Continues to Increase Life Expectancy in USA*, MEDWIRENEWS, SPRINGER HEALTHCARE LTD., Dec. 12, 2012, <http://www.news-medical.net/news/20121212/Decreased-air-pollution-continues-to-increase-life-expectancy-in-USA.aspx>.

Process in order to evaluate and address health issues caused by exposure to environment hazards.²¹¹

In many of the CEE nations, the key public health problems are preventable cancers and diseases. Indeed, the incidence of many preventable cancers is relatively high. For example, cervical cancer is up to three times higher in Eastern European states than in the rest of the European Union. Furthermore, cardiovascular and malignant diseases account for about 70% of all deaths in Serbia.²¹²

Today, environmental health surveillance is becoming more universal in health policy. Major external funds and support are being directed to focus on prevention of disease through environmental monitoring. The World Health Organization has identified many populations without access to safe water supplies and clean air.²¹³ To ameliorate such problems, WHO recommends greater focus on industrial pollution, management of hazardous industrial waste, greater political support, implementation of an organized groundwater access system, as well as abandoning the use of leaded fuel.²¹⁴ Another tragic example of environmental public health risks is minefield bombs. Indeed, in Bosnia and Herzegovina, about eight percent of the land is covered by minefields from the Bosnian-Serbian conflict of the early 1990s.²¹⁵

c. Human Rights

One way to prevent backsliding is to establish environmental law in a paradigm of human rights and health protection. The shift in perspective is even more imperative as more refugees enter Eastern Europe. The UN Committee for Economic Social and Cultural Rights (CESCR) condemns “any deliberately retrogressive measures.”²¹⁶ The idea that once a human right is recognized it cannot be restrained,

²¹¹ World Health Organization Regional Office for Europe, *Environment and Health Performance Review: Serbia*, 7 (2009).

²¹² *Id.* at 6.

²¹³ *Id.* at 7.

²¹⁴ *Id.*

²¹⁵ Committee of Environmental Policy, Economic Commission for Europe, ENVIRONMENTAL PERFORMANCE REVIEWS: BOSNIA AND HERZEGOVINA, 21 (2004).

²¹⁶ Prieur, *supra* note 178 at 1 (*citing* Universal Declaration of Human Rights, 1948, Art. 30vi; European Convention on Human Rights, 1950, Arts. 17 and 53vii; Art. 5 of the two 1966 human rights covenantsviii). (Para.9) General Comment 3 of December 14 1990).

destroyed or repealed is shared by all major international instruments on human rights.²¹⁷ Indeed, the Lisbon treaty aims for strong protection and improvement of the quality of the environment. Moreover, the treaty asserts that there can be no derogation from the principle based on the *Acquis Communautaires*.²¹⁸

1. *Public Participation would Instigate other forms of Social Leverage*

a. Municipality Governance – Smaller Scale, More Accountable to the People

Despite the insufficient resources on the local level, as well as the arguably increased risk of corruption, municipal governments may be in a better position to oversee environmental projects in their own towns.²¹⁹ Local governments are directly accountable to their own communities and may be more apt to select options that are least harmful to their own environments as well as beneficial to the local economy.²²⁰ National governments could additionally retain the power to block municipal decisions in areas of national or transnational importance.²²¹ Citizens are more likely to voice concerns about the environmental impact of local activities if they are localized and accountable parties are actually in the area. The increased involvement of municipal participation may indeed make environmental enforcement more accountable.

b. Judiciary Activism

A potentially powerful action which could enhance the enforcement of constitutionally granted environmental rights is to encourage a more active role of the national judiciary in interpreting and enforcing environmental rights.²²² The judiciary could ultimately and gradually

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Stanimir N. Kostov, *Increasing the Role of Local Governments in Infrastructure Projects in Russia and Bulgaria as a Tool for Environmental Protection*, EMISSION NOT ACCOMPLISHED: THE FUTURE OF CARBON EMISSIONS IN A CHANGING WORLD, 33 WM. & MARY ENVTL. L. & POL'Y REV. 349, 350 (2008).

²²⁰ *Id.*

²²¹ *Id.* at 349–350.

²²² Ryan K. Gravelle, *Enforcing the Elusive: Environmental Rights in East European Constitutions*, 16 VA. ENVTL. L.J. 633, 652-53 (1997).

establish a strong environmental jurisprudence for future generations. Indeed, the judiciary can be held insulated from political pressures which remain a problem in Eastern Europe. Moreover, “courts can help to equalize the political and administrative leverage of the adversaries.”²²³ Additionally, in giving courts reign over punishing environmental violations, the burden of environmental enforcement could be shifted in part to the judiciary.

c. Implementing a Public Trust Doctrine

The Public Trust doctrine recognizes that there are certain interests in public assets that cannot be alienated or controlled by a particular individual or governmental regime to the exclusion of others.²²⁴ Environmental resources are arguably within the realm of public trust rights. A court acknowledgment of the public rights doctrine within CEE states would provide the opportunity for judiciaries to institute environmental protection decisions despite political corruption.

d. Media Accountability

In the 1960s, Robert F. Kennedy Jr. acknowledged the value of vigilant media during the civil rights movement: “Once those rights were generally recognized, nobody has been able to take them away. Anyone who tries, gets a negative story on the front page of the paper... Everyone in the country, including ... the press, has a stake in assuring that [the right] is not eroded.”²²⁵

Eastern European countries should try to encourage a “watchdog” media that benefits from publicizing egregious infractions of the citizens’ environmental rights.²²⁶ A vigilant and aggressive media is effective in guarding newfound rights.²²⁷ The consequence of negative media coverage for environmental violations could be self-perpetuated disincentive within CEE nations. Media accountability would be a

²²³ *Id.*

²²⁴ William J. Bussiere, *Extinguishing Dried-Up Public Trust Rights*, 91 B. U. L. Rev. 1749, 1750 (2011), <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/BUSSIERE.pdf>.

²²⁵ *Id.* at 653 (quoting *Thoughts on Environmental Rights and Ownership*, 11 PACE ENVTL. L. REV. 11, 17 (1993)).

²²⁶ Gravelle *supra* note 223, at 648.

²²⁷ *Id.*

strong response to the challenging need for secondary obligations in order to enforce environmental regulations.

e. European Community Pressure

“The European Economic Community Treaty contains a provision detailing protection of the environment that emphasizes the preservation of the environment, the protection of human health, and the rational use of natural resources.”²²⁸ The language indicates the European Union’s value place on environmentalism. The European Community has a number of methods to pressure Eastern Europe to adopt this paradigm on environmental policy. For example, the EU could withhold World Bank facilitated cleanup financing if pollution enforcement is visibly lacking. But comfortable members of the EU could also provide a friendly support system for struggling members.²²⁹

Unfortunately, if more stable environmentally active EU members do not enforce Environmental Acquis requirements, environmental standards may begin to decline as other EU members with financial plights incite a predicted coalition for deregulation.²³⁰ Indeed, high income countries generally value environmental protection more than countries who are forced to focus their priorities and resources on other policy targets.

f. Influence of Other actors

An active and functioning insurance regime that compensated people who suffered harm because of environmental degradation could

²²⁸ *Id.*

²²⁹ Isabelle de Pommereau, *Baltic Nations Offer Ex-Soviet States a Western Model*, THE CHRISTIAN SCIENCE MONITOR, December 12, 2012, <http://www.csmonitor.com/World/Europe/2012/1212/Baltic-nations-offer-ex-Soviet-states-a-Western-model>. (noting “[b]uilding on their successful transition from communist states into modern democracies, the Baltics have become advocates for Eastern Europe and South Caucasian regions one day joining the European Union and NATO, implementing programs helping those countries govern themselves more efficiently and transparently. The Baltic states have been promoting the European idea in Georgia, Armenia, Azerbaijan, Moldova, Ukraine, and in all the eastern states,” says Kakha Gogolashvili of the Georgian Foundation for Strategic and International Studies in Tbilisi. “They’ve worked harder and better than anybody else so that those countries would be better supported in European institutions.”).

²³⁰ See Kulesa, *supra* note 6, at 286.

address the problem of “discounting” environmental costs.²³¹ That is, companies would incur the external social costs of environmental degradation and insurers would consequently exercise their influence to reduce risks where possible.

IV. CONCLUSION

Section II of this paper elucidated how the EU has developed, inviting countries to join membership and cultivating a single, regional, and interdependent body of nations. By establishing such a community, the EU has inevitably developed a collection of organized legislation addressing every aspect of governance. This collection of laws is intended to act as standards, guiding member states to improve and progress in the company of neighboring nations all simultaneously striving for the same goals. Furthermore, section II explained the extent of environmental law as promulgated by the EU. Indeed, the EU has developed a landscape for regulations and legislation involving clean water and air, waste disposal, nuclear radiation, environmental impact assessment, habitats protection, and endangered species. Section II also demonstrated how the EU uses membership candidacy to encourage rule transformation in Eastern Europe.

Section III discussed the current situation in Eastern Europe. Eleven years after the greatest European enlargement initiative, new Member States are presumed to be “harmonizing” their legislation to the EU standards and complying with membership obligations.²³² Yet, there is significant instability in Eastern Europe today, encouraging regression. Over 1.5 million refugees have entered into Europe, many through Balkan channels. Other political and economic forces have spurred the question as to whether Eastern European countries will regress after years of EU rule adoption. EU membership has long been an incentive to instigate EU rule adoption in Eastern Europe. Today, however, Eastern European states have outright refused pressures from the EU and commentators fear that Eastern Europe will backslide.

²³¹ Stephen Stec, *Ecological Rights Advancing the Rule of Law in Eastern Europe*, 13 J. ENVTL. L. & LITIG. 275, 289 (1998).

²³² Georges Kremlis and Jan Dusik, *The Challenge of the Implementation of the Environmental Acquis Communautaire in the New Member States*, INTERNATIONAL CONFERENCE FOR ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 1 (2004), http://www.inece.org/conference/7/vol1/Kremlis_Dusik.pdf.

Traditionally, environmental policy is deemed to be ‘prone’ to backsliding, forever competing ‘for the place in the sun’ with the ‘urgent’ single market economic policies.²³³ Indeed:

“[a] number of important judgments of the European Court of Justice helped to identify the mutual position of the two streams of the EU policy: the most recent examples include the *Commission v. United Kingdom* case C-30/01 (judgment of 23 September 2003) on the application of single market legislation with environmental components for Gibraltar or the ongoing litigation in the case *Commission v. Austria* (C-320/03) concerning environmentally driven restrictions of transport over the Alps.”

Additionally, the Environmental Directives are characterized by challenges such as the secondary obligations of enforcement, the importance of public participation, and the need for EU funding. Nevertheless, these “challenges” can be reworked to identify the potential advantages of the Environmental Acquis that could combat backsliding. In particular, sparking public participation would invoke indirect consequences such as media accountability, insurance company involvement, judiciary concern, and municipal government accountability. It appears that public participation can best be tapped into through individuals’ concerns for their own health and the health of their families. By shifting the perception of environmentalism to one of environmental protections of public health, CEE nations could evolve a self-perpetuating implementation of the environmental acquis that prevents backsliding.

This article calls for a new perspective for EU environmental policy implementation: one that is self-sustaining and no longer requires the EU’s micromanagement or incentive structure. Environmental law is inherently well-positioned for social leverage because it is directly related to public health and quality of life. This is the “incentive” that should be encouraged and supported. The era of coveted EU membership is over. But environmental policy has the potential to develop beyond EU implementation and into the hands of the people.

²³³ *Id.* at 2.