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**ENVIRONMENTAL REFORMS IN POST-COMMUNIST  
CENTRAL EUROPE: FROM HIGH HOPES TO  
HARD REALITY**

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*Margaret Bowman\* and David Hunter\*\**

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INTRODUCTION

*We have laid waste to our soil and the rivers and the forests that our forefathers bequeathed to us, and we have the worst environment in the whole of Europe today.*<sup>1</sup>

The revolutions that swept through Central and Eastern Europe<sup>2</sup> in 1989 and 1990 opened the Iron Curtain only to reveal a devastating environmental legacy — a legacy left from forty years of an authoritarian, centrally planned political and economic system. By now, the details of the environmental situation in Central and Eastern Europe have been widely reported.<sup>3</sup> In fact, we have become relatively numb to some fairly startling statistics. For example, sixty-five percent of Poland's rivers are unfit even for industrial use; eighty percent of Prague's annual output of 40,000 tons of hazardous waste cannot be traced; forty percent of Bulgaria's birds are endangered; and seventy-three percent of the forests in the Czech and Slovak Federal Republic (CSFR) are severely damaged from acid rain.<sup>4</sup>

To environmentalists in the East, the opening of the Curtain — and the environmental concern that sparked the revolutions — spawned new hope that Central Europe could finally address its tragic environmental conditions. It was a chance to restructure their society and economy in a way that will protect individual rights, including the right to a clean and healthy environment. It was a chance to use the

1. Vaclav Havel, *Our Freedom*, WASH. POST, Jan. 3, 1990, at A15.

2. This article covers the countries of Poland, Hungary, the Czech and Slovak Federal Republic, Romania, and Bulgaria. Although there is some confusion over what is the precise term to refer to these countries, this article will refer to these countries collectively as Central and Eastern Europe, or at times for convenience simply Central Europe. East Germany is not covered in this article because its path towards environmental reforms has generally been dictated by its merger with West Germany. Both Yugoslavia and Albania are not covered because the political tensions in these countries since their transition to more democratic forms of government have overshadowed, and left in doubt, any environmental developments. Finally, although parts of the former Soviet Union may rightfully belong to Central and Eastern Europe, they are beyond the scope of this article. [Editor's note: while emerging Central and Eastern European legislation is cited in this article according to traditional printed sources, some of it is also available in LEXIS, Intlaw library, DSTATE and ILM files; and Europe library, EELEG file.]

3. See, e.g., HILARY FRENCH, GREEN REVOLUTIONS: ENVIRONMENTAL RECONSTRUCTION IN EASTERN EUROPE AND THE SOVIET UNION (Worldwatch Paper No. 99, Nov. 1990); Jon Thompson, *Eastern Europe's Darkest Dawn*, NAT'L GEOGRAPHIC, June 1991, at 36; Ruth E. Gruber, *Word is Out: East Europe is a Disaster Area*, CHRISTIAN SCI. MONITOR, Apr. 18, 1990, at 10; Cynthia Schultz & Tamara Raye Crockett, *Economic Development, Democratization, and Environmental Protection in Eastern Europe*, 18 B.C. ENVTL. AFF. L. REV. 53, 55-58 (1990); Environment for Europe, Environmental Action Programme for Central and Eastern Europe: Environmental Policy Issues (Feb. 5, 1992) (unpublished background note on file with *Michigan Journal of International Law*); U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL CONDITIONS IN POLAND AND HUNGARY: REPORT TO CONGRESS REQUESTED UNDER SECTION 703 OF THE SUPPORT FOR EASTERN EUROPEAN DEMOCRACIES (SEED) ACT OF 1989 27-119 [hereinafter EPA REPORT TO CONGRESS].

4. FRENCH, *supra* note 3, at 5, 19, 28; Patrick G. Marshall, *The Greening of Eastern Europe*, CQ RESEARCHER, Nov. 15, 1991, at 851.

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experience from Western democracies as well as from the former Soviet bloc to develop a new social and political system: a "third way," perhaps greener than communism or capitalism, that incorporates environmental protection as a foundation for economic development.

Environmentalists in the West had similar high hopes from the revolutions in the East. The pending restructuring of the Eastern economies posed an historic opportunity to find a new path toward sustainable development. The West, and its preoccupation with economic growth, is being confronted increasingly with environmental limits. As this occurs, sustainable development — no longer a radical concept — is rapidly replacing growth as the most legitimate goal for a modern economy.<sup>5</sup> The restructuring of the economies of Central and Eastern Europe from central planning to a free market offered the first real chance since the dawning of environmental awareness to structure an economy from the ground up with the goal of sustainable development. Surely rapidly changing societies, like those in Central Europe, provide the best opportunity to achieve something new, something sustainable. It was this hope that led the authors, and others, to move to Central Europe to help the East realize their high hopes.

In the months since these political changes, however, environmentalists have been confronted with the hard realities of restructuring an entire economic, political, and social system. This overwhelming task is made even more difficult by the economic crises brought on by the collapse of the communist infrastructure that supported the region's ailing economies. With these difficulties has come a decrease in popular concern for the environment and increasing political pressure to delay any new environmental protection measures until the economy improves. For many environmentalists in the region, the high hopes for developing an environmentally sustainable economic system have been replaced with the desire simply to put some environmental controls in place and worry about improving the system later.

This article surveys the environmental law reforms taking place throughout the region and some of the important issues surrounding these reforms. Two caveats to this approach should be highlighted at the outset. First, information from the region is still somewhat incom-

5. See, e.g., EPA REPORT TO CONGRESS, *supra* note 3, at 9 ("the task before policymakers is to chart environmentally sustainable courses of development for all parts of the world."); Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, art. 2(1)(vii), T.I.A.S. —, 29 I.L.M. 1083, 1084 (requiring that the Bank promote democracy and sustainable development in all of its activities) [hereinafter EBRD Agreement]. See also WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987); HERMAN E. DALY & JOHN B. COBB, JR., FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE 2 (1989).

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plete. Precise translations of laws, in particular, are not always available. This article can provide only a general guide to legislative and regulatory trends in the region and should not form the basis for specific action or decisions. Second, every country in the region is different, with its own complexities. Despite our failure to resist the temptation to generalize about the region,<sup>6</sup> we urge others to take the time to learn the differences between the countries, their cultures, and their paths to environmental reform.

This article is divided into four parts. Part I traces the path of environmental reforms from high hopes to hard reality. Part II surveys each country's environmental law reforms.<sup>7</sup> Part III discusses several key issues surrounding environmental reform in the region, drawing generally from experiences in all the countries. Part IV describes the West's roles and responsibilities in Central and Eastern Europe.

### I. FROM HIGH HOPES TO HARD REALITY

This section traces the shift from the environmental optimism that fueled Central and Eastern Europe's revolutions to today's growing concern over the truly Herculean task of reforming an entire economic, legal, and social structure.

#### A. *High Hopes: Revolution and the Environment*

Environmentalism played a critical role in virtually all of the revolutionary changes in Central Europe. For example, the environmental group Danube Circle organized the first opposition protests in Hungary to oppose construction of the Gabčíkovo-Nagymaros dam. The Gabčíkovo-Nagymaros dam continued to be an important rallying point for the opposition until political pressure forced the Hungarian government to halt construction of the project in October 1989.<sup>8</sup>

6. See *infra* part III.

7. Treatment of the countries will not be completely parallel, because each has experienced a different level of law reform, and because information is not equally available.

8. See, e.g., *FIDESZ: The Next Generation*, UNCAPTIVE MINDS, Aug.-Oct., 1989, at 27. Although plans for constructing the Gabčíkovo-Nagymaros project began in 1951, it was not until 1977 that the governments of Hungary and Czechoslovakia signed the Treaty Between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks ("the 1977 Treaty"). Czechoslovakia has responded to Hungary's withdrawal from the project by announcing plans to build an alternative dam upstream entirely on Slovak territory and build an extra 17 kilometers of canals to the Gabčíkovo power plant. Slovakia claims it has the right to divert unilaterally the Danube because Hungary breached the 1977 Treaty when it canceled further participation. The split continues to be a volatile issue between the two countries, as any diversion of the Danube seriously threatens the Danube ecosystem, surrounding agricultural lands, and the largest groundwater aquifer in Central Europe.

Environmental protests played a similar role in Bulgaria. When 5,000 people gathered in Sofia in November 1989 to protest environmental pollution, it was the country's first public protest in forty years.<sup>9</sup> One week later Todor Zhikhov, the Bulgarian leader, stepped down. By 1989, Bulgaria's Ecoglasnost, a small non-governmental environmental organization formed after protests of industrial pollution in the city of Ruse, had grown into one of the most important political opposition organizations in the country.<sup>10</sup>

Environmentalism was also essential in Slovakia, where the opposition movement was largely united by the 1987 publication of a report called "Bratislava Aloud," which exposed industrial pollution in and around the Republic's capital of Bratislava.<sup>11</sup> The publication of "Bratislava Aloud" is widely considered the most important political event in the entire country between the publication of the 1977 landmark human rights declaration, Charter 77, and the 1989 "velvet revolution." Its circulation, and the subsequent attempt to jail the authors, was a central rallying point for the pro-democracy revolution in November, 1989.<sup>12</sup>

Two elements converged to make environmental issues a major cause of the revolutions. First, environmental damage was probably the most visible flaw of communist rule in Central Europe. Citizens could see the pollution, taste the pollution, smell the pollution. They lived in it, breathed it, and sometimes even died from it.<sup>13</sup> One thing they could never do, however, was talk about it. To speak out about the pollution was to criticize the government and the Communist Party, and thus was forbidden. This dichotomy between the visible effects of industrial pollution and the inability to speak about them was ultimately one of the most intolerable aspects of daily existence for Central Europeans.

9. See Clyde Haberman, *Bulgarian Chief Quits After 35 Years of Rigid Rule*, N.Y. TIMES, Nov. 10, 1989, reprinted in THE COLLAPSE OF COMMUNISM 186 (Bernard Gwerzman & Michael Kaufman eds., 1990).

10. See *Ecoglasnost*, UNCAPTIVE MINDS, Mar.-Apr. 1990, at 30, 32 (interview with Dimitrina Petrova).

11. SLOVAK UNION OF LANDSCAPE AND NATURE PROTECTORS, GROUPS 6 & 13, BRATISLAVA NAHLAS [BRATISLAVA ALOUD] (Jan Budaj ed., 1987) (translation on file with *Michigan Journal of International Law*).

12. See generally FRENCH *supra* note 3, at 6; Philip Warburg, *Opening the Door to Citizens in Central Europe*, ENVTL. F., Nov.-Dec. 1991, at 18, 20.

13. Studies show that public health was highly affected by environmental pollution in many areas. Life expectancies in some areas are the lowest in Europe and decreasing. In a vivid illustration of the health risks, workers in the severely polluted regions of Northern Bohemia receive a yearly wage premium of approximately \$150. They refer to this as burial money, in implicit recognition of their reduced life expectancies. FRENCH, *supra* note 3, at 5, 10; HUBERT HUMPHREY INSTITUTE OF PUBLIC AFFAIRS, SUSTAINABLE DEVELOPMENT IN CZECHOSLOVAKIA (Oct. 1991), at app. 5 [hereinafter HUMPHREY INSTITUTE]; Marshall, *supra* note 4, at 851.

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The second critical element was that certain nature protection activities were among the few organized non-governmental activities permitted by the communist regimes. In towns and villages throughout Central Europe, groups of ten to fifteen people formed to conduct varied nature activities, from transplanting rare native plants, to building tunnels for frogs to pass safely under roads. Although these activities were typically conducted under the umbrella of a large centralized organizational structure, the local groups enjoyed relative autonomy. These local groups allowed citizens the opportunity to meet and discuss not only nature, but environmental pollution concerns and other political issues as well. Many of these groups slowly evolved into hotbeds of dissident activity, spawning many post-revolution leaders.<sup>14</sup>

The environmental roots of the revolutions initially carried over into post-revolution policies. Environmental concerns continued to top everyone's list; in early 1990 an opinion poll in the CSFR found that eighty-three percent of respondents considered the nation's top priority to be improving environmental conditions.<sup>15</sup> New environmental ministries were formed, or existing ones restructured, with the hopes of developing a new, effective, environmental protection system.<sup>16</sup> By early 1991, many countries in the region had developed strong policies that outlined general plans for incorporating environmental protection as a basic element in the countries' shift to a market economy.<sup>17</sup> In short, the region was enthusiastic and optimistic about the opportunity to reverse the environmental degradation.

### B. *The Hard Reality: Economics and the Environment*

The initial enthusiasm of Central Europe's environmentalists has recently been clouded by hard reality. The task facing Central Europe is immense: completely restructuring its entire social, cultural, political, economic, and legal systems. Any one of these tasks alone would

14. After the revolutions, many of these "environmental" leaders left the environmental movement, confirming the political convenience of these groups.

15. Steven Dickman, *Pollution as Czech Public Enemy Number One*, NATURE, Mar. 8, 1990, at 91.

16. In Romania, for example, a new environment ministry was created on December 28, 1989, only a few days after the coup that toppled the Ceausescu government. FRENCH, *supra* note 3, at 40.

17. See, e.g., MINISTRY OF ENVIRONMENTAL PROTECTION, NATURAL RESOURCES, AND FORESTRY, NATIONAL ENVIRONMENTAL POLICY (1990) (Pol.) [hereinafter POLAND'S NATIONAL ENVIRONMENTAL POLICY]; CZECH MINISTRY OF THE ENVIRONMENT, THE ENVIRONMENTAL RECOVERY PROGRAM FOR THE CZECH REPUBLIC (Academia trans., 1991). See also Cynthia Whitehead, *Czechoslovakia Launches a Great Clean Up*, NEW SCIENTIST, July 28, 1990, at 20; FRENCH, *supra* note 3, at 38-40.



be daunting; taken together it is hard to see how the region can possibly cope.

Moreover, Central European governments face tremendous personnel problems. Many people experienced with governmental systems were removed with the communist system. Although the new officials may carry the moral strength and legitimacy that comes from democratic election, they lack practical experience. "Good dissidents make bad bureaucrats" aptly sums up the experience of many ministries and governments within Central Europe. In addition, even those bureaucrats who remained in government positions after the revolutions (generally mid-level officials) did not necessarily have the skills required for effective management. The old system frequently rewarded loyalty and silence over effectiveness or creativity. Although most of the holdovers do not have high level jobs, they can create significant bureaucratic interference. Anyone who has ever tried to pass a diligent Central European door guard or submit an official document without the appropriate stamp knows that they take these procedures very seriously. The government bureaucrats in charge of these tasks are immune to any suggestion that they might be interfering with progress.

Central and Eastern Europe also faces serious political and economic difficulties. Attempts at a rapid transition to a market-based economy and the collapse of the COMECON trading system have resulted in dramatic economic declines.<sup>18</sup> As money gets tight and the social safety net of the communist era disappears, concern for the environment has taken a back seat to the economy. Political uncertainties have also slowed environmental reforms. Increased nationalism in some countries has at times obscured issues relating to the environment.<sup>19</sup> It has also undermined the political unity of the green parties,

18. The estimated drop in Central European Gross Domestic Product was 15-16% in 1991. Richard L. Holman, *East Europe's Economic Outlook*, WALL ST. J., Oct. 28, 1991, at A12. See also Marshall, *supra* note 4, at 852 (reporting drops in GDP in 1990 from 3% (CSFR) to 12% (Pol.)). Unemployment is also on the rise. In Poland, for example, unemployment is predicted to reach 12%, or two million people. *Number of Investments Up in Region; Hungary Attracts One-Third*, U.N. SAYS, 1 E. EUR. REP. (BNA), at 227 (1991). Yet the bill for environmental cleanup could be staggering. Estimates for cleaning up Poland alone range from \$100 to \$300 billion. Marshall, *supra* note 4, at 851.

19. Obviously, the war in Yugoslavia provides the most vivid example of the dangers of nationalism. Although far less serious, the tensions between the Czechs and Slovaks have slowed the passage of every environmental law in the CSFR. Nationalist tensions between Slovaks and Hungarians as well as the need for the Czechs to appease the Slovaks have also obscured the debate over completion of the Gabčíkovo-Nagymaros dam on the Danube River. See David Hunter & Margaret Bowman, *An Overview of the Environmental Community in the Czech and Slovak Federated Republic* (Center for International Environmental Law — U.S. Country Report No. 1, Aug. 1991) (unpublished report on file with *Michigan Journal of International Law*) at III-2-3.

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particularly in Slovakia. These economic and nationalistic forces have clearly undercut the popular importance of environmentalism.

Spurred on by a desire to westernize, the region is also witnessing something approaching free market mania. The rejection of communism brought a relatively unquestioned embrace of capitalism and an increasing blind reliance on the market to solve the region's environmental problems. This is fueled by a common belief that the environment in the United States is "clean" simply because it has had a free market.<sup>20</sup>

The countries of Central and Eastern Europe have taken a fairly uniform, and conservative, approach to market reform. The resulting tight monetary policies leave little room for social programs, including environmental protection. For example, CSFR Finance Minister Vaclav Klaus believes environmental issues are the "icing on the cake" of economic development. The environment can simply wait until the economy is strengthened. In Hungary, even Environment Minister Sandor Keresztes has voiced the preeminence of economics: "As to the environment, one has to understand that its development is connected to the economic situation. Results can be achieved which are based only on a successful economy."<sup>21</sup>

Due to the changes in priorities, the environmental ministries are now threatened with irrelevance. They suffer from low budgets and little political clout. Separated from the economic ministries, in many cases environmental officials have virtually no say in critically important privatization decisions. Obviously, economic wealth is necessary to address quickly the environmental challenges facing Central Eu-

20. For an excellent and readable criticism of free-marketeters espousing unfettered capitalism, see John Kenneth Galbraith, *The Rush to Capitalism*, N.Y. REV. OF BOOKS, Oct. 25, 1990, at 51. See also *infra* part IV. The environmental history of the United States itself clearly shows that a free market does not lead to environmental protection. Only after the 1960s, when the public became involved, was the U.S. willing to respond to environmental problems, despite the fact that we had one of the freest markets in the world, at least with respect to environmental conditions.

21. Judy Dempsey, *Inheriting the Earth*, FIN. TIMES, Mar. 18, 1992, § 1, at 12 (quoting Minister Keresztes). The basic economic prescription for the region involves removing price controls, closing inefficient businesses, privatizing small shops, restricting the money supply, and making the currency convertible. Steven Greenhouse, *Czechs Begin Shift to a Free Market*, N.Y. TIMES, Jan. 1, 1991, at A3. Variations on this approach are occurring in other countries as well. Poland took the "bitter pill" of strict economic reforms beginning in 1990. The underlying theory of these reforms presumes that the faster the country moves to a free market economy, the better off it will be in the long run, even if it suffers more in the short term. Poland's leaders received substantial advice from Jeffrey Sachs, a U.S. professor, in developing this "bitter pill" program. See Jeffrey Sachs, *Building a Market Economy in Poland*, SCI. AM., Mar. 1992, at 37. It is hard to judge whether Poland's current economic difficulties are merely the "bitter" short term effects of an eventually successful pill, or whether the entire approach is unnecessarily harsh. Cf. Blaine Harden, *Poles Lead the Way But Have Far to Go*, WASH. POST, Jan. 2, 1992, at A1.

rope. Unfortunately, however, the predominance of economics has resulted in the loss of a unique opportunity to integrate environmental and economic decisions from the outset — the opportunity to avoid the adversarial approach to environmental and development issues so characteristic of the United States.

The overall result of these hard realities hitting home has been a retrenchment and a reconsideration of the goals of the region's environmental protection regimes. The pace of change will not be as fast as hoped during the revolutions. Fundamental institutional changes and certainly on-the-ground environmental improvements will take many years. Today, thoughts of a "third way" somewhere between capitalism and communism are virtually nonexistent in most governments. Current discussion is limited to simply getting something adequate in place. The drive for unlimited free-market growth can no longer be stopped; environmentalists must be content simply to redirect it slightly to minimize the environmental damage.

## II. OVERVIEW OF MAJOR DEVELOPMENTS

### A. Environmental Reforms in Poland

Poland's strict economic reform program<sup>22</sup> has substantially affected attempts to implement environmental reforms. Off to an impressive start in 1989, Poland adopted environmental impact assessment regulations and established a committee to draft a new omnibus environmental law. With the economic reforms in 1990, however, came economic troubles and governmental uncertainty, culminating with the elections in November 1991 when over a dozen political parties won representation in the Parliament with no one party winning a clear majority. This uncertainty has taken its toll on environmental law reform — only a few laws and regulations have been adopted since 1989.

#### 1. Existing Environmental Laws

Poland's first significant environmental law was the Nature Protection Act, passed in 1949.<sup>23</sup> The Act established institutional structures for the protection of plant and animal species and for the preservation of natural areas, such as national parks, natural reserves, and nature monuments. The Act emphasized the rational use of natural resources over the conservation of nature. Although fifteen na-

22. See discussion *supra* note 21 (discussing Poland's bitter pill plan).

23. A new Nature Protection Act was passed on December 12, 1991. See discussion *infra* part II.A.3.

tional parks and n under this act, little 1961 and 1966, Pola air pollution.<sup>25</sup> Alt there was little enfo

In 1976, an ame citizen's right to a c have the right to use it. However, Polanc not a legal one, and courts unless the r legislation.<sup>26</sup>

In response to tl Protection,<sup>27</sup> Polanc ing environmental p vironmental Protec regulated mining, w tion, landscape pro management, and ) criminal liability fo included fairly stro: sulted in only mini

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24. Jerzy Jendrońska & Overview and Critical Assu MENT: A NEW CHALLENGE 1991); RESEARCH GROUP POLISH ACADEMY OF SC IN POLAND (Oct. 1991) D.C., on file with *Michiga* Jerzy Jendrońska, Nature F tute of State and Law, W

25. Water Protection item 33 (Pol.); Air Protect 1966, item 87 (Pol.).

26. Jendrońska & Rad

27. Declaration of the (1972), reprinted in 11 I.L

28. Jendrońska & Rad

tional parks and numerous other protected areas were established under this act, little actual protection was afforded to these areas.<sup>24</sup> In 1961 and 1966, Poland also adopted limited laws regulating water and air pollution.<sup>25</sup> Although implementing regulations were developed, there was little enforcement.

In 1976, an amendment to the Polish Constitution introduced a citizen's right to a clean environment. Under Article 71, all citizens have the right to use the natural environment and the duty to protect it. However, Poland's Constitution is essentially a political document, not a legal one, and constitutional rights cannot be enforced before the courts unless the rights have been implemented through ordinary legislation.<sup>26</sup>

In response to the 1972 Stockholm Declaration on Environmental Protection,<sup>27</sup> Poland began developing a comprehensive law addressing environmental pollution. Eight years later, Poland adopted its Environmental Protection Act of 1980. This comprehensive Act regulated mining, water use and pollution, plant and animal preservation, landscape protection, air pollution, noise and vibration, waste management, and radiation. It established user fees and civil and criminal liability for violations of the Act. Although the 1980 Act included fairly strong enforcement provisions, in practice the Act resulted in only minimal pollution fines.<sup>28</sup>

## 2. The Draft Omnibus Environmental Law

Poland's experience in developing a new general environmental law is indicative of the long road to enactment that draft laws must travel in post-communist Central Europe. In 1989, Poland's Prime Minister established an Environmental Law Reform Committee to develop a draft omnibus environmental law. This Committee was

24. Jerzy Jendroška & Wojciech Radecki, *The Environmental Protection Act of 1980: An Overview and Critical Assessment*, in *DESIGNING INSTITUTIONS FOR SUSTAINABLE DEVELOPMENT: A NEW CHALLENGE FOR POLAND* 57, 57-58 (Zbigniew Bochniarz & Richard Bolan eds., 1991); RESEARCH GROUP ON ENVIRONMENTAL LAW, INSTITUTE OF STATE AND LAW OF THE POLISH ACADEMY OF SCIENCES, *PUBLIC PARTICIPATION IN ENVIRONMENTAL REGULATION IN POLAND* (Oct. 1991) (report prepared for the Environmental Law Institute, Washington, D.C., on file with *Michigan Journal of International Law*) [hereinafter *PUBLIC PARTICIPATION*]; Jerzy Jendroška, *Nature Protection in Polish Law* 1-5, 10 (1989) (unpublished paper of the Institute of State and Law, Wroclaw, Poland, on file with *Michigan Journal of International Law*).

25. Water Protection Against Pollution Act, Jan. 31, 1961, *DZIENNIK USTAW* No. 5/1961, item 33 (Pol.); Air Protection Against Pollution Act, Apr. 21, 1966, *DZIENNIK USTAW* No. 14/1966, item 87 (Pol.).

26. Jendroška & Radecki, *supra* note 24, at 66-67.

27. Declaration of the U.N. Conference on the Human Environment, U.N. Doc. A/C.48/14 (1972), reprinted in 11 *I.L.M.* 1416 (1972).

28. Jendroška & Radecki, *supra* note 24, at 62-64.

chaired by the Research Group on Environmental Law, a part of the Institute of State and Law of the Polish Academy of Sciences in Wroclaw. The Committee developed and submitted a draft law to the Ministry of Environmental Protection, Natural Resources and Forestry ("the Ministry") in Spring 1991.<sup>29</sup>

The Committee's draft law regulates a broad range of activities, including both nature protection and pollution control.<sup>30</sup> Most of the draft provisions are very general and anticipate the development of more specific supporting laws and regulations (called executive orders). The Committee's draft law includes general procedural provisions that establish national and regional environmental protection authorities, and address issues such as public participation, inspection, enforcement, civil and criminal liability, and economic incentives (fees and fines). The draft contains special procedures for environmental impact assessments, as well as for environmental disasters. Substantively, the draft addresses a range of topics, including air pollution control, solid and hazardous waste management, protection of water resources and quality, land-use planning, mining, agriculture, noise and vibration, environmental compliance for products, radiation, nature conservation, protection of genetic diversity, natural resource management, parks and preserves, open space, and recreation.

The Ministry revised the draft law based both on its own review and on recommendations from other ministries. In the final Ministry draft, most of the public participation provisions were eliminated, except for a general right to information. The Council of Ministers approved the Ministry draft in Fall 1991.<sup>31</sup>

A group of representatives from the Sejm (parliament) were unhappy that the draft environmental law included both nature protection and pollution control provisions (which had traditionally been regulated separately). This group subsequently developed its own draft law, which included the general provisions in the Ministry's draft plus the nature protection provisions. It eliminated all pollution control provisions. The group submitted this draft to the Sejm as a private bill. The Sejm approved this private nature protection bill before the national elections in November. In spite of the Ministry's lobbying for a veto, President Walesa signed the bill into law on December 12,

29. The Act on the Environment and Nature Protection (draft, Mar. 1991) (Pol.) (translation on file with *Michigan Journal of International Law*). See *infra* note 34 for final enactment.

30. The existing Polish legislative system has separate laws for these two subjects. The Committee's draft law attempts to change this traditional separation in order to achieve a more coordinated environmental protection system.

31. Interview with Jerzy Jendroška, Research Group on Environmental Law, Polish Academy of Sciences, in Wroclaw, Poland (Nov. 15, 1991).

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The Ministry is now reassessing its approach to the regulation of environmental pollution. Instead of submitting its integrated environmental pollution bill, the Ministry is likely to develop separate media-specific bills for air pollution, water pollution, and waste management.<sup>33</sup>

### 3. The 1991 Nature Protection Law

Poland's new Law on Nature Protection,<sup>34</sup> adopted in December 1991, replaces the 1949 Nature Conservation Act. The 1991 law grants authority for nature protection to three administrative bodies: the Ministry, the voivoda environmental departments,<sup>35</sup> and the National Park Directorships. Two independent advisory bodies are also established to evaluate the current status of nature protection. The National Council on the Protection of Nature is appointed by, and will advise, the Minister. The Commission for the Protection of Nature is appointed by, and will advise, the voivoda. In addition, the law creates a primary Protector of Nature, who will assist both the Ministry and the voivoda in the execution of their duties.<sup>36</sup>

The Law on Nature Protection also establishes a hierarchy of protected areas.<sup>37</sup> National Parks, regions distinguished by exceptional academic, natural, social, cultural, or educational value, are afforded the most protection. The Minister of the Environment can establish National Parks and must approve a nature protection plan for each park. National Parks are afforded a buffer zone, established around the park, to add to their environmental protection. The second class of protected areas are Nature Reservations. A Nature Reservation is a full ecosystem where there are different types of plants, animals, and

32. *Id.*

33. Interview with Andrzej Rudlicki, Director of the Legal Department, Polish Ministry of Environmental Protection, Natural Resources, and Forestry, in Warsaw, Poland (Jan. 14, 1992).

34. Law on Nature Protection, Dec. 12, 1991, DZIENNEK USTAW No. 114/492, item 492 (Pol.) (summary translation on file with *Michigan Journal of International Law*).

35. Voivoda are Poland's regional governments; there are presently 49 voivoda in Poland. The voivoda also have the bulk of the authority for ensuring compliance with environmental laws. See Law on Inspection for Environmental Protection, July 20, 1991, DZIENNEK USTAW No. 77/1991 (Pol.), translated in U.S. Department of Commerce, National Technical Information Service Doc. No. PB92-961011.

36. Law on Nature Protection, *supra* note 34, part 2.

37. These protected nature areas may also be afforded special treatment with respect to air and water standards. See Executive Order on Air Pollution, Feb. 12, 1990, DZIENNEK USTAW No. 15/1990, item 92 (Pol.), translated in U.S. Department of Commerce, National Technical Information Service Doc. No. PB92-961012 (setting special air pollution standards for specially protected areas, which at the time included "spa areas, spa protection areas, national parks, nature preserves, and landscape parks").

other natural features of academic, natural, cultural, and scenic value. As with National Parks, the Ministry has the authority to create a Nature Reservation, and must approve the Reservation's protection plan. A buffer zone around a Nature Reservation is optional. The next class of protected areas are Scenic Parks—regions protected because of their natural, historical, or cultural values. The voivoda holds the authority to create a Scenic Park, and must approve their protection plans. The purpose of a Scenic Park is not only to protect the area, but to popularize its natural features as well. Scenic Parks can also be used for economic purposes.<sup>38</sup>

The Law on Nature Protection requires the Ministry to develop a national strategy for the protection of nature that addresses activities in all six types of protected areas. This national strategy would subject the activities conducted within the protected areas to regulation, including the prohibition of certain activities. The national strategy must be approved by the voivoda.<sup>39</sup> In addition to this national strategy, the law calls for the development of protected management plans for each type of protected area.<sup>40</sup>

The Law on Nature Protection also creates two interesting citizen authorities. Under part six of the law, any citizen organization can apply to the Minister of the Environment for authority to become an "Environmental Protection Guard." As an Environmental Protection Guard, the organization has the authority to enforce environmental regulations within the boundaries of national parks, landscape reserves, or forestry reserves. Similar authority is granted to the voivoda to authorize "Communal Protectors of Nature" in national parks, landscape reserves, and forestry reserves. Building on the long tradition of citizen involvement in nature protection and education, these organizations have the authority to carry out physical maintenance of the parks and instruct people regarding environmental regulations.<sup>41</sup>

38. Law on Nature Protection, *supra* note 34, part 3. In addition to these three major types of protected areas, the law also creates Regions of Protected Visibility (areas with distinct landscape features and diverse ecosystems), Natural Monuments (individual examples of nature of exceptional academic, cultural, historical, or scenic value which have features that distinguish them from other elements found in nature), and Natural and Scenic Groups (exceptional elements of the natural or cultural landscape that are protected for their aesthetic value). *Id.*

39. *Id.* part 4.

40. *Id.* part 1. The Act also regulates the management of natural resources and addresses liability and enforcement issues. *Id.* parts 5 (management of natural resources), 7 (environmental liability), 8 (enforcement issues).

41. *Id.* part 6.

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#### 4. The Draft Water Law

In addition to the draft omnibus environmental law, the Ministry has developed a detailed draft water law.<sup>42</sup> The draft water law is presently being reviewed by other ministries. It is hoped that the bill will be adopted by the Sejm in the upcoming months.

Modeled on the French water management law, the draft water law would organize water management around River Basin Authorities, denoted by watershed boundaries, rather than the political boundaries of the voivoda.<sup>43</sup> Each River Basin Authority would have a River Basin Water Resources Management Council. The Councils would consist of thirty to sixty representatives of federal and regional government and water users. These Councils would determine the water management goals and policies for the region, impose water use conditions, set fees for water use in the basin, and determine how the financial resources collected from the fees and fines would be utilized. The voivoda, which presently manage water use, would retain authority to issue and enforce permits, subject to the conditions imposed by the Councils.<sup>44</sup>

Under the existing water management law, all water fees and fines collected are split equally between the National Environment Fund and the voivoda.<sup>45</sup> Under the new draft law, the River Basin Authority would receive almost all the revenues for use in developing water protection projects.<sup>46</sup> The National Fund will retain a small percentage of the revenues, and the voivoda will receive nothing. Not surprisingly, the voivoda oppose this new division of funds, because they will still be responsible for permitting and enforcement, yet will receive none of the funds. The National Fund Administration also opposes this system because it substantially decreases its revenue.<sup>47</sup>

42. Act from Water Law (Draft, July 1991) (Pol.) (translation on file with *Michigan Journal of International Law*). In addition to developing the omnibus and the water law drafts, the Ministry is developing draft laws on hunting, geological development, forestry and mining. Interview with Andrzej Rudlicki, *supra* note 33.

43. On February 1, 1991, seven River Basin Administrations were created. Until the water law is passed, these Administrations have no authority except to collect fees and fines. Interview with Janusz Kindler, Director of Water Resources and Environmental Systems Department, Institute of Environmental Engineering, Warsaw Technical University, in Warsaw, Poland (Jan. 14, 1992).

44. Act from Water Law, *supra* note 42, art. 68. The draft would also establish a water resources management computer system, and would establish a fee for both water use and pollution discharges. *Id.* arts. 50, 69.

45. This money is a major source of revenue for the National Fund.

46. The voivoda can apply to the River Basin Administration for funds for specific water improvement projects on a project-by-project basis.

47. Interview with Janusz Kindler, *supra* note 43. The division of funds also creates strong



### 5. Environmental Impact Assessment Provisions

Poland has had environmental impact assessment (EIA) provisions in its environmental law since 1980.<sup>48</sup> These EIA provisions, however, are closely connected to Poland's Land Use Planning Act and only apply to certain development siting decisions. All development undertaken by a publicly owned entity, as well as all industrial plants developed by a private entity, must receive permission to develop on the selected site.<sup>49</sup> An EIA is required for any such project that may cause harm to the environment. The Minister of the Environment must approve EIA reports for projects with regional or national significance. For those projects with only local significance, approval by the governor of the voivoda is sufficient.<sup>50</sup>

Although these EIA provisions have been on the books since 1980 (and applied to land use planning since 1984), they were rarely used because there was no guidance regarding what projects may cause harm to the environment. Amendments to the Polish Environmental Protection Act in 1989 substantially strengthened these EIA provisions. The amendments (and the supporting regulations adopted in 1990) mandated EIAs in specific situations, allowed the State to conduct an EIA (at the project proponent's expense) if the proponent fails to conduct a mandatory EIA, and established administrative appeal procedures for disputes arising under the EIA provisions.<sup>51</sup>

The Minister of the Environment established a special review com-

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incentives for corruption, as the voivoda will be collecting fees and fines that they must transfer to the River Basin Administrations, and then apply to the Administration for funding.

48. Act on the Protection and Shaping of the Environment, Jan. 31, 1980, art. 70, DZIENNIK USTAW No. 3/1980, item 6 (Pol.) (amended Dz. U. 44/1983, item 201, Dz. U. 33/1987, item 180, Dz. U. 26/1989, item 139, Dz. U. 35/1989, item 192) [hereinafter Polish Environmental Protection Act].

49. Land Use Planning Act of 1984, art. 99, DZIENNIK USTAW No. 17/1984 (as amended 1989) (Pol.). This permission is also required for substantial alterations of existing facilities. See Jerzy Jendroška & Jerzy Sommer, Environmental Impact Assessment in Polish Law: The Concept and Scope of Existing EIA Law and Draft Proposals 13 (Apr. 1992) (report Prepared for the Environmental Law Institute's International Roundtable on Environmental Impact Assessment and Public Participation in Environmental Decisionmaking, Wrocław, Poland, April 1-3, 1992) (on file with *Michigan Journal of International Law*).

50. The Minister's approval is required for the location of proposed development projects if the project: (1) has a certain level of impact, or has regional or national significance; and (2) is expected to emit over a certain level of pollutants. The Ministry has published a list of independent institutes which are qualified to conduct the assessment. Jendroška & Somer, *supra* note 49, at 10-12; Interview with Andrzej Kassenberg, Director of the EIA Commission, in Warsaw, Poland (Nov. 14, 1991); Jendroška & Radecki, *supra* note 24, at 69.

51. Jendroška & Sommer, *supra* note 49, at 13-15 (citing Polish Environmental Protection Act, *supra* note 48, art. 70; Executive Order of the Ministry of Environmental Protection, Natural Resources & Forestry on the Development Projects Specially Harmful for the Environment and Man's Health and on Conditions of Environmental Impact Assessment, Apr. 23, 1990, art. 126, MONITOR POLSKI No. 16/1990 (Pol.)).

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mittee for the EIA reports (the EIA Commission) by internal regulation in 1990. Modeled on the Dutch EIA Committee, the Commission consists of seventy-five independent experts from academia, government, and non-governmental organizations (NGOs). Because the Commission was not established by statute, its authority in the EIA procedures derives from the Ministry's authority. The Commission's role is to review and make recommendations on all EIA reports submitted to the Ministry. In most cases, the Minister has followed the recommendations of the Commission in deciding whether to approve a project.

The Land Use Planning Act, as well as the executive orders implementing the EIA law, are presently being revised.<sup>52</sup> These revisions may eliminate the siting mechanism that presently triggers the EIA process. This could result in an improvement to the EIA requirements, as it may force the development of an independent EIA procedure rather than the development of scattered requirements designed to fit into pre-existing legal processes.<sup>53</sup>

#### B. *Environmental Reforms in the Czech and Slovak Federal Republic*<sup>54</sup>

The CSFR has accomplished more environmental law reforms since its revolution than any other country in the region.<sup>55</sup> This is particularly noteworthy given the critical role that nationalism often plays within the country. As its official name indicates, the Czech and Slovak Federal Republic consists of three governments — federal, Slovak, and Czech. The country has yet to adopt a final post-revolution constitution that clarifies the relationship among these governments.<sup>56</sup> The resulting uncertainty has affected almost all major

52. Interview with Jerzy Jendroška, *supra* note 31.

53. Jendroška & Sommer, *supra* note 49, at 4, 22.

54. For general information about the CSFR, see FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, CZECHOSLOVAKIA: A COUNTRY STUDY (Ihor Gawdiak ed., 1987). For general information about the environmental issues facing the CSFR, see Hunter & Bowman, *supra* note 19; WORLD BANK, CZECH AND SLOVAK FEDERAL REPUBLIC JOINT ENVIRONMENTAL STUDY, Vol. I, at vi (World Bank Report No. 9623-CS, 1992) [hereinafter CSFR JOINT ENVIRONMENTAL STUDY].

55. For example, in the first 30 months the Slovak Commission for the Environment was in existence, it prepared 31 environmental laws or regulations. L'ubomíra Zimanová, Chief of the Legislative Department, Slovak Commission of the Environment, remarks at the International Roundtable on Environmental Impact Assessment and Public Participation in Environmental Decisionmaking, sponsored by the Environmental Law Institute, in Wroclaw, Poland (Apr. 1-3, 1992).

56. Ultimately, three constitutions will be passed — one at the federal level, and one each for the two republics. See, e.g., CSFR, FEDERAL CONST. (Draft, Mar. 1991), translated in U.S. Department of Commerce, National Technical Information Service Doc. No. PB91-960232. The primary issue slowing the adoption of all three constitutions is the degree of autonomy that will

decisions made in the past two years. Nonetheless, the CSFR has made major changes in environmental law and policy over the past two years.

### 1. Pre-Revolution Environmental Laws

By the late 1970s, the CSFR had passed four major environmental laws and over 350 environmental regulations.<sup>57</sup> The four major laws regulated air, water, agricultural land, and forestry. There was no law regulating waste until 1991. Due to a lack of effective enforcement, and because fines and fees had no deterrent effect in the centralized planned economy, these laws garnered little respect and were largely ignored. Since the 1989 revolution, the CSFR has passed several key environmental laws,<sup>58</sup> including a general environmental law and laws regulating air and waste, as well as a Charter of Fundamental Rights and Freedoms.

be granted to the republics. A vocal, albeit numerically small, independence movement in Slovakia opposes any control from the federal government in Prague. Another group advocates a loose confederation between the Czech and Slovak republics based on a treaty. Some activists in Moravia and Silesia are calling for three republics under the new constitution: Bohemia, Slovakia, and Moravia and Silesia (as one republic). This very emotional issue has been the focus of much attention in the press. It has also turned most debates over any specific law in the three Parliaments into a debate on the autonomy of the republics (until the constitutions are passed, the issue is being revisited with respect to every law or policy). As a result, the adoption of many laws has been substantially delayed. For a discussion of federalist issues facing the CSFR, see Eric Stein, *Devolution or Deconstruction, Czecho-Slovak Style*, 13 MICH. J. INT'L L. 786 (1992). See generally, Claudia Saladin, *Self-Determination, Minority Rights, and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic*, 13 MICH. J. INT'L L. 172 (1991).

57. CSFR JOINT ENVIRONMENTAL STUDY, *supra* note 54, Vol. II, at 5-6; HUMPHREY INSTITUTE, *supra* note 13, at App. 6-7.

58. The process for adopting a federal environmental law in the CSFR is usually as follows: (1) The relevant ministry develops a draft Principle of Law, often with the help of an outside agency or expert. This Principle of Law generally describes the principles behind the act, how it will change existing law, and why it should be enacted; (2) The Minister approves the draft Principles as an official ministry draft; (3) The draft is submitted to the Federal, Czech and Slovak Governments (comprised of all ministers) for their approval; (4) If the Federal Government approves of the draft, it is submitted to Federal Parliament as an official Government draft (approval by the Czech and/or Slovak Governments are noted, but not required; Federal Government approval is technically not required either, as drafts not approved by the government can be submitted by any parliament member as a private bill); (5) The draft is also submitted to the Czech and Slovak Parliaments for approval (again, approval is not required); (6) The draft Principles must then be approved by the relevant parliamentary committee (for environmental laws, the environment committee); (7) The draft Principles can then be submitted for a majority vote of the Parliament; (8) If the Federal Parliament adopts the draft Principles, the relevant ministry then drafts the act itself; (9) The process for approving the act is the same as for the Principles. The government can in certain circumstances receive approval from the Parliament to submit both the Principles and the act at the same time. This process is generally similar for adoption of laws at the republic level, but of course the republic level parliaments have the final say. This process is also relatively similar in the other parliamentary systems in the region. See Hunter & Bowman, *supra* note 19, at II-2, n. 1; Pamela Tillinghast, Guide to the Environmental Laws and Regulations of the Czech Republic 3-5 (Draft, Apr. 1, 1992) (unpublished draft on file with *Michigan Journal of International Law*).

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## 2. Institutional Reforms

As with most important issues in the CSFR, three environmental agencies have jurisdiction over the country's environmental affairs: the Federal Committee for the Environment, the Czech Ministry for the Environment, and the Slovak Commission for the Environment. All three were formed or substantially restructured in 1990.<sup>59</sup> Although there were initial reasons for the distinction between a committee, a commission, and a ministry,<sup>60</sup> the differences have disappeared over time. Much of the authority and responsibilities for environmental protection have devolved to the republic levels; the Federal Committee for the Environment has limited authority over domestic environmental issues, and is primarily active on the international level.

Both the Czech Ministry and the Slovak Commission have district offices in addition to their central offices (in Prague and Bratislava, respectively). The authority of these district offices is not yet completely clear, but they will undoubtedly have more of the day-to-day inspection and enforcement responsibilities. In the Czech Republic, the Ministry and the local government share control over these offices. In Slovakia, these district offices were once fully independent from the local government, but may be losing this autonomy.<sup>61</sup>

Both the Czech and the Slovak Republics have adopted republic level laws establishing an environmental fund.<sup>62</sup> These funds will collect revenues from environmental taxes, fees, and fines, and will use the money for grants and loans for the benefit of the environment. Both the Czech and Slovak governments rejected proposals to establish smaller environmental funds for the Federal Committee and local environmental agencies.

## 3. The Charter of Fundamental Rights and Freedoms

The CSFR still has not adopted a new constitution, but on January 9, 1991 the Federal Parliament adopted a Charter of Fundamental

59. CSFR JOINT ENVIRONMENTAL STUDY, *supra* note 54, Vol. I, at 25.

60. For example, the Slovak Commission was originally intended to have more power than a ministry and thus have some control over policies and actions of non-environmental ministries. This impressive idea was not successful in practice, and today the Commission has no greater authority than the other Slovak ministries.

61. Moreover, Slovakia's Act on the State Administration for the Environment, passed in December 1990, leaves much more of the enforcement and implementation authority to the central office (at least as compared to the Czech Republic). See Law on State Administration for the Environment, Dec. 17, 1990, Slovak National Council Law No. 595/1990 (unofficial translation on file with *Michigan Journal of International Law*).

62. See, e.g., Czech National Council, Law on State Environmental Fund of Czech Republic, Jan. 1, 1992 (unofficial translation on file with *Michigan Journal of International Law*).

Rights and Freedoms.<sup>63</sup> The Charter will be incorporated in any constitution adopted at the federal or republic level.<sup>64</sup> Similar to the U.S. Bill of Rights, the Charter grants to all citizens certain basic political rights necessary for the protection of the environment, including the right to receive information, the right to participate in the administration of public affairs, and the right to the protection of each person's health.<sup>65</sup> The Charter's environmental section grants everyone the right to live in a favorable environment and the right to receive information about the state of the environment and natural resources.<sup>66</sup> All persons are prohibited from endangering or damaging the environment, natural resources, the diversity of species, or cultural monuments beyond the limits set by law.<sup>67</sup> Perhaps most significantly, the Charter allows citizens to enforce these rights in an independent Constitutional Court.<sup>68</sup>

There is a chance that each of the three constitutions may provide additional environmental rights. For example, a group of influential environmental officials are promoting a particularly strong set of environmental constitutional provisions, which include a broad right to a healthy environment, rights to participate in environmental decisions, obligations to protect the environment, and a definition of property that excludes the right to destroy the property's ecological functions.<sup>69</sup> These draft environmental provisions, in one form or another, will be proposed with respect to all three constitutions.

#### 4. The General Environmental Protection Law

On December 5, 1991, the CSFR Federal Parliament passed a General Environmental Protection Law.<sup>70</sup> The law dictates the basic rights and duties of the government, industry, and citizens concerning environmental protection and the use of natural resources in light of

63. Constitutional Act Instituting the Charter of Fundamental Rights and Freedoms, Jan. 9, 1991, CSFR Act No. 23/1991 (unofficial translation on file with *Michigan Journal of International Law*) [hereinafter CSFR Fundamental Rights and Freedoms Act].

64. See, e.g., CSFR FEDERAL CONST., *supra* note 56, art. 44.

65. CSFR Fundamental Rights and Freedoms Act, *supra* note 63, arts. 17 (right to expression and to information), 21 (right to participate in administration of public affairs), 31 (right to health).

66. *Id.* art. 35.

67. *Id.*

68. *Id.* art. 36.

69. See Proposal of the Environmental Part of Czechoslovak Constitution, arts. 44-49 (Apr. 22, 1991) (unofficial translation by Jiri Plaminek on file with *Michigan Journal of International Law*).

70. Act Concerning the Environment, Dec. 5, 1991, CSFR Act No. 17/1992 (unofficial translation by Federal Committee for the Environment, Prague, Jan. 1992, on file with *Michigan Journal of International Law*) [hereinafter, CSFR General Environmental Protection Law].

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the goal of sustainable development.<sup>71</sup> The CSFR General Environmental Protection Law, which is very general when compared to U.S. environmental laws, establishes a right to a clean environment and a corresponding duty to protect the environment. It takes an ecological approach, prohibiting any human activity that damages the ecological stability of a region,<sup>72</sup> and embodying such internationally accepted concepts as sustainable development, the precautionary principle of environmental protection, and the "polluter pays" principle.<sup>73</sup>

Although the CSFR General Environmental Protection Law does not provide any details, it does clearly anticipate the use of command and control regulations as well as a wide range of economic instruments to encourage environmental protection.<sup>74</sup> It establishes the right of citizens to information concerning the environment,<sup>75</sup> and establishes a corresponding duty for industry to develop and provide access to such information.<sup>76</sup> The law requires an environmental impact assessment before initiation of any construction activity, use of natural resources, or production of products or technologies. Finally, the law enables citizens to claim rights under the environmental laws through standard procedures in court.<sup>77</sup> Details of these provisions must await further enunciation in republic laws or regulations.

## 5. The Regulation of Hazardous and Solid Wastes

### a. Federal Laws and Regulations

The CSFR's first waste law, passed on May 22, 1991, became effective on August 1, 1991.<sup>78</sup> This Federal Act anticipates a waste regulation scheme generally similar to the U.S. and European Community programs; one which requires systematic waste tracking, data gathering, and reporting. The law divides waste into three categories — waste, special waste, and hazardous waste — and regulates them ac-

71. *Id.* art. 1.

72. *Id.* arts. 11 (prohibiting activities resulting in a burden beyond the measure of a tolerable load), 6 (defining a regional tolerable load in terms of ecological stability).

73. *Id.* arts. 6 (defining sustainable development), 13 (incorporating the precautionary principle, by stating that uncertainty over irreversible damage shall not delay measures to prevent such damage), 27(1) (reflecting the "polluter pays" principle by requiring people who damage the environment to restore it), 31 (authorizing fees and taxes for those who pollute).

74. *Id.* arts. 12 (stating that permissible limits of pollution will be determined on public health and other grounds), 31-33 (authorizing fees, taxes, and the use of other economic instruments).

75. *Id.* art. 14.

76. *Id.* art. 18.

77. *Id.* art. 15 (claiming rights in court), 17 (requiring an EIA).

78. Waste Management Act, art. 17, May 22, 1991, CSFR Act No. 238/1991 (unofficial translation on file with *Michigan Journal of International Law*) [hereinafter CSFR Waste Act].

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cordingly.<sup>79</sup> The production, transport, treatment, and disposal of waste are regulated, with permits required for all waste disposal facilities, trans-republic waste transporters, and organizations that handle hazardous waste.<sup>80</sup> The law also prohibits importing or exporting waste unless certain conditions, including government approval, are met.<sup>81</sup> Waste management plans are required,<sup>82</sup> as is waste minimization.<sup>83</sup>

The CSFR Waste Management Act also calls for the republic ministries to develop more detailed laws and regulations establishing the enforcement and implementation regimes for waste management. Progress at the republic level is discussed briefly below.

#### b. Waste Laws and Regulations in the Czech Republic

The Czech Republic has passed several laws and regulations implementing the CSFR Waste Management Act. On July 8, 1991, the Czech Parliament passed the Act on the State Administration of Waste Management which assigned relative authority over waste regulation to the three levels of government, i.e., the republic, district, and local levels. Under this Act, most of the responsibility for implementing and enforcing the CSFR Waste Management Act will fall to the Republic's seventy-five district offices, including responsibility for issuing permits, and inspecting and operating the waste recordkeeping system. The Act also added further detail to the powers and duties of operators of waste management facilities.<sup>84</sup>

79. *Id.* art. 2. By a Directive passed on August 1, 1991, the Federal Committee defined and categorized all wastes expected to be produced in the country. Federal Committee for the Environment, CSFR, Federal Directive on Waste Identification, Aug. 1, 1991. The categorization, modeled after Germany's system, was developed by a working group of twenty experts from both republics. Under the Directive, hazardous waste is a subpart of special waste. (Special waste is all waste that requires special handling, and hazardous waste is all waste that may be hazardous.) The CSFR hopes over time to mirror Germany and regulate all special wastes as hazardous wastes. Interview with Jan Bily, Chairman, Directive Drafting Committee, Federal Committee for the Environment, in Prague, CSFR (Oct. 7, 1991).

80. CSFR Waste Act, *supra* note 78, arts. 2(6) (defining waste handling to include activities related to storage, transport, treatment, and disposal), 4(1) (authorizing republic officials to grant approvals for hazardous waste handling and the operation of waste processing facilities, *inter alia*).

81. *Id.* arts. 3(4), 3(6). Waste can only be imported if there is a preexisting technology available in the CSFR for disposing of the waste, if all the waste will be disposed of, and (most interestingly) if there is an equal amount of waste reduced within the country. *Id.* art. 3(4). Waste exports are only allowed with the written approval of the importing countries. *Id.* art. 3(6).

82. *Id.* art. 5.

83. *Id.* art. 3(1).

84. Interview with Pavel Novák, Waste Department, Czech Ministry of the Environment, in Prague, CSFR (Oct. 18, 1991); Tillinghast, *supra* note 58 (citing Act on the State Administration of Waste Management, July 8, 1991, Czech National Council Act No. 311/1991).

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On August 16, 1991, the Czech Government adopted a Regulation on Waste Management Programs, which establishes time schedules for certain waste producers (including municipalities) to develop waste management plans. The district governments and the Ministry must also develop a plan based on the waste produced within their jurisdiction.<sup>85</sup>

The Ministry also instituted a per-ton fee on waste deposited in landfills.<sup>86</sup> The fee on landfills not in compliance with waste laws and regulations will increase disproportionately over the next few years. The Ministry hopes that this will create a financial incentive both for landfills to come into compliance and for waste producers to minimize their waste.

Although several different republic-level regulations are being discussed,<sup>87</sup> most of the waste requirements will be contained in the republic's waste management regulations, presently being drafted by the Ministry. These regulations will outline everything from how organizations can become authorized to analyze waste or operate the Ministry's centralized database of records, to procedures for waste identification and for permitting waste management activities. The regulations will also clarify issues surrounding the transportation, import, and export of waste.<sup>88</sup> In addition, they will establish the general conditions for the treatment, storage, and disposal of all wastes, including requirements for operating incinerators and landfills.<sup>89</sup>

In comparison to the United States, these waste regulations will

85. Public Notice on Waste Management Programs, § 1, Aug. 16, 1991, Czech Republic Ministry of the Environment Public Notice No. 401/1991 (Czech Republic translation on file with *Michigan Journal of International Law*).

86. Act on Charges for the Deposit of Waste, Jan. 22, 1992, Czech National Council Act No. 62/1992.

87. For example, the Czech Ministry has developed a draft recordkeeping regulation. This regulation addresses administrative issues about maintaining waste handling records and outlines what records must be maintained. The requirements about what is done with these records (how to keep records, who receives copies, how the records are processed, etc.) will be addressed in the Ministry's more extensive waste management regulations.

88. According to these draft provisions, the Czech Ministry of the Environment will issue permits for the transport of hazardous waste through the republic. This proposal will be hotly contested by the Ministry of Transportation, which has traditionally held responsibility for such transportation issues. Through these provisions, the Ministry of Environment will also try to establish more extensive documentation requirements applicable to the drivers of vehicles carrying waste.

89. This section briefly outlines procedures for siting an incinerator or a landfill. However, many of these procedures are limited by the Republic's Act on Communities, which gives substantial powers to self-regulated communities (certain cities and villages). This Act gives these self-regulated communities sufficient power to decide what will and will not be located within their city limits. Thus, if a community opposes the siting of a landfill or an incinerator within its jurisdiction, there is little the Ministry can do to force the community to allow the facility to be built there. The Ministry has repeatedly tried to limit the authority of these self-regulated communities to reject the siting of waste disposal facilities, but so far it has been unsuccessful. Inter-



not be very detailed. Much of the detailed requirements will be developed later through technical guidelines. This has caused concern among some officials in the Ministry because technical guidelines cannot be enforced as strongly as regulations. For example, it is not even clear whether the district offices (which will have much of the permitting and enforcement authority) will be required to follow the central Ministry's technical guidelines.<sup>90</sup>

### c. Waste Laws and Regulations in the Slovak Republic

The Slovak Act on Waste Management Administration divides the authority for enforcing and implementing the waste laws between the republic, district, and local levels. Unlike in the Czech Republic, where much of the enforcement and implementation authority has been placed at the district level, the Slovak Commission has retained the majority of the authority at the republic level.<sup>91</sup>

The Slovak Commission is in the process of developing its waste management regulations. According to officials at the Commission, these regulations will establish a permitting system for the generation, treatment, storage and disposal, or import or export, of waste. The regulations will also describe acceptable methods for treating or disposing of each subgroup of waste, establish strict requirements for the treatment of waste, and promote waste recycling. Technical regulations for waste disposal, currently being developed in cooperation with the Ministry of Industry, may be established in this regulation or in a separate Commission directive. The regulations contemplate granting, under certain specific circumstances, a five year phase-in period for waste generators to comply.<sup>92</sup>

## 6. The Air Pollution Law

The new Clean Air Act was passed by the Federal Parliament on July 9, 1991.<sup>93</sup> It requires that industrial sources obtain permits from the Czech Ministry or Slovak Commission for a variety of activities, including any production that causes air pollution, any changes in

view with Svatomír Mlěoch, Deputy Minister, Czech Ministry of the Environment, in Prague, CSFR (June 27, 1991).

90. Interviews with Olga Vidlaková, Director, Department of Public Administration Analysis, Office of the Government of the Czech Republic, in Prague, CSFR (Oct. 7, 1991); Eva Kružíková, Advisor to the Deputy Minister, Czech Ministry of the Environment, in Prague, CSFR (Oct. 18, 1991); and Pavel Novák, *supra* note 84.

91. Interview with L'ubomíra Zimanová, Chief of the Legislative Department, Slovak Commission for the Environment, in Bratislava, CSFR (Oct. 10, 1991).

92. *Id.*

93. Clean Air Act, July 9, 1991, CSFR Act No. 309/1991 [hereinafter CSFR Clean Air Act].

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technology, and any construction or alteration of equipment or structures. The law covers most pollution sources, including mobile sources, and differentiates the amount of penalties imposed and the amount of protection required based on the source's thermal capacity and type of technology. The law contains provisions for both taxes and command and control requirements. Emission limits for new sources of pollution will be technology-based, with old sources phasing in the new limits within five years. Ambient concentration limits will be established based on public health and environmental harm concerns. Deposition limits will also be established for certain areas.<sup>94</sup> The law gives the Czech and Slovak environmental agencies authority to close a source both in emergency situations and when a source fails to respond to compliance requests.

The Czech Republic has already adopted implementing laws and regulations to the CSFR Clean Air Act.<sup>95</sup> The Czech provisions implement emission standards for new sources and establish a system of fees and penalties to encourage full compliance by existing sources by 1997. Under this system, large and medium-sized existing pollution sources will pay an annual fee for noncompliance with the Act. The fee will be equivalent to thirty percent of the cost of operating a fully complying facility and will increase over the next five years until 1997 when it will be equivalent to one hundred percent of the cost.<sup>96</sup> The Czech provisions also establish a system for regulating smog and alerting the public if the smog reaches dangerous levels. The Slovak Republic has not yet passed implementing legislation to the CSFR Clean Air Act.

## 7. The Water Pollution Law

The CSFR continues to rely on its existing water law passed in 1973,<sup>97</sup> although amendments are expected in the next year. The existing law regulates both surface and groundwaters throughout the country. The law requires permits for all discharges to ground and

94. On October 1, 1991, the Federal Committee adopted federal emission limits and ambient concentration levels for certain air pollutants. This decree only regulates a fraction of the 118 pollutants listed in the CSFR Clean Air Act. There is currently debate over whether the federal or the republic ministries have the authority to establish limits for the remaining pollutants. Tillinghast, *supra* note 58, at 10-11.

95. Act on the State Administration of Air Protection and Charges for the Pollution of Air, Sept. 10, 1991, Czech National Council No. 389/1991.

96. *Id.* § 7(3). These provisions were criticized as placing unreasonable expectations on existing sources, and in late April the Czech Parliament passed an amendment extending the compliance schedule for an additional two years. Telephone interview with Pamela Tillinghast, Advisor to the Deputy Minister, Czech Ministry of the Environment (May 11, 1992).

97. Act on Waters, Oct. 31, 1973, Czechoslovak Socialist Republic Act No. 138/1973.

surface waters as well as for certain non-domestic withdrawals of water. A per-ton fee is assessed for most of these activities. The law also establishes protected water management areas to preserve the quality of certain natural lakes and rivers. In addition, it regulates the development of waterworks, e.g., dams, reservoirs, etc.; the administration of watercourses, e.g., brooks, canals, etc.; and the development of flood control measures.<sup>98</sup> Although the law appears adequate on paper, in reality it has not protected water quality effectively. Over the past twenty years almost every discharge was granted a special exception to the regulation.<sup>99</sup> As of January 1, 1992, all existing special exceptions have been eliminated.<sup>100</sup>

Both the Czech and the Slovak republics are developing amendments to this 1973 law.<sup>101</sup> The Czech republic is proposing minor amendments to the Act, while the Slovak Republic would like to make substantial revisions. A single bill of amendments will be adopted by the Federal Parliament.<sup>102</sup>

#### 8. Environmental Impact Assessment Law

The CSFR General Environmental Protection Law includes several provisions requiring environmental impact assessments (EIAs). The EIA requirement applies to a list of activities relating to the use of natural resources and the production of certain technologies.<sup>103</sup> The law anticipates a process generally similar to the European Community's EIA laws, but it leaves the details of implementing and enforcing the EIAs to the republics and explicitly authorizes them to pass more comprehensive EIA laws.<sup>104</sup> Although the law contains some details about which activities require an EIA and what documentation is required in an EIA, it is silent with respect to what role the public

98. *Id.* §§ 8 (permits), 43 (payments), 18 (water management areas), 38 (waterworks), 31 (watercourses), 42 (flood control).

99. *See id.* § 23(3) ("In individual extraordinary cases. . . the Government of the Republic may give its consent with the discharge of waste waters deviating from the provisions of this law . . .").

100. Interview with L'ubomíra Zimanová, Chief of Legislative Department, Slovak Commission for the Environment, in Bratislava, CSFR (Jan. 20, 1992). Eliminating these special exceptions has created quite a number of problems, because many of the factories with exceptions cannot currently meet the regulated limits.

101. In the Slovak Republic, these amendments are being drafted by the Slovak Commission for the Environment with input from the Ministry of Forestry and Water Management, which has authority for water management. In the Czech Republic, the amendments are being drafted by the Czech Ministry of the Environment, with input from the Ministry of Agriculture, which has authority over drinking water supply and sewage treatment.

102. Tillinghast, *supra* note 58, at 20.

103. CSFR General Environmental Protection Law, *supra* note 70, art. 17.

104. *Id.* art. 21.

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The CSFR General Environmental Protection Law includes specific provisions addressing EIAs in a transboundary situation.<sup>106</sup> This provision was prompted by the CSFR's desire to join the U.N. Convention on Environmental Impact Assessment in a Transboundary Context that was signed in Finland in February, 1991.<sup>107</sup> The CSFR could not accede to the convention until it adopted an EIA law.

The Czech and Slovak Republics are presently drafting detailed republic laws requiring EIAs. Under the Czech Republic's draft law, an EIA must be conducted for public and private projects involving the construction of new buildings and the reconstruction of existing buildings, as well as for certain other listed activities and technologies. An EIA must also be conducted for State plans, policies, and programs, and for the import and distribution of products. The EIA report would be conducted by the project investor, and then submitted to the Ministry for review and approval. The public would be allowed to review and comment on the EIA report after it is submitted to the Ministry.<sup>108</sup> The Slovak Commission is closely modeling its draft law on the recently adopted Austrian EIA law.<sup>109</sup>

## 9. Nature Protection Laws

There is no federal nature protection law in the CSFR, as the republics have been delegated the responsibility for nature protection. The Czech Republic passed its new nature protection law on February 18, 1992. The goal of the Act is to protect biodiversity by protecting ecosystems and species. The Act ensures the protection of all threatened species and provides a list of the species that will initially be protected under the Act. It also establishes a series of protected areas throughout the republic. These protected areas are classified into six categories: national parks, national nature reserves, and national natural monuments, all managed by the Ministry; and landscape protection areas, nature reserves, and natural monuments, all managed at the regional or district level. No regulations have yet been

105. *Id.* apps. 1 (activities requiring EIA), 2 (documentation). See also Vaclav Mezricky, *State of Environmental Law in Central and Eastern Europe: Czechoslovakia*, STATE OF ENVIRONMENTAL LAW REPORT 11-14 (Center for International Environmental Law — U.S. ed., forthcoming, 1992) (Jan. 1992 draft on file with *Michigan Journal of International Law*).

106. CSFR General Environmental Protection Law, *supra* note 70, arts. 24-26.

107. U.N. Convention on Environmental Impact Assessment in a Transboundary Context, *opened for signature* Feb. 25, 1991, 30 I.L.M. 800.

108. Mezricky, *supra* note 105, at 14-17; Tillinghast, *supra* note 58, at 14. The Czech Republic passed its EIA law in late spring.

109. Interview with L'ubomíra Zimanová, *supra* note 100.

written to implement this Act.<sup>110</sup>

The Slovak Republic is presently developing a similar nature protection act. Although a draft law has yet to be submitted to the Slovak Parliament,<sup>111</sup> the Slovak Commission has passed a decree on natural preserves in the Tatra National Park.<sup>112</sup>

### 10. Other Anticipated Laws

In addition to the laws described above, the environmental agencies expect to pass new laws in virtually all environmental fields over the next few years. At the federal level, there are plans to pass laws relating to nuclear energy, waste and land use. Additional law reforms at the republic level will address mining, forestry, soil conservation, fish and wildlife, and national parks.

#### C. Environmental Reforms in Hungary

Unlike the CSFR, Hungary has seen very little environmental reform in the past three years. For a long time after the change in governments there was debate as to whether a new environmental law should be drafted at all. Finally in 1991, the Parliament's Committee on Environment and the Ministry of Environmental Protection and Regional Planning agreed that a new law should be drafted. At present, there are two separate draft laws being discussed. It is unlikely that any law will be adopted this year.

#### 1. Existing Environmental Laws

Hungary's first comprehensive environmental law was passed in 1976.<sup>113</sup> This law, the Act on the Protection of the Human Environ-

110. Tillinghast, *supra* note 58, at 15-17 (citing Czech National Council, Act Regarding the Conservation of Nature and the Landscape, Feb. 18, 1992).

111. Interview with L'ubomíra Zimanová, *supra* note 100.

112. See Jan Drgonec, *State of Environmental Law in Czecho-Slovakia*, STATE OF ENVIRONMENTAL LAW REPORT 12 (Center for International Environmental Law — U.S. ed., forthcoming, 1992) (Mar. 1992 draft on file with *Michigan Journal of International Law*) (citing Decree on State Natural Preserves and Protected Deposits in the Tatra National Park, Slovak Commission on the Environment Decree No. 166/1991).

113. Prior to the 1976 Act on the Protection of the Human Environment, Hungary had passed other legislation on specific issues related to nature protection. In 1879, Hungary first passed a forestry act, amended in 1935. In the 1960s, legislation was passed regulating agricultural land (1961) and silviculture (1961). In addition, Hungary passed a water management act in 1964. Géza Kilényi, *Environmental Policy in Hungary: Environmental Legislation*, in STATE OF THE HUNGARIAN ENVIRONMENT 35-40 (Don Hinrichsen and György Enyedi eds., 1990). See generally Gyula Bándi, *State of Environmental Law in Central and Eastern Europe: Hungary*, STATE OF ENVIRONMENTAL LAW REPORT 52-76 (Center for International Environmental Law — U.S. ed., forthcoming, 1992) (Nov. 1991 draft on file with *Michigan Journal of International Law*). For general information on Hungary's environmental community, see Marta Szigeti, *An Overview of Hungary's Environmental Community*, (Center for International Envi-

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ment, regulated all disciplines of environmental law, including water, air, flora and fauna, landscape, and the urban environment.<sup>114</sup> The Act imposes civil, criminal, or administrative fines for violating its provisions. Before this law was enacted, almost 200 specific legal provisions relating to the environment had been enacted in other legislation. Under the Environmental Protection Act, these provisions were to be coordinated and harmonized. Unfortunately, this law was never fully implemented or enforced, due to political pressures, mismanagement, and lack of funds.<sup>115</sup>

## 2. The Parliament's Draft Environmental Law

In 1991, the Hungarian Parliament's Committee on the Environment commissioned a committee of experts to develop a new draft environmental law for Hungary. The Ministry for Environment and Regional Policy ("the Ministry") also endorsed this Drafting Commission. The Parliament's Committee and the Ministry appointed as principal draftsman Professor András Sajó, Professor of law at the Hungarian Academy of Sciences.<sup>116</sup> Professor Sajó completed an extensive draft law in January 1992.<sup>117</sup>

Professor Sajó's draft environmental law would lay the general framework for more detailed, media-specific laws.<sup>118</sup> The draft would grant most authority for developing regulations and enforcing the law to the Ministry and the Inspectorate General for Environmental Protection. In addition, the law would create the following agencies: (1) a National Environmental Protection Council, an independent body comprised of representatives of national, regional, and local governments, as well as representatives of non-governmental organizations, to monitor and evaluate the state of the environment and environmental protection activities; (2) a Board of Environmental Experts, a scientific advisory board made up of leading environmental professionals;

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ronmental Law — U.S. Country Report No. 3, forthcoming, June 1992) (May 1992 draft on file with *Michigan Journal of International Law*).

114. Provisions relating to solid and hazardous waste management were not enacted until 1981, and noise and vibration provisions were delayed until 1983. Bándi, *supra* note 113, at 70-74.

115. See Kilényi, *supra* note 113, at 36-37; Bándi, *supra* note 113, at 3-4.

116. Professor Sajó is also head of the Legal Studies Program at Central European University, and was Visiting Professor at the Benjamin Cardozo School of Law in New York for the 1991-92 school year.

117. Environmental Protection Code of Hungary (draft, Jan. 1992) (English translation on file with *Michigan Journal of International Law*) [hereinafter the Hungarian Draft Environmental Act].

118. In addition to the media-specific laws, the draft anticipates an act addressing community right-to-know, access to information, and the duties of companies to disclose certain information. *Id.*

and (3) an environmental ombudsman, to monitor and report on environmental protection activities and represent environmental interests in policy and administrative actions.<sup>119</sup>

The draft law establishes the framework for environmental permits, for establishing quality and emission standards, for regulating the import and export of environmentally sensitive materials, for allowing public participation in environmental decision making, and for establishing administrative penalties as well as civil and criminal liability for violations of the act.<sup>120</sup> The draft also includes procedures for assessing the environmental impacts of rulemaking, privatization, and certain other activities.<sup>121</sup>

The draft law establishes authority to use market-based incentives for compliance, such as user fees and permit trading.<sup>122</sup> Environmental fees and fines would be placed in an environmental fund and applied towards environmental protection projects.<sup>123</sup> In addition, operators would have to establish contingency reserve funds to cover civil liability for damages resulting from pollution. These funds, which apply only to pollution occurring after the Act is adopted, must be retained for 30 years after the property has been sold or abandoned.<sup>124</sup>

The draft contains numerous phase-in provisions and special exemptions in an attempt to accommodate the need for flexibility over the next few economically difficult years.<sup>125</sup> In addition, the draft makes an impressive attempt to address important environmental issues raised during the privatization process. First, an environmental audit must be conducted on certain property undergoing privatization. This audit would assess the existing environmental damage to the property and the future environmental impacts of the activity, and estimate the cost of cleaning up the pollution or taking protective measures against contamination.<sup>126</sup> If contamination is found at the

119. *Id.* §§ 63-87, 206-14.

120. *Id.* §§ 189-214, 218-19, 222-33, 299-356, 547-64, 574-84.

121. *Id.* §§ 165-88, 429-94, 612-28.

122. *Id.* §§ 249-74, 276-98.

123. *Id.* §§ 107-45.

124. *Id.* §§ 565-73. A subsequent act is expected to provide operators with the option of establishing a contingency reserve fund or obtaining environmental cleanup insurance.

125. *Id.* §§ 234-48, 593-606. Many other phase-in and exemption provisions are scattered throughout the draft.

126. *Id.* §§ 607, 609. In general, properties which may have significant impacts on the environment will be audited. This includes projects that are always subject to EIA in the European Community EIA Directive. See András Sajó, Privatization and Environmental Liabilities: Legislative Proposals in Hungary (draft, May 1992) (on file with *Michigan Journal of International Law*). Voluntary audits are encouraged on properties not meeting the mandatory audit requirements. Hungarian Draft Environmental Act, *supra* note 117, § 628.

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property, the State may issue an administrative order against the property requiring remediation. The State entity owning the property can either clean up the contamination or privatize the property subject to the cleanup order. Any reduction in the property's purchase price due to the cleanup order would be separately negotiated. Although liability for the cleanup imposed in the administrative order would transfer with the property to the new owner, the State would retain liability for any contamination not identified in the audit.<sup>127</sup>

The draft also requires the establishment of environmental reserve funds by both the State and the new property owner to cover both past and future liability. To cover the contingent liability retained by the State for past contamination, five percent of the purchase price (up to twenty-five percent for sites previously used for hazardous activities) must be placed in the Central Environmental Protection Reserve Fund. In addition, new owners of enterprises conducting hazardous activities must also place up to twenty-five percent of the purchase price in a Company Environmental Liability Fund to cover both past liabilities assumed with the property and any liabilities which may arise in the future. This Company Environmental Liability Fund must be exhausted before drawing upon the State fund. The private fund must be retained for five years after privatization. After five years, the money reverts to the private owner.<sup>128</sup>

The Drafting Committee distributed the draft environmental law for comment in January 1992. The draft has met with criticism and political opposition for a variety of reasons, including that it is "too modern" for Hungary's present economic climate (and even that some provisions are "too modern" by Western European standards), that it allows for too much public participation, that it is too long (over 300 pages), and that it limits too much the powers of the Ministry.

The Ministry oppose many provisions in the draft law, and in April 1992 released an alternative draft.<sup>129</sup> The Ministry's draft addresses many of the same issues as the Committee draft, but lacks de-

127. Hungarian Draft Environmental Act, *supra* note 117, §§ 631-32. Sajó, *supra* note 126, at 17.

128. Hungarian Draft Environmental Act, *supra* note 117, §§ 633-35. Sajó, *supra* note 126, at 19-20. In the most recent revision of the draft law, these privatization provisions have been removed from the environmental act and added as amendments to the privatization law. This draft creates only a private contingency reserve fund, which is a flat five percent of the purchase price.

129. See Draft Environmental Protection Law (Hung.) (Ministry of Environmental Protection and Regional Policy Draft, Mar. 1992) (June 1992 English Summary on file with *Michigan Journal of International Law*); see also Interviews with András Sajó, Hungarian Academy of Sciences; Peter Hardi, The Regional Environmental Center; and Gyula Bándi, Eötvös Lorand Technical University, in Washington D.C. and Hungary (Feb.-June 1992).



tail (118 articles as compared to the Committee's 641). The draft provides little substantive guidance for environmental protection activities, and grants few participation rights to the public. In May, the Drafting Committee also submitted a revised version of its draft to address concerns raised by the Ministry, NGOs and others. The future of these two drafts is not clear. However, the Environmental Minister has recently indicated that he may be willing to endorse the Committee's revised draft.

#### D. *Environmental Reforms in Romania*

Beginning with its violent and sudden revolution in December 1989, Romania has had a difficult time making the transition to democracy. Miners have led sometimes violent protests into Bucharest four times since the revolution, and the country has changed leaders twice.<sup>130</sup> Stability may finally be coming to the country, however, as democratic opposition parties have mounted a coordinated attack on the former communists. If the opposition remains unified, the next election, perhaps as soon as this summer, may result in Romania's first non-communist government in forty years.<sup>131</sup>

Despite the instability in Romania's government and despite the continued rule by communists (newly labelled the National Salvation Front), the country has begun to reform its environmental laws. Legislative reforms since the December 1989 revolution have included the preparation of a new comprehensive environmental law, as well as several laws governing specific environmental factors. Reform efforts are aimed at promoting sustainable development and harmonizing environmental legislation with the requirements of a market economy, democracy, and international standards.

##### 1. Pre-Revolution Environmental Laws

Romanian environmental law prior to the December 1989 Revolution consisted of a comprehensive law as well as a series of specific laws. The comprehensive law set up the framework for the regulation of everything from water pollution to land use, from noise pollution to the control of pesticides.<sup>132</sup> Among the specific environmental laws in effect prior to the revolution were laws regulating water, land use, for-

130. William McPherson, *On Democracy's Edge*, WASH. POST, Mar. 22, 1992, at C1.

131. *Id.* at C4.

132. See Dumitra Popescu, *The State of Environmental Law in Romania*, STATE OF ENVIRONMENTAL LAW REPORT 4-6 (Center for International Environmental Law U.S. ed., forthcoming, 1992) (Mar. 1992 draft on file with *Michigan Journal of International Law*) (discussing Law on Environmental Protection, *infra* note 134).

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estry, pesticide use, and toxic substances.<sup>133</sup>

## 2. Institutional Reforms

The National Council for the Protection of the Environment was established in 1973 as the central governmental body for protecting the environment.<sup>134</sup> It was, however, primarily a consultative body. On December 29, 1989 — just days after the overthrow of the Ceausescu regime — Romania established a Ministry of Environment with general authority over environmental protection at the national level.<sup>135</sup> The Ministry has broad authority to coordinate and oversee environmental protection and natural resource conservation.<sup>136</sup> It is charged with drafting environmental laws and with supporting environmental NGOs. The Ministry also has authority over county-level agencies, including the Agency for Monitoring and Protection of the Environment, the Administration of the Danube Delta Biosphere, the Office of Information, the Institute for Research on Environmental Engineering in Bucharest, and the Institute for Marine Research in Constanta. In all, over forty agencies are subject to the authority of the Ministry.<sup>137</sup>

The Ministry will also administer the Environment Fund, as proposed in the draft environmental law. The Fund will be supported by user fees, permitting fees, fines, and other sources.<sup>138</sup> The Fund will be used, along with the Ministry's general budget allocation, to support restoration of ecologically damaged areas, provide monitoring and other equipment, and promote environmental education.<sup>139</sup>

## 3. The Constitution

Romania passed its new Constitution in December 1991. This Constitution formalized the transformation to a constitutional democracy and affirmed certain fundamental political rights.<sup>140</sup> Among the rights critical to the future restoration and protection of Romania's

133. See *id.* at 2-3 (discussing pre-revolutionary environmental laws).

134. See Law on Environmental Protection, arts. 62-72, June 20, 1973, COLECTIA DE LEGI SI DECRETE Law No. 9/1973 (Rom.).

135. See Decree on the Organization and Functioning of the Ministry of Environment, December 29, 1989, COLECTIA DE LEGI SI DECRETE Decree No. 264 (Rom.).

136. Environmental Protection Act of Romania, arts. 84-86 (9th draft, Dec. 1991) [hereinafter Draft Romanian Environmental Protection Act].

137. Popescu, *supra* note 132, at 12.

138. Draft Romanian Environmental Protection Act, *supra* note 136, art. 87(2).

139. *Id.* art. 87(3).

140. See generally ROM. CONST. tit. II (Dec. 1991) (Fundamental Rights, Liberties, and Duties).

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environment are the rights of expression including the right to a free press,<sup>141</sup> the right of free association,<sup>142</sup> the right to vote and hold elected office,<sup>143</sup> and the right to appeal to a court.<sup>144</sup> The right of the public to receive information is guaranteed under Article 31 of the Constitution. This fundamentally important right obligates the public authorities to provide correct information to citizens in matters of "public affairs" or "private interests."<sup>145</sup> Although the details are not clear from the constitution, this right could potentially be broader than the rights provided under the U.S. Freedom of Information Act.<sup>146</sup> The only exception under the Romanian Constitution's right to information is access to information that would be prejudicial to "youth or to national security."<sup>147</sup>

The Constitution also moved Romania towards a free market economy<sup>148</sup> and provided protection of private property.<sup>149</sup> The Constitution clearly states, however, that ownership of private property does not include the right to damage the environment. Article 41(6) holds that the "right of property is binding to the observance of duties relating to environmental protection and insurance of good neighborhood, as well as of other duties that, in accordance with the law or custom, are incumbent upon the owner." The importance of the environment is also reflected in the decision to retain State ownership over certain ecological resources. Article 135(4) holds that the following shall remain exclusively public property: "Subsoil resources of any nature, . . . the airspace, waters that can generate motive force or can be used for the public interest, beaches, territorial sea, natural re-

141. *Id.* arts. 30 (granting freedom of expression and press), 31(5) (holding that radio and television shall be independent and shall guarantee access to the airwaves to "major" social and political groups). *But see id.* art. 30(7) ("Any defamation of the country and the nation, instigation to a war of aggression, to national, racial, class, or religious hatred, any incitement to discrimination, territorial separatism, public violence, as well as any obscene conduct contrary to morality shall be prohibited by law."). This prohibition of defamations of the country could allow for politically motivated abuses against legitimate political speech in the future.

142. *Id.* art. 37.

143. *Id.* arts. 34(1) (granting the right to vote to every citizen 18 years or older), 35 (allowing voters over the age of 23 to be elected to the Chamber of Deputies, and over the age of 35 to the Senate or Presidency).

144. *Id.* art. 21(1) ("Any person is entitled to appeal to the Court for the defence of his legitimate rights, liberties and interests."). Although the judges are "independent and subject only to the law," *id.* art. 123(2), they are appointed by the President for six year *renewable* terms. *Id.* art. 124(1).

145. *Id.* art. 31(2).

146. 5 U.S.C. § 552 (1988).

147. *Compare* ROM. CONST. art. 31(3) (Dec. 1991) with 5 U.S.C. § 552(b) (1988) (listing nine exceptions to the ability to obtain information).

148. ROM. CONST. art. 134 (Dec. 1991) ("Romania's economy is a free market economy").

149. *Id.* arts. 41, 135(1).

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150. *Id.* art.

151. *Id.* art. exploit natural r provide a decent tion." *Id.* art. 1.

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sources of the economic zone and the continental shelf, as well as other assets established by law."<sup>150</sup> Although much of the motivation for retaining public control over these resources is undoubtedly economic, such control could also facilitate stronger protection of the ecological integrity of those resources.

Although the Romanian Constitution provides a solid base for the restoration and protection of the country's environment, it does not reach as far as some modern constitutions in recognizing a specific right to a clean environment. There are several provisions that nonetheless appear to obligate the State to provide such an environment. For example, under Article 134(d) the State shall provide for the "recovery and protection of the environment and preservation of ecological balance."<sup>151</sup>

#### 4. The Draft General Environmental Law

The most important source of environmental law in Romania, besides the Constitution, will be the general environmental law currently under consideration by Parliament. The new law will replace the 1973 Act on Environmental Protection,<sup>152</sup> which sets out broad duties and responsibilities relating to the environment. Although the new law has not been enacted yet, the most recent draft (the ninth) provides valuable insight into what the law will ultimately contain.

The proposed law provides for a right to a healthy environment and guarantees, among other things, general access to environmental information, the right of association in environmental organizations, and the right to compensation for particular environmental damage.<sup>153</sup> The law also provides for eighteen specific obligations of both physical and legal persons, ranging from modernizing existing production facilities to performing environmental impact assessments, from recycling to using energy efficient technologies.<sup>154</sup> The law requires permits for certain specific activities, including, *inter alia*, any construction that affects the environment, any changes in land-use, any creation of tree plantations, any importing or exporting toxic substances or certain plants or animals, and "any other activities which can affect the envi-

150. *Id.* art. 135(4).

151. *Id.* art. 134(2)(e). This would seem to counter the State's constitutional obligation to exploit natural resources in accordance with the national interest. The State is also obliged to provide a decent standard of living "by measures of economic development and social protection." *Id.* art. 134(2)(d).

152. Law on Environmental Protection, *supra* note 134. See also Draft Romanian Environmental Protection Act, *supra* note 136, art. 102.

153. Draft Romanian Environmental Protection Act, *supra* note 136, art. 6(1).

154. *Id.* art. 7.

ronment."<sup>155</sup> Substantively, the draft law sets out the general principles of environmental protection in such areas as toxic products and wastes, chemical fertilizers, protection of water resources, air, soil, nature protection, urban development, and nuclear radiation.<sup>156</sup>

### 5. Water Pollution Laws

Beginning in 1974, Romania had developed a complex system of laws and decrees regulating water pollution.<sup>157</sup> The system requires the acquisition and renewal of discharge permits. Under a 1979 decree, permissible discharge limits were set for a variety of contaminants including, for example, cadmium, cyanides, and lead. The decree also strictly prohibited discharges of contaminants that could pose greater health hazards, although allowances for some discharges could be made. Despite the existing regime, the drafting of a new water law is expected within the next year or two.

### 6. Environmental Impact Assessment Provisions

The Draft Romanian Environmental Protection Act will require environmental impact assessments for all new projects that might negatively affect the environment. The EIA must be conducted before any permits are issued. The draft law does not provide for any specific public participation requirements in the EIA process. However, the regulations, which must be passed within thirty days after approval of the law, may include such provisions. The law also requires that the EIA be prepared by a specialized institution related to the Ministry or by some other "competent organization authorized by the Ministry."<sup>158</sup>

Romania's construction law requires local environmental assessments for the siting and construction of certain buildings.<sup>159</sup> For example, building permits are required for most industrial or agricultural buildings. The permitting process, in theory at least, should reflect local zoning and environmental siting concerns.<sup>160</sup> Environmental studies are also required in connection with the siting of

155. *Id.* art. 8.

156. *Id.* arts. 20-83.

157. See Popescu, *supra* note 132, at 7-8 (discussing pre-revolutionary water laws); see also Act on Waters, Mar. 29, 1974, COLECTIA DE LEGI SI DECRET, Law No. 8/1974 (Rom.); Law No. 5/1989, June 29, 1989 (amending Law No. 8/1974); Decree Establishing Permissible Value Limits, COLECTIA DE LEGI SI DECRET, Decree No. 414/1979 (Rom.).

158. Draft Romanian Environmental Protection Act, *supra* note 136, art. 11.

159. See Popescu, *supra* note 132, at 15-16 (discussing Law No. 50/1991 on the Authorization of Execution of Constructions).

160. *Id.* at 15-16.

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

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### E. Environmental Reforms in Bulgaria

On October 2, 1991, the Bulgarian Grand National Assembly enacted a broad Environmental Protection Act which, among other things, established new responsibilities for different public ministries.<sup>162</sup> Under the Act, the Ministry of Environment is given primary authority for the day-to-day protection of the environment. Thus, for example, the Ministry approves any proposed international transportation of dangerous substances across Bulgarian territory,<sup>163</sup> develops the country's environmental protection strategy, and coordinates the environmental activities of other ministries.<sup>164</sup> The Ministry of Environment shares environmental responsibility with a host of other organizations. For example, most of the regulatory standards must be developed jointly with the Ministries of Health and of Agriculture and Food Industry.<sup>165</sup> The Ministry of Building Construction, Architecture and Town Planning also shares considerable power with the Ministry of Environment regarding environmental impact assessments. Most importantly, the Council of Ministers has the authority to pass the acts and orders necessary to implement the Bulgarian Environmental Protection Act, including the authority to set charges for the use of natural resources or contamination of the environment,<sup>166</sup> to prepare an annual state of the environment report which will set government priorities,<sup>167</sup> and to specify additional rights and duties of the Minister of Environment.<sup>168</sup>

The Ministry will carry out many of its responsibilities within a given territory through regional inspectorates. The regional inspectorates will also act in place of the municipality where no municipality has an environmental program. Under Article 26 of the Bulgarian Environmental Protection Act, municipalities are charged with developing their own environmental programs and controlling pollution.

161. *Id.* at 17 (discussing Law No. 18/1991).

162. Environmental Protection Act, Oct. 2, 1991, DURZHAVEN VESTNIK No. 86/1991 (Sofita Private Agency translation on file with *Michigan Journal of International Law*) [hereinafter Bulgarian Environmental Protection Act]. For a general discussion of environmental law reforms in Bulgaria, see Kalinka Moudrova, *State of Environmental Law: Bulgaria*, STATE OF ENVIRONMENTAL LAW REPORT (Center for International Environmental Law — U.S. ed., forthcoming, 1992) (Apr. 1992 draft on file with *Michigan Journal of International Law*).

163. Bulgarian Environmental Protection Act, *supra* note 162, art. 7.

164. *Id.* art. 24.

165. *Id.* art. 24, § 1(7).

166. *Id.* art. 3, § 1.

167. *Id.* art. 4.

168. *Id.* art. 24, § 2.

They are also given the right to manage and distribute the municipal fund, which contains fifty percent of all pollution charges collected within the municipality. The regional inspectorates receive forty percent of the charges, and the Ministry's national environmental protection fund receives the remaining ten percent.

### 1. Bulgaria's New Constitution

On July 12, 1991, Bulgaria's Grand National Assembly passed a new constitution based on individual sovereignty and the rule of law.<sup>169</sup> The Bulgarian Constitution guarantees certain basic human rights, including the right of equal protection,<sup>170</sup> the right to legal counsel,<sup>171</sup> the right to privacy,<sup>172</sup> and the right to freedom of religion.<sup>173</sup> With certain exceptions for protecting national security, public order, public health, and morality, citizens also enjoy the right to seek, obtain, and disseminate information.<sup>174</sup> Citizens can receive information from the State on any matter of legitimate interest.

The Bulgarian Constitution also includes a variety of rights and responsibilities explicitly relating to the environment. Article 55 grants citizens the right to a healthy environment, although the right seems limited to "established standards and norms." With the right comes the corresponding responsibility to protect the environment.<sup>175</sup> Under Article 15, the State must ensure the protection and maintenance of the environment, the conservation of natural diversity and the reasonable use of natural resources. Under Article 52, the State is charged with protecting the health of citizens, which presumably extends to protecting the public health.

Importantly, the Bulgarian Constitution's guarantee of private property<sup>176</sup> does not extend to certain important ecological resources. The State retains "exclusive ownership rights over the nethers of the earth; the coastal beaches; the national thoroughfares, as well as over waters, forests and parks of national importance, and the natural and

169. BULG. CONST. art. 1(2) (July 1991). See also Bulgarian Law on Constitutional Court, July 30, 1991, DURZHAVEN VESTNIK No. 67/1991, at 1, translated in U.S. Department of Commerce, National Technical Information Service Doc. No. PB92-960407 (establishing an independent Constitutional Court to guarantee the supremacy of the Constitution).

170. BULG. CONST. art. 6(1) (July 1991).

171. *Id.* art. 30(4).

172. *Id.* art. 32.

173. *Id.* art. 13(1).

174. *Id.* art. 41.

175. *Id.* art. 55.

176. *Id.* art. 17(1). Foreigners, however, cannot own land itself (except through legal inheritance), but only the right to use the land. *Id.* art. 22.

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177. *Id.* art. 1

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181. *Id.* ch. 2.

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archaeological reserves established by a law."<sup>177</sup> The State also made constitutional its control over the use of nuclear power and the manufacture of radioactive and extremely toxic substances,<sup>178</sup> although the State will grant licenses to exercise this monopoly. Land is also given special constitutional recognition as a "chief national asset," and arable land can only be used for agriculture, unless the applicable law allows a change of purpose.<sup>179</sup>

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## 2. The Environmental Protection Act

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Bulgaria's Environmental Protection Act sets out the initial broad framework for environmental regulation. As mentioned above, it sets out the relative authorities of the Ministry of Environment, the Council of Ministers and the various other ministries, regional inspectorates, and municipalities.<sup>180</sup> The Act was passed shortly before the November 1991 elections in which the Communist Party lost its majority in Parliament. As a result of the election, a new Minister of the Environment emerged, who is presently preparing minor revisions to the Act.

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The Act contains fairly detailed provisions explicating the right of all persons, the State, and the municipal authorities to gain access to available information concerning the state of the environment.<sup>181</sup> By defining what constitutes information about the environment, however, Bulgaria may inadvertently have narrowed the type of information covered by the right.<sup>182</sup> The Act makes up for this potential deficiency by requiring State and municipal authorities, corporations, and individuals to respond within two weeks of receiving any request for information about the potential environmental impacts of their activity.<sup>183</sup> This broad provision is supplemented by specific requirements to report environmental hazards or consumer safety information. Under Article 13, corporations and others must report to the public any pollution or other damage to the environment. Such a report must include details about the damage, the measures for con-

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177. *Id.* art. 18(1).

178. *Id.* art. 18(4).

179. *Id.* art. 21.

180. *See generally* Bulgarian Environmental Protection Act, *supra* note 162.

181. *Id.* ch. 2.

182. Under Article 8, environmental information consists of data about the components of the environment, data about the results of activities that may pollute or damage the environment, and data about activities undertaken to protect or restore the environment. It would be unfortunate if this provision is used to make citizens seeking information show that their information falls within one of the categories. *Id.* art. 8.

183. *Id.* art. 12.

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trolling the damage, and recommendations for public response to the dangers. Similarly, producers of goods and services must provide consumer safety information simultaneously with the sale. They must provide this information in writing unless the negative effects are clearly unimportant, in which case they may give the information orally.<sup>184</sup> To ensure that these rights are taken seriously, Article 15 provides a specific right to judicial or administrative enforcement.

Liability for environmental pollution under the Act, at least for current pollution, clearly falls on the polluter. The Act follows the "polluter pays" principle in assessing pollution charges (and user fees),<sup>185</sup> and sets out an elaborate system of fines and charges. Under Article 18, the polluters must also pay for monitoring. Moreover, "persons found guilty of harming others by pollution or damage to the environment shall be bound to remedy the damage."<sup>186</sup> In what is probably the strongest new citizen suit provision in the region, Article 30 explicitly allows any citizen or association to lodge a claim and institute proceedings against offenders to enjoin the pollution and remedy the damage.

Standards under the Act, generally speaking, will be set in order to mitigate risks to public health and the environment "by applying the best available technologies, scientific knowledge, techniques, expertise and international experience." This general standard, however, will probably not be universally applied. For example, when not set by international agreements, standards for transboundary pollution under the law will be the same as those in the European Community.<sup>187</sup>

### 3. Environmental Impact Assessment Provisions

Prior to the passage of the new environmental law, Bulgaria required only a limited environmental impact assessment. Under the former law, an independent research institute was charged with assessing environmental impacts. The Minister of the Environment could approve or modify the project based on the EIA. According to one Bulgarian academic, the Minister never modified a single project be-

184. *Id.* art. 14. There are other obligations to generate and provide certain types of information. For example, published information about the environment must include discussions of potential public health and environmental risks and the recommended actions to avoid such harm. *Id.* art. 10. The Ministry of Environment and other ministries are required to gather information about the environment, and the Council of Ministers must prepare an annual state of environmental law report for the Parliament. *Id.* art. 4.

185. *Id.* art. 3.

186. *Id.* art. 29.

187. *Id.* art. 6.

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The new environmental law provides a fairly detailed framework for future EIA requirements. Under Article 19, potentially all activities of individuals, corporations, or State or municipal authorities could be subject to an EIA. The same provision lists certain activities which trigger mandatory assessments, including national, regional, or local development plans and certain listed construction projects. The Ministry has discretion to require EIAs for any activities that may have significant effects on the environment. Interestingly, EIAs on certain large activities must be performed periodically at least every five years.<sup>189</sup>

The Bulgarian law is one of the most progressive in the region. Unlike most of the other EIA laws in the region, the Bulgarian Act explicitly provides for broad public review of the EIA results.<sup>190</sup> To give concerned citizens and others a chance to hear about the EIA, information must be provided in both the local and national mass media. The Bulgarian law carefully ensures the independent credibility of the EIA. The initiator of the project must submit initial documentation to get the EIA process underway and must pay for the EIA, but the actual EIA is conducted by an independent expert with no contractual interest in the project.<sup>191</sup> The competent governmental authority is supposed to make its decision on the basis of the independent expert's EIA. Interested persons have a right to appeal any decision.<sup>192</sup> Finally, Bulgaria's EIA has a clearly substantive component. Under Article 23, the competent authority must prohibit projects resulting in negative EIAs, projects failing to undergo EIA review, or projects which have not been equipped with the necessary purification plants.<sup>193</sup>

### III. ISSUES OF COMMON CONCERN

The countries of Central Europe are all unique. They have different political and cultural backgrounds, and are concerned with differ-

188. Interview with George Penchev, Institute of State and Law, Bulgarian Academy of Sciences, in Wroclaw, Poland (Apr. 2, 1992).

189. Bulgarian Environmental Protection Act, *supra* note 162, art. 19. See also George Penchev, Environmental Impact Assessment and Public Participation in Environmental Decision making in Bulgaria 3-6 (1992) (report prepared for the Environmental Law Institute's International Roundtable on Environmental Impact Assessment and Public Participation in Environmental Decisionmaking, Wroclaw, Poland, Apr. 1-3, 1992) (on file with *Michigan Journal of International Law*).

190. Bulgarian Environmental Protection Act, *supra* note 162, art. 20.

191. *Id.* arts. 21, 22.

192. *Id.* art. 22.

193. *Id.* art. 23.

ent issues. Nevertheless, they face similar challenges in developing new environmental regulatory systems. Some of the most important challenges and the region's approaches to them are described below.

#### A. Public Participation and Access to Information

For the past forty years, environmental decision making in Central and Eastern Europe was a secretive process conducted behind closed doors, without the consultation of environmental experts or the public. Environmental decisions were made, not through an open legal process, but rather through "telephone law." High officials in the centralized communist party would telephone the local officials charged with implementing and enforcing the laws to tell them what actions were expected.<sup>194</sup> Some of the region's environmental laws permitted limited public participation, but these provisions were largely ignored.<sup>195</sup> In short, "[e]nvironmental protection was considered under communist rule as a privileged obligation of the public environmental bureaucracy and all attempts to associate environmental protection with genuine public participation were considered politically unacceptable."<sup>196</sup>

After over four decades of this closed decision making paradigm, the countries of Central and Eastern Europe are struggling with ways to "democratize" the process, allowing for public access to information, and effective involvement in the decision making process. The adoption of such a process will help to avoid the flawed, politically or economically motivated, decisions of the past forty years. An open

194. This "telephone law" was not unique to environmental decisions; it pervaded all aspects of governmental decision making.

195. For example, in Poland the 1960 Administrative Procedure Code provides citizens and NGOs a right to submit a proposal to an administrative agency on any issue within the agency's jurisdiction. The agency must consider the proposal and respond to it within one month. Although this is potentially a strong provision in theory, in practice there is no claim for relief in administrative court if the agency fails to comply. Public Participation, *supra* note 24, at 9-10; Jerzy Jendroška & Konrad Nowacki, *Participation Rights of Environmental Associations and the Possibilities of Taking Legal Action in Poland*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 39, 40 (Martin Führ & Gerhard Roller eds., 1991). In Hungary, the environmental protection system has not afforded many participation rights to citizens or environmental organizations. The 1976 Hungarian Environmental Protection Act states that citizens and their environmental protection associations have the right to participate in environmental protection. However, regulations under the Act addressing rule making, permitting, and monitoring do not contain any provisions allowing for public participation. András Sajó, *Participation Rights of Environmental Associations in Hungary*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 9-10 (Martin Führ & Gerhard Roller eds., 1991).

196. Sajó, *supra* note 195, at 9-10. See also Drgonec, *supra* note 112, at 12 ("The public participation in the decision making concerning activities which are important for creation and protection of environment is in the Czech and Slovak Federal Republic comparable to the occurrence of trace elements among other chemical elements on the planet.").

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system will facilitate public education about environmental issues and will enable the public to provide valuable input. It will also provide a check on government decision makers to ensure that environmental laws and policies are implemented and that government decisions are made on an environmentally sound basis.

The present restructuring of Central and Eastern Europe makes the opening of the environmental decision making process even more vital. The fundamental decisions made during this restructuring will have a profound effect on the system of environmental protection and the future role of citizens. If the traditions of closed-door environmental decisions are not reversed now, as the system is being changed, reversing them later will be nearly impossible.

The adoption of an open system, however, is not universally accepted as a necessary component of the region's new democratic systems. Many of the region's decision makers are wary of creating a fully open and democratic governing structure. The tradition of "protest" that characterized citizen groups in the past still lingers in the minds of governing officials, and they often doubt whether citizens are able to participate constructively in the environmental decisionmaking process.<sup>197</sup> Other government officials take an Orwellian<sup>198</sup> approach to public participation, arguing that some citizens are more qualified to participate than others, and that the laws should limit participation to the "educated" public in academia and private research institutions.

In addition, the overwhelming task presented to the region's decision makers — restructuring their entire political and regulatory system — makes them unwilling to delay the process in order to allow for full citizen participation. They believe citizen participation will substantially delay environmental decisions with no assurance that the ultimate decisions will be analytically better. To some extent, these views merely reflect a European tradition of closed-door decision making. Even where public participation and access to information is afforded in Western European laws, the actual use of these provisions remains limited.<sup>199</sup>

In spite of the challenges, many of Central Europe's environmentalists realize that public access to environmental information and public participation in environmental decision making is fundamental

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197. Warburg, *supra* note 12, at 19.

198. "All animals are created equal, but some are more equal than others." GEORGE ORWELL, *ANIMAL FARM* 148 (1946).

199. See generally PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE, *supra* note 195.

to the democratic system.<sup>200</sup> Many of the new environmental laws include at least a general right to participation. For example, the CSFR General Environmental Protection Law, adopted in December 1991, includes such a general right to information and participation.<sup>201</sup> Poland's Nature Protection Act, also adopted in December, gives citizen organizations limited rights to enforce environmental laws within national parks and other protected lands.<sup>202</sup> However, these rights alone are very difficult to enforce, and supporting laws and regulations rarely include procedures for exercising these rights.

Of course, strong public participation laws alone will not create effective public participation in Central Europe's environmental decision making. The social traditions of disenfranchisement must also be reversed before citizens will feel the desire and the ability to provide constructive input into the decision making process. The lack of influence in the decision making process over the past forty years has created in the citizens of Central and Eastern Europe a feeling of distance between "we" the people, and "they" the rulers:

With every year of its existence, the totalitarian regime deepened the chasm between the ordinary citizen and those who ruled and acted in his or her name. An awareness gradually emerged of that classic division between the anonymous "we" — the powerless "we" — and the powerful "they." They rule and are responsible for everything that happens. . . . But at the same time we still remain members of that wider social body known as "we." We, the robbed, the cheated, without rights, we, who have no influence on the course of events and hence bear no responsibility either . . . .<sup>203</sup>

In order to develop an effective decision making process, this culture of helplessness must be replaced by a culture of participation.

[A]s long as the division will continue in our thoughts between "we" and "they," until we begin to feel that the street on which we live, the town

200. See, e.g., CSFR JOINT ENVIRONMENTAL STUDY, *supra* note 54, Vol. I, at xi; POLAND'S NATIONAL ENVIRONMENTAL POLICY, *supra* note 17, at 15; Federal Committee for the Environment, State of Environment in Czechoslovakia 33-36 (draft, 1991) (emphasizing the importance of public participation and access to information) (draft on file with *Michigan Journal of International Law*); Josef Vavrousek, Chairman, Federal Committee of the Environment, remarks at private reception sponsored by Center for International Law - U.S., in Washington D.C., Jan. 11, 1992. See also Chris Wold & Durwood Zaelke, Access to Information and the European Bank for Reconstruction and Development (Center for International Environmental Law — U.S. ed., Mar. 25, 1991) (draft working paper on file with *Michigan Journal of International Law*).

201. CSFR General Environmental Protection Law, *supra* note 70, §§ 14-15. See also Hungarian Draft Environmental Act, *supra* note 117, § 189; BULG. CONST. art. 41 (July 1991); Bulgarian Environmental Protection Act, *supra* note 162, arts. 9, 18; ROM. CONST. art. 31 (Dec. 1991); Draft Romanian Environmental Protection Act, *supra* note 136, art. 6(1); CSFR Fundamental Rights and Freedoms Act, *supra* note 63, art. 17; Polish Environmental Protection Act, *supra* note 48.

202. Law on Nature Protection, *supra* note 34, part 6.

203. Ivan Klima, *Forty Years Within Us*, LIDOVE NOVINY, Feb. 14, 1991, at 2, 3.

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204. *Id.* at 4.

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207. See Sachs,

in which we live, the country where we've been born, are not "Theirs," but ours, we will not enter into a civic society. And we will even help to make those at the top begin to feel once more that they are something more than they are — that is, just one part of us.<sup>204</sup>

Many environmental NGOs in Central and Eastern Europe have begun to make this transition, working with the government through informal channels to influence the development of environmental laws and policies. For example, groups like the Environmental Public Advocacy Center in Bratislava are forming to use legal processes to influence the environmental decisions in their countries. In 1989, Austerity and Work, a citizen organization in Lodz, Poland, brought the country's first successful citizen suit, which forced the Municipal Transport Enterprise to install emission control devices on the city's public buses.<sup>205</sup> And in Hungary, the citizen group Green Future is presently threatening to bring a class action to close a lead factory.<sup>206</sup>

The development of effective public participation processes will be a slow process. It will take both strong legislation and widespread education — education not only of the government bureaucrats as to the value of public participation, but also of the public as to the power of participation.

#### B. *Privatization and Environmental Liability*

The most frequently discussed issue surrounding Central and Eastern Europe's transition to a market economy is the privatization of State-owned enterprises. At the time of the region's revolutions, over ninety percent of property and businesses in Central and Eastern Europe were owned by the State. The transfer of so many entities so rapidly into private hands is unprecedented. When the United Kingdom privatized many of its State-owned enterprises in the 1980s, it succeeded in privatizing about five enterprises per year. If the countries of Central and Eastern Europe privatized their State-owned enterprises at the same rate, the process in each country would take several hundred years.<sup>207</sup>

Many of the Central and East European countries have adopted privatization procedures, and are beginning the slow process of transferring title to the State enterprises. When these privatization laws were first drafted, little attention was paid to environmental concerns,

204. *Id.* at 4.

205. Warburg, *supra* note 12, at 22; Jendroška & Nowacki, *supra* note 195, at 53.

206. Bob Hagerty, *Environmental Groups in Eastern Europe Flex Their Muscles*, WALL ST. J. EUR., Apr. 8, 1992, at A1.

207. See Sachs, *supra* note 21, at 37 (discussing the situation in Poland).

and in most countries the environmental ministries were not even consulted. However, most major Western investors are legitimately concerned with the widespread presence of industrial pollution in the region, and have raised environmental issues during their investment negotiations.<sup>208</sup> The lack of attention to environmental issues in the region's privatization and foreign investment processes may have resulted in the hesitation of many early Western prospectors in the region to commit to large investments.<sup>209</sup>

As privatization in Central and Eastern Europe increased, two major environmental issues arose: the question of liability for existing property contamination, and the question of what level of future compliance will be expected. The sale of government-owned property provides a unique and important opportunity to use the leverage of the privatization agreement to ensure cleanup of the property and environmental compliance in the future. This section discusses past liability issues in greater detail. The next section discusses the potential use of privatization agreements to establish individually designed consent decrees to allow enterprises some time to enter into compliance.

Mounting pressure from Western investors, and the increased attention to the issue from Western assistance organizations,<sup>210</sup> has prompted many of the countries in the region to develop laws and

208. Marlise Simons, *Pollution Blights Investment, Too, in East Europe*, N.Y. TIMES, May 13, 1992, at A1. Some of this concern is of course due to the large emphasis in the United States (and growing emphasis in Western Europe) on liability for on-site contamination under CERCLA, 42 U.S.C. § 9601-9675 (1988), and similar state superfund statutes.

209. Simons, *supra* note 208. It may be easy to overstate the importance of environmental liabilities in slowing foreign investment in Central Europe. Although environmental uncertainties are undoubtedly a factor in some investment decisions, they may by and large present a relatively small obstacle compared to other obstacles slowing investment in Eastern Europe. The lack of available credit, political and social uncertainties, economic chaos, and few guarantees of hard currency returns may all be far more important obstacles. See *id.* at A12; Michael R. Sesit, *Soviets, East Europeans Are Viewed As Unlikely to Cause a Credit Crunch*, WALL ST. J., Nov. 5, 1991, at C1, C12. See also *U.S. Officials Outline Pitfalls For Small Business in East Europe*, 1 Eastern Europe Rep. (BNA) 174 (Dec. 9, 1991) (noting the following obstacles to business investment: lack of commercial banks, inadequate commercial infrastructure, lack of financing, and the difficulty of establishing clear title to property). This lack of attention may also prove to have benefitted Western investors. For example, in the General Electric/Tungstam Electric joint venture signed last year in Hungary, the privatization entity signed a statement that all of the Tungstam facilities were in full environmental compliance. Having conducted its own audits of the Tungstam sites and finding non-compliance, General Electric is now trying to force the Hungarian privatization entity to pay all of the costs of bringing the facilities into environmental compliance.

210. There have been at least four conferences held in the region on issues concerning privatization and the environment, including: Conference on the Environment, Industry, and Guiding Principles for Investment Decisions in Central and Eastern Europe, sponsored by the EC and the Regional Environmental Center, in Budapest, Hungary (Nov. 20-22, 1991); "West Goes East" Conference, sponsored by Ecoglasnost and Friends of the Earth International, in Sofia, Bulgaria (Jan. 16-18, 1992); Conference on Industrial Reform and the Environment in Central and Eastern Europe, sponsored by the Aspen Institute Berlin, in Berlin, Germany (Jan. 26-28, 1992); International Conference on Privatization, Foreign Direct Investment and Environmental

policies address who will take responsibility for contaminated sites is, in part, a function of laws and policies.

Poland has been successful in this process. Although the process has not been adopted, the results of a program of privatization and environmental assessment of a subcontractor's environmental assessment of environmental issues.

In addition, the government has opened an information system for remediation of contaminated sites. One of the reasons for this is that it is not possible to prohibit by law the use of State budget.

It is not clear if the government has agreed to place a fund to be used for remediation. In these cases, the government has separately negotiated remediation prohibited by law. State budget.

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211. This requires a pre-privatization developing guidelines and Guiding Principles for Present and Guiding Principles for Hungary 1-2 (Nov. 1991).

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214. *Id.* In cases of prior contamination, the privatization agency, Treuhänder, has not privatized property in this position. *Cyrilus Go to Clean Up F*

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policies addressing environmental liability. At present, the question of who will take responsibility for the cleanup of contamination at privatized sites is, in most cases, addressed on an ad hoc basis. However, laws and policies for this process are slowly being developed.

Poland has arguably advanced the furthest in its privatization process. Although no law addressing environmental liability issues has been adopted, the State has begun to require environmental assessments of a property before it can be privatized.<sup>211</sup> Under this process, a subcontractor to the privatization ministry would conduct the environmental assessment and provide the assessment report to the privatization ministry and to potential investors.<sup>212</sup> The Ministry of Privatization accepts bids for the enterprise from investors and assesses all elements of the bids, including any proposals to address the environmental issues.<sup>213</sup>

In addition to requiring environmental audits, Poland has developed an informal policy for resolving the question of liability for the remediation of environmental contamination. Poland's general position is that it will not fully indemnify purchasers of State property for environmental liability.<sup>214</sup> Each agreement regarding liability must be separately negotiated. In addition, the Ministry of Privatization is prohibited by law from making unquantified future obligations to the State budget. Thus, all State assumptions of liability must be quantified at the time of privatization. In several cases, the Ministry has agreed to place a portion of the purchase price of the property into a fund to be used to remedy environmental contamination on the site. In these cases, the new property owner has agreed to clean up the contamination within a set time. Any money in the fund not expended on remediation by a certain date will revert to the State budget.<sup>215</sup>

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Liability in Central and Eastern Europe, sponsored by the Government of Poland in cooperation with EBRD, OECD, and the World Bank, in Warsaw, Poland (May 19-21, 1992).

211. This requirement is based on a broad interpretation of Poland's Privatization Law that requires a pre-privatization economic assessment of the enterprise. The environment ministry is developing guidelines for these site assessments. Ruth Greenspan Bell & Thomas A. Kolaja, Notes for Presentation on Privatization in Poland, Conference on the Environment, Industry, and Guiding Principles for Investment Decisions in Central and Eastern Europe, in Budapest, Hungary 1-2 (Nov. 20-22, 1991) (on file with *Michigan Journal of International Law*).

212. The investor can choose to conduct a more thorough environmental assessment of the property.

213. Bell & Kolaja, *supra* note 211, at 1-2.

214. *Id.* In contrast, Germany has taken the position that it will assume responsibility for prior contamination on former East German government properties. The state privatization agency, Treuhandanstalt, will pay for all but 10% of the environmental cleanup costs of each privatized property. It is unclear, however, whether the state has the funds to follow through on this position. Cynthia Pollack Shea, *One Year After Unification: Germany Still Has Long Way to Go to Clean Up Polluted Eastern Region*, Int'l Env't. Rep. (BNA) 555, 557 (Oct. 9, 1991).

215. See Ruth Greenspan Bell, "Industrial Privatization and the Environment in Poland,"



Although Poland's tentative approach is a creative first attempt to obtain funds for environmental remediation, it may result in allocating State funds to clean up environmental contamination without assessing the relative risks of that contamination. Ideally, the limited money available for environmental remediation should be spent according to the greatest risk to human health and the environment, rather than according to which properties are privatized.

Hungary's draft environmental law partially addresses this relative risk problem by creating a general State fund from privatization proceeds for the cleanup of environmental contamination. As in Poland, Hungary's draft first requires that an environmental audit be conducted of most properties undergoing privatization. Based on this audit, the environmental authority would impose an administrative remediation order on the property. This order would pass with the property to the private owner if the property is not remediated before privatization. Although most liability for environmental contamination would pass to the new property owner, the State would retain liability for any contamination not identified in the audit.

The draft law would require the State to place five percent of the purchase price (up to twenty-five percent for hazardous activities) in a general reserve fund to cover this residual liability. Unlike Poland's property-specific funds, this reserve fund could be used to offset any State environmental liability.<sup>216</sup> Although this general fund may be an improvement over the Polish system, it only partially solves the relative risk problem, as the new property owner must still clean up the contamination identified in the audit. Because this liability is likely to result in a reduction in the property's purchase price, a portion of the State's privatization revenue is still being "spent" on environmental remediation with little or no reference to relative public health risks.<sup>217</sup>

The region's first legal provision addressing environmental issues in the privatization process was passed in the CSFR in February

22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,092, 10,095 (1992); Bell & Kolaja, *supra* note 211, at 2-3. Simons, *supra* note 208, at A12.

216. See Hungarian Draft Environmental Protection Act, *supra* note 117, §§ 616-640. Sajó, *supra* note 195, at 9-11, 19-20. See also *supra* part II.C.2 (discussing Hungarian Draft Environmental Protection Act).

217. The Hungarian Draft Environmental Protection Act attempts to address this relative risk problem further by: (1) requiring audits early in the privatization process; (2) ensuring that the cleanup order against the property is assessed independent of the privatization process; (3) encouraging voluntary audits on non-qualifying properties; (4) providing some forms of enforcement amnesty for properties which comply voluntarily; and (5) requiring audits during State "transformation" of property (e.g., transferring property from one State entity to another), not just during privatization. See generally Sajó, *supra* note 195.

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1992.<sup>218</sup> Through an amendment to the Czech privatization act, all privatization projects presented after February 1992 must include an environmental assessment. This assessment must disclose violations of environmental laws and estimate the costs of compliance, reveal existing pollution fees, and specify any environmental damage caused by the company's past activity.<sup>219</sup> As in Poland and Hungary, the Czech environmental audit requirements should ensure that environmental issues are exposed during the privatization process. However, the CSFR has not yet developed a law or policy regarding how environmental liability issues will be addressed once the audit is completed.<sup>220</sup>

Although the new focus on environmental liability in the privatization process is a step in the right direction, the countries of Central and Eastern Europe should not get swept away by Western interest in environmental liability before making a careful assessment of their environmental priorities. Cleaning up past contamination is very important. However, if attention is not paid to ongoing pollution, such cleanup may only minimally improve the region's environment. Future compliance may be more important to the environment in Central and Eastern Europe than the cleanup of past pollution. Funds transferred to the State during the privatization process provide vital capital. To the greatest extent possible, the projects on which this money is spent should be dictated by environmental and public health risks, not by property boundaries.

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218. Act On Privatization, § 6(a), Czech National Council Act No. 92/1991 (as amended Feb. 1992) (unofficial translation of amendment on file with *Michigan Journal of International Law*).

219. *Id.* § 6(a)(1). Guidelines for conducting these assessments have recently been passed by the Ministries of Environmental and Privatization. Methodological Instruction for the Management of State Property and its Privatization of the Czech Republic and the Ministry of the Environment of the Czech Republic of May 18, 1992 for carrying out the Provision § 6a of the Law No. 92 of February 18, 1992, which Adjusts and Amends the Law No. 92/1991 sb. on Conditions of the Transfer of the State Property to Other Juristic Persons (translation on file with *Michigan Journal of International Law*).

220. See Jim Scherer, Privatization and Environmental Issues: Compliance with Environmental Laws and Cleanup of Past Contamination (Feb. 1992) (unpublished report on file with *Michigan Journal of International Law*). The CSFR's General Environmental Law only sheds limited light on the question of liability for past environmental contamination. The only provision relevant to liability requires anyone who discovers a danger of damage to the environment to avert such danger or to mitigate its consequences. CSFR General Environmental Protection Law, *supra* note 70, art 19. This arguably requires current owners to avert any hazards on their property, without any clear avenue for compensation. The Slovak Republic's draft waste management regulation does require all property owners to notify the Commission of any past waste disposal site on their property within six months after the regulations come into effect. The regulation anticipates penalties for not providing this information, but it does not explain how the information will be used. The regulation does not establish whether the old waste site must be cleaned up, or who will be financially responsible for the cleanup.

### C. Setting Appropriate Environmental Standards

The struggle between economic recovery and environmental protection as reflected in the above discussion of environmental liabilities is mirrored in the development of environmental standards. Every country in the region aspires to membership in the European Community (EC). As a result, the countries favor establishing environmental standards which are consistent with existing and anticipated EC standards. This raises a separate concern, however, of how to balance twentieth century standards<sup>221</sup> with nineteenth century economies. Most of the countries in the region have relied for the past twenty years on ambient standards for environmental pollution. These standards often did not relate to actual environmental conditions, and were by nature not self-implementing.<sup>222</sup> Recognizing the difficulty of relying solely on ambient standards, many of the countries in the region have passed interim legislation providing for the establishment of emission-based standards.<sup>223</sup>

There is general consensus, however, that it is not possible for industries in the region to meet most EC environmental standards in the near future. In many countries, there is a debate as to whether to adopt strict new emission standards with realistic phase-in periods, or weaker transitional standards, which could be revised when the economy has recovered. Proponents of the phase-in method argue that by setting the optimally desired goals now, factories will be able to incorporate long-range plans for achieving those goals into their budget and technical upgrade plans. Opponents argue that unrealistic standards, even with realistic phase-in schedules, will discourage factories from even trying to comply.

This debate has been felt most strongly in the CSFR, where new standards have recently been established. The new Czech Air Pollution Act, adopted in September 1991, established a phase-in period of five years for the new air pollution standards at existing sources.<sup>224</sup> This phase-in schedule was extensively criticized as unrealistically

221. Whether EC standards are, in fact, deserving of this title is a subject for another article.

222. Ambient standards are nearly impossible to achieve without establishing emission standards as well. In addition, the preferred method of compliance with ambient standards in Central and Eastern Europe was simply dilution of the pollutant until the ambient standard was met. Interview with Andrzej Rudlicki, *supra* note 33.

223. For example, the CSFR passed legislation effective January 1, 1992 that eliminated all special exceptions to the 1974 water law and authorized the development of discharge standards for water. Interview with L'ubomíra Zimanová, *supra* note 100. Poland passed a similar amendment to its water law in late 1991. Interview with Janusz Kindler, *supra* note 43.

224. Act on the State Administration of Air Protection and Charges for Air Pollution, § 7(3), Sept. 10, 1991, Czech National Council Act No. 389/1991.

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short. By April 1992, the Parliament had already been forced to extend the deadline to seven years.<sup>225</sup>

The focus on environmental liability in the privatization process has unfortunately overshadowed the opportunity offered by privatization to ensure future environmental compliance. Through the privatization process, the government is giving up control of much of its property. The privatization agreement is the last time the government can impose non-regulatory conditions on the property.<sup>226</sup> This provides the government with an opportunity to conduct site-specific negotiations regarding the enterprise's ability to comply with environmental regulations. In privatization agreements, the government could include compliance schedules for the privatized enterprises outlining specific deadlines for environmental compliance. The site-specific nature of this schedule will make it more likely that the compliance schedule is a realistic assessment of the factory's ability to comply, and will make the compliance schedule easier to enforce against the factory.

Romania currently appears to have the strongest legal framework for requiring such compliance schedules. Romania's New Foreign Investment Law allows for foreign investment in all sectors of the economy, including the production of natural resources, "provided that they shall not: (a) infringe the regulations in force meant to protect the environment . . . or (c) harm the public order, health and good morals."<sup>227</sup> Romanian officials may be able to use this law as leverage to require foreign corporations investing in Romanian enterprises to negotiate a schedule for bringing the enterprise into compliance.<sup>228</sup> Of course, such a compliance schedule may only postpone difficult questions of enforcement and available remedies. There is no guidance yet on whether remedies for violating the compliance schedule will be limited to fines or will include closing or confiscating the factory.

225. Interview with Pamela Tillinghast, *supra* note 96.

226. For example, the government could retain certain public trust rights even after transferring the property to private hands. These public trust rights could act much like conservation easements do in this country, restricting certain development activity. *See also* Alaskan Native Claims Settlement Act, 43 U.S.C. § 1621(k)(2) (1988) (requiring land patents to contain conditions assuring that former public lands "are managed under the principle of sustained yield and under management practices for [the] protection and enhancement of environmental quality. . . for a period of twelve years.").

227. Law Concerning the Status of Foreign Investments, arts. 4(a), (c), Mar. 29, 1991, COLECTIA DE LEGI SI DECRETE Law No. 35/1991 (Rom.) *translated in* 3 CENTRAL EUROPEAN LEGAL MATERIALS (Vratislav Pichota ed., July 1991).

228. Because of the continued communist presence in the Romanian government, privatization and foreign investment in Romania has been very limited. Therefore, the importance of these provisions has not yet been tested.

#### D. Enforcement of Environmental Laws

Central and Eastern Europe has had strong environmental laws for years, but there has been virtually no enforcement. In the past, environmental regulations were typically enforced, if at all, through a system of fines. The pollution limits for each factory were set by local authorities. For particularly bad violations, or for chronic violators, progressive multipliers were used when assessing the fine.<sup>229</sup> Although in theory these fines might encourage environmental compliance, in practice they merely represented a license to pollute. The fines were set so low they had no economic effect on industry. More fundamentally, industry under the communist system was not responsive to financial incentives, but rather to production quotas. Their success was judged not by their profit margin, but by their level of output. In many instances, the fines for violating the pollution limits were simply included as line items on the factory's annual budget.

The current focus on developing new environmental laws and regulations may divert attention away from enforcement. Changing enforcement practices is even more difficult than developing new laws, as it requires changing the habits and attitudes of both industry and government. With the "fresh start" of the new government systems in the region, however, there is an opportunity to reverse the traditional ineffectiveness of environmental laws resulting from insufficient enforcement and to create enforcement systems that are respected. By postponing strong environmental enforcement, the region will reinforce the traditional habit of ignoring environmental regulations. Reversing these habits will only get more difficult with time.

In part, the enforcement problem stems from overlapping and uncertain authorities between ministries. For example, in the CSFR the ministries of environment, water management and forestry, health, privatization, interior, transport, and agriculture all have some authority over environmental issues, as well as the Atomic Energy Commission, the Mining Office, and others.<sup>230</sup> The relative authority of these ministries is far from established. Each ministry, vying to establish its "turf" in the environmental arena, makes decisions that often have more to do with maintaining or expanding a ministry's authority than with rational environmental protection. The competition for authority between the federal ministries, and between the republic and

229. Kilényi, *supra* note 113, at 37.

230. The number of ministries responsible for environmental issues is also multiplied by some Central European federalist systems. For example, in the CSFR, there are three "ministries of the environment" — the Federal Committee for the Environment, the Czech Ministry of the Environment, and the Slovak Commission for the Environment.

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local level authorities, has also delayed environmental decision making.<sup>231</sup>

Perhaps the largest obstacle to the effective enforcement of the new environmental laws and policies is the reluctance and skepticism of local officials and industry. The revolutions in Central and Eastern Europe did not replace all vestiges of the communist bureaucracy with a new democratic and effective government. It was practically and economically impossible to "clean house" during the transitions in the region. As a result, many of the old bureaucratic structures remain, especially at the local and regional levels. These old structures pose substantial challenges to environmental protection reforms in the region.

Four decades under the highly centralized communist structure also left a distrust of centralized decision making. The resulting move toward decentralization has affected the governments' environmental administration, as well as the other governmental institutions.<sup>232</sup> Many of the new environmental laws being developed in the region delegate much of the administration and enforcement of the laws to regional environmental authorities.

Decentralization does create some opportunity for improved environmental decisions. Regional offices should have better knowledge of the environmental concerns in the area. If administration is based on ecological boundaries such as water or air sheds, implementation may also better reflect ecological differences in regions. Unfortunately, local authorities are also more susceptible to strong local pressures because enforcement may result in local unemployment and economic hardship.<sup>233</sup> The regional environmental agencies are also often understaffed, underfunded, and underequipped. Moreover, even an efficient decentralized environmental administration can create

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231. For example, when the CSFR Parliament adopted the new federal air law, the Slovak Commission for the Environment refused to endorse the law despite their close involvement in its development, as they believed it should have been adopted at the state level. This issue was debated repeatedly in the Slovak Parliament, as well as in the federal system, and resulted in significant delay in the implementation of the law. See *Clean Air Legislation in Prague Threatened by Slovak Nationalism*, 14 Int'l Env't. Rep. (BNA), at 361 (July 3, 1991).

232. The World Bank and the U.S. government have also promoted decentralization. In its Report to Congress Regarding the Support for East European Democracy (SEED) Act of 1989, the U.S. Environmental Protection Agency listed the development of decentralized integrated environmental management systems as the second underlying principle of U.S. policy in assisting environmental protection efforts in Eastern Europe. EPA REPORT TO CONGRESS, *supra* note 3, at 135. In the World Bank's draft report on the environmental system in the CSFR, it listed the development of decentralized integrated management systems as one of the fundamental building blocks for an environmental policy and management system. WORLD BANK, JOINT ENVIRONMENTAL STUDY FOR CZECHOSLOVAKIA at 3 (Draft, Mar. 1991).

233. See Federal Committee of the Environment, *supra* note 200, at 33 ("Decentralized units should be large enough to prevent polluting units from influencing overall policy choices.").

inconsistent standard setting and enforcement, resulting in pollution havens or a destructive competition to attract polluting businesses.<sup>234</sup>

As the transitional period in Central and Eastern Europe draws to a close, the true test of the success of the environmental movement will be whether the new environmental laws result in fundamental changes in the way the region's industry does business, or whether, like the region's old environmental laws, the new laws remain simply impressive edicts on paper. The fate of these new laws remains not with the new leaders in Budapest, Prague, Warsaw, Sofia, and Bucharest, but rather with bureaucrats in the regional environmental agencies. As stated by one of the region's environmental lawyers:

Although the official appraisal of measures taken to control the environmental questions ranges between optimism and euphoria, the effect of the enforcement of legal regulations on the state of the environment can be varied. Legal norms can have proclamative character without substantial impact on the environment balancing on the brink of ecological catastrophe, but they can also stimulate a change toward improvement. The future only can show which of these alternatives will become a reality.<sup>235</sup>

#### IV. THE ROLE OF THE WEST

Clearly, the West is a critical player in the economic and environmental reforms of Central and Eastern Europe. The combination of money and experience has made the West extremely influential in the region's reforms. Western capital, both in assistance and investment, is vital to the region's recovery.<sup>236</sup> In addition, the region is looking to the West's economic and environmental systems as models for its own restructuring.

With this influence, however, comes a certain amount of responsibility — responsibility to act honestly and openly, and at times to forego self-interest for the best interest of the region. To help Central Europe strive towards the goal of achieving sustainable development, Western investment and capital must also be oriented towards this goal. Unfortunately, Western institutions have not lived up to this admittedly high standard, and they have not done so for two basic reasons. First, Western institutions have no clear idea of how to lead

234. Cf. William L. Cary, *Federalism and Corporate Law: Reflection on Delaware*, 83 YALE L.J. 663 (1974) (discussing the "race to the bottom" theory in the context of state corporate law).

235. Drgonec, *supra* note 112, at 2-3.

236. Estimates for environmental cleanup in Poland alone range from \$100 to \$300 billion. Marshall, *supra* note 4, at 851; Hagerty, *supra* note 206, at 9 (Poland would need to invest \$260 billion in a long-term effort to transform the economy to one with an environmentally sound basis).

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Central Europe towards a sustainable future, even if they wanted to. Second, they simply don't want to.

A. *Do As I Say — Not as I Do?*

If we select as the goal of the environmental reforms of Central Europe to set in place a legal and regulatory system that can lead the region to a sustainable future, then we must wonder which Western institution with significant financial resources can be that helpful.

Major financial assistance to Central and Eastern Europe can primarily be divided into two categories: bilateral assistance from Western governments; and multilateral assistance from international organizations like the World Bank, the European Bank for Reconstruction and Development, and the International Monetary Fund.<sup>237</sup> In addition to this public sector financial assistance, there is increasing private investment in the region. Unfortunately, neither the public nor the private sector knows how to achieve sustainable development.

Certainly no government in the West can yet claim its economy is approaching sustainability. Most have not even officially accepted it as a national priority. As Dr. Karolyi Kiss, a leading economist at the Institute for World Economics in Budapest, Hungary, recently stated in response to endless statements about Western assistance: "What we would really like is for just one Western country to step forward as a patron saint of sustainable development."<sup>238</sup>

Western governments are not the only institutions unable to provide a model for sustainable development; the private sector and international development agencies are equally unprepared to provide this assistance. Except where a particular technology has been developed that moves closer to sustainability, the private sector is wholly unprepared to assist governments in implementing sustainable development policies.

Although in theory international development agencies hold somewhat more promise, in practice they fall far short. The European Bank for Reconstruction and Development (EBRD), created in 1989, provides perhaps the best example.<sup>239</sup> Created in direct response to

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237. There are also several philanthropic organizations giving financial support to the region, particularly the Soros Foundation, the Rockefeller Brothers Fund, the Charles Stewart Mott Foundation, the German Marshall Fund for the United States, and the Ford Foundation.

238. Dr. Karolyi Kiss, Senior Research Fellow, Institute for World Economics of the Hungarian Academy of Sciences, Budapest, Hungary, remarks at the Conference on Industrial Reform and the Environment in Central and Eastern Europe, sponsored by the Aspen Institute Berlin, in Berlin, Germany (Jan. 26-28, 1992).

239. See generally Chris Wold & Durwood Zaelke, *Promoting Sustainable Democracy in Central and Eastern Europe: The Role of the European Bank for Reconstruction and Develop-*



the social and political reforms of Central Europe, the EBRD was spawned in the time of high hopes and aspirations for the region. Even the EBRD seemed to be caught in the euphoria. The excitement of the moment, coupled with pressure from environmental organizations, led the EBRD to be the first multilateral development bank to adopt as a primary goal in its charter to promote sustainable development.<sup>240</sup> However, the EBRD has also fallen from high hopes to hard realities. The Bank's subsequent environmental policies and procedures go no further than the heavily criticized World Bank practices. When it came down to putting sustainable development into practice, the Bank was either unwilling or unable to be innovative with respect to the environment.<sup>241</sup>

The countries of Central and Eastern Europe look to the West not only as an informal model for environmentally sound policies and practices, but in the case of the EC, as a specific goal. Every country in the region has expressed an interest in joining the EC, and they are all guiding their legislative reforms toward that end. Such a goal, however, does not necessarily ensure strong environmental standards. EC directives and standards for the most part represent the lowest common denominator of the Western standards. In the words of one Hungarian, "We do not want to adopt EC standards, because then we would be following Portugal."<sup>242</sup>

#### B. Sustainable Development — A Failure of Leadership

Perhaps more disturbing than the West's inability to provide a formula for achieving sustainable development is its apparent lack of commitment to doing so. Much Western assistance is motivated more by building Western markets than by supporting the development (economic or otherwise) of Central and Eastern Europe. Much of the U.S. government assistance, for example, is explicitly designed to in-

ment, 17 AM. U. J. INT'L L. & POL'Y (forthcoming Summer 1992) (draft on file with *Michigan Journal of International Law*).

240. EBRD Agreement, *supra* note 5, art. 2(1)(vii).

241. See Wold & Zaelke, *supra* note 239 (discussing sustainable development and the EBRD); Center for International Environmental Law - U.S., Working Statement from the Workshop on Environmental Protection and Citizen Participation in the Lending Practices of the European Bank for Reconstruction and Development, Budapest, Hungary (Mar. 26-27, 1991) (recommending specific measures the EBRD should take to achieve sustainable development) (on file with *Michigan Journal of International Law*); Chris Wold & Durwood Zaelke, *Independent Administrative Review and the European Bank for Reconstruction and Development*, 2 DUKE ENVTL. L. & POL'Y F. 59 (1992) (proposing an independent administrative panel to review environmental effects of EBRD lending activities).

242. Interview with Endre Kovács, Hungarian Institute for Environmental Protection, in Washington D.C. (May 1, 1992).

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crease U.S. business opportunities in the region.<sup>243</sup> In addition to providing markets for their domestic business, assistance from Western Europe has also been motivated by the desire to eliminate trans-boundary pollution migrating into Western Europe.<sup>244</sup> Further, Western assistance can also be criticized as providing unnecessary subsidies for Western technologies. These subsidies are likely to result in a permanent debtor cycle in Central Europe, which may, in turn, ensure the permanent noncompetitiveness of Central European industries, and result in continued reliance on the West.<sup>245</sup>

Perhaps more forgivable, but just as damaging, is the behavior of some (certainly not all) private companies investing in the region. There have been several well-publicized examples of overreaching where Western companies have taken advantage of the region's desperate need for foreign capital and their general inexperience with free-market business negotiations. Examples of this include a nearly successful joint venture that would have given exclusive development rights to Slovakia's entire Tatras National Park to a single New Hampshire company; and an effort by Norsk Hydro, a Norwegian company, to benefit from environmentally damaging subsidies while investing in the Ziar nad Hronom aluminum plant, also in Slovakia.<sup>246</sup>

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243. See, e.g., Sheila Kaplan, *The Superlawyers Roll East*, WASH. POST, July 21, 1991, at C1. See also, U.S. DEPARTMENT OF STATE, BUREAU OF PUBLIC AFFAIRS, OFFICE OF PUBLIC COMMUNICATION, FACT SHEET, FREEDOM SUPPORT ACT OF 1992, May 5, 1992 (describing the Bush Administration's proposed Freedom Support Act primarily as a means for promoting American business and investment opportunities in the former Soviet Union).

244. The result of this motivation is that many international projects are focused on the areas, such as the Baltic Sea and the "triangle of death" in northwestern CSFR and southwestern Poland, that border on Western Europe. Although these areas are substantially polluted, the prioritization of these areas for cleanup is not based on a concern for the health and welfare of the CSFR and Poland, but rather is based on the fact that pollution from this area migrates to Western Europe.

245. See *Environment for Europe*, *supra* note 3, at 8 ("It now appears that CEE countries are being pressured to use scarce financial resources (and in some cases, loans) to pay for Western firms to clean up pollution sources which affect Western Countries."); James Sheehan, *The Greening of Eastern Europe*, 7 GLOBAL AFF. 153. Sheehan's argument that U.S. foreign assistance may lead to dependency and non-competitiveness within Central and Eastern Europe is interesting. Unfortunately, the rest of this article's arguments reveal a basic lack of understanding of the causes of environmental damage both on a global scale and in Central Europe. Sheehan's blind and dogmatic worship of private property as a solution to environmental problems ignores fundamental lessons we have learned about the environment in the past twenty years: e.g., that environmental damage results in many cases from a failure in the free market, that some government intervention is thus necessary in some cases, and that public participation and information is both a basic human right and an effective tool for environmental protection.

246. The Tatra episode became known as "Tatragate," and was one of the early post-revolution examples of environmental organizations successfully stopping particular Western investment. See *Privatizing a Park: A Scandal in Slovakia*, FRIENDS OF THE EARTH MAGAZINE, Aug. 1991, at 8. The Ziar agreement also received substantial attention by environmentalists and may have been reversed. See Open letter from Juraj Mesik, Vice President, Slovak Union of Nature and Landscape Protectors, to Gro Harlem Brundtland, Prime Minister of Norway (June 7, 1991) (on file with *Michigan Journal of International Law*).

Regardless of the virtue of specific projects, Western companies have entered Central Europe almost smug in their belief that whatever the West has to sell is good for the region. As a result, we have proven much better at promoting cigarettes than democracy in the region.<sup>247</sup>

The West is also not setting the best of examples with respect to conflict of interest issues. Central Europe is still trying to learn what is and is not acceptable behavior within a capitalist system. It simply does not help their development toward an open and democratic free market system when, for example, law firms from the United States offer to assist the region's ministries in developing regulations, while at the same time representing clients with a vested business interest in the area.<sup>248</sup> The U.S. Agency for International Development, which is supporting some of this activity, apparently does not see a conflict of interest, primarily because they take a narrow view of the purpose of Western assistance: "The ultimate aim is to get these companies privatized. . . . If American investors can benefit from that by having access to that information, it's quite all right."<sup>249</sup>

Further, much Western assistance comes under the guise of promoting free market capitalism. This promotion is devoid of any caution that a free-market economy not only does not exist anywhere in the West, but that a free-market unhindered by certain social safety nets has been proven to be an undesirable goal. In the words of John Kenneth Galbraith:

In my view, some, and perhaps much, of the advice now being offered the Central and Eastern European states proceeds from a view of the so-called capitalist or free-enterprise economies that bears no relation to their reality. Nor would these economies have survived if it had. What is offered is an ideological construct that exists all but entirely in the minds and notably in the hopes of the donor. It bears no relation to reality; it is what I have elsewhere called the primitive ideology. . . . The economic system which Central and Eastern European countries see in the West and in Japan is not capitalism in its pristine and primitive form. It is a system deeply modified by ameliorating social services, by supported incomes, and by public controls. It is by these that the system has survived.<sup>250</sup>

247. For a discussion of Western tobacco companies' marketing efforts in Central Europe, see Robert Weissman, *The Marlboro Man Goes East*, MULTINATIONAL MONITOR, Jan.-Feb. 1992, at 31.

248. See Kaplan, *supra* note 243, at C1, C4 (quoting Squire, Sanders, & Dempsey's managing partner, who, in referring to the firm's work with government ministries, said "I think it puts us in a better position to serve our Western clients."). See also Linda Himmelstein, *Big Oil Plays a Big Role Shaping Russia's Energy Laws*, LEGAL TIMES, Jan. 13, 1992, at 1 (recounting how U.S. oil companies are funding and participating in the drafting of Russian oil laws).

249. Kaplan, *supra* note 243, at C4.

250. Galbraith, *supra* note 20, at 51.

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This deep-seated faith in the free-market is perhaps the most damaging aspect of international assistance, at least with respect to environmental protection. The International Monetary Fund provides Central Europe with a specific prescription for its transition to a free-market economy. Among other things, this requires restricting the money supply even as prices are allowed to adjust to the market. The resulting pinch leaves virtually nothing for social programs, including environmental programs.<sup>251</sup> Not only does this policy, indeed all of these Western practices, not promote sustainable development; taken together they have made finding a third way — a “greener” way — impossible.

#### CONCLUSION

Despite all the difficulties facing the governments of Central and Eastern Europe, they have made some environmental progress. The region's environmental emissions have actually decreased since the revolutions of 1989, albeit often due to the closing of inefficient factories. Not surprisingly, these factories were also among the worst polluters. In addition, the economic chaos resulting from the collapse of the COMECON trading system has also reduced production and decreased pollution.

True, pollution levels have fallen recently in Central and Eastern Europe, but short-term declines, especially those resulting from economic hardships, should not be the yardstick for measuring the success of environmental changes in the region. We must look at environmental protection in Central and Eastern Europe with long-term goals. In order to obtain permanent improvements in the environmental conditions in the region, the countries in Central and Eastern Europe must build the underlying institutional structures necessary for an effective environmental protection regime.

As the environmental law reforms outlined in this article suggest, Central and Eastern Europe has clearly started to restructure its environmental protection regimes. New ministries of environment have emerged and new environmental laws have been adopted. The region is also slowly developing the legal procedures necessary for a transparent and democratic environmental protection system. There is even reason to believe that privatization and environmental protection may eventually be integrated.

In short, there is renewed hope that in the long run, law and public

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251. See Paul Hockenos, *Capital Goes East: The Role of the IMF in Eastern Europe*, *MULTINATIONAL MONITOR*, June 1991, at 14, 17.

interest — not politics — might once again control environmental decision making in Central Europe. Nevertheless, the high hopes for the environment that surrounded the region's revolutions were that the new governments could learn from forty years of mistakes (in both the East and the West) regarding environmental protection, and could leapfrog over the years of struggle that have taken the West from the uncontrolled industrial destruction of the 1940s and 1950s to where we are today (wherever that may be). The hard reality of today's Central Europe is that the emerging democracies in the region have taken a place in line behind all the other industrialized nations in what is at best a slow trudge toward sustainable development.

