The Evolving and Interacting Bases of EU Environmental Policy Legitimacy

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Abstract

Some recent scholarship has focused on concerns that implementation and compliance difficulties are undermining the legitimacy of European Union environmental policies and even the EU itself. Other officials and analysts, however, contend that environmental policy is one of the EU’s most successful policy areas. While most discuss “legitimacy” in unspecified and/or absolutist terms, it is instead a more nuanced and contested concept. This paper investigates several evolving and interacting bases of legitimacies associated with “permissive acceptance” (based upon functionalist criteria, expert and technical authority, and policy effectiveness), “appropriateness” (based upon value and norm consensus and legalization), active commitment (based upon democratic processes), and identity (based upon global leadership, among other factors). These legitimacies vary in terms of their strength, stability and durability and among the multiple European actors and institutions.
Recent scholarship has focused on concerns that implementation and compliance difficulties are undermining the legitimacy of European Union environmental policies and even the EU itself (Grant et al. 2000; Jordan and Schout 2006: ix; Livanis 2010). Other officials and analysts contend, however, that environmental policy is one of the EU’s most successful policy areas, pointing to the promulgation of hundreds of pieces of legislation and regulations covering a host of environmental concerns ranging from the quality of drinking water to migratory birds (Kramer 1995, Johnson and Corcelle 1996, Collier 1999: 81). They insist that environmental protection enjoys widespread public support capable of generating and increasing support for the entire integration project. These concerns and assertions invite a consideration of the evolving and interacting bases of EU environmental policy legitimacy.

While most discuss “legitimacy” in unspecified and/or absolutist terms (i.e. institutions, policies, and/or behavior are or are not legitimate), it is instead a more nuanced and contested concept. Backstrand et al. (2008: 38) embrace this definition: “the acceptance of a particular social order, rule, norm, or institution by set of actors or by a specific community.” March and Olsen (2009: 2) discuss legitimacy in terms of “appropriateness:”

The logic of appropriateness is a perspective that sees human action as driven by rules of appropriate or exemplary behavior, organized into institutions. Rules are followed because they are seen as natural, rightful, expected, and legitimate. Actors seek to fulfill the obligations encapsulated in a role, an identity, a membership in a political community or group, and the ethos, practices and expectations of its institutions.

Baber and Bartlett (2005: 92) conceptualize legitimacy in terms of commitment to participation and compliance. And, most scholars concur that identity, defined as trust and “mutual sympathies,” “a sense of community” and/or a “we-feeling” (Deutsch et al., 1957: 36) is the
most stable and durable basis for legitimacy. So rather than an absolutist dichotomy of complete legitimacy or the lack therefore, it is more useful to think of various legitimacies occupying places along a continuum in terms of strength, stability, and durability:

\[ \leftarrow \text{permissive acceptance—deemed appropriate ("natural, rightful, expected")—active commitment (participation, implementation, compliance)} \rightarrow \text{identity-based legitimacy} \]

One might expect these legitimacies to evolve and interact across time and among European actors and institutions, from the general to the attentive public, to the EU bodies and officials associated with various policy areas, to legal actors, to scientific experts and academic analysts, and to environmental groups and green parties, among others.

This paper posits that the various legitimacies and different actors’ perceptions of legitimacy derive the phenomena’s several interacting sources and bases. While the sources and levels of legitimacy clearly defy strict categorization, this paper explores several potential interacting bases of legitimacies associated with permissive acceptance (based upon functionalist criteria, expert and technical authority, and policy effectiveness), appropriateness (based upon value and norm consensus and legalization), active commitment (based upon democratic processes), and identity (based upon global leadership), among other factors. These multiple bases of legitimacy help explain why scholars disagree over whether and the extent to which organizational and policy effectiveness are related to legitimacy, how legitimacy in one policy area is related to legitimacy in others, and how legitimacy in one sector affects the legitimacy of the entire organization and \textit{vice versa}. 
Legitimacy as Permissive Acceptance

Permissive acceptance of EU environmental policies may proceed from functionalist, instrumental/utilitarian, and/or consequentialist logics (Eriksen and Fossum 2004: 437). Over time, the requisites for creation of the Single Market, the transnational scope of many environmental problems, expert and technical authority, and policy effectiveness (“output legitimacy,” see Scharpf 1999), have provided foundations for a permissive acceptance of EU environmental undertakings.

The original mission of the European Community (EC) was to create a Single Market fostering freedom of movement of goods, services, capital, and people across Member States’ (MSs) frontiers; environmental protection was not mentioned in the 1957 Treaties of Rome that established the organization. The desperate need for economic recovery from war-time devastation and to provide an alternative to communism as the Cold War loomed prompted former enemies to undertake these cooperative ventures.1 EC Member States acknowledged that divergent environmental legislation can distort economic competition, and during the 1960s, they promulgated several environmental directives in support of their Single Market objectives. Lodge (1989: 321) confirms that initially EC interest in environmental policy was “spurred not so much by an upsurge of post-industrial values…or to give the EC a ‘human face’ as by the realization that widely differing national rules on industrial pollution could distort competition.” Thus, EC environmental policies initially represented “spillover” (Haas 1958) from Single Market objectives rather than values and normative consensus or treaty-based legalization of environmental protection. Over subsequent decades, other functional imperatives have driven EU policies such as environmental problems like acid rain and pollution of rivers that transverse
several MSs which cannot be addressed autonomously and require regional cooperation. These two functional/utilitarian bases for permissive acceptance of EU environmental policies have only increased over time as it has become clear that completing the Single Market and dealing with increasingly complex and harmful environmental problems require regional cooperation.

Permissive acceptance of environmental policies has also been fostered and reinforced by the need for and the authority of scientific and technical information and experts. From the early 1970s, the EC sought to martial information and expertise in support of environmental objectives. Particularly during these early years, Orhan (1999: 38) informs that “Policies were based on an unshakeable faith in the capacity of science and technology to solve environmental problems.” Scientific research and scientists were assumed to be “fact-based” and value-neutral, respectively, and policy decisionmaking was understood as a rational and technical exercise in the service of the public interest rather than serving the values and interests of policymakers.

Article 130r(3) of the 1987 Single European Act requires that the Community consider available scientific data in its policy-making (Hildebrand 2005). At every stage of policymaking, the EU by law avails itself of scientific input. Committees, working groups, and networks include scientific and technical experts among their membership, and conferences and hearings are convened to engage in issue framing, agenda-setting, policy alternative deliberations, and policy implementation and evaluation. The Commission, as drafter of legislation and regulations, “steerer” of policy networks, and monitor of policy compliance, also brings a great deal of expertise to the policy processes. Martens (2008, 645) quotes a Commission official as saying, “we are perceived as a repository of knowledge and experience.” The Commission often uses resolutions and White and Green papers to inform and persuade.
Input from the scientific and technical communities extends to the level of individual projects. The 1985 Environmental Impact Assessment Directive\(^2\) requires evaluations of environmental costs of projects at the regional level, and Directive 2001/42/EC\(^3\) implements the global 1991 Convention on Environmental Impact Assessment in a Transboundary Context and the 2001 Protocol on Strategic Environmental Assessment. Overtime there has been a democratizing of input relative to this level of planning. The 2003 Public Participation Directive provides for public participation in the drawing up plans and programs relating to the environment\(^4\) guaranteeing input from a variety of societal sources (Marsden 2011: 267-69).

During the 1980s and 1990s, the EU also created a number of semi-autonomous agencies to serve as “apolitical” sources of scientific data and policy expertise. The European Environment Agency (EEA) was founded in 1990 and began operations in Copenhagen in 1994. Its primary mission is to collect, analyze, and disseminate information to support its 33 member countries’ environmental decisionmaking, assessment, and public participation on all levels from the local to the global. In 2002, a European Food Safety Authority began operations in Parma, Italy and a European Chemicals Agency was established in Helsinki in 2007. The Commission also draws upon the expertise of independent sources such as the Institute for European Environmental Policy and European Academies’ Science Advisory Council (Hildebrand 2005, 99; Martens 2008, 637).

Since the 1990s, a more skeptical attitude has emerged with regard to the role scientific information and experts play in the policy process. Early EU policies dealt with the most pressing and best-understood environmental problems, and more recent problems (such as climate change) are characterized by novelty, complexity, and scientific uncertainty. Highly contentious policy challenges such as the BSE (“mad cow”) crisis and questions surrounding
genetically-modified foodstuffs have raised questions about science as an objective mode of inquiry governed by universally understood and accepted criteria. Scientific information and experts were rallied to support all sides of these policy debates and it became clear that the scientific community and individual scientists represented their own values and objectives. Orhan (1999: 47) explains that “Science, like all human knowledge, is grounded in and shaped by the normative suppositions and social meaning of the world it explores.”

Even as political leaders were increasingly required to rely upon scientific expertise to understand environmental problems and to serve as a basis of legitimacy for the policy process and outcomes, decision-making processes and policies were increasingly challenged by opposing scientists, environmental advocacy groups, and the general public. The EU turned to two solutions to shore up legitimacy based on scientific input, use of the precautionary principle and the democratization of scientific analysis and input. Together these responses were referred to as “civic” or “negotiated” science. O’Riordan and Cameron (1994: 66) explain:

[Science-democracy partnerships raise] the issue of civic science, or a negotiated science in which participation becomes a means of brokering knowledge and valuation between scientific processes and public opinion. Precaution opens up the scope for this, because precaution encourages thoughtful and creative dialogue between an activated citizenry and the wider scientific community.

Most ascribe the precautionary principle to German legal tradition. The EU embraces the 1992 Rio Declaration formulation of principle 15 which provides that “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” When faced with inadequately understood environmental problems, the precautionary principle allows time for scientific knowledge to increase and gives officials time to gather more information, include a wider range of participants in policy deliberations, and undertake implementation in a step-by-step manner. Public input can supplement scientific expertise by providing locally relevant
information and social value insights. Critics charge that employing the precautionary approach undermines effectiveness by restricting research and innovation and that public participation in policymaking complicates and delays decisionmaking. However, continuing with traditional approaches to scientific uncertainties undermines permissive acceptance by leaving policies open to further protest and delayed implementation and compliance. By acknowledging the inherent uncertainties of science, EU scientific-public advisory groups work together to increase public accountability, reach consensus, and gain public trust rather than use scientific information and experts as weapons in policy debates (Hunt 1994: 123-24; Carr and Levidow 1999: 161-72).

While functional spillover, the necessity of addressing transfrontier environmental problems, and expert authority and negotiated science are potential sources of permissive acceptance, recent conversations have focused on policy effectiveness as a primary source of legitimacy. Analysts with a policy output-orientation tend to define effectiveness as a polity’s ability to achieve policy objectives in a cost-effective, efficient way with minimum undesired side effects (Scharpf 1999, Grant et al., 2000: 1), but this definition conveys a limited understanding of the effectiveness of EU environmental efforts. The EU has faced divergent environmental challenges along its evolutionary path, so assessing policy effectiveness is a moving target in terms of the polity’s objectives and indicators of success. During 1970s through the mid-1980s, the primary challenges were to place environmental protection on the agenda of the economic organization, to articulate and legalize environmental objectives and principles to a status equal to economic integration and growth goals, and to address the most health-threatening environmental concerns such as water quality. Once those goals were achieved culminating with the 1987 Single European Act, the organization devoted itself to promulgating hundreds of pieces of legislation and regulations and bringing its MSs’ legislation
in line with these obligations. After the 1992 Maastricht Treaty, the relatively less difficult environmental objectives had been achieved by legislation and regulation, and the organization was confronted with increasingly novel and complicated issues, within increasingly complex political processes, including increasing numbers of MSs, many of whom assigned environmental issues relatively low priority and who lacked the administrative capacity to vigorously pursue environmental objectives.

With the new legal obligations, EU environmental policies’ effectiveness came to be assessed in terms of the narrow indicator of rates of policy implementation and compliance. As might be expected, analysts’ different definitions, criteria, and indicators of effectiveness yield disagreement over whether the EU has been, is, and will be environmentally effective. Collier (1997: 1) agrees that “Environmental policy is considered to be one of the European Union’s most successful policies.” It has established a treaty foundation for undertaking environmental objectives and allocated powers comparable to economic ones to EU institutions including creating a Directorate General for the environment. It has promulgated hundreds of pieces of legislation and regulations to undertaking comprehensive and complex environmental policies. And, along the way, it has articulated and constitutionalized innovative principles and paradigms that shape dominant global discourses and negotiations around environmental issues.

If the criteria for success is the degree to which EU efforts change MSs’ behavior, there is some evidence that the EU has produced a “ratcheting up” of environmental standards, particularly among MSs with previously nonexistent or ineffective environmental institutions and policies (Grant et al, 2000: 66). And, positive policy outcomes for the environment have been noted in some specific issue-areas such as water quality and restoration of the ozone layer.
However, a review of the 5th Environmental Action Programme by the European Environment Agency (1995: 1) concluded that:

The European Union is making progress in reducing certain pressures on the environment, though this is not enough to improve the general quality of the environment and even less to progress towards sustainability. Without accelerated policies, pressure on the environment will continue to exceed human health standards and the often limited carrying capacity of the environment.

Grant et al.’s (2000: 66-67) assessment is similarly negative: “the overall impact of E.U. environment policies through the legislative route has not been a notable success.” Policy implementation and enforcement have been weak, many policies have not achieved their intended outcomes, and there has been a slow and unrelenting deterioration of environmental quality. Often EU environmental effectiveness is undermined by other policy initiatives such as in those of the Common Agricultural Policy and Single Market. Grant et al. derive these conclusions by focusing mostly on rates of delayed, incomplete, or inadequate MS implementation of legislation and regulations, increasing numbers of public and official complaints of breaches of EU environmental law, and infringement cases registered by the Commission and heard by the European Court of Justice. Livanis (2010: 88, 92), whose dataset includes the years 1998-2007, identifies 2002 as having the lowest implementation rate of approximately 92%. He concludes that this level of “non-compliance amounts to a crisis.” What constitutes a “crisis,” however, is debatable---these data may be interpreted as “half-full” or “half-empty.”

Additional indicators employed to argue ineffectiveness are the annual numbers of complaints and alleged breaches of EU law deriving from the public, Parliamentary questions or petitions, and cases identified by the Commission; and the number of environmental infringements cases brought before the ECJ. Livanis (2010: 84) informs that between 1998-2007, 25% of all infringement proceedings brought before the ECJ were related to the
environment compared to 21% that pertained to the Single Market. The usefulness of these indicators to assessing and comparing effectiveness is debatable. Over the years, the quantity and types of environmental obligations have proliferated and changed and EU citizens, nongovernmental organizations, and EU bodies have increased knowledge of and procedures whereby complaints might be lodged. With stronger principles, norms, and legal embeddedness of environmental goals, the EU and its citizens have a greater commitment to and expectations with regard to environmental protection. Increasing numbers of complaints and infringements proceedings may indicate increased effectiveness and legitimacy of EU environmental governance. More environmental problems are being addressed by EU governance and EU citizens and bodies participate more actively in insuring implementation and compliance.

The process whereby legitimacy in the form of permissive acceptance is derived is a rational choice; policy choices are motivated by needs, interests, preferences, cost-benefit analysis, and expected consequences; i.e. a “narrow view of economic citizenship” (Eriksen and Fossum 2004: 436). This is a relatively unstable basis for legitimacy in that citizens’ and elites’ acceptance of environmental policies is conditional and their priorities subject to change as they confront various policy challenges, as predicted by Inglehart’s (2008) work on materialist and post-materialist values. Eriksen and Fossum (2004: 440-41) contend that to achieve long-term effectiveness and legitimacy, a common set of values and/or more formal institutions are needed. They explain that “the consequentialist mode of legitimation is…insufficient. Indirect and performance-based legitimation does not suffice to account for the present-day EU in democratic terms.”

Many scholars contend that a “permissive consensus” persisted with regard to the EC until the early 1990s. Hooghe and Marks (2008: 118, 123-25) write that after the 1992
Maastricht Treaty, support for integration “essentially disappeared.” Proliferating European legislation and regulations reached deeper into society, affecting citizens’ daily lives and creating winners and losers in ways that made EU policies salient and contested. Politicization was only heightened by sustained debates and referenda over successive treaties and the EU constitution.

By the mid-2000s, many judged overall EU legitimacy among the public at an all-time low, and the organization’s capacity to govern was increasingly called into question (Jordan and Schout 2006: ix). However, EU officials’ and the general publics’ “permissive acceptance” of the EU’s pursuit of environmental objectives has remained strong over the decades.7 One must assume that EU support for environmental policies derives from bases more essential and integral than functionalist spillover, cost-benefit analysis, the authority of scientists and experts, and/or even the policy’s record of effective problem solving.

**Legitimacy as “Appropriateness”**

As was noted, March and Olsen inform that a stronger, and more stable and enduring legitimacy derives from the conceptualization of a behavior as natural, customary, expected, and rightful. The most important bases of this legitimacy are value and norm consensus; the articulation of supporting principles; the embedding of these values, norms, and principles into treaties, policies, laws, and regulations; and rulings by the European Court of Justice (ECJ) in support of these values, norms, and principles.8 Embedding values, norms, and principles within treaties, policies, legislation and regulations shapes and educates society across generations “through the language of law” (Baber and Bartlett 2005: 91).

While environmental awareness and prioritization are not uniform among European citizens, environmental values are deeply entrenched within European publics and national institutions and there has been no demonstrated willingness to roll back environmental
regulations since the late 1970s, despite recent neoliberal economic tendencies to reduce the role of governments and promote market-based policy instruments and voluntarism (Orhan 1999: 53). Eurobarometer surveys have consistently demonstrated European citizens’ support for addressing environmental problems at the regional level (see footnote 7).

Over time, EU environmental values and norms have been articulated into principles that guide policymaking and the promulgation of legislation and regulations and have been constitutionalized into successive EU treaties. At the October 1972 Paris Summit, the European Council confirmed that “economic expansion is not an end in itself,” laid down several environmental principles, and agreed to adopt an environmental policy. In the concluding communication, summit participants elaborated that economic expansion “should result in an improvement in the quality of life as well as in the standards of living…[and] particular attention will be given to intangible values and to protecting the environment” (quoted in McCormick 2001: 47). Since 1973, the EU has enacted seven multi-year Environmental Action Programmes (EAPs) establishing principles and priorities and outlining measures to be undertaken in various policy areas. These programs demonstrate MSs’ growing value commitment to coordinate and harmonize environmental regulations to level the economic playing field and to protect the environment. EAPs mostly represent contemporary thinking regarding the environment and medium-term planning rather than treaty-based law. However, by the end of the 1970s, the ECJ had ruled that environmental policy fell within the EEC’s competence as an implied power.

The first two EAPs (1973-77 and 1977-81) mostly provided for remediation of past environmental damage rather than proactively pursuing environmental protection. However, a new conceptualization of environmental resources as constituting the basis for and imposing limits to economic and social development was discernible in the Third EAP (1982-1986).
Environmental goals were no longer to be regarded as separate and subordinate to Single Market ones, and were to be integrated into other policy areas such as agriculture, energy, industry, and transportation (CEC 1983). Hildebrand (2005: 25) informs that the Third EAP was the first EEC effort to end the subordination of environmental objectives to economic ones.

In 1985, the European Council meeting in Brussels upgraded environmental protection to be regarded as a fundamental part of agricultural, economic, industrial, and social policies (Johnson and Corcelle 1989: 3). In a preliminary ruling that same year concerning the Directive on the Disposal of Waste Oils, the ECJ opined that:

The principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community… The Directive must be seen in the perspective of environmental protection, which is one of the Community’s essential objectives.10 (emphasis added; quoted in Koppen 2005: 74-5).

Koppen contends that this ruling is an example of judicial activism—environmental protection was not yet an “essential objective” because it had not been enshrined in the treaties. Instead, this ruling demonstrated ECJ support for treaty changes being discussed. The ruling placed environmental protection on a more equal footing with Single Market objectives as long as environmental measures were not discriminatory or disproportionate (Koppen 2005: 75).

Between 1972 and 1986, in addition to the three EAPs, the EC enacted more than 100 environmental measures. Likely in reaction to the lack of treaty basis and the EAP and the directive format of many environmental decisions, Rehbinder and Steward (1985: 33) describe the pre-Single European Act EAPs and other environmental measures as “Soft law [which] consists of programs and declarations of a non-binding nature…” representing “a new type of policy developed through political consensus of the member states.” [emphasis added]

The 1987 Single European Act (SEA) provided the first explicit treaty basis to address environmental issues. Articles 130r, s, and t lay out several principles of environmental
protection: preventing environmental damage is preferred to remediation, environmental problems should be addressed at their source, and the “polluter pays.” Articles 100a and 130t allow MSs to introduce more stringent environmental standards than those agreed to in the EU as long as they are “not a means of arbitrary discrimination or a disguised restriction on trade between Member States.” In slight overstatement, Hildebrand (2005: 36) writes: “The protection of the environment is now formally of equal or even superior status to all other Community objectives.” In many ways, environmental policy had come of age. Almost immediately, the ECJ confirmed the new environmental provisions when in 1988 it supported Danish legislation requiring that beer and soft drinks be marketed in reusable containers despite potential negative consequences for the single market.11 In a July 1991 ruling associated with “the titanium dioxide case,”12 the ECJ registered its preference that the EC deal with environmental matters under Article 100a which made it more difficult for a few MSs to block environmental proposals (Haigh and Baldock 1989: 15).

The late 1980s also brought a major shift in EC understandings associated with this policy area to include sustainable development (SD). In 1987, the United Nations-initiated World Commission on Environment and Development published the *Brundtland Report*, and ideas associated with SD gradually infiltrated the single market-oriented EC discourse. The *Brundtland Report* explains that “Humanity has the ability to make development sustainable---to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs.” It continues:

In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations (WCED 1987: 16, 43).
The 1992 Maastricht Treaty committed the EU to promote harmonious and balanced expansion of economic activities and “sustainable non-inflationary growth respecting the environment….” (Article 2), and gave the ECJ power to impose fines for nonimplementation of environmental legislation. The subsidiarity principle became applicable to all policy areas where the EU doesn’t have exclusive competence, and the EU is to ensure that environmental objectives are applied consistently across policy areas. Additional environmental prerogatives were conferred on the European Parliament, and the EU is empowered to make binding international environmental agreements on behalf of the MSs. The Fifth EAP was entitled *Towards Sustainability* (CEC 1992; Gottweis 1999: 65).

The Preamble and Article 2 of the 1997 Amsterdam Treaty confirm SD as a fundamental objective of the EU, and MSs’ rights to maintain higher environmental standards than those established by the EU if they so choose. It also extended co-decision procedures to directives adopted on the basis of the environmental paragraph 130s, increasing the powers of the EP (Skjaerseth and Wetterstad 2002: 102). Jordan and Fairbrass (2005: 45) write that with the ratification of the Amsterdam Treaty, creating a legal foundation for providing environmental protection and SD was completed; environmental policy was now a “mature” policy area.

The European Council adopted its first Sustainable Development Strategy at a meeting in Goteborg in 2001 which serves as a foundation for mainstreaming SD to reduce negative policy externalities, benefit from synergies, and provide a more integrated approach to problem solving based on better instruments such as environmental impact assessments (CEC 2002; Geyer and Lightfoot 2010: 348). In 2006, the EU renewed its commitment to SD in its articulation of a SD strategy for the enlarged EU by laying out principles to guide policy, key objectives, and identifying its most serious challenges. Article 3(3) of the 2008 Lisbon Treaty arguably
broadens the EU definition of sustainable development---the EU shall “contribute to peace, security, [and] the sustainable development of the Earth.” Lisbon states that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development” (Council of the EU 2008: 21, 68; Benson and Jordan 2010: 469).

Few would dispute that environmental values, norms, principles, policies, laws, regulations, constitutionalization, and judicial affirmation constitute a firm foundation for labeling EU environmental policies as appropriate, “rightful,” customary, and expected. Functional needs, cost-benefit analyses, and scientific authority and advocacy laid the foundation for value and normative consensus among Europeans except the most doctrinaire free market advocates and Eurosceptics; these norms were then articulated into principles and legalized in treaties, laws, and regulations. Rulings by the ECJ reaffirmed the appropriateness and “rightfulness” of EU policies in support of the environment in some cases even at the expense of Single Market objectives. Normative and legal bases of legitimacy are also clearly more stable than permissive acceptance based on functional needs and cost-benefit analysis relative to other policy objectives and outcomes. Yet recently the legitimacy of EU environmental policy and the EU itself has been called into question on the grounds that it suffers from a “democratic deficit.” This suggests that citizen participation, deliberation, and/or active commitment constitute another basis for legitimacy.

Democracy-based Legitimacy

At the outset, the EC was an elite-driven project committed to the creation of the Single Market, however, democratic government is a requirement for EU membership.13 Early in the polity’s
development, democracy-based legitimacy relied upon the MSs’ representative democratic credentials. In 1978, the European Parliament (EP) became the first and remains the only directly-elected body. Before the 1990s, debates among politicians and academics derived from state-centric models and focused on strengthening the powers of the EP. Most agree that the EP is the “greenest” among EU bodies, Green parties play a significant role in its activities, and the Environment Committee is recognized as among the most influential, as illustrated by its heavy workload and the fact that it deals with more co-decision legislation than any other committee (Burns 2005: 89). However, even as the EP gained in strength, particularly via co-decision powers conferred in the Maastricht and Amsterdam treaties, this level of representative democracy was deemed insufficient to address the democratic deficit. Detractors point out the low turnout in EP elections and the fact that voters tend to cast their ballots on national issues rather than European ones.

Early in the 1990s, a new norm emerged insisting on the necessity of “civil society” participation in decisionmaking, transferring the conversation from representative democracy to participatory democracy. The Fifth EAP (CEC 1992: 49) informs that:

> [T]he basic strategy therefore is to achieve full integration of environmental and other relevant policies through the active participation of all the main actors in society (administrations, enterprises, general public)… [emphasis added].

Adherence to the expert and technical input, subsidiarity, sustainable development, policy integration, and market-oriented principles increases participation from all levels including nongovernmental, grassroots, and transnational actors, making decisionmaking more inclusive, equitable, transparent, and accountable. Nagal (1995 cited in Conca and Dabelko 1998: 263) writes:

> [T]here is a remarkable consensus that a sustainable society must be democratic, with multiple fora for negotiation and decision making. Democracy is not exclusively about the creation of formal institutions and processes but it is also about improving the collective capacity to resolve common problems in an effective and peaceful manner.
Inclusive and transparent processes reduce the risk that decisions will be based on inadequate information, not take into account the needs of all stakeholders, will favor the interests of the powerful, will not be effectively implemented, and thus enhance effectiveness- and democracy-based legitimacy. For stakeholders to participate effectively, they must possess the rights, the freedom, and the capacity to participate including having access to adequate resources including complete and timely information (Lele 1991, Woods 2010).

The Commission has been at the forefront of the movement to increase participation in the EU (Smismans 20003, Saurugger 2010: 472). The legal and procedural changes wrought by the SEA and the subsequent rash of new environmental legislation and regulations exacerbated ongoing implementation and compliance problems and concerns that environmental challenges were going unmet. Policymakers interpreted these problems as signaling a needed for expanded participation via partnerships and networks. Seeking to create horizontal connections between and among various sectors and to increase vertical interaction with societal actors, the Commission created three categories of dialogue groups:

1. A consultative forum to serve as a sounding board for EU environmental policymaking in relation to its economic agenda;\(^{18}\)
2. An implementation network comprised of MSs’ officials; and,
3. A policy review group composed of MSs and DG Environment officials.

A number of additional transparency measures were announced by the Commission, including earlier publication of its annual work plan and the delineation of a code of conduct on access to information supported by technological innovations (Lenschow 1999: 46).

DG Environment’s efforts to become more inclusive and participatory was to be achieved by creating networks; Ward and Williams (1997: 439) confirm that “networking provides the non-tangible infrastructure for this process.” They identify the 1990 *Green Paper on the Urban*
Environment as the first sustained discussion and effort by DGXI to include subnational governments (SNGs, i.e. cities, regions, etc.) in policy-making processes. Prior to the 1990s, interactions between DG Environment and SNGs had been limited and sporadic. The Commission turned to networks to address a variety of legitimacy concerns including those associated with adequate capacity, implementation and compliance problems, and democratic deficits. Increasing SNGs,’ interest groups,’ and experts’ input into environmental policy was seen as a way to improve the practicality of policies and to enhance implementation and compliance. SNGs’ participation in networks was envisioned as a means to increase awareness and understanding of the EU across the various levels of government. Transnational networks also represented a mechanism whereby the Commission could gain access to representative European expertise and opinion while simultaneously coordinating and controlling interactions with lobbyists, avoiding lobbying overload. Networks were also regarded as a way to improve policy effectiveness.

At the outset, the net consequences of these profound legal and procedural changes were mixed. The thrust of the network concept was to change the roles of SNGs from implementers of hierarchically-mandated policy into innovators, leaders, partners, and facilitators. Throughout the 1990s, however, SNGs’ abilities to participate effectively in network governance were limited due to the lack of resources, lack of knowledge of participatory opportunities on the regional level, and a lack of political will.

Many questions were left unanswered as to how these networks would work, including: How would the networks be structured and managed? How would the new governance relate to the old forms of governance, i.e. legislation and regulations? How could their effectiveness and legitimacy be guaranteed? The Commission had significant experience working with networks
in relation to lobbying and policy-making activities, but it was less clear how networks could be used to govern, implement policies, and achieve compliance. Many policymakers realized that new coordination capacities would have to be created and managed to address the increasingly interconnected policy processes, but few had the time or political incentives to identify and create bureaucratic procedures, provide staff training, or manage the networks (Jordan & Schout, 2006: xi-xiii). However, by the end of the decade, the responses of environmental networks were changing from reactive efforts to improve access to funding and to enhance their economic performance via lobbying to proactive partnership in policymaking. Ward and Williams (1997: 460) expressed optimism that SNGs-Commission networks also were becoming more formal and stable, and that “a process of incorporation …[was] occurring.”

The case may be made that the changes in governance wrought during this period represented progress in participatory democracy in that many more participants were brought into the decisionmaking, implementation, and evaluation stages of environmental policymaking. Access to both context-specific and scientific/technical expertise was enhanced through the introduction of new participants including semi-autonomous specialized agencies. The introduction of network governance also portended benefits in effectiveness-based legitimacy in terms of flexibility, efficiency, and participation-based legitimacy derived from expanded participation, understanding and consensus building, and policy commitment.

Over the past fifteen years, the EU has sought to achieve its environmental objectives via new modes of governance, particularly the Open Method of Coordination (OMC, articulated in 1998) with regard to policymaking and Cardiff Process (codified in 2000) which aims to incorporate environmental objectives into other policy areas. The OMC and the Cardiff Process involves creating networks of regional, state, and subnational partners, both public and private,
within and across sectors to engage in environmental target-setting and benchmarking, performance reporting, identifying “best practices” via peer review, and “naming, faming, and shaming.” The multiple actors involved are encouraged to develop a sense of ownership of environmental problems. The EU hopes that the “new modes of governance” will encourage the multiple sectors to “design out” potential negative environmental externalities from policies at early stages of the policy process (Jordan and Schout, 2006: x), and that the heightened level of participation would improve the effectiveness- and participation-based legitimacy of environmental policies. 19

In 2004 and 2007, twelve new East European states joined the EU introducing formidable challenges to the achievement of regional environmental objectives and to the effectiveness and legitimacy of governance. Environmental problems of increasing scale, complexity, and scientific uncertainty proliferated. 20 EU governance, in general, has become more deeply and widely involved in European citizens’ lives increasing politicization and decreasing effectiveness-based legitimacy in all policy areas (Jordon and Schout, 2006: 20). However, civil society participation in decisionmaking is formalized in Article 8b of the 2009 Lisbon Treaty and is regarded as essential to what is regarded as a legitimate legal order (Fligstein and Stone Street 2002, Saurugger 2010).

Recently scholars, particularly those interested in communitarianism and/or communicative logics, contend that deliberative democracy rather than representative and participatory democracy is the most stable and enduring source of democratic legitimacy. “Deliberation” refers to interactions by actors who are open to persuasion by force of superior arguments. Deliberative democracy creates a public space wherein citizens can contemplate and debate what constitutes the “common good,” and establish trust, solidarity, and eventually a
common identity. Participants recognize each other as fellow-citizens, and deliberation helps shape their preferences, and allows citizens to accept the results of deliberation as “right” and worthy of respect, enhancing commitment and policy compliance and effectiveness (Sandel 1982, Eriksen and Fossum 2004: 443). Eriksen and Fossum (2004: 445-6) elaborate:

Public deliberation is the way to find out what is good, right, and just in the political sphere of action. It is only possible to test the quality of arguments in debate in which all affected parties are involved. This is the task of the public sphere, the realm outside of state administration and the market and in which people gather and become a public and hold the decision-makers accountable.

The only requirement for deliberative democracy is free and open debate in terms of the public good (Habermas 1998: 107). Eriksen and Fossum (2004: 446-52) explain: “The demos is to be shaped by political means; hence, there can be no European demos without a European democracy.”

Identity-based Legitimacy

Significant debate centers on the extent to which the EU has achieved a common identity, and if so, what is the basis of this identity. Eriksen (2000: 42) asks:

What is the European Union…? It is not a state based on a common identity, a fixed territory and an established demos, nor is it a loosely coupled system of allies who co-operate on the basis of mutual interest. The EU involves a lot more than international co-operation, meaning co-operation among states but it is not a new state.

Most scholars focus on common values and norms and some conceptualization of a shared European heritage, but as was noted above, a common identity may also derive from deliberative democracy concerning what constitutes the “good life.” Human beings possess a primordial need for belonging and participation and deliberation allow them to clarify who they are and who they wish to become. In addition to the universal political values outlined in the Copenhagen Criteria (i.e. the rule of law, human rights, respect for and protection of minorities),
environmental protection is an deontological and cosmopolitan norm recognized globally as necessary for the good life. Thus, the European identity as protector of the environment is affirmed by the United Nations and, to a lesser degree, other regional organizations (Eriksen and Fossum 2004: 436-46).

Beyond the EU green identity’s being affirmed by universal values and global organizations, the EU has sought to identity itself as a global environmental leader. The 1971 ERTA case\textsuperscript{23} granted implied powers to the Commission to enter into agreements with external parties in all areas where it enjoyed internal competence in its ruling that “No separation must be created …between the system of internal Community measures and external relations” (European Court Reports 1971: 274 quoted in Koppen 2005: 72). Each EAP has included international dimensions in EU planning, and Article 130r of the 1987 SEA called for cooperation with third countries and international organizations on environmental matters (Hildebrand 2005: 34). Europeans and the EU have pioneered in creating and disseminating principles and discourses like the subsidiarity and precautionary principles and SD, and devised innovative policy instruments such as eco labels and carbon emissions trading schemes. In signing the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change, EU MSs committed as a bloc to reduce greenhouse gases 8\% over the 2008-2012 period relative to 1990 levels, compared to 6\% and 7\% commitments made by Japan and the United States, respectively (Collier 2002: 176-77). Globally, the EU also links environmental objectives to other policy issues such as trade, development assistance, and promoting democratic governance in fora such as the World Trade Organization and bilateral and regional negotiations. Eckersley (2004: 80-81) writes that Europeans have made the transition “from environmental exploiter and facilitator of private environmental exploitation to public environmental trustee…”
Much constructivist literature contends that an actor’s identity is shaped by who she is not (relative to “the other”) as well as who she is (Lebow 2008). As the United States declined to provide global leadership in protecting the environment, particularly during the George W. Bush administration (2001-09), Collier writes that “the US emerged as the global villain, while the EU’s negotiating position was welcomed by all but the most radical environmentalists.” Acting as a bloc, the EU exerts pressure on other states, facilitating the concluding of global environmental agreements (Collier 1999: 81, 99). Commission efforts to enhance EU legitimacy via identity strategies have been steadily more manifest over the past two decades (Eriksen and Fossum 2004: 455).

Conclusion

Recent literature critical of EU environmental policies has focused on its ineffectiveness, defined as problems with implementation and compliance, and the broader EU literature expresses concern over the polity’s “democratic deficit.” These two concerns lead many to conclude that the EU lacks legitimacy. These conversations often fail to define “legitimacy,” but most seem to operate out of an absolutist understanding of “legitimacy”----the actor or action is or is not legitimate. This study unpacks and problematizes the concept of legitimacy by positing that there are various definitions, forms, and logics of legitimacy deriving from various interacting bases. These legitimacies may be associated with different actors at different times in different time periods, and they vary in terms of their stability and durability. Legitimacy as “permissive acceptance” may derive from a functionalist, instrumental, or consequentialist logics. This form of legitimacy may derive from the environmental policy’s functional necessity or usefulness to achieving other organizational goals such as completing the Single Market, or the necessity of collectively addressing transnational and global issues like aid rain, river pollution, or climate
change. Permissive acceptance may also derive from the authority of scientific and technical experts and scientific data’s role in the policy-making process (a source of “input legitimacy”). Finally, permissive acceptance may derive from the perception that the policy is effective, variously defined as achieving implementation and compliance or policy goals, among other indicators. Actors according EU environmental policies permissive acceptance are not necessarily committed to environmental values, and their permissive acceptance may wax and wane as priorities change, as attitudes toward scientific and technical information change, and as perceptions of the effectiveness of environmental policies change. However, permissive acceptance based on these factors may lay the foundation for normative commitment, the articulation of principles, and the legalization of these principles and goals.

A stronger, more stable, and more durable legitimacy derives from the “logic of appropriateness.” Based on value and norm consensus, policies enjoying this form of legitimacy are deemed natural, rightful (e.g. fair, legal), customary and expected. The strength and durability of this legitimacy is enhanced by the norms being articulated as principles that serve as a basis for policies, action programs, regulations, legislation, treaties, and measuring compliance. Environmental policies embedded in treaties and affirmed by rulings of the ECJ have strong claims to appropriateness, rightfulfulness, and expectedness. As a matter of fact, in some instances both EU law and rulings by the ECJ accord greater priority to EU environmental objectives than those associated with creating the Single Market. Many actors afford environmental policies legitimacy on the basis of legalization alone, and this form of legitimacy is very stable and durable over time.

Legitimations defined as permissive acceptance and appropriateness derive from relatively passive bases, however, democracy-based legitimacy relies on active participation by the
governed. Overtime, the literature focusing on the democratization of the EU has evolved from a state-centric understanding of democracy as electoral and representative in nature, to democracy as widening and deepening participation, to democracy as deliberation associated with a communicative logic. At present, a consensus obtains that all polities’ legitimacy derives from democratic processes (“input legitimacy”), however defined. The EU has responded to this imperative by increasing the power of the EP, deepening and widening participation (e.g. via increasing input from committees and working groups and creating the Committee of the Regions), and discussing and/or moving through a series of governance reforms including the Cardiff Plan, Open Methods of Coordination, new modes of governance, and multilateral and network governance. Deliberative democracy-based legitimacy is particularly useful in increasing knowledge and permissive acceptance among new participants, increasing policy effectiveness via context-specific input from multiple actors and increasing participants’ commitment to implementation and compliance. Moreover, deliberative interactions are essential to creating trust, solidarity, and a sense of community, the foundations for identity-based legitimacy.

While some lament that the EU has yet to solidify an identity or to constitute a public sphere, the polity has worked to present itself as a leader in environmental institution building and to distinguish itself from the United States (“the other”) in the global environmental negotiations like those associated with climate change. The EU has also sought to integrate environmental objectives within other global regimes such as trade and foreign assistance. This basis of legitimacy is clearly the most stable and durable, and over time the Commission has increased its identity-oriented strategies. As might be expected, some European actors such as Green Parties, environmental nongovernmental organizations, and officials most directly
responsible for promoting the environmental agenda such as DG Environment and the Environment Committee of the EP accord EU environmental policy identity-based legitimacy.

The EU has moved well beyond utilitarian bases of permissive acceptance of environmental policies; the creation and legalization of environmental norms and principles provide a foundation for general acceptance of the appropriateness of these policies. Over time, participatory and deliberative democracy will likely translate into the EU environmental policy’s enjoying more identity-based legitimacy.

Notes

1. Preuss (1997: 219) confirms that the original functional rationale for the EC drew legitimacy from its enhancing economic efficiencies and market stability:

   After all, it was the presumed superiority of the Community’s problems-solving capacity over those of the traditional nation-states which largely motivated the foundation of the community in the fifties. In other words, reasons of efficiency and utility belong to the most significant founding rationales of the community.


5. Eckersley (2004: 135-36) considers constitutionally embedding the precautionary principle a parsimonious and effective way to require a systematic consideration of all potential environmental impacts, including on nonhuman species and future generations. Constitutionalization of the precautionary principle is justifiable on grounds of fairness and its helpfulness to managing risk and avoiding displacement of environmental problems across time and space. She concludes: “No single decision rule is likely to do more to protect environmental victims.”

6. Wynne (1992) identifies four categories of scientific “unknowns”: risk, when the odds of danger are known; uncertainty, when the odds of danger are currently unknown but the data necessary for assessment may eventually be available; ignorance, when scientists are unaware of what they do not know; and indeterminacy, when the phenomenon is unpredictable and outcomes open-ended or when the validity of present knowledge is contingent (Carr and Levidow 1999: 160).

7. A 2011 Eurobarometer poll of EU citizens’ attitudes toward the environment reveals that 95% of citizens feel that protecting the environment is important to them personally, 64% believe that action to protect the environment should be undertaken at the European level, and 89% think that more funding should be allocated to protect the environment (<http://ec.europa.eu/environment/pdf/ebs_365_en.pdf>).

8. While these concepts overlap somewhat and are contested, this study discusses “values” as salient and stable beliefs regarding what is important and what is good or bad. “Norms” are standards of acceptable and preferred behavior regarded as customary and expected. Norms prescribe and proscribe actions serving to guide and regulate behavior (see Legro 1997, Finnemore and Sikkink 1998). “Principles” are fundamental assumptions that serve as a basis for rules, codes of conduct, laws, regulations, and measuring policy compliance.

9. McCormick (2001: 48-85) provides a summary of the principles that have evolved to guide EU environmental policies over the decades (in no particular order): the precautionary principle, the polluter pays, prevention over
remediation, subsidiarity, the safeguard principle which allows MSs to adopt more stringent environmental standards than those in EU law, environmental impacts should be considered at the earliest possible stage of decision making, sustainable development, the proximity principle—i.e., environmental damage should be addressed at the source, the integration principle, scientific and technical data are to be taken into account, the international principle, market-oriented solutions, and the proportionality principle.


13. In June 1993, the European Council reaffirmed membership requirements that became known as the Copenhagen Criteria:

   Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, the existence of 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 (Council of the European Union 1993).

14. The European Green Party (EGP) first contested European Parliament elections in 1979 achieving representation in 1984 as part of the Rainbow Alliance. Following the 1989 elections, the Green Party formed a separate group in the EP. Reduced in numbers in the 1994 elections, the Greens formed part of the European Radical Alliance, but a successful outcome in 1999 allowed them to combine with the European Free Alliance. In the 2004 and 2009 elections, 35 (4.8% of EP members) and 48 (6.2% of EP) Green Party members, respectively, were elected to the EP. The EGP ran the first election campaign featuring common motifs and slogans in all EU countries (Bomberg 1998, <http://europeangreens.eu/front>).

15. A minority of scholars argue that the democratic deficit is a myth based on assertions that the EU remains an intergovernmental body that takes its decisions via democratically-elected governments and/or that EU policies are predominantly regulatory and are best developed by technical experts (Majone 1996, Saurugger 2010: 474).

16. The subsidiarity principle requires that:

   In areas which do not fall within its exclusive competence, the Community shall take action...only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community (Article 5, formerly Article 3b, of the TEC, Commission 1992).

17. The subsidiarity principle may increase the number of participants in environmental decisionmaking, bring in additional and alternative sources of knowledge, make environmental policy more context specific, and increase opportunities for deliberation and normative and policy consensus building, however, it also introduced more ambiguity and uncertainty in policymaking and implementation, undermining policy effectiveness.

18. Forum membership included four representatives from regional and local authorities, five representatives from consumer and environmental groups, two representatives from trade unions, nine industrial representatives, two representatives from agricultural and agri-food organizations, and nine individuals acting in a personal capacity (Lenschow 1999: 46). Between 1998-2010, the EU created 37 social dialogue committees who generated more than 300 documents such as guidelines and codes of conduct (Pop 2010).

19. These transitions in governance are not without problems. No MS has completely made the transition to new modes of governance, and the EP has generally failed to join the networks. In 2003, the European Environment Agency (p. 277) wrote with regard to the Cardiff Process, “the process...lacked urgency and has yet to have a significant impact on sectoral policy making, let alone on improvements on the ground.” And, the following year, the Commission conceded that “the [Cardiff] process has failed to deliver fully on expectations.”

20. Two salient examples: The “Mad Cow Crisis,” which began in Britain in 1986 and persisted for more than a decade, was compared to the 1965-66 “Empty Chair Crisis” in its undermining confidence in European integration, and MSs often blatantly refused to comply with EU decisions regarding genetically modified organisms.
There has been some efforts to add direct democracy to the EU democratic repertoire. Major treaty changes are subject to referenda in several MSs. There have been multiple efforts to increase citizen access to information. And, web-based technologies have been applied to perceived legitimacy concerns.

Habermas (2000: 40) explains the need for a common identity:

Pluralist culture gets involved in hermeneutic conflicts on the constant revision of the traditions it can choose; existing institutions find themselves confronted with the need to provide rational justifications, so that legitimate orders increasingly become dependent on deliberate politics and democratic legislation; and the individual persons who are exposed to the pressure to decide between even more alternatives, are compelled to stabilize themselves by creating a highly abstract Ego identity.

References


