The EEC’s Proposed Directive on Civil Liability for Damage Caused by Waste: Taking Over When Prevention Fails*

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INTRODUCTION

The European Economic Community (EEC) is unique among international organizations in that it can create legislation binding on each of its twelve member states.1 Since the adoption of its Council Directive on Waste in 1975,2 the EEC has increasingly used its legislative power to address pollution problems.3 In one of its most sweeping proposals of environmental legislation to date, the EEC recently proposed a directive addressing civil liability for damage caused by waste.4 “Waste” under this directive includes any substance that a person disposes of pursuant to applicable national law.5 This definition thus includes both hazardous and nonhazardous materials.

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1. Haigh, The Environmental Policy of the European Community and 1992, 12 [Current Reports] Int’l Env’t Rep. (BNA) 617, 617 (Dec. 1989). The following countries are currently members of the EEC: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. Id. at 617 n.1. In addition, Austria and Malta have applied for membership, and Norway is considering filing an application. Role of European Environmental Agency Will Be in Data Collection and Monitoring, 12 [Current Reports] Int’l Env’t Rep. (BNA) 477, 478 (Oct. 1989).
3. For a comprehensive list of EEC environmental directives, decisions, and regulations, see N. Haigh, EEC ENVIRONMENTAL POLICY AND BRITAIN 371-82 (2d rev. ed. 1989).
5. Civil Liability Directive, supra note 4, art. 2(1)(b) (referring to the Council Directive on Waste, supra note 2, art. 1(a)).
Two transnational waste scandals precipitated development of this new directive. First, in March 1983, citizens of the EEC states were stunned to discover that forty-one barrels of “lost” dioxin-contaminated waste had traveled undetected from Seveso, Italy to a barn in San Quen- tin, France. This incident prompted the enactment of a 1984 EEC directive regulating transfrontier shipments of hazardous waste within the EEC. This directive required the EEC to study the issue of liability for damage arising from transboundary waste movements. Second, a November 1986 fire at a warehouse near Basel, Switzerland caused large amounts of toxic chemicals to spill into the Rhine, resulting in serious damage in Switzerland, France, West Germany, and the Netherlands. Following the accident, the EEC Council of Ministers called on the European Commission to investigate “equitable arrangements for liability and compensation” for damage caused by polluters of Community waterways.

The EEC responded to the mandates arising from these two highly-publicized regulatory failures by proposing the Council Directive on Civil Liability for Damage Caused by Waste (Civil Liability Directive) in August 1989. Although it arose in the context of transboundary pollution, the directive regulates all sources of waste-related injuries in the EEC, whether or not the waste has crossed state lines. Once the Council of Ministers approves the directive, all EEC member states will be required to implement its provisions. Thus, the directive serves to harmo-


8. Specifically, the directive states that “[t]he Council shall determine . . . the conditions for implementing the civil liability of the producer in the case of damage or that of any other person who may be accountable for the said damage and shall also determine a system of insurance.” Id. art. 11(3).

9. See generally Comment, The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution, 16 ECOLOGY L.Q. 443 (1989). Because of the spill, the ecological rejuvenation of the Rhine was set back by decades. Id. at 447.

10. The Council and the Commission are two of the four main EEC institutions. For a description of EEC institutions and the legislative process, see infra text accompanying notes 13-42.


nize liability laws among the member states. This harmonization plays a crucial role in ensuring the efficient operation of the EEC internal market. In addition to promoting an efficient market, the directive protects injured parties and the environment by holding waste producers strictly liable for harm caused by their wastes. Plaintiffs may bring both toxic tort and site cleanup actions under the directive.

The primary purpose of this Comment is to analyze the Civil Liability Directive and evaluate its likely effectiveness in addressing perceived inadequacies in current liability laws. Part I provides background information on the structure of the European Community and details the procedure by which the EEC approves and implements laws. Part II describes the current liability regimes applicable within EEC member states and summarizes the shortcomings of these regimes in ensuring that victims are compensated and that the environment is protected. Part III outlines the provisions of the proposed Civil Liability Directive.

Part IV analyzes and evaluates the proposed directive in two ways. First, it discusses the directive's effectiveness in achieving its stated goals. Second, it studies the directive's ability to overcome the inadequacies of existing liability laws. Part V examines the future of the proposed directive by reviewing possible changes to the directive proposed by some EEC institutions. It also examines the possible effect of the United Nations Environment Programme's draft liability instrument on the final form of the EEC directive.

Finally, part VI draws some overall conclusions. This analysis concludes that, while the proposed Civil Liability Directive does not address all of the gaps in existing liability laws, it is an important advance because it provides significant opportunities to obtain remedies virtually unavailable under current law. These remedies will, in turn, enhance existing pollution prevention laws by giving waste producers further incentives to avoid damage caused by wastes.

I

EEC STRUCTURE AND LAWMAKING

A. Structure of the EEC

In March 1957, six European states signed the Treaty of Rome (Treaty), formalizing their decision to create the European Economic

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Community. States joining the EEC essentially transfer some of their sovereign powers to the Community. Thus, unlike other international organizations, the EEC has its own sovereign rights, with the Treaty serving as the EEC "constitution." However, the EEC should not be viewed as a "nation state" like the United States. Unlike U.S. states, member states of the EEC retain most sovereign powers and embrace different cultures, forms of government, and official languages. On the other hand, the EEC may be the most unified group of sovereign states in the world, and its moves toward further unity have recently accelerated. The most significant example of this trend is the EEC's 1987 adoption of the Single European Act, which amends the Treaty and calls for a unified, internal EEC market for goods and services to be in place by 1992.

The EEC is governed primarily by four separate bodies with distinct powers: the European Commission (Commission), the Council of Ministers (Council), the European Court of Justice, and the European Parliament. The Commission's main function is to initiate and draft legislation. It also oversees implementation of legislation by the member states. This legislation can take one of three forms: "regulations," which directly bind the member states; "directives," which bind member states only as to the results to be achieved; and "decisions," which bind only those states to whom they are addressed. The seventeen members of the Commission are appointed for renewable four-year terms by each of the member states. Within the Commission, the Di-
rectorate-General on the Environment, Consumer Protection, and Nuclear Safety assists the Commission in drafting new environmental legislation.\textsuperscript{25}

The Commission submits its proposed legislation to the Council of Ministers for approval. The Council, which is composed of one officially appointed delegate from each member state,\textsuperscript{26} can either approve proposed legislation (thus making it law) or send it back to the Commission for additional work.\textsuperscript{27} Once the Council approves proposed legislation, the member states must begin to implement the new legislation by amending their national laws.\textsuperscript{28}

The European Court of Justice is responsible for interpreting the Treaty.\textsuperscript{29} If a state fails to implement legislation approved by the Council, the Commission may bring the recalcitrant state before the Court of Justice's thirteen judges.\textsuperscript{30} If the Court of Justice finds that a member state has breached a Treaty obligation, that state must take measures necessary to comply with the Court's judgment.\textsuperscript{31} However, the only sanction that the Court of Justice can impose is a statement that the offending country has breached its obligation under the Treaty.\textsuperscript{32}

Finally, the European Parliament is an advisory body to the Commission\textsuperscript{33} composed of 518 popularly elected representatives.\textsuperscript{34} The European Parliament historically has played a relatively insignificant role in creating EEC policy, despite the fact that it has budgetary powers\textsuperscript{35} and the authority to dissolve the Commission.\textsuperscript{36} However, the recent adoption of the Single European Act has provided the European Parliament with a greater voice in EEC policy. Specifically, the Act requires the Council to consider the Parliament's opinion on legislation related to the functioning of the new internal market before approving such legislation.\textsuperscript{37} A committee within the European Parliament already has sug-

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  \item \textsuperscript{25} S. JOHNSON & G. CORCELLE, THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES 6 (1989).
  \item \textsuperscript{26} Treaty, supra note 13, art. 146. Each of these delegates is also a member of his or her state government. \textit{Id}.
  \item \textsuperscript{27} \textit{Id}. art. 145.
  \item \textsuperscript{28} See \textit{id}. art. 189.
  \item \textsuperscript{29} \textit{Id}. arts. 164, 177.
  \item \textsuperscript{30} \textit{Id}. art. 169. Other member states also may file complaints with the Court of Justice in order to push a state toward implementing a particular directive. \textit{Id}. art. 170. However, a state cannot take such action without first submitting the issue to the Commission for its "reasoned opinion." \textit{Id}.
  \item \textsuperscript{31} \textit{Id}. art. 171.
  \item \textsuperscript{32} Haigh, \textit{supra} note 1, at 619.
  \item \textsuperscript{33} Treaty, \textit{supra} note 13, art. 137.
  \item \textsuperscript{34} \textit{Id}. art. 138(1)(2).
  \item \textsuperscript{35} \textit{Id}. art. 203.
  \item \textsuperscript{36} \textit{Id}. art. 144.
  \item \textsuperscript{37} \textit{Id}. art. 100A ("The Council shall . . . in cooperation with the European Parliament . . . adopt the measures . . . which have as their object the establishment and functioning of the
gested changes to the proposed Civil Liability Directive. If the Parliament and the Commission decide to propose these changes to the Council, the Council must consider them before approving the directive.

In addition to the four primary bodies, the Economic and Social Committee plays a significant, although secondary, role in shaping EEC policy. The Committee is an advisory body whose 188 members are appointed by the Council for renewable four-year terms. Its members represent various economic and social groups, such as farmers, laborers, professionals, and members of the general public. The Committee often comments on environmental proposals, and it has made some comments on the proposed Civil Liability Directive.

B. EEC Environmental Lawmaking

1. The Legal Basis for EEC Environmental Legislation

Before it was amended by the Single European Act, the EEC Treaty did not provide a specific legal basis for environmental legislation; it did not even mention the word "environment." Nevertheless, in the early 1970's, the EEC decided to enter the field of environmental regulation, in part to reduce technical barriers to trade caused by differing state environmental laws. Environmental disasters such as the oil spill caused by the sinking of the Torrey Canyon provided further political motivation for regulation. These and other factors led the heads of the member states to request at their October 1972 summit meeting that the EEC develop an "action programme" for the environment by 1973.

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39. Treaty, supra note 13, art. 100A.
40. Id. arts. 193, 194.
41. Id. art. 193.
44. See, e.g., General Program for the Elimination of Technical Barriers to Trade Within the Community, Council Resolution of May 28, 1969, 12 J.O. COMM. EUR. (No. C 76) 1 (1969). Permitting states to enact environmental regulations with widely varying degrees of stringency distorts trade and thwarts attempts to create a unified internal market. The increased cost of doing business with companies subject to more stringent environmental laws is a practical barrier to trade with countries enacting such regulations.
45. In 1967, the tanker Torrey Canyon spilled approximately 620,000 barrels of oil on the English and French coasts. Haagsma, supra note 15, at 317 n. 24; see also Clarke, Oil Spill Fantasies, ATLANTIC MONTHLY, Nov. 1989, at 67 (discussing political fallout of Torrey Canyon spill).
46. Declaration of the First Summit Conference of the Enlarged Community, [5 No. 10]
sulting Programme on the Environment (the first of four to date) emphasized that the task of the EEC is "to promote ... a harmonious development of economic activities and a continuous and balanced expansion." The Programme concluded that this task "cannot now be imagined in the absence of an effective campaign to combat pollution. ..." Thus, although the Treaty did not specifically provide for environmental lawmaking, the Council and the individual sovereign states essentially agreed to read such powers into the Treaty, paving the way for a stream of environmental directives, decisions, and regulations.

Until the Treaty was amended by the Single European Act in July 1987, the EEC based its environmental directives almost exclusively on authority granted by articles 100 and 235 of the Treaty. Article 100 permits the EEC to harmonize ("approximate") laws that directly affect the functioning of the internal market. In cases in which a desired environmental measure did not have some influence on the internal market, the EEC resorted to article 235. This article permits the EEC to use measures not specifically granted in the Treaty in order to attain one of the objectives of the Community. One difficulty with using articles 100 and 235 as bases for legislation, however, is that they state that the Council cannot approve such legislation unless it does so unanimously.

The Single European Act amended the Treaty to include two new sources of legal authority for environmental directives: title VII and article 100A. These provisions give new legitimacy to the EEC's previous environmental policies and broaden its base of authority for future environmental work. Title VII of the Treaty is devoted entirely to the envi-
ronment. It contains two articles, 130R and 130T, that provide substantive ground rules for EEC environmental policy. Article 130R establishes the objectives of EEC environmental policy: to protect and improve environmental quality, to protect human health, and to ensure the rational use of natural resources. It also contains the principles that will guide the EEC in its efforts to attain those stated objectives. These principles are that "preventive action should be taken, that environmental damage should as a priority be rectified at the source, and that the polluter should pay." Article 130T permits member states to adopt more stringent environmental measures than those enacted by the EEC. This provision was added in part to appease certain countries who feared that weak Community standards might replace their own stringent national standards. Finally, the Treaty's new article 100A definitive article 100A and title VII for environmental matters.

60. Treaty, supra note 13, art. 130T ("The protective measures adopted in common pursuant to Article 130S shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.").

61. See Haagsma, supra note 15, at 335; Kramer, The European Economic Community, in UNDERSTANDING U.S. AND EUROPEAN ENVIRONMENTAL LAW 4, 6 (T. Smith & P. Kromarek eds. 1989). Generally, member states consider the southern EEC countries to be
provides a basis for EEC legislation related to the establishment of the internal market. Thus, it can be invoked as a basis for any environmental law that reduces technical barriers to trade.

The Single European Act also added to the Treaty a procedural framework for EEC environmental legislation. One piece of this framework is article 130S of title VII, which requires the Council to adopt environmental legislation unanimously, with certain narrow exceptions. This unanimity requirement contrasts sharply with article 100A, which provides that the Council can adopt legislation relating to the internal market on a qualified majority, rather than on a unanimous basis.

less progressive than the northern countries in protecting the environment. See Kramer, supra, at 6; T. Adams, Current Environmental Issues in the European Community 1, in McMahon, Europe: 1992 Is Almost Here — Implications for Environmental Aspects of Corporate and Real Estate Transactions (paper submitted at ABA/WESFACCA Program on the Practical Implications of International Environmental Law, Stamford, Connecticut, Apr. 25-26, 1990). In fact, some commentators have argued that, with respect to the stringency of environmental regulations, the states can be divided into three categories. See S. Johnson & G. Corcelle, supra note 25, at 8; T. Smith & R. Falzone, Environmental Issues Facing U.S. Corporations in Europe 9 (paper submitted at ABA/WESFACCA Program on the Practical Implications of International Environmental Law, Stamford, Connecticut, Apr. 25-26, 1990). The countries that are the most advanced with respect to addressing environmental problems are Germany, the Netherlands, and Denmark. S. Johnson & G. Corcelle, supra note 25, at 8; T. Smith & R. Falzone, supra, at 9. These countries tend to view Community environmental policy as not proceeding quickly enough and as creating obstacles to effective implementation of stringent environmental measures. S. Johnson & G. Corcelle, supra note 25, at 8.

The middle, "neutral" group of countries includes France, Luxembourg, Belgium, and, in certain circumstances, Italy. Id. These countries do not have extensive national programs, but they generally have accepted the EEC's directives and have used them as the focus of their national policies. See id. Also in the middle group, but less neutral, are the United Kingdom and, to some extent, Ireland. Id. Both countries have environmental policies in place, but both frequently have shown a "certain reticence" with regard to "over-restrictive" EEC policies. Id; T. Smith & R. Falzone, supra, at 9.

Finally, Greece, Portugal, and Spain (and Ireland and Italy to a certain degree) are in the beginning stages of creating environmental programs, and may have some difficulties implementing EEC policies. See S. Johnson & G. Corcelle, supra note 25, at 8; T. Smith & R. Falzone, supra, at 9.

62. Article 100A of the Treaty states that it serves as a basis for legislation designed to achieve the objectives set out in article 8A. Treaty, supra note 13, art. 100A. Article 8A states that "[t]he Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992..." Id. art. 8A.

63. Id. art. 130S. The article reads as follows:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community.

The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority.

Id. The second paragraph permits the Council to decide unanimously to take a qualified majority vote on a particular environmental issue. Id. The Council generally has limited its use of this power to fairly specific issues, such as modification of technical standards. Prieur Interview, supra note 4.

64. Under qualified majority voting, the votes of the member states are weighted in pro-
2. The Legal Basis for the Proposed Civil Liability Directive

The Commission based the proposed Civil Liability Directive on article 100A.65 This reliance on article 100A emphasizes one of the primary purposes of the directive: to harmonize liability laws. Such harmonization is essential if the EEC is to protect the free movement of goods among the EEC member states and avoid "artificial" investment patterns.66 Reliance on article 100A also enables the Council to use qualified majority voting in adopting the final directive, which may increase the directive's chance of passage.67

While legally based on article 100A, the proposed directive is also rooted in EEC environmental policy. Specifically, the Commission believes that it cannot effectively achieve the environmental principles laid out in the Single European Act (that the polluter should pay and that preventive action should be taken)68 unless it forces waste producers to reflect the costs of waste-related damage in the prices of goods and services giving rise to the waste.69 The Civil Liability Directive serves this cost internalization purpose by holding waste producers strictly liable for waste-related damage.70

II INADEQUACIES OF CURRENT LIABILITY REGIMES

The Commission drafted the proposed Civil Liability Directive because it perceived numerous inadequacies and inconsistencies in current international and national liability laws.71 This part explores current liability law and its inadequacies in order to create a framework for the discussion of the proposed Civil Liability Directive in parts III and IV.

First, this part outlines the problems that a fault-based liability system presents for plaintiffs. It then discusses the ways in which a strict
liability regime can address those difficulties. Next, it reviews the difficulties of proving causation in waste-related cases; this burden often poses a significant obstacle for plaintiffs. This part then studies the failure of EEC law to address injuries to the environment and examines the procedural difficulties inherent in transnational cases. Although an EEC treaty exists that is intended to streamline procedures in transnational cases, victims of transboundary harms still face numerous obstacles to compensation. This part then examines the special problem of state liability for damage caused by waste. As will be shown, the opportunities for injured parties to obtain redress against states under international law are limited. This part of the Comment concludes by summarizing the gaps in current liability regimes.

A. Problems for Plaintiffs Under a Fault-Based Liability Regime

The two basic liability concepts are fault-based liability and strict liability. Fault-based liability is currently the generally accepted rule of liability in the EEC waste management sector. It requires (1) that a defendant act without the requisite standard of care (e.g., with negligence), and (2) that a defendant's action cause the damage to the injured party or the environment. Because the second element — causation — also exists in strict liability schemes, this section focuses on the first element and discusses the difficulties imposed by a system in which liability turns on obedience to a standard of care.

One difficulty of fault-based regimes is that a low standard of care may make recovery difficult. In other cases, defendants may have sole access to critical data regarding their behavior. In such a case, even plaintiffs with discovery rights may not be able to effectively frame their requests for information because they may not know the types and extent of data the defendants possess. Distance and language barriers in trans-


75. Id.

76. For a discussion of the problems posed by causation, see infra notes 97-103 and accompanying text.

77. A. REST, supra note 74, at 135. Such standards can significantly limit the number of cases injured plaintiffs can win. For example, standards of what actions constitute a "nuisance" may be so stringent that they may preclude use of nuisance law in many cases. In the Netherlands and Germany, for instance, a defendant's action has to be both substantial and beyond the bounds of local custom in order to be a nuisance. Id.
frontier damage cases only exacerbate the problems with obtaining this information.78

Waste cases in general severely test a fault-based tort system, since toxics often cause long-term health problems rather than immediate injury.79 Specifically, because diseases generally do not occur instantaneously, waste cases often can involve significant time-lags,80 possibly resulting in the loss over the years of important data. These time-lag issues also affect plaintiffs’ cases by forcing them to prove that defendants acted negligently at the time of the damage-causing incident (such as waste burial). If the delays are significant enough, plaintiffs may have to show that defendants acted negligently at a time when environmental standards of care were quite weak,81 thus making it difficult for plaintiffs to win their cases.

Another, related drawback of fault-based systems is that defendants who act within the bounds of statutes are generally immune from claims of negligence.82 This is true even where the statutes in question are relatively lax.83 Because statutory standards of conduct often do not reflect the actions waste producers must take in order to internalize fully the costs of their wastes, fault-based systems essentially allow polluters to impose their costs of pollution on society by simply obeying the rules.84

Injured parties who can establish that the producer or handler has violated a law aimed at proper waste disposal may be able to use that violation as proof of breach of a duty of care.85 All EEC states regulate waste handling, and each nation’s waste disposal laws can create duties

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78. Problems occurring in actions between parties residing in different states include dealing with language barriers, determining which laws are applicable, deciphering court procedures, and pleading and proving foreign law. See R. SCHLESINGER, H. BAUDE, M. DAMASKA & P. HERZOG, COMPARATIVE LAW 868-90 (5th ed. 1988) [hereinafter COMPARATIVE LAW]. For a detailed description of the requirements of proving foreign law, see id. at 43-228.


80. Id.

81. Most EEC member states did not have even basic environmental regulations until the mid-1970’s. See generally 3 [Reference File] Int'l Env't Rep. (BNA) (Mar. 1991) (reviewing the environmental programs of the EEC member states).

82. For example, in most EEC member states, if the defendant has complied with the conditions of a required permit, she is immune from private damage actions. See E. REHBINDER & R. STEWART, ENVIRONMENTAL PROTECTION POLICY 173-74 (1985).

83. Id.

84. The costs of pollution on society imposed in this way are called “externalities.” In economic theory, externalities occur when economic agents have effects on each other’s activities that are not reflected in market transactions. W. NICHOLSON, MICROECONOMIC THEORY 695 (3d ed. 1985). In waste-related cases, waste producers inflict the costs of waste damage on injured parties rather than try to avoid the damage and add the costs of such avoidance to the price of their goods or services. The producers thus “externalize” the costs of pollution on society, rather than “internalize” these costs within their own operations. For further discussion of externalities, see W. NICHOLSON, supra, at 695-96.

85. See E. REHBINDER & R. STEWART, supra note 82, at 164.
and standards of conduct for those parties subject to the laws. For example, a number of EEC states hold waste producers responsible (primarily to the state in the form of fines) for ensuring that their wastes are properly disposed of (i.e., disposed of at an authorized site and following required procedures). To hold a party liable for damage caused by a violation of such a law, however, an injured party would have to prove a causal relationship between violation of the legal duty (e.g., disposal of waste without a permit) and the pollution incident.

The inadequacies of fault-based systems have led to the development of strict liability regimes. Strict liability retains one element of fault-based liability — that the defendant cause the injury — but eliminates the requirement that the defendant act without the appropriate standard of care. When no defenses are allowed (i.e., defendants are held liable for all injuries they cause), strict liability is often referred to as "absolute" liability. Often, however, strict liability schemes permit some defenses to liability. For example, in limited situations United States tort law permits a defendant to argue that factors outside of his control were the legal cause of a plaintiff's injury. The Commission has criticized the member states' general reliance on fault-based liability and wishes to encourage a trend toward strict liability in the waste management sector.

The justifications for strict liability generally parallel the criticisms of fault-based liability regimes. For instance, strict liability eases the plaintiff's burden of proof by not forcing the plaintiff to prove a failure to

86. Plaintiffs generally are limited to using these laws as evidence of breach of a duty of care in tort cases, rather than as the basis for a private cause of action to remedy a violation. See generally 3 [Reference File] Int'l Env't Rep. (BNA) (Mar. 1991) (general review of the environmental laws of each of the EEC member states). Dutch statutes represent the primary exception to this rule. See infra text accompanying note 110.


88. See A. REST, supra note 74, at 137-38.

89. See Gaines, supra note 73, at 330 (strict liability is less than absolute liability because "it reflects the influence of fault-based concepts").

90. RESTATEMENT (SECOND) OF TORTS § 435 comment a (1965).

91. Explanatory Memorandum, supra note 12, at 1. The most significant moves toward strict liability have been in products liability cases, with France and Germany leading the way. COMPARATIVE LAW, supra note 78, at 560-62. However, all EEC member states, including France and Germany, still follow fault-based liability in such cases, although laws vary widely. See id. at 561-62.

92. Explanatory Memorandum, supra note 12, at 2. One indication that such a trend may be beginning in the environmental sector is the fact that the Netherlands' new Civil Code contains a provision imposing strict liability for damage caused by dangerous substances. 3 [Reference File] Int'l Env't Rep. (BNA) 281:0102 (Mar. 1991).
observe a standard of care.\textsuperscript{93} Strict liability also eliminates the immunization of defendants from liability based on their mere obedience to permits.\textsuperscript{94} Moreover, it imposes the costs of wastes directly upon the waste producer so that the producer has an incentive to price her goods and services to reflect their cost to society.\textsuperscript{95} Finally, the Commission has argued that strict liability should be placed on the producer because the waste producer is in the best position to judge the risk the waste creates, and so is likely to be in the best position to prevent harm.\textsuperscript{96}

B. Problems with Proving Causation

Proving causation is the "paramount obstacle" facing plaintiffs bringing environmental damage claims.\textsuperscript{97} In particular, three causation difficulties arise in such cases: showing that the waste is actually capable of causing the harm in question, linking exposure to the waste to a plaintiff's injuries, and linking a defendant to the exposure.\textsuperscript{98} First, proving that the waste at issue could have caused the harm is difficult because it "often involves evidence on the frontiers of science."\textsuperscript{99} This difficulty is compounded by the fact that courts increasingly are unable to grasp effectively the scientific evidence involved in such cases.\textsuperscript{100} Problems associated with presenting scientific evidence also appear in relation to the second causation difficulty — proving that exposure to

\textsuperscript{93} See supra text accompanying note 75.

\textsuperscript{94} See supra note 82 and accompanying text.

\textsuperscript{95} See supra note 84 and accompanying text; see also A. REST, CONVENTION ON COMPENSATION FOR TRANSFRONTIER ENVIRONMENTAL INJURIES: DRAFT WITH EXPLANATORY NOTES 38 (1976) (the assumption behind strict liability is that the persons enjoying the benefits of an action also should be responsible for the accompanying risks); Explanatory Memorandum, supra note 12, at 3 ("polluter pays" principle implies that costs of waste should be reflected in the price of goods and services).

\textsuperscript{96} Explanatory Memorandum, supra note 12, at 3. Preventing harm is one of the primary purposes of the directive, and the Commission believes that if producers were held strictly liable, they "would be encouraged to take action to minimize risks as soon as possible." \textit{Id.} at 1. Another commentator, however, views strict liability as an "unduly harsh standard" to apply to the "multitude of mundane, diffuse environmental insults...." Gaines, supra note 73, at 333. On the other hand, this same commentator acknowledges that strict liability can be imposed for certain "diffuse damages" in response to a "fundamental shift in social attitudes about industrial wastes." \textit{Id.} The EEC's liberal use of strict liability concepts in its proposed Civil Liability Directive may be a result of such a shift in attitudes within the EEC. However, the Commission counteracted this liberal move by drafting a stringent proof of causation standard. See infra notes 269-70 and accompanying text (discussing the drawbacks of this causation standard).


\textsuperscript{98} Farber, Toxic Causation, 71 MINN. L. REV. 1219, 1226-27 (1987).

\textsuperscript{99} \textit{Id.} at 1220. In fact, "the most that can be said is that exposure to the substance increased the risk" of (rather than caused) the disease. \textit{Id.}

\textsuperscript{100} Brennan, supra note 97, at 470.
the wastes in question caused the plaintiff's injuries. This task is made
difficult because toxics often cause illnesses that can result also from ex-
posure to substances normally found in the environment. Thus, if
other potential sources of harm exist, plaintiffs may not be able to iden-
tify satisfactorily the exposure as the cause of their injuries.

Finally, plaintiffs in many environmental damage cases face signifi-
cant obstacles in determining the source of the exposure in question.
These obstacles are generally more difficult to overcome than in tradi-
tional tort cases (e.g., auto accidents) because environmental harm is fre-
quently a consequence of aggregate risk created by a number of
independently acting forces. If the harm caused by each such force is
inconsequential, then plaintiffs will not be able to show convincingly that
a particular defendant caused their collective injuries.

C. Limitations of Environmental Restoration Law in EEC Countries

Few effective options exist under current law to hold waste produ-
cers or handlers liable for restoring the natural resources that they have
contaminated. Private nuisance law provides one possible avenue for re-
dress of injury to the environment. A "private nuisance" may be defined
loosely as an "interference with the use and enjoyment of land." All
EEC countries provide remedies for parties injured by a nuisance
originating on a neighbor's property. The usefulness of this approach,
however, is limited because private nuisance actions can be brought only
by the owners or occupiers of property harmed by wastes. Thus, pri-
ivate nuisance actions do not address environmental injuries to common
resources.

Belgian, British, Danish, French, German, and Italian waste
cleanup statutes each have provisions holding certain parties responsible
for the costs of site cleanup. However, such laws vary widely in their

102. Farber, supra note 98, at 1228; see McCaffrey, Expediting the Provision of Compensa-
tion to Accident Victims, in TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES:
The INTERNATIONAL LEGAL CHALLENGE 199, 215 (G. Handl & R. Lutz eds. 1989) (proof of
fault can be a formidable obstacle in cases involving intricate chemical compounds and victims
who were not in perfect health before exposure).
103. Rabin, supra note 79, at 32.
104. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE
105. See A. REST, supra note 74, at 134.
106. Id. at 136; see E. REHBINDER & R. STEWART, supra note 82, at 172 (in European
countries, nuisance is considered part of the law of property).
107. However, tenants and lessees can bring tort actions on the theory that their "owner's
rights" have been violated (i.e., they can argue that the defendant interfered with their "owners-
ship" of the property in question). A. REST, supra note 74, at 136.
108. Lummert, Liability of the Generator and the Disposer of Hazardous Wastes, in TRANS-
FRONTIER MOVEMENTS OF HAZARDOUS WASTES 238, 247 n.23 (OECD, 1985).
strength and degree of implementation. The Netherlands seems to have the most stringent law. Article 21 of the Netherlands’ Interim Soil Sanitation Act permits the Minister of the Environment to sue polluters for compensation for the costs of cleaning up contaminated sites. However, money for site cleanup in all of the above countries, including the Netherlands, usually comes from general taxes, rather than from individual polluters. Thus, current laws in EEC states do not provide an effective way of holding those who contaminate the environment responsible for restoring it.

D. Special Difficulties of Transnational Suits

While plaintiffs bringing actions against domestic defendants face some procedural hurdles (such as needing standing to sue), plaintiffs bringing transnational claims confront more serious procedural problems. Transnational cases can arise, for example, when wastes generated in State A and shipped to State B injure someone in State B. Another example of a transnational case is a State B plaintiff suing a State A business over toxins flowing from the State A business into State B. The two most important procedural concerns in such cases are the choice of forum and the choice of law.

1. Choice of Forum and Law

“Choice of forum” rules determine the state in which the injured party can bring her claim. Choice of forum is important to plaintiffs for several reasons. First, plaintiffs may find it easier (because of language difficulties, distance, and similar factors) to bring an action in their own state. More significantly, however, plaintiffs should be concerned about choosing the proper forum because the forum state’s choice of law (or “conflict of law”) rules determine which law will apply in the ac-

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109. See supra note 61. For example, in less environmentally advanced states such as Ireland and Greece, enforcement of environmental laws has been lax. See Smith, Environmental Liability Grows in EC, Bus. Ins., Apr. 2, 1990, at 35; 3 [Reference File] Int’l Env’t Rep. (BNA) 251:0101 (Mar. 1991). Although other states may have better enforcement, their laws are not much more advanced: most EEC member states’ environmental rules stem from EEC directives rather than from state initiatives. 3 [Reference File] Int’l Env’t Rep. (BNA) 231:0101 (Mar. 1991). Even in environmentally progressive states such as Belgium and Germany, implementation of laws is dispersed among regional administrators, resulting in norms and enforcement patterns that can vary widely throughout the country. 3 [Reference File] Int’l Env’t Rep. (BNA) 211:0101 (Mar. 1991) (Belgium); 3 [Reference File] Int’l Env’t Rep. (BNA) 241:0101 (Mar. 1991) (Germany).


Because environmental laws can vary significantly from state to state, choice of law through appropriate choice of forum can be critical to the success of a plaintiff's case.\textsuperscript{114}

With respect to tort actions, choice of law rules in most EEC countries require courts to apply the law of the place where the tort was committed (\textit{lex loci delicti commissi}).\textsuperscript{115} However, countries differ on whether this "place" is the site where the damage occurred\textsuperscript{116} or the site where the tortfeasor engaged in the tortious conduct.\textsuperscript{117} Some states give a plaintiff a choice between these two places,\textsuperscript{118} while others simply apply the law of the place where the court sits (\textit{lex fori}).\textsuperscript{119} Finally, some states do not yet have settled law on the subject.\textsuperscript{120} However, in practice many courts, including those applying their own law, consider both the standards of conduct of the state where the harm occurred and those of the state where the tortfeasor acted.\textsuperscript{121}

2. \textit{Treaties Addressing Choice of Forum and Law}

States often resolve choice of forum questions through treaties. In fact, some states have agreed to make each other's courts available for environmental suits by foreign parties and to enforce resulting judgments. For example, the Nordic states agreed in 1974 to eliminate choice of forum problems in nuisance actions. Their treaty provides that "[a]ny person who is affected or who may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring" an action for damages in the foreign state.\textsuperscript{122}

The EEC has a similar treaty addressing tort actions — the EEC's Convention of Brussels.\textsuperscript{123} This treaty, which regulates jurisdiction and enforcement of civil and commercial judgments, permits plaintiffs to

\begin{itemize}
\item \textsuperscript{113} E. REHBINDER & R. STEWART, \textit{supra} note 82, at 172.
\item \textsuperscript{114} Lummert, \textit{supra} note 108, at 241. Further, outside the EEC, some states protect their citizens against civil judgments by foreign courts, making enforcement of such judgments extremely difficult. \textit{Id}.
\item \textsuperscript{115} A. REST, \textit{supra} note 74, at 141.
\item \textsuperscript{116} Lummert, \textit{supra} note 108, at 241. France is one such country. \textit{Id}.
\item \textsuperscript{117} \textit{Id}.; see also E. REHBINDER & R. STEWART, \textit{supra} note 82, at 172-73 (current trend, with some exceptions, applies law of place where injury occurred).
\item \textsuperscript{118} A. REST, \textit{supra} note 74, at 59. Germany is one example of a state that applies the law most favorable to the plaintiff. \textit{Id} at 143. However, with respect to nuisance actions, Germany applies the law of the affected land (\textit{lex rei sitae}). See E. REHBINDER & R. STEWART, \textit{supra} note 82, at 172 n.104.
\item \textsuperscript{119} Lummert, \textit{supra} note 108, at 241. The United Kingdom follows \textit{lex fori}. \textit{Id}.
\item \textsuperscript{120} See E. REHBINDER & R. STEWART, \textit{supra} note 82, at 173 n.104. For example, choice of law rules are not well settled in the Netherlands. \textit{Id}.
\item \textsuperscript{121} See Lummert, \textit{supra} note 108, at 241.
\item \textsuperscript{122} Convention on the Protection of the Environment Between Denmark, Finland, Norway, and Sweden, art. 3, 13 I.L.M. 591, 592 (1974) [hereinafter Nordic Convention].
\item \textsuperscript{123} Convention of Brussels, \textit{supra} note 72.
\end{itemize}
bring tort-based actions in the state where the injurious event occurred.\(^{124}\) The European Court of Justice later interpreted this provision as giving the plaintiff a choice of either the place of the act or the place of the result.\(^{125}\) This decision permits persons injured by transboundary pollution to bring tort actions in the forum they believe will be more favorable to their action.\(^{126}\)

Parties who obtain judgments against foreign defendants in their own courts still may need to access the foreign defendant’s courts to enforce the judgment. Generally, the Convention of Brussels requires EEC member states to enforce judgments rendered in compliance with the convention.\(^{127}\) However, it provides exceptions, including situations in which the foreign state believes that the judgment violates public policy.\(^{128}\) Thus, it is possible that where a polluting facility in the originating state has complied with a permit that bars actions for damages, the courts of that state may refuse to recognize the neighboring state’s award against that facility.\(^{129}\)

With respect to choice of law, the Nordic Convention provides that “[t]he question of compensation shall not be judged by rules which are less favorable to the injured party than the rules of compensation of the State in which the activities are being carried out.”\(^{130}\) The Convention of Brussels, however, addresses only jurisdiction and enforcement of foreign judgments;\(^{131}\) it does not provide a procedure for choosing the applicable law in a dispute between parties residing in different EEC countries. Thus, victims of transboundary injuries still face significant legal uncertainties in trying to obtain compensation and to clean up sites.

E. Lack of State Liability

States play a significant role in generating, treating, and disposing of wastes, including running waste disposal facilities.\(^{132}\) In fact, in some

\(^{124}\) Id. art. 5(3). Note that in nuisance cases, the Convention vests exclusive personal jurisdiction in the courts where the property is situated. Id. art. 16(1).

\(^{125}\) Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d’Alsace S.A., 1976 E. Comm. Ct. J. Rep. 1735, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8378 (1976), analyzed in Rest, Plaintiff Can Choose His Court, 3 ENVTL. POL’Y & L. 41 (1977). This decision, however, is limited to tort actions. E. REHBINDER & R. STEWART, supra note 82, at 172. In some European countries such as Germany and Italy, transboundary pollution actions involve the law of nuisance rather than tort law. Id. In these nations plaintiffs may be able to employ article 16(1) of the Convention of Brussels, which vests exclusive jurisdiction in cases involving property in the courts of the state where the property is located. See id.

\(^{126}\) See E. REHBINDER & R. STEWART, supra note 82, at 171.

\(^{127}\) See Convention of Brussels, supra note 72, art. 31.

\(^{128}\) Id. art. 27.

\(^{129}\) E. REHBINDER & R. STEWART, supra note 82, at 174.

\(^{130}\) Nordic Convention, supra note 122, art. 3.

\(^{131}\) Convention of Brussels, supra note 72, tit. 1 & art. 25.

states, wastes must be sent to state-run treatment facilities. Further, states present particularly significant sources of harm to parties in neighboring states because of the tendency of many states to locate abnormally dangerous activities in border areas. While citizens injured by the activities of their own state may have domestic remedies for waste-related harm, foreign parties injured by state transboundary pollution must follow a tortuous path to obtain remedies, if they are available at all. This section focuses on these special problems arising from harm caused by foreign states.

Under international law, private parties injured by state-caused transboundary pollution cannot simply sue another state. Rather, they must approach their own government to see if it will sue the defendant state on their behalf. Injured parties have no recourse if their own state refuses to initiate an action against the foreign state.

Where a party succeeds in prompting his state to initiate a suit, international law governs that suit. The international law applicable to contests between states arises from several sources. The most significant of these are international common law and treaties. International common law refers to "international legal rules ... generated by means other than the explicit consent of states expressed in treaties." Gen-

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135. See L. Hurwitz, The State as Defendant 20 (Studies in Human Rights No. 2, 1981) (the United Kingdom has moved from the use of the classical sovereign immunity doctrine to being subject to "practically all" of the limitations, responsibilities, and liabilities of private individuals); id. at 23 (the French Conseil d'Etat provides an "effective system of redress" for private citizens in their dealings with the French government).

136. Many of these obstacles are related to those which parties injured by foreign individuals must face. See supra notes 112-31 and accompanying text.

137. A. Rest, supra note 74, at 145. This is the situation that occurred in the Trail Smelter arbitration. See infra notes 143-50 and accompanying text.

138. See Birnie, The Role of International Law in Solving Certain Environmental Conflicts, in INTERNATIONAL ENVIRONMENTAL DIPLOMACY 95, 98 (J. Carroll ed. 1988). Writings by commentators can provide secondary sources of international law. Id. See generally A. Rest, supra note 74, at 107-17 (discussing how treaties, international common law, and generally recognized legal principles form the bases of international law).

139. M. Janis, An Introduction to International Law 35 (1988). Rather than using the term "international common law," Janis subdivides this body of law into four groups: customary international law, general legal principles, natural law, and equity. Id. Customary international law arises from the premise that "states in and by their international practice may implicitly consent to the creation and application of international legal rules." Id. at 36. General legal principles, which are the most frequently relied-upon noncustomary, nontreaty source of international common law, encompass propositions of law "so fundamental that [they] will be found in virtually every legal system." Id. at 47.
eral legal principles provide another source of international common law. General legal principles that affect waste-related cases include the principle of "good neighborliness" and the principle *sic utere tuo ut alienum non laedas* (use your property so as not to injure that of another). Although these two principles arguably can be applied to hold states liable for injuries they inflict on foreign parties, they are too vague to handle complex environmental conflicts.

Court decisions comprise one source of international common law. Of them, the *Trail Smelter* arbitration and the *Corfu Channel* case represent essentially the entire legal regime relating to state responsibility for transboundary environmental harm. States that breach the duties outlined in these cases violate international law, whether they themselves commit the harmful action (as in the *Corfu Channel* case) or whether a private entity commits the action with the knowledge of the state (as in the *Trail Smelter* arbitration).

The *Trail Smelter* arbitration was the first attempt to delineate state responsibilities with respect to transboundary environmental harm. In the *Trail Smelter* arbitration, the United States and Canada set up a tribunal to assess damages against Canada for harm to U.S. citizens in the State of Washington which had been caused by a smelter in British Columbia. The arbitral tribunal determined that, under the principles of international law,

[n]o State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."}

140. *See supra* note 139.
145. The International Law Commission, an organ of the United Nations General Assembly made up of legal experts whose mandate is to codify and progressively develop international law, also has addressed this issue. For over ten years, the Commission has been drafting and revising a Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law. *See, e.g.*, Barboza, Second Report, U.N. Doc. A/CN.4/402 and Corr. 1, 2, 4 (1986). However, the U.N. has not yet adopted the Commission's work.
146. The *Trail Smelter* arbitration involved circumstances different than those addressed in this Comment, in that the case involved state responsibility for a private action, while the focus of this section is on state responsibility for state action (such as running waste disposal facilities). Nevertheless, this discussion addresses the *Trail Smelter* arbitration because it provides important precedent for state responsibility for both private and public actions.
The effect of this significant ruling is limited because it only protects land owned by people who suffer actual economic harm;\textsuperscript{148} it does nothing to prevent damage to the environment itself.\textsuperscript{149} Further, even victims suffering economic injury face significant hurdles to obtaining relief under the principles articulated in the \textit{Trail Smelter} arbitration because they must show that their case is of "serious consequence," and must prove their injuries by "clear and convincing evidence."\textsuperscript{150}

The \textit{Corfu Channel} case addressed Albania's laying of mines in its waters without giving warning to other states. The International Court of Justice held that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."\textsuperscript{151} Commentators generally have read this holding as affirming the \textit{Trail Smelter} arbitration's concept of state responsibility for transboundary pollution damage.\textsuperscript{152} In addition, some commentators believe that the \textit{Corfu Channel} case provides support for the argument that a state is liable if it knowingly exports wastes to a state that lacks adequate facilities and technology to handle the wastes.\textsuperscript{153} However, because the \textit{Corfu Channel} case failed to define the "rights" of other states that it says cannot be violated, its usefulness to victims of transboundary environmental harms as a source of authority is limited.\textsuperscript{154}

\begin{flushright}
\textsuperscript{148} Id. at 1924-31.
\textsuperscript{149} For example, the tribunal equated the cost of the destruction of wooded land with the value of the merchantible timber destroyed on that land. \textit{Id.} at 1928.
\textsuperscript{150} \textit{Id.} at 1965.
\textsuperscript{151} \textit{Corfu Channel Case} (U.K. v. Albania), 1949 I.C.J. 4, 22 (Apr. 9, 1949) (determination on the merits).
\textsuperscript{152} For instance, James Barros and Douglas Johnston have written that [although they occurred in a case far removed from the problem of environmental damage, some of the comments of the International Court of Justice in the \textit{Corfu Channel} case (1949) can be interpreted as an important judicial affirmation of state responsibility from which one today can infer the obligation of each state not to allow the nationals of other states to suffer pollution damage that might reasonably be prevented and the liability of providing appropriate compensation to the injured party when that obligation is violated.\textit{J. BARROS & D. JOHNSTON, supra note 141, at 69; see Nanda & Bailey, Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law, 17 DEN. J. INT'L L. \& POL'Y} 155, 159-60 (1988) (applying the \textit{Corfu Channel} case doctrine to the issue of state liability for damage caused by state-exported wastes). On the other hand, Ian Brownlie asserts that the \textit{Corfu Channel} case's reference to knowledge does not necessarily mean that it holds that states are always liable for damages that they reasonably could have prevented. Rather, Brownlie claims, the reference to "knowledge" merely may have given the claimant state a realistic burden of proof. By requiring the claimant to show only that the defendant state "knowingly" allowed its territory to be used illegally, rather than requiring the claimant to identify precisely the officials involved in the action and the chain of events, the court avoided setting "unwarrantable limits to the effective placing of responsibility." I. BROWNLIE, \textbf{STATE RESPONSIBILITY} 152-53 (1983) (part I of I. BROWNLIE, \textit{SYSTEM OF THE LAW OF NATIONS}). Thus, Brownlie reads the \textit{Corfu Channel} case not as a reaffirmation of the \textit{Trail Smelter} doctrine of state responsibility, but simply as a development in favor of easing plaintiffs' burden of proof in cases against states. \textit{Id.}
\textsuperscript{153} Nanda \& Bailey, \textit{supra} note 152, at 160.
\textsuperscript{154} \textit{See Birnie, supra note 138, at 111-12.}
International common law in this area has remained essentially unchanged since the Trail Smelter arbitration and the Corfu Channel case were decided in the 1930’s and 1940’s, and it remains at an “embryonic stage of development.” As such, it provides little help to current victims of transboundary harms seeking state compensation. This stagnation most likely stems from the fact that policymakers cannot draft, and states likely would not accept, liability regimes holding sovereign states responsible for harm caused by their own legal acts or those of their nationals.

Treaties and other formal agreements between states provide another source of international law. Few treaties currently hold states liable for environmental harms that they inflict on foreign parties, primarily because states traditionally have been unwilling to give up the


Some commentators have suggested that the Stockholm Declaration can serve as a precedent in international cases specifically relating to the environment. A. Rest, supra note 74, at 112 (the Stockholm Declaration is a valid principle of international common law because “UN Resolutions are, by common consent, capable by themselves of demonstrating and generating the conviction required for the establishment of international common law”). Principle 21 of the Stockholm Declaration broadly states that it is a state’s responsibility not to injure another state: “[s]tates have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” Stockholm Declaration, 11 I.L.M. at 1420. However, the drafters seriously restricted this holding by declaring in principle 21 that states have the right to exploit their own resources: “[s]tates have ... the sovereign right to exploit their own resources pursuant to their own environmental policies.” Id. The potential usefulness of principle 21 to plaintiffs injured by a foreign state has been weakened further in operation. Despite the apparently equal emphasis of these two statements in principle 21, the international balance has tended to tip away from state responsibility and towards favoring exploitation. Gaines, supra note 73, at 316. Therefore, the Trail Smelter arbitration’s limitation to cases of “serious consequence” that are “established by clear and convincing evidence” remains the dominant rule. See supra text accompanying note 147.


157. See Gaines, supra note 73, at 316 (the “theories of transnational liability have been distorted by the intellectual difficulty of conceiving sovereign State liability for non-prohibited acts”). In fact, some commentators have criticized attempts to make states liable for legal activities as “fundamentally misconceived.” I. Brownlie, supra note 152, at 49-51. Indeed, the fact that the International Law Commission has been trying since 1978 to finalize a report on this issue indicates the controversial nature of the subject. See supra note 145.

158. Interview with Stephen J. McCaffrey, Member, United Nations International Law Commission, in Berkeley, California (Apr. 5, 1990) [hereinafter McCaffrey Interview] (states are afraid of anything compulsory with respect to liability for transboundary harm).
sovereignty necessary to effect liability.\textsuperscript{159} For example, the Treaty of Rome does not mention state liability for environmental harm. One noteworthy exception, however, is the Convention on the Regulation of Antarctic Mineral Resource Activities.\textsuperscript{160} This treaty holds states liable for damage caused by state-sponsored private operators in the Antarctic if the damage "would not have occurred or continued if the Sponsoring State had carried out its obligations under the Convention."\textsuperscript{161} In addition, the United Nations Environment Programme (UNEP)\textsuperscript{162} is drafting a protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)\textsuperscript{163} that may hold states liable for damage caused by wastes they ship to other states.\textsuperscript{164} However, this protocol provision remains controversial and may be dropped before the final draft.\textsuperscript{165}

In sum, revision of international common law to provide greater opportunities for compensation seems unlikely in the near future, primarily because states appear unwilling to relinquish enough sovereignty to ensure that international courts and tribunals can function effectively.\textsuperscript{166} Expansion of the \textit{Trail Smelter} doctrine to include state liability for damage to common resources as well as private property seems similarly unlikely. Finally, with the exception of the draft Basel Convention protocol, no states appear to be writing treaties that relinquish state immunity for waste-related harm. Thus, current international law offers little help for victims of state-caused transboundary environmental harm.


\textsuperscript{161} \textit{Id.} art. 8(3)(a). The Convention, however, probably provides poor precedent for plaintiffs in international cases because it does not involve the type of state sovereignty addressed in the \textit{Trail Smelter} arbitration and the \textit{Corfu Channel} case (since Antarctica is not a sovereign state). Thus, it is primarily useful only as a model for future conventions addressing state liability.


\textsuperscript{164} United Nations Environment Programme, Informal Preparatory Consultation on Liability and Compensation for Damage from Transboundary Movements of Hazardous Wastes and Their Disposal, Annex, art. VIII (Apr. 30-May 2, 1990) [hereinafter Informal Draft Liability Protocol]. The protocol responds to the mandate of article 12 of the Basel Convention, which requires parties to the Convention to adopt a protocol addressing liability and compensation "as soon as practicable." Basel Convention, supra note 163, art. 12.

\textsuperscript{165} Telephone interview with Professor Gunther Handl, Wayne State University, Member of Working Group drafting Basel Convention Liability Protocol (June 6, 1990).

\textsuperscript{166} See supra note 157 and accompanying text.
F. Summary of Inadequacies of Current Liability Regimes

The EEC member states' Convention of Brussels guarantees injured parties access to the courts of other EEC states and gives them a choice as to the most convenient court. However, many potential claimants choose not to bring actions. A number of factors account for this reluctance to seek compensation. First, the laws of most states still assign liability based on fault. The deficiencies of fault-based liability regimes regarding the compensation of victims have been well-documented. Defendants may rely on compliance with state law as an immunizing factor, and plaintiffs often experience difficulties proving that defendants acted without the requisite standard of care. In addition, plaintiffs may not be able to show definitively that their injuries were caused by particular wastes because of the multiple causation possibilities inherent in waste-related cases. Even where a plaintiff has been able to bring a solid environmental restoration case against a polluter, current environmental cleanup laws have been ineffective in ensuring that the responsible parties pay for cleaning up the sites they have contaminated.

Procedural difficulties in suing a foreign party, such as proving the content of foreign law, choosing the most advantageous forum and laws, and overcoming the information-gathering obstacles posed by distance and language barriers, only exacerbate these substantive problems. Further, even if a plaintiff prevails over a foreign party, she may encounter problems enforcing the judgment.

Finally, current international law makes it virtually impossible for victims to obtain remedies from responsible states. As states often play significant roles in generating, treating, and disposing of wastes, this void results in numerous uncompensated injuries.

The proposed EEC Civil Liability Directive attempts to address most of these problems, with some significant exceptions. The next two parts of this Comment examine the directive in detail and judge its potential efficacy in ensuring injured parties receive compensation and in protecting the environment.

III

PROVISIONS OF THE PROPOSED CIVIL LIABILITY DIRECTIVE

A. Overview

The basic substantive premise of the proposed Civil Liability Directive is that producers are strictly liable for the harm caused by their

167. See supra notes 73-88 and accompanying text.
168. See supra note 78.
169. See supra notes 127-29 and accompanying text.
170. See supra notes 132-34 and accompanying text.
wastes.\textsuperscript{171} This harm includes both "damage" (personal and property injuries) and "injury to the environment" (natural resource damages).\textsuperscript{172} The directive defines "producer" so as to make the issue of physical control of waste irrelevant in most cases.\textsuperscript{173} However, the holder of the waste will be deemed the producer if she is unable to name the true producer.\textsuperscript{174} In addition, the directive does not hold the producer strictly liable where she has transferred the wastes to a licensed treatment and disposal facility (as opposed to the waste hauler); in such a case, the directive imposes strict liability on the facility owner.\textsuperscript{175} The advantages of a strict liability regime to plaintiffs are limited by the fact that plaintiffs must show an "overwhelming probability" of a link between the defendant's waste and the alleged injury.\textsuperscript{176}

The directive establishes two types of actions. First, private parties may bring tort actions for their personal and property injuries.\textsuperscript{177} Second, government officials may bring "cleanup" actions, under which they either may order the defendant to clean up the contaminated site or demand reimbursement for money spent to clean up such sites.\textsuperscript{178} The directive also permits states to allow public interest groups to clean up contaminated sites and seek reimbursement for the cleanup.\textsuperscript{179} The directive sharply restricts the number of cleanup actions that can be brought, however, because it only applies to damages arising from incidents occurring after implementation of the directive.\textsuperscript{180}

This part of the Comment first reviews in more detail the basic provisions of the proposed directive. Specifically, it describes: (1) who is liable and when, (2) the responsibilities of regulated parties, (3) the plaintiff's burden of proving liability, and (4) the remedies available to plaintiffs. It then discusses the limitations of, and exceptions to, the directive's requirements.

\begin{enumerate}
  \item Civil Liability Directive, supra note 4, art. 3. The Commission has made it clear that the proposed directive covers all types of waste (both hazardous and nonhazardous). The only exceptions are nuclear waste and pollution caused by oil. Explanatory Memorandum, supra note 12, at 2.
  \item Civil Liability Directive, supra note 4, art. 3; see also id. art. 2(1) (definitions of "damage" and "injury to the environment"); infra notes 197-98.
  \item Civil Liability Directive, supra note 4, art. 2(1)(a).
  \item Id. art. 2(2)(b)(i).
  \item Civil Liability Directive, supra note 4, art. 4(6).
  \item Id. arts. 4(1)(a)-(c), (e).
  \item See id. art. 4(1)(d).
  \item See id. art. 4(4).
  \item Id. art. 13.
\end{enumerate}
B. Liability Scheme

1. Parties Subject to the Directive

The proposed directive makes the "producer" of the waste liable for damage and injury to the environment. It defines "producer" as "any natural or legal person whose occupational activities produce waste." As will be discussed below, the drafters chose to place primary responsibility on the actual waste producer because they believe that the actual waste producers are in the best position to avoid the risks created by wastes.

However, in three cases the directive calls other parties the "producer" in place of the actual waste producer. First, if the waste was generated outside the EEC, then the person inside the EEC who imported the waste is the "producer" for purposes of the directive. Second, the person in "actual control" of the waste when an incident occurs must assume responsibility for the damage caused by the waste if she is unable "within a reasonable period" to identify the waste generator. Third, if a producer "lawfully transfers" its waste to a licensed waste disposer, the liability shifts from the actual producer to the waste disposal facility. Thus, the directive holds the "actual" waste producer liable up until the time her wastes have arrived safely at the waste disposal facility. These provisions, combined with a provision that producers cannot limit or exclude their liability to injured parties by any contractual provisions, should ensure that the injured party is always protected by some class of "producer."

A notable exception to this comprehensive coverage is the directive's failure to hold public waste producers and handlers responsible for dam-

181. Id. art. 3.
182. Id. art. 2(1)(a).
183. See infra text accompanying notes 239-41 (the directive's goal of preventing damage caused by waste is premised on the assumption that producers know the most about wastes and so are best able to avoid inflicting harm).
184. Explanatory Memorandum, supra note 12, at 3.
185. Civil Liability Directive, supra note 4, art. 2(2).
186. Id. art. 2(2)(a).
187. Id. art. 2(2)(b); see also T. Smith & R. Hunter, supra note 175, at 6-7 (describing "actual control" in terms of an "operational control" test).
188. Civil Liability Directive, supra note 4, art. 2(2)(c); see supra text accompanying note 175.
189. The Commission specifically exempted waste haulers from liability (unless the hauler could not identify the actual producer). Explanatory Memorandum, supra note 12, at 3. In so doing, the Commission explained that while carrier liability "has its merits" it is "unsuitable" for the carriage of wastes. Id. The Commission based this conclusion on the reasoning that wastes are of a "different character" than goods because of their generally doubtful value, and so producers may be tempted to get rid of them illegally. Id. Thus, according to the Commission, the waste producer must retain liability until proper disposal is ensured. Id.
191. See id. preamble.
age caused by their wastes. This is evidenced by the fact that the directive specifically limits the scope of its reach to "civil," rather than "civil and administrative," liability.192 This decision may have resulted from pressure placed upon the Commission by state and local government officials who wished to avoid being subject to the directive.193

2. Responsibilities of Regulated Parties

Regulated parties (which include all types of "producers") are strictly liable under the proposed directive for "civil liability for damage and injury to the environment caused by waste generated in the course of an occupational activity . . . ."194 This provision has several significant effects. First, the strict liability requirement prevents regulated parties from arguing that they are immune from liability because they have maintained a particular standard of care.195 Similarly, regulated parties may not claim immunity because they hold a permit for their activities.196

The directive defines "damage" and "injury to the environment" separately. "Damage" refers to injuries to persons and their property.197 "Injury to the environment" refers to "significant and persistent" environmental interference resulting from certain "modifications" of environ-

192. Id. art. 1. Most European countries draw sharp distinctions between private (civil) law and public (administrative) law. See COMPARATIVE LAW, supra note 78, at 498. A controversy involving the propriety of an administrative act is a "public law" dispute, whereas disputes between private parties are often referred to (although perhaps not too accurately) as "civil law" disputes. Id. at 301 n.22, 498. Thus, the fact that the title of the proposed directive refers only to "civil" liability may indicate that the directive addresses private party disputes only. Prieur Interview, supra note 4.

193. Prieur Interview, supra note 4. The decision to exclude public waste producers and handlers is not surprising considering the fact that international law regulating state liability has remained essentially stagnant since the Trail Smelter arbitration and the Corfu Channel case, which make states liable for harm only in tightly limited circumstances. See supra text accompanying note 155.


195. Id. art. 3.

196. Id. art. 6(2).

197. Specifically, the directive defines "damage" as either "damage resulting from death or physical injury" or "damage to property." Id. art. 2(1)(c). The latter term refers to private property as opposed to the environment generally, which the Commission purposefully put in a separate category, primarily because of the special difficulties of quantifying "environmental" damages. Explanatory Memorandum, supra note 12, at 3.
mental conditions. The directive defines "waste" by referring to the definition of "waste" in the Council Directive on Waste. Under this definition, generators can be liable for damages caused by any regulated waste, whether hazardous or nonhazardous.

Parties regulated by the directive are responsible for harm caused by their wastes irrespective of whether the harm occurs within or outside of the state of generation. Thus, even though the directive was prompted by transnational waste scandals, it covers all waste generated in, or imported into, the EEC. The drafters presumably broadened the scope of the directive in this way so as to create a truly uniform system of liability within the EEC, rather than one that is only uniform with respect to damage caused by wastes shipped across boundaries.

Finally, the directive attempts to ease the burden on plaintiffs somewhat by requiring that multiple responsible producers be jointly and severally liable for the harm caused. Thus, if a plaintiff finds one responsible producer, she can sue that producer for the entire amount of her damage, even if that producer was only partly responsible.

3. Burdens of Proving Liability

Strict liability eases the burden on plaintiffs in that it does not require them to prove that producers breached a particular standard of care. However, the plaintiff does retain two burdens under the directive. First, a plaintiff must demonstrate the existence of the damage or injury to the environment. Plaintiffs may find it difficult to prove their injuries if those injuries involve diseases such as cancer, which may require detailed technical information to attribute the disease to the

198. Civil Liability Directive, supra note 4, art. (2)(1)(d). More specifically, the directive defines "injury to the environment" as "significant and persistent interference in the environment caused by a modification of the physical, chemical, or biological conditions of water, soil, and/or air in so far as these are not considered to be damage within the meaning of subparagraph (c)(ii)." Id. By contrast, the United States' Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), permits state and federal government agencies to recover damages from parties for "injury to, destruction of, or loss of natural resources" caused by the parties' hazardous waste. Id. § 9607(f).


200. See supra text accompanying notes 6-7.

201. See Explanatory Memorandum, supra note 12, at 2.

202. See id. at 1 (one aim of the directive is to establish a "uniform system of liability" to avoid "unequal competition among the Member States").

203. Civil Liability Directive, supra note 4, art. 5.

204. See supra note 195 and accompanying text. Industry representatives have argued strongly against this strict liability standard, claiming that it leads to unjust results because, among other things, "[t]he producer has no influence over the transporter during transportation. . . ." European Chemical Industry Says ECC Draft Misinterprets Principle of 'Polluter Pays,' 13 [Current Reports] Int'l Env't Rep. (BNA) 236 (June 1990) [hereinafter European Chemical Industry] (quoting European Chemical Industry Federation position paper).
wastes. Plaintiffs also may have difficulty showing the extent to which the defendants’ wastes injured the environment if such a showing requires extensive ecological tests or calls for detailed information on the state of the environment before the damage. Second, the plaintiff must demonstrate the “overwhelming probability of the causal relationship between the producer’s waste and the damage or . . . the injury to the environment suffered.” The use of the word “overwhelming” gives courts the opportunity to demand a prohibitively high evidentiary showing in environmental cases, which by their nature are already very difficult to prove.

4. Remedies

The proposed directive provides for both tort and cleanup actions. Specifically, article 4 of the directive permits parties injured by wastes to recover damages for personal and property injuries (toxic tort actions) and provides for remediation of contaminated sites by either the government or public interest groups (cleanup actions). The directive generally sets no specific financial ceilings on liability because, according to the Commission, such limits are “not justified” from the point of view of the victims or the affected environment.

Toxic tort suits under the directive closely resemble traditional tort actions. Plaintiffs may sue to enjoin the activity causing the harm. Plaintiffs also may seek reimbursement for expenditures made to avoid or

205. Rabin, supra note 79, at 29; see also infra notes 268-69 and accompanying text.


207. Civil Liability Directive, supra note 4, art. 4(6) (emphasis added).

208. See T. Smith & R. Hunter, supra note 175, at 10; supra notes 97-103 and accompanying text.

209. Under article 4, plaintiffs in tort and cleanup actions may sue to obtain:
   (a) the prohibition or cessation of the act causing the damage or injury to the environment;
   (b) the reimbursement of expenditure arising from measures to prevent the damage or injury to the environment;
   (c) the reimbursement of expenditures arising from measures to compensate for damage . . . ;
   (d) the restoration of the environment to its state immediately prior to the occurrence of injury to the environment or the reimbursement of expenditures incurred in connection with measures taken to this end; [and]
   (e) indemnification for the damage.

Civil Liability Directive, supra note 4, art. 4(1). The right to seek the above remedies belongs to the victim or the victim’s heirs. Explanatory Memorandum, supra note 12, at 4.

210. The directive may limit liability in some cases. See Civil Liability Directive, supra note 4, art. 4(2); infra notes 223-25 and accompanying text.

211. Explanatory Memorandum, supra note 12, at 5.

compensate for personal and property damage. More importantly, plaintiffs may collect actual damages for their injuries.

In cleanup actions, government authorities can order the defendant to restore the injured environment to its state prior to the injury. Where the government performs the cleanup itself, it may seek reimbursement from the defendant for that restoration. Finally, the government may take action under the directive to enjoin the activities giving rise to the environmental injury and may seek reimbursement for expenditures made to prevent environmental injury. The directive also allows states to permit "common-interest groups" to bring cleanup actions similar to those brought by public authorities. However, unlike government authorities, common-interest groups can seek only reimbursement for their cleanup expenses; they cannot use the directive to order the defendant to perform the cleanup.

The cleanup standard used in the above actions may be quite stringent in some circumstances. The directive states that the environment must be restored "to its state immediately prior to the occurrence of injury to the environment. . . ." In originally pristine areas, this standard could require cleanup to background contaminant levels. On the other hand, the Commission recognized that restoration to the condition prior to the damage may involve costs "all out of proportion" to the desired result. Thus, the Commission decided that a plaintiff cannot achieve restoration or obtain reimbursement for restoration undertaken if the costs of the plaintiff's suggested restoration method "substantially exceed" its benefits and if alternative restorative measures could be

213. Id. art. 4(1)(b)-(c).
214. Id. art. 4(1)(e).
215. Id. art. 4(1)(d).
216. Id.
217. Id. art. 4(1)(a).
218. Id. art. 4(1)(b). The directive does not address the possibility of allowing the government to also sue for natural resource damages, perhaps due to the conspicuous failure of the United States to effectively implement such a provision. See Woodward & Hope, supra note 206, at 191 (outlining the failures of CERCLA's natural resource damages provision).
219. Civil Liability Directive, supra note 4, art. 4(4). The number of states that permit such actions, however, is limited, although the Netherlands and Luxembourg grant special interest groups a direct right to take such actions, and France and Italy, in certain circumstances, permit them to institute civil proceedings joined to a criminal action. Explanatory Memorandum, supra note 12, at 4.
221. Id. art. 4(1)(d).
222. Explanatory Memorandum, supra note 12, at 3.
223. Civil Liability Directive, supra note 4, art. 4(2). The Commission recognizes that environmental injuries are "sometimes difficult to quantify." Explanatory Memorandum, supra note 12, at 3. However, it makes no attempt to propose a method for such quantification. Thus, the Commission leaves open the question of how to calculate the costs of restoration for the purpose of determining whether its benefits (which can be similarly difficult to quantify) "substantially exceed" those costs.
undertaken at a "substantially lower cost." This provision prevents plaintiffs from having complete control over the cleanup method. If a defendant proposes a similarly adequate restoration method of "substantially lower cost," the court must reject a plaintiff's suggested restoration method. However, if there are no adequate, "substantially" less expensive alternatives to the restorative method favored by a plaintiff, then the plaintiff may force a restoration method on a defendant even if the costs of that method will substantially exceed its benefits.

C. Limitations and Exceptions to the Directive

Several provisions in the directive limit, or provide exceptions to, liability for damage caused by waste. Most importantly, the directive does not apply to "damage or injury to the environment arising from an incident which occurred before the date on which its provisions are implemented." Thus, unlike the United States' Comprehensive Environmental Response, Compensation, and Liability Act, the EEC's Civil Liability Directive would technically not be retroactive.

In addition, a defendant's liability may be reduced or disallowed when the actions of an injured party contributed to causing the damage in question. This provision parallels contributory negligence provisions adopted in other EEC directives. The directive does not, however, reduce the producer's liability if the intervening person is a third party (as opposed to the injured party).

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226. The directive explicitly declares that it does not preempt certain other treaty regimes. See supra note 194. In addition, the producer can avoid liability completely if he shows that the damage or injury to the environment arose from a force majeure (e.g., an act of God, act of war). Civil Liability Directive, supra note 4, art. 6(1).
229. Civil Liability Directive, supra note 4, art. 13. Whereas CERCLA speaks in terms of "release," 42 U.S.C. § 9607(a)(4) (1988), the directive provides a remedy for an "incident." Civil Liability Directive, supra note 4, art. 2(2)(b). The directive does not, however, define the term "incident." Some commentators believe that, despite the apparently clear intent of the Commission that the directive not be retroactive, the states or the Court of Justice could make the directive essentially retroactive by defining "incident" as the moment of harm, rather than the moment of disposal. See, e.g., T. Smith & R. Hunter, supra note 175, at 7-8. According to this view, some risk exists that the states or the Court might adopt the Council of Europe's chosen definition of "incident": "any leak or emission or any series of occurrences having the same origin, which causes damage. . . . " Id. at 8 n.18. If such a definition is chosen, generators could be liable for wastes disposed of well before implementation of the Civil Liability Directive.
230. Civil Liability Directive, supra note 4, art. 7(2); see also Explanatory Memorandum, supra note 12, at 5 (where damage or injury was caused in part by the plaintiff's behavior, circumstances of each particular case should determine whether the producer's liability should be reduced).
231. Explanatory Memorandum, supra note 12, at 5.
232. Civil Liability Directive, supra note 4, art. 7(1). This provision would have no impact
The directive also contains a fairly strict statute of limitations. Specifically, plaintiffs must bring their actions within three years of the time they "become aware or should have become aware" of both the damage or injury to the environment and of the identity of the producer. All injured parties lose their rights to bring actions under the directive thirty years after the date on which the incident giving rise to the damage or injury to the environment occurred.

IV
ANALYSIS AND EVALUATION OF THE PROPOSED CIVIL LIABILITY DIRECTIVE

This part of the Comment analyzes the proposed directive in two ways. First, it describes the goals that the EEC has set out for the directive, and it studies whether the provisions of the directive actually serve those goals. Because this goal-oriented analysis necessarily begs the question of whether a liability regime in general can achieve the goals of the directive, this part also briefly addresses that issue. However, because the EEC has apparently already concluded that a liability regime is a necessary supplement to its waste prevention efforts, this part analyzes the directive in a second way — evaluating whether the directive effectively addresses the inadequacies of existing liability laws. Finally, this part also studies the roles of implementation and of insurance and compensation funds in influencing the overall ability of the directive both to serve its goals and redress the inadequacies of existing liability laws.

A. The Directive's Adherence to EEC Goals

1. Stated Goals

The goals that the EEC has set for itself can be grouped loosely into three general categories: (1) vindicating the rights of injured parties and the health of the environment (the "compensation" goal), (2) preventing and deterring the behavior that creates environmental damages (the "prevention" goal), and (3) assuring the effective functioning of a unified internal market among the EEC member states (the "internal market" goal).

With respect to the "compensation" goal, the directive focuses on compensation as the primary means of protecting injured parties. In fact, the Commission has stated that "ensur[ing] ... that victims of damage caused by waste receive fair compensation" is one of the two primary goals on inconsistent national rules. Id. art. 9(1).

234. Id. art. 10. The definition of "incident" could affect this provision significantly. See supra note 229. For example, if "incident" is defined as the act of burying wastes, plaintiffs may have less time to bring an action than if "incident" were defined as the harm resulting from the burying (since wastes may not escape until years after their disposal).
aims of the directive.\textsuperscript{235} The compensation goal similarly extends to the environment. For example, the preamble states that “compensation should be extended to ... injuries to the environment. ...”\textsuperscript{236} This “compensation” takes the form of reimbursement for expenditures undertaken to restore contaminated sites to their previous quality.\textsuperscript{237} The directive underscores the compensation goal’s role with regard to environmental harm by urging states to adopt implementing laws reflecting a “high level of protection ... with regard to the ... injury to the environment which may be repaired. ...”\textsuperscript{238}

The Commission has illustrated the importance of the directive’s “prevention” goal in several ways. First, the Commission believes that strict liability will help prevent future risks because if a polluter knows with certainty that he will have to pay the costs of waste damage, he will minimize waste production.\textsuperscript{239} Second, the fact that the directive holds waste generators liable until the wastes have arrived safely at a licensed disposal facility ensures that producers, who have a “temptation ... to deal with the waste illegally” because of the waste’s “generally doubtful value,” will dispose of the wastes safely.\textsuperscript{240} Finally, the Commission concludes that strict liability should be imposed on generators because they know the most about their own wastes and thus can best avoid potential risks.\textsuperscript{241}

The third goal focuses on assuring the effective functioning of the new internal market. Specifically, the Commission and the Council argue that disparities among liability laws can lead to “artificial patterns of investment and waste; ... distort competition, [and] affect the free movement of goods within the internal market ...”\textsuperscript{242} The proposed directive aims to minimize these disparities and thus promote equal conditions for investment, competition, and trade among EEC member states. The directive also helps achieve the efficient functioning of the internal market by “ensur[ing] ... that industry’s waste-related costs resulting from environmental damage are reflected in the price of the product or service giving rise to the waste.”\textsuperscript{243} Internalizing the costs of damage in the price of goods and services directly implements the principle that the

\begin{itemize}
\item \textsuperscript{235} Explanatory Memorandum, \textit{supra} note 12, at 1. The directive also aims to ensure that “the environment will recover.” \textit{Id.} at 2.
\item \textsuperscript{236} Civil Liability Directive, \textit{supra} note 4, preamble.
\item \textsuperscript{237} \textit{Id.} art. 4(1)(d).
\item \textsuperscript{238} \textit{Id.} preamble.
\item \textsuperscript{239} Explanatory Memorandum, \textit{supra} note 12, at 1; see also Civil Liability Directive, \textit{supra} note 4, preamble (“Community action in the field of waste management seeks to minimize the production ... of waste. ...”).
\item \textsuperscript{240} Explanatory Memorandum, \textit{supra} note 12, at 3.
\item \textsuperscript{241} \textit{Id.}
\item \textsuperscript{242} Civil Liability Directive, \textit{supra} note 4, preamble; see Explanatory Memorandum, \textit{supra} note 12, at 1.
\item \textsuperscript{243} Explanatory Memorandum, \textit{supra} note 12, at 1.
\end{itemize}
"polluter should pay" for the damage caused. In theory, internalization would reduce waste production to an economically efficient level because waste producers would have an incentive to minimize the costs associated with such production.

2. Background Considerations

In addition to the above stated goals, the directive also may address other, unstated considerations. For example, one likely consideration behind the directive is the increasing concern of EEC citizens regarding harm caused by wastes. The EEC has begun to address these concerns in recent years by passing a growing number of environmental directives and by devoting an entire title in its revised Treaty to environmental issues. The proposed Civil Liability Directive is thus a natural extension of the EEC's continuing recognition of increasing public desire for strong environmental legislation.

An additional consideration behind the directive may be to balance the goals of compensation and prevention with a concern for "fairness" to industry. The Commission may have sought to ensure that the directive and implementing state laws are not so stringent that they will seriously affect the ability of EEC businesses to compete in the world market. The EEC indicated its concern for the directive's effect on business by inserting in the directive a rigorous proof of causation standard to balance the strict liability standard on polluters.

Finally, one basic consideration behind the directive is to ensure that citizens of EEC member states resolve their differences peacefully and effectively. The directive attempts to do this by establishing rules that will streamline adjudication of waste-related disputes, and thus encourage parties to resolve their differences more quickly and efficiently.

244. See Treaty, supra note 13, art. 130R(2).
245. Industry representatives disagree with the directive's interpretation of the "polluter should pay" principle. They believe that the principle applies only if the producer has some control over the waste. European Chemical Industry, supra note 204, at 236.
248. See supra notes 3, 56 and accompanying text.
249. Civil Liability Directive, supra note 4, art. 4(6); see supra text accompanying note 207.
250. One commentator described this consideration as "peaceful vindication of rights" and argues that it is the "most important goal in the context of transboundary harms." Gaines, supra note 73, at 320.
3. Effectiveness of a Civil Liability Regime in Addressing the Directive's Goals

A number of commentators have disputed the effectiveness of liability regimes in addressing the types of goals discussed above. Some stress the importance of goal conflicts in determining which goals will prevail and how the regime will operate. Others focus on the difficulties inherent in ensuring full and fair compensation of injured parties. Awarding "fair" compensation may be quite difficult given the problem of valuing injuries. Moreover, the transaction costs of bringing suit limit the effectiveness of the directive in ensuring compensation. Valuation and transaction cost problems will occur in almost all environmental cases in spite of the directive, although the EEC can attempt to minimize these problems.

With respect to the prevention goal, commentators hold widely divergent views on the effectiveness of potential liability in preventing waste-related injuries. Commentators especially differ on whether findings of liability in specific waste cases achieve "general deterrence." Under the "general deterrence" theory, the regulated parties themselves adjust their activities to minimize related costs resulting from increased liability. Skeptics of the "general deterrence" theory argue that prevention of injury in waste-related cases requires use of specific scientific and engineering skills and therefore calls for "specific deterrence" strategies. "Specific deterrence" requires regulators (rather than the regulated parties) to decide how much of each activity should be permitted and how each activity should be performed. Supporters of general and specific deterrence do agree both that a broad pattern of liability holdings relating to a single product or activity affects industry be-

251. In order to resolve the goal conflicts that inevitably occur in a liability regime, the EEC must recognize the necessary tradeoffs and directly evaluate the relative importance of different goals. For example, a regime that imposes awards sufficient to deter a large generator from mishandling waste may significantly overcompensate an injured party; conversely, a system that primarily seeks to award fair compensation to victims may have little deterrent effect. Id. at 320. Without a firm idea of which goals it wishes to promote most, the EEC may not approve a directive that truly addresses its needs. Thus, to ensure that the final directive best furthers the goals that are most important to it, the EEC should rank its goals, study the possible tradeoffs between them, and then determine how to best reflect that goal ranking in the language of the final directive.

252. Id. at 324-26.

253. Id. at 326.


255. Gaines, supra note 73, at 326.

256. Id. at 326 n.76.

257. Id. at 327.

258. Id. at 327 n.77.
behavior, but that liability imposed today does little to reduce the risk due to actions (such as waste disposal) taken long ago.259

Finally, with respect to the internal market goal, it is uncertain whether the "polluter should pay" principle, which helps promote efficient functioning of the market, can be implemented in Europe. Dr. Laurens Brinkhorst, Director-General of the EEC's Directorate on Environment, Nuclear Safety, and Consumer Protection, has stated that the "polluter pays" principle, while an "excellent principle for transboundary harm," has not been adopted in Europe,260 despite the fact that it has been endorsed by the EEC since its first action programme.261 Indeed, at least one commentator feels that a "pollutee pays" principle (i.e., where parties injured by a waste stream pay the polluters to stop) is more prevalent in Europe.262

In sum, the question of whether the goals of compensation and prevention can be achieved effectively through a civil liability regime has been debated hotly. Although the EEC appears to believe that these goals can be achieved, it is unclear based on current data whether the EEC will prove to be right. The issue of whether a liability regime can promote effectively the "polluter pays" principle is similarly controversial, especially considering the fact that the EEC has had some difficulty implementing that aim. Thus, it is not clear whether a civil liability regime, as opposed to some other solution, will best address all of the EEC's primary goals. For example, the EEC could separate the issues of compensation and waste minimization by establishing a fund to compensate victims and setting quotas on the amount of waste industry could generate. Or, the EEC simply could spend more resources on increasing enforcement of existing environmental protection laws. However, given the inadequacies of the current liability regime, as discussed in the second part of this Comment, some modifications of liability laws seem necessary in order to ensure that more victims will be compensated and that some sites will be cleaned.

B. Effectiveness of the Directive in Addressing Inadequacies of Current Liability Law

The other method of evaluating the directive — analyzing whether it satisfactorily addresses the inadequacies of the current liability regime — presumes the conclusion of part II that some changes to the current

259. Id. at 327.
261. Id. Further evidence of the EEC's favorable views on the "polluter pays" principle can be found in European Communities, Council Recommendation on the Application of the Polluter-Pays Principle, 14 I.L.M. 138 (1975).
262. McCaffrey Interview, supra note 158.
regime are necessary. The fact that the EEC has drafted and proposed this Civil Liability Directive indicates that the EEC has concluded that such changes are necessary. Thus, while the EEC should consider the effectiveness of the proposed directive in achieving its stated goals, the more significant issues are those that question whether the proposed directive sufficiently repairs the weaknesses of current liability law.

1. Problems Posed by Fault-Based Systems

The current liability regimes of the EEC member states are generally fault-based. Fault-based schemes suffer from significant problems both with respect to the compensation of injured parties and the minimization of waste-caused risks. The directive attempts to remedy the problems of fault-based liability by holding waste producers strictly liable for harm caused by their wastes. Strict liability promotes compensation of injured parties and the environment by removing from plaintiffs the burden of proving that the waste producer violated a particular duty of care, thus making it easier for them to prevail. In addition, because it extends to parties without physical control over the wastes (such as waste producers who have transferred their wastes to a licensed hauler), the directive's strict liability provision makes it easier for injured parties to find a liable defendant. Strict liability promotes prevention of harm by placing more responsibility on the waste producer, who has the best information about the wastes and their potential for harm. Strict liability also promotes prevention of harm by prohibiting defendants from relying on compliance with weak waste regulations as a defense. Under a strict liability regime, then, defendants will have an incentive to go beyond the mandates of environmental statutes in order to avoid liability, thus decreasing the likelihood of waste-related injuries.

The European Chemical Industries Federation (CEFIC) has argued against the directive's strict liability provision. In particular, CEFIC believes that strict liability ought to apply only to wastes that are particularly hazardous, and that strict liability should not apply after the producer has released control of the wastes to a responsible transporter. Relaxing the directive's strict liability coverage to account for CEFIC's concerns presumably would protect the assets of EEC industries, but it also could seriously undermine the goals that strict liability is designed to achieve. Moreover, industry opinion regarding the directive's provi-

263. See supra notes 73-88 and accompanying text (discussing inadequacies of fault-based liability regimes).
264. See European Chemical Industry, supra note 204, at 236.
265. Id.
266. The Commission has stated that "automatic liability" will ensure that "victims receive compensation, the environment will recover, and economic agents are held liable" under the provisions of the directive. Explanatory Memorandum, supra note 12, at 2.
sions may be divided. In fact, some industry representatives “welcome the challenge” of a new liability regime and accept the imposition of strict liability, as long as that liability is not also retroactive.267 In sum, the advantages of strict liability in ensuring both compensation of victims and prevention of harm seem to outweigh the concerns of industry representatives, especially since they may be split on the issue. However, strict liability alone will not ensure that all victims are compensated and that all sites are restored; plaintiffs still have to shoulder the significant burden of proving causation.

2. Causation Problems

Proving causation is one of the most significant hurdles to winning a waste-related action.268 Plaintiffs can experience difficulties in showing that the waste is capable of causing the harm, and particularly in showing that the wastes caused the damage or injury at issue. Rather than easing this burden, however, the directive exacerbates it by requiring plaintiffs to show the “overwhelming probability” of the causal relationship between the waste and the harm.269 Considering the difficulties of proving causation in environmental cases under any standard, requiring such a high level of proof makes it virtually impossible for many plaintiffs to prove their case. This difficulty of proving causation likely will discourage injured parties from bringing claims. This in turn may seriously impair achievement of the directive’s stated goal of “full redress” for injured parties.270 Further, if this standard results in a dearth of cases, it will interfere with the goal of deterrence, and thus the goal of waste minimization (since businesses will not cut back on risk-producing acts if they realize that they will not be held responsible for those actions). If the EEC wishes to ensure compensation and waste minimization over other goals (such as “fairness” to industry), it should relax this causation standard.

There is some evidence that the EEC may weaken the causation standard in the final directive. Specifically, the Commission, in revising the draft directive, decided to use the term “balance of probability” instead of “overwhelming probability” in the English version of the directive.271 The Commission made this revision because “balance of probability” more accurately represents the current status of English and Irish jurisprudence.272 If the Commission drafts (and the Council ap-

268. See supra text accompanying notes 97-103.
269. Civil Liability Directive, supra note 4, art. 4(6).
270. Id. preamble.
272. Id.
proves) a similar change in other translations, the causation burdens outlined above could be relieved greatly.

3. Inadequacies of Laws Addressing Environmental Injury

Under current liability regimes, plaintiffs wishing to bring environmental damage cases must rely generally on nuisance actions and, where available, statutory cleanup laws. Nuisance law, however, limits the class of plaintiffs to affected property owners. Further, current statutes that apparently require polluters to pay for site cleanup generally do not, in practice, actually force the polluters to pay.

The proposed directive provides a significantly more accessible alternative for plaintiffs seeking site cleanup. For example, it does not limit plaintiffs to property owners as nuisance actions do (although it does limit them to government bodies and, in some cases, public interest groups). It also addresses the current dearth of effective statutory cleanup remedies by providing a fixed framework for bringing environmental cases. The directive thus prevents further harm to the environment by facilitating restoration.

Of course, the directive does not address one significant gap in current liability law — the failure of current law to ensure that victorious plaintiffs actually will be able to compel defendants to either restore the site or pay for restoration. The failure of the directive to choose a method of ensuring site cleanup, such as requiring mandatory insurance or setting up a "compensation fund," limits its ability to promote effectively its goal of protecting the environment.

4. Special Difficulties of Transnational Suits

Currently, the daunting requirements of facing a foreign legal system discourage many injured parties from bringing claims against defendants from other states. Choice of forum and choice of law complications, as well as barriers caused by distance and differing languages and legal procedures, all make bringing suit against a party in another state difficult under present law. The directive clearly minimizes the choice of law problem by providing a uniform guide for future national liability laws. However, the directive will not eliminate entirely the choice of law problem because states hold some discretion in drafting laws to implement the directive. On the other hand, the increasing unity among EEC member states nevertheless may lead to more harmonized laws in the future. Minimization of the choice of law hurdle should

273. See supra notes 106-07 and accompanying text.
274. See supra text accompanying note 111.
275. See supra text accompanying notes 112-21.
276. See, e.g., McCaffrey, supra note 102, at 213.
277. See infra notes 315-18 and accompanying text (discussing the role of increasing EEC
enhance the likelihood that injured parties will pursue their claims. As such, it will directly promote realization of the compensation goal and indirectly promote the prevention goal (as businesses reduce waste production to avoid liability).

While the problems raised by distance and language barriers, and those posed by differences in legal procedures, cannot be effectively addressed in a single directive, the EEC can take certain actions to help alleviate these problems. First, the EEC can better manage information available to plaintiffs, perhaps through regional information centers designed both to educate injured parties about their rights and to help them overcome their concern over bringing actions against foreign defendants. Second, the EEC can provide new sources of information to injured parties. The EEC's recent establishment of the European Environment Agency and adoption of a "freedom of information" directive serve these purposes.

The Council approved the creation of the European Environment Agency (EEA) in May 1990. One EEA objective is to provide the EEC and its member states with reliable environmental information so that they may "ensure that the public is properly informed about the state of the environment." The EEA will focus on collecting information relative to transfrontier phenomena. This information, which the EEA will compile and disseminate, may reduce greatly some of the diffi-

278. Handl and Lutz argue that internationalization of fact-finding in accidents involving the transfer of hazardous substances may be inevitable since it is more logical to entrust fact-finding to international institutions already processing information about these hazards than to entrust fact-finding intrastate legal procedures, which might prove inadequate in a complex situation. Handl & Lutz, The Transboundary Trade in Hazardous Technologies and Substances From a Policy Perspective, in TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE 40, 58 (G. Handl and R. Lutz eds. 1989).

279. Council Regulations on the Establishment of the European Environment Agency and the European Environment Information and Observation Network, 33 O.J. EUR. COMM. (No. L 120) 1 (1990) [hereinafter EEA Regulation]. Although the EEA is an EEC-created agency, the EEC has decided to open it to other European countries wishing to participate. Id. art. 19.

280. Id. preamble. The European Parliament believes that the EEA should develop into more of a regulatory body with environmental inspectors. T. Adams, supra note 61, at 2. The EEC Environment Commissioner also has hinted strongly that he believes the EEC should follow that path. Environment Ministers Agree on Format for Forthcoming EC Environmental Agency, 12 [Current Reports] Int'l Env't Rep. (BNA) 477 (Oct. 1989). However, because some states desired the EEA to act only as a data collection agency, the EEA will act as one for at least two years after it begins operations. After two years, the EEC will reconsider whether to expand the EEA's powers. EEA Regulation, supra note 279, art. 20. An expanded international monitoring and enforcement agency would help achieve all of the directive's goals by ensuring that states properly implement the directive, and it particularly would further the goal of protection by making it easier for potential plaintiffs to get the information and support they need to bring cases.

281. EEA Regulation, supra note 279, art. 3.
culties injured parties experience in collecting sufficient data to use in actions against foreign parties.

The recently adopted directive on freedom of information,\textsuperscript{282} which requires member states to set up procedures by which interested parties may gain quick access to official information related to the environment,\textsuperscript{283} also should aid injured parties in their data-gathering. Under this directive, individuals and other entities (such as public interest groups) can obtain from the government "information relating to the environment" without having to prove any particular interest (such as a possible legal claim).\textsuperscript{284} The directive defines "information relating to the environment" as including, among other things, data on "activities . . . or measures" that either adversely affect or protect the environment.\textsuperscript{285}

5. Lack of State Liability

Current liability regimes generally fail to hold states liable for the environmental injuries they cause,\textsuperscript{286} and the proposed directive seems to follow this pattern. Although the directive does not specifically exempt state and local governments from coverage,\textsuperscript{287} it seems likely that if the Commission had intended to hold government institutions liable, it would have said so specifically.\textsuperscript{288} Holding states liable is critical to the success of the directive because states can generate significant amounts of waste and, as discussed earlier, in some states they virtually monopolize the waste disposal industry.\textsuperscript{289} If states are not held responsible for harm caused by the waste that they generate and dispose of, many injuries will go unremedied. Thus, the EEC's decision to exclude state liability from the directive fails to address this problem and seriously impedes achievement of the directive's goals of compensation and prevention of harm.\textsuperscript{290}

Admittedly, holding states liable as if they were private entities involves taking significant steps beyond existing international law.\textsuperscript{291}
However, it can be done. The working group drafting the Basel Convention's liability provisions has been debating the possibility of holding states liable for damage caused by their wastes.\textsuperscript{292} Moreover, the recent Convention on the Regulation of Antarctic Mineral Resource Activities holds states liable for environmental damage in certain situations.\textsuperscript{293} If the EEC wishes to maximize achievement of its goals, it should use these conventions as starting points for drafting a provision in the Civil Liability Directive that specifically makes state and local governments liable for the harm they cause.

6. \textit{Summary}

The proposed directive attempts to remedy a number of inadequacies in the liability law of the EEC and its member states. It directly addresses the problems caused by fault-based liability systems by making waste producers strictly liable. It adds a more certain source of remedy to substantive environmental damage law. Finally, it minimizes plaintiffs' procedural difficulties in transnational cases by providing a set framework for EEC liability law, thus reducing plaintiffs' choice of law (and thus choice of forum) difficulties.

On the other hand, the proposed directive fails to fill some important gaps in liability law, such as the general lack of state liability for harms caused, particularly in transboundary pollution cases. The directive also exacerbates a current hurdle for plaintiffs bringing environmental cases — proving causation — by requiring plaintiffs to meet a stringent proof of causation standard. The EEC should consider remediying these restrictions on compensation and cleanup in making future revisions to the directive.

C. \textit{Implementation Issues}

Each state is required to implement the directive by enacting relevant laws and regulations.\textsuperscript{294} However, so long as they generally follow the provisions and intent of the directive, states are free to create their own, individualized implementing legislation.\textsuperscript{295} Since the directive leaves some important concepts (such as the particular wastes that will be regulated) open to interpretation, the states can play a significant role in shaping the directive's final effect.\textsuperscript{296}

\textsuperscript{292} See Informal Draft Liability Protocol, supra note 164, Annex, art. VIII.
\textsuperscript{293} See supra notes 160-61 and accompanying text.
\textsuperscript{294} See Treaty, supra note 13, art. 189.
\textsuperscript{295} Although the states are required to implement the provisions of the directive, they might do so in a manner that the Commission deems insufficient. For a discussion of the problems raised by poor implementation and enforcement by the states and the Commission, see infra text accompanying notes 303-06.
\textsuperscript{296} However, the European Court of Justice may modify interpretations that do not achieve the results the directive intends. See Treaty, supra note 13, art. 171.
Satisfactory implementation of the directive by the states directly affects the success of the directive in achieving its goals and addressing the inadequacies of current liability regimes. Implementation difficulties inevitably occur because of differing legal systems, differing attitudes toward environmental protection, and lack of effective oversight.\textsuperscript{297} Although such implementation problems apply to most directives, a review of these problems is useful here in order to evaluate completely the proposed directive's potential for success.

First, states must fit their implementing responses within their existing liability regimes. Yet, the characteristics of current regimes vary widely.\textsuperscript{298} For example, French liability law addresses all types of damages together in one regime; thus, implementing a civil liability directive will entail breaking up that regime to form a separate system devoted solely to waste-related damages.\textsuperscript{299} Because of the varying degrees of difficulty states may experience inserting waste liability laws into their current liability regimes, some states may lag behind others in implementing the directive.

Different states also hold disparate views on how stringently environmental directives should be enforced.\textsuperscript{300} Although they at least must enforce the Civil Liability Directive at some minimum level to avoid action against them by the Commission, states with relatively weak environmental protection programs may not enforce their implementing legislation to the extent that states with strong programs will.

Differing levels of implementation pose a number of problems. For example, lax enforcement in some states inhibits the creation of an efficient "internal market," since waste producers and handlers may gravitate towards states with weaker regulations. Further, lax implementation by some states can seriously undermine the directive's efforts to uniformly protect individuals and the environment from injury. Both of these problems pose difficulties for parties who wish to recover for harm caused by wastes generated in another state.

The Commission could have avoided these implementation problems by drafting the directive as a series of "regulations," which automatically apply to the states exactly as written.\textsuperscript{301} However, it chose the flexibility of the directive, perhaps in part because it allows more progressive states to implement legislation more stringent than the direc-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{297} Implementation problems also may occur where the directive at issue was approved by qualified majority voting. See \textit{supra} note 67.
\item \textsuperscript{298} Prieur Interview, \textit{supra} note 4.
\item \textsuperscript{299} \textit{Id}.
\item \textsuperscript{300} See \textit{supra} note 61 (discussing differences between states in drafting, implementing, and enforcing environmental legislation).
\item \textsuperscript{301} Treaty, \textit{supra} note 13, art. 189. For a discussion of the difference between a regulation and a directive, see \textit{supra} notes 20-21 and accompanying text.
\end{itemize}
\end{footnotesize}
tive, and so permits them to retain a measure of the sovereignty that they have given up in supporting this uniform liability system.

The implementation problems posed by different legal systems are compounded by the Commission's relatively ineffective oversight of state implementation of environmental directives. Studies conducted by the Commission indicate that states often ignore or refuse to take seriously their duty to implement environmental directives. For example, in 1987, the Commission discovered that states committed 188 “infringements” relating to implementation of environmental directives, as compared with just twenty-five in 1978. Of course, this increase may have occurred partly because the number of environment directives has increased steadily in recent years. However, the increase in infringements also is in part due to minimal efforts on the part of certain states to implement environmental directives.

The European Parliament, which has come to realize the significance of this oversight problem, has asked the Commission to make monitoring of EEC environmental laws a priority in the future. However, the magnitude of the task, combined with the relatively small size of the Commission staff, may not make the effect of the increased effort significant enough to deter recalcitrant states from violating their duty to implement the directive promptly and effectively.

The inability of the European Court of Justice to present a credible enforcement threat only exacerbates the implementation and oversight problems. If the Commission brings a successful action against a state, the best the Court of Justice can do is to state openly that the offending country has breached its obligations under the Treaty. This “public disgrace” method of punishing violations has only limited usefulness.

Other factors, however, suggest that the above analysis of implementation problems may be overly pessimistic. For instance, rising environmental awareness may lead to relatively quick adoption and implementation of the directive by the EEC and its member states. Since

302. See Treaty, supra note 13, art. 130T (permitting states to implement laws more stringent than related EEC environmental measures).
304. Id. These infringements include: delaying implementation of the directive, only partially incorporating the directive into national law, and treating the directives as mere recommendations rather than as binding law. Id. at 340.
305. See id. (certain deficiencies in implementation came to light as a result of the Seveso scandal).
306. Id.
307. See Treaty, supra note 13, art. 169. States also may initiate actions against states which fail to implement the EEC directive. Id. art. 170.
308. See supra text accompanying note 32.
309. However, the difficulty of punishing sovereign states makes the approval of more stringent measures unlikely.
the Seveso and Sandoz scandals, \(^{310}\) citizens and officials of the EEC states have become increasingly concerned about the dangers posed by wastes. \(^{311}\) The rise in the political appeal of the Green Party, which holds seats in the German legislature as well as the European Parliament, \(^{312}\) provides evidence of the growing belief of citizens that the environment and the health of the people should be protected from the harm that wastes can cause. The growing popularity of “green” voting has in turn lead to the “greening” of other political parties and the enactment of increasingly stringent environmental legislation, including the proposed Civil Liability Directive. \(^{313}\) Based on this trend, some industrial analysts believe that the Civil Liability Directive will be adopted more quickly than past environmental directives because members of the European Parliament “want to be seen to be green.” \(^{314}\) This trend also may mean that the current governments of the member states will be more willing to effectively implement and enforce this environmental directive than they have been with past directives.

Increasing unity among the EEC member states also may speed implementation of the directive. The most significant evidence of increasing EEC unity is the integration of the EEC internal market; this integration will be completed by December 1992. \(^{315}\) At that time, goods, services, and people will be able to move freely throughout the EEC, unrestricted by state borders. \(^{316}\) The heads of the EEC member states also recently agreed to strengthen EEC unity even further by moving toward some form of political union. \(^{317}\) Although this political union will not make the EEC a “United States of Europe,” it should involve increasing the powers of the EEC to enforce its directives. \(^{318}\)

Greater unity also will enhance efforts to harmonize state laws, including environmental laws. Considering the current pro-environment climate, harmonization of environmental laws most likely will lead to more stringent laws in general, including those laws implementing the Civil Liability Directive. Thus, while it is possible that a fully integrated EEC may make it easier for businesses to increase the amount of wastes they ship to other EEC countries, increased unity generally will promote
the Civil Liability Directive's goal of ensuring that citizens of all EEC states enjoy equal access to compensation for waste-caused damage.

D. Insurance and Compensation Funds

Injured parties with strong cases may nevertheless go uncompensated if they find only defendants who are either insolvent or otherwise unable to provide full compensation.319 Other injured parties may be unable to locate a defendant at all. Although the Commission was unable to draft a provision addressing these problems,320 it did require the Council to determine by the end of 1992 a method to ensure that such parties receive full compensation.321

The problem of insolvent defendants could possibly be averted by requiring all hazardous waste generators, transporters, and disposers to carry some minimum amount of insurance covering accidental releases. Compulsory insurance also may alleviate general public fears about the ability of industry to pay for pollution damage.322 On the other hand, compulsory insurance actually may result in increased waste production if insured firms act less carefully than they would if they were to be personally liable for damages.323 Counteracting any such decrease in deterrence, however, would be the desire of businesses to avoid the negative publicity and increased premiums that would follow a suit for damages. Thus, the positive aspects of mandatory insurance seem compelling enough to warrant more serious consideration.

Despite the arguments in favor of compulsory insurance, the EEC currently seems to think that it can conduct an effective compensation program without requiring insurance. The Council states that it is "not opportune" under present market conditions to establish a mandatory system of insurance.324 The Commission explains further that

319. Of course, an insolvent defendant may be the subsidiary of a solvent parent. In such cases, the potential plaintiff may want to look to the parent for harms caused by its subsidiary. See McCaffrey, supra note 102, at 208 n.38. For example, plaintiffs might try to hold a parent liable by using vicarious liability theories and direct liability for the parent's own negligence (for example, in not adequately supervising its subsidiary). Id. For more information, see ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: RESPONSIBILITY OF PARENT COMPANIES FOR THEIR SUBSIDIARIES (1980) (surveying the legal situation in OECD states, which include the EEC member states); Westbrook, Theories of Parent Company Liability and the Prospects for an International Settlement, 20 TEX. INT'L L.J. 321 (1985) (using Bhopal disaster as the framework for a discussion of legal theories behind holding multinational corporations directly liable for their subsidiaries' actions).

320. See Explanatory Memorandum, supra note 12, at 6.

321. Civil Liability Directive, supra note 4, art. 11.


mandatory insurance is currently unwise because a minimum ceiling might distort the insurance market and because insurance companies are opposed to even limited mandatory insurance coverage.\textsuperscript{325} Despite this claim, not all insurers are necessarily opposed to compulsory insurance.\textsuperscript{326} Nevertheless, the Council and the Commission do not seem inclined to commit themselves presently to mandatory insurance without further study.\textsuperscript{327}

Even if a mandatory insurance scheme were adopted, it would not solve the problem of plaintiffs who cannot locate a liable defendant. This problem might be addressed by establishing a Superfund-like compensation fund, which could be used to fund cleanup of abandoned waste sites and to compensate parties with demonstrable injuries who have exhausted all other remedies.\textsuperscript{328} However, industry representatives have rejected this idea, claiming that litigation automatically would follow the establishment of such a fund.\textsuperscript{329} Further, EEC countries are leery of adopting a replica of the United States' Superfund, which they feel has many problems.\textsuperscript{330}

In sum, the remedies provided by the directive are useless in cases in which plaintiffs cannot find a solvent defendant. In order to advance the compensation goal, and thereby protect injured parties' rights and the health of the environment, the EEC should give serious consideration to enacting a scheme that will promote solvency and ensure compensation and environmental restoration in the event a solvent defendant cannot be found.

\textsuperscript{325} Explanatory Memorandum, supra note 12, at 5; see also Shapiro, supra note 311, at 36 (insurers are concerned about being able to measure environmental risks to industry). The Commission also suggested that liable parties might prefer some other, equally effective method of ensuring that they would have funds in case of a suit over damage caused by waste. Explanatory Memorandum, supra note 12, at 5.

\textsuperscript{326} Cowell, The Current Status of Insurance on the European Level, in TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTES 257, 258 (OECD, 1985).

\textsuperscript{327} To this end, the Council may wish to examine an amendment proposed by the European Parliament's Committee on Legal Affairs and Citizens' Rights requiring mandatory insurance coverage and setting limits on liability. See infra text accompanying notes 336-52.

\textsuperscript{328} See Compulsory Pollution Insurance, supra note 247, at 15 (describing a possible environmental damage fund).

\textsuperscript{329} Shapiro, supra note 311, at 36. Most likely, industry representatives made this claim on the assumption that large numbers of parties, on hearing that a significant compensation fund is available, would bring actions that they otherwise would not have contemplated.

\textsuperscript{330} OECD Official Says Basel Convention Interim Step in Governments' Waste Efforts, 12 [Current Reports] Int'l Env't Rep. (BNA) 542, 543 (Nov. 1989). As the head of OECD's environmental directorate, Bill Long, stated, "when [the states] take a look at what the U.S. has done, how many sites have been actually cleaned up, and at what it will cost, then they get a little nervous about it." Id.
FUTURE OF THE PROPOSED CIVIL LIABILITY DIRECTIVE

The Council likely will recommend changes to the proposed Civil Liability Directive before giving it final approval. If so, the various EEC government institutions will probably review the directive and suggest amendments. By law, the Council must consider the proposed changes of certain of these institutions. Considering the controversial nature of some of the directive's provisions (such as the proof of causation standard), the Council probably will study the suggested modifications carefully. The Council also may consider possible changes prompted by the work of other international bodies. For example, UNEP is currently drafting a liability protocol to its Basel Convention that may influence significantly the EEC's modification of its own liability directive.

This part of the Comment reviews the changes suggested by the European Parliament's Committee on Legal Affairs and Citizens' Rights and discusses the impact these changes might have on the directive's success. This part also outlines the relevant provisions of UNEP's draft liability protocol and examines how those provisions might influence the EEC.

A. Comments by the Committee on Legal Affairs and Citizens' Rights

The European Parliament’s Committee on Legal Affairs and Citizens’ Rights (Committee) has drafted a number of changes to the proposed directive. First, the Committee recommends that the directive require all potentially liable parties to carry compulsory insurance.

331. The Commission, the European Parliament, and the Economic and Social Committee all will suggest changes. Prieur Interview, supra note 4.

332. For example, because the directive is legally based on article 100A, the Council must consider the opinion of the European Parliament in making its final decision. See supra note 37 and accompanying text.


334. Basel Convention, supra note 163, art. 12.

335. A member of the committee drafting the Basel Convention's liability protocol recently commented that it is unlikely that the Council would approve the EEC directive without seriously considering the Basel Convention's liability protocol. Telephone interview with Gunther Handl, supra note 288.

336. Committee Report, supra note 38.

337. Id. amend. 18 (amending article 11 of the Civil Liability Directive). The Commission claims that compulsory insurance is necessary because the Transfrontier Waste Directive, which required the Council to consider drafting a civil liability directive, also required the Council to determine a system of insurance. Transfrontier Waste Directive, supra note 7, art. 11(3). The Economic and Social Committee, however, has commented that the Commission correctly decided that it should not install a compulsory insurance system. Comité Economique et Social, supra note 42, at 4 ("[c]est a juste titre que la Commission n'envisage
The Committee contends that since compulsory insurance is required in all related international conventions, it should also be a requirement in the Civil Liability Directive.\(^{338}\) The Committee tempers this recommendation, however, by permitting states to set a maximum liability limit, subject to minimum floors.\(^{339}\) Such limits minimize the difficulty the insurance industry would face in setting premiums for unknown risks.\(^{340}\) The limits thereby might increase the ability of regulated industries to obtain insurance and hence compensate injured parties.\(^{341}\) However, if states set the limits too low, many victims could be left without full compensation. In addition, disparities in limits among the states could cause some companies to locate in states with lower liability ceilings, thus reintroducing artificial investment patterns that undermine the integrity of the internal market.

Second, the Committee recommends that states be given greater flexibility in establishing remedies, within limits.\(^{342}\) Most notably, with respect to personal injuries, the Committee would only compel states to provide an injunction and/or compensation as remedies.\(^{343}\) Exclusion of mandatory compensation seriously threatens the directive’s attempt to ensure compensation for waste-related injuries. Yet, in other respects, the Committee’s remedy amendment could strengthen the directive. For example, while the Committee would permit states to set the standard of proof for causation, they would approve only standards that were “no higher than the standard burden of proof in civil law...”\(^{344}\) This likely will be an easier standard for plaintiffs to meet than the “overwhelming probability” standard set by the proposed directive.\(^{345}\)

Third, the Committee urges that nationally-approved common-interest groups “having as their objective the protection of nature and the environment” should be granted universal standing to enjoin action impairing the environment.\(^{346}\) This differs from the proposed directive, which defers to state law on the standing of interest groups.\(^{347}\) Since

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\(^{338}\) Committee Report, supra note 38, Annex B, ¶ 17.

\(^{339}\) Id. amend. 18.

\(^{340}\) See supra note 325.

\(^{341}\) However, insured parties may feel that they need not be as careful as they would be were they uninsured.

\(^{342}\) Committee Report, supra note 38, amend. 16 (amending article 4 of the Civil Liability Directive).

\(^{343}\) Id.

\(^{344}\) Id.

\(^{345}\) Apparently, the Commission (and the Economic and Social Committee) also agree that the “overwhelming probability” standard is too stringent. See supra text accompanying notes 271-72 (on the use of “balance of probability” instead of “overwhelming probability” in the English version of the directive).

\(^{346}\) Committee Report, supra note 38, amend. 16 (amending article 4 of the Civil Liability Directive); see also id. Annex B, ¶ 16.

\(^{347}\) Civil Liability Directive, supra note 4, art. 4(4).
many states currently prohibit or restrict the ability of such groups to bring suits,\textsuperscript{348} the amendment might expand greatly the powers of those groups throughout the EEC.

Finally, the Committee's amended directive would hold "a \textit{public authority} or private body" responsible for damages caused by wastes.\textsuperscript{349} The amendment at issue defines "person," a term the Committee uses in its definitions of "producer," "manufacturer," "carrier," and "eliminator," as "any natural or legal person as defined by \textit{public} or private law."\textsuperscript{350} The proposed Civil Liability Directive, by contrast, refers to the "producer" (the only liable party under the proposal) as simply "any natural or legal person" who engages in certain activities.\textsuperscript{351} If accepted by the Council, the Committee's specific inclusion of state and local governments as liable parties would contribute significantly to the achievement of all of the directive's goals.\textsuperscript{352}

The breadth of the suggestions offered by the Committee indicates that the directive likely will undergo several rounds of revisions before reaching final form. Such a process may take months or years, and the incentives to delay are increased by the presence of another, similar draft liability law — the liability protocol to the Basel Convention.

B. The Basel Convention Liability Protocol

I. Influence of the Basel Convention

In March 1989, 105 nations signed the final version of UNEP's Basel Convention on the Transboundary Movements of Waste and their Disposal.\textsuperscript{353} The Convention will become legally binding on its parties after twenty states have ratified it.\textsuperscript{354} Although all of the EEC member states, and the EEC itself, have signed the Convention,\textsuperscript{355} none have ratified it.\textsuperscript{356} However, the EEC has continually expressed its support for the Basel Convention,\textsuperscript{357} and recently issued a Council Decision recommending that the member states take steps to ratify and implement it.\textsuperscript{358}

\begin{itemize}
\item \textsuperscript{348} See supra note 219.
\item \textsuperscript{349} Committee Report, supra note 38, Annex B, \textsection 10 (emphasis added).
\item \textsuperscript{350} Id. amend. 10 (amending article 2 of the Civil Liability Directive) (emphasis added).
\item \textsuperscript{351} Civil Liability Directive, supra note 4, art. 2(1)(a).
\item \textsuperscript{352} See supra text accompanying notes 286-93 (discussing the problems raised by the Commission's decision not to include public authorities as liable parties under the directive).
\item \textsuperscript{355} Telephone interview with public relations officer, supra note 354.
\item \textsuperscript{356} See supra note 354 (listing states that have ratified the Convention).
\item \textsuperscript{357} \textit{EEC to Revise Notification Scheme for Transboundary Shipments of Waste}, 12 [Current Reports] Int'l Envt'l Rep. (BNA) 531, 532 (Nov. 1989).
\item \textsuperscript{358} Council Decision on the Acceptance by the European Economic Community of an
Parties to the Convention must adopt a Convention protocol on liability for damage caused by transboundary waste shipments.\textsuperscript{359} Assuming that the EEC states ratify the Convention (which seems likely), they will have to implement the Convention's provisions, including the liability protocol, once the twenty-state mark is reached and the protocol is completed.

The drafting of UNEP's liability protocol has taken place rather slowly. The UNEP drafting team met only twice in 1990, and they have yet to complete a draft of the protocol.\textsuperscript{360} Despite this slow pace, the EEC should pay close attention to the protocol's provisions for several reasons. First, the EEC Treaty requires the EEC and its member states to cooperate with nonmember countries and relevant international organizations.\textsuperscript{361} This provision may prohibit the EEC from disrupting UNEP's negotiations by enacting a "rival" directive. Second, the EEC states may be unwilling to change their national laws to implement both the directive and a different liability provision under the Basel Convention, and so may put pressure on the Council to delay passage of the Civil Liability Directive.\textsuperscript{362} If the slow drafting pace continues, however, the EEC may grow impatient and approve the final version of its liability directive before UNEP is finished. This, however, could exacerbate implementation difficulties,\textsuperscript{363} as some EEC member states may try to delay implementation of the directive to avoid having to amend their laws twice.

2. \textit{Comparison of EEC and UNEP Liability Provisions}

The directive and the current (incomplete) draft of the Basel Convention protocol differ in several significant ways. First, with respect to the scope of application, the draft protocol limits itself to damage caused by wastes that have been shipped across borders.\textsuperscript{364} Second, the protocol drafters do not appear to have decided which parties should be held liable for damages.\textsuperscript{365} The first draft of the protocol contained a clause virtually identical to the liability-channeling provision in the EEC direc-

\textsuperscript{359} \textit{Basel Convention, supra} note 163, art. 12.

\textsuperscript{360} Telephone interview with Professor Gunther Handl, Wayne State University, Member of Working Group drafting Basel Convention Liability Protocol (July 17, 1990). An informal meeting was held from April 30 to May 2, 1990, while a second, formal meeting was held from July 2 to July 6, 1990. Each meeting produced a partially-completed draft of the protocol, leaving certain issues to be addressed in the next round of meetings. \textit{Id.}

\textsuperscript{361} \textit{Treaty, supra} note 13, art. 130R(5).

\textsuperscript{362} Telephone interview with Gunther Handl, \textit{supra} note 360.

\textsuperscript{363} \textit{See supra} notes 294-318 and accompanying text.

\textsuperscript{364} U.N. Doc. UNEP/CHW/WG.1/3 at 6 (1990) [hereinafter Draft Liability Protocol].

\textsuperscript{365} \textit{See id.} at 9.
tive, but the second draft eliminated that provision. Third, the protocol suggests that it might favor either absolute or strict liability. Thus, unlike the EEC directive, the Basel Convention may refuse to recognize defenses such as force majeure and contributory negligence on the part of the injured party. Fourth, the protocol drafters have considered holding states liable for harm caused by wastes. Finally, unlike the directive, the draft protocol requires businesses to carry a minimum amount of insurance to cover damage actions.

In other respects, the protocol and the directive are similar. For example, both reject a retroactive approach. Further, both provide similar remedies (actions for personal injuries as well as for costs incurred in responding to environmental damage).

The drafters of the protocol have declared that they intend to harmonize their work with other civil liability regimes. However, the current draft of the protocol differs in some significant ways from the proposed EEC directive. While it is too early to tell what the final version of the protocol will look like, the fact that the protocol drafters have suggested some stringent provisions may put political pressure on the EEC to strengthen its Civil Liability Directive.


368. Civil Liability Directive, supra note 4, arts. 6(1), 7(1).

369. See Informal Draft Liability Protocol, supra note 164, Annex, art. VIII. The Netherlands, in particular, favors including some form of state liability, while other states feel that a private law scheme can address liability concerns effectively without resorting to holding states liable. Telephone interview with Gunther Handl, supra note 165.

370. See Draft Liability Protocol, supra note 364, at 10, 11.

371. Compare Civil Liability Directive, supra note 4, art. 13, with Informal Draft Liability Protocol, supra note 164, Annex, art. XIII. However, like the proposed directive, the protocol might be interpreted retroactively. Article XIII of the Informal Draft Liability Protocol states that the future protocol “should not apply to damage that has arisen from incidents which occurred [sic] before the date on which its provisions enter into force.” Informal Draft Liability Protocol, supra note 164, art. XIII (emphasis added). Thus, the protocol faces the same problem with the definition of “incident” that the drafters of the EEC directive must face. See supra note 229.


374. Specifically, the draft protocol contemplates absolute liability or strict liability with only a few narrow exceptions. Draft Liability Protocol, supra note 364, at 8-9. It requires regulated parties to carry a minimum amount of insurance. Id. at 10. Finally, its terms suggest that states as well as private parties might be held liable for damages. See id. at 10. Each of these provisions is significantly more stringent than its counterpart in the proposed directive, and so may influence the EEC's efforts in finalizing the directive.
CONCLUSION

The proposed Civil Liability Directive responds to many of the inadequacies of current international and national liability regimes, but with varying degrees of effectiveness. First, and most importantly, it responds to the difficulties victims currently face in proving fault by substituting a standard of strict liability on the producer. This strict liability provision, combined with the focus on the waste producer as the responsible party, significantly eases plaintiffs' burden of finding a defendant against whom they can bring a viable case. The directive further eases this burden by providing that if the actual waste producer cannot be found, the plaintiff may hold liable the person in control of the wastes when the incident giving rise to the injury occurred.

The directive also addresses the difficulties raised by joint liability regimes by permitting plaintiffs to sue on a joint-and-several liability basis. This provision is particularly important because waste-related injuries often can be attributed to a number of sources, and the costs plaintiffs face in suing multiple parties where joint-and-several liability is unavailable generally will more than offset any possible gains (thus resulting in fewer parties compensated and fewer sites restored).

These gains in protecting injured parties and the environment are offset by the fact that the current draft of the directive limits the number of cases that plaintiffs may bring by imposing a high standard of proof for demonstrating causation. This standard makes it difficult for plaintiffs to meet their responsibility of linking their injuries with particular wastes. The Commission and the Council already have made some moves toward weakening this standard; these moves will significantly improve injured parties' chances of winning their cases.

By enacting the directive, the Council also will harmonize the different national liability laws. This harmonization will directly serve the goals underlying article 100A, the legal basis of the directive, by reducing barriers to the achievement of an efficient internal market. It also will help plaintiffs in transnational cases. For example, plaintiffs will have less difficulty proving foreign national law if the law in question is based on an EEC directive, and plaintiffs will have a minimal choice of law problem for the same reason. However, these conclusions assume that all of the states will implement the directive properly. If some states do not implement the directive to achieve the required results, the directive will not reduce plaintiffs' burdens significantly.

The directive fails to address two significant gaps in current liability regimes: the relative lack of state liability and the lack of an effective mechanism to ensure that liable parties have the funds necessary to com-

375. See supra text accompanying notes 271-72.
376. See supra note 62 and accompanying text.
pensate injured parties. With respect to state liability, both UNEP and the European Parliament's Committee on Legal Affairs and Citizens' Rights believe that state liability is both possible and necessary. If the EEC Commission and Council seriously wish to ensure that victims of exposure to hazardous waste receive compensation, they may be wise to heed the recommendations of those groups. With respect to ensuring solvency, the most likely route seems to be mandatory insurance, which both UNEP and the Committee on Legal Affairs and Citizens' Rights seem to favor. The EEC might be able to overcome insurers' concerns about evaluating risk by allowing the states to set maximum limits on liability, subject to a minimum floor (as the Committee suggests). Although such limits would prevent some plaintiffs from being fully compensated (and some sites from being fully cleaned), they may ensure that all injured parties and sites receive at least some compensation and restoration.

The general difficulties of bringing suits also may deter many injured parties from trying to obtain compensation, even under the proposed directive. Some commentators argue that these difficulties, combined with the fact that remedies may be inadequate to rectify the injuries incurred, lead to the conclusion that the EEC should be focusing its energies on preventing and minimizing harm, rather than on accounting for harm once it has occurred. While it is true that the EEC should pay close attention to enacting preventive measures (such as the directive regulating transfrontier waste shipments), it is also true that prevention inevitably will fail in some cases. Ignoring the consequences of such failure leaves injured parties with few remedies under current liability regimes. The proposed Civil Liability Directive takes over where prevention fails by giving injured parties a meaningful opportunity to obtain compensation and by giving governments a chance to restore some contaminated sites without paying the bill. These remedies in turn help prevent future harms by providing waste producers with incentives to minimize waste production and handle wastes safely, thereby both adding to and complementing current laws designed to prevent damage caused by wastes.

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