Environmental Liability and Partieipation: The Second-Best Solution

Gretta Goldenman *et al.*, *Environmental Liability and Privatization in Central and Eastern Europe*. London: Graham & Trotman/Martinus Nijhoff, 1994. Pp. xviii, 242 [$90.00 (U.S.)].

Reviewed hy Richard Brooks and David Farnsworth*

The authors use their review of *Environmental Liability and Privatization in Central and Eastern Europe* as a vehicle to discuss environmental liability in Central and Eastern Europe. In their view, one of the major difficulties facing Central and Eastern European countries is the simultaneous restoration of their environments and their economies.

In their discussion of this challenge, the authors question whether privatization is the proper entry point from which to embark upon environmental cleanup. They discuss the current comparative risk debate in the United States, and ultimately dismiss a comparative risk analysis as the solution for Central and Eastern Europe because it could favour the prevention of future pollution over the cleanup of past pollution.

The authors then elucidate the failure of the American system to efficiently clean up hazardous sites and point to the German model as a more useful example for Central and Eastern Europe. They conclude that the current economic situation in Central and Eastern Europe will probably only allow for the securing of hazardous sites and modest improvements to current technology.

Cette chronique bibliographique portant sur le livre intitulé *Environmental Liability and Privatization in Central and Eastern Europe*, fournit aux auteurs l'occasion de traiter du sujet de la responsabilité environnementale en Europe centrale et en Europe de l'Est. Selon ceux-ci, la restauration simultanée tant de l'économie que de l'environnement constitue l'un des problèmes les plus importants auxquels doivent faire face les pays d'Europe centrale et de l'Est.

À la lumière du débat qui sévit actuellement aux États-Unis relativement à la question du risque comparatif, les auteurs se demandent si la privatisation constitue le point de départ idéal de ce nettoyage environnemental. Ils rejettent l'analyse comparative du risque comme solution pour l'Europe centrale et l'Europe de l'Est parce qu'elle risque de favoriser la prévention contre la nouvelle pollution au détriment de la lutte contre la pollution déjà existante.

Par la suite, les auteurs expliquent pourquoi le système américain n'a pas permis de régler efficacement le problème des sites de déchets dangereux et concluent que le modèle allemand constitue sans doute un exemple fort utile duquel devraient s'inspirer les pays d'Europe centrale et d'Europe de l'Est. Finalement, ils concluent que la situation économique qui prévaut actuellement dans ces pays ne permettra probablement que d'assurer la sécurité des sites de déchets dangereux et de procéder à de modestes amélioration de la technologie actuelle.

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Synopsis

Introduction

Eastern Europe and Russia are privatizing their industries.[1] In the course of their transformation to a market regime, these nations face the problem of restoring their environments and developing sustainable economies for the future. *Environmental Liability and Privatization in Central and Eastern Europe*[2] is one of several recent works reporting on this difficult transition period and recommending future courses of action.

In one sense, Western Europe and the United States share the environmental problems of Central and Eastern Europe (C.E.E.), since these nations also face mammoth cleanup responsibilities for contaminated industrial and defence industry sites.[3] In another sense, Eastern Europe and Russia face the more difficult task of simultaneously restoring both their economies and their environments. Such a predicament raises the fundamental question whether significant environmental protection is possible in the early stages of these nations' efforts at economic development. A review of *Environmental Liability* reveals that environmental protection during privatization is likely to arise as a second-best solution, promising neither comprehensive nor adequate cleanup and control. Since neither the international community, the centralized governments of these states, nor the market will fully protect citizens from environmental hazards, these citizens may need to rely upon the forms of civic participation which recently secured their independence from the U.S.S.R. and their freedom from communist rule.

I. The Warsaw Conference

In *Environmental Liability*, Gretta Goldenman has assembled the findings of an international conference on privatization, foreign direct investment, and environmental liability which took place in Warsaw, Poland in 1992.[4] *Environmental Liability* seeks to

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[1] See *e.g.* R. Frydman *et al.*, *The Privatization Process in Central Europe* (London: Oxford University Press, 1993).

[2] G. Goldenman *et al.*, *Environmental Liability and Privatization in Central and Eastern Europe* (London: Graham, Trotman/Martinus Nijhoff, 1994). The book is one of a series of supporting documents for the Environmental Action Programme for Central and Eastern Europe endorsed at the Ministerial Conference in Lucerne, Switzerland in April 1993. The general editor of the series is S.P. Johnson. Advisory editor is G. Handl.

[3] See Parts **III.B** and **III.C**, below.

[4] The conference was sponsored by the World Bank, the Organization for Economic Cooperation and Development, and the European Bank for Reconstruction and Development. The government of Poland hosted the conference, which was attended by government officials responsible for privatization and environmental protection in Albania, Belarus, Bulgaria, the Czech and Slovak Federal Republics, Estonia, Germany, Hungary, Latvia, Lithuania, Poland, Romania, the Russian Federation, and the Ukraine. The Warsaw Conference was convened to establish solutions to environmental problems which arise in the context of privatization. It sought to (i) assess the role of environmental liability in the context of privatization and direct investment; (ii) survey and assess the usefulness in Central and Eastern Europe of the environmental liability regimes of other industrialized countries; (iii) under-

shed light on privatization issues arising from the economic transformation of Central and Eastern Europe, and its implications with respect to liability for and cleanup of past environmental harm. The book warns that the risk of derailing urgently needed privatization may be too great to justify fully integrated privatization/environmental protection programs. Instead, the authors recommend a "less cumbersome" means of addressing past pollution and establishing effective current environmental management.[5] For example, the authors suggest that such alternatives include "[p]arallel environmental programs aimed at ensuring that regulatory frameworks are appropriate for the new economic conditions, along with educating enterprise managers about the implementation of compliance requirements."[6]

Three years have passed since the Warsaw Conference, but policy makers still face the problem of reconciling rapid privatization and liability for past environmental damage. The initial dilemma may be simply stated. The success of the restructuring of the C.E.E. economies depends on the substantial foreign investment necessary to develop up-to-date technical and managerial capability. However, foreign investment is currently restrained, due especially to a lack of clearly defined liability schemes for past pollution.[7]

In spite of being somewhat dated,[8] *Environmental Liability* does a remarkable job of presenting a comprehensive picture of privatization activity and environmental liability in C.E.E.[9] This book is divided into two parts. The first discusses and characterizes the framework in which privatization takes place in both C.E.E. and other parts of the world. Of greatest interest are the authors' discussions of the legal issues associated with environmental liability; the economic impacts on privatization of environmental problems; the privatization process itself and how it affects enterprises with environmental problems; the role played by liability in environmental cleanup in other industrialized countries; and the issue of cost containment, in other words, how investors and governments can manage environmental problems during property transfer.

The second part of *Environmental Liability* presents short studies of privatization in practice. In addition to focusing on different countries, each of these sections

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stand the practical techniques used by the public and private sectors to manage environmental risks arising in the transfer of industrial property; and (iv) consider appropriate legislative and policy frameworks which define environmental liability in C.E.E. (Goldenman *et al.*, *supra* note 2 at ix).

[5] *Ibid.* at 41.

[6] *Ibid.*

[7] The authors also express concern for the absence of well-established and enforced control programs for ongoing pollution.

[8] According to one of the authors, actual legal requirements and procedures described in this book have changed since 1992 (see *e.g.* with respect to the Czech Republic). In fact, the law in all of these nations has been modified since 1992 (telephone interview with P. Tillinghast, Hogan & Hartson (1 February 1995) Washington, D.C.).

[9] While the implications of this study are meant to apply broadly to all C.E.E. countries and to the Russian Federation, the book draws most of its examples from Hungary, Poland, and the Czech and Slovak Republics.

reviews selected aspects of the larger subject, for example: preparing an enterprise for privatization in Poland; developing legislation on environmental liability in Hungary; coping with environmental risks through due diligence and other means in privatization transactions; and examining the various legal approaches to environmental liability adopted in Hungary, Poland, and the Czech and Slovak Federal Republics.

Privatization and environmental cleanup must be viewed in light of the full range of environmental disasters plaguing Eastern Europe. Although numerous accounts of these environmental conditions have been prepared, no systematic descriptions are available.[10]

II. Choosing the Proper Entry Point

Given the level of environmental degradation in Central and Eastern Europe, *Environmental Liability* asks whether privatization is a proper entry point for issues such as the cleanup of past pollution, compensation for past pollution harms, and the establishment of future environmental controls. The current comparative risk debate in the United States sheds light on this question. The Environmental Protection Agency (E.P.A.) and selected American states have undertaken to rank the relative seriousness of environmental risks in order to allocate scarce resources for cleanup or for prevention.[11] The United States Congress is currently considering new statutes to require this type of comparative risk analysis.[12]

If a similar comparative risk evaluation scheme were to be employed in Central and Eastern Europe, the results might be surprising. Although United States government officials rank environmental health threats from hazardous pollutants as an important class of risks, they accord a higher priority to other risks such as pesticides, indoor radon, and global ecosystem threats. Administrators have given some hazardous sites lower priority partly because these sites present a lower risk of public exposure than do other kinds of pollution. Studies suggest, however, that the American public remains deeply concerned about hazardous waste sites and a detailed review of the

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[10] *Environmental Liability* is based upon the World Resources Institute Report, *World Resources 1992-93* (New York: Oxford University Press, 1992), which is the most comprehensive aecount to date; however, a completely comprehensive account does not yet exist.

[11] Environmental Protection Agency, *Unfinished Business: A Comparative Assessment of Environmental Problems, Overview Report* (Washington, D.C.: Office of Policy Analysis, Office of Policy, Planning and Evaluation, February 1987).

The Northeast Center for Comparative Risk at Vermont Law School has both promoted and evaluated state comparative risk projects (see Northeast Center for Comparative Risk, *State Comparative Risk Projects: A Force for Change* by R. Minard, K. Jones & C. Patterson (South Royalton, Vermont: Vermont Law School, 15 March 1993) [unpublished]).

[12] See A. Finkel & D. Golding, eds., *Worst Things First? The Debate Over Risk-Based National Environmental Priorities* (Washington, D.C.: Resources for the Future, 1994).

literature indicates significant public exposure in some instances.[13] We suspect the existence of a similar split between official and public opinion in Central and Eastern Europe.

If priority is accorded to hazardous waste sites, whether in the United States or in Central and Eastern Europe, presumably those sites with significant populations exposed to serious pollution should be selected. Unfortunately, selecting sites on the basis of privatization does not take into account the level of threat posed by the pollution. That is, privatization as the basis for cleanup is a hit and miss proposition. It may result in sites which do not pose serious risks being cleaned, while many non-privatized sites which pose serious risks are ignored. For example, many of the district sites which are held in public ownership in C.E.E. will not be reviewed in the privatization process.

A comparative risk approach also raises serious questions about the relative importance of allocating funds for the cleanup of past sites, as opposed to the prevention and control of future pollution. It is important to remember that past and future pollution problems are often, but not always, separable. Comparative risk assessment may reveal pollution prevention to be more important than are cleanup efforts. Technology adopted for the purpose of new economic production may prevent future pollution but do little about past pollution. Whether due to a lack of information or the orientation of the Warsaw Conference, *Environmental Liability* offers no general comparative risk evaluation of using privatization as a tool for environmental cleanup and preservation.

There may, however, be good reason for ignoring a comparative risk evaluation. Privatization becomes the inevitable and required choice for Central and Eastern European environmental cleanup and for the prevention of future abuses. Foreign purchasers and international lenders accustomed to the environmental laws of North America and Western Europe — and hence wary of future liabilities — hoist the environmental warning flag before buying companies. Hence, one rationale for C.E.E. to undertake environmental cleanup during the privatization process is to remove the environmental obstacle to privatization. In this context, environmental protection is viewed as a regrettable necessity on the road to free markets. Of course, raising environmental issues at the time of privatization may mobilize outside environmental resources to help in any cleanup effort; however, it may also scare away investments and reduce sale prices.

A government-owned enterprise must first become privatized before that government can divest itself of the property. The authors of *Environmental Liability* have observed that C.E.E. policy makers have experimented with different privatization programs, which they divide into two groups. The most common method is "transformation" whereby the legal structure of the enterprise is changed. The alternate is "liquidation" which involves the winding up of a public entity and the

[13] National Research Council, *Environmental Epidemiology: Public Health and Hazardous Waste* (Washington, D.C.: Natural Academy Press, 1991).

transfer of its assets.[14]

The first step of transformation is "corporatization" whereby the company originally organized under a public law instrument becomes a private law company. In some cases this change is effected by general legislation or decree.[15] Other countries corporatize in an *ad hoc* manner, company by company.[16] The legal form of the new company is determined by each country's commercial code, and the state retains ownership until the company is formally divested.[17] Privatization in Hungary, the Czech Republic, and Slovak Republic also calls for a "privatization plan" or "project proposal" for each enterprise. These documents contain information regarding the company's assets, liabilities, the legal form which the company has taken, any scheme for worker participation in ownership, and also environmental information.[18]

The alternate method, liquidation, allows for a state-owned enterprise to be broken into pieces and for those pieces to be sold or leased. The advantage of liquidation is that especially large enterprises can be dismantled into more workable units, allowing for certain assets to be transferred free of liability, and for other liabilities to be retained by the state. Bankruptcy is related to this overall liquidation process, which involves the winding up of no longer economically viable businesses and the liquidation of the remaining assets.[19]

Whether transformation or liquidation is involved, both are precursors to "divestiture", the actual valuation and transfer of the property to private ownership. For purposes of assignment of liability and ultimate valuation of the property, "[t]he environment-related issues at the time of divestiture is [*sic*] how responsibility for environmental problems will be allocated between the buyer and the government selling the property, and if such problems will affect the price of transferability of the

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[14] Goldenman *et al.*, *supra* note 2 at 28; see also ch. IV generally. Joint venture is another corporate form which can give rise to a private-public partnership. Note also that liability for past environmental damage is, of course, not the only concern of privatization officials. One author has argued that beyond promoting market economies, the central goal of privatization laws is to redress takings by deposed governments (see A. Gelpern, "The Laws and Politics of Reprivatization in East-Central Europe: A Comparison" (1993) 14 U. Pa. J. Int'l Bus. L. 315).

[15] This transformation occurs differently in different countries: in Germany, the Czech Republic, Slovak Republic, and in Russia, this change was effected by mandatory legislation or by decree (Goldenman *et al.*, *ibid.* at 35-40).

[16] See *e.g.* the discussions of Poland and Hungary (*ibid.* at notes 67-68, p. 93).

[17] *Ibid.*

[18] *Ibid.*

[19] At the time the materials for *Environmental Liability* were developed, bankruptcy procedures in C.E.E. and in the former Soviet Union were not yet in place (*ibid.* at 31). For more current information on bankruptcy options, see M. Balfour & C. Crise, "A Privatization Test: The Czech Republic, Slovakia and Poland" (1993) 17 Fordham Int'l L.J. 84. The Czech Republic's bankruptcy law came into effect in April 1993; the Slovak government also made significant amendments to its own bankruptcy law at approximately the same time; Poland, an exception, has had a bankruptcy law since 1934 which it revised in 1990 (*ibid.* at 88-89, 118).

company."[20] Divestiture can take various forms such as an individually negotiated sale,[21] mass privatization,[22] or a worker/management takeover.[23] Due to extensive negotiations over potential environmental liability and the absence of national guidelines on the allocation of pre-privatization pollution, individual sales tend to be long and cumbersome. The additional time required can also be attributed to the fact that nearly all foreign investors perform environmental audits to determine the environmental condition of the enterprise.[24]

Where C.E.E. enterprises are involved in transformation from state to private ownership, all enterprise assets and liabilities typically move from the former to the new owner. This is referred to as the rule of "general succession".[25] Under this scenario, the successor private company would become liable for the cleanup of past contamination.[26] The purchaser in this situation, however, is not liable for previously undetected environmental problems which surface after the required due diligence investigation.

The great strength of *Environmental Liability* is its thoughtful assessment of C.E.E. laws which link liability for past environmental damages to property transfer in the privatization context. The authors' assessment is based on four options:

(a) Investor pays less but assumes all liability for past contamination;
(b) Government uses some of the purchase funds for cleanup;
(c) Government indemnifies investors and assumes responsibility for past pollution;
(d) Combinations of the above options.[27]

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[20] Goldenman *et al.*, *ibid.* at 31.

[21] This may involve a bidding process whereby the bid valuation considers environment liability (see *ibid.* at 32, discussing Poland's use of environmental considerations in negotiations).

[22] This procedure has been used in the Russian Federation, and in the Slovak and Czech Republics. To create a demand for shares in the company, vouchers are given or sold to citizens, who in turn use them to purchase shares. Apparently these voucher-based mass privatization programs involved little disclosure of environmental information (*ibid.* at 33-34; Balfour & Crise, *supra* note 19 at 85).

[23] This list is not exhaustive. *Environmental Liability* explores other methods and also suggests that a number of these methods may be combined in practice. Poland, for instance, adopted a scheme which combined liquidation and a voucher system (Goldenman *et al.*, *ibid.*).

[24] *Ibid.* at 32.

[25] This is the case in Hungary and Poland (*ibid.* at 11).

[26] It should be noted that the civil codes in some countries allow a buyer and seller to arrive at a different allocation of assets and liabilities. For example, in Poland buyers assume liability; however, the buyer becomes "jointly and severally liable with the former owner for all liabilities arising from the conduct of the enterprise prior to its sale, up to the value of the enterprise at the time of purchase" (*ibid.* at 12).

[27] *Ibid.* at xv.

Although some of the nations opt for the first two alternatives,[28] the authors found the third alternative the most cost effective.[29] Indemnification neither scares off potential purchasers nor encourages them to consider costly restoration, with a consequent reduction in the purchase price. Government assumption of responsibility for past pollution may speed the privatization process and permit a more rational approach to the general pollution problem. However, such an approach depends upon the adequacy of these nations' environmental laws and the possibility of government-sponsored cleanups. Studies of environmental laws in Central and Eastern Europe reveal the anticipated pattern of non-enforcement.[30] If we seriously consider the option of government-funded initiatives, the prospects of significant environmental restoration are dim. *Environmental Liability*'s review of the abysmal record of cleanup in Central and Eastern Europe and North America supports this pessimistic assumption. For instance, in its characterization of various privatization and cleanup experiences in England and Germany the book points out that the primary concern for policy makers was to balance the concerns of both investors and environmentalists.[31]

III. The United States Experience

The United States is experiencing challenges similar to those faced by Western European and C.E.E. countries dealing with privatization and liability for environmental damage. In situations involving military base closures, Superfund liability, and bankruptcy proceedings generally, environmental liability has created unusual problems requiring unique solutions.

A. Base Closure and Environmental Liability

As part of the overall plan to reduce the size of the American military, the *Defense Base Closure and Realignment Act of 1990* "prescribes the closing and realignment of a substantial number of domestic military bases."[32] Selling the real property on which the facilities are located would permit the government to recover costs related to closing and relocation, and also to relocate personnel to other bases and help rebuild

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[28] For example, Poland and the Czech Republic (see E.M. Zechenter, "The Socio-Economic Transformation of Poland: Privatization and the Future of Environmental Protection" (1993) 6 Georgetown Int'l Env. L. Rev. 99).

[29] Goldenman *et al.*, *supra* note 2 at xv.

[30] For an overview of selected environmental laws in Eastern Europe, see D.M. Goldberg, *A Comparison of Seven Environmental Impact Assessment Regimes* (Washington, D.C.: Center for International Environmental Law, 1993).

[31] Goldenman *et al.*, *supra* note 2 at 35.

[32] Pub. L. No. 101-510, 104 Stat. 1808 (1990) (codified at 10 U.S.C. § 2687 (Supp. III 1991). For a full discussion of base closure and federal facility liability, see D.C. Steppick, "A Military Mess: C.E.R.C.L.A. Liability and the Base Closure and Realignment Act" (1994) 59 J. Air L. & Commerce 449; S. Darmody, "Hazardous Waste Law for the Federal Employee After the Federal Facility Compliance Act of 1992: An Analysis of the Legal Framework" (1993) 40 Fed. Bar News & J. 650.

local economies historically reliant on the government facility.[33] However, the plans to transfer the real property at these sites to municipal and private control have been "severely impaired by thousands of environmental hazards left behind by military operations. Environmental cleanup at these sites may delay cost recovery and redevelopment for decades."[34] This effectively turned the government's expected "peace dividend" into environmental liability which, under existing American environmental law, has brought to a halt any hopes of a quick closure.

The sheer amount of cleanup required at American federal facilities is staggering.[35] According to Steven A. Herman, the Assistant Administrator for Enforcement at the E.P.A., it will cost hundreds of billions of dollars "and require decades of studies and remedial action" to right environmental wrongs.[36] In response to the enormity of the task, efforts have been made to accelerate the typically slow pace of base closures.[37]

B. United States Superfund

The *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*[38] (Superfund or C.E.R.C.L.A.) provides a mechanism for waste site cleanup and for an emergency response to spills. The C.E.R.C.L.A. is a restitution-based remedial statute which establishes a framework for response, liability, and compensation.

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[33] Steppick, *ibid.* at 450.

[34] *Ibid.* at note 8, p. 450, quoting K. Schneider, "Toxic Pollution Stalls Transfer of Military Sites" *The New York Times* (29 June 1991) 3A.

[35] S.A. Herman, "Environmental Cleanup and Compliance at Federal Facilities: An E.P.A. Perspective" (1994) 24 Env. L. 1097.

[36] In the United States and elsewhere, the Department of Defense is undertaking cleanups at approximately 1,800 bases; the Department of Energy's Environmental Management Program is cleaning up 137 sites and facilities; and the Department of Interior and Agriculture may be faced with the cleanup of hundreds or thousands of abandoned mines (*ibid.* at 1099).

[37] According to Assistant Administrator Herman, the Department of Defense provided the E.P.A. with funding to hire 100 additional E.P.A. staffers to assist with the acceleration of environmental cleanups at closing bases (*ibid.* at 1103).

[38] 42 U.S.C. §§ 9601-9675 (1980); reauthorized and amended by the *Superfund Amendments and Reauthorization Act of 1986*, Pub. L. No. 99-499, 100 Stat. 1613 (1986) [hereinafter S.A.R.A.]. S.A.R.A. provided for more stringent cleanup standards, produced another regulatory program called the *Emergency Planning and Community Right-to-Know Act*, 42 U.S.C. §§ 11001-11050 (1986) [hereinafter E.P.C.R.A.], and codified several court decisions. Generally speaking, the C.E.R.C.L.A. provides that where there is a release or threatened release of a hazardous substance or any pollutant or contaminant that poses imminent threat to public health or welfare, the executive (*i.e.* the E.P.A.) is authorized to act, consistent with the National Contingency Plan, to remove or arrange for the removal of the released material (42 U.S.C. § 9604(a)(1)(A),(B) (1980)). The major C.E.R.C.L.A. regulations, known as the National Oil Hazardous Substances Pollution Contingency Plan (National Contingency Plan or N.C.P.), establish criteria governing responses to releases and threatened releases and also oversee the development of appropriate remedies (55 Fed. Reg. 8666 (1990) (codified at 40 C.F.R. Part 300ff (1990)).

Liability under the C.E.R.C.L.A. is strict, joint and several; thus a plaintiff does not need to prove negligence. Also, if more than one party has contributed to harm, each and every party can be held individually liable for the entire cost of cleanup.[39] Courts, however, are able to allocate cleanup costs among defendants. Liability under the C.E.R.C.L.A. is also retroactive and thus applies to past acts that have contributed to current environmental damage.

There are, however, certain defences to liability under the C.E.R.C.L.A.: the innocent landowner defense;[40] the government's limited waiver of sovereign immunity to suit under the C.E.R.C.L.A.;[41] a notice requirement for sale of government land;[42] statutorily mandated deed covenants;[43] contractual indemnity for environmental liability;[44] and potential indemnity from the government.[45]

Potentially responsible parties in a C.E.R.C.L.A. case are frequently insolvent or face insolvency due to liability. Because actions for cost recovery brought under the C.E.R.C.L.A. "run into the millions of dollars," it has been argued that enterprises will use bankruptcy as a "haven for relief".[46] As a result, the Superfund law has largely failed to date. The reasons for that failure are complex, but one significant factor may be the law's stringent cleanup standards.

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[39] The C.E.R.C.L.A. lists general categories of liable parties: present or past owners or operators of a site where a release has occurred; persons who have arranged for disposal of hazardous waste at a site (*i.e.* "generators"); and transporters of that waste (42 U.S.C. § 9607(a)(1)-(4) (1980)).

[40] Requiring a defendant to prove by a preponderance of the evidence that: 1) the hazardous release was caused by others; 2) the defendant and those parties had no relationship; 3) the defendant had no knowledge or reason to know of the release at the time the defendant purchased the property; and 4) the defendant exercised due care with respect to the site (Steppick, *supra* note 32 at notes 124-28, pp. 515-16; T.L. Garrett, "Superfund Liability and Defenses: A 1992 Primer" (1992) 6:3 Natural Resources & Env't 3 at 6).

[41] This waiver applies when the government is not acting in a regulatory capacity.

[42] The C.E.R.C.L.A. contains a scheme which requires the identification and the cleanup of environmental contamination at federal facilities, and also imposes notice and covenant requirements on the federal government when it transfers contaminated real property (42 U.S.C. § 9620(h) (1988)).

[43] The covenant must warrant that all necessary remedial action has been taken and that any additional measures required shall be taken by the United States government.

[44] In spite of being subject to liability separately, private parties to a real estate transaction can agree to indemnify one another by contract (A.D. Weber, "Misery Loves Company: Spreading the Costs of C.E.R.C.L.A. Cleanup" (1989) 42 Vand. L. Rev. 1469 at 1493-94).

[45] Steppick, *supra* note 32 at notes 219-58, pp. 529-36.

[46] J.C. Ryland, "When Policies Collide: The Conflict Between the Bankruptcy Code and C.E.R.C.L.A." (1994) 24 Memphis State U. L. Rev. 739 at 740. Ryland argues against dischargeability issues such as: the "abusive use of bankruptcy as a means for those responsible for environmental degradation to transfer their liability to the taxpayers of this country" in the context of the automatic stay; the trustee's power of abandonment; and the administrative expense priority. See also R.E. Phelan & M.L. Hood, "Dancing the Toxic Two-Step, Part II: Environmental Problems in Bankruptcy Cases" (1994) 41 Fed. Bar News & J. 282. With respect to the right of contribution and the priority of environmental claims, the authors draw a parallel between the conflicts in policies found in environmental laws and those found in the Bankruptcy Code.

C. *The United States Bankruptcy Code*

The Bankruptcy Code provides debtors with a "fresh start".[47] One of the Bankruptcy Code's underlying purposes is the "equitable distribution of the bankrupt's estate among creditors holding just demands."[48] Under the Code the debtor, depending on the circumstances, must liquidate[49] or develop and follow a reorganization plan.[50] Unfortunately, the Code's "fresh start" policy conflicts with the need for cleanup resources. The relationship between the C.E.R.C.L.A. and bankruptcy, and between environmental law and bankruptcy generally, is still evolving, with no imminent resolution of the conflicts between their policies in sight.[51]

The complete failure of the American C.E.R.C.L.A. law and the dim prospects for its complete reform in the near future suggest that the American approach to cleanup of hazardous sites is hardly exemplary.[52] A more likely model for Central and Eastern Europe is the *Länder* experience in Germany, which is characterized by the local assessment of problems and joint cleanup efforts between businesses, local communities, and the landowners of contaminated sites. These cleanup efforts are often jointly financed and managed.[53]

Conclusion

The most likely environmental scenario in Central and Eastern Europe is minimal cleanup of past pollution and modest control of present and future polluting activities. Rescue by the much-heralded arrival of Green technology — the "clean" technology which presumably will replace current polluting activities — does not appear imminent in this region.[54]

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[47] In *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 78 L. Ed. 1230 (1934) [hereinafter *Hunt* cited to U.S.], the United States Supreme Court described the fresh start principle as

> of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns ... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt (*Hunt, ibid.* at 244).

[48] *Kothe* v. *R.C. Taylor Trust*, 280 U.S. 224 at 227, 74 L. Ed. 382 (1930).

[49] 11 U.S.C. §§ 701-766 (1978).

[50] 11 U.S.C. §§ 1101-1174 (1978).

[51] A.E. Mirsky, R.J. Conway & G.G. Humphrey, "The Interface Betwecn Bankruptcy and Environmental Laws" (1991) 46 Bus. L. 623.

[52] Environmental Law Center of Vermont Law School & Keystone Center, "Final Consensus Report on the National Commission on Superfund" (Keystone, Colorado and South Royalton, Vermont, 1 March 1994).

[53] Goldenman *et al.*, *supra* note 2 at 55-59. The term "*Länder*" is used here to mean regional, local, and municipal levels of government, *i.e.* non-federal.

[54] See R.B. Stewart, "Environmental Regulation and International Competitiveness" (1993) 102 Yale L.J. 2039; J.G. Speth, "E.P.A. Must Help Lead an Environmental Révolution in Technology" (1991) 21 Env. L. 1425; G.R. Heaton, R. Repetto & R. Sobin, *Technological Innovations* (Washington, D.C.: World Resources Institute, 1991). See also World Bank, "Romania Environment

Without the equivalent of a Marshall Plan to mobilize resources for cleanup, a "second-best" solution to Central and Eastern Europe's problems is likely. This creates a situation where these nations simply "secure" their hazardous waste sites and make modest improvements in some of their current technology.

The reason for this dismal conclusion is fairly simple. Residents of Central and Eastern Europe face the dilemma of seeking to promote simultaneous economic development and environmental protection. These nations do not have the structural benefits of Western Europe and North America, where current environmental protection efforts are supported by previous decades of economic growth.[55]

Environmental Liability focuses on the practical problems of privatization and environmental protection. The resulting picture primarily demonstrates the emergence of centralized regulatory states and the movement towards a market society. The historical civil law tradition and the presence of a formal centralized environmental law regime in several of the countries appears to support the predominance of national regulation.[56] However, the recent history of these nations is marked by a civic revolution challenging the fundamental role of the centralized state.[57] Solidarity in Poland and the civic forum in the former Czechoslovakia stood for something other than a regulatory state. The ideology of a civic society which emphasizes not only the role of markets and individual rights, but also the importance of mediating institutions, such as churches, unions, local districts, and other groups, should not be forgotten.[58]

The United States is currently undergoing its own brand of political upheaval. Part of that upheaval is a mistaken backlash against all federal environmental regulation. Yet, the movement accurately recognizes important federal regulatory failures and seeks to promote a new "civic environmentalism".[59] Decentralized, citizen-based institutions which would replace or supplement centralized regulation are now being

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Strategy Paper" (31 July 1992), for the argument for modest reform and the limits of "Green Technology".

[55] One admittedly idealistic alternative not explored here would be the adoption by Central and Eastern Europe of the West's advanced technology.

[56] See S.S. Cummings, "Environmental Protection and Privatization: The Allocation of Environmental Responsibility and Liability in Sale Transactions of State-Owned Companies in Poland" (1989) 17 Hastings Int'l & Comp. L. Rev. 551.

[57] R.J. Crampton, *Eastern Europe in the Twentieth Century* (London: Routledge, 1994).

[58] For a full discussion of the theory of civil society, see J. Cohen & A. Arato, *Civil Society and Political Theory* (Cambridge, Mass.: MIT Press, 1994). For a discussion of possible decentralization in the context of selected Eastern European nations, see D.B. Hunter & M.B. Bowman, "An Overview of the Environmental Community in the Czech and Slovak Federal Republic" (Washington, D.C.: Center for International Environmental Law, August 1991); World Bank, *Poland: Decentralization, and Reform of the State* (Washington, D.C.: World Bank, 1992).

[59] J. Dewitt, *Civic Environmentalism: Alternatives to Regulation in States and Communities* (Washington, D.C.: Congressional Quarterly Press, 1993). Whether civic environmentalism can be successful may be questioned in light of the findings in D. Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca: Cornell University Press, 1986).

considered viable alternatives.

In the rush towards privatization, C.E.E. countries have to "try on" liberal regulatory regimes before recognizing their shortcomings. To be sure, it is difficult to imagine anything but a centralized government presiding over the transformation to a market economy. However, decentralization can take place once the initial steps of privatization are accomplished. Future environmental scholars might review the privatization experience and the environmental problems of Central and Eastern Europe in light of this recent western interest in a more civic-minded environmentalism. At the very least, the strengthening of decentralized groups in Central and Eastern Europe can promote more effective enforcement of the national environmental laws and offer citizens exposed to these pollutants an opportunity to implement innovative means of avoiding, or at least mitigating, their impacts.