

SHORTER ARTICLES, COMMENTS, AND NOTES

PROTECTING THE INTERESTS OF CIVIL SOCIETY IN COMMUNITY DECISION-MAKING—THE LIMITS OF ARTICLE 230 EC

I. INTRODUCTION

In the Commission's White Paper on European Governance¹ and the subsequent Laeken² Declaration, the participation of civil society in the Community method of decision-making was viewed as the primary way of engaging directly with EU citizens. The White Paper accepts that participatory democracy is created from the bottom up by 'groups of people dedicated to the disinterested search for the public interest in society'.³ This statement recognises that participation goes beyond the pre-legislative lobbying process. It suggests that the representation and protection of citizens' interests requires *ex post* judicial protection in circumstances where the legislative measure breaches fundamental rights or if its application infringes principles of procedural propriety. The only vehicle for such judicial protection at the Community level is paragraph 4 of Article 230 EC, which already provides recourse to individuals who are 'directly and individually concerned' by an act of the institutions. Direct actions under Article 230 EC are preferable to the indirect protection available in national courts when a preliminary reference can be made under Article 234 EC. This is because national courts cannot declare a Community measure as being invalid or provide a remedy against the Commission. Despite these deficiencies with domestic enforcement actions, the Court's judgments have been consistently of the view that the granting of *locus standi* under Article 230 EC should be narrowly construed and most significantly does not extend to judicial review actions by representative groups. This is in stark contrast to the practice within the domestic courts of Member States where proxy actions have, in recent years, been encouraged.

Direct actions, under Article 230 EC, now contribute to the increasing workload of the Community Courts.⁴ The expansion of Community competence is undoubtedly one reason for this increase in litigation, but does not fully explain the increase. The rise in litigation has come about *despite* any relaxation of the requirements for *locus standi* that are imposed by the Court on non-privileged applicants.⁵ Although there have been developments with regard to the position of the European Parliament,⁶ the position of individuals or representative groups who are non-privileged applicants has remained

¹ COM(2001) 428 *European Governance—A White Paper*.

² Laeken Declaration on the Future of Europe, Dec 2001. Available at <http://www.europa.eu.int/futurum/documents/offtext/doc151201_en.htm>.

³ See D Curtin, *Postnational Democracy: The European Union in search of a Political Philosophy* (The Hague: Kluwer Law International, 1997), 90.

⁴ For an illustration of this point and a comprehensive overview of the post-1990 case law under Art 230 EC see A Arnulf, 'Private Actions and the Application for Annulment since *Cordoniu*' (2001) 38 *CMLRev* 7.

⁵ Defined by Art 230 (4) EC.

⁶ Until the Treaty of Nice, the European Parliament was only awarded the status of a semi-privileged applicant under Art 230 (3) EC.

unchanged for 40 years. Prior to the Nice Treaty,⁷ the European Parliament was only permitted to protect its own prerogatives⁸ on the basis that this was intended to promote institutional balance within the Community.⁹ How the Parliament will utilise Article 230 EC, with its elevation to the status of a fully privileged applicant in the Treaty of Nice,¹⁰ remains to be seen.

The Court of First Instance¹¹ and Advocate General Jacobs¹² recently argued for a relaxation in the definition of direct and individual concern for non-privileged applicants.¹³ Their arguments are based on the premise that it is the role of *any* court to protect the fundamental rights of *all* individuals and offer effective judicial protection when decision makers have breached these rights.¹⁴ Both judicial pronouncements recognise that any mature, democratic, and representative system of public law, such as the EU, requires rules on *locus standi* that allow applicants whether individually or collectively, the opportunity to challenge decisions which materially affect them. This should not extend to a challenge by any 'busybody'¹⁵ or meddlesome organisation, rather it should allow for measured and controlled intervention by individuals, or representative groups that can demonstrate a genuine interest and concern in the contested decision. In addition to protecting fundamental rights, effective judicial protection should also be available in circumstances when procedural impropriety prevents interested parties participating in the decision-making process and having their voice heard.¹⁶ It is in such circumstances where the Court has yet to develop consistent jurisprudence distinguishing between economic and non-economic interests.

⁷ This occurred on 1 Feb 2003 after a drawn out ratification process because of the need for the second Irish referendum.

⁸ Art 230 (3).

⁹ Case 302/87 *European Parliament v Council (Comitology)* [1988] ECR 5615. The Court of Justice declined to follow the view of Advocate-General Darmon who argued that Parliament should be a privileged applicant for the purposes of protecting its right to participate in the comitology process. However, in Case C-70/88 *European Parliament v Council (Chernobyl)* [1990] ECR I-2041 less than 20 years later the Court of Justice accepted the institutional balance arguments of Advocate-General Darmon and extended the position of privileged applicant to the European Parliament specifically in those circumstances when it seeks to protect its own privileges. This is discussed more fully below.

¹⁰ Art 34 Treaty of Nice.

¹¹ Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365.

¹² Case C- 50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

¹³ This issue has been the subject of much academic debate for many years. See, eg, Usher, J 'Judicial review of Community acts and the private litigant', in A Campbell and M Voyatzis (eds), *Legal Reasoning and Judicial Interpretation of Community Law* (1996), 121; A Arnall, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty' (1995) 32 *CMLRev* 7; N Neuwahl, 'Article 173 Paragraph 4 EC: Past, Present and Possible Future' (1996) 21 *ELRev* 17.

¹⁴ See the Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores v Council*, at para 39.

¹⁵ A term used quite frequently by the English courts. See, eg, *Greenpeace No 2* below.

¹⁶ The liberal approach of the Court to procedural propriety in cases involving Community institutions is in stark contrast to those cases involving Member States, eg, free movement of workers cases or more recently in the 'Golden Shares' cases, Cases C-367/98 *Commission v Portugal*; C-483/99 *Commission v France*, Case C503/99 *Commission v Belgium* judgments of 4 June 2002 nyr. Available at <<http://www.curia.eu.int/en/index.htm>>. In the Golden Shares cases

II. JUDICIAL REVIEW AS A CONSTITUTIONAL GUARANTEE— THE EXPERIENCE WITHIN THE MEMBER STATES

An argument regularly advanced to justify the liberalising of *locus standi* under Article 230 EC is that the conditions for access to judicial review in most Member States have been relaxed in recent years.¹⁷ Some Member States, for example Germany and Italy, have always placed judicial review at the centre of their public law process, while other jurisdictions, such as England, have only relatively recently seen a growth in judicial review actions. In English law the development reflects not only the constitutional importance of judicial review in the public law process, but arguably the greater emphasis that has been placed upon the protection of fundamental rights and higher norms, whose infringement courts are not prepared to accept. The English courts are also alive to procedural abuses by public bodies and do not tolerate such behaviour.

This contrasts with judicial review before the Court of Justice. The Court has rejected the argument that developments within the Member States provide a sufficient justification for the relaxation of the *locus standi* rules.¹⁸ The ECJ does not view the two legal positions as comparable. This is somewhat surprising, as the Court has consistently stressed through its judgments that the values under which it operates are based upon legal principles and traditions that are common to the Member States.¹⁹ If the Court adopted this approach towards standing under Article 230 EC, it would both replicate the objective of and operate as an extension to national courts by providing effective judicial protection to individuals whose rights or legitimate expectations had been infringed within a Community context. This would address the difficulties with an applicant relying on indirect protection under Article 234 EC where national courts cannot provide the remedy sought by an applicant.

Article 230 EC requires a non-privileged applicant to establish that the measure is of 'direct and individual concern'. The ECJ has consistently stated that this narrow definition is contained within the Treaty for a reason, and any change will require specific Treaty amendment. Any such amendment is beyond the competence of the Court and in the hands of the Treaty makers.²⁰ The Court's policy is founded on a 'floodgates' argument, where any relaxation of the criteria for *locus standi* could lead to spurious actions by opportunistic litigants challenging any measure which is merely inconvenient.²¹ The effect would be political gridlock in the Community decision-making process and a judicial bottleneck in the Court.

the Court was adamant that Member States must comply with EC law even if this may cause economic hardship. For more on this issue see E Szyszczak, 'Golden Shares and Market Governance' [2002] 29 *Legal issues of Economic Integration*, 255.

¹⁷ See, eg, Belgian law: *Conseil d'État, Ville de Liège et Heze*, 20.9.91, No 37.676; German Law: *Bundesverwaltungsgericht (Federal Administrative Court)* 1.12.82 BverwGE 66, 307 (crab-fishermen case); Italian law: *TAR Lazio*, 20.1.95, No 62 *Foro Italiano* 1995 II-460; French law: *Conseil d'État*, 24.6.91, *Soc Côte d'Azur, Lebon*, 1110.

¹⁸ See, eg, the judgment of the Court of First Instance in Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-2205, para 51 and approved by the Court of Justice in Case C-321/95P *Stichting Greenpeace Council (Greenpeace International and Others) v Commission* [1998] ECR I 1651. Discussed below.

¹⁹ See, eg, C-11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 44/79 *Hauer v Lad Rheinland-Pfalz* [1979] ECR 3727; *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

²⁰ Judgment of the Court in *Unión de Pequeños Agricultores v Council*, at para 49.

²¹ This was the view of the Court of First Instance in *Greenpeace*, at 2230–2.

The essential difference between domestic courts and the ECJ is the criteria by which individuals demonstrate that a particular measure affects them and are thus granted *locus standi*. The threshold adopted by domestic courts is generally lower than the criteria of direct and individual concern under paragraph 4 of Article 230 EC. For example, under English law, the Supreme Court Act 1981 states that an application for judicial review will only be permitted if the applicant can demonstrate a 'sufficient interest in the matter to which the application relates'.²² The English courts have after some initial reservation²³ taken a liberal view of what amounts to a 'sufficient interest'. This relaxed approach has produced markedly different decisions to those of the ECJ, particularly in those cases involving surrogate actions. In the ECJ the *Plaumann* test, which is consistently applied by the Court since 1963, interprets direct and individual concern as requiring the applicant to demonstrate that the loss suffered is unique to him or a limited closed class of persons. By its very nature this requirement makes representative actions very difficult to accommodate within this definition.

III. REPRESENTATIVE ACTIONS BEFORE THE ENGLISH COURTS

In *Greenpeace (No 2)*²⁴ the issue before the High Court concerned a decision by Her Majesty's Inspectorate of Pollution (HMIP) to grant British Nuclear Fuels Limited (BNFL) a variation in its licence to reprocess nuclear waste at its plant in Sellafield, Cumbria. Greenpeace was concerned with the levels of radioactive discharge and applied for judicial review of the decision of HMIP, seeking an order of *certiorari* to quash the respondent's decision to vary the licence. HMIP argued that Greenpeace had no standing, as it could not demonstrate sufficient interest in the decision. The High Court rejected this assertion and held that Greenpeace would be permitted to bring a representative action. Otton J established the existence of *locus standi inter alia* on the grounds that 2,500 Greenpeace members lived in the Cumbria region.²⁵ This fact was seen as carrying more weight than the presence of 400,000 members of Greenpeace living in the entire United Kingdom. For the High Court, sufficient interest in this case was established through geographical proximity. If compared to the Greenpeace case²⁶ before the ECJ, it is apparent that this is a lower threshold to satisfy than the *Plaumann* criteria, which does not accommodate the notion of geographical proximity as a basis for granting *locus standi*.

English courts have gone beyond geographical proximity as a basis for granting *locus standi*. In the *Pergau Dam* case,²⁷ the court acknowledged that judicial review is a central part of any democratic system of public law. The *Pergau Dam* case concerned the legality of a decision by the Foreign Secretary to use the overseas aid budget to fund

²² Section 31 (3).

²³ See, eg, the judgment of Lord Wilberforce in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] 2 AC 617, at 630; and Scheimann J in *R v Secretary of State for Environment Ex parte Rose Theatre Trust Co* [1990] 1 QB 504, at 520.

²⁴ *R v Inspectorate of Pollution and another, Ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329.

²⁵ *Ibid*, at 350.

²⁶ Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) v Commission* [1998] ECR I-1651, discussed below.

²⁷ *R v Secretary of State for Foreign Affairs Ex parte World Development Movement Ltd* [1995] 1 All ER 611.

the building of the Pergau dam in Malaysia. Under the Overseas Development and Co-operation Act 1980²⁸ the Secretary of State has the power, for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, to furnish any person or body with financial or technical assistance.

The World Development Movement (WDM), a pressure group concerned with the distribution of aid to developing countries, challenged the government's decision to fund the building of the dam on the basis that it was not good value for the British taxpayer and the building of the dam itself was not a beneficial project to the Malaysian economy. The High Court held that, on its proper construction, section 1 of the Act only permitted funding which was economically sound.²⁹ As to the question of whether the WDM had standing to challenge the decision of the Secretary of State, the judgment of the court must be seen as progressive.³⁰ Focusing on the constitutional role of judicial review, Rose LJ extended significantly the notion of sufficient interest, arguably beyond that seen in *Greenpeace No 2*.

In his judgment Rose LJ placed a great deal of emphasis on the concept that in a system of public law, judicial review plays a fundamental role in securing effective accountability of the executive in relation to substantive policy choices and ensuring procedural fairness. In *Pergau Dam* Rose LJ addressed this question of accountability by concluding that, if the WDM could not bring this judicial review of the Secretary of State's decision, then no alternative challenger would exist.³¹ In this respect, when deciding on the question of standing, Rose LJ examined the merits of the action in addition to considering procedural questions as set out in the rules of court.³² The judgment of Rose LJ referred approvingly to the dissenting judgment of Diplock LJ in the *ex parte Federation of Small Businesses* case.³³ Lord Diplock some 14 years earlier put forward the opinion that judicial review is more than a mere mechanical exercise; rather, it serves a specific constitutional function within the public law process. His Lordship stated that:

It would in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped.³⁴

It is clear therefore that for both Diplock and Rose LJs, judicial review is a mechanism by which the rule of law is maintained and the legality of executive actions is guaranteed. In *Pergau Dam*, the WDM were granted standing to bring a representative action on behalf of the British taxpayer. As a respected and long-standing pressure group with a particular interest in the issue of overseas aid, Rose LJ concluded that the WDM was the ideal body to bring this challenge. Furthermore, this made the challenge all the more credible as their knowledge and expertise distinguished them from so-called mischief-makers or meddlesome busybodies. WDM was not an opportunistic litigant. This is an important point and places clear blue water between the English courts and the European Court of Justice. This issue will be considered further below.

In *Pergau Dam*, Rose LJ provided three specific reasons for his decision to grant

²⁸ Section 1.

²⁹ Rose LJ discussed this issue at 626–7.

³⁰ See A Tomkins, 'Judges Dam(n) the Government', vol 7, *King's College Law Journal* (1996–7) 91.

³¹ At 619.

³² See Order 54 Rules of the Supreme Court.

³³ See n 21 above.

³⁴ At 620.

locus standi. First, he stated that the merits of the case are crucial and quotes Professor Sir William Wade's words in *Administrative Law*:³⁵ 'the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interest are involved.'³⁶

Professor Wade's assertion goes to the central issue of the Court vindicating the rule of law through their judicial review function and this opinion clearly influenced the Court. Secondly, his Lordship highlights the lack of any other responsible challenger³⁷ which would leave a vacuum in the accountability of the executive. Thirdly, Rose LJ turns his attention to the credibility of the WDM itself.³⁸ Though not actively part of the consultation or decision-making process in the course of events that lead to the Secretary of State's decision, his Lordship stressed that the WDM regularly played a prominent role in giving advice and assistance to governments and international organisation such as the European Union and the United Nations. This third reason is particularly interesting because despite being involved in such affairs, the WDM, or perhaps more accurately its members, were not personally affected by the decision to build the dam in the way that the residents in *Greenpeace No 2* were. In this judgment, Otton J attached significant weight to the fact that 2,500 members of Greenpeace lived in Cumbria and would be directly affected by any radioactive discharge. No such geographic nexus existed in *Pergau Dam*, leading to the conclusion that surrogate actions will be permitted before the English courts when an applicant can establish that there is an interests of justice argument to permit a challenge.

These developments in the English courts demonstrate that effective judicial review will not necessarily inhibit the process of government, but rather that judicial review is part of *good* government, and permitting a challenge to an executive decision does not automatically mean that the decision will be set aside. In this sense judicial review operates as an integral part of the system of checks and balances that are essential within any system of public law. The English experience in recent years displays no overwhelming evidence that applicants have abused judicial review proceedings and that there has been a growth in 'busybody' litigation. Procedural guarantees require applicants to establish a *prima facie* case before they can come before the court. In fact what is apparent from cases such as *Greenpeace (No. 2)* and *Pergau Dam* is that in both decisions the English court stressed that each pressure group was a respected and influential organisation and that it welcomed informed and targeted proxy actions by such pressure groups on grounds of efficiency and expediency.³⁹

IV. JUDICIAL REVIEW BEFORE THE COURT OF JUSTICE

If the national courts have been prepared to accept surrogate actions involving public interest litigation, the ECJ remains hostile to this concept.⁴⁰ The ECJ is consistently of

³⁵ 8th edn (Oxford: Oxford University Press, 2000).

³⁶ *Ibid* at 712.

³⁷ A similar argument was put forward by Otton J in *Greenpeace (No 2)*.

³⁸ At 620.

³⁹ For further discussion of these issues see C Harlow, 'Public Law and Popular Justice' (2002) 65 *MLR* 1.

⁴⁰ See the judgment of the Court in *Unión de Pequeños Agricultores v Council*, at para 29. This hostility can be traced back to the early years of the EC. See, eg, Cases 16 & 17/62 *Confédération Nationale des Fruits et Producteurs des Fruits et Légumes v Council* [1962] ECR 471.

the opinion that a representative group could not fall within the ambit of the *Plaumann* test criteria for individual concern. This raises the question of why the ECJ is so intent on maintaining this unreceptive stance towards representative actions?⁴¹ The floodgates argument has already been identified as one justification of the Court. Scepticism with this view must be expressed, as courts within the Member States do not appear to have experienced any significant abuse of judicial review where the rules on *locus standi* are relaxed.⁴² Representative actions have in many jurisdictions been encouraged, as they prove to be both efficient in terms of financial resources and judicial time.⁴³

Despite this reluctance towards permitting class actions, the ECJ has, on occasion, used Article 230 EC to promote institutional balance, which it stated was inherent in the EC Treaty by protecting the 'prerogatives' of the European Parliament. This despite Article 230 EC not containing any reference to 'institutional balance' as a ground for judicial review. In the *Chernobyl* case,⁴⁴ the Parliament sought an annulment of a Council Regulation which it argued had been adopted under an incorrect legal base. At the time the European Parliament was not included in the Treaty as a privileged applicant. Yet the Court through teleological reasoning filled what it viewed as a vacuum in the Community's legal order.⁴⁵ The Parliament had been given rights of consultation under the Treaty and the Court concluded that those rights would be undermined if the Parliament could not bring judicial review proceedings in its own right to protect them. Granting *locus standi* to the Parliament on this occasion did not provide some *carte blanche* to challenge any action which may adversely affect Parliament's interests generally. It related only to those occasions when the Treaty provided for a particular legislative procedure to be followed and where the Parliament could demonstrate that its prerogatives had been infringed through use of the incorrect decision-making process.⁴⁶

This *Chernobyl* judgment was a measured and targeted extension of Article 230 EC and intended to improve accountability of the decision-makers and prevent abuse of the decision-making process.⁴⁷ It demonstrates the Court's maturity and understanding of the constitutional function which is expected of it. The Court's decision did not open the floodgates and the judgment stated explicitly the boundaries within which the Court would accept a challenge by the Parliament. At Maastricht, the Treaty makers noted the constitutional significance of the Court's judgment through the introduction of amendments to Article 230 EC.⁴⁸ This allowed the Parliament to bring judicial review

⁴¹ The call for an extension of the right to *locus standi* before the European Court of Justice is not a new phenomenon and has been advanced by several commentators as a part of the solution to the EU's democratic deficit. See, eg, C Harlow, 'Towards a Theory of Standing for the European Court of Justice' (1992) 12 *Yearbook of European Law* 213 and D Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 *MLR* 44.

⁴² Advocate General Jacobs also expressed scepticism with the floodgates argument in his Opinion in *Unión de Pequeños Agricultores v Council*. See paras 75–81.

⁴³ See n 39 above, at 8–11.

⁴⁴ See n 9 above.

⁴⁵ In fact the Court adopted the view given in the Opinion of Advocate-General Darmon in the *Comitology* case, who similarly argued for a specific extension to Art 230 EC to allow Parliament to protect its own prerogatives. See para 34 of the Advocate General's Opinion.

⁴⁶ Ibid, at para 25.

⁴⁷ See further A Arnall, 'Does the Court of Justice have inherent jurisdiction?' (1990) 27 *CMLRev* 683.

⁴⁸ Para 3.

proceedings as of right, in circumstances where its prerogatives had been infringed. This extension of Parliament's ability to bring judicial review proceedings must be seen in the context of the Treaty makers addressing the democratic deficit. In this case, the Court led and the politicians followed. The fact that Parliament had already been successful in its action with no obvious detrimental effects upon either the efficiency of decision-making or on the Court's workload made such a Treaty amendment all the more logical and easier. The Court in *Unión de Pequeños Agricultores* recently stated that if there are to be any changes to paragraph 4 of Article 230 EC then this is a matter exclusively for the Treaty makers.⁴⁹ The *Chernobyl* case and subsequent Treaty amendments at Maastricht seem to advocate the contrary and suggest that when considering modification to the Court's jurisdiction the Treaty makers *will* look for guidance from the judiciary.

The Court in *Chernobyl* was explicit that it would police closely applications brought by the Parliament. Consequently the Court stated that any action for annulment initiated by the Parliament would only be admissible where it sought to 'safeguard its prerogatives and that it is founded only on submissions alleging their infringement'.⁵⁰ Arguably such a condition has, at a superficial level, a similar objective to the *Plaumann* test of individual concern. The Court's judgment suggests a lower threshold for the Parliament to satisfy to permit the challenge, because in *Chernobyl*, the breach was seen as being too important to ignore. The Court overlooked the formal requirements of standing and focused on the substantive issue of promoting institutional balance—concluding that permitting this action was of greater necessity than a literal reading of Article 230 EC. With the entry in to force of the Nice Treaty, the question of what comes within the Parliament's prerogatives is now redundant.

The question of principle which the *Chernobyl* judgment raises today, is whether the Court could adopt a teleological approach with regard to representative actions and their objective of promoting accountability? The efficiency of such actions has already been identified in Member States and is not in dispute. It is in the interests of the Court to hear informed and targeted challenges by one pressure group representing several individuals who share a particular concern. Professor Harlow categorises this growth of representative actions in the Member States as a form of 'popular democracy' which satisfies and insatiable appetite for transparency and democracy.⁵¹ In many respects, permitting responsible proxy actions would not be dissimilar from the objectives that the Court sought in the *Chernobyl* case, where it filled a legal vacuum that undermined the accountability of decision-makers. The Court's judgment in *Greenpeace* illustrates the paradox that has become evident in the Court's approach to judicial review actions. Perhaps the most striking part of the *Greenpeace* judgment is that the Court was not prepared to permit the challenge in circumstances where there was strong opposition to the project, not only from Greenpeace, but also from numerous local residents and in circumstances where there was clear procedural impropriety.

V. REPRESENTATIVE ACTIONS BEFORE THE ECJ—THE *GREENPEACE* CASE

The case before the ECJ concerned an appeal by Greenpeace against an order of the

⁴⁹ Judgment of the Court, para 45.

⁵⁰ *Ibid.*, para 27.

⁵¹ See Harlow, at 39 above, at 16.

CFI that neither Greenpeace or the local residents of the Canary Islands could bring a direct action under Article 230 EC to challenge the award of Commission funding for the building of two power stations on the Canary Islands.⁵² The construction of the power stations was to be financed, in part, by a grant from the European Regional Development Fund which is allocated according to the criteria that are laid out in Regulation 2052/88. Of most relevance to this challenge were the provisions of Article 7 which state that:

measures financed by the funds shall be in keeping with the provisions of the Treaties, with the instrument adopted thereto and with Community policies, including those concerning with [*inter alia*] environmental protection.

Before the project could commence there was a requirement, both under domestic and Community law, that an Environmental Impact Assessment (EIA) should be carried out. No such assessment was commissioned and the first of four annual grants was paid to the Spanish government in 1993. Greenpeace commenced a challenge based on this failure to carry out the EIA and to stop payment of the second instalment of money before the Spanish Administrative Court.

The Spanish court dismissed the action and in support of this decision Advocate General Cosmas stated that such a challenge would not be permitted in national courts on the grounds that an indirect challenge to a Commission decision cannot be dealt with, even indirectly through Article 234 EC, by domestic courts.⁵³ The Spanish court could control domestic administrative action and whether an EIA was carried out, but lacked the competence to provide a remedy on the substantive issue of the challenge, that of the decision by the Commission to continue financing the project in the absence of an EIA.

The applicants based their challenge on the failure to follow the provisions of the Environmental Impact Assessment (EIA) Directive,⁵⁴ prior to what they considered an incorrect decision by the Commission to award the funding. The applicants brought this fact to the attention of the Commission through correspondence and in meetings even after the project had already commenced.⁵⁵ In the light of this incorrect procedure, Greenpeace argued that the Commission should have suspended the payment of the second instalment of funding for the project, pending a comprehensive review. When the Commission refused to do this, the applicants initiated their challenge before the CFI, which rejected their application on the ground that Greenpeace was not directly or individually concerned within the *Plaumann* formula. The applicants appealed to the ECJ.

In his Opinion Advocate General Cosmas reviewed the state of the case law with regard to the application of Article 230 EC. The crucial question for him in this respect was whether Greenpeace, acting in a representative capacity, could on the facts be differentiated from all other affected persons?⁵⁶ The key issue the Advocate General identified concerned the question of participation by the applicants in the decision-

⁵² For an annotation of the *Greenpeace judgment*, see F Berrod, (1999) 36 *CMLRev* 635.

⁵³ ECR I-1653, at 1681, para 74

⁵⁴ Directive 85/337/EEC of the Council, 27 June 1985, OJ 1985, L175/40.

⁵⁵ Though the relevant competent Spanish authorities conducted an impact assessment of the project, this did not occur until over one year after the project had commenced.

⁵⁶ Opinion of Advocate General Cosmas at para 76.

making process.⁵⁷ In addressing this question Advocate General Cosmas considered in great detail the issue of participation by various organisations and individuals in the lobbying and decision-making process within the Community and focused particularly on the substance and nature of that participation.

The applicant's view was that their participation, through making representations and providing evidence to the Commission on the effects of not carrying out the EIA, would give them standing to challenge the Commission's decision. However, the ECJ rejected this by stating that the submissions made by Greenpeace were unsolicited and therefore could not be considered as part of the 'formal' consultation process. In the Court's opinion, for Greenpeace to be granted *locus standi*, the Commission would have to request Greenpeace to provide evidence, which would, according to the Court, place them within the contemplation of the decision-maker, thereby making them directly and individually concerned.⁵⁸ In *Greenpeace*, where the consultation process was an open one, the Commission chose not to consult with Greenpeace.

The purpose of the EIA Directive is to protect the 'public concerned'⁵⁹ through the establishment of formal consultation procedures. However, the concept of the 'public concerned' is very broad and is not accurately defined by the directive. The ECJ stated that the concept of the public concerned is a matter for the national courts but the Spanish court had already dismissed the domestic application for judicial review on the grounds that it was not within its competence to award a remedy against the Commission. In the light of this, and given the lack of a precise definition within the directive, it is inappropriate to consider the 'public concerned' as being able to encompass the principle of the closed class within the *Plaumann* formula. The ECJ refused to extend the reasoning applied in competition cases where there was a failure to follow procedural requirements contained within a regulation in relation to the making of a Commission decision,⁶⁰ to those where the procedural requirement is contained within a directive. Most significantly for the Court, whereas persons affected by a Commission decision directed specifically at them can be considered as members of a closed class, those affected by a failure under a directive—which is a general legislative measure—cannot be part of a closed class.⁶¹ Therefore where a directive is concerned, the ECJ concluded there could never be a closed class within the *Plaumann* formula.

The Court analysed this issue by considering the applicants' contention that in terms of environmental policy, which affects people generally, there could never be a 'closed class'. For Greenpeace, the distinguishing feature of environmental interests is that they are shared values within the Community which need respecting and defending and this alone should justify the award of *locus standi*. The Court strongly rejected this argument on the basis that this reasoning merely concluded that the applicants were affected in a general and abstract manner which did not distinguish them from any other potential challenger. Following established case law, the Court concluded that the applicants required no special consideration when the Commission made its final decision because Greenpeace had not participated in the decision-making process. Though

⁵⁷ Ibid, para 79.

⁵⁸ Judgment of the Court, at para 28.

⁵⁹ Preamble to Council Directive 85/337 EEC.

⁶⁰ See, eg, Case 26/76 *Metro v Commission* [1977] ECR 1875.

⁶¹ Judgment of the Court, at paras 28ff9.

Greenpeace was unsuccessful in its challenge, the Court's judgment appears, superficially at least, to rely less on the notion of the closed class by suggesting that standing would be granted when the decision maker contemplates an applicant. This interpretation is a false dawn for two reasons. First, the limited definition of participation offered by the Court to cover only those invited by the Commission to participate in the decision-making process, maintains the idea of some form of closed class. Secondly, the challenge by Greenpeace was based upon the failure to follow the correct procedure within a directive, which led to the award of the funding. The EIA Directive, being a general legislative, was not open to challenge by a non-privileged applicant. The net result was, that on the facts of this case, no judicial review of the Commission's decision took place.

VI. THE GREENPEACE FALLOUT

The Advocate General and the Court both stressed that an invitation to participate in the consultation process was necessary within the framework of the EIA Directive if Greenpeace was to be awarded standing. *Greenpeace*, a case concerning what can loosely be defined as 'social rights', may be distinguished from anti-dumping or competition cases such as *Cofaz*⁶² and *Extramet*.⁶³ In these cases, procedural guarantees within the secondary legislation granted the affected party an opportunity to make formal representations to the Commission as a way of protecting their economic rights.⁶⁴ In *Greenpeace* there was no equivalent guarantee for the applicants or any other pressure group to make representations to the Commission. This meant that their unsolicited submissions gave them no additional privileges over any other potential challenger.⁶⁵

Within the context of the *Plaumann* formula, this was a significant issue for the Court. The Court rejected the argument advanced by the applicants that their action, which sought compliance with Community environmental legislation, filled a legal vacuum.⁶⁶ The applicants argued that environmental interests of the type they sought to protect were 'common and shared'⁶⁷ and that the rights relating to those interests are liable to be held by a potentially large number of individuals. In effect the applicant's argument challenged the objectives of the *Plaumann* formula. *Plaumann* requires that the applicant differentiate himself from all other persons before standing is granted. Greenpeace was in fact arguing the contrary. Their submission was based on the assertion that the presence of a 'popular concern' against the building of the power stations should in itself be a justification for judicial review. This is in stark contrast to cases involving economic rights where Commission inquiries into a relevant product market will only concern a limited number of companies, making compliance with the *Plaumann* formula much easier. The argument advanced by Greenpeace is therefore not one of exclusivity but rather one which is based on seeking to protect shared interests and rights.

This argument is quite a powerful one. If we consider again the *Greenpeace No 2*

⁶² Case 169/84 *Cofaz v Commission* [1986] ECR 391.

⁶³ Case 358/89 *Extramet Industries v Council* [1991] ECR I-2501.

⁶⁴ eg, such procedural guarantees are contained within Council Regulation 4064/89. On the Control of Concentration Between Undertakings (The Merger Regulation) OJ 1990 L257/90.

⁶⁵ Judgment of the Court, at para 16.

⁶⁶ *Ibid*, para 18.

⁶⁷ *Ibid*.

judgment of the English High Court, *locus standi* was granted primarily because Greenpeace represented not only individuals living in the area of the power station, but also more generally through their work as a respected environmental pressure group. The Court's insistence on a closed class of applicant under Article 230 EC will almost always exclude such representative groups not formally invited to make representations in the consultation process, but who independently will voice the concerns of a significant proportion of the population. In a democratic system of public law, this is not an effective or satisfactory model for judicial accountability of decision-makers. Furthermore, the Greenpeace judgment reinforces the notion that the EU is remote from its citizens. Following the Court's decision, the Canary Islanders have to live with two power stations that the majority did not want.

The *Greenpeace* case demonstrates moreover that decision-making within the Community still lacks transparency. If we consider the issue before the Court more closely this will become apparent. The initial decision to fund the project was taken in 1990. This was at a time when environmental concerns were very much at the top of the Community's policy agenda. The Court had already recognised the importance of environmental policy in cases such as the *Danish Beer Cans*⁶⁸ case, where it concluded that environmental policy could be a permissible mandatory requirement under Article 28 EC.

The issue of transparency originates directly from the consultation process itself. Greenpeace was excluded from the formal exercise and merely made unsolicited representations. The question of individual concern ultimately turns on this fact. It seems unreasonable that on this reasoning, judicial review proceedings can only be instigated by a group or by individuals who were part of the formal consultation process. Such an exclusionary view of Article 230 EC results in those not being asked to participate, but who are directly affected by the decision, not having any effective right of redress. By comparison with the English court's decision in *Pergau Dam* where standing was awarded because of the lack of any other responsible challenger, the *Greenpeace* judgment does raise cause for concern that accountability of decision-makers before the Court of Justice is limited to those who would be in any event unlikely to challenge, given their already privileged participation in the consultation process.

Is there any way to mitigate against this harsh impact of the *Plaumann* formula? Clearly some interest in the measure to be challenged must remain an important prerequisite for an applicant to establish before the challenge may proceed. One solution could be for the Commission to draw up a formal list of pressure groups that are experts in their particular field. However, such a list is arbitrary and still focuses on the issue of the 'class' of applicant. In effect this would do no more than create a wider 'closed class' of non-privileged applicant. Advocate General Cosmas himself was not in favour of such an approach as it created the possibility for any group of individuals to organise themselves in to a pressure group merely for the purposes of fulfilling the criteria.⁶⁹

A second solution could be to develop a sectoral approach to judicial review. For example, environmental issues as in *Greenpeace* could be classed as 'environmental rights' which, because they are considered to be a fundamental Community policy, could be challenged by any interested party before the Court.⁷⁰ In effect this would

⁶⁸ Case 302/86 *Commission v Denmark* [1988] ECR 4607, at para 9.

⁶⁹ Opinion of Advocate General Cosmas, at para 117.

⁷⁰ In the context of environmental matters before the Court there are several other cases of

make environmental policy a 'privileged class of issue'⁷¹ that could be brought automatically before the Court. The Aarhus Convention on public access to environmental information will add further weight to this argument. The Convention, when implemented by the EU, will replace the 1990 Directive⁷² on access to environmental information by creating a right, as opposed to merely freedom of access, to environmental information.⁷³ This development reinforces the argument that environmental rights have acquired a 'special status' within the EU. The proposed Directive⁷⁴ will give a right of access to environmental information and a right to challenge certain types of environmental licensing decision.⁷⁵ The inclusion of such rights will place an onerous duty on the Court to protect these rights absolutely⁷⁶ and is what pressure groups such as Greenpeace will strive for. Though some commentators will welcome this development,⁷⁷ it is not without difficulties. The elevation of environmental protection to the status of environmental right will inevitably lead to value judgements about which other Community policies could have an extended definition of a 'right' attributed to them. It must also be borne in mind that within the context of environmental protection, not *all* projects will necessarily be uniformly perceived as breaching an individual's environmental rights. The notion that shared environmental values exist within Member States or the EU can be overstated. For example, if the local community for whom a project were proposed was to be divided on the project's potential and benefit, how should the Court decide upon the question of which rights to protect and whether to permit a review of the decision to approve the project? Would those opposed to the development have an automatic right of challenge? If so what redress is left for those who support the venture? These are questions that remain outstanding and while the Aarhus Convention may offer a partial solution to the problem of standing in cases involving environmental issues, it fails to provide a universal solution to the problems with Article 230 EC when environmental protection is not at issue.

One alternative solution could be to draw upon the recent developments in English administrative law. If we consider the statement of Sir William Wade,⁷⁸ it is apparent that he views the abuse or impact of the measure on the individual(s) as the crucial issue. The applicant's status would, under such criteria, be a secondary consideration.

failed attempts by NGOs to review Community measures. See, eg, Case T-461/93 *An Taisce v Commission* [1994] ECR II-733; Case T-219/95R *Danielsson v Commission* [1995] ECR II-3051.

⁷¹ See Berrod above, at 50.

⁷² Council Directive 90/313 on freedom of access to environmental information, OJ 1990 L158/56.

⁷³ For a further discussion on the impact of the Aarhus Convention on EU environmental law generally see J Scott, 'Law and Environmental Governance in the EU' (2002) 51 *ICLQ* 996.

⁷⁴ Proposal from the Commission of 29 June 2000 for a Directive on public access to environmental information, OJ 2000 C337/156.

⁷⁵ Under Art 9 (1) of the Aarhus Convention there is a requirement that the rules on standing must be consistent with the objective of giving the public wide access to justice to any person who considers they have had their right to information violated. However, the Convention does not address procedural questions which are still left entirely in the hands of the signatories.

⁷⁶ See R Macrory and S Turner, 'Participatory rights, transboundary environmental governance and EC law', 39 (2002) *Common Market Law Review* 489, at 519.

⁷⁷ See, eg, L Krämer, 'Public Interest Litigation in Environmental matters before the European Courts' (1996) 8 *Journal of Environmental Law* 1; N Gerard, 'Access to Justice in Environmental Matters—A Case of Double Standards' (1996) 8 *Journal of Environmental Law* 139, and Scott above at n 73.

⁷⁸ At n 36 above.

This solution is not dissimilar from the Opinions of Advocates General Jacobs and Lenz who in *Extramet* and *Cordoniu*⁷⁹ respectively, both stressed the need to examine the impact or effect of the measure on the applicant. The primary point which arises from these two Opinions is that an individual can be substantially affected by a measure, but this effect may not necessarily be unique. Exclusivity should therefore not be the primary consideration when deciding whether to grant *locus standi*.

In *Greenpeace*, the applicants established a legitimate argument that the *Plaumann* criteria were inappropriate and actually undermined the application of Community environmental policy. It appears to be inconsistent to make environmental policy a central Community objective, yet not permit established and experienced pressure groups from initiating an informed challenge to a failure to fulfil the procedural requirements contained within the EIA Directive. This decision also raises difficulties in the light of the EU's attempts to increase participation by citizens in the activities of the EU. The *Greenpeace* judgment suggests that the Commission could ignore opinions that it has not asked for, leading perhaps to the cynical conclusion that only those groups who share the Commission's views will be asked to provide their opinions.

VII. GRANTING LOCUS STANDI TO PROTECT FUNDAMENTAL RIGHTS— THE WAY FORWARD?

The Court's judgments have consistently demonstrated a willingness to protect the economic rights of an applicant where a Commission decision has significantly affected their commercial status. For example, in *Cordoniu* the ECJ placed protection of the applicants' intellectual property rights at the centre of its decision and arguably this was viewed as more important than the procedural requirements of Article 230 EC. Is there scope within Article 230 EC and the Courts jurisprudence to adopt a form of rights based approach to the protection of fundamental non-economic rights, for example, environmental protection?

Such an argument is strengthened by two specific developments. The first is the pivotal position which environmental protection has already attained in the EU and in particular through its inclusion as a specific right within the Fundamental Charter of Rights.⁸⁰ The second development, also arising from the Charter, is that Article 47 of the Charter contains the right to an effective remedy for all EU citizens.⁸¹ Could an applicant seeking to protect the right to a high level of environmental protection, in circumstances, such as in *Greenpeace*, invoke Article 47 of the Charter?⁸²

In the recent Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores v Council* and the CFI's judgment in *Jégo-Quéré et Cie SA v Commission*

⁷⁹ Case C-309/89 *Cordoniu SA v Council* [1994] ECR I-1853.

⁸⁰ Art 37 states that 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' It is worth noting though that the Charter includes reference to a large number of social rights which could all be subjected to similar considerations as those advocated by the CFI and Advocate General. See n 87 below.

⁸¹ The effective protection of a citizen's fundamental rights has already been acknowledged by the Court, where the rights contained within Art 13 of the ECHR for effective judicial protection have readily been protected by the Court of Justice. See, eg, Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

⁸² See AW Bradley, 'Administrative Justice: A Developing Human Right' (1995) 1 *European Public Law* 347.

express reference was made to Article 47 of the Charter, that individuals should have the right to an effective remedy, in all circumstances, when their rights have been infringed by the decision-makers. For the Advocate General, this right was viewed as an overriding principle that every Court must endeavour to protect. Advocate General Jacobs stated at paragraph 39:

That principle [of an effective remedy] is, as the Court has repeatedly stated, grounded in the constitutional traditions common to the Member States and in Articles 6 and 13 of the European Convention on Human Rights. Moreover, the Charter of fundamental rights of the European Union, while itself not legally binding, proclaims a generally recognised principle in stating in Article 47 that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'.

The CFI was equally enthusiastic about the Charter stating that Article 47 guarantees persons an effective remedy enabling them to contest the legality of Community measures of general application which directly affects their legal situation.⁸³ What is most apparent from these references to Article 47 is that both the Advocate General and the CFI reject the restrictive numerical requirement of individual concern and are suggesting that whenever fundamental rights are infringed, an individual must be entitled to a remedy, irrespective of the number of persons affected.⁸⁴ The CFI agreed with the Advocate General that there is no compelling reason to read in to the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a measure must be differentiated from all others affected by it in the same way as an addressee.⁸⁵ Could such an interpretation mean the end of the *Plaumann* test?

One advantage of a rights-based approach towards Article 230 EC is that it removes the need for applicants to accommodate the restrictive criteria of paragraph 4. Under the reasoning of both the Advocate General and the CFI, once the applicant has established a right, it is then the duty of the Court to protect that right. If implemented, this solution would have to be accompanied by some form of admissibility test, because unchecked it does have the potential to open up the floodgates to opportunistic litigants who may view the rights contained within the Charter as being absolute. One solution could be for the Court to introduce a pre-hearing stage where applicants would present written pleadings through which they would establish a *prima facie* case. This could be similar to the procedure in the Council of Europe where the Commission conducts a review, prior to a case being heard before the European Court of Human Rights. Whatever solution is adopted, this problem is not insurmountable. Even with such a development, one question still remains unanswered. That is whether a Community system of judicial review focused upon the Fundamental Charter of Rights is the most appropriate solution to not only liberalise the rules on standing under paragraph 4 of Article 230 EC, but also to provide a remedy to applicants in a case with factual issues such as those of *Greenpeace*?

In *Unión de Pequeños Agricultores* the ECJ rejected the arguments advanced by the Advocate General and the CFI. First, the Court did not apply Article 47 of the Charter, instead relying on the principles of Articles 6 and 13 of ECHR which it has already acknowledged in previous judgments.⁸⁶ This judgment therefore continues the trend of the post-Charter case law in which the ECJ has not formally acknowledged the existence of the Charter, primarily due to its lack of legal status within the EU, even though

⁸³ Judgment of the CFI, at para 47.

⁸⁵ *Ibid.*, para 49.

⁸⁴ *Ibid.*

⁸⁶ See n 81 above.

the Advocate General or CFI may have expressly mentioned it.⁸⁷ The Court remains to be convinced by the arguments put forward by the Advocate Generals or the CFI, probably because it fears the floodgates opening with opportunistic litigants seeking to establish rights contained within the Charter as being absolute. This is a legitimate concern. In *Unión de Pequeños Agricultores* the ECJ was clear that any change to paragraph 4 Article 230 EC would require Treaty amendment. This judgment of the Court suggests that the Charter should not be considered as a panacea.

The future status of the Charter has been discussed within Working Group II of the Convention on the Future of Europe, which has considered whether the Charter should be incorporated, and if so, in what form.⁸⁸ It could be argued that if future litigation under Article 230 EC were to be primarily concerned with giving effect to the rights within the Charter, it is possible that this solution alone will not provide a universal guarantee of access to the Court. Failure to fulfil the procedural requirements contained within a directive should give rise to a cause of action which is independent of the enforcement of any rights within the Charter. In cases involving the failure to follow the correct administrative procedure contained within a directive, the Court would still require that the applicant satisfy some criteria of *locus standi*, to demonstrate how the procedural impropriety affected him. Therefore Article 230 EC will still be relevant. If, as appears likely, the legal status of the Charter were to be enhanced under any EU constitutional settlement, this development alone would only be a partial improvement for non-privileged applicants if Article 230 EC remains unchanged. Furthermore, if the Court is correct that unilaterally it cannot rewrite paragraph 4 of Article 230 EC through teleological reasoning as it did in *Chernobyl*, then the matter must be left up to the Treaty makers to re-draft Article 230 EC and extend *locus standi* to non-privileged applicants such as Greenpeace, who seek to enforce procedural rights within a directive. Conversely, applicants such as *Unión de Pequeños Agricultores* could rely on Article 47 of the Charter where the challenge is not based upon procedural impropriety but where a general legislative measure has substantially affected the interests of the members who constitute the representative group.

VIII. CONCLUSION—RETHINKING *LOCUS STANDI*

Where then are representative actions left following *Unión de Pequeños Agricultores*? As the current state of case law stands Article 230 EC paragraph 4 will not permit proxy challenges. The Court has been clear on this. Similarly the Court will not apply Article 47 of the Charter as the Advocate General or the CFI have suggested. A possible, and less controversial solution could be for the Court to focus on the need to give effect to procedural requirements in all cases, irrespective of the number of persons affected by the decision and the legislation involved. This solution omits the need for the Court to make value judgments about which fundamental rights to protect and only requires the Court to enforce procedural requirements which are already part of the EC law. In *Federazione Nazionale del Commercio Oleario (Federolio) v Commission*,⁸⁹

⁸⁷ See, eg, Case C-173/99 *R. v Secretary of State for Trade and Industry ex parte BECTU* [2001] ECR I-4881.

⁸⁸ Convention Document 354/02, at 2. Available at <<http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>>.

⁸⁹ Case T-122/96 [1997] ECR II-1559.

the Court of First Instance acknowledged that an organisation could be granted *locus standi* when a legal provision expressly grants a series of procedural rights. Though the applicants were ultimately unsuccessful in their challenge, the principle stated by the Court is of considerable importance. The issue of due process and procedural propriety are crucial in any system of public law.

In the context of an action such as that brought by Greenpeace, the failure by the Commission or Spain to follow the correct procedure of the Environmental Impact Assessment was undoubtedly a breach under the directive. Such a failure clearly affected citizens of the Island generally and some inhabitants more specifically,⁹⁰ but all Islanders were affected to a minimum level of impact. In a case such as *Greenpeace*, if the importance of procedural rights is accepted, then there is little scope for the *Plaumann* test to operate effectively to protect those rights, because of the requirement of exclusivity. It seems absurd in such circumstances to recognise the existence of a procedural right within a directive, but for the rules of the Court to operate in a manner which essentially denies effective protection of the substantive right. In *Greenpeace*, once the Court denied *locus standi*, there was no alternative body or procedure to challenge the Commission's decision, leaving a legal vacuum.

The Court did not permit such a vacuum to exist in cases such as *Cofaz* or *Cordoniu*, which involved commercial interests and where secondary legislation provided for a due process to be followed. There is no reason why such a vacuum should exist when an organisation seeks to enforce a procedural requirement to protect a non-commercial interest. Extending the reasoning of the Court in this way is both logical and desirable. It would fill the gap in the EU system of public law which leaves individual citizens, who share common rights, from being able to protect those rights collectively and obtain an effective remedy in the event of those rights being breached.

The conclusion to be drawn from *Unión de Pequeños Agricultores* is that for an applicant in similar circumstances to Greenpeace, the opportunity to bring a challenge under Article 230 EC remains ever distant. In *Greenpeace* itself the ECJ rejected a representative action on the basis that the *Plaumann* criteria were not satisfied. The Court in *Unión de Pequeños Agricultores* confirmed this decision, but even the Opinion of Advocate General Jacobs offers an applicant such as Greenpeace limited comfort. The Advocate General's focus on protecting fundamental rights misses the point that in *Greenpeace* the challenge was initiated because of a failure to fulfil the legal procedural requirements of the EIA Directive rather than because of the abuse of some fundamental right. The lack of any review and the absence of an effective remedy could be a breach of Article 47 of the Charter, but this only arises subsequently once the ECJ and national court have refused to hear the case. The substantive issue therefore still remains unresolved—a failure to conduct an EIA before the Commission funding was paid and procedural impropriety not reviewed.

The right to seek judicial review under Article 230 EC should not in itself lead to legislative stagnation or open the dreaded floodgates. The objective is to provide recourse for individuals when their rights, whether procedural or fundamental, have been infringed. The trend within the Member States is one of adopting relaxed stand-

⁹⁰ eg, those living in close proximity to the power stations or whose livelihood was affected by the projects. This question of proximity was seen as a crucial issue for the English Court in *Greenpeace No 2* and ultimately a key factor in the Court granting *locus standi* to Greenpeace to bring the representative action. See n 22 above.

ing criteria to allow for wider access to judicial review. In particular the growth of public interest litigation has in many Member States proved to be an effective form of opposition to governments which are regularly perceived as being out of touch.

The crucial problem for the Court is to establish working parameters of who should be given *locus standi*. Permitting public interest litigation in circumstances where collective rights are infringed is arguably the preferred option. The advantages of this have already been discussed, but the Court remains unreceptive to the idea. As the law currently stands, the Court's view in *Unión de Pequeños Agricultores* that the matter ultimately rests with the Treaty makers remains the only option to secure change, though some guidance from the Court as to what it views as achievable would be welcome. Modifying the Treaty to allow for targeted public interest litigation to allow citizens to protect their own rights and safeguard the rights of the community in which they live would be an excellent starting point for shaping the future the social and political structure of the EU.

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