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Environmental Assessment and the Skye Bridge

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ENVIRONMENTAL ASSESSMENT AND THE SKYE BRIDGE

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Speed bonnie boat like a bird on the wing
Onward the sailors' cry
Carry the lad who is born to be King
Over the sea to Skye

I. Introduction

The Environmental Assessment of the Skye Bridge Project failed to provide a meaningful mechanism for controversial development. Although a European Union directive imposed Environmental Impact Assessment (EIA) procedures, the British Government has been dilatory in implementing them alongside planning law. Private enterprise built the bridge under legislation that enables it to finance and construct roads, which has traditionally been the responsibility of government. However, the secrecy surrounding the bridge contract negotiations and the limitations of planning law was an abuse of the legal process. An indirect result of this abuse is the civil disobedience over crossing tolls by hundreds of protestors, such as the infamous Robbie The Pict.

The Skye Bridge is a remarkable story of public procurement mixed with private capital. Although no proper examination of the extent of the threat exists, the bridge is a threat to wildlife, including Eurasian otters, a type of Coastal otter. A mixture of International treaty, European Union, and domestic British law purportedly protects these endangered species.

The Skye Crossing: Environmental Statement (Skye-EIA)[1] discussed site analysis and ownership, geological surveyance, existing vegetation, marine charting, and soil surveyance. However, two serious defects exist. The price per copy is a staggering

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[1] The Skye Crossing: Environmental Statement (Holford Associates, Glasgow Oct. 1991) (prepared by consultants for the successful tenderer, a joint venture between Miller Construction Ltd. and Dykerhoff & Widmann AG. The 1"x12"x16", 52 page (plus 40 "A3" maps) report is coupled with an approximately 100 page 12"x8"x1" bound Appendices) (on file with author) [hereinafter Skye-EIA].

£175 for the standard version or £250 for the glossy version. This excessive cost limits access, public discourse, and debate, the *raison d'être* of the EIA process.

The objective of the Skye crossing was to provide a privately financed, fixed crossing to Skye as explained by a Government Green Paper.[2] Thus, the second main criticism of the *Skye-EIA* was its misstatement of facts:

> This Environmental Statement is an essential part of the process demonstrating that all aspects of the design have been adequately considered and that all reasonable precautions have been taken. This Environmental Statement is published in association with the Road Orders for the project and has been prepared in accordance with the European Community Directive 85/337/EC and the Environmental Assessment (Scotland) Regulations 1988.[3]

The *Skye-EIA* also failed to determine the cost of alternative schemes. The then-Scottish Secretary, Mr. Ian Laing, said that the Skye bridge was part of the Government's "non-interventionist" approach to the future provision of essential public amenities, however, a classic conflict of interest arose between the government as the promoter and overseer of the project.[4] This conflict pitted economic exigencies against the whole concept of sustainable development.

Celebrity activists like Bridgitte Bardot helped to focus attention on the matter.[5] Indeed, work began on the project before the February 1992 public inquiry report was released. The report was colored with allegations of cynicism and hypocrisy and encouraged a campaign of direct action,[6] which thereafter resulted in the arrests of demonstrators for breach of the peace near the construction site.[7] Employing his discretionary powers, the Secretary of State disregarded the recommendation of the public inquiry concerning bridge design and otter protection.

For various reasons, both good and bad, the adversarial system in Scotland discourages public-interest litigation. Opponents of the Bridge made a Court of Session challenge to the merits of the EIA but were thwarted by a slow, expensive, and cum-

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[2] *See* "New Roads by New Means" (advocating the building of privately funded toll roads) (on file with author).

[3] Skye-EIA, *supra* note 1, at 1 & iii.

[4] *See* Donnie Munro, *Skye Bridge and Islander's Rights*, THE SCOTSMAN, Feb 24, 1993, editorial page.

[5] *See* Ian McKerron, *Bardot Backs Battle to Halt Skye Bridge*, SCOTTISH DAILY EXPRESS, February 11, 1994, at 1.

[6] *See* Oliver Tickell, *Direct Action is the Only Way Left*, THE GUARDIAN, May 28, 1993.

[7] *See* Tom Morton, *Skye Campaign Soaked in Sea of Anger*, THE SCOTSMAN, June 9, 1994.

bersome process. Public-interest litigation concerning the environment needs a streamlined process, guaranteeing faster and less expensive access to the courts.

In *Stevens v. Secretary of State*,[8] environmental activists objected to the hearing outcome, and lodged an appeal in the Court of Session. These activists sought suspension of the Scheme and attendant Orders, and their appeal went through two years of interlocutory motions and procedural skirmishes which forestalled the court from determining the merits of the claim. However, EIA is just beginning to develop in the European Union, and a lack of precedent inhibits rational procedure. By treating it as a form of localized planning law, therefore, environmental review has become impotent.

Stevens v. Secretary of State involved an interlocutory motion concerning the 1979 Berne Convention on the Conservation of European Wildlife and Habitats. This multilateral, international treaty provides for the protection of certain species, including otters (*Lutra lutra*). Although an EU Council decision adopted the treaty,[9] the issue became whether the laws of the United Kingdom have fully incorporated the treaty even though Britain reputedly implemented the Berne Convention by passing

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[8] On appeal to the Court of Session under the Roads (Scotland) Act 1984 and the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. Originally there were four appellants: Bruce Stevens, Paul Yoxon, Peter Findlay & Kathleen MacRae, although the latter three withdrew for financial reasons.

[9] *See* Council Decision 82/72/EEC (implementing the European Convention on the Conservation of European Wildlife and their Habitats within its area of legal competence). Ch. II, Art. 4(1) states:

> Each contracting party shall take appropriate and legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species especially those specified in the Appendices I and II and the conservation of endangered natural habitats. . . . (2) The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimize as far as possible any deterioration of such areas.

Id. Ch. II, Art. 6 states that "[e]ach contracting party shall take appropriate and legislative and administrative measures . . . to prohibit"

> (a) all forms of deliberate killing (b) deliberate damage to or destruction of breeding or resting sites (c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention.

Id. Ch. II, Art. 9 provides for exceptions "provided there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned," including "the interests of public health and safety, air safety or other public interests." *Id.*

the 1981 Wildlife and Countryside Act.[10] In other words, the questions remaining unanswered were whether Britain partially implemented its EC obligations and what steps were necessary to ensure compliance with this treaty.

II. Otters and Environment: "Ring of Bright Water"

The Skye bridge runs from the west of Kyle of Lochalsh to the island Eilean Bàn (actually two islands) and then crosses to the western side of Kyleakin on the eastern shore of the Isle of Skye. Eilean Bàn was formerly owned by Gavin Maxwell, author of *Ring of Bright Water*, a novel about otters which was later made into a 1969 feature film. Maxwell wanted to establish an otter sanctuary[11] on the island but died before accomplishing his goal. He reportedly contributed £10,000 to the World Wildlife Fund for Nature.[12] This high-profile environmental group was noteworthy in its absence from the bridge protest. Because the Bank of America funded the group with £3 million, part of the project consortium, this environmental group was co-opted.[13] Thus, business joined the environmental bandwagon and tried to shape the movement and debate. One of Maxwell's otters, Teko, is buried on the island. Consultant ecologists did not find Teko's grave[14] but cited a literary reference from *The White Island* by Sir John Lister-Kaye, who carved Teko's name on a nearby rock:

> Teko alone chose not to be moved again. He died suddenly and unexpectedly of a heart attack whilst swimming in his pool. We buried him at the foot of a huge boulder at the top of the island and I carved his name and dates in the rock face above the spot: Teko 1959-69. A Memorial to the last of the Ring of Bright Water otters.

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[10] The Wildlife and Countryside Act of 1981, § 9, states that "if any person intentionally kills, injures or takes any wild animal included in Schedule 5" or (a) "damages destroys, or obstructs access to, any structure or place which any wild animal included in Schedule 5 uses for shelter or protection, or (b) disturbs any such animal while it is occupying a structure or place which it uses for that purpose, he shall be guilty of an offence." Exceptions are provided in § 10(3): "Notwithstanding anything in section 9, a person shall not be guilty of an offence by reason of (c) any act made unlawful by that section if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided."

[11] *See* Brian Jackman, *A Shock Wave on the Bright Water*, WEEKEND TELEGRAPH, Sept. 25, 1993.

[12] *See* Paul Keel, *Cash Snub Hits Bid to Save Otters*, THE MAIL ON SUNDAY, April 11, 1993.

[13] *See* Catherine Deveney, *Bridge Campaign Casts Redford as Saviour of the Otter*, SCOTLAND ON SUNDAY, Feb. 21, 1993, at 7.

[14] *See* Skye-EIA, *supra* note 1, app. 9, Report by The Vincent Wildlife Trust, London, July 17, 1991, & "Non-Technical Summary" at 45.

> As the dinghy crunched into the shingle of Kyleakin beach for the last time on that December morning, we turned to look back at the island which had been our home . . . . For the first time I saw a good reason for the island's name, Eilean Bhan, the White island.[15]

While ubiquitous in the West Highlands, otter populations are endangered in England except in the western regions. Two national surveys in the mid-1980's reported otters inhabited approximately 75% of the Scottish landmass, compared to 9% of England's—a common phenomenon across Europe.

The Scottish otter population has international significance; it is one of only three substantial marine populations in Europe.[16] Marine populations are important due to their relative scarcity and, although otters are not distributed equally across Skye's coastline, the crossing area is one of the most populated habitats around Skye.[17] The World Conservation Union, a Swiss environmental group focusing on otters, stated that the Scottish otter population should be officially recognized as having international importance, that the scheme should be stopped, and that conservation of viable populations like those along the crossing route should be given top priority.[18]

Although few otters inhabit a single kilometer of shore in the West Highlands, the social organization of the animals suggest that the Skye crossing's population is more dense. Female otters in groups of four or five exclusively occupy ranges up to 14 kilometers around holts (natural cairns); males occupy more expansive ranges. The crossing area of Eilean Bàn currently has an estimated ten to twelve resident otters with a about two or three transients at a given time.[19] Otters eat small bottom-living fish or crustaceans and hunt near rocky shores, where the seaweed zone is well-developed. Otters are prone to hypothermia because they lack a layer of subcutaneous fat, and the insulating quality of their fur decreases after repeated immersions. To restore this insulation, they require frequent grooming and bathing in fresh-

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[15] *Id.* at pp. 172-3.

[16] *Id.* at 1. The other two substantial marine populations are located in Eire and Norway.

[17] *See* Paul Yoxin, *The Effects of the Skye Bridge on the Eurasian Otter Population* (1993) (unpublished manuscript((on file with the Skye Environmental Centre, Broadford, Isle of Skye, Scotland IV49) (quoting A.N. Van de Zander et al., *The Impact of Roads on the Densities of Four Bird Species in an Open Field Habitat—Evidence of a Long Distance Effect,* 18 BIOL. CONS. 229 (1980)("Environmental impact statements concerning roads and bridges that disregard long distance effects on wildlife should be rejected.")).

[18] Newsletter, International Union for Conservation of Nature, May 4, 1993 (available from Clause Reuther, Director, Otter Specialist group, Sudendorfallee 1, D-3122, Hankensbuttell, Germany).

[19] *See* Skye-EIA, *supra* note 1, app. 9 at 3-4.

water to remove accumulated salt crystals. Otters are protected pursuant to Schedule 5 of the Wildlife and Countryside Act 1981.[20] Recently, the Forestry Commission created an "otter haven" at Kylerhea.[21]

Approximately 700 coastal otters might inhabit the Skye and West Highland region, but the estimated loss of twenty to thirty on bridge crossing is nonetheless significant.[22] Despite the Skye-EIA's statement that they "do not see this as forming a major problem" after construction, bridge construction, with its attendant sea-water passages, will likely disturb and destruct the otter's habitats, including the holts. Likewise, road construction will likely increase the number of road casualties—a "sump effect" will attract new individuals to spaces vacated due to the loss of a resident animal.[23]

One study in Shetland found that roads accounted for 42% of all known mortalities, despite the otter's low reproductive rate and cub development. The Vincent Wildlife Trust, consultants for the bridge builders, claimed that the bridge would destroy at least two holts, impede four paths, and one sea passage between Eilean Bàn and Eilean Dubh.[24] Because dense vegetation prevented surveying inland, the Skye survey was "accurate but limited" and further acknowledged the need for a winter survey, which was never conducted. Consequently, a minimum of fifteen to sixteen otters will likely be affected.[25]

Consultants recommended replacement of otter holts by relocating artificial sites, provided their location did not encourage animals onto the road. Otter road signs, like those in use in Shetland and Orkney were recommended in addition to road underpasses, fences and overhangs around vulnerable sections of the crossings, and drains flowing off embankments at steep angles to discourage otters naturally attracted to freshwater. The *Skye-EIA* accepted that "the relationship between plants and animals, though often complex, is one of mutual dependence."[26] However, the *Skye-EIA* did not complete a full otter study and recommended that a survey be undertaken in the winter months when low vegetation would allow survey of habitats away

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[20] *See id.*

[21] *See id.*

[22] *See* Oliver Tickell, *Bridge Over Bright Water: Onward to Skye and Don't Spare the Otters*, BBC WILDLIFE, April 1993, at 15 (interviewing Dr. Sheila MacDonald, International Union for Conservation of Nature).

[23] *See* Skye-EIA, *supra* note 1, app. 9 at 2-9.

[24] *See id.*

[25] *See* YOXIN, *supra* note 17, at 14, 19. "Following the Exxon Valdez disaster, Esso and the State of Alaska agreed upon cost of $80,000 per otter yet monetarist values on environmental damage were omitted in the Skye Environmental Statement." *Id.*

[26] Skye-EIA, *supra* note 1, at 5.

from the shore.[27] This was not done despite the recommendations of the Public Local Inquiry.

III. The Skye Bridge Proposal

In 1986 the Highland Regional Council considered the feasibility and socioeconomic effect of building a bridge to Skye; it found the financial cost to be too expensive. About this time, the Government published a Green Paper entitled *New Roads by New Means*. This Paper proposed that roads which were not economically justifiable, and therefore could not utilize public funds, could instead be built by private enterprise and financed by collecting toll charges. In October 1989, Highland Regional Council voted in favor of this proposal and created a Skye Bridge Working Party, which received expressions of interest from over fifty companies. Six of these companies submitted proposals to design, build, finance, and operate the bridge. In February 1990, three finalists were chosen to tender: the Miller/Dywidag joint venture, the Morrison Construction Group (a *cable stay* bridge proposal), and Trafalgar House Offshore and Structure Ltd. These companies prepared tenders pursuant to a performance brief prepared by the Highland Regional Council and J.M.P Consultants Ltd.[28]

This "performance" or outline brief stipulated a minimum free height of thirty-six meters above the high-water mark, thus precluding tall ships from sailing up the Sound of Sleat.[29] The brief also excluded an alternative direct (central location), low-level causeway plus *bascule bridge* solution, which was proffered as the least environmentally damaging. Nevertheless, officials urged that "[t]his brief, in addition to technical and financial matters, directed attention to the need for the proposed crossing to be designed with priority given to any environmental effects it might have on the exceptional location in which it would be built."[30]

In November 1990, after submission of the three tenders, the views of the *Royal Fine Art Commission for Scotland*, the *Countryside Commission for Scotland*, and the *National Trust for Scotland* were sought. The three finalists engaged Professor Fritz Leonhardt, the consultant and a member of the Pisa Tower Committee, who preferred an alternative high level cable-stayed bridge design, which was preferred based on its more aesthetic qualities and its relation to the nearby topography.

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[27] *See id.*, app. 9 at 2-9.

[28] *See* Skye-EIA, *supra* note 1, at 1.

[29] The founder of the Miller Group, the late Sir James Miller, donated the schooner "Malcolm Miller" to the Sail Training Association in memory of the tragic death of Malcolm. It is ironic that the Skye bridge will prevent sea-going vessel traffic, irrespective of the height of her masts. *See Skye Passage*, Editorial, THE SCOTSMAN, January 8, 1992.

[30] Skye-EIA, *supra* note 1, at 1.

All three finalists expressed grave reservations about the design of the least expensive tenderer, the Miller/Dywidag submission for a £23 million box-girder design. In April 1991, however, this design was announced as the preferred scheme. The Highland Regional Council approved the proposal to proceed with the preferred scheme in September 1991. The design team for the project was Dykerhoff & Widmann A.G. as the bridge designers, Ove Arup and partners acting as the project engineers, and Glasgow-based landscape and environmental consulting firm of Holford Associates.

While popular support on Skye favored the bridge (before ferry service became a 24-hour service), it has always remained decidedly opposed to a toll bridge. More than 2,000 islanders objected by petition and letter.[31] Hence, the immediately affected communities branded the Highland Regional Council members as "quislings," due to their apparent acquiescence to the dictates of the Scottish Office to accept either the toll bridge or no bridge within the foreseeable future.[32]

The Council will act as agent for the project during the payback period, estimated to be twenty years, in which tolls will be an inflation-linked version of 1991 ferry charges exceeding £4 per car.[33] Now, the sum exceeds £5 per car peak season. A £50,000 PIEDA consultant's study assessed the likely impact of the bridge on the two communities, stating that it would hit Kyleakin the hardest by causing a loss of jobs due to the ferry closure. Proposals were made for a £228,000 tourism-visitor center initiative to develop Kyleakin when its present role as the "Gateway to Skye" dissipates.[34]

Compulsory purchase Orders and Road Orders were issued on October 23, 1991, and published about a week later.[35] Objections were received within the prescribed 6-week period, and a statutory "Public Local Inquiry" was subsequently ordered by the then-Secretary of State, Ian Laing. However, the terms of reference had a limited scope, referring only to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. This Public Local Inquiry heard objections from a wide range of interest groups.[36]

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[31] *See* Editorial, *Islanders' Objections*, GLASGOW HERALD, Jan. 15, 1992.

[32] *See Another Skye Bridge Betrayal by Highland Region Quislings*, WEST HIGHLAND FREE PRESS, Sept.20, 1991.

[33] *See Region Accepts Tolls on the Bridge to Skye*, GLASGOW HERALD, Sept. 13, 1991, at 14.

[34] *See Action is Needed Soon*, WEST HIGHLAND FREE PRESS, Aug. 16, 1991.

[35] *See* WEST HIGHLAND FREE PRESS, Nov. 1, 1991. The notice failed to cite the name of the applicant, address where copies of the EIA could be purchased or the cost of the EIA (£170-250) as required by Reg. 16, Environmental Assessment (Scotland) Regulations 1988. *See id.*

[36] Objectors included: the Architectural Heritage Society of Scotland, Royal Incorporation of Architects in Scotland, The Landscape Institute, The Saltire Society, the Liberal Democrats,

The contract was signed December 16, 1991, before the Public Hearing concluded.[37] However, the terms remained secret—ostensibly due to reasons of "commercial confidentiality".[38] Ironically, the whole matter affects the public interest. The Secretary of State has quasi-judicial functions, but the act of awarding the contract effectively made the public hearing process the subject of concurrent proceedings. To the contrary, planning procedure usually does not condone project construction during a pending appeal.

Procurement of government contracts should be more "transparent" than commercial arrangements between private individuals at arms-length negotiation. Government contracts are different from private enterprise contracts, because government has a superior bargaining position and owes political accountability to parliament. Here the construction contract was signed while consultation and possible public litigation concerning the bridge was pending (*lis pendens*). The process should not fetter the Government's ability to conclude ripe private deals and should preserve resolution of bona fide public disputes.

The confidential construction contract may or may not have provided an escape clause if an appellant's case succeeds. Nonetheless, the Government would likely face a penalty payable to the contractor if it stopped or canceled the project. The implication is that the Government disdainfully regarded the local public hearing and the potential appeals as a *fait accompli*, in the Government's favor. Part of the Government's confidence stems from the narrow possibility of remit of the EIA.

The *Skye-EIA* stated: "Ecology and Landscape: The area is extensively used by otters and the main features of their habitat have been identified together with mitigation and habitat replacement proposals, with a view to minimizing disturbance and reducing the risks of road mortality."[39] Appendix 9 of the report specifically concerned Otters and was prepared by The Vincent Wildlife Trust, London.[40]

The Public Local Inquiry (PLI) was held between January 28 and February 7, 1992, by Miss E.B. Haran (the "Reporter").[41] Draft copies of Part I of the Report

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Labour, Scottish Nationalist, and Highland green political parties. Objectors who made detailed representations included the Countryside Commission for Scotland and the Royal Fine Art Commission for Scotland. Ironically, the Saltire Society, formed 60 years ago to promote Scottish culture, presented its prestigious civil engineering award to the Skye bridge based on engineering grounds, despite opposing its design at a public inquiry in 1992. *See* David Ross, *Saltire Society Honours Skye Bridge*, GLASGOW HERALD, Nov. 19, 1996, at 1.

[37] *See Skye Bridge Inquiry "Is Just a Sham,"* WEST HIGHLAND FREE PRESS, Jan. 10, 1992, at 2. Final approval was allegedly given in June 1992. *See* David Ross, *Lang to Give Go-Ahead for Skye Bridge*, GLASGOW HERALD, June 24, 1992.

[38] *See* Catherine Deveney, *Bridge Campaign Casts Redford as Saviour of the Otter*, SCOTLAND ON SUNDAY, Feb. 21, 1993, at 7.

[39] Skye-EIA, *supra* note 1, at 2.

[40] *See* Skye-EIA, *supra* note 1, app. 9.

[41] Report of a Public Local Inquiry into Objections to the Following Orders: The Iver-

were circulated to parties for comment. No full transcript of the hearing (a first instance proceeding) was circulated even though the Reporter recommended that:

> [8.2] . . . further consideration is given to the risk of disturbance of otters on the islands . . .
>
> [9.32] . . . further consideration be given to resolving the potential conflict between providing opportunities for quiet enjoyment of the islands and adequate protection of the otters . . .
>
> [9.66] and . . . [a] supplement to the Environmental Statement is prepared in respect of changes made since the Statement was published and matters omitted from the Statement (para 9.7).

Thereafter, the Secretary of State replied that:

> 15. . . . [T]he Secretary of State is not persuaded that there are any significant omissions from the environmental statement, nor does he consider that a supplementary environmental statement is the appropriate means of updating the information referred to by the reporter in 9.7. Accordingly, he does not agree with the consequent recommendations in paragraph 9.16.1 that a supplement should be prepared.[42]
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> 17. . . . The Secretary of State accepts the Reporter's conclusions in paragraphs 9.31 and 9.32 regarding the need for further protection for the otters. These matters continue to be pursued and will be the subject of consultation with the Scottish Natural Heritage and the National Trust for Scotland. Arrangements will be made to have otter activity, and the effectiveness of the measures introduced, monitored by representatives of the Vincent Wildlife Trust.[43]
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> The foregoing decision is final, subject to the right of any person aggrieved by the decision to apply to the Court of Session

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garry-Kyle of Lochalsh Trunk Road (A87) Extension (Skye Bridge Crossing) Special Road Scheme 199 et al., Jan. 28, 1992-Feb. 7, 1992, (unpublished report by Miss E.B. Haran MA BD MRTPI, Reporter, on file with the author).

[42] Letter from Peter Mackay, Secretary, The Scottish Office, Industry Department, to Chief Executive, Highland Regional Council, 6 (June 23, 1992) (on file with the author).

[43] *Id.*

within 6 weeks [pursuant to the] Tribunals and Inquiries Act 1971.[44]

IV. Opposition to the Bridge Design

The high box-girder bridge[45] requires 2.5 miles of approach roads with a secondary bridge. These approach roads will cost approximately £10 million and will be financed publicly. The project bypasses the village of Kyleakin, thus requiring publicly-funded mitigation roads. Professor Fritz Leonhardt of Stuttgart, a leading world expert on bridge design, wrote a report[46] commissioned by the National Trust for Scotland (NTS), the Countryside Commission, and the Royal Fine Arts Commission for Scotland. He remarked, "I think that all other options for the Skye crossing have to be properly investigated and . . . . an environmental Assessment carried out by an impartial team of experts and more time for public consultation as well".[47]

Professor Leonhardt criticized the heavy box-girder design as being aesthetically and environmentally the most damaging. He further disputed the figures cited by the Scottish Office for modern cable-stay bridges, contending that it could be cheaper and citing modern technology in Norway in support of this contention. In an effort to allay criticism, the *Skye-EIA* stated that "[a]esthetic quality is a subjective issue, however, and, as with any scheme of such visual importance, the bridge inevitably will have both admirers and critics."[48] The *Skye-EIA,* even as drafted by its proponents, was a portent of future controversies.

The Secretary of State overruled the advice of the Royal Fine Arts Commission for Scotland, which advised a different style of bridge more uniform with the landscape. The *Skye-EIA* admitted that the bridge and roads "will lead to a loss of the islands' character and individuality," but it claimed that the bridge and roads would lessen the occurrence of vandalism aimed at the lighthouse and the keepers' cottages.[49]

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[44] *Id.* at 9.

[45] "The proposed bridge design is at the forefront of existing design and construction technology." Skye-EIA, *supra* note 1, at 2.

[46] Royal Fine Art Commission for Scotland, 15th Report for the year 1991, Cm. 2124 (unpublished report, on file with the author).

[47] David Rose, *EC Concern Over "Damaging and Ugly" Skye Bridge Design,* GLASGOW HERALD, Feb. 21, 1992.

[48] Skye-EIA, *supra* note 1, at 2.

[49] *See id.* at 46. The lighthouse and the keepers' cottage are B-listed properties protected under the Town and Country Planning Act of 1972.

V. National Trust for Scotland: Conflict of Interest

The box-girder design was criticized by the National Trust before it sold crucial land after a high-pressure visit from Scottish Office officials.[50] The Trust, which owns the Skye landing, had previously maintained that the proposed bridge had to be "an outstanding design of international quality," yet in October 1991 it yielded to Scottish Office political pressure.[51] The National Trust for Scotland is an independent charity that owns over one hundred properties of national importance "in perpetuity for the Nation." The National Trust employs the motto: "We serve the nation."

These are the terms under which the Scottish Office purchased the island Eilean Bàn:

> . . . the larger of the two islands at the mouth of Kyle Akin where it meets the Blind Sound at the southern limit of the Inner Sound of Raasay. The Smaller island, Eilean Dubh, is in the ownership of the National Trust for Scotland, and although in private ownership, the Trust is also feu[dal] superior of Eilean Bàn itself. The islands are often referred to as one, Eilean Bàn, but are separated by a calas, except at low tide when the crossing can be made by foot.[52]

The Scottish Office has no power of compulsory purchase over NTS property. The environment minister at the time, Lord James Douglas-Hamilton, wrote to the Trust chairman Charles Tyrell, stating that if the NTS opposed the government-approved bridge, compensation would be due to the construction company, no bridge would be built, and "great disappointment"would exist among the residents of Skye.[53]

Allegedly, the Minister and other high-ranking Scottish Office officials bluntly intimidated the NTS by telling them if they did not approve, a bridge would not be built for another twenty years. In April 1996, the Scottish Office announced its intention to sell the island by public auction in the Central Hotel in Glasgow, but later withdrew the sale. As late as November 1996, the Scottish Office was engaged discussions with environmental groups about the sale of the island.

When the NTS council voted in 1991 against the recommendation of the Bridge-working party for a cable-stayed bridge, the council sought to save face by pressing

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[50] *See* Catherine Deveney, *Bridge Campaign Casts Redford as Saviour of the Otter*, SCOTLAND ON SUNDAY, Feb. 21, 1993, at 7.

[51] The architectural advisor to the Trust in the Highlands, Ian Begg, resigned in protest of the vacillation of the officially independent body. *See* Torcuil Crichton, *Skye Bridge Plan is Limit for Architectural Adviser*, SCOTLAND ON SUNDAY, Nov. 3, 1991.

[52] Skye-EIA, *supra* note 1, at 45.

[53] *See* Jeremy Watson, *Why the National Trust Changed its Skye Line*, SCOTLAND ON SUNDAY, Dec 1991.

for minor modifications to the concrete box girder bridge—namely, switching to V-shaped pillars. These modifications were rejected by the design team leader of Dywidag of Munich, which designed the crossing with the Miller Group as a joint venture.[54] On the Skye side of the bridge, Mrs. Clodagh MacKenzie was upset because her woods were cut down to make way for the bridge approach. Her late husband left money to the National Trust of Scotland in 1971, and they jointly signed a conservation agreement protecting the Kyle House policies and land.[55] This was probably a breach of faith by the National Trust for Scotland and certainly amounts to poor stewardship in light of their acquiescence to political pressure from the Scottish Office.

VI. E.U. Environmental Assessment

E.U. Directive 85/337 provides for both an Environmental Impact Assessment (EIA), and the legislation which implements the EIA.[56] Because European Union environmental law is newer than its American counterpart, Britain was less than enthusiastic about the Directive; however, it was adopted unanimously.[57] The history and character of America was forged by the frontier, "the ever advancing line where civilization confronted nature. Each move forward provided a clean slate and free land where the advancing Americans would develop an independent spirit and a democratic society."[58] Conversely, the European Union is comprised of twelve ancient member states, numerous cultures, and several language groups whose turbulent, sometimes even aggressive, history did not experience a "frontier" in the Eighteenth and Nineteenth Centuries. Therefore, European environmental laws are new attempts to tackle regional controversies like the perennial hot potato of Scottish land use and ownership.

Initially, the E.U. focused on solving acute problems within the Community. However, realizing that pollution did not stop at its frontiers, the E.U. intensified cooperation with other countries.

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[54] *See Changes to Skye bridge "would put £4m on to costs,"* GLASGOW HERALD, Jan. 31, 1992.

[55] Rod Harbinson, *Over the Sea to Skye*, GREEN MAGAZINE, July 1993, at 32.

[56] Town and Country Planning (Assessment of Environmental Effects) Regs. 1988, S.I. 1988 No. 1199.

[57] *See Environmental Assessment*, ESTATES GAZETTE, Nov. 2, 1991, at 135. The principal E.U. environmental assessment provision is Council Directive 85/337/EEC, "Environmental Impact of Certain Private and Public Development Projects," June 27, 1985, O.J. (1985) L 175/40.

[58] Frederick Jackson Turner, *The Significance of Frontier in American History*, in AN AMERICAN PRIMER 547 (Daniel J. Boorstein ed. 1966).

> Generally, however, the initial response within western European states to the environmental agenda has been muted. Several reasons account for this slower application. European planning law, at least in north-western Europe, already required a measure of environmental assessment as part of normal planning and development controls. Corporate and government actors had already found means of controlling chemical and nuclear toxic wastes in response to the existing requirements of occupational health laws, the social welfare culture and the high density of population. The problems of regaining economic growth have also tended, until recent years, to swamp environmental issues.[59]

Community policy has recently accepted that climate change, ozone depletion, and diminution of biodiversity are "threatening the ecological balance of our planet as a whole." E.U. environmental policy presently seeks "sustainable development" through a mixture of coercion and self-regulation.[60]

But black-letter environmental provisions are relatively new, and reference must be made to general Community law.[61] Pursuant to article 130r(1), Community actions affecting the environment must satisfy objective requirements, for example, "to ensure a prudent and rational utilisation of natural resources." Article 130r(2) goes on to state that "[e]nvironmental protection requirements shall be a component of the Community's other policies," and Article 130r(3) directs that in preparing its action relating to the environment, the Community shall take account of: (i) available scientific and technical data; (ii) environmental conditions in the various regions of the Community; (iii) the potential benefits and costs of action or lack of action; (iv) the economic and social development of the Community as a whole and the balanced development of its regions.

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[59] GRANT LEDGERWOOD ET AL., THE ENVIRONMENTAL AUDIT AND BUSINESS STRATEGY: A TOTAL QUALITY APPROACH 11 (1992).

[60] *See* Towards Sustainability: A European Community Programme of Policy and Action in relation to the Environment and Sustainable Development, Vol. II, at 4, COM (92) final, 27.3.92 ("E.U. Fifth Environmental Action programme").

[61] For instance, concerning energy: "Specific Community measures to integrate environmental considerations into energy policy are lacking . . . . The Community has restricted its activity in the energy sector almost exclusively to general Decisions and recommendations on energy saving in particular." LUDWIG KRÄMER, EEC TREATY AND ENVIRONMENTAL PROTECTION 22 (1992).

Like EEC Articles 8a and 100a, which promote the approximation or harmonization of national laws which otherwise would create obstacles to free trade, Articles 130f and 130r create "multidimensional framework provision(s)". These provisions are unlike the "straightforward, unambiguous, one-dimensional" provisions of classic Community law such as Article 34(1) Quantitative Measures and measures having equivalent effect. Thus, "there is no absolute frame of reference and Community law is now about to enter into its *relativistic age* where formulas need to be found which allow the reconciliation of a magnitude of shifting frames of references, each of them composed of a set of legal objectives of equal importance."[62]

The interdependence of environmental exigencies accentuates this relativistic age. Mandatory environmental assessment in Britain came into force in July 1988 because of E.U. initiatives. E.U. Directive 85/337 took over twenty drafts and ten years before the legislature approved it. The Directive was designed to provide uniformity of EIA requirements for all member nations. "There was concern within the Community that great disparities in such legislation would affect investments in the Community and distort economic competition within the common market."[63]

The Directive sets out the basic framework for assessment to be implemented in each member state, listing twelve categories of development that could require environmental impact statements and nine categories which are mandatory. The latter categories require specified information which describe the project, precautions against adverse effects, data required to assess the main environmental effects on the environment, and a non-technical summary and consultation with interested "authorities." For instance, mandatory assessment is required for facilities such as crude oil refineries, thermal power stations, motorways, and roads over a certain length. An impact statement must consider the direct and indirect effects of a project upon: (1) human beings, fauna and flora; (2) soil, water, air, climate and the landscape; (3) the interaction between these first two items; and (4) materials, assets, and cultural heritage.

Although the British Government thought that the Town and Country Planning Acts were sufficient, it felt that defining the type of projects needing assessment would be difficult. Pursuant to section 42 of the New Roads and

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[62] Jürgen Grunwald, *Common Carriage—A Reassuring View From Brussels*, 3 OGTLR 55, 61 (1989-90).

[63] Louis L. Bono, *Assessments with the English Planning System: A Refinement of the NEPA Process*, 9 PACE L. REV. 155, 157 (1991).

Street Works Act 1991, "special roads" are treated as having characteristics which make Environmental Assessment compulsory within the meaning of Annex 2 of the EIA Directive 85/337/EEC.[64] Thus, certain planning purposes which are classified by British legislation require environmental impact assessment. The process requires wider consultation than ordinary planning applications and must be advertised in the same way as a bad-neighbor development. It also takes the form of an "Environmental Statement," which must have a non-technical summary of its contents and be publicly available at a reasonable charge.[65]

In *Kincardine and Deeside District Council v. Forestry Commissioners*,[66] the District Council (petitioners) objected to a Woodland Grant Scheme to plant trees on an area in the petitioners' district. European Union Directive 85/337 provides that projects likely to have a significant impact upon the environment must be subjected to an EIA before consent is given. This directive concerned forestry in the United Kingdom by the Environmental Assessment (Afforestation) Regulations of 1988. The respondent Forestry Commissioners claimed that the petitioners had no title and interest to sue. Lord Coulsfield held that the petitioners' concern to encourage tourism gave them sufficient interest in the matter, however, the Directive was not unconditional and sufficiently precise to have *direct effect* in the United Kingdom. Furthermore, the court held, the petitioners did not prove that the respondents failed to consider any requirements of the 1988 regulations or any Directive having direct effect in the United Kingdom.

In *Lewin and Another v. The Secretary of State for the Environment and Another*,[67] representatives of the Society for the Preservation of the Field of the Battle of Naseby unsuccessfully challenged a road construction project order under the Highways Act concerning the M1-A1 link road. Judge Otton dismissed the motion for judicial review, stating that the Minister "must consider the environmental statement, any opinion expressed by the public and publish his decision as to whether or not to initiate the project."[68] This judgement is unsatisfactory, however, because it failed to define the ambit of the considerations required of the Minister. The court consequently noted that a series of interconnected road orders, concerning an original line road and

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[64] *See* Report of a Public Local Inquiry, *supra* note 41, at 23.

[65] JOHN H. BATES, U.K. WASTE LAW 187 (1992).

[66] 1992 S.L.T. 1180, 1991 Scot. L.R. 729 (Sess. 1991).

[67] CO/426/91 1992 VPC 342, 1992 J. PUB. L. 342 (Q.B. 1991).

[68] *Id.*

attendant side-roads, was not "one project" under the Directive and the regulations. Therefore, the court did not award costs, citing salient provisions of EC Directive 85/337:

> For the purposes of this directive, 'project' means: the execution of construction works. 'Developer' means: the applicant for authorization for a private project or the public authority which initiates a project; 'Development consent' means the decision of the competent authority or authorities which entitles the developer to proceed with the project .
>
> Article 3 provides: The environmental impact assessment will identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors: . . . .
>
> Art 4(1) refers to projects of the class listed in Annex I which shall be made subject to an assessment. (this class includes construction of motorways, express roads). . . .
>
> Art 4(2) refers to projects of the class listed in Annex II which shall be made subject to an assessment . . . . where Members States consider that their characteristics so require.
>
> Art 5(1) is largely procedural, requiring specific information, elaborated by Annex III, including A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna , flora, soil, water . . . including the architectural and archeological heritage, landscape and the inter-relationship between the above factors . . . .
>
> Art. 6.2 provides: Member States shall ensure that: any request for development consent and any information gathered pursuant to Art. 5 are made available to the public" and that the "public concerned is given the opportunity to express an opinion before the project is initiated.
> S. 105A Highways Act 1980 enjoins the Secretary of State to have regard to in particular to current knowledge and methods of assessment.[69]

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[69] *Id.* (quoting EC Directive 85/337).

European Union Directive 85/337 illustrates the ability of the European Union to make progressive reforms in Britain.[70] Theoretically, EIAs safeguard the environment in a changing world fraught with development pressures. European Union Directive 85/337 establishes common principles which the legislation of all member states must implement. These principles of the Directive basically require assessment before planning consent, which may be an issue when a development is likely to have significant direct or indirect environmental effects. The responsibility for providing the necessary information and producing the EIA is a prime responsibility of the developer. Nevertheless, the Commission has complained about British non-compliance concerning seven projects, four of which include the construction of the M3 link near Winchester; the East London River Crossing; the Channel Tunnel Rail Link and Passenger Terminal; and a road link between Hackney, Wick, and the M11.[71]

VII. Functional Environmental Assessment

Difficult decisions in developed countries regarding large construction or natural resources projects are increasingly accompanied by environmental impact statements (EIS) or environmental impact assessments (EIA). Impact assessment "institutionalizes foresight" by encouraging government consultation.[72] This EIA trend stems from the U.S. National Environmental Policy Act (NEPA)[73] of 1969, which anticipates problems and "identifies alternative courses of action to avoid or mitigate adverse impacts."

> The EIS document is only the most visible feature of an underlying social process whereby environmental values are identified, articulated, and advocated. While this process does insure that the decision maker will be apprised of at least some of the environmental issues surrounding a project, it also insures that he will treat them with considerably more disdain than they deserve. Environmental interests have managed to acquire a negative image in many circles which may be reinforced by the EIS.[74]

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[70] *See also* Council Directive 90/313 of 7 June 1990 on Freedom of Access to Information, 1990 O.J. (L 158/6) (designed to increase public access to public authority information concerning the environment); Council Regulation (EEC) 1210/90 of 7 May 1990 on the Establishment of the European Environment Agency and the European Environment Information and Observation Network, 1990 O.J. (L 120).

[71] *See* Phillippe Sands & Daniel Alexander, *Assessing the Impact*, 141 NEW L.J. 1478 (1991).

[72] *See* Nicholas Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591 (1992).

[73] 42 U.S.C. § 4332(2)(c) (1994 & Supp. 1996).

[74] Eugene Bardach & Lucian Pugliaresi, *The Environmental-Impact Statement vs. the*

Environmental assessment serves as a focal point between legal rules which often conflict with environmental concerns. But impact assessment is a dynamic process that helps bridge the doctrinal demarcations concerning private-law incidents between individuals and the field of public law occupied by the state.

These demarcations discourage environmental litigation by denying individuals the standing to sue. Denial of *locus standi* for environmental matters illustrates the functional conflict between substantive and adjectival law.[75] Impact assessment encourages a wide variety of inter-disciplinary information. It widens justiciability by creating a public forum that enables so-called "intervenors" to contribute to the decision-making process. It also alleviates the standing problem by giving a voice to disenfranchised local people who cannot mobilize into an effective interest group.

Several global trends are apparent. EIA adapts to various political systems but works best when implemented by a politically independent authority. EIAs encourage communication and consultation between government agencies. EIAs are increasingly being recognized as part of international law and are utilized by international agencies like the World Bank. It is arguably becoming a norm of customary international law (*opinio juris*) that nations should engage in effective EIA before taking action that could adversely affect either shared natural resources, another country's environment, or the Earth's commons.[76]

Conversely, opponents who are skeptical of the assessment's usefulness often resist EIA, at least initially. Countries that have adopted EIA tend to use the process for large projects and rarely enjoin courts to oversee its accuracy. The procedures may reflect proponent bias. Responsibility for EIA in federal-type jurisdictions may be divided, which can influence positive or negative biases towards the project.[77]

Environmental impact assessments are usually carried out in a limited time period within a restricted area. It is assumed that reasonable estimates of the large-scale impact on the total area, can be represented by multiplying proportional small-scale effects, such as on a few arctic oil wells, by a factor of 100 or more. But the probability exists that "industry will be on its behavior, so the results will always be on the conservative side." Often these studies miss synergistic effects, the interaction of

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Real World, 49 PUB. INTEREST 22, 35 (1977).

[75] In England, under the framework of the forms of action (or formulary) system, a plaintiff who sought relief in the common law courts had to state a case in accordance with one of a limited number of standard forms. Maitland said that "English law knows a certain number of forms of action, each with its own uncouth name . . . . The choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds . . . The forms of action we have buried, but they still rule us from their graves." F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1962).

[76] *See* World Bank Operational Directive 4.01, *cited in* Ibrahim F.I. Shihata, *The World Bank and the Environment: A Legal Perspective*, 16 MD. J. INT'L L & TRADE 1, 9-11 (1992).

[77] *See* Robinson, *supra* note 72.

several components giving new or greater consequences than the sum of their isolated impact.[78]

Because expectation interests conflict, the process of environmental regulation is not so much conciliatory as adversary.[79] And because development proposals involve uncertainty, much of an EIS is dominated by the "worst-case" scenario.[80]

> The concept . . . [that an impact is any "alteration in the state of the world"] is not straightforward, of course. What it means depends in large measure on beliefs about what the world might look like in the absence of the project. The simplest and most legally and politically defensible belief is that the world would in no way look different than at present. Unfortunately, this view . . . is most unrealistic. There is constant change in human and natural environments all around us, but this endemic change is ordinarily not contemplated by the EIS. Nor does it ordinarily take into account how people or other organizations, will adapt to change.[81]

Governmental impact statements might also contain an "institutional pessimism." In the United States, too much optimism has led to "whitewashing" claims, which sometimes require a court to order the department to return and prepare an "adequate" impact statement.[82] Conversely, agencies might not want the impact statement to look like a "balanced document" just in case environmental critics allege that the balancing was incompetent or prejudicial to environmental interests.[83] An-

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[78] *See* DAVID SUZUKI, INVENTING THE FUTURE: REFLECTIONS ON SCIENCE, TECHNOLOGY AND NATURE 57 (1989).

[79] Part of the problem with regulatory rate hearings is that the same debates are continuously replayed, the regulated firm arguing for higher revenues and toll payers and consumer associations arguing against them. The National Energy Board of Canada has indicated that it is receptive to a settlement process under which interested parties negotiate many of the details prior to the beginning of a hearing. *See* Improving the Regulatory Process—Current Position on Submitters' Suggestions, Nat'l Energy Bd. of Can., (Sept. 1988) (unpublished report, on file with author).

[80] *See* Bardach & Pugliaresi, *supra* note 74, at 29.

[81] *Id.* at 30.

[82] *See id.* at 29.

[83] *See id.* at 34.

other problem affecting the EIA process is the asymmetry of information.[84] Objections, can be made on confidentiality and Crown privilege, but not on relevancy.

VIII. Legal Measures "Protecting" the Eurasian Otter

The 1979 Berne Convention for the Protection of European Wildlife and Habitats, Appendix II, places certain species in the "Strictly Protected" category, including otter (*Lutra lutra*). Britain purportedly implemented and enacted the Berne Convention by passing the 1981 Wildlife and Countryside Act. This statute renders it an offense to deliberately kill or intentionally disturb an otter's shelter, unless no reasonable alternative exists or the survival of the relevant population will not be affected.[85]

Relying on what they understood about the law, environmental opponents to the Skye Bridge complained to the European Commission. The Commission examined the Skye Bridge EIA and report of the public inquiry and, perhaps not surprisingly, said that it:

> gives an account of the consultation of interested bodies and of the public required by Art. 6, (Council Directive 85/337/EEC) and indicates how the results of that consultation and the Environmental

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[84] The absence of oral pretrial depositions in Britain (as opposed to Canada or the United States) has an inhibiting impact on the substantive outcome of litigation. *See* A.J. Black, *Pretrial Discovery in Scotland, England and Canada*, 37 NETH. INT'L L.J. 267, 267-290 (1992). The British government is particularly tight-fisted with information compared to other democracies. In Scotland, the procedure for Commission and Diligence for the recovery of writings is cumbersome, indefinite, and complex. Where Crown privilege is claimed, diligence (discovery) will almost certainly be refused if the Minister provides the requisite certificate. In practice, where documents sought are in the hands of the police or a government department, one must apply to the Lord Advocate, who may deny the request. The court may reject his decision in favor of another public interest.

[85] Misleadingly stated in the Skye-EIA:

> Of primary interest are the otters which are active along the coasts of the area and it is estimated that their numbers are high here, in contrast to much of the U.K. and Europe (see appendix 9). Otters concentrate on hunting inshore fish and crustaceans, commonly from rocky coasts where seaweed is abundant such as exist along the line of the proposed road. The otter is included in Schedule 5 of the Wildlife and Countryside Act 1981 and is *protected at all times*. Special precautions therefore must be taken to avoid any unnecessary disturbance.

Skye-EIA, *supra* note 1, at 5.

> Statement itself were taken into account by the competent authority in the procedure for granting development consent, as required by Article 8 of the Directive. On the basis of this examination, the Commission considers that the procedures followed met the requirements of Directive 85/337/EEC .... With regard to Decision 82/72/EEC, the Commission ensures compliance with the requirements of the Convention on the Conservation of European Wildlife and their habitats within its area of legal competence. This corresponds to those areas of the Convention which are implemented in Community law by *Directive 79/409/EEC on the conservation of wild birds.* The information before the Commission does not indicate any breach of those provisions of the Convention.[86]

Community law is not static but rather a "living tree"[87] which incrementally develops and has a nexus within the political arena. The Berne Convention, E.U. Directive 85/337, and Britain's 1981 Wildlife and Countryside Act reflect this incremental development which requires judicial clarification.

This multilateral treaty has been acknowledged by an EC Council resolution. However, the vexing legal question is whether it has adequately been incorporated into the law of the United Kingdom, a "dualist" jurisdiction that allows the government to conclude treaties but requires Parliament's ratification in order to incorporate them into domestic law. Opinion is mixed whether a resolution of the Council of Ministers is sufficient to incorporate a Treaty into Community law.

Section 2(1) of the European Communities Act of 1972 provides that all rights, remedies, procedures, and obligations created or arising under the European Community Treaties are to be given legal effect without further enactment in the United Kingdom. The expression "enforceable Community right" refers to the recognition and enforcement in the United Kingdom of directly effective or applicable Community rights and obligations enjoyed by or imposed on Member States or private individuals. It covers rights and obligations created by the Treaties themselves, existing

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[86] Letter from Dr. L. Krämer, Directorate-Generale, Environment, Nuclear Safety and Civil Protection, Commission of the European Communities, to Wendy Macleod-Gilford (June 23, 1994) (on file with author).

[87] *See* Edwards v. A.-G. Canada, 1930 App. Cas. 124, 136 (P.C. 1930) (Lord Sankey stating the "living tree metaphor" and comparing the British North America Act (the predecessor of Canada's current Constitution) as having "planted in Canada a living tree capable of growth and expansion within its natural limits").

and future Community Regulations[88] which take effect directly in the Member States, and Directives[89] to the extent that they are directly effective or applicable.

If a Community provision is not directly applicable, the United Kingdom does not incorporate it until domestic legislation is enacted pursuant to section 2(2) of the European Communities Act of 1972.[90] Thus, a directly applicable provision—whether a provision of the EEC Treaty, a Regulation or Directive, or Decision made under the Treaty—must be clear and unconditional. It must not need implementation by domestic legislation, nor can it only concern intercommunity[91] relations. Afterwards, it has the required "direct effect" being sufficiently clear and precise to allow a litigant to rely upon it in a court of a Member State.[92] For instance, the European Court[93] gave direct effect to Articles 85 and 86 of the Treaty, which forbid practices to reduce competition or amount to an abuse of a dominant trading position in an unduly fashion.[94]

Community Directives set out the objects to be achieved and leave Member States to choose the method of achieving them. These and other existing and future Community laws, that are not directly effective or applicable, may be given effect pursuant to Section 2(2) of the Act. Typically, the legal instrument to do this is either an Order in Council or a ministerial regulation. Supplementary matters, including references to the European Court of Justice, may be dealt with by subordinate legislative power under section 2(2), which itself is limited pursuant to Schedule 2.[95]

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[88] *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, Art. 189(2) [hereinafter Treaty of Rome] (providing that a Regulation shall be binding in its entirety and directly applicable to all Member States. Conversely, a directive (Community measure) is binding upon each Member State addressed concerning the Community objective to be achieved but it leaves the choice of methods open to the respective national authorities).

[89] *See id.* at Art. 189(3).

[90] *C.f. In re* Westinghouse Uranium Contract, 1978 App. Cas. 547, 564 (1978) (Lord Denning M.R. stating that Community law is part of domestic law "lock, stock and barrel").

[91] "Inter-community" refers to the relations, including trade, of Member states inter se. It is akin to the terms "inter-state" or inter-provincial" (as opposed to "intra-state" or intra-provincial) in American and Canadian law respectively.

[92] However, it is a matter of interpretation since the tenor of some directly applicable community rules do not necessarily create individual rights. *See* Mark Friend, *Judicial Review, Private Rights and Community Law*, 1985 PUB. L. 21 (1985); Josephine Steiner, *Direct Applicability in EEC Law—A Chameleon Concept*, 98 L.Q.R. 229 (1982).

[93] *See* Application des Gaz S.A. v. Falks Veritas Ltd., 1974 Ch. 381 (Ct. App. 1974) (citing Belgische Radio en Televisie v. SABAM, 1974 E.C.R. 51 (1974)).

[94] Articles 85 and 86 attempt to prohibit policies aimed at price fixing, market sharing or the use of a dominant position to control these. Treaty of Rome, *supra* note 88, at Art 85, 86.

[95] It does not include the power: (a) to impose or increase taxation; or (b) to legislate with retroactive effect; or (c) to confer power of sub-delegation, except rules of court; or (d) to

However, "external relations" powers of the European Community refers to the ability of the EC to conclude international treaties and "internal powers to adopt measures in relation to external relations."[96] It is not clear whether agreements that bind the Community but have not been concluded by the Community bind the United Kingdom. Accordingly, the jurisdiction conferred upon courts in order to ensure the uniform interpretation of Community law must accommodate a determination of the scope and effect of the rules of the Berne Convention within the Community, regardless of whether the national court is required to assess the validity of Community measures or the compatibility of national legislative provisions with the commitments binding the Community.[97]

Transposition of a directive into national law does not require that the directive be domestically enacted in the same words. A general legal context could suffice, but only if it ensures the full application of the directive in an adequately clear and precise manner.[98] Furthermore, a planning tribunal, even a government Minister acting as a planning appeal authority, is not an emanation of the State. Consequently, a directive such as Directive 85/337 will not directly bind the tribunal under the principle of vertical direct effect.[99] Thus, a need exists for a faithful transposition of a directive by member states.[100] Faithful transposition is "particularly important where a directive entrusted management of a common heritage to the Member States in their respective territories."[101] The question becomes one of compliance and monitoring of EC directives, which ultimately means action by the Commission or a European Court of Justice.

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create any new criminal offence punishable for more than two years or (on summary conviction) three months, or with a fine up to the maximum figure on level 5 or per day at level 3. *See* An Act to Make Provision in Connection with the Enlargement of the European Communities to Include the United Kingdom, Together with (for Certain Purposes) the Channel Islands, the Isle of Man and Gibraltar, Oct. 17, 1972.

[96] E.L.M. VÖLKER & J. STEENBURGEN, LEADING CASES AND MATERIALS ON THE EXTERNAL RELATIONS LAW OF THE E.U. at v (1985).

[97] *C.f. id.* at 73-74 (This argument was borrowed directly from E.L.M. Völker & J. Steenburgen, substituting the "Berne" Convention for their use of "GATT" and their discussion of GATT cases.).

[98] *Re* Protection Wild Birds: Commission v Netherlands, 2 C.M.L.R. 360 (1993) (following Commission v France 1988 E.C.R. 2243 (1988)).

[99] *See* Browne v. An Bord Pleanala, 1 CMLR 3 (Ir. H. Ct. 1990) (Merrell Dow Manufacturing Ltd. and the County Council of the County of Cork, notice parties).

[100] *See* Commission v. Netherlands, 1987 E.C.R. 3989 (E.C.J. 1987) (considering the European Community Directive 79/409 on the Conservation of Wild Birds).

[101] Commission v. France, 1988 E.C.R. 2243 (E.C.J. 1988).

IX. Intervenors and Litigation Process

In *Stevens v. Secretary of State,*[102] the litigation spawned at least seven interlocutory hearings at the Court of Session. On November 10, 1992, the appellant unsuccessfully sought an order for suspension *ad interim* of the construction order. Furthermore, court costs were awarded in favor of the respondent Secretary of State, the government agency in charge of both the project and the hearing process. More recently, the appellant unsuccessfully sought to amend the pleadings on February 11, 1994, in order to include reference to the Berne Convention. The previous solicitor for the appellant had failed to include this multilateral treaty in the pleadings, and the motion to amend pleadings was rejected. The Court of Session considered this an attempt to lodge a completely new appeal, and it remarked that this should have been done within six weeks of the Enquiry decision. Costs of the motion, to be taxed by the Auditor of the Court, were again awarded against the Appellant. Although this effectively might have signaled the end of the litigation in Scotland, the same is not necessarily true in regards to the European Court of Justice.

Although prejudice to the judicial process began in October 1992, work on the bridge continued. The Scottish Office Minister, Lord James Douglas Hamilton, explained that "[i]t was our conclusion on an assessment of the strength of the appeal that we could not justify the potential cost to the tax-payer of halting the work."[103] In effect, ministerial discretion prejudged the outcome of litigation in which it was involved—arguably, an improper exercise of discretion.

As a consequence, "reasonable alternatives" to the *Skye-EIA* recommendations were never considered by the court. For instance, section 29(1) of the Wildlife and Countryside Act of 1981 (c.69) allows the Secretary of State, after consultation with the Nature Conservancy Council, to make an order prohibiting any operation likely to destroy or damage flora, fauna, or geological or physiological features on designated land. In *North Uist Fisheries Ltd. v Secretary of State for Scotland,*[104] the court held that "likely" referred to that which was probable rather than that which

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[102] The Grounds of the Appeal included averments (1) that the Secretary of State had a powerful financial and prestige incentive to approve the schemes which accorded with the contracts entered into. The Secretary of State had thus disabled himself from being an unbiased decision maker on the matters before him .... (2) The (Public Local Inquiry) Reporter erred in law, by failing to consider all alternatives, (3) the decision proceeded on inaccurate facts (4) the EIA was insufficient concerning the Roads (Scotland) Act 1984, (5) the EIA was insufficient concerning EC Directive 85/337/ and EC law. A fundraising campaign to support the action was launched, however, three appellants withdrew due to fear of personal liability for costs should the appeal be unsuccessful. *See also* Catherine Devaney, *A Sting in the Otter's Tale*, THE GUARDIAN, Mar. 12, 1993.

[103] John Vass, *Bid to Halt Work on Bridge*, PRESS & JOURNAL, Oct. 22, 1992.

[104] 1992 Sess. Cas. 333, at 336J (1992).

was merely possible. Accordingly, the probability of environmental damage has not been properly reviewed.

In Britain, Canada, and other Commonwealth countries following the adversarial system, court costs are awarded in the discretion of the judge to the winning side. Two main types are used: party and party costs based on a periodically revised, but much cheaper tariff, and solicitor and client costs, a more expensive tariff. A court official "taxes" or reviews the file in a separate hearing, apportions hourly rates for appearances and preparation, and then orders reimbursement of disbursements for items like process serving. In the United States, costs are not normally awarded except where provided for by certain statutes, such as civil rights legislation. Moreover, the contingent-fee system has exponentially increased litigation by allowing an attorney to agree to take a proportion of an award if he wins, but nothing if he loses.[105] Contingent fees coupled with the class action have widened the scope of standing (*locus standi*) to sue.[106] Although criticized for encouraging high damages awards, the result provides greater access to the courts.

In the United States and Canada, a contingent-fee procedure is allowed subject to the court's power to modify imprudent arrangements, providing that the agreement itself is entered on the court record. But,

> The tradition of the English common law, the French and German civil law, and the Roman law all agree that it is unethical for lawyers to accept fees . . . . The [British] explained that lawyers would no longer make their cases 'with scrupulous fairness and integrity' [if contingency fees were allowed] . . . . America is the only major country that denies to the winner of a lawsuit the right to collect fees from the loser. In other countries, the promise of a fee recoupment from the opponent gives lawyers good reason to take on a solidly meritorious case from even a poor client."[107]

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[105] However, disbursements are usually awarded whether or not the attorney wins the case.

[106] The Civil Rights Attorneys Fee Awards Act of 1976 (codified at 42 U.S.C.) states that a prevailing party may be awarded attorneys fees from the other side in a suite brought under civil rights statutes or other Federal legislation. The act was a direct response to the Supreme Courts reaffirmation of the "American Rule" that litigants share their own expenses. In Aleyeska Pipelines Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the U.S. Supreme Court refused to extend the common law doctrines of fee shifting beyond the common fund theory, rejecting a decade of liberal development of awarding attorneys fees where litigants, in the public interest, had acted as private attorneys general.

[107] STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 119 (3rd ed.1992) (quoting WALTER OLSEN, THE LITIGATION EXPLOSION (1991)).

In Scotland, a Speculative Action is allowed under a "no win, no fee" situation pursuant to the Law Reform Misc. Provisions Act of 1990, but this is not a contingent-fee procedure. Similarly, no procedure for class action presently exists. Time and resource-intensive agreements between litigants are the only way to select cases as "leading actions, the results of which may be accepted as determining other claims."[108]

Furthermore, the *locus standi* question is often intertwined with the costs issue, and litigants who fail to meet the test for *locus standi* face paying adversarial costs as well as their own. One potential solution to this financial deterrent involves the public funding of intervenors,[109] who regularly utilize complex socioeconomic and financial data to advocate the position of their respective interest groups. However, expansion of the right to be heard by intervenors can cost millions of dollars yet fail to yield an efficient result.

X. Conclusion

Although foreign case law is of limited persuasive value, the Canadian case concerning the Bridge to Prince Edward Island enticingly suggests the need for clearly stated environmental assessment guidelines.[110] Madam Justice Reed of the Federal Court Trial Division concluded that "all the assessments which have been done . . . have addressed the bridge project at the concept level . . . . I think the applicant is entitled to a s.12 assessment undertaken with respect to the specific design of the bridge which SCI plans to build before irrevocable decisions are taken."[111]

> Much of the impetus behind both assessments and audits is the desire to anticipate, assess and avoid environmental problems. To this end, it makes sense to make decisions about potential impacts and mitigative measures before proceeding. But try as we might, we can never know everything before proceeding. Nor would we want to know everything . . . the costs are simply too high and the likely benefits are too low. It makes sense therefore, to conduct a more limited assessment or audit of potential environmental impacts and a more detailed assessment of real or actual environmental impacts. This philosophy is reflected in the growing demand that environmental assessment include a monitoring component that involves those who must live with the impacts.[112]

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[108] McInally v. John Wyeth & Brother Ltd., 1992 S.L.T. 344 (Outer House 1991).

[109] *See* A.J. Black, *Environmental Impact Assessment and Energy Exports*, 16 LOY. L.A. INT'L & COMP. L.J. 799 (1995).

[110] *See* Friends of the Island, Inc. v. Canada 102 D.L.R. 4th 696 (Fed. Ct. 1993).

[111] *Id.*

[112] Friends of the Island, Inc. v. Canada 102 D.L.R. 4th 696 (Fed. Ct. 1993) (quoting with

Unfortunately, the Skye Bridge case illustrates the failure of European-driven EIA and the recourse by protesters to the political forum. Petitions relating to the EIA-Berne Convention issue were presented to the Committee of Petitions of the European Parliament. As a consequence, the MEP's and the Commission sought more information regarding full compliance of EU Environmental Impact Assessment Directive.

The EIA-approval process should be proportional to the desired end—in this case, construction of the Skye Bridge after a thorough screening. Proportionality is ancillary to the principle of subsidiarity because the latter embodies the goal of "minimum interference."[113] The proportionality test requires that the means must be rationally connected to the objective and not be arbitrary, unfair, or based on irrational considerations.[114] But the EIA process has been broken up to fit the narrower, formalistic, and more mechanistic legal process and the larger conflicting governmental agendas.[115]

Ironically, one of the recommendations for mitigation of the impact of the Skye crossing on Eilean Bàn was the potential creation of a museum which "could house an exhibition of Gavin Maxwell material, lighthouse history and equipment, and a record of the development of the crossing project, together with a model of the bridge."[116] Yet the EIA process seems to have been marked by cynicism, if not hypocrisy, concerning environmental assessment objectives. The £175 price of the *Skye-EIA* report—or £250 glossy version—has contributed to an asymmetry of information and lack of public consultation. The limited nature of the Public Inquiry, the premature choice of the developer, and the failure to conduct a further EIA impugned the process.

The court challenge raises serious questions about the barriers facing environmentally related public-interest litigation. "Given London's reputation for closed government,"[117] the "explicit willingness on the part of Government ministers to deceive the public" is not new nor limited to environmental matters. The barriers to

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approval, D. Paul Emond, *The Greening of Environmental Law*, 36 McGILL L.J. 742, 757 (1991)).

[113] *See* Internationale Handelsgesellschaft mbH, 1970 E.C.R. 825; *see also* Re Disposable Beer Cans: Commission v Denmark, 1989 CMLR 619.

[114] *See* Regina v. Oakes [1986] 1 S.C.R. 103, 138-39.

[115] Rationality "is simply a method of being open and curious, and of relying on persuasion rather than force." Richard Rorty, *Is Natural Science a Natural Kind? in* CONSTRUCTION AND CONSTRAINT: THE SHAPING OF SCIENTIFIC RATIONALITY 49, 71 (Ernan McMullin ed. 1988).

[116] Skye-EIA, *supra* note 1, at 47.

[117] ALAN FRIEDMAN, SPIDER'S WEB: BUSH, SADDAM, THATCHER AND THE DECADE OF DECEIT 276-78 (1993).

public interest litigation involve the legal process which needs to be streamlined as well as the abuse of process by government in the decision-making process.

In particular, the Scottish Office has placed political pressure on the National Trust for Scotland, straddling the boundaries between executive and judicial functions. Indeed, a presumption of shared confidences exists when a substantial relationship exists between the subject matter of prior and present representations.[118]

The rules regarding the award of costs inhibit environmentally related litigation. Therefore, public interest groups litigate less successfully than private individuals. Because EIA is a nascent concept in Britain, judicial clarification is needed concerning its substantive and procedural scope. Although the legal process thwarts a proper appeal concerning the merits of the EIA, reduction of the transaction costs associated with EIA-public interest litigation requires that substantive changes in the law be accommodated by procedural mechanisms that facilitate rather than inhibit the process.

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[118] *Cf.* Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983) (concerning conflicts of interest that can disqualify an attorney).