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## The Future of Europe Lies in Waste

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# **The Future of Europe Lies in Waste: The Importance of the Proposed Directive on Civil Liability for Damage Caused by Waste to the European Community and Its Environmental Policy**

## ABSTRACT

*This Note suggests that waste issues provide valuable insight into the European Community. As the Community has developed more fully into a common market, the movement of waste across national borders has caused concern in some member states. Waste has flowed from states with more restrictive environmental standards to those with less restrictive standards. In some states, the perceived increase in waste importation gave rise to public outcry for laws that banned any further waste importation.*

*After illustrating the problems by discussing a waste crisis in Belgium, this Note examines the European Community's response to such problems. This study reveals a trend in waste legislation that has allowed greater restrictions on the movement of waste across the Community. This Note suggests that the Community's legislative responses to the perceived waste crisis are misguided. Moreover, the mistakes of the legislative branch of the EC have been compounded by the judicial arm of the Community, the European Court of Justice. The Court has appeared willing to allow member states to erect trade barriers banning waste importation in order to encourage each state to become self sufficient with regard to waste disposal. As such, a theory of environmental protection called the proximity principle, which mandates the disposal of waste near its source, has eclipsed one of the Community's founding purposes—the free movement of goods. These legislative and judicial developments in environmental law threaten to undermine the Community's ideals.*

*However, a recent Community proposal for legislation might alleviate this threat. The European Commission has*

*proposed a law that would impose civil liability for environmental damage caused by waste. This law could provide a uniform measure applicable across the Community that would require polluters to pay for the environmental damage that they cause. Though a good idea, this proposed legislation has languished. This Note reasons that the proposed liability law, with a few modifications, represents the best means of promoting both sound environmental policy and the further development of the European Community.*

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## I. INTRODUCTION: SOMETHING'S ROTTEN IN THE STATE OF THE EUROPEAN COMMUNITY

By 1992, the people of Wallonia sensed that something was rotten in the state of the European Community (Community or EC).<sup>1</sup> Across the continent, that year had been anticipated as a significant milestone in European history. Five years earlier, in 1987, the Single European Act (SEA) mandated a host of legal reforms that were to accelerate the development of a European common market by 1992.<sup>2</sup> Yet, in Wallonia, the southeastern part of Belgium, residents noticed a dramatic increase in the importation of a particular good—waste.

Several factors had transformed Wallonia into a magnet for European waste. First, an overall shortage of landfill space in Europe, a densely populated continent, had raised the costs of waste disposal.<sup>3</sup> These higher costs led corporations to search for cheap, lawful disposal sites; in some states, the rising costs of disposal led polluters to resort to unlawful dumping.<sup>4</sup> Second, by

1. The 1992 Treaty on European Union, also known as the Maastricht Treaty, has engendered some confusion regarding the proper name for the supranational organization formed by the states of Europe. Under the Maastricht Treaty, it is appropriate to refer to the European Union only when discussing certain competencies set forth in the Treaty; in these new areas of power, the term European Union should be used. Regarding all other powers, the older term European Community is still appropriate. It is appropriate, for example, to refer to the European Union with regard to matters of citizenship, common foreign and security policy, as well as issues of justice and home affairs. The term European Community should be used in the following areas: competition, company law, environmental issues, banking, insurance, and the free movement of goods and services. See *Current Developments: Recent Legal Developments of the European Community*, 4 DUKE J. COMP. & INT'L L. 189 n. 11 (1994). Some writers in the area, however, have chosen to refer to the European Union after Maastricht, and to reserve the term European Community for those acts that transpired before Maastricht. See, e.g., Ethan T. James, Note, *An American Werewolf in London: Applying the Lessons of Superfund to Great Britain*, 19 YALE J. INT'L L. 349 & n. 4 (1994).

2. SINGLE EUROPEAN ACT, 1987 O.J. (L 169) 1 [hereinafter SEA]. See generally, JOSEPHINE STEINER, *TEXTBOOK ON EEC LAW* (3d ed. 1992).

3. Patrick E. Thieffry & Peter E. Nahmias, *The European Community's Regulation and Control of Waste and the Adoption of Civil Liability*, 14 HASTINGS INT'L & COMP. L. REV. 949 (1991) (reporting that the EC generates 2000 million tons of waste each year) (citing S.P. JOHNSON & G. COERCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* 185 (1981)); see, e.g., Paul Luiki & Dale Stephenson, *European Community Waste Policy: At the Brink of a New Era*, 14 Int'l Env'tl. Rep. (BNA) 403 (July 17, 1991) (reporting that population density is a major reason for the "drastic lack of disposal capacity within the EC").

4. Bob Hagerty et al., *Chemical Reaction: For People of Mellery, Waste Dumping Issue Gains New Urgency*, WALL ST. J. EUR., Feb. 15, 1991, para. 13

the late 1980s, the European Community had established a common market within which goods could travel freely across national borders. Waste is such a good and, as such, as the European common market became more developed, waste moved more freely across national borders.<sup>5</sup> Third, the laws of the member states regarding waste disposal varied considerably. Although Germany, Denmark, and the Netherlands have relatively high environmental standards, the other member states have established less demanding standards for environmental protection.<sup>6</sup> Moreover, enforcement of environmental laws varies among the member states.<sup>7</sup> To simplify, three general factors have shaped the European market for waste: (1) an overall shortage of landfill space in Europe has raised costs, which has led to a search for cheap, lawful disposal sites and increased the likelihood of unlawful dumping; (2) the removal of national barriers to establish a European common market has allowed waste from one country to be disposed in another; and (3) the varied environmental standards of the member states made some states more attractive than others as sites for waste disposal.

In addition to these general conditions within the European market, internal developments in Belgium further contributed to making the region of Wallonia a particularly attractive dumping ground. Through the 1980s, the Belgian government transferred powers from its federal center in Brussels to the regional seats of power.<sup>8</sup> In the area of environmental regulation, some Belgian regions moved slower than others. Wallonia adopted a *laissez faire* approach to the environment. Among the effects of this policy was to encourage a group of entrepreneurs to purchase old sand quarries<sup>9</sup> for the purpose of filling these large pits with waste and providing their operators with a quick source of profits.<sup>10</sup> The cumulative effects of these landfill operations and Wallonia's *laissez faire* policies were devastating.

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[hereinafter Hagerty, *Urgency in Mellery*]; see also L. Hencher & H. Sevenster, *Case Law*, 30 COMMON MKT. L. REV. 351, 352 (1993) (commentary by two European professors on waste policy and a 1992 ruling of the European Court of Justice).

5. Hencher & Sevenster, *supra* note 4, at 352.

6. Hagerty, *Urgency in Mellery*, *supra* note 4, para. 8. See also Thomas W. Church & Robert T. Nakamura, *Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States*, 7 GEO. INT'L ENVTL. L. REV. 15 (1994).

7. Hagerty, *Urgency in Mellery*, *supra* note 4, para. 9. The Italian Environmental Ministry estimates that half of the industrial waste disposed of in that country does not comply with its environmental standards. *Id.*

8. *Id.* para. 14.

9. *Id.* paras. 5, 17.

10. *Id.*

The experience of Mellery, a village approximately thirty-five kilometers south of Brussels, Belgium, vividly illustrates the harmful effects of this waste trade. Nearby the village were a number of sand quarries that a company had purchased for use as landfills. These sites became a "waste dumper's dream, offering much lighter regulation and lower costs than Germany, the Netherlands, and even the northern Belgian region of Flanders."<sup>11</sup> As a result, the private landfills in their region had become a dumping ground for waste from other parts of Belgium and other European states.<sup>12</sup> The reportedly lax regulation and comparatively low dumping costs in Wallonia resulted in a massive inflow of waste from other regions.<sup>13</sup> This increase in foreign waste precipitated significant environmental and health problems.<sup>14</sup> According to one resident of Mellery, the region of Wallonia had become the "garbage can of Europe."<sup>15</sup>

By the mid-1980s, "convoys of waste-hauling trucks—many of them from the Netherlands or Germany—began arriving at the local dump."<sup>16</sup> By 1989, residents of Mellery complained that the odors from the dumps were overwhelming.<sup>17</sup> Although Wallonian officials closed the dump two years later, by 1991 medical diagnoses of the people of Mellery found considerable exposure to toxins.<sup>18</sup> The Belgian press reported to the country the sad tale of the "Mutants in Mellery."<sup>19</sup> By one estimate, there are three hundred to four hundred such dumps in Wallonia.<sup>20</sup> This concentration of dump sites has exposed the people of Wallonia to a "cocktail of poisons."<sup>21</sup> The town and its residents have been poisoned; their land has been spoiled, and their lifestyles dramatically affected. To the people of Wallonia, something was truly rotten about the European Community; its affect on their quality of life had been striking and harmful.

Moreover, this influx of waste seemed particularly unfair to the people of Wallonia, given the province's goal of becoming self-sufficient with regard to the processing and treatment of its own

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11. *Id.* para. 5.

12. *Id.*

13. *Id.* paras. 2, 12-20.

14. *Id.* paras. 3, 4, 14-19.

15. *Id.*

16. *Id.* para. 2.

17. *Id.* para. 3.

18. *Id.*

19. *Id.* para. 4.

20. *Id.* para. 16.

21. *Id.* para. 18 (quoting a spokesperson for Greenpeace Belgium).

waste. Therefore, to stop the inflow of waste, the regional government adopted a decree that prohibited, *inter alia*, the importation of waste into Wallonia from other European states, as well as from other regions of Belgium.<sup>22</sup>

While this decree addressed Wallonia's concerns, it seemed to conflict with one of the primary goals of the European Community—promoting the free movement of goods across national boundaries without any restraints. The tension between Wallonia's environmental concerns and the EC's economic goals was apparent to the European Commission (EC Commission or Commission), the executive branch of the European Community. In 1992, the EC Commission challenged the validity of the Wallonian decree. Under the EC Treaty, the Commission filed a lawsuit with the European Court of Justice (ECJ), the supreme judicial authority in the Community. In the case of *Commission v. Belgium (Belgian Waste Case)*,<sup>23</sup> the ECJ upheld the Wallonian decree against the Commission's challenge. The people of Wallonia had won a substantial victory. However, for the European Community—both as a litigant and as an ideal—the case represented a damaging defeat. The reasoning of the *Belgian Waste Case* allows individual member states to restrict the free movement of a particular good through the European Community. The Court, by upholding a law that established a trade barrier on grounds of environmental protection, seemed to invite environmental protectionism, or trade protectionism under the guise of environmental protection.

This Note suggests that such perplexing waste issues are significant to the future of the European Community. The legislative actions and judicial rulings surrounding the issue of waste disposal reveal much about the present nature and the likely future of the European Community. Part II of this Note discusses the Community's waste policy and explains how the proximity principle, the idea that waste should be disposed of close to its source, has attained such prominence in waste policy that it has eclipsed other principles that are supposed to guide the Community's environmental policies.<sup>24</sup> Part III more fully

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22. Decree of the Walloon Regional Executive of 17 May 1983, § 5 (cited in Case C-2/90, *Re Imports of Waste: EC Commission v. Belgium*, [1993] 1 C.M.L.R. 365, Facts (1992) [hereinafter *Belgian Waste Case*]).

23. *Belgian Waste Case*, 1 C.M.L.R. 365 (1992).

24. Aspects of the EC's waste policy have garnered a fair amount of attention in law journals. Several sources provide a strong foundation on European environmental policy. LUDWIG KRÄMER, *FOCUS ON EUROPEAN ENVIRONMENTAL LAW* (1992); E. REHBINDER & R. STEWART, *INTEGRATION THROUGH LAW: ENVIRONMENTAL PROTECTION POLICY* (1985); Michael S. Feeley & Peter M.



describes the *Belgian Waste Case* and the rulings of the European Court of Justice on issues of environmental protection and free trade. Part IV analyzes trends in European waste policy. It first compares the jurisprudence of the ECJ with that of highest court in a long-standing common market—the United States.<sup>25</sup> It then examines a proposal to adopt legislation that would establish civil liability for environmental damage caused by waste. This proposed legislation would revive a buried principle in the Community's environmental law—the "polluter pays principle."<sup>26</sup>

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Gilhuly, *Green Law-making: A Primer on the European Community*, 24 VAND. J. TRANSNAT'L L. 653 (1991); Auke Haagsma, *The European Community's Environmental Policy: A Case Study in Federalism*, 12 FORDHAM INT'L L.J. 311 (1989).

Numerous articles discuss aspects of the EC's waste policy. See, e.g., Andrew Evans Skroback, Note, *Even A Sacred Cow Must Live in a Green Pasture: The Proximity Principle, Free Movement of Goods, and Regulation 259/93 on Transfrontier Waste Shipments Within the EC*, 17 B.C. INT'L & COMP. L. REV. 85 (1994) (commenting favorably on the transfrontier shipment regulation, which allows states to ban the importation of waste shipments); Jan H. Jans, *Waste Policy and European Community Law: Does the EEC Treaty Provide a Suitable Framework for Regulating Waste?*, 20 ECOLOGY L.Q. 165 (1993); Nelson Smith, III, *The Procedural Implementation Process and a Model Substantive Approach Towards the Storage, Treatment, and Disposal of Hazardous Waste in Western Europe*, 13 U. PA. J. INT'L BUS. L. 354 (1992); Linda M. Sheehan, Comment, *The EEC's Proposed Directive on Civil Liability for Damage Caused by Waste: Taking Over When Prevention Fails*, 18 ECOLOGY L.Q. 405 (1991); George C. Freeman, Jr. & Kyle E. McSarrow, *The Proposed EC Directive on Civil Liability for Waste—A Comparison with the US Superfund Liability Regime*, in CURRENT EC LEGAL DEVELOPMENTS: EC ENVIRONMENT AND PLANNING LAW (David Vaughn, Q.C., ed., 1991); Alan C. Williams, *A Study of Hazardous Waste Minimization in Europe: Public and Private Strategies to Reduce Production of Hazardous Waste*, 14 B.C. ENVTL. AFF. L. REV. 165 (1987). Coopers & Lybrand also provides a service tracking developments in EEC law. See Coopers & Lybrand, EC Commentaries, Env't, § 9, Feb. 24, 1994, available in LEXIS, Europe Library, Alleur file [hereinafter Coopers & Lybrand Report].

25. Far fewer articles have discussed the relevant jurisprudence of the European Court of Justice. See Damien Geradin, *Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice*, 2 J. TRANSNAT'L L. & POL'Y 141 (1993); Jans, *supra* note 24, at 169-76 (briefly discussing the *Belgian Waste Case* and concluding that the ECJ has helped to establish a sound waste policy).

26. Since 1989, several articles have been written comparing proposed EC legislation that would impose civil liability for environmental damage (the Proposed Directive on Civil Liability for Environmental Damage Caused by Waste, discussed *infra* Part IV), with the United States Superfund law. See, e.g., Ethan T. James, Note, *An American Werewolf in London: Applying the Lessons of Superfund to Great Britain*, 19 YALE J. INT'L L. 349 (1994) (examining England's existing law and the Community's proposed directive); Church & Nakamura, *supra* note 6; Thieffry & Nahmias, *supra* note 3; Jonathan I.J. Goldberg, *An Uncertain Future: Retroactivity, Insurance, and the EC's Attempts at Environmental Liability Legislation*, 33 VA. J. INT'L L. 685 (1993); Thomas R. Mounteer, *Proposed European*

Part IV concludes that this proposed legislation would assist the Community in developing an environmental policy consistent with its fundamental goal of ensuring the free movement of goods. Part V recommends modifications to the EC's proposed liability law that would ensure that the European Community does not repeat some of the more egregious problems with analogous United States legislation, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund). This Note concludes that the proposed European liability law offers the best hope for waste regulation in a manner that preserves the Community's fundamental goal of ensuring the free movement of goods and arrests the emerging trend of environmental protectionism in the European Community.

## II. THE COMMUNITY'S REGULATION OF A PECULIAR GOOD

Understanding the importance of the Proposed Directive to the Community requires some knowledge of the structure of the Community, as well as some understanding of its environmental policies. The EC operates under several treaties: the 1957 Treaty of Rome, the 1987 Single European Act, and the 1992 Treaty on European Union (collectively, the EC Treaty).<sup>27</sup> Although the Treaty of Rome, which was adopted in 1957 to establish the European Economic Community, did not address environmental protection, the Community passed legislation based on provisions in the Treaty that called for the harmonization of laws among the member states to promote the development of a common market. To accelerate the development of the common

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*Community Directive for Damage Caused by Waste*, 23 ENVTL. L. 107 (1993) (comparing the Proposed Directive with CERCLA and discussing some of the problems of adopting a liability law in the form of a directive); Michael S. Feeley, et al., *W(h)ither Goes the Proposed Directive on Civil Liability for Waste*, 15 B.C. INT'L & COMP. L. REV. 241 (1992) (describing the history of the Proposed Directive and comparing it to an earlier 1989 proposal) [hereinafter *W(h)ither the Directive*]; Luiki & Stephenson, *supra* note 3, at 411 (setting forth a table comparing the U.S. and European law); Russell A. Klingaman, *The European Community and Liability for Cleaning Up Abandoned Hazardous Waste Sites: Should the EC Follow the United States' Example?* 9 WIS. INT'L L.J. 125 (1990) (concluding that the EC should not follow the example of the United States Superfund law).

To keep abreast of developments in the field, several services have been quite useful. See, e.g., Luiki & Stephenson, *supra* note 3, at 403 (discussing EC waste policy and the proposed directive specifically).

27. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 (1958)[hereinafter EEC TREATY]; SINGLE EUROPEAN ACT, 1987 O.J. (L 169) 1 [hereinafter SEA]; TREATY ON EUROPEAN UNION, 31 I.L.M. 247 (1992)[hereinafter MAASTRICHT TREATY].

market, member states adopted the Single European Act (SEA) in 1987. In addition to removing obstacles to the attainment of a common market, the SEA expressly authorized the EC to legislate in the field of environmental protection.<sup>28</sup> The increased movement of goods following in the wake of the SEA's passage included a rise in the transfer of waste over national borders. While the increased traffic in most goods was embraced by member states, the increase in "waste tourism,"<sup>29</sup> or movement of waste from one state to another, was not as well received. In response to several highly publicized environmental disasters,<sup>30</sup> the Community adopted legislation that restricted the movement of waste across the member states. Since the passage of the SEA, EC legislation has consistently restrained the movement of waste. These restrictions have been justified on the basis of the "proximity principle"—a principle of environmental law that appears in the SEA and urges the disposal and treatment of waste close to its source. This Part concludes by suggesting that the EC's obsession with the proximity principle has effectively buried another principle that is supposed to guide Community environmental policy. That other principle, the polluter pays principle—and proposed legislation that would implement it—may help the Community redirect its environmental policy, so that it is consistent with the overarching goal of preserving free trade.

#### A. *The Structure of the European Community*

In the wake of the devastation of World War II, several European leaders met to discuss the future of Europe. Instead of perpetuating hostility among the states of Europe, their ideal was to establish a common market in an atmosphere of cooperation.<sup>31</sup>

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28. SEA, arts. 130(r)-(t); Hencher & Sevenster, *supra* note 4, at 352. The authors reported a shift in the focus of EC waste policy after the passage of the SEA from eliminating distortions in competition to a clearer emphasis on environmental protection. The authors conclude "[t]his is undoubtedly a result of fears about "waste tourism" [because of] unrestricted free movement of waste as a result of the abolition of border controls." *Id.* (citations omitted).

29. Hencher & Sevenster, *supra* note 4, at 352.

30. *Whither the Directive*, *supra* note 26, at 242-43 & nn. 7-9 (describing transboundary harm caused in 1983 by a chemical plant in Seveso, Italy, as well as harm caused to the Rhine by the Sandoz spill in 1986). These two incidents brought considerable attention to the issue of the movement of waste and dangerous substances across national borders in Europe. *Id.*

31. STEINER, *supra* note 2, at 3. The initial drive for a European Community was the result of interest in "international cooperation [that] had been growing throughout the 20th century, and [that] was given particular

In 1957, six states became parties to the Treaty of Rome (EEC Treaty or Treaty of Rome), establishing the European Economic Community.<sup>32</sup> The Community is a peculiar creature in international law. It is a supranational organization; that is, one that has been empowered by its member states with autonomous institutions. The member states have ceded power to the Community to address those areas provided for in the Treaty. The European Community is unique in the manner by which its law "penetrates the domestic legal systems of member states, and creates rights and obligations for individuals enforceable within their national courts."<sup>33</sup> Community law may come from one of three sources: (1) the EC Treaty itself; (2) legislation adopted by Community institutions; or (3) rulings of the European Court of Justice.<sup>34</sup>

In general, the EC Treaty is a "framework treaty," which establishes broad goals to be achieved and sets forth general principles to be followed.<sup>35</sup> It also establishes several governmental bodies to draft legislation and to interpret the Treaty's provisions.<sup>36</sup> The Treaty established an executive branch (the European Commission), a legislative branch (the European Council), and a judicial branch (the European Court of Justice).<sup>37</sup> In addition, the Treaty established a European Parliament as an advisory body to the Council.<sup>38</sup>

Since 1957, most of the Community's efforts have focused on establishing a common economic market; however, even in its origins in the Treaty of Rome, the Community sought to move

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impetus in Europe following the devastation inflicted by the Second World War." *Id.* See generally, D. LASOK & J.W. BRIGGS, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES, 3-17 (5th ed. 1991) (providing a summary of the background to the EC).

32. STEINER, *supra* note 2, at 5-6. The original six members of the EC were: Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. Six more have joined. Denmark, Ireland and the United Kingdom joined in 1973. Greece joined in 1979, and Spain and Portugal became members in 1986. *Id.* Austria, Finland, and Sweden recently have become members. See, e.g., *Europe Opens Way to 3 New Members*, N.Y. TIMES, March 2, 1994, at 11.

Significantly, in 1965, the member states reached an agreement that merged three previously distinct entities that governed atomic energy, coal and steel, and general economic matters. See Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, reprinted in 4 I.L.M. 776; STEINER, *supra* note 2, at 3-4.

33. STEINER, *supra* note 2, at 5-6.

34. *Id.*

35. *Id.* at 5-7.

36. *Id.* at 7.

37. *Id.* at 3-7, 9-19.

38. *Id.* at 5-11.

toward "an ever closer union among the peoples of Europe."<sup>39</sup> Three major treaties serve as milestones along the path of the Community's development of "an ever closer union:" the 1957 Treaty of Rome;<sup>40</sup> the Single European Act<sup>41</sup> (SEA) of 1987, which amended the EEC Treaty in order to accelerate the development of the common market; and the 1992 Treaty on European Union<sup>42</sup> (Maastricht Treaty), which sets forth comprehensive goals for the development of a more complete political union.

### 1. Early Regulatory Efforts under the Treaty of Rome

The Treaty of Rome established the EEC, which had as its goal, *inter alia*, "to promote throughout the Community a harmonious development of economic activities."<sup>43</sup> Since then, the Community has attempted to secure the free movement of goods, capital, persons, and services across national boundaries.<sup>44</sup> The Treaty of Rome expressly provides for the removal of all national trade barriers, including numerical import and export quotas,<sup>45</sup> as well as "all measures having equivalent effects."<sup>46</sup> The "equivalent effects" provisions have been

39. EEC TREATY, pmb1.

40. EEC TREATY. See also Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, 295 U.N.T.S. 259; Treaty Establishing the European Coal and Steel Community (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140.

41. SEA, 25 I.L.M. 503.

42. TREATY ON EUROPEAN UNION, 31 I.L.M. 247 (1992).

43. EEC TREATY, art. 2. The article provides for the establishment of a European Economic Community, having:

. . . as its task, by establishing a common market, and progressively approximating the economic policies of Member States, to promote throughout the Community, a harmonious development of economic activities, a continued and balanced expansion, and an increase in stability, an accelerated raising of the standard of living and closer relations between States belonging to it.

*Id.*

44. EEC TREATY, arts. 9-11, 12-17 (requiring the elimination of customs duties between member states); *id.* arts. 18-29 (establishing a common customs tariff); *id.* arts. 20-37 (providing for the elimination of quantitative restrictions between member states, and enumerating exceptions); *id.* arts. 67-73 (securing the free movement of capital); *id.* arts. 48-49 (free movement of persons); *id.* arts. 59-66 (free movement of services).

45. EEC TREATY, art. 30 (imports); *id.* art. 34.

46. EEC TREATY, art. 30 (imports), art. 34 (exports). The phrase "all measures having equivalent effects," includes "any measures which amount to a total or partial restraint on imports . . . or goods in transit." STEINER, *supra* note 2,

interpreted broadly to strike down any type of measure that might impede trade among the member states.<sup>47</sup> However, Article 36 of the EC Treaty limits the Treaty's provisions promoting free trade by allowing for certain restrictions on trade as necessary for human health or the protection of plants and animals.<sup>48</sup>

To enact legislation necessary to achieve the Treaty's goals, the Treaty of Rome empowered two governmental bodies of the European Community, the European Commission and the European Council.<sup>49</sup> The Community's legislation takes three major forms: regulations, directives, and decisions.<sup>50</sup> Regulations

at 82 (summarizing Case 2/73, *Riseria Luigi Geddo v. Ente Nazionale Risi*). This phrase has been "interpreted very generously (by the ECJ) . . . to include not merely overtly protective measures or measures applicable only to imports or exports ('distinctly applicable' measures), but measures applicable to imports (or exports) and domestic goods alike ('indistinctly applicable' measures), often introduced . . . for the most worthy purpose. Such measures range from regulatory measures designed to enforce minimum standards, for example, of size, weight, quality, price or content, to tests and inspections or certification requirements to ensure that goods conform to these standards, to any activity capable of influencing the behaviour of traders such as promoting goods by reason of their national origin." STEINER, *supra* note 2, at 83.

47. See STEINER, *supra* note 2, at 82-85. The European Court of Justice has interpreted to this effect: "All trading rules enacted by member States which are capable of hindering trade, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. *Id.* at 84 (summarizing Case 8/74, *Procureur du Roi v. Dassonville*, 1976, E.C.R. 497, 2 C.M.L.R. 436). For a more complete discussion, see *infra* Part III (discussing the jurisprudence of the ECJ).

48. EEC TREATY, art. 36. Article 36 of the EC Treaty provides:

The provisions of Articles 30 to 36 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member States.

EEC TREATY, art. 36.

49. EEC TREATY, art. 189. These acts are referred to as "secondary legislation."

50. EEC TREATY, art. 189. Though generally beyond the scope of this Note, a brief overview of the process for developing secondary legislation may be useful. One author summarized the EC legislative process as follows:

The Commission (consisting of one or more representatives from each Member State appointed to four-year terms) initiates legislation, and also has the executive function of ensuring that Member States implement EC legislation. The Parliament (consisting of MPs directly elected in Member States) gives recommendations on Commission proposals before the Council acts. The Council (consisting of ministers from Member State governments) acts by adopting, altering (by unanimity) or rejecting

are laws that become automatically binding in their entirety across the Community.<sup>51</sup> In contrast, directives are binding "as to the result to be achieved."<sup>52</sup> That is, directives set forth general standards that member states must meet through their own national legislation. Each individual state, however, may determine how to implement the directive.<sup>53</sup> Finally, decisions, are issued by either the Council or the Commission and bind only those entities (either member states or private companies) to which they are addressed.<sup>54</sup>

## 2. Environmental Protection under the Treaty of Rome

As adopted in 1957, the Treaty of Rome contained no provisions expressly authorizing environmental regulation.<sup>55</sup> Absent express power to adopt such laws, the Community used the trade harmonization provisions of the Treaty to legislate in this field.<sup>56</sup> Specifically, the European Commission justified its early environmental legislation on the basis of two broad provisions drafted to ensure that the EC could achieve its goals: Articles 100 and 235.<sup>57</sup> Article 100 directs the European Council to issue directives to promote harmony among the national laws

Commission proposals. The Single European Act strengthened the participation of the Parliament in the legislative process by introducing the "cooperation procedure" and also gives the Council the authority to adopt legislation by qualified majority, which in effect means that no two Member States can block legislation.

Luiki & Stephenson, *supra* note 3, at 405 n.15. See generally STEINER, *supra* note 2, at 9-19.

51. EEC TREATY, art. 189. "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." *Id.*

52. *Id.* "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.*

53. *Id.*

54. STEINER, *supra* note 2, at 38. The Council and Commission may also issue "recommendations" and "opinions;" neither of these have any binding effect. *Id.* at 38-39.

55. Haagsma, *supra* note 24, at 319-323.

56. The European Community has not been regarded as having any powers beyond those clearly set forth in the EC Treaties. Superficially, this view makes the current EC seem like the United States government; that is, one of limited powers. Although the U.S. Constitution empowered Congress to regulate, *inter alia*, interstate commerce, U.S. CONST. art. I, s. 8, cl. 3 (empowering Congress to regulate interstate commerce), this power remained limited until the twentieth century. See, e.g., JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 127-29 (1992).

57. STEINER, *supra* note 2.

of the member states in order to promote economic development and the establishment and operation of a common market.<sup>58</sup> Article 235 is a broad "catch-all" provision that enables the Council, acting unanimously, to take "appropriate measures" to achieve the goals of the Community and the Treaty.<sup>59</sup>

The European Community first invoked these trade harmonization provisions for the purpose of regulating the environment in 1972.<sup>60</sup> The following year, the EC promulgated its First Action Programme on the Environment.<sup>61</sup> As of 1993, the Community had promulgated forty regulations and 196 directives regulating various activities that implicate an array of environmental concerns.<sup>62</sup> However, these legislative efforts have

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58. EEC TREATY, art. 100. This Article reads:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or the functioning of the common market. The European Parliament and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more member states, involve the amendment of legislation.

*Id.*

59. EEC TREATY, art. 235. This Article provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the commission and after consulting the European Parliament, take the appropriate measures.

*Id.*

60. Declaration of the First Summit Conference of the Enlarged Communities, *cited in* Programme of Action of the European Communities on the Environment, Council Declaration, 16 O.J. EUR. COMM. (No. C 112) 1 (1973).

61. Programme of Action of the European Communities on the Environment, Council Declaration, 16 O.J. EUR. COMM. (No. C 112) 1 (1973). The Community continued to act in this manner through four more programs. *See generally* Continuation and Implementation of a European Community Policy and Action Programme on the Environment, Council Resolution, 20 O.J. (No. C 139) 1 (1977)[hereinafter Second Environmental Action Program]; Continuation and Implementation of a European Community Policy and Action Programme on the Environment, Council Resolution, 26 O.J. (No. C 46) 1 (1983)[hereinafter Third Environmental Action Program]; Continuation and Implementation of a European Community Policy and Action Programme on the Environment, Council Resolution, 29 O.J. (No. C 328) 1 (1987)[hereinafter Fourth Environmental Action Program].

62. Jared Blumenfeld, 1994: *The Year that Regional Environmental Enforcement Gets Tough? An Analysis of NAFTA Environmental Side Agreement and Maastricht Treaty*, 16 Int'l Env'tl. Rep. (BNA) 959 (Dec. 15, 1993) (noting that the EC has enacted a total of 445 legislative acts regarding environmental protection).



faced numerous obstacles to their effective implementation.<sup>63</sup> First, only a few member states have established their own comprehensive environmental policy.<sup>64</sup> Second, because most of this legislation has been promulgated through directives, environmental policy is not entirely uniform across the Community. Although directives set forth general principles and goals, member states have some discretion in selecting the best means of implementing the directive. Significantly, some member states have resisted the idea of adopting Community environmental policy through regulations (laws imposed uniformly on member states at the Community level). The resistance to regulations has arisen, among other reasons, because certain states that have established high environmental standards are concerned that a regulation would reduce environmental protection to the lowest common denominator.<sup>65</sup> Third, there is no clear policy regarding civil liability for environmental damage in the Community. Each member state has its own framework for making polluters pay for the damage they cause.<sup>66</sup> Moreover, there are no economic incentives for persons damaged to enforce the Community's environmental legislation.<sup>67</sup> Finally, enforcement of EC directives has been a

63. Enforcement responsibility lies with the Commission. Under Article 155 of the Treaty, it has responsibility that "the provisions of this treaty and the measures taken by the institutions pursuant thereto are applied." EEC TREATY, art. 155. It may investigate, EEC TREATY, art. 213, issue a reasoned opinion, and if that does not suffice to effect compliance, may bring the matter before the ECJ. EEC TREATY, art. 140.

64. KRÄMER, *supra* note 24, at 52. The author defines "environmental policy" as "a coherent . . . self-contained package of measures . . . designed with the objective of protecting, preserving and improving the environment in all its aspects. *Id.* According to Kramer, in 1991, only three states—Denmark, Holland and Germany—had such environmental policies. France, the United Kingdom and Luxembourg have some middle ground. *Id.* at 53. The other six Member States—Greece, Italy, Spain, Portugal, Ireland and Belgium—lack a comprehensive environmental policy; in these States, "measures for the protection of the environment are generally taken for the purpose of implementing in national law rules determined by the Community." *Id.* at 52-3.

65. Haagsma, *supra* note 24, at 327 (referring to this phenomenon as the "Danish problem"). Denmark often opposed proposals that threatened to lower the environmental protection that its national laws imposed. *Id.* at 328.

66. See, e.g., James, *supra* note 26 (discussing the environmental laws of England); Church & Nakamura, *supra* note 6 (examining laws of the Netherlands, Denmark, and Germany); Caroline London & Brizay London, *Environmental Liability Under the Laws of EC Member States*, C764 ALI-ABA 255 (1992) (discussing the laws of Germany, Greece, the Netherlands, France, Belgium, and Italy).

problem because there is not a developed technique for ensuring member states comply with the directives.<sup>68</sup>

### 3. Environmental Protection Becomes An Express Community Goal Under the Single European Act of 1987

By 1987 European leaders perceived a loss of momentum in their quest for a single European market. To accelerate the development of such a market, the member states amended the Treaty by adopting the Single European Act (SEA).<sup>69</sup> Amid the many provisions designed to achieve the overarching goal of perfecting the common market, the SEA expressly made environmental protection an explicit "objective" of Community policy.<sup>70</sup> Accordingly, the SEA set forth several principles that were to guide the Community's environmental policy and established procedures for implementing these principles into law.<sup>71</sup>

The SEA integrated environmental protection into all other Community policies.<sup>72</sup> Accordingly, in taking any official action, Community institutions were to consider three principles:

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67. See Richard Macrory, *The Enforcement of Community Environmental Laws: Some Critical Issues*, 29 COMMON MKT. L. REV. 347 (1992). A "fundamental characteristic of environmental law, both at Community and national level, is the lack of readily identifiable vested interests willing and able to secure enforcement." *Id.* (citations omitted). In other areas of law, a member state's failure to implement Community law can directly affect economic interests. In contrast, many "aspects of [the] environment are not susceptible to conventional concepts of legal property rights which are capable of enforcement by private interests." Macrory, *supra*, at 350.

68. Blumenfeld, *supra* note 62; Cynthia Pollack Shea, *European Environmental Policy: Effects of the Single Market*, 16 Int'l Envtl. Rep. (BNA) 30 (Jan. 13, 1993) (quoting former EC Environment Commissioner who stated that Member States "widely ignored" environmental directives).

69. SEA.

70. SEA, art. 130r(1). The SEA provided that:

Community policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regular or worldwide environmental problems.

*Id.*

71. The SEA introduced a new "Title" on the Environment consisting of three articles, numbered 130r-t.

72. As stated in the SEA, "[e]nvironmental protection requirements shall be a component of the Community's other policies." *Id.*

prevention, proximity, and the "polluter pays."<sup>73</sup> The prevention principle implores decisionmakers to take "preventive action."<sup>74</sup> The proximity principle requires states to make rectifying environmental damage at its source a priority.<sup>75</sup> The polluter pays principle simply states that the "polluter should pay" for damage that it causes.<sup>76</sup> Each of these principles offers vague admonishments to guide policymakers drafting environmental legislation. None of them suggests any specific policy standards.

In addition to these guiding principles, the SEA lists a set of considerations for the Community to examine in developing policy. In making decisions regarding environmental law, the Community must take into account the following: available technology and scientific information; varying environmental conditions in the Community; the costs and benefits of the proposed measure; and the general economic and social impact of the law on the Community as a whole and on the balanced development of its regions.<sup>77</sup> While the SEA clearly set forth these principles and considerations, how they translate into or are incorporated in specific policies is less clear.

The SEA also expressly declared that individual member states may adopt measures more stringent than those established by Community policy.<sup>78</sup> For example, if the Community

73. This provision, and all other sections of Art. 130r-t, remain intact as part of the Treaty on European Union, *reprinted in* 31 I.L.M. 368 (1992).

74. SEA, art 130(2). In the literature of public international law, this idea has been referred to as the "precautionary principle." *See, e.g.,* Daniel Bodansky, *The Precautionary Principle: Scientific Uncertainty and International Environmental Law*, 85 ASIL PROC. 413 (1991). Though it generally suggests that policymakers should consider the potential damage caused by contemporary activities, it does not draw a line or establish a standard for evaluating when risk outweighs current economic benefits.

75. SEA, art 130(2).

76. *Id.*

77. EEC TREATY, art. 130r(3) (as amended by the SEA), explicitly provides that:

In preparing its action relating to the environment, the Community shall take account of:

- (i) available scientific and technical data;
- (ii) environmental conditions in the various regions of the Community;
- (iii) the potential benefits and costs of action or of lack of action;
- (iv) the economic and social development of the Community as a whole and the balanced developments of its regions.

*Id.* The Maastricht Treaty retains these provisions, but deletes the numbering.

78. SEA, art. 130t provides:

established a directive that allowed a certain level of groundwater pollution, the Netherlands could set a more stringent level of pollution controls for its waterways. However, there is an overarching limit on such laws. The member state may not impede the Treaty's fundamental objective of securing the free movement of goods. The tension between the SEA's environmental provisions, which allows states to enact environmental laws that are more stringent than those of the Community, and the Treaty's overall goal of a common market remains problematic.

In practice, the translation of the environmental principles set forth in the SEA into legislation has been particularly unclear in the Community's waste policy. The Community established a general regulatory framework for waste, known as the Community Waste Management Strategy (Waste Strategy).<sup>79</sup> The Waste Strategy has been implemented through four legislative acts:<sup>80</sup> a framework directive on non-hazardous waste,<sup>81</sup> a similar directive on toxic and dangerous waste,<sup>82</sup> a third directive for waste oils,<sup>83</sup> and a fourth for the transfrontier shipment of waste.<sup>84</sup> The Waste Strategy sets forth three objectives: prevention, proximity, and

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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.

*Id.* The Maastricht Treaty simply adds "Such measures must be compatible with this Treaty. They shall be notified to the Commission." Haagsma, *supra* note 24, at 336-37.

79. Communication from the EC Commission to the EC Council and to Parliament, a Community Strategy for Waste Management, SEC (89) 934 final (1989) [hereinafter Waste Strategy]. For an extensive listing of the Community's waste legislation, see Hencher & Sevenster, *supra* note 4, at 352 & n. 1.

80. See generally KRÄMER, *supra* note 24, at 32-34.

81. *The Directive on Waste*, Council Directive 75/442, 1975 O.J. (L 194) 39 amended by Council Directive 91/156, 1991 O.J. (L 78) 32. This directive contains general rules regarding disposal, *id.* art. 4; waste disposal plans, *id.* art 7; and permitting programs, *id.* art 9.

82. *The Directive on Toxic and Dangerous Waste*, Council Directive 78/319, 1978 O.J. (L 84) 43, amended by Council Directive 91/689, art. 2, 1991 O.J. (L 377) 20. It contains similar rules for toxic and dangerous waste.

83. *The Directive on the Disposal of Waste Oils*, Council Directive 75/439, 1975 O.J. (L 194) 23, as amended by Council Directive 87/101, 1987 O.J. (L 42) 43. These Directives prohibit certain discharges, *id.* art. 4; promote the safe collection and disposal of waste oil, *id.* art. 3; and promote recycling, *id.*

84. *The Directive on the Supervision and Control Within the European Community on the Transfrontier Shipment of Waste*. Council Directive 84/631, 1984 O.J. (L 326) 31. Significantly, this directive was later amended. Council Regulation 259/93, 1993 O.J. (L 30) 1. This directive requires notification of the destination state for shipments, *id.* art. 3; mandates acknowledgments, *id.*; and allows for objections and conditions, *id.* art. 4.

recycling.<sup>85</sup> Conspicuously absent is the polluter pays principle. To achieve its goals, the Waste Strategy generally requires operators in the waste industry to obtain permits and meet other regulatory standards.<sup>86</sup> The responsibility for enforcement of environmental regulations rests upon the member states; national authorities must implement the relevant directives.<sup>87</sup> In its implementation, the "guiding principle" of the Waste Strategy has been that disposal should be "carried out as near to the place of production as possible, by means of adequate technology and the highest possible level of protection for the environment and for health."<sup>88</sup> In effect, the proximity principle has become the beacon guiding the Community in the development of its waste policy.

The heightened importance of the proximity principle in EC legislation seems linked to the accelerated development of the common market and fear of the consequences of waste flowing freely through the Community.<sup>89</sup> The adoption of the SEA in 1987 was driven by an interest in removing the remaining economic barriers to a common market by 1992. The removal of these obstacles has been accompanied by an increased traffic in transboundary waste. This increased traffic in waste has been accompanied by more frequent cries of "NIMBY," or "not in my backyard." The rise of the "internal market" has given rise to a "widely voiced fear . . . that reduced border controls and increased goods transport will result in more trade of . . . waste."<sup>90</sup> This heightened concern has resulted in more frequent invocation of the proximity principle.<sup>91</sup> By focusing on the proximity principle, Europeans hope to deter waste tourism, the travel of waste from one state to another, and to prevent the transformation of less affluent member states into Community-wide dumping grounds. Ironically, the environmental protection provisions of the SEA—a

85. Jans, *supra* note 24, at 173.

86. Thieffry & Nahmias, *supra* note 3, at 956-960.

87. *Id.*

88. Coopers & Lybrand Report, *supra* note 24, § 9.1. The Council's favorable comment on the Strategy appears in a Resolution, O.J. C/122 (1990). For a general summary of the Strategy, see Coopers & Lybrand Report, *supra* note 24, § 9.2

89. Hencher & Sevenster, *supra* note 4, at 352.

90. Shea, *supra* note 68.

91. *Id.* The author relates the concern expressed at a meeting of the Council of Ministers on October 20, 1992. At that meeting an agreement was reached "that every country can keep out foreign waste by systematic rejection or by legislation adopted for environmental reasons." *Id.*

law that was motivated primarily by an interest in perfecting the common market— have been invoked to establish trade barriers.

#### 4. As the Member States Assume Treaty Obligations Aspiring to Political Union, Community Waste Policy Reveals Reservations

##### a. The Treaty on Political Union (Maastricht Treaty)

Through the late 1980s, the member states discussed measures that would move them closer toward a political union, such as the completion of the economic union (including the adoption of a common currency), the development of a common foreign policy, and a common defense policy.<sup>92</sup> In 1992, EC leaders met in the Belgian city of Maastricht to sign the Treaty on European Union. Among the issues addressed by the Maastricht Treaty was the inextricable link between economic development and environmental preservation.<sup>93</sup>

The Treaty reaffirmed that EC environmental policy was to be guided by the principles of prevention, proximity, and the “polluter pays.” Moreover, the Maastricht Treaty amended Article 130r(2) in a manner that heightened the sense of urgency about the environment. It expressly declared that the European Community “aims to provide a high level of [environmental] protection.”<sup>94</sup> To achieve that goal, advocates may invoke the increased enforcement powers of the European Court of Justice.<sup>95</sup>

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92. STEINER, *supra* note 2, at 5.

93. EEC TREATY (as amended by the TREATY ON EUROPEAN UNION, Feb. 7, 1992), 31 I.L.M. 247 (entered into force Nov. 1, 1993) [hereinafter MAASTRICHT TREATY]. The Maastricht Treaty on European Union entered into force on November 1, 1993. The dates of ratification for the twelve Member States follow: Belgium (December 10, 1992), Denmark (June 6, 1993), France (November 4, 1992), Germany (October 13, 1993), Greece (November 3, 1993), Ireland (November 23, 1992), Italy (December 5, 1992), Luxembourg (August 28, 1992), Netherlands (December 28, 1992), Portugal (February 16, 1993), Spain (December 31, 1992), and the United Kingdom (August 8, 1993). The provision referring to sustainable development is Article 2. EEC TREATY, art. 2 (as amended by the Treaty on European Union).

94. EEC TREATY, art. 130r(2), para. 1.

95. MAASTRICHT TREATY, art. 171(2). This enforcement provision states:

If the member state concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the member state concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the member state

Significantly, the Maastricht Treaty enables the European Commission to sue a member state for damages for failure to comply with any rulings of the Court. The Maastricht Treaty also allows a member state to impose more stringent environmental standards than the Community.<sup>96</sup>

Despite this invigorated commitment to the environment, the Maastricht Treaty also contains a number of provisions intended to alleviate the burden that this higher level of protection places upon the member states. It expressly provides that, in pursuit of its commitment to a high level of protection, the EC will take into account "the diversity of situations in the various regions of the Community."<sup>97</sup> To implement this "differentiation" policy, which recognizes geographic and economic differences among the member states, the Maastricht Treaty provides two safety valves.<sup>98</sup> First, the Treaty allows "temporary derogations"<sup>99</sup> from Community environmental policy. Second, the Treaty suggests financial support from a fund established by the member states, called the "Cohesion Fund."<sup>100</sup> These two safety valves are intended for temporary use, to assist a particular member state in

concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it.

*Id.*

96. Art. 130t provides: "The protective measures adopted pursuant to Art. 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission." *Id.*

97. *Id.* art. 130r(2) para. 1. "Community policy on the environment shall aim at a high level of protection *taking into account the diversity of situations in the various regions of the Community.* *Id.* (emphasis added). The Maastricht Treaty clarifies the meaning of such consideration in the following paragraph: "In this context, harmonization measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure. *Id.* art. 130r(2) para. 2.

98. TREATY ON EUROPEAN UNION, art. 130s(5). This article provides:

Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of:

- temporary derogations and/or
- financial support from the Cohesion Fund to be set up no later than 31 December 1993 pursuant to Article 130d.

*Id.*

99. *Id.*

100. *Id.*

adjusting to Community standards in a manner that will not cause an undue financial or social burden upon its businesses or people.

b. The Transfrontier Shipment Regulation

Under the Maastricht Treaty, the Community's waste policy has continued to emphasize the proximity principle. Indeed, in the wake of the adoption of the Maastricht Treaty, which was intended to move the member states toward "an ever closer political union," the Community's waste policy illustrated the continued importance of state territorial boundaries. Rather than facilitating the free movement of waste through a common market, the Community appears to have increased its reliance on the proximity principle.

This development could be seen most clearly in the 1993 Regulation on the Supervision and Control Within the European Community on the Transfrontier Shipment of Waste (Transfrontier Shipment Regulation).<sup>101</sup> This Regulation, which superseded an earlier directive, establishes a system that allows member states to object to a particular shipment of waste in order to protect their state's environment, public health, or safety.<sup>102</sup> A member state may "prohibit generally or partially . . . shipments of waste for disposal."<sup>103</sup> As such, the Transfrontier Shipment Regulation authorizes such actions in order to allow member states "to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels."<sup>104</sup> As such, the Transfrontier Shipment Regulation represents the legislative perfection of the proximity principle. It transforms the long-standing Community preference for this principle into a powerful tool by which member states may bar the importation of waste from other member states. Ultimately, the Regulation could allow member states to erect impenetrable trade barriers to waste. This result hardly seems consistent with

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101. Council Directive 84/631, 1984 O.J. (L 326) 31, as amended by Council Regulation 259/93, 1993 O.J. (L 30) 1 [hereinafter Transboundary Shipment Regulation]. The Regulation requires notification of the destination state for shipments, *id.* art. 3; mandate acknowledgments, *id.*; and allow for objections and conditions, *id.* art. 4. The 1993 Regulation incorporates the Basel Convention on the Control of Transboundary Movements of Hazardous Waste, March 22, 1989, 28 I.L.M. 649 (1989) [hereinafter Basel Convention] into Community law. See Skroback, *supra* note 24 (concluding that this Regulation is a desirable solution that does not "unfairly abuse" the ideal of a common market).

102. Transboundary Shipment Regulation, *supra* note 101, pmbl.

103. *Id.* art 4(3)(c).

104. *Id.* pmbl., art. (3)(b)(i).



the idea of a common market, which guarantees the free movement of goods across national borders.<sup>105</sup> Under this Regulation, waste in the European Community has become a peculiar good, one that does not benefit from the general rules regarding the common market.

Yet, it should be noted that the Community's Transfrontier Shipment Regulation reflects a developing trend in international law.<sup>106</sup> In fact, the Regulation was specifically adopted in order to implement the European Community's 1993 ratification of the Basel Convention on the Transboundary Shipment of Hazardous Wastes (Basel Convention).<sup>107</sup> The Basel Convention generally charges states to dispose of their own waste within their territorial boundaries.<sup>108</sup> The only exception to this overarching principle arises when environmental concerns of a particular state require transboundary movement of waste.<sup>109</sup> The Community's ratification of the Basel Convention was consistent with its emphasis on the proximity principle as the primary guide for its Waste Strategy.<sup>110</sup> Cumulatively, the Basel Convention and the Community's internal Waste Strategy reflect strong support both

105. See Pierre V.F. Bos, *The Proposed Regulation on the Supervision and Control of Movement of Waste: Some Comments*, in CURRENT EC LEGAL DEVELOPMENTS: EC ENVIRONMENT AND PLANNING LAW 158-64 (David Vaughn, Q.C., ed. 1991).

106. See Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 24, 33-36 (1994).

107. Basel Convention, *supra* note 101, art. 4, § 2(d).

108. *Id.*

109. *Id.* "There should be no free movement of waste, unless there are environmental reasons to decide otherwise."

110. Jans, *supra* note 24, at 173. The Directive, as amended, provides that member states are obliged:

. . . to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialized installations for certain types of waste. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.

*Id.* at 172 (quoting Council Directive 91/156, art. 5, 1991 O.J. (L 78) 34).

in the Community and globally for disposing of waste close to the place where it is generated.<sup>111</sup>

While the adoption of the Maastricht Treaty was viewed as an important milestone on the way to the development of a political union in Europe, the debate regarding waste and environmental protection more generally reveals how difficult the further strengthening of such a union will be. Viewed narrowly, waste may just be an issue that falls outside the scope of the Community's overarching goal of maintaining a common market. Viewed more broadly, however, the problems arising with the movement of waste across national borders may reveal the limits of any union in Europe. Specifically, while the member states are willing to cooperate on a host of economic matters, they are far more reluctant to surrender their sovereignty on issues that pose potential negative ramifications for them or seem to encroach on their vital interests as sovereign states. Waste disposal has proven such an issue.

#### B. *Has the "Polluter Pays" Principle Been Buried?*

While Community legislation has been preoccupied with the proximity principle, another principle that appears throughout Community treaties and legislation—the polluter pays principle—has been buried. The belief that the polluter should pay for damage it causes has long been mentioned in the Community's environmental policy. The polluter pays principle has appeared in every Community environmental programme since the first in 1973.<sup>112</sup> More significantly, it appears in both the Single European Act<sup>113</sup> and the Treaty on European Union.<sup>114</sup> However, despite regular mention of this principle, no treaty, directive, or programme offers any guidance for its implementation.<sup>115</sup>

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111. See generally Hugh J. Marbury, *Global Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L 251 (1995) (discussing this global trend and related issues of eco-racism).

112. First Action Programme, O.J. 1973, No. C 112/1, pt. I, tit.II, no. 5. This provision states "The cost of preventing and eliminating nuisances to the environment must in principle be borne by the polluter. However there may be certain exceptions and special arrangements . . . provided that they cause no significant distortion to international trade and investment." *Id.*

113. SEA, art 130r(2).

114. TREATY ON EUROPEAN UNION, art. 130r(2).

115. Dr. Ludwig Krämer, *The "Polluter Pays" Principle in Community Law: The Interpretation of Article 130r of the E.E.C. Treaty*, in FOCUS ON EUROPEAN ENVIRONMENTAL LAW, 244, 258 (1992) [hereinafter Krämer, *Polluter Pays*] (stating that the particular method of legislation necessary to implement the polluter pays principle cannot be deduced from the principle itself). Significantly, individual

The only development of this concept by any Community organ—other than a proposal for liability legislation that has languished since 1989 (which is the focus of Part IV of this Note)—appears in a 1975 Council Recommendation, an official document without binding legal force.<sup>116</sup> This Recommendation explores the meaning of the polluter pays principle and emphasizes its importance. Above all else, it urges that implementation of the polluter pays principle is necessary to avoid trade distortion<sup>117</sup> and to promote environmental protection.<sup>118</sup> By charging polluters for the costs of the environmental damage they caused, the principle would create an economic incentive for them to reduce their pollution output.<sup>119</sup> This market incentive would encourage a “more rational use” of the Community’s environmental resources.<sup>120</sup> The Recommendation also concludes that implementing the polluter pays principle would not offend the Community’s deeply rooted notions of fairness.<sup>121</sup>

The Recommendation stresses the importance of applying the polluter pays principle uniformly throughout the Community in order to avoid distortions of competition and trade.<sup>122</sup> Specifically, the Recommendation would require polluters to pay

member states have developed laws that sketch out some meaning to this principle. See Church & Nakamura, *supra* note 6.

116. Council Recommendation Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, 1975 O.J. (L 194) 1 [hereinafter Recommendation]. The Council Recommendation records the favorable consideration of the European Council on a Communication from the Commission to the Council Regarding Cost Allocation and Action by Public Authorities on Environmental Matters: Principles and Detailed Rules Governing Their Application, 1975 O.J. (L 194) 1 annex. The Commission Communication is annexed to the Recommendation. For clarity, both documents are referred to collectively as the “Recommendation.”

117. Recommendation, *supra* note 116, pmb. para. 8.

118. *Id.*

119. *Id.*, annex. princ. 1, para. 2.

120. *Id.* The phrase “more rationale use” of environmental resources sounds consistent with the increasingly important notion of “sustainable development.” See Rio Declaration on Environment and Development, U.N. Doc. A/CONF. 151/5/Rev. 1, June 13, 1992, reprinted in 31 I.L.M. 874 (1992). The EC is a party to the Rio Conventions.

121. Recommendation, *supra* note 116, princ. 1, para. 2.

122. *Id.* princ. 1, para. 3 provides:

In order to avoid distortions of competition affecting trade and the location of investments which would be incompatible with the proper functioning of the common market, the costs connected with the protection of the environment against polluters should be allocated according to the same principles throughout the Community.

*Id.*

for the costs of measures necessary to eliminate or reduce pollution to levels established by member states.<sup>123</sup> Interpreting this Recommendation narrowly, the polluter pays principle just requires polluters to pay for the costs of complying with environmental legislation adopted by the Community and its member states. Complementing this proposition, the principle also means that environmental protection should not primarily depend on public subsidies or grants. In short, the burden of cleaning up pollution should rest not on the Community or member states, but rather on the individual polluters.<sup>124</sup> Those polluters must pay fines or penalties for failing to comply with environmental standards.<sup>125</sup> Notably, this Recommendation does not interpret the polluter pays principle as necessarily requiring the imposition of civil liability for damage caused by waste, an approach used by the United States and discussed more fully in Part IV.B.1.

While the Recommendation leaves the issue of implementation somewhat vague, it serves two useful purposes: (1) it defines "polluter" and suggests a chain of persons to pursue for payment; and (2) it lists permissible exceptions to the enforcement of the polluter pays principle. First, a "polluter" is defined broadly as "someone who directly or indirectly damages the environment or who creates conditions leading to such damage."<sup>126</sup> This definition suggests responsibility for pollution will be defined broadly. The Recommendation also suggests a policy for seeking payment when a polluter cannot pay. In such cases, "the cost of combating pollution should be borne at the point in the pollution chain . . . and by the legal or administrative means which offer the best solution from the administrative and economic points of view and which make the most effective contributions toward improving the environment."<sup>127</sup> For example, if there are several causes of the pollution, the Recommendation suggests two strategies.<sup>128</sup> Costs could be assessed at a point in the pollution chain where the "number of economic operators is least and control is easiest."<sup>129</sup> Alternatively, costs could be charged "at the point where the most

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123. *Id.* annx. princ. 2.

124. *Id.* princ. 2, para. 2.

125. *Id.* princ. 4 (stating that "standards and charges . . . are the major instruments of action available to public authorities for the avoidance of pollution) (emphasis added).

126. *Id.* princ. 3.

127. *Id.* princ. 3, para. 2.

128. *Id.*

129. *Id.* princ. 3, para. 3.

effective contribution is made towards improving the environment, and where distortions to competition are avoided."<sup>130</sup> These two suggestions offer guidance for a state trying to determine who to charge for the costs of remedying environmental damage caused by pollution. The first formula focuses on defining a manageable group of identifiable polluters who could be charged for the costs of remedying environmental damage, while the second suggests keeping an eye on the best interests of the environment and trade policies. Both are still vague, but they provide at least some direction for the implementation of the polluter pays principle.

The Recommendation also suggests certain exceptions to the enforcement of a policy based on the polluter pays principle.<sup>131</sup> First, an exception might be warranted if the immediate application of stringent environmental standards would pose substantial economic costs on a company that could result in social harm (such as a loss of jobs) within a particular state.<sup>132</sup> In such cases, polluting companies may be given more time to conform to the new standards; alternatively, the member state or the Community might set a higher standard and provide financial aid to noncomplying companies for a limited period of time.<sup>133</sup> A second exception would allow a member state to grant subsidies for favored sectors of its economy.<sup>134</sup> The Community generally has prohibited such pollution subsidies in the area of environmental protection because they relieve the polluter of the costs and pass them on to taxpayers. Nonetheless, if a new stringent environmental regulation threatens to cause substantial harm to a significant industry, a member state may seek an exemption to give that industry time to adapt a reasonable strategy, while still somewhat alleviating the environmental problem.

The Community has broad discretion to determine the best means of implementing the polluter pays principle in its secondary legislation.<sup>135</sup> Yet, to date, the practical effect of this

130. *Id.* princ. 3, para. 3.

131. *Id.* princ. 6.

132. *Id.*

133. *Id.*

134. *Id.* princ. 6(b) (allowing an exception for "industrial, agricultural or regional structural problems"). This exception would seem flexible enough to allow a considerable amount of the burden for environmental protection to fall on the taxpayers.

135. See KRÄMER, *supra* note 24, at 257-58. "The legislature has a free hand as to the shaping of the legal provisions." It has considerably leeway in its choice of method, whether a public fund, a system of strict rather than fault-

principle had been unclear.<sup>136</sup> Some commentators have noted that the principle remains dormant because it is not tied to an adequate risk-based, market incentive.<sup>137</sup> Others claim it is not pragmatic.<sup>138</sup> Regardless, one thing that is clear is that the polluter pays principle remains untried in Community legislation. Other than in the 1975 Recommendation, the Community had not examined, developed, or implemented the meaning of the polluter pays principle. In sharp contrast, the legislation enacted by the political entities of the Community has been guided foremost by the proximity principle.

To summarize, the Community's legislative and executive branches have demonstrated a strong preference for the proximity principle as a guide for waste policy. Before the adoption of the Transfrontier Waste Regulation in 1993, the Community Waste Strategy emphasized the importance of the proximity principle; with the adoption of that Regulation, the Community's reliance on the proximity principle expressly allowed a member state to impair the free movement of goods. These political developments raised an important question regarding the development of the Community: Would the European Court of Justice, which was empowered as the final arbiter of matters arising under the Treaty, invalidate the environmentally restrictive law adopted by the Council as contrary to the goals of the Community? Would the Court allow laws based on the proximity principle to restrict the free movement of waste across national borders? The Court answered these questions in the *Belgian Waste Case*.

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based liability, or imposing compulsory insurance. *Id.* Further, it also must wrestle with the issue of apportionment, and whether it should be borne by one polluter or split among them. *Id.*

136. *Id.* at 253. Dr. Krämer suggests that the polluter pays principle means that:

Community action in environmental matters shall proceed on the basis that the costs for the removal of damage that has occurred to the environment where existing legal provisions have not been adhered to is in principle to be borne by the emitter of the pollution. The burden of such costs shall only be borne by the general public in exceptional circumstances. Exceptions may be formulated differently for various regions.

*Id.*

137. Smith, *supra* note 24, at 394 (implying that the principle has failed because it has not been attached to a market-based incentive). As a remedy, Smith suggests that "new methods which incorporate appropriate market based incentives so as to encourage companies to monitor their hazardous waste output should be developed." *Id.* at 395.

138. *Id.* (claiming that the principle is flawed because "the polluter may not be the cause of the problem"). Like the preceding criticism, however, this difficulty does not render the principle fatally flawed.

### III. THE EUROPEAN COURT OF JUSTICE BURIES A FUNDAMENTAL PRINCIPLE OF THE EUROPEAN COMMUNITY

As discussed in Part I of this Note, a region in eastern Belgium responded to a perceived waste crisis by barring any future importation of waste. When the *Belgian Waste Case* arose before the European Court of Justice in 1992, the European Community's waste policy clearly emphasized the proximity principle. Several directives regulating the movement of waste showed a policy preference for the proximity principle. However, at that time, the Community had not yet become a party to the Basel Convention; nor had it adopted the Transfrontier Shipment Regulation. Nonetheless, the proximity principle guided Community waste policy. The 1992 ruling of the European Court of Justice (Court or ECJ) in the *Belgian Waste Case* would further entrench this principle in Community policy. The case was a harbinger of trouble for the Community; it illustrates why the future of Europe lies in waste.

Before discussing the *Belgian Waste Case*, however, this Part provides a brief overview of the role of the European Court of Justice in the European Community. Then, it examines the development of the Court's jurisprudence in the field of environmental law. Generally, the Court has become more tolerant of environmental protectionism as the common market has become more fully developed. This Part concludes that this trend is deleterious to the ideals of the European Community.

#### A. *The European Court of Justice and Its Early Environmental Jurisprudence*

The European Court of Justice is the highest authority with regard to the "interpretation and application" of the EC Treaty.<sup>139</sup> Its interpretation of the EC Treaty and secondary legislation are supreme.<sup>140</sup> The laws of the individual member states, including their constitutions, may not conflict with ECJ rulings.<sup>141</sup> Among

139. EEC TREATY, arts. 164-68; See generally STEINER, *supra* note 2, at 18.

140. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, Common Mkt. Rep. (CCH) ¶ 8,023.

141. *Costa v. ENEL*, 1964 E.C.R. at 593. *Costa v. ENEL* set forth the Court's definitive statement on the nature of the Community's power:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers

the sources of law upon which the ECJ may rely are the EC Treaty, secondary legislation passed by Community organs, and general principles of law common to the member states.<sup>142</sup> While the Court "seeks to achieve consistency in its judgments, its precedents are not binding" upon it.<sup>143</sup> Thus, the Court interprets each case before it in light of the spirit of the EC Treaty.<sup>144</sup>

Examining the role of the ECJ in environmental protection reveals several interesting themes. First, between the adoption of the Treaty of Rome in 1957 and the SEA in 1987 (when environmental protection was not expressly within the scope of the Community's powers), the ECJ invoked the trade harmonization provisions of the EC Treaty (Articles 100 and 235) to uphold early environmental legislation.<sup>145</sup>

After the adoption of the SEA, which expressly authorized the Community to legislate with regard to environmental protection, the ECJ invoked general principles of law to uphold member states' environmental regulations against attack by Community organs on grounds that they were contrary to the free movement of goods. The jurisprudence of the Court during these two periods provides significant background for the *Belgian Waste Case*, which expressly upheld a member state's law that raised a barrier to the import of waste.

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from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields.

The reception, within the laws of each member State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity . . . .

The transfer, by member States, from their national orders in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail.

*Id.* For an interesting discussion of the conflict between the laws of the European Community and one member state (Ireland), see Anne M. Hilbert, *The Irish Abortion Debate*, 26 VAND. J. TRANSNAT'L L. 1117 (1994) (discussing the tension surrounding the abortion issue in Irish and Community policy).

142. STEINER, *supra* note 2, at 18, 21.

143. *Id.* at 18.

144. *Id.*

145. See discussion *supra* part II (regarding the use of Articles 100 and 235 to justify early EC environmental legislation).



### 1. Early Cases Establishing Environmental Protection as a Valid Community Objective

Before the SEA made environmental protection an express Community goal in 1987, the ECJ upheld several early environmental laws against challenges that the Community lacked authority to adopt such legislation. For example, in 1980 Italy challenged an EC directive that established environmental standards for biodegradable detergents. Italy argued that the Community lacked authority to adopt such legislation. In *Commission v. Italy*, the ECJ upheld the EC directive based on the Treaty of Rome's trade harmonization provisions, Articles 100 and 235.<sup>146</sup> The ECJ reasoned that environmental protection was a valid field for Community legislation.

The alternative—if the Community could not adopt a uniform law—would be that the member states could adopt varying standards. For example, the Netherlands could establish stringent environmental standards for the disposal of detergents, while Spain accepted much lower standards. Given such a disparity, companies would have a greater economic incentive to dispose of detergents in Spain because it would cost less to meet its standards than those of the Netherlands. Over time, this economic incentive to send detergent to Spain would create a market distortion; that is, Spain would seize an economic advantage over the other member states because of its “race to the bottom” to establish the least demanding environmental standards for detergent disposal. Only uniform, Community-wide standards could prevent such market distortion and ensure fair competition. *Commission v. Italy* suggests that the ECJ would not allow the member states to distort trade through their individual environmental laws.

This ruling was consistent with the ECJ's role as guardian of the common market. As the final arbiter of the meaning of the Treaty, the ECJ heard numerous cases regarding national laws that allegedly conflicted with the goal of a common European market. In its rulings, the ECJ regularly invalidated quantitative

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146. Case 91/79, *Commission v. Italy*, 1980 E.C.R. 1099. The ECJ upheld a challenge to Council Directive 73/404, regarding the biodegradability of detergents. Rejecting Italy's argument that the directive exceeded the scope of the Community's competence, the Court clearly ruled that environmental protection was a valid field of legislative action. In its words, environmental laws “may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.” *Id.* at 1106.

restrictions on trade, as well as "measures having equivalent effect to quantitative restrictions."<sup>147</sup> The Court interpreted the Treaty broadly as invalidating: "[a]ll trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. . . ."<sup>148</sup> The Court appeared served as a guardian of the internal market.

However, the Court diverged from its earlier jurisprudence in the 1979 case of *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.<sup>149</sup> In *Cassis de Dijon*, the Court held that national laws will not breach the Treaty if they are necessary to satisfy "mandatory requirements," or important state policies.<sup>150</sup> In such cases, the Court would analyze the national law under the "rule of reason."<sup>151</sup> Under this analysis, a law had to employ means that were no more than necessary to protect a state's interest.<sup>152</sup> Before *Cassis*, a law had to be justified upon the grounds set forth in Article 36 of the Treaty (either necessary for the public health, safety, or morality). After *Cassis*, laws that incidentally burdened interstate commerce were analyzed under the rule of reason, a general balancing test.<sup>153</sup>

In 1985, the ECJ suggested another justification for allowing restraints on trade. Its ruling in *Procureur de la République v. ADBHU*<sup>154</sup> suggested that environmental protection could justify certain restraints on trade. In *ADBHU*, the Court ruled that free trade could not be "viewed in absolute terms." To the contrary, certain Community objectives were sufficiently important that they could justify legislation restricting free trade.<sup>155</sup>

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147. STEINER, *supra* note 2, at 83.

148. *Id.* (citations omitted). Interestingly, the jurisprudence of the ECJ paralleled that of the United States. State laws that were facially discriminatory (referred to as "distinctly applicable" measures by the ECJ) were per se invalid. In contrast, those that applied equally to imports and domestic goods (called "indistinctly applicable" measures) were analyzed under a balancing test similar to that used by the U.S. Supreme Court. Compare *id. with Pike v. Bruce Church*, 397 U.S. 137 (1970).

149. STEINER, *supra* note 2, at 85-86 (discussing Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 599).

150. *Id.*

151. *Id.*

152. *Id.* at 87.

153. *Id.* at 86. Whether facially discriminatory laws were subject to the *Cassis* rule was left unclear.

154. Case 240/83, *Procureur de la République v. ADBHU*, 1985 E.C.R. 531, Common Mkt. Rep. (CCH) ¶ 14,164. The ECJ upheld Directive 75/439, regarding the disposal of waste oils.

155. *Id.* at 549, ¶ 12, Common Mkt. Rep (CCH) ¶ 14,164, at 15,993.

Environmental protection was one such objective.<sup>156</sup> Therefore, EC institutions could legislate in the field of environmental protection, even though these laws might impede the free movement of goods. Vindicated by these rulings, the European Commission adopted legislation addressing specific environmental problems.<sup>157</sup>

Significantly, *Commission v. Italy* and *ADBHU* stand for the proposition that the EC has the power to legislate in the field of environmental protection even though such laws might restrain trade. Both of these cases involved legislation by the Community and not national laws of individual member states. The ECJ viewed EC laws as necessary for the Community. In its early environment rulings, the Court only allowed Community measures to restrict trade; as yet, it had not allowed a member state to restrain trade through an environmental protection law.

## 2. Using General Principles of Law to Uphold Increasingly Protectionistic Environmental Laws

In the wake of the SEA's passage, the ECJ allowed member states to impose more stringent environmental standards. It did so by invoking general principles of law.<sup>158</sup> General principles of law are those rights commonly incorporated in the constitutional traditions of the member states.<sup>159</sup> In 1988, the ECJ invoked the principle of proportionality to uphold heightened environmental standards adopted by the state of Denmark.<sup>160</sup> In short,

156. *Id.* at 549, ¶ 13, Common Mkt. Rep. (CCH) ¶ 14,164, at 15,993.

157. Thieffry & Nahmias, *supra* note 3, at 956.

158. The legal basis for incorporating such principles is based on three Articles. STEINER, *supra* note 2, at 55. Article 173 gives the court power to review the legality of Community acts on the basis of *inter alia* any "infringement of this Treaty," or "any rule of law relating to its application." EEC TREATY, art. 173. Article 215(2) provides that the Community's tort liability shall be determined "in accordance with general principles common to the laws of the Member States." EEC TREATY, art. 215(2). Article 164 provides that the ECJ "shall ensure that in the interpretation and application of this Treaty the law is observed." EEC TREATY, art. 164. Finally, as one commentator noted: "respect for fundamental rights forms an integral part of the general principles of law protected by the Court." STEINER, *supra* note 2, at 56 (summarizing Case 11/70, Internationale Handelsgesellschaft mbH, 1970 E.C.R. 1125, [1972] C.M.L.R. 255).

159. *Id.* See also TREATY ON EUROPEAN UNION, art. F. "The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member States as general principles of Community law." *Id.*

160. STEINER, *supra* note 2, at 58, 60, 86.

proportionality requires that the means used to achieve a particular end must not exceed what is necessary and appropriate to achieve that end.<sup>161</sup> The ECJ has interpreted this principle as establishing a test requiring a regulating entity to "justify its actions" and consider alternatives.<sup>162</sup> Derogation is permissible if "justified" on one of the grounds listed in the Treaty. For a derogation to be justified, the measure must be "no more than is necessary" to achieve a particular goal.<sup>163</sup> In the context of environmental law, the proportionality principle requires "the aim of protecting the environment, or the health and life of humans, animals, and plants, [to] be achieved by the means least restrictive" of trade within the Community.<sup>164</sup>

The leading case on proportionality is the 1988 *Danish Bottle Case*, in which the ECJ reviewed the validity of a Danish recycling law.<sup>165</sup> The law established a deposit-and-return system for bottle recycling and required foreign manufacturers to submit their container designs for review by Danish authorities.<sup>166</sup> The European Commission challenged this system as a violation of Article 30 of the Treaty, which prohibits restrictions on imports. Denmark defended its law on the ground that it was an acceptable derogation under Article 36 of the Treaty, which allows derogation when necessary to protect human health.<sup>167</sup> Moreover, Denmark asserted that its law was proportional to the goal of environmental protection.

The Court regarded the deposit-and-return provision of the Danish law as compatible with Article 30 of the EC Treaty.<sup>168</sup> The deposit system was a "necessary" and "indispensable" part of the Danish recycling program.<sup>169</sup> Therefore, the Court ruled that to the extent that the Danish law restricted the free movement of goods, it was proportional to the environmental goals of

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161. *Id.* at 58, (citing Case 11/70, *Internationale Handelsgesellschaft mbH*, [1970] E.C.R. 1125).

162. *Id.*

163. *Id.*

164. *Jans*, *supra* note 24, at 71. *See, e.g., ADBHU*, 1985 E.C.R. at 549 (a directive providing means by which member states may dispose of waste oil does not restrict trade in violation of Community law principles); *Danish Bottle Case*, 1988 E.C.R. at 4629 (Danish law more restrictive of imports than necessary).

165. *Geradin*, *supra* note 25, at 183 (citing *Danish Bottle Case*, 1988 E.C.R. 4607).

166. *Id.* (citing 1988 E.C.R. at 4629).

167. EEC TREATY, art. 36. *See supra* note 48 (setting forth text of this provision).

168. *Geradin*, *supra* note 25, at 184 (citations omitted).

169. *Id.*

Denmark.<sup>170</sup> A separate provision requiring Danish approval of foreign bottles, however, was disproportionate to the goal of environmental protection and, therefore, incompatible with the Treaty.<sup>171</sup>

In the *Danish Bottle Case*, the ECJ seemed to ignore the discriminatory effects that the Danish program had on non-Danish recyclers.<sup>172</sup> This ruling is at odds with the free movement of goods and the EC Treaty, which allows trade restrictions only when a state's rules apply equally to domestic and imported products.<sup>173</sup> The Court avoided that issue, however, and focused solely on the inquiry into proportionality.<sup>174</sup> By characterizing the Danish deposit system as "proportionate," the Court allowed a rather high level of environmental protection to impede the free movement of goods.<sup>175</sup> As such, the *Danish Bottle Case* expanded the scope of permissible derogations under Article 36 to include those measures necessary for the protection of the environment.<sup>176</sup> In so doing, the ECJ ruled that a law was "proportional" to the goal of environmental protection even though it placed a greater burden on imports than domestic goods.<sup>177</sup>

Although the ECJ has interpreted the relation between several general principles of law (such as proportionality) and the EC Treaty, it has never ruled on the meaning of the polluter pays principle. The environmental jurisprudence of the ECJ conspicuously lacks any discussion of the polluter pays principle, despite the fact that this principle is supposed to guide EC environmental law. Although this principle appears in the EC Treaty and environmental programmes, no case has arisen before the ECJ that has resulted in a ruling on the actual meaning of the polluter pays principle or a statement regarding its actual meaning or weight relative to other principles guiding EC environmental law.<sup>178</sup>

Nonetheless, the ECJ has clearly established the meaning of general principles of law that are not expressly set forth in the

170. *Id.*

171. *Id.* at 185.

172. *Id.* ("even though on the surface the measures were indiscriminately applicable to Danish and non-Danish manufacturers, the Danish measures applied a heavier burden on the latter") (citations omitted).

173. *Id.* (citations omitted).

174. *Id.*

175. *Id.* (citations omitted).

176. Jans, *supra* note 24, at 168 n. 37.

177. *Id.* See also Pascale Kromarek, *Environmental Protection and the Free Movement of Goods: The Danish Bottle Case*, 2 J. ENV'T L. 89 (1990).

178. Haagsma, *supra* note 24, at 339-340.

Treaty, like proportionality. Collectively, the absence of any rulings on the polluter pays principle and the Court's interpretation of general principles of law have provided fertile soil for the seeds of environmental protectionism.

B. *The Belgian Waste Case: The Proximity Principle Trumps the Free Movement of Goods*

However, the early jurisprudence of the ECJ on environmental protection never threatened the fundamental EC goal of guaranteeing free trade as directly as the Court did in *Commission v. Belgium [Belgian Waste Case]*.<sup>179</sup> As discussed briefly in Part I, the people of Wallonia, Belgium, had ample reason to be concerned about the significant increase in waste disposal within their borders. Wallonian outrage created political pressure, which led the regional government of Wallonia in 1987 to ban any future importation of waste from outside of its borders. While this ban somewhat alleviated the concerns of the people of Wallonia, it disturbed the European Commission, which viewed the ban as contrary to the fundamental principles of Community law.

Thus, the Commission brought an action before the ECJ claiming that Belgium<sup>180</sup> had failed to fulfill its obligations under applicable waste directives<sup>181</sup> and the EC Treaty.<sup>182</sup> In the *Belgian Waste Case*, the Court reviewed the Wallonian decree. The Advocate General (AG),<sup>183</sup> an attorney appointed to serve as a

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179. Case C-2/90, Re Imports of Waste: EC Commission v. Belgium, [1993] 1 C.M.L.R. 365 (1992) [hereinafter *Belgian Waste Case*]. This case offers ample opportunity for comparison with the United States' Supreme Court ruling in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); see Geradin, *supra* note 25.

180. Under the EC Treaty, the state is held liable for the action of its regional governments. See e.g., Case C-21/88, *duPont de Nemours Italia SpA v. Unita Sanitaria Locale No. 2 di Carrara* (holding that there are no "grounds for distinguishing between national measures which produce purely regional effects and regional measures having the same effects) cited in *Belgian Waste Case*, *supra* note 179, "Written Replies," § c.

181. The Commission asserted that Belgium had violated both Council Directive 75/442 (regarding disposal, plans and permits for waste) and Council Directive 84/631 (regarding the transfrontier movement of hazardous waste). *Belgian Waste Case*, *supra* note 179, First Opinion of the AG, para. 1.

182. The Commission also asked the Court to declare Wallonia's ban a failure by Belgium to fulfill its obligations under Articles 30 and 36 of the EC Treaties. *Id.*

183. An attorney appointed to serve as a permanent *amicus curiae* for the ECJ, as provided for in the EC Treaty. EEC TREATY, arts. 166-67. The role of the AG is to assist the Court by presenting detailed analysis of all relevant issues of fact and law, as well as recommendations to the Court. These recommendations are not always followed. However, when the Court follows the AG's opinion, it is

permanent *amicus curiae* for the ECJ, framed the discussion aptly. Because the Wallonian decree applied only to non-hazardous waste, it was outside the scope of the Community's existing regulatory scheme at the time for non-hazardous waste;<sup>184</sup> however, the ban did violate the directive on hazardous waste.<sup>185</sup>

The AG then focused on whether the ban violated the free movement of goods protected by the EEC Treaty.<sup>186</sup> The AG reasoned that waste is a good and, therefore, its movement should not be impeded.<sup>187</sup> Because the free movement of waste fell under the protection of Article 30 of the EC Treaty, Belgium needed to justify its law either under Article 36 (allowing derogations for threats to human health), or the "mandatory requirements" exception to Article 30 (which analyzed indistinctly applicable measures, those applying equally to domestic and foreign goods, under the rule of reason test). First, the AG stated that the Article 36 human health exception "must be interpreted restrictively."<sup>188</sup> The AG did not accept Belgium's argument<sup>189</sup> that its law was necessary as an "urgent and temporary safeguard . . . to prevent Wallonia [from] becoming the 'dustbin of Europe.'"<sup>190</sup> Moreover, because the Wallonian ban clearly discriminated against foreign waste, it was not appropriate to analyze it under the more permissive "rule of reason" standard used for indistinctly applicable measures.<sup>191</sup> As such, the AG concluded that the EC Commission had established that Belgium breached its EC Treaty obligations regarding the free movement of goods.<sup>192</sup>

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useful for understanding the reasoning underlying the Court's decision. STEINER, *supra* note 2, at 18. The Court's decisions themselves are often short, providing little reasoning. *Id.*

184. *Belgian Waste Case*, *supra* note 179, First Opinion of the AG, para. 8.

185. *Id.* paras. 9-12.

186. EEC Treaty, arts. 30, 36.

187. *Belgian Waste Case*, *supra* note 179, First Opinion of the AG, para. 16. The AG expressly rejected the Belgian argument that waste was not a "good" because it had "no intrinsic commercial value." *Id.* The AG concluded that "objects which are transported over a frontier in order to give rise to commercial transactions are subject to Article 30, irrespective of the nature of these transactions." *Id.*

188. *Id.* para. 20.

189. *Id.* para. 15.

190. *Id.* para. 20.

191. *Id.*

192. *Id.* paras. 20-30.

The Court agreed with the AG that waste was a good,<sup>193</sup> but it disagreed with the AG's conclusion that the Wallonian law was discriminatory. The Court suggested that the nature of waste might warrant special consideration.<sup>194</sup> The Court noted that "waste has a special characteristic."<sup>195</sup> Moreover, "[t]he accumulation of waste, even before it becomes a health hazard, constitutes a threat to the environment because of the limited capacity of each region or locality for receiving it."<sup>196</sup> The Court accepted the Belgian government's claim that an "abnormal, massive influx of waste" into Wallonia constituted a "genuine threat to the environment" in light of the area's "limited capacity."<sup>197</sup>

Based on these concerns, the Court took a peculiar analytical turn. Rather than analyzing the facially discriminatory law under the Article 36 standard, the Court examined the law under the "mandatory requirements" exception which was normally reserved for indistinctly applicable measures.<sup>198</sup> The Court stated that to determine if a law was discriminatory "the particular type of waste must be taken into account."<sup>199</sup> This statement is a non sequitur. Having determined that waste was a good, the Court should have determined whether the law was facially discriminatory or "indistinctly applicable." Instead, the Court developed a new line of reasoning.

To support its peculiar analysis, the Court noted the Community's reliance on the principles of proximity and self-sufficiency in EC waste policy,<sup>200</sup> referring specifically to these principles in the EC Treaty<sup>201</sup> and the Basel Convention.<sup>202</sup>

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193. *Belgian Waste Case*, *supra* note 179, Decision of the Court, para. 30. More directly, the Court held that "waste, whether recyclable or not, should be regarded as a product [,] the movement of which must not in principle, pursuant to Article 30 EEC, be impeded." *Id.*

194. *Id.* para. 32.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* para. 36.

199. *Id.*

200. *Id.* paras. 36-37; see Jans, *supra* note 24, at 170 (declaring this reasoning a "surprisingly new approach").

201. *Belgian Waste Case*, *supra* note 179, Decision of the Court, para. 36 (citing EEC Treaty, art. 130r(2)).

202. The reference to the Basel Convention was peculiar. Hencher & Sevenster, *supra* note 4, at 362-63. According to Hencher and Sevenster, the Transfrontier Shipment Regulation, which was just in draft form at the time, would allow "Member States to restrict substantially the transfer of wastes, [but] would not tolerate an absolute ban." *Id.* at 363. The Court later addressed this



Moreover, the Court acknowledged the EC's general policy that each region or local political division "take appropriate measures to receive, process[,] and dispose of its own waste."<sup>203</sup>

Preoccupied with the importance of self-sufficiency regarding waste, the Court failed to confront the inconsistency in its logic. Instead, the Court concluded that "having regard to the differences between waste produced in one place and that in another and its connection with the place where it is produced, the contested measures cannot be considered . . . discriminatory."<sup>204</sup> The emphasis on the proximity principle in Community treaties and legislation caused the Court to view waste as a good that should be disposed of near the place where it was generated. Thus, the Community's obsession with the proximity principle blinded the Court to the fact that waste is a good, and its movement should not be restricted.

The *Belgian Waste Case* upheld Wallonia's ban on the importation of foreign, non-hazardous waste by ruling that it was a permissible trade barrier. Somehow, the nature of waste transformed an import ban from a trade barrier that seemed to violate a fundamental EC principle into a permissible law.<sup>205</sup> Moreover, the *Belgian Waste Case* elevated the proximity principle, a concept specifically applicable to environmental protection, over a fundamental tenet of the Community—the free movement of goods.<sup>206</sup> For years, the proximity principle had influenced the shape of EC waste policy.<sup>207</sup> The EC strengthened its embrace of this principle by signing the Basel Convention in 1989 and adopting the Transfrontier Shipment Regulation to implement the Basel Convention in 1993.<sup>208</sup> However, the proximity principle had never before fully eclipsed the

issue in the *Waste Regulation Case*, see *infra* part III.C (suggesting that a complete ban was justifiable).

203. *Belgian Waste Case*, *supra* note 179, Decision of the Court, para. 36.

204. *Id.* para. 38. The Court's holding is limited to the effect of the Wallonian Decree on non-hazardous waste, absent any specific provision regarding transboundary movement of such waste in Directive 75/442 (regarding non-hazardous waste). *Id.* para. 39.

205. *Id.* para. 38. The Court did rule that Belgium "failed to fulfill its obligations" under a Directive that regulated the movement of hazardous waste. *Id.* Specifically, prohibiting the dumping of hazardous waste from another state conflicted with Council Directive 84/631 (regarding the transboundary movement of hazardous waste). *Id.*

206. See Jans, *supra* note 24, at 172-73.

207. See *supra* part II (discussing EC waste policy).

208. See *supra* part II (discussing the Basel Convention and Transfrontier Shipment Regulation).

Community's fundamental commitment to the freedom of the movement of goods.<sup>209</sup>

While the EC Treaty allows derogations for limited purposes,<sup>210</sup> the *Belgian Waste Case* marked the "first time" that the Court upheld a "trade restriction facially discriminating against imports."<sup>211</sup> The key to the Court's ruling appeared to lie in the phrase "having regard to the differences between waste produced in one place and that in another."<sup>212</sup> The nature of waste transformed it into a good unprotected by the Treaty. The *Belgian Waste Case* failed to examine the Wallonian decree under general principles of law applicable in the European Community. Specifically, the Court did not undertake the proportionality analysis that it applied in the *Danish Bottle Case*. If the Wallonian decree had been analyzed under the proportionality test, the decree would have had to achieve its environmental goal by the means least restrictive of trade.<sup>213</sup> More importantly, the *Belgian Waste Case* contradicts one of the fundamental principles of the European Community—the free movement of goods.<sup>214</sup> Now, absent applicable Community legislation, a member state may impose restrictions on the waste trade if they are necessary to protect the environment.<sup>215</sup> While the *Belgian Waste Case* is consistent with the trend in Community legislation emphasizing the importance of self-sufficiency through the proximity principle, the Court failed to explain how waste could be a good and yet not

209. Cf. Jans, *supra* note 24, at 173 (suggesting that the *Belgian Waste Case* represents a conclusion by the ECJ that the Basel Convention's reliance on the proximity principle does not contradict the EEC Treaty's protection for the free movement of goods).

210. EEC TREATY, art. 36. Under Article 36 of the Treaty, a restriction on trade shall not "constitute a means of arbitrary discrimination . . . on trade between Member States."

211. Geradin, *supra* note 25, at 194.

212. *Belgian Waste Case*, *supra* note 179, Decision of the Court, para. 38

213. Jans, *supra* note 24, at 171-2 (commenting that the Court's failure to consider the proportionality principle seemed a "remarkable omission").

214. Cf. Geradin, *supra* note 25, at 190. The author states:

The particular nature of waste appears, however, as rather a weak justification. It does not have the precision necessary to ensure legal certainty, and therefore it opens the door to potential abuse. The principle of correction at source, as included in Article 130r(2) of the Treaty, and the principles of proximity and self-sufficiency, developed in the Basel Convention, offer little additional support to the ECJ. Indeed the Court mentioned these principles without questioning in any way their compatibility with the Maastricht Treaty.

*Id.*

215. See *supra* notes 179-205 and accompanying text (discussing the *Belgian Waste Case*).

warrant the protection generally afforded goods. The Court also did not explain why any restriction on the movement of waste did not merit scrutiny under the proportionality test.<sup>216</sup>

C. *The Polluter Pays Principle Forgotten:*  
Parliament v. Council, 1994

In 1994 the European Court of Justice reviewed another dispute relating to the issue of waste. Although the case focused on the procedure used by the Community institutions in developing environmental policy, *European Parliament v. Council [Waste Regulation Case]*<sup>217</sup> revealed the continued dominance of the proximity principle in the Community's waste policy. Moreover, the *Waste Regulation Case* reaffirmed that the EC will not encroach on the political decisions of individual states regarding their waste policies.

In the *Waste Regulation Case*, the European Parliament sought to annul the Transfrontier Shipment Regulation, which was adopted by the European Council in 1993 to implement the Basel Convention.<sup>218</sup> The Parliament expressed greater concern regarding the procedure by which the Regulation was adopted than with its substantive provisions. Parliament claimed that such legislation could only be adopted under Article 100a of the EC Treaty (regarding trade harmonization), which requires a more complex "cooperation" procedure that involves greater participation of the European Parliament.<sup>219</sup> Council, in contrast, claimed that it adopted the Regulation under Article 130s

216. This case raises important questions about the role of the ECJ. One commentator, comparing the role of the ECJ with the United States Supreme Court, suggested that:

Courts have a very important, although limited role to play. Their decisions have mainly a corrective effect: they can only strike down obstacles to trade in an integrated market. The duty falls on the federal or Community legislator to adopt coherent environmental policies based on harmonized standards that are protective of the environment.

Geradin, *supra* note 25, at 196.

217. *European Parliament v. Council*, Case 187/93, reprinted in *FINANCIAL TIMES*, July 5, 1994, available in LEXIS, Intlaw Library, ECCASE file [hereinafter *Waste Regulation Case*].

218. *Id.*, Opinion of the AG, para. 1 (setting forth the opinion of the Advocate General). For a more thorough discussion of the Transfrontier Shipment Regulation, see *supra* part II.

219. *Id.* para. 2.

(regarding environmental policy), which only requires the Council to consult the Parliament.<sup>220</sup>

The Court examined the Regulation and ruled in favor of the European Council, holding that the law was based on Article 130s of the Treaty.<sup>221</sup> Under Article 130s, the Council was only required to consult the Parliament and did not need its cooperation.<sup>222</sup> Under the *Waste Regulation Case*, a law adopted with a view toward environmental protection could be justified entirely by Article 130s.<sup>223</sup> The fact that such a law might affect the internal market was not sufficient to invoke Article 100a (the trade harmonization provision of the Treaty).<sup>224</sup> Once more, the Court invoked the proximity principle, as though simply mentioning the idea explained everything—including its avoidance of the clear conflict with the Community's ideal of ensuring free trade.<sup>225</sup>

There are two ways to interpret the *Waste Regulation Case*. One is to view the Court as deferring to Council's judgment on Community-wide waste policy.<sup>226</sup> The *Waste Regulation Case* could be interpreted as establishing a principle that the EC organs, because they represent the entire community, may impede trade within the common market. Though this interpretation holds some appeal, the *Belgian Waste Case* suggests that the ECJ will also allow member states to unilaterally ban the import of waste.

The Court's ruling in the *Waste Regulation Case* revealed the key role played by the proximity principle in the Community's Waste Strategy. Moreover, this case also reinforced the perception that there is not a common market for waste, but rather a system of individual member states, each of which can bar the import of waste from other member states. Finally, the

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220. *Waste Regulation Case*, *supra* note 217, Decision of the Court, para 16.

221. *Id.* paras. 23-30.

222. *Id.* para 23.

223. *Id.* para 22-25.

224. *Id.* para 25.

225. *Id.* para 20-23.

226. This narrow view of the ruling is analogous to the U.S. Congress passing a law that allows states to regulate a particular activity even though such laws may restrain interstate commerce. *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 275 (4th ed. 1991). Two examples of such laws regard those governing the insurance and banking industries. In the United States, the rationale justifying such interference with interstate trade is that Congress, which represents the entire nation's interests, can best determine what is best for the common market. If it allows some restraint on interstate commerce, that is acceptable. In the United States, the Commerce Clause only restrains the states.

opinion noted that the Wallonian decree upheld in the *Belgian Waste Case* was an example of a measure that was compatible with the EC Treaty.<sup>227</sup>

The *Belgian Waste Case* and *Waste Regulation Case* raise significant questions about the role of the ECJ in the Community, especially with regard to the protection of the free movement of goods. The *Belgian Waste Case* threatens to allow member states to enact laws that raise barriers to trade under the guise of environmental protection.<sup>228</sup> Such a result is inconsistent with the goal of establishing a common market.

#### IV. ANALYSIS

This Part analyzes the judicial rulings of the ECJ and the legislation of the European Council and Commission. First, this Part suggests that the ECJ should examine the free trade jurisprudence of the most long-standing common market, the United States. Not surprisingly, the United States has encountered litigation much like that which arose in the *Belgian Waste Case*. The very different result reached by the U.S. Supreme Court may offer a guide to the ECJ in its role as guardian of the European common market. Second, this Part examines a 1989 proposal by the EC Commission for legislation that would impose civil liability for environmental damage caused by waste. This proposal would revive the polluter pays principle and establish a better waste policy, which would be consistent with the Community's overall goal of securing a common European market. After describing this proposed legislation, this Part discusses the reluctance in Europe to adopt such an environmental liability law. Part IV then concludes with an explanation of the current status of the Proposed Directive.

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227. *Waste Regulation Case*, *supra* note 217, Opinion of the AG, para. 21. See also Hencher & Sevenster, *supra* note 4 (reaching a similar conclusion about the effect of the *Belgian Waste Case*).

228. *But cf.* Betsy Baker, *Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT*, 26 VAND. J. TRANSNAT'L L. 437 (1993) (suggesting that the tension between environmental protection and economic protectionism is not irreconcilable).

A. *Toward a Simpler Jurisprudence of Free Trade: Looking to the United States for Comparative Insight*

As the world's most long-standing common market, the United States offers a useful comparative study for the European Community. However, any comparison of the United States and the European Community must acknowledge the fundamental differences between them. When the United States became an independent nation, it consisted of thirteen modestly developed colonies. In contrast, the member states of the European Community are densely developed countries with advanced technologies, different cultures, and centuries of political history and conflict among themselves. Even this simplistic comparison suggests vast differences between the two entities. Simply stated, there were far fewer obstacles for the United States to form a common market and political union than there are for the member states of the European Community.<sup>229</sup> Nonetheless, the European Community, particularly the ECJ, may benefit from examining the role of the United States Supreme Court in preserving a common market.

In order to promote the development of a common market, the United States Constitution limits the states in their regulation of interstate commerce. Specifically, the Commerce Clause, which is phrased as empowering the U.S. Congress to regulate interstate commerce,<sup>230</sup> has been interpreted by the United States Supreme Court as imposing a significant limitation on state regulation in this area.<sup>231</sup> The judicial doctrine embodying this

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229. Although this comparison is cursory, any broader discussion is beyond the scope of this Note. As one article stated: "The Community is not a recast version of the United States, needing to fine tune its interpretation of federalism. Rather it is a supranational organization [that] strives to forge consensus among very different Member States in a unique political context." *W(h)ither the Directive*, *supra* note 26, at 282.

230. U.S. CONST. art. I, § 8, cl. 3. This clause provides: Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

231. For one of the most eloquent statements of the theory underlying Dormant Commerce Clause doctrine, see *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949). In that case, Justice Jackson stated:

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action. *[Perhaps] even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution. [The] principle that our economic unit is the Nation, who alone*

limitation, known as the Dormant Commerce Clause doctrine, remains a very real check on state powers in the late twentieth century.<sup>232</sup>

In general, there are two different standards for analysis under the Dormant Commerce Clause: one for state laws that facially discriminate against out-of-state interests, and another for state laws that apply uniformly to in-state and out-of-state interests, but incidentally burden interstate commerce.<sup>233</sup> State laws that facially discriminate against out-of-state goods are per se invalid.<sup>234</sup> In contrast, state laws that do not discriminate facially, but nonetheless have some incidental effect on interstate commerce, are deemed valid unless the burden on interstate

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*has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. [The] material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens. [The] distinction between the power of the State to shelter its people from menaces to their health and safety. . . even when the dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce to their economic advantage is one deeply rooted in both our history and our law. [This] Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety. [Our] system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it [reality].*

*Id.* (cited in GERALD GUNTHER, CONSTITUTIONAL LAW 212-13 (12th ed. 1991) (emphasis added)).

232. *See, e.g., Oregon Waste Systems v. Oregon Dep't of Env'tl. Quality*, 114 S. Ct. 1677 (1994).

233. *Id.* The ECJ employs a similar analysis. It distinguishes between "distinctly applicable laws" and "indistinctly applicable laws." The former have generally been ruled invalid, until the *Belgian Waste Case*. Indistinctly applicable laws have been subjected to a balancing test. *See supra* part III.A. (describing applicable ECJ caselaw).

234. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

commerce is "clearly excessive in relation to the putative local benefits" under the state law.<sup>235</sup>

In 1978, the U.S. Supreme Court faced a case arising on facts quite similar to those of the *Belgian Waste Case* in *City of Philadelphia v. New Jersey*.<sup>236</sup> In *Philadelphia*, the Court reviewed a New Jersey law that barred private disposal enterprises in New Jersey from importing waste from other states.<sup>237</sup> The implementation of this law prohibited garbage haulers from Philadelphia, Pennsylvania, from disposing waste in privately-owned New Jersey landfills.<sup>238</sup> The Court stated that the New Jersey law, regardless of its ultimate purpose, could not discriminate against "articles of commerce coming from outside the [s]tate unless there is some reason, apart from their origin, to treat them differently."<sup>239</sup> Because there was no such reason, the New Jersey law impermissibly "impose[d] on out-of-state commercial interests the full burden of conserving landfill space" in New Jersey.<sup>240</sup> As such, the Court characterized the New Jersey law as an "attempt by one [s]tate to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."<sup>241</sup> The U.S. Supreme Court, when faced with a ban on waste importation, resorted to its per se analysis; because such laws discriminated on their face, they were per se unconstitutional.

Since 1978, the Court has revisited the issue of the interstate movement of waste in several cases; each time, it has sustained the fundamental principles of *Philadelphia*.<sup>242</sup> In 1992, the Court invalidated an Alabama law that imposed an additional fee on the disposal of hazardous waste generated outside the state.<sup>243</sup> Two years later, the Court struck down similar legislation from Oregon, even though that state provided financial analysis to

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235. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

236. 437 U.S. 617 (1978); see Geradin, *supra* note 25. For a discussion of the law of the United States, see David Pomper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989).

237. *Philadelphia*, 437 U.S. at 618-19.

238. *Id.* at 619.

239. *Id.* at 627.

240. *Id.* at 628.

241. *Id.* Significantly, the Court did not comment on whether New Jersey could prohibit out-of-state waste if it owned all of the landfills in the state. *Id.* at 627 n. 6. If it did, it might have invoked the market participant exception.

242. *Oregon Waste Systems v. Oregon Dep't of Env'tl. Quality*, 114 S. Ct. 1677 (1994); *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992).

243. *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992) (invalidating an Alabama law that imposed a higher fee for disposal of out-of-state waste than on waste generated in-state).



justify the differential between fees charged to in-state and out-of-state dumpers.<sup>244</sup> Finally, in 1994, the Court regarded as unconstitutional a municipal flow control ordinance, which required all waste moving through a town to be processed at a particular transfer station; the town imposed the requirement as a means of financing the construction of the waste processing center.<sup>245</sup> In each case, the Court regarded any discriminatory treatment of out-of-state interests as unconstitutional.

Contrasting the reasoning of *Philadelphia* and its progeny with the *Belgian Waste Case* reveals sharp contrasts between the jurisprudence of the United States and the European Community. In the United States, the drafting of the Commerce Clause was motivated by political goals as much as economic interests.<sup>246</sup> In the European Community, economic goals have been the primary motivation; although political aspirations have been mentioned since the Treaty of Rome in 1957, they have remained in the background. The history of the European Community to date has focused primarily on the benefits of a common market for the free movement of goods. The Maastricht Treaty, which was the first

244. *Oregon Waste Systems v. Oregon Department of Env'tl. Quality*, 114 S. Ct. 1345 (1994) (invalidating a purportedly cost-based, higher disposal fee for out-of-state waste than in-state waste).

245. *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 114 S. Ct. 1677 (1994). The better reasoned view in this case, however, is the dissent. See *Carbone, supra*, 114 S. Ct. at 1691.

Another significant point raised about this line of cases is that lurking behind this discussion of constitutional principles is the reality that it may be of limited practical importance. In the United States, nearly eighty percent of all landfills are operated by state or municipal governments, not private enterprises. *Oregon Waste Systems, Inc. v. Department of Env'tl. Quality of Oregon*, 114 S. Ct. 1345, 1357 (1994) (Rehnquist J., dissenting) (citing U.S. Environmental Protection Agency, Resource Conservation and Recovery Act, Subtitle D Study: Phase I Report, at 4-7, tbl. 4-2 (Oct. 1986)).

Under U.S. law, such government enterprises are exempted from Dormant Commerce Clause doctrine; this status is accorded by the "market participant exemption." *Id.* (citing *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984)). In *South-Central Timber*, the Court stated that "if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *South-Central Timber*, 467 U.S. at 93.

Because *Philadelphia* and its progeny may apply to only one-fifth of waste disposal operations in the United States, some commentators may regard this debate a waste, or much ado about nothing. Although their argument raises significant questions, further discussion is beyond the scope of this Note.

246. LAWRENCE TRIBE, *CONSTITUTIONAL LAW* 417 (2d ed. 1988). According to Tribe, the "negative implications of the commerce clause derive principally from a political theory of union, not from an economic theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency." *Id.*

EC treaty to emphasize political goals,<sup>247</sup> has encountered considerable resistance.<sup>248</sup> Ultimately, the developing European Union differs significantly from the United States. While the member states of the Community may strongly support measures that reap clear economic benefits, they will be much more reluctant to endorse measures that encroach on traditional spheres of their sovereignty.

However, the ECJ should not encourage such resistance or cast its rulings in a manner that allows such political sentiments to become entrenched in Community law. The Court would better promote the goals of the EC Treaty by simplifying its jurisprudence along the lines of the United States Supreme Court.<sup>249</sup> In the United States, the Commerce Clause and Dormant Commerce Clause doctrine serve important roles in defining the political union<sup>250</sup> and in shaping the national

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247. STEINER, *supra* note 2, at 8. The Maastricht Treaty reaffirmed the goals set forth by the earlier treaties and added language committing the member states to: common foreign and security policies as well as a common currency, and ultimately full economic and monetary union. *Id.*

248. For example, the attempt to establish a common currency failed. Although this endeavor sounds like an economic issue, it has strong political ramifications. Its failure also revealed considerable reluctance among the member states to certain Community objectives. *See, e.g., Europe's Currency Tangle*, ECONOMIST-U.K ED., Jan. 30, 1993 at 21.

249. Interestingly, the EC's contortion of its version of the Commerce Clause has parallels in U.S. history. *See, e.g., ELY, supra* note 56, at 123-24. Though U.S. President Franklin Delano Roosevelt pushed for legislation that would affect areas "traditionally reserved for state regulation" (such as labor law), the Court continued to emphasize a distinction between commerce and manufacturing or production. *Id.* The Court held that Congress could not legislate on matters of production, which was an area reserved to the states. *Id.* This distinction remained in place until 1937, when the Supreme Court ruled that "Congress could regulate activities that directly or indirectly affected interstate commerce." *Id.* at 128.

Since the 1930s, the Court has interpreted congressional powers under the Commerce Clause as plenary. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942).

250. *See West Lynn Creamery v. Healy*, 114 S. Ct. 2205 (1994). The Court stated:

The "negative" aspect of the Commerce Clause was considered the more important by the "father of the Constitution," James Madison. In one of his letters, Madison wrote that the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the [federal] Government.

*Id.* at 2211 n. 9 (citing 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911)).

economy.<sup>251</sup> In contrast, the developing body of ECJ caselaw appears less likely to foster a common market than to allow the balkanization of member states.

Since the passage of the Single European Act in 1987, the ECJ has become more tolerant of environmental laws that impede the movement of waste across the Community. Viewed one way, the Court has just deferred to the legislature, which has carved out an exception to the general principle of ensuring the free movement of goods for the issue of waste.<sup>252</sup> The European Commission has passed laws relying on the proximity principle and the Court has appropriately deferred to the legislature's judgment. This interpretation, however, does not account for the ruling in the *Belgian Waste Case*, which vindicated an individual state's ban on waste importation. In that case, the Court elevated the political branches' emphasis on the proximity principle to a higher constitutional level, such that it eclipses other Treaty principles (specifically the free movement of goods and the polluter pays principle).<sup>253</sup> The latter has become virtually lost amid the discussion of waste in the European Community. Though the polluter pays principle also appears in the EC Treaty, and is supposed to guide Community environmental policymaking, it presently has no practical significance.

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251. For an interesting perspective on the role of the Dormant Commerce Clause, see ELY, *supra* note 56, at 139 (1992). According to Professor Ely,

. . . the primary purpose of dormant commerce jurisprudence is to foster free trade within a national marketplace. Judicial opinions speak in terms of safeguarding interstate trade, but in actuality dormant commerce power protects the entrepreneurial liberty of individuals and corporations to conduct business across state lines. In the modern era, judicial review of state economic regulations under the commerce clause serves some of the same functions as economic due process before the constitutional revolution of 1937. By balancing economic interests against a state's rationale for regulation, the Supreme Court effectively inquires into the reasonableness of economic legislation. Thus, dormant commerce jurisdiction preserves an important role for the federal courts in the field of economic rights.

*Id.*

252 See, e.g., Bob Hagerty, *Legal Beat: EC Court Backs Limits on Imports of Rubbish*, WALL ST. J. EUR., July 14, 1992.

253. Some commentators regard the current state of affairs as acceptable, reflecting a sound balance of trade and environmental protection. See, e.g., Jans, *supra* note 24; Geradin, *supra* note 25.

*B. How a Proposal to Revive the Polluter Pays Principle Can  
Address the Legislative and Judicial Threats of Environmental  
Protectionism*

Despite the Community's overwhelming emphasis on the proximity principle, legislation initially proposed by the European Commission in 1989 offers an opportunity to breathe life into the polluter pays principle. This legislation, the Proposal for a Council Directive on Civil Liability for Damages Caused by Waste (Proposed Directive), also provides a means by which the Community can stop the trend toward environmental protectionism. At present, absent liability for environmental damage, the externalities of waste disposal are not paid by the polluter, but rather by the member states and their taxpayers. Absent liability, polluters can dump wastes without paying for the damage that they cause. This problem is exacerbated by the "Wallonia problem"<sup>254</sup>—in a European common market in which member states have varying environmental standards, harmful concentrations of waste sites will develop in states with the lowest environmental standards. In short, waste flows downstream to states with the least demanding environmental standards. If liability were imposed uniformly across the Community, polluters would have to factor the costs of potential liability into their own expenses, regardless of where they disposed of their waste; this cost internalization would correct the current market failure in which polluters do not bear the entire cost of their operations.

By establishing a tool to foster cost internalization, the Proposed Directive would reduce irresponsible dumping, a primary concern that has led to the current trend of environmental protectionism in the European Community. Thus, the Proposed Directive would enable the Community to function as a common market. Without trade barriers, the market would be able to function efficiently. Although no state wants to allow its scenic countryside to become the site of landfills, ultimately most states will allow them. However, all of the states, or regions within the states, will not be equally well suited for waste disposal. The best way to decide how to site landfills is to establish uniform standards and then allow the market to find the best solution; this strategy will work well so long as there are uniform standards for waste disposal across the Community.

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254. See discussion *supra* part I (discussing the problem of an inordinate number of landfills developing in Wallonia because of that region's lower environmental standards within a common market that included areas with higher environmental standards).

The Proposed Directive<sup>255</sup> would establish a uniform law that imposes liability across the Community. As such, it would clearly implement the polluter pays principle.<sup>256</sup> Moreover, the Proposed Directive would accomplish this goal in a manner consistent with the other principles of European waste policy. Again, because it would impose liability for environmental damage throughout the Community, it would reduce the present demand for severe import restrictions, which arose from the "Wallonia problem." Thus, the Proposed Directive would promote the free movement of waste in the Community.

### 1. The Proposed Directive on Civil Liability for Damage Caused by Waste

In 1989 the European Commission completed drafting the Proposed Directive; following initial comments, the Commission amended its proposal in 1991.<sup>257</sup> The Proposed Directive sets forth a legislative scheme that includes a liability law, which assesses liability among those parties responsible for the discharge of waste, and a compensation fund, which would help pay for a cleanup when a liable party cannot be found or cannot pay the full costs of a cleanup. As such, the Proposed Liability Directive generally parallels United States legislation regarding liability for the release of waste, the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as Superfund or CERCLA.<sup>258</sup>

#### a. The Basis for Legislation

Several environmental catastrophes and scandals in Europe precipitated political action to develop a tough policy that would

255. Amended Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1991 O.J. (C 192) 6 [hereinafter Proposed Directive]. The Commission initially proposed a directive in 1989, Commission Proposal for a Council Directive on Civil Liability Caused by Waste, 1989 O.J. (C 251) 4. The difference between the two are beyond the scope of this Note. For clarity, all discussion of the "Proposed Directive" regards the 1991 Amended Proposal.

256. Proposed Directive, *supra* note 255, pmb. para. 14 ("Whereas the principles established in Article 130r(2) of the Treaty that the polluter should pay").

257. Luiki & Stephenson, *supra* note 3, at 405 n.15.

258. 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 475 (1992) (explaining that Superfund had four basic elements, the other two being information gathering and authorization for federal response to emergencies and cleanup).

make polluters pay for any environmental damage they cause.<sup>259</sup> The European Commission drafted the Proposed Directive primarily as a measure necessary for trade harmonization.<sup>260</sup> According to the Commission, the legislation is necessary at the Community level to prevent market distortions that result from the member states having varied environmental standards.<sup>261</sup> Moreover, the preamble of the Proposed Directive suggests that including the cost of environmental damage in the price of waste is necessary for prevention of future environmental damage, one of the other key principles guiding the Community's waste policy.<sup>262</sup> Polluters, faced with substantial costs if liable for environmental damage, will seek the most economically efficient way to avoid such costs; one means of reducing exposure to liability is to reduce the amount of waste produced. Thus, the EC views the Proposed Directive as a significant component of its Waste Strategy, which will complement existing laws. The Directive revives the polluter pays principle as a means of shifting cleanup costs back to the polluter and as a way to improve prevention.

#### b. The Nature and Scope of Liability

The Proposed Directive adopts strict liability as the standard best suited to remedying the waste problem.<sup>263</sup> This choice is based partially on the "inherent risk" involved in waste handling and disposal.<sup>264</sup> Adopting a strict liability standard would reduce the cost of enforcement by removing the need for enforcement agencies to prove negligence. It would also force cost internalization by the companies, making them bear the burden rather than the taxpayers. Finally, it will have preventive, or deterrent, effects. A company that knows it must pay the costs of

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259. See discussion *supra* note 30 (regarding environmental disasters).

260. Proposed Directive, *supra* note 255, pmb. para. 1. The proposal opens with the words: "Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof." *Id.*

261. *Current Report: European-Level Liability Gets Mixed Response from Environment Ministers*, 16 Int'l Env'tl. Rep. 928 (Dec. 15, 1993). Though European ministers agreed that an EC law was necessary, they also emphasized that such legislation "should be regarded circumspectly otherwise." *Id.*

262. Proposed Directive, *supra* note 255, pmb. para. 14.

263. *Id.* art. 3 ("The producer of waste shall be liable under civil law for the damage and impairment of the environment caused by the waste, irrespective of fault on his part"). *Id.*

264. *Id.* pmb. para. 14 (setting forth the premises of this choice: "in view of the risk inherent in the very existence of waste, the strict liability of the producer constitutes the best solution").

its dumping will seek to reduce its production of such waste requiring disposal.

Under the Proposed Directive, strict liability would also be joint and several.<sup>265</sup> Thus, a plaintiff may recover the entire cost of cleanup from any one of the liable parties. The Proposed Directive attempts to "channel" liability; that is, it focuses liability on particular groups of polluters.<sup>266</sup> This broad exposure to liability, however, is tempered by "concepts of fairness and reasonableness" that have been incorporated into the Proposed Directive.<sup>267</sup> Most significantly, the Proposed Directive would not apply retroactively.<sup>268</sup> This non-retroactivity provision may serve as the greatest limitation on liability in the entire scheme of the Proposed Directive. There are several reasons why the EC drafters did not impose retroactive liability. First, there has been a consensus in the Community that retroactive liability has been the one of the most controversial aspects of the U.S. Superfund law. As one commentator noted: "By avoiding retroactivity, the EC will avoid the inefficiency, uncertainty, unfairness, and costliness which plagues the Superfund program."<sup>269</sup> Second, retroactivity is contrary to the general principle of legal certainty that pervades Community law.<sup>270</sup> Third, retroactivity would be

265. *Id.* art. 5 ("Where, under this Directive, two or more persons are liable for the same damage or the same impairment of the environment, they shall be liable jointly and severally"). *Id.* While this scheme itself has been somewhat controversial in the United States, most of the criticism has arisen because of its interplay with the other provisions of CERCLA.

266. *Id.* At least one industry representative supports this scheme, but emphasized the importance of a "strong causal link" between the damage and the actions of a particular factory. *Id.*

267. Luiki & Stephenson, *supra* note 3, at 406 (stating that the fairness and reasonableness of the Directive should ameliorate some of the concerns raised by the harshness of the United States Superfund law).

268. Proposed Directive, *supra* note 255, art. 13 ("This Directive shall not apply to damage or impairment of the environment arising from an incident which occurred before the date on which its provisions are implemented"). *Id.*

269. Luiki & Stephenson, *supra* note 3, at 406. Though much maligned, the retroactive nature of CERCLA has withstood constitutional challenge in the United States. Jones & McSlarrow, . . . *But Were Afraid To Ask: Superfund Case Law, 1981-1989*, 19 *Env'tl. L. Rep.* 10,430, at 10,431 nn. 10-16 (1989).

270. The "principle of non-retroactivity" is part of the concept of "legal certainty," a general principle of law that has been incorporated in Community law. STEINER, *supra* note 2, at 60 (citing Case 43/75, *Defrenne v. Sabena* (No. 2)). This principle, "applied to Community secondary legislation, precludes a measure from taking effect before its publication." *Id.* The other half of "legal certainty" is "the principle of legitimate expectations." This means "in the absence of an overriding matter of public interest, Community measures must not violate the legitimate expectations of the parties concerned." *Id.* A legitimate expectation is one that a reasonable person would hold under the circumstances. *Id.*

out of character with the "cooperative relationship" between European industries and governments.<sup>271</sup> Fourth, by making the liability scheme only apply prospectively, the Proposed Directive should not wreak havoc on the European insurance industry.<sup>272</sup> Thus, by establishing a scheme of strict liability, but not imposing it retroactively, the Proposed Directive adapts the model of the U.S. Superfund law for European soil.

The next question is who is liable? The primary party held liable under the Directive is the "producer"<sup>273</sup> of waste.<sup>274</sup> Producer is defined as "any person who, in the course of a commercial or industrial activity, produces waste . . ." <sup>275</sup> The Directive relieves a "producer" of waste in three situations: (1) upon delivery to an eliminator;<sup>276</sup> (2) when someone else has actual control of the waste at the time of an incident causing damage<sup>277</sup> and; (3) when waste has been imported from outside the Community.<sup>278</sup> An eliminator is a person whose business is waste disposal.<sup>279</sup> An eliminator may avoid liability if the producer defrauded him regarding the nature of any delivery.<sup>280</sup> A controller is one who had "actual control of the waste when the incident giving rise to the damage . . . occurred."<sup>281</sup> Controllers

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Application of strict liability would violate these general principles of Community law.

271. Luiki & Stephenson, *supra* note 3, at 406.

272. Freeman & McSarrow, *supra* note 24, at 187.

273. Proposed Directive, *supra* note 255, art. 2(a).

274. *Id.* art. 2(1)(b). This provision uses the definition of waste from Council Directive 75/442, O.J. (L 194) 39 (1975).

275. Proposed Directive, *supra* note 255, art. 2(a).

276. *Id.* art. 2(2)(c) (holding liable "the person responsible for the installation, establishment or undertaking where the waste was lawfully transferred . . ."); Michael McCann, *CERCLA and the European Community's Civil Liability Proposal: A Comparison of U.S. and E.C. Law Pertaining to Liability from Environmental Harm Caused by Hazardous Wastes*, 11 BALT. J. ENVTL. L. 161 (1991). This differs significantly from CERCLA, which holds both parties liable.

277. Proposed Directive, *supra* note 255, art. 2(2)(b) (holding liable "the person who had actual control of the waste when the incident giving rise to the damage to or impairment of the environment occurred"). Liability under this provision has been referred to as "controller" liability. Munteer, *supra* note 26, at 127 (citing Turner T. Smith & Roszell D. Hunter, *The Revised European Civil Liability for Damage from Waste Proposal*, 21 *Envtl. L. Rep.* 10,718, at 10,721 (Dec. 1991)).

278. Proposed Directive, *supra* note 255, art. 2(2)(a) (holding liable "the person who imports the waste into the Community").

279. A producer, however, is not relieved of liability if he holds a permit, *id.* art. 6(2); nor if he purported to limit or avoid such liability by contract. *Id.* art. 8.

280. *Id.* art. 7.

281. *Id.* art. 2.



may escape liability if they identify the producer within a reasonable period.<sup>282</sup>

### c. Options When the Polluter Cannot Pay

The Proposed Directive suggests several alternative approaches for when the polluter cannot pay, either because it no longer exists, cannot be determined, or has become insolvent.<sup>283</sup> First, it attempts to avoid such a situation by requiring producers of waste to maintain adequate insurance to cover the risk of environmental damage.<sup>284</sup> Second, the Proposed Directive provides that the European Council shall determine common rules for when the liable person cannot fully pay for the damage he has caused;<sup>285</sup> it also provides for compensation when the liable person "cannot be identified."<sup>286</sup> Finally, the Proposed Directive directs the Commission to "study the feasibility" of establishing a "European fund" to cover otherwise uncompensated damages.<sup>287</sup>

While the details of this European Fund remain sketchy, it appears that the European Community contemplates establishing a public fund to pay for environmental damage when a polluter cannot be properly identified. The creation of such a fund to assist with payments for the cleanups it mandated was the "most ingenious political stroke" behind the U.S. Superfund law.<sup>288</sup> This fund is financed in part by a tax on businesses that benefited from inexpensive disposal and that have posed substantial risks to society.<sup>289</sup> This fund is used in two ways: parties that have undertaken approved cleanups can make claims against the fund, and the United States government can increase the fund through civil actions against all potentially responsible

282. *Id.* art. 2(2)(b).

283. *Id.* art. 11.

284. *Id.* art. 11(1). Given the bar on retroactive application, insuring these enterprises may be easier. See Goldberg, *supra* note 26 (discussing insurance issues).

285. *Id.* art. 11(2)(i) (Council shall determine common rules governing the situation arising "where the person liable is incapable of providing full compensation for the damage and/or impairment of the environment caused").

286. *Id.* art. 11(2)(ii).

287. *Id.* art. 11 *flush left* after 2. This executes the goal expressed in the preamble. *Id.* pmb. para. 25 ("Whereas rules must be laid down at Community level for compensation for damage and impairment of the environment caused by waste in the event that payment of full compensation is not possible"). *Id.*

288. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 478 (1992).

289. *Id.* at 479.

parties.<sup>290</sup> In this regard, the U.S. Superfund "revolves" to finance and implement cleanups; it is not a subsidy for cleanups. Whether the final version of the Proposed Directive will fully employ such a fund remains to be seen.

## 2. Fear of a Foreign Law: How the Perception of the United States Superfund Law Has Nearly Buried the Proposed Directive

Through May 1995, the European Community has taken no further official action on the Proposed Directive.<sup>291</sup> European industries have been divided on the proposal. Some worry that the Directive still too closely resembles the notorious United States Superfund law.<sup>292</sup> Significantly, Europeans have become aware of the criticisms of Superfund. For example, in 1992, the European edition of the *Wall Street Journal* reported the conclusions of a study of the U.S. Superfund law. The study stated that almost ninety percent of money spent on Superfund

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290. *Id.*

291. Interestingly, several member states of the European Community have shown their support for liability legislation in another forum, the Council of Europe. The Council of Europe is an intergovernmental organization with a membership of twenty-six European States. GEORGE A. BERMAN & ROGER J. GOEBEL, *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 34 (1993). Members include the states in the European Community as well as the former Czechoslovakia, Hungary, and Poland. Headed by a Committee of Ministers and national parliamentary representatives in a Consultative Assembly, it has produced numerous conventions. *Id.*

In 1993, the Council of Europe adopted a binding Convention that established civil liability for damage caused by hazardous waste. Council of Europe: Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 I.L.M. 1228 [hereinafter Council of Europe Convention]. The seven signatories to this Convention on Civil Liability are Italy, Greece, Cyprus, Luxembourg, Finland, Liechtenstein, and the Netherlands. Significantly, the United Kingdom, Ireland, Germany and Denmark will not sign the Council of Europe Convention. Germany is reluctant because of the burdens of unification. The United Kingdom and Denmark are reluctant because of discrepancies between the convention and existing national legislation. *Id.* Further, other commentators have questioned the value of the signature of the former Czech Republic and Slovakia, because of the severe environmental problems those countries face owing to their heavy industries. *Id.* Therefore, the effect of this Convention remains uncertain. However, it does raise significant questions about the relations of the Council of Europe to the European Community.

292. See, e.g., 16 Int'l Envtl. Rep. (BNA) 839 (Nov. 17, 1993) (quoting representatives from the European Chemical Industry Council and E.I duPont Corporation). John Lynn of E.I duPont Corporation expressed concern that, despite regular statements that the Community did not want to "make the same mistakes as the United States," and that the legislation "had worrying similarities with [S]uperfund." *Id.*

went to lawyers.<sup>293</sup> These reports undoubtedly inform the European debate and may be one reason why the Proposed Directive has not yet become law. Others believe that adopting a uniform law is more important than its actual content.<sup>294</sup> Ultimately, imposing civil liability for environmental damage caused by waste offers the best means of achieving the Maastricht Treaty's goal of "sustainable development." The Proposed Directive would force cost internalization and preserve the free movement of goods through the Community. Though some commentators believe that existing Community law has established a suitable framework for regulating waste,<sup>295</sup> the development of a Waste Strategy shaped almost entirely by the proximity principle threatens a regime of environmental protectionism.<sup>296</sup> Although the Proposed Directive offers a way to avoid environmental protectionism, the fear of creating a "Eurofund" replete with the problems of the United States Superfund legislation has delayed, and might defeat, the Proposed Liability Directive.<sup>297</sup> The alternative to the Proposed Directive—the continued development of law and policy under the *Belgian Waste Case*—will undermine the ideals of the European Community, bury the polluter pays principle, and result in deleterious economic and environmental effects.

### 3. Sustaining the Dialogue

In May 1993, the European Commission disseminated a communication regarding the Proposed Directive to the European Council and Parliament. Subtitled the "Green Paper on

293. *Law Brief: Superfund Cases*, WALL ST. J.-EUR, Apr. 28, 1992, at 4, available in LEXIS, WSJ-EUR file. The author of the report claimed that of the \$1.3 billion spend on Superfund-related claims made to insurance companies between 1986 and 1989, almost \$1 billion was paid to attorneys. *Id.*

294. *Id.* Jean-Marie Devos, representing the European Chemical Industrial Council, stressed the importance of having an EC law that is "concrete and transcribed to regions in a homogeneous way." *Id.*

295. See Jans, *supra* note 24. Professor Jans of the Centre for Environmental Law of the University of Amsterdam concludes that the "EEC has developed, with the aid of [the ECJ], a suitable framework for waste disposal policy." *Id.* at 176.

296. See *supra* part II (discussing EC legislation regarding waste).

297. There has been considerable criticism of CERCLA, emphasizing that as a solution the Superfund law takes a greater toll on the quality of life than the risks it was supposed to address. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* (1994).

Remedying Environmental Damage" (Green Paper),<sup>298</sup> this report discusses the Proposed Directive in straightforward terms. The Green Paper acknowledges that the polluter pays principle is an important part of European law.<sup>299</sup> It also ties this principle to prevention and points out the danger of trade distortion that arises from the lack of a uniform law across the community.<sup>300</sup> In general, it provides a useful summary of the proposed liability legislation. In particular, the Green Paper suggests when the Proposed Directive would impose liability and when it would allow recourse to a new, public, Community-level compensation fund. The following table indicates the Community's thinking on the relevant factors for choosing the appropriate option.

THE SHAPE OF THE PROPOSED DIRECTIVE:  
THE GREEN PAPER'S ANALYSIS OF WHEN LIABILITY IS APPROPRIATE<sup>301</sup>

<b>LIABILITY APPROPRIATE</b>	<b>LIABILITY INAPPROPRIATE: USE COMPENSATION FUND</b>
Measurable and immediate damage	Unbounded or latent damage
Finite act or incident	Cumulative acts or incidents
Identifiable liable parties	Unidentifiable liable parties
Liability (fault-based or strict)	No basis for liability
Causal link established	No causal link determinable
Party with legal interest who can bring action	No party with legal interest to bring action

298. Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage, COM (93) 47 final [hereinafter Green Paper].

299. *Id.* at 18 (stating that imposing "liability for the cost of cleaning up environmental contamination would be a concrete application of [the polluter pays] principle").

300. The Green Paper states:

A Community-wide system of civil liability for environmental damage would draw on a basic and universal principle of civil law, the concept that a person should rectify damage that he causes. This legal principle is strongly related to two principles forming the basis of Community environmental policy since the adoption of the Single [European] Act, the principle of prevention and the "polluter pays" principle.

*Id.* at 5.

301. *Id.* at 24. The chart incorporated in the text is simply reformatted from the text of the Green Paper.

This summary suggests that the Community will impose liability when the polluter and extent of damage are readily identifiable. Alternatively, when a polluter cannot be so easily identified and imposing liability on a particular party may result in an injustice, the Community will pay to remediate the damage from a newly created public compensation fund.

While the Green Paper has brought additional attention to the idea of liability legislation, it has also drawn more criticism toward it. For example, in response to the release of the Green Paper, the UK Environment Minister stated that his country intended to "keep national control over the legal framework for civil liability and rejected EC-wide comprehensive legislation."<sup>302</sup> Such resistance is likely to continue and debate over the ideal shape of an EC liability law could continue to the end of this century. However, if the Proposed Directive languishes and the current waste policy remains in effect, the Community will suffer.

The preceding parts discussed major problems with the EC's current waste policy. Part I revealed that the current liability schemes of the member states vary considerably; this situation has resulted in environmental tragedies like that which occurred in Wallonia. Part II examined the development of an EC waste strategy and noted that current policy has been shaped predominantly by the proximity principle, the idea that waste should be disposed of close to its source. Part III looked at the European Court of Justice, the final arbiter of Community law. Regarding waste policy, the Court has upheld various laws restraining the free movement of waste through the Community; the Court has upheld Community legislation as well as import bans on waste adopted by individual member states. As such, the Court has elevated the proximity principle above the Community's fundamental goal of securing the free movement of goods. Part IV first emphasized that the Court should abandon its trend of inviting environmental protectionism, and should instead consider the United States interstate commerce jurisprudence as a better means of protecting a common market. Part IV also examined a recent proposal to establish a Community-wide liability scheme for environmental harm caused by waste and suggested that it offers a better solution for the Community than its current policy. By implementing the polluter pays principle through the Proposed Directive, the Community would improve a waste policy that has relied to heavily on the proximity principle.

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302. *Environment Minister Criticizes EC Paper on Civil Liability for Environmental Damage*, 16 Int'l Env'tl. Rep. (BNA) 774 (Oct. 20, 1993).

More importantly, by making polluters pay—no matter where they dispose of their waste within the Community—the Proposed Directive would reduce the likelihood of encountering the “Wallonia problem.” The next section discusses the most recent, significant Community action regarding the Proposed Directive.

## V. RECOMMENDATIONS

This Note concludes with a series of recommendations for improving the Proposed Directive. As presently written, the Proposed Directive offers an opportunity to improve the Community’s regulation of waste by implementing the polluter pays principle. In simplest terms, the Directive makes polluters pay by imposing liability on those persons who dispose of waste in a manner that causes environmental damage. In its present form, the Proposed Directive would significantly improve the Community’s waste policy.

Nonetheless, the Proposed Directive could benefit from several changes. First, given the difficulties of implementing and enforcing directives, liability legislation should take the form of a regulation. Second, the Proposed Directive should incorporate several provisions that will encourage a fair apportionment of liability. Scholars, practitioners, environmentalists, and corporate leaders will all find fault with the law ultimately adopted. Nonetheless, the Community should adopt the Proposed Directive in order to revive the polluter pays principle and to halt the creeping trend of environmental protectionism.<sup>303</sup>

### *A. Why a Regulation Would Promote Better Enforcement of Any Scheme Imposing Civil Liability for Environmental Damage*

There are several problems with enacting this liability legislation as a directive. First, directives have encountered several general problems, including slow incorporation into the national laws of member states and weak enforcement. Second, member states may implement the directive’s requirements differently. For these reasons, the liability legislation would be more effective if adopted as a regulation.

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303. See, e.g., James A. Rogers & P. Kathleen Wells, *Superfund Reform Act of 1994*, 948 ALI-ABA 773 (1994).

## 1. General Problems with Directives

The first reason why a regulation is a better form for the proposed liability legislation is that the enforcement of EC directives has been notoriously weak.<sup>304</sup> The absence of a central oversight and enforcement agency has left implementation and enforcement of directives to the discretion of each state. Moreover, some member states, including France and Germany, lack statewide oversight and implementation agencies.<sup>305</sup> While the European Commission has responsibility for ensuring the implementation of directives, that task is enormously complex.<sup>306</sup>

## 2. Varying Concepts of Liability Among the Member States

Under a directive, the member states determine the best means of achieving the goals laid out by the Community. The general problems with directives are compounded by the complexity of liability issues. Presently, the standards of liability for environmental damage vary considerably across the member states.<sup>307</sup> However, certain general propositions about the

304. Smith, *supra* note 24, at 393; Macrory, *supra* note 67.

305. Smith, *supra* note 24. See generally *id.* at 357-391 (summarizing the hazardous waste regulations of the former Federal Republic of Germany, France, the Netherlands, the United Kingdom, Belgium, Denmark and Italy).

306. A recent development may improve the Community's ability to enforce directives. The Maastricht Treaty empowers the European Commission to file a case for a "lump sum or penalty payment" if a member state fails to take measures necessary to comply with a judgment of the European Court of Justice. TREATY ON EUROPEAN UNION, art. 171(2). This provision provides:

If the member state concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the member state concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the member state concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 170.

*Id.* While this provision may assist the Commission, enforcement is likely to remain a difficult problem. Under another principle of EC law, the ECJ has ruled that individuals can obtain damages against their national government for the non-implementation of a directive, if the directive grants rights to individuals; the rights are "identifiable on the basis of the provisions of the directive" and a link exists between the "violation of the obligation incumbent upon the state and the damage suffered by the injured persons." STEINER, *supra* note 2, at 37-38.

307. See Williams, *supra* note 24, at 223-230; Luiki & Stephenson, *supra* note 3, at 407-410; Klingamen, *supra* note 26, at 147-154.

existing state laws can be stated.<sup>308</sup> First, recovery of damages is generally difficult.<sup>309</sup> Second, European waste producers are not "generally held liable for injury caused by waste after it has passed into the possession of another person."<sup>310</sup> Third, producers have not been subject to substantial costs relating to financial assurance for proper waste related activities.<sup>311</sup>

Beyond these basic propositions, however, the laws of the member states vary significantly.<sup>312</sup> For example, under German law, the government has discretion to determine which party will be held liable among multiple potentially responsible parties.<sup>313</sup> The government considers an array of factors, including a party's financial position, their responsibility for the pollution, and their ability to abate it.<sup>314</sup> The high costs of cleanup and the absence of a right to contribution from the other parties pose not only a substantial deterrent under German law, but also fundamental questions of fairness.<sup>315</sup>

In contrast, the United Kingdom holds a different view of liability. In the *Cambridge Water Case*, the Law Lords—the highest court in England—rummaged through English common law examining forms of liability that have been imposed in the past.<sup>316</sup> The Court decided that none of these common law theories provided a basis for holding a party liable for "historic pollution,"<sup>317</sup> damage that is not entirely caused by the current owner, but rather has accumulated over time on a particular property. This approach differs significantly from that which a German court might employ.

*Cambridge Water* is like a divining rod for the problems that the Proposed Directive would encounter if adopted. It suggests that member states are likely to view their own national laws as adequate to address their environmental problems. For example, in November 1993, the UK Minister for the Environment proclaimed his state's "clear view that EC action is neither needed

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308. See generally Williams, *supra* note 24, at 223-230.

309. Williams, *supra* note 24, at 223.

310. *Id.*

311. *Id.*

312. *Id.*

313. Gunter Hager, *Waste Control Under German Law: Liability and Preventive Measures*, 25 HOUS. L. REV. 963, 973 (1988) (citations omitted).

314. *Id.*

315. *Id.*

316. *Cambridge Water Co. Ltd. v. Eastern Counties Leather plc*, [1994] 1 All ER 53 (H.L., December 9, 1993).

317. *Id.*



or wanted" with regard to liability for waste.<sup>318</sup> Given the ruling in *Cambridge Water* and the statement of the UK Minister, it seems likely that the United Kingdom would simply retain its own laws and insist that they are adequate to comply with the EC Liability Directive.

Because of the aforementioned problems, the Community's liability legislation should take the form of a regulation. A regulation, by definition, would impose a uniform standard across the Community in one fell swoop.<sup>319</sup> By adopting a regulation, the EC would begin to harmonize the liability laws of countries with traditions as different as England and Germany.

Through the Maastricht Treaty, the member states reaffirmed their commitment to achieve an "ever closer union." Since 1987, the ascendance of the "proximity" principle, which reached its highest point to date in the Transfrontier Shipment Regulation and the *Belgian Waste Case*, has become a genuine threat to the free movement of goods. Moreover, because the nearest disposal site may not maintain high environmental standards, the proximity principle may subsidize inferior processes, technologies, and operations—ultimately it may undermine the EC's environmental protection efforts.<sup>320</sup> By adopting a Regulation on Civil Liability, the Community would establish a uniform law across its member states and might halt the development of environmental protectionism. The adoption of such a law would also reduce the incidence of the "Wallonia problem." There is a need for a Community-wide system of liability that implements the polluter pays principle. That result can be achieved most effectively through the promulgation of a Regulation.

### B. Seeking a "Fair Share" Apportionment of Liability

While the Proposed Directive represents a better law than the U.S. Superfund, several modifications would strengthen the proposed EC law and might further reduce resistance to it. First, the definition of "controller" should be clarified, particularly by

318. 16 Int'l Envtl. Rep. (BNA) 839 (Nov. 17, 1993). U.K. Minister for the Environment Timothy Yeo stated: "It is our clear view that EC action is neither needed or wanted in this area. EC action can only be justified if, one, member states' actions are not sufficient, or two, if different national approaches to civil liability cause distortions to the single market. But the U.K. has civil liability legislation, and I am not aware of distortions." *Id.*

319. See *supra* note 51 (discussing regulations).

320. Cf. Jans, *supra* note 24, at 172 (suggesting the closest facility may not be the best).

excluding certain parties. Second, the Proposed Directive should establish a procedure for allocating liability.

However, regardless of its form and despite the best efforts of its drafters, the Proposed Directive will face significant problems in its implementation. These include: trying to apportion liability fairly when the harm at a particular site is indivisible, defining "actual control" in a manner that does not cast too broad a net of liability, and developing a policy that encourages equitable settlements. While these problems cannot be ignored, the Proposed Directive adequately limits the scope of harm that these problems might pose.

### 1. The Difficulty of Apportioning an Indivisible Harm

Although the Proposed Directive strives to apportion liability fairly, this goal may become elusive when faced with a site that presents an indivisible harm, a mixture of chemicals that have caused harm which cannot be readily allocated based on the relative contribution of particular polluters.<sup>321</sup> The Proposed Directive attempts to impose a "fair share" of liability<sup>322</sup> and to ensure that "the polluter will ultimately bear the costs imposed by his own wastes, but not those caused by the waste of others."<sup>323</sup> However, the mix of substances at a particular site may not be easily traced to their sources. In such cases, apportioning liability may be difficult. Even when deliveries of waste may be traced to a particular corporation, the harm to the site may be indivisible because of the "synergistic effects of the commingling of different wastes."<sup>324</sup> Because of the difficulty of allocating

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321. The Restatement sets forth the general rule for divisibility of harm.

If there is a single harm that is theoretically or practically indivisible, each defendant is jointly or severally liable for the entire injury. However, if there are distinct harms that are capable of division, then liability should be apportioned according to the contribution of each defendant.

RESTATEMENT (SECOND) OF TORTS § 433 (1965).

322. Significantly, the United States Environmental Protection Agency (EPA) attempted such a "fair share" apportionment policy at the outset of CERCLA regulation. See *Superfund Improvement Act of 1985: Hearings of S. 51 before the Senate Judiciary Committee*, 99th Cong., 1st Sess. 18-19 (hereinafter *1985 Senate Hearings*) (remarks of former EPA Administrator Thomas who acknowledged that EPA tried an apportionment process in the program for the first two years. "We tried a fair share approach, we tried a voluntary approach, and it did not work." *Id.* Perhaps the EPA should have extended its experiment for more than two years before abandoning hope at the expense of U.S. businesses and basic notions of justice.

323. Freeman & McSlarrow, *supra* note 24.

liability in such cases, U.S. courts have placed the burden of apportionment upon the defendants.<sup>325</sup> The resulting litigation to establish liability has trapped many potentially responsible parties in the net of CERCLA liability, despite an array of arguments regarding their contribution to the harm.<sup>326</sup> In the United States, concern regarding the fairness of a cost allocation has been relegated to second-tier contribution suits, when potentially responsible parties seek compensation from each other.<sup>327</sup>

No legislation can resolve the problem of an indivisible harm. The issue of apportionment, however, can be more fairly left to a court to determine *ad hoc* on an equitable basis. The Proposed Directive, however, reduces the "threat of disproportionate liability" by limiting its scope, especially by not imposing liability retroactively.<sup>328</sup>

## 2. Promoting a Fair Allocation of Liability and Avoiding High Stakes Settlement Games

The Proposed Directive expressly incorporates concepts of fairness and reasonableness.<sup>329</sup> Most importantly, it focuses liability solely on the person who has possession of the waste when the harm occurs. The Directive's emphasis on "producer" liability should relieve some of the problems that CERCLA faced.

324. See, e.g., *United States v. Stringfellow*, 661 F.Supp. 1053, 1060 (C.D. Cal. 1987); *O'Neil v. Picillo*, 682 F.Supp. 706, 725, (D.R.I. 1988), *aff'd* 883 F.2d 176 (1st Cir. 1989), *cert. denied* 493 U.S. 1071 (1990).

325. According to Rodgers, *supra* note 288, this practice began with *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio 1983) (holding that the defendant corporation had not "carried their burden of demonstrating the divisibility of harm and the degrees to which each defendant is responsible." *Id.* at 811).

326. See RODGERS, *supra* note 288, at 663.

Over the years, this burden has remained as something that is ostensibly achievable but practically out of reach. Thus, defendants continue to be stuck in the net of joint and several liability despite arguments that their volumes were small, their drums were few, their substances benign, or that their materials were not linked to the cleanup costs, were not implicated in the release, or had been removed altogether from the site before the trouble began.

*Id.* at 663-64 [citations omitted].

327. *Id.* at 664. While such arguments have not been allowed in the government's cost recovery suit, they have been permitted in contribution suits between PRPs.

328. Freeman & McSlarrow, *supra* note 24, at 180.

329. Luike & Stephenson, *supra* note 3, at 406.

The Proposed Directive generally makes the "producer" liable. However, it relieves the producer of the liability if another party is in "actual control" of the waste at the time it causes damage. Thus, unlike CERCLA, which imposed liability on nearly anyone who had any relation to the site, the Proposed Directive focuses its liability more narrowly. This narrower definition of liability is likely to result in a fairer apportionment of liability than under CERCLA. As such, the Community would apportion liability among a much narrower group of potentially responsible parties than the U.S. Superfund law.<sup>330</sup>

However, the Proposed Directive's imposition of liability for "persons in actual control," invites litigation as much as did CERCLA's liability for "owners." A creditor trying to protect property that is subject to a lien might be regarded as exercising "actual control." Under the Directive, such a creditor might be subject to "producer liability." This problem may be compounded as the definition of "producer liability" is fleshed out individually by the courts and legislatures of the member states.<sup>331</sup> Therefore, the Proposed Directive should incorporate a procedure for allocating costs among responsible parties.<sup>332</sup> Moreover, the definition of "actual control" should be defined more clearly, providing examples of what constitutes such control and excluding activities that are insufficient to constitute "actual control."

The Proposed Directive should incorporate a procedure for allocating costs among responsible parties. Proposed amendments to the U.S. Superfund law suggest such a process.<sup>333</sup> The U.S. Environmental Protection Agency (EPA), within sixty days of beginning an investigation to cleanup a site, would be required to search for all potentially responsible parties (PRPs) for that site.<sup>334</sup> Within eighteen months thereafter, the EPA would have to issue a list of all PRPs for that site and share with each member of that group all information that the EPA had obtained from information requests made to the other PRPs.<sup>335</sup> This process would give the PRPs a more complete picture of their responsibility for a given site. Moreover, the proposed Superfund amendments set forth a procedure for allocation among the

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330. Freeman & McSlarrow, *supra* note 24, at 178.

331. McCann, *supra* note 276, at 162.

332. See Rogers & Wells, *supra* note 303, at 792-98 (describing proposed reforms to the allocation procedure under the U.S. Superfund law).

333. *Id.* at 792-97.

334. *Id.*

335. *Id.*

PRPs.<sup>336</sup> The European Community should review the most recently proposed amendments to the U.S. Superfund law and adapt several of their proposals into the Proposed Directive.

One final recommendation is that the European Community should be careful not to copy the settlement provisions in the U.S. Superfund. The settlement provisions in Superfund encourage potentially responsible parties to engage in a game of high stakes poker.<sup>337</sup> A party that settles under Superfund is not vulnerable to contribution suits by other potentially responsible parties.<sup>338</sup> Theoretically, under Superfund a party that is only modestly responsible for polluting a site (for example, one that contributed only five percent of the chemicals dumped on a site), but refuses to settle could end up paying one hundred percent of the costs of cleaning up a site. The Directive contains no such provisions regarding settlements.

In shaping the Proposed Directive, the European Community has benefited considerably from examining the U.S. Superfund experience. While Superfund continually evokes cries of injustice, the Proposed Liability Directive is pervaded by fairness in its provisions that limit the scope of liability, restrain its application to prospective violations, and suggest efforts to apportion liability. The Directive would significantly enhance the Community's comprehensive waste strategy. It would implement the polluter pays principle by holding the "producer" liable for the costs of cleaning up contaminated sites. By placing these costs on those primarily responsible, the Community will save taxpayers the cost of cleanup. Significantly, the liability scheme will only be part of a truly comprehensive policy. The Community's Proposed Liability Directive would complement the Transfrontier Shipment Regulation.<sup>339</sup> The latter, which requires recordkeeping and imposes notification requirements, will make it easier to identify

336. *Id.*

337. McCann, *supra* note 276, at 179-80. The restricted use of joint and several liability in the Proposed Directive will reduce "the threat of disproportionate joint and several liability, in conjunction with a settlement policy that cuts off contribution rights, to coerce settlements from deep-pocket defendants, as Superfund" does. *Id.* It is worth noting that the EPA only adopted this policy after attempting, though only briefly, a "fair share" apportionment approach.

338. See 42 U.S.C. § 9613(f)(2). A "persons who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims of contribution. . . ." *Id.*

339. See Council Directive 84/631, 1984 O.J. (L 326) 31, *as amended by* Council Regulation 259/93, 1993 O.J. (L 30) 1.

parties responsible for any shipment that runs afoul of the directive.

## VI. CONCLUSION

The Proposed Directive represents an opportunity to breathe life into the polluter pays principle. Although this principle has been mentioned in EC treaties, directives, programmes, and most every other form of Community document, it has been dormant in practice. The Proposed Directive would invigorate this principle and provide a much needed check on the protectionism emerging under the guise of the proximity principle. Moreover, adopting the Proposed Liability Directive might prevent the ECJ from undermining the fundamental tenets underlying the EC Treaty; that is, the Directive would implement the polluter pays principle and might stir the ECJ to realize that the Community's obsession with the proximity principle has undermined its commitment to the free movement of goods and the ideals of a European Community, much less a European Union. If the leaders of the Community allow the fear of creating their own Superfund defeat the Proposed Directive, they will invite the member states to erect barriers to trade under the guise of environmental protection.

The Community's recent legislation and judicial rulings represent a noticeable step backward for the European common market. The Community's obsession with the proximity principle, which urges disposal of waste close to its source, has given rise to a trend of environmental protectionism. The political branches of the EC have adopted legislation that allows member states to prevent the importation of waste from other states. Moreover, the European Court of Justice has contorted its jurisprudence to allow an environmental protection exception to the ideal of securing the free movement of goods. These developments represent missteps for the European Community.

Adopting the Proposed Directive would allow the Community to reset its compass. To reaffirm the common market and move toward an ever closer union, a uniform, Community-wide liability law is necessary. This law, undoubtedly, will be problematic. Businesses will complain that it has driven them to bankruptcy; environmentalists will cry that it is insufficient to secure the quality of life that Europeans deserve. Nonetheless, the absence of such a law is a greater problem. The harmful concentration of landfills in Wallonia reveals the tragic result of a single European market in which member states retain varying environmental standards. However, the knee-jerk response from both the Community's legislative and judicial branches has also been

deleterious. The Transfrontier Shipment Regulation<sup>340</sup> and the *Belgian Waste Case*<sup>341</sup> undermine the Community's commitment to the free movement of goods by endorsing a system that urges member states to be self-sufficient. This trend seems contrary to the ideals of the European Community.

Such ideals should not be discarded so easily. The member states of the Community will always have to deal with waste issues. For that reason, the creeping environmental protectionism should be alarming, because instead of moving toward an ever closer union, the member states seem to be isolating themselves on an important issue. Adopting the Proposed Directive will not be a panacea, but it will represent a step in the right direction.

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340. See discussion *supra* part II.

341. See discussion *supra* part III.