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W(h)ither Goes the EC Proposed Directive on Civil Liability for Waste

*Michael Scott Feeley**
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INTRODUCTION

Europe is awash in waste. The European Community (EC or Community) is an engine producing billions of tons of industrial, consumer, and organic waste every year.¹ The EC's population of over 340 million people inhabits an area approximately one quarter the size of the United States, yet the infrastructure and regulatory regime necessary to handle discarded matter varies from country to country.² The EC's Member States have entered into a free trade compact to eliminate internal trade barriers. Inconsistent waste laws and environmental enforcement among Member States, however, pose a challenge to the economic integration of the Community.

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¹ It has been estimated that waste amounting to 2.2 billion metric tons is generated in Europe each year with clean-up costs running into the hundreds of billions of dollars. See Joel Havemann, *Europe's Toxic-Waste Problems Mount*, PHILADELPHIA INQUIRER, June 23, 1991, at 5-C. In fact, the European waste management market is expected to be valued at over \$60 billion by the year 2000. *European Waste Management Market Seen Topping \$60 Billion by 2000*, INTEGRATED WASTE MANAGEMENT, Oct. 2, 1991, at 1.

² In some areas, however, there is disposal capacity for only 50 percent of the waste produced. The shortage of disposal sites has led to illegal disposal and the increased exportation of waste. Illegal dumping has, in many places, become the rule instead of the exception. For example, officials in Italy estimate that producers dispose of 80 percent of all hazardous waste illegally. Paul Luiki & Dale Stephenson, *European Community Waste Policy: At the Brink of a New Era*, Int'l Env't Daily (BNA), July 17, 1991, at 403.

Divergent approaches to environmental protection in Member States could lead to development of *de facto* non-tariff trade barriers which could distort competition.³ States with lenient waste laws or enforcement policies, in effect, would grant their waste producers an economic advantage over producers located in states with stricter approaches. The advantage would arise from the lower liability risks incurred by producers, carriers, and disposal facilities in the more permissive states as well as from lower operating costs. These cost savings could be internalized and used to promote economic growth, or passed on to consumers in the form of lower prices. Many in the EC also fear that an inconsistent waste structure would encourage Member States to shift production and disposal, transforming those countries receiving waste into "Toxic States."⁴

Furthermore, the environmental devastation of the dissolved Soviet Empire provides a stark warning to the Community of the dangers in continuing to operate without a comprehensive approach to waste.⁵ The powerful Green parties of the EC are seizing upon the environmental tragedy of eastern Europe as a strong rallying point to enact an effective waste regulatory system, as the Community envisioned two decades ago.

The EC has long been aware of the waste issue both in eastern Europe and in the Community. The EC first focused on the problem of waste with its adoption of Council Directive 75/442, the Framework Waste Directive, in 1975.⁶ Nonetheless, few productive efforts to develop a waste regulatory regime occurred until the Seveso incident in 1983⁷ and the Sandoz

³ *Id.* at 404.

⁴ *Id.*

⁵ For example, one source reports that in Czechoslovakia, 70 percent of the rivers are badly polluted; in Poland, half of the cities and 35 percent of industries do not treat sewage and other waste; in former East Germany, 15,000 hazardous waste sites have not yet been evaluated and a third of the rivers and 9,000 lakes are biologically dead; and in Hungary, where 44 percent of sewage treatment plants only provide crude treatment, 700 of the country's wells are contaminated. See Michael Parrish, *E. Europe Seeks Way to Pay Environmental Cleanup Tab*, L.A. TIMES, July 12, 1991, at 1.

⁶ Council Directive 75/442, 1975 O.J. (L 194) 47 [hereinafter Framework Directive].

⁷ The Seveso incident actually happened in 1976, when a chemical plant in Seveso, Italy exploded and released large quantities of dioxin causing vast air pollution and contaminated waste. In March 1983, however, 41 barrels of the dioxin-contaminated waste from Seveso were discovered in France, having been transported without detection. The incident showed how easily hazardous waste could be transported across international borders without detection. See F. James Handley, *Hazardous Waste Exports: A Leak in the*

spill⁸ in 1986. The Seveso incident concerned the covert shipment of dozens of barrels of waste contaminated with dioxin from Italy to France.⁹ The discovery of the waste stockpiled in a French barn caused a popular outcry in the Community and resulted in the enactment of the Council Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste.¹⁰ The Sandoz spill involved the accidental discharge of an enormous amount of toxic chemicals from a Swiss warehouse into the Rhine River in 1986. The spill contaminated the Rhine and adjacent properties in Switzerland, France, Germany, and the Netherlands.¹¹ The graphic coverage of the accident fueled public awareness of potential and actual environmental damage.¹²

The combination of the sheer volume of waste and inadequate infrastructure, the scheduled economic integration of the Community, the rise of the Green parties, the experience of the Soviet bloc, and the publicized environmental catastrophes prompted an effort to develop and harmonize an environmental legal strategy, including a waste management regulatory structure.¹³ In 1987, the Single European Act (SEA)¹⁴ amended the Treaty Establishing the European Economic Community (EEC Treaty).¹⁵ The SEA articulates the Community's environmental objectives in Article 132r: 1) to preserve, protect, and improve the quality of the environment; 2) to contribute toward the protection of

System of International Legal Controls, 19 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,171, 10,172 (1989); see generally THOMAS WHITESIDE, *THE PENDULUM AND THE TOXIC CLOUD* (1979).

⁸ See generally Aaron Schwabach, *The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution*, 16 *ECOLOGY L.Q.* 443 (1989).

⁹ See Handley, *supra* note 7, at 10,172.

¹⁰ See *id.*; Teresa A. Wallbaum, *America's Lethal Export: The Growing Trade in Hazardous Waste*, 1991 *U. ILL. L. REV.* 889, 905 n.177 (1991).

¹¹ See Schwabach, *supra* note 8, at 443-48.

¹² *Id.* at 452-53.

¹³ Public awareness of the importance of confronting environmental issues is sweeping the globe, particularly in the more affluent nations. See, e.g., Michael S. Feeley, *Reclaiming the Beautiful Island: Taiwan's Emerging Environmental Regulation*, 27 *SAN DIEGO L. REV.* 907 (1990).

¹⁴ Single European Act, 1987 O.J. (L 169) 1 [hereinafter SEA]. The major goal of the Act is to complete the EC's internal market by December 31, 1992. See George A. Bermann, *The Single European Act: A New Constitution for the Community*, *COLUM. J. TRANSNAT'L L.* 529, 535-38 (1989). For a description of the SEA's impact on the EC legislative process, see Michael S. Feeley & Peter M. Gilhuly, *Green Law-making: A Primer on the European Community's Environmental Legislative Process*, 24 *VAND. J. TRANSNAT'L L.* 653, 672-76, 679-83 (1991).

¹⁵ TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

human health; and 3) to ensure a prudent and rational utilization of natural resources.¹⁶

Furthermore, Article 130r defines the basic triad principles—"polluter pays," proximity, and prevention—on which Community environmental action should be based. The "polluter pays" principle states that those responsible for the creation of the waste should pay for the harm caused by it; the proximity principle requires waste to be disposed of at the facility closest to its place of origin; and the preventive principle asserts that action should be taken to prevent environmental harm, not merely to remediate the injury after it has occurred.¹⁷ These principles are not universally supported and remain the subject of continuing political negotiations as to their appropriateness, meaning, and extent, yet they are the centerpiece of the Community's attempt to craft a waste management regulatory regime.

Incorporating these principles, the European Commission has developed the proposed Directive for Civil Liability for Damages Caused by Waste (1989 Proposal) as an integral part of the EC's comprehensive approach to waste,¹⁸ but the Proposal is languishing under widespread criticism and remains in legislative limbo. It is unclear whether the 1989 Proposal is permanently shelved or will be resurrected in the coming year. Almost twenty years have elapsed since the Community mandated the enactment of a waste strategy; the uncertain fate of the 1989 Proposal illustrates that the Community has yet to forge a consensus on how to regulate waste.

The 1989 Proposal, as amended, is a case study on how the lack of agreement on fundamental environmental legal principles can paralyze the enactment of a common approach to waste management. This Article seeks to cull out the conflicting positions of the various players in order to better understand the political, legal, and policy choices posed by the proposed directive. To accomplish this task, Part I sets forth the political system in

¹⁶ *Id.* at art. 132r.

¹⁷ EEC Treaty Article 130r states: 1) "that preventive action should be taken;" 2) "that environmental damage should as a priority be rectified at the source;" and 3) "that the polluter should pay." *Id.* at art. 130r.

¹⁸ The proposed directive was initially proposed in 1989. Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1989 O.J. (C 251) 3 [hereinafter 1989 Proposal]. The 1989 Proposal was amended in 1991. Amended Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1991 O.J. (C 192) 6 [hereinafter Amended Proposal].

which the proposed directive is shaped by briefly presenting the background of the EC, describing its major institutions, its legislative process, and its forms of legislation. Part II describes the historical development, legal basis, and significant provisions of the 1989 Proposal, and explores the major issues targeted by Community commentators. Special attention is accorded to the positions taken by the Select Committee of the European Communities appointed by the British House of Lords, as the United Kingdom will hold the presidency of the Council for the second half of 1992 when the fate of the proposed directive may be decided. Part III discusses the proposed amendments to the 1989 Proposal, which the Commission released in 1991 after evaluating the comments on the proposed directive, including the views of the European Parliament. The Article concludes with a reflection on the uncertain future of the proposed directive.

I. OVERVIEW OF THE EC POLITICAL STRUCTURE

A. *Background of Community Law*

The Community is a supra-national, treaty-based organization,¹⁹ composed of twelve Member States.²⁰ The EC is an economic community whose main purpose is the establishment of a common market which would allow goods, services, and capital

¹⁹ The European Community is actually three communities. It operates under three separate treaties: the EEC Treaty; the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY; and the TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY. Although each treaty established a separate, autonomous grouping of countries for a particular purpose of economic integration, the EEC Treaty is by far the most important because it provides for the establishment of a general common market and the establishment of several common institutions.

Membership in these three treaty groups overlaps. The adoption of the Merger Treaty in 1965 effectively combined the three separate communities created by these treaties. JOSEPHINE STEINER, *TEXTBOOK ON EEC LAW* 3 (1988); see Treaty Establishing a Single Council and a Single Commission of the European Communities of April 8, 1965, 1967 O.J. (L 152) 2 [hereinafter Merger Treaty]. Today, the main treaty of importance, governing Community affairs generally, and environmental policy specifically, is the EEC Treaty. See Thomas H. Reynolds, *Introduction to the European Economic Community: Its History and Institutions*, 8 *LEGAL REFERENCE SERVICES Q.* 3/4, 1988, at 7, 12-13. Thus the terms "European Community" and "European Economic Community" are often used interchangeably.

²⁰ The six original Member States are Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. Subsequently, six other countries joined the Community: Denmark, Ireland, and the United Kingdom (1972); Greece (1979); and Portugal and Spain (1984). See Stefan A. Riesenfeld, *The Single European Act*, 13 *HASTINGS INT'L & COMP. L. REV.* 371, 371 (1990); EEC TREATY art. 227.

to move freely across its Member States' national borders.²¹ The final steps towards realization of this "free market" ideal are expected by the end of 1992.²²

Community law is "a peculiar mix of international and domestic law."²³ In areas where the EEC Treaty provides a legal basis, Community law is supreme over national law, and no Member State may enact any statute that deviates from EC law.²⁴ Individual states may enact their own national legislation whenever the EC has not addressed the relevant area at the Community level.²⁵ Even when the EC has adopted Community standards, they are usually in the form of directives, which require Member States to enact implementing legislation giving effect to the directives.²⁶ Consequently, the vast majority of EC law, including environmental law, exists in the form of the national legislation of individual Member States. These states have principal responsibility for implementing and enforcing the Community policies encompassed therein.²⁷

B. *Major Institutions of the EC*

The EC, like many political systems, is composed of several interactive parts. Each constitutive element has its own peculiar function in the complex legislative process. The major institutions

²¹ ECKARD REHBINDER & RICHARD STEWART, ENVIRONMENTAL PROTECTION POLICY 15 (Mauro Cappelletti et al. eds., 1985). Essentially this requires the creation of a customs union and the abolition of all restrictions on the movement of the factors of production. Mark L. Jones, *Symposium 1992: Doing Business in the European Internal Market, Putting "1992" in Perspective*, 9 Nw. J. INT'L L. & BUS. 463, 466 (1989). These goals are encompassed in the four freedoms sought under the EEC Treaty: free movement of goods; persons; services; and capital. EEC TREATY art. 8a.

²² A white paper drafted by the European Commission calls for adoption of nearly 300 legislative measures by the end of 1992 aimed at achieving a common market. See generally *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85) 310 final. These measures have given rise to slogans like "Project 1992" and "EC 1992." See generally, C. Ehlermann, *The "1992 Project": Stages, Structures, Results and Prospects*, 11 MICH. J. INT'L L. 1097, 1098 (1990).

²³ CONOR QUIGLEY, *EC Law: Litigation and the Environment*, in THE EUROPEAN ECONOMIC COMMUNITY: PRODUCTS LIABILITY RULES AND ENVIRONMENTAL POLICY 288 (Patrick E. Thieffry & G. Marc Whitehead eds., 1990).

²⁴ See generally STEINER, *supra* note 19, at 30-39 (discussion of Member States adoption of principle of EEC law supremacy); Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 3 E.C.R. 629 (1978); EEC TREATY art. 5.

²⁵ See generally Auke Haagsma, *The European Community's Environmental Policy: A Case Study in Federalism*, 12 FORDHAM INT'L L. J. 311 (1989).

²⁶ See *infra* Section I(D).

²⁷ See *infra* Section I(D).

of the EC, as set out in the EEC Treaty, are the European Commission (Commission), the Council of the European Community (Council), the European Parliament (Parliament), and the European Court of Justice (ECJ).²⁸ To comprehend the proposed waste directive, one must understand these institutions and how the legislative drafting process operates.

1. The European Commission

The Commission, which is headquartered in Brussels, essentially acts as the executive branch of the EC.²⁹ The Commission plays an extremely important role in the legislative process. It is responsible for proposing virtually all new legislation to the Council.³⁰ In fact, the Commission drafted the proposals for the 1992 program.³¹ In proposing new legislation, the Commission will typically consult interested parties, including government officials, private parties, and trade associations although there is no formal process that requires it to do so.³² Additionally, under the "cooperation procedure,"³³ the Commission has the opportunity to re-examine proposals following review by Parliament. Finally, the Commission always retains the ultimate discretion to amend or withdraw any proposal under consideration at any time during the legislative process prior to final passage.³⁴

The Commission is responsible for ensuring "the proper functioning and development of the common market."³⁵ The Com-

²⁸ A fifth noteworthy EC institution is the Economic and Social Committee (ESC). It serves as an advisory body to the Council and Commission pursuant to EEC Treaty Article 4(2). The ESC is appointed by the Council from three general groups: 1) employers; 2) workers (primarily consisting of trade unionists); and 3) others (including representatives of farmers, consumers, and professionals). Under some circumstances the ESC has the right to issue its opinion on Community proposals prior to enactment by the Council. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 36 (Tony Honore & Joseph Raz eds., 1990).

²⁹ See generally *id.* at 8-13.

³⁰ See EEC TREATY art. 155; AUDREY WINTER ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* 25, 27-28 (2d ed. 1989). The Council may, however, request certain proposals it deems desirable. EEC TREATY art. 152.

³¹ See Eleanor Roberts Lewis & Mark Adam Goldstein, *The Effect of EC 1992 on U.S. Companies: A U.S. Government Perspective*, 3 *TEMPLE INT'L & COMP. L.J.* 153, 156 (1989).

³² WINTER ET AL., *supra* note 30, at 42, 44.

³³ See *infra* Section I(B). For a complete discussion of the development of EC legislation and the various procedures utilized therein, see Feeley & Gilhuly, *supra* note 14, at 671-76 (1991).

³⁴ WINTER ET AL., *supra* note 30, at 45.

³⁵ EEC TREATY art. 155.

mission serves as a watchdog over the Member States to ensure their compliance with the EEC Treaty and Community law. When a Member State fails to comply, the Commission may open informal discussions and issue instructions for compliance to the offending Member State.³⁶ The Commission may also issue a "reasoned opinion" stating the alleged violation, reasons for the Commission's conclusions, and deadlines for compliance.³⁷ Finally, the Commission may request that the ECJ issue a final determination of Treaty or Community law regarding the alleged violation.³⁸

2. The Council

The Council of the European Communities³⁹ is the main decision-making body of the EC, having the final vote on all legislation. It adopts, revises, or rejects the proposals of the Commission. The Council is composed of one voting representative from each Member State, each directly representing the interests of its own nation.⁴⁰ Member States do not designate a particular individual as their voting representative, therefore the individual voting at any given meeting may vary depending on the subject under consideration.⁴¹ One representative serves as Council president.⁴² The Council operates under its own rules of procedure,⁴³

³⁶ Janet Zagorin, *Europe 1992: Navigating New Waters* (Baker & McKenzie, New York, N.Y.), Jan. 1990, at 5. The Member State is usually given about two months to comply.

³⁷ See EEC TREATY art. 169.

³⁸ *Id.*

³⁹ This is the official name of the Council although it is often referred to as "the Council of Ministers" or simply as "the Council." See generally HARTLEY, *supra* note 28, at 13-20. The Council is not to be confused with the "European Council," which consists of the heads of state of the EC Member States and the president of the Commission. The European Council's main purpose is to provide policy guidance to other EC institutions. JAMES GARDENER, *EFFECTIVE LOBBYING IN THE EUROPEAN COMMUNITY* 17 (1991).

⁴⁰ EEC TREATY art. 148; Merger Treaty, *supra* note 19, at art. 2.

⁴¹ Generally each Member State is represented on the Council by the national minister for the topic area under consideration. Anyone may be present, however, including the heads of state when certain high level policy matters are discussed. STEINER, *supra* note 19, at 10.

⁴² The role of Council President rotates among Member States for six-month terms. WINTER ET AL., *supra* note 30, at 29. The order of this control is Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. For the second six months of 1992, the President of the Council will be a representative from the United Kingdom.

⁴³ *Id.* (citing Rules of Procedure of the Council 79/868, 1979 O.J. (L 268) 1, modified by 1987 O.J. (L 291) 27).

its meetings are closed to the public, and its records are confidential.⁴⁴

The EEC Treaty authorizes the Council to act by a simple majority, a qualified majority, or by unanimous vote, depending on the nature of the matter under consideration.⁴⁵ The SEA specifies that only a "qualified majority"⁴⁶ is necessary for certain vital legislation. This includes legislation to complete the internal market by 1992, and legislation to preserve, protect, and improve the environment.⁴⁷

Despite its power to vote on all EC legislation, the Council's powers are somewhat limited. Generally, the Council may act only on legislative proposals the Commission submits to it, although the Council has some power to suggest proposals to the Commission.⁴⁸ The Council is required by the EEC Treaty to consult Parliament on all proposals,⁴⁹ and all the council's actions are subject to judicial review by the ECJ.⁵⁰

3. The European Parliament

Parliament⁵¹ is the only EC institution composed of representatives or Members of Parliament (MEPs) elected directly by citizens of Member States.⁵² It is not, however, a parliamentary body in the traditional sense. Rather, it serves an advisory and supervisory function, participating in the legislative process at several different points.⁵³ Various treaty provisions require that the Council consult Parliament on any legislation proposed in certain areas before the Council may enact the legislation.⁵⁴

⁴⁴ *Id.*

⁴⁵ *See generally id.* at 30–31.

⁴⁶ "Qualified majority" voting is weighted by country so that the larger countries do not represent a controlling voting block. *Id.* at 30 n.26; *see infra* note 79.

⁴⁷ *See SEA, supra* note 14, at art. 100a. Prior to the enactment of the SEA, most substantial Council decisions required unanimity. *See infra* note 79.

⁴⁸ Reynolds, *supra* note 19, at 22; WINTER ET AL., *supra* note 30, at 30.

⁴⁹ WINTER ET AL., *supra* note 30, at 30.

⁵⁰ *See HARTLEY, supra* note 28, at 58.

⁵¹ The European Parliament was originally known as the "European Assembly." *See R. Beiber, et al., Implications of the Single Act for the European Parliament*, 23 COMMON MKT. L. REV. 767, 770–71 (1986).

⁵² Direct elections were first instituted in 1979, resulting in increased legitimacy, power, and influence for Parliament. STEINER, *supra* note 19, at 8. The term for each MEP is five years. WINTER ET AL., *supra* note 30, at 31.

⁵³ STEINER, *supra* note 19, at 8; Reynolds, *supra* note 19, at 18–19; EEC TREATY art. 137; *see infra* Section I(B).

⁵⁴ *See Reynolds, supra* note 19, at 18–19.

The importance of Parliament's comments in the legislative process has increased substantially since the SEA implemented the cooperation procedure for certain legislative proposals.⁵⁵ In the past, the Council was virtually free to ignore Parliament's comments; now, Parliament has greater power to block or delay legislation that it opposes.⁵⁶ The new procedure gives Parliament a second reading of certain draft proposals and it may reject them. If it does reject a proposal, its passage requires a unanimous Council vote. Parliament may also submit its own amendments which, if supported by the Commission, can be defeated only by a unanimous Council vote.⁵⁷

Parliament may also indirectly influence EC policy. For example, because the Commission is directly subordinate to Parliament,⁵⁸ Parliament has the right to submit written questions to which the Commission must respond.⁵⁹ Parliament also has the power to dismiss the Commission in its entirety and may reject any annual EC budget proposed by the Commission.⁶⁰ Notwithstanding Parliament's influence and increased participation in decision-making, the power it exercises still largely depends on the actions taken by the Council and the Commission.⁶¹

4. The European Court of Justice

The fourth principal political institution created by the EEC Treaty is the ECJ, which sits in Luxembourg.⁶² The ECJ is composed of thirteen judges, one appointed from each Member State,

⁵⁵ See Feeley & Gilhuly, *supra* note 14, at 671-74.

⁵⁶ Although the Council must consider these opinions, they are still not obliged to follow them. STEINER, *supra* note 19, at 8. In order to pass legislation which Parliament opposes, however, the Council must reach unanimous approval. See Reynolds, *supra* note 19, at 19; see also Feeley & Gilhuly, *supra* note 14, at 671-74.

⁵⁷ For a detailed description of the process under the SEA, see Feeley & Gilhuly, *supra* note 14, at 671-74, 679-82 citing WINTER ET AL., *supra* note 30, at 41-44.

⁵⁸ Zagorin, *supra* note 36, at 4.

⁵⁹ EEC TREATY art. 140. Parliament may submit questions to the Council as well, but it is not required to respond. WINTER ET AL., *supra* note 30, at 33.

⁶⁰ Martin E. Elling, *The Emerging European Community: A Framework for Institutional and Legal Analysis*, 13 HASTINGS INT'L & COMP. L. REV. 511, 521 (1990); GARDENER, *supra* note 39, at 19.

⁶¹ Beiber et al., *supra* note 51, at 791.

⁶² The formal name of the ECJ is "the Court of Justice for the European Communities" but it is commonly referred to as "the European Court of Justice." See generally HARTLEY, *supra* note 28, at 49-82; Carl O. Lenz, *The Court of Justice of the European Communities*, 14 EUR. L. REV. 127 (1989).

and one in rotation from among the five largest states,⁶³ who must have independence of an "undisputed nature."⁶⁴ The judges are appointed for six-year renewable terms.⁶⁵ The ECJ has primary jurisdiction over all questions relating to Community law. It interprets this law and settles any disputes regarding its application.⁶⁶ The Commission may bring a claim before the Court.⁶⁷ Additionally, any Member State, individual, or firm "directly affected" by EC laws or rulings⁶⁸ may present a claim to the ECJ. The ECJ also has the power to decide interlocutory requests from Member States' national courts regarding EC law, and may advise other EC institutions in certain areas.⁶⁹ Its decisions must be unanimous, and once issued are final and not subject to appeal.⁷⁰

Although the Court was originally expected to play only a minor part in shaping Community law, it has greatly influenced EC law through the judicial review process.⁷¹ Still, despite its powers to decide cases and interpret Community law, the ECJ's influence is greatly limited because it has no enforcement powers.⁷² It cannot impose fines or sanctions.⁷³

⁶³ WINTER ET AL., *supra* note 30, at 33.

⁶⁴ See EEC TREATY art. 167.

⁶⁵ *Id.*

⁶⁶ GARDENER, *supra* note 39, 20–21.

⁶⁷ EEC TREATY art. 169.

⁶⁸ *Id.* at art. 173. The effect must be directly on the individual claimant, and cannot merely affect the claimant as a member of a class or group. Quigley, *supra* note 23, at 294. These individual claims may even be brought by foreign (or non-member) firms, if they feel unfairly penalized by an act of a Member State or business. Zagorin, *supra* note 36, at 6.

⁶⁹ EEC TREATY art. 177. The ECJ may advise EC institutions through preliminary rulings regarding the interpretation of the EEC Treaty, the validity and interpretation of acts of the institutions of the Community, and the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. See *id.*

⁷⁰ Zagorin, *supra* note 36, at 6.

⁷¹ See WINTER ET AL., *supra* note 30, at 34; Reynolds, *supra* note 19, at 24–25. One commentator has described the ECJ as a "secret ally of integration and . . . pro-environment." *Panel Discussions, in UNDERSTANDING U.S. AND EUROPEAN ENVIRONMENTAL LAW: A PRACTITIONER'S GUIDE*, 59, 65 (Turner T. Smith, Jr. & Pascale Kromarek eds., 1989) (statements of Ludwig Kramer).

⁷² Instead, the Court must rely on Community politics and pressure from other Member States to force compliance. See REHBINDER & STEWART, *supra* note 21, at 145; Reynolds, *supra* note 19, at 26.

⁷³ See *New Unit Would Police Member's Actions in Implementing Environmental Standards*, 13 Int'l Env't Rep. (BNA) No. 2, at 42 (Feb. 14, 1990). Carlo Ripa di Meana, the Environmental Commissioner of the EC, has complained that some countries have simply ignored Court judgments ordering them to comply with Community environmental standards. David W. Johnston, Note, *The European Community's Amended Waste Directive*, 14 B.C. INT'L & COMP. L. REV. 413, 416 n. 21 (1991).

C. *The EC Legislative Process*

The EEC Treaty sets out the process by which the EC enacts legislation. The exact procedure used, and the roles of the various actors in this procedure, vary depending upon the EEC Treaty article serving as the basis for the legislation. The procedure generally begins with a proposed draft from the Commission. The draft is then critiqued and amended based on comments from Parliament, and sometimes from the Economic and Social Committee of the Community (ESC), before it is finally voted upon by the Council.⁷⁴ Generally, a unanimous vote of all Council representatives is required to ratify the legislation. Since the adoption of the SEA,⁷⁵ however, the initial procedure has changed.⁷⁶ It provides increased access to the process for certain Community institutions⁷⁷ and permits the easier passage⁷⁸ of certain legislation under a "qualified majority" vote.⁷⁹

D. *The Form of EC Legislation*

The EEC Treaty provides several mechanisms for implementing Community laws. EC legislation, which must be initiated by

⁷⁴ See HARTLEY, *supra* note 28, at 37.

⁷⁵ The SEA is the first and only amendment to the EEC Treaty. It became effective on January 1, 1987. See generally A. Arnulf, *The Single European Act*, 11 EUR. L. REV. 388 (1986); Reynolds, *supra* note 19, at 33.

⁷⁶ For an overview of the changes the SEA makes, see Feeley & Gilhuly, *supra* note 14, at 672-76. Of particular importance in the environmental area was the addition of Title VII to the EEC Treaty, which explicitly articulates and defines the goals of the Community to include the protection of the environment and improvement of the quality of life for the people of the Community. WINTER ET AL., *supra* note 30, at 135; see also STEINER, *supra* note 19, at 4.

⁷⁷ See *supra* Part I(B)(1)-(3); see also Feeley & Gilhuly, *supra* note 14, at 672-76.

⁷⁸ This "easier passage," which involves qualified majority voting on certain directives is actually found outside of Article VII, in EEC Treaty art. 100a.

⁷⁹ Under the qualified majority voting system, each Member State is assigned a number of votes based upon its relative size, importance, and economic power. A proposal must receive a qualified majority of the votes available (54 out of 76) in order to be approved. EEC TREATY art. 148(2). For a complete discussion of the distinctions between the qualified majority procedure and the unanimous consent requirement, see Feeley & Gilhuly, *supra* note 14, at 675-76.

The SEA gives the Community the ability to pass environmental legislation by a qualified majority vote using the cooperation procedure set forth in Article 100a. SEA, *supra* note 14, at art. 25. Although the main goal of Article 100 is to promote legislation having as its objective "the establishment and functioning of the internal market," subparagraph 3 explicitly provides that environmental legislation may be based upon this article as well. EEC TREATY art. 100a(3). This section provides: "The Commission, in its proposals envisaged [under this Article] concerning health, safety, environmental protection and consumer protection, will take as its base level a high level of protection." *Id.*

the Commission, takes one of three main forms: 1) general rulings or decisions; 2) regulations; or 3) directives.⁸⁰ The legal basis for a given action and the circumstances surrounding the particular case dictate which procedure will be utilized.⁸¹

General rulings or decisions are directed toward a particular Member State or individual and are binding only upon the party to whom they are addressed.⁸² Regulations, on the other hand, are broad, general statements of Community law. Regulations applied in a Member State operate like any national law, but they are also "directly applicable" to every Member State and citizen of the EC.⁸³ Although the EEC Treaty permits the use of regulations in environmental law, they have rarely been used for environmental purposes.⁸⁴

The directive is the principal legislative form used by the EC.⁸⁵ A directive mandates the result to be achieved but allows the Member State's legislature to decide the method.⁸⁶ Generally, EC directives merely set minimum standards, and Member States are free to adopt more stringent guidelines as long as they are compatible with the EEC Treaty.⁸⁷ This approach recognizes that the

⁸⁰ EEC TREATY art. 189. Article 189 also provides for the issuance of recommendations and opinions which have no binding force and are not properly classified as legislation. See Nigel Haigh, *Impact of the EEC Environmental Programme: The British Example*, 4 CONN. J. INT'L L. 453, 456 (1989).

⁸¹ WINTER ET AL., *supra* note 30, at 41.

⁸² Article 189 of the EEC Treaty states: "A decision shall be binding in its entirety upon those to whom it is addressed." EEC TREATY art. 189.

⁸³ Article 189 of the EEC Treaty also states: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." *Id.* The phrase "directly applicable" means that the legislation grants individuals rights which must be upheld by the national courts and is binding on all citizens of the Community upon its adoption and no Member State implementation is necessary. See HARTLEY, *supra* note 28, at 183-84.

⁸⁴ Haigh, *supra* note 80, at 456. One notable use of a regulation, however, was a ban on the import of whale products.

⁸⁵ On the differences between directives and regulations, see Yves Quintin, *Certain Institutional Aspects of "Europe 1992" and Their Effects on American Companies*, 3 TEMP. INT'L & COMP. L.J. 143, 147-48 (1989).

⁸⁶ Quigley, *supra* note 23, at 293.

⁸⁷ Article 130t of the EEC Treaty states: "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." See EEC TREATY art. 100a(4) (providing special Commission procedure to authorize deviation from EEC law on grounds of "major [state] needs . . . relating to protection of the environment"). In no case, however, may these stricter requirements "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." *Id.* at arts. 36, 100a(4). Overly strict environmental standards may thus be challenged before the Com-

Member States are generally more aware of the social and political environment in their countries and are thus able to choose the most effective way to accomplish the directive's objective.⁸⁸ The main role in implementing the vast majority of EC legislation thus falls upon the Member States themselves. The EC also relies on Member States to enforce the national legislation implementing EC directives.⁸⁹ In this process, the EC mainly acts to formulate Community policy, and to oversee Member State compliance with,⁹⁰ and enforcement of, these directives.⁹¹

II. PROPOSAL FOR A COUNCIL DIRECTIVE ON CIVIL LIABILITY FOR DAMAGE CAUSED BY WASTE: THE 1989 PROPOSAL

A. *Historical Development of the Proposal*

In December 1984, the Council issued a Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste (Directive on Waste Shipment).⁹² Article 11(3) of the Directive provides: "The Council shall . . . determine not later than 30 September 1988 the conditions for implementing the civil liability of the producer [of waste] in the case of damage . . . and shall also determine a system of insurance."⁹³ The Council's commitment to adopt a directive on civil liability for damage caused by waste led to mounting public pressure on the Commission to issue a proposal that could be enacted by the deadline imposed by the Directive on Waste

mission as contrary to the EEC Treaty. See David P. Hackett & Elizabeth E. Lewis, *European Economic Community: Environmental Requirements*, in *THE EUROPEAN ECONOMIC COMMUNITY: PRODUCTS LIABILITY RULES AND ENVIRONMENTAL POLICY* 253, 256 (Patrick E. Thieffry & G. Marc Whitehead eds., 1990).

⁸⁸ Haigh, *supra* note 80, at 456.

⁸⁹ REHBINDER & STEWART, *supra* note 21, at 137-38; see, e.g., Koenraad Lenaerts, *The Application of Community Law in Belgium*, 23 COMMON MKT. L. REV. 253 (1986).

⁹⁰ In this instance, the phrase "compliance with" means that the Member State has enacted the legislation necessary to accomplish the Community objective as outlined in the directive. See GARDNER, *supra* note 39, at 29.

⁹¹ The EC has been weak in overseeing Member State enforcement of directives once they have been enacted into national law. In fact, of all the infringement proceedings the EC has brought, none have ever been targeted at Member State enforcement of Community directives. REHBINDER & STEWART, *supra* note 21, at 144. Thus, despite the goal of harmonizing EC law across the entire Community, in reality, Member States are largely free to enforce or not enforce EC law. Feeley & Gilhuly, *supra* note 14, at 670-71.

⁹² Council Directive of 6 December 1984 on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste, 1984 O.J. (L 326) 31 (as amended 1986 O.J. (L 181) 13) [hereinafter Directive on Waste Shipment].

⁹³ *Id.* at art. 11(3).

Shipment.⁹⁴ The Commission failed to meet the September 30, 1988 deadline; however, it eventually submitted the 1989 Proposal.⁹⁵

B. *Legal Basis for the Proposal*

As described above, the legal basis for proposed EC legislation is important as it determines whether a proposal must be passed by unanimous vote or by a qualified majority vote. If a directive's legal basis is Article VII of the EEC Treaty—as amended by the SEA—passage requires a unanimous Council vote. The directive thus becomes susceptible to political compromise inherent in obtaining unanimity among the Council's diverse membership.⁹⁶ If, however, a directive's legal basis is Article 100a, the SEA's trade harmonization article, the Council may pass it by a qualified majority vote.⁹⁷ Directives adopted under Article 100a must be submitted to the Parliament—with its increasingly "green" representation⁹⁸—under Article 100a's cooperation procedure.⁹⁹ This procedure grants Parliament a much more influential role

⁹⁴ Letter from Dr. George Berrisch, Brussels office of the German law firm Schon, Nolte, Finkelnburg & Clem, to Peter M. Gilhuly, Latham & Watkins (Sept. 13, 1991) (commenting on the 1989 Proposal based on discussion with Commission staff) (on file at Latham & Watkins).

⁹⁵ The 1989 Proposal was not the first EC environmental legislative attempt. Since 1973 over 100 environmental measures have been adopted with additional proposals constantly being generated. James D. Pagliaro & Brady L. Green, *E.C. Directive Proposal is Based on CERCLA*, NAT'L L.J., Feb. 10, 1992, at 33. Thus far, EC environmental legislation has concentrated on the areas of waste disposal and the regulation of intra-frontier and transfrontier shipments of waste. *Id.* Much of the earlier legislation has proven ineffective, due in great part to the unique nature of the legislative vehicle used by the EC to implement its environmental measures. For a complete description of the forms of EC legislation, see *supra* Section I(D) and accompanying notes.

⁹⁶ Article 130s of the EEC Treaty provides:

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

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

EEC TREATY art. 130s. Note that unless the Council explicitly finds that a decision is to be passed by qualified majority vote, Article 130s requires that the traditional consultation procedure be utilized and that any environmental legislation so considered be passed by unanimous consent.

⁹⁷ See *supra* note 79 and accompanying text.

⁹⁸ See Feeley & Gilhuly, *supra* note 14, at 685–86.

⁹⁹ SEA, *supra* note 14, at art. 6.

in the legislative process than does the "consultation procedure" utilized in cases where a unanimous vote is required.¹⁰⁰

The Commission chose Article 100a as the legal basis for the 1989 Proposal, stating:

Whereas disparities among laws of the Member States concerning the liability for damage and injury to the environment caused by waste could lead to artificial patterns of investment and waste; whereas such a situation could distort competition, affect the free movement of goods within the internal market, and entail differences in the level of protection of health, property and the environment; whereas an approximation of the laws of the Member States on this subject is needed;

Whereas, since the [enactment] of the Single European Act, Article 100a has replaced Article 100 as the appropriate basis in the Treaty for approximating national provisions that affect the internal market . . . [the Commission] has adopted this [Proposal].¹⁰¹

Various sectors of the Community have criticized the Commission's choice for the 1989 Proposal's legal basis. In its report to the British House of Lords, the Select Committee¹⁰² determined that the appropriate legal basis should be Article 130s, the SEA's environmental article, instead of Article 100a.¹⁰³ The Select Committee acknowledged the Commission's argument that Article 100a should be used because it was the basis for the Directive on Waste Shipment¹⁰⁴ which mandated the creation of civil actions to determine liability for damage caused by waste.¹⁰⁵ The Select Committee, however, countered that the "predominant purpose"

¹⁰⁰ The main difference between the consultation and the cooperation procedures is that under the cooperation procedure, both the Parliament and the Council are each given two (as opposed to one) opportunities to review and propose amendments to Commission proposals. Feeley & Gilhuly, *supra* note 14, at 672-74, citing WINTER ET AL., *supra* note 30, at 30.

¹⁰¹ 1989 Proposal, *supra* note 18, at 3-4.

¹⁰² The Select Committee on the European Communities is appointed by the British House of Lords to "consider Community proposals, . . . to obtain all necessary information about them, and to make reports on those which, in the opinion of the Committee, raise important questions of policy or principle . . ." SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, TWENTY-FIFTH REPORT, 1990, CMND, at 7 (on file at Latham & Watkins) [hereinafter SELECT COMMITTEE].

¹⁰³ *Id.* at 36.

¹⁰⁴ Directive on Waste Shipment, *supra* note 92, at 13.

¹⁰⁵ SELECT COMMITTEE, *supra* note 102, at 36.

of the 1989 Proposal was the “protection of the environment,”¹⁰⁶ which comes within the specific ambit of Article 130s. The Select Committee also pointed out that the great bulk of evidence it had received related to environmental issues as opposed to internal market concerns.¹⁰⁷ Moreover, the Select Committee expressed its opinion that divergent national approaches to civil liability were unlikely to be “a significant obstacle to competition and free movement of goods.”¹⁰⁸

In 1990, the ESC¹⁰⁹ reviewed the question of the correct legal basis for the 1989 Proposal. Acting at the request of the Council pursuant to Article 100a, the ESC issued its Opinion on the Proposed Directive for Civil Liability.¹¹⁰ The ESC stated that: “In view of the objectives set out by the Commission . . . reference to Article 100a is not justified. Reference should be made . . . to Articles 130r and s of the Treaty.”¹¹¹ The ESC’s Opinion would require unanimous approval of the proposed directive, rather than ratification by qualified majority. The effect of the ESC’s Opinion is questionable, however, given the ECJ’s recent decision in its precedent-setting ruling regarding the appropriate legal basis for a titanium dioxide directive.¹¹² In that case, the ECJ held that the appropriate legal basis for a directive prohibiting the dumping of titanium wastes into waterways, and limiting other disposal methods according to the production process used, was Article 100a and not Article 130s. This decision is likely to allow a much broader use of Article 100a as the legal basis for environmental legislation. In light of this ruling, it is unclear

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ For a brief description of the Economic and Social Committee and its place in the EC legislative process, see *supra* note 28.

¹¹⁰ Economic and Social Committee Opinion on the Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1990 O.J. (C 112) 3 [hereinafter ESC Opinion].

¹¹¹ *Id.* at 2.1.

¹¹² Case 300/89, *Commission v. Council* (June 11, 1991) (on file at Latham & Watkins). The Commission had originally based the titanium dioxide directive on Article 100a. The Council, however, changed the basis to Article 130s by unanimous vote. When the Commission contested the Council’s action before the ECJ, the Court upheld the Commission’s position that Article 100a was the proper legal basis for the directive. The ECJ held that the environmental concerns addressed in the directive would burden enterprises and therefore affect competition in the common market. *Id.*

whether unanimous or qualified majority approval will be necessary for promulgation of the proposed directive.

C. *Significant Provisions of the 1989 Proposal*

The Commission designed the 1989 Proposal with three primary goals in mind: 1) to encourage producers to adopt measures to reduce their production of waste; 2) to promote the internalization of the societal costs associated with waste by encouraging producers to include the costs of covering the risks of civil liability in the price of goods sold to consumers; and 3) to ensure fair compensation for victims of environmental harm.¹¹³ The purpose of the provisions of the 1989 Proposal was to effectuate these aims. Its sections, discussed below, addressed the scope of liability; imposed joint and several strict liability; granted standing to victims of waste, public authorities, and “common interest groups;” delineated remedies; established the burden of proof; and set time limitations.¹¹⁴ The central issue of insurance, however, was not addressed.

1. Scope of Liability

The 1989 Proposal provided civil liability for “producers of waste.”¹¹⁵ It defined “producer” as any entity “whose occupational activities produce waste and/or anyone who carries out preprocessing, mixing, or other operations resulting in a change of the

¹¹³ Explanatory Memorandum to the Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, *reprinted in* SELECT COMMITTEE, *supra* note 102, at 41 [hereinafter Explanatory Memorandum]; Eric Souers, Environmental Law and Waste Management 7 (Feb. 20, 1991) (prepared for presentation to the International Company Lawyer’s Conference in Lisbon, Portugal) (manuscript on file at Latham & Watkins).

¹¹⁴ Several similarities between the 1989 Proposal and the U.S. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9657 (1983), have been noted by commentators. Among the most significant similarities are: 1) the use of joint and several strict liability; 2) a minimum of available defenses (neither measure allows defendant to escape liability by showing that its actions were approved by the relevant public authority); and 3) provision of liability despite attempted contractual limitations. *See generally* Pagliaro & Green, *supra* note 95, at 27; *see also* George C. Freeman, Jr. & Kyle E. McSlarrow, *The Proposed European Community Directive on Civil Liability for Waste—The Implications for U.S. Superfund Reauthorization in 1991*, 46 BUS. LAW. 1 (1990).

¹¹⁵ 1989 Proposal, *supra* note 18, at art. 3. The 1989 Proposal’s liability scheme was designed to be administered without prejudice to any rights or actions available to the plaintiff under applicable national law. Pagliaro & Green, *supra* note 95, at 33.

nature of this waste, until the moment when the damage or injury to the environment is caused.”¹¹⁶ These entities were considered “original producers” and apparently were to remain liable for harm caused until the waste was deposited with an authorized disposal or treatment facility.¹¹⁷ Moreover, an entity could be deemed a “producer” by falling into any one of three sub-categories.

First, any entity which imported waste from outside the Community could be considered a producer for purposes of the 1989 Proposal.¹¹⁸ Second, an entity transporting waste within the EC, with actual control of it, could be deemed a producer if, at the time of damage or injury to the environment, the entity could not identify the original producer “within a reasonable time.” Alternatively, an entity which has received waste from outside the EC, could be deemed a producer if that entity had actual control of the waste at the time of the incident.¹¹⁹ Third, installations that lawfully received waste for disposal or treatment were also subject to producer liability pursuant to Article 2(2)(c).¹²⁰ The 1989 Proposal expressly provided that a producer’s liability could not be reduced through a showing that the actions or inactions of a third party caused the damage or injury to the environment.¹²¹ The 1989 Proposal, however, also provided the producer with recourse against responsible parties pursuant to applicable national law in such situations.¹²²

Although Article 3 of the 1989 Proposal created liability for waste producers,¹²³ the term “waste” was not specifically defined. Instead, the 1989 Proposal referred to the definition of waste found in the Council’s Framework Directive on Waste¹²⁴—then under consideration for amendment by the Council.¹²⁵ While the

¹¹⁶ 1989 Proposal, *supra* note 18, at art. 2(1)(a).

¹¹⁷ SELECT COMMITTEE, *supra* note 102, at 20.

¹¹⁸ 1989 Proposal, *supra* note 18, at art. 2(2)(a).

¹¹⁹ *Id.* at arts. 2(2)(b)(i) and (ii).

¹²⁰ *Id.* at art. 2(2)(c).

¹²¹ *Id.* at art. 7(1).

¹²² *Id.*

¹²³ *Id.* at art. 3.

¹²⁴ Framework Directive, *supra* note 6. The Framework Directive defined “waste” as “any substance or object that the holder disposes of or is required to dispose of pursuant to the provisions of national law in force.” *Id.* at art. 1.

¹²⁵ The amendments to Directive 75/442 were adopted by the Council and can be found in the Council Directive of 18 March 1991 Amending Council Framework Directive on Waste 75/442, 1991 O.J. (L 78) 32 [hereinafter Amended Framework Directive]. Article

1989 Proposal did not specify what was included in its definition, it expressly excluded from the definition of waste certain controversial substances such as nuclear waste covered by national laws promulgated pursuant to the Convention on Third Party Liability in the Field of Nuclear Energy.¹²⁶ The 1989 Proposal's definition also excluded waste under national laws giving effect to the International Convention on Civil Liability for Oil Pollution Damage or the International Convention on the Establishment of an International Fund for Compensation for Oil Damage.¹²⁷ Finally, the Select Committee reported that the 1989 Proposal's definition of waste also excluded "mining waste, animal carcasses and agricultural waste of faecal origin, waste waters discharged into sewers and the aquatic environment, and emissions into the atmosphere."¹²⁸

2. Strict Joint and Several Liability

The 1989 Proposal provided strict liability in cases of harm caused by waste.¹²⁹ The Explanatory Memorandum to the 1989 Proposal asserted that the use of strict liability helps ensure that

1 of the Amended Framework Directive defines waste as "any substance . . . in the categories set out in Annex I which the holder discards or intends or is required to discard." *Id.* at art. 1. Annex I of the Amended Framework Directive sets forth an extensive list of substances, including expired products, household wastes, and industrial wastes. *See id.* at Annex I. Although the 1989 Proposal expressly adopted only Article 1 of the Amended Framework Directive, Mr. Carel de Villeneuve of the Commission explained that by including Article 1, the 1989 Proposal "tacitly implies the exclusions . . . [contained in] Article 2 [of the Amended Framework Directive]." Supplementary Memorandum by Mr. Carel de Villeneuve, DG XI, Commission of the European Communities, *reprinted in* SELECT COMMITTEE, *supra* note 102, at 129 [hereinafter Villeneuve Supplementary Memorandum].

¹²⁶ 1989 Proposal, *supra* note 18, at art. 1(2).

¹²⁷ *Id.*

¹²⁸ SELECT COMMITTEE, *supra* note 102, at 14. The exclusions noted by the Select Committee were the result of the exclusions expressly listed in the Amended Framework Directive, *supra* note 125, at arts. 2(1)(a) and (b).

In his Supplementary Memorandum to the Select Committee on the European Communities, Mr. Carel de Villeneuve stated that under the 1989 Proposal, "waste water" is water . . . emitted into surface water through a sewer system or a drainage pipe." Mr. Villeneuve continued by pointing out that emissions from combustion plants would not be covered by the 1989 Proposal while emissions from waste treatment facilities would fall within its liability scheme. Villeneuve Supplementary Memorandum, *supra* note 125, at 129.

¹²⁹ 1989 Proposal, *supra* note 18, at art. 3. It is important to note that liability under the Directive is in addition to any liability under the laws of individual Member States. *See Pagliaro & Green, supra* note 95, at 33.

the victim of harm caused by waste receives just compensation. It also stated that strict liability ensures that producers dispose of the waste by depositing it in an authorized disposal facility. Furthermore, the Commission explained that a strict liability scheme ensures that societal costs associated with waste production are included in the cost of the goods giving rise to the production of waste.¹³⁰ In rejecting a fault-based liability scheme, the Commission defended its use of strict liability by stating that “[t]he concept of . . . strict liability for environmental risks is everywhere gaining ground.”¹³¹ The Commission pointed out that the comparable field of defective products had adopted the strict liability scheme,¹³² as had several international conventions.¹³³ The Commission also noted that the draft of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels (Convention on Civil Liability or Convention), then being negotiated within the United Nations Economic Commission for Europe, was also based on strict liability principles.¹³⁴

The 1989 Proposal further provided that strict liability should be joint and several when “two or more producers are liable for the same damage or injury to the environment.”¹³⁵ Therefore, under Article 5, liability would attach in full to a producer whose waste causes harm in any way to a victim; liability is unaffected even where the waste of another producer is a contributing cause of the harm.¹³⁶ Article 5’s stipulation that the paying producer could seek redress against the non-paying producer pursuant to national law softened this somewhat severe result.¹³⁷

¹³⁰ Explanatory Memorandum, *supra* note 113, at 42.

¹³¹ *Id.* CERCLA is also based on the principle of strict liability for damage caused by waste. See Pagliaro & Green, *supra* note 95, at 27.

¹³² Council Directive 85/374, 1985 O.J. (L 210) 29.

¹³³ Explanatory Memorandum, *supra* note 113, at 42.

¹³⁴ *Id.*; Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels, INTERNATIONAL TRANSPORT TREATIES, Supp. 14, at 81 (Oct. 10, 1989) (Kluwer Law and Taxation Publishers) [hereinafter Convention on Civil Liability]. For a brief summary of Member States’ approaches to the use of no-fault liability for environmental risks, see SELECT COMMITTEE, *supra* note 102, at 133 (Memorandum by Professor Terence Daintith, Director of Advanced Legal Studies, University of London).

¹³⁵ 1989 Proposal, *supra* note 18, at art. 5.

¹³⁶ See SELECT COMMITTEE, *supra* note 102, at 21 (discussing position of Confederation of British Industry regarding joint and several liability provision of 1989 Proposal).

¹³⁷ *Id.*

Articles 6 and 7 of the 1989 Proposal established the only defenses to its liability scheme: *force majeure* and contributory negligence.¹³⁸ Liability could be avoided completely if the producer could show that the harm resulted from “*force majeure* as defined in Community law.”¹³⁹ Article 7(2) provided a second defense if the damage or harm to the environment was caused both by the producer’s waste and the fault of the injured party or its agent.¹⁴⁰

3. Parties with Standing

The 1989 Proposal gave the victim or the victim’s heirs the right to institute legal proceedings when damage¹⁴¹ to the person or person’s property occurred.¹⁴² The 1989 Proposal also granted standing to “public authorities” and “common interest groups” to bring suits to remedy imminent or actual injury to the environment.¹⁴³ The concept of “citizen suits” has received differing treatment in the EC.¹⁴⁴ For example, the Netherlands and Luxembourg grant common interest groups standing to bring suits to protect the environment, while France and Italy allow citizen suits when joined to criminal proceedings under certain circumstances.¹⁴⁵ Recognizing that standing for interested citizens and organizations was controversial, the Commission expressly stated that its common interest group standing provision was not an attempt to harmonize Community law. Rather, the Commission

¹³⁸ 1989 Proposal, *supra* note 18, at arts. 6 and 7.

¹³⁹ *Id.* at art. 6(1). The term “*force majeure*” as used in EC law is defined as “unusual and unforeseeable circumstances, beyond the trader’s control, the consequences of which could not have been avoided even if all due care had been exercised” Case 145/85, *Denkavit Belgi NV v. The State (Belgium)*, 1987 E.C.R. 565, 2 C.M.L.R. 679 (1987) (quoting Case 266/84, *Denkavit France v. FORMA*, 1986 E.C.R. 149, 3 C.M.L.R. 202 (1987)).

¹⁴⁰ Under this defense, producer liability may be reduced or disallowed. 1989 Proposal, *supra* note 18, at art. 7(2).

¹⁴¹ The 1989 Proposal defined “damage” as “(i) damage resulting from death or physical injury; [or] (ii) damage to property.” *Id.* at art. 2(1)(c).

¹⁴² Explanatory Memorandum, *supra* note 113, at 43.

¹⁴³ 1989 Proposal, *supra* note 18, at arts. 4(3) and 4(4). The Commission defined “injury to the environment” as “a significant and persistent interference in the environment caused by a modification of the physical, chemical or biological conditions of water, soil and/or air in so far as these are not considered to be damage [to property].” *Id.* at art. 2(1)(d).

¹⁴⁴ *See, e.g.*, Explanatory Memorandum, *supra* note 113, at 43.

¹⁴⁵ *Id.*

explained that it was merely trying to reach an “intermediate solution” to the various approaches utilized in the EC.¹⁴⁶

4. Remedies

Under the 1989 Proposal, the identity of the party bringing the action determined which remedies would be available to the party. A private party could seek remedies to obtain:

- (a) the prohibition or cessation of the act causing the damage or injury to the environment;
- (b) the reimbursement of expenditure arising from measures to prevent the damage or injury to the environment;
- (c) the reimbursement of expenditure arising from measures to compensate for damage [to property] . . . [and]
- (e) indemnification for the damage.¹⁴⁷

Public authorities could seek remedies (a) and (b) above in suits brought to address injuries to the environment.¹⁴⁸ Furthermore, under Article 4(1)(d), public authorities could seek “the restoration of the environment to its state immediately prior to the occurrence of injury to the environment or the reimbursement of expenditure incurred in connection with measures taken to this end.”¹⁴⁹ Pursuant to Article 4(4), common interest groups could seek “only prohibition or cessation of the act giving rise to the injury to the environment.”¹⁵⁰ Yet if the group had actually taken steps to prevent the injury, or to restore the environment, then it could request reimbursement for its efforts under Article 4(1)(b) and (d).¹⁵¹

If a plaintiff sought to restore the environment, its recovery would be subject to two provisos: (1) the costs of restoration could not exceed the benefit gained by the environment from the repair; and (2) less costly alternative measures could not have been

¹⁴⁶ *Id.*

¹⁴⁷ 1989 Proposal, *supra* note 18, at arts. 4(1)(a), (b), (c) and (e). It is important to note that the 1989 Proposal did not provide for reimbursement of the “intrinsic value” of the environment injured, or for punitive recovery. The 1989 Proposal permitted indemnification only for damage to property; injury to the environment gave the plaintiff the right to receive reimbursement for restorative or preventive measures only. Memorandum by Mr. Carel de Villeneuve, DG XI Commission of the European Communities, *reprinted in* SELECT COMMITTEE, *supra* note 102, at 128 [hereinafter Villeneuve Memorandum].

¹⁴⁸ 1989 Proposal, *supra* note 18, at arts. 4(1)(a) and (b).

¹⁴⁹ *Id.* at art. 4(3).

¹⁵⁰ *Id.* at art. 4(4).

¹⁵¹ *Id.* at art. 4(1)(b) and (d).

available.¹⁵² If the first proviso was not met, the 1989 Proposal's language appeared to deny any restoration. Ostensibly, there was no provision for a "half-way solution" allowing for partial restoration of the environment.¹⁵³ According to a memorandum to the Select Committee written by Mr. Carel de Villeneuve, DG XI of the Commission¹⁵⁴ (Villeneuve Memorandum), a provision for partial restoration was unnecessary because Article 4(2)¹⁵⁵ allowed a plaintiff to implement a less expensive alternative to restoration if it existed, or to request reimbursement for having done so.¹⁵⁶

5. Burden of Proof

Article 4(6) of the 1989 Proposal provided: "The plaintiff shall be required to prove the damages or injury to the environment, and show the overwhelming probability of the causal relationship between the producer's waste and the damage or . . . injury to the environment suffered."¹⁵⁷ According to the Villeneuve Memorandum, the phrase "overwhelming probability" was unintentionally included in the English version of the 1989 Proposal.¹⁵⁸ Article 4(6) should have contained the "balance of the probabilities" test found in the French and German texts.¹⁵⁹ It was thus unclear what standard of proof a plaintiff would have been required to meet under the 1989 Proposal; however, it is likely that the less stringent "balance of probabilities" test would have been utilized rather than the "overwhelming" standard of the English text.

6. Limitation Periods and Retroactive Effect

Under Article 9 of the 1989 Proposal, a plaintiff was barred from bringing suit three years after the plaintiff discovered or

¹⁵² *Id.* at art. 4(2).

¹⁵³ Villeneuve Memorandum, *supra* note 147, at 128.

¹⁵⁴ Each member of the Commission receives specific areas of responsibility, or portfolios, and serves in the Directorate General (DG) for at least one of the Commission's twenty-three major subdivisions. DG XI is entitled "Environmental, Consumer Protection and Nuclear Safety." See WINTER ET AL., *supra* note 30, at 26 and app. F (listing 22 of the 23 major subdivisions).

¹⁵⁵ 1989 Proposal, *supra* note 18, at art. 4(2).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at art. 4(6).

¹⁵⁸ Villeneuve Memorandum, *supra* note 147, at 128; ESC Opinion, *supra* note 110, at 23.

¹⁵⁹ ESC Opinion, *supra* note 110, at 23.

should have discovered both the damage or injury to the environment and the producer's identity.¹⁶⁰ Under no circumstances could an action be brought after the expiration of "thirty years from the date on which the incident giving rise to the damage or injury to the environment occurred" ¹⁶¹ Article 13 expressly provided that the rights and liabilities set out by the 1989 Proposal could not arise from "an incident which occurred before the date on which [the Directive was] implemented."¹⁶²

Referring to the language in Articles 10 and 13, the Villeneuve Memorandum stated that some difficulties could arise concerning persistent pollution¹⁶³ due to the problems associated with determining what constituted an Article 10 or 13 "incident."¹⁶⁴ In his supplementary memorandum (Villeneuve Supplementary Memorandum), Mr. Villeneuve maintained that the term "incident" [was] meant to refer to a human action or omission, such as the land filling of waste eventually leading to soil or ground water pollution."¹⁶⁵ The Villeneuve Supplementary Memorandum insisted that the Commission did not intend to apply the 1989 Proposal retroactively.¹⁶⁶

7. Insurance

The 1989 Proposal was silent on the issue of insurance in spite of the Council's mandate in the Directive on Waste Shipment that a mandatory insurance scheme be developed to cover civil liability for harm caused by waste.¹⁶⁷ The Commission explained its fail-

¹⁶⁰ 1989 Proposal, *supra* note 18, at art. 9(1).

¹⁶¹ *Id.* at art. 10.

¹⁶² *Id.* at art. 13.

¹⁶³ An example of persistent pollution is burial of waste at an authorized location in an authorized manner, but which subsequently leaks pollution that causes harm. The Select Committee inquired whether burying waste was an "incident or whether the subsequent leakage was the occurrence targeted by Articles 10 and 13." Villeneuve Memorandum, *supra* note 147, at 128.

¹⁶⁴ *Id.*

¹⁶⁵ Villeneuve Supplementary Memorandum, *supra* note 125, at 130.

¹⁶⁶ *Id.*

¹⁶⁷ Directive on Waste Shipment, *supra* note 92, at 35. The Directive on Waste Shipment states:

The Council shall, acting in accordance with the procedure referred to in Article 100 of the Treaty, determine not later than 30 September 1988 the conditions for implementing the civil liability of the producer [of waste] in the case of damage or that of any other person who may be accountable for the said damage and shall also determine a system of insurance.

Id.

ure to legislate mandatory insurance by pointing to the reluctance of insurance companies to become involved in covering environmental risk for over 70 million European Currency Units (ECUs)¹⁶⁸ under a mandatory system. The European insurance industry apparently believed that for political reasons the minimum insurance requirement could not be less than 70 million ECUs.¹⁶⁹ The industry felt that the figure was too high and would distort the market by eliminating producers that statistically needed, and could only afford, a lesser amount of coverage.¹⁷⁰ The Villeneuve Supplementary Memorandum supported the insurers' position, claiming that the liability scheme devised by the Commission would result in extremely large claims—above 40 million ECUs—in only the rarest of cases. Thus, the Villeneuve Supplementary Memorandum stated that producers should be insurable on a voluntary basis at amounts substantially below that called for in the Directive on Waste Shipment.¹⁷¹

The ambiguities, vagueness and controversial issues plaguing the 1989 Proposal evoked a chorus of criticism from several sides. The substantive and substantial outcry forced the Commission to reevaluate its draft. It also forced the Commission to adopt a position in negotiations which could gain support from the many interests actively participating in the EC legislative process.

D. *Reactions to the 1989 Proposal*

The Commission worked behind closed doors to amend the 1989 Proposal. Although the details of those bargaining sessions

¹⁶⁸ *Id.* at 35. The European Monetary System established the ECU in 1979 with the intention that it would ultimately become the single European currency. The ECU is not yet legal tender in any country, but its value is based on the currencies of Member States. See Keith Clark and Richard Parlour, *EMU and Development of ECU—The Legal Implications*, NAT'L L.J., Feb. 24, 1992, at 17–18. The ECU is currently worth approximately 1.25 U.S. dollars. See FIN. TIMES, Mar. 2, 1992, at 25.

¹⁶⁹ Seventy million ECUs was the minimum insurance set forth in the EC directive on product liability, Council Directive 85/374, 1985 OJ (L 210). See Explanatory Memorandum, *supra* note 113, at 44.

¹⁷⁰ Explanatory Memorandum, *supra* note 113, at 44.

¹⁷¹ Villeneuve Supplementary Memorandum, *supra* note 125, at 130. Mr. Villeneuve claimed that clean-up costs would rarely exceed 40 million ECUs and, even in past instances when costs did exceed that estimate, insurance fully covered liability. *Id.* In comparison, the liability scheme utilized in CERCLA has severely tested the ability of insurers to provide coverage and has resulted in an estimated clean-up cost between \$242 billion and \$612 billion. Freeman & McSarrow, *supra* note 114, at 2, citing *Coming Clean*, Office of Technology Assessment Report to Congress, ch. 4, at 194 (Oct. 19, 1989), reprinted in 19 CHEM. WASTE LIT. REP. 466, 468 (Feb. 1990).

were not openly divulged, the issues subject to discussion and negotiation were the focus of significant public comment. The questions generating the greatest controversy included: (1) the scope of liability; (2) the strict liability standard; (3) standing; (4) the remedies available; (5) the possibility of retroactive effect; and (6) insurance.

1. Scope of Liability

The Commission's application of the "producer pays" principle to channel liability back to the producer regardless of when the producer controlled the waste, drew heavy criticism from many associations submitting position papers on the 1989 Proposal. The papers repeated the common theme that the producer pays principle was contrary to established common and civil law principles equating control with responsibility and responsibility with liability.¹⁷² The Conseil Européen des Federations de L'Industrie Chimique (CEFIC)¹⁷³ claimed that the use of the producer pays principle led to unjust results because "[t]he transporter . . . of waste provide[s] the producer with a service for which [the transporter is] paid. Thus [the transporter] also assume[s] responsibility and therefore liability. [T]he producer has no influence over the transporter during transportation and therefore the action of the latter should not trigger liability of the former."¹⁷⁴

CEFIC also felt that the proposal conflicted with the draft of the Convention on Civil Liability.¹⁷⁵ The Convention, while employing a strict liability scheme, places liability on the entity with actual control of the dangerous good at the time of the damage.¹⁷⁶ CEFIC reasoned that the 1989 Proposal's liability scheme did not fall within any of the reservations available to signatory states

¹⁷² See ORGALIME-Liasion Group of the European Mechanical, Electrical, Electronic, and Metalworking Industries, EC Draft Directive on Civil Liability for Damage Caused by Waste: ORGALIME Position, at 1 (June 26, 1990) (on file at Latham & Watkins) [hereinafter ORGALIME Paper]; Conseil European des Federations de L'Industrie Chimique, CEFIC Comments on the Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, at 1 (Feb. 13, 1990) (on file at Latham & Watkins) [hereinafter CEFIC Paper]; and ESC Opinion, *supra* note 110, at arts. 5.1-5.3.

¹⁷³ CEFIC is a sectoral trade association which acts as the European chemical industry's chief advocate to the Council and Commission. Its membership consists of both national chemical producers and private sector manufacturers. GARDENER, *supra* note 39, at 51.

¹⁷⁴ CEFIC Paper, *supra* note 172, at 4.

¹⁷⁵ Convention on Civil Liability, *supra* note 134, at 81.

¹⁷⁶ *Id.* at 83.

under Article 24 of the Convention on Civil Liability, and the draft Convention expressly included hazardous waste within its scope. Therefore, those Member States which had promoted the Convention's liability scheme were bound to reject the Commission's Proposal.¹⁷⁷

The European Federation of Waste Management (FEAD)¹⁷⁸ claimed that the producer pays principle gave rise to a distortion of competition because it provided that a producer remains liable until it deposits its waste with an authorized facility. FEAD argued that because the Member States' national laws set the criteria for becoming an authorized facility, the situation was ripe for a state to set low qualification standards for disposal facilities. Low qualification standards would permit less expensive operation in some Member States, and in turn, lower costs for the producers disposing of waste in those Member States.¹⁷⁹

The 1989 Proposal's definition of waste provoked at least four major objections. The first objection concerned the nature of the substances included within the scope of the 1989 Proposal's definition. Many associations asserted that if strict liability were applied to a waste producer, such liability should inure only to the producer of "hazardous waste."¹⁸⁰ The Select Committee disagreed with the hazardous/nonhazardous distinction called for by many of the groups.¹⁸¹ It argued: "If wastes are not hazardous, then by definition no damage will result from their handling or

¹⁷⁷ CEFIC Paper, *supra* note 172, at 4. The Union of Industrial and Employers Confederations of Europe (UNICE) also submitted comments concerning the 1989 Proposal. UNICE is an officially recognized representative of European business interests and is composed of national business federations from both Member and non-Member States in Europe. GARDENER, *supra* note 39, at 40. UNICE noted:

Since the transport of dangerous wastes falls within the field of application of . . . [the Convention on Civil Liability] . . . [it] will offer enough guarantees for the reparations of damage caused during the transport of such waste to be born by the transport operator. The protection of persons suffering damage during transport of dangerous waste does not therefore constitute justification for liability being channeled onto the producer of waste.

Union of Industrial and Employers Confederations of Europe, Position Paper on the Proposal for a Directive in Civil Liability for Damage Caused by Waste, at 2 (Oct. 20, 1989) (on file at Latham & Watkins) [hereinafter UNICE Paper].

¹⁷⁸ The European Federation of Waste Management is an association for European waste management companies and interests.

¹⁷⁹ European Federation of Waste Management, FEAD Statement on the Draft Directive of the Commission of the European Communities Concerning Civil Liability for Damage Caused by Waste, at 3 (May 2, 1990) (on file at Latham & Watkins) [hereinafter FEAD Paper].

¹⁸⁰ CEFIC Paper, *supra* note 172, at 2; ORGALIME Paper, *supra* note 172, at 1.

¹⁸¹ SELECT COMMITTEE, *supra* note 102, at 30.

treatment. The fact is . . . that almost all wastes are potentially hazardous in certain circumstances.”¹⁸² The second objection to the definition of waste focused on its inclusion of secondary raw materials.¹⁸³ The Union of Industrial and Employers Confederations of Europe (UNICE) argued that by including secondary raw materials within the scope of its waste definition, the 1989 Proposal would impede the development of the recycling industry.¹⁸⁴ The third objection was that no express definition of waste appeared in the 1989 Proposal. Rather, waste was defined merely by referring to a previously enacted Council Directive.¹⁸⁵ Finally, the Comité Européen des Assurances (CEA)¹⁸⁶ stated that the 1989 Proposal’s liability scheme could not be insured due in part to its broad and imprecise definition of waste.¹⁸⁷

Another issue discussed in several position papers was whether Article 2’s definition of “injury to the environment” was sufficient to accomplish the goals of the 1989 Proposal. The Select Committee noted that under the Commission’s definition, no action for injury to the environment was available for harm to property.¹⁸⁸ Therefore, an action for injury to the environment could seldom be brought in a country like the United Kingdom where most of the land was privately owned. The Select Committee felt that the definition did not anticipate situations where the owner of the property being injured actually produced the harmful waste.¹⁸⁹ In such circumstances, there was technically no injury to the environment, and the only entity with standing to prevent the harm would be the one with the least incentive to do so.¹⁹⁰

¹⁸² *Id.*

¹⁸³ Secondary raw materials are wastes used to create useable goods. An example of a secondary raw material is the emptied aluminum can which is purchased as scrap and then melted down to make aluminum foil.

¹⁸⁴ UNICE Paper, *supra* note 177, at 4; *see* FEAD Paper, *supra* note 179, at 2.

¹⁸⁵ SELECT COMMITTEE, *supra* note 102, at 29–30. The Select Committee felt that reference to the Framework Directive of 1975 was inadequate to accomplish the stated goals of the 1989 Proposal and could lead to confusion. *Id.* at 30; *see* FEAD Paper, *supra* note 179, at 2.

¹⁸⁶ The Comité Européen des Assurances is an association representing European insurance companies’ interests.

¹⁸⁷ Comité Européen des Assurances, Note of Comments on Community Proposals on Liability for Damage Caused by Waste, at 2 (Nov. 1990) (on file at Latham & Watkins) [hereinafter CEA Paper].

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

A second criticism of the definition of “injury to the environment” was made by the ESC in its report to the Council. The ESC pointed out that the definition could include “modifications” resulting in a positive or productive “interference in the environment,” and thus might be subject to interpretations that ran counter to the purposes of the 1989 Proposal.¹⁹¹ Moreover, the ESC expressed its opinion that, given the time limitations set out in the 1989 Proposal, even if a modification were harmful in nature, it would be difficult to prove that such modification caused the interference in question. This would be especially true in scenarios where intervening modifications might also have affected the interference during the proposed time period.¹⁹²

2. Strict Liability

With potential liability so high in the realm of waste disposal, business groups challenged the Commission’s use of strict liability in the 1989 Proposal. In its position paper,¹⁹³ UNICE questioned whether a strict liability scheme should be applied to waste.¹⁹⁴ UNICE claimed that strict liability was historically imposed only on inherently dangerous activities¹⁹⁵ and in the product liability field.¹⁹⁶ UNICE maintained that waste could not be considered a “product,” nor was all waste inherently dangerous. Therefore, it argued that strict liability should not be used in determining liability for producers of waste.¹⁹⁷ The Select Committee, however, disagreed with UNICE stating “strict civil liability should apply to those who carry out dangerous or potentially dangerous activities which give rise to environmental damage.”¹⁹⁸ The Select Committee noted that “it is clear that waste represents a serious environmental risk,” and that “the problem must be tackled . . .

¹⁹¹ ESC Opinion, *supra* note 110, at 24.

¹⁹² *Id.*

¹⁹³ UNICE Paper, *supra* note 177, at 1.

¹⁹⁴ *Id.*

¹⁹⁵ UNICE gave the example of damage caused by nuclear power plants.

¹⁹⁶ UNICE Paper, *supra* note 177, at 1.

¹⁹⁷ *Id.* CEA concurred with UNICE’s sentiment that the 1989 Proposal should not contain a strict liability scheme. CEA felt that such a liability scheme, when combined with the Proposal’s “producer pays” principle, the concept of “overwhelming probability of the causal relationship,” and a doubtful definition of waste, would result in liabilities that could not be covered by any existing liability insurance technique. CEA Paper, *supra* note 187, at 1.

¹⁹⁸ SELECT COMMITTEE, *supra* note 102, at 29.

by facilitating the recovery of damages by the introduction of strict civil liability.”¹⁹⁹ Thus, the two groups squarely set out the policy choices on how to define wastes and who should bear the burden of policing their production and transportation.

As stated above, the only defenses the 1989 Proposal provided were *force majeure* and contributory negligence.²⁰⁰ Moreover, the Proposal expressly imposed liability despite the producer’s possession of a permit to carry on the potentially harmful activity.²⁰¹ The exclusion of the “permit defense” from the 1989 Proposal attracted several comments. The Liaison Group of the European Mechanical, Electrical, Electronic, and Metalworking Industries (ORGALIME),²⁰² UNICE, and CEFIC all requested that the Commission include an exception to liability for those permitted to carry on an activity.²⁰³ The organizations reasoned that, because such permits are issued only after public authorities scrutinize the activity, the same authorities would not be justified in bringing suit under the 1989 Proposal for harm caused by the authorized activity.²⁰⁴

The Select Committee reported to the House of Lords its approval of the permit defense exclusion.²⁰⁵ It stated that the defense, if included in the 1989 Proposal, would inhibit the internalization of waste costs by allowing producers to omit the expense of covering potential harm from the price of their products. The Select Committee believed that the potential for harm would exist regardless of the producer’s possession of a permit, and therefore, the expense of insuring against such harm should be borne by the purchasers of the producer’s goods.²⁰⁶ The Select Committee also considered the argument that by not providing the permit defense, the Commission brought the permitting pro-

¹⁹⁹ *Id.*

²⁰⁰ See *supra* Section II (C)(2).

²⁰¹ 1989 Proposal, *supra* note 18, at art. 6(2).

²⁰² ORGALIME represents over 30,000 small and medium sized manufacturing companies from 15 western European countries. ORGALIME Paper, *supra* note 177, at 1.

²⁰³ *Id.* at 3–4; UNICE Paper, *supra* note 177, at 5; CEFIC Paper, *supra* note 172, at 6. CEFIC felt that the possession of a permit should not provide a defense in instances where the permit was not complied with; it maintained, however, that the permit should provide a defense against harm arising from activities within the scope of the permit and that any such harm should be recoverable under a fault-based liability scheme. CEFIC Paper, *supra* note 172, at 6.

²⁰⁴ ORGALIME Paper, *supra* note 172, at 3–4; UNICE Paper, *supra* note 177, at 5.

²⁰⁵ SELECT COMMITTEE, *supra* note 102, at 33.

²⁰⁶ *Id.*

cess into disrepute. The Select Committee, however, dismissed this notion by explaining that permits are granted in recognition that a certain activity is inherently dangerous and hence should be regulated in a manner designed to *reduce* the identified risk. The Select Committee elaborated that a permit does not guarantee that *all* risk has been removed from the operation, and those who choose to engage in the permitted activity should be held responsible for harm that arises despite the regulatory precautions taken.²⁰⁷

Many EC associations called for some form of the “state of the art” defense.²⁰⁸ The state of the art defense would excuse producer liability “when the level of scientific . . . knowledge available to the [producer] was such that he could not possibly foresee that damage would occur from the way in which the waste was handled”²⁰⁹ The Select Committee cautioned that the defense was not to be confused with the “best practices” defense, under which a producer could free itself of liability by showing it had adhered to regulatory requirements. Instead, the state of the art defense would apply only when a producer could show “that even the most eminent scientist could not have known that the waste would give rise to the damage in the given circumstances.”²¹⁰ In a strict liability regime, of course, such a defense would conflict with the goal of internalizing societal costs associated with waste production.

3. Parties With Standing

The Commission’s decision to allow common interest groups to sue for injury to the environment also drew the attention of various EC associations. Greenpeace called for the Commission to harmonize Community law²¹¹ by introducing into the 1989 Proposal specific regulations governing standing for common interest groups, thus removing any national law control over com-

²⁰⁷ *Id.*

²⁰⁸ CEFIC Paper, *supra* note 172, at 7; UNICE Paper, *supra* note 177, at 7; CEA Paper, *supra* note 187, at 2; ORGALIME Paper, *supra* note 172, at 5; SELECT COMMITTEE, *supra* note 102, at 34.

²⁰⁹ SELECT COMMITTEE, *supra* note 102, at 34.

²¹⁰ *Id.*

²¹¹ Phillippe Sands, In the Matter of the Proposed Council Directive on Liability for Damage Caused by Waste: General Comments on the Proposed Directive 4 (Sept. 4, 1989) (prepared for Greenpeace International) (on file at Latham & Watkins).

mon interest group standing.²¹² Alternatively, FEAD called for the elimination of common interest group standing, stating that such standing was contrary to harmonization principles because public interest group standing was not available in all Member States.²¹³

The Select Committee contended that in most cases, the local authorities should decide whether to bring suit for injury to the environment because such injury is inflicted on the public.²¹⁴ The Select Committee recognized, however, that instances could arise in which the authorities could not be relied upon to pursue an action for injury to the environment—notably, where the local authority produced the waste causing the harm.²¹⁵ In those instances, the Select Committee recommended that common interest groups be given standing to recover the costs of preventive and restorative work.²¹⁶ While noting that common interest group standing might be necessary in certain circumstances, the Select Committee acknowledged “substantial difficulties in giving such groups the right to seek the prohibition or cessation of an action which gives rise to injury to the environment.”²¹⁷ As an example of the difficulties, the Select Committee pointed to the problems associated with determining which groups would have standing and the plethora of unsubstantiated suits that could arise if all interest groups were allowed to sue under the 1989 Proposal.²¹⁸

4. Remedies

Various EC political and industrial associations commented on the 1989 Proposal’s provision for remedies to address injury to the environment. The most popular sentiment the associations expressed was that inclusion of a right to bring suit for injury to the environment was completely unnecessary. UNICE, CEFIC, and ORGALIME all called for the provision’s removal.²¹⁹ As UNICE stated in its position paper: “[By] introducing the notion

²¹² *Id.*

²¹³ FEAD Paper, *supra* note 179, at 3.

²¹⁴ SELECT COMMITTEE, *supra* note 102, at 31.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ UNICE Paper, *supra* note 177, at 2–3; CEFIC Paper, *supra* note 172, at 4; ORGALIME Paper, *supra* note 172, at 5.

of 'injury to the environment' into the area of civil liability, the Commission is making an innovation. The usual term for what has to be redressed under . . . civil liability . . . is 'damage.'"²²⁰ UNICE expressed its view that preventive and restorative measures for environmental damage should be reserved for public authorities or those holding a direct economic interest in the property at issue in order to avoid suits by "an indeterminate number of . . . entities."²²¹

The Select Committee disagreed with UNICE and the other groups. In its report to the House of Lords, the Select Committee supported the Commission in its introduction of the concept of injury to the environment.²²² The Select Committee declared: "If an activity causes the . . . destruction of a particular habitat, then the person responsible for the activity should be accountable to society The availability of a legal remedy . . . is an important development which should strengthen the cause of environmental protection."²²³

5. Limitation Periods and Retroactive Effect

Despite the Commission's stance to the contrary,²²⁴ many EC associations expressed concern about the possibility that the 1989 Proposal's liability scheme could be retroactively applied. The source of this concern stemmed from Article 13's use of the term "incident" in its attempt to limit the 1989 Proposal's scope to *prospective* application. UNICE voiced its concern that the language "arising from an incident" was ambiguous and thus subject to interpretations which could give the Commission's liability scheme retroactive effect.²²⁵ The Select Committee felt that Article 13 could not be practically applied due to the difficulty in identifying when an "incident" took place.²²⁶ The Select Com-

²²⁰ UNICE Paper, *supra* note 177, at 2.

²²¹ *Id.* at 3.

²²² SELECT COMMITTEE, *supra* note 102, at 30.

²²³ *Id.*

²²⁴ See *supra* Section II(C)(6).

²²⁵ UNICE Paper, *supra* note 177, at 6.

²²⁶ SELECT COMMITTEE, *supra* note 102, at 34. The Committee singled out cases involving landfills as particularly troublesome scenarios in which to apply Article 13. The difficulty arises because these sites are often in operation for several years and contain mixes of various types of waste. Therefore, it would be difficult to determine which waste caused the harm or whether that particular waste was present at the site at the time the 1989 Proposal took effect. *Id.*

mittee recommended that in place of Article 13, the Commission adopt an article providing a defense for defendants who could show that the pollution in question existed at the time the 1989 Proposal became effective.²²⁷

6. Insurance

As noted above, the Commission failed to address the issue of insurance under the liability scheme it created.²²⁸ Regardless of whether producers would be required to obtain insurance or allowed to participate in voluntary coverage, the overriding question raised by many EC organizations was whether the liability scheme was insurable at all.²²⁹ Addressing the insurance question, the Select Committee stated: "In assessing the impact of measures designed to promote environmental protection, regard must be paid to the practical effect on industry."²³⁰ The Select Committee recognized that extremely high liability risks were often uninsurable and eventually could inhibit investor activity in the industry subject to such liability. The Select Committee concluded that it was vital that the liability imposed by the 1989 Proposal be insurable.²³¹

The European insurance industry's reaction to the 1989 Proposal was strong. CEA expressed the European insurers' "very grave concerns" regarding the insurability of the proposal. CEA explained that the coverage of any liability scheme depended on certain conditions.

Firstly, it must be possible to study the probability of occurrence of the event to be covered using objective data resulting especially from observation of past events. Secondly, the cost of the risk to be covered must be able to be quantified so that insurers can mobilize the necessary reserves for an eventual settlement of a claim. Furthermore, the constitution, over a very long period, of technical provisions for claims which

²²⁷ *Id.* The Select Committee maintained that such an approach would encourage landfill operators to properly monitor the composition of their landfills and time of waste deposit. *Id.*

²²⁸ See *supra* Section II(C)(7).

²²⁹ See, e.g., SELECT COMMITTEE, *supra* note 102, at 35; see also UNICE Paper, *supra* note 177, at 7.

²³⁰ SELECT COMMITTEE, *supra* note 102, at 35.

²³¹ *Id.* UNICE echoed the Committee's position by stating: "It would be unacceptable to industry if legislation were passed which made it liable for risks without insurance against these risks being available on the market." UNICE Paper, *supra* note 177, at 7.

have yet to occur, is particularly difficult . . . when the economic and monetary situation is uncertain.²³²

CEA declared that the Commission's liability scheme failed to meet its conditions due to the 1989 Proposal's introduction of new legal concepts, imprecise definitions, and the absence of the state of the art defense.²³³

The consensus reached between UNICE and the ESC was that the Commission was correct in not requiring producers to obtain minimum insurance coverage. They also agreed that any future amendment of the 1989 Proposal should likewise avoid mandatory insurance provisions.²³⁴ The Select Committee disagreed, however, stating that the only way to guarantee victims of waste just compensation was to require producers to obtain minimum coverage.²³⁵

III. PROPOSAL FOR A COUNCIL DIRECTIVE ON CIVIL LIABILITY FOR DAMAGE CAUSED BY WASTE: 1991 AMENDED DRAFT

Pursuant to the cooperation procedure of Article 100a,²³⁶ the Council submitted the Commission's 1989 Proposal to Parliament for its opinion.²³⁷ Following Parliament's first reading of the 1989 Proposal, it issued its Resolution on the Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste (Resolution) on November 22, 1990.²³⁸ Parliament sent its Reso-

²³² CEA Paper, *supra* note 187, at 2.

²³³ CEA claimed that the concept of injury to the environment gave rise to liability which could not be assessed on a monetary basis. It also noted that the 1989 Proposal's use of the phrase "overwhelming probability," with regard to the burden of proof to be met by plaintiffs, was new and would thus be subject to various interpretations throughout the Community. CEA expressed its opinion that when the above factors are combined with a system of no-fault liability, inadequate and badly defined defenses, and a limitation period of 30 years, the European insurance community would not be able to cover the resulting "massive potential costs." *Id.*

The Select Committee similarly felt that the 1989 Proposal's liability scheme was un-insurable. The Select Committee suggested that coverage might be obtainable if the Commission adopted the state of the art defense, restricted liability to the entity with control of the waste at the time of the harm, and set a cap on financial liability. SELECT COMMITTEE, *supra* note 102, at 35.

²³⁴ See UNICE Paper, *supra* note 177, at 7; see also ESC Opinion, *supra* note 110, at 25.

²³⁵ SELECT COMMITTEE, *supra* note 102, at 35.

²³⁶ See *supra* Section I(B). For a detailed description of the EC institutional legislative interplay, see generally HARTLEY, *supra* note 28.

²³⁷ See *supra* Section I(B)(1).

²³⁸ Parliament Resolution on the Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1990 O.J. (C 324) 248 [hereinafter Resolution].

lution to the Commission requesting it to amend the 1989 Proposal to reflect the provisions of the Resolution. Parliament also sent its Resolution to the Council to aid in preparation of its "common position." Prior to the Council's adoption of a common position, the Commission amended the 1989 Proposal and resubmitted the new version (Amended Proposal) to the Council.²³⁹ The Amended Proposal included several of Parliament's positions and many viewed it as a compromise between the industry-oriented Commission and the relatively "green" Parliament.²⁴⁰

A. *Parliament's Position*

In its Resolution, Parliament recommended numerous significant changes to the Commission's 1989 Proposal.²⁴¹ In particular, Parliament suggested that the cause of action—"injury to the environment"—be changed to "impairment of the environment."²⁴² Parliament defined "impairment of the environment" as "any significant physical, chemical or biological deterioration of the environment insofar as this is not considered to be damage [to person or property]."²⁴³ The Resolution also recommended eliminating authorized disposal and treatment facilities from Article 2's definition of "producer."²⁴⁴

In what appeared as an acknowledgment of the positions taken by several EC associations,²⁴⁵ Parliament seemed to suggest that the producer pays principle be removed from the Commission's 1989 Proposal and replaced with one based upon control.²⁴⁶ Parliament then stated, however, that "[w]aste shall be deemed to remain under the control of the producer . . . until it is subsequently consigned to [an authorized eliminator]."²⁴⁷ Without more, there would have been no functional difference between Parliament's revised version of the 1989 Proposal and the Commission's original provision.²⁴⁸ Parliament, however, suggested

²³⁹ Amended Proposal, *supra* note 18, at 6.

²⁴⁰ See Luiki & Stephenson, *supra* note 2, at 405.

²⁴¹ See generally Resolution, *supra* note 238.

²⁴² *Id.* at 251, art. 2(1).

²⁴³ *Id.*

²⁴⁴ *Id.* at 251, art. 2(2)(c).

²⁴⁵ See *supra* Section II(D)(1).

²⁴⁶ Resolution, *supra* note 238, at 252, art. 3(1).

²⁴⁷ *Id.* at 252, art. 3(2).

²⁴⁸ Compare 1989 Proposal, *supra* note 18, art. 3 with Resolution, *supra* note 238, at 252, arts. 3(1) and (2).

that producer liability be limited to the amount exceeding the carrier's liability under the Convention on Civil Liability if the waste had been transferred into the control of a carrier subject to the Convention, and such waste was in the carrier's control at the time the harm occurred.²⁴⁹

Parliament made extensive changes to Article 4 of the 1989 Proposal.²⁵⁰ The changes allowed Member States to determine which entities would be able to sue under the Directive²⁵¹ and the remedies available to each category of plaintiff.²⁵² The changes also modified the plaintiff's burden of proof in bringing its case,²⁵³ and allowed Member States to determine "whether and

²⁴⁹ Resolution, *supra* note 238, at 252, art. 3(3).

²⁵⁰ Parliament's revisions to Article 4 provided:

1. The National laws of the Member States shall determine:

(a) the person who may bring a legal action in the event of damage or impairment to the environment caused or about to be caused by waste;

(b) the remedies available to such persons shall include:

(i) an injunction prohibiting the act or correcting the omission that has caused or may cause the damage and/or compensation for the damage suffered;

(ii) an injunction prohibiting the act or correcting the omission that has caused or may cause impairment of the environment;

(iii) an injunction ordering the reinstatement of the environment and/or ordering the execution of preventive measures and the reimbursement of costs lawfully incurred in reinstating the environment and in taking preventive measures (including costs of damage caused by preventive measures);

(c) the burden of proof on the plaintiff, when affirming the causal link between the waste . . . and the damage or impairment to the environment suffered or likely to be suffered . . . ; the burden of proof shall be no higher than the standard burden of proof in civil law;

(d) whether and to what extent damages for loss of profit or economic loss may be recoverable.

. . . .

4. Common interest groups or associations, which have as their object the protection of nature and the environment, shall have the right to bring legal proceedings to pursue any remedy under paragraph 1(b) or to join in legal proceedings that have already been brought. However, in order to avoid a proliferation of litigation, Member States may limit the number of such groups . . . by authorizing . . . only certain groups . . . to exercise the right provided for under this paragraph.

Id. at 252-53, art. 4.

²⁵¹ *Id.* at 252, art. 4(1)(a). Under Parliament's provisions, Member States' ability to determine which parties could sue under the Directive was not absolute. Such discretion was limited by the Resolution's express grant of standing to public interest groups "which have as their objective the protection of nature and the environment . . ." *Id.* at art. 4(4). Member States, however, were free to determine which public interest groups would qualify for Article 4(4) standing. *Id.* Thus, the limitation on Member States' discretion was itself somewhat diluted.

²⁵² *Id.* at 252-53, arts. 4(1)(b)(i), (ii) and (iii); see *supra* note 250 for text of the provision.

²⁵³ Resolution, *supra* note 238, at 253, art. 4(1)(c). The Resolution called for the standard burden of proof utilized throughout the EC in civil cases. This amendment would correct the purportedly mistaken use of the "overwhelming probability" test found in the English version of the 1989 Proposal. See *supra* Section II(C)(5).

to what extent damages for loss of profit or economic loss . . . [could] be recover[ed].”²⁵⁴

Parliament’s revisions also included two new defenses. The first gave a defendant the right to exculpate itself by showing that a third party who acted with the intent to cause the harm did cause the harm suffered.²⁵⁵ The second new defense provided that carriers and waste disposers would be free from liability if they could prove that the consigning producer had misrepresented the true character of the transferred waste.²⁵⁶

Article 8a of the Resolution called for the Commission to amend the 1989 Proposal to include a provision requiring Member States to repair damaged or impaired lands if the party liable for the harm could not be identified.²⁵⁷ Moreover, under the Resolution an insurer of an entity that produced or eliminated waste would be personally liable to a party injured by the waste if the producer or eliminator became insolvent prior to the injury.²⁵⁸

Despite the insurance community’s broad opposition,²⁵⁹ Parliament felt that the 1989 Proposal should call for mandatory insurance “or some other financial security” to cover the risks arising under its liability scheme.²⁶⁰ The risks created by the 1989 Proposal would be subject to limitation by Article 11(2) of the Resolution. It provided that Member States could set limits on the liability of any one defendant, but that such limits could not be lower than 70 million ECUs for damage to the environment and 50 million ECUs for impairment of the environment.²⁶¹ The Resolution also stated that no limit should be available to a defendant who acted with the intent to cause the harm inflicted.²⁶²

B. *Significant Revisions in the Amended Proposal*

Much of the Commission’s 1989 Proposal remained unchanged after the July 1991 amendments. This section will therefore ad-

²⁵⁴ Resolution, *supra* note 238, at 253, art. 4(1)(d).

²⁵⁵ *Id.* at 254, art. 6(1)(a).

²⁵⁶ *Id.* at 254, art. 7(1).

²⁵⁷ *Id.* at 255, art. 8a.

²⁵⁸ *Id.* at 256, art. 13a.

²⁵⁹ See *supra* Section II(D)(7).

²⁶⁰ Resolution, *supra* note 238, at 255, art. 11(1).

²⁶¹ *Id.* at 255, art. 11(2).

²⁶² *Id.* at 255, art. 11(4).

dress only those articles that were revised following Parliament's suggestions or according to the Commission's initiatives. As noted above, a substantial portion of the Commission's revised draft is the result of the compromise it reached with Parliament.²⁶³ One of the most notable results of the compromise was the adoption of Parliament's revisions to Article 4.²⁶⁴ The revisions give Member States the right to determine who can bring suit under the Amended Proposal, outline the remedies available, set the burden of proof to be met, and determine whether economic loss is recoverable.²⁶⁵ The Commission also adopted Parliament's suggestion that a defense for intentional intervention by third parties be available to defendants.²⁶⁶ The Amended Proposal thus allows a producer to avoid liability by showing that, due to no fault of the producer, an intentional act or omission of a separate entity caused the damage or impairment of the environment.²⁶⁷

Article 7 of the Amended Proposal partially incorporates Parliament's suggested defense regarding the producer's intentional misstatements to subsequent consignees concerning the character of waste. In Parliament's Resolution such a defense was available to the carrier and waste disposer.²⁶⁸ The Amended Proposal, however, allows only the eliminator of waste to assert the defense.²⁶⁹

Article 11 of the Amended Proposal addresses the issue of insurance. Article 11 adopted the Resolution's position²⁷⁰ that a mandatory insurance provision should be included in the Amended Proposal.²⁷¹ The Commission, however, conspicuously failed to include the liability caps²⁷² provided for in Parliament Resolution Article 11,²⁷³ which some EC associations considered

²⁶³ See *supra* Section III(A).

²⁶⁴ Amended Proposal, *supra* note 18, at art. 4.

²⁶⁵ See *supra* notes 250–54 and accompanying text.

²⁶⁶ Amended Proposal, *supra* note 18, at art. 6(1)(a).

²⁶⁷ *Id.*

²⁶⁸ Resolution, *supra* note 238, at 254, art. 7(1). Parliament's desire to hold carriers liable for harm caused during transport—up to the limits set by the Convention on Civil Liability—necessitated the inclusion of the carrier within the defense provision. *Id.* at 252, art. 3(3).

²⁶⁹ Amended Proposal, *supra* note 18, at art. 7(1). The defense was not granted to carriers due to the Commission's position that, under the Amended Proposal, carriers generally are not to be directly liable for harm caused by waste during transport. See *id.* at arts. 2 and 3.

²⁷⁰ See Resolution, *supra* note 238, at 255, art. 11(1).

²⁷¹ Amended Proposal, *supra* note 18, at art. 11(1).

²⁷² See *id.* at art. 11.

²⁷³ Resolution, *supra* note 238, at 255, art. 11(2).

key to achieving insurability of the Directive's liability scheme.²⁷⁴ In what must have been an acknowledgment of the need to clarify terms for insurance purposes, the Commission adopted Parliament's revision of "injury to the environment" to "impairment of the environment" and the Resolution's accompanying definition.²⁷⁵

The only significant change in the Amended Proposal not suggested by Parliament was the Commission's treatment of Article 3 regarding cases of damage or impairment to the environment caused by the actions or omissions of a carrier and covered by the Convention on Civil Liability.²⁷⁶ Under the Amended Proposal's provisions, the carrier will be liable according to the Convention's liability scheme, while the producer of the waste will remain strictly liable under the Directive on Civil Liability.²⁷⁷ This provision is consistent with the Commission's position that the producer, and not the transporter, should be subject to the Amended Proposal's liability scheme.²⁷⁸

CONCLUSION

The Community reacted to the Amended Proposal and the consensus problems it posed by placing the document in legislative limbo. Its fate is unsure. The political exercise of drafting, critiquing, and revising the proposed directive has exposed conflicting positions on environmental regulation which go to the heart of crafting a comprehensive approach to waste management. The questions arising from these conflicting positions are profound—who shall bear responsibility for preventing or remediating contamination; who can claim injury; what are damages; can the risk be insured. Consideration of the proposal has forced the Community to confront these questions, which are integral not only to the Amended Proposal but to its overall environmental strategy. Moreover, the issues the Amended Proposal raises highlight the fundamental structural weakness of the EC political arrangement. The creation of a waste regulatory

²⁷⁴ See *supra* note 232.

²⁷⁵ Amended Proposal, *supra* note 18, at art. 2(1)(d). The Amended Proposal defines impairment of the environment as "any significant physical, chemical or biological deterioration of the environment insofar as this is not considered to be damage [to person or property]." *Id.*

²⁷⁶ *Id.* at art. 3(1).

²⁷⁷ *Id.*

²⁷⁸ See *id.* at arts. 2 and 3.

regime presupposes both a general consensus on the principles which provide the basis for environmental regulation and a political system in place to process and implement such legislation.

The resolution of the issues the Amended Proposal has raised is intertwined with the perennial EC problem of sovereignty. The EC continues to struggle through its basic governmental functions of developing legislation, coaxing Member States to adopt conforming laws, and monitoring individual enforcement. 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 which strives to forge consensus among very different Member States in a unique political context. It has little direct power to compel countries to accept its direction. The legislative and legal mechanisms created by treaty are still evolving. Harmonizing laws, let alone enforcing them, remains a daunting task.

Almost twenty years have elapsed since the Community first officially mandated the establishment of a waste regulatory regime. Much has occurred in those decades, including the explosion in environmental awareness and modifications to the EC legislative system. The confluence of these two movements paved the way for the thoughtful debate on the proposed directive over the last three years. Now the issues are fully on the table and the players can analyze their conflicting positions and arguments. The blessing and curse of open and intelligent debate is that it places in stark relief differing credible views. The parties can now reach a compromise, make specific policy choices on basic environmental principles, or remain paralyzed. The logjam must be broken by passing the Amended Proposal as is, after further amendment, or by scrapping the directive and crafting a new one within the broader framework of a comprehensive approach to environmental regulation.

The fate of the proposed directive is unclear, but its stormy legislative history may provide the impetus for the EC to undertake a serious effort to construct a comprehensive waste management regime. By focusing on the principles set forth in the 1989 Proposal and its amended version, a broad spectrum of EC actors has revealed its position on critical environmental issues. Now the Community must seize this opportunity to make fundamental policy choices which will chart not only the future of the proposed Directive on Civil Liability for Waste but the course of the EC's overall approach to environmental regulation.