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Environmental Liability in a European Perspective

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and
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Environmental Liability in a European Perspective

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Foreword

The idea to write a paper on environmental liability in Europe first came up when a group of representatives of the Institute of Environmental Damages of the Erasmus University in Rotterdam visited the European University Institute (EUI), in September 1990. On this occasion, the European Policy Unit of the EUI organized a seminar where researchers of both Institutes introduced the subject-matter and discussion papers were exchanged. The three chapters contained in this Working Paper are a re-written version of the papers that were presented by the EUI participants at the seminar. For further information on the research done at the Institute of Environmental Damages, the reader is referred to the Journal published by the Institute, the *Environmental Liability Law Review*.

In this paper we do not present a comprehensive overview of environmental liability in Europe. Such an overview would have to cover the legal doctrine and the case-law of all the individual countries as well as look at the international legal regime. We were not in a position to adequately address such a vast subject, although we believe that a detailed and in-depth analysis of all aspects of environmental liability in Europe is highly desirable both for the development of comparative legal doctrine and as a basis for improving international environmental policy. The recent proposal of the Council of Europe to set up a Standing Committee to ensure the uniform implementation of the Draft Convention on Damage Resulting from Activities Dangerous to the Environment points in the same direction.

What we have tried to do here is nothing more than a first step. The papers were originally written as discussion papers and should still be regarded as such. We hope that the variety of aspects presented - ranging from public international to private national law - does indeed contribute to the ongoing debate in Europe about the difficult and complex problem of environmental liability. A discussion of international aspects of liability must take into account the national legal traditions

that are so often conceptually inaccessible for lawyers, let alone policy-makers, trained in other traditions. That is the reason why we have included a detailed discussion of environmental liability in one European country, namely Italy.

At the same time, a discussion of the efforts now undertaken at the EC level, to harmonize environmental liability in Europe, must be seen in the context of the international law that binds the Community or one of its Member States. Hence a description of the state of the art of international law precedes the part on EC measures in this field.

It is our hope that this first step will lead to further study. Not just for academic purposes, although the papers radically demonstrate scope for such further study. But a Europe-wide comparative research of national liability rules is especially needed for purposes of European policy making. A consistent European liability scheme for environmental damages will have to be founded on solid knowledge of national legal traditions and in-depth analysis of international law. This argument is even more pressing now that Europe's borders are extending towards the East. But it is equally relevant in view of Europe's general international responsibility especially vis-a-vis developing countries that are often the recipients of risk-bearing materials and technologies.

This paper is the indirect result of the first contacts between the EUI and the Institute of Environmental Damages. We hope that this collaboration will continue, and will lead to further contributions to Europe's evolving policy concerning international environmental liability.

The finalisation of the paper benefitted greatly from the support of our colleagues at the European Policy Unit. We wish to thank Michelle Everson for her advice on the editing of the text and Fabiola De Pin for her help with the production.

Ida J. Koppen
Executive Coordinator, European Policy Unit.
Florence, October 1991

Introduction

Ida J. Koppen

The doctrine of liability for damages has always been a main part of civil law studies. When liability for environmental damage was first studied as a separate topic it was just a small section of this general field. By now, however, environmental liability has become a major subject in itself, still embedded in the civil law doctrine, but studied from different angles and with connections to other areas like insurance law and public law.

In this paper we have made no effort to cover the topic exhaustively. On the contrary, the paper merely covers *some aspects* of environmental liability in Europe, put together in a way that we hope will stimulate discussion. Different topics are dealt with that are not usually presented in one paper. Civil liability and state responsibility are discussed as well as national and international legal measures. On the one hand this broad orientation carries the risk of a superficial analysis, on the other hand we feel that the combination of elements might prevent the fragmentation that is so typical of legal studies and might indeed provide new insights.

The contribution of Francesca Pestellini in Part I deals with environmental liability in existing international law. It is divided into two sections. In the first section, Pestellini discusses the international legal doctrine regarding environmental liability. She analyzes the two main liability regimes, strict liability and liability based on fault, and then moves on to a general discussion of state responsibility for an internationally wrongful act. The first section is concluded with a description of the recent initiatives of the International Law Commission, proposing an international liability regime for 'lawful acts', the so-called 'responsibility for risk.'

The second section of Part I gives an overview of the existing Treaties and international conventions on environmental liability. A distinction is made between Treaties that deal with state liability and Treaties that deal with civil liability.

Special attention is given to the participation of European countries in the different Treaties.

In Part II, Ida Koppen describes recent initiatives of the European Community in the field of environmental liability. Community action in this area is justified by the fact that different national liability schemes would interfer with the functioning of the internal market since they create unequal conditions of competition. In 1989, the Commission presented the Proposal for a Council Directive on civil liability for damage caused by waste. The second, amended version of the Proposal was sent to Parliament in July of this year, but it is still not clear if adoption may be expected shortly. An internal discussion document was circulated about a general Directive on environmental liability. No official documents, however, have sofar been published. In the frame of drafting the fifth Environmental Action Programme, an *integrated Community approach to environmental liability* is proposed, which would combine civil liability with joint responsibility systems. Part II finally looks at the the Draft Convention on Damage Resulting from Activities Dangerous to the Environment which was recently issued by the Council of Europe. The Convention has some important overlaps with the EC initiatives. The EC, moreover, is a potential signatory of the Convention.

In Part III Maria Rosaria Maugeri gives a detailed account of liability for environmental damage in Italy. She first discusses the situation prior to the adoption of the Act on the Establishment of the Ministry of the Environment and Provisions on Environmental Damage of 1986, N.349. Art.18 of the Act introduces a new system of liability for damages. Public authorities are given the right to claim reparation for environmental damage. This action runs parallel to the rights of individuals and organizations under civil law to sue for damages that have been inflicted upon them. This dual system can lead to unforeseen difficulties if both the public authorities and a civil party sue for the same damage. Maugeri shows that only part of this conflict has been resolved by the so-called *simultaneous processus*. In her contribution, she also discusses the different legal fora in Italy involved in environmental liability cases. She explains the difference between the Court of Accounts, responsible for all financial matters, and the regular civil judge. Finally,

Maugeri presents an overview of recent case-law of the different fora pertaining to environmental liability.

To conclude the Introduction, one comment must be added about the evolving dual legal character of environmental liability. While still embedded in civil law doctrine, environmental liability has acquired a strong public policy component. The origins of the doctrine of liability for environmental damages lie, as mentioned above, in the general theory of torts and liability for damages. The limits of acceptability of social behaviour affecting the environment were thus defined by civil law, and environmental interests were fit into the legal structures of property rights and neighbour-law. This is no longer the case. Environmental issues have gained political importance, an aura of emergence we might say, and the occasional legal interpretation of civil law statutes has been complemented by the adoption of specific rules concerning environmental liability. Most European countries are incorporating environmental liability clauses in their Civil Codes. At the same time environmental statutes, typically public law instruments, now often contain references to liability. This 'blurring of private and public law' supports the proposition that environmental liability is an instrument of both civil and public law, an instrument, moreover, that must be interpreted and understood in the context of political decisions about the distribution of the costs and benefits of pollution, both nationally and internationally.

Part I - Substantive Principles of Environmental Liability in International Law

Francesca Pestellini

1. Introduction

In the last twenty years increasing concern for ecological damage has resulted in a greater effort on the part of the international community to develop a new system of environmental protection law and to establish uniform compensatory regimes for the harmful consequences of transfrontier pollution. International and regional organisations have contributed to the adoption of multilateral treaties on environmental protection and liability. We could hardly affirm, however, that international concern for environmental deterioration was the primary cause underlying the adoption of international standards. In fact transboundary environmental damage has proved to have a strong impact on the long-term economy of the states concerned, prompting both preventive action and remedies. Unilateral regulatory actions are likely to alter competition in the marketing of goods and services in that the costs of regulation may be transferred to the price of such goods and services. This was in essence the reason why the European Community (EC) decided take competence for the matter. The EC has become party to the main international conventions concerning environmental protection and liability.

This section aims to give a general presentation of the topic of environmental responsibility and liability in international law, and to analyse a number of connected questions. The first part deals with the general principles of responsibility for environmental harm according to international doctrine. After a discussion of the two main forms of responsibility, strict liability and fault-based liability, I describe responsibility with and without an internationally wrongful act. The second

part gives an overview of multilateral treaties to which the European Community or the Member States are parties. We will find that the most stringent treaty obligations on the reparation for environmental damage primarily rest on private actors and entities, while state liability has often a residual or a subsidiary role.

2. General Principles of International Responsibility and Liability for Environmental Damage

2.1 The Main Forms of Responsibility for Environmental Harm in International Law

In international law on the protection of the environment we find rules concerning state and civil responsibility which establish the regime of liability to be applied in cases involving a breach of an international obligation or in case of damage. Two main liability regimes may be distinguished in international treaty law: they are the strict liability regime and the fault-based liability regime respectively.

Strict Liability

The scope of strict liability is one of the most controversial subjects of international negotiations on transnational environmental liability. Under a strict liability regime the actor is held liable for damage even if the harm was not a result of intentional or negligent conduct on his part. The obligation of an actor to pay for damage regardless of any lack of care is sometimes referred to as 'absolute liability', but this expression overstates the varying degrees of stringency that strict liability can involve.

Some scholars use the expression 'objective responsibility' to indicate the legal consequence of a wrongful act where the conduct of the accountable actor is faultless. The use of two different terms in English - responsibility and liability - gives rise to confusion when these concepts are translated into other languages. In

Italian and French just one word is used - *responsabilità*; *responsabilité* - to express the two concepts of responsibility and liability.[1]

According to Italian doctrine two different forms of responsibility can be distinguished within the category of so-called 'objective responsibility': strict responsibility, if the accountable State can invoke a number of circumstances precluding wrongfulness - namely act of God, distress, force majeure, unforeseeable event, state of necessity, and where expressly provided for by a treaty, intentional or negligent conduct on the part of the victim - and absolute liability, where no defence is allowed.[2] An example of absolute liability can be found in the 1972 Convention on International Liability for Damage Caused by Space Objects, which provides for liability for damage caused on the surface of the earth or to aircraft in flight.[3]

Strict liability is generally adopted in cases involving activities likely to have harmful consequences even if conducted with care. The most important merit of this regime is that it relieves the victim of the burden of proof. The underlying assumption is that the actor benefits from the activity pursued and therefore should bear the costs of any unavoidable injury. Moreover, the actor should be aware of any connected risks as well as of the means by which they may be reduced.

In general, strict liability regimes provide victims with adequate compensation for environmental harm both in case of activities which present a high risk of danger,

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[1] The well established distinction between responsibility and liability in international law can be traced back to the distinction between primary and secondary rules. In the work of the International Law Commission, secondary rules, or rules on State responsibility, determine the legal consequences of the breach of a primary rule, e.g. a rule which imposes specific obligations on States, whilst liability, especially where directly imposed by a primary rule, only implies the duty to repair harm, which is not contingent upon the breach of an international obligation. See the discussion in the next paragraph; also G. Handl, "Liability as an obligation established by a primary rule of international law", in *NYIL*, 1985, vol. XVI, p. 50.

[2] See R. Pisillo Mazzeschi, *"Due-diligence" e responsabilità internazionale degli Stati*, Milano, 1989.

[3] See Art. II UN Convention on International Liability for Damage Caused by Space Objects, signed in London on March 29, 1972, in force since September 1, 1972. This Convention supplements the 1967 Outer Space Convention. Under the 1972 Convention claims can be heard by a mixed claims commission. The European Space Agency has also accepted the rights and the obligations under the Convention. For a distinction between absolute and strict liability as used in international treaty law, see F. Goldie, "Liability for Damage and the Progressive Development of International Law", *International Comparative Law Quarterly*, 14, 1965, p. 1203 ff.

and in the case of activities which, although involving a low probability of damage, are nevertheless defined by the literature as "hazardous" with respect to the magnitude and gravity of harm, should it materialize - so called "ultra-hazardous-low probability activities".[4]

Liability Based on Fault

Under the fault-based liability standard the defendant is liable only for damage caused by intentional or negligent conduct, where negligence is defined by reference to a general standard of care - namely the due-diligence standard -, as a behavioural rule.[5] However, the border between the definition of a strict liability and a fault-based liability system is not very clear, particularly in the event that the *res ipsa loquitur* principle is assumed.[6]

Generally speaking, under a fault-based liability regime compensation for environmental damage may be obtained if the victim proves that the defendant failed to comply with a legal and established standard of care. But in practice, the standard of behaviour in international environmental law is not well defined and may vary according to the circumstances and to the nature of the polluting activity. The main goal of fault-based liability is *deterrence* - and thus prevention of environmental damage - while strict liability emphasizes *compensation*. Therefore, where fault-based liability is adopted, it is necessary for the international community to expand the scope of prescribed standards of behaviour in order to improve

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[4] See W. Jenks, "Liability for Ultra-Hazardous Activities in International Law", *RCADI*, vol. I, 1966, p. 105 ff.; and J. Kelson, "State Responsibility and the Abnormally Dangerous Activities", *Harvard Int. L.J.*, vol. 13, 1972, pp. 197-244.

[5] Under general international law the due-diligence principle makes reference to the proper behaviour that the community of states could expect from a civilized state in given circumstances, e.g. the conduct which is commonly considered as necessary to prevent or, at least reduce the significant harmful effects of polluting activities carried out within the territory of the state concerned (the source-state). See R. Pisillo Mazzeschi, 1989, *supra* fn. 2.

[6] The Roman *res ipsa loquitur* principle means that the evidence of facts in itself can relieve victims of the burden of proof. The adoption of such a principle within the frame of a fault-based liability regime implies that the polluter is assumed to be liable for environmental harm unless he can prove that the damage was not the result of a careless or guilty conduct on his part. In other words, the polluter could avoid incurring responsibility by demonstrating that his own conduct was faultless. See S. MacCaffrey, *Private Remedies for Transfrontier Environmental Disturbances*, Morges, IUCN, 1975, p. 47.

environmental protection and to prevent damage from occurring. From this perspective, liability and compensation would thus constitute a tool of last resort for those cases where the responsible person failed to meet the international standards.

2.2 State Responsibility for the Internationally Wrongful Act

The topic of state responsibility has attracted the attention of the International law Commission since the sixties. The first Special Rapporteur on state responsibility was Garcia Amador. In 1963 he was succeeded by Roberto Ago, who presented his first report in 1969. Between 1969 and 1980 the Commission adopted 35 draft articles on state responsibility for internationally wrongful acts. Initially no attempt was made to codify the 'primary rules', which impose specific international obligations on States, and the Commission concentrated on the 'secondary rules', which determine the legal consequences of the breach of an international obligation.

The work of the Commission on this topic can be divided into three phases: in the first phase the origin and the elements of the wrongful act were studied under the guidance of Roberto Ago, while during the second phase, when Riphagen was appointed Special Rapporteur, the content, the forms and the degrees of state responsibility were studied. Finally, the third phase focused on the settlement of disputes and on the implementation of international law on state responsibility.[7]

The Commission agreed with Special Rapporteur Ago to exclude from consideration liability for the injurious consequences of acts which are not prohibited under international law, such as nuclear activities, activities in space, or, in general, those activities which expose human health and the environment to a high risk of harm.[8] In fact, in 1978 the Commission set up an ad hoc working group under the guidance of Quentin Baxter, charged with examining this topic.

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[7] See *ILC Yearbook* from 1973 to 1988. For a commentary on this topic, see Pinto, "Reflections on International Liability", in *NYIL*, vol. XVI, 1985, p. 17 ff.

[8] See *ILC Yearbook*, vol. I, 1973, p. 13 ff.

The Essential Elements of the Internationally Wrongful Act

In accordance with the scheme developed by the International Law Commission, international responsibility applies to every internationally wrongful act of a state and involves the secondary obligation to repair it. Two essential conditions are required in order to define the internationally wrongful act: first, conduct which is attributable to a state, that is to say to a state-organ; second, conduct which constitutes the breach of an international obligation (Art. 3, ILC Draft on State responsibility). In other words, wrongful conduct is, by definition an act or omission which violates an obligation imposed by a primary rule. Given that almost every international obligation of a State corresponds to a correlative subjective right of another State, responsibility could be viewed as the obligation of the accountable State to repair the tort inflicted on the victim State. We could say that the civil law concept of extra-contractual liability has to some extent been transferred to the international level.

International responsibility thus takes the form of a juridical relationship between sovereign entities, centering around an obligation to repair damage. If this assumption is correct, we can conclude that the accountable actor will generally be freed from his obligation through payment of compensation for damages, if they occurred, in the traditional way of compensation paid in kind or in its equivalent. In other words, reparation is deemed to be the necessary and sufficient consequence of the internationally wrongful act, without any additional sanction, unless an international crime was committed.

International crime occurs where there is a massive violation of an international obligation, generally *jus cogens* obligations, aimed at protecting a fundamental right or interest of mankind. Different legal consequences flow from this qualification, with regard to subjective standing rights and to the content of the reparation itself. Under Art. 19 of the ILC draft on State responsibility, extensive violations of the international norms protecting the environment should be considered as international crimes.

In this context, the last huge environmental disaster which involved the Persian Gulf during the Gulf War, gives now the opportunity to check whether or not

international environmental crimes are recognised by the international community. It is rather encouraging that Resolution 687 of the Security Council expressly states that Saddam Hussein is liable under international law for crimes against the environment. EC Commissioner for the Environment Carlo Ripa di Meana, in his contribution made at the *International Seminar on the Establishment of an International Environmental Tribunal*, stressed that international crimes against the environment should be punished by the international community, even if committed in war time, and he also added that the conclusion of an international convention on this topic is urgent.[9]

The absence of sanctions reveals once again the weakness of the international law enforcement system, and in particular the lack of a supra-national coercive apparatus, that would deter states from infringing international law, and would make unilateral reactions redundant.

A second remark, which again stems from the definition of international responsibility and often arises in environmental litigation, concerns the tendency of states to refer unlawful conduct back to the violation of a sovereign right. As a consequence, in order to give rise to international responsibility, environmental damage must have a transboundary nature and must affect the legitimate use of the territory of the victim State. Under this rather traditional view, international customary law only imposes an obligation to make reparation for environmental damage in so far as this constitutes a breach of the general principle *sic utere tuo ut alienum non laedas*, and not a violation of any autonomous prohibition against pollution, of which states should be seen as simple guarantors. The civil law rule stating that the owner of a good or property is responsible for the damage caused by the utilization of the good or property to the property of the neighbour, is thus applied to inter-state relations as a 'good-neighbour' rule. In this context the polluting state is required to make reparation for damage affecting the territorial

[9] The seminar was held in Florence under the auspices of the *Corte di Cassazione di Roma*, on 10-12 May 1991.

integrity and the use of the territorial resources of the victim State, when such damage is caused by an activity carried out under its jurisdiction or control.

In the light of the above observations, we will examine the most famous precedent in international litigation concerning transboundary pollution. In the *Trail Smelter Case*, the tribunal stated that according to a general principle of international law "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[10] My first remark concerns the fact that the tribunal derived from general international law the principle that prevents States from carrying out activities, directly or by allowing certain private conduct, which have transboundary harmful effects. The International Court of Justice, in its decision on the *Corfu Channel case*, upheld the obligation of a State to not knowingly allow their own territory to be used for acts contrary to the rights of other states.[11] Finally, several documents enacted by international organizations include the principle that states shall ensure that activities within their jurisdiction or control do not cause environmental damage in other states, or even in areas beyond the limits of national jurisdictions.[12]

The second remark concerns the concept of damage and anticipates to some extent a topic that will be treated in detail in the second part of this contribution. From the Trail Smelter award we can deduce that the obligation to avoid pollution is not absolute, in that only *serious consequences* must be avoided. If states are bound to the general obligation to refrain from causing transboundary harm, this does not imply that the affected, or potentially affected states enjoy an absolute protection against transfrontier pollution. International practice in fact, suggests that *substantial* or at least *significant* harm is required for the violation of an affected

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[10] *UNRIAA*, 1941, p. 1965.

[11] *ICJ Reports*, 1949, p. 22.

[12] See Art. 21 of the UN 1972 Stockholm Declaration on the Human Environment, in *ILM*, vol. II, 1972; Art. 30 of the 1974 UN Res. 3 281 (XXIX) Charter of Economic Rights and Duties of States; the UN Res. 37/7 World Charter for Nature and its Annex; and the UN Res. 2996 (XXVII) International Responsibility of States in regard to the Environment.

state's right.[13] In fact, international conventions on environmental protection generally aim at the prevention of substantial harmful effects or a non-negligible impact on the environment. Finally, even international doctrine tends to exclude the existence of an absolute obligation prohibiting transboundary harm, and instead makes reference to *substantial* or *appreciable* damage - which practically corresponds to the typical pattern of foreseeable damage whose effects can be avoided or limited by the adoption of proportionate standards of care.[14]

The Problem of Fault

As we have already seen, international state responsibility arises when a state is accountable for an act or omission which constitutes the breach of an international obligation. These two conditions represent respectively the subjective and the objective element of the wrongful act. But when we turn to the attribution of responsibility the question arises whether fault is to be considered a fundamental and necessary element of international responsibility - and therefore liability without fault can be imposed only under specific treaty provisions - or whether the psychological link between the tort and the tortfeasor is irrelevant in international law. In fact Art.3 of the ILC draft on state responsibility does not mention fault among the essential conditions of an internationally wrongful act. As Quentin-Baxter pointed out in his Preliminary Report the concept of fault "...nowhere makes an 'on stage' appearance in the Commission's draft articles on State responsibility".[15]

In the traditional doctrine on international state responsibility, two main streams of thought can be identified with regard to *fault*. The Roman principle of fault-based responsibility was introduced in international law by Grotius, and was re-

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[13] See G. Handl, "Liability as an obligation established by a primary rule of international law. Some basic reflections on the International Law Commission's work", in *NYIL*, vol. XVI, 1985, p. 49 ff.

[14] See Lammers, "Balancing the Equities in International Environmental Law", in AA.VV., *L'Avenir du Droit International de l'Environnement, Colloque*, La Haye, 1984, pp. 153-165; and Handl, "Territorial Sovereignty and the Problem of Transboundary Pollution", in *AJIL*, 1975, p. 51 ff.

[15] Doc. A/CN 4./334, par. 15. For a commentary see Pinto, *supra* fn. 7, pp. 34-5.

elaborated in a second period by Triepel.[16] However, according to the *objective theory* it is even unnecessary to ask whether or not fault represents an essential element for the attribution of responsibility to the state.[17] State responsibility is in fact 'objective' *per se*, given that the link between the breach of an international obligation and the state organ's conduct is purely of a causal nature and is in no way contingent upon the latter's intention or negligence. In fact, if the organ acts in conflict with national provisions we could *not* speak of an *act of state* according to the objective theory; on the other hand, if the organ acts in compliance with national law and violates an international obligation, we could not speak of negligence on its part. As a consequence, state responsibility consists of a form of strict responsibility that the international order imposes on states as a guarantee for third parties' rights. International practice, however, has in reality shown that in order to invoke state responsibility it is necessary to establish guilty conduct on the part of the accountable state. Thus we can say that fault still represents the usual criterion for the establishment of state responsibility for a wrongful act, while strict liability represents the exception, and is hardly applied outside the limited scope of a convention.[18]

Due-diligence as the Ordinary Criterion for the Attribution of International Responsibility for a Wrongful Act

We can deduce from the above that in this context the due-diligence standard comes into play as the ordinary parameter for evaluating the conduct of states. Applied to the environmental field, the due-diligence standard obliges each state to ensure that activities carried out under its jurisdiction or control do not cause damage to the territory, to properties or to the environment in other states. Unfortunately the content of such an obligation is rarely well defined. In a general

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[16] See R. Ago, *Scritti sulla responsabilità internazionale degli Stati*, vol. I, Napoli, 1979.

[17] The main scholars supporting this theory are Anzilotti and Kelsen. See Ago, *supra* fn. 16, p.213; and Pinto, *supra* fn. 7, p. 33.

[18] See Handl, "State Liability for Accidental Transnational Environmental Damage by Private Persons", in *AJIL*, 1980, p.540; and P.M. Dupuy, "La responsabilité internationale des Etats pour les dommages causés par les pollutions transfrontières", in AA.VV., *Aspects juridiques de la pollution transfrontière*, OCDE, Paris, 1977, pp. 369-395.

conception it includes the duty to provide an efficient executive apparatus, able to ensure the ordinary compliance with international obligations, in particular those obligations concerning environmental protection. However, according to doctrine, the content of due-diligence, although interpreted in a very broad sense, may vary in relation to the degree of risk involved in different activities, where risk is assessed both on the basis of the probability of harm to human health and the environment, and on the gravity of such a harm.

Circumstances Precluding Wrongfulness but not Liability

To conclude this overview of the theory of internationally wrongful acts, it is worth mentioning the inclusion in the ILC draft of six conditions that states can invoke in their defence - namely circumstances which preclude wrongfulness.[19] It is also important to note however that the Commission has formulated a provision which establishes liability as the simple duty to give compensation even when responsibility cannot be invoked because of a defence.[20] It follows that in the Commission's view the possibility is open to affirm the principle that states, even when acting lawfully, are nevertheless bound to consider the rights and interests of other states potentially affected by their actions. The attention then must be shifted to those situations in which liability is not dependant on wrongfulness, but arises directly from a primary rule.

2.3 *The Hypothesis of State Responsibility Without the Wrongful Act: the ILC Draft on International Liability for Injurious Consequences which are not Prohibited Under International Law*

The purpose of the ILC's work on international liability for *lawful acts* - or better, acts which are not prohibited under international law - consists essentially of an examination undertaken from the perspective of primary rules of the legal consequences of high-risk technology activities, the so called *responsibility for risk*.

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[19] See Arts. 29/33 of the ILC draft on State responsibility.

[20] See Art. 35 of the draft.

These activities, in fact, have resulted in an interdependence among states through the creation of exposure to significant risk of physical harm.[21] The rationale behind this theoretical effort is twofold: first to minimize the external effects of these economic activities through a suitable reallocation of costs - the problem of loss-shifting; second, to provide victims with adequate compensation in accordance with the principle of equity, without prohibiting or hampering the activities themselves, which are generally deemed to be 'socially desirable'. From this last point we can immediately deduce that this topic is strictly connected with the regime of strict and absolute liability as described above, and that it is justified more or less by the same needs.

The core of the topic is evidently to establish whether or not the concept of liability as a primary obligation is supported by international practice. In this context the two distinct parts of the 1941 *Trail Smelter Case* serve to illustrate the dichotomy between the case of transboundary environmental harm caused by intentional or negligent conduct attributable to the Canadian authorities, and the rather exceptional situation where such harm occurs accidentally, despite the fact that preventive measures have been implemented. In this second part, the tribunal did not attach liability to the Canadian authorities for any wrongful conduct, but in stating that future accidental damage would entail the duty of reparation it clearly moved from the issue of responsibility for a wrongful act to liability as a primary obligation.[22]

Two conclusions can be drawn from the above. First of all, it emerges that responsibility for a wrongful act is the typical legal consequence of continuous and foreseeable pollution. In this case, substantial transboundary harm could have been prevented through the adoption of 'proportionate' preventive measures,[23] that is to say through compliance with the due diligence obligation on the part of the

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[21] See G. Handl, *supra* fn. 13, p. 49 ff.; See also *ILC Yearbook*, vol. II, 1970, p. 178; and Akerhurst "International Liability for Injurious Consequences Arising Out of Acts Which are not Prohibited Under International Law", in *NYIL*, 1985, p. 2 ff.

[22] See G. Handl, *supra* fn. 13, p. 61.

[23] The term 'proportionate' in this context only indicates that preventive action should not cause a disproportion between the costs and benefits of regulation.

source-state. Second, *a contrariis* we deduce that where reparation is due irrespective of wrongfulness, the case is effectively one of accidental damage. Transboundary accidental harm thus emerges as the key-issue in situations which are likely to entail liability for lawful conduct.

As will be shown in the second part of this paper, most treaty regimes regulating so-called 'ultra-hazardous' activities provide for liability without any wrongful act.[24] Another example, as we have already pointed out, is given by Art. 35 of the ILC draft on state responsibility where the wrongfulness of state conduct has been precluded but not the liability for the harm caused.

Alternative Theories on the Phenomenon

Now the question arises whether sufficient elements currently exist to categorize liability without a wrongful act as an autonomous legal regime, or whether it only represents a distinct aspect of international responsibility. The Commission itself has not given a strict categorization of liability for lawful acts. It has also limited its analysis to liability for physical transfrontier damage, thus postponing questions relating to economic harm caused by the lawful conduct of states.[25]

Apparently, a rather attractive suggestion is that of simply fitting liability into the system of state responsibility regardless of whether or not transborder harm is the result of wrongful conduct.[26] By assuming that the progressive use of modern technologies in industrial activities creates as a natural consequence the risk of transboundary harm, all the consequences can be regulated by good-neighbour and state responsibility rules. This view starts from the premise that substantial harm itself reveals the wrongfulness of the source-state's conduct in the particular form of the abuse of its rights.

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[24] See *infra* the 1972 Outer Space Convention, the Four Nuclear Conventions on Civil Liability, and Art. 139 of the 1982 LOS Convention on Responsibility to Ensure Compliance and Liability for Damage.

[25] See "IV Report", *ILC Yearbook*, vol. II, part I, 1983.

[26] See Brownlie, *Principles of Public International Law*, 1979, p. 476-7; Garcia Amador, "V Report on State Responsibility", in *ILC Yearbook*, vol. II, 1960, p. 41; G. Handl, *supra* fn. 13, p. 65.

A second position, which actually seems similar to the first, is adopted when 'ultra-hazardous' activities *per se* are presumed to entail the unlawful conduct of the source-state. This presumption aims at protecting the rights of third parties from the risk of future accidents.[27] In this case the victim state will also be entitled to call for the cessation of the harmful conduct.

However, these alternatives are inconsistent with the twofold purpose that underpins the adoption of no-fault liability regimes in international treaties, namely ensuring adequate compensation for victims without banning or penalizing the activities themselves. When liability is established through recourse to the 'pure-causality' assumption, liability arises directly upon the occurrence of significant harm. This view may sound very attractive for environmental purposes, but unfortunately it is not supported by evidence in current international practice. In fact, the Tchernobyl case has shown that transboundary accidental loss itself is not considered a sufficient condition for the imposition of international liability on the source-state.[28] Moreover, the pure-causality theory, when applied for the purpose of reallocating external costs, is too similar to strict or absolute liability to serve as an autonomous legal ground.

The adoption of strict liability regimes in international treaty law, as will be shown afterwards, is justified by the presence of several factors, among which causality - *i.e.* the relationship between the activity and harm - is the main determinant. In particular, the risk of accidental transboundary harm is supposed to be inherent to the hazardous nature of the activity carried out. The actual or presumed knowledge of such a risk, and, at the same time the qualification of harm as typical of the risk created, justify the imposition of preventive obligations as well as strict liability on the grounds of fairness. The limits within which strict liability should be applied are set by the requirement that there be a *significant risk*,

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[27] See G. Handl, *supra* fn. 13, p. 65.

[28] The pure causality theory was supported by the Canadian and the Australian delegations in the OECD Transfrontier Pollution Group. See Handl, *supra* fn. 13, p. 67; see also Handl, "Après Tchernobyl, quelques réflexions sur le programme législatif multilatéral à l'ordre du jour", in *RGDIP*, vol. I, 1988, pp. 5-62; and Sands, *Chernobyl, Law and Communication*, Grotius, Cambridge, 1988.

interpreted as a risk creating the threat of serious consequences; in the event of there being a high probability of relatively minor consequences, the damage is assumed to be easily preventable through compliance with due-care obligations.

Going back to the original purpose of this analysis, we may conclude that liability for lawful acts does not seem to have, at present, a well defined identity, given that it can be encompassed by presumption of fault on the one hand, and by strict liability on the other.

Liability and Cooperation Duties

If we look at the ILC Schematic Outline,[29] it emerges that the intent of the Commission was twofold: firstly, to set up a regime that could induce States to adopt preventive measures against transboundary pollution; and secondly, to provide for a method of apportionment of liability which is likely to be accepted by States.

In this context shared interests and mutual expectations of states are emphasized and, as a consequence of this interdependence, cooperation must be established between the acting State and the 'potentially affected' State. This relationship would imply mutual obligations concerning, for example, the exchange of information, remedial action and joint fact finding, as well as the duty to negotiate and agree on a regime of cost-sharing in order to respect the balance of interests between the states concerned. In other words, in the Commission's view the recognition of cooperation duties would imply the establishment of a set of rules that should be applied whenever there is a risk of physical transboundary harm.[30] In this sense, the scheme laid down by the Commission goes far beyond that of strict liability which, instead, plays only a residual role, in that it intervenes only when the transboundary damage has already occurred.

Parts of this approach are present in almost every treaty.[31] As an example, the Commission makes reference to boundary waters agreements, such as the 1909

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[29] See "IV Report", doc. A/CN.4/373, par. 69.

[30] See "V Report", *ILC Yearbook*, vol. II, part I, 1984.

[31] See "V Report", p. 166.

Boundary Water Treaty between the US and the UK, and the 1964 Finnish-Soviet Agreement Concerning Frontier Watercourses which, in Art. 2 states:

> No measures may be taken, in disregard of the procedure laid down in chapter II of this agreement ... which might so alter the position, depth, level of the free flow of watercourses in the territory of the other Contracting Party as to cause damage or harm to the water area ... alter the main fairway or interfere with the use of common fairway or transport.

And with regard to pollution the Contracting Parties are required to decide jointly upon the quality standards of water in each frontier watercourse or area. However, the Commission specifies that the treaties referred to above do not generally provide specific criteria that can always be applied to future issues. In fact, they only give a method, that can range from the application of national standards to the establishment of joint boundary decision-making bodies.[32]

Final Remarks on the ILC's Work on Liability for 'Lawful Acts'

The theories that seek to establish the legal basis for the reallocation of transboundary loss as a primary rule generally raise the question of the normative grounds for loss-shifting in inter-state relations.[33] An analysis of international practice almost leads us to conclude that considerations of equity, both at the national and at the international level, can serve as legal grounds for the re-allocation of accidental transboundary loss. A further confirmation of that statement will be found in the second part of this paper, after the description of liability regimes in international conventions. The notion of equity itself, however, could hardly represent the rationale for liability as a primary rule, and therefore international doctrine has invoked the principles of good-neighbourliness on the one hand, and the duties of cooperation, or even of international solidarity, on the other.[34]

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[32] *Ibid.*, p. 166. The Commission also pointed out the distinction between a physical consequence, even potential, and its transboundary negative effects on the use or the enjoyment of shared natural resources, such as a basin. As an example the Lake-Lanoux arbitral award is cited. The award is reproduced in *UNRIAA*, vol. XII, p. 304.

[33] See G. Handl, *supra* fn. 13, p. 76.

[34] See Quentin-Baxter, *ILC Yearbook*, vol. I, 1980, p. 243.

The main purpose of the Commission's work was to establish a normative framework for the management of risks of physical transboundary loss, a regime that could justify the obligation to take preventive measures, as well as to take remedial action and provide for reparation. Three elements, in particular, identify the scope of the topic. The first is represented by the transboundary element. The Commission emphasizes that the topic deals with actual, or even potential, transboundary loss or injury that cannot be avoided and repaired except through international cooperation - namely through the implementation of reciprocal rights and duties.[35] The second element consists of the physical consequence, in the sense that the topic is limited to those consequences which flow from the very nature of activities and situations and not from any intervening policy decision. 'Purely economic' consequences, in other words, are not considered as prerequisites. The third and last element referred to in the draft is that the physical harm in question alters the ordinary use or the enjoyment of the territory, the environment and the natural resources of the affected state. However, these values should not be understood in absolute terms. If freedom from pollution is recognized as a protected subjective right in international law, the risk of transboundary harmful effects should be regulated by international customary law, even though the protection is limited to that which is technically and economically feasible. The distinguishing feature of the topic is the accidental nature of the transborder harm and the fact that the harm is the result of a risk generated in the source-state or is under its control.[36]

A new norm of customary law is developing in the Commission's view, based on the duties of cooperation as well as on the fair distribution of costs and benefits. The principle of good-faith and the reciprocal expectations of the states concerned are thus involved. In this context, the topic cannot be adequately placed within the scheme of State responsibility, but calls for an independent legal framework. One could argue, however, that the most probable and efficient implementation of such

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[35] See Art. 1 of ILC draft on international liability for the injurious consequences arising out of acts which are not prohibited under international law. See also the Fifth Report, at 157.

[36] See G. Handl, *supra* fn. 13, p. 79.

an approach will occur at the level of compensation; and since compensation can also be paid under the regime of liability for wrongful acts, the question arises whether in practice, the distinction between the two regimes - liability for wrongful acts and liability for lawful acts - actually makes sense. The most convincing argument in favour of the distinction is the fact that states may be more reluctant to respond where there has been a wrongful act because they usually are unwilling to admit that their conduct was illegal. Thus we could expect that where compensation is due without wrongful conduct it, "... should make easier a just, effective and amicable settlement of any liability that may arise".[37]

3. Environmental Liability in International Treaty Law

In summarizing the main characteristics of current international treaty law on environmental liability, it is suitable to consider separately the international conventions on state responsibility and those concerning civil liability for environmental harm.

3.1 State Responsibility

A well defined and clear treaty rule on state responsibility for environmental damage is included in Art. 139 of the *1982 Convention on the Law of the Sea*, which is based on the concept of responsibility for a wrongful act:

para 1 State Parties shall have the responsibility to ensure that activities in the Area whether carried out by State Parties or State enterprises... shall be carried out in conformity with this Part...

para 2 Without prejudice to the rules of international law... damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability...[38]

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[37] Quentin-Baxter, *ILC Yearbook*, vol. II, part. 1, 1980, p. 2630; Akehrust, *supra* fn. 21, p. 15.

[38] See United Nations Convention on the Law of the Sea, reprinted in *ILM*, 1982, p. 1261 ff. The Convention was adopted at Montego Bay on December 10, 1982 and signed on behalf of 117 States and two other entities. Among the signatories: Belgium, Bulgaria, Byelorussian Soviet Socialist (continued...)

General Provisions on Cooperation

Unfortunately, the existence of clear and precise treaty rules on State responsibility is quite rare. In fact, treaties on environmental protection include for the most part only very general provisions concerning cooperation and the exchange of information among states. As it will be shown later, the vagueness and the uncertainty of such provisions raise doubts about the binding nature of the rules, and about the possibility of suing states under international law, for example for a breach of norms of cooperation.

In this context the *ECE Convention on Long Range Transboundary Air Pollution* must be considered. It was adopted at Geneva in November 1979 by 34 countries under the auspices of the U.N. Economic Commission for Europe, which is one of the five regional commissions of the United Nations. This regional body includes both Eastern and Western Countries, as well as the United States, Canada, Japan, New Zealand and Australia.[39]

The Convention is the product of almost a decade of international research and negotiations on the subject of transboundary air pollution. Notwithstanding the complexity of the problem the Convention has achieved important results, such as a reduction in polluting emissions, and increased cooperation and communication among countries and it has encouraged the exchange of scientific and technological information between countries. For example, the *SO2 Protocol* adopted under the

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[38](...continued)
Republic, Canada, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Italy, Liechtenstein, Romania, Spain, Ukrainian Soviet Socialist Republic, Netherlands, Union of Soviet Socialist Republics, United Kingdom, United States, Yugoslavia, European Economic Community. Yugoslavia was in 1988 the only European Party to the convention, this term referring to all States and to other international subjects that have agreed to be legally bound by the treaty whether it is in force or not. See Bowman and Harris, *Multilateral Treaties. Index and Current Status*, Butterworths, 1988.

[39] The Convention came into force on 16 March 1983. In 1989 there were 35 signatories to the Convention, the European Economic Community included, but only 32 countries had already ratified it. All the EEC members and the Community have ratified the Convention. See Amy A. Fraenkel, "The Convention on Long-Range Transboundary Air Pollution: Meeting the Challenge of International Cooperation", in *Harvard Int. L. J.*, 30, Spring 1989, pp. 447-476.

Convention led to real reductions in air pollution.[40] However, Art. 2 on State obligations only provides that the Parties:

> ...shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long range transboundary air pollution.

Moreover, the Convention establishes that Parties shall exchange information on policies, on scientific activities and technology in combatting atmospheric pollution. Art. 5 provides that binding consultations shall be held, upon request,

> ...at an early stage between, on the one hand, Contracting Parties which are actually affected by or exposed to a significant risk of long range transboundary air pollution and on the other hand, Contracting Parties within which and subject to whose jurisdiction a significant contribution to long range transboundary air pollution originates or could originate...[41]

The Convention, however, explicitly excludes state responsibility for environmental damage from its scope (Art. 8.f- footnote). This is obviously a great limit on the implementation and the effectiveness of the Convention, reflecting the difficulties of drafting an international arrangement on the protection of the environment.

There are other international Conventions which, besides stating rules of cooperation among States, lay down abstract and often uncertain principles of state responsibility for environmental harm. They merely provide that Parties should endeavor to adopt at some future point a liability regime for environmental damage. We may cite, for example, the *1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution*, which, at Art. 12 states as follows:

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[40] Three protocols to the 1979 Geneva Convention must be mentioned: the first one, on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP) was signed in Geneva on 28 September 1984. The protocol entered into force on 28 January 1988. Among the Parties are: Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Hungary, Ireland, Liechtenstein, Luxembourg, Netherlands, Norway, Spain, Sweden, Switzerland, U.K., U.S.S.R., U.S.A., Yugoslavia. Italy and the EEC are signatories. Up until 1988 the EMEP was financed by the UN Environmental Programme (UNEP) and by voluntary contributions from the Parties. The second protocol, done at Helsinki, July 8 1985, concerns the reduction of sulphur emissions or their transboundary fluxes by at least 30 per cent as soon as possible, and at the latest by 1993. Parties: Austria, Bulgaria, Byelorussian SSR, Canada, Czechoslovakia, Denmark, Finland, Luxembourg, Netherlands, Liechtenstein, Switzerland, Ukrainian SSR, U.S.S.R. Signatories: Belgium, GDR, Italy. Finally, the third and most recent protocol concerns the control of emissions of nitrogen oxides or their transboundary fluxes. It was signed in Sofia on October 31 1988 by the representatives of the State Parties to the Helsinki Protocol.

[41] See 1979 ECE Convention on Long-Range Transboundary Air Pollution, reprinted in *ILM*, 1979, p. 1442.

> The Contracting Parties undertake to cooperate as soon as possible in the formulation and adoption of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment deriving from violations of the provisions of this Convention and applicable protocols.[42]

Similarly, the *1989 Basel Convention on the control of Transboundary Movements of Hazardous Waste and their Disposal*,[43] while providing lists of hazardous waste movements that States Parties must prohibit or limit with the intent to stop the illegal traffic of hazardous wastes, does not include a precise rule on liability and compensation for damage. Art. 12 only provides that:

> The Parties shall cooperate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movements and disposal of hazardous wastes and other wastes.

The weakness of general obligations under the Convention has given rise to reservations on the part of some African states - in particular of those to which waste is exported - who had suggested the absolute prohibition of transboundary movements of hazardous waste, as well as stringent provisions regarding state responsibility.

Due-Diligence Obligations

In an attempt to prevent pollution, some international treaties include clauses which oblige states to ensure that all appropriate measures are taken to control and, as

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[42] See *ILM*, 1976, p. 290 ff. Adopted on February, 16 1976, it entered into force on February 1978. Among the Parties are: the EEC, Spain, France, Italy, Greece, Malta and Yugoslavia. See *ILM*, 15, p. 290. The Convention imposes general duties with respect to combatting pollution from various sources. The first Protocol concerns the problem of pollution by dumping from ships and aircraft. The second Protocol deals with Cooperation in combatting pollution by oil and other harmful substances in case of emergency. No State may be a Party to the Convention without becoming a Party of at least one of the Protocols as well. The Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources was signed at Athens on 17 May 1980. It entered into force on 17 June 1983. Among the Parties are: France, the EEC, Greece, Morocco, Spain, Italy and Turkey. The Protocol concerning Mediterranean Specially Protected Areas was concluded in Geneva, on 3 April 1982. Among the Parties: The EEC, France, Greece, Israel, Italy, Malta, Spain, Yugoslavia, Turkey.

[43] See *ILM*, vol. 28, 1989, p. 649 ff. The Convention was adopted on March 21-22, 1989. The European Economic Community also signed it. The Convention will enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, approval, accession etc... Until now, only a few countries have ratified the Convention; France is among them.

far as possible reduce, the sources of transfrontier pollution within their territories. The implementation of such provisions implies the establishment of technical and administrative procedures, as well as procedures for the exchange of information in the event of pollution or probable pollution.

The obligation to 'endeavour' or to 'make efforts' to prevent or at least reduce existing pollution is not to be considered as absolute and does not imply the strict obligation not to pollute at all. As a consequence, this obligation will be met through compliance with the due-diligence standard of behaviour of states, as well as with the rules laid down in the Convention itself. With regard to marine pollution, the *1982 U.N. Convention on the Law of the Sea*[44] in Art. 194 establishes due-diligence obligations, providing that:

> States shall take... all measures that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities...

A similar reference to the due-diligence obligation can be found in Art. 235 of the same Convention, concerning responsibility for damage to the marine environment. Preventive obligations of this kind are also set out in the *1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*, and in particular in Arts. 1 and 2 stating that the Contracting Parties should take all practicable steps to prevent marine pollution by dumping of waste.[45]

Finally, as far as the protection of common spaces is concerned, the *1985 Vienna Convention for the Protection of the Ozone Layer* must be mentioned, which in Art. 2 establishes that States Parties should undertake all appropriate measures to protect human health and the environment against the harmful effects of human

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[44] See *supra*, fn. 5.

[45] Adopted in London, December 29, 1972, it entered into force on August, 30, 1975. Among States Parties: Belgium, Denmark, Canada, Greece, the German Democratic Republic, the Federal Republic of Germany, Hungary, Iceland, Ireland, Italy, Spain, UK, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Ukrainian SSR, United Kingdom, United States, U.S.S.R., Yugoslavia. *ILM*, 11, p. 1924. See also Bowman and Harris, *supra* fn. 2, p. 1973.

activities affecting the ozone layer.[46] Secondly, the *1988 Wellington Convention on Regulation of Antarctic Mineral Resources Activities* provides in Art. 7.1 that States Parties should take appropriate measures to ensure compliance with the Convention and any measures in effect pursuant to it.[47] Art. 8, in fact, which concerns liability, establishes strict liability for the operator, while leaving fault-based liability of the source-state.

3.2 Civil Liability[48]

Civil Liability as the Preferred Alternative in International Treaty Law

For the moment we can say that international state liability for environmental harm has rarely been implemented. In its claim for damage caused by Cosmos 954, Canada obtained compensation on the basis of the absolute liability of the launching State as a breach of the Space Objects Liability Convention.[49] Examples of state liability, however, are quite exceptional. Moreover, state practice shows that in general states de-emphasize their own responsibility for environmental damage while the polluter is directly requested to pay compensation on the basis of civil liability systems, without entailing a parallel responsibility of the source-state.

The international rules on civil liability are substantially aimed at establishing uniform principles which national legislation must follow. In particular they aim to guarantee adequate and prompt compensation for victims, without prohibiting the

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[46] The text is reproduced in *ILM*, vol. 26, 1987, p. 1529 ff. The Convention was signed in Vienna on March 22, 1985. Among the Parties: Australia, Austria, Canada, Finland, France, Norway, Sweden, Switzerland, Ukrainian SSR, United Kingdom, United States, USSR. It is open to regional economic integration organizations (Arts. 12-14). On September 16, 1987 the Montreal Protocol on Substances that Deplete the Ozone Layer was adopted. The EEC, France, Belgium, Denmark, GFR, Greece, Luxembourg, Italy, UK, the Netherlands, Portugal, Sweden, Switzerland, USSR, Finland are the European signatories Countries. See *ILM*, vol. 26, 1987, p. 1550.

[47] Done at Wellington, on June 2, 1988; it was adopted by consensus. Among the signatories: Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, the German Democratic Republic, Greece, Italy, Netherlands, Norway, Poland, Romania, Sweden, United Kingdom, United States. The Final Act is reproduced in *ILM*, 27, 1988, p. 865.

[48] This part focuses on the Introductory document prepared by the Italian Government for the International Forum on International Law of the Environment, which was held in Siena, April 17-21, 1990.

[49] See *ILM*, vol. 18, 1979, p. 902.

polluting activity itself. Secondly, the adoption of private law solutions is in most cases a consequence of the reluctance of states to approach transboundary pollution costs in terms of concurrent state liability. In fact, the *Montego Bay Convention* in Art. 235(2) provides that:

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation... in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

Some treaties, however, leave state liability as a residual measure to be invoked in the event that the primary liability of the private actor cannot be enforced, for example when the latter is unknown. So, under Art. 9 of the 1989 Basel Convention defining the 'illegal traffic' of hazardous waste, the states concerned are required to ensure that the disposal of the waste is carried out in an environmentally friendly manner, where civil responsibility of the transactors is not applicable. In addition, under Art. 8 the State of export is bound to reimport the waste if the shipment cannot be carried out in compliance with the contract between the parties involved and if no alternative arrangements are feasible. In any case, as stated above, the Basel Convention does not contain provisions on liability for environmental damage.

Multilateral Conventions on Civil Liability for Environmental Damage

Under the *1969 Brussels Convention on Civil Liability for Oil Pollution Damage* liability rests on private persons directly involved in the polluting activity.[50] The Convention attaches strict liability to the owner of the vessel at the time when the accident occurs. The concept of damage includes the costs of preventive measures. Some forms of defence, however, are allowed, namely in the case of war, hostilities, insurrection, deliberate acts of third parties or negligence on the part of public

[50] See the International Convention on Civil Liability for Oil Pollution Damage, *O.J.* of the E.E.C., July 3, 1975, p. 672. It was adopted in Brussels, November 29, 1969, and it entered into force in June, 1975. Among the Parties: Belgium, Denmark, Finland, France, Greece, Iceland, Italy, Netherlands, Norway, Poland, Portugal, Spain, Sweden, U.S.S.R., and Yugoslavia. See also the 1976 Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage, drawn up in London on November 19, 1976. The Protocol entered into force on April 8, 1981. The text is reproduced in *O.J.* of the E.E.C. of May 13, 1981.

authorities. Art. 5 of the Convention, as amended by the 1976 Protocol, limits the owner's liability to a certain amount in relation to every single accident. As a counterbalance to this limitation, the owner shall deposit a prescribed sum or guarantee with a Court or any other competent authority of the State to which the claim is addressed. The owner is also required to take out insurance cover.

Lastly, the Convention itself indicates the competent forum for deciding claims for compensation. The recognition and execution of the judgements in each of the contracting Parties is also provided for by the Convention.[51] In addition, in 1971 the International Fund for Compensation for Oil Pollution Damage was established. It is made up of contributions calculated in different percentages, by those persons or legal entities resident in any Contracting State with a vested economic interest in importing oil. The Fund plays a residual role providing for compensation up to a limit, fixed at 60 million Special Drawing Rights of IMF, in all cases where the victim cannot obtain adequate redress under the 1969 Brussels Convention.[52]
A similar approach has been adopted in the above mentioned *1988 Convention on the Regulation of Antarctic Mineral Resource Activities* where Art. 8 provides for the strict liability of the operator undertaking any activity affecting the Antarctic environment.

Finally, we should mention the international Conventions on civil liability for nuclear risks, as examples of treaties concerning environmental problems which minimize resort to state responsibility and channel strict liability for damage to the operator of the polluting source.[53] The four nuclear Conventions impose strict

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[51] See Introductory document prepared by the Italian Government for the Forum on International Law of the Environment, Siena, April, 1990, p. 69.

[52] Given the enormous ramifications that oil pollution accidents can have, two Protocols have been adopted in the wake of the Amoco Cadiz accident, raising considerably the limit of compensation for accident both under the Brussels Convention and under the International Fund.

[53] See the 1960 OECE Paris Convention on Third Party Liability in the Field of Nuclear Energy, and the 1963 Supplementary Protocol, in *Selected Multilateral Treaties in the Field of the Environment*, edited by A. Kiss, UNEP, 1983; and the 1963 Vienna Convention on Civil Liability for Nuclear Damage and Optional Protocol, in *ILM*, 2, 1963, p. 727. See also the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, concluded on May 25, 1962, reproduced in *AJIL*, 2, 1963, p. 268 ff. The Convention sets the duty for the Contracting State authorizing the operation of the nuclear vessel flying its flag, to ensure the payment for damages which the operator is liable for, even beyond
(continued...)

liability on the operator of the nuclear installation, which is limited in amount and supported by compulsory insurance or security. Moreover, the compensatory system set up in the *1963 Brussels Protocol Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy*, provides for a contribution from the source state to the extent that the damage exceeds the maximum amount for which the operator is liable.[54] At present the protocol binds all the Parties to the 1960 Paris OECD Convention, with the exception of Greece, Portugal and Turkey. In addition, as a last resort, the Protocol includes a contribution formula involving all the Contracting Parties (Art. 3), apportioned in relation to several factors, among which is the gross national product. In so doing, the Protocol shares the principle of allocating costs and risks among a plurality of actors, who are not polluters *stricto-sensu*. The underlying principle justifying this extension of liability first to the national collectivity, and second to the collectivity of the States Parties, is that society should share the costs and not only the benefits of activities which are dangerous but necessary to collective welfare.

A Few Remarks on International Civil Liability Regimes for Environmental Harm

The preference for private forms of compensation is probably related to the attempt to facilitate victim-redress, allowing direct actions against polluters, and thus avoiding the procedural disadvantages normally entailed in pursuing inter-state claims and public international law in general. Moreover, the adoption of a strict liability regime has the merit of relieving victims of the burden of proof.

Some limits of civil liability regimes for environmental harm can, however, be identified. First of all, the recourse to national private systems of law does not necessarily achieve the best redistribution of transboundary environmental costs

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[53](...continued)
the limits of the latter's liability and to the extent that the compensation due exceeds the sums covered by insurance.

[54] The Contracting State in which the plant is located also has supplementary liability for damages up to the limit of 70 million European Agreement units of account. At a third and last level, damages can be redressed by the intervention of all State Parties up to the amount of 120 million units of account. In accordance with two additional Protocols, adopted in 1982 and not yet in force, the sums for compensation are due to increase considerably.

among the parties involved, especially where the source-state is also held to be liable. Secondly, the scope of treaties concerning civil liability has so far been limited to accidental sea pollution damage and to damage caused by ultra-hazardous activities, in particular to the peaceful use of atomic energy and the transfrontier movement of dangerous goods and waste. As a consequence, the most frequent forms of continuous transboundary pollution are excluded from the scope of these Conventions. Another limit, connected with the scope of application of such Conventions, concerns the nature of the damage itself. Damage giving rise to the right to compensation, is generally that affecting the personal integrity of victims or their private property, within the territory of any Contracting State. This means that damage to the environment *per se* is not considered to be recoverable and neither is damage occurring outside the territory or jurisdiction of State Parties, such as that affecting the global commons. More detailed regulation in this field is desirable.[55]

An Alternative to Overcoming the Traditional Liability Schemes: International Funds

To conclude this overview of instruments regulating the field of liability and compensation for environmental damage, it is worth mentioning a few voluntary agreements that establish international funds of compensation. These agreements have been largely concluded at a private level, among the main actors involved in polluting or high-risk activities, and they are limited to cover accidental oil pollution damage to the sea. In particular, reference should be made to the *Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution* (TOVALOP), which entered into force in 1969, the *Contract Regarding Interim Supplement to Tanker Liability for Oil Pollution* (CRISTAL) of 1971, and finally, the *Offshore Pollution Liability Agreement* (OPOL) of 1979.[56] These agreements substantially reproduce the scheme of strict liability of private actors under the International Conventions

[55] A recent evolution in this sense is represented by the new definition of recoverable damage as adopted in the recent Council of Europe Draft Convention on Damage Resulting from Activities Dangerous to the Environment. See *Environmental Policy and Law*, 20/6, 1990, pp. 215 and 238.

[56] On International Funds see OECD, *supra* fn. 18; and Introductory Document, *supra* fn. 51, p. 71.

considered above. Thus, we could argue that two types of action are likely to overlap in the sector of marine pollution for oil spills: one of a public nature, the other of a private nature, but both basically adopting the same regimes. In fact, under international funds private liability for each accident is also limited.

The original aspect of such funds is that victims can obtain compensation for damage by drawing directly from the fund, without the previous identification of the polluter. Thus, the polluter could even remain unknown. The traditional bipolar relationship between the polluter and the victim has been replaced by a mutual-pre-damage arrangement of all the potential polluters constituting the fund, the so-called 'mutualization of costs and risks'.

4. Conclusions

Several conclusions can be drawn from the above. Firstly, we have seen that in international treaty law the forms of State responsibility and civil liability - strict or fault-based - vary according to the single treaties. We have also pointed out that even in recent international Conventions on the environment there is still a lack of rules concerning responsibility and compensation for environmental harm. In future treaties, states will have to include more precise and detailed provisions on state responsibility.

As far as civil liability is concerned, the international Conventions do not meet all the requirements needed to guarantee complete compensation for damage. Multilateral treaties adopting a strict liability regime place the risk, even of unavoidable damage, on the polluter, as a price for pursuing an ultra-hazardous activity. This sort of liability, however, is limited in amount. Such limitation is justified by the attempt to protect industrial interests from the award of exorbitant damages, and to ensure that adequate insurance will guarantee the compensation of victims. In this last respect, civil liability regimes represent a tool to make the polluter pay and thus to *internalize externalities*. For example, the structure of the environmental liability regime in the EEC is based on the *polluter pays principle*, but in practice the polluter is only required to bear the costs and risks of the hazardous

activities, while liability represents the price that the polluter pays *ex post* in order to continue the activity. In other words, the role of liability in this context can also be seen as a source of legitimacy for the polluter's conduct. In this perspective, the polluter-pays principle could hardly perform preventive functions. This is one of the reasons why, in my view, the polluter-pays principle, as well as civil liability regimes in general, can successfully be employed after damage has occurred, but as far as prevention of pollution is concerned, more stringent obligations on the part of public authorities are needed. The attention of the international Community should thus be focused on drafting a wide-range Convention providing that States shall be liable for all serious damage deriving from activities carried out in their territory, also in the case of ultra-hazardous activities. This is the general position of the International Law Commission in a recent proposal about International Liability for environmental damage.[57] Also moving in this direction are the first drafts of the Protocol on liability for damages arising out of the transfrontier movements of hazardous waste. Under particular examination is the idea to introduce concurrent-direct liability of the exporting state. At present the proposal is obstructed by the general objection of industrialized countries.

LIST OF ABBREVIATIONS

AJIL	The American Journal of International Law
NYIL	The Netherlands Yearbook of International Law
Harvard Int. L.J.	Harvard International Law Journal
ICJ Rep.	International Court of Justice Reports
ILM	International Legal Materials
ILR	International Law Report
Int. Comp. L.Q.	International and Comparative Law Quarterly
RGDIP	Revue générale de droit international public
RCADI	Recueil des cours de l'Académie de droit international
UNRIAA	United Nations Report of Int. Arbitral Awards
ILC Yearbook	Yearbook of the International Law Commission

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[57] See ILC, 5th Report on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law, UN Doc.A/CN.4/423.

Part II - European Community Initiatives on Environmental Liability

Ida J. Koppen

1. Introduction

The European Community has been concerned with environmental politics for almost two decades now. The beginning of this policy field is typically traced back to the early seventies when the Heads of State and Government at a Summit meeting in Paris asked the EC institutions to prepare the first Environmental Action Programme.[1] The Programme adopted the *polluter-pays principle* and the *principle of prevention* as guiding principles of EC environmental policy,[2] but this didn't result in Community action in the field of environmental liability until much later. In 1986, with the amendments introduced by the Single European Act, environmental protection was incorporated in the Treaty of Rome, strengthening the legal basis for Community action in this field. The fourth Environmental Action Programme, published in 1987, announced "the better definition of responsibility in the environment field (including the possibility that the polluter should assume extended liability for damage caused by products and processes)."[3]

Diverging national liability schemes cause unequal conditions of competition and interfer with the functioning of the internal market. Harmonization of national liability schemes is thus necessary. In 1985 the EC Directive on Product liability of was adopted, stimulating the first in-depth discussions of liability in the Community

[1] See Krämer, L. (1987), The Single European Act and environmental protection, *24 CMLR*, pp. 659-688; Koppen, I.J. (1988), *The European Community's environment Policy: from the summit in Paris, 1972, to the Single European Act, 1987*, EUI Working Paper No. 88/328, Florence, EUI.

[2] See OJ C 20.12.73, 112/6.

[3] See OJ C 7.12.87, 328/15. For the second and the third Action Programmes, see OJ C 13.6.77, 139/1; OJ C 17.2.83, 46/1.

context.[4] From that moment on the EC has endeavoured to explore different aspects of liability in the sphere of both consumer and environmental protection. The Draft Directive on Product safety is expected to be adopted shortly, after a long period of preparation.[5] The Council recently adopted a common position which will be sent to the European Parliament for its opinion in second reading. Formal adoption is in any case expected shortly.[6]

In the discussion below we will first look at Community rules concerning damage caused by the transfrontier shipment of hazardous waste. This was the first area for which environmental liability was mentioned in a Community Directive (see paragraph 2). We will then discuss the Draft Directive on liability for damage caused by waste, issued in 1989 (see paragraph 3.1). In July 1991 a second, amended version of the Directive was published by the Commission, including some of the changes that had been proposed by the European Parliament and the Economic and Social Committee. The Community institutions are in the process of drafting a general Directive on environmental liability. In the Explanatory Memorandum of the 1989 Draft Directive the Commission announced that it "is currently preparing a communication to the Council and Parliament which examines the problems related to the introduction of a system of civil liability for damage to the environment." Similarly, the European Parliament stressed in the preliminary considerations to the amendments it proposed, that "there is still a vital need for a Draft General Directive on civil liability for damage to the environment." A discussion paper on environmental liability was circulated within the Commission early in 1991, but no official document was published. Hence our discussion is focussed on the second Draft Directive itself. The only other source of recent information to which we refer is a preliminary Commission document on the proposed Draft of the fifth Environmental Action Programme (see paragraph 4).

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[4] OJ L 1985, 210/29; see Joerges, Chr. (1989), *Product liability and product safety in the European Community*, EUI Working Paper No. 89/404, Florence, EUI.

[5] See Joerges, Chr. (1990), *Product Safety Law, Internal Market Policy and the Proposal for a Directive on General Product Safety*, EUI Working Paper, EPU No. 90/3, Florence, EUI.

[6] See *Europe*, 18 October 1991, No.5591, p. 13.

Finally some comments will be made about the Draft Convention of the Council of Europe on Damage Resulting from Activities Dangerous to the Environment, and its relation to Community activities in this field (see paragraph 4).

2. The Directive on the Transfrontier Shipment of Hazardous Waste

The first EC Directive addressing the issue of environmental liability dates from 1984. In the Preamble of the Council Directive on the supervision and control within the European Community of the transfrontier shipment of hazardous waste of 6 December 1984, we read:

> Whereas any difference between the provisions on disposal of hazardous waste already applicable or in preparation in the various Member States may distort the conditions of competition and thus directly affect the functioning of the common market...
>
> Whereas it is important that the liability of the producer and that of any other person who may be accountable for damage should be defined and the conditions of application determined in order to guarantee effective and fair compensation for damage which may be caused during shipment of dangerous waste.[7]

Art. 11 of the Directive creates a kind of three-step liability procedure. First of all, the producer of waste is given the responsibility to take "all necessary steps to dispose of or arrange for the disposal of the waste so as to protect the quality of the environment". Secondly, the Member States are given the task to "ensure that the obligations laid down in paragraph 1 (*i.e.* the obligations of the producer of waste, IJK) are carried out". Finally, the Council itself must, no later than 30 September 1988, determine "the conditions for implementing the civil liability of the producer in the case of damage or that of any other person who may be accountable for the

[7] OJ L 13.12.84, 326/31.

said damage and shall determine a system of insurance." The Directive was amended twice, but these changes did not concern liability.[8]

The obligation of the Council to establish further provisions regarding liability for damages still hasn't been fulfilled. On 15 September 1989, the Commission presented the proposal for a Directive on civil liability for damage caused by waste, of which an amended version was issued on 23 July 1991. The Directive, however, is not in force yet.

3. The Draft Directive on Civil Liability for Damage Caused by Waste

3.1 The first Proposal of the Commission

Almost a year after the deadline stated in Art. 11 of the Directive on the transfrontier shipment of hazardous waste, the Commission submitted the Proposal for a Directive on Civil liability for damage caused by waste.[9] Indeed if it had not been for the damage caused by the accident at the Sandoz plant, which obviously increased political attention for the subject, the 1989 document would have probably been issued later.

The Proposal calls for the harmonization of national liability rules, since "disparities among laws of the Member States concerning the liability for damage and injury to the environment caused by waste could lead to artificial patterns of investment and waste" (Preamble of the Directive). The following aspects of the Proposal deserve special attention: the interrelatedness of liability rules and the establishment of the Internal Market; the type of liability proposed in the Directive; the kind of reparation provided for in the Directive; the *locus standi* of common interest groups; and finally the legal basis of the Directive.

As far as the Internal Market issue is concerned we find the following considerations in the Explanatory Memorandum:

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[8] They were mostly technical changes, see Directive 86/279 of 12 June 1986, OJ L 181/13 and Directive 87/112 of 23 December 1986, OJ L 48/31, 32.

[9] COM (89), 282 final - SYN 217, OJ C 4.10.89, 251/3.

> A prime objective of the Directive is to apply the "polluter pays" principle on terms conducive to the goal of completing the internal market. The aim of establishing a uniform system of liability within the Community is to ensure, firstly, that victims of damage caused by waste receive fair compensation and, secondly, that industry's waste-related costs resulting from environmental damage are reflected in the price of the product or service giving rise to the waste. The occurrence of differences among national laws regarding the designation of the person liable (producer, holder) and the absence of a concerted development of notions like the damage and injury to the environment covered by liability, the causal relationship, the limitations of liability, etc, would lead to unequal conditions for competition among Member States and thus to artificial currents of investments and of wastes to those countries where conditions are least stringent for the operators and most disadvantageous to the victim (p. 1).
>
> The current differences in national provisions on the civil liability of the producer for damage and injury to the environment caused by waste are liable to distort competition, affect the free movement of goods in the internal market and give rise to differences in the level of protection of health, property and the environment. These differences therefore have a direct effect on the establishment or functioning of the internal market (p. 6).[10]

The Preamble repeats that diverging national liability schemes "would distort competition, affect the free movement of goods within the internal market and entail differences in the level of protection of health, property and the environment."

As far as the liability regime introduced by the Directive is concerned, the Explanatory Memorandum refers to the fact that both national and international legislation increasingly recognizes *no-fault or strict liability for environmental risks*. The Preamble states that "in view of the risk inherent in the very existence of waste, the strict liability of the producer constitutes the best solution to the problem." The Directive follows this trend and introduces a system of strict liability for damages caused by waste in Art. 3: "The producer of waste shall be liable under civil law for the damage and injury to the environment caused by the waste irrespective of fault on his part." The fact that the producer holds a permit issued by the public authorities does not affect this liability (Art. 6 para 2).

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[10] The Explanatory Memorandum is included in the COM document, but not in the OJ publication.

The conclusion that strict liability regimes for environmental risks exist as a general phenomenon throughout Europe, was challenged by the House of Lords in the UK. The Subcommittee on Environment of the House of Lords' EC Committee ordered an expert report, investigating recent trends in the continental EC Member States. The report, prepared by Terence Daintith, draws a careful conclusion: while no Member State appears to have "straightforward tortious liability, based on fault, for damage caused by waste... a variety of judicial and legislative devices are in evidence which may impose more demanding liability, some of which may appropriately be qualified as 'strict'."[11]

The different kinds of reparation that can be obtained under the Directive are listed in Art. 4. They include: a prohibition of the act causing the damage; the reimbursement of expenditure arising from measures to prevent damage or to compensate for damage; and *the restoration of the environment to its state immediately prior to occurrence of injury*. This last provision is rather new in civil liability law. As we will see in Part III, Italy now recognizes the restoration of the environment as a valid claim. Another provision that is interesting in view of recent developments in Italy is Art. 4 para 3 that reads: "the public authorities may take the legal action provided for in paragraph 1." As Maugeri explains in Part III, public authorities in Italy, under the new rules of the Act of 1986, N.349, have the right to take legal action against environmental damage.

Art. 4 para 4 determines that interest groups may bring an action as plaintiff, if they have standing under national law. Jessurun d'Oliveira qualifies Art. 4 para 4 as a failure since "it has not succeeded in unification or harmonization of rules concerning *locus standi* of public interest organisations. It refers to the law of the Member States as it stands or may develop, and does not exercise any direct

[11] See House of Lords Select Committee on the European Communities, Sub-Committee Environment, *Paying for Pollution: Civil Liability for Damage Caused by Waste*, House of Lords, Session 1989-1990, 25th Report, p. 134.

pressure on those Member States which have not yet introduced possibilities for group actions in the area of environmental pollution."[12]

The European Parliament proposed a different formulation for Art. 4 extending the *locus standi* of interest groups and clarifying the terms *injury to the environment* and *producer of waste*.[13] Some of the amendments proposed by the Parliament are now included in the second version of the Directive that was presented by the Commission in July of this year (see Paragraph 3.2). Similarly, some of the comments of the Economic and Social Committee have been incorporated in the second Draft. The suggestion to extend liability for waste to the carrier of waste or the person having actual control of the waste, in addition to the producer, was rejected as was the suggestion to change the legal basis of the Directive from Art. 100A to Art. 130R and S of the Treaty.[14] Art. 100A serves as the legal basis for all measures related to the establishment of the internal market. Environmental measures that have no bearing on the functioning of the internal market are based on Art. 130S, whereas Art. 130R contains the principles and objectives of EC environmental policy. Sometimes the Commission and the Council disagree about the legal basis of a proposed Directive, the distinction being relevant because of the difference in voting procedure prescribed by the two articles. Art. 100A requires a decision by majority vote, with an increased involvement of the European Parliament, the so-called *cooperation procedure*, while Art. 130S asks for decision by unanimity vote. When the Council recently changed the legal basis of a Directive proposed by the Commission from Art. 100A to Art. 130S, the Commission asked for a Court decision.[15] In its judgment, the Court formulated an extensive interpretation of Art. 100A, leaving little room for the application of Art. 130S, in all those cases where a measure regards environmental protection as well as the

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[12] Jessurun d'Oliveira, H.U. (1991), *Class Actions in Relation to Cross-Border Pollution. A Dutch Perspective*, EUI Working Paper, Law No. 91/19, Florence, EUI, pp. 36-37.

[13] See European Parliament 1990-1991, Minutes of the Sitting of Thursday, 22 November 1990, pp. 78-92.

[14] CES (90) 215, Opinions and Reports, 28 February 1990, pp. 2-3.

[15] See Judgment of the Court of 11 June 1991, *The Commission versus the Council*, Case C-300/89. Text only available in French.

internal market. The objectives of environmental protection, according to the Court, can be effectively pursued by measures on the basis of Art. 100A, given the fact that Art. 100A para 3 obliges the Commission, in its proposals of measures related to the establishment of the internal market that concern environmental protection, to take as a base a high level of protection[16].

3.2 The amended Proposal of the Commission

The second Proposal of the Commission for a Council Directive on civil liability for damage caused by waste indicates Art. 100A as the legal basis of the Directive, similar to the first proposal and contrary to the suggestion of ECOSOC.[17] In view of the Court decision just mentioned the Council is not expected to change this. Reference is made to Art. 130R, only insofar as it establishes the polluter pays principle and the prevention principle.

The following are the most significant changes in the amended proposal. First of all, a change of wording was introduced. Throughout the Directive the phrase *injury to the environment* was replaced by *impairment of the environment*. This new concept is more comprehensive, since it "includes lasting harm to the environment, unlike the term previously used."[18] Art. 2 para 1(d) describes impairment to the environment as *any significant physical, chemical or biological deterioration of the environment insofar as this is not considered to be damage to property*. The scope of application of the Directive described in Art. 1 thus reads:

> This Directive shall concern civil liability for damage and impairment of the environment caused by waste generated in the course of an occupational activity, from the moment it arises.

Secondly, the new proposal introduces an extension of liability to the *eliminator of the waste*, identified in Art. 2 para 1(f) as the person who carries out any of the

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[16] *Supra* fn. 15, consideration 24.
[17] See COM (91) 219 final - SYN 217, OJ C 23.7.1991, 192/5.
[18] See Explanatory Memorandum to the amended Proposal, *supra* fn. 16.

operations listed in Annex IIA or IIB to Council Directive 75/442/EEC.[19] The person who had actual control of the waste when the damage to or impairment of the environment occurred, has *secondary liability*. He will be held liable only if he is not able within a reasonable period to identify the producer. This provision is in line with the so-called *cradle-to-grave* registration of hazardous wastes which is prescribed by the Directive on the transfrontier shipment of hazardous waste discussed in paragraph 2.[20] On the basis of this registration waste materials can be traced back to their source. ECOSOC expressed its concern about this two-tier system of liability, pointing to the fact "it is likely to cause problems in practice from the point of view of the right to compensation, particularly in cases where the damage which triggers liability occurs during the transport or storage of the waste and not in its production. Injured parties will frequently have difficulty in identifying the producer within the required time limit."[21] I don't think this problem will arise, as long as the carrier is indeed held liable if the producer cannot be identified. ECOSOC proposed to attribute liability to all persons having actual control of the waste. The Commission, as we know, only added the liability of the eliminator, and forgot to include a reference to it in the text of Art. 3 para 1 on the scope of liability:

> The producer of waste shall be liable under civil law for the damage and impairment of the environment caused by the waste, irrespective of fault on his part.

As far as the liability of carriers is concerned, the amended Proposal follows the suggestion of the Parliament to refer to the provisions of the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels of 10 October 1989 (Art. 3 para 1 second sentence).

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[19] Council Directive of 15 July 1975 on waste, OJ L 25.7.75, 194/39. To my knowledge the Directive doesn't have any Annexes.

[20] See Annex I of the Directive, OJ L 13.12.84, 326/37-39.

[21] *Supra* fn. 14, at 5.1.

The third amendment I want to discuss regards the *locus standi* of common interest groups as elaborated in Art. 4. The text of the new Art. 4 follows the suggestions of the Parliament almost word by word.[22] Art. 4 para 1 now reads:

> The national laws of the Member States shall determine
> (a) the person who may bring a legal action in the event of damage to or impairment of the environment caused or about to be caused by waste.

Note that a "person" is defined in Art. 2 para 1 (e) as "any natural or legal person as defined by public or private law." Member States must also determine:

> (b) the remedies available to such persons which shall include:
> (i) an injunction prohibiting the act or correcting the omission that has caused or may cause the damage and/or compensation for the damage suffered;
> (ii) an injunction prohibiting the act or correcting the omission that has caused or may cause impairment to the environment;
> (iii) an injunction ordering the reinstatement of the environment and/or ordering the execution of preventive measures and the reimbursement of costs lawfully incurred in reinstating the environment and in taking preventive measures (including cists of damage caused by preventive measures).

You will recall that the first Proposal stated in Art. 4 para 4 that interests groups had the right to bring an action as plaintiff only to the extent that the national law of a Member State attributed them this right. Art. 4 para 3 now reads:

> Common interests groups or associations, which have as their object the protection of nature and the environment, shall have the right either to seek any remedy under paragraph 1(b) or to join in legal proceedings that have already been brought. The conditions under which the interest groups or associations defined in the previous sentence may bring an action before the competent authorities shall be laid down by national legislation.

The second sentence was not included in the text proposed by the Parliament, which, according to the Commission "failed to make sufficiently clear reference to

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[22] *Supra* fn. 13, p. 84-86.

the national legislation as regards the conditions under which such actions are admissible."[23]

The text of Art. 4 is a real improvement with respect to the first Proposal, although it remains to be seen how soon Member States will clarify the standing of interest groups in their respective legislations. Art. 14 requires that *Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive, not later than 1 January 1991* (sic!).

Finally I want to comment on the provisions concerning insurance in the amended Proposal. In the Preamble to the first Proposal the Commission stated that market conditions at present were such that it was not opportune to establish a mandatory system of insurance. ECOSOC mentioned in its comments that it fully agreed with this statement.[24] The Preamble to the new Proposal, however, states that "the liability of the producer and eliminator of waste must be covered by insurance or other financial security." Art. 3 para 2, furthermore, requires that "the producer shall include in his annual report the name of his insurers for civil liability purposes." Again it forgot to mention the eliminator. And last but not least, Art. 11 determines that

> 1. The liability under this Directive of the producer, who in the course of a commercial or industrial activity produces waste, and of the eliminator shall be covered by insurance or any other financial security.
>
> 2. The Council, acting on a proposal from the Commission shall determine by 31 December 1992:
> - common rules governing the situation arising
>
> (i) where the person liable is incapable of providing full compensation for the damage and/or impairment of the environment caused or
>
> (ii) the person liable under this Directive cannot be identified.
>
> In this regard the Commission shall study the feasibility of the establishment of a 'European Fund for Compensation for Damage and Impairment of the Environment Caused by Waste.'

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[23] *Supra* fn. 16, Explanatory Memorandum.

[24] *Supra* fn. 14, at 9.3.

The Commission did not include Parliament's suggestion to fix a limit on the liability of any person for claims arising from any one accident. The full consequences of the system of compulsory insurance that is now proposed need further study, as does the establishment of a Fund for damage not covered by insurance.[25] It is clear from the text itself, however, that the present Proposal, much more than the first version, reflects the policy approach laid down in the Treaty of Rome that asks for economic integration and the establishment of the internal market together with an elevated level of environmental protection.

The same approach can be found in the internal Commission document on the fifth Environmental Action Programme. The fourth Environmental Action Programme addressed liability issues briefly, in the context of a discussion of economic instruments (par. 2.5.5) and in relation to waste management, announcing proposals on civil liability and insurance for the transfrontier movement of hazardous waste (par. 5.3.6).[26]

In the preparatory document for the fifth Environmental Action Programme, the Commission proposes an *integrated approach* towards environmental liability based on the notion of shared responsibility for the environment. The approach combines civil liability with *joint responsibility systems*. Civil liability, according to the document, typically assigns the duty to provide a remedy for damage to the person who has caused the damage; it enables one private party to seek compensation from another private party. It thus creates the incentive to refrain from damage-causing activities and to practice better risk management. This is an important preventive aspect of civil liability. But since environmental damage is often not damage to private interests, special measures are required to empower public agencies and public interest groups to take legal action on behalf of the public interest, to ensure that the damage is restored and to establish joint responsibility systems when the liable party cannot be identified. Joint responsibility systems are ways of spreading

[25] In its comments to the first Proposal, ECOSOC listed some first questions to be answered. *Supra* fn. 14, 9.1-9.4.

[26] *Supra* fn. 3.

the cost of compensation among a number of parties, for instance through mutual insurance and/or the creation of funds.[27]

These suggestions are generally in line with the amendments to the Directive on Civil liability for damage caused by waste that were discussed above. We notice an emerging trend to look at liability as a programmatic principle, closely related to other environmental principles. No longer is liability restricted to the sphere of civil law applied in cases of wrongful or negligent conduct. Liability issues have become more closely intertwined with public policy and societal steering. Liability rules are used as regulatory instruments with a preventive effect on the one hand and a risk management function on the other hand. Through the creation of liability funds, certain risks and the costs of compensation for damages are transferred to society as a whole avoiding many of the injustices of traditional civil liability procedures. Finally, we should note that an integrated approach to environmental liability and the extended *locus standi* of interest groups it entails will have a positive effect on the implementation and enforcement of Community measures, one of the most problematic areas of Community environmental policy.

4. The Council of Europe Draft Convention on Damage resulting from Activities Dangerous to the Environment

The Draft Convention proposed by the Council of Europe has great importance for the initiatives of the Community. In fact, the Economic and Social Committee underlined the need to take account of the work of the Council of Europe in its opinion on the EC Directive.[28] It is clear, moreover, that the text of the Draft Convention has had an impact on the discussions on liability in Community circles and on the text of the amended version of the Directive. The object and purpose of the Convention are stated in Art. 1:

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[27] The fifth Environmental Action Programme is scheduled to be published in March/April 1992.

[28] *Supra* fn. 14, p. 1.

> This Convention aims at ensuring adequate compensation for damage resulting from dangerous activities and provides for means of prevention (of damage to the environment) and reinstatement (of the environment).

This is not the right place to discuss the entire text of the Convention, I will just highlight the provisions that are most relevant in relation to environmental liability in the EC context.[29] The Convention places liability with the *operator* of a dangerous activity (Art. 6), meaning "the person who exercises the actual control of the activity" (Art. 2 para 5). A *person* can be "any individual or partnership or any body governed by public or private law, whether corporate or not, including a State or any of its constituent subdivisions" (Art. 2 para 6). The notion of operator coincides to a large degree with the added concept of *eliminator* in the second version of the Proposed Directive. Art. 6 para 1(b) reads:

> The operator of a waste disposal installation or site at the time when damage caused by these activities becomes known shall be liable for this damage. ... However, if this operator or the person who suffered the damage proves that the damage resulted from an incident which occurred at a time when another person was the operator, this former operator shall be liable.

The last sentence of the provision reminds us of the two-tier liability introduced in the Directive. The operator *cq* eliminator is held liable unless he can prove the liability of the person who had actual control of the waste.

Art. 11 introduces compulsory insurance or other financial security, just like Art. 11 in the proposed Directive:

> To cover the liability under this Convention, the operator shall be required to have and maintain insurance or other financial security of such type and terms as the competent public authority shall specify.

The Convention doesn't propose the establishment of a European Fund which I think is an omission. The only indirect reference to the possibility of creating funds is contained in the phrase "or other financial security of such type and terms" in

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[29] See also Jessurun d'Oliveira (1991), *supra* fn. 12, at 3.4 and at 4.2.3, and *Environmental Policy and Law*, 20/6 1990, pp. 238 ff.

Art.11. The execution of this option, however, is left to the initiative of the national authorities. The Standing Committee which will be set up to ensure the application of the Convention (Art. 25) should seriously consider the creation of a European Fund for Damage resulting from Activities Dangerous to the Environment.

As far as the *locus standi* of interest groups is concerned Art. 18 para 1 contains the following provision:

> Any association or foundation which according to its statutes takes care of the protection of the environment and which complies with any further conditions of national law of the State Party where the action is brought is entitled to bring action in court or before a competent administrative authority.

An interesting measure is introduced in Art. 18 para 4: State Parties may declare that an association or foundation having its seat in another State Party and complying with the conditions mentioned in para 1 shall have the right to take action in that State.

The Convention talks at several points about the special position of the European Community. Art. 32 determines that the EC is a potential signatory of the Convention. One of the five alternative texts of Art. 24 about the Relations between the Convention and other international agreements or arrangements reads:

> In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

I hope this alternative doesn't make it into the final text. Rather I would propose a text which reads: In their mutual relations, the Council of Europe and the European Economic Community shall coordinate the initiatives in the field of environmental liability and other measures relating to compensation for and restoration of damage to the environment.

5. Conclusion

The initiatives of the European Community in the field of environmental liability have so far focussed on liability for damage caused by waste. In the amended version of the proposed Directive on this topic, the Commission has included some important improvements that had been suggested by the European Parliament and, to a lesser degree, by the Economic and Social Committee. The most important changes include: the extension of liability to the *eliminator of waste*; mandatory insurance for the producer and for the eliminator of waste; *locus standi* for common interests groups; a change in wording of the notion *injury to the environment*, which is now referred to in terms of *impairment of the environment*. The Commission also proposes to analyze the feasibility of the establishment of a European Fund for Compensation for Damage and Impairment of the Environment caused by Waste.

Very much in line with the EC initiatives mentioned is the proposed Convention of the Council of Europe on Damage Resulting from Activities Dangerous to the Environment. A close cooperation between the two levels of decision making is recommended for the future. Especially in view of the possible creation of a General European Fund for Compensation for Damage and Impairment of the Environment it is necessary to coordinate initiatives at the pan-European level.

Part III - Liability for Environmental Damage in Italy

Maria Rosaria Maugeri

1. Introduction

The object of this part of the paper is to offer an outline of both jurisprudence and doctrine on the subject of liability for environmental damage in Italy. In particular, I will focus my attention on the legal regime introduced by Art. 18 of the law of 8 July 1986, n. 349 on the Establishment of the Ministry of the Environment and Provisions on Environmental Damage. In section 2, I will start with a short description of how the problem of environmental damage was dealt with prior to the enactment of the above-mentioned Art. 18. This will, I hope, help anyone unfamiliar with Italian affairs to understand a text which, for reasons intrinsic to the Italian legal system, can be seen to be a mixture of legal elements, with both private and public characteristics. In sections 3, 4, 5 and 6, I will focus my attention on the field of application of this provision and on the problems of interpretation which are created. In particular, I will concentrate on the differences which arise between the application of this provision and the system of civil liability in general. I will also try to identify the party who is entitled to compensation for damage, as well as the party entitled to promote an action under the provision. Sections 7, 8, and 9 will be dedicated to the delicate subject of jurisdiction in the field of environmental damage. This problem is closely linked to another important question; namely, whether it is possible to insert this new legal provision into the framework of civil liability. Finally, I will touch on the problem of how to quantify damage.

2. The Problem of Environmental Damage prior to Enactment of Art. 18 of the Law of 8 July 1986 N. 349

Before describing the legal regime contained in Art. 18 of the law of 8 July 1986, n. 349 which governs the subject of environmental damage, it is appropriate to

briefly review the jurisprudence and doctrine which preceded its enactment (for a more detailed treatment, see Libertini). In particular, I wish to pay regard to the different theories on the problem of the 'subjective situation' relating to the environment (*i.e.* the problem of who or which body has rights, rights of action, interests and duties with reference to the environment).

One school of thought has developed within the case law of the Court of Accounts (State Auditor's Department),[1] in which environmental damage has been deemed to be *danno erariale* (financial damage). The case law of this court established the following:

(1) That the State, as the representative of the collectivity, has a right to compensation for environmental damage;

(2) That the *Procuratore Generale presso la Corte dei Conti* (Public Prosecutor of the Court of Accounts) has the task of initiating any such action;

(3) That it has exclusive jurisdiction over such actions (see Arts. 25[2] and 103 of the Constitution).

The founding principles of these decisions are two-fold: a conceptualisation of the environment as a 'unique good' destined for collective enjoyment and the extension of the pre-existing concept of *danno cagionato allo Stato* (damage caused to the State).[3] This latter concept was extended beyond its original meaning of financial damage (*i.e.* alteration to or disturbance of the budget) and patrimonial damage (*i.e.* destruction, misappropriation or damage of *beni demaniali* -domainal goods-) to include damage caused to goods destined for collective use.

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[1] Art. 103, second section, of the Constitution provides that "The Court of Accounts (State auditor's Department) has jurisdiction over matters of public accounts and such other questions are specified by law" (as translated in Constitutions of the countries of the world).

[2] Art. 25, first section, of the Constitution, provides that "No one may avoid proceedings resulting from offences against legislation in force" (as translated in Constitutions of the countries of the world).

[3] Damage caused to the State, within the meaning of Art. 82 of the *Legge di contabilità generale dello Stato* and Art. 52 of *Testo Unico delle leggi sulla Corte dei Conti.*

Additionally, the Court held that the financial award could also be of a punitive character (this finding is somewhat foreign to Italian civil doctrine).[4]

Two further schools of thought are to be found within the ambit of civil law doctrine. The first, based on a debate found primarily in French doctrine, affirms the existence of a general right to the enjoyment of the environment, capable of being identified as one of the rights of the person (Patti). The second develops the idea of collective environmental damage within the general scheme of civil liability (Salvi). This latter theory is based on an 'individualisation' of the damage, in the sense that it must be suffered in a particular way by one or more legal subjects. In the absence of this condition there can be no tortious liability. This thesis distinguishes two situations: *patrimonial damage*,[5] in which case the *locus standi* belongs to the body representing the collective interest, usually territorial authorities; and *non-patrimonial damage*, in which case the *locus standi* belongs to those subjects, private or public, on whom the representation and guardianship of certain collective interests has been conferred by law, when these interests are violated by criminal behaviour.

I will mention only one other theory, which attempts to interpret the problem of environmental damage in objective terms. This thesis, elaborated by Lener, through an examination of Arts. 2, 3, 9, 32, 41.2, and 42.2 of the Constitution,[6] identified

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[4] For the relevant case law see, for example: Sez.I, 15 May 1973, n. 39, in *Foro Amm.*, 1973, I, 247 ss.; Sez.I, n. 108 of 1980, in *Foro It.*, 1981, III, 593 ss.; United Sections, 16 June 1984, n. 378/A, in *Foro It.*, 1985, III, 37 ss. The first two cases deal with damage to the environment in the National Park of Abruzzo, and the last with the problem of the so-called 'Red Mud of Scarlino'. Doctrinally, this thesis is strongly supported by Judge Maddalena (for criticism of this position see Libertini).

[5] *Patrimonial Damage*, no longer tied to a mathematic conception but linked rather to the economic relevance that the alteration or destruction of collective goods have in themselves, and which necessarily impinges on the collectivity.

[6] Art. 2 of the Constitution provides that "The Republic recognizes and guarantees the inviolable rights of man both as an individual and as member of the social groups in which his personality finds expression, and imposes the performance of unalterable duties of a political, economic and social nature".

Art. 3 Const. provides that "All citizens are invested with equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions and personal or social conditions.

It is the responsibility of the Republic to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevent the full development of the individual

(continued...)

certain duties to be placed on those, who have powers capable of being exercised in such a way as to affect the environment. These duties, although not matched by correlative rights, are nonetheless important for the safeguarding of certain other interests, so that their breach constitutes a qualified abuse.

The above is a far from exhaustive exposition on the subject nor is it intended to be such. I refer to the different theories, and to the authors who might be considered the most representative exponents of each, to demonstrate those elements of argument, which I consider to have most influenced the formation of Art. 18 and to which I will refer in explaining its 'anomalies'.

3. The Concept of Environment and the Field of Application of Art. 18

The law of 8 July 1986, n. 349, established the Ministry of the Environment in Italy. Within the ambit of this law, Art. 18 is of particular importance as it "introduces into our legal scheme the concept of environmental damage. It entails an innovation of great import, so much so as to justify a qualification to the very title of the draft law", to quote the Explanatory Memorandum, which significantly is "Establishment of the Ministry of the Environment and *Rules in the Matter of Environmental Damage*". The provision in question represents the culmination of a lengthy debate

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6(...continued)
and the participation of all workers in the political, economic and social organization of the country".

Art.. 9 Const. provides that "The Republic promotes the development of scholarship and scientific and technical research.

It safeguards the natural beauties and the historical and artistic wealth of Italy".

Art. 32 Const. provides that "The Republic provides health safeguards as a basic right of the individual and in the interests of the community, and grants medical assistance to the indigent free of charge.

No one may be forced to undergo any particular medical treatment, save under the provisions of the law. In no case shall the law violate the limits imposed by proper respect for the human person".

Art. 41, second section, Const. provides that "Private economic enterprise is open to all.

It cannot, however, be applied in such a manner as to be in conflict with social utility or when it is prejudicial to security, freedom and human dignity (...)".

Art. 42, second section, Const. provides that "Private ownership is recognized and guaranteed by laws which prescribe the manner in which it may be acquired and enjoyed and its limitations, with the object of ensuring its social function and of rendering it accessible to all" (as translated in Constitutions of the countries of the world).

about environmental damage, and more generally about public damage to which I referred above.

The term of reference used to define the ambit of the provision is based on the concept of *environment*. As already noted by Luminoso, the meaning of such a notion is important as, contrary to the usual practice whereby one delimits the field of application of a norm by the character of the act that produces the harm (e.g. Art. 2050 c.c.: Liability arising from the exercise of dangerous activities; Art. 2051 c.c.: Damage caused by things over which control is exercised, etc.), in the case of Art. 18 the field of application is defined with reference to the *good* affected by illicit behaviour.

While this may not be the correct forum, in which to take a position on the subject, it may, however, prove useful to do so in order to shed some further light on the concept of environment. On this point, the positions of both doctrine and jurisprudence are varied and often ambiguous:

- There is no agreement on the ordinary, non-legal meaning of the notion of environment, in fact, each interpretation reflects a different social and political perspective;
- The law does not define what is meant by environment, taking as given something which, however, is not;
- There was an attempt to identify the meaning of the concept by interpreting the law in question, n. 349, and in particular by referring to the competences of the Ministry of the Environment (Giampietro), but I do not think that this gives satisfactory results (cf. Libertini).

The lawyer is thus required to ascribe a specific content to the legal concept of environment. However, it is not within the scope of this chapter to present a wide ranging analysis of the different positions on this point (for a detailed treatment see Libertini); it is enough to detail how these may be categorised under two broad headings:

- The first includes the supporters of the so-called unitary theory of the environment, for whom the environment is a unique good. Within this legal theory, the resulting definitions of the environment are many (e.g. "everything

around us" (Anastasi, Cortese, Pastore, Alinante - as cited by Libertini); "man's habitat" (Bigliazzi Geri); "global ecological equilibrium" (Ruffolo - as cited by Libertini); "the right of the biosphere" (Pigretti - as cited by Libertini) etc.).

- The second school of thought, which I prefer as it seems to me that no system has yet enforced a law with "global vision of the environment", includes those who have an atomistic vision of the environment (Giannini, Di Giovanni, Libertini). In other words, they consider the environment to be made up of a plurality of distinct goods. In the general legal order we can find a plurality of criteria, such as the rational use of resources (see Art. 44 of the Constitution; hygienic environment (see Art. 32 of the Constitution); preservation of the environment as a cultural good (see Art. 9 of the Constitution); and the principle of the respect for life (see, but problematically, Art. 4 of the Constitution). These criteria, laid down over centuries, are still present as expressions of vital necessities and, hence do not allow us to construct a single definition of the environment.

The case law seems to have adopted the unitary notion of the environment. Both the Constitutional Court and the Court of Cassation in United Sections, however, use ambiguous language of a dubious logical rigour. In fact, the Constitutional Court, in a judgment of 30 December 1987, n. 641 (in *Corr. giur.*, 1988, 234) considers the environment to be a unitary material good with various components, each of which, individually and separately, can be the object of care and protection; and the Court of Cassation in United Sections, in a judgment of 25 January 1989, n. 440 (in *Corr. giur.*, 1989, 505) considers the environment as a unitary and immaterial good, but capable of being divided into four aspects, to wit: "environment as territorial order, environment as the wealth of natural resources, environment as landscape in its aesthetic and cultural value and environment as the condition for a healthy life".

Returning to the field of application of Art. 18, the greater part of jurisprudence holds that this provision is limited to environmental damage *tout court*, leaving to private persons and associations (to which point I will return later) the possibility

of taking action to protect their patrimonial and personal rights if compromised by environmental degradation (Cass. U.S., n. 440/1989).

In particular, they can take action for the following:

1) **Violation of the right to a healthy environment** (which right is to be understood as a fundamental attribute of human personality - Pret. pen. Vibo Valentia, 9 December 1986, in *Nuovo dir. agr.*, 1987, 157) on condition that the complainant is indigenous to the territory in which the environmental injury occurred and, further, that the injurious act be, at least potentially, capable of harming the psycho-physical integrity of the subject or social formation (trib. Verona, 19 October 1988, in *Giur. mer.*, 1989, I, 552);
2) **Damage to goods which are in public or private ownership** (or which are the object of rights of enjoyment);
3) **Prejudice caused to owners of legal concessions** (Cass., 28 October 1988, n. 5856, in *Cons. Stato*, 1989, II, 79).

A dual system thus emerges, in which the same injury can give rise to two separate causes of action, *i.e.* on the one hand, you have the action under Art. 18, which we will see to be reserved to the State and/or territorial bodies, and on the other hand, you have tortious liability. This situation gives rise to some theoretical and practical difficulties. The theoretical problem relates to the possibility of conceiving of a subjective environmental right in our legal order (Giampietro, Verardi, and recently, Francario), while the practical problems relate to the co-ordination of these various actions. Even if it were conceptually possible to make a distinction between damage suffered by a private person and damage suffered by the collectivity (one can consider the difference between damage suffered by the owner of land on which centuries-old trees were destroyed, and the damage suffered by the collectivity whose interest in safeguarding the environment has been disturbed by the same injurious act) this would not be easy on the practical level; one need only think of the problem of double quantification of damages.

With respect to this, the Court of Cassation (Un. Sect., n. 440/1989) has recently affirmed that it is best to use the *simultaneous processus* in each case in which there

are several complainants having interconnected compensatory demands, so as to avoid contrasting results. While agreeing with the Court on this point, I do not think that the problem of coordination is thereby completely solved. It is enough to think of a hypothetical situation, such as the example cited above, where the landowner had already obtained compensation for damage before the State has acted to have the land returned to its pristine condition (see Art. 18.8). Can the malfeasor in the latter case raise some defence? There are currently no satisfactory answers to this question. To this end, one can only hope for further reflection on this point both judicially and doctrinally.

4. Typification and Criteria for Imputation of Liability

The first section of Art. 18 provides that "every malicious or negligent act in violation of law, or of any provision adopted on the basis of any law, that compromises the environment, causing to it any damage through alteration or deterioration, in whole or in part, obliges the author of such an act to compensate the State".

As is evident, the wording of the section is derived from that of Art. 2043 of the civil code.[7] There is, however, an addition to the formula of Art. 2043, to wit, the reference in the text to the "law or any provision adopted on the basis of law", the violation of which triggers liability. The 1986 legislation has therefore created a restrictive distinction in regard to the general scheme of civil responsibility, re-introducing the argument of 'typification'.[8] As was noted by Bigliazzi Geri, this

[7] Art. 2043 c.c. (Compensation for unlawful acts) provides that: "Any fraudulent, malicious or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages" (as translated by Beltramo, Longo, Merryman).

[8] In all systems there is the problem of the distinction between the harmful unlawful acts and the harmful lawful acts. "In some of the juridical systems the problem is solved with unlawful typical figures. In Italy, on the contrary, (as in, *i.e.*, France, Switzerland and Austria) there is a very general principle, that of Art. 2043 c.c., which defines the unlawful act as: 'Any fraudulent, malicious, or negligent act that causes an unjustified injury'. It is true that alongside this rule (Art. 2043 c.c.) there are others that provide and regulate numerous particular kinds of unlawful acts (...). But the presence of Art. 2043 opens the lists of the unlawful acts, permitting the addition of other figures to those (continued...)

distinction would work only on an abstract level of opinion, because the typicity of civil responsibility has been asserted by some authors also in relation to Art. 2043. For these authors, the express provision in Art. 18 would serve only as a confirmation of this point. Some scholars have identified the legislative choice of 'typification' as one of the signs of a punitive function, that would characterize environmental liability.

Returning to the interpretation of Art. 18, I agree with the following propositions:

- It is not necessary that the violated law be specifically intended for protection of the environmental good (Libertini);
- The violated law in question includes not only specific norms of conduct but also more general normative principles contained in environmental legislation (Cendon/Ziviz, Libertini);
- Liability can also be triggered by omission (Libertini).

While the Constitutional court has, on the one hand, stressed that liability under Art. 18 was linked by the legislature to "certain and unequivocal parameters" thereby showing a preference for the same restrictive interpretation which is attached to *certainty* in civil responsibility, it immediately afterwards, in the course of its judgment, referred to what would seem to be a general principle of *due-diligence*, the violation of which makes any damage caused actionable. The precise wording of the court was that "the formal respect of rules must not exonerate any acts of negligence or bad faith in the exercise of any administrative activity or enterprise, as these acts are always prohibited, and contrary to constitutional principles of good management of the public administration, of the social function of property and of limits on private initiative which must in any case not be violated".

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[8](...continued)
expressly provided in specific rules. Thus is received the principle of the a-typification of the unlawful acts" (Trimarchi).

There has also been an attempt in some of the case law to open up and overcome the straitjacket of 'typification' and thus one reads in the judgment of a *Pretore* (Pret. Verona, 1 December 1988, in *Riv. giur. ed.*, 1989, I, 469) that "the fact that Art. 18.1 sanctions only those injurious acts committed in violation of any law or any provision adopted pursuant to any law does not protect the position of defendants, as an event prejudicial to the environment may arise, as in the present case, from an activity authorized by the public administration. This can occur both in the management of an installation which does not conform to the provisions of existing law, or in the illegality of an administrative act of authorisation (in which case the act would be disregarded by the ordinary judge)".

The criteria for the imposition of liability in Art. 18.1 are purely subjective: intention and negligence. This restriction of liability with respect to the general system of extra-contractual responsibility (which also allows for strict liability for damage) has been construed as another sign of the punitive nature of environmental responsibility (Bigliazzi Geri).

The results of this legislative choice are the following:

- Arts. 2050, 2051 and 2052 of the civil code[9] could only be used on the condition that they be considered as an inversion of the burden of proof;
- The application of Art. 2049 of the civil code[10] would certainly be excluded as would all other provisions imposing strict liability, unless these latter rules are endowed with a further degree of specificity, e.g. the rule contained in Art.

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[9] Art. 2050 c.c. (Liability arising from exercise of dangerous activities) provides that: "Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instruments employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury" (as translated by Beltramo, Longo, Merryman).

Art. 2051 c.c. (Damage caused by things in custody) provides that: "Everyone is liable for injures caused by things in his custody, unless he proves that the injuries were the result of a fortuitous event" (as translated by Beltramo, Longo, Merryman).

Art. 2052 c.c. (Damage caused by animals) provides that: "The owner of an animal, or one who makes use of it, for the period of such use, is liable for damage caused by the animal, regardless of whether the animal was in his custody or strayed or escaped, unless he proves that the damage was the result of a *fortuitous* event" (as translated by Beltramo, Longo, Merryman).

[10] Art. 2049 c.c. (Liability of masters and employers) provides that: "Masters and employers are liable for the damage caused by an unlawful act of their servants and employees in the exercise of the functions to which they are assigned" (as translated by Beltramo, Longo, Merryman).

21 of the law of 21 December 1982, n. 979, on the pollution of marine waters (Libertini, Luminoso. For a particular view on this, see Cendon/Ziviz).

5. Those Entitled to Compensation for Damage

Art. 18 presents other problems of interpretation in relation to the individualisation of those entitled to compensation for damage. The first section in fact seems to identify only the State as being entitled to compensation for damages. This solution, which is certainly influenced by the theory developed within the jurisprudence of the Court of Accounts (see above), seems both incongruous and misleading (Francario) in the following situations:

- When the managing public body has already covered the costs for reinstatement;
- When the administrator in question can not intervene due to lack of funds. There is, in fact, no assurance that the sum accorded to the State as compensation will be, in effect, utilised for restoring the environment because there are no legal ties on how the sum will be used in the future.

To remedy this, an interpretation has been proposed within doctrine, whereby the reference to the "State" in the first section of Art. 18 would enounce only that "the principle for which the action for compensation of collective environmental damage refers to Public Administration and not to the private subject" (Libertini).

In this perspective, territorial bodies (within the meaning of Art. 18.3) would have standing *iure proprio* to seek the award of compensation (Libertini). By contrast, for those authors who adhere to the thesis of the State as the only body entitled to damages, the standing to act of the territorial bodies (regions, provinces and local authorities) would instead only have a procedural quality. These bodies would act by way of procedural substitution and not through any formal entitlement to safeguard the collective interest. Following from the doctrine which defined environmental law in objective, and not subjective, terms (Lener see above), a thesis was developed seeing in the standing of the State and the territorial bodies a simple

right to take legal action which is not tied to a specific interest of that body (Grasso).

The case law established in a few judgements that territorial bodies have the right to compensation for damages. In the majority of these cases the territorial bodies appeared as civil plaintiffs in penal proceedings.[11]

6. The Role of Environmental Associations

The third section of Art. 18 provides that "the action for compensation for environmental damage, also if exercised within the penal court, is promoted by the State, as well as the territorial bodies, on which rests the proprietorship of the goods which are the object of the harmful fact".

On the contrary, the environmental associations, identified on the basis of Art. 13 of the same law n. 349,[12] can only:

- Denounce the harm caused to environmental goods, of which they know, in order to press for the exercise of the right to action by the legitimated subject

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[11] See *i.e.* Pret. Pietrasanta, 23 February 1987, in *Foro It.*, 1987, II, 714; Pret. Mestre, 3 June 1987, in *Giur. mer.*, 1988, III, 417, in which the statement referring to the rights of the territorial bodies was only incidental. In fact, in this case the problem was only referred to during the acceptance of the associations in criminal cases. See also: Cass. Pen., sez. III, 11 January - 21 July 1988, n. 27, in *Cons. Stato*, II, 89, 439, which affirms the right of territorial bodies to take action for compensation for damages caused by industrial waste. However, in this case it is not clear if the territorial bodies are taking action for environmental damage or for something else. In fact the court directly afterwards affirms that in the case of environmental damage the judge must send a copy of the judgement to the Minister of the Environment in order to give him the possibility to act, exercising the powers provided in Art. 18 of the law n. 349; Pret. Verona, 1 December 1988, in *Riv. giur. ed.*, 1989, I, 469 (civil judgement), which seems to admit the right of the territorial bodies to take action for compensation although also in this case the statement is only incidental to the judgement.

[12] The legitimacy given by Art. 13 is to: "The associations of environmental protection with a national character and those present in at least five regions" that "are identified in the decree of the Environmental Secretary on the basis of their projected purposes and with a democratic internal order provided by statute, as well as the continuity of the action and its external relevance, subject to the opinion of the National Council for the Environment to be expressed within ninety days of the application". By the decrees of the Environmental Secretary of 20 February 1987 and 1 March 1988 the following associations have been identified, under the above-mentioned Art. 13 of the law n. 349: Amici della terra, Associazione Kronos 1991, Club Alpino italiano, Federnatura, Fondo ambiente italiano, Gruppi ricerca ecologica, Italia nostra, Lega ambiente, Lega italiana protezione uccelli, Mare vivo, Touring club italiano, World Wildlife found, Greenpeace and Associazione ambiente e lavoro.

(section 4). It is not clear if owing to this denunciation the legitimated subjects are free to exercise the action or not if there are presuppositions (such as an obligation, see Maddalena);

- Apply to the administrative court to obtain an injunction against the illegitimated acts;
- Attend the action for environmental damages, promoted by the State or by the territorial bodies, both before civil or criminal courts (section 5). Here, the main interpretative doubts concentrate upon the possibility that the associations might appear as civil plaintiff in criminal proceedings.

In the case law different positions are taken. One of the most restrictive of these seems to be the position of Pret. Mestre, (ord.) 3 June 1987 (in *Giur. mer.*, 1988, 417). In this case, the *Pretore* refused the associations the action, stating that "the law n. 349/1986 ascribes to the State and to territorial bodies alone, the possibility to appear as civil plaintiff in a criminal trial in order to obtain compensation for environmental damage; thus the environmental associations are excluded from the exercise of this possibility and cannot attend even *ad adiuvandum*, because this latter is not admitted in the criminal trial". Section 5 of Art. 18 will be "applicable only when the action for compensation for environmental damages is promoted by the legitimated subjects in civil proceedings". This scheme is criticized by those (Verardi) who think that there exists the possibility to make Art. 18 compatible with the code of criminal procedure. In order to overcome the problem of the absence of provision in the code of criminal procedure for the status of the civil plaintiff *ad adiuvandum*, it has in fact been proposed to apply analogically those rules provided for the civil plaintiff and for the presence of the responsible party under civil law, which are closer and more similar to the institution of the presence of the associations in the trial. In contrast to Pret. Mestre, the Trib. Vallo della Lucania, 20 November 1986 (in *Riv. pen.*, 1987, 469), even while stressing the fact that the associations do not have subjective right to environmental patrimony, admits the possibility that those associations might attend *ad adiuvandum* (substantially in conformity App. Trento, 9 June 1987, in *Riv. pen.*, 1987, 954). The position expressed in the ordinance of the Trib. Trento, 15 April 1988, in relation to the

Stava's tragedy (quoted almost entirely in Verardi's article, in footnote n. 20, in *Giur. mer.*, 1989, IV, 1056) should also be noted. In this ordinance the presence of the environmental associations at the trial is declared not admissible because:

- "The constitution of the State indispensable for the admission of the cohesive presence of the exponential bodies" was lacking. This gap was not filled by the constitution in the judgment of the Tesero's commune, because this last, according to the court, did not exercise in judgment the action for the environmental damage but something different;
- The court did not think that the standing of the associations could have been admissible "under the power of the principles of law and rules that actively legitimate the action as a civil plaintiff in the criminal trial. In fact, in this case and in the absence of an express legal provision, a position of subjective right for the environmental associations is not recognizable, even with reference to the pursuit of the statutory aims, rather than diffuse interest: it cannot, therefore, result that although crimes were imputed, these associations had suffered patrimonial or non patrimonial-damage directly linked with the injury of a right". In other words, the court, in addition to excluding a subjective right for environmental safety for the environmental associations, has specified, in the presence of the State or of the exponential bodies that *have an action on environmental damage*, the presupposition legitimating the presence of the above-mentioned associations.

It is, therefore, necessary to identify the action for environmental damage, and to this end I again foresee a joint effort by both case law and doctrine to solve the problems inherent to the separation of the field of application of Art. 18 in the definition of the concept of environment and in the differentiation between environmental damage and other kinds of damage.

Another case law trend starting with the presupposition that it is possible to define for every citizen and for social bodies a subjective right to a healthy environmental as an attribute of personality, has admitted the standing as civil plaintives of environmental associations (pret. Vibo Valentia, 9 December 1986, in *Nuovo dir. agr.*, 1987, 157; Trib. Verona, 19 October 1988, in *Giur. mer.*, 1989, 552;

Cass.pen., 23 October 1989, in *Foro It.*, 1990, II, 169). This point is much discussed in the doctrine. In support of the case law discussed above see Novarese and Salmi, and also, for a critical approach, Francario, Giampietro and Verardi.

The new code of criminal procedure, PRd 22 February 1988, n. 447, has introduced a procedure different from that concerning the standing as civil plaintiff. Art. 91 c.c.p., in fact, ascribes some rights and some powers, the same given to the person injured by the crime, to those bodies and associations recognized by law, who *prior* to the occurrence of the act giving rise to proceedings, have been given the legal right to protect the interests of those injured by the crime. However, the exercise of such rights and powers remains subordinate to the agreement of the person injured by the crime (Art. 92). Such agreement can only be given to one of the bodies or associations, and it can always be revoked (Art. 92).

The doctrinal debate which has just begun concerning this point rests on the individualisation of those persons injured by the crime, who are called upon to give their agreement. Thus if on one hand it has been maintained that "the associations, selected on the basis of Art. 13 L.349/86 could attend the criminal trial without the necessity of agreement, because the subject injured by the crime is an indeterminate collectivity" (Amodio), on the other hand it has been said that, also when one wishes to identify the State as the only person injured by the crime, it would be opportune "to operate restrictively the use of the presuppositions of Art. 91, appealing to the application of them only when there is an injured person different from the State (...). In the different cases agreement should be presumed where the association has been recognized; in the environmental field this has already occurred by virtue of the decree of 20 February 1986" (Verardi).

7. Jurisdiction

The second paragraph of Art. 18 of law n. 349/1986 ascribes jurisdiction in the field of environmental damage to the ordinary judge, leaving unaffected that of the Court of Accounts outlined by Art. 22 of the decree of the President of the Republic, 10 of January 1957 n. 3.

The legislative passage of the provision in question was particularly difficult. It suffered the difficulties inherent to co-ordinating elements of public origin - it should be recalled that Art. 18 has its roots in the case law elaborated by the Court of Accounts in the field of environmental public damage (see above) - with the system of civil liability. The parliamentary bill of the MP Vernola introduced on 15 February in the Chamber of Deputies, entitled "Rules on environmental protection and on the jurisdiction of the Court of Accounts in the field of environmental public damage", accordingly ascribed the jurisdiction in this field to the Court of Accounts, leaving in place the competence of the penal and civil judge in cases where damage has been suffered by physical or legal persons. This bill was unified with the government's bill n. 1203 entitled: "Institution of Ecology Ministry".

Art. 16 of the unified text, even if slightly modifying the text of Vernola, still ascribed the jurisdiction in the field of environmental damage "to the Court of Accounts, preventing any other possible action by the competent jurisdictional organs according to the laws in force", was passed by the Chamber on 24 July 1985. The senate dramatically modified this rule giving exclusive jurisdiction to ordinary judges, thus significantly upsetting the general legislative scheme of the Chamber in the field of jurisdiction, the only exception being in Art. 22 dPR 10-1-1957, n. 3. When the text passed again to the Chamber there was a move both to intervene to again give competence to the Court of Accounts, and to attempt to do away with Art. 18 as it appeared totally unsatisfactory. "That this did not happen and that there was an abandonment (motivated by the persistent disagreement between the two Chambers) of the extreme attempt to cancel the provision about environmental damage from the text of the measure so as to leave unprejudiced the question for future examination, was due to the sudden development of the political situation, which would soon have caused the resignation of the first Craxi government. The fear that the impending crisis (...), would make uncertain the adoption of the law concerning the new Ministry induced the Deputies to confirm, without any modifications, the text returned from the Senate, albeit with strong reservations and as regards the question of the damages, with the intention to return as soon as possible with new legislative interventions" (D'Orta).

The reaction of the Court of Accounts was almost immediate. The Unified Sections of this Court, with the ordinances of 21 October 1986, n. 107, and 9 January 1987, n. 221 (in G.U. n. 25, of the 17 June 1987), petitioned the Constitutional Court regarding the question of the constitutional legitimacy of the second section of Art. 18 in relation to Art. 103, second section, Art. 25, first section, and Art. 5 of the Constitution. The Constitutional Court, in a judgment of 30 December 1987, n. 641 (*in Foro It.*, 1988, I, 1057) considered this question of legitimacy not to be well-founded.

I will briefly review the Court's thinking. The petitioners maintained that Art. 103 identified a fundamentally general jurisdiction of the Court of Accounts in the matter of public accounts, and that in the area of environmental damage there were present all the elements that justified the attribution of jurisdiction to the Court of Accounts. Moreover they maintained that in cases of environmental damage imputable to the responsibility of public employees there existed all the elements, both subjective and objective, capable of determining the attribution of jurisdiction to the Court of Accounts, and that the constitutional reservation of the jurisdiction to the Court qualified, *in subjecta materia*, the same Court of Accounts as "*giudice naturale*"[13] in all such cases (from that the violation from Art. 18, second section, L. 349, of Art. 25, first section of the Constitution. Art. 18, in fact, took the responsibility of public officials for environmental damage away from the "*giudice naturale*" on the basis of the above-mentioned constitutional rule).

Finally, the United Sections of the Court of Accounts pointed out that, whereas the active presence in all such cases of the Public Prosecutor of the Court of Accounts, who holds the power to proceed and all other connected powers, especially those relevant to the direct acquisition of proof, would have assured the full protection of the collectivity and the local administrations, Art. 18 was, on the contrary, lacking an organ which had, *in subjecta materia*, a fair and intransgressible power to take proceedings for compensation. This meant in practice, in the

[13] The Italian Constitution, Art. 25, first section, provides that "no one may avoid proceedings resulting from offences against legislation in force", see above.

petitioners point of view, a compression of the local self-government (in violation of Art. 5 of the Constitution), particularly evident when the public official competent to decide to institute legal proceedings, was also the potential defendant in the relative judgment, as perpetrator and as liable for the environmental damage.

The reasoning of the Constitutional Court, which denied any possibility of constitutional illegitimacy within the second section of Art. 18, is articulated on three levels. The first aims to identify the functional bond of the jurisdiction of the Court of Accounts, the second seeks to place the new institution composed under Art. 18 in the sphere of civil liability, and the third is related to the effectiveness of the working of the rule in question.

With regard to the first level of argument, the Court's thinking may be summarized as follows:

1) To the Court of Accounts is reserved the jurisdiction in the fields of "public accounts". This last cannot be defined in law but needs special legislative qualifications even if "it appears sufficiently individualized both in the subjective element regarding the public nature of the body (State, provinces, other local bodies and the public administration in general) and in the objective element regarding the public qualification of the money and the good object of the management";
2) According to the case law of the Constitutional Court, the jurisdiction of the Court of Accounts, in the above mentioned fields, is fundamentally only general. Some derogations are possible where there are specific legislative provisions;
3) This trend is not contrary to the case law of the Constitutional Court which has "maintained the fundamental expansion of the jurisdiction of the Court of Accounts, where there exists the identity of a subject and protected interest, and in the absence of particular regulation from the legislator that could also provide the jurisdiction, and ascribe it to a different judge".

In other words, the functional bond of the jurisdiction of the Court of Accounts is represented by the *interpositio* of the legislator.[14]

The *interpositio legislatoris*, implemented in the second section of Art. 18, with respect to the ordinary judge, therefore appears to conform, in the Court's point of view, with constitutional requirements. That the question of legitimacy raised by the petitioners is unfounded, following the reasoning of the Constitutional Court, is made clear "by the context of Art. 18".

As I have already said, this second part of the reasoning, which appears to exceed the requirements of the *ratio* of the judgement, is intended to place Art. 18 within the sphere of civil liability. Briefly, the thinking can be summarised as follows:

1) As was previously stated the Court considers the environment to be a unitary juridical good made up of various components, the pleasure of which is secured by a form of civil liability;
2) The nature of a juridical good is granted to the environment because it is an object for protection by rules both constitutional and ordinary;
3) The violation of these rules constitutes damage in itself (damage-event). This damage, whilst already identified by the same Court, as relating to the injury of human health and biological damage, can also be included in the sphere of civil liability. This latter can have a punitive as well as a preventive function;
4) The damage resulting is patrimonial, "though it is free from arithmetical countable conceptions and it is made concrete in the economic relevance that the destruction or the deterioration or the alteration or, in general, the compromising of the goods holds in itself and is reflected on the collectivity, which is going to be burdened by the economic *onus*";

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[14] On this point see the criticism of Maddalena, according to which one can infer from the examination of the judgements of the Constitutional Court that the approach of this Court, before it was overturned by judgement n. 641/1987, was that the *interpositio legislatoris* was necessary "only to bring again to the jurisdiction of the Court of Accounts subjects (...) traditionally ascribed to the ordinary judge". According to this author the legislator's choice appears vitiated by constitutional illegitimacy.

5) The fundamental scarcity of resources determines the economic character and attributes a "realisable" value to the good;

6) The economic value of environmental damage is measurable in relation to certain parameters (management costs, recovery costs, damage costs), and is independent from both the cost of restoration and the diminution of financial resources.

Thus, following the reasoning of the Court, the formula whereby the right for compensation for damages arises only in consequence of a financially determinable loss to the funds of the public body is overcome. The Court, in other words, distances itself from the jurisprudence of the Court of Accounts (see above) which preceeded the promulgation of Art. 18. *Locus standi* is given to the State and to public bodies. It is based on the duty of these bodies to protect the rights of the collectivity.

This formulation has been subjected to various criticisms, some of which I share. First of all it re-focuses attention "upon the 'old stamp' sanctionary model, at one time, present in Italian civil liability which should, on the contrary, be becoming more residual and exceptional within the general actions taken in the scheme of civil liability" (Ponzanelli). Secondly, it construes the environmental damage "in the same way as damage to health, as a damage-event, which is completely anomalous to our outline. Moreover, it is a damage-event with punitive character not so much with respect to the private subjects as to the State (...). Civil liability has in this way been diverted from its original function of substitution, and has been redeployed to become one of the instruments of the accomplishment of wider public purposes" (Ponzanelli).

With regard to the effectiveness of the working of the rule, the third level of reasoning within the judgement, the Court states that: "The criticisms relate to the rule such as it is formulated, for both the effectiveness of its working and the assurance of the desired protection of the environmental good, but it, in particular, concerns the legislator's desire to eventually fill the gaps and lacunae in order to secure the effective enforcement of the same rule in concrete cases, while the same system already provides some remedies (*i.e.* the denunciation of nonfeasance of

public duty; inefficient administrators for the legitimacy of these organs of the body required to maintain vigilance; the appointment of commissaries *ad acta* or special trustees) (Art. 78 c.c.p.)".

It also considers the possibility of a change of the persons elected or appointed for office who are responsible for the representation of the body, and the possibility of the replacement of the administrators liable for eventual damages, with others who take more care of the public interest and who are thus able to take legal action against the above-mentioned responsible parties. It supports, in other words, the principle of the transitoriness of public office and the concrete possibility of an alteration that makes it possible for replacements to sue those who have been inefficient, also because the suspension of the prescription is provided for (Art. 2941 c.c.).

Nevertheless, one should also state that the choice of the ordinary judge secures a continuity of judgements, both in the existence of three degrees of jurisdiction and in the structure of the preliminary and probatory system, and moreover, in the greater fitness of the ordinary judge to take care of the interests concerning relations of equal nature, ascribed to its competence.[15]

8. Jurisdiction (continued)

On the delicate subject of jurisdiction in the field of environmental damage the Court of Cassation in United Section has also recently expressed a view (judgement of 25 January 1980, n. 440, in *Corr. giur.*, 1989, 505). It was called upon to give a verdict in two appeals against the judgement of the United Sections of the Court of Accounts (judgement of 16 June 1984), in which the latter had declared its own jurisdiction in a case concerning the discharge of titanium dioxide into the Tyrrhenian Sea, by Montedison SPA.

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[15] See on this point the criticism by Maddalena, which states that the Court has undervalued to some extent the problem of the obligatory nature of the action, existing in the hypothesis, according to which the possibility of instituting legal proceedings would have been entrusted to the Public Prosecutor of the court of Accounts, in relation to the effectiveness of the working of Art. 18, reducing the debate to a choice between the ordinary judge and Court of accounts.

The case, better known as the Red Mud of Scarlino, saw the conviction for compensation of the *danno erariale* (financial damage), of the harbour-office master of Livorno and of the director of the central hydrobiological laboratory of the Ministry of Agriculture and Forests, for having respectively authorized and expressed favourable opinions as to the granting of the necessary authorizations to discharge into the Sea. This judgement confirmed and consolidated the trend of the Court of Accounts on the subject of environmental damage (see above). The Court of Cassation, on the contrary, agreeing with the interpretation of the Constitutional Court has maintained that jurisdiction in this field was a matter for the ordinary judge.

The Supreme Court, having made the discharge illegal through the application of Art. 18, maintained that the *interpositio legislatoris* (which happened during the suit) operated by virtue of the second section of Art. 18 in favour of the ordinary judge and decided along the following lines.

On the characteristic of the damage, the Court

- criticized the formulation of the Court of Accounts which had introduced the point of environmental damage into the category of fiscal damage through a succession of syllogisms and conceptual equivalences. This progressive widening of the ambit of the legitimacy of the intervention of its judges, does not allow for the consideration of one indispensable presupposition, that is the existence of a damage determined in its specific dimension: an event of provenance not *latu sensu* patrimonial but precisely financial;
- maintained that the damage was not identifiable as prejudicial to the treasury. Environmental damage, according to the Constitutional Court, does indeed have a patrimonial dimension, but the loss that results, even if taken into account in economic terms, cannot be identified as being prejudicial to the treasury, since the responsibility is postulated independently of both the cost of restoration and the diminution of financial resources of the State and of the territorial bodies;
- called for the immediateness of the action for the environmental good. After it denied that the right to compensation for damage arises only owing to the

financial loss in the accounts of the public body, both the reference for the assertion of the jurisdiction of the Court of Accounts, and the necessity of the settlement of the damage to the treasury disappeared, raising in this way the immediateness of the action for the environmental good.

On the peculiarity of the reactions to damage from the system, the Court maintained that

- since environmental damage usually entails a series of damaging effects, which are either permanent or destined to change or become worse with time, one can well understand the choice taken by the legislation of 1986 in favour of the restoration of the state of the damaged areas as a privileged form of compensation (see later);
- since the judge of the Court of Accounts has no power to require these privileged forms of restoration of the state of the area, or other injunctions or cautionary measures, one can well understand the choice of the legislator in favour of the ordinary judge;
- while in some aspects the kind of reaction provided by the system in response to the crime causing the environmental damage is similar to fiscal damage - think of the public character of both, the responsibilities, the sanctionary nature of the conviction, the absence of bonds of solidarity between the responsible parties (see later) -, in other no less important ways it deviates from it, as in the choice of the adoption of restoration of the state of the area as a technique for the compensation of damage, and replacement of the so-called "*potere riduttivo della misura della condanna*" (reductionary power of the measure of conviction) granted to the judge of accounts, with wider and more penetrating power of evaluation in an equitable way of the damage's amount.

On the correlation of procedures, the Court held that

- because of the plurality of subjects usually involved in case of environmental damage, both in view of the potential defendant (when both private subjects and public officers have produced the damaging event), and from the point of view of the *locus standi* (the State as well as other subjects are entitled to

compensation for environmental damages), the *simultaneous processus* is needed to avoid a contrast in judgements;

- the problems posed by the *simultaneous processus* have been satisfied by the legislator in the only possible way, that is by placing jurisdiction in the ambit of the ordinary judge.

I have already expressed some doubt relating to the adoption of *simultaneous processus* as an instrument capable of solving all the problems of co-ordination between the right to compensation for environmental damage on the basis of Art. 18 and the personal and patrimonial rights of private parties. The judgement I just analyzed deserves singling out, however, because it is the first interpretation by the Civil Court of Cassation of Art. 18 of law 349/1986.

9. Jurisdiction (continued)

A final point merits attention regarding the derogation from the jurisdiction of the ordinary judge in favour of the Court of Accounts in cases provided for by Art. 22 of the P.R.d. of 10 January 1957, n.3.

The relevant decree is that concerning the so-called 'Statute of Civil Employees of the State'. Art. 22, in particular, refers to the liability of employees for damage caused to third parties. The article, categorized as "Liability to Third Parties", makes provision that: "employees, who in the exercise of powers conferred on them by laws or regulations, cause to others a damage in contravention of Art. 23, are personally liable for compensation. The action for compensation against them can be exercised jointly with the action against the Administration, so that on the basis of the rules and principles in force in the juridical system, there is also liability of the State". An Administration which compensates a third of the damage caused by the employee may retrieve its losses by suing the employee in accordance with Arts. 18 and 19. As it has already been noted by other commentators (D'Orta, Maddalena, Giampietro), and in the legislative seat by the Sen. Bonifacio, the reference to Art. 22 seems to be at best an error or, at worst, improper. In fact, while Art. 18, as we have already seen, surely concerns the right to compensation for environmental

damage for the State, Art. 22 clearly takes into account only the responsibility of third parties and the compensation for damage with respect to them. As in the field of environmental damage, according to Art. 18 law 349/1986, injured third parties cannot be distinguished from the State, and the hypothesis provided by Art. 22 does not create a real limitation to the competence of the ordinary judge in this area. The Court of Cassation, U.S., 25 of January 1989, n. 440 (in *Corr. giur.*, 1989, 505) has maintained that: "The suspicions of ambiguity and incomprehensibility as regards Art. 22 of the P.R.d. n. 3 of 1957, must be removed taking into account (...) that the exception provided there for the jurisdiction of the Court of Accounts concerns the reimbursement of the State for compensatory sums already paid to third parties, as a consequence of acts carried out with intention or serious negligence by its employees, which cause injury to the personal or patrimonial subjective rights to which those third parties were entitled; even if the injury was connected with or consequential to an event of environmental damage". In other words, the fact that the Court has admitted that the derogation from the jurisdiction of the ordinary judge in favour of the Court of Accounts does not concern the environmental damage *tout court* regulated by Art. 18, but the injury of other subjective patrimonial or personal rights, pertaining to the third parties.

10. The Damage

A final, if brief, mention should be made of the rules provided by Art. 18 for damage. The sixth section of Art. 18 makes provision that: "The judge, in cases where a precise quantification of the damage is not possible, fixes the amount in an equitable way, taking into account the seriousness of the individual negligence, the costs of restoration, and the profit obtained by the transgressor in consequence of his damaging behaviour to the environmental goods". The eigth section makes provision that: "The judge in giving final judgement requires where possible the restoration of the condition of the area charging the costs to those responsible". Finally, in the seventh it is established that: "In cases of multi-liability in the same occurrence of damage, each is answerable for their own responsibility". The above

mentioned rules deviate from the Civil Code system (Arts. 2056, 2058, 2055 Civil Code[16]) in that they distinguish the compensation in a specific form with respect to that of equivalence, because they dictate different criteria from those provided by the Code in relation to the equitative judgement, and exclude the rule of solidarity. In doctrine it has been stressed that those derogations represent some indication of the sanctionary function that characterizes the compensation for environmental damage (Bigliazzi-Geri).

Significant uncertainties are manifest in the doctrine with respect to the interpretation of the above mentioned rules, and in particular it is doubted whether:

1) The reintegration in a specific form must always be given, on the condition that it is possible, leaving out of consideration of an express request of the plaintiff, or if the judge following the general rules is bound by this request (for the first interpretation see Libertini, Maddalena);
2) The limit of excessive onerousity provided in Art. 2058 Civil Code functions or not (Libertini maintains that this limit does not work);
3) There is a derogation from the rule of prohibition of conviction relating to the Public Administration to *facere*.

In relation to the derogation from solidarity (Art. 2055 Civil Code) it has been maintained that this finds its raison d'être in the fact that normally the entity of

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[16] Art. 2055 c.c (Liability *in solido*) provides that: "If the act causing damage can be attributed to more than one person, all are liable *in solido* for the damages.

The person who has compensated for the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom.

In case of doubt, the degree of fault attributable to each is presumed to be equal" (as translated by Beltramo, Longo, Merryman).

Art. 2056 c.c. (Measures of damages) provides that: "The damages owed to the person injured shall be determined in accordance with the provisions of Arts. 1223, 1226, and 1227.

The damage arising from loss of earnings shall be equitably estimated by the judge according to the circumstances of the case" (as translated by Beltramo, Longo, Merryman).

Art. 2058 c.c.: "The injured party can demand specific redress when this is wholly or partially possible".

The judge, however, can order that the redress be made only by providing an equivalent, if specific redress would prove to be excessively onerous for the debtor" (as translated by Beltramo, Longo, Merryman).

environmental damage is particularly high, and in the fact that it is difficult to discern when there is true multi-party liability.

The problems underlying the analysis of these three sections of Art. 18, like those inherent to the other rules contained in the same article, merit an analysis of much greater depth than is allowed within the parameters of this work. The exposition offered here is far from exhaustive, but aims to highlight some of the problems that are present in the topic of environmental damage.

I hope that this work will help to stimulate future research, and could help to introduce the non-Italian reader to a topic, which as I have already stated, is particularly complex because of internal Italian conditions.

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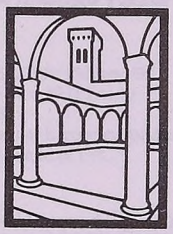

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