

The Implementation of the WFD in France and Spain: Building Up the Future of Water
in Europe

by

Marta Giménez-Sánchez LL.B., University of Barcelona, 2003

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Supervisory Committee

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Co-Supervisor

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Abstract

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The Water Framework Directive (Directive 2000/60/EC) is an innovative piece of legislation aimed at harmonizing Water Policy among the 27 Member States. This Directive, the reading of which may appear quasi-revolutionary due to its territorial and material scope, is a new policy instrument with, as of yet, still ongoing implementation. The final deadline for the complete implementation of the Water Framework Directive is 2015, when the *good ecological status* of the water bodies in the European Union should have been achieved. The purpose of this study is to analyze the development of the implementation on three essential aspects of the Directive: the transposition, the creation of the administrative authorities, and the public participation in the elaboration of the River Basin Management Plans. My thesis has two main research questions: 1) Have France and Spain implemented the WFD correctly? 2) Does the pervasive theory of the Mediterranean Syndrome apply to my study cases? In order to answer the first question, I use the scoreboard method to assess of the correctness of implementation of the three essential aspects of the Directive mentioned above, complemented by an examination of the domestic dynamics that shaped the implementation categorized into different modes of governance. To address the second question the two case studies I have chosen will test the doctrine of the northern leaders and southern laggards as based on institutional

culture. The doctrine of the Southern Laggards (also known as the Mediterranean Syndrome doctrine) advocates that the Southern/Mediterranean states are doomed to fail implementing EU environmental policy. In my thesis, I address this doctrine by using a practical case study: the comparison of the implementation of the Water Framework Directive between France and Spain. The essence of these arguments is rooted in the mainstream doctrine of *the goodness of fit*. That is, a Directive is more likely to be correctly implemented where there is a matching institutional framework. In order to use this theory as a departure point to examine the hypothesis of likelihood of correct implementation of the WFD by France and Spain, I selected three main institutional features that are hallmarks in France and Spain and also practically opposed: political centralization versus decentralization, democracy and participation versus totalitarianism, and the status of economic development of each EU Member. I use them as indicators to determine the degree of fit of France and Spain's institutional frameworks with the purpose, the policy style and the institutions required by the WFD.

I conclude with highlighting the importance of this study for the contribution that it may make to two contemporary issues: the current Eastern/Western divide in the EU (can the doctrine of the Northern/Southern states usefully be extrapolated to the Western/Eastern Members?) and the thorny economic situation of the EU today. At the time of finishing writing this thesis, all the fingers point to Greece, immersed in a striking public debt that has shaken the rest of the Mediterranean countries: is the Mediterranean Syndrome attacking again?

Table of Contents

Contents

Supervisory Committee	ii
Abstract	iii
Table of Contents	v
List of Tables	vii
List of abbreviations and acronyms	viii
Acknowledgments.....	x
Dedication	xi
Chapter 1. The Implementation of the WFD by France and Spain: Purpose, Scope, Methodology, and Applicability	1
1. Introduction to the WFD	1
2. Topic and purpose.....	2
3. Methodology	4
3.1. Introduction to the case studies and applied theories	4
3.2. Theoretical framework.....	6
3.2.1. Assessment of the correctness of implementation	6
3.2.2. Analysis of domestic institutional dynamics: The theories of modes of governance	7
4. Scope and limitations of this study	9
5. Applicability and importance of this study.....	11
Chapter 2: Theoretical Framework: Assessing Correctness of Implementation and Analyzing Domestic Institutional Dynamics	13
1. Introduction.....	13
2. Theories on assessment of implementation	14
3. Measuring the likeliness of successful implementation of the WFD by France and Spain	15
3.1. Introduction to the importance of the study of implementation of EU water Policy: The implementation gap	15
3.2. An overview of the evolution of the EU implementation scholarship.....	17
3.3. The likeliness of France and Spain implementing the WFD correctly.....	18
4. Definition of correct transposition and methodology of the analysis	22
5. Theory about modes of governance.....	28
Chapter 3. The WFD and the CIS Benchmarks for Evaluating Correctness of Implementation	32
1. Introduction.....	32
2. The Water Framework Directive and the harmonization of EU water policy (aim, nature, content, and scope of the WFD)	33
3. Transposition into national law, creation of the River Basin Districts (RBDs) and Competent Authorities (CAs), and public participation in River Basin Management Plans (RBMPs).....	37
4. The CIS: A joint implementation strategy	39
5. Benchmarks for the assessment of implementation	42

Chapter 4. The Implementation of the WFD in France	50
1. Introduction	50
2. Water management in France: The institutional framework.....	51
2.1. Evolution of the water institutional framework in France	51
2.2. Analysis of the institutional framework: Centralization, democracy and participation, and economic development	56
3. The hypothesis of likeliness of correct implementation: Determining the degree of fit	59
4. Transposition of the WFD in France	61
4.1 The transposition of the WFD by Act 2004-338	61
4.2. Theories of governance and policy-making: The transposition of the WFD in France from a political perspective.....	64
5. Creation of the RBDs and the CAs	66
6. Public participation in the elaboration of the RBMPs	68
7. Conclusion about the implementation of the WFD in France.....	70
Chapter 5. The Implementation of the WFD in Spain.....	73
1. Introduction	73
2. Water management in Spain: The institutional framework	74
2.1. Evolution of the water institutional framework in Spain.....	74
2.2. Analysis of the institutional framework: Decentralization, totalitarianism, and economic development.....	79
2.3. The hypothesis of the likeliness of correct transposition and application: Setting the degree of fit.....	83
4. Transposition of the WFD in Spain.....	85
4.1. Transposition of the WFD by <i>Act L62/2003</i>	85
4.2. Theories of governance and policy-making: The transposition of the WFD in Spain from a political perspective	88
5. Creation of the RBMPs and CAs	90
6. Public participation in the elaboration of the RBMPs	92
7. Conclusions about the implementation of the WFD in Spain.....	98
Chapter 6. Comparative Analysis and Conclusions	102
Bibliography	112
Appendix.....	122
Appendix I. Interviews with experts on the implementation of the WFD.....	122

List of Tables

<i>Table 1.</i> Taxonomy for the assessment of implementation of EU directives	25
<i>Table 2.</i> Elements of the content of an EU directive	27
<i>Table 3.</i> Deadlines for the transposition of the WFD	37
<i>Table 4.</i> National actors involved in the implementation of the Water Framework Directive.....	55
<i>Table 5.</i> National actors involved in the implementation of the Water Framework Directive.....	76
<i>Table 6.</i> Hypothesis of the likeliness of implementation of the WFD by France.....	103
<i>Table 7.</i> Data, analysis and score (France)	103
<i>Table 8.</i> Modes of governance that have shaped the implementation of the WFD in France.....	103
<i>Table 9.</i> Hypothesis of the likeliness of implementation of the WFD by Spain	104
<i>Table 10.</i> Data, analysis and score (Spain)	104
<i>Table 11.</i> Modes of governance that have shaped the implementation of the WFD in Spain	104
<i>Table 12.</i> Comparative analysis of the implementation of the WFD in France and Spain	105

List of abbreviations and acronyms

ACA – *Agència Catalana de l'Aigua* (Catalan Water Agency)

AI – Access to Information Directive

AN – *Assemblée nationale* (French National Legislature)

BOE – *Boletín Oficial del Estado* (Official State Bulletin – Spanish National Official Journal)

CA – Competent Authority

CE – *Constitución Española* (Spanish Constitution)

CENTA – *Centro de Nuevas Tecnologías del Agua* (Centre for New Water Technologies)

CF – *Constitution Française* (French Constitution)

CH – Confederaciones Hidrográficas (Water Confederations)

CIS – Common Implementation Strategy

COM – Commission of the European Communities/ European Commission

DDAC – *Diverses dispositions d'adaptation au droit communautaire* (Miscellaneous Provisions of Adjustment to Community Law)

DG – Directorate-General

DOGC – *Diari Oficial de la Generalitat de Catalunya* (Official Journal of the Generalitat of Catalonia)

DOM – Département d'outre-mer

EC – European Community

ECJ – European Court of Justice

ECSC – European Coal and Steel Community

EEB – European Environmental Bureau

EIA – Environmental Impact Assessment

EU – European Union

GD – Guidance Document

GDP – Gross Domestic Product

ICPDR – International Commission for the Protection of the Danube River

IU – *Izquierda Unida* (United Left)

J.O. – *Journal officiel de la République française* (Official Journal of the French Republic)

NGO – Non-Governmental Organization

OECD – Organization for Economic Co-operation and Development

PP – *Partido Popular*

PSOE – *Partido Socialista Obrero Español*

RBD – River Basin District

RBMP – River Basin Management Plan

SAGE – *Schéma d'aménagement et de gestion des eaux* (Plans for Water Management)

SDAGE – *Schéma directeur d'aménagement et de gestion des eaux* (Directive Plans for water management)

TEC – Consolidated Version of the Treaty Establishing the European Community

TRLA – Texto Refundido de la Ley de Aguas

UMP – *Union pour un mouvement populaire*

WFD – Water Framework Directive (Directive 2000/60/EC of the European Parliament and of the Council)

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I would also like to thank Prof. Deborah Curran, who took over as my co-supervisor from the Law Faculty after my project was already half crafted. Thank you for your patient assistance and your insightful criticism.

Finally, I want to thank all the participants in the interviews who kindly collaborated with me in the elaboration of this thesis.

Dedication

I dedicate this thesis to my parents for all their patient support all along the way. I also want to dedicate my work to Dr. Amy Verdun, because she has always been supportive, in the good and in the bad times.

I would like to make collective mention of my friends, who have been by my side cheering me on every day. This thesis would not have been completed without them. In particular, I want to thank Johnny Lu, whom I cherish and who greatly helped me in the last and crucial moments of this project. Thank you, Johnny, for your unconditional help and support as I completed my goal.

Finally, I would like to dedicate this thesis to all the international students who are away from their home towns to pursue research, and especially to all the non-native speakers in their hosting countries, who have to deal with culture and language challenges in their everyday lives. I hope that your experience is as enriching as mine has been.

To all, I want to say thank you for teaching me the most valuable lesson that I learned while working on this project: “No matter what, one step at a time”.

Chapter 1. The Implementation of the WFD by France and Spain: Purpose, Scope, Methodology, and Applicability

1 Introduction to the WFD

The Water Framework Directive (WFD) (Directive 2000/60/EC)¹ is an innovative piece of legislation aimed at harmonizing Water Policy among the 27 Member States. This Directive, the reading of which may appear quasi-revolutionary due to its territorial and material scope, is a new policy instrument with, as of yet, ongoing implementation. The final deadline for the complete implementation of the Water Framework Directive is 2015, when the *good ecological status*² of the water bodies in the European Union should have been achieved. The purpose of this study is to analyze the development of the implementation on three essential aspects of the Directive: its transposition, the creation of the administrative authorities, and the public participation in the elaboration of the River Basin Management Plans. The methodology used in this analysis is twofold: I use the scoreboard method to assess of the correctness of implementation of the three aspects of the Directive mentioned above, complemented by an examination of the domestic dynamics that shaped the implementation categorized into different modes of governance. Taking into account these findings, the specific aim of this study is to assess implementation of the Directive up until 2009 and to offer suggestions as to how to improve the process in the future.

¹ Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, [2000] O.J. L 327/1.

² The definition of “Good ecological status” is still highly controversial; however, as a basic reference we can use the stage when water denotes the presence of certain quality conditions defined in Annex V of the WFD for each type of water (art. 2(22) and Annex V WFD).

2. Topic and purpose

The topic of my thesis is the implementation of the Directive in France and Spain.

The purpose of my analysis is twofold: specifically, to determine whether France and Spain have correctly implemented the WFD in order to provide suggestions for improving the effectiveness of this Directive; and, more generally, to contribute to the literature on implementation by testing the mainstream hypothesis of the literature of EU environmental law and policy implementation, that is the Mediterranean Syndrome (and Southern Problem) and the doctrine of the goodness of fit (broad target).

My first goal is to assess whether France and Spain have correctly implemented this Directive that deals with one of the most regulated areas of EU Environmental Policy, namely Water Policy. In particular, water management is the most standardized facet of EU Environmental Policy. The WFD aims to create a common framework for Water Policy among all the member states (and it also applies to other non-member countries, such as Norway). My goal is to assess the implementation of the Directive in France and Spain up until 2009. Regarding the implementation of the WFD, it is important to bear in mind that the Directive establishes several stages for transposition and implementation, which run from 2003 to 2015; therefore, this assessment remains a work in progress at the time of writing this thesis. Since the WFD is very broad and the deadline for the implementation of some of the policies is still a few years away, I focus my thesis on the examination of three main issues: the transposition of the WFD, the creation of the River Basin Districts (“RBDs”) and the Competent Authorities (“CAs”),

and public participation in the elaboration of the River Basin Management Plans (“RBMPs”).³

As for my second purpose, more generally I seek to assess whether the theories of the Mediterranean Syndrome/Southern Problem apply to these case studies. I ask whether Southern Members are doomed to fail in implementing EU environmental legislation using the WFD as a significant example. The answer to this puzzle will have some implications for current EU issues, as I state in section 5 of this introduction and in the final conclusions of my thesis.

The theories of the Southern Problem/Mediterranean Syndrome are mainly rooted in the doctrine of the *goodness of fit*: the Southern states do not perform well because their administrative/institutional frameworks and political cultures do not fit with the general aim, style and institutions of centralized EU Environmental Policy. To challenge this theory, which is dominant in the implementation literature, I test the hypothesis of likelihood of implementation of the WFD by France and Spain using the arguments put forward in the Southern Problem/Mediterranean Syndrome. I use the following indicators to characterize the two Member States used in the case studies: centralization/decentralization, more/less developed economy, and democracy/totalitarianism. The degree of fit would suggest that, according to the doctrine of the Mediterranean Syndrome, France will perform significantly better than Spain implementing the WFD. This hypothesis will be tested and analyzed in Chapter 6.

³ In Chapter 3, section 3, I offer an explanation of the selection of these three issues.

Finally, to frame my two purposes in research question format: 1) Have France and Spain implemented the WFD correctly?; 2) Does the theory of the Mediterranean Syndrome apply to these case studies?

3. Methodology

3.1. Introduction to the case studies and applied theories

1) Have France and Spain implemented the WFD correctly?

This is an assessment question that I respond to with an analysis of empirical data. The answer is a value, not a YES/NO response to a hypothesis. I respond to this question in the individual analysis of each Member State in chapters 4 and 5, and in the data comparison between France and Spain in chapter 6. To answer this question, I take two steps. First, I state what I consider “correct implementation” taking on the definitions in the implementation literature. With this conceptual framework, I elaborate a scoreboard where I place the empirical data obtained during my research. Then, I use the theory of governance to complement the scoreboard. The governance theory serves me also as a conductor from research question 1 to research question 2.

2) Does the theory of the Mediterranean Syndrome apply to my study cases? Does the goodness of fit theory apply?

This is a hypothesis testing question; therefore, the answer is YES/NO. I formulate the hypothesis in chapters 4 and 5 respectively in sections 3: “Likelihood of Implementation”, and I respond to the question in Chapter 6. I use indicators about the Member States, centralization/decentralization, more/less developed economy, and democracy/totalitarianism, to show the medium-high degree of fit of France and the medium-low degree of fit of Spain with the WFD.

Regarding the case studies, I have chosen France and Spain because these two countries are different in a number of ways. These two EU member states present distinctive historical and institutional features that make such a comparative study highly interesting. France is the cradle of modern democracy, and a founding member of the European Communities. France is a major industrial power and a very centralized state. By contrast, Spain has had totalitarian governments for centuries, either absolute monarchies or dictatorships, interspersed with brief periods of parliamentarianism until 1978, when the current parliamentary monarchy was established by the *Constitution*. Spain has historically been at the rear of the western European process of industrialization, and it only joined the European Communities in 1986, 35 years after the *Treaty of Paris* was signed by France, West Germany, Italy and the Benelux states.⁴ Furthermore, since 1978, Spain has been a politically decentralized state: it became a state of Autonomous Communities under the present *Spanish Constitution* (1978).⁵ This means that each of the Autonomous Communities has a parliament and a government that passes regulations, and that the jurisdiction of the different parliaments depends on a recognized distribution of powers. These different historical, political and economic contexts in France and Spain make it very interesting to explore how these countries are operating to achieve the same environmental goals under the mandate of the Directive.

Since I focus my study on an institutional perspective, I choose as my point of departure for my institutional analysis the theory of *the goodness of fit*. According to this theory, the member states that have an institutional framework that matches EU policies

⁴ *Treaty of Paris establishing the European Coal and Steel Community*, France, West Germany, Italy, Belgium, Luxembourg and the Netherlands, 18 April 1951, 261 U.N.T.S. 140.

⁵ *Constitución Española de 1978*, BOE (*Boletín Oficial del Estado* – Official State Bulletin) 29 December 1978, arts. 2, 137, 143-158.

and legislation are more likely to implement them correctly. Conversely, the countries that have a mismatched institutional framework with the EU are not likely to be successful in implementing EU policies and legislation. In the cases of France and Spain, I selected the three main historical and institutional aspects mentioned above (democracy/totalitarianism, centralization/decentralization, and high/medium-small economy), which are the main institutional features of their respective political and administrative systems. In the case of the WFD, France's institutional framework presents a closer match to the aim, policy style, and institutions required by the WFD.⁶ In addition, the choice of these two case studies perfectly aligns with the literature about environmental leaders and laggards, in particular, with the dominant doctrines of the Southern Problem and the Mediterranean Syndrome.⁷ According to the geographical criteria of this theory, France, a northern country, falls under the category of environmental leader, while Spain, as a southern and Mediterranean state, is seen as an environmental laggard. Therefore, following this notion, France should be expected to implement the WFD successfully, whereas Spain should not. In my study, I address this assumption by analyzing empirical data about the implementation of the Directive in France and Spain.

3.2. Theoretical framework

3.2.1. Assessment of the correctness of implementation

There are two different ways to approach a study assessing compliance (in this case, correctness of implementation): to evaluate non-compliance or on compliance. In this study, I focus on compliance. First, I will review the literature about the

⁶ For further details, see Chapter 2, section 3.3 and sections 3 of Chapter 4 and 5.

⁷ For further details, see Chapter 2.

implementation of EU policy and legislation with the purpose of determining a cohesive terminology for my analysis. In particular, I will address political science studies about EU social and environmental policies over the last 20 years.⁸ Further, in order to determine a theoretical framework for the study of correct implementation, I will review the traditional sources of information for compliance studies, such as the reports of the European Commission and the relevant case law. I will complement these sources with analysis of the documents issued by the Common Implementation Strategy (“CIS”), which consists of the meetings of the Water Directors of the 27 member states plus Norway and define common goals for the implementation of the WFD.⁹ Finally, I will present additional data from my interviews with experts on the process of implementation of the WFD.¹⁰ In my conclusion, using all the data collected, I will elaborate a scoreboard that will help me assess the correctness of WFD implementation by France and Spain.

3.2.2. Analysis of domestic institutional dynamics: The theories of modes of governance

After the elaboration of the scoreboard for the assessment of the implementation of the WFD by France and Spain, I will explain the domestic dynamics that have shaped this process by using Tömmel and Verdun’s theory of modes of governance. I will consider, following some innovative implementation scholars like Tanja Börzel,¹¹ that the

⁸ For further details about the importance of these currents of literature, see Chapter 2, section 1.

⁹ For further details, see Chapter 3.

¹⁰ See Annex I, WFD.

¹¹ “New implementation scholars” is a label that I use to group in one category those scholars who reject the monistic EU level perspective on implementation studies. Although they also take different approaches to implementation, these scholars share common ground, namely, the emphasis on a multi-perspective approach, highlighting the importance of domestic politics in EU policy implementation. Among these, I would like to highlight two major relevant studies: Tanja Börzel, *Environmental Leaders and Laggards in Europe: Why There is (Not) a “Southern Problem”* (Aldershot, UK: Ashgate, 2003) [Börzel]; and Gerda

assessment of implementation through a scoreboard may be an indicator to assess implementation but it needs to be complemented by other instruments. Admittedly, the elaboration of a scoreboard does not tell the whole story about all the relevant facts caused by the domestic dynamics of the implementation process. For example, the fact that Spain has transposed the WFD in an essentially correct manner according to the scoreboard does not address why Spain transposed the WFD as a last-minute amendment of the law accompanying the *Budget Act*. This piece of information is, nevertheless, very relevant when drawing conclusions about the implementation of the WFD.

Therefore, I use the theoretical framework on EU modes of governance created by Tömmel and Verdun¹² to explain the domestic dynamics that have shaped the implementation of the WFD in France and Spain, and point out examples of pathologies under a governance approach. This theoretical framework is an up-to-date approach to theories of modes of governance regarding different policies in the EU which categorizes the different “trends” in policy-making as follows: hierarchy, negotiation, competition, and cooperation.¹³ I will use these “labelled containers” to systematize the dynamics of implementation in the transposition of the WFD. As a result, I will be able to explain, for instance, that the transposition of the WFD in Spain was carried out through hierarchy (by the central government, which acted without consulting any other actors) and competition (by some Autonomous Communities, which tried to be first-movers in order

Falkner, *et al.*, *Complying with Europe: EU Harmonization and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005) [Falkner]. For more detail about Börzel’s work, see Chapter 2.

¹² Ingeborg Tömmel & Amy Verdun, *Innovative Governance in the European Union: The Politics of Multilevel Policymaking* (Boulder, CO: Lynne Rienner, 2009) [Tömmel & Verdun].

¹³ *Ibid.*, at. 9-23.

to expand their powers as much as possible).¹⁴ In addition, I consider this systematic classification to be helpful for my goal of connecting the top-down view of implementation of EU environmental policy (looking at the EU Commission's indicators of performance, which have been, up until now, the only instruments that implementation scholars have had to approach compliance from a top-down, hierarchical outlook) to the dynamics of implementation in the domestic realm. This theory will help me to show on a scoreboard the relationship between the institutional features and the correctness of implementation.

4. Scope and limitations of this study

The main challenge in writing this thesis has been to keep it within its specified scope. Studies about implementation of EU environmental policy have attracted the attention of several EU scholars in the fields of both law and political science.¹⁵ As a result, the approaches are numerous, and often overlap or leave gaps. For example,

¹⁴ For an exploration of these dynamics in more detail, see Chapter 5: "The Implementation of the WFD in Spain".

¹⁵ Some of the foremost thinkers in on the EU implementation scholarship include Antonio La Spina and Giuseppe Scortino "Common Agenda, Southern Rules: European Integration and Environmental Change in the Mediterranean States" in *European Integration and Environmental Policy*, J.D. Liefferink, P.D. Love & A.P.J. Mol, eds. (London: Bellhaven, 1993); Geoffrey Pridham & Michelle Cini. "Enforcing Environmental Standards in the European Union: Is There a Southern Problem?" in *Environmental Standards in the EU and Interdisciplinary Framework*, M. Faure, J. Vervaele & A. Weale, eds. (Antwerp: Maklu, 1994) at 251; Tanja Börzel, *Environmental Leaders and Laggards in Europe. Why There is (Not) a 'Southern Problem'*. Ashgate: Aldershot, England, 2003 (see more works written by Tanja Börzel in the bibliography of this thesis); Gerda Falkner, Miriam Hartlapp & Oliver Treib (see references in the bibliography); Andrew Jordan & Ducan Liefferink, eds. *Environmental Policy in Europe: The Europeanization and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005.); Cristoph Knill & Ducan Liefferink., *Environmental Politics in the European Union: Policy-Making, Implementation and Patterns of Multi-Level Governance* (Manchester: Manchester University Press, 2007); Maria Lee, *EU Environmental Law: Challenges and Decision-Making* (Portland, OR: Hart, 2005). It is also worth mention recent outstanding scholars, such as Carina Sprungk, junior professor at Free University of Berlin whose PhD dissertation I rely on for the study of the implementation of the WFD in France. In any case, this is not an exhaustive list, but simply a brief summary of some of the most salient scholars that undertake research on EU legislation and policy implementation. For more names and a reference literature see the bibliography of this thesis at 111.

merely establishing a cohesive terminology to use throughout this study has been a challenge, since there is no univocal framework of reference and, thus, as a researcher, I had to investigate the different uses of the words “compliance”, “application”, “implementation”, etc., and choose the most suitable set of terms for this thesis. The same applies to different approaches that may be taken in studying the implementation of a piece of EU environmental legislation. In this study, I opted for an institutional approach because I thought it could contribute to comparing and contrasting the many assumptions (e.g. theory of the goodness of fit, Mediterranean Syndrome) that are preeminent and pervasive among EU environmental implementation theorists and that can be counter-productive if fully taken for granted.

My thesis uses a two-fold, multidisciplinary approach. That is, I provide a legal analysis as well as an examination from a political science perspective. Admittedly, the political component takes over the legal, if defined *stricto sensu*. While the reader should bear in mind that my focus is the implementation of a piece of EU environmental legislation, it should be noted that the WFD is a Directive with major political implications. Finally, I should clarify that my analysis is not intended to be mathematically exact. Hence, the scoreboard that I create is based on the following semi-abstract concepts about when or how well each Member State undertook the required steps required by the Directive: timely, almost timely, significantly delayed; completely correct, essentially correct, and significantly incorrect.¹⁶ Moreover, the separate analyses of the implementation of the WFD in France and in Spain are not exactly parallel. In each, I examine analogous aspects of implementation in each country as well as some

¹⁶ See Chapter 2.

additional features of both countries that are more relevant in each case. Finally, the comparative analysis and the conclusions offer key points of connection for comparison, a final “balance sheet” of the implementation of the WFD in France and Spain, and suggestions for future improvement.

5. Applicability and importance of this study

The importance of this study is primarily based on its contribution to the literature on implementation of EU environmental policy. The study of implementation, especially in the environmental field, has attracted the particular attention of scholars in law and political science, given that environment has been a domain earning poor marks, according to institutional reports, since it became an area of influence of EU policy.¹⁷ To date, the literature about the WFD has not yet included a comparative case study that assesses and compares the correctness of WFD implementation by two member states. Similarly, studies have not previously used the theory of modes of governance to explain how implementation has developed. Therefore, I expect that my study will make a contribution to implementation scholarship through the empirical analysis of the implementation of the WFD by France and Spain.

My study should also help to shed light on two current issues of high relevance for the EU: the “new” perceived east/west divide and the current difficult financial situation of the EU today. With the last accession and new candidate countries waiting to become members, the differences between the west and the east are exacerbated. The different institutional history and economic situations of the countries which years ago fell to the east of the “Iron Curtain” are likely to attract similar criticisms as the Southern

¹⁷ This low performance in the implementation of EU policies, particularly noticeable in the area of environmental policy and legislation, has been named “the implementation gap” by policy analysts. For more details about the implementation gap, see Chapter 2, section 2.1.1.

Problem. With my study, I hope to contribute to defending a complex Europeanization approach that takes into account much more than geographical barriers when analyzing implementation. In addition, I believe my thesis will contribute to the evolution of the literature on the Southern Problem at a time when all fingers point to Greece, blaming it for the delicate economic situation of the European Union. Today, the EU is on guard and putting the Mediterranean countries into quarantine. The broader policy question is whether such a reaction is justifiable given the experience of France and Spain in implementing the WFD.

Chapter 2: Theoretical Framework: Assessing Correctness of Implementation and Analyzing Domestic Institutional Dynamics

1. Introduction

The purpose of this chapter is to establish a theoretical framework for the analysis of the implementation of the WFD. This chapter is divided into three parts: introduction, theories about assessment of implementation, and theory about modes of governance.

This division can be rationalized as follows:

In section 2, I will review the literature concerning implementation of EU policy and, in particular, the scholarship about social policy and environmental policy. I draw on this literature because it deals with implementation deficits that are especially remarkable in these areas.¹⁸ Prolific research has been carried out in these fields in order to understand the problems with implementation and to look for solutions. In this chapter and for the purposes of this study, I define “correctness of implementation” in order to provide a framework to elaborate a scoreboard to rate the data obtained through my research.

Second, I state the hypothesis of the likeliness of France and Spain implementing the WFD correctly taking into account their respective institutional frameworks.¹⁹

¹⁸ In section 3.1 of this chapter, I show how the area of social policy is also one of the top four that ranks higher regarding the implementation gap. I retrieved this information from the First Environmental Policy Review, which I cite there as well. In addition, I consider this one of the works of the social policy implementation scholarship that is particularly relevant to my study; that is, Gerda Falkner, et al., *Complying with Europe: EU Harmonization and Soft Law in the Member States*, supra note 11. In this book, Chapter 1 and 2 offer an excellent comprehensive summary of the EU implementation scholarship in general, not only targeted to social policies, that I used here.

¹⁹ In Chapter 3, I review a series of indicators that will help me determine benchmarks for implementation, such as EU Commission reports, guidance documents and working programs issued from the Common Implementation Strategy, and empirical findings from interviews carried out with experts on the implementation of the WFD.

In section 3, I will use governance theory to connect the reviewed literature to the domestic dynamics of implementation of the Directive in France and Spain. As discussed in Section 2, new implementation scholars²⁰ are highlighting the importance of studying implementation from a domestic (national, regional and local) perspective.²¹ They argue that implementation is a complex process that cannot be understood simply through statistics or a snapshot evaluation.²² Thus, I draw on governance theory as an essential tool for understanding and helping to explain how France and Spain have implemented the WFD; that is, the theory of modes of governance will connect the theoretical hypotheses drawn from the literature on implementation (doctrine of the goodness of fit and the Southern Problem/Mediterranean Syndrome) to my empirical findings.²³

2. Theories on assessment of implementation

In this section, I review the literature on EU implementation in order to set out a hypothesis of likeliness of implementation success for my case studies and to determine a definition for correctness of implementation. In particular, I locate the empirical studies in political science in the fields of EU social and environmental policy over the last 20 years. I use the EU implementation literature to craft a preliminary hypothesis about how likely it is that the implementation of the WFD will be smooth. In order to test this

²⁰ *Supra* note 11.

²¹ See Chapter 2, section 2.1.2.

²² “While these more recent contributions [referring to studies building on the misfit-centred approach, but considerably expanding this perspective] have considerably improved our understanding of Europeanization and implementation processes, EU scholarship is still missing a study that uses an encompassing theoretical approach which also takes into account the findings of the first wave of implementation studies [Europeanization, and goodness-of-fit-based], as well as the insights of the two strands of the literature on law enforcement and on public-private interaction patterns [...]” Falkner, *supra* note 11 at 17.

In a similar vein, Börzel examines implementation issues that go beyond the fit-misfit picture: “How can we explain variations in member-state compliance with EU environmental law, which cut across the alleged North-South divide? Why do member states successfully implement some policies while leaving others insufficiently transposed, applied and enforced?” Börzel, *supra* note 11 at 1.

²³ See Chapters 4 and 5.

hypothesis in Chapters 4 and 5, I develop here a theoretical framework that defines “correct implementation”. I will apply this definition, and the specific implementation criteria relevant to the WFD,²⁴ to the empirical data regarding the implementation of the WFD.²⁵ Then, I will determine whether France and Spain have been implementing the WFD correctly so far.²⁶ Therefore, the definition of correct implementation is the key element of the analysis; it will help me test the validity of the hypotheses drawn from the EU implementation scholarship.

3. Measuring the likeliness of successful implementation of the WFD by France and Spain

3.1. Introduction to the importance of the study of implementation of EU water Policy: The implementation gap²⁷

In 2007, the European Commission adopted the first Environmental Policy Report,²⁸ aimed at evaluating the progress of the European Union in fulfilling the goals set by EU environmental policy, particularly by the 6th Environmental Action Program.²⁹ The review concludes that the establishment of framework legislation has been a success. In contrast, the implementation of environmental policies lags behind the success of the

²⁴ See Chapter 3, at 43-51.

²⁵ See Chapters 4 and 5.

²⁶ For the specific aspects of the WFD that are being examined see Chapter 3 at 38.

²⁷ For a different viewpoint about the existence of the implementation gap, see Börzel “Non-compliance in the European Union: Pathology or Statistical Artifacts?” Börzel, *supra* note 11 at 7-21. Basically, she explains that with the sources available (data issued from infringement proceedings), it is impossible to determine whether there actually exists an implementation gap in EU Environmental Policy and legislation or, at least, to picture the exact dimension of it: “To sum up, the infringement data do not allow us to make any statements about the absolute level of non-compliance in the European Union. We can use the data, however, for comparing relative levels of non-compliance across time, policy sectors, and member states.” Börzel, *supra* note 11 at 7-21.

²⁸ 2007 Environment Policy Review. Communication from the Commission to the Council and the European Parliament. COM(2008)409. Luxembourg: Office for Official Publications of the European Communities, 2008.

²⁹ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme. OJ L 242, 10.9.2002, p. 1–15.

framework legislation. One example of this lack of implementation is that, at the end of 2007, there were 479 open infringement cases – 22 % of the EU-total – concerning EU environmental legislation.³⁰ Among the EU policies with the most pronounced deficits of implementation – namely, integration of the common market, consumer protection, social policy, and environment – the environment ranks the worst on the implementation scale.³¹ As a result, implementation of EU environmental law and policy is today at the centre of attention among EU analysts. The process of implementation in the environmental sector, rather than being automatic, is extremely complex, and it has been studied with particular attention by lawyers and political scientists from the 1990s onwards.³² The evolving scholarship on implementation shows that a significant number of implementation studies have been devoted to the field of EU Environmental Policy.³³ Studying implementation (particularly in the most compromised policy areas, such as EU Environmental Policy) is important because, in the end, the ability to implement environmental policy affects the core credibility of EU countries; a nation that cannot

³⁰ EC, *Environmental Policy Review: Report from the Commission to the Council and the European Parliament* (2007) COM (2008) 409 at 17 [EPR],.

³¹ In the same vein, Börzel reports “No other European laws are so frequently violated as environmental Directives. Over 20 per cent of the infringements registered with the European Commission fall into the area of environment.” Börzel, *supra* note 11 at 1.

³² Christoph Knill & Duncan Liefferink. *Environmental Politics in the European Union: Policy-making, Implementation and Patterns of Multi-level Governance* (Manchester: Manchester University Press, 2007) at 146 [Knill & Liefferink]. However, Knill points out in the same chapter that, notwithstanding the increasing number of studies on implementation, there is no common understanding in the literature of the phenomenon, the size of the implementation deficit, and the factors that cause it. This assertion can be extrapolated to the method of study of implementation, which is far from a unique formula.

³³ Andrew Jordan regards the environment (or the environmental sector) as the most suitable sector in which to study Europeanization, as the impact of the EU policies on its member states is a highly developed area of EU policy. Andrew Jordan, *Environmental Policy in Europe: The Europeanization of National Environmental Policy*. Andrew Jordan & Duncan Liefferink, eds., (Abingdon, UK: Routledge, 2004) at 2 [Jordan] at . Jordan also points out that the first Europeanization studies about implementation (studied as a measure of impact of EU policies) which coined the term the “goodness of fit” were empirical studies on environment policy. Jordan, *ibid.* at 4. Similarly, Falkner points out: “[...] focusing mainly on Environmental Policy , many scholars have pointed out the degree of fit or misfit between European rules and existing institutional and regulatory traditions as one of the central factors determining implementation performance[...].” Falkner, *supra* note 11 at 15-16.

implement its policies will lose its legitimacy and credibility from both the inside and outside.

3.2. An overview of the evolution of the EU implementation scholarship³⁴

Europeanization scholars have been the first to devote particular attention to implementation. Theories of implementation are rooted in European integration theories and theories of Europeanization.³⁵ The main purpose of these theories is to analyze how and to what extent the European Union has modified the domestic institutions, politics, and policies of its member states. To measure this adaptation of domestic structures to EU patterns, students of Europeanization have been traditionally informed by the theory of *the goodness of fit*, which first emerged from empirical studies on implementation in the field of EU environmental policy.³⁶ The doctrine of the goodness of fit explains that EU policies can usually be implemented smoothly in countries where the domestic structures match those designed by EU policy and, conversely, poorly where the national or local institutions mismatch the EU design.³⁷ Thus, this approach regards implementation from a top-down perspective. The application of this method leads to a classification of good and bad implementers: the *nice guys* and the *bad boys* of the EU policies.³⁸ Nevertheless, taken only from this perspective, the process within the domestic

³⁴ For a summarized history of the evolution of the implementation scholarship see Falkner, “Theorising the Domestic Impact of EU Law: The State of Art and Beyond” in Falkner, *supra* note 11 at 11-40.

³⁵ Falkner, *supra* note 11 at 14. For an in-depth study of the theories of European integration, neo-institutionalism and Europeanization, see Ian Bache & Stephen George, *Politics in the European Union* (Oxford: Oxford University Press, 2006). For an analysis of multiple definitions and a typology of the concept “Europeanization” see Jordan, *supra* note 31 at 5-7.

³⁶ Jordan, *supra* note 31 at 4.

³⁷ “Focusing mainly on environmental policy, many scholars have pointed to the degree of fit or misfit between European rules and existing institutional and regulatory traditions as one of the central factors determining implementation performance”. Falkner, *supra* note 11 at 16.

³⁸ In other words, the environmental leaders and laggards in Europe. Börzel, *supra* note 11.

sphere largely remains unexplored and leaves out many questions. For instance, one of such questions that are relevant for this study is why did Spain transpose the WFD through an article of the law attached to the Budget Act and not by a specific law?”³⁹

3.3. The likeliness of France and Spain implementing the WFD correctly

According to the literature about the goodness of fit, member states with policies similar to those resulting from the decision-making process at the EU level would likely implement EU policies properly, whereas member states with mismatching policies would likely fail. In broad terms, the goodness of fit is a doctrine that takes a cost-benefit based economic approach to policy implementation, employing a top-down perspective. Scholars informed by the goodness of fit theory usually study institutional settings in the domestic arena, that is, to what degree they match or mismatch the policy or legislation to be applied (briefly, the adaptation pressure and its costs). As a result of applying the doctrine of the goodness of fit to the institutional framework of the member states in the field of EU environmental policy, a group of countries were diagnosed with “Mediterranean Syndrome”⁴⁰ by LaSpina and Scortino because of the endemic misfit between their public administration systems and civic cultures, and EU environmental policy (more generally, this disease was called “the Southern Problem” by some implementation scholars).⁴¹ Despite the fact that the scope of the doctrine of the goodness

³⁹ See Chapter 5: “Implementation of the WFD in Spain: Implementation through Hierarchy and Competition”, at 76.

⁴⁰ Antonio La Spina & Giuseppe Scortino, “Common Agenda, Southern Rules: European Integration and Environmental Change in the Mediterranean States” in J.D. Liefferink, P.D. Lowe & A.P.J. Mol, eds., *European Integration and Environmental Policy* J.D. Liefferink, P.D. Lowe & (London: Belhaven, 1993) at 217-236.

⁴¹ Geoffrey Pridham & Michelle Cini. “Enforcing Environmental Standards in the European Union: Is There a Southern Problem?” in M. Faure, J. Vervaele & A. Weale, eds., *Environmental Standards in the EU and Interdisciplinary Framework* (Antwerp: Maklu, 1994) at 251-277.

of fit has expanded and has increasingly been contested by some scholars,⁴² it remains the mainstream focus in EU environmental implementation studies. Therefore, I take it as a point of departure for my analysis of the implementation of the WFD to formulate a hypothesis of likeliness of implementation that will be contrasted in Chapters 4, 5, and 6 with empirical evidence obtained from public data and research interviews that I conducted with experts on the implementation of the WFD. The case studies of France and Spain are particularly interesting because France does not fall into the group of member states diagnosed with the Mediterranean Syndrome or Southern Problem. Thus, according to the doctrine, France falls under the category of “environmental leader” and, *a priori*, presents a lesser degree of misfit than Spain. The latter is one of the representatives of the “diseased” group whose historical institutional framework supposedly presents substantial mismatches with the design of the WFD.

According to the doctrine of the goodness of fit, France should be able to transpose the WFD relatively smoothly, whereas Spain is likely to fail. This is a statement based on the assumption that the historical institutional setting in Spain that is not specific to water governance presents a high degree of misfit with the WFD while French institutions are in closer harmony. From a historical institutional perspective, Spain presents some distinctive features that are not likely to accommodate the Directive: a long tradition of totalitarian government, a politically decentralized system,⁴³ and a small-medium

⁴² Among this more recent scholarship of implementation see the illustrative work of Börzel, and Falkner, both *supra* note 11, and that of Knill & Liefferink, *supra* note 30.

⁴³ The current political decentralization of Spain dates from the *Constitution of 1978*. Shortly after its sanction, the Spanish territory became constituted into 17 Autonomous Communities and two Autonomous Cities. Nevertheless, the Autonomous Communities did not come out of nowhere. That is, multi-nationalism and decentralization have been present in the Spanish state for a long time and have evolved throughout history. For detailed studies on political decentralization in Spain from a historical constitutional perspective see Jordi Solé Tura & Eliseo Aja, *Constituciones y períodos constituyentes en España, 1808-1936* (Madrid: Siglo XXI de España, 1977).

economy.⁴⁴ It is also a late-comer to the European Communities compared to France. These factors are preconditions for a likely unsuccessful implementation of the WFD. The reverse is supposed to happen with France: it is the cradle of modern democracy, a considerably centralized state with some local and less regional decentralization at the administrative level and an economy that ranks in the top five worldwide (by nominal GDP); therefore, it should be able to afford the resources necessary for the implementation of the Directive.

Nevertheless, the theory and method of study of the goodness of fit has already been contested by the new implementation scholars. Some scholars have started to underscore the important role that domestic dynamics play in the field of implementation.⁴⁵ From a formal point of view, for example, there is no gap in the responsibility of implementing EU environmental law, that is, in the case of non compliance (not implementation or incorrect implementation) the member states are ultimately responsible for fulfilling EU “obligations”.⁴⁶ However, it would be unrealistic to think that this disregard of the domestic dynamics in terms of responsibility before the EU means that domestic dynamics do not have a deep impact on the final outcome.⁴⁷ Indeed, it is essential to acknowledge that, regarding implementation issues, the Commission has only an indirect

⁴⁴ For further details about economic development indicators in France and Spain, see note 134 in Chapter 4 at 61.

⁴⁵ “An EU Directive’s life cycle involves a multitude of actors at various levels, stretching from supranational to subnational. To gather all the information needed to answer the [...] research questions we had to ‘go local’.” Falkner, *supra* note 11 at 6.

⁴⁶ *Consolidated Version of the Treaty Establishing the European Community*, [2002] O.J. C 325/35, art. 228 [TEC]. TEC is a consolidation of the *Treaty of Rome, 1957*, with various amendments.

⁴⁷ “Whilst there is a consistent line of EC jurisprudence to the effect that no state can rely on internal administrative, political or practical difficulties to justify a failure to implement, it is clear that simple punishment or exhortation leaves many genuine difficulties unaddressed.” Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making* (Oxford; Hart, 2005), at 50 [Lee]. Note that when I use the term domestic dynamics I am referring to private actors, sub-state or sub-national entities and domestic interest groups.

role in enforcement and that the core of enforcement and implementation is developed domestically. For example, the Commission is not entitled to initiate infringement proceedings against particulars (e.g. industries) or against sub-national/sub-state actors.⁴⁸

Emphasizing the importance of the study of the implementation process within the member states, Börzel highlights the role that domestic dynamics have in successful implementation in her theory of the pull-and-push model. In this model, domestic environmental actors such as NGOs and other civil society groups are able to push – from below – and the European Commission, as guardian of the treaties and enforcer of the *acquis communautaire*,⁴⁹ should push – from above – so as to “sandwich” national administrations for the benefit of the environment.⁵⁰ I take on this multilevel approach (avoiding a reductionist top-down view), because, from a practical perspective, it is crucial not only to know whether France and Spain are implementing the WFD correctly, but also why implementation has been shaped in the particular way that it has. With this purpose in mind, I use the theories on modes of governance to analyze the implementation process in the domestic sphere.⁵¹

⁴⁸ Lee, *ibid.*, at 55.

⁴⁹ The *acquis communautaire* is the compendium of primary and secondary sources of EU law comprising foundational treaties, following treaties and legislation of the EU and the European Communities, and jurisprudence of the ECJ. See definition of *acquis communautaire* or *community acquis* at *Europa Glossary*, online: <http://europa.eu/scadplus/glossary/community_acquis_en.htm>.

⁵⁰ See the section “Pressure from Below and from Above: The Pull-and-Push Model” in Börzel, *supra* note 11 at 35-43.

⁵¹ See section 3 of this chapter.

4. Definition of correct transposition and methodology of the analysis

In order to test the hypothesis of the goodness of fit and respond to my first research question, I have to assess whether France and Spain are implementing the WFD correctly. Therefore, in this section, my purpose is to establish a definition of “correct implementation”. The main challenge to establishing a definition of correct implementation is the fact that there is prolific literature in this field,⁵² which is often not coordinated or uniform. The terminology used is vast and sometimes ambiguous. For example, when talking about implementation, there is a host of different terms: compliance, enforcement, application, transposition, patterns of compliance, worlds of compliance, levels of compliance, essentially correct transposition/implementation, adequate level of implementation, inadequate practical application of the law, completely correct transposition/implementation, partial transposition, timely transposition, full implementation, practical application, formal application, formal implementation, practical implementation, etc.⁵³ The problem is that the different studies on implementation come from different perspectives and use different terminology that sometimes does not match with the taxonomies used by others.⁵⁴ That is, the terms of reference do not share a common ground. They may only partially overlap, or different words may completely overlap in meaning. Therefore, the challenge of every specific case study is to find the “right” or suitable framework of reference. In order to do so, I

⁵² For a sample of the many authors and the extensive work on implementation see the reference about Europeanization on note 11 at 8. Remember that Europeanization studies were the first at looking into implementation as a measure to determine the degree of European integration. See this chapter at 16.

⁵³ These terms have been retrieved from the work of three outstanding scholars on implementation: Lee, *supra* note 45; Falkner, *supra* note 11; and Börzel, *supra* note 11.

⁵⁴ For example, some scholars focus on compliance, while others focus on non-compliance; similarly, some think that absolute compliance can be attained (e.g. Falkner), and others argue against this idea (Lee).

combine the legal and political perspectives of two scholarly experts on implementation: Maria Lee (from a legal perspective)⁵⁵ and Gerda Falkner (from a political perspective).⁵⁶

In order to provide a workable definition of “correct implementation”, it is important to bear in mind that there are two main approaches in the literature that will condition the definition: considering implementation as a fixed and determined value that can be attained at a certain moment (potentially finite process),⁵⁷ or considering implementation as a relative value and the implementation process as an ongoing one that can never be totally completed.⁵⁸ As I need to evaluate the implementation of the WFD in France and Spain to identify whether these countries’ different institutional frameworks have an impact on their performance, I need a snapshot of correctness of implementation as a reference. This can be done, for example, as the European Court of Justice (“ECJ”) states in Case C-278/01, *Commission v. Spain*.⁵⁹ In this case, the ECJ rules on a specific point in time regarding compliance with bathing water standards. However, I bear in mind that the snapshot is a fiction, so that I do not hold onto it as an irrevocable approach. Indeed, although I concur with Lee that implementation is an ongoing process, I will assume the opposite here for practical reasons, so as to keep the study workable.

⁵⁵ Lee, *supra* note 45.

⁵⁶ Falkner, *supra* note 11.

⁵⁷ For example, when Falkner talks about “completely correct transposition” she is foreseeing a specific moment when all the criteria for correct implementation will concur. Falkner, *ibid.*

⁵⁸ According to Lee: “[...] because implementation is inevitably a moving target in the environmental sphere (environmental conditions change, knowledge and regulation evolve), it is unrealistic to anticipate a moment at which compliance is ‘complete.’” Lee, *supra* note 15 at 50; “Compliance with environmental law requires environmental quality or performance standards to be met on an ongoing basis, rather than a one-off ‘event’ of compliance.” Lee, *ibid.*, at 52.

⁵⁹ *Commission v. Spain, C-278/01*, [2003] E.C.R. 14141 (E.C.J.), online: <<http://eur.lex-europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0278:EN:HTML>>. This case concerned EC, *Commission Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water*, [2004] O.J. 2004/C 7/11.

In order to draw a map of my criteria for assessing implementation, I will combine the work of Maria Lee and Gerda Falkner, who provide valuable definitions and pedagogic typologies for working with the issue of implementation more clearly and understandably. It is important to obtain a clear vision of the phases a piece of legislation or policy goes through before it can be implemented and, thus, comply with its own mandates. In order to better understand the concepts of implementation and compliance, Lee states that implementation of a Directive covers a range of issues making environmental law effective, while compliance with environmental law requires environmental quality or performance standards to be met on an ongoing basis, rather than there being a one-off “event” of compliance.⁶⁰

Lee’s “range of issues” or main phases that a directive goes through are transposition, application, and enforcement. In “dividing” implementation into phases, scholars vary somewhat in their methods of classification. For example, for Lee, the main divisions are formal implementation (transposition of the Directive onto a national legal system) and practical implementation (which includes application and enforcement).⁶¹ Below is a table with a more detailed vision of the phases, based on Falkner’s work.⁶² I have completed the table with some insights drawn from her categorization.

⁶⁰ Lee, *supra* note 45 at 52.

⁶¹ *Ibid.* at 56.

⁶² Falkner, *supra* note 11.

Table 1. Taxonomy for the assessment of implementation of EU directives

	TRANSPOSITION	APPLICATION	ENFORCEMENT (⁶³)	= IMPLEMENTATION
TIMELINESS (Formal requirements)	Timely	Timely	Effective	
	Almost timely	Almost timely		
	Significantly delayed	Significantly delayed		
ADEQUATENESS (Practical requirements)	Completely correct	Completely correct	Ineffective	
	Essentially correct	Essentially correct		
	Significantly incorrect ⁶⁴	Significantly incorrect		

For Falkner, the main phases that a Directive goes through are transposition, application, and enforcement. However, she seems to understand implementation as the conjunction of transposition and enforcement, separate from application, which would fall in a separate category,⁶⁵ and she distinguishes a set of categories to assess implementation outcomes. I will follow an eclectic approach. Borrowing from Lee and Falkner, I distinguish three phases in the implementation process: transposition, application, and enforcement.

The categories “completely correct” and “essentially correct” should also be defined at this stage. Falkner provides a definition of “essentially correct” (regarding transposition of a Directive): “that is the point in time at which the national rules and regulations satisfied the standards of the Directive almost completely, with only minor

⁶³ Enforcement refers to the host of measures for monitoring compliance and sanctioning non-compliance. In this thesis, I will not be referring to enforcement because the implementation of the WFD is still an ongoing process. Admittedly, in order to attain correct implementation of the WFD, the mechanisms for enforcement have to be in place before the deadline for the implementation of the Directive, but in most cases it is very difficult to evaluate the effectiveness of such mechanisms prior to the deadline.

⁶⁴ This is a category that I added to Falkner’s taxonomy to complete the theoretical framework for assessment of implementation in this thesis.

⁶⁵ Falkner, *supra* note 11 at 6: Figure 1.1 – *Directives in the European multi-level system*.

details missing or incorrect.”⁶⁶ She also provides criteria to define “almost timely”: delayed no more than six months.⁶⁷ Taking these definitions into account, we can infer definitions for the rest of the categories. The result would be as follows:

- Timely transposition/application: all required measures executed before the deadline
- Almost timely: required measures executed less than six months after the deadline
- Significantly delayed: measures delayed for six months or more
- Completely correct: national rules and regulations satisfying the standards of the Directive executed completely
- Essentially correct: satisfied almost completely, with only minor details missing or incorrect
- Significantly incorrect: major relevant aspects missing or incorrect

In order to clarify which are minor details or major relevant aspects of the Directive, Falkner points out the need to identify different parts or elements of the directive: the general aim (usually indicated in art.1 or the first articles of the piece of legislation), compulsory minimum standards, and non-binding soft law provisions (usually soft law included in or accompanying such a norm).⁶⁸ This analysis is very useful for looking at implementation from a legal perspective. Following Falkner’s directions, we can apply this typology and argue that in a piece of legislation (which

⁶⁶ *Ibid.* at 66, footnote 11..

⁶⁷ *Ibid.*, at 67. Actually, the book does not provide a specific rationale about considering the timeline of six months as the deadline to distinguish almost timely transposition/application from significantly correct transposition/application. However, on page 67, the author comments on the transposition of a specific directive and sets out the deadline over six months as reasonable to consider the transposition of the directive significantly delayed.

⁶⁸ *Ibid.* at 56.

belongs to a certain policy program), we can identify the main goal, the main inputs (or sub-goals), and the secondary inputs of a piece of legislation or policy.

Table 2. Elements of the content of an EU directive

TYPOLGY OF ELEMENTS CONTAINED IN AN EU DIRECTIVE (to assess compliance together with Table 1, “Taxonomy for the assessment of implementation of EU directives”)	LEGAL PERSPECTIVE	POLITICAL PERSPECTIVE
	General aim	Main goal
	Compulsory minimum standards (obligatory elements)	Main inputs (or sub-goals)
	Non-binding soft law provisions (voluntary elements)	Secondary inputs

According to the tables, I identify specific key aspects to investigate in order to assess transposition:

- 1) Reporting (adequately) – This is an easy aspect to monitor; the member states have an obligation to send reports required by the directives, such as the report on the transposition of a piece of legislation into national law.

- 2) Adequate transposition into the legal system – that is, ensuring that the mechanisms that interact with the rest of the legal system will be effective for the purpose of the legislation and policy being implemented. This is the most difficult aspect to assess, because it requires a deep knowledge of the various national legal systems.

The crucial points to investigate in order to evaluate application are:

Effective creation or re-organization of the administrative bodies required by the implemented legislation;

- 1) Effective functioning of the institutions created;
- 2) Effective problem-solving of the challenges found by the functioning of the bodies and by the difficulties in attaining the specific objectives of the legislation being implemented; and
- 3) Sufficient financial resources to carry out the activities required to implement the Directive.

Enforcement can be pursued by:

- 1) Law mechanisms: administrative (incentives and sanctions) and criminal.⁶⁹
- 2) Other mechanisms.⁷⁰

5. Theory about modes of governance

The Southern Problem, the Mediterranean Syndrome, and the impact of institutional structures on implementation can, in fact, only be understood through a framework that studies relationships among institutions, actors, and “forces” playing together in a process of synergy. The theory of modes of governance provides me with the tools to explain these interactions and answer my second research question.

In order to examine the domestic dynamics that have influenced the implementation of the Directive, I use the typology of modes of governance of Tömmel

⁶⁹ Lee, *supra* note 45 at 67.

⁷⁰ For a detailed description of mechanisms of enforcement, see Falkner, *supra* note 11 at 38.

and Verdun.⁷¹ They classify the different tendencies observed in the different areas of EU policy-making into four innovative modes of governance: hierarchy, cooperation, negotiation, and competition. The first, hierarchy, corresponds to the traditional (hard) mode of governance based on the intervention of public administration through command-and-control methods: legislation, legally-binding rules, and coercive enforcement mechanisms. Cooperation is considered an innovative (soft) mode of governance based on voluntary actions of different actors participating in decision-making processes which have no legally binding force. Negotiation is a mode of governance also based on the participation of different role-players. The results achieved through this way of listening to others' positions can be legally binding or not. Competition is a mode of governance based on particular actors' actions. That is, the receptors of a policy or those affected by it may behave competitively regarding relevant incentives/disincentives. The actors involved may be individuals, collective entities, or even member states reacting towards a policy or any significant circumstances. Negotiation and competition are considered traditional (hard) modes of governance with some innovative trends/elements.⁷²

The typology designed by Tömmel and Verdun is a very useful tool in the analysis of the process of implementation in my two study cases. As mentioned by the authors, none of these modes of governance exists in purity in practice, since they are mixed and nuanced.⁷³ However, their taxonomy is pedagogically instructive.

⁷¹ Tömmel & Verdun, *supra* note 12.

⁷² *Ibid.* at 13-15.

⁷³ "We have shown that these modes of governance are mostly used in specific combinations and in hybrid forms." *Ibid.* at 292. "A closer look at European modes of governance across policy sectors shows that the four ideal types identified in Chapter 2 evolve in combination with each other and in hybrid forms." *Ibid.* at 293.

Governance, like implementation, is a discipline much studied as well as somewhat blurred. As in the case of implementation, governance has been studied from many perspectives, and the term has been variously interpreted. Therefore, I will employ these building blocks to identify patterns of hierarchy, cooperation, negotiation, and competition in the domestic politics of France and Spain and will show how these affect the implementation of the WFD.

It is important to bear in mind that the framework on modes of governance that I am using in my analysis was *a priori* conceived to understand policy-making at the EU level. Nevertheless, I submit that the typography also applies to the domestic level. As argued by Tömmel and Verdun, these innovative modes of governance are not in essence different from the modes of governance present in the national sphere, although the specific characteristics of the EU make it an institution more suitable for innovative modes of governance (e.g. cooperation, negotiation and competition);⁷⁴ therefore, there may exist a difference mostly from a quantitative point of view, but that does not mean that the categories cannot be applied to the domestic realm. Indeed, these modes of governance may be a model which is already influencing domestic politics and, above all, they represent the most consistent conceptual framework to apply to an analysis of governance.

I will apply the Tömmel and Verdun typology of modes of governance to the most relevant institutions that have intervened in the process of implementation in France

⁷⁴*Ibid.* at 298-299. “In conclusion, I argue that European modes of governance in principle do not significantly differ from those exercised at the national level insofar as their process dimension is concerned. The impact of these modes of governance on actors’ behaviour, however, as compared to national political systems, may vary.” *Ibid.*, at, 18; “European modes of governance in their process dimension do not significantly differ from those practiced at the national level. They differ in their impact, however, since the multilevel system of the EU offers more opportunities for actors to choose an exit option.” *Ibid.* at 22.

and Spain. The specific institutions will vary from one to another aspect of the WFD (namely, transposition, creation of RBDs and Competent Authorities, and public participation in the elaboration of the RBMPs) but, essentially, I will be looking at the following four main groups of actors: the government and public administration, political parties, interest groups, and civil society (citizens and environmental groups).

Chapter 3. The WFD and the CIS Benchmarks for Evaluating Correctness of Implementation

1. Introduction

The aim of this chapter is to introduce the WFD,⁷⁵ to identify the aspects of it that I will be evaluating in my thesis, and to establish a set of standards or benchmarks to assess its implementation. The first part of this chapter will consist of a brief overview of the WFD in which I will highlight the aim of the Directive, its nature, its content, and its scope. Then, I will identify the aspects of the WFD which are the subject of my thesis: the transposition of the Directive into national law, the creation of the River Basin Districts (“RBDs”) and Competent Authorities (“CAs”), and public participation in the elaboration of the River Basin Management Plans (“RBMPs”). Next, I will introduce the Common Implementation Strategy⁷⁶ (“CIS”) as a *sui generis* process of implementation of the WFD while I highlight its value as a referent to assess implementation. Having set out the targeted aspects, I will present my criteria to assess the correctness of implementation. In order to do that, I will combine the theoretical framework explained in Chapter 2 with specific sources that refer to the WFD. In particular, I will take Falkner and Lee’s theoretical typologies for the assessment of implementation and apply them to the benchmarks set out by the Guidance Documents issued by the CIS and the *First*

⁷⁵ *Supra*, note 1.

⁷⁶ The Common Implementation Strategy was launched formally in May 2001 by the production of the first strategic document: *Common Implementation Strategy for the Water Framework Directive (2000/60/EC)*. Strategic Document as Agreed by the Water Directors Under Swedish Presidency, 2 May 2001 [CIS]. online:<http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/implementation_documents&vm=detailed&sb=Title>. However, the political foundations of the CIS date from the informal meeting of EU Water Directors and the Norwegian Water Director in Paris, October 23-24, 2001. The conclusions of the Paris meeting and the documents prepared by the French Presidency were used as a basis for the CIS Strategic Document.

*Implementation Report on the WFD (“First Implementation Report”)*⁷⁷ by the European Commission. This application will conclude the methodology section of the analysis. In the following chapters, I will apply this combined methodology to the empirical findings of the transposition of the WFD in France and Spain.

2. The Water Framework Directive and the harmonization of EU water policy (aim, nature, content, and scope of the WFD)

The European Parliament and European Council adopted the WFD in 2000 to harmonize the water policies among member states.⁷⁸ This piece of legislation reflects the debates that had been ongoing at the European Union in the Council and the Parliament since the ministerial seminar in Frankfurt in 1988, when the Ministers gathered together to discuss the necessity of acting at the European Community level to improve the ecological quality of water. The purpose of the ministerial informal meeting in Frankfurt was to harmonize the piece-meal and *ad hoc* existing legislation on water and to elaborate a consistent legislative and policy framework that would effectively address the needs of the European Community regarding water policy.⁷⁹ The final legislative act was adopted in 2000 and entered into force in the same year on December 23. This Directive represents the most ambitious step that the Community members have taken regarding

⁷⁷ CE, Commission Staff Working Document accompanying document to the Communication from the Commission to the European Parliament and the Council “Towards Sustainable Water Management in the European Union”. First stage in the implementation of the Water Framework Directive 2000/60/EC. COM (2007) 128; final SEC (2007) 363 [*First Implementation Report*].

⁷⁸ See Preamble ss. 5, 9, 10 and 18 WFD.

⁷⁹ See Preamble s. 2 WFD, *ibid.*. To read more on water as a challenge to EC environmental policy and the need for a WFD as well as the evolution of EC Water Policy, see Duncan Matthews, “The EBB and Flow of EC Environmental Instruments: Why the Need for a New Framework Approach to Community Water Policy?”, a paper prepared for the panel on New Challenges for EC Environmental Policy at the Sixth ECSA Biennial International Conference, June 2-5, 2009, Pittsburgh, PA. Retrieved from Archive of European Integration (“AEI”), online: <http://aei.pitt.edu/2331/01/002593_1.pdf>.

water protection. Translated into environmental outputs, the main goal of this piece of legislation is to protect marine and inland water (comprising surface and groundwater) within the European Community (art. 1 WFD) and, eventually, to have all member states achieve *good ecological status* of water by 2015 (art. 4 WFD).

The WFD is a directive, the most used tool in EU environmental legislation. Directives are legislative actions that are binding on member states as to the results but discretionary in form and method (art. 249 TEC).⁸⁰ For example, when the WFD establishes that the *good ecological status* of water is the goal to be attained (art. 4 WFD) it does not set forth detailed procedures or compulsory means to attain the goal. That is, despite the fact that it indicates a set of steps to follow (creation of the RBDs, establishment of the CAs, analysis of the characteristics of the RBDs, elaboration of programs of measures, creation of the RBMPs, etc.) it leaves the freedom to the national authorities (through their legal and public administration systems) to accomplish the different phases and to achieve the final common goal, namely, *good ecological status*. This means that the results of the implementation of the WFD will vary among the different member states. Indeed, the differences are likely to be greater because the WFD is not a detailed directive (like, for example, the *Nitrates Directive*⁸¹) but a framework directive. The aim of the WFD is to create a common denominator of basic principles for water policy in the EU.

⁸⁰ However, this freedom of choice is nuanced by art. 10 TEC, which states that the member states should adopt all the necessary measures to fulfill their obligations towards the Community, and they should also facilitate Community tasks.

⁸¹ EC, *Commission Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources*, [1991] O.J. L 375 at 1–8.

The wording of this piece of legislation can be regarded as both ambiguous and challenging from an ecological perspective. The key points of the ecological content can be summarized as follows:

- a. Generalized establishment of the river basins as the basic units in water management;
- b. Cross-border cooperation between member states and interested parties;
- c. Economic analysis of water use with the purpose of recovering the total cost of the service provided;
- d. Promotion of public participation, including consultation, access to information, and engagement in the process of implementation;
- e. Integration of all aspects of water management into one water policy and integration of the water policies into the rest of the economy and policy sectors.

Finally, regarding its scope, we must distinguish between territorial and temporal applicability. The WFD is applicable to the 27 member states of the EU,⁸² to Norway (a non-EU member),⁸³ and to the candidate countries.⁸⁴ The deadline set by the Directive for its transposition into national legal systems was December 22, 2003.⁸⁵ Nevertheless, the Directive sets up different deadlines for the implementation of a subset of objectives, and

⁸² The date of the last accession to the EU is 2007, when Bulgaria and Romania joined the 25 previous member states.

⁸³ Norway joined the CIS, and thus, the process of implementation of the WFD in May 2001. See CIS, *supra* note 74 at 1.

⁸⁴ The candidate countries (and others, like Ukraine) started to get involved in the CIS from 2003. See the CIS second working program: *Carrying forward the Common Implementation Strategy for the Water Framework Directive -Progress and Work Programme for 2003 and 2004*, at 8. The candidate countries joined the CIS as a way to comply with their obligation of implementing the *acquis communautaire* before their accession. Other countries, like Ukraine, saw in the CIS a positive system for international managing the Danube, which flows through 10 different states.

⁸⁵ Art. 24.1 WFD.

transposition is only one of them. Consequently, the task of implementation is manifold; in other words, it should be carried out by successive steps. The final deadline to achieve the *good ecological status* of water is 2015. This is despite some exceptions that may apply and that must be well justified (see arts. 4.3, 4.4 WFD on heavily modified water bodies and other exceptional cases) which could put off the achievement of the final goal to two subsequent cycles of implementation, in 2021 and 2027 respectively. Therefore, the implementation of the Directive involves different phases and is still an ongoing process. In order to summarize, the most relevant stages of implementation are set out in the table below:

Table 3. Deadlines for the transposition of the WFD

Deadlines	Objectives
2003	Transposition into national legal systems + identification of RBDs ⁸⁶ and CAs ⁸⁷
2004	Report characterizing RBDs: report on pressures, impacts, and economic analysis
2006	Monitor program operations + start public consultation (at the latest)
2008	Present drafts of RBMPs to the public
2009	Report on BMPs and mechanisms for cost recovery
2015	Achieve <i>good ecological status</i> ⁸⁸

3. Transposition into national law, creation of the River Basin Districts (RBDs) and Competent Authorities (CAs), and public participation in River Basin Management Plans (RBMPs)

The WFD comprises a set of basic principles and measures to harmonize water policy among the member states, but only some specific aspects will be considered in this thesis. There are two main reasons for choosing a specific set of elements of the WFD for my analysis. First, as stated, the process of implementation of the WFD is still ongoing.

⁸⁶ Art. 3(1) WFD.

⁸⁷ The Competent Authority is the public authority who should ensure the application of the rules of the WFD within its respective RBD (arts. 2(16), 3(2) and 3(3) WFD).

⁸⁸ For a definition see *supra* note 1 at 2.

That is, if the deadline for the implementation of a certain phase has not passed yet, it is impossible to assess the correctness of the implementation of that particular aspect of the WFD.⁸⁹ As stated above, directives leave member states a period of time in which to adjust their national legal and administrative systems to the requirements of EU legislation. During that time lag, the enforcing aspects of directives remain dormant until the deadline arrives. Second, it is worth focusing on the most relevant inputs of the WFD that can be assessed at this point in time: the transposition of the WFD, the creation of the RBDs and CAs, and the exercise of public participation in the elaboration of the RBMPs. The analysis of the implementation of these aspects will highlight the impact of the WFD on pre-existing state water management systems. The reason for choosing these three aspects is to determine whether France and Spain are correctly transposing the WFD in response to time and relevance factors.

There cannot be application of a European norm if it has not been incorporated into the domestic legal system. Therefore, correct transposition is a prerequisite for the correct implementation of the Directive. On similar grounds, the creation of the RBDs and the CAs is the first significant milestone that the WFD establishes. Note that the RBDs are the basic units of water management according to the WFD.⁹⁰ Therefore, little progress can be made on implementation without having achieved this prerequisite. Similarly, the Competent Authorities are the main decision-making bodies in the RBDs and their task is essential to the basic implementation of the WFD. Indeed, the RBDs and CAs are essential for the correct functioning of the whole system. The assessment of public participation in the elaboration of the RBMPs is also crucial for testing the impact

⁸⁹ The research for this project was conducted between January 2008 and May 2009.

⁹⁰ Arts. 2.15 and 3.1 WFD.

of the institutional frameworks of France and Spain on the implementation of the Directive. Spain presents a long tradition of authoritarianism and corporatism, which should hypothetically be a drawback for a management system that encourages and requires different levels of participation of stakeholders in water decision-making. In summary, these three aspects of the WFD (transposition, creation of the RBDs and the CAs, and public participation in the elaboration of the RBMPs) will be the ones that I will assess in Chapters 4, 5 and 6 as the most significant points for validating the degree of implementation of the WFD and its impact on the pre-existent water management systems in France and Spain.

4. The CIS: A joint implementation strategy

The CIS is a joint implementation strategy that the member states, together with Norway and the candidate countries, have been developing in order to agree on common grounds for the implementation of the WFD. This is the first time that a joint implementation strategy has been followed in such depth and with so much compromise from the participants. Although we can find a precedent for joint implementation of EU environmental legislation in the *Habitats Directive*,⁹¹ the intensity of the strategy was much less in extent (it included some particular initiatives, but it did not deal with the implementation of all aspects of the directive) and with lower commitment from the parties.⁹² The CIS consists of informal meetings of the Water Directors of the member states and Norway. The meetings of the Water Directors are aimed at elaborating working

⁹¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. OJ L 206, 22.7.1992, at 7–50.

⁹² Interviews with the infringement unit in DG Environment in January 2009. For more detail about the participants in my interviews, see Appendix.

programs for the implementation of the WFD. The candidate countries and NGOs also participate as guests (they can listen and sometimes they are invited to provide feedback, but they are not part of the decision-making). The CIS also interacts with other institutions working on water management in Europe, such as the International Commission for the Protection of the Danube River (“ICPDR”), which is the coordinating body for international aspects of the Directive’s implementation in the Danube River Basin. The basis for the formation of the CIS as a joint implementation group is the need to support the Regulatory Committee established by the WFD (art. 21) in its task to assist the European Commission on the implementation of the Directive. Nevertheless, the real rationale behind it is the gathering together of states and other stakeholders to discuss and define a common denominator for implementation.

The Water Director Meetings have elaborated five working programs to date.⁹³ The working programs divide the stages of implementation according to priority of tasks and set up the structure of the institutions working on the implementation of the WFD. This structure consists of meetings of Water Directors, which are assisted by a committee. These two organisms regulate and coordinate the Working Groups, which work on each of the designated priority issues at the meetings.⁹⁴ The Working Groups must adopt guidance documents for the implementation of the Directive regarding priority issues. The documents issued and actions taken by the “common implementation group” are not legally binding. Thus, rather than functioning as legislation, they

⁹³ The last and current working program was issued on December 2009. For a complete list of the working programs issued at the CIS, see the section “Working Programs” in the bibliography at 111.

⁹⁴ For a more detailed description of the complex structure of the CIS and its evolution, see the CIS working programs available online:
<http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/implementation_documents&vm=etailed&sb=Title>.

constitute a corpus of guidelines and best practices for the implementation of the WFD that the participants may voluntarily use as a reference tool.

Despite the fact that the instruments of the CIS are not legally binding, the impact of the CIS has been acknowledged by many competent authorities in the field. Even the former president of the European Commission, Romano Prodi, quoted the WFD and the CIS as examples of good governance in the EU in his mid-term review of the Commission.⁹⁵ The participants in the interviews for this project also highlighted the contribution that these instruments have had on the implementation of the WFD: as a tool to create a constant and wide dialogue between different stakeholders and interested parties, as a mechanism to resolve ambiguities of the WFD, as a method to prevent malimplementation and resulting infringement proceedings launched by the European Commission. Given the relevance of the CIS, I took into account the content of the working programs and the guidance documents (especially Guidance Document 8 on public participation)⁹⁶ in setting out benchmarks for the assessment of WFD implementation.

⁹⁵ See CIS third working program: *Moving to the next stage in the Common Implementation Strategy for the Water Framework Directive – Progress and Work Programme for 2005 and 2006*, at 10.

⁹⁶ EC, *Guidance Document No. 8: Public Participation in Relation to the Water Framework Directive* (Luxembourg: EC, 2003) [GD8].

5. Benchmarks for the assessment of implementation

In this section, I will examine the specific requirements to be met by France and Spain for the implementation of the WFD. The benchmarks that I will use for assessment are a product of the combination of the guidelines elaborated by the CIS and those in the *First Implementation Report*.⁹⁷ My analysis is not aimed at undertaking a detailed examination of all the characteristics of implementation of the aspects assessed or to elaborate a report parallel to that of the European Commission. Rather, my evaluation of correctness aims at pointing out the relevant points of the implementation of the Directive and the extent to which they are correct according to Falkner and Lee's taxonomy.⁹⁸ Then, I will evaluate the implementation of the three subjects of my study (transposition, administrative arrangements, public participation), and I will use Tömmel and Verdun's theories of governance to finally explain why this is happening this way, taking into account the French and Spanish institutional settings.

According to Falkner, we can find different degrees of implementation of a directive depending on to what extent and with what quality the elements of the directive have been implemented. In order to assess the process or outcome of implementation of a directive, Falkner distinguishes between the general aim, the compulsory elements, and the voluntary elements.⁹⁹ Following the *First Implementation Report*, and thus the criteria of the Commission, I proceed to identify these key elements in the WFD:

- Aim of the directive: Integration of water management and *good ecological status* of European waters by 2015

⁹⁷ *Supra* note 75.

⁹⁸ See Chapter 2, Tables 1 and 2 at 25 and 27 respectively.

⁹⁹ See Chapter 2, Table 2 at 27.

- Compulsory elements for the transposition, the creation of RBDs and CAs, and the public participation in RBMPs
- The rest are non-binding provisions, therefore, additional assets for implementation, but will not be considered in the assessment of correctness of implementation, because they are voluntary measures

The *First Implementation Report* (2007) assessed the three main steps for implementation to the report date: transposition, creation of RBDs and CAs, and report of the ecological analysis (impacts and pressures of water). In addition, the Commission assessed the reporting performance of the member states regarding these three steps. The Commission looked at whether the reports provided by the member states allowed for a timely, complete and clear assessment of implementation progress.¹⁰⁰ The assumption was that if a poorly drafted report arrives with significant delays, the Commission would not be able to analyze the situation appropriately and fairly.¹⁰¹ In addition, the Commission established a point scale from three to zero (three being the maximum correctness and zero the minimum) and gave a value to every member state based on their reporting. The same strategy was followed to assess the implementation of transposition, administrative arrangements (that is, the creation of the RBDs and CAs), and the ecological analysis (characterization of the RBDs). For these latter reports, the Commission created a scale ranging from zero to 100 and gave a value to each of the

¹⁰⁰ The Commission uses a check box to assess reporting performance:

submission date of report(s) (in time or extent of delay);
 clarity and completeness of report;
 in case implementation is not complete, gap analysis and identification of follow up.
 See *First Implementation Report* of the WFD *supra* note 75 at 42.

¹⁰¹ *Ibid.*

member states. Note that in the *First Implementation Report*, some of this information had been disclosed, sometimes by member states and sometimes in a general fashion, without individualizing the performance of every member. In conclusion, following Lee's and Falkner's work on implementation, in particular, 1) Falkner's theoretical taxonomy for assessing implementation of directives; 2) Falkner's typology of elements of a directive; and 3) the *First Implementation Report* on the implementation of the WFD by the Commission, I establish the following methodology for the analysis of implementation:

1) Transposition:

The overview analysis on transposition performance in the *First Implementation Report* focused on article 4 (environmental objectives), taking into account the relevant definitions (in article 2) and annexes (Annexes II and V), article 9 in conjunction with the relevant definitions (cost recovery of water services) and article 14 (public participation). These provisions are at the core of the WFD and confer rights on the individuals which must be appropriately reflected in the national law(s). Moreover, conformity with other provisions was also briefly evaluated. Therefore, we can conclude that the important aspects to look at in order to assess the correctness of transposition are:

- Timeliness
- Clarity and completeness

- Major shortcoming in articles 4, 9 and 14¹⁰²

2) Creation of the RBDs and the CAs:

The performance indicators in the *First Implementation Report* were based on a simple scoring system in which a number of points is attributed to each question. The questions followed the reporting guidance and were answered with the help of the screening assessment.¹⁰³ The questions were grouped around key issues. The total number of points was added and the total divided by the maximum number of available points in order to calculate a score between zero and 100. Where certain questions were not relevant for member states (e.g. regarding international cooperation for member states that do not share a river basin with another country) the total scores were normalized. The questions posed by the Commission followed the template of Annex 5 in the *First Implementation Report*: timeliness, clarity, completeness, uncertainties, gaps. Therefore, the main benchmarks for the creation of the RBDs and CAs subject to analysis in this thesis are:

- Timeliness in submitting the report

¹⁰² The definition of services and, thus, the cost recovery aspect will not be assessed by this study because the debate is still ongoing. In broad terms, the member states and the environmental NGOs involved in the implementation of the WFD have radically different points of view. Therefore, this definition is not univocal and, as pointed out in one of my interviews about the Infringements Unit at the Environment Directorate-General, it will most likely be resolved by the ECJ in a future judgment. See Appendix 2 for more detail about the interviews.

¹⁰³ Note that the reporting guidance is an internal document of the implementation process elaborated by the European Commission in order to assess the reports that it received from the Member States. The screening assessment took into account the guidelines set out by the reporting guidance and was filled out by the Commission regarding the terms of clarity, completeness, and quality of the reports elaborated by the member states that the Commission had received. The reporting guidance was formerly available online at CIRCA, but it is no longer available. The screening assessment procedure is established at the *First Implementation Report* at 15 and 23.

- Legislative action for the creation of the RBDs (as the basic unit for water management) and the CAs
- Clarity and completeness of the implementation, which in this case may refer to clarity of the report regarding the designation of RBDs and CAs (easy to identify by the reader/audience) and functioning in full capacity

Important aspects that may become gaps if not implemented: actual coordination of the RBDs and CAs into the administrative structure

3) Public participation in the elaboration of the RBMPs:

The Commission did not assess the implementation of the RBMPs in its *First Implementation Report* but it did evaluate the performance of the member states in their ecological analysis.¹⁰⁴ I will adopt this evaluation, which uses the same point system as used in evaluating administrative arrangements, as a template to select the criteria for the assessment of public participation in the creation of the RBMPs. In other words, in order to assess public participation performance in the elaboration of the RBMPs in France and Spain, I will again use the basic criteria of the Commission in the *First Implementation Report*: timeliness, clarity, completeness, and major shortcomings. To identify the major shortcomings, I will refer to Guidance Document 8 (“GD8”) of the CIS, which deals with public participation in the WFD. According to this guidance document, we can distinguish three different levels of participation in the WFD: access to information, consultation, and active public participation.¹⁰⁵ The latter was pointed out by participants

¹⁰⁴ Note that the member states had until 2009 to elaborate their RBMPs.

¹⁰⁵ Note as relevant for this study that the working group on public participation was driven forward by Spain and the EU Commission. CIS, *supra* note 74 at 58.

interviewed in this study as one of the major inputs and the most difficult aspects to implement. For the elaboration of the RBMPs, the participation required should be carried out at all three levels.¹⁰⁶

That is, the Preamble emphasizes the need to include users in water management, but public participation is not only restricted to users. The GD8 provides a list of possible

¹⁰⁶ According to the WFD:

Preamble 14

(14) The success of this Directive relies on close cooperation and coherent action at Community, Member State and local levels as well as on information, consultation and involvement of the public, including users.

Public information and consultation

1. Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users:

- (a) a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;
- (b) an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;
- (c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.

On request, access shall be given to background documents and information used for the development of the draft river basin management plan.

- 2. Member States shall allow at least six months to comment in writing on those documents in order to allow active involvement and consultation.
- 3. Paragraphs 1 and 2 shall apply equally to updated river basin management plans.

WFD CIS Guidance Document No. 8

Public participation in relation to the Water Framework Directive

Annex VII

RIVER BASIN MANAGEMENT PLANS

A. River basin management plans shall cover the following elements:

...

9. a summary of the public information and consultation measures taken, their results and the changes to the plan made as a consequence;

...

11. the contact points and procedures for obtaining the background documentation and information referred to in Article 14(1), and in particular details of the control measures adopted in accordance with Article 11(3)(g) and 11(3)(i) and of the actual monitoring data gathered in accordance with Article 8 and Annex V.

takeholders that should be taken into account for participation: professionals, authorities, local groups, individual citizens, farmers, and corporations.¹⁰⁷

It may be clear from for instance preamble 14 that active involvement is not the same as consultation. Consultation means that the public can react to plans and proposals developed by the authorities. Active involvement, however, means that stakeholders actively participate in the planning process by discussing issues and contributing to their solution. Essential to active involvement is the potential for participants to influence the process. It does not necessarily imply that they also become responsible for water management.¹⁰⁸

In addition, in order to assess the performance of the implementation of public participation, it is important to pay attention to the scale issue. According to GD8, consultation and active public participation have to be developed not only at the level where decisions have to be taken, but at the level of impact of those decisions (individuals and others affected).¹⁰⁹ Therefore, to assess the implementation of public participation in the elaboration of the RBMPs, I will follow the provisions of WFD article 14, the number and typology of stakeholders involved, and the scale.

Employing this method, the following two chapters will deal with the implementation of the WFD, taking into account the performance benchmarks mentioned above. Nevertheless, as stated in Chapters 1 and 2, benchmarking by itself is not the appropriate way to assess implementation, and it falls short if we do not take into account the domestic dynamics, which will indeed provide an explanation for the shape that

¹⁰⁷ GD8, *supra* note 93 at 16.

¹⁰⁸ *Ibid.*, at 10.

¹⁰⁹ *Ibid.*, at 20.

implementation takes,¹¹⁰ and the degree and correctness of performance that the member states achieve (in this case, France and Spain). Thus, my assessment of implementation according to Falkner and Lee's taxonomy will be followed by an explanation of the domestic dynamics of the transposition, the creation of the RBDs and CAs, and the exercise of public participation in the elaboration of the RBMPs in the language of governance. The purpose of this thesis is not to use benchmarking as a reference, but to provide an explanation of the facts in order to overcome the reductionist top-down approach and, in Börzel's words, to cut across the north-south divide.¹¹¹

¹¹⁰ As stated above, member states are bound to the goals, not to the means (art. 249 TEC). Therefore, theories on governance help us understand the instruments that the member states have chosen in order to implement the WFD.

¹¹¹ Börzel, *supra* note 11 at 1.

Chapter 4. The Implementation of the WFD in France

1. Introduction

In this chapter, I will examine the implementation of the WFD in France. In particular, I will analyze in the French context the implementation of the three aspects that I highlighted in Chapter 3 as suitable global indicators for implementation: the transposition of the WFD into domestic law, the creation of the RBDs and the CAs, and the incorporation of public participation in water management. In order to carry out my analysis, I will use the criteria and methodology outlined in Chapter 2. In addition, I will offer a complementary explanation about the dynamics that shaped implementation of these three aspects in France using the theory of modes of governance and highlighting the predominant patterns of each aspect. I will use the theories of modes of governance to assess the results scored by the study of the correctness of implementation. My intention is to explain what causes have influenced the success or failure of implementation. My final goal will be to identify the shortcomings in the domestic arena and, thus, offer constructive critiques of the process of WFD implementation.

This chapter is structured as follows: I will start by setting out the legal framework for water management in France. This point of departure will help me examine the degree of fit of the WFD within the French institutional framework. I will thereby establish a hypothesis of the likeliness of correct WFD implementation by France based on the theory of the goodness of fit. Next, I will contrast the hypothesis with the empirical findings obtained through my research. To complete this assessment, I will analyse the domestic dynamics that shaped the implementation of each of the three

aspects. I will determine whether the predominant modes of governance have been competition, cooperation, negotiation and/or hierarchy. Finally, I will draw conclusions from my analysis, highlighting the most important aspects of the implementation of the WFD in France and will make suggestions for improvement and further progress.

2. Water management in France: The institutional framework

2.1. Evolution of the water institutional framework in France

In France, water is considered a public good, with a few exceptions that follow private law regulation.¹¹² The legal framework for water management is set by the French *Constitution* of 1958,¹¹³ (which has included the *Environmental Charter*¹¹⁴ since 2004), the *Water Act* of 1964,¹¹⁵ the *Environmental Code* (2000),¹¹⁶ and the *Water Act* of 2006¹¹⁷ (which repealed the majority of the sections of the 1992 *Water Act*).¹¹⁸ These

¹¹² Article L210-1 of *Code de l'environnement*, *infra* note 112.

¹¹³ *Constitution du 4 Octobre 1958*, online: <<http://www.legifrance.gouv.fr/>>.

¹¹⁴ *Charte de l'environnement de 2004*. This was adopted by the Congress on February 28, 2005. See *La loi constitutionnelle n° 2005-205 du 1 mars 2005*, J.O. 2 March 2005, 3697.

¹¹⁵ *Loi n° 64/1245 du 16 décembre 1964 relative au régime et à la répartition des eaux et à la lutte contre leur pollution*, J.O., 18 December 1964, 11258 [*Water Act 1964*], online : <<http://www.legifrance.gouv.fr/>>.

¹¹⁶ *Ordonnance n° 2000-914 du 18 septembre 2000 relative à la partie Législative du code de l'environnement*. J.O. num. 219, 21 September 2000, 14792, online : <<http://www.legifrance.gouv.fr/>>. The compilation of regulations under the *Code de l'environnement* was issued in 2005 (*Décret n° 2005-934 du 2 août 2005*, J.O. num. 181, 5 August 2005, 38001-38155 and *Décret n° 2005-935 du 2 août 2005*, J.O., 5 August 2005, 3795-3800) and it was updated in 2007 by *Décret n° 2007-396 du 22 mars 2007* and *Décret n° 2007-397 du 22 mars 2007*, both in J.O. num. 70, 23 March 2007, 5384.

¹¹⁷ *Loi n° 2006-1772 du 30 décembre 2006 sur l'eau et les milieux aquatiques*, J.O., 31 December 2006, 20285 [*Water Act 2006*], online : <<http://www.legifrance.gouv.fr/>>.

¹¹⁸ *Loi n° 92-3 du 3 janvier 1992 sur l'eau*, J.O., 4 January 1992, 187 [*Water Act 1992*], online: <<http://www.legifrance.gouv.fr/>>. The 1992 *Water Act* was the first regulation that clearly linked water law to environmental law. See Raphaël Romi. *Droit et administration de l'environnement*, 6th ed. (Paris: Montchrestien, 2007); at 515.

legal sources establish the general framework for water management: objectives, distribution of jurisdiction, policy instruments and actors involved in water management.

To understand French water policy, an overview of the *Water Act 1964* is essential. The *Water Act 1964* was the first comprehensive piece of legislation about water in France. The *Water Act 1964* laid out the framework for water policy that has substantially subsisted until the present. This piece of legislation sets out the “rules of the game”. The objectives are fighting pollution and attaining the regeneration of waters through the conciliation of different interests such as water supply for human consumption, economic development [agriculture, industry, etc.], biodiversity, and water conservation (art. 1). Water management is based on hydrological planning, and the main policy instruments employed in this planning system are the *Schémas directeurs d'aménagement et de gestion des eaux* [“SDAGEs”]¹¹⁹ and the *Schémas d'aménagement et de gestion des eaux* [“SAGEs”].¹²⁰ The territorial circumscription for water management, matching with the WFD, is the river basin (arts. 13 and 14). The water administration and the actors that are entitled to participate in the design and implementation of water policy within these institutions (*Comités de Bassin*, *Agences de l'Eau*, and *Conseil National de l'Eau*) are determined in arts. 13, 14, and 15 (roughly, representatives of different categories of users and of the public administrations involved).¹²¹ These institutions have persisted until the present with minor changes,

¹¹⁹ This may be translated as “Organizational Outlines for the Development and Management of Water Resources”.

¹²⁰ This may be translated as “Outlines for the Development and Management of Water Resources”.

¹²¹ For more detail, see basic composition of each institution in the respective articles (arts. 13, 14, and 15 Water Act 1964).

mainly directed towards coordination efficiency of the policy actors and enhanced participation in water policy.

Policy instruments and definition of water management scale are correlated key notions in French water management. In France, the Prime Minister, after consultation with the *Comité national de l'eau*,¹²² establishes, by *arrêté*,¹²³ the amount and perimeter of the water circumscriptions: the river basins.¹²⁴ France is currently divided into six river basin districts apart from the ones situated in the *Départements d'outre-mer* (“DOMs”) (Overseas Departments) and Mayotte. The River Basins (equivalent to the concept of RBDs of the WFD) are administered by six respective *Comités de bassin* (River Basin Committees) and *Agences de l'eau* (Water Agencies).¹²⁵ The *Comités de bassin* are administrative bodies under the authority of the Ministry of Environment. They gather at least once a year in order to design water management and water public policy and to elaborate the SDGAEs (main planning instruments for water management) every six years.¹²⁶ Participants in the *Comités de bassin* may be divided into three categories: users and entitled stakeholders; territorial collectives (regional and local administrative representatives); and representatives of the national public administration.¹²⁷ Because of their function and their composition, the *Comités de bassin* are also called “water parliaments”. The *Agences de l'eau* are administrative institutions under the authority of

¹²² The *Comité national de l'eau* is a consultative body at the national level concerning water policy created by the *Water Act 1964* (art. 15). This may be translated as the “National Water Committee”.

¹²³ An *arrêté* is an executive regulation emanating from one or several ministers (ministerial order).

¹²⁴ *Décret n° 66-699 du 14 septembre 1966*, J.O., 23 September 1966, 8379- 8380 (art. 1) and *Décret n° 66-700 du 14 septembre 1966*, J.O., 23 September 1966, 8380-8382.

¹²⁵ Arts. 13 and 14, respectively, of the *Water Act 1964*.

¹²⁶ Art. L 212-2 *Code de l'environnement*.

¹²⁷ See the current detailed composition of the *Comités de bassin* in art. L 213-8 *Code de l'environnement*.

the Ministry of Environment and the Ministry of Finance. Their main function is to assist the *Comités de bassin* in the elaboration of the SDAGEs. For this mission, the *Water Act* 1964 provides them with legal personality and financial autonomy.¹²⁸

The SDAGEs and the SAGEs are the direct instruments for water management planning. They were created by the *Water Act* 1992.¹²⁹ The SDAGEs are the documents that design the water policy at the river basin scale. This is similar to the idea of the WFD River Basin Management Plans. The SDAGEs are elaborated by the *Comités de bassin* and proposed to the Minister of Environment for their approval by *décret* (decree).¹³⁰ The SAGEs are the plans for sub-river basins or a group of river basins, following the same concept of the SDAGEs. Ultimately, they have to be compatible with the SDAGEs. Their elaboration involves different stages, including public consultation about draft plans. After their approval, the SDAGEs become the master guidelines for water policy at the river basin scale.

In France, water management involves actors at different levels of jurisdiction, but the National Assembly (*Assemblée nationale*) is the only legislator. The table below provides an overview of the actors implicated in water management in France and their roles.

¹²⁸ In France, Water Agencies are rich and powerful administrative bodies. Illustrative of their strong position is the fact that they receive between 1-2% of the national public budget – which corresponds to approximately two billion Euros per year – for the autonomous management of water. See Carina Sprungk, *National Parliaments in the European Union: Policy-Shapers or Policy-Takers?* (Original title of April 2007 submission: *How Policy-Shaping May (Not) Affect Policy-Taking: National Parliaments in the Decision-Making and the Transposition of EU Directives*) PhD in Political Science, Free University of Berlin, 2007 [unpublished] at 164 [Sprungk]. In addition, Water Agencies are allowed to collect *redevances* (special taxes similar to royalties) for pollution and consumption of water (art. 14 *Water Act* 1964). For a detailed explanation of *redevances* in water management see arts. L-212-9, L212-10, L-212-11 and L-213-14 to L 213- 20, *Code de l'environnement*.

¹²⁹ Arts. 3 and 5, *Water Act* 1992.

¹³⁰ Arts. L 212-1, 2 *Code de l'environnement*.

Table 4. National actors involved in the implementation of the Water Framework Directive

National level (legislative competence)	Regional level 22 regions ¹³¹ (executive competences)	Local level (executive competences)		The watershed level (executive competences)
		96 <i>départements</i> ¹³² (main level of implementation of central government policies) ¹³³	36,433 <i>communes</i> ¹³⁴	
Legislature and executive (art. 34 CF)	<i>Préfet de région</i> (Representative of the Ministry of Interior in the region) Coordination with executive (Ministry of Environment and other)	<i>Préfet de département</i> (Representative of the Ministry of Interior in the region) Coordination with executive (Ministry of Environment and other)	Mayor and council (Elected locally and directly) Maintainance of public order (police functions) and of service supply (including health issues; thus, services of waste water treatment) May draft their own environmental plan within their territory	6 <i>Agences de l'eau</i> (Water Agencies) Administratively linked to the Ministry of Environment (supervisor) Elaborate and submit the SDAGES and SAGES They have their own financial autonomy Entitled to tax collection (<i>redevances</i>) on water pollution and consumption
Ministry of Environment (<i>Ministère de l'écologie, de</i>	<i>Directions régionales de l'environnement</i> (Deconcentrated	General Council and assemblies may draft environmental		<i>Comités de bassin</i> Consultative assembly that deliberates about

¹³¹ Source of information: CE, *Administrative Structures for Environmental Management in the European Community* (Luxembourg: Directorate-General XI, Environment, Nuclear Safety and Civil Protection, 1993). [Administrative Structures].

¹³² *Ibid.*

¹³³ The *départements* are divided into about 400 *arrondissements* and 4,000 *cantons* (depending on the source, the total number is different; the total number of *arrondissements* is 325 and the number of *cantons* is 3,710 according to the study of the Commission; see Administrative Structures, *ibid.* at 85). These are smaller administrative structures for implementing policies. However, these two administrative units do not hold any significant competences in environmental or water issues.

¹³⁴ Administrative Structures, *ibid.*

<i>l'énergie, du développement durable et de la mer</i>)	service of the Ministry of Environment which includes water supervision bodies at the regional level)	plans within their territories		river basin management plans
Other ministries with water competences: Ministry of Agriculture, Ministry of Culture, Ministry of Equipment, Ministry of Industry and Ministry of Interior and Social Security	Regional Assembly and Economic and Social Committee (Regionally elected – planning and executive competences) They draft the regional plan, which includes measures like water resource and quality and pollution reduction			<i>Commissions du milieu naturel aquatique de bassin</i> Composed of the <i>Préfet de département</i> and agents of the <i>Comités de bassin</i> Consultative role regarding SDAGEs, SAGEs
<i>Conseil national de l'eau</i> Composed of representatives of the different administrative levels and stakeholder groups Consultative role about water management and coordination	Regional Environmental Structures (Are an option for the region and take different forms)			

Briefly, the national government and the *Assemblée nationale* have the only legislative authority with the application responsibility lodged at the river basin level.

2.2. Analysis of the institutional framework: Centralization, democracy and participation, and economic development

French water management has been inserted into a rigid vertical and centralized administrative tradition which is rather unsuitable for a multi-sector subject like the environment. The result is the horizontal proliferation of sectoral agencies: water

agencies are illustrative in the field of water management.¹³⁵ Over time, a number of competences have been delegated from the national to the regional and local authorities, but legislative power remains exclusively at the national level. The decentralization movement influenced environmental policy in the early 1980s. The government of François Mitterrand approached the regional and local levels, trying to make them more participative in policy-making.¹³⁶ As a result of this “soft” decentralization, executive competences (management, consultation, and planning) were delegated to local administrative bodies.¹³⁷ In any case, against this background, there is no potential source of jurisdictional conflicts amongst legislators. However, the dualistic French presidential system and the relationship of the government to parliament is often the cause of conflict. One important cause of conflicts of interest in this uneasy relationship is the fact that the government sets the parliament’s agenda, which gives the *Assemblée nationale* very little say in creating priority issues.¹³⁸

Regarding democracy and participation, the water organizations at the river basin level (*Comités de bassin*, Administrative Councils of the Water Agencies, local water commissions, etc.) have had a multi-stakeholder participatory system since their creation,

¹³⁵ For a detailed overview of the environmental (and water) administration and its evolution, see Michel Prieur, *Droit de l’environnement*. (Paris: Dalloz, 1984) [Prieur].

¹³⁶ For instance, the Ministry of Environment, quickly after elections, undertook a white book consultation at the regional and local levels in order to gather information aimed at drafting an environmental charter. In the end, this charter never saw the light of day. See Prieur, *ibid.* at 40-41.

¹³⁷ See *Loi n° 82-213 du 2 mars 1982 relative aux droits et libertés, des communes, des départements et des régions (loi Defferre)*, J.O., 3 March 1982, 730; *Loi n° 82-623 du 22 juillet 1982 modifiant et complétant la Loi 82213 du 02-03-1982 relative aux droits et libertés des communes, des départements et des régions et précisant les nouvelles conditions d’exercice du contrôle administratif sur les actes des autorités communales, départementales et régionales*, J.O., 23 July 1982, 2347.

¹³⁸ “On the one hand, the AN may not elect the head of government, (let alone its members), who is determined by the directly elected French President. With regard to legislative and control activities, on the other hand, the government and even the Constitutional Court have several constitutional rights to intervene in the parliamentary work. [...] The latter has e.g. to agree on the adoption of the parliament’s standing orders, and the government has the (almost) exclusive right to set the parliamentary agenda.” Sprungk, *supra* note 130 at 126.

which has evolved over time to include more voices in the decision-making process.¹³⁹ In broad terms, the three branches represented are: users and relevant stakeholders entitled by regulation; representatives of the regional and local levels of public administration; and representatives of the state.¹⁴⁰

Concerning the economic development of France, it is important to bear in mind that France is one of the world's top economies, ranking 22nd in the world GDP ranking in 2000, the year of the entry into force of the WFD.¹⁴¹ Despite this fact, the vertical administrative organization of France, as stated above, and the non-existent environmental policy in France before it joined the EU created a difficult situation for the Ministry of Environment. For instance, the small allocations from the national public budget to the Ministry of Environment are an indicator of its weak position.

Consequently, this investment translates into a lack of qualified personnel.¹⁴²

¹³⁹ The laws regulating participation in these organisms are: the *Water Act* 1964, *Water Act* 1992, and *Water Act* 2006; the transposition of the WFD (2004); *Décrets n° 66-699 et 66-700 du 14 septembre 1966*, J.O., 23 September 1966, 8379-8382; *Décret n° 86-1059 du 19 septembre 1986*, J.O., 27 September 1986, 11579; *Décret n° 99-765, du 6 septembre 1999*, J.O., 7 September 1999, 13411; and the internal by-laws of each institution. For a more complete review of participation in water policy, see section 4.5 below.

¹⁴⁰ The representation of water stakeholders has always been present in French water management since the creation of the river basin administration system by the *Water Act* 1964. Nevertheless, representation was initially not detailed in the legislation (laws or general regulations of the organisms), and it was left to the decision of the competent *préfet* (prefect) to determine what competent persons and users, e.g., were entitled to participate in the decision-making process. *Décret n° 99-765 du 6 septembre 1999*, J.O., 7 September 1999, 13411 is the first regulation that establishes a detailed composition of the users and stakeholders, requiring the mandatory presence of members of relevant consumer associations and environmental NGOs.

¹⁴¹ At the time of writing this thesis, France occupied the 26th position in the ranking. In 1952, when the first European Community (the ECSC) was founded, France occupied 14th place in the world GDP ranking. In 1986, when Spain joined the European Communities, France's position was 18th. It is interesting to compare this data with the position of Spain, which ranked 26th in 1952, 28th in 1986, 29th in 2000, and 23rd in 2006. Note that these data are approximate because of the lack of parameters for a number of countries, especially for the years 1952 and 1986. Source: Pen World Table (PWT), online: <http://pwt.econ.upenn.edu/php_site/pwt_index.php>. Other sources have been consulted: OECD (Organisation for Economic Co-operation and Development) and Eurostat, but not all the information for all the targeted years could be retrieved.

¹⁴² "Compared to both other EC member states and other policy sectors, France did neither have an established body of environmental legislation, nor a powerful environmental lobby at that time [...] Environmental issues did not have a high political priority ever since, which is most prominently reflected in the low budget assigned to the Ministry of Environment [...] This also translates into the lack of qualified staff

3. The hypothesis of likeliness of correct implementation: Determining the degree of fit

In this section, I will formulate the hypothesis of the likeliness of France to implement the WFD correctly according to the theory of the goodness of fit and the institutional framework analyzed in the previous section. In the following parts of this chapter, 4.3, 4.4, and 4.5, I will contrast this hypothesis with my empirical findings.

- Transposition:

Initially, France presents a high degree of fit for the transposition of the WFD regarding the distribution of competences. The only legislator is the national assembly *Assemblée nationale* (AN); thus, there is no conflict of jurisdiction for transposition between local and national entities. The administrative unit responsible for the transposition of the WFD is the Ministry of Environment and Sustainable Development (*Ministère de l'écologie et du développement durable*). Nevertheless, one of the difficulties that the Ministry of Environment has to face in this endeavour, as stated in section 4.2, is its weak situation within the inter-ministerial context. On the positive side, because the transposition of the WFD is occurring in the context of the transposition reforms in France, and the new measures that are being debated, the transposition of the WFD is more likely to be smooth. This political situation should be taken into account with a caveat: debate was ongoing when the WFD had to be transposed and no single solution had been adopted yet. Moreover, the existence of a deliberative process to improve transposition of EU legislation indicates that there is a

for e.g. transposition of environmental directives. As a result, the Ministry usually has a weak position in inter-ministerial meetings.” Sprungk, *supra* note 130 at 155.

pre-existing problem with transposition achievements.¹⁴³ Overall, I qualify the degree of fit as being medium-high.

- **Administrative arrangements:**

France has a long tradition of managing water at the river basin level. Beginning in 1964, the *Water Act* established the river basins as the basic units for water management.¹⁴⁴ Thus, I consider that the degree of fit with the WFD requirements in this regard is high.

- **Participation:**

As reflected in section 4.2 of this thesis, France has had a long tradition of participative water management. However, the administrative mechanisms for participation have been based on a very hierarchical administrative tradition, and only through traditional administrative instruments, like publication through edicts and audiences of interested parties, have opportunities for participation been granted. Issues like public consultation and active public participation are not contemplated in the existing French legislation in the same breadth and depth than the WFD prescribes. Therefore, I propose that the degree of fit regarding public participation is medium.

¹⁴³ See the report of official sources of compliance with EU law drafted by Carina Sprungk in Sprungk, *supra* note 130 at 140-143.

¹⁴⁴ See section 4.2 of this chapter.

In conclusion, I hypothesize that overall the French institutional framework will present a medium-high degree of fit with the water policy designed by the WFD.¹⁴⁵

4. Transposition of the WFD in France

4.1 The transposition of the WFD by Act 2004-338

France transposed the WFD by Act 2004-338 of April 21, 2004 (hereinafter also called “*Transposition Act*”).¹⁴⁶ This is a specific act targeted at the implementation of the Directive. The provisions of this act modify articles 210 and 212 of the *Code de l’environnement* as well as some provisions of the *Code de l’urbanisme* (Urban Code) et the *Code général des collectivités territoriales* (The General Code of Territorial Collectivities).

Following the criteria outlined in Chapters 2 and 3, it is important to take the following into account when evaluating the correctness of transposition of the WFD: timeliness, clarity, and major shortcomings regarding articles 4, 9 and 14 of the WFD.

Regarding timeliness, France completely transposed the Directive four months and 15 days after the official deadline. Therefore, the transposition was almost timely.¹⁴⁷

The first transposition proposal (within the project of reform of the *Water Act* 1992) was

¹⁴⁵ This is the result of the combination of a medium-high degree of fit for the transposition, a high degree of fit for implementation of administrative arrangements, and a medium degree of fit for implementation of public participation requirements in the elaboration of the RBMPs. The average total score (medium-high + high + medium) equals a medium-high degree of fit.

¹⁴⁶ *Loi n° 2004-338 du 21 avril 2004 portant transposition de la directive 2000/60/CE du Parlement européen et du Conseil du 23 octobre 2000 établissant un cadre pour une politique communautaire dans le domaine de l’eau*, *J.O.*, 22 April 2004, 7327 [Transposition Act 2004], online : <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000418424&fastPos=1&fastReqId=269731107&categorieLien=id&oldAction=rechTexte>>.

¹⁴⁷ This assumption is based on Falkner’s taxonomy for assessing the correctness of transposition (see Chapter 2, at 25 and 27).

submitted in June 2001 to the *Assemblée nationale*,¹⁴⁸ that is, at a very early stage of the process. The proposal was adopted by the *Assemblée nationale* on January 10, 2002 and submitted to the *Sénat*.¹⁴⁹ However, a change in government and continuing discussion about the adequate type of instrument for the legal transposition instrument delayed the actual final transposition of the WFD to April 6, 2004.¹⁵⁰

Concerning clarity, it is important to take into account the legal instrument used for the transposition and the comprehensiveness of its contents. According to the table of actors and distribution of competences in water management, the transposition of the WFD in France requires the intervention of parliament.¹⁵¹ The necessary parliamentary action may take any of four different shapes: 1) a linkage law gathering together similar aspects of regulation to which the Directive is related; 2) a specific act transposing only the Directive; 3) DDACs (*Diverses dispositions d'adaptation au droit communautaire*) (Various Provisions for Adapting Community Law) – which are pieces of legislation used to simultaneously transpose a set of directives; or 4) a legislative delegation to the executive to transpose a directive by issuing regulations (*ordonnances*) according to art. 38 CF.¹⁵² In the case of the WFD, the Directive was transposed through Act 2004-338, a specific law targeted solely at the transposition of the WFD provisions. This fact contributed to the enabling act's clarity because all the provisions of the WFD can be

¹⁴⁸ Sprungk, *supra* note 130 at 165.

¹⁴⁹ *Ibid.*

¹⁵⁰ Before that, the European Commission commenced an infringement proceeding against the French Republic for failing to transpose the WFD. The infringement proceeding consisted of a formal letter and a reasoned opinion, in which the Commission warned France about the failure to transpose the WFD and the lack of adoption of adequate measures. After the enactment of the *Transposition Act 2004*, the European Commission withdrew the infringement proceeding in July 2005.

¹⁵¹ See section 4.2 of this chapter.

¹⁵² Sprungk, citing the *Sénat supra* note 130 at 146.

found within it, with the sole purpose of incorporating the WFD mandates into the national legal system. However, the act also halted comprehensive reforms of the national water framework legislation that the original 2001 transposition proposal had suggested. These reforms were aimed at achieving cohesiveness within the legislative framework of water management in France. Therefore, while the transposition of the WFD provisions is clear, the provisions are merely superimposed on the existing water legislation. Thus, the overall water framework remains fragmented, instead of being a unique, comprehensive reference law.

Regarding shortcomings in transposition, major obstacles in the incorporation of articles 4, 9, and 14 have been encountered.¹⁵³ The *Transposition Act* incorporates the content of these WFD articles into its articles 1 (recovery of costs), 2 (environmental objectives including *good ecological status*), and 3 (public participation). This latter provision includes the term “public” instead of the traditional “users and competent stakeholders”. Articles 1-3 of the *Transposition Act* modify articles L210-1, L212-1 and L212-2 of the *Code de l’environnement*. The Act 2004-338 transposes the environmental objectives of the WFD in detail, following the wording pattern of the WFD itself. However, the recovery of costs has been introduced in a forced way in the text. Article 1 briefly states that the cost of use of water should be supported by users. Yet, this statement is closer to a declaration of intention than to a regulative provision. The provisions concerning public participation have been integrated with the provisions regarding the elaboration of the SDAGEs (that is, the RBMPs). In general, the provisions of the *Transposition Act* essentially contain the content necessary to fulfill the

¹⁵³ The definition and wording of “good ecological status”, the recovery of costs, and the information available to the public were the most contested aspects of the debate in the AN during the negotiation of the WFD at the EU level. For more details, see Sprungk, *supra* note 130 at 166-178.

incorporation of these elements of the WFD into the French legal system. Thus, I conclude that these features have been transposed to an essentially correct degree.

4.2. Theories of governance and policy-making: The transposition of the WFD in France from a political perspective

The transposition of the WFD in France is set in the context of the transposition reforms undertaken by the government and the AN in 2001 and 2006.¹⁵⁴ During this period, the government and the National Assembly launched a quest for a better transposition method due to the poor record on transposition of EU environmental legislation achieved by France.¹⁵⁵ In the case of the WFD, the Ministry of Environment was entitled to transpose it, and the political parties in power had a say in its final shape. The transposition of the WFD was first conceptualized as part of a systematic reform of water management that the government of François Mitterrand (Socialist Party) sought to undertake. The French government started working on the transposition of the WFD at a very early stage: the draft bill for the transposition was ready in June 2001 to be voted on in the AN.

However, in June 2002, a change of political party dramatically modified the process of transposition of the Directive. The new party in power, the centre-right *Union pour un Mouvement Populaire* (“UMP”), decided that the transposition should be carried

¹⁵⁴ The first initiative of this kind was the Philip Reports, followed by Jean Pierre Raffarin’s *circulaires*, which were intended to identify major problematic areas and shortcomings in transposition of EU legislation. The result of these analyses was the re-parlamentarization of the transposition of EU legislation by a constitutional amendment in 2005 (art. 34 CF), and, on the other hand, the delegation by the parliament of the powers for transposition of EU legislation to the government, which was habilitated for transposition by *ordonnances* (regulations). This “battle” for the transposition power ended more or less successfully in the use of DDACs for the speedy transposition of delayed directives without withdrawing control from the AN. For more details, see Sprungk, *supra* note 130 at 125-155.

¹⁵⁵ For a detailed picture of France’s transposition records see Sprungk, *supra* note 130 at 140-143 and footnote XX in this chapter. I have relied on her work in this section.

out through a law which exclusively targeted the incorporation of the WFD into the domestic legal system. Consequently, a new proposal restricted to the transposition of the WFD was submitted to the AN on February 12, 2003 and adopted by it on April 10, 2003.¹⁵⁶ Therefore, the systematic reform of the legal framework for water management was abandoned and, with it, the original proposal of the *Parti Socialiste* for transposition of the WFD. The UMP's modification of the process was aimed at meeting the deadline by preventing further delay and debate on the transposition of the WFD. Nevertheless, the actual transposition was delayed, and so the European Commission reacted quickly by sending a formal letter of infringement in January 2004. Meanwhile, the debate about the approval of the WFD *Transposition Act* went on and was essentially delayed during the “*navette*”, that is, the debate and the vote in the *Sénat*. The legislative proposal waited for almost a year in this transition (the *Sénat* did not approve the text until April 10, 2003), so this step of the transposition was clearly ineffective.

From a political perspective, the transposition of the WFD by France was driven by hierarchy. The party in power in the government (UMP), together with the majority of the same colour in the parliament, decided to change the instrument of transposition of the WFD. However, the differences between government and opposition were always based in the reform of the *Water Act* of 1992 and were not about the contents of the transposition of the WFD. This fact indicates that the type of instrument to be used for transposition of the WFD was an issue for ongoing debate during the process and it delayed the final incorporation of the WFD into national law. In regarding this issue from a political perspective, it is key to highlight the inefficient coordination and cooperation

¹⁵⁶ Sprungk, *ibid.* at 179-180.

between the political parties in power and the opposition, as well as the ineffective coordination in the transition from the AN to the *Sénat*. These two factors were the main causes of the delay of the transposition of the WFD and, eventually, the reason the European Commission opened an infringement proceeding against France.

5. Creation of the RBDs and the CAs

In France, water management at the watershed level has had a long tradition. Despite the lack of environmental legislation in other areas prior to the adoption of EU environmental legislation, France has had policy-making standards and basic water management systems, such as planning and licensing organizational structures, since the 1960s. In 1964, the *Water Act* established the core of water management policy and set the legal framework that has shaped French water policy ever since. Against this background, the creation of the RBDs and CAs required by the WFD has not posed any major challenges to the French administrative system from a structural perspective.

However, the Water Agencies and *Comités de bassin* have faced a significant challenge in adjusting their functioning to the mandate of the WFD. Participation in these institutions has traditionally been restricted to the major economic stakeholders, such as the industrial and the agricultural sectors. Another important group of stakeholders, the representatives of NGOs, has often been disregarded, despite the fact that NGOs were taken into account in the composition of the basin administration committees. In fact NGO representatives were often conceived of as trouble-makers instead of as necessary actors in the policy-making process.¹⁵⁷ The WFD encouraged integration and

¹⁵⁷ Alain Dutemps pointed out this fact of “marginalization” of the NGO representatives about a decade ago. Today, he refers to the negotiation and cooperation with NGOs as “*parténariats de longue durée*” (long-term

participation; thus, the *Agences de l'eau* have had to undertake a “change of mindset”.¹⁵⁸

For instance, regarding initiatives promoting a more cooperative and substantively participative approach, the *Agence de l'eau Adour-Garonne* has co-financed a position together with NGOs in order to work together on water planning and management. The objective is to be able to have a permanent environmental agent who works as a liaison with the entire network of environmental NGOs. This investment, according to the *Agence*, has been successful in incorporating environmentalists' voices into the institution's work.¹⁵⁹

Taking into account the fact that the institutions for water management required by the WFD were already in place in France since 1964, the creation of the RBDs and the establishment of the CAs has not been a problem for the French administration in terms of formal requirements. However, it has posed important challenges regarding institutional functioning. From a political perspective, the modes of governance that have shaped the administrative arrangements in France are hierarchy and cooperation. The former has been the persistent framework shaping river basin administration since its creation. The latter has contributed to the design of more participative structures that incorporate necessary views into water management, such as the environmental values expressed by representatives of NGOs. An example is, as I mentioned above, the creation of a co-funded position in the *Agence de l'eau Adour-Garonne* for a permanent

partnerships); that is, he views them as organizations that have to negotiate and cooperate with the public administration in the long run. M. Dutemps distinguishes between the NGOs that have solid networks established at a national level, and minor NGOs, which, according to his opinion, are not that willing to cooperate constructively with the public administration. Interview with Alain Dutemps, Toulouse, France, 29 December 2008. See Appendix.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

representative of the NGOs in the *Agence*. This decision goes beyond the mandatory representation that NGOs need to have in the composition of the administrative council of the *Agence* according to law. Thus, this is a further step towards the goals of the Directive of incorporating multi-stakeholders into decision-making organisms, that is, into the CAs in the RBDs.

6. Public participation in the elaboration of the RBMPs

The WFD refers to three different types of public participation: information (supply), consultation, and active public participation. The WFD states that the first two kinds should be ensured, whereas the latter should be encouraged.¹⁶⁰ However, it should be pointed out that active public participation is not a voluntary exercise: the WFD establishes the need to involve the public in debate and decision-making at different stages of water planning.¹⁶¹ In France, the *Transposition Act 2004* incorporates the provisions of the WFD about public participation in the configuration of the RBMPs. The *Transposition Act* modifies the *Code de l'environnement* by incorporating innovative elements such as public consultation into the drafting of the plans. Articles L 212-2-II and III establish the mandate to deliver draft RBMPs (SDAGEs) to the public and they incorporate the possibility of modifying such plans according to the results of the public consultation carried out. In addition, article L 212-6 sets out the same procedure for the SAGEs (sub-basin management plans). The key issues in applying the WFD requirements for public participation in France are two. First, there is the issue of how to craft

¹⁶⁰ Art. 14 WFD. See also the GD8, *supra* note 93 at iv.

¹⁶¹ From the reading of the Preamble 46 and Annex VII, element 4, the conclusion is that active public participation must be involved at least at the stages that the WFD requires. Thus, this is a mandate, not a voluntary element. See the GD8, *ibid.* at 27.

innovative initiatives suitable for communicating information to the public, as public consultation is crucial.¹⁶² Second, regarding active public participation, it has been necessary, to meet WFD requirements, to shift from the concept of a stakeholder as a participant to the concept of the public as a participant.

Regarding the first issue, French administrative legislation had already implemented certain measures to inform the public about the SDAGEs and the SAGEs, but these measures were mostly reduced to the traditional administrative tools of edicts and audiences of the interested parties (entitled stakeholders). In terms of public consultation, French policy-making did not envisage a system of wide consultation that included civil society as prescribed by the WFD. The *Transposition Act 2004* does not regulate any concrete procedures of public consultation apart from the ones established for standard administrative procedures. Thus, this aspect remained to be developed by regulations and the initiative of the *Agences de l'eau*.¹⁶³ Prior to the elaboration of the RBMPs, the Ministry of Environment and the six *Agences de l'eau* held a number of meetings to share information obtained at the CIS gatherings, carried out at the European level, and resulted in agreements on common measures for the development of public participation in water management.¹⁶⁴ In particular, the most significant strategy to come out of the meetings held by the Water Agencies was the elaboration of a questionnaire to be used in conducting a survey of public opinion.¹⁶⁵ Regarding the second issue, the *Transposition Act 2004* switches the term “users and competent persons/stakeholders” to

¹⁶² Implied from interview with M. Dutemps, supra note 160 at 68.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Questionnaire available online: <<http://www.eau-adour-garonne.fr/page.asp?page=1350>>. The responses of the public are also available on the same webpage.

“public”. This new terminology allows individuals without a title or an administratively proved interest to participate in water decision-making at a number of stages. Yet, regarding substantive change, it is still difficult to foresee how the RBMPs are going to indicate the specific contributions of the “public”.

From a governance perspective, the adoption of the public participation mandates of the WFD has been led by negotiation, fostered by the debates between the agencies, the Ministry of Environment, and the public. Some traits of hierarchy can also be spotted in the case of the substantive contribution to the RBMPs. During the time I was conducting research for this paper, no specific measures were being taken regarding the tracking of public input into the RBMPs. This is mostly due to the pervasive notion that the public administration makes final decisions on water management. Thus, I consider that this fact is not incompatible with the RBMPs informing the public of their actual input. Therefore, I conclude that this conception falls under a pattern of hierarchy.¹⁶⁶

7. Conclusion about the implementation of the WFD in France

In the previous sections 4.4, 4.5, and 4.6, I analyzed the correctness of the implementation of the three aspects of the WFD that are the subject of my study. In summary, France transposed the WFD in an almost timely manner (3 months and 15 days after the deadline). The text of the transposition law is clear; one of the causes that may have contributed to its clarity is the adoption of a specific act as a unique instrument for

¹⁶⁶ The WFD does not explicitly require in its provisions the formal obligation of following up the specific input that public participation has had on the final draft of the plan. However, the mandate of active public participation that the WFD establishes in article 14, among others, according also to the GD8 about public participation, it is not a voluntary step. Therefore, in order that this notion might be implemented, I understand that it is necessary to enact a system that can identify the real input of the public, in order to not leave this important provision as a blank or programmatic measure, but as an effective one.

the transposition of the WFD. On the negative side, the adoption of a law solely targeted at transposition of the WFD stopped reforms of the systematization of the water legal framework, which may have added coherence to water legislation. Despite some shortcomings in the transposition of the WFD regarding its articles 4, 9 and 14, I consider the transposition of the Directive to be almost timely and essentially correct. Regarding the creation of the RBDs and the CAs, these were pre-existing institutions in French water management, operating since 1964; therefore, France did not have to take any specific measures in order to meet the deadline for the creation of the necessary administrative institutions. Finally, public consultation and active public participation were the most difficult milestones for France. In general, France met the deadlines for public consultations; yet, it becomes difficult to determine how the final product (RBMP) would show what effect these surveys had in the actual drafting of the plans. Today, there is no specific way to track the public's input but to compare the results of the survey with the final version of the RBMP. Therefore, I consider that the implementation of this aspect has been two-fold: essentially correct in the structures of the organisms and the timeliness for public consultations, but at risk of being significantly incorrect regarding the elaboration of the RBMP because there is no accounting of the public contribution in the final plan.

Looking at the domestic dynamics that have shaped the implementation of the WFD, hierarchy and negotiation have been the mainstream modes of governance. The transposition of the WFD was clearly driven by hierarchy. The change in power in the presidency and in the new parliamentary majority switched the debate from the national revision of a water policy framework to the adoption of an act solely transposing the

WFD. The creation of the RBDs and the CAs has also followed patterns of cooperation and hierarchy. In sum, French water administration is going through a transition period of more negotiation between different administrative units and stakeholders. Public participation has also been implemented through negotiation and hierarchy. The process of negotiation between the Ministry of Environment and the *Agences de l'eau* has been crucial to the implementation of public participation by providing agreement, for instance, about the questionnaire for the survey and public consultation of the WFD and by setting common standards to promote active public participation. However, the final plans have so far not included any reference to the actual contribution of the public. This is an indicator that hierarchy is still a relevant steering force in the elaboration of the RBMPs. In conclusion, the contrast of the hypothesis of the likeliness of transposition of the WFD by France and the analysis of the empirical findings confirms that France has implemented the WFD as expected, to an essentially correct degree. Therefore, I consider that the theory of the goodness of fit suits this case study.

Chapter 5. The Implementation of the WFD in Spain

1. Introduction

In this chapter, I will follow a structure parallel to that of the previous chapter.

First, I will introduce the legal water management framework Spain and will follow that with a brief overview of the evolution of Spanish water policy. This introduction will help me to draw the institutional framework for water management and set the degree of fit for the implementation of the WFD. Then, I will formulate the hypothesis of the likeliness of implementation of the selected milestones of the WFD by Spain according to the theory of the goodness of fit. Later, I will analyze the implementation of the three selected topics – transposition, administrative arrangements, public participation – in their respective sections. I will study Spain’s compliance with the WFD benchmarks and will complement this analysis with an examination of the modes of governance that have influenced the process of implementation in its three aspects mentioned above. Finally, I will test the hypothesis of likeliness of implementation of the WFD by contrasting it with my empirical findings.

2. Water management in Spain: The institutional framework

2.1. Evolution of the water institutional framework in Spain

In Spain, water is a public resource subject to public dominion.¹⁶⁷ The legal framework for water management is set by the *Spanish Constitution of 1978* (*La Constitución Española de 1978*) (“CE”) in articles 45, 148 and 149, the *Real Decreto Legislativo 1/2001, de 20 de Julio por el que se aprueba el texto refundido de la Ley de Aguas* (Royal Legislative Decree 1/2001 of July 20 Approving the Revised Text of the Water Act) (“TRLA”), and the legislation of the Autonomous Communities (Statutes of Autonomy and acts) governing water. In addition, the *Reglamento del Dominio Público Hidráulico* (Public Hydrological Regulation) completes the legislative framework.¹⁶⁸ The first act that sets the legal framework for water management is the *Water Act 1985*,¹⁶⁹ which establishes water as a public good and, hence, submits it to licensing and control of the public administration. This *Water Act* was substantially reformed by *Act L46/1999*.¹⁷⁰ The latter was repealed by the *Real Decreto Legislativo 1/2001*, which establishes the current water management framework in Spain.

The TRLA, which is the main legal text setting the framework of water management in Spain,¹⁷¹ established the river basin as the basic administrative unit for water management in art.16. With this purpose, the *Confederaciones Hidrográficas*

¹⁶⁷ See arts.1 and 2 in *Real Decreto Legislativo 1/2001, de 20 de Julio, por el que se aprueba el texto refundido de la Ley de Aguas*, BOE 176, 24 July 2001, 26791-26817 [TRLA].

¹⁶⁸ *Reglamento del Dominio Público Hidráulico. Real Decreto 849/1986, de 11 abril; RCL 1986\1338*. BOE 103; 30 April 1986, 15500. Amended version, BOE 157, July 1986, 24020.

¹⁶⁹ *Ley 29/1985, de 2 de agosto, de Aguas*, BOE 189, 8 August 1985. Amended version: BOE 243, 10 October 1985.

¹⁷⁰ *Ley 46/1999, de 13 de diciembre, de modificación de la Ley 29/1985, de 2 de agosto, de Aguas*. BOE 298, 14 December 1999, 43100-43113.

¹⁷¹ The TRLA (act) is completed and developed by the *Reglamento del Dominio Público Hidráulico* (regulation).

(Water Confederations) (“CHs”) were established in 1926. The CHs are public organisms attached to the Ministry of Environment (*Ministerio de Medio Ambiente y Medio Rural y Marino*) that function at the river basin level.¹⁷² They agglutinate the different public administrations (central, autonomic and local) and actors (users and NGOs) that are affected in water management. Their main function is to elaborate management plans (*Planes de Cuenca* – named *Planes de Demarcación* after the WFD), after negotiation among their members. These plans are to be submitted to the National Water Council (*Consejo Nacional del Agua*) for their approval. These plans have to be compatible with the National Plan for Water Management (*Plan Hidrológico Nacional*).¹⁷³ The *Plan Hidrológico Nacional* is an act which sets the main directions for water management in Spain and establishes the elements for coordination among the different *Planes de demarcación* (RBMPs).¹⁷⁴

Regarding the actors involved in water management, as Spain is a decentralized state, the transposition of the WFD should be carried out by the administration with jurisdiction over the environment and water, which is shared between the State and the Autonomous Communities. The central authorities (central government and *Las Cortes* –

¹⁷² The fact that the CHs are based at the river basin level does not mean that there is a *Confederación* for every single basin in Spain. As in France, some CHs manage different river basins that are in a nearby geographic area. Concerning the rivers and waters that flow within the territory of a single Autonomous Community, the latter is responsible to create their organ of management, which should respond to the same principles established for the CHs by national legislation (art. 18 TRLA).

¹⁷³ *Ley 29/1985, de 2 de agosto, de Aguas*, BOE 189, 8 August 1985, arts. 1.3, 38. Amended version, BOE 243, 10 October 1985.

¹⁷⁴ The first *Plan Hidrológico Nacional* was approved in July 2001 by the *Ley 10/2001 de 5 de julio del Plan Hidrológico Nacional*. The previous Plan proposed by Partido Popular (PP) in 2000 was significantly overruled by Partido Socialista Obrero Español (PSOE) after it came into power at the national elections in March 2000. The Plan of 2001 is still the current National Plan for Water Management, which has been developed by *RDL 2/2004 de 18 de junio* [*Real Decreto-Ley 2/2004, de 18 de junio, por el que se modifica la Ley 10/2001, de 5 de julio, del Plan Hidrológico Nacional*.BOE 148 19 June 2004, 22453-22457] and by *Ley 11/2005 de 22 de junio* [*Ley 11/2005, de 22 de junio, por la que se modifica la Ley 10/2001, de 5 de julio, del Plan Hidrológico Nacional*. BOE 149, 23 June 2005, 21846-21856].

bi-cameral parliament-) should issue basic legislation in matters regarding water and the Autonomous Communities should develop this legislation.¹⁷⁵ Local authorities have executive jurisdiction only.

Table 5. National actors involved in the implementation of the Water Framework Directive

	<u>Central administration</u>	<u>Autonomous Communities</u>	<u>Local authorities</u>
	<i>Ministerio de Medio Ambiente y del Medio Rural y Marino</i>	17 regional governments of 17 Autonomous Communities	8000 local authorities (approximately)
Jurisdiction	Sea fishing, without prejudice to the powers which, in the regulations governing this sector, shall be conferred on the Autonomous Communities (art. 149.1.19 ^a)	Management of environment protection (art. 148.1.9 ^a)	No legislative jurisdiction attributed – only executive power
	Legislation, regulation and concession of water resources and development when waters flow through more than one Autonomous Community, and authorization for hydro-electrical installations when their development affects another Community or when energy transport goes beyond a Community's territory (art. 149.1.22 ^a)	Planning, construction and operation of hydraulic projects, canals and irrigation of benefit to the Autonomous Community; mineral and thermal waters (art. 148.1.10 ^a)	
	Basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to	Inland fishing, the shellfish industry and aquaculture, hunting and river fishing in their territory (art. 148.1.11 ^a)	

¹⁷⁵ See CE, arts. 148.1. (9^a, 10^a, 11^a) and 149.1. (19^a, 22^a, 23^a).

establish additional protective measures; basic legislation on woodlands, forestry, and livestock trails (art.149.1.23 ^a)	
Public works of general benefit or the execution of works affecting more than one Autonomous Community (art. 149.1.24 ^a)	
Powers not specifically attributed to the Autonomous Communities by the <i>Constitution</i> or the Statutes of Autonomy (art. 149.3)	Other powers not exclusive to the central administration adopted by the Statutes of Autonomy (art. 149.3)

Finally, for an adequate study of water management in Spain, it is essential to make a reference to its geophysical situation. Spain is a country facing particular water management challenges due to its geography: its situation in the southwest of Europe and its geophysical and morphological features make it a country with several diverse microclimates. As a result, the presence of water in Spain is inconsistent and substantially irregular.¹⁷⁶ Because of this reality, water management experts often talk about the “two

176 The rain catchments may dramatically vary between short periods of a few years, or even between two consecutive years. Also, the water distribution among the territory is not even: for instance, the river basins in the north (e.g. North Ebro Catchment) obtain more water than the ones in the south (e.g. Almería) simply by the fact that rainfall is considerably more abundant in the North Atlantic region than in the desert region of Almería. This is an extreme example, but this pattern can be found even within the same northern strip. Simply comparing the catchment of the northern basins in Galicia and in the Cantabric area with the interior basins in Catalonia can provide us a clear idea of this extremely relevant fact in terms of water management: in the northern basins, the average amount of water available per capita is greater than 8000m³ per year whereas, in the interior Catalan basins, this amount decreases to 495m³ per year. Note also that the average amount of water available per capita in Spain is 2829m³/year. These figures give us a clear notion of the unequal distribution of water within the Spanish population. In addition, the particular climatology of a large part of the country leads to high fluctuation of water courses due to a high variability of rainfall seasons, oscillating from very dry to flood seasons; therefore, the calculation of real availability of (still) water in Spain is about 8%, a figure far from the European average, which is 40%. These data have been obtained from Anna Pallarés, *La planificación Hidrológica de Cuenca como Instrumento de Ordenación Ambiental sobre el Territorio* (Ph.D. dissertation, Autonomous University of Barcelona, Faculty of Law, 2005) [unpublished] at 409 [Pallarés], online: <<http://www.tdx.cat/TDX-0713106-114208>>.

Spains”:¹⁷⁷ the dry and the “water-sufficient”. Nevertheless, the notion of the “two Spains” may not be accurate,¹⁷⁸ and the reality is that Spain is going through a period of transition in water management policy, from the “traditional” or “old culture” of water to the “new culture of water”.¹⁷⁹ The “traditional culture” of water consists of a corporative system of water management, which predominantly promotes certain specific actors (engineers, farmers and hydropower companies) to make decisions on water management. It is also a system based on the use of hydrological engineering works responding to the extreme challenges that the country faces (geographical and thus, climate-related, as well as economic). The so-called “new culture” of water is based on a new dimension of participation (not only restricted to users or to mainstream economic groups of interest) and sustainable water management. Thus, participation in decision-

¹⁷⁷ This expression has been constantly cited referring to different aspects of Spanish society, but the most significant and predominant reference is to the Spanish Civil War (1936-1939). Indeed, this expression shows the high level of intensity and controversy of the water debate in Spain. Among others, for example, the writer Julio Llamazares uses this expression while complaining about water privileges within lightly versus heavily populated areas in Spain: “*Las dos Españas*” *El País* (13 February 2007); available online at: http://www.elpais.com/articulo/opinion/Espanas/elpepiopi/20070213elpepiopi_6/Tes

¹⁷⁸ Antonio Embid Irujo argues that the notion of surplus and deficit regarding water in an ecosystem is a fallacy. Translating his words: “[...] from an environmental point of view, nothing is ‘extra’ or surplus in a river, and by all means, water that flows into the sea is not wasted water[...]” in *Alegaciones al Plan Hidrológico Nacional de 2000* (Gobierno de Aragón: Civitas, 2001), at 145 [translation by author] [Embid Irujo]. See also Embid Irujo’s view about the incorrect calculations of surpluses and deficits in the project of the PHN 2001 (*Anteproyecto de Ley del Plan Hidrológico Nacional, 2000 - Bill Concerning the National Hydrological Plan, 2000*) and overestimates of surpluses of water in the Ebro basin and the legal implications concerning “caducity” that a regime of water regulation based on the grounds of surplus and deficit can imply. *Ibid.*, Conclusions 24 and 25, at 259-260.

¹⁷⁹ Note that when I refer to culture around these expressions, the translation from the Spanish entails more than culture as merely a set of customs and values: I am actually referring to water policy trends. Concerning water culture or water management policy, we can distinguish between three models: the model of supply, the model of demand, and the sustainability model. The model of supply is based on providing all possible facilities to exploit water as much as possible in order to satisfy water demands and to foster economic development. The model of demand consists of planning for the possible demands of water by different users in order to exploit water only to the extent of satisfying these users. The sustainability as well as the demand model stands on the belief that water is a scarce resource. However, this model goes beyond the demand system and primarily focuses on environmental aspects, arguing for a change in economy that would lead to environmentally-friendly trends in water management. For further details, see Xavier Ponce Alifonso, *La política del agua en España: formación e incentivos para su uso eficiente en la agricultura* (Ph.D. Dissertation, University of Rovira i Virgili, Department of Economics, 2007) [unpublished] at 15-16, 27 [Alifonso], online: <<http://www.tesisenred.net/TDX-0606107-124649>>.

making should be open to interests that have not been present before in the shaping of water policy, that is, civil society in general, environmental groups, and consumers of water for domestic use, among the most relevant. The new culture of water is not perceived as a culture of hierarchy, but as a culture of governance.¹⁸⁰ This new conception of water management also highlights the need to reduce the reliance on hydrological works as the only response to water shortages, and to look for more integrative and sustainable solutions that would primarily promote environmental welfare: efficient use (saving water), reuse, and water treatment, among others.¹⁸¹

2.2. Analysis of the institutional framework: Decentralization, totalitarianism, and economic development

The distribution of jurisdiction regarding water management in Spain is certainly complex. In the *Spanish Constitution of 1978*, Spain is declared a state of Autonomous Communities: 17 communities and two autonomous cities (Ceuta and Melilla).¹⁸² Within this institutional setting of political decentralization, the competences for the transposition and the application of EU legislation are distributed among different levels: the central administration, the Autonomous Communities, and the local administration. The central government is responsible for the implementation of EU legislation before

¹⁸⁰ See Alifonso, *ibid.* at 9-10, 45.

¹⁸¹ Within the “New Culture of Water” we can also distinguish two different tendencies: the public and the private ways to sustainability. The supporters of the first trend argue that water is a public good unlike any other and should be protected from private trade rules; thus, they aim for public intervention in water policy (represented by the *Fundación Nueva Cultura del Agua* - New Culture of Water Foundation). The advocates of the second theory claim that water should no longer be an exclusive public good; therefore, they propose methods of market regulation of water (represented by the *Fundación para el Análisis y los Estudios Sociales* (“FAES”) - Foundation for Analysis and Social Studies). For a more detailed explanation of these two theories, see Alifonso, *ibid.* at 49.

¹⁸² Arts. 137, 143-145 CE. See also the *Leyes Orgánicas* (Organic Laws) of creation of the statutes of each Autonomous Community.

the European Commission. However, this fact does not mean that it has complete jurisdiction over the implementation of EU environmental law. In fact, these competences are distributed among the central administration and the Autonomous Communities according to the lists comprised in the *Spanish Constitution of 1978* and the Statutes of Autonomy. This distribution of competences is not uniform because the different Autonomous Communities have not each assumed the same number of competences or reached a uniform level of competence in their Statutes of Autonomy.¹⁸³

Furthermore, the system of distribution of competences within the Spanish administration is not the same as the system of attribution of competences in the EU: the first distribution follows a subject logic while the latter follows a teleological notion.¹⁸⁴ That is, the competences in Spain are attributed by different policy sectors: for example, the central government has the jurisdiction to establish basic legislation concerning the environment (art. 149.1.23^a CE), and the Autonomous Communities have complete jurisdiction over the water resources that flow or are situated completely within their respective territories (art. 148.1.11^a CE). In EU legislation, competences are attributed according to a goal; for instance, according to art. 14 TEC, “The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of

¹⁸³ The CE established different ways to access autonomy and attribute jurisdiction to the Autonomous Communities. Four of the Communities (Andalusia, the Basque Country, Catalonia and Galicia), because of their particular historical backgrounds, gained autonomy through the so-called “fast track” (art.151 CE), whereas the rest had to go through a slower process (art. 143 CE). In the process of assuming competences (anything not within the competence of the central government can be within the jurisdiction of the Autonomous Communities), the Communities have taken over different kinds and levels of competences among themselves. Therefore, there is no harmonious jurisdictional framework among the different autonomous administrations.

¹⁸⁴ See Maria Jesús Montoro Chiner, “Integración Europea y creación del Derecho” (1992) 128 *Revista de administración pública* 145 at 145-170 [Montoro Chiner], online: <http://www.cepc.es/rap/Publicaciones/Revistas/1/1992_128_145.PDF>.

Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.” This fact implies a mismatch between the EU and the Spanish legal system that creates difficulties in incorporating EU legislation into the Spanish legal system.

Regarding totalitarianism and the lack of tradition of participative institutions in the Spanish public administration, it is remarkable that water policy was more intense and active during the dictatorships of Primo de Rivera and Franco than during other periods. This may be due to a number of factors: the regimes were searching for legitimacy through an active water policy aimed at supplying all demands and providing economic prosperity to the state. Furthermore, this policy was targeted at engaging the core of powerful water-specific sectors, such as the engineering and the agricultural and hydropower sectors, in order to further economic development.¹⁸⁵ The strategy of these regimes was to retain the support of decisive actors in the political and economic scene. This background led to a policy of massive engineering works.¹⁸⁶ This trend of hydraulic construction was intertwined with the political discourse of economic development. The fact that Spain was a small economy based primarily on agriculture and farming at that time is one of the key economic points. The engineering works were aimed at shoring up that small economy through the promotion of technical and industrial works that would provide an increase in employment and industry, and would standardize the economic conditions of the various regions. That is, the argument for Spanish unity, such an important theme for the dictatorships, was also used as a persuasive argument for water exploitation.

¹⁸⁵ Alifonso, *supra* note 182 at 37-38.

¹⁸⁶ Note that 5% of Spain’s surface is covered by engineering works such as dams, reservoirs, and other water projects. See Alifonso, *supra* note 182 at 29.

Admittedly, Spain's institutional framework contributed to perpetuating the traditional culture of water until today. Currently, a new intense debate on water policy is taking place between: the traditional and new cultures of water, public and private (and market) mechanisms, and between hydrological construction and sustainable consumption. Concerning the transition from the traditional to the new culture of water, Xavier Ponce Alifonso wonders why the institutional change to democracy has not yet entailed the transition to a different water culture.¹⁸⁷ Over the past 30 years, the debate about water management has vividly reopened. In terms of the social dimension, three facts have helped to incorporate new perspectives into water management thinking. First, new environmental ideas started to resound in the political and intellectual arena in the late 1970s and in the 1980s, challenging the discourse of economic development at any cost. Second, the social and economic model of Spanish society has changed: new uses of water have started to develop that are not exclusively targeted to agricultural production; that is, tourist and recreational uses of the water supply may have higher payoffs. Third, democracy requires consensus-building; therefore, the support of a few actors is not enough for leaders to stay in power. Concerning the institutional framework, the accession to the EU by Spain goes together with the duty to incorporate prolific EU environmental legislation that has clashed with the Spanish reality in two main ways: first, upon joining the EU, Spain entered a community of agricultural surpluses, which challenged the primacy of the Spanish agricultural sector; second, the hierarchical model of decision-making in Spanish water policy collides with the governance model (and thus, with new modes of governance) of the EU. However, despite all these changes,

¹⁸⁷ Alifonso, *supra* note 182 at 52.

corporatism and aggressive hydrological construction remain dominant trends in water policy.¹⁸⁸

2.3. The hypothesis of the likeliness of correct transposition and application: Setting the degree of fit

In order to analyze the implementation in progress of the WFD and the likeliness that Spain will achieve these targets, I set out in this section the degree of fit of the Spanish institutional framework for water management with the requirements of the WFD. The resulting picture will help me to formulate the hypothesis of the likeliness of Spain implementing the Directive correctly according to the theory of the goodness of fit. In the following sections, 5.3, 5.4, and 5.5, I will contrast this hypothesis with my empirical findings.

- **Transposition:** *A priori*, the jurisdiction for transposition of the WFD is clear: the central government is entitled to incorporate the WFD into the Spanish legal system (art. 149.1 CE). Therefore, the degree of fit of transposition could be considered high. However, there have been many complaints about how the legislative techniques of Spanish norm production present significant obstacles to transposing EU legislation.¹⁸⁹ Therefore, taking into account this endemic feature, the degree of fit could arguably be viewed as medium.¹⁹⁰ In addition, the apparent clarity of the jurisdiction over transposition becomes less obvious when it is realized that the deadline for transposition of the WFD

¹⁸⁸ Alifonso, *ibid*, *supra* note 182 at 67-68.

¹⁸⁹ This drawback can just as easily be extrapolated to the general production of norms in the Spanish legislative system. See Montoro Chiner, *supra* note 187.

¹⁹⁰ The transposition of the WFD through the *Budget Act's* accompanying law is a clear manifestation of the lack of appropriate administrative and legislative technique. For more detail, see section 5.4 of this chapter.

concurrent with a period of reform of the Statutes of Autonomy of several Autonomous Communities. In conclusion, I qualify the *a priori* high degree of fit of the WFD for transposition as an actual medium-high fit.

- **Administrative arrangements:**¹⁹¹ Spain has had a long tradition of managing water at the river basin level; it is, in fact a pioneer state in establishing such policy. Nevertheless, coordination among the different levels of public administration involved in water management is poor and the jurisdictional framework is unclear. Overall, however, I conclude that the degree of fit regarding administrative arrangements is high.
- **Participation:** The apparent degree of fit may also be misleading concerning this aspect. Being that Spain is a state with a long authoritarian tradition, it may seem surprising that it was also a pioneer in incorporating users into water management very early on.¹⁹² However, this participative element is a mirage in reality: the *Confederaciones Hidrográficas* were for a long time mere instruments for authorizing engineering works sought by the governments, and the Autonomous Communities have experienced an environment hostile to their participation.¹⁹³ Moreover, participation has been restricted to traditional users of water until recently and the concept of

¹⁹¹ This section refers to the establishment of the RBDs and the CAs.

¹⁹² The notion of a system of water management based on river basins was exported from the Spanish legal system to international law. See Pallarés, *supra* note 179 at 414-415.

¹⁹³ Antonio Embid Irujo argues in his interview that the Autonomous Communities do not behold a relevant position in the organisms in order to have their own voice. *Contra*, Antonio Galván Plaza thinks that the Autonomous Communities are today well represented in the river basin administrations. Interviews with Antonio Embid Irujo and Antonio Galván Plaza, Zaragoza, Spain, December 22, 2009.

“public” had never been targeted until the transposition of the WFD.¹⁹⁴ The degree of fit is, thus, medium.

Overall, we can conclude that Spanish institutional framework presents a medium degree of fit with the water policy designed by the WFD.¹⁹⁵

4. Transposition of the WFD in Spain¹⁹⁶

4.1. Transposition of the WFD by Act L62/2003

Spain transposed the WFD into Spanish Law by *Act 62/2003*.¹⁹⁷ This type of legislation corresponds to an act that has to be approved every year in the Spanish national parliament to facilitate the execution of the *Budget Act*. Therefore, it is also known as *Ley de Acompañamiento de los Presupuestos Generales del Estado*, that is, the piece of legislation that accompanies the *Budget Act*. This instrument is supposed to set out key points necessary for the approval and application of the *Budget Act*, but has traditionally been used as a tool to include miscellaneous legislation for urgent procedures. It has been overused, no matter the parties in power, to pass legislation which otherwise would not likely have passed or would have generated very controversial debate. The threat that the *Budget Act* may fail to pass influences the approval of many

¹⁹⁴ Pallarés, *supra* note 179 at 473-475.

¹⁹⁵ The result of this evaluation is obtained by calibrating the degrees of fit of each of the aspects examined: low-medium (for transposition) + high (for administrative arrangements) + low-medium (for public participation in the elaboration of the RBMPs) equals an average of medium degree of fit.

¹⁹⁶ In this section, I follow a structure parallel to that in the analysis of transposition of the WFD in Chapter 4.

¹⁹⁷ *Ley 62/2003, de 30 diciembre, de medidas fiscales, administrativas y del orden social*, BOE 313, 31 December 2003, 46874-46992.

measures, treated in the debate as a “package deal”. The result is a mix of bits and pieces and thus a lack of legislative clarity.

Article 129 of *Act 62/2003* is the legal instrument used for the transposition of the WFD in Spain. This article modifies several parts of the (Spanish) *Water Act* of 2001 to introduce the elements required by the WFD, such as definitions of River Basin Districts and Competent Authorities, among others. The degree of clarity of the *Water Act* 2001 is also low, because of the continuous patching and modification that it has suffered from 1985 onwards. Note that the previous (Spanish) *Water Act* dates from 1879.¹⁹⁸ Since 1985, the text has been reshaped and modified, but there has been no attempt to adopt a completely new one.

Spain transposed the Directive eight days after the deadline.¹⁹⁹ Thus, technically, Spain did not transpose the WFD on time; however, eight days of delay is not a substantial amount of time, especially when one considers the length of postponement of some other member states.²⁰⁰ According to Falkner’s categorization of timeliness,²⁰¹ I conclude that the transposition of the WFD by Spain was almost timely because the delay was only of a few days past the deadline and, in any case, far from the benchmark of six months of delay.

Yet, this does not mean that the transposition in Spain was clear and adequate. Indeed, legal experts have pointed out several concerns about the form and substance. For

¹⁹⁸ *Ley de Aguas de 1879*, online: <http://sirio.ua.es/libros/BGeografia/ley_de_aguas/ima0000.htm>.

¹⁹⁹ The deadline for transposition was December 22, 2003 (art. 24 WFD).

²⁰⁰ For example, in 2005, the ECJ handed down three sentences regarding the failure to transpose within the prescribed period (cases C-32/05 – *Commission v. Luxembourg*; C-118/05 – *Commission v. Portugal*; C-85/05 – *Commission v. Italy*).

²⁰¹ See Chapter 2, at 25 and 27..

instance, the fact that the transposition was introduced at the last minute as an amendment to the *Ley de Acompañamiento* by the centre-right *Partido Popular* (“PP”) implied that the congress was not able to discuss the form and the content properly.²⁰²

As regards the transposition of articles 4, 9, and 14 WFD, the environmental objectives and the recovery of costs have been incorporated into the Spanish legal system in essence, although they are not as developed as would be expected from the reading of the WFD.²⁰³ However, the TRLA 2001 does not make any explicit reference to the participation of the public. It could be assumed that public information and consultation were already present in the Spanish legal system through the standard legislative framework setting out the principles and functioning of the public administration.²⁰⁴ Nevertheless, there is no provision in the legal framework about active participation of the wider public (by “public” I mean not only users and stakeholders, but civil society in general). Therefore, since there is no mention of public participation in *Act 62/2003*, I consider that this aspect of the WFD has not been properly transposed.

In summary, the transposition of the WFD in Spain has been “almost timely”, yet controversial. Indeed, the rush to transpose on time may have lead to the sacrifice of some necessary elements for an adequate transposition, namely, more clarity and cohesiveness. Some key aspects that may generate problems in the future due to improper

²⁰² Antonio Embid Irujo, “La Directiva Marco del Agua y Algunos de los Problemas de su proceso de Implantación en España y Otros Países Europeos” (2007) 80 *Ingeniería y Territorio* at 20-27 [Embid Irujo 2007], online: <<http://www.ciccp.es/revistaIT/textos/pdf/03-Antonio%20Embid%20Irujo.pdf>>.

²⁰³ These aspects have been transposed into the following articles of the *Real Decreto Legislativo 1/2001*: environmental objectives – including good ecologic status (arts. 40, 92, 93, 97, and 100 to 108); and the recovery of costs has been inserted into the articles establishing provisions governing economic and financial aspects of water management (arts. 112 to 115). No particular mention of public participation is made in this text.

²⁰⁴ See *Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, BOE 285, 27 November 1992, 40300-40319.

transposition are the adoption of hydrological plans and the recovery of costs for services provided. Regarding these issues, Embid Irujo establishes 2010 as the date when we will start to see whether WFD implementation will be possible and successful despite the (not extremely accurate) transposition.²⁰⁵

4.2. Theories of governance and policy-making: The transposition of the WFD in Spain from a political perspective

Spain's institutional framework and the domestic political panorama did play a significant role in the shaping of the transposition; particularly notable were the absolute majority in parliament of the political party in power, and the context of reform of the Statutes of Autonomy. From 2000 to 2003, when the WFD had to be transposed, the *Partido Popular* had an absolute majority in parliament; thus, it did not have to negotiate with any other party the transposition of the WFD. It is worth mentioning that, even if the party in power had been willing to negotiate with other political forces, there was no presence of strong environmental parties, in the way that the Green Party is very strong in Germany, for example. In the case of Spain, green parties are disseminated and they form coalitions with other major parties, such the *Partido Socialista Obrero Español* ("PSOE"), the current ruling party, and the *Izquierda Unida* ("IU"). Similarly, the PP did not negotiate the transposition of the WFD with any other actors in the environmental field, such NGOs. As a result, in the process of transposition we cannot identify elements of negotiation or cooperation. The pattern of policymaking that we observe in the introduction of the transposition legislation during the last-minute of the reading of the

²⁰⁵ Embid Irujo 2007, *supra* note 205.

draft in the senate is that of hierarchy: the PP used its predominant position to adopt the text for the WFD transposition by absolute majority without the necessity of bargaining.

Another important factor which has undoubtedly had an impact on the transposition is the fact that the implementation of the WFD is intertwined with the process of reform of the statutes of several Autonomous Communities, which started with the reform of the Statutes of Autonomy of Catalonia and Valencia in 2006.²⁰⁶ In this context of expansion of jurisdiction, Catalonia was the first mover, and it adopted the institutions of the WFD before the central government, and even prior to the definitive adoption of the Directive. The Parliament of Catalonia enacted the (Catalan) *Water Act* in 1999 incorporating the institutions of the WFD. This piece of legislation was repealed by a new legal text regulating water on November 4, 2003,²⁰⁷ that is, 56 days before the transposition by the central authorities. Certainly, this fact has had an impact on the regulation adopted by the central authorities and may have conditioned it.²⁰⁸ Therefore, in the transposition of the WFD by Spain, we can perceive elements of hierarchy and competition. In this phase, I could not identify elements of negotiation or cooperation.

In sum, Spain transposed the WFD through *Ley 62/2003*, which was the 2003 version of a multi-issue piece of legislation that accompanies the *Budget Act* every year.

²⁰⁶ Note that the Statutes of Autonomy of Catalonia and Valencia have already been the object of claims of unconstitutionality in 2006 involving trespass on water management jurisdiction among other reasons.

²⁰⁷ *Decreto Legislativo 3/2003, de 4 de noviembre, por el que se aprueba el Texto refundido de la legislación en materia de aguas de Cataluña*, DOGC (*Diari Oficial de la Generalitat de Catalunya* – Official Journal of the Generalitat of Catalonia) 4015, 21 November 2003, 22823-22840 [(Catalan) *Water Act*].

²⁰⁸ See for more details see Antonio Fanlo Loras' commentary about the (Catalan) *Water Act* and its impact on the transposition of the WFD in Spain, especially regarding issues concerning the interpretation of state and autonomic jurisdiction on the programs of measures and the RBMPs. Antonio Fanlo Loras, "Los Planes de Gestión y los Programas de Medidas en la Directiva Marco de Aguas: Su Confusa Transposición al Derecho Español" (2006) 4 *Revista electrónica del Departamento de Derecho de la Universidad de La Rioja* (REDUR) at 57-58, online: <http://www.unirioja.es/dptos/dd/redur/numero4/fanlo.pdf> .

For the purposes of clarity and the facilitation of the implementation of the Directive, this is not the most appropriate legal instrument for adopting the institutions of the WFD. The Directive sets out the policy lines for water management in the EU and it comprises issues that involve more than a single administration within the territories of the member states (waters do not flow according to administrative divisions). Therefore, avoiding debate on the form and content of the legal text of transposition will cause conflicts of jurisdiction and resulting implementation costs; and this is even more true in a decentralized country like Spain. The theories of modes of governance help us to understand that two main factors have shaped the transposition of the WFD in Spain: the absolute majority of the PP during the transposition period (governance through hierarchy), and the context of reform of the Statutes of Autonomy (governance through competition). Finally, the lack of clarity and legal quality of the Directive has also influenced the transposition to a considerable extent. As a result, the transposition has already been generating conflicts of jurisdiction and, thus, problematic application, and these problems are likely to increase in the future.

5. Creation of the RBMPs and CAs

Concerning water management at the river basin level, the WFD did not import any substantial innovations into the Spanish system. Through the transposition of the WFD, the RBDs were established by articles 16 and 16.4 of the TRLA. In the Spanish legal system, these institutions are now called *Demarcaciones Hidrográficas* (River Basin Districts; literally, “hydrographic demarcations”). The application of the WFD entailed the change of denomination from *Cuencas Hidrográficas* (Watersheds; literally,

“hydrographic basins”) to the broader term *Demarcaciones Hidrográficas* in order to include ground waters and coastal waters within the unity of the basin. The CAs are the authorities responsible for coordinating water management at the river basin level and for complying with the requirements of the WFD before the European Commission. The CAs in Spain were created by article 36 (revised) of the TRLA and are named *Comités de Autoridades Competentes* (Committees of Competent Authorities).

The *Comités* develop consultative functions for water management within the *Demarcaciones* and promote cooperation among all the public administrations involved in the planning of water management.²⁰⁹ The composition of the *Comités* is similar to that of the CHs, although their voting system is still uncertain.²¹⁰ The *Comités* are a very recent creation and a consequence of the application of the WFD, but they add very little input to the organization of water management. Their incorporation into the organization of the water management system should therefore be smooth.²¹¹

From a political perspective, the CHs have received several critiques for not properly representing the interests involved in water management. Regarding their objectives of drafting hydrological river basin plans, for a long time, these institutions have been limited to authorizing and planning the management of new engineering work.

²⁰⁹ The three different levels of public administration – the central government, the Autonomous Communities, and local administrations – are involved in the management of water at the river basin level. . All these levels have some jurisdiction over water management and, in addition, they have jurisdiction over the environment and a number of issues that are intrinsically related to water management, such as territory and land management, which is within the competence of the Autonomous Communities (art. 148.1.2ª, 3ª CE). Therefore, all this levels of public administration have to engage in and be represented by the organism that manages water at the river basin level since each of them has jurisdiction over many issues that are crucial for the development of water management plans.

²¹⁰ See art. 36.4 L62/2003, *supra* note 200.

²¹¹ In the same vein, Embid Irujo and Galván Plaza share the opinion that the *Comité de Autoridades Competentes* should not have any problem with functioning smoothly within the existent river basin administrative framework. Interviews with Antonio Embid Irujo and Rogelio Galván Plaza in Zaragoza, Spain, 22 December 2008. For more detail see Appendix.

Furthermore, the Autonomous Communities have persistently complained about their difficulties in participating in the elaboration of water policy in the CHs.²¹² Likewise, the CHs have promoted a corporatist model of participation in water management decision-making by privileging the traditional users of water over other actors with different interests, like consumers or environmental groups. Because of these dynamics, I conclude that the modes of governance that shape the creation of the RBDs and the CAs are hierarchy and negotiation.

6. Public participation in the elaboration of the RBMPs

First, before starting the analysis of the application of the provisions for public participation in the WFD, it is crucial to bear in mind that, as I already mentioned in section 5.4, the 2001 TRLA, after the transposition of the WFD, does not include any references to public participation. Therefore, I conclude that the application of these precepts of the WFD has been developed without a solid legal basis. In other words, it has followed an intuitive development directed by the CHs creating new mechanisms of participation taking as a reference the directions generated by the Water Director meetings at the CIS. Yet, the corresponding legal framework of reference is missing. In Spain, the active involvement of the public has been the most difficult aspect to apply. While publicly supplying information and consulting with interested parties has not posed any major problems for the public authorities, implementing active public

²¹² Anna Pallarés describes their perception by the central administration as “annoying”. See Pallarés, *supra* note 179 at 478.

participation has become a challenge. Nevertheless, in general terms, this test has been welcomed by the public administrations.²¹³

Information supply and consultation have been regulated and applied in Spain since the 1980s. We can say that the WFD does not provide any substantial innovation in these two areas. In general, the legislation and policy on access to information by the public, and on information supply and consultation follow the principles of the *Aarhus Convention*.²¹⁴ In order to satisfy these requirements, the central government, the Autonomous Communities, and the local administrations have made full use of new communications technologies. The internet has been an excellent tool for developing public information on water management and for implementing the WFD. The Ministry of Environment, the CHs and the autonomous water administrations host websites with complete information generated from the process of WFD implementation. Other mechanisms that have been used are online email consultation in the CHs, workshops, and the elaboration of informative material (DVDs on the WFD and its implementation in Spain, informative leaflets, etc.). In general, the public administrations have tried to disseminate the information about the WFD in a plain and accessible manner.

Active public participation has been the most challenging aspect to implement in Spain due to the interpretation of the concept of active public participation. Based on my study, it seems that active public participation can be perceived significantly differently,

²¹³ Both Antonio Embid Irujo and Rogelio Galván Plaza agree that public information and consultation already have a tradition within the Spanish legal system. Thus, in a general these questions have not been an obstacle for the application of the WFD. (Interviews with Antonio Embid Irujo and Rogelio Galván Plaza, see *supra* note 214 at 92). However, the public was not part of the water management process to the extent that the WFD requires. In Spain, only users of water had been traditionally involved in active participation. The WFD brings to the Spanish water scene concepts that are not familiar to it: the participation of civil society and the public, rather than just the participation of “users”.

²¹⁴ UNECE, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, signed at Aarhus, Denmark, online: <<http://www.unece.org/env/pp/documents/cep43e.pdf>>.

depending on the actors' viewpoints. The perception of environmental groups is that public participation means that decisions should only be taken after public debate (in forums, round tables of consultation, etc.).²¹⁵ Yet, the public authorities believe that, although the public should be consulted, the final decision should belong to the public administration, which has been constitutionally established and democratically elected (even if indirectly).²¹⁶ The problem with these somewhat contradictory notions of active public participation is that it is questionable what value should be attributed to its input in the decision-making process. For example, in Spain, public participation has often been considered by the public administration as a “nuisance”, something to be gotten through as fast as possible simply to comply with the law. This is certainly not a constructive outlook on public participation and the valuable contribution that it can make to the decision-making process.

Some of the initiatives taken by the public authorities regarding public participation are very innovative and imply a new conception of water management. For example, the *Confederación Hidrográfica del Ebro*²¹⁷ divided the basin into more than 30 sub-basins and organized a series of meetings with key water actors (farmers, NGOs, etc.) before preparing the Outline of Important Issues (*Esquema de Temas Importantes*).²¹⁸ These documents are available online on the website of the *Confederación* and some paper copies were provided as well to the participants in the

²¹⁵ This is the impression that I obtained at the interviews with M. Sergey Moroz and Mr. Pieter Depous conducted in Brussels, Belgium, 13 and 14 January 2009 respectively.

²¹⁶ This is what M. Antonio Embid Irujo and M. Rogelio Galván plaza argued in the interviews. See *supra* note 214 at 92.

²¹⁷ CH of the Ebro River Basin District. Online: <<http://www.chebro.es/>>.

²¹⁸ The Outline of Important Issues is a Document that aims at gathering together the most relevant sub-basin management issues that should be debated for the elaboration of the RBMP. Antonio Galván Plaza, interviews, Zaragoza 22 Dec 2008.

consultation sessions.²¹⁹ In Catalonia, the *Agència Catalana de l'Aigua* (Catalan Water Agency) (“ACA”) has established a highly interesting method of showing the integration of the inputs from public consultation and active participation in a transparent way. The ACA has classified the proposals of the public into four different groups: 1) those excluded from the planning process by reasonable justification (which must accompany the denial); 2) those considered for inclusion; 3) those already included in the planning of the ACA; and 4) those beyond the jurisdiction of the Autonomous Community of Catalonia.²²⁰ In Andalusia, the *Confederación Hidrográfica del Guadalquivir* took the initiative of developing direct active public participation and the *Centro de Nuevas Tecnologías del Agua* (Centre for New Water Technologies) (“CENTA”) has organized two forums for water debate. Nevertheless, with a few exceptions like the Guadalquivir River Basin Authority, participation still remains relegated to non-decisive fora; decision-makers do not take the wider public into account when elaborating water policy, only interest groups.²²¹ This is indeed one of the complaints that the participants in these fora have highlighted. In general, all these initiatives raise the issue of the need to change to a more participative water culture which supports the actual endeavour that the public authorities, interest groups and civil society are making in order to attain water sustainability. However, it is still difficult for the broader civil society to actually make a contribution to water policies and to feel embraced by the public authorities in the design of such policies.

²¹⁹ Online: <<http://oph.chebro.es/DOCUMENTACION/DirectivaMarco/CuencasEbro.htm>>.

²²⁰ Leandro del Moral Ituarte, “La Participación Pública en el Nuevo Proceso de Planificación Hidrológica en Curso: La Experiencia de la Demarcación del Guadalquivir y de la Comunidad Autónoma de Andalucía”, in Antonio Embid Irujo, *et al.*, eds., *Ciudadanos y Usuarios en la Gestión del Agua* (Cizur Menor, Spain: Thomson-Civitas, 2008) at 270 [Ituarte].

²²¹ The insights of the fora have been gathered together by Leandro del Moral Ituarte. See Ituarte, *ibid.*

In sum, four main dynamics can be drawn out from the process of trying to incorporate public participation into water management in Spain:

- The public administration has welcomed active public participation to a great extent. For a number of reasons, it has been interesting to the public authorities to involve the public (or at least, environmental NGOs) in water policy design. The main reasons are the need to legitimate their policies, the contribution that public input may have in implementing water policy effectively (saving opposition costs), and the need to comply with the mandate of the WFD.
- The Autonomous Communities have not acted in a uniform manner regarding public participation. For instance, some Autonomous Communities – Catalonia has been one of the most active – have worked intensively to involve the public in water management. while some others have not paid much attention to this mandate of the WFD.²²²
- Public participation has still been restricted to interest groups and users of water (mostly traditional users) and the contributions of the wider public have been little taken into account. As I mentioned above, the initiatives of active public participation have been taken outside of the decision-making process, as informative tools, but have not been integrated in fact into water policy design. Limiting the contributions of the public to providing an informative reference framework has its value as a tool to originate debate and to gather different opinions and different voices in order to raise the consciousness of political

²²² As del Moral Ituarte reports: “[...] what has been done in Aragón and Catalonia is very different from that in the Andalusian Mediterranean region.” Ituarte, *ibid.*[translation by author]. The Andalusian region had a considerable delay (about a year) in publishing information that should have been available to the public at the time of writing the article. Ituarte, *ibid.*

leaders. However, the input of the public is not directly enforceable; therefore, it would only be discretionarily taken into account in the design of water policy.

- On the other hand, the fact is that, even if the public authorities try facilitating debate and active involvement, the majority of the population does not participate.

Spanish water law scholar Antonio Embid Irujo points out in an interview that only about 2% of the public is interested in participating in water management policy.²²³

Against this background, I identify different modes of governance regarding the implementation of public participation in the elaboration of the RBMPs. The predominant model is hierarchy, but negotiation and cooperation have also played a role in the implementation of public participation in the elaboration of the RBMPs. Hierarchy is still the mainstream mode of governance: the actors who have more say in the decision-making process are the traditional users of water. There is still a long way to go before the understanding of public subjects actively involved in public participation can be switched from “users” to “the public”. Cooperation between the public authorities and environmental groups has also been further developed since the WFD came into force. The NGOs see in the Directive an official invitation to participate in the process of drafting the RBMPs and, in general, the quality of their participation has improved, as they seem to feel more welcome by the rest of the participants.²²⁴ Finally, the race of some Autonomous Communities to stand out in the implementation of this aspect of the WFD (primarily Catalonia) shows a pattern of competition, in order to do better than the

²²³ Interview with Antonio Embid Irujo, Zaragoza, Spain, 22 Dec 2008. See *supra* note 214 at 92.

²²⁴ Interview participants (Embid Irujo, Galván Plaza, Sergey Moroz) concurred about the fact that the WFD has promoted the participation of NGOs in water management from a formal and mainly from a substantial perspective.

central administration and to show a better score in legal compliance before the EU. The presence of these three modes of governance implies that the picture of water management policy in Spain has started to change. A few years ago, before the transition to democracy, it would have been impossible to find patterns of competition between the central government and the Autonomous Communities. What is more, since the 1990s and even more so after the entry into force of the WFD in 2000, there has been little cooperation between the NGOs and the public authorities with respect to water management. Therefore, regarding public participation in water policy, cooperation and competition have become important modes of governance that have nuanced the dominant mode of governance, which is still hierarchy.

7. Conclusions about the implementation of the WFD in Spain

In general, the degree of compliance of Spain with the implementation of transposition, administrative arrangements and public participation can be qualified as medium on average (between essentially correct and somewhat incorrect, but not quite significantly incorrect to date).

The transposition was almost timely, although the quality of fit regarding the legislation itself (an accompaniment of the *Budget Act*) and its content was poor. That is, the legislation did not completely transpose of the public participation provisions of the WFD, and was not well adapted into a cohesive legal framework of water management. Similarly, the transposition of the definitions contained in article 2 WFD was poor; definitions were gathered together simply by translating them under the same article – little effort was made to place them accurately within the legal framework. Overall, I

conclude that the transposition of the Directive has been almost timely and essentially correct in form, although significantly incorrect in content.

The transposition of administrative arrangements has been completely correct and its practical application could be qualified as essentially correct concerning the mandates of the WFD, yet with major shortcomings regarding the coordination among the different public administrations involved.

Regarding public participation, on average, Spain has implemented public information and consultation essentially correctly. However, the lack of active public participation remains a drawback of the Spanish water policy model. In general, besides a few innovative initiatives like the interactive online consultation in the Guadalquivir river basin, active involvement in decision-making remains restricted to traditional users of water. Thus, in this aspect, Spain's application of the WFD scores low, that is, between somewhat and significantly incorrect. On average, I assess the implementation by Spain of the three aspects analyzed in this chapter as being almost essentially correct, although not all aspects have been implemented to the same degree. As a final remark, it is interesting to see how the transposition of the WFD, which apparently should have been (and seems) smooth is actually rather incorrect from a substantive point of view and may lead to troublesome water policy design in the future, as well as making it difficult to correctly implement the WFD. Yet, it is surprising that, even if the score is still medium in terms of public participation, some new initiatives have entirely embraced the need for public participation in water management and, in general terms, Spain scores better than expected taking into account its long totalitarian institutional background. Thus, I conclude that the theory of the goodness of fit does not fully apply to the case of Spain.

Through the analysis of domestic dynamics, I have illustrated the presence of hierarchy as the mainstream mode of governance in Spain's water policy, as well as in the process of the implementation of the WFD. I would like to point out that hierarchy is not necessarily a detrimental mode of governance for water policy *per se*, if complemented by others. In theory, hierarchy could be a good mode for effective coordination. However, this is not what we actually perceive in the study of the domestic dynamics that have shaped the WFD implementation process: coordination is definitively a missing element in Spanish water policy. During my interviews, most of the participants, from the European Commission and NGOs representatives at the EU level, to national experts and authorities, complained about the unclear institutional framework of water policy in Spain as a major obstacle for the implementation of the WFD. The outcome of the analysis is not surprising: hierarchy is the predominant mode of governance, followed by competition. In contrast, cooperation has had very little presence in the process of implementation of the WFD. In my view, this is the cause of the problems of coordination that the experts refer to in my interviews; thus, this should be a mode of governance to be promoted in order to achieve better results in the implementation of the Directive.

From the analysis of the benchmarks for implementation and the modes of governance that have shaped the implementation, the degree of fit of Spain (medium-low) has not had a decisive impact on the final result of implementation up until the time of writing this thesis. In contrast, Spain scores as an essentially correct implementer (with some nuances of functional incorrectness) at present. Admittedly, I should highlight the fact that the real outputs of the implementation process will not be able to be tested until

approximately 2011 to 2020. This study is a preliminary analysis of the ongoing process of implementation of the WFD. However, the analysis of the three aspects studied in this chapter already shows a remarkable fact: the picture of water policy in Spain is slowly changing. As Embid Irujo states, the debate on water policy has vividly and controversially reopened in the last ten years.²²⁵ The WFD has contributed to the re-examination of water policy in Spain. As stated above in this chapter, the formal inputs provided by the Directive (management of water at the river basin level, participation of the public in water management rather than restricting participation to public administrators) have not made a significant change to the pre-existent water policy because most of the organizational mechanisms that the WFD establishes were already in place well before it came into force. Nevertheless, the WFD has had significant input from a practical perspective by backing some values that have had very little support in the traditional water culture. Therefore, the endeavour to implement the WFD correctly should be practical and teleological rather than formal. The final results of the implementation of the WFD by Spain are to be seen later this year and in 2015 and beyond. In any case, the implementation of the three aspects of the WFD studied has been essentially correct, so this fact describes an initial transition from the traditional culture to the new culture of water.

²²⁵ It is important to make a reference here to the mode of governance of competition that has been driven to the extreme in some occasions. For example, the tension between the Communities of the “dry” Spain and the “water sufficient” Spain reached a peak with the drafting of the PHN 2000/2001 (National Hydrological Plan). Several transfers of water were established despite the anger of environmentalists and the “donor” Autonomous Communities. See Embid Irujo, *Alegaciones al PHN 2000*, *supra* note 181. The introduction of this bill inspired major protests all over the country, steered by both supporters and detractors of the plan (in Aragón alone, more than 400,000 people were mobilised against the plan; Embid Irujo, *ibid.*), and spurred a controversial debate in the Congress and the Senate between the left and the right (PSOE and PP were the two major exponents of this confrontation). In the end, the bill drafted by the PP (who held the absolute majority in the Congress) was derogated by the PSOE in June 2004 after it came into power after the general elections in March 2004 and the political parties against the bill formed an absolute majority in the Congress. However, despite the fact that the major transfers were repealed, smaller ones (“mini-transfers”) were carried out and article 12 PHN (which leaves open the possibility for new transfers in the future) remains in force.

Chapter 6. Comparative Analysis and Conclusions

The purpose of my study has been to assess the implementation of the WFD and to address the doctrine of the Southern Problem/Mediterranean Syndrome based on the theory of the goodness of fit. In my thesis, I used the case studies of the implementation of the WFD in France and Spain to explore the implementation of the WFD within two EU member states that belong to opposing categories according to the doctrines of the Southern Problem and the Mediterranean Syndrome: France (a leader) and Spain (a laggard).²²⁶ In the previous chapters, I analyzed the data gathered during my research. I examined legal instruments such as the WFD, the CIS, the transposition laws and others. I also reviewed the European Commission reports and infringement proceedings, as well as the theoretical doctrine (particularly studies by “new implementation scholars”). Also, I analyzed the empirical data that I obtained through my interviews with authorities and experts who have been working on the implementation of the Directive. To answer my second research question, I formulated the hypothesis of the likeliness of transposition according to the preeminent theory of the goodness of fit; analyzed the data obtained and determined the score in the implementation of the three aspects of the WFD examined (transposition, creation of administrative units, and public participation in the elaboration of the RBMPs). Then, I contrasted these results with the hypothesis of successful implementation previously formulated and explained the dynamics that shaped the process of implementation in the domestic field. Up to this point, I have analyzed the

²²⁶ Note that this categorization follows the geographical criteria of the doctrine of the Southern Problem and the Mediterranean Syndrome. Admittedly, France does not always fall in the category of “leader”. While following other criteria, like the latest reports of the European Commission on implementation of EU legislation, particularly since the first publication of the *Annual Report on Monitoring of the Application of Community Law* in 1986, France has repeatedly scored as a laggard regarding transposition of Directives. See Sprungk, *supra* note 130 at 140.

implementation of the WFD in France and Spain separately. In order to undertake a comparative analysis, I first present a summary of the results obtained in each individual case study in a set of six tables.

As hypothesized, France implemented the WFD essentially correctly (Tables 6 and 7).

Hierarchy has been the mainstream mode of governance in the implementation of the WFD, as shown on Table 8.

Table 6. Hypothesis of the likeliness of implementation of the WFD by France

Aspect	Degree of fit	Hypothesis of likeliness of implementation		Overall hypothesis of likeliness of implementation
Transposition	Medium-high	Essentially correct	=	Essentially correct
Administrative Arrangements	High	Essentially correct		
Public Participation	Medium-high	Essentially correct		

Table 7. Data, analysis and score (France)

Aspect	Score		Overall score
Transposition	Essentially correct	=	Essentially correct
Administrative Arrangements	Essentially correct		
Public Participation	Essentially correct regarding consultation; essentially correct in form, regarding public participation but risks falling under significantly incorrect category if the input of the public in the RBMPs is not tracked		

Table 8. Modes of governance that have shaped the implementation of the WFD in France

Aspect	Modes of governance		Dominant modes of governance
Transposition	Hierarchy	=	Hierarchy
Administrative Arrangements	Hierarchy and cooperation		
Public Participation	Negotiation and hierarchy		

Contrary to hypothesis, Spain performed better than expected implementing the WFD (Tables 9 and 10). The dominant mode of governance in the implementation of the WFD has been hierarchy and competition, as a sub-mode (Table 11).

Table 9. Hypothesis of the likeliness of implementation of the WFD by Spain

Aspect	Degree of fit	Hypothesis of likeliness of implementation	=	Overall hypothesis of likeliness of implementation	
Transposition	Low-medium	Significantly incorrect			Medium risk for significantly incorrect implementation
Administrative Arrangements	Medium-high	Essentially correct			
Public Participation	Medium	Between essentially correct and significantly incorrect			

Table 10. Data, analysis and score (Spain)

Aspect	Score	=	Overall score	
Transposition	Essentially correct overall but significantly incorrect regarding clarity			Essentially correct
Administrative Arrangements	Essentially correct			
Public Participation	Between essentially correct and somewhat incorrect			

Table 11. Modes of governance that have shaped the implementation of the WFD in Spain

Aspect	Modes of governance	=	Dominant modes of governance	
Transposition	Hierarchy and competition			Hierarchy (and competition as a sub-mode)
Administrative Arrangements	Hierarchy and cooperation ²²⁷			
Public Participation	Hierarchy, competition; and cooperation			

²²⁷ I found it very difficult to determine a mode of governance that shapes the implementation of the administrative arrangements because the necessary administrative bodies were already in place a long time before the WFD. Since the opinions expressed in my interviews with experts in river basin administration in France and Spain about the institutions were similar, I concluded by analogy I would give the Spain the same designation as France.

Following the results obtained in each analysis, I can summarize my conclusions as follows:

Table 12. Comparative analysis of the implementation of the WFD in France and Spain

Country	Hypothesis of likelihood of implementation	Score	Modes of governance shaping the implementation
France	Essentially correct	Essentially correct	Hierarchy
Spain	Medium risk for significantly incorrect implementation	Essentially correct	Hierarchy (and competition as a sub-mode)

The comparison of the two analyses reveals very similar results in both cases. Although the two cases have significant nuances, the score is, overall, the same, and so is the predominant mode of governance: hierarchy. Regarding transposition, it is essentially correct without major problems in France whereas, in Spain, clarity becomes a major shortcoming for the interpretation of the legal water framework and is prone to create conflicts of jurisdiction. The creation of the administrative authorities in both cases is essentially correct due to the fact that France and Spain “exported” their river basin management systems to European water policy. Therefore, no significant adjustments had to be made. Finally, in terms of public participation, I observed that France has achieved a better response from the public regarding public consultation by sending out a questionnaire about the implementation of the WFD.²²⁸ In contrast, in Spain, the

²²⁸ In the southwestern *Agence de l'eau Adour-Garonne* alone, the WFD questionnaire was sent to 3,200,000 households, receiving 44,000 responses. (Interview with Alain Dutemps, Toulouse, France, 29 December 2008). However, note that this initiative overall successful in collecting the opinions of the public has been critiqued by some of the NGOs. In my interviews with NGOs, their representatives pointed out two main drawbacks. First, they highlighted the waste of resources (paper) implied. Second, they remarked on the fact that some of the questions might have been formulated using biased wording; for example, the wording seemed to imply that the implementation of the recovery of costs would involve cutbacks on public spending on other sensitive issues and also to imply that a full implementation of this aspect would be detrimental to the French economy. (Interview with Sergey Moroz, representative of WWF Brussels Brussels, Belgium, January 13, 2010.)

involvement of the public has been marginal.²²⁹ In Spain there have been some initiatives from the ACA, as mentioned in Chapter 5, aimed at tracking the effective input of the public in the final version of the RBMPs whereas, in the case of France, I have not found examples of that kind. Overall, in both analyses, hierarchy is the predominant mode of governance, present in every aspect. This fact stresses the resilience of traditional modes of governance versus innovative ones, which are starting to come into the picture more regularly.

The most interesting question that has come out of my analysis is why Spain and France have such similar scores (both achieving a global essentially correct result) when, according to the dominant hypothesis, the former should have achieved a result significantly worse than the latter.²³⁰ That is, the hypothesis based on the theory of the *goodness of fit* applies well to the case of France but not to the case of Spain. In other words, in terms of the WFD, Spain has not been infected by the so-called “Mediterranean pandemic”. According to my analysis, the doctrines of the Southern Problem and the Mediterranean Syndrome have proven not to be suitable instruments for the assessment of implementation of EU environmental policy. At least, it is inadequate to take these doctrines as the mainstream or only theories for the study of implementation.²³¹

²²⁹ There are a few exceptions to this norm. The most salient is the mobilization of public opinion about the transfers of water established by the National Hydrological Plan 2000. However, as Antonio Embid Irujo remarks in his interview, these (*ad hoc*) mobilizations respond to particular cases, e.g. specific dam projects. However, these reactions are far from constituting a continuous mobilization of the public about water issues or around general concerns as opposed to punctual cases. (Interview with Antonio Embid Irujo, Zaragoza, Spain, 22 December 2008).

²³⁰ Note that Spain presented a medium risk for falling in the category of significantly incorrect implementation according to the hypothesis of the likeliness of transposition, whereas France was expected to implement the WFD in an essentially correct manner.

²³¹ Note that the theories of the Southern Problem and the Mediterranean Syndrome imply a dangerous two-sided reading: on the one hand, at first glance, these theories appear to be complaining about the poor performance of the laggards at the same time that they make the “northern leaders” a proud, superior class.

Therefore, this study reinforces the theories of the new implementation scholars that suggest that monistic theories are not appropriate for implementation studies. Moreover, domestic political dynamics matter.

In response to this finding, I consider that two main factors might have influenced France's and Spain's similar scores: the CIS and similar domestic dynamics shaped implementation in both cases. At the EU level, the CIS may have facilitated a common understanding and the display of concrete measures targeted at consensual objectives discussed thorough the joint implementation process. The importance of this strategy was highlighted in the interviews in France and Spain with national authorities, legal experts, as well as in interviews with commission officials and NGO representatives.²³² In the domestic field, it is significant that the same modes of governance have shaped the implementation of the WFD in France and Spain. In addition, it is important to bear in mind that France and Spain already had water management systems in place based on river basins. This fact has made the implementation of the administrative arrangements develop smoothly in both cases. Interestingly, hierarchy is the prominent mode of governance shaping implementation in both cases. Again, in both cases, cooperation is still very weak, as is coordination between the different political actors involved. This

Yet, these theories may be used by the Mediterranean and southern laggards as an excuse not to comply with EU environmental policy and legislation, using the argument that they would not have to make the effort because they are intrinsically doomed to failure in any case.

²³² The importance of the CIS as an instrument for the common understanding of the implementation of the WFD has been highlighted by the experts in all my interviews. In particular, national authorities working at the river basin administrations found the guidance documents and the working programs very helpful for understanding the ambiguous wording of the WFD. In addition, the debates held at the EU level helped the national authorities check on each other and compare and contrast the efforts that had globally been made to implement the Directive. Nonetheless, the CIS received a strong critique from the NGOs. While they agreed upon the positive side of the CIS as a tool for common understanding, NGO representatives also underscored the negative aspects of the CIS: the rulings and new decision-making beyond the scope of the WFD and the non-participation of the NGOs in the process (remember that NGOs are invited to the Water Director meetings but they have neither voice nor vote).

pattern has led in both cases to problems with transposition and the implementation of public participation in the elaboration of the RBMPs. Although it is true that the problems in transposition have been different in the cases of France and Spain – the former presenting problems with timeliness and the latter with clarity and the absence of deep debate – in both cases the staunch dominance of hierarchy has jeopardized completely correct transposition of the WFD. In the same vein, the major challenge has been the implementation of public participation, particularly active public participation. For both countries, it has been challenging to learn how to involve the public in the decision-making process. Another additional fact that may have led to a higher degree of implementation in Spain than was expected (compared to France) is the trend of competition as a sub-mode of governance present in the transposition of the WFD and the implementation of public participation in the elaboration of the RBMPs. The fact that there is a “tension” between the central government and some autonomous communities sometimes leads to a deficit of coordination, but in this case there is also a willingness of the autonomous communities to take the lead to “perform better and faster” than the central government. The autonomous communities, for instance Catalunya, make the first move to seize the opportunity to show the effectiveness of autonomous regional government and the importance of the autonomous regional public administration for their citizens.

Taking into account these findings, I expect my study to make a contribution to the existent literature about implementation of EU environmental policy and legislation in a number of ways:

It sheds light onto EU Environmental Policy in general by assessing the implementation of WFD and providing suggestions for improvement in its implementation in each Member State; showing that the implementation of EU Environmental Policy can overcome the pervasive north-south divide. This study will be applicable also to the accession of newcomer Eastern Europe members by unpacking the shortcomings of the Mediterranean Syndrome this analysis may assist in forestalling the application of prejudicial theories of implementation success based only on geographical location and economic situation to newcomer members. That is, like my study shows the north-south divide does not always apply in the context of compliance and implementation of environmental law and policy. Finally, this thesis also applies to the current economic situation of the EU.²³³ Today, the theory of the Mediterranean Syndrome/Southern Problem is still in vogue. It is still applied *de rigueur* whenever a Mediterranean Member faces a significant problem from the perspective of the EU and applied to the rest of Southern/Mediterranean Members. This study addresses this blanket application and shows that a more nuanced domestic analysis is required. It could help prevent uniform reactions like the responses that several EU members immediately took regarding the “discovery” of the worrisome public debt of Greece and its critical financial situation. This response saw the EU subjecting other Southern members, like Spain, Italy, and Portugal, to extreme threats of intervention without first providing convincing data of

²³³ For further detail about the current financial situation of the EU and Greece see: <http://euobserver.com/?aid=30398> (Greek corruption worth €800 million a year, by Valentina Pop), <http://watch.ctv.ca/news/latest/greek-economy/#clip296221> (Rescue Package For Greece? -interview on CTV News Channel about the Greek financial situation on May 1st 2010, by Amy Verdun), http://www.elpais.com/articulo/economia/Banco/Mundial/advierte/situacion/Espana/grave/elpepueco/20100609elpepueco_14/Tes (El Banco Mundial advierte de que la situación de España es "muy grave". El organismo afirma que las medidas de austeridad del Gobierno van en la "dirección correcta"; El País, 09-06-2010.)

any Greece-like problem in each of them. These reactions are unwarranted and inefficient in administering a centralized economy.

In sum, I conclude that France and Spain have been developing an essentially correct implementation of the three aspects of the WFD examined in this study. Nevertheless, as I have already mentioned, the implementation of the WFD is still ongoing and a number of the most important elements are still difficult to assess. For instance, it is difficult to determine the recovery of costs and the percentage of water bodies that might attain *good ecological status* by 2015. Based on the findings of this study, I posit that, in terms of implementation, hierarchy has been a detrimental mode of governance when it operates almost exclusively. Alternatively, cooperation, when it has been present in the implementation process, has helped to encourage the new trends inspired by the WFD (integration, cooperation, participation) to permeate the pre-existent opposed institutions and dynamics. As an example, the creation of a network of related river basin authority NGOs in France has become a consolidated practice welcomed by the *Agence de l'eau Adour-Garonne* and the NGOs that form part of the network.²³⁴ Hence, I conclude that more cooperation with non-traditional stakeholders is necessary to ensure they are equally involved in water management, which is the aim of the WFD. Furthermore, my advice for France and Spain is to strengthen cooperation of the administrative authorities among themselves as well as among the rest of the political actors on an egalitarian basis. The reinforcement of cooperation mode of governance in water management in France and Spain will, hopefully, contribute to maintaining positive implementation scores and to overcoming major shortcomings in the search for a better

²³⁴ Interview with Alain Dutemps, Toulouse, France, 29 December 2008.

future for water in Europe and for a sustainable model of water management that could inspire the rest of the world.

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Interviews:

For more details, see Appendix.

Appendix

Appendix I. Interviews with experts on the implementation of the WFD

The following is a list of the interviews that I conducted in Europe with the purpose of gathering empirical data for my analysis. The cost of these interviews was partially funded by a travel grant of the University of Victoria (“UVic”) Faculty of Law and a grant from the Student International Activities Fund of the UVic Office of International Affairs. The interviews were conducted with the approval of the Human Research Ethics Board of the University of Victoria.

The participants in the interviews are listed below:

Dr. Antonio Embid Irujo. University of Zaragoza, Faculty of Law. **Capacity:** Chair of Administrative Law at the University of Zaragoza. Interview conducted in Zaragoza, Spain, December 22, 2008.

Professional background: Dr. Embid Irujo has been a professor at the University of Zaragoza Faculty of Law since October 1974. He was also Chair of Administrative Law at the University of Valencia during the years 1987-89. Dr. Embid Irujo is currently Chair of Administrative Law at the University of Zaragoza. He was a scholar of the March (1980) and A. von Humboldt (1982) Foundations, which conceded two grants that allowed Dr. Embid Irujo to study in the Max Planck Institut für ausländisches, öffentliches Recht und Völkerrecht in Heidelberg (Germany). At the Max Planck Institute, he developed research in He was a Humboldt Scholar of International Public

Comparative Law. In addition, he was also president of the Cortes de Aragón (Aragon Autonomous Parliament) from 1983 to 1987. Spanish water law is one of the main interests of Dr. Embid Irujo, to which he has dedicated a large part of his career.

Mr. Rogelio Galván Plaza. *Confederación Hidrográfica del Ebro. Unidad de Planificación.* **Capacity:** Director of the Planning Unit of the Ebro Water Confederation. Interview conducted in Zaragoza, Spain, December 22, 2008.

Professional background: Mr. Galván Plaza is director of the Technical Section of the Planning Unit of the *Confederación Hidrográfica del Ebro*. He has worked in the Planning Unit for 10 years, always in charge of planning issues. Since the WFD came into force, Mr. Galván Plaza has been working on its implementation in the Ebro River Basin.

M. Alain Dutemps. *Agence de l'eau Adour-Garonne.* **Capacity:** Institutional representative and Counsellor of the *Directeur général*. Interview conducted in Toulouse, France, December 29, 2008.

Professional background: M. Alain Dutemps pursued his studies in law in Toulouse, France. He entered the *Agence de l'eau Adour-Garonne* in 1975. First, he worked in the litigation department, regarding tax (*redevances*) issues and then and matters regarding groups of local entities (*les collectivités locales*). Mr. Dutemps has also worked on water matters concerning issues involving the communes, and the agricultural and industry sector. Afterwards, he became responsible for the water treatment service. Later, he was designated institutional representative of the *Agence* in 1980 (in charge of the relations

and coordination within the river basin institutions and the international action). Mr. Dutemps is, as well, counsellor of the *Directeur général*. He is, today, the person with the most years of experience at the *Agence de l'eau Adour-Garonne*.

Mr. Jorge Rodríguez Romero. European Commission, Directorate-General, Environment. **Capacity:** Coordinator of the WFD Team. Interview conducted in Brussels, Belgium, January 12, 2009.

Professional background: Mr. Rodríguez Romero has worked at the European Commission since December 2004. He started working as national expert, that is, as a civil servant of the Spanish government. At that time, he already worked as part of the WFD Team. In January 2008, he started to work as the coordinator of the WFD Team in DG Environment, becoming an official of the Commission. Prior to his work at the European Commission, he used to work on issues concerning the WFD and other water policy matters in the Northern River Basin in Spain, as well as a private consultant in water management.

European Commission, Directorate-General Environment. Infringements Unit.

[Anonymous by request] Interview conducted in Brussels, Belgium, January 12, 2009.

Professional background: Twenty years working in DG Environment.

Mr. Sergey Moroz. WWF Brussels. **Capacity:** Freshwater Policy Officer. Interview conducted in Brussels, Belgium, January 13, 2009.

Professional background: Sergey Moroz has been Freshwater Policy Officer at the European Policy Office of the World Wide Fund for Nature (“WWF”) since January 2005. As Freshwater Policy Officer, he is working on a range of issues, including the implementation of the Water Framework Directive and integration of sustainable water management into relevant EU policies. Before joining the WWF European Policy Office, Sergey worked for four years with WWF’s Freshwater Programme in Denmark, UK, and France, and previously he worked for the WWF restoration project in the Danube delta.

(Source:

http://www.friendsofeurope.org/Portals/6/download/EPS_Water_2008/FoE_Water_2008_Conf_book.pdf).

Mr. Peter Depous. European Environmental Bureau (“EEB”). **Capacity:** Water Policy Officer. Interview conducted in Brussels, Belgium, January 14, 2009.

Professional background: Mr. Depous started his studies in forestry management in the Netherlands and he worked in that domain for four years. In 2008, he took over the Water Office at the EEB, where he works primarily on issues regarding nitrates and hazardous chemical substances in water.