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Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous With the Polluter Pays Principle

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Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous With the Polluter Pays Principle

ABSTRACT

Significant concern about the harm to the environment caused by the disposal of hazardous wastes and detrimental materials abounds. In response, regulators around the globe have struggled to develop environmental liability regimes that effectively remediate contaminated sites. Regulators in the United States, the European Community, and Japan have addressed environmental contamination concerns by adopting the polluter pays principle as a core component of their domestic environmental liability regimes. The polluter pays principle demands that the polluter bear the burden of remediating the waste it generates. The impetus for adoption of the polluter pays principle in the United States, the European Community, and Japan is somewhat unclear. Certain sources and trends, however, have likely contributed to and informed the principle's adoption. These sources include the prevalence of international treaties, the increasing availability of information concerning the environment, domestic and foreign laws that influence the conduct of other countries, nongovernmental organizations that exert pressure on regulatory bodies, bilateral and multilateral development institutions that condition their lending practices on the friendly treatment of the environment, and the growing standardization of environmental policies worldwide. This Note addresses these sources, and explores the manner in which they have influenced and encouraged the United States, the European Community, and Japan to embrace the polluter pays principle as an effective tool to achieve environmental waste remediation.

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I. INTRODUCTION

Linked by a global communication system, political participants, advocacy groups, and electorates in economically advanced democracies are increasingly expressing concern about the same environmental harms.¹ Amidst this concern, regulatory officials, scientists, legal scholars, and environmental activists are traveling across borders, in person and electronically, talking about the risks and policy concerns associated with cleaning up the environment.² At the center of much of their concern is the harm to the environment that arises from the disposal of hazardous wastes and detrimental material. Specifically, regulators around the world are contemplating how contaminated sites should be remediated.

Regulators in the United States, the European Community, and Japan have responded to this concern by merging the polluter pays principle into their domestic environmental liability regimes. This principle suggests that the polluter should bear the cost of abating waste and restoring the environment to an acceptable condition. By compelling the polluter to bear the expense, the cost of these clean up measures is reflected in the cost of the goods and services that generate the pollution through their production or consumption. When the price of goods and services reflects their environmental costs, consumers are not challenged to gather and consider information concerning a good's or service's effect on the environment. Rather, because consumers prefer the least expensive goods and services, the consumer generally makes a decision based on price alone, in which the social and environmental costs of contamination are already embedded. Consequently, the polluter pays principle ensures that the choices made in the self-interest of the consumer further environmental responsibility.

It is unclear what has encouraged the adoption of the polluter pays principle in the United States, the European Community, and Japan. This Note identifies certain of the principal sources that have contributed to the development and harmonization of environmental liability regimes in these countries under the polluter pays principle. These principal sources include the prevalence of international treaties, the increasing availability of information concerning the environment, domestic and foreign laws that influence other countries, nongovernmental organizations (NGOs) that exert

1. Robert A. Kagan, *The Consequences of Adversarial Legalism*, in REGULATORY ENCOUNTERS 376 (Robert A. Kagan & Lee Axelrad eds., 2000).

2. *Id.*

pressure on regulatory bodies, bilateral and multilateral development institutions that condition their lending on the friendly treatment of the environment, and the growing standardization of environmental policies worldwide.

This Note examines the global convergence of the polluter pays principle by emphasizing the experiences of the United States, the European Community, and Japan. Part II provides a background of the polluter pays principle as a normative doctrine of environmental policy; it also outlines its history and its current interpretation. Part III outlines the development of the principle in the United States, the European Community, and Japan, as well as the framework in which the principle arose in each country. Part IV highlights the sources which have arguably been the most influential in encouraging the United States, the European Community, and Japan to adopt the polluter pays principle as an effective tool to achieve environmental waste remediation.

II. THE POLLUTER PAYS PRINCIPLE

"The Polluter Pays principle is a normative doctrine of environmental law."³ Although the principle's precise legal definition remains difficult to ascertain, the core of the principle derives from the fundamental, fair, and logical proposition that the parties who generate pollution, not the government, should bear the cost of abatement.⁴

A. *History of the Polluter Pays Principle*

The principle first appeared in a legal context in a document prepared by the international Organization for Economic Cooperation and Development (OECD).⁵ The document included the following recommendation:

The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter Pays principle." This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the costs of goods and services

3. Jonathan R. Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 HARV. ENVTL. L. REV. 465, 466 (2000).

4. *Id.*

5. *Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies*, Annex ¶ 1, OECD Doc. C(72)128, (May 26, 1972), available at 1972 WL 24710.

which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.⁶

For years, only the OECD recommendation formally documented the principle.⁷ More recently, however, the principle has appeared in a number of international legal documents addressing issues surrounding environmental law.⁸ For instance, the principle played a significant role in the formation of law and policy in the European Community.⁹ In 1992, as described hereinafter, the United Nations Conference on Environment and Development included the principle in its Rio Declaration on Environment and Development,¹⁰ an "instrument of international jurisprudence [that] articulates policies and prescriptions directed at the achievement of worldwide sustainable development."¹¹ Principle 16 of the Rio Declaration provides that "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."¹² The principle's inclusion in one of the most important and influential international statements of the fundamental principles of environmental law demonstrates its significance in environmental liability regimes around the world.¹³

6. *Id.* ¶ 4.

7. Nash, *supra* note 3, at 469.

8. Hans Chr. Bugge, *The Principles of "Polluter Pays" in Economics and Law*, in *LAW AND ECON. OF THE ENV'T* 53, 54 (Erling Eide & Roger van den Bergh eds., 1996) ("Reference to the polluter pays principle is found in an increasing number of international recommendations and treaties." (internal citation omitted)); Ursula Kettlewell, *GATT - Will Liberalized Trade Aid Global Environmental Protection?*, 21 *DENV. J. INT'L L. & POL'Y* 55, 55 (1992) ("The polluter-pays principle has been accepted by the majority of industrialized nations as the mechanism for controlling global pollution." (internal citations omitted)).

9. See Isabelle Martin, *The Limitations to the Implementation of a Uniform Environmental Policy in the European Union*, 9 *CONN. J. INT'L L.* 675, 675-76 (1994) ("The polluter pays principle, which is one of the basic principles of EC environmental policy, also governs EC State aid policy, and subsidies may be granted to companies for environmental purposes only in specific circumstances." (internal citations omitted)).

10. *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, U.N. Doc. A/CONF. 151/5/Rev.1 (1992), reprinted in 31 *I.L.M.* 874, 878 (1992) [hereinafter *Rio Declaration*].

11. John Batt & David C. Short, *The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development*, 8 *J. NAT. RESOURCES & ENVTL. L.* 229, 230 (1993).

12. *Rio Declaration*, *supra* note 10, at 879.

13. Nash, *supra* note 3, at 471.

While domestic law in the United States has never codified the principle,¹⁴ the principle has informed the evolution of environmental law in the United States.¹⁵ Certain provisions of the 1970 Clean Air Act (CAA)¹⁶ and the 1977 Clean Water Act (CWA)¹⁷ require polluters to satisfy environmental standards at their own expense.¹⁸ The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) assigns liability for costs associated with cleaning up sites contaminated by hazardous wastes.¹⁹ CERCLA was patterned on, and attempts to fulfill, the polluter pays principle²⁰ by imposing liability for cleanup costs on those parties that are likely responsible for the underlying pollution and contamination.²¹

B. Interpretations of the Principle

Clear contours and boundaries of the polluter pays principle remain unclear.²² A number of interpretations have been articulated, and the principle can reflect different meanings in different contexts.²³ The OECD recommendation described above, for example,

14. *Id.*

15. See Sanford E. Gaines, *The Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, 26 TEX. INT'L L.J. 463, 480 (1991) ("The United States, in contrast to the European nations, does not officially recognize the [polluter pays principle] as a distinct principle or policy mandate, but does, by natural political and economic inclination, closely follow its precepts in practice." (internal citations omitted)).

16. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q (1994 & Supp. III 1997)) [hereinafter CAA].

17. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997)).

18. See, e.g., CAA, *supra* note 16, § 7502.

19. See generally Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 107, 42 U.S.C. § 9607 (1994) (identifying parties potentially responsible for CERCLA liability costs).

20. See REPORT OF THE HOUSE SUBCOMM. ON INVESTIGATIONS AND OVERSIGHT OF THE COMM. ON PUBLIC WORKS AND TRANSPORTATION, ADMINISTRATION OF THE FEDERAL SUPERFUND PROGRAM, H.R. DOC. NO. 103-55, at 12 (1993); J. Whitney Pesnell, *The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlers*, 58 LA. L. REV. 167, 190 (1997) (the polluter pays principle is "one of the central objectives or goals of CERCLA.").

21. See CERCLA § 107, 42 U.S.C. § 9607 (1994).

22. See JAMES BRIAN MCLOUGHLIN & E.G. BELLINGER, ENVIRONMENTAL POLLUTION CONTROL 145 (1993) ("There is no agreed definition of the term 'polluter pays principle,' . . . nor of any precisely defined scope of its application, nor of any clear agreement on permissible exceptions."); Alan E. Boyle, *Economic Growth and Protection of the Environment: The Impact of International Law and Policy*, in ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH 173, 180 (Alan E. Boyle ed., 1994) (speaking of "continuing evolution in the scope and definition of the principle which differing formulations in OECD recommendations and later instruments have not entirely clarified.").

23. See Bugge, *supra* note 8, at 53 ("The so-called 'polluter pays principle' . . . has several meanings." (internal citations omitted)). Professor Bugge has identified

is essentially economic in nature.²⁴ The recommendation can be viewed as requiring only that the government not subsidize polluters or pollution costs.²⁵

Over time, however, interpretations of the principle have tended to shift beyond this foundation.²⁶ Considering the global nature of pollution issues, the predominant view is no longer that governments merely determine the degree to which abatement and residual pollution costs should be internalized.²⁷ Instead, a growing number of scholars believe that governments should demand the internalization of costs by polluters that achieves the "optimal level of pollution."²⁸

Distortions in international trade and investment arising from differential pollution abatement financing methods could be eliminated through the adoption of the polluter pays principle.²⁹ This would occur because the polluter pays principle furthers "procedural integration by providing private decision-makers with a simple means of considering a great deal of information."³⁰ Without the principle, "private actors could ignore social and environmental costs, making decisions based simply on price."³¹ More conscientious decision makers would be forced to undertake the overwhelming "tasks of gathering information about social and environmental costs and then weigh[ing] those costs against the economic price of goods and services. . . . When the price of goods and services reflects their environmental and social costs, however, these separate tasks are

four versions of the polluter pays principle that have found expression in various manners:

- (1) the principle is an economic principle; a principle of efficiency; (2) the principle is a legal principle; a principle of "just" distribution of costs; (3) the principle is one of international harmonization of national environmental policy; and (4) the principle is a principle of allocation of costs between states.

Id.

24. See Note on the Implementation of the Polluter-Pays Principle, OECD Jan. 21, 1974, 14 I.L.M. 238, 239 (1975) ("[T]he Polluter-Pays Principle is no more than an efficiency principle for allocating costs...."); Bugge, *supra* note 8, at 55 ("The early discussions on the polluter pays principle in OECD were based on theories of environmental economics, and the problems of internalization of environmental costs.").

25. See Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 506 (1994) ("Despite its name, the [polluter pays principle] does not really call for polluters to pay anything. It is a procedural injunction to governments." (internal citations omitted)).

26. Gaines, *supra* note 15, at 482-85.

27. Nash, *supra* note 3, at 475.

28. *Id.*

29. Charles S. Pearson, *Testing the System: GATT + PPP = ?*, 27 CORNELL INT'L L.J. 553, 555 (1994).

30. John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 60 (1998).

31. *Id.*

unnecessary.”³² “Because decision makers prefer the least expensive goods and services when given a choice among goods and services of comparable quality, the polluter pays principle makes it more likely that the choices they make in their self-interest also will further sustainable development” and environmental responsibility.³³ “The [principle] thus furthers substantive integration as well.”³⁴

1. Equitable Side of the Principle

Current interpretations of the principle introduce an equitable side of the principle as well.³⁵ These interpretations contend not only that the government should not bear the abatement costs, but also that the specific polluters should incur the responsibility for abating their contribution to a particular pollution problem.³⁶ This “strong approach”³⁷ demands that polluters internalize at least the pollution abatement expenses, a requirement that Professor Nash calls “equitable internalization.”³⁸ “Equitable internalization allocates abatement costs and the costs of residual pollution among polluters and between polluters and victims.”³⁹ If, for example, a single factory discharges waste into a river that affects a farmer downstream, “equitable internalization calls for the proper apportionment of the costs of abatement and of residual pollution between the factory and the farmer—with the polluter bearing these costs.”⁴⁰

32. *Id.*

33. *Id.*

34. *Id.*

35. Dernbach, *supra* note 30; see also MCLOUGHLIN & BELLINGER, *supra* note 22, at 151 (“The United States favours interpretation of the [polluter pays] principle in ‘equity terms,’ . . . as distinct from the criterion of efficiency.”); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1504 (1999) (“In addition to . . . economic efficiency considerations, fundamental fairness and the protection of property also require that polluters pay for or abate their own emissions. . .”).

36. Nash, *supra* note 3, at 476; see also Gaines, *supra* note 15, at 470 (“[L]awyers have interpreted the economic [polluter pays principle] as a requirement that polluters should pay all the social and economic costs of their conduct.”).

37. See David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 643 (1995).

Rio Principle 16 . . . appears to state an affirmative and original ‘strong’ form of the Polluter-Pays Principle that directs governments to assure the internalization of environmental costs through the use of economic instruments, not merely to refrain from subsidizing the purchase and use of pollution control equipment by private industry.

Id.

38. Nash, *supra* note 3, at 477.

39. *Id.*

40. *Id.*

2. Extensions of the Principle in the Multiple Polluter Context

Some interpretations of the principle embrace two additional extensions, which are “applicable to pollution created, and contributed to, by multiple polluters.”⁴¹ First, if a pollution problem arises because of the aggregate conduct and emissions of multiple polluters, the “equitable internalization” doctrine must be refined.⁴² Here, equitable internalization addresses the proper allocation of costs among the multiple polluters.⁴³ Equitable internalization would prefer to apportion the costs according to each polluter’s responsibility for the aggregate problem.⁴⁴

Second, it is often difficult to identify the particular victims of multiple polluter conduct.⁴⁵ Here, the government resides as the proxy for the “victimized society,” particularly because the government bears the responsibility and expense of remediating the pollution’s effects.⁴⁶ Therefore, pursuant to the polluter pays principle, each individual polluter should internalize the cost of residual pollution by compensating the government for its expenses in remediating the problems that the polluter caused.⁴⁷

III. THE FRAMEWORK AND DEVELOPMENT OF THE POLLUTER PAYS PRINCIPLE IN THE UNITED STATES, THE EUROPEAN COMMUNITY, AND JAPAN

It is difficult to recognize and make sense of the convergence of environmental liability regimes in the United States, the European Community, and Japan under the polluter pays principle without first considering the framework in which the principle arose in each country. In particular, this section highlights each region’s adoption of the polluter pays principle, which is arguably one of the basic standards that has informed the development of each country’s environmental liability regime.

41. *Id.* at 478.

42. *Id.*

43. *Id.*

44. *Id.* at 477.

45. *Id.*

46. *Id.*

47. *Id.*; see also WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* 180, (2d ed. 1988) (asserting that, under the polluter pays principle, “society’s environmental resources, including clear air and water, . . . belong to the public at large. Those who ‘use’ these resources must then compensate the owners (i.e., the public) for any environmental degradation that occurs.”).

A. The United States and CERCLA Regulation

CERCLA was enacted to provide the Environmental Protection Agency (EPA) with a set of tools to effect hazardous waste cleanup.⁴⁸ These tools include a stringent liability regime, strengthened by the federal courts,⁴⁹ that assigns cleanup expenses to nearly any landowner, disposal operator, transporter, or generator of hazardous waste associated with a polluted site.⁵⁰ This stringent liability regime is synonymous with the polluter pays principle.⁵¹ CERCLA also includes a provision empowering the EPA to order private party cleanups, with the potential of subjecting recalcitrants to treble damages.⁵² Furthermore, the EPA is authorized to employ a number of conciliation devices and incentives to generate private party cooperation, including (1) the use of alternative dispute resolution procedures, (2) permitting the government to bear certain cleanup expenses, and (3) assigning proportionate shares of responsibility among "Potentially Responsible Parties" (PRPs) at multiparty sites.⁵³ The EPA discovers and remedies hazardous waste sites with federal funds that are designated for cleanup, commonly known as the Superfund.⁵⁴

1. Administration of the Polluter Pays Principle by the EPA

The EPA relies on a number of implementation schemes in the administration of these enforcement mechanisms under the polluter pays principle and the Superfund Program.⁵⁵ First, the EPA has discretion in the degree to which it uses coercion to compel cooperation, ranging from accommodation to prosecution.⁵⁶ Second, the efforts of the EPA are enhanced by its reliance on strong legal

48. 42 U.S.C. §§ 9601-75 (1980).

49. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); see generally W. Wilkerson & T.W. Church, *The Gorilla in the Closet: Joint and Several Liability and the Cleanup of Toxic Waste Sites*, 11 LAW & POLY 425 (1989).

50. 42 U.S.C. § 9607.

51. T. Church & R. Nakamura, *Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States*, 7 GEO. INT'L ENVTL. L. REV. 15, 24-25 (1994).

52. 42 U.S.C. § 9606(a) (authorizing the EPA to order private party cleanups); 42 U.S.C. § 9607(c)(3) (authorizing the award of treble damages against recalcitrant private parties).

53. 42 U.S.C. § 9622.

54. 26 U.S.C. § 9507 (1993) (establishing the Hazardous Substance Superfund); 42 U.S.C. § 9611(a) (1994) (defining the uses of the Superfund). "Superfund" is used to refer to the entire Comprehensive Environmental Response, Compensation and Liability Act of 1980, as well as to refer to the Hazardous Substance Superfund.

55. T. CHURCH & R. NAKAMURA, *CLEANING UP THE MESS: IMPLEMENTATION STRATEGIES IN SUPERFUND* (The Brookings Institution ed., 1993).

56. *Id.*

doctrines and administrative powers to compel responsible parties to bear most or all of the costs of remediation under the principle.⁵⁷

Since the adoption of the Superfund program in 1980, the EPA has generally used what the Agency calls an "enforcement first" approach, which emphasizes the coercive tools at the Agency's disposal.⁵⁸ The two primary tenets of this approach are the legal doctrine of strict joint-and-several liability and the EPA's authority to tender unilateral administrative orders to compel cleanup using the threat of treble damages.⁵⁹

2. Functional Application of the Polluter Pays Principle

The U.S.'s environmental liability regime under CERCLA defines "polluter" broadly. PRPs at a polluted site can be owners of the polluted site, operators of disposal facilities residing on the polluted site, generators of any hazardous wastes discovered at the polluted site, and transporters of the waste.⁶⁰ The liability of polluters is strict, which means that no negligence or fault need be found to hold the polluter legally responsible for the cleanup expenses. Liability under CERCLA is also retroactive, meaning that it can attach to conduct that occurred before the passage of CERCLA in 1980.⁶¹

The amount of damages paid by any of these parties included under CERCLA's broad definition of "polluter" (the "pays" element of the polluter pays principle) is also broad in Superfund actions. Courts have determined that liability under CERCLA is "joint and several," which allows a claimant to hold any single responsible party liable for all of the cleanup expense, irrespective of that party's actual contribution to the aggregate contamination.⁶² While the availability of joint-and-several liability does not necessarily mean that liability will fall on just one party at a multiparty site, it does allow the EPA to chase those with "deep pockets," regardless of their level of contribution to the contamination.⁶³

The broad embrace of the polluter pays principle also plays a significant role in the negotiation of Superfund cases in the United

57. *Id.*

58. Church & Nakamura, *supra* note 51, at 23.

59. 42 U.S.C. § 9601(32) (establishment of strict, joint and several liability); *id.* § 9606(a) (establishment of the EPA's authority to compel cleanup); *id.* § 9607 (authorizing the award of treble damages against recalcitrant parties).

60. *Id.* § 9607(a).

61. *Id.* § 9607.

62. *See* United States v. Chem-Dyne Corp., 572 F. Supp 802, 810 (S.D. Ohio 1983).

63. *See* CHURCH & NAKAMURA, *supra* note 55, at 43-143 (addressing the EPA's strategy of chasing deep pocket defendants).

States. Church and Nakamura have identified three important roles. First, CERCLA and court determinations have identified a number of potential defendants in Superfund cases, which allows the EPA to proceed selectively against the PRPs against whom it has the strongest case and who have the requisite resources to pay for site remediation.⁶⁴ Second, the broad reach of CERCLA liability allows for the collection of 100 percent of the cleanup costs at sites where at least one "deep pocket" PRP is identifiable.⁶⁵ Third, the nearly undefeatable legal posture of the government promotes inflexibility in its negotiating position vis-à-vis the defendants in CERCLA liability actions.⁶⁶

3. Cleaning Up Superfund Sites Under the Polluter Pays Principle

The EPA uses four methods to compel the polluter to pay for the expenses for the cleanup of a Superfund site. First, the EPA can perform the cleanup work itself and subsequently sue one or more of the PRPs in a cost recovery action.⁶⁷ Second, the EPA can sue identified PRPs in advance of the cleanup process, obtain a judgment of liability against the PRP, and then force the PRP to perform the cleanup work or ensure that costs in a subsequent government-financed cleanup will be recovered pursuant to the judgment.⁶⁸ Third, the EPA can issue a unilateral administrative order to force liable parties to remediate the site, and if the liable parties do not comply with the order and the EPA conducts the cleanup itself, the penalty rendered can be treble damages.⁶⁹ Fourth, the EPA and the PRPs can negotiate a voluntary cleanup agreement, and the government can

64. Church & Nakamura, *supra* note 51, at 25; see generally CHURCH & NAKAMURA, *supra* note 55.

65. Church & Nakamura, *supra* note 51, at 25; see also CHURCH & NAKAMURA, *supra* note 55, at 164.

66. Church & Nakamura, *supra* note 51, at 25.

67. 42 U.S.C. § 9604. For a general discussion of this topic, see *Lautenberg-Durenberger Report on Superfund Implementation: Cleaning Up the Nation's Cleanup Program: Hearings Before the Senate Subcomm. on Superfund, Ocean and Water Protection*, 101st Cong., 1st Sess. (1989); H. BARNETT, TOXIC DEBTS AND THE SUPERFUND DILEMMA (1994); CENTER FOR HAZARDOUS WASTE MANAGEMENT (ILLINOIS INSTITUTE OF TECHNOLOGY), COALITION ON SUPERFUND REPORT (1989); CLEAN SITES, IMPROVING REMEDY SELECTION: AN EXPLICIT AND INTERACTIVE PROCESS FOR THE SUPERFUND PROGRAM (1990); ENVIRONMENTAL DEFENSE FUND, ET. AL., RIGHT TRAIN, WRONG TRACK: FAILED LEADERSHIP IN THE SUPERFUND CLEANUP PROGRAM (1988); D. MAZMANIAN & D. MORELL, BEYOND SUPERFAILURE: AMERICA'S TOXIC POLICY FOR THE 1990S (1992); OFFICE OF TECHNOLOGY ASSESSMENT, COMING CLEAN: SUPERFUND'S PROBLEM'S CAN BE SOLVED (1989); THE ENVIRONMENTAL LAW INSTITUTE, ELI DRAFT ENFORCEMENT REPORT (1989).

68. 42 U.S.C. § 9607.

69. *Id.*

either implicitly or explicitly use coercive alternatives if the parties do not reach an agreement.⁷⁰

4. The Bottom Line on the United States' Environmental Liability Regime and the Polluter Pays Principle

The four methods used to clean up Superfund sites are complementary in practice.⁷¹ Despite the coercive posture of this liability regime, the government generally uses the voluntary agreement option because it decreases enforcement and administrative costs and also reduces the EPA's role in the site remediation process to supervising the cleanup process.⁷² The EPA's generally preferred strategy of working with PRPs is to use its formal coercive powers—the certainty of cost recovery, its unilateral administrative order powers, and its strong legal position in any liability action—to nudge targeted, liable parties into a voluntary cleanup agreement according to the polluter pays principle.⁷³

These voluntary cleanup agreements, however, can arise from contentious negotiations.⁷⁴ Considering the cost of cleaning up a Superfund site—with cleanup costs estimated by the EPA in 1991 at more than \$15.2 billion—the sizeable transaction costs involved in a defendant's resistance to the EPA's demands are slight in comparison with the enormous costs associated with satisfying EPA demands.⁷⁵ Although the expectation of prevailing in such resistance is minimal, particularly in light of CERCLA's incredibly strong joint and several liability regime, some argue that a defendant's resistance at least postpones the foreseeable outcome, perhaps to a time when Congress or the courts will modify the liability regime.⁷⁶ Further, defendants often file third party suits against other deep-pocket PRPs.⁷⁷ Consequently, the significant cost that society incurs in terms of increased litigation and delays in the remediation of Superfund sites is an additional outcome of the Superfund program.⁷⁸

70. 42 U.S.C. § 9622.

71. Church & Nakamura, *supra* note 51, at 26.

72. *Id.*; see also Joel A. Mintz, *Agencies, Congress and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement Effort, 1970-1987*, 18 ENVTL. L. 683 (1988).

73. Church & Nakamura, *supra* note 51, at 26.

74. *Id.* at 27.

75. See J. PAUL ACTION ET. AL., *SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCE OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS* (1992); see also L. DIXON, D.S. DREZNER ET. AL., *PRIVATE-SECTOR CLEANUP EXPENDITURES AND TRANSACTION COSTS AT 18 SUPERFUND SITES* (1992).

76. See Church & Nakamura, *supra* note 51, at 28.

77. *Id.*

78. *Id.*

Despite more than two decades of expensive litigation and administrative confusion, however, it should be emphasized that the Superfund program and the adoption of the polluter pays principle as a remediation tool have generated cleanup activities at many of the major toxic waste sites in the United States.⁷⁹ Although the EPA has expended substantial public funds, many commentators argue that the availability of private funds under the polluter pays principle increases efforts to clean up Superfund sites and allows more protective and permanent remedies to be used than would be available with public resources alone.⁸⁰

B. *The European Community: Embracing a Framework for Polluter Liability*

The European Community has grown equally clear in its call for the adoption and implementation of the polluter pays principle.⁸¹ The European Community is calling on those responsible for pollution to bear the abatement costs, declaring that "environmental protection should not in principle depend on policies which rely on grants or aid and place the burden of combating pollution on the Community."⁸² The European Community believes that allocating environmental waste abatement costs to the private sector will force market prices to represent more closely the social costs of production.⁸³ This, in turn, will tend to encourage pollution abatement "by reducing the consumption of pollution intensive products."⁸⁴

The European Commission (hereinafter the Commission) moved forward in the development of the Community's environmental liability regime by adopting a White Paper that addresses environmental liability.⁸⁵ One of the goals of the White Paper is to determine how the polluter pays principle, the key environmental principle in the European Community, can best be used to promote the Community's environmental policy.⁸⁶

79. *Id.* at 29; see *The Clinton Administration's Proposal for Superfund Reform: Testimony Before the Subcomm. on Water Resources and Environment Comm. on Public Works and Transportation*, U.S. House of Representatives, at 2 (June 9, 1994) (Statement by Carol M. Browner, Administrator, EPA) (Cleanup was complete at more than 220 sites, and another 1,100 were in various stages of remediation. In addition, 3,500 emergency removal actions at 2,700 different sites were completed.).

80. See, e.g., Church & Nakamura, *supra* note 51, at 29.

81. Pearson, *supra* note 29, at 555.

82. Council Recommendation of 3 March 1975 Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, 1975 O.J. (L 194).

83. Pearson, *supra* note 29, at 555.

84. *Id.*

85. European Commission on the Environment, White Paper on Environmental Liability, COM(2000) 66 final, available at http://europa.eu.int/comm/environment/liability/white_paper.htm [hereinafter White Paper].

86. *Id.* at 2-3.

1. Developing the Polluter Pays Principle in European Environmental Liability Regimes

To date, each Member State of the European Union maintains a national environmental liability regime that covers damages to persons and goods.⁸⁷ These national regimes do not, however, address the issue of liability for damage to land, which is a primary reason why economic actors in the European Community merely concentrate on their obligations with respect to the health and property of others rather than on their responsibilities concerning the wider natural environment.⁸⁸ The wider natural environment has traditionally been considered a "public good" for which society in general should remain responsible, rather than a resource that individual parties should bear the responsibility for maintaining.⁸⁹ The introduction of strict liability under the polluter pays principle for polluters of the environment, as proposed in the White Paper, is expected to generate more preventative and cautious conduct on the part of economic actors concerning the unprotected environment.⁹⁰

Discussion on the topic ensued in May 1993, when the Commission published its Green Paper on Remedying Environmental Damage.⁹¹ In response, more than 100 comments were submitted, and Parliament and the Commission held a Joint Public Hearing in November 1993.⁹² "In April 1994, the European Parliament adopted a Resolution, calling on the Commission to submit 'a proposal for a directive on civil liability in respect of [future] environmental damage.'"⁹³ Since that time, the issue of environmental liability has arisen before the Parliament on a number of occasions.⁹⁴ A comprehensive opinion on the Green Paper was issued by the Economic and Social Committee on February 23, 1994; it supported the Commission's potential role in developing an environmental liability regime in Europe under the polluter pays principle.⁹⁵ In early 1997, the Commission determined that a White Paper on environmental liability and the polluter pays principle should be

87. *Id.* at 2.

88. *Id.*

89. *Id.*

90. *Id.*

91. Communication of 14 May 1993 presented to the Council, the Parliament and the Economic and Social Committee, COM(93)47 final.

92. See White Paper, *supra* note 85, at 9.

93. *Id.* (citing European Parliament Resolution of April 20, 1994 O.J. (C 128/165)).

94. *Id.* at 10.

95. *Id.*

prepared, and it began doing so in consultation with Member States, national experts, and interested parties.⁹⁶

2. The Polluter Pays Principle in the European Union's Environmental Liability Regime and Its Anticipated Effects

The Commission asserts that codifying an environmental liability regime represents a way of implementing the main principles of environmental policy enshrined in the European Community Treaty, Article 174(2), which emphasizes the Polluter Pays principle.⁹⁷ The Commission's primary objective, then, focuses on ensuring that the polluter liable for the damage pays for the harm.⁹⁸ The Commission opines that if liable polluters are required to pay for the remediation of their damage, they will reduce their polluting at least to the point where the marginal cost of abatement exceeds the compensation avoided.⁹⁹ Consequently, a polluter pays environmental liability regime should result in the prevention of further damage and in the internalization of environmental costs by the polluter himself.¹⁰⁰ Furthermore, the Commission expects the polluter pays principle to lead to more precaution, resulting in the avoidance of risk and damage, as well as generating additional investment in research and development to improve knowledge and technologies.¹⁰¹

3. What Might the Polluter Pays Principle Cover Under the European Union's Environmental Liability Regime?

The Commission has approached the scope of the regime from two different perspectives: "first, the types of damage to be covered, and second, the activities, resulting in such damage, to be covered."¹⁰²

Above all, environmental damage should be covered by the new environmental liability regime.¹⁰³ Environmental damage constitutes harm caused by activities that are considered harmful to the environment, or damage that is caused by effects that result in traditional damage to the environment, i.e., pollution of air or water.¹⁰⁴

The Commission also proposes that the environmental liability regime cover damage to health and property, damage that it calls

96. *Id.*

97. *Id.* at 11.

98. *Id.* at 9.

99. *Id.*

100. *Id.* at 11-12.

101. *Id.* at 12.

102. *Id.* at 14.

103. *Id.*

104. *Id.* at 9.

"traditional damages."¹⁰⁵ The Commission argues that if the traditional damage is caused by a dangerous activity, it is often caused by the same event that causes environmental damage.¹⁰⁶ The Commission is concerned that if only environmental damage were covered by the new environmental liability regime and traditional damage were left entirely to the Member States, inequitable results might arise.¹⁰⁷ For instance, remedies might be much less available for health damage than for environmental damage caused by the same event. Moreover, human health is an important policy objective in its own right and is closely connected with environmental protection: Article 174(1) of the European Community Treaty states that the Community's policy concerning the environment shall contribute to the pursuit of protecting human health.¹⁰⁸

Nearly all national environmental liability regimes strive to cover activities that carry an inherent risk of causing damage to the environment.¹⁰⁹ Many of these activities are currently covered by Community environmental legislation.¹¹⁰ The Commission determined that to be the most effective, the new environmental liability regime in the European Community should be linked to the relevant European Community legislation on protection of the environment.¹¹¹ If the current European Community legislation does not cover environmental protection, the new environmental liability regime will ensure restoration and encourage compliance with national laws that implement European Community environmental legislation.¹¹²

The Commission proposes that the new environmental liability regime cover, and the polluter pays principle apply to, the following categories of European Community legislation: legislation that governs discharge or emission limits for hazardous substances into water or air; legislation addressing dangerous substances and preparation with a view to protecting the environment; legislation designed to prevent and control the risks of accidents and pollution; legislation regulating the production, handling, treatment, recovery, recycling, reduction, storage, transport, trans-frontier shipment, and disposal of hazardous and other waste; and legislation in the field of the transportation of hazardous substances.¹¹³

105. *Id.* at 15.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 9.

111. *Id.*

112. *Id.*

113. *Id.* at 15-16.

4. The Type of Liability Under the Polluter Pays Principle

The Commission notes that fault-based liability¹¹⁴ may appear more economically efficient than strict liability because fault-based liability prevents abatement costs from exceeding the benefits of the resultant reduced environmental pollution.¹¹⁵ But, recent national and international environmental liability regimes are based on the principle of strict liability because the achievement of environmental cleanup pursuant to the polluter pays principle is better accomplished this way.¹¹⁶ One of the primary reasons for the increased opportunity for achievement is that it is very difficult for plaintiffs to establish fault on the part of the defendant in an environmental liability case.¹¹⁷ Furthermore, the Commission argues, the polluter pays principle demands that the actor whose conduct is inherently dangerous to the environment bear the risk of damage caused by their conduct, rather than the victim of the damage or society at large.¹¹⁸

5. The Bottom Line on the European Union's Environmental Liability Regime and the Polluter Pays Principle

The introduction of liability for damage to the environment, as proposed by the White Paper, is expected to generate a change of attitude in the European Community that should result in an increased level of prevention and precaution.¹¹⁹ The new environmental liability regime aims at making the polluter pay for remediating the damage that he has caused.¹²⁰ Environmental regulation aims at establishing norms and procedures through which the environment is preserved, and it will allow the European Community to challenge potential polluters to comply, or to restore and compensate for, the damage that they have caused according to the polluter pays principle.¹²¹

114. Fault based liability applies when an operator's conduct is intentionally wrongful, is negligent, or is without sufficient care. *Id.* at 16 n.10. Such an act, or omission, may involve non compliance with legal standards or with the conditions of a permit, or may occur in any other form. *Id.*

115. *Id.* at 16.

116. See White Paper, *supra* note 85, at 9.

117. *Id.*

118. *Id.*

119. *Id.* at 2.

120. *Id.* at 11.

121. *Id.*

C. *Japan's Environmental Liability Regime: The "Four Major Lawsuits"*

Like the emergence of liability regimes in the United States, Japan began to develop a comprehensive environmental liability regime in the 1970s.¹²² The primary shortcoming of the early Japanese liability regime was that it often failed to protect the environment and citizens from contamination.¹²³ Japan has made improvements during the past twenty years, however, through a series of court cases known as the "four major lawsuits" that embraced the polluter pays principle as an environmental waste remediation tool.¹²⁴

1. The Japanese Environmental Liability Scheme

The Japanese environmental liability scheme includes two different methods through which individuals may recover. First, the Japanese Civil Code includes common law tort provisions, which entitle individuals to file actions to compel the polluter to bear the responsibility of eliminating waste to the environment.¹²⁵ Second, Japanese environmental pollution laws establish standards that permit third party claims to be filed in the event that an injury has resulted from a violation of the environmental laws.¹²⁶ Neither alternative imposes a limit on the potential award, and both allow for strict liability and joint-and-several liability under the polluter pays principle.¹²⁷

While the national government of Japan generally articulates the policies, standards, and goals to be achieved through environmental laws, local governments are responsible for enforcing and implementing the laws.¹²⁸ The fifty-two prefectures in the

122. ELGA BARTSCH, LIABILITY FOR ENVIRONMENTAL DAMAGES: INCENTIVES FOR PRECAUTION AND RISK ALLOCATION 9 (Mohr Siebeck ed., 1998).

123. Mary Elliott Rollé, Note, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135, 151 (2003).

124. *Id.* (quoting MINPÔ, art. 709 (1898)(Japan)).

125. See BARTSCH, *supra* note 122, at 14.

126. See *id.* ("Liability payments for third-party damages can be claimed under Art. 709 of the Japanese civil code.").

127. See Rollé, *supra* note 123, at 151-52.

128. George F. Curran III, *Pacific Rim Environmental Regulation: A Western Perspective of Several Countries' Environmental Liability Laws*, 3 J. INT'L L. & PRAC. 47, 51 (1994).

country manage and monitor compliance with environmental standards.¹²⁹

2. Flexible Negotiating Process

Although the polluter pays principle imposes penalties for failing to comply with Japan's environmental laws, the Japanese government has traditionally induced compliance through a flexible and cooperative negotiating process that occurs at the local level.¹³⁰ Local governments are empowered to regulate environmental matters by executing private pollution control contracts with potential polluters that reside in their community.¹³¹ Because Japan has embraced the polluter pays philosophy of environmental liability, business owners are encouraged to execute private pollution control agreements with their local governmental units to promote a reduction in pollution levels below the proscribed levels.¹³² Japan's environmental laws also require businesses to submit yearly reports to their local governments, articulating their pollution prevention plans.¹³³

The flexibility of Japan's negotiating process is most evident in the articulation of the country's goal-oriented emission standards. Rather than demanding particular technology-based standards or the use of particular pollution control techniques to achieve environmental standards, as is the practice in the United States, the Japanese system permits industry to select its own method of complying with environmental standards.¹³⁴

3. The Polluter Pays Principle and the Four Major Lawsuits

Although interactive cooperation between the government and industry remains the primary means of ensuring compliance with environmental laws in Japan, civil litigation drawing on the polluter pays principle, as well as tort theories of liability, have proved influential in achieving implementation of environmental standards, as well as compliance with those standards.¹³⁵ Most notably, four public pollution cases were litigated and resolved in favor of the

129. *Id.*

130. *Id.* at 52.

131. *Id.*

132. *Id.*

133. *Id.*

134. Curran, *supra* note 128.

135. *Id.* at 53; see also Nobuo Kumamoto, *Recent Tendencies and Problems of Court Cases on Environmental Protection in Japan*, in ENVIRONMENTAL LAW AND POLICY IN THE PACIFIC BASIN AREA 6 (Ichiro Kato et. al. eds., 1981).

plaintiffs in the early 1970s.¹³⁶ The cases were personal injury and nuisance actions that resulted in awards exceeding ¥1.3 billion.¹³⁷ From this series of litigation also emerged a joint liability doctrine, whereby each defendant can be held jointly and severally liable for damages caused by its operation or business, even if there is no direct causal link between a harmful discharge from the defendant's operation or business and the injuries sustained by the plaintiffs.¹³⁸ Consequently, the polluter pays principle has attained primary importance in the enforcement of Japan's environmental liability regime.

4. Injunctive Relief

Japan also permits injunctive causes of action to prevent the environment from being injured as a complement to the strength of the polluter pays principle.¹³⁹ Injunctive suits in Japan are typically limited to those cases in which there is a probability that the defendant may injure the plaintiff "beyond the limitation of endurance."¹⁴⁰ Japanese tribunals have considered the following factors in determining whether an injunctive suit should proceed: (1) the probability of the character and degree of interests which will be infringed; (2) the standards set in public laws to regulate discharges; (3) the degree of consideration of the opinions stated in the hearings by persons who will be adversely affected; (4) the extent of the exchange of opinions concerning the disposition for compensation and monitoring system for pollution; (5) the thoroughness of effort to identify the best alternative possible to the challenged conduct; (6) the social value and character of publicity about the challenged conduct; (7) the degree and character of injuries caused to the defendant by granting an injunction; and (8) the financial responsibility and investigative ability of the defendant.¹⁴¹

136. [1] Toyama District Court, Showa 46 (1971) 6.30, 22 Kasai Minsha Bessatsu 1 (No. 5.6 (1971)); Nagoya High Court, Kanazawa Branch, Showa 47 (1972), 8.9, 674 Hunrei Jiho 25 (1971); [2] Niigati District Court, Showa 46 (1971), 9.29., 22 Kasai Minshu Bessatsu 1 (No. 5.6); [3] Tsu District Court, Yokkaichi Branch, Showa 47 (1972), 7.24, 23 Kasai Minshu Bessatsu 1 (No. 7) (1972); [4] Kumamoto District Court, Showa 48 (1973), 3.20, 696 Hanrei Jiho 15 (1973).

137. See Curran, *supra* note 128, at 53.

138. *Id.*

139. *Id.*

140. See Kumamoto, *supra* note 135.

141. See Curran, *supra* note 128, at 55-56.

5. The Bottom Line on Japan's Environmental Liability Regime and the Polluter Pays Principle

In November 1993, the Fundamental Act for Environment went into effect in Japan, prescribing basic environmental protection standards that the Japanese government should pursue, as well as accounting for modern global developments in environmental laws, including the polluter pays principle.¹⁴² Japan's recent pursuit of a more effective environmental liability regime under the polluter pays principle represents a new step toward the pursuit of comprehensive environmental protection in Japan, which closely resembles the environmental liability regimes in the United States and in the Member States of the European Community.¹⁴³

IV. WHY HAVE ENVIRONMENTAL LIABILITY REGIMES IN THE UNITED STATES, THE EUROPEAN COMMUNITY, AND JAPAN CONVERGED UNDER THE POLLUTER PAYS PRINCIPLE?

Part III of this Note illustrates the emerging similarities among the environmental liability regimes of the United States, the European Community, and Japan. This alignment of the polluter pays principle has arguably been inspired by a number of sources, representing the diverse cultures, political agendas, human agendas, economic goals, and environmental goals of different countries.¹⁴⁴ This section identifies and examines what are arguably the principal sources that have contributed to the development and harmonization of environmental liability regimes in the United States, the European Community, and Japan under the polluter pays principle. These sources include international treaties, the increasing availability of material information concerning the environment, domestic and foreign laws, nongovernmental organizations, bilateral and multilateral development institutions, and the growing standardization of environmental policies worldwide.

A. *International Treaties, Agreements, and Conventions*

This section highlights certain environmental treaties to demonstrate the manner in which international agreements have

142. *Id.*

143. *Id.*

144. William Prince & David Nelson, *Developing an Environmental Model: Piecing Together the Growing Diversity of International Environmental Standards and Agendas Affecting Mining Companies*, 7 *COLO. J. INT'L. ENVTL. L. & POL'Y* 247, 249 (1996).

arguably contributed to the convergence of environmental liability regimes in the United States, the European Community, and Japan. Because there is often no enforcement mechanism supporting these treaties, international cooperation and effective communication are essential. The polluter pays principle, then, can be disseminated as a fundamental principle underlying environmental liability policies in this open forum of communication and treaty construction by leading environmental nations like the United States. Consequently, international environmental treaties have likely encouraged the review and subsequent implementation of the polluter pays principle in countries like the United States, those in the European Community, and Japan as a result of the process by which international treaties arise.

1. The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area (La Paz Agreement)

The La Paz Agreement¹⁴⁵ establishes general goals for the protection of the environment along the border of the United States and Mexico.¹⁴⁶ The La Paz Agreement is a general outline of the parties' administrative and cooperative efforts, which provide for specific solutions to environmental problems to be resolved through formal annexes when needed.¹⁴⁷ While the La Paz Agreement does not expressly embrace the polluter pays principle, it does illustrate the enormous influence that U.S. environmental policy exerts on its foreign counterparts. Again, this influence can be expended to encourage the use of the polluter pays principle as a remediation tool.

2. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)

The primary concern of the Basel Convention¹⁴⁸ is to ensure that the management of hazardous wastes, particularly the transboundary movement and disposal of such wastes, promotes the protection of

145. Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827.

146. *Id.*

147. *Id.*

148. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. DOC. NO. 102-5 (1991), reprinted in 28 I.L.M. 657 [hereinafter Basel Convention]; see generally INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES (Edith Brown Weiss et al. eds., 1992) (providing a collection of international environmental treaties and primary sources).

human health and the environment to protect countries against the uncontrolled dumping of toxic wastes.¹⁴⁹ The Basel Convention was adopted on March 22, 1989, by 116 countries and the European Economic Community. On May 5, 1992, pursuant to its ratification by forty countries, the Basel Convention was executed and went into effect.¹⁵⁰

While the Basel Convention does not explicitly codify the polluter pays principle, it does expressly support the general principles of international environmental law, which do include the polluter pays principle.¹⁵¹ Again, because of the growing use of international treaties as tools of articulating environmental policy, global recognition of the polluter pays principle is a factor that certainly encourages the United States, the European Community, and Japan to incorporate the principle into their respective domestic environmental liability regimes.

3. The Rio Declaration on Environment and Development (Rio Declaration)

The Rio Declaration¹⁵² arose out of the United Nations Conference on Environment and Development held in Brazil in 1992. The Rio Declaration pursues broad principles of environmental protection. Evidence of the emerging alignment of international environmental regulatory processes, including use of the polluter pays principle, is reflected in a few of the Rio Declaration's twenty seven principles: Principle 10, which affords individuals the right to have access to environmental information and to participate in decision making; Principle 13, which demands that states develop national liability and compensation laws directed at resolving injuries attributable to polluters; Principle 16, which encourages states to internalize environmental costs through the polluter pays principle; and Principle 17, which demands that states establish a process for assessing the environmental effects of proposed undertakings.¹⁵³

The Rio Declaration represents one of the more prominent multilateral expressions of international support for the polluter pays principle. It is important that the Declaration highlights some of the environmental trends that this Note argues have encouraged the adoption of the polluter pays principle: open access to information, citizen participation, environmental assessments, and liability and

149. Basel Convention, *supra* note 148, pmbl.

150. Prince & Nelson, *supra* note 144, at 253.

151. David P. Fidler, *Challenges to Humanity's Health: The Contributions of International Environmental Law to National and Global Public Health*, 31 ENVTL L. REP. 10048, (Jan. 2001).

152. *Rio Declaration*, *supra* note 10.

153. Batt & Short, *supra* note 11, at 246-48.

compensation schemes for pollution damage pursuant to the polluter pays principle.¹⁵⁴ In sum, the Rio Declaration, like the La Paz Agreement and the Basel Convention, reflects an emerging consensus of international support for the polluter pays principle that likely bears significantly on a country's decision to adopt the principle.

B. *Availability of Information*

The polluter pays principle is arguably a mainstay in U.S., European Community, and Japanese environmental liability regimes because of the increasing availability of material information concerning effective environmental liability models as well.¹⁵⁵ Most notably, Canada, Japan, Australia, and many European countries have structured their respective environmental liability regimes, and have centered them on the polluter pays principle, by consulting the environmental liability model of the United States.¹⁵⁶ Many components of a developed nation's regulatory programs are available either in hard copy, facsimile, in CD-ROM format, or via the Internet.¹⁵⁷ Environmental regulatory personnel in nations developing their regulatory models do access, "in an unprecedented way," materials to inform their policy decisions.¹⁵⁸ Thus, the emergence of globalized information networks that provide access to environmental regulatory models and information is likely a factor bearing on the decisions of developed nations, like those of the European Community and Japan, to structure their respective environmental liability regimes, at least in part, on the polluter pays principle.

C. *Extraterritorial Application of U.S. Environmental Laws*

This section explores three aspects of U.S. law that also arguably influence the development of environmental standards in the European Community and Japan by regulating the activities of U.S. companies abroad.

154. Prince & Nelson, *supra* note 144, at 304.

155. *Id.* at 262.

156. *Id.* at 263.

157. *Id.* at 262.

158. *Id.* at 263.

1. U.S. Environmental Laws

Generally, U.S. environmental laws do not apply extraterritorially. Some scholars have asserted that the notion of sovereignty makes it difficult, even undesirable, for a state to afford its laws extraterritorial breadth.¹⁵⁹ Application of the National Environmental Protection Act and the polluter pays principle to the conduct of U.S. corporations abroad, as well as to U.S. foreign military installations, however, is permissible because application of U.S. laws to U.S. interests in foreign nations is not considered extraterritorial.¹⁶⁰ Enforcing U.S. environmental laws abroad merely constitutes the straightforward application of U.S. laws on facilities, activities, and operations that are under substantial control by a U.S. interest.¹⁶¹ Consequently, the European Community and Japan have observed the effectiveness of the polluter pays principle in remediating environmental contamination on their own soil.¹⁶² This circumstance has arguably exerted tremendous influence on the formation of environmental liability regimes in these countries, thereby encouraging employment of the polluter pays principle.

2. Securities and Exchange Commission Environmental Disclosures

The U.S. Securities and Exchange Commission (SEC) imposes certain disclosure obligations through registration-statement and prospectus-disclosure requirements for companies registering securities for sale or for issuance in business transactions under the Securities Act of 1933, and through periodic and other reporting requirements for companies under the Securities Exchange Act of 1934.¹⁶³ Again, because SEC disclosure requirements apply to the activities of foreign subsidiaries, foreign governments and regulators observe firsthand, within their own national boundaries, the effectiveness and influence of the polluter pays principle in eliminating environmental waste.

For instance, Regulation S-K requires that reporting companies describe the scope of disclosure for certain information in documents such as the company's registration for the offering of its securities and a company's 10-K annual report.¹⁶⁴ Regulation S-K also requires disclosure related to environmental matters. Item 101, titled

159. JAMIE CASSELS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* 273 (1993).

160. *Id.*

161. *Id.*

162. See Prince & Nelson, *supra* note 144.

163. 15 U.S.C. §§ 77a-77aa, 78a-7811 (1994).

164. 17 C.F.R. § 229.10 (1993).

“Description of Business,” regulates the disclosure of the material effects of compliance with environmental provisions. In part, Item 101 reads:

Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.¹⁶⁵

Item 103, titled “Legal Proceedings,” requires the disclosure of “any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject.”¹⁶⁶

Item 303, titled “Management’s Discussion and Analysis of Financial Condition and Results of Operations” (MD&A), is a set of guidelines for disclosing liquidity, capital resources, results of operations, and other information necessary to an understanding of a registrant’s financial condition, changes in financial condition, and results of operations.¹⁶⁷ The SEC has issued an interpretive release to determine MD&A disclosure obligations and to highlight Item 303’s application to environmental matters.¹⁶⁸

The SEC also comments on a reporting company’s accounting presentations pursuant to Regulation S-X, addressing the disclosure of environmental contingencies in accounting presentations.¹⁶⁹ The SEC currently requires that a reporting company independently evaluate environmental liability expenditures and claims for recovery.¹⁷⁰

Again, foreign subsidiaries of U.S. corporations that remain subject to the disclosure requirements of the SEC arguably sit as experiments for foreign governments developing their environmental liability regimes. As the SEC imposes and polices its requirements, foreign regulators and policymakers observe the successes and shortcomings of U.S. environmental regulation. Consequently, the extraterritorial application of U.S. environmental laws likely exerts significant influence on foreign regulators, including those in the

165. 17 C.F.R. § 229.101(c)(xii) (1995).

166. 17 C.F.R. § 229.103 (1995).

167. 17 C.F.R. § 229.303(a) (1995).

168. Management’s Discussion and Analysis of Financial Condition and Results of Operations, 54 Fed. Reg. 22427 (May 24, 1989); Prince & Nelson, *supra* note 144, at 268.

169. Prince & Nelson, *supra* note 144, at 269.

170. *Id.*

European Community and in Japan. As a result, the effectiveness and efficiency of the polluter pays principle is highlighted firsthand.

D. Nongovernmental Organizations (NGOs)

As a result of the growing public activism and environmental awareness among NGOs,¹⁷¹ nations throughout Europe and Asia have integrated the polluter pays principle into their environmental agendas.¹⁷² Throughout the 1990s, environmental NGOs with substantial international and domestic influence developed highly sophisticated legal support systems, captured the advantages of information technologies, and marketed themselves and their positions effectively.¹⁷³ One scholar has observed that “[t]he international environmental movement is having a growing impact on national and international politics, and there is little evidence to suggest that the movement’s momentum will slow in the near future.”¹⁷⁴

NGOs often reference Principle 10 of the Rio Declaration, asserting that the Principle formally empowers them as public participants in environmental protection.¹⁷⁵ NGOs are increasingly empowered by a number of other sources as well. For instance, the World Bank allows for NGO participation, as do most multilateral development agencies.¹⁷⁶ If potential borrowers resist the disclosure of environmental impact assessments to NGOs, the Bank and other development agencies often withdraw from any further participation in the project.¹⁷⁷

As highlighted in subsection B above, information is the source of NGO power, and NGOs are using available information in “unprecedented and extraordinarily effective ways” to promote environmental interests, including the polluter pays principle.¹⁷⁸ For instance, NGOs have access to substantial information concerning a

171. NGOs are scientific, professional, business, or public interest organizations, which are neither affiliated with, or under the direction of, a government. See, e.g., Prince & Nelson, *supra* note 144, at 276 (describing the power sources and agendas of environmental NGOs).

172. See *id.* at 277 (“At the international level, NGOs are growing in number, constituencies, and influence.”).

173. *Id.* at 276.

174. Sheldon Kamieniecki, *Emerging Forces in Global Environmental Politics*, in ENVIRONMENTAL POLITICS IN THE INTERNATIONAL ARENA: MOVEMENTS, PARTIES, ORGANIZATIONS, AND POLICY 3 (Sheldon Kamieniecki ed., 1993).

175. See Batt & Short, *supra* note 11, at 246 (Principle 10 gives individuals the right at the nation-state level to have access to environmental information, thus allowing people to intelligently participate in decision making.).

176. Prince & Nelson, *supra* note 144, at 278.

177. *Id.*

178. See *id.* (“Information is the source of NGO power.”).

company's worldwide environmental policies.¹⁷⁹ NGOs consult reporting companies' SEC disclosures, as addressed in subsection C above, and often hyperlink to U.S. SEC EDGAR files on their homepages so that an inquirer may review SEC-required environmental disclosures of publicly held companies.¹⁸⁰

This empowerment via access to information has allowed NGOs to move from merely articulating environmental policy to that of formulating and implementing policy.¹⁸¹ Arguably, therefore, the increasing participation of NGOs in the development of environmental liability regimes has played an equally significant role in encouraging and demanding the adoption of the polluter pays principle as a remedial tool to combat pollution in the United States, the European Community, and Japan.

E. *Bilateral and Multilateral Development Institutions*

International investments are increasingly tied to bilateral and multilateral lending and insurance requirements, which often require environmental evaluation and protective investments in the project, as well as environmental covenants in the loan and insurance package.¹⁸² Many of these lending arrangements include covenants requiring adoption of the polluter pays principle to remedy any environmental problems that arise from use of the lending proceeds.¹⁸³ Consequently, proliferation of the polluter pays principle as an effective tool for environmental waste remediation is promoted by development institutions around the world as well.

In February 1980, the principal development banks adopted a policy statement on the need for environmental protection considerations in a project titled, "Multilateral Development Banks' Declaration on Environmental Policies and Procedures Relating to Economic Development."¹⁸⁴ Since 1980, the major multilateral and

179. *Id.* at 279.

180. *Id.*

181. *Id.*; see also A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61, 63 (1992) ("NGOs became permanent players in the regulatory game with the capacity to influence all phases of policy, and NGO participation in law making has now become a political theory.")

182. Prince & Nelson, *supra* note 144, at 279.

183. *Id.*

184. Declaration of Environmental Policies and Procedures Relating to Economic Development, Feb. 1, 1980, 19 I.L.M. 524. Signatories were the African Development Bank, the Arab Bank for Economic Development, the Asian Development Bank, the Caribbean Development Bank, the Inter-American Development Bank, the World Bank, the Commission of the European Communities, the Organization of American States, the United Nations Development Programme, and the United Nations Environment Program. *Id.*

bilateral development institutions have developed and adopted environmental policies and procedures.¹⁸⁵ Two examples highlight the importance that bilateral and multilateral development institutions have played in the emergence of the polluter pays principle as a core facet of environmental liability regimes in the United States, the European Community, and Japan.

1, The World Bank

The International Bank for Reconstruction and Development, generically referred to as the World Bank, is headquartered in Washington, D.C. The International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency, and the International Development Association, together with the World Bank, comprise the World Bank Group. The World Bank's environmental requirements are described in a three volume series called the Sourcebook.¹⁸⁶ The Sourcebook emphasizes the attention to be given to major projects that have the potential to generate negative environmental effects.¹⁸⁷ The World Bank's assessment policy provides that "[t]he purpose of Environmental Assessments is to ensure that the development options under consideration are environmentally sound and sustainable, and that any environmental consequences are recognized early in the project cycle and taken into account in project design."¹⁸⁸

Considering the developments in environmental technology, regulatory and institutional development, and scientific advances, the World Bank is interested in providing the most relevant review procedures possible.¹⁸⁹ These procedures now include consideration of the host country's environmental waste remediation standards, with an emphasis on the adoption of the polluter pays principle as a factor bearing on a favorable review.¹⁹⁰ Furthermore, as highlighted in subsection D above, the World Bank is lobbied with increasing success by sophisticated NGOs that often require adherence to the Polluter Pays principle as the chief mechanism for site remediation.¹⁹¹ And, because most, if not all, multilateral and

185. Prince & Nelson, *supra* note 144, at 280.

186. *Policies, Procedures, and Cross-Sectoral Issue, TP-139*, in 1 WORLD BANK ENVIRONMENTAL ASSESSMENT SOURCEBOOK (1991); *Sectoral Guidelines, YP-140*, in 2 WORLD BANK ENVIRONMENTAL ASSESSMENT SOURCEBOOK (1991); *Guidelines for Environmental Assessment of Energy and Industry Projects*, in 3 WORLD BANK ENVIRONMENTAL ASSESSMENT SOURCEBOOK (1991).

187. Prince & Nelson, *supra* note 144, at 280.

188. WORLD BANK, WORLD BANK OPERATIONAL MANUAL, OPERATIONAL DIRECTIVE (1989).

189. Prince & Nelson, *supra* note 144, at 281.

190. *Id.*

191. *Id.*

bilateral lending and insurance institutions benchmark their environmental standards against those used by the World Bank, host countries petitioning for lending and insurance services are confronted in every direction with adoption of the polluter pays principle.¹⁹²

Consequently, the polluter pays principle has grown in popularity as an effective tool for environmental site remediation because those nations that participate in the financing process through monetary contributions and project administration (i.e., the United States, Member States of the European Community, and Japan) often support the tenets of the lending process and formulate their domestic environmental policies accordingly.

2. The Overseas Private Investment Corporation

The Overseas Private Investment Corporation (OPIC) is a for-profit agency of the U.S. government that finances various projects throughout the world.¹⁹³ OPIC's mandate is to facilitate economically productive and environmentally sound U.S. private investment in developing countries and emerging free market economies.¹⁹⁴ OPIC currently operates in 140 countries, including the Member States of the European Community and Japan.¹⁹⁵ Because of OPIC capital available for investment in economies around the world, the governments of many potential beneficiaries likely adjust their environmental policies accordingly to attract capital infusion, which arguably includes adoption of the polluter pays principle.

Since 1995, OPIC has been subject to Section 117 of the U.S. Foreign Assistance Act,¹⁹⁶ which requires OPIC to "prepare and take fully into account an environmental assessment of any proposed program or project under this chapter significantly affecting the environment of any foreign country."¹⁹⁷ OPIC's environmental review requires understanding the process involved in the proposed project, waste material produced, waste treatment and disposal method, worker health and safety standards, citing issues, host country environmental requirements, and overall short- and long-term

192. *Id.*

193. *Id.* at 284.

194. *Id.* at 284-85.

195. *Id.* at 281.

196. Exec. Order No. 12,114, 3 C.F.R. 356 (1979), *reprinted in* 42 U.S.C. § 4321 (1994 & Supp. 1996).

197. *Id.*

environmental effect.¹⁹⁸ Furthermore, OPIC strongly considers the position of relevant NGOs in rendering their investment decisions.¹⁹⁹ The mere violation of environmental requirements can put an OPIC loan in technical default.²⁰⁰ Thus, because OPIC investments must comply with World Bank standards, and because World Bank standards often require use of the polluter pays principle, the prevalence of OPIC participation in financing projects around the world has likely increased the awareness of the principle as an important environmental remediation tool in the European Community and Japan.

F. *Standardization of Environmental Policies Worldwide*

Various industry practices, policies, and guidelines have evolved into recognized international environmental standards.²⁰¹ This section describes one of these practices, as well as its influence on the proliferation of the polluter pays principle, as a mechanism for achieving efficient remediation of environmental waste.

1. ISO 9000/14000

The International Organization for Standardization (ISO) was organized in 1947 to encourage the development of standardization to facilitate the efficient exchange of goods and services.²⁰² In 1987, the ISO published a series of quality standards known as the ISO 9000 Series that have been adopted in more than seventy countries and are the most widely accepted product quality standards worldwide.²⁰³ In 1991, the ISO formed the Strategic Advisory Group on the Environment (SAGE) to review the adoption of standardized environmental management practices as well.²⁰⁴ Based on the SAGE review, the ISO established Technical Committee 207 (TC 207) to establish new standards for environmental management systems.²⁰⁵ TC 207 was later designated as the ISO 14000 Series, and it has worked on developing international environmental standards in six areas: environmental management systems, environmental performance evaluation, environmental auditing, environmental labeling, life cycle analysis, and terms and definitions.²⁰⁶

198. Prince & Nelson, *supra* note 144, at 286.

199. *Id.*

200. *Id.* at 287.

201. *Id.* at 290.

202. *Id.*

203. *Id.*

204. *Id.* at 291.

205. *Id.*

206. *Id.*

The ISO 14000 was partly catalyzed by the proliferation of different environmental standards worldwide.²⁰⁷ As a consequence of the external pressures addressed in this section, these different environmental standards have, to a significant extent, been eliminated by the convergence of environmental policies among leading economic nations. In particular, the United States, Member States of the European Community, and Japan have developed and adopted the polluter pays principle as a core component of their country's environmental liability regimes. For instance, the American National Standards Institute, which is the U.S. representative before the ISO, has historically encouraged the polluter pays principle.²⁰⁸ Similarly, the European Union had adopted as its environmental management tool the European Eco-Management and Audit Scheme for Member States, which also promotes the advantages of the polluter pays principle.²⁰⁹

In sum, international treaties, the increasing availability of material information concerning the environment, domestic and foreign laws, nongovernmental organizations, bilateral and multilateral development institutions, and the growing standardization of environmental policies worldwide have greatly contributed to the adoption and proliferation of the polluter pays principle in the United States, the European Community, and Japan.

V. CONCLUSION

International environmental agendas, practices, standards, and treaties are becoming more and more prevalent globally. As this Note illustrates, it is a challenge to read a law review article addressing environmental liability without also reading about NGOs, and to read about NGOs without also reading about multilateral lending and development practices, and to read about multilateral lending practices without also coming across the ease with which information can be discovered, and so on. These elements, as well as the others addressed in this Note, are arguably informing an environmental model that greatly influences regulatory bodies at the international, domestic, and local levels.

Adoption of the polluter pays principle in the United States, in the European Community, and in Japan is tremendously important because economically advanced countries often exert positive pressure on developing countries through project finance,

207. *Id.*

208. *Id.* at 290.

209. *Id.* at 291.

international treaties, and foreign relations generally. Because the polluter pays principle has proved productive and efficient in these countries, the principle, and the support for a cleaner environment, can be encouraged through their efforts with developing countries as well.

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