法官和检察官环境法律实务研讨会·培训资料

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Second TRAINING COURSES FOR JUDGES AND PROSECUTORS ON ENVIRONMENTAL LEGAL PRACTICE

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中国环境保护立法和主要环境法律制度

中国西部环境司法和环境维权能力建设项目
法官检察官环境法律实务研讨班
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本讲内容

- 环境保护立法
- 主要的环境保护法律制度
- 2014年《环境保护法》修订内容介绍

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一、中国环境保护立法

- 中国环境保护法的产生和发展
- 中国环境保护基本原则
- 中国现行环境保护法律框架体系

（了解现行环保法律法规的主要内容）

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中国环境保护法的产生和发展

中国现代意义上的环境立法起步于二十世纪七十年代末。

1979年，中国发布了第一部环境保护法律----《中华人民共和国环境保护法（试行）》。

从此，中国的环境立法进入了蓬勃发展的阶段。国家制定发布了一系列的环境保护法律、法规、规章、标准等。

发展至今，已初步形成了适合我国国情的环境保护法律框架体系，成为中国社会主义法律体系中的重要内容。

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中国环境保护基本原则

（一）保护优先、协调发展原则
（二）预防为主、综合治理原则
（三）公众参与原则
（四）损害担责原则
（开发利用环境资源者付费）

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（四）损害担责原则
（开发利用环境资源者付费）

所有因开发利用环境和资源或者排放污染物而对环境造成不利影响和危害的单位和个人，都必须按照法律的规定，支付由其活动所形成的环境损害费用或者治理其造成的环境污染与破坏。可概括为：

谁开发，谁保护；谁破坏，谁恢复；
谁受益，谁补偿；谁污染，谁付费。

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现行的环境保护法律框架体系
（从法的内容来看环境法律框架体系的构成）

1、综合性的环境保护法规
2、有关防治环境污染的法规
3、有关自然资源和生态保护的法规
4、有关辐射安全的法规
5、环境标准
6、环境监督管理专项法规
7、有关环境执法程序的法规
8、有关公众参与环境保护的法规
9、其他法规含有的环境保护特别规定

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1、综合性的环境保护法规

- 如《中华人民共和国环境保护法》

  该法是环境保护领域的基础性、综合性法律，主要规定环境领域的基本原则和基本制度，解决环保的共性问题。

- 再如，《重庆市环境保护条例》

相关概念：综合法，单行法

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2、有关防治环境污染的法规

- 水污染防治法规
- 大气污染防治法规
- 环境噪声污染防治法规
- 防治固体废物污染环境的法规
- 海洋污染防治法规
- 控制有毒有害物质污染环境的法规

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现行防治环境污染的法律

- 《海洋环境保护法》（1982年发布，1999年修订）
- 《水污染防治法》（1984年发布，96、08年修订）
- 《大气污染防治法》（1987年发布，95、00年修订）
- 《固体废物污染环境防治法》（1995年发布，04年修订）
- 《环境噪声污染防治法》（1996年发布）
- 《放射性污染防治法》（2003年发布）

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3、有关自然资源和生态保护的法规

如《森林法》，《草原法》，
《渔业法》，《矿产资源法》，
《土地管理法》，《水法》，
《水土保持法》，《野生动物保护法》，
《煤炭法》，《气象法》，
《种子法》，《防沙治沙法》，
《节约能源法》，《海域使用管理法》，
《海岛保护法》，《文物保护法》，
《可再生能源法》，《专属经济区和大陆架法》，
《领海及毗连区法》，等等。

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3、有关自然资源和生态保护的法规（续）

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《全国生态环境保护纲要》，
《生态功能保护区评审管理办法》，
《国家级自然保护区监督检查办法》，
《矿山地质环境保护规定》等

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4、有关辐射安全的法规

《放射性污染防治法》2003年，
《放射性同位素与射线装置安全和防护条例》2005年，
《民用核安全设备监督管理条例》2007年
《放射性物品运输安全管理条例》2009年
《放射性废物安全管理条例》2011年通过
《城市放射性废物管理办法》，
《电磁辐射环境保护管理办法》，
《放射性物品运输安全许可管理办法》2010年，
《放射性同位素与射线装置安全许可管理办法》2006年，
《放射性同位素与射线装置安全和防护管理办法》 2011年

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5、环境标准

环境标准是环境法体系中一个特殊的组成部分，是环境保护执法和管理工作的技术依据。

中国的环境标准在层次上分为两部分：

第一部分是国家环境标准（GB），包括国家环境质量标准、国家污染物排放标准（或控制标准）、国家环境监测方法标准、国家环境标准样品标准和国家环境基础标准；

第二部分为地方环境标准，包括地方环境质量标准、地方污染物排放标准。

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环境标准含义

- 环境标准：是为了保障公众健康，防治环境污染，对某些环境要素所作的统一的、法定的和技术的规定。环境标准是行使环境监督管理职能和环境执法的依据，也是衡量排污状况和环境质量状况的主要尺度。
- 环境质量标准：是评价环境状况的标尺，也是在一定时间和空间范围内对环境质量的要求所作的规定，即在一定时间和空间范围内对环境中的有害物质或者因素的容许浓度所作的规定。它是国家环境政策目标的具体体现，是制定污染物排放标准的依据，是环境保护主管部门和有关部门对环境进行科学管理的重要手段。
- 污染物排放标准：是为实现环境质量标准，结合经济、技术条件和环境特点，限制排入环境中的污染物或者对造成环境危害的其他因素所作出的规定。由于污染物排放标准是针对污染物排放作出的限制，是判断排污行为是否违法的客观标准和重要依据，对排放污染物的行为具有直接约束力。

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有关环境质量标准的法律规定

《环境保护法》（2014年）第十五条规定：“国务院环境保护主管部门制定国家环境质量标准。

省、自治区、直辖市人民政府对国家环境质量标准中未作规定的项目，可以制定地方环境质量标准；对国家环境质量标准中已作规定的项目，可以制定严于国家环境质量标准的地方环境质量标准。地方环境质量标准应当报国务院环境保护主管部门案。

国家鼓励开展环境基准研究。”

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有关污染物排放标准的法律规定

《环境保护法》（2014年）第十六条规定：“国务院环境保护主管部门根据国家环境质量标准和国家经济、技术条件，制定国家污染物排放标准。

省、自治区、直辖市人民政府对国家污染物排放标准中未作规定的项目，可以制定地方污染物排放标准；对国家污染物排放标准中已作规定的项目，可以制定严于国家污染物排放标准的地方污染物排放标准。地方污染物排放标准须报国务院环境保护主管部门备案。”

（89年环保法规定：凡是向已有地方污染物排放标准的区域排放污染物的，应当执行地方污染物排放标准。”）

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6、环境监督管理专项法规

（1）建设项目与环境影响评价管理法规
（2）排污收费管理法规
（3）环境监测、统计管理法规
（4）环境标准管理法规
（5）环境应急、事故报告与处理方面的管理法规
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7、有关环境执法程序的法规

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(2) 行政复议
(3) 行政处分
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8、有关公众参与环境保护的法规

如《环境影响评价公众参与暂行办法》
《环境保护行政许可听证暂行办法》，
《环境信息公开办法（试行）》2007年，
《环境保护部信息公开指南》
《环境信访办法》等。

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9、其他法规含有的环境保护特别规定

如《民法通则》
《刑法》修正案（八）2011年
《物权法》2007年，
《清洁生产促进法》2002年，
《循环经济促进法》2008年，
《城乡规划法》，2008年
《治安管理处罚法》等。

这些法律中都有一些与环境保护紧密相关的特别规定。

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《刑法》关于环境保护的规定

修订后的《刑法》在分则第六章“妨害社会管理秩序罪”中设立了第六节“破坏环境资源保护罪”，集中规定了16种环境与资源保护类犯罪，包括：

污染环境罪（第338条），非法处置进口的固体废物罪（第339条第1款），擅自进口固体废物罪（第339条第2款），走私固体废物罪（第339条第3款），非法捕捞水产品罪（第340条），非法猎捕、杀害珍贵、濒危野生动物罪（第341条第1款），非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪（第341条第1款），非法狩猎罪（第341条第2款），非法占用农用地罪（第342条），非法采矿罪（第343条第1款），破坏性采矿罪（第343条第2款），非法采伐、毁坏国家重点保护植物罪（第344条），非法收购、运输、加工、出售国家重点保护植物、国家重点保护植物制品罪（第344条），盗伐林木罪（第345条第1款），滥伐林木罪（第345条第2款），非法收购、运输盗伐、滥伐的林木罪（第345条第3款）。

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《刑法》关于环境保护的规定（续）

第338条规定了污染环境罪：

“违反国家规定，排放、倾倒或者处置有放射性的废物、含传染病病原体的废物、有毒物质或者其他有害物质，严重污染环境的，处三年以下有期徒刑或者拘役，并处或者单处罚金；后果特别严重的，处三年以上七年以下有期徒刑，并处罚金。”

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《刑法》关于环境保护的规定（续）

第408条规定规定了环境监管失职罪：

“负有环境保护监督管理职责的国家机关工作人员严重不负责任，导致发生重大环境污染事故，致使公私财产遭受重大损失或者造成人身伤亡的严重后果的，处三年以下有期徒刑或者拘役。”

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《物权法》关于环境保护的规定

第七章关于相邻关系的规定是处理相邻环境关系的准则。如：

- 第90条规定：“不动产权利人不得违反国家规定弃置固体废物，排放大气污染物、水污染物、噪声、光、电磁波辐射等有害物质。”
- 第92条规定：“不动产权利人因用水、排水、通行、铺设管线等利用相邻不动产的，应当尽量避免对相邻的不动产权利人造成损害；造成损害的，应当给予赔偿。”

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有关环境保护的国际条约、公约和议定书

除国内法规外，还有我国缔结和参加的有关环境保护的国际条约、公约和议定书，如：

《保护臭氧层维也纳公约》
《控制危险废物越境转移及其处置的巴塞尔公约》
《气候变化框架公约》
《生物多样性公约》
《南极环境保护议定书》
《京都议定书》
《生物安全卡特赫拉议定书》
《关于持久有机污染物(POPs)的斯德哥尔摩公约》

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二、中国主要的环境保护法律制度

- 环境影响评价制度
- 环境保护设施“三同时”制度
- 限期治理制度
- 排污申报登记制度
- 环境保护许可制度
- 总量控制制度
- 征收排污费制度
- 落后的生产工艺和设备淘汰制度
- 生态补偿制度
- 现场检查制度
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- 其他

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（一）环境影响评价制度（EIA）

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- 适用环境影响评价政策的范畴
- 环境影响评价的形式
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- 违反环境影响评价制度的法律后果

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有关环境影响评价制度的立法

- 1、《环境影响评价法》，2002年发布
- 2、《建设项目环境保护管理条例》，1998年发布
- 3、《规划环境影响评价条例》，2009年公布
- 4、《建设审目环境影响评价文件分级审批规定》2009年
- 5、《国家环境保护总局建设项目环境影响评价文件审批程序规定》2005年
- 6、《建设项目环境影响评价资质管理办法》2005年
- 7、《建设项目录境影响评价分类管理名录》2008年

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环境影响评价概念

《中华人民共和国环境影响评价法》（2002年）第二条：“本法所称环境影响评价，是指对规划和建设项目实施后可能造成的环境影响进行分析、预测和评估，提出预防或者减轻不良环境影响的对策和措施，进行跟踪监测的方法与制度。”

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违反环境影响评价规定的法律后果

- 对未依法报批建设项目环境影响评价文件即擅自开工建设的，责令停止建设，限期补办手续；逾期不补办手续的，可处五万元以上二十万元以下罚款，并可以责令恢复原状（2014年环保法新增加）；
- 对建设项目环境影响评价文件未经批准即擅自开工建设的，责令停止建设，可处五万元以上二十万元以下罚款，并可以责令恢复原状（2014年环保法新增加）；
- 对直接责任人员给予行政处分；构成犯罪的，依法追究刑事责任。

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（二）环境保护设施“三同时”制度

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- “三同时”制度的适用范围
- “三同时”制度在不同建设阶段的要求
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- 2、《建设项目环境保护管理条例》1998年
- 3、《建设项目竣工环境保护验收管理办法》2010年

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有关“三同时”制度的具体规定

- **《环境保护法》（2014年）**

  第四十一条规定：" 建设项目中防治污染的设施，应当与主体工同时没计、同时施工、同时投产使用。“
- **《建设项目环境保护管理条例》（1998年）**

  第十六条 “建设项目需要配套建设的环境保护设施，必须与主体工程同时设计、同时施工、同时投产使用。”

  第二十三条 “建设项目需要配套建设的环境保护设施经验收合格，该建设项目方可正式投入生产或者使用。”

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违反“三同时”规定的法律后果

根据《建设项目环境保护管理条例》第28条规定：对建设项目需要配套建设的环境保护设施未建成、未经验收或者经验收不合格，主体工程即正式投入生产或者使用的，责令停止生产或者使用，可以处10万元以下的罚款。

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（三）限期治理制度

- 基本要求
- 限期治理的对象
- 限期治理的决定权
- 限期治理的目标和期限
- 违反限期治理制度的法律后果

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限期治理制度的基本要求

- 环境管理机构对不符合要求的排污者规定一定的期限，要求排污者在该期限内完成治理污染的任务、达到治理目标；
- 排污者必须如期完成治理任务，逾期未完成的，将受到罚款直至停业、关闭的处罚。

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违反限期治理规定的法律后果

按照《水污染污染防治法》第74条的规定，责令限期治理的，

- 由环境保护主管部门处应缴纳排污费二倍以上五倍以下的罚款；
- 在限期治理期间，由环境保护主管部门责令限制生产、限制排放或者停产整治；
- 逾期未完成治理任务的，报经有批准权的人民政府批准，责令关闭。

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2014年《环境保护法》对限期治理制度的修改

1989年环保法	2014年环保法
第二十九条 “对造成环境严重污染的企业事业单位，限期治理。……” 第三十九条 “对经限期治理逾期未完成治理任务的企业事业单位，……可以根据所造成的危害后果处以罚款，或者责令停业、关闭。……责令停业、关闭，由作出限期治理决定的人民政府决定；……”	第六十条 “企业事业单位和其他生产经营者超过污染物排放标准或者超过重点污染物排放总量控制指标排放污染物的，县级以上人民政府环境保护主管部门可以责令其采取限制生产、停产整治等措施；情节严重的，报经有批准权的人民政府批准，责令停业、关闭。” （该条款对限期治理制度作了修改）

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（四）排污申报登记制度

- 含义、目的
- 申报登记的适用对象
- 申报登记的内容
- 申报登记的程序
- 违反排污申报登记制度的法律后果

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（五）环境保护许可制度

- 基本要求和目的
- 环境保护许可证的种类
- 污染物排放许可证制度介绍

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环保许可的基本要求和目的

基本要求：凡从事有害或可能有害环境的活动之前，其建设者或经营者必须向有关管理机关提出申请，经法定的主管部门审查批准颁发许可证后，才能从事该项活动。

目的：通过行政许可这种方式依法配置有限的环境容量和资源 。

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环境保护许可证的种类

(1) 防止环境污染的许可证，如排放污染物许可证，海洋倾废许可证，危险废物收集、贮存、处置经营许可证，放射性固体废物贮存、处置许可证，废物进口许可证等。

(2) 有关自然资源开发和防止环境破坏的许可证，如林木采伐许可证，渔业捕捞许可证，野生动物特许猎捕证、狩猎证、驯养繁殖许可证等。

在环境管理中适用最广泛的是污染物排放许可证和自然资源开发利用许可证。

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污染物排放许可证制度

- 适用范围：排污许可证在我国目前仅适用于水污染和大气污染控制领域。
- 基本要求：按照排污许可证制度的要求，环保部门对不超过国家和地方规定的污染物排放标准和污染物排放总量指标的排污单位发给排污许可证；对超过标准或指标的，发给临时排污许可证，同时要求限期达到标准；禁止无证排放污染物。

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（六）重点污染物排放总量控制制度

- 基本要求
- 大气污染物排放总量控制
- 水污染物排放总量控制

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总量控制制度基本要求

- 国家实行重点污染物排放总量控制制度。
- 地方人民政府可以按照国务院下达的总量控制约束性指标和本行政区域的需要，削减和控制本行政区域的重点污染物排放量。
- 对超过国家重点污染物排放总量控制指标的地区，有关人民政府环境保护主管部门应当暂停审批新增重点污染物排放总量的建设项目的环境影响评价文件。

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大气污染物排放总量控制制度

按照《大气污染防治法》第15条的规定：

- 国务院和省级人民政府，可以划定主要大气污染物排放总量控制区
- 地方人民政府核定企业事业单位的主要大气污染物排放总量
- 地方人民政府核发主要大气污染物排放许可证
- 企业事业单位按总量和许可证规定排放污染物

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水污染物排放总量控制制度

按照《水污染防治法》第18条的规定：

- 省级人民政府应当按照国务院的规定分解落实重点水污染物排放总量控制指标到市、县人民政府
- 省级人民政府可以确定本行政区域实施总量削减和控制的重点水污染物
- 市、县人民政府再将总量控制指标分解落实到排污单位。
- 违法后果。环保部门对超过重点水污染物排放总量控制指标的地区，应当**暂停审批**新增重点水污染物排放总量的建设项目的环评文件。

（“区域限批”手段）

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2014年《环境保护法》

第四十四条规定：

“国家实行重点污染物排放总量控制制度。重点污染物排放总量控制指标由国务院下达，省、自治区、直辖市人民政府分解落实。企业事业单位在执行国家和地方污染物排放标准的同时，应当遵守分解落实到本单位的重点污染物排放总量控制指标。

对**超过国家重点污染物排放总量控制指标或者未完成国家确定的环境质量目标的地区**，省级以上人民政府环境保护主管部门应当**暂停审批**其新增重点污染物排放总量的建设项目环境影响评价文件。”

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（七）征收排污费制度

- 征收排污费的目的
- 征收排污费的对象
- 征收排污费的范围
- 征收排污费的标准
- 收费的计算方法
- 排污费的加收、减免和缓缴
- 征收排污费的程序
- 排污费的管理和使用
- 缴纳排污费与承担其它法律责任的关系
- 拒绝缴纳排污费的法律后果

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基本要求和目的

- 直接向环境排放污染物的单位和个体工商户（简称排污者），应当依照国家规定按照排放污染物的种类、数量和征收标准缴纳排污费，列入环境保护专项资金用于污染防治。
- 设立该项政策的目的，在于促使企业加强经营管理，节约和综合利用资源，减少污染物的排放，治理污染和改善环境。
- 拒绝缴纳排污费的法律后果：给予警告或者处以罚款。

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有关征收排污费的立法

需要研究下列法律、法规、规章：

- 有关水、气、噪声、固体废物污染防治的法律
- 《排污费征收使用管理条例》
- 《排污费征收标准管理办法》
- 《排污费征收工作稽查办法》
- 《排污费资金收缴使用管理办法》
- 《关于减免及缓缴排污费有关问题的通知》

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（八）淘汰落后的生产工艺和设备制度

- 基本要求
- 淘汰严重污染大气环境的落后生产工艺和设备
- 淘汰严重污染水环境的落后生产工艺和设备

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基本要求

- 国务院有关部门要公布限期禁止采用的严重污染环境的工艺名录，公布限期禁止生产、销售、进口、使用的严重污染环境的设备名录。
- 生产者、销售者、进口者或者使用者应当在规定的期限内停止生产、销售、进口或者使用列入设备名录中的设备。工艺的采用者应当在规定的期限内停止采用列入工艺名录中的工艺。
- 被淘汰的设备，不得转让给他人使用。

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（九）生态补偿制度

- 目的
- 法律规定

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实行生态补偿的目的

保护江河源头的生态环境，下游地区是主要受惠者，但上游地区往往因此丧失某些发展机会，从而造成地区间发展失衡。实践证明，实行生态补偿有利于扭转这种失衡现象。

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《水污染防治法》第七条规定

“国家通过财政转移支付等方式，建立健全对位于饮用水水源保护区区域和江河、湖泊、水库上游地区的水环境生态保护补偿机制。”

这一规定为推进生态补偿机制的建立提供了有力的法律保障。

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（十）现场检查制度

- 现场检查的目的
- 现场检查的范围和内容
- 现场检查的主体
- 现场检查部门的义务
- 拒绝现场检查的法律后果

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2014年《环境保护法》

第二十四条：

- 县级以上人民政府环境保护主管部门及其委托的环境监察机构和其他负有环境保护监督管理职责的部门，有权对排放污染物的企业事业单位和其他生产经营者进行现场检查。
- 检查者应当如实反映情况，提供必要的资料。实施现场检查的门、机构及其工作人员应当为被检查者保守商业秘密。

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（十一）污染事故报告处理制度

- 因发生事故或者其他突然性事件，造成或者可能造成污染事故的单位，必须立即采取措施处理，及时通报可能受到污染危害的单位和居民，并向当地环境保护行政主管部门和有关部门报告，接受调查处理（见1989年《环境保护法》第31条）。
- 县级以上地方人民政府环境保护行政主管部门，在环境受到严重污染威胁居民财产安全时，必须立即向当地人民政府报告，由人民政府采取有效措施，解除或者减轻危害（见1989年《环境保护法》第32条）。

这项制度在其他环境单行法中也有规定，内容为，环境污染事故和环境紧急情况的报告及处理制度。

2014年《环境保护法》47条对该项制度作了补充修改

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突发环境事件应急机制

2014年《环境保护法》四十七条 “各级人民政府及其有关部门和企业事业单位，应当依照《中华人民共和国突发事件应对法》的规定，做好突发环境事件的风险控制、应急准备、应急处置和事后恢复等工作。

县级以上人民政府应当建立环境污染公共监测预警机制，组织制定预警方案；环境受到污染，可能影响公众健康和环境安全时，依法及时公布预警信息，启动应急措施。

企业事业单位应当按照国家有关规定制定突发环境事件应急案，报环境保护主管部门和有关部门备案。在发生或者可能发生突发环境事件时，企业事业单位应当立即采取措施处理，及时通报可能受到危害的单位和居民，并向环境保护主管部门和有关部门报告。

突发环境事件应急处置工作结束后，有关人民政府应当立即组织评估事件造成的环境影响和损失，并及时将评估结果向社会公布。”

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三、《环境保护法》（2014年）修订内容介绍

- （一）合理定位
- （二）创新理念
- （三）完善制度
- （四）明确责任
- （五）多元共治
- （六）经济手段
- （七）强化监管

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（一）合理定位

- 张德江委员长
  在十二届全国人大常委会第八次会议闭幕会上的讲话（2014.04.24）：
  环境保护法是环境保护领域的基础性、综合性法律，对于保护和改善环境，防治污染和其他公害，保障公众健康，推进生态文明建设，促进经济社会可持续发展，都具有重要意义。

- 全国人大法制工作委员会副主任信春鹰
  规定环境领域的基本原则和基本制度，解决环保的共性问题

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（二）创新理念

对经济社会发展与环境保护关系作出全新表述

■将“保障公众健康，推进生态文明建设，促进经济社会可持续发展”列入立法目的（第一条）

■将环境保护作为国家的基本国策（第四条）

■明确要求经济社会发展与环境保护相协调（第四条）

■提出促进人与自然和谐的理念和保护优先的基本原则（第五条）

■污染防治与生态保护并重（第十三、三十条）

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（三）完善制度

■生态保护红线
■排污许可管理
■总量控制和区域限批
■政策“环评”、规划环评
■跨行政区域联合防治
■环境资源承载能力预警
■规范环境监测
■环境与健康评估研究，等

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1、生态保护红线

1989年环保法	2014年环保法
（无相关规定）	第二十九条 “国家在重点生态功能区、生态环境敏感区和脆弱区等区域划定生态保护红线，实行严格保护。……”
	• 环保部已经开展相关工作，一直争取，四审稿“入法” • 十八届三中全会《决定》明确要求 • 与环保部工作有机衔接：例如，“建设自然保护区是严守生态保护红线的有力抓手” • 下一步，环保部将“出台指导意见和相应技术规范，推动地方划定并严守生态保护红线”

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2、排污许可管理

1989年环保法	2014年环保法
（无相关规定）	第四十五条 “国家依照法律规定实行**排污许可管理制度**。 实行排污许可管理的企业事业单位和其他生产经营者应当按照排污许可证的要求排放污染物；**未取得排污许可证的，不得排放污染物。**”
	2008年水污染防治法等已有规定，实践证明成熟

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3、总量控制和区域限批

1989年环保法	2014年环保法
（无相关规定）	第四十四条 “**国家实行重点污染物排放总量控制制度。**重点污染物排放总量控制指标由国务院下达，省、自治区、直辖市人民政府分解落实。企业事业单位在执行国家和地方污染物排放标准的同时，应当遵守分解落实到本单位的重点污染物排放总量控制指标。 对**超过国家重点污染物排放总量控制指标或者未完成国家确定的环境质量目标的地区**，省级以上人民政府环境保护主管部门应当**暂停审批**其新增重点污染物排放总量的建设项目环境影响评价文件。”
	2008年水污染防治法等已有规定，实践证明成熟

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4、政策“环评”、规划环评

1989年环保法	2014年环保法
（无相关规定）	第十四条 “国务院有关部门和省、自治区、直辖市人民政府组织**制定经济、技术政策，应当充分考虑对环境的影响**，听取有关方面和专家的意见。”
第十三条 （只规定了项目环评）建设污染环境的项目，必须遵守国家有关建设项目环境保护管理的规定。	第十九条 “编制有关开发利用规划，建设对环境有影响的项目，应当依法进行环境影响评价。 **未依法进行环境影响评价的开发利用规划，不得组织实施**；未依法进行环境影响评价的建设项目，不得开工建设。”

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5、跨行政区域联合防治

1989年环保法	2014年环保法
第十五条 跨行政区的环境污染和环境破坏的防治工作，由有关地方人民政府协商解决，或者由上级人民政府协调解决，作出决定。	第二十条 国家**建立跨行政区域**的重点区域、流域环境污染和生态破坏**联合防治协调机制**，实行统一规划、统一标准、统一监测，统一的防治措施。 前款规定以外的跨行政区域的环境污染和生态破坏的防治，由上级人民政府协调解决，或者由有关地方人民政府协商解决。

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6、环境资源承载能力预警

1989年环保法	2014年环保法
（无相关规定）	**第十八条 省级以上人民政府应当组织有关部门或者委托专业机构，对环境状况进行调查、评价，建立环境资源承载能力监测预警机制。**
	• 十八届三中全会《决定》明确要求 • “经济社会发展与环境保护相协调”理念的具体体现 • 推动绿色转型的重要依据 • 结合探索编制自然资源资产负债表，对领导干部实行自然资源资产离任审计，建立生态环境损害责任终身追究制等

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7、环境监测

1989年环保法	2014年环保法
第十一条 “国务院环境保护行政主管部门建立监测制度，制定监测规范，会同有关部门组织监测网络，加强对环境监测的管理。……”	第十七条 “国家建立、健全环境监测制度。国务院环境保护主管部门制定监测规范，会同有关部门组织监测网络，统一规划国家环境质量监测站（点）的设置，建立监测数据共享机制，加强对环境监测的管理。 有关行业、专业等各类环境质量监测站（点）的设置应当符合法律法规规定和监测规范的要求。 监测机构应当使用符合国家标准的监测设备，遵守监测规范。监测机构及其负责人对监测数据的真实性和准确性负责。”

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8、环境与健康评估研究

1989年环保法	2014年环保法
（无相关规定）	第三十九条　“国家建立、健全环境与健康监测、调查和风险评估制度；鼓励和组织开展环境质量对公众健康影响的研究，采取措施预防和控制与环境污染有关的疾病。”

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（四）明确责任

- 政府责任
- 企业责任
- 部门责任

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对政府和环保监督管理部门相关人员问责的情形

（一）不符合行政许可条件准予行政许可的；
（二）对环境违法行为进行包庇的；
（三）依法应当作出责令停业、关闭的决定而未作出的；
（四）对超标排放污染物、采用逃避监管的方式排放污染物、造成环境事故以及不落实生态保护措施造成生态破坏等行为，发现或者接到举报未及时查处的；
（五）违反本法规定，查封、扣押企业事业单位和其他生产经营者的设施、设备的；
（六）篡改、伪造或者指使篡改、伪造监测数据的；
（七）应当依法公开环境信息而未公开的；
（八）将征收的排污费截留、挤占或者挪作他用的；
（九）法律法规规定的其他违法行为。

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（五）多元共治

2014年环保法增加了若干条款，改变了以往主要依靠政府和部门单打独斗的传统方式，体现了多元共治、社会参与的现代环境治理理念。

新增加的主要内容：

1.公民权利
2.公民义务
3.环境公益诉讼
4.环境日
5.相关部门职责
6.其他组织义务，等

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环境公益诉讼

《民事诉讼法》（2012年）第五十五条规定：“对污染环境、侵害众多消费者合法权益等损害社会公共利益的行为，**法律规定的机关和有关组织可以向人民法院提起诉讼。**”

《环境保护法》第五十八条规定：“对污染环境、破坏生态，损害社会公共利益的行为，**符合下列条件的社会组织可以向人民法院提起诉讼**：
（一）依法在设区的市级以上人民政府民政部门登记；
（二）专门从事环境保护公益活动连续五年以上且无违法记录。
符合前款规定的社会组织向人民法院提起诉讼，人民法院应当依法受理。
提起诉讼的社会组织不得通过诉讼牟取经济利益。”（新增）

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（六）经济手段

序号	内容	条目（新增加）
1	将环境违法信息记入社会诚信档案（黑名单）	第五十四条
2	国家建立、健全生态保护补偿制度	第三十一条
3	国家鼓励投保环境污染责任保险	第五十二条
4	国家采取财政、税收、价格、政府采购等方面的政策和措施，鼓励和支持环境保护产业的发展	第二十一条、第二十二条
5	为改善环境，依照有关规定转产、搬迁、关闭的，人民政府应当予以支持	第二十三条

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（七）强化监管

授予环保监督管理部门新的监管权力

1. 查封扣押
2. 按日计罚
3. 停业关闭
4. 停建罚款
5. 移送公安机关行政拘留

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谢 谢！

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The Right to Healthy Environment and International Law

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Materials to be distributed

Treaties and Legal Provisions on Human Rights and the Environment

UN Practice and Case-Law by the European Court of Human Rights

Court of Justice of the Economic Community of West African States, SERAP v. Nigeria, 14 December 2012

Alan Boyle, *Environmental Dispute Settlement*, Max Planck Encyclopedia of Public International Law www.mpepil.com

Alan Boyle, *Environment and Human Rights*, Max Planck Encyclopedia of Public International Law www.mpepil.com

Alan Boyle, *Human Rights and the Environment: Where Next?*, in *EJIL*, 2012, pp. 613-642

Alan Boyle, James Harrison, *Judicial Settlement of International Environmental Disputes: Current Problems*, in *JIDS*, 2013, pp. 1-32

Further bibliography

John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to e Healthy Environment as a Principle of Customary International Law*, in *Colum. J. Envtl. L.*, 2000, pp. 283-339

Svitlana Kravchenko, John E. Bonine, *The Global Impact and Implementation of Human Rights Norm: Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights*, in *Pac. McGeorge Global Bus. & Dev. L.J.*, 2012, pp. 245-287

Randall S. Abate, *Climate Change Liability and the Allocation of Risk: Climate Change The United States, and the Impacts of Artic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, in *Stan. J Int'l L.*, 2007, pp. 3-76

Marc Limon, *Human Rights and Climate Change: Constructing A Case for Political Action*, in *Harv. Envtl. L. Rev.*, 2009, pp. 439-476

Christoph Sobotta, *Compliance with European Environmental Law – Deficiencies and Approaches: The Role of the Court of Justice of the European Union*, in *Journal for European Environmental Planning Law*, 2012, pp. 91-107

From the website of the NGO "Right to Environment"
http://www.righttoenvironment.org/default.asp?pid=1

Treaties and Legal Provisions on Human Rights and the Environment

Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. As a result, there are few references to environmental matters in international human rights instruments, although the rights to life and to health are certainly included and some formulations of the latter right make reference to environmental issues.

Universal Declaration on Human Rights (1948)
Despite its non-binding status, many of its provisions are now considered to be customary international law, reasserted in many international legal documents. The declaration does not refer to the environment directly. However, **Article 25** acknowledges: "**Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services**..." The term "including" indicates that the component elements listed were not meant to form an all-inclusive list, but serve as an indication of certain factors essential for an adequate standard of living. Therefore, it can be argued that satisfying the standards of the Declaration necessitates the environment being of sufficient quality to maintain human health and well-being.

International Covenant on Civil and Political Rights (1966) – China: signature 5 Oct 1998

As far as the environment is concerned, this covenant is not of great importance. On the right to life (**Article 6(1)**), it declares: "**Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.**"

International Covenant on Economic, Social and Cultural Rights (1966) - China: signature 27 Oct 1997; ratification: 27 Mar 2001

This covenant guarantees the right to safe and healthy working conditions (Article 7 b) and the right of children and young persons to be free from work harmful to their health (Article 10-3). The **right to health** (Article 12) within the Covenant expressly calls on States parties to take steps for "the improvement of all aspects of environmental and

industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational, and other diseases."

Convention on the Elimination of All Forms of Discrimination against Women (1979) - China: signature 17 Jul 1980; ratification 4 Nov 1980

This covenant obliges States parties to eliminate discrimination against women, particularly in rural areas, to ensure that women "enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications" (Article 14 (2)(h)).

Convention on the Rights of the Child (1989) – China: signature 29 Aug 1990; ratification: 2 Mar 1992

This covenant refers to aspects of environmental protection in relation to the child's right to health. Article 24 provides that parties (States) shall take appropriate measures to combat disease and malnutrition through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution. Article 24(2)(c). Information and education is to be provided to all segments of society on hygiene and environmental sanitation. (Article 24(2)(e).

ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989)

This convention contains numerous references to the lands, resources, and environment of indigenous peoples (e.g., Articles 2, 6, 7, 15). Part II of the Convention addresses land issues, including the rights of the peoples concerned to the natural resources pertaining to their lands. Further, governments are to ensure adequate health services are available or provide resources to indigenous groups "so that they may enjoy the highest attainable standard of physical and mental health." (Article 25(1)). Article 30 requires that governments make known to the peoples concerned their rights and duties.

Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, (1998)

Also known as **The Aarhus Convention**, this important convention takes a comprehensive approach to the many international agreements, utilising procedural human rights to achieve better environmental protection in order to protect human health. Thirty-five States and the European Community have signed it already. The Convention builds on prior texts, especially Principle 1 of the Stockholm Declaration, which it

incorporates and strengthens. The Preamble forthrightly proclaims, "Every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." [1]

United Nations Declaration on the Rights of Indigenous Peoples (2007)
The UN General Assembly[2] on 7 September 2007 adopted the United Nations Declaration on the Rights of Indigenous Peoples. It's the first General Assembly Declaration on Human Rights which recognises the conservation and protection of the environment and resources as a Human Right. For indigenous people, that is. Article 29 of the Declaration declares:1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

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[1] The following paragraph adds that to be able to assert the right and observe the duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. These provisions are repeated in Article 1 where States parties agree to guarantee the rights of access to information, public participation, and access to justice. Article 19 opens the door to accession by States outside the ECE region; provided that they are members of the UN and that the Meeting of the Parties of the Convention approves the accession.[2] Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples.

Regional Treaties and Legal Provisions

Not all regions have a regional human rights convention or charter, such as the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights and the European Convention on Human Rights, which will be addressed below.

For the **Asia and Pacific region** it should be mentioned that there are several Ministerial declarations on rights, such as The (16 October 1990) Bangkok Declaration, which affirms rights of individuals, groups, and organizations to obtain, publish and distribute information on environmental issues in Asia and the Pacific.

In 2000, the Ministerial Conference on Environment and Development in Asia and the Pacific declared to adopt the Regional Action Program for Environmentally Sound and Sustainable Development, 2001-2005 . This Program dealt with several human rights related issues such as establishing rights to access to information and empower the people and declaring there being a lack of adequate legislation including water rights or entitlements, insufficient political and public awareness, lack of public and stakeholder participation in water resources planning and management.

Regarding the **Arab region** one could mention The Arab Declaration on Environment and Development and Future Perspectives of September 1991 , which speaks of the right of individuals and non-governmental organizations to acquire information about environmental issues relevant to them.

In addition to that, the Johannesburg 2002 Arab Ministerial Declaration on Sustainable Development declares (full text below) "Achieving sustainable development...requires...the agreement on a new mechanism for governance taking into consideration the principle of international law and people's rights in reaching sustainable development within the Rio declaration...".

Regional Human Rights Treaties

Out of the three mentioned regional human rights treaties, two regional human rights treaties contain specific provisions on the right to a healthy and clean environment. The approach of each differs, with the African Charter linking the environment to development, while the American Convention Protocol speaks of a "healthy environment."

American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988)

Article 11 of the Additional Protocol to this convention is entitled: "Right to a healthy environment" and proclaims (1.) Everyone shall have the right to live in a healthy environment and to have access to basic public services and (2.) The States parties shall promote the protection, preservation and improvement of the environment.

The Protocol provides for both a right to environment and a right to health. Article 10 states that (1.) Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. (2) In order to ensure the exercise of the right to health, the States Parties agree to recognise heath as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community; (b) Extension of the benefits of health services to all individuals subject to the State's jurisdiction; (c) Universal immunisation against the principal infectious diseases; (d) Prevention and treatment of endemic, occupational and other diseases; (e) Education of the population on the prevention and treatment of health problems, and (f) Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

African Charter on Human and Peoples' Rights (1981)

The distinction between individual and peoples rights is not made clear. This charter contains both a right to health and a right to environment.
Article 16 of the Charter guarantees the right to enjoy the best attainable state of physical and mental health to every individual.
Article 24 declares that all peoples shall have the right to a general satisfactory environment favourable to their development.

European Convention on Human Rights (1950)

Many would assume that this convention would contain a provision relating to the environment. However, this is not the case. The European Convention on Human Rights has no explicit provision on the right to a decent environment. As will be shown from case law mentioned further down on this site, the Court has found ways to fix this gap by allowing compensation for environmental damages under other rights, such as the right to life, privacy and family life and freedom of expression.

The Council of Europe has adopted the 1990 Dublin Declaration on "The Environmental Imperative" stating that the objective of the Community action for the protection of the environment "must be to guarantee citizens the right to a clean and healthy environment".

In addition to that, the Parliamentary Assembly of the Council of Europe has recommended considering legal ways in which the human rights protection system can contribute to the protection of the environment. It described its wishes to encourage this process by adding provisions into the European Convention on Human Rights and advised that an additional protocol to the European Convention on Human Rights should be drawn up concerning these rights.

The Parliamentary Assembly has officially recommended for a "Human Right to a Healthy and Clean Environment" in the European Convention and made reference to this and other

human rights approaches to environmental issues in PA Recommendations 1130 (1990), 1431 (1999) and 1614 (2003). The Committee of Ministers denied all three...

Non-binding Declarations and Reports

The Stockholm Declaration (1972)

This declaration proclaims its concern about: "growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment". Stockholm Principle 7 calls on States "to take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health.

Declaration on the Right to Development (1986)

This and several other international documents, among them the Vienna Declaration (adopted by the World Conference on Human Rights (1993)), state that the right to development is a "universal and inalienable right and an integral part of fundamental human rights" (Article I (10)).

Article 8(1) of the Declaration on the Right to Development says that "[s]tates should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income...

In interpreting this article, the UN General Assembly clarified and reaffirmed in its Resolution 54/175 that "[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community." The UN General Assembly, in its 1994 Resolution 45/94, had already recognised "that all individuals are entitled to live in an environment adequate for their health and well-being.

Legal Principles for Environmental Protection and Sustainable Development (1987)

The influential ***Brundtland Report*** sought for solutions to parallel problems of global environmental degradation and global lack of social and economic development by asking for these challenges to be addressed in an integrated way in the interests of present and future generations. In the report, sustainable development was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Article 1 of the legal principles, adopted by the Expert Group of the Brundtland Commission, expressly links the three fields in declaring that: "All human beings have the fundamental right to an environment adequate for their health and well-being.

Rio Declaration on Environment and Development (1992)

Chapter 6 of Agenda 21, adopted at the 1992 Rio Conference on Environment and Development, is entirely devoted to "protecting and promoting human health condition",

while the Rio Declaration itself (Principle 1) proclaims that human beings are entitled to a healthy and productive life in harmony with nature and provides that states should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances that, *inter alia*, are found to be harmful to human health (Principle 14).

Draft Declaration of Principles on Human Rights and the Environment (1994)
This is the most comprehensive international statement on environmental rights to date. It was appended to the Report of the UN Special Rapporteur on Human Rights and the Environment. The Report was presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 46th Session (UN Doc, E/CN.4/Sub.2/1994/9).

The Declaration sets out a series of general principles, including the human right to a secure and healthy environment, the right to non-discrimination and the right to an environment adequate to meet the needs of the present generation without impairing the rights of future generations to meet their needs. It further defines a series of substantive rights, including the human right to protection of the environment, the right to safe and healthy water, the right to preservation of unique sites and the rights of indigenous peoples to land and environmental security, delineating procedural rights, including the right to environmental information, and active participation in environmental decision-making, and the right to effective redress for environmental harm.

The principles set out in the Draft Declaration reflect and build upon the rights found in both national and international law. Although this instrument is non-binding legally, national courts have used the Draft Declaration as a basis for decisions on environment matters and have found legal support in the Draft Declaration in deciding in favour for the protection of the fundamental right to a healthy environment.

UN Environmental Programme (UNEP) (1999)
When UNEP reported on its activities in the field of human rights and the environment in 1999, it explicitly referred to the individual's right to a clean and healthy environment. The report started with mentioning: "Environmental standards in environmental management are an important tool which ensures the right to a clean and healthy environment for all people living on this earth.

Johannesburg Declaration on Sustainable Development (2002)
The 2002 World Summit on Sustainable Development specifically commits to "assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels" (para. 5).

UN Secretary-General report on Relationship Between Human Rights and the Environment (2005)

In February 2005, the Secretary-General released an updated report on the relationship between the environment and human rights, science and environment - Human rights and the environment as part of sustainable development.

The report analyses some of the developments that have taken place at the international, regional and national level in recognition of the link between the protection of the natural environment and the enjoyment of human rights. The report concludes that, since the World Summit on Sustainable Development, there has been growing recognition of the connection between environmental protection and human rights.

From the website of the NGO "Right to Environment"

http://www.righttoenvironment.org/default.asp?pid=1

UN Practice - UN Human Rights Council (and its predecessor the Human Rights Commission)

In addition to specific human rights treaties, United Nations organs concerned with human rights have taken up the links between human rights, health and environmental protection. And so have the UN Human Rights Council and its predecessor the Human Rights Commission.

The United Nations Human Rights Commission in 1991 adopted Resolution 1991/44, which recognises that "all individuals are entitled to live in an environment adequate for their health and well-being." The Commission also has a Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, whose mandate includes consideration of complaints. All of the reported cases involve harm to human health as a result of the trans-boundary movement of hazardous materials, nearly always in violation of national and international environmental law. In 1998 the Bureau of the Commission recommended that the mandate of the Special Rapporteur on toxics and human rights be converted to a mandate on human rights and the environment[1].

A similar recommendation was made in February 2000 by the Commission's intersession open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights[2].

The issue of converting the Special Rapporteur's mandate reflects the growing understanding that the full enjoyment of human rights requires addressing a broad range of environmental problems - including but not limited to problems related to toxic wastes - because such problems implicate a host of fundamental human rights.

In its resolutions on this topic, the UN Commission on Human Rights now consistently recognises that such environmental violations also "constitute a serious threat to the human rights to life, good health and a sound environment for everyone." (Commission on Human Rights, Resolutions 1999/23 and 2000/72).

In this context, the Commission also increasingly refers to cooperation between the human rights bodies and those concerned with environmental protection, supporting the development of issue-specific cooperative action among UN bodies with a wide range of mandates. The Commission has also specifically linked the issue of the right to food with sound environmental policies and noted that problems related to food shortages can generate additional pressures upon the environment in ecologically fragile areas (Resolution 2001/25, The right to food)[3].

Other resolutions of the Commission similarly link human rights and environmental protection, sometimes referring explicitly to the right to a safe and healthy environment: In Resolution 2001/65, entitled "Promotion of the Right to a Democratic and Equitable International Order", the Commission affirmed that "a democratic and equitable international order requires, *inter alia*, the realisation of...the right to a healthy environment for everyone..." The Sub-Commission on Human Rights also has pressed the issue of the right to drinking water and sanitation, recommending that the Human Rights Commission authorise it to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realisation of the right to drinking water supply and sanitation.

In 2005, the Commission linked human rights and environmental protection in two resolutions, sometimes explicitly referring to the right to a safe and healthy environment. In Resolution 2005/57 (Promotion of a democratic and equitable international order)[4] the Commission affirmed that democratic and equitable international order requires, *inter alia*, the realisation of the right of every person and all peoples to a healthy environment.

Resolution 2005/60 on human rights and the environment as part of sustainable development[5] again recognised that environmental damage, including that caused by natural circumstances or disasters, can have potentially negative effects on the enjoyment of human rights and on a healthy life and a healthy environment (preamble). It calls upon States to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development.

And as of late March 2008, Climate change is officially a human rights issue. As the UN Human Rights Council passed a resolution on the subject (7/23) on 28 March 2008, recognising that the world's poor are particularly vulnerable to climate change.

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[1] UN Doc. E/CN.4/1999/104, paragraph 20(b).[2] UN Doc. E/CN.4/2000/112 (2000).[3] UN Doc. E/CN.4/RES/2001/25 of 20 April 2001.[4] UN Doc. E/CN.4/2005/L.73.[5] UN Doc. E/CN.4/2005/L.79.

Case Law by the European Court on Human Rights

Arrondelle v. UK 26 DR 5 (1982)

This case was about the interference with an individual's right to private life and home as well as the peaceful enjoyment of his property through aircraft noise from increased flights and extension of flight paths at Heathrow Airport. Article 8 and Article 1 of Protocol No. 1 provided the basis for a 'friendly settlement' between the parties in a complaint, alleging nuisance due to the development of an airport and construction of a motorway adjacent to the applicant's home.

Zimmerman and Steiner v. Switzerland, 8737/79 [1983] ECHR 9 (13 July 1983)

The Court found Article 6 applicable to a complaint about the length of proceedings for compensation for injury caused by noise and air pollution from a nearby airport. The Court held that there had been a violation of Article 6-1.

Oerlemans v. Netherlands, 12565/86 [1991] ECHR 52 (27 November 1991)

This case concerns the question whether the applicant could challenge the lawfulness before a court of an order designating his land as a protected natural site.
Article 6-1 was held applicable because there existed a serious dispute concerning the restrictions on the applicant's use of his property. In the light of the Court's case law, the property right in question was "civil" in nature in the meaning of Article 6-1. The Court ruled, however, that there was no breach of Article 6-1.[1]

Zander v. Sweden, [1993] IIHRL 103 (25 November 1993)

Article 6 provided the basis for a complaint that the applicants had been denied a remedy for threatened environmental harm.[2] The applicants' claim was directly concerned with their ability to use the water in their well for drinking purposes. Such ability was one facet of their right of property. The entitlement in issue was thus a 'civil right' and thus Article 6-1 was applicable. At the material time it was not possible for the applicants to have the relevant decision reviewed by a court. Accordingly, the Court held that there had been a violation of Article 6-1 in their case.

Lopez Ostra v Spain 16798/90 [1994] ECHR 46 (9 December 1994) and Guerra v. Italy 14967/89 [1998] ECHR 7 (19 February 1998)

Landmark cases include Lopez Ostra v Spain and Guerra v. Italy. In both cases ECHR found the violation of the Article 8 (privacy and family life).
The Court, in Lopez Ostra v. Spain, for the first time held that a failure by the state to control industrial pollution was a violation of Article 8 where there was a sufficiently serious interference with the applicants' enjoyment on their home and private life.[3] However, the ECHR noted that regard has to be given to the fair balance between

competing interests of individual and community as a whole (balancing the 1st and the 2nd paragraph of the Article 8).[4]. It is important to note that in some cases[5] the economic interest of a state (which is regarded as the interest of the community as whole) can override the interest of an individual.

However, as the cases Lopez Ostra v Spain and Guerra v. Italy confirm, where a polluting activity is actually violating an existing national law, the State's overriding economic interest in its continued illegal operation is difficult to assert. Moreover, both cases also point to the positive duty of a state to take measures, which would secure the enjoyment of the individual rights to private life and property (note that the essence of both cases is in a failure of governments to enforce already existing law or a failure to act).

Balmer-Schafroth v. Switzerland, 22110/93 [1997] ECHR 46 (26 August 1997)

The applicants claimed that the failure of Switzerland to provide for administrative review of a decision extending the operation of nuclear facility violated Article 6 (everyone is entitled to a fair hearing by [a] tribunal). Conclusion: the Court held that Article 6-1 of the Convention is not applicable in the instant case.[6]

LCB v. UK (1999) 27 EHRR 212

The applicant's father, while in the RAF, was exposed to radiation at nuclear testing near Christmas Island in 1957 and 1958.[7] The Court concluded there had been no breach of Articles 2 or 3 concerning the state's failure to advise the applicant's parents and monitor her health.

Concerns exposure to nuclear tests; based on Article 2, the Court found no violation because the state had done all it could to avoid risk to life.[8]

Bladet Tromso and Stensaas v. Norway, 21980/93 [1999] ECHR 29 (20 May 1999)

This case refers to the newspaper's freedom under Article 10 to publish environmental information, regarding the consequences of seal hunting, of local, national and international interest. The Court held that there had been a violation of the Article 10 (freedom of expression).[9] The Court determined that public awareness and the possibility of an informed public debate resulting from the news story took priority over the protection of the reputation of the crew members who had skinned the seals, finding a violation of the Article 10. The Court's decision embraces an important aspect of human rights and the environment: the right to public information to keep the public aware of when its government engages in environmentally harmful activities, such as skinning seals alive.

Such awareness should trigger public demand for better enforcement of existing environmental laws, such as Norwegian seal hunting regulations in the instant case. Thus, a robust right to freedom of expression can lead to greater public information, which, in turn, can foster enhanced protection of biodiversity.[10]

Hatton and Others v. the United Kingdom, 36022/97 [2003] ECHR 338 (8 July 2003)

The case concerned noise nuisance in the vicinity of London's Heathrow Airport and in particular the adequacy of the studies carried out by the authorities prior to implementing a system of noise quotas. The Court (Grand Chamber) considered that a fair balance had been struck between the competing interests involved.[11]

Kyrtatos v. Greece, 41666/98 [2003] ECHR 242 (22 May 2003)

Environmental considerations were also raised in Kyrtatos v. Greece (the refusal of domestic authorities to comply with or their delay in implementing binding decisions of courts), in which one aspect of the applicants' complaint under Article 8 related to the effect of tourist development on an important wildlife refuge adjacent to property owned by one of the applicants. The Court held that there had been a violation of Article 6 of the Convention due to the non-compliance with the judgements pronounced, and as regards the length of the two sets of proceedings; in relation to Article 8 the Court held that there had been no violation.

Taşkin and Others v. Turkey, 46117/99 [2004] ECHR 621 (10 November 2004)

In Taşkin and Others v. Turkey, the authorities had failed to comply with a court decision annulling a permit to operate a gold mine using a particular technique, on the grounds of the adverse effect on the environment, subsequently granting a new permit. The Court held that national authorities had violated the applicants' right to respect for private and family life and to a fair trial under Articles 6 and 8 of the European Convention, both by the authorisation of a permit to operate a gold mine using the cyanide leaching process and the related decision-making processes.

Moreno Gomez v Spain, 4143/02 [2004] ECHR 633 (16 November 2004)

In this case there had been serious night noise disturbance from pubs and clubs, exceeding 100 dbA, which made sleeping difficult. An expert report concluded that noise levels were unacceptable. The council had banned any further activities that would have noise impacts on the area but a month later licensed a new disco in the building that the applicant lived in. The licence was eventually declared to be invalid and the applicant lodged a claim against the council, which the national courts rejected. The court concluded that there had been a violation of Article 8 (respect for private life and the home) because the authorities had tolerated and hence contributed to, the repeated breach of the local rules dealing with noise. The authorities had repeatedly failed to respect regulations relating to the control of noise, granting permits for discotheques and bars despite being aware that the area was zoned as "noise saturated". In view of the volume of the noise, at night and beyond permitted levels, and the fact that it had continued over a number of years, the Court found that there had been a breach of the rights protected by Article 8.

Oneryildiz v. Turkey, 48939/99 [2004] ECHR 657 (30 November 2004)

In this case the European Court of Human Rights decided its first environmental case involving loss of life. The applicant lived in a slum area of Istanbul built around a rubbish tip under the authority and responsibility of the main City Council. An expert report from 1991 noted that no measures had been taken to prevent a possible explosion of methane gas from the tip. In 1993 there was such an explosion. The refuse erupting from the pile of waste buried 11 houses, including the applicant's. The applicant lost nine members of his family. The applicant complained under Article 2 of the ECHR (the right to life) that the accident had occurred as a result of negligence on the part of the relevant authorities.

He also relied on Article 1 of Protocol 1 (the protection of property), as regards the loss of his house and other property. The Court concluded there had been a violation of right to protection of life enshrined in Article 2 in its procedural aspect; violation of the right to peaceful enjoyment of possessions as protected by Article 1 of the Protocol No. 1; and violation of the right to a domestic remedy, as set forth in Article 13 of the Convention, in respect of both complaints (complaint under the substantive head of Article 2, and complaint under Article 1 of Protocol No. 1); The Court deemed it not necessary to examine Article 6 and Article 8.

Fadeyeva v Russia, 55723/00 [2005] ECHR 376 (9 June 2005)

The applicants were exposed to pollution from a massive steel works close to their home. Although the authorities had established a sanitary 'buffer zone' around the works, the applicants, like many thousands of others, had been housed in a flat inside the zone. The applicants obtained a court order requiring that they be re-housed outside the zone, but this was never executed, and a subsequent attempt to enforce this order was rejected by the courts. The Court held that there had been a violation of Article 8 (right to private, family life, and no interference by a public authority).

Okyay and others v. Turkey, 36220/97 [2005] ECHR 476 (12 July 2005)

This case concerned a failure by the national authorities of Turkey to implement an order of their domestic court, closing down three thermal-power plants (Yatağan, Gökova (Kemerköy) and Yeniköy thermal-power plants in the Muğla province), which were polluting the environment in southwest Turkey. The applicants thus complained under Article 6 of the Convention that their right to a fair hearing had been breached on account of the administrative authorities' failure to enforce the administrative courts' decisions and orders to halt the operations of the thermal-power plants. The Court held that there had been a violation of Article 6-1 of the Convention. The Court considers that the national authorities failed to comply in practice and within a reasonable time with the judgements rendered by the Aydın Administrative Court on 30 December 1996 and subsequently upheld by the Supreme Administrative Court on 3 and 6 June 1998, thus depriving Article 6-1 of any useful effect.

Öçkan and others v. Turkey, 46771/99 [2006] (28-03-2006)

The case concerns the granting of permits to operate a goldmine. The applicants, and other inhabitants of Bergama, asked for the permit to be set aside, citing the dangers of the cyanidation process used by the operating company, the health risks and the risks of pollution of the underlying aquifers and destruction of the local ecosystem. The Court concluded a violation of Articles 6-1 (right to a fair trial) and 8 (right to respect for private and family life); it was not necessary to examine separately the complaints under Articles 2 (right to life) and 13 (right to an effective remedy).

Giacomelli v. Italy, 59909/00 [2006] (2 November 2006)

After having given an extensive outline on the case law of the court (thus redefining when environmental pollution creates a violation of Article 8), the Court concludes that there had been a violation of Article 8 in this case, which related to the Lombardy government allowing for a waste treatment plant. The licence included the "detoxification" of hazardous waste, a process involving the treatment of special industrial waste using chemicals.

To the Court's opinion "... the fact remains that for several years her right to respect for her home was seriously impaired by the dangerous activities carried out at the plant built thirty metres away from her house. Having regard to the foregoing, and notwithstanding the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life. The Court therefore dismisses the Government's preliminary objection and finds that there has been a violation of Article 8 of the Convention.

Budayeva and Others vs. Russia, Application, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 [2008] (20 March 2008)
The Court was asked to confirm that the Russian government had failed to fulfil its obligations under Article 2 of the European Convention on Human Rights (ECHR), namely to protect the right to life.

The case concerned events between 18 to 25 July 2000, when a mudslide led to a catastrophe in the Russian town Tyrnauz: it threatened the applicants' lives and caused eight deaths, among them the husband's of one of the applicants. The Court found that the Russian government breached Article 2 ECHR, both in its substance and in its procedural aspects.

First, the authorities omitted to implement land-planning and emergency relief policies despite the fact that the area of Tyrnauz was particularly vulnerable for mudslides, thus exposing the residents to "mortal risk". Second, the Court determined that the lack of any state investigation or examination of the accident also constituted a violation of Article 2 ECHR. The decision was so obvious that the Russian national judge did not opt for his right not to act up on it.

Tatar v. Romania, Application no. 67021/01. (27.01.2009)
The European Court held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, on account of the Romanian authorities' failure to protect the right of the applicants, who lived in the vicinity of a gold mine, to enjoy a healthy and protected environment.

Leon and Agnieszak Kania v. Poland, Application no 12605/03 (21.07.2009)
The applicants, two Polish nationals, filed a complaint before the European Court of Human Rights (ECtHR) against the Republic of Poland complaining about the excessive length of administrative proceedings related to the functioning of a craftsmen's cooperative established next to the their home in 1978. The applicants further alleged that due to the cooperative's continuous activities they have been subjected to serious noise and pollution for a number of years, which resulted serious and long-term health problems. On 21 July 2009, the European Court held that there has been a violation of the applicants' right to a fair hearing, since the length of the administrative proceedings was excessive and failed to meet the "reasonable time" requirement. With regard to the applicants' right to respect for private and family life, the Court reiterated that even if there is no explicit right in the Convention to a clean and quiet environment, Article 8 of the Convention may apply in environmental cases, regardless of whether the pollution is directly caused by the State or the State's responsibility arises from failure to regulate private-sector activities properly. Nevertheless, the Court concluded that it has not been established that the noise levels considered in the present case are so serious as to reach the high threshold established in cases dealing with environmental issues. Therefore, the Court held that Article 8 of the Convention had not been violated.

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[1] Following the Court's judgement in the Benthem Case, it was the view of many authorities on Netherlands law that the civil courts would be able to examine the lawfulness of any administrative decision coming within the scope of Article 6 against which an appeal lay to the Crown. The Supreme Court upheld this view in a decision of 12 December 1986 and confirmed the principle in several judgements. Accordingly under well-established principles of Netherlands law, which existed at the time of the Royal Decree in the present case, the applicant could have submitted his dispute to the civil courts for examination. There was thus no breach of Article 6-1.

[2] The applicability of Article 6 was based on the Court's finding that "the applicants could arguably maintain that they were entitled under Swedish law to protection against the water in their well-being polluted as a result of VAFAB's [the polluting company] activities on the dump."

[3] What is important is that the interference did not have to threaten the health of the applicants ("/S/evere environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.", Lopez Ostra v Spain).

[4] In the Lopez Ostra v Spain case, The Court noted that "…regard must be had to the fair balance that has to be struck between individual and community interests, and in any case the State enjoys a certain margin of appreciation.".

[5] For instance see Powell and Rayner v. UK, where no violation of Article 8 was found.

[6] The claim was thus rejected by the majority, because the connection between government's decision and the applicants' right was too remote and tenuous ([the applicants] did not for all that establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures, which the Federal Council could have ordered to be taken in the instant case, therefore remained hypothetical. Consequently, neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. In the Court's view, the connection between the Federal Council's decision and the right invoked by the applicants was too tenuous and remote.")

However, this judgement was criticised by the Dissenting opinion of Mr Pettiti, joined by Mr Gölcüklü, Mr Walsh, Mr Russo, Mr Valticos, Mr Lopes Rocha and Mr Jambrek – Dissenting opinion of the ("The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage. … Where the protection of persons in the context of the environment and installations posing a threat to human safety is concerned, all States must adhere to those principles.")

[7] . The applicant was born in 1966 and was diagnosed as having leukaemia in 1970. She alleged that the failure to warn her of her father's exposure to radiation had prevented pre- and post-natal monitoring, which would have led to earlier diagnosis of her illness The European Court held that it had no jurisdiction to consider the complaint under Article 2 because the state's failure to monitor her father's exposure to radiation occurred prior to the UK's allowing individual petitions on 14 January 1966 and the point had not been raised before the European Commission.

[8] The Court held that the State could only have been required to take steps to provide information if it had appeared likely at the time that there was a real risk to the health of future children.

[9] The Court ruled: "the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest. In short, the reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic society". Notwithstanding the national authorities' margin of appreciation, the Court considers that there was no reasonable relationship of proportionality between the restrictions placed the applicants' right to freedom of expression and the legitimate aim pursued."

In May 1999, the Grand Chamber of the European Court of Human Rights found that Norwegian Ministry of Fisheries had violated the right to freedom of expression under Article 10 of the European Convention on Human Rights when it tried to withhold from the Norwegian public a story about government employees skinning seals alive. An employee of the Norwegian Ministry of Fisheries had inspected a Norwegian government vessel, discovered that crew members had skinned seals alive in violation of Norwegian seal hunting regulations and reported the matter to the Ministry of Fisheries office. When the Ministry of Fisheries office decided not to inform the Norwegian public of the incident, the employee provided the story to the Norwegian press. Shortly thereafter, the crew members sued the Norwegian press for defamation and won. The Norwegian press brought the matter to the European Court.

[10] See EarthJustice, Issue Paper, Human rights and the environment, 2001.

[11] The ECHR concluded that there had been breaches of both Article 8 and Article 13 of the ECHR. The Court furthered its growing jurisprudence on the application of the right to privacy to environmental harms. The Chamber found on October 2, 2001 that noise from overnight air traffic at Heathrow Airport violated the right to privacy and inviolability of the home and family of nearby residents under Article 8 of the European Convention on Human Rights. The Chamber also found a violation of the right of access to an effective legal remedy under Article 13 of the European Convention on grounds that the scope of review provided by the UK courts was insufficient to allow petitioners to claim that the increase in night flights under the 1993 scheme represented an unjustifiable interference with their privacy. Finding that the United Kingdom had violated both Article 8 and 13, the Commission ordered that the United Kingdom pay the plaintiffs damages.

Băcilă v. Romania (Case No. 19234/04; judgment 30 March, 2010)

In this case it was clear that applicants were affected by the operation of an industrial plant in gross excess of applicable environmental standards. The complaint of the applicant pertained to the fact that the state had not acted in due diligence in ensuring that the impugned plant would reduce pollution levels to a level consistent with the level needed to ensure the well- being of the population. The levels of permissible environmental harm in the operating permit were set inter alia by reference to the levels set at EU level and through the use of findings in an IEA carried out by a special institute.

In deciding on the merits of the case, and in finding that the state had not respected the interest of the applicant to '*live in a healthy and balanced environment'*, the Court inter alia relied on domestic legal provisions determining unsafe levels of pollution, environmental studies commissioned by the authorities, relevant reports, statements or studies made by private entities, and medical certificates.

The Băcilă case in 2010 was the first case in which the European Court of Human Rights clearly affirmed the existence of a right to environment.

***Di Sarno and Others v. Italy* - 30765/08**

Judgment 10.1.2012 [Section II]

Publication:			
Title:	Di Sarno and others v. Italy		
Application No:	30765/08		
Respondent:	Italy		
Referred by:			
Date of reference by Commission:			
Date of reference by State:			
Date of Judgment:	10-01-2012		
Articles:	8	Conclusion:	Violation of article 8
	13		Violation of article 13
	41		Compensation awarded for costs and expenses
Keywords:	PRIVACY / RESPECT FOR HOME / EFFECTIVE REMEDY		

Summary:
(Press release)
Italy's prolonged inability to deal with "waste crisis" in Campania breached human rights of 18 people living and working in the region: the case concerned the state of emergency (from 11 February 1994 to 31 December 2009) in relation to waste collection, treatment and disposal in the Campania region of Italy where the applicants lived and/or worked, including a period of five months in which rubbish piled up in the streets.

The applicants are 18 Italian nationals, 13 of whom live in - and the other five who work in - the municipality of Somma Vesuviana (Campania). From 11 February 1994 to 31 December 2009 a state of emergency was in place in the region of Campania, declared by the then Prime Minister on account of serious problems with the disposal of urban waste. The management of the state of emergency was initially entrusted to "deputy commissioners". On 9 June 1997 the President of the Region, acting as deputy commissioner, drew up a regional waste disposal plan which provided for the construction of five incinerators, five principal landfill sites and six secondary landfill sites. He issued an invitation to tender for a ten-year concession to operate the waste treatment and disposal service in the province of Naples. According to the specifications, the successful bidder would be required to ensure the proper reception of the collected waste, its sorting, conversion into refuse-derived fuel (RDF) and incineration. To that end, it was to construct and manage three waste sorting and fuel production facilities and set up an electric power plant using RDF, by 31 December 2000. The concession was awarded to a consortium of five companies which undertook to build a total of three RDF production facilities and one incinerator. On 22 April 1999 the same deputy commissioner launched an invitation to tender for a concession to operate the waste disposal service in Campania. The successful

bidder was a consortium which set up the company FIBE Campania S.p.A. The company undertook to build and manage seven RDF production facilities and two incinerators. It was required to ensure the reception, sorting and treatment of waste in the Campania region. In January 2001 the closure of the Tufino landfill site resulted in the temporary suspension of waste disposal services in the province of Naples. The mayors of the other municipalities in the province authorised the storage of the waste in their respective landfill sites on a temporary basis.

On 22 May 2001 the collection and transport of waste in the municipality of Somma Vesuviana was entrusted to a consortium of several companies. Subsequently, on 26 October 2004, management of the service was handed over to a publicly-owned company. In 2003 the Naples public prosecutor's office opened a criminal investigation into the management of the waste disposal service in Campania. On 31 July 2007 the public prosecutor requested the committal for trial of the directors and certain employees of the companies operating the concession and of the deputy commissioner who had held office between 2000 and 2004 and several officials from his office, on charges of fraud, failure to perform public contracts, deception, interruption of a public service, abuse of office, misrepresentation of the facts in the performance of public duties and conducting unauthorised waste management operations. A further crisis erupted at the end of 2007, during which tonnes of waste piled up in the streets of Naples and several other towns and cities in the province. On 11 January 2008 the Prime Minister appointed a senior police official as deputy commissioner, with responsibility for opening landfill sites and identifying new waste storage and disposal sites. In the meantime, in 2006, another criminal investigation was opened, this time concerning the waste disposal operations carried out during the transitional phase following the termination of the first concession agreements. On 22 May 2008 the judge made compulsory residence orders in respect of the accused, who included directors, managers and employees of the waste disposal and treatment companies, persons in charge of waste recycling centres, managers of landfill sites, representatives of waste transport companies and officials from the office of the deputy commissioner. Those concerned were charged with conspiracy to conduct trafficking in waste, forging official documents, deception, misrepresentation of the facts in the performance of public duties and organised trafficking of waste.

Relying on Articles 2 (right to life) and 8 (right to respect for private and family life), the applicants complained that, by omitting to take the necessary measures to ensure the proper functioning of the public waste collection service and by implementing inappropriate legislative and administrative policies, the State had caused serious damage to the environment in their region and placed their lives and health in jeopardy. They criticised the authorities for not informing those concerned of the risks entailed in living in a polluted area. Relying on Articles 6 (right to a fair hearing) and 13 (right to an effective remedy), the applicants complained that the Italian authorities had taken no initiatives aimed at safeguarding the rights of members of the public, and criticised the Italian courts for delays in prosecuting those responsible.

The Italian Government's preliminary objections:
The Italian Government argued that the applicants could not claim "victim" status. According to the Court's case-law, the crucial element in determining whether environmental pollution amounted to a violation of one of the rights safeguarded by Article 8 was the existence of a harmful effect on a person's private or family life and not simply the general deterioration of the environment.

However, in today's case the Court considered that the environmental damage complained of by the applicants had been such as to directly affect their own well-being. Accordingly, it rejected the Government's preliminary objection concerning the applicants' victim status.

The Government further alleged that the applicants had not exhausted domestic remedies, arguing that they could have brought an action for compensation against the agencies managing the collection, treatment and disposal of waste in order to seek redress for the damage sustained as a result of the malfunctioning of the service, as other inhabitants of the Campania region had done.

As to the possibility for the applicants to bring an action for damages, the Court noted that that might theoretically have resulted in compensation for those concerned but would not have led to the removal of the rubbish from the streets and other public places. The Court further observed that the Government had not produced any civil court decision awarding damages to the residents of the areas concerned, or any administrative court decision awarding compensation for damage. Likewise, the Government had not cited any court rulings establishing that the residents of the areas affected by the "waste crisis" could have been joined as civil parties to criminal proceedings concerning offences against the public service and the environment. Lastly, as to the possibility of requesting the Environment Ministry to bring an action seeking compensation for environmental damage, the Court noted that only the Environment Ministry, and not the applicants themselves, could claim compensation. The only course of action open to the applicants would have been to ask the Ministry to apply to the judicial authorities. That could not be said to constitute an effective remedy for the purposes of Article 35 § 1 of the Convention. Accordingly, the Court rejected the Government's preliminary objection of failure to exhaust domestic remedies.

Article 8
The Court pointed out that States had first and foremost a positive obligation, especially in relation to hazardous activities, to put in place regulations appropriate for the activity in question, particularly with regard to the level of the potential risk. Article 8 also required that members of the public should be able to receive information enabling them to assess the danger to which they were exposed.

The Court observed that the municipality of Somma Vesuviana, where the applicants lived

or worked, had been affected by the "waste crisis". A state of emergency had been in place in Campania from 11 February 1994 to 31 December 2009 and the applicants had been forced, from the end of 2007 until May 2008, to live in an environment polluted by the piling-up of rubbish on the streets.

The Court noted that the applicants had not complained of any medical disorders linked to their exposure to the waste, and that the scientific studies produced by the parties had made conflicting findings as to the existence of a link between exposure to waste and an increased risk of cancer or congenital defects. Although the Court of Justice of the European Union, which had ruled on the issue of waste disposal in Campania, had taken the view that a significant accumulation of waste on public roads or in temporary storage sites was liable to expose the population to a health risk, the applicants' lives and health had not been in danger.

The collection, treatment and disposal of waste were hazardous activities; as such, the State had been under a duty to adopt reasonable and appropriate measures capable of safeguarding the right of those concerned to a healthy and protected environment. It was true that the Italian State, from May 2008 onwards, had adopted several measures and launched a series of initiatives which made it possible to lift the state of emergency in Campania on 31 December 2009. However, the Court could not accept the Italian Government's argument that that state of crisis was attributable to force majeure. Even if one took the view, as the Government did, that the acute phase of the crisis had lasted only five months - from the end of 2007 until May 2008 - the fact remained that the Italian authorities had for a lengthy period been unable to ensure the proper functioning of the waste collection, treatment and disposal service, resulting in an infringement of the applicants' right to respect for their private lives and their homes. The Court therefore held that there had been a violation of Article 8.

On the other hand, the studies commissioned by the civil emergency planning department had been published by the Italian authorities in 2005 and 2008, in compliance with their obligation to inform the affected population. There had therefore been no violation of Article 8 concerning the provision of information to the public.

Articles 6 and 13

As to the applicants' complaint concerning the opening of criminal proceedings, the Court reiterated that neither Articles 6 and 13 nor any other provision of the Convention guaranteed an applicant a right to secure the prosecution and conviction of a third party or a right to "private revenge". However, in so far as the complaint related to the absence of effective remedies in the Italian legal system by which to obtain redress for the damage sustained, the Court considered that that complaint fell within the scope of Article 13.

In view of its findings as to the existence of relevant and effective remedies enabling the applicants to raise their complaints with the national authorities, the Court held that there

had been a violation of Article 13.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that its findings of violations of the Convention constituted sufficient redress for the non-pecuniary damage sustained. It held that Italy was to pay 2,500 euros (EUR) to Mr Errico di Lorenzo in respect of costs and expenses.

COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO
TRIBUNAL DE JUSTIÇA DA COMUNIDADE DA
CEDEAO

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THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT IBADAN, IN NIGERIA
THIS 14 DAY OF DECEMBER 2012

Between

SERAP **Applicant**

Lawyers : A. A. Mumuni
Sola Egbeyinka

And

Federal Republic of Nigeria **Defendant**

Lawyer : T.A. Gazali

GENERAL LIST N°ECW/CCJ/APP/08/09 **JUDGMENT N° ECW/CCJ/JUD/18/12**

Before their Lordships

Hon. Justice Benfeito Mosso Ramos - Presiding
Hon. Justice Hansine Donli - Member
Hon. Justice Anthony Alfred Benin - Member
Hon. Justice Clotilde Médégan Nougbodé - Member
Hon. Justice Eliam Potey - Member

Assisted by Tony Anene-Maidoh - Chief Registrar

Delivers the following Judgment:

PARTIES

1. The Plaintiff, the Socio-Economic Rights and Accountability Project, SERAP, is a non governmental organization registered in Nigeria with Office at 4 Akintoye Shogunle Street Off Awolowo Way Ikeja, Lagos, Nigeria. The Plaintiff is represented by Mr. A. A. Mumuni with Sola Egbeyinka.

2. The First Defendant is the Federal Republic of Nigeria while the Second Defendant is the Attorney General of the Federation and the Chief Law Officer of the Federation. The First and the Second Defendants are represented by Mr. T.A. Gazali.

PROCEDURE

3. This case originated from a complaint brought on 23 July 2009 by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) pursuant to Article 10 of the Supplementary Protocol A/SP.1/01/05 against the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil.

4. The Plaintiff alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution

5. The Application was served on the Defendants in line with the provisions of Articles 34 of the Rules of Procedure of this Court.

6. Upon receipt of the Application, the 3rd to 9th Defendants raised Preliminary Objections to the jurisdiction of this Court to entertain the Application on various grounds.

7. After careful consideration of the issues raised in the Preliminary Objections, the Court, in Ruling No. ECW/CCJ/APP/07/10 delivered on 10 October 2010, ruled that the Plaintiff is a legal person and has the locus standi to institute this action.

8. The Court also held that it has no jurisdiction over the 3rd to 9th Defendants who are corporations and struck out their names in the suit.

9. Consequently the Plaintiff on the 11th of March 2011 filed with the leave of court an amended application against the President of the Federal Republic of Nigeria and The Attorney General of the Federation.

10. On the 10th day of March 2011, the Defendants filed a joint statement of defence to the suit to which the Plaintiff replied on the 8th of July 2011.

11. Both parties subsequently filed and exchanged written addresses of counsel. The Plaintiff for the first time attached a copy of the Amnesty International report to its address and the Defendant objected to the admissibility of that report on the ground that it is too late and not in accordance with the rules. The Court then asked both parties to address it on the admissibility of the report and reserved its ruling for judgment.

THE FACTS OF THE CASE

12. The Plaintiff contended that Niger Delta has an enormously rich endowment in the form of land, water, forest and fauna which have been subjected to extreme degradation due to oil prospecting.

13. It averrred that Niger Delta has suffered for decades from oil spills, which destroy crops and damage the quality and productivity of soil that communities use for farming, and contaminates water that people use for fishing, drinking and other domestic and economic purposes. That these spills which result from poor maintenance of infrastructure, human error and a consequence of deliberate vandalism or theft of oil have pushed many people deeper into

poverty and deprivation, fuelled conflict and led to a pervasive sense of powerlessness and frustration.

14. It further contended that the devastating activities of the oil industries in the Niger Delta continue to damage the health and livelihoods of the people of the area who are denied basic necessities of life such as adequate access to clean water, education, healthcare, food and a clean and healthy environment.

15. The Plaintiff submitted that although Nigerian government regulations require the swift and effective clean-up of oil spills this is never done timorously and is always inadequate and that the lack of effective clean-up greatly exacerbates the human rights and environmental impacts of such spills.

16. It admitted that though some companies have engaged in development projects to help communities construct water and sanitation facilities and some individuals and families received payments these were inadequate.

17. It submitted that government's obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and the failure of the government to take the concerns of the communities seriously and take steps to ensure independent investigation into the health impacts of gas flaring and ensure that the community has reliable information, is a breach of international standards.

18. It averred specifically that:

    - In 1995 SPDC Petroleum, admitted that its infrastructure needed work and that the corrosion was responsible for 50 per cent of oil spills.

    - On 28 August 2008, a fault in the Trans-Niger pipeline resulted in a significant oil spill into Bodo Creek in Ogoniland. The oil poured into the swamp and creek for weeks, covering the area in a thick slick of oil and killing the fish that people depend on for food and for livelihood. The oil spill has resulted in death or damage to a number of species of fish that provide the protein needs in the local community. Video footage of the

site shows widespread damage, including to mangroves which are an important fish breeding ground. The pipe that burst is the responsibility of the Shell Petroleum Development Company (SPDC). SPDC has reportedly stated that the spill was only reported to them on 5 October of that year. Rivers State Ministry of Environment was informed of the leak and its devastating consequences on 12 October. A Ministry official is reported to have visited the site on 15 October. However, the leak was not stopped until 7 November.

- On 25 June 2001 residents of Ogbobo in Rivers State heard a loud explosion from a pipeline, which had ruptured. Crude oil from the pipe spilled over the surrounding land and waterways. The community notified Shell Petroleum Development Company (SPDC) the following day; however, it was not until several days later that a contractor working for SPDC came to the site to deal with the oil spill. The oil subsequently caught fire. Some 42 communities were affected as the oil moved through the water system. The communities' water supply, which came from the local waterway, was contaminated. SPDC brought ten 500-litre plastic tanks of water to Ogbodo, but only after several days. Although SPDC refilled the tank every two to three days, 10 tanks are insufficient for their needs, and are emptied within hours of refilling.

- People in the area complained of numerous symptoms, including respiratory problems. The situation was so dire that some families reportedly evacuated the area, but most had no means of leaving

- Though companies have engaged in development projects to help communities construct water and sanitation facilities and some individuals and families have received payments however, some of these development projects and compensations have been criticised as inadequate and poorly executed.

- Hundreds of thousands of people are affected, particularly the poorest and other most vulnerable sectors of the population, and those who rely on traditional livelihoods such as fishing and agriculture.

ORDERS SOUGHT BEFORE THE COURT

19. The Plaintiff prays the Court to make the following orders:

a) A Declaration that everyone in the Niger Delta is entitled to the internationally recognised human right to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to social and economic development; and the right to life and human security and dignity.

b) A Declaration that the failure and /or complicity and negligence of the Defendants to effectively and adequately clean up and remediate contaminated land and water; and to address the impact of oil-related pollution and environmental damage on agriculture and fisheries is unlawful and a breach of international human rights obligations and commitments as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

c) A Declaration that the failure of the Defendants to establish any adequate monitoring of the human impacts of oil-related pollution despite the fact that the oil industry in the Niger Delta is operating in a relatively densely populated area characterised by high levels of poverty and vulnerability, is unlawful as it violates the International Covenant on Economic, social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and peoples' Rights.

d) A Declaration that the systematic denial of access to information to the people of the Niger Delta about how oil exploration and production will affect them, is unlawful as it violates the International Covenant on Economic, Social and Cultural rights, the international Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

e) An Order directing the Defendants to ensure the full enjoyment of the people of Niger Delta to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to socio and economic development; and the right to life and human security and dignity.

f) An Order directing the Defendants to hold the oil companies operating in the Niger Delta responsible for their complicity in the continuing serious human rights violations in the Niger Delta.

g) An Order compelling the Defendants to solicit the views of the people of the area throughout the process of planning and policy-making on the Niger Delta.

h) An Order directing the government of Nigeria to establish adequate regulations for the operations of multinationals in the Niger Delta, and to effectively clean-up and prevent pollution and damage to human rights.

i) An Order directing the government of Nigeria to carry out a transparent and effective investigation into the activities of oil companies in the Niger Delta and to bring to justice those suspected to be involved and /or complicit in the violation of human rights highlighted above.

j) An Order directing the Defendants individually and/or collectively to pay adequate monetary compensation of 1 Billion Dollars (USD) ($1 billion) to the victims of human rights violations in the Niger Delta, and other forms of reparation that the Honourable Court may deem fit to grant.

20. The Federal Republic of Nigeria maintains that the Court has no jurisdiction to examine the alleged violations of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It equally asks the Court to make a declaration that it is not competent to sit on the case, for, as it contends, the Plaintiff failed to annex to its Application, the report by Amnesty International; in so doing, it violates the provisions of the Rules of the Court and deliberately infringes on

the rights of the Defendant. It adds that if in any extraordinary manner, the Court holds that it has jurisdiction to examine the case, it will nevertheless have to conclude that the report adduced by the Plaintiff does not meet the universally accepted criteria for it to be admitted in evidence.

21. Besides, the Federal Republic of Nigeria affirms that the Plaintiff does not have locus standi to bring the instant action and maintains, morever, that by virtue of the provisions of the new Article 9(3) of the Protocol on the Court as amended by the 19 January 2005 Protocol, certain facts brought by the Plaintiff have come under the three-year statute bar, and therefore its action is foreclosed.

22. The Federal Republic of Nigeria therefore concludes that the Plaintiff's Application is not founded and must be dismissed.

IN LAW

23. The Court considers that certain issues raised by the Federal Republic of Nigeria, notably – (1) that the Court lacks jurisdiction to examine the alleged violations of the said Covenants ; (2) lack of locus standi on the part of the Plaintiff ; (3) the Plaintiff's failure to produce the Amnesty International report at the time of lodgment of the substantive application; and (4) that certain facts pleaded by the Plaintiff have come under a three-year statute bar. These questions present a preliminary aspect which touches on the jurisdiction of the Court and the admissibility of the Application. The Court therefore intends to analyse them before any analysis is made on the merits of the case.

I- PRELIMINARY QUESTIONS

(i) Whether the Court lacks jurisdiction to examine the alleged violations of the said Covenants

24. The Federal Republic of Nigeria argues notably, that the Constitution of Nigeria only recognises the jurisdiction of the domestic courts of Nigeria, as far as competence to examine violation of the rights contained in the ICCPR is

concerned, and that ICESCR did not provide that the rights contained in the said instrument were justiciable. The Federal Republic of Nigeria added that the Court has jurisdiction to adjudicate only in cases regarding the treaties, conventions and protocols of the Economic Community of West African States.

25. The new Article 9(4) of the Protocol on the Court as amended by Supplementary Protocol A/SP.1/01/05 of 19 January 2005 provides: ˝***The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State*** ˝.

26. This provision, which gives jurisdiction to the Court to adjudicate on cases of human rights violation, results from an amendment made to the 6 July 1991 Protocol A/P1/7/91 on the Community Court of Justice. The raison d'être of this amendment is Article 39 of the 21 December 2001 Protocol A/SP1/12/01 on Democracy and Good Governance, which provides: ˝***Protocol A/P1/7/91 adopted in Abuja on 6 July, 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights…***˝.

27. When the Member States were adopting the said Protocol, the human rights they had in view were those contained in the international instruments, with no exception whatsover, and they were all signatory to those instruments. Thus attests the preamble of the said Protocol as well as paragraph (h) of its Article 1, which stipulates the principles of constitutional convergence common to the Member States, which provides: ˝***The rights set up in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States ; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights***˝.

28. Thus, even though ECOWAS may not have adopted a specific instrument recognising human rights, the Court's human rights protection mandate is exercised with regard to all the international instruments, including the African

Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. to which the Member States of ECOWAS are parties.

29. That these instruments may be invoked before the Court reposes essentially on the fact that all the Member States parties to the Revised Treaty of ECOWAS ***have renewed their allegiance to the said texts, within the framework of ECOWAS***. Consequently, by establishing the jurisdiction of the Court, they have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international instruments they are signatory to.

30. This reality is consistently held in the Court's case law [See Judgment of 17 December 2009, Amouzou Henri v. Republic of Côte d'Ivoire § 57 to 62; Judgment of 12 June 2012, Aliyu Tasheku v. Federal Republic of Nigeria §16].

31. As to the justiciability or enforceability of the economic, social and cultural rights, this Court is of the view that instead of a generalistic approach recognizing or denying their enforceability, the appropriate way to deal with that issue is to analyse each right in concrete terms, try to determine which specific obligation it imposes on the States and Public Authorities, and whether that obligation can be enforced by the Courts.

32. Indeed there are situations in which the enjoyment of the economic, social and cultural rights depends on the availability of State resources. In those situations, it is legitimate to raise the issue of enforceability of the concerned right. But there are others in which the only obligation required from the State to satisfy such rights is the exercise of its authority to enforce the law that recognises such rights and prevent powerful entities from precluding the most vulnerable from enjoying the right granted to them.

33. In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta, but rather a failure to use the State authority, in compliance with international

obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region.

34. The Court notes that behind the thesis developed by the Federal Republic of Nigeria is the principle contained in its own Constitution that the economic, social and cultural rights, being mere policy directives, are not justiciable or enforceable.

35. But it should also be noted that the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

36. As held by the jurisprudence of this Court, in the Ruling of 27 October 2009, *SERAP* v. *Federal Republic of Nigeria* and *Universal Basic Education Commission*, once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.

37. This view is consistent with paragraph 2, Article 5 of the International Covenant on Economic, Social and Cultural Rights which Nigeria is party to by adhesion since 29 July 1993 which provides:

> *`No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent´*.

38. In these circumstances, invoking lack of justiciability of the concerned right, to justify non accountability before this Court, is completely baseless.

39. It is thus evident that the Federal Republic of Nigeria cannot invoke the non justiciability or enforceability of ICESCR as a mean for shirking its responsibility in ensuring protection and guarantee for its citizens within the framework of commitments it has made vis-à-vis the Economic Community of West African States and the Charter.

40. The Court adjudges that it has jurisdiction to examine matters in which applicants invoke ICCPR and ICESCR.

ii) That the Plaintiff lacks locus standi

Argument advanced by the Federal Republic of Nigeria

41. The Federal Republic of Nigeria maintained that SERAP has no *locus standi* because its Application was filed without the prior information, accord and interest of the People of Niger Delta, and that SERAP acts in its own name, with no proof that it is acting on behalf of the people of Niger Delta.

Argument advanced by the Plaintiff

42. The Plaintiff countered this plea-in-law by citing Ruling N°ECW/CCJ/APP/07/10 delivered by the Court on 10 December 2010 on the preliminary objections raised by the oil companies who were summoned to appear in court.

Analysis of the Court

43. The Court recalls that this issue has already been examined in the above-cited ruling among the numerous preliminary objections raised by the oil companies and it concluded that the NGO known as SERAP has locus satndi in the instant case (see §62 of the Ruling).

44. However, the Court notes that the Federal Republic of Nigeria did not take part in the proceedings relating to the said objections. But, by virtue of the relative effect of the decisions of the Court, the 10 December 2010 decision affect only the parties who pleaded their cases during that hearing. The authority of that decision cannot therefore be applied to the Federal Republic of Nigeria.

Consequently, the Court declares that this argument advanced by the Federal Republic of Nigeria is admissible.

45. Nevertheless, the Court does not find in the arguments advanced by the Federal Republic of Nigeria any determining factor capable of compelling it to set aside the previous decision. Consequently, the Court adjudges that SERAP, in the instant case, has locus standi.

iii) As to the admissibility of the report by Amnesty International

Argument advanced by the Federal Republic of Nigeria

46. The Federal Republic of Nigeria maintained that at the time of lodgment of the initial application, and even the amended application, the Plaintiff did not produce the report by Amnesty International, which it had listed among the annexed schedule of exhibits. By acting in such manner, and deliberately so, the Plaintiff violated the provisions of Article 32 of the Rules of Procedure – particularly paragraphs 1, 4, 5 and 6 – which it was bound to respect, and thus violated its right to defence. It added that the Plaintiff thus contributed to a systematic denial of fair hearing in the suit.

Argument advanced by the Applicant

47. Plaintiff counsel maintained that the admissibility of the document is at the discretion of the Court, and urged the Court to discountenance the argument brought by the Defendant, which falls under technicality, to the detriment of substantial justice. Moreover, the Plaintiff argued that the report is a piece of evidence he intended to rely on. He added that the failure to produce the report is due to an omission on the part of counsel to the Plaintiff, which should not result in injury to the Plaintiff. He prayed the Court to admit the said document.

Analysis of the Court

48. Paragraphs 1, 4, 5 and 6 of Article 32 of the Rules of Procedure of the Court provides:

˝1. The original of every pleading must be signed by the party's agent or lawyer. The original, accompanied by all annexes referred to therein, shall be lodged together with five copies for the Court and a copy for evry other party to the proceedings. The party lodging them in accordance with Article 11 of the Protocol shall certify copies.

4. To every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them.

5. Where in view of the length of a document only extracts for it are annexed to a pleading, the whole document or a full copy of it shall be lodged at the Registry.

6. Without prejudice to the provisions of paragraphs 1 to 5, the date on which a copy of the signed original of a pleading, including the schedule of documents referred to in paragraph 4, is received at the Registry by telefax or any other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 above, is lodged at the Registry no later than tend ays thereafter˝.

49. The Court recalls that it is not for the parties to indicate the procedure to be followed by the Court and that parties are required to abide by the provisions of the Court's Protocol and Rules of Procedure. The lawyers and counsels are under obligation to assist the parties with all the diligence and professionalism required.

50. The Court is of the view that failure to produce an exhibit in evidence is akin to the situation provided for in paragraph 6, Article 33 of the Rules of Procedure thus:

˝If the application does not comply with the requirements set out in paragraphs 1 to 4 of this Article, the Chief Registrar shall prescribe a period not more than thirty days within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the above-mentioned documents. If the applicant fails to to put the application in order or

to produce the the required documents within the time prescribed, the Court shall, after hearing the Judge Rapporteur, decide whether the non-compliance with these conditions renders the application formally inadmissible˝.

51. Thus, the sanctioning of any failure to comply with the provisions of Article 32 of the Rules of Procedure comes under the discretionary power of the Court and the latter exercises that power in accordance with the provisions of the texts of the Court and the dictates of an efficient administration of justice.

52. In that regard, paragraph 1 of the new Article 15 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol A/SP.1/01/05, and Articles 51 and 57(1) of the Rules of the Court provide respectively as follows :

Article 15.1 : *˝At any time, the Court may request the parties to produce any documents and provide any information or explanation which it may deem useful. Formal note shall be taken of any refusal.˝*
Article 51 : *˝The Court may request the parties to submit within a specified period all such information relating to the facts, and all such documents or other particulars as they may consider relevant. The information and/or documents provided shall be communicated to the other parties.˝*
Article 57(1) : *˝The Court may at any time, in accordance with these rules, after hearing the parties, order any measure of inquiry to be taken or that a previous inquiry be repeated or expanded˝.*

53. The Court recalls that as soon as it noticed that the Amnesty International report was produced along with the Plaintiff's final written submission and that an objection had been raised by the Defendant, it decided to reopen the oral procedure, under Article 58 of its Rules of Procedure, to allow the Parties to address that issue.

54. After receiving oral and written submissions of the Parties on the admissibility and content of that report, the Court reserved its decision for the judgment.

55. Consequently, the Court concludes that even if Plaintiff Counsel failed to produce the report initially, he made up for that omission in accordance with the Rules of the Court, and that in the instant case, it cannot be successfully

maintained that there has been infringement on the Defandant's rights to fair hearing. The Court adjudges, without prejudice to the authenticity of the report, that the Amnesty International report, as produced by the Plaintiff, is admissible.

iv) That certain facts brought by the Plaintiff have come under a three-year statute bar

Argument advanced by the Federal Republic of Nigeria

56. The Federal Republic of Nigeria maintained that the facts which occurred before 1990, in 1995, on 25 June 2001 (oil spill in Ogbodo), on 3 December 2003 (oil spill in Rukpokwu, Rivers State), in June 2005 (oil spill in Oruma, Bayelsa State), on 28 August 2008 and on 2 February 2009 (oil spills in Bodo, Ogoniland), have come under a three-year statute bar in line with the new paragraph 3, Article 9 of the 19 Jnauary 2005 Supplementary Protocol A/SP.1/01/05 which provides :

> *« any action by or against a Community Institution or any member of the Community shall be statute barred after three (3) years from the date when the right of action arose »*

Argument advanced by the Plaintiff

57. Conversely, the Plaintiff affirmed that "the Defendants' arguments are fundamentally flawed, based on outdated or mistaken principles of law and cannot be sustained having regard to sound legal reasoning established by the ECOWAS Court's own jurisprudence, and other national and international legal jurisprudence". The Plaintiff argued that the position of the Federal Republic of Nigeria conceals the cumulative effect of the various causes of pollution experienced by the Niger Delta region for decades. It stressed that there is a considerable difference between an isolated event of pollution or of environmental damage and the continuous and repeated occurrence of the same event in the same region for years. It further contended that in regard to the facts it is relying on, notably the recent report by Amnesty International (2009), the Federal Republic of Nigeria cannot validly argue that the current events and situation have come under a three-year statute bar. It is the view of

the Plaintiff that the violations are still continuing as a result of the unceasing nature of the oil spills and the damage done to the environment. The Plaintiff concluded that Article 9(3) does not apply to the instant case.

Analysis of the Court

58. In the instant case, the issue of statute of limitation raised by the Defendants based on facts that took place more than three years before the complaint was filed with the Court may be analysed in line with the date of the enactment of the ECOWAS 2005 Protocol which entrusted the Community Court of Justice with jurisdiction to entertain cases of human rights violation.

59. The facts that occurred before the Protocol of 2005 came into force cannot be taken into consideration in this case for the simple reason that the said Protocol cannot be applied retroactively.

60. As for the facts that occurred after the enactment of that instrument, their subjection to the statute of limitation depends on their characterisation as an isolated act or as a persistent and continuous omission that lasted until the date the complaint was filed with the Court.

61. Indeed, in the application lodged by the Plaintiff, the Federal Republic of Nigeria is faulted for omission over the years in taking measures to prevent environmental damage and making accountable those who caused the damage to the environment in the Niger Delta Region.

62. It is trite law that in situations of continued illicit behaviour, the statute of limitation shall only begin to run from the time when such unlawful conduct or omission ceases. Therefore, the acts which occurred after the 2005 Protocol came into force, in relation to which the Federal Republic of Nigeria had a conduct considered as omissive, are not statute barred.

II-CONSIDERATION OF THE ALLEGED VIOLATIONS

63. The Plaintiff alleged violation of Articles 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 21, 22, 23 and 24 of the Charter, Articles 1, 2, 6, 9, 10, 11, 12.1, 12.2, 12.2(b) of the International Covenant on Economic, Social and Cultural Rights, Articles 1, 2, 6, 7 and 26 of the International Covenant on Civil and Political Rights, Article 15 of the Universal Declaration of Human Rights. The Plaintiff particularly brings claims in respect of violation of the right to an adequate standard of living – including adequate food – and the violation of the right to economic and social development.

Argument advanced by the Plaintiff

64. Plaintiff argues that Article 11 of the International Covenant on Economic Social and Cultural Rights establishes "the right of everyone to an adequate standard of living-- including adequate food". The right to adequate food requires States to ensure the availability and accessibility of food. Availability includes being able to feed oneself directly from productive land or other natural resources. They submit that the Nigerian government has clearly failed to protect the natural resource upon which people depend for food in the Niger Delta, and has contravened its obligation to ensure the availability of food in that thousands of oil spills and other environmental damage to fisheries, farmland and crops have occurred over decades without adequate clean-up. They referred to African Commission's decision in the Ogoni case to the effect that Nigeria had violated the right to food by allowing private oil companies to destroy food sources and submitted that several years after this decision, the government of Nigeria has continued to violate its obligations under the Covenant and the African Charter by failing to take effective measures to enforce laws to prevent contamination and pollution of the food sources (both crops and fish) by private oil companies in the Niger Delta.

65. They submit that Article 6 of the ICESCR obliges State Parties to recognize the right of everyone to the opportunity to earn their living by work and as such the Government of Nigeria is obliged to take all necessary measures to prevent infringements of the right to earn a living through work by third parties.

66. On the right of everyone to an adequate standard of living they submit that it is linked with the rights to food and housing, as well as the right to gain a living by work and to the right to health.

67. On the right to health they refer to Articles 16 and 24 of the African Charter and Article 12.1 of the ICESCR and submit that the government of Nigeria has failed to promote conditions in which people can lead a healthy life due to its failure to prevent widespread pollution as a consequence of the oil industry which has directly led to the deterioration of the living situation for affected communities in the oil producing areas of the Niger Delta.

68. Frequent oil spills are a serious problem in the Niger Delta. The failure of the oil companies and regulators to deal with them swiftly and the lack of effective clean-up greatly exacerbates the human rights and environmental impacts of such spills.

69. Clean-up of oil pollution in the Niger Delta is frequently both slow and inadequate, leaving people to cope with the ongoing impacts of the pollution on their livelihoods and health.

70. There has been no effective monitoring by the Defendants of the volumes of oil-related pollutants entering the water system, or of their impacts on water quality, fisheries or health.

71. The Federal Government is yet to put in place modalities and logistics for the protection of the Niger Delta people as well as laws that will regulate activities in the Niger Delta and has not acted with due diligence to ensure that foreign companies operating in the Niger Delta do not violate human rights.

72. Plaintiff submits that by failing to deal adequately with corporate actions that harm human rights and the environment, the government of Nigeria has not only compounded the problem but has aided and abetted the oil companies operating in the Niger Delta in the violation of human rights.

Argument advanced by the Federal Republic of Nigeria

73. The Defendants deny all the material allegations of fact put forward by the Plaintiff and required the strictest proof of the averments contained therein.

74. In denying the allegation that the oil spill led to poverty in the area, the Defendants contend that the oil exploration has no direct relation with poverty in the region and that the allegations thereof are speculative.

75. The Defendants, while admitting oil spillage, aver that most of the spillage is caused by the errant youths of the Niger Delta who vandalise the oil pipelines and kidnap expatriates and oil workers thereby making it difficult for the government to function there.

76. Defendants deny the allegation of avoidance to pay compensation by the oil companies and state that these companies had on many occasions paid compensation to identified victims of leakages and pollution on account of court orders or out of court settlements.

77. The Defendants further aver that compensation had always been paid to victims and any delays in the payments are brought about by internal disagreement among claimants.

78. While denying the Plaintiff's allegation of neglect, Defendants aver that by the provisions of the Constitution of the Federal Republic of Nigeria, 13% of the oil revenue goes to the oil producing areas.

79. They also aver that the Federal Government established OMPADEC (Oil Minerals Producing Area Development Commission) which later crystallised into NDDC (Niger Delta Development Commission) with the responsibilities among others to ***formulate policies ,implement projects and programmes, liaise with the various oil mineral producing companies on all matters of pollution prevention and control, tackle ecological and environmental problems that arise from the exploration of oil mineral and advise the Federal***

Government on the prevention and control of oil spillages, gas flaring and environmental pollution of the Niger-Delta area.

80. The Federal Ministry of works also issues contracts for the construction of roads, bridges and other essentials of life in the Niger Delta.

81. The Federal Government established the Ministry of Niger Delta saddled with the responsibility of catering for the basic needs of the people of the Niger Delta and has put in place necessary legal tools for the protection of the Niger Delta Region as well as avenues for compensation to any inevitable victim of oil spill or pollution through various legislations which include the Oil Pipeline Act 1956,Petroleum Regulation Act 1967,Oil in Navigable Waters Regulation 1968, Petroleum Act 1969, Petroleum (drilling and production) Regulations 1969 , Federal Environmental Protection Act 1988, Impact Assessment Act 1992, Oil and Gas Pipeline Regulations, 1995, Environmental Standards and Regulation Enforcement Agency (Establishment) Act 2006, The Environmental Guidelines and Standards for the Petroleum industry 2002, National Oil Spill Detection and Response Agency (Establishment) Act 2006, Harmful Waste Special Criminal Provision Act 1990 among others.

82. That it is the responsibility of a holder of a licence to take all reasonable steps to avoid damage and to pay compensation to victims of oil pollution or spill and any delays in payment of compensation are on account of challenges in courts as to who are rightly entitled to compensation.

83. They conclude that the Plaintiff has not established any of the allegations levelled against them as they are not in breach of any of their international obligations.

84. The Defendants also deny all the allegations by the Plaintiff on Defendants' lack of concerted effort to check the effect of pollution and recounted the legal frameworks put in place for the enforcement of rights by persons injured, regulation of the activities of oil prospectors and of sanctioning defaulters all in an effort to ensure a safe environment.

85. They point out that the Environmental Impact Assessment Act 1992 was adopted and applied towards assessing the possible impact of any planned activity before embarking on it. They referred to section 20 of the Nigerian Constitution which provides for the protection of the environment and submit that Defendants have put in place adequate legislative framework.

86. They submit that Article 2(1) of ICESCR lays down the basis for determining States' non compliance with the provisions of the Covenant. In that regard, the Defendant by virtue of section 13 of the Constitution adopted policies aimed at implementation of the provisions of the Covenant. That through the instrumentality of the Niger Delta Development Commission, the people of Niger Delta have been enjoying the rights contained in the Covenant and that the Defendants have discharged their obligations under the Covenant.

87. They refer to Plaintiff's allegation of violations of Article 16 of the African Charter and Article 12(1) of ICCPR and submit that in so far as Plaintiff made no prayers on them and led no evidence in proof, they are deemed abandoned.

88. On Plaintiff allegation of pollution, they submit that the existence of pollution needs to be proved by expert evidence or at least evidence of people affected supported by medical report; that having failed to so prove the Plaintiff's averments remain mere allegations.

89. They admit oil spillage but aver that as admitted by the Plaintiff, the spills are mainly as a result of vandalisation of pipelines and sabotage by youths of Niger Delta.

90. They refer to the Land Use Act which vests ownership of land in the Federal Government and submit that the issue of infringement of Article 14 of the African Charter does not therefore arise.

Analysis of the Court on the merits

91. The Court notes that the Plaintiff alleges violation of several articles of the African Charter on Human and Peoples' Rights, the International Covenant on

Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Court finds that considering all the instruments invoked, including the Universal Declaration of Human Rights, 29 articles were alleged to have been violated.

92. The success of an application for human rights protection does not depend on the number of provisions or international instruments the applicant invokes as violated. When various articles of different instruments sanction the same rights, the said instruments may, as far as those specific rights are concerned, be considered equivalent. It suffices therefore to cite the one which affords more effective protection to the right allegedly violated.

93. At any rate, it is incumbent upon the Court to shape out the dispute along its essential lines and examine no more than the violations which, in regard to the facts and circumstances of the suit, appear to it to constitute the heart of the grievances brought.

94. For the Court, the heart of the grievances is to be looked for in relation to the facts of the case it considers as established. In that light, although the report produced by Amnesty International may be in the public domain and may contain well known facts reported by other numerous sources (international organisations, the media, etc.), the Court is of the view that this report cannot on its own, alone, be considered as conclusive evidence. The report, as well as other well-known facts, constitutes for the Court a kaleidoscope of elements and indices that may specifically help enlighten it on the actual existence and scope of the problem. In the instant case, the Court upholds as decisive and convincing the facts on which there is agreement among the parties or those on which one of the parties does not raise objection while in a position to do so.

95. From the submissions of both Parties, it has emerged that the Niger Delta is endowed with arable land and water which the communities use for their social and economic needs; several multinational and Nigerian companies have carried along oil prospection as well as oil exploitation which caused and continue to cause damage to the quality and productivity of the soil and water;

the oil spillage, which is the result of various factors including pipeline corrosion, vandalisation, bunkering, etc. appears for both sides as the major source and cause of ecological pollution in the region. It is a key point that the Federal Republic of Nigeria has admitted that there has been in Niger Delta occurrences of oil spillage with devastating impact on the environment and the livelihood of the population throughout the time.

96. Though the Defendant's contention is that the Plaintiff allegations are mere conjectures, this Court highlights and takes into account the fact that it is public knowledge that oil spills pollute water, destroy aquatic life and soil fertility with resultant adverse effect on the health and means of livelihood of people in its vicinity. Thus in so far as there is consensus by both parties on the occurrence of oil spills in the region, we have to presume that in the normal cause of events in such a situation, to wit, consequential environmental pollution exist there. [*Cf.* Torrey Canyon (1967), Amoco Cadiz (1978), Exxon Valdez (1989), Erika (1999), Prestige (2002), Deepwater Horizon (avril 2010)]

97. In the face of this finding, the question as to the causes or liability of the spills is not in issue in the instant case. What is being canvassed is the attitude or behaviour of the Defendant, as ECOWAS Member State and party to the African Charter. Indeed, it is incumbent upon the Federal Republic of Nigeria to prevent or tackle the situation by holding accountable those who caused the situation and to ensure that adequate reparation is provided for the victims.

98. As such, the heart of the dispute is to determine whether in the circumstances referred to, the attitude of the Federal Republic of Nigeria, as a party to the African Charter on Human and Peoples' Rights, is in conformity with the obligations subscribed to in the terms of Article 24 of the said instrument, which provides: *˝All peoples shall have the right to a general satisfactory environment favourable to their development˝*.

99. The scope of such a provision must be looked for in relation to Article 1 of the Charter, which provides: *˝The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and*

freedoms enshrined in this Charter and ***shall undertake to adopt legislative or other measures to give effect to them****.˝*

100. Thus, the duty assigned by Article 24 to each State Party to the Charter is both an obligation of attitude and an obligation of result. The environment, as emphasised by the International Court of Justice, *˝is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn˝* (*Legality of the threat or use of nuclear arms, ICJ Advisory Opinion of 8 July* 2006, paragraph 28). It must be considered as an indivisible whole, comprising the *˝biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors* (International Law Institute, Resolution of 4 September 1997, Article 1). The environment is essential to every human being. The quality of human life depends on the quality of the environment.

101. Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results.

102. In its defence, the Federal Republic of Nigeria exhaustively lists a series of measures it has taken to respond to the environmental situation in the Niger Delta and to ensure a balanced development of this region.

103. Among these measures, the Court takes note of the numerous laws passed to regulate the extractive oil and gas industry and safeguard their effects on the environment, the creation of agencies to ensure the implementation of the legislation, and the allocation to the region, 13% of resources produced there, to be used for its development.

104. However, compelling circumstances of this case lead the Court to recognise that all of these measures did not prevent the continued environmental degradation of the region, as evidenced by the facts abundantly proven in this case and admitted by the very same Federal Republic of Nigeria.

105. This means that the adoption of the legislation, no matter how advanced it may be, or the creation of agencies inspired by the world's best models, as well as the allocation of financial resources in equitable amounts, may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered.

106. As stated before, as a State Party to the African Charter on Human and Peoples' Rights, the Federal Republic of Nigeria is under international obligation to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them.

107. If, notwithstanding the measures the Defendant alleges having put in place, the environmental situation in the Niger Delta Region has still been of continuous degradation, this Court has to conclude that there has been a failure on the part of the Federal Republic of Nigeria to adopt any of the "other" measures required by the said Article 1 of African Charter to ensure the enjoyment of the right laid down in Article 24 of the same instrument.

108. From what emerges from the evidence produced before this Court, the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.

109. Contrary to the assumption of the Federal Republic of Nigeria in its atempt to shift the responsibility on the holders of a licence of oil exploitation (see paragraph 82), the damage caused by the oil industry to a vital resource of such

importance to all mankind, such as the environment, cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry.

110. It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.

111. And it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity, that characterises the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter on Human and Peoples'Rights.

112. Consequently, the Court concludes and adjudges that the Federal Republic of Nigeria, by comporting itself in the way it it is doing, in respect of the continuous and unceasing damage caused to the environment in the Region of Niger Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples' Rights, and has violated Articles 1 and 24 of the said instrument.

REPARATIONS

113. In the statement of claims the Plaintiff asks for an order of the Court directing the Defendants to pay adequate monetary compensation of 1 Billion Dollars (USD) ($ 1,000,000,000) to the victims of human rights violations in the Niger Delta, and other forms of reparation the Court may deem fit to grant.

114. The Court acknowledges that the continuous environmental degration in the Niger Delta Region produced devastating impact on the livelihood of the population; it may have forced some people to leave their area of residence in search for better living conditions and may even have caused health problems

to many. But in its application and through the whole proceedings, the Plaintiff failed to identify a single victim to whom the requested pecuniary compensation could be awarded.

115. In any case, if the pecuniary compensation was to be granted to individual victims, a serious problem could arise in terms of justice, morality and equity: within a very large population, what would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbour? Based on which criteria should be determined the amount each victim would receive? Who would manage that one Billion Dollars?

116. The meaning of this set of questions is to leave clear the impractibility of that solution. In case of human rights violations that affect indetermined number of victims or a very large population, as in the instant case, the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes.

117. Based on the above reasons, the prayer for monetary compensation of one Billion US Dollars to the victims is dismissed.

118. The Court is, however, mindful that its function in terms of protection does not stop at taking note of human rights violation. If it were to end in merely taking note of human rights violations, the exercise of such a function would be of no practical interest for the victims, who, in the final analysis, are to be protected and provided with relief. Now, the obligation of granting relief for the violation of human rights is a universally accepted principle. The Court acts indeed within the limits of its prerogatives when it indicates for every case brought before it, the reparation it deems appropriate.

119. In the instant case, in making orders for reparation, the Court is ensuring that measures are indicated to guide the Federal Republic of Nigeria to achieve the objectives sought by Article 24 of the Charter, namely to maintain a general satisfactory environment favourable to development.

DECISION

For these reasons, and without the need to to adjudicate on the other alleged violations and requests,

120. THE COURT,

Adjudicating in a public session, after hearing both parties, and after deliberating:

- Adjudges that it has jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;
- Adjudges that SERAP has locus standi in the instant case;
- Adjudges that the report by Amnesty International is admissible;
- Adjudges that the Federal Republic of Nigeria has violated Articles 1 and 24 of the African Charter on Human and Peoples' Rights;

CONSEQUENTLY,

121. Orders the Federal Republic of Nigeria to:

i. Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;

ii. Take all measures that are necessary to prevent the occurrence of damage to the environment;

iii. Take all measures to hold the perpetrators of the environmental damage accountable;

Since other requests asking for declarations and orders from the Court as to rights of the Plaintiff and measures to be taken by the Defendant, and listed in the subparagraphs of paragraph 19, have already been considered albeit implicitly, by this decison, the Court does not have to address them specifically.

COSTS

122. The Federal Republic of Nigeria shall bear the costs.

123. The Federal Republic of Nigeria shall fully comply with and enforce this Decision of the Community Court of Justice, ECOWAS, in accordance with Article 15 of the Revised Treaty and Article 24 of the 2005 Supplementary Protocol on the Court.

Thus made, declared and pronounced in English, the language of procedure, in a public session at Ibadan, by the Court of Justice of the Economic Community of West African States, on the day and month above.

124. **AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES :**

- Hon. Justice Benfeito Mosso Ramos — Presiding
- Hon. Justice Hansine Donli — Member
- Hon. Justice Anthony Alfred Benin — Member
- Hon. Justice Clotilde Médégan Nougbodé — Member
- Hon. Justice Eliam Potey — Member

125. **ASSISTED BY** Tony Anene-Maidoh — Chief Registrar

Environmental Dispute Settlement

Alan Boyle

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A. International Adjudication: Judicial Settlement and Arbitration

1. A Choice of Forum

1 General international law takes an eclectic approach to international dispute settlement (for more details on the topic of this article see Birnie and Boyle Chapter 4). Art. 33 → *United Nations Charter* gives pre-eminence to the principle that disputes must be settled peacefully, but leaves the choice of means to the parties. Jurisdiction of the → *International Court of Justice (ICJ)*, in common with all international judicial and arbitral tribunals, is based on the consent of the States Parties to each dispute (see also → *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*). It has no general jurisdiction to hear applications submitted unilaterally save to the extent provided for by Art. 36 (2) ICJ Statute, or in other treaties such as the 1982 UN Convention on the Law of the Sea ('1982 UNCLOS'). Despite its status as the 'principal judicial organ' of the UN, the ICJ enjoys no priority as a forum for dispute settlement. States are free to resort to diplomatic methods of dispute settlement such as → *conciliation* or → *good offices* (see Sec. E below), or to negotiate. Many inter-State environmental disputes have been submitted to ad hoc arbitration (see *Behring See Fur Seals Arbitration* [1893]; → *Trail Smelter Arbitration* [1938; 1941]; → *Lac Lanoux Arbitration* [1957]). The → *Permanent Court of Arbitration (PCA)* has special rules for disputes involving natural resources or the environment (Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment [2001]; see also *Iron Rhine Arbitration* [2005]; *OSPAR Arbitration* [2003]). By default, arbitration has become the preferred forum for dispute settlement under the 1982 UNCLOS (see eg → *Southern Bluefin Tuna Cases* [2000]; → *MOX Plant Arbitration and Cases* [2001]; and *Land Reclamation Arbitration* [2005]). Finally, investor-State environmental disputes may fall under the arbitration provisions of the 1965 Convention on the Settlement of Investment Disputes ('ICSID Convention') or Chapter 11 → *North American Free Trade Agreement (1992)* ('NAFTA') (see eg *Metalclad Corporation v United Mexican States* [2000]; *SD Myers Inc v Canada* [2000]; and *Methanex Corporation v United States of America* [2005]).

2 Nor is the ICJ necessarily the preferred forum under those treaties which provide for compulsory binding settlement of inter-State environmental disputes. The 1991 Protocol on Environmental Protection to the Antarctic Treaty refers disputes to arbitration, unless the parties agree otherwise, while the 1994 Marrakesh Agreement Establishing the World Trade Organization creates its own system of specialized panels, an appeal body, and arbitration, for the purpose of settling trade disputes, a number of which have involved environmental questions (→ *World Trade Organization, Dispute Settlement*). A small number of WTO cases have involved environmental issues (*EC—Measures Affecting Asbestos* [2001]; *United States—Import Prohibition of Certain Shrimp and Shrimp Products ['Shrimp/Turtle Case']* [1998]). Part XV 1982 UNCLOS brings disputes concerning the marine environment and living resources of the → *high seas* within its extensive provision for compulsory settlement of disputes (see Sec. C (2) below), but it allows the parties to choose various options, including conciliation, several forms of arbitration, the ICJ, or a specialized court, the → *International Tribunal for the Law of the Sea (ITLOS)*. If the parties cannot agree on a forum, arbitration is obligatory. The creation of ITLOS has significantly widened the choice of forum for any dispute concerning the protection of the

marine environment or the conservation of marine living resources (→ *Marine Environment, International Protection*; → *Marine Living Resources, International Protection*; see also → *Environment, Multilateral Agreements*; → *Law of the Sea, Settlement of Disputes*).

2. The Benefits and Drawbacks of Litigation

3 Litigation before international courts and arbitration has played only a limited role in the development of international environmental law—much less than for the law of the sea. It works best in bilateral disputes concerning transboundary environmental problems where there is agreement on the applicable law (eg *Trail Smelter Arbitration*; *Lac Lanoux Arbitration*; → *Pulp Mills on the River Uruguay [Argentina v Uruguay]* [2006 and 2009]). Even where agreed rules are set out in a treaty, however, there may be uncertainty about the proper forum or the applicable law if the dispute straddles several treaties, or the jurisdiction of the forum is limited (*OSPAR Arbitration*; *MOX Plant Arbitration*; *Southern Bluefin Tuna Cases*). In any of these circumstances a judicial or arbitral award might establish precedents with unwelcome implications for the claimant State, or for the international community as a whole. These factors have often favoured negotiated solutions to multilateral environmental disputes such as the Chernobyl disaster, or acid rain in Europe and North America; compare the unsuccessful attempt to secure a judicial settlement in the → *Gabčíkovo-Nagymaros Case [Hungary/Slovakia]* (1997).

4 Judicial proceedings and arbitration also tend to be less well adapted to the multilateral environmental problems than supervision by meetings of the parties to treaty regimes, including non-compliance procedures (→ *Environmental Compliance Control*). It is not easy for third parties to intervene in bilateral contentious litigation. In arbitration it is rare to find any provision for third-party intervention. Before the ICJ and the ITLOS third parties may intervene as of right only if the interpretation or application of a treaty to which they are party is in question (Art. 63 ICJ Statute; Art. 32 ITLOS Statute; see also → *International Courts and Tribunals, Intervention in Proceedings*). This would entitle any party to a multilateral environmental treaty, such as the Ozone or Climate Change Conventions, to intervene and make representations in any litigation concerning those treaties.

5 Multilateral interests are less well protected in disputes concerned with customary law, where there is merely a discretion to allow intervention when the legal interests of a third-party may be 'affected' by the decision in a case (Art. 62 ICJ Statute; Art. 31 ITLOS Statute). States are not permitted to intervene in such cases for the purpose of assisting a court to decide what the law is, nor can they use intervention as a means of initiating what is in effect a new dispute (→ *Land, Island and Maritime Frontier Dispute Case [El Salvador/Honduras: Nicaragua Intervening]* [1990] 92 paras 52–105; → *Continental Shelf Case [Libyan Arab Jamahiriya/Malta]* [1984] 3). Moreover, allowing multiple third-parties with competing interests to intervene in litigation may make it harder to settle a dispute, may deter States from going to court, and may thus undermine the UN Charter's concern for the peaceful resolution of inter-State disputes by whatever means the parties choose.

3. Public Interest Litigation

6 International law makes no general provision for a public interest *actio popularis*. It is instead assumed that contentious litigation will be initiated by States seeking to enforce their own legal rights or interests, rather than those of the international community as a whole (Art. 42 UN ILC Draft Articles on State Responsibility (2001)). Only those environmental obligations which have → *erga omnes* character are potentially enforceable by any State (Art. 48 UN ILC Draft Articles on State Responsibility); even then the consent of the respondent is still essential for jurisdictional purposes (*East Timor Case* [1995] 102 para. 29). An alternative to inter-State proceedings, however, is to allow international organizations with responsibility for protection of the global environment to act in the public interest. The UN General Assembly and the UN Security Council have competence to seek → *advisory opinions* from the ICJ on any question of international law, while the → *United Nations, Economic and Social Council ('ECOSOC')*, the → *International Maritime Organization (IMO)*, the → *World Health Organization (WHO)*, the → *International Atomic Energy Agency (IAEA)*, and possibly the → *United Nations Environment Programme (UNEP)* may do so in respect of environmental matters falling within their specific competence (Arts 65–68 ICJ Statute). The UNGA and WHO requests for an *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* were the first such use of this power in respect of questions which were at least partly environmental (→ *Nuclear Weapons Advisory Opinions*). As these cases demonstrate, it is possible for any State or relevant international organization to make representations in advisory proceedings (Art. 66 ICJ Statute), and to that extent a genuine multilateralism is possible in such cases. The earlier → *Western Sahara (Advisory Opinion)* (1975) shows how this power can also be used in matters concerned with inter-State controversy (at 12).

7 It is sometimes argued that → *non-governmental organizations* ('NGOs') and other → *non-State actors* should also have the power to represent the public interest by initiating or intervening in international legal proceedings. In the *Asbestos*

case, the WTO Appellate Body for the first time permitted NGOs to apply for leave to file a separate written brief, but all such applications were then rejected (*EC—Measures Affecting Asbestos* paras 50–57). Such bodies and groups are already represented as → *observers* in environmental treaty negotiations, and their participation in legal proceedings could be beneficial for the same reasons: provision of information and expertise, detachment from the interests of specific States, and the ability to reflect more accurately the real composition of the international 'community' as it presently exists. There are also objections to broadening NGO access to international courts, however. NGOs are not in reality representative of the international community, but at best only of their own members. Their policies and priorities may be driven by factors other than a rational appreciation of true global needs. Many of the wealthiest and most influential NGOs are American or European, and do not necessarily reflect third world concerns or perspectives. For all these reasons it may be preferable to broaden the rights of other States or intergovernmental organizations to represent the public interest in international legal proceedings rather than extend that right to NGOs. It is always open to States Parties to litigation to adopt NGO submissions as part of their own case: such a tactic was held admissible by the WTO Appellate Body in the *Shrimp-Turtle Case* (at paras 79–91), and there is no reason to believe it would not also be permissible before the ICJ or the ITLOS. In the *Pulp Mills Case (Provisional Measures)* (2006), Argentina's advocates included the head of an environmental NGO who claimed to speak for the River Uruguay (→ *Environment, Role of NGOs*).

8 Although international organizations, NGOs, and companies can all be party to an arbitration based on international law (see PCA 'Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment'), only States can be parties to contentious proceedings before the ICJ, and only competent intergovernmental organizations may seek advisory opinions (Arts 34 and 65 ICJ Statute). Other international tribunals, including those concerned with → *human rights*, commercial and investment disputes, international claims, or the European Community have adopted broader rules on access that allow participation by private parties and, where necessary, international organizations. In consensual proceedings brought before the ITLOS—but *not* in compulsory jurisdiction cases—the range of potential parties may include international organizations, NGOs, private parties, and entities of uncertain status, such as → *Taiwan* (Art. 20 (2) ITLOS Statute). This has significant implications for environmental cases, because it offers the possibility of creating a judicial process capable of accommodating the broader conceptions of participation already apparent in international environmental law-making, environmental institutions, or national environmental law.

B. An International Environmental Court?

9 In 1993 the ICJ established a special chamber for environmental cases under Art. 26 (1) ICJ Statute, composed of seven judges. Thirteen years later, no cases had come before the chamber, and it was abolished—the ITLOS also has an environmental chamber, also unused. It was difficult to see what advantages the ICJ environmental chamber afforded over the full court, or over an ad hoc chamber, since the parties could not choose the judges, and the judges would not necessarily be experts on international environmental law or on the scientific and technical issues which may be relevant to certain kinds of dispute. The cost, the procedure, and the parties would be the same whether the action proceeded in the full court or the chamber. Moreover, it is not easy to identify what is an environmental case. Cases may raise environmental issues, whether legal or factual, but they rarely do so in isolation. The *Gabčíkovo-Nagymaros Case*, for example, is as much about the law of treaties, → *international watercourses*, → *State responsibility*, and → *State succession in treaties*, as it is about environmental law. Much the same could be said about the *Pulp Mills* litigation. In these circumstances the parties need a generalist court, not a specialist one.

10 Nor is the view that there should be a specialist environmental court, similar to the ITLOS, borne out by experience. Specialist tribunals are most useful when they have a special body of law to apply, usually a treaty such as the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)*, the 1982 UNCLOS, or the → *General Agreement on Tariffs and Trade (1947 and 1994)* and related agreements. There is a case for such bodies, not only because of their specialist expertise and procedures, but also because they relieve the ICJ of a burden of litigation it could not sustain. But international environmental law is not a self-contained, codified system of this kind. Settling disputes involving environmental issues requires a wide-ranging grasp of international law as a whole; it is not a specialism which can be detached for the purposes of litigation. Cases invoking the contentious and advisory jurisdiction of the ICJ show both that there is a role for the Court in answering environmental questions and that such questions cannot easily be isolated from disputes about international law in general (see especially *Pulp Mills Case [Provisional Measures]* 113; → *Kasikili/Sedudu Island Case [Botswana/Namibia]* 1045; *Gabčíkovo-Nagymaros Case 7*; *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* 226; see also Okowa Chapter 10). Moreover, even specialized tribunals such as the → *European Court of Human Rights (ECtHR)*, the ITLOS, or the WTO Appellate Body may have to decide environmental issues in the course of their normal work. It is difficult to see how an environmental court could either monopolize the field, or avoid the risk of over-specialization and distorted focus for which the WTO disputes system has been criticized.

11 This does not mean that there is no role for specialized environmental tribunals. The principal potential weakness of the ICJ and the ITLOS as *fora* for the settlement of some categories of environmental disputes lies not in their comprehension of international law relating to the environment but in their ability to handle scientific evidence and technical expertise. In this respect valuable lessons can be derived from the dispute settlement provisions of the 1982 UNCLOS. During the 1982 UNCLOS negotiations it was recognized that no single forum would be appropriate for the whole range of issues likely to arise in disputes under that convention. Provision was therefore be made for specialist bodies, not necessarily composed of lawyers, to deal with the more technical matters. This accounts for the inclusion of arbitration and special arbitration among the options available to parties in law of the sea disputes. The composition of these bodies reflects differences in their intended functions. Whereas the ITLOS is composed of persons of 'recognised competence in the field of the Law of the Sea'—and functions as an alternative to the ICJ—arbitrators appointed under Annex VII need not be lawyers but must be 'experienced in maritime affairs'. Special arbitrators appointed under Annex VIII similarly do not have to be lawyers, but are instead selected for their expertise in the four areas for which special arbitration is available: fisheries, protection of the marine environment, scientific research, and navigation. The → *Food and Agriculture Organization of the United Nations (FAO)*, the UNEP, the Intergovernmental Oceanographic Commission ('IOC'), and the IMO will maintain lists of appropriate experts in these fields. Technical experts may also be appointed to sit with the ICJ, the ITLOS or an arbitral tribunal in accordance with Art. 289 1982 UNCLOS. These experts are 'preferably' to be chosen from the list of special arbitrators. It is thus possible within the 1982 UNCLOS scheme to tailor the choice of tribunal to the characteristics of each dispute, and to bring in technical expertise where necessary.

12 In practice a similar freedom to draw on technical expertise is available to States in environmental disputes not governed by the 1982 UNCLOS. The *Trail Smelter* case shows how legal and technical expertise can be blended in an international arbitration to produce an award that is competent and creative in both fields. The PCA has adopted rules intended to reflect the particular characteristics of such disputes by allowing, inter alia, for provisional measures, expedited procedures, participation of non-State entities, and assistance from scientific experts (PCA 'Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment'). The ICJ also possesses a general power to sit with expert assessors, or to request outside bodies to carry out an inquiry or give expert opinion (Arts 30 and 50 ICJ Statute). The Court has been criticized for not doing so in the *Gabcčkovo-Nagymaros* case (Okowa 167), although given its conclusion that the parties should negotiate, taking into account the environmental consequences, technical expertise was evidently not considered decisive for the outcome of the case. The lack of a specialized international environmental court has not so far handicapped the settlement of environmental disputes. The wide choice of means available to the parties, and their inherent freedom to choose the most appropriate, provides ample scope for ensuring that disputes are competently handled. Nor would the problems of accommodating multilateral participation in legal proceedings necessarily be solved by creating a specialist tribunal.

C. Compulsory Adjudication of Treaty Disputes

1. In General

13 Provision for compulsory judicial settlement or arbitration remains relatively rare in environmental treaties. A few Western European treaties allow any party to refer disputes concerning 'interpretation or application' to binding arbitration (Art. 15 Agreement for the Protection of the Rhine against Chemical Pollution [1976]; Art. 18 Berne Convention on the Conservation of European Wildlife and Natural Habitats [1979]; Art. 32 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic [1992]; Art. 16 Convention on the Protection of the Rhine [1999]), as does Art. 10 Convention for the Prevention of Pollution from Ships (1973) and its Protocol of 1978 ('MARPOL Convention (1973/78)'). The London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (1972) ('London Convention') provides for such cases to be referred unilaterally to binding arbitration or by agreement to the ICJ (procedure agreed by the parties under Art. XI London Convention [1972]; Art. 16 Protocol [1996]). Many other environmental treaties have no dispute settlement clause at all or merely provide for negotiation, followed by arbitration or judicial settlement if all parties to the dispute agree (Art. 28 Convention on International Trade in Endangered Species of Wild Fauna and Flora [1973]; Art. 25 Convention for the Conservation of Antarctic Marine Living Resources [1980]; Art. 20 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes [1989]; Art. 15 Convention on Environmental Impact Assessment [1991]; Art. 21 Convention on the Transboundary Effects of Industrial Accidents [1992]; Art. 22 Convention on the Protection and Use of Transboundary Watercourses and International Lakes [1992]; Art. 12 Agreement on the Conservation of African-Eurasian Migratory WaterBirds [1995]). One common provision is for negotiation followed by compulsory non-binding conciliation if agreement cannot be reached on any other means of settlement (Art. 9 Convention on Long-Range Transboundary Air Pollution [1979]; Art. 11 Vienna Convention for the Protection of the Ozone Layer [1985]; Art. 14 Convention on Climate Change [1992]; Art. 27 Convention on Biological Diversity [1992]; Art. 28 Convention to Combat Desertification [1994]; Art. 9 Protocol on the Further Reduction of Sulphur Emissions [1994]). Some treaties also allow a party to make an optional declaration

accepting compulsory judicial settlement or arbitration, but this operates only against other States making a similar declaration. Like the optional clause in Art. 36 (2) ICJ Statute (→ *International Court of Justice, Optional Clause*), this falls well short of a general system of compulsory binding settlement of disputes. Apart from disputes under the 1982 UNCLOS, the only recent contentious environmental case to be brought under a compulsory adjudication clause in a treaty is the Pulp Mills case, initiated by Argentina under Art. 60 Statute of the River Uruguay (→ *Arbitration and Conciliation Treaties*).

14 This pattern is consistent with the view that international adjudication has too many disadvantages in an environmental context to be widely attractive to States as a primary means of multilateral treaty enforcement. The inclusion of a non-compliance procedure in a growing number of environmental treaties emphasizes the importance of collective supervision by the parties in this context, while relatively weak dispute settlement clauses indicate the continuing opposition of many States to compulsory adjudication. Even where compulsory adjudication is the primary method of dispute settlement, as with the MARPOL Convention (1973/78), or the London Convention (1972), the parties may in practice choose to seek agreement on matters of interpretation, in this case through the IMO, without ever resorting to formal dispute settlement. Although courts are not unmindful of the need for purposive construction, the parties to a treaty are usually best placed to decide for themselves what is appropriate, and can help the regime evolve by their decisions.

2. Settlement of Environmental Disputes under the 1982 UNCLOS

15 The 1982 UNCLOS is one of the few treaties under which environmental and natural resources disputes fall potentially within the compulsory jurisdiction of international tribunals (Arts 279–99 and Annexes VI–VII 1982 UNCLOS), although it remains open to the parties to make alternative arrangements which will then prevail over the 1982 UNCLOS dispute settlement (Arts 281–82 1982 UNCLOS; *Southern Bluefin Tuna Cases*; *MOX Plant Case*). Art. 288 1982 UNCLOS allows unilateral reference of disputes concerning interpretation or application of the convention to the ITLOS, the ICJ, or an arbitral tribunal. The court or tribunal chosen will also have jurisdiction to interpret or apply international agreements 'related to the purposes of the Convention' if they so provide. Art. 288 1982 UNCLOS is broad in scope. It applies inter alia to allegations that 'a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State', and also includes flag State violations of the convention's marine pollution articles (Art. 297 (1) 1982 UNCLOS; *MOX Plant Case*). High seas fisheries disputes are in general subject to compulsory jurisdiction, but the → *exclusive economic zone* ('EEZ') fishery disputes involving the determination of a total allowable catch, harvesting capacity, and the allocation of surpluses are not (Art. 297 (3) (a) 1982 UNCLOS (→ *Fisheries, High Seas*). Allegations of a failure by coastal States to ensure proper conservation and management of stocks must, however, be submitted to conciliation (Art. 297 (1) (b) 1982 UNCLOS), although any award is without mandatory effect (→ *Fisheries, Coastal*).

16 The Agreement relating to the Conservation of Straddling and Highly Migratory Fish Stocks (1995) extends the 1982 UNCLOS dispute settlement articles to disputes arising under this agreement or under any related regional fisheries treaty (→ *Straddling and Highly Migratory Fish Stocks*). It is arguable that the exclusion of disputes concerning the EEZ sovereign rights incorporated in the 1995 Agreement should be construed narrowly, to cover only the exercise of coastal State discretion on matters that are purely of the EEZ concern only, ie which do not affect straddling or migratory stocks, whether inside or outside the EEZ. If this is correct, then, as between parties to the 1982 UNCLOS or the 1995 Agreement, all or almost all disputes concerning high seas fisheries or → *marine mammals* will fall within the compulsory jurisdiction of a court or tribunal. In the *Southern Bluefin Tuna Arbitration*, however, the arbitrators held that the 1993 Convention on the Conservation of Southern Bluefin Tuna had deprived them of jurisdiction under the 1982 UNCLOS to decide a high seas fisheries dispute. This decision is inconsistent with the arbitral decision in the *MOX Plant Case*, and it seems probable that it will not be followed. The ITLOS also has power to prescribe binding provisional measures to protect the marine environment or living resources (Art. 290 1982 UNCLOS; Art. 31 1995 UN Agreement on Straddling and Highly Migratory Fish Stocks). It has used this power quite liberally to set catch quotas, require environmental studies, and promote co-operation (*Southern Bluefin Tuna Cases*; *MOX Plant Case*; *Land Reclamation Case* (2003)).

3. Protocol to the Antarctic Treaty on Environmental Protection

17 Apart from the 1982 UNCLOS and related treaties, the only other comprehensive scheme for the settlement of environmental disputes is found in Arts 18–20 Protocol on Environmental Protection to the Antarctic Treaty (1991). No new court is created, but disputes concerning interpretation or application of certain articles of the protocol—notably Art. 7 (Prohibition of Mineral Resource Activities), Art. 8 (Environmental Impact and Assessment ('EIA')), Art. 15 (Emergency Response Action) and the Annexes—are subject to compulsory arbitration, once attempts at negotiation and conciliation have been exhausted. Any party to the treaty may also make a declaration accepting as compulsory the jurisdiction of the ICJ and/or arbitration. The arbitral tribunal provided for in the schedule is composed of persons 'experienced

in Antarctic affairs' with a 'thorough knowledge' of international law (Art. 2 Schedule to the Protocol). The tribunal has power to 'indicate' provisional measures to preserve the respective rights of the parties to the dispute, and to 'prescribe' provisional measures to prevent serious harm to the Antarctic environment or associated ecosystems. Only the latter are binding. Unusually, in an arbitration, there is provision for a third party to intervene in the proceedings if it believes it has a legal interest, 'whether general or individual', which may be substantially affected by the award of the tribunal. This wording may be broad enough to allow any party to the protocol to intervene, as would be the case under Art. 32 ITLOS Statute in cases involving interpretation or application of the UNCLOS. This is a sophisticated, but so far untested scheme, which draws substantially on Part XV 1982 UNCLOS.

D. Dispute Settlement by Treaty Supervisory Bodies

18 Formal settlement of environmental disputes may also fall within the competence of treaty bodies. The United States-Canadian International Joint Commission ('IJC') is a leading example. Art. 10 Boundary Waters Treaty (1909) permits it to act as an arbitrator, but only with the consent of both parties, and it has not found favour in this role. More use has been made of its power of fact-finding under Art. 9 Boundary Waters Treaty, because this places no obligation on the parties to comply with its recommendations. Art. 9 was invoked in the early stages of the *Trail Smelter* case and in a dispute between British Columbia and the city of Seattle over the Skagit River in the 1980s.

19 Some dispute settlement powers have been given to the North American Commission for Environmental Cooperation ('NACEC'), established under the → *North American Agreement on Environmental Cooperation (1993)* ('NAAEC') as part of the NAFTA accords. This agreement is principally concerned with ensuring that each party 'effectively' enforces its own environmental laws through appropriate government action. There is limited provision for private access to remedies in each party's legal system; corporations may also have standing under Arts 14 and 15 NAAEC, and the standing of a corporation was recognized in the *Methanex* case. NGOs or private individuals may complain about inadequate law enforcement to the secretariat of the NACEC, which has power to investigate and report, but no power to compel action. Unresolved disputes concerning law enforcement may be taken up at inter-State level, however. In such cases the NACEC then has power to investigate, mediate, or conciliate between the parties to see whether a mutually satisfactory solution can be agreed. If this proves impossible, and if trade or competition is affected, a dispute may go to arbitration. The arbitrators have power to approve remedial measures, to impose a substantial fine, or to suspend the NAFTA benefits. This is a potentially powerful dispute settlement scheme, but it is principally aimed at Mexico and it has never been used; Canadian provinces are bound only if they agree on ratification. Moreover, while the agreement's focus on disputes about enforcement of national law represents a novel but useful extension of international dispute settlement, it also precludes it from operating as a mechanism for settling disputes about international environmental law.

20 A few agreements involve the relevant body in settling treaty disputes. Disputes arising out of Arts 18 (c), 24 (f), 34, 35 Mekong River Agreement (1995) may be referred to the Mekong River Commission, while the Art. 31 International Tropical Timber Agreement (1994) provides that any dispute arising under the agreement shall be referred to the Council of the International Tropical Timber Organization ('ITTO') for a 'final and binding' decision. This enables the council to interpret the agreement definitively. The benefit of dealing with such disputes in this way is that it keeps control over interpretation and development of the treaty in the hands of the parties collectively, rather than surrendering it to an independent third party, or to the parties acting unilaterally.

E. Diplomatic Methods of Dispute Settlement

21 Diplomatic methods of settlement facilitate negotiation of a dispute without resort to binding adjudication. They have two principal advantages over adjudication by courts or arbitration. First, and most importantly, the parties remain in control of the outcome. They can walk away at any time and, until agreement is reached in the form of a treaty, there will be no final or binding determination of rights or obligations. Secondly, there are the added benefits of cheapness, flexibility, privacy, and complete freedom to determine who is involved, what expertise is relevant, and the basis on which any solution will be sought. The solution need not be based on international law. In many of these respects diplomatic settlement has much in common with the concept of alternative dispute resolution in national legal systems, although it differs in the important respect that inter-State negotiation will not necessarily take place against a background of resort to compulsory adjudication should the parties fail to reach agreement.

22 Global or regional organizations may provide good offices, → *mediation*, or conciliation for States involved in environmental disputes. For example, in 2006–7 the King of Spain tried unsuccessfully to 'facilitate' a solution to the *Pulp Mills* case between Argentina and Uruguay. The World Bank (→ *World Bank Group*) mediated a solution to the → *Indus River* dispute, resulting in negotiation of the Indus Waters Treaty (1960). The UNEP could offer its good offices or act as a mediator or conciliator, since its responsibilities include the power to provide 'at the request of all the parties

concerned advisory services for the promotion of cooperation in the field of the environment' (UNEP 'Institutional and Financial Arrangements for International Environmental Cooperation' para. 2), and the Executive Director can also bring problems to the attention of the Governing Council for its consideration.

23 Conciliation is provided for in Annex V 1982 UNCLOS and in certain environmental treaties. Relatively few environmental treaties provide for an inquiry procedure, but Art. 3 Convention on Environmental Impact Assessment in a Transboundary Context (1991) is an important example (see also Art. 19 ILC Draft Articles on Prevention of Transboundary Harm [2001]; Arts 11–12 Nordic Convention for Protection of the Environment [1974]). The first such inquiry assessed the possible risks posed by river works on the Romania-Ukraine border (Espoo Inquiry Commission 'Report on the Danube-Black Sea Navigation Route' [2006]). There are also several instances of States resorting to scientific inquiry (→ *Fact-Finding*) to establish the causes or consequences of environmental pollution or depletion of natural resources (see eg the *Trail Smelter Case*, and the use of the IJC under Art. 9 United States-Canada Boundary Waters Treaty).

F. Conclusions

24 In considering how the international legal system handles environmental disputes, the diversity of issues needs to be emphasized. Where the problem is one of compliance with agreed standards of global or regional environmental protection, treaty COPs (→ *Conference [Meeting] of States Parties*) and non-compliance committees afford a multilateral forum appropriate to the protection of common interests. In bilateral disputes, international proceedings will rarely be the best way of settling claims for environmental injury; the Trail Smelter case remains the only example so far of inter-State judicial proceedings in which → *compensation* has been sought or awarded for transboundary pollution or environmental damage. In this context attention has mainly focused on facilitating individual access to remedies through civil liability treaties (eg the Vienna Convention on Civil Liability for Nuclear Damage [1963] and the Convention on Civil Liability for Oil Pollution Damage [1969]; → *Liability for Environmental Damage*), equal access to justice (eg the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [1998]; → *Access to Justice in Environmental Matters*; → *Access to Information on Environmental Matters*; → *Public Participation in Environmental Matters*), or international claims procedures such as the → *United Nations Compensation Commission (UNCC)*.

25 At the same time, inter-State litigation has proved its utility as a means of challenging failure to carry out an EIA or to co-operate with neighbouring States in the management of transboundary environmental risks. Like negotiating a new treaty, it can also have the politically satisfying effect of appearing to do something about the environment. Moreover, international adjudication can provide a form of third-party determination of rights over natural resources, or over common spaces, but here too, political supervisory institutions will usually prove more attractive because of their various advantages, including flexibility, accessibility, and capacity for resolving matters multilaterally without necessarily following existing rules of international law. Finally, advisory opinions have shown how erga omnes environmental rules could be adjudicated on the basis of international law in a relatively multilateral process outside the normal framework of bilateral contentious litigation.

Select Bibliography

RB Bilder 'Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation' (1972) 70 MichLRev 513–56.

J Barnes 'Environmental Mediation: A Tool for Resolving International Environmental Disputes in the "Pacific Way"' in RJ Dupuy (ed), *The Future of International Law of the Environment* (Nijhoff Dordrecht 1985) 167–215.

CA Cooper 'The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms' (1986) 24 ACDI 247–313.

AO Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Nijhoff Dordrecht 1987).

PJ Sands 'The Environment, Community and International Law' (1989) 30 HarvIntlLJ 393–420.

M Koskenniemi 'Peaceful Settlement of Environmental Disputes' (1991) 60 ActScandJurisGent 73–92.

A Postiglione 'An International Court for the Environment?' (1993) 23 EnvtlPolyL 73–8.

D Shelton ‘The Participation of Nongovernmental Organizations in International Judicial Proceedings’ (1994) 88 AJIL 611–42.

L Boisson de Chazournes ‘La mise en œuvre du droit international dans le domaine de la protection de l’environnement: Enjeux et défis’ (1995) 99 RGDIP 37–76.

L Sohn ‘Settlement of Law of the Sea Disputes’ (1995) 10 IJMCL 205–17.

T Treves ‘Compulsory Settlement of Disputes: A New Element in the Antarctic System’ in F Francioni and T Scovazzi (eds), *International Law for Antarctica* (2nd ed Kluwer The Hague 1996) 603–12.

G Bosco ‘Settlement of Disputes under the Antarctic Treaty System’ in F Francioni and T Scovazzi (eds), *International Law for Antarctica* (2nd ed Kluwer The Hague 1996) 613–23.

M Fitzmaurice ‘Environmental Protection and the International Court of Justice’ in AV Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP Cambridge 1996) 293–315.

RR Churchill and AV Lowe, *The Law of the Sea* (3rd ed Manchester University Press Manchester 1998).

P Okowa ‘Environmental Dispute Settlement: Some Reflections on Recent Developments’ in MD Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart Oxford 1998) 157–72.

R Wolfrum ‘Means of Ensuring Compliance with and Enforcement of International Environmental Law’ (1998) 272 RdC 9–154.

E Hey, *Reflections on an International Environmental Court* (Kluwer The Hague 2000).

CPR Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer The Hague 2000).

M Fitzmaurice ‘Public Participation in the North American Agreement on Environmental Cooperation’ (2003) 52 ICLQ 333–68.

N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP Cambridge 2005).

JG Merrills, *International Dispute Settlement* (4th ed CUP Cambridge 2005) 64–90, 182–210.

R Rayfuse ‘The Future of Compulsory Dispute Settlement under the Law of the Sea Convention’ (2005) 36 Victoria University of Wellington Law Review 683–712.

J Pauwelyn ‘Judicial Mechanisms: Is There a Need for a World Environment Court?’ in WB Chambers and JF Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press Tokyo 2005) 150–77.

RR Churchill ‘Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea during its First Decade’ in D Freestone, R Barnes, and DM Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP Oxford 2006) 388–416.

T Treves ‘A System for Law of the Sea Dispute Settlement’ in D Freestone, R Barnes, and DM Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP Oxford 2006) 417–32.

D Anderson ‘Scientific Evidence in Cases under Part XV of the LOSC’ in M Nordquist and others (eds), *Law, Science and Ocean Management* (Nijhoff Leiden 2007) 505–18.

CPR Romano ‘International Dispute Settlement’ in D Bodansky, J Brunnée, and E Hey, *The Oxford Handbook of International Environmental Law* (OUP Oxford 2007) 1036–56.

PW Birnie, AE Boyle, and C Redgwell, *International Law and the Environment* (3rd ed OUP Oxford 2009).

Select Documents

Affaire du Lac Lanoux (1957) 12 RIAA 281.

Agreement on the Conservation of African-Eurasian Migratory Waterbirds (signed 16 June 1995).

Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (done 5 April 1995, entered into force 5 April 1995) (1995) 34 ILM 864.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (done 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

Agreement for the Protection of the Rhine against Chemical Pollution (signed 3 December 1976, entered into force 1 February 1979) 1124 UNTS 406.

Annex VI of the Statute of the International Tribunal for the Law of the Sea, United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 561.

Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (done 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57.

Bering Sea Fur Seals Arbitration (Great Britain v United States) (1893) 1 Moore International Arbitrations 755.

COE 'Convention on the Conservation of European Wildlife and Natural Habitats' (done 19 September 1979, entered into force 1 June 1982) CETS No 104.

Continental Shelf (Libyan Arab Jamahiriya/Malta) *(Application to Intervene)* [1984] ICJ Rep 3.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (done 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

Convention on Biological Diversity (concluded 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Opened for signature 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3.

Convention on the Conservation of Antarctic Marine Living Resources (concluded 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47.

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) (done 25 February 1991, entered into force 10 September 1997) (1991) 30 ILM 802.

Convention on Environmental Impact Assessment in a Transboundary Context Inquiry Commission (Espoo Inquiry Commission) 'Report on the Likely Significant Adverse Transboundary Impacts of the Danube-Black Sea Navigation Route at the Border of Romania and the Ukraine' (10 July 2006).

Convention on International Trade in Endangered Species of Wild Fauna and Flora (opened for signature 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

Convention on Long-Range Transboundary Air Pollution (done 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter of 1972 (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 138.

Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (concluded 19 February 1974, entered into force 5 October 1976) 1092 UNTS 279.

Convention for the Protection of the Marine Environment of the North-East Atlantic (opened for signature 22 September 1992, entered into force 25 March 1998) 32 ILM 1069.

Convention on the Protection of the Rhine (signed 12 April 1999, entered into force 1 January 2003) (2000) OJ L289/31.

Convention on the Protection and Use of Transboundary Watercourses and International Lakes (with Annexes) (done 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

Convention on the Transboundary Effects of Industrial Accidents (done 17 March 1992, entered into force 19 April 2000) (1992) 31 ILM 1333.

East Timor (Portugal v Australia) [1995] ICJ Rep 90.

Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7.

The Indus Waters Treaty 1960 (done 19 September 1960, entered into force 12 January 1961) 419 UNTS 125.

International Convention on Civil Liability for Oil Pollution Damage (signed 29 November 1969, entered into force 19 June 1975) 973 UNTS 3.

International Convention for the Prevention of Pollution from Ships (signed 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (MARPOL Convention).

International Tropical Timber Agreement (done 26 January 1994, entered into force 1 January 1997) (1994) 33 ILM 1016.

Iron Rhine Arbitration (Belgium v The Netherlands) (Award) (Permanent Court of Arbitration) (2005).

Kasikili/Sedudu Island (Botswana/Namibia) [1999] ICJ Rep 1045.

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (Judgment) [1990] ICJ Rep 92.

Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Award) (2005) 27 RIAA 133.

Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Order) ITLOS Case No 12 (10 September 2003).

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66.

Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

Metalclad Corporation v United Mexican States (Award of 30 August 2000) ICSID Case No ARB(AF)/97/1 (2000) 5 ICSID Rep 209.

Methanex Corp v United States (Final Award of the Tribunal on Jurisdiction and Merits) UNCITRAL (NAFTA, 3 August 2005).

MOX Plant Case (Ireland v United Kingdom) (Order) ITLOS Case No 10 (3 December 2001).

North American Agreement on Environmental Cooperation (1993) (signed 8 September 1993, entered into force 1 January 1994) (1992) 32 ILM 1482.

North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289.

OSPAR Arbitration (Ireland v United Kingdom) (Final Award) (Permanent Court of Arbitration) (2003) 42 ILM 1118.

Permanent Court of Arbitration 'Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment' (19 June 2001).

Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972 (signed 7 November 1996, entered into force 24 March 2006) 2006 ATS 11.

Protocol on Environmental Protection to the Antarctic Treaty (done 4 October 1991, entered into force 14 January 1998) (1991) 30 ILM 1455

Protocol relating to the International Convention for the Prevention of Pollution from Ships, 1973 (with Annexes, Final Act and International Convention of 1973) (signed 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61.

Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution and Further Reduction of Sulphur Emissions (done 14 June 1994, entered into force 5 August 1998) (1993) 33 ILM 1540.

Pulp Mills on the River Uruguay (Argentina v Uruguay) (ICJ filed 4 May 2006).

Pulp Mills on the River Uruguay (Argentina v Uruguay) (Provisional Measures) [2006] ICJ Rep 113.

SD Myers Inc v Canada(Partial Award) UNCITRAL (NAFTA, 13 November 2000) 121 ILR 73.

Southern Bluefin Tuna Case (New Zealand and Australia v Japan) (Award on Jurisdiction and Admissibility) (2000) 23 RIAA 1.

Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures) ITLOS Cases Nos 3, 4 (27 August 1999).

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

Trail Smelter Case (Decision of 11 March 1941) (United States v Canada) (1941) 3 RIAA 1938.

Trail Smelter Case (Decision of 16 April 1938) (United States v Canada) (1941) 3 RIAA 1911.

Treaty between the United States and Great Britain relating to Boundary Waters between the United States and Canada (done 11 January 1909, entered into force 5 May 1910) (1910) 4 AJIL Supp 239.

UNEP 'Institutional and Financial Arrangements for International Environmental Cooperation', UNGA Res 2997 (XXVII) (15 December 1972).

United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

United Nations Framework Convention on Climate Change (with Annexes) (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

UN ILC 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' (2001) GAOR 56th Session Supp 10, 370.

UN ILC 'Draft Articles on State Responsibility' (2001) GAOR 56th Session Supp 10, 43.

Vienna Convention on Civil Liability for Nuclear Damage (signed 21 May 1963, entered into force 12 November 1977) 1063 UNTS 265.

Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 324.

Western Sahara (Advisory Opinion) [1975] ICJ Rep 12.

WTO *EC—Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001) WT/DS135/AB/R.

WTO *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R.

Environment and Human Rights

Alan Boyle

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A. Introduction

1 In 1972 the → *United Nations* Conference on the Human Environment declared that

> [m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1 UN Conference on the Human Environment, 'Stockholm Declaration of the United Nations Conference on the Human Environment' ['Stockholm Declaration'])

2 This statement might have provided the basis for subsequent elaboration of a human right to environmental quality, but its real-world impact has been noticeably modest (→ *Human Rights*; for more details on the topic of this article see Birnie and Boyle Chapter 5). It was not repeated in the 1992 Rio Declaration on Environment and Development ('Rio Declaration'), which merely makes human beings the 'centre of concerns of sustainable development', and refers only to their being 'entitled to a healthy and productive life in harmony with nature' (Principle 1 Rio Declaration; → *Sustainable Development*).

3 Environmental rights do not fit neatly into any single category or 'generation' of human rights. They can be viewed from at least three perspectives. First, existing civil and political rights can provide a basis for giving affected individuals access to environmental information, judicial remedies, and political processes (→ *Access to Information on Environmental Matters*; → *Access to Justice in Environmental Matters*; → *Public Participation in Environmental Matters*). On this view their role is one of empowerment, facilitating participation in environmental decision-making, and compelling governments to meet → *minimum standards* of protection for life, private life, and property from environmental harm (see eg → *Universal Declaration of Human Rights [1948]*, especially the right to life, and the right to a standard of living for the health and well-being of oneself and one's family; → *Life, Right to, International Protection*; → *Property, Right to, International Protection*). A second possibility is to treat a decent, healthy, or sound environment as an economic or social right, comparable to those whose progressive attainment is promoted by the → *International Covenant on Economic, Social and Cultural Rights (1966)* ('ICESCR'). The main argument for this approach is that it would privilege environmental quality as a value, giving it comparable status to other economic and social rights such as development, and priority over non rights-based objectives (→ *Development, Right to, International Protection*). Like other economic and social rights it would be programmatic, and in most cases enforceable only through relatively weak international supervisory mechanisms. The third option would treat environmental quality as a collective or solidarity right, giving communities—'peoples'—rather than individuals a right to determine how their environment and natural resources

should be protected and managed (→ *Solidarity Rights [Development, Peace, Environment, Humanitarian Assistance]*; → *Conservation of Natural Resources*).

4 The first approach is essentially anthropocentric insofar as it focuses on the harmful impact on individual humans, rather than on the environment itself. It amounts to a 'greening' of human rights law, rather than a law of environmental rights. The second comes closer to seeing the environment as a good in its own right, but nevertheless one that will always be vulnerable to tradeoffs against other similarly privileged but competing objectives, including the right to economic development. The third approach is the most contested. Not all human rights lawyers favour the recognition of third generation rights, arguing that they devalue the concept of human rights, and divert attention from the need to implement existing civil, political, economic, and social rights fully. The concept hardly featured in the agenda of the → *Vienna World Conference on Human Rights (1993)*, and in general it adds little to an understanding of the nature of environmental rights, which are not inherently collective in character. However, there are some significant examples of collective rights which in certain contexts can have environmental implications, such as the protection of minority cultures and → *indigenous peoples* (see Art. 27 → *International Covenant on Civil and Political Rights (1966)* ('ICCPR'); Art. 7 (4) International Labour Organization 'Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989'; → *Environment and Indigenous Peoples*), or the right of all peoples freely to dispose of their natural resources, recognized in the 1966 ICCPR and ICESCR (common Art. 1 (2); Art. 25 ICESCR; Art. 47 ICCPR), and in Art. 21 → *African Charter on Human and Peoples' Rights (1981)* ('Banjul Charter').

B. The Environment in Human Rights Treaties

5 Among human rights treaties, only the 1981 Banjul Charter proclaims environmental rights in broadly qualitative terms. It protects both the right of peoples to the 'best attainable state of physical and mental health' (Art. 16) and their right to 'a general satisfactory environment favourable to their development' (Art. 24). In the *Ogoniland* Case the → *African Commission on Human and Peoples' Rights (ACommHPR)* held, inter alia, that Art. 24 Banjul Charter imposes an obligation on the State to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources' (*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* [27 October 2001] para. 52 ['*Ogoniland* Case']).

6 Actions required of States in fulfilment of Arts 16 and 24 included

> ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities. (para. 53).

TheCommission's final order is also the most far-reaching of any environmental rights case. It called for a 'comprehensive clean-up of lands and rivers damaged by oil operations' (para. 71), the preparation of environmental and social impact assessments, and provision of information on health and environmental risks and 'meaningful access to regulatory and decision-making bodies' (ibid). As Shelton observes, '[t]he result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights' (Shelton [2002] 942).

7 The only other treaty to make specific provision for environmental rights is the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention'). Its → *preamble* not only recalls Principle 1 of the Stockholm Declaration and recognizes that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself' but also asserts that

> every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations. (see also → *Association, Freedom of, International Protection*)

However, the focus of the Aarhus Convention is strictly procedural in content, limited to public participation in environmental decision-making, access to justice, and access to information. As a conception of environmental rights it owes little to Principle 1 Stockholm Declaration, and everything to Principle 10 Rio Declaration, which gives explicit support in mandatory language to the same category of procedural rights.

8 Other human rights treaties either make no explicit reference to the environment at all, or do so only in relatively narrow terms, focused on human health, which add little or nothing to case-law, derived from the right to life (Art. 11 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [done 14 November 1988, entered into force 16 November 1999] (1989) 28 ILM 156 ['Protocol of San Salvador']; World Health Organization [ed], *Environment and Health: The European Charter and Commentary* [WHO Regional Publications Copenhagen 1990]; World Commission on Environment and Development Experts Group on Environmental Law [ed], *Environmental Protection and Sustainable Development: Legal Principles for Environmental Protection and Sustainable Development* [Graham & Trotman London 1987] 38, Art. 1; Art. 24 (2) (c) Convention on the Rights of the Child [adopted 20 November 1989, entered into force 2 September 1990] 1577 UNTS 3; Art. 11 → *European Social Charter* [signed 18 October 1961, entered into force 26 February 1965] CETS No 35). Insofar as most human rights treaties have relevance to the environment, it is mainly or exclusively through the growing body of jurisprudence in which the 'greening' of other rights has been pursued with increasing vigour. The → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR') says nothing about the environment. Nevertheless, so extensive is its growing environmental jurisprudence that proposals for the adoption of an environmental protocol have not been pursued. Nevertheless, as the Council of Europe Manual points out: 'The Convention is not designed to provide a general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment' (COE [ed], *Manual of the Council of Europe: Structure, Functions and Achievements* 7).

C. A Right to a Decent, Healthy, or Viable Environment?

1. The 1972 Declaration on the Human Environment

9 Sohn argues that Principle 1 of the 1972 Stockholm Declaration created an individual human right to a decent, healthy, or viable environment (at 455), but it is significant that no treaty refers explicitly to the right to a decent environment in these terms. When the concept is employed in a similarly broad and autonomous form, as in Art. 24 Banjul Charter, it appears as a collective right only: 'All peoples shall have the right to a general satisfactory environment favorable to their development'. However, as the *Ogoniland* Case amply demonstrates, it is no less justiciable in legal proceedings. Whether general international law recognizes such a right is more doubtful, but attempts have been made to develop one.

2. The UN Draft Principles on Human Rights and the Environment

10 The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994 proposed a Declaration of Principles on Human Rights and the Environment (Special Rapporteur F Zohra Ksentini 'Human Rights and the Environment (Final Report)' Annex I). This draft offered a conception of human rights and the environment much closer to Principle 1 of the 1972 Stockholm Declaration than to Principle 1 of the 1992 Rio Declaration. It proclaimed that '[a]ll persons have the right to a secure, healthy and ecologically sound environment' (Annex I, para. 2) and to 'an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs' (Annex I, para. 4). The response of the UN Human Rights Commission and of States generally was not favourable to this approach, and the proposal has made no further progress (→ *United Nations Commission on Human Rights/United Nations Human Rights Council*).

11 Many scholars have also argued that a 'decent environment' is too anthropocentric and uncertain a concept, and that its elaboration is unnecessary given the extent to which international law has already addressed environmental problems. Moreover, there is little international consensus on the correct terminology. Even the UN Sub-Commission could not make up its mind, referring variously to the right to a 'healthy and flourishing environment' (Introduction) or to a 'satisfactory environment' (Chapters I, IV, VI) in its report, and to the right to a 'secure, healthy and ecologically sound environment' (Annex I, para. 2) in the draft principles. Other formulations are equally diverse. Principle 1 Stockholm Declaration talks of an 'environment of a quality that permits a life of dignity and well-being', while Art. 24 Banjul Charter refers to a 'general satisfactory environment favourable to their development'.

3. The Environment as an Economic, Social, and Cultural Right

12 An alternative approach would expand the economic, social, and cultural rights set out in the 1966 ICESCR. These rights are generally concerned with encouraging governments to pursue policies which create conditions of life enabling individuals or peoples to develop to their full potential. They are programmatic, requiring progressive realization in accordance with available resources, but nevertheless requiring States to 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' (UN Committee on Economic, Social, and Cultural Rights ('UNCESCR'); 'General Comment No 3: The Nature of States Parties Obligations' para. 10). Their application is supervised by a process of 'constructive dialogue' with governments in the UNCESCR, rather than by litigation.

13 One problem with this approach is the 'built-in defects' of the monitoring process, including poor reporting and excessive deference to States (Leckie 129; Arts 16–21 ICESCR; UNCESCR, 'General Comment No 1: Reporting by States Parties'). Another problem is the narrowness of Art. 12 ICESCR, with its focus limited to health and 'environmental hygiene', rather than environmental quality as such. According to the UNCESCR, Art. 12 includes 'the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health' (UNCESCR, 'General Comment No 14: The Right to the Highest Attainable Standards of Health (Art. 12)' para. 15).

14 At the same time, economic and social rights do provide some basis for addressing questions of environmental quality. The so-called 'right to water' is an example. The UNCESCR has also concluded that States are required to ensure an adequate and accessible supply of water for drinking, sanitation, and nutrition, based on Arts 11 and 12 1966 ICESCR (UNCESCR 'General Comment No 15: The Right to Water (Arts 11 and 12)'). The 1999 UN Economic Commission of Europe ('UNECE') Protocol on Water and Health expressly commits parties to ensuring provision of adequate supplies of wholesome drinking water, adequate sanitation, and other measures to protect human health (UNECE, 'Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes'). The Protocol takes priority over other less stringent agreements (Art. 4 (9)). There is little doubt that the UN Watercourses Convention, and other watercourses treaties, would be interpreted and applied taking these rights into account (→ *International Watercourses*; → *International Watercourses, Environmental Protection*). These at least would appear to be vital human needs, and a conflicting use is arguably neither sustainable nor equitable if it prevents them from being met. Moreover, whatever the legal status of sustainable use as a legal principle, it is clear from these various precedents that where human rights are sufficiently affected unsustainable use of water will violate applicable human rights standards.

4. Environmental Rights in National Constitutions

15 Environmental provisions of some kind have been added to an increasing number of constitutions since 1972. Some clearly create no justiciable rights, but may nevertheless influence the interpretation and application of other constitutional rights, or of general law. Other constitutions give environmental rights a stronger focus, although there is no consistent formulation. Countries which have specific constitutional provisions include: Brazil, Arts 170 and 225; Chile, Arts 19–20; China, Arts 9 and 26; Cuba, Art. 27; Ecuador, Art. 19; Greece, Art. 24; Guatemala, Art. 93; Guyana, Art. 36; Honduras, Art. 145; Hungary, Arts 18 and 70; India, Art. 48A; Iran, Art. 50; Mozambique, Art. 11; Namibia, Art. 95; The Netherlands, Art. 21; Nicaragua, Art. 60; Papua New Guinea, Art. 4; Paraguay, Art. 93; Peru, Art. 123; Portugal, Art. 66; Russian Federation, Art. 42; South Africa, Sec. 24; South Korea, Art. 35; Spain, Art. 45; Thailand, Art. 65; Turkey, Art. 56; and Yemen, Art. 16.

D. Greening Existing Human Rights

1. Environmental Nuisances and the European Convention on Human Rights

16 Even if no independent right to a decent environment has yet become part of international law, States have a positive duty to take appropriate measures to prevent industrial pollution or other forms of environmental nuisance from seriously interfering with health, or the enjoyment of private life or property. The case- law of the → *European Court of Human Rights (ECtHR)* shows how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information (*López Ostra v Spain* [1994]; *Guerra and Others v Italy* [1998]; *Öneryildiz v Turkey* [2004]; *Fadeyeva v Russia* [2005]; *Taskin v Turkey* [2006]).

17 All of these cases have common features. First, there is an industrial nuisance—a chemical plant, smelter, tannery, mine, or waste disposal site, for example. Secondly, there is a failure to take adequate preventive measures to control these known sources of serious risk to life, health, private life, or property. In contrast, where the State has done all it could to avoid a risk to individuals, there will be no violation of the ECHR (*LCB v United Kingdom* [1999], a case concerned with exposure to nuclear tests; see also UN Human Rights Committee ('UN HRC'), 'Communication No 645/1995, *Bordes et al v France*' [1996]; → *Nuclear Tests Cases*). Thirdly, it is irrelevant that the State itself does not own or operate the plant or industry in question. As the ECtHR said in *Fadeyeva v Russia*, the State's responsibility in environmental cases 'may arise from a failure to regulate private industry' (para. 89). The State thus has a duty 'to take reasonable and appropriate measures' (ibid) to secure rights under the ECHR. In *Öneryildiz v Turkey* it emphasized that '[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 … entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life' (para. 89). The Court had no doubt that this obligation covered the licensing, setting up, operation, security, and supervision of dangerous activities, and required all those concerned to

take 'practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks' (para. 90).

18 These practical measures include law enforcement: it is a characteristic feature of *Guerra and Others v Italy, López Ostra v Spain, Taşkin v Turkey* and *Fadeyeva v Russia* that the industrial activities in question were either operating illegally, or in violation of environmental laws and emissions standards. In *López Ostra v Spain* and *Taşkin v Turkey* the national courts ordered the closure of the facility in question, but their decisions had been ignored or overruled by the political authorities. In effect, there is a right to have the law enforced and the judgments of national courts upheld: 'The Court would emphasise that the administrative authorities form one element of a State subject to the rule of law, and that their interests coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose' (*Taşkin v Turkey* paras 124–25; → *Rule of Law*). The Inter-American Court of Human Rights has taken the same view pursuant to Art. 25 → *American Convention on Human Rights (1969)* ([signed 22 November 1969, entered into force 18 July 1978]; → *Mayagna [Sumo] Awas Tingni Community v Nicaragua Case* IACtHR paras 106–14).

2. Other Human Rights Treaties

19 Attempts to invoke the rights to life, or private life, for environmental purposes before other international human rights bodies have been less successful. In *E H P v Canada* the UN HRC accepted that dumping of nuclear wastes raised a serious right to life issue for local residents and future generations under Art. 6 1966 ICCPR, but the application was dismissed due to failure to exhaust local remedies ('Communication No 67/1980, *E H P v Canada*' [27 October 1982]; → *Nuclear Waste Disposal*; → *Local Remedies, Exhaustion of*). In *Bordes et al v France* a complaint to the UN HRC about nuclear tests in the Pacific was dismissed because there was no evidence of serious risk to life.

20 In a report on Ecuador the → *Inter-American Commission on Human Rights (IACommHR)* found that 'where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights [viz right to life] are implicated' ('Report on the Situation of Human Rights in Ecuador' 88), while in *Yanomani Indians v Brazil* it concluded that the construction of a road through the applicants' traditional lands had so seriously affected their way of life that it violated both the right to life and the right to health (*Yanomami Indians v Brazil* Case 7615).

3. Indigenous Culture and the Environment

21 A small number of environmental cases have concerned interference with the rights of indigenous peoples or other minorities to enjoy their own culture under Art. 27 ICCPR. In *Länsman et al v Finland* the UN HRC held that 'measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27' ('Communication No 511/1992, *Länsman et al v Finland*' [26 October 1994] para. 9.4; see also 'Communication No 167/1984, *Ominayak, Chief of the Lubicon Lake Band v Canada*' [26 March 1990] para. 32.2; 'Communication No 547/1993, *Mahuika et al v New Zealand*' [27 October 2000]). The Committee concluded that Finland had taken adequate measures to minimize the impact of stone quarrying on reindeer herding.

22 In somewhat similar circumstances, the Inter-American Commission and the → *Inter-American Court of Human Rights (IACtHR)* have relied instead on a broad reading of the right to property in order to afford indigenous peoples protection from environmental destruction, and unsustainable development, and they go some way towards achieving the same outcome as Art. 27 ICCPR or Art. 24 Banjul Charter. In the *Maya Indigenous Community of Toledo Case* (*Maya Indigenous Community of the Toledo District v Belize* Case 12.053 IACommHR; see also *Mayagna [Sumo] Awas Tingni Community v Nicaragua IACtHR*), the IACtHR accepted that logging → *concessions* threatened long-term and irreversible damage to the natural environment on which the petitioners' system of subsistence agriculture depended. Citing *Ogoniland*, the Court concluded that there had been violations of the petitioners' right to property in their ancestral lands. Its final order required Belize to repair the environmental damage, and to take measures to demarcate and protect their land in → *consultation* with the community (→ *Liability for Environmental Damage*).

E. Environmental Protection as a Legitimate Aim

23 Fundamental to the case-law is the balancing of interests that must often take place when environmental matters are involved. Obvious questions often posed in this context are whether human rights law trumps environmental law, or whether environmental rights trump the right of States to pursue economic development. Such potential conflicts have not led international courts to employ the concept of → *ius cogens*, or to give human rights, environmental protection, or the right to sustainable development automatic priority. Instead, the case-law has concentrated on questions of

balance, necessity, and the degree of interference (see UN HRC, 'Communication No 511/1992, *Länsman et al v Finland*' [26 October 1994] para. 9.4; UN HRC, 'Communication No 167/1984, *Ominayak, Chief of the Lubicon Lake Band v Canada*' [26 March 1990] para. 32.2; *Maya Indigenous Community of the Toledo District v Belize* Case 12.053 IACommHR). In cases before the ECtHR, States have been allowed a wide → *margin of appreciation* to pursue environmental objectives provided they maintain a fair balance between the general interests of the community and the protection of the individual's fundamental rights (*Fredin v Sweden* [1991]; *Pine Valley Developments Ltd and others v Ireland* [1991] paras 57–59; *Matos e Silva, Lda, and others v Portugal* [1997]; *Katsoulis and others v Greece* [2004]).

24 At the same time, environmental protection and human rights do not necessarily trump the right to promote economic development. In *Hatton and others v United Kingdom* the applicants challenged the extension of night flights at Heathrow Airport (*Hatton and others v United Kingdom* [2003]). In the European Court's view the United Kingdom had acted lawfully, had done its best to mitigate the impact on the private life of those affected, and had maintained a fair balance between the economic benefit to the community as a whole and the rights of individuals who lived near the airport. The State would be failing in its duty to those affected if it did not regulate or mitigate environmental nuisances or environmental risk caused by airport development projects, but it was required to do so only to the extent necessary to protect life, health, enjoyment of property, and family life from disproportionate interference. In its judgement the Grand Chamber leaves little room for the Court to substitute its own view of the extent to which the environment should be protected from economic development. On this basis, decisions about where the public interest lies are for politicians, not for the Court, save in the most extreme cases.

25 The equally important case of *Taşkin v Turkey* shows, however, that the balance of interests to be maintained is not only a substantive one, but has important procedural dimensions. In particular, the most important feature of *Taşkin v Turkey* is that it envisages an informed process. The Court put the matter like this: 'Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake' (para. 119). The words → *environmental impact assessment* are not used, but in many cases that is exactly what will be necessary to give effect to the evaluation process envisaged here. The IACommHR (*Maya Indigenous Community of the Toledo District v Belize* Case, para. 150) and the UN HRC ('Communication No 511/1992, *Länsman et al v Finland*', para. 9.4; 'Communication No 167/1984, *Ominayak, Chief of the Lubicon Lake Band v Canada*', para. 32.2) have taken a similar approach in cases concerning logging, oil extraction, and mining on land belonging to indigenous peoples.

F. Participatory Rights

26 Although the Rio Declaration contains no explicit human right to a decent environment, Principle 10 lends substantial support in mandatory language for participatory rights of a comprehensive kind, including 'appropriate access to information concerning the environment that is held by public authorities … ' and 'the opportunity to participate in decision-making processes'. It further requires that '[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided'. The public participation and access to information requirements of Principle 10 Rio Declaration are to some extent reflected in various treaties and international instruments. Among the most far-reaching are the 1998 Aarhus Convention, the 2003 UNECE Protocol on Strategic Environmental Assessment, and the → *North American Agreement on Environmental Co-operation (1993)*.

27 What distinguishes Principle 10 from participatory rights in the ICCPR and regional human rights conventions is its greater specificity and environmental focus, and its emphasis both on participation in environmental decision making, including access to information, and on effective access to justice. An important question posed by developments in the case-law of the ECtHR is the extent to which the participatory rights contained in the Aarhus Convention and Principle 10 of the Rio Declaration have become part of general human rights law.

28 Access to, or communication of, environmental information may be required under general human rights law but only insofar as necessary in order to give effect to rights to life, private life, or access to justice. Thus in *Öneryildiz v Turkey* the ECtHR placed 'particular emphasis' on the public's right to information about dangerous activities which posed a threat to life (para. 90). Where governments engage in, or permit, dangerous activities with unknown consequences for health, such as nuclear tests, there is a duty to establish an 'effective and accessible' procedure for allowing those involved to obtain relevant information (*McGinley and Egan v the United Kingdom* paras 97 and 101; *LCB v United Kingdom*). In appropriate cases there is a duty to inform, not simply a right of access. In *Guerra and Others v Italy*, Italy's failure to provide 'essential information' about the severity and nature of toxic emissions from a chemical plant was held to constitute a breach of the right to private life (para 60).

29 The most significant case is *Taşkin v Turkey*, about the licensing of a mine, in which the European Court held that

> whilst Article 8 [of the ECHR] contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8. (para. 118)

30 This passage, and the Court's emphasis on taking into account the views of affected individuals, strongly suggest that their participation in the decision-making process will be essential for → *compliance* with Art. 8. Similarly, the right to 'meaningful consultation' is upheld by the IACommHR in the *Maya Indigenous Community of the Toledo District v Belize* Case (paras 154–55), by the African Commission in *Ogoniland*, and by the UN HRC ('Communication No 511/1992, *Länsman et al v Finland*', para. 9.5; 'Communication No 547/1993, *Mahuika et al v New Zealand*' para. 9.8).

31 However, the ECHR right of participation in decision-making is plainly not available to everyone, nor does it apply to decisions concerning the environment in general. Only those whose convention rights are in some way affected will benefit from this protection. Finally, the *Taşkin v Turkey* judgment stipulates that

> the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process. (para. 119)

32 If *Hatton and others v United Kingdom* shows a reluctance on the part of the ECtHR to grapple with the merits of a decision interfering with individual rights, *Taşkin v Turkey* convincingly demonstrates an unequivocal willingness to address the proper procedures for taking decisions relating to the environment in human rights terms. This is a profound extension of the scope of Art. 8 ECHR. It goes far to translate into European human rights law the procedural requirements set out in Principle 10 Rio Declaration, and elaborated in European environmental treaty law, despite the fact that Turkey was not a party to the Aarhus Convention at that time. However, the broader public interest approach of the Aarhus Convention, and the narrower ECHR focus on the convention rights of affected individuals, is also very evident in the case-law. This distinction has important implications for any debate about the need for an autonomous right to a decent or satisfactory environment, a question to which we return in the final section.

G. The Value of Human Rights Approaches

33 Despite its evolutionary character, however, human rights law still falls short of guaranteeing a right to a decent or satisfactory environment if that concept is understood in broader, essentially qualitative, terms unrelated to impacts on specific humans. It remains true, as the ECtHR reiterated in *Kyrtatos v Greece*, that '[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such' (para. 52). This case involved the illegal draining of → *wetlands*. The ECtHR could find no violation of their right to private life, or enjoyment of property arising out of the destruction of the area in question. Although they lived nearby, the applicants' rights were not affected. They were not entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved.

34 The Court's conclusion in *Kyrtatos v Greece* points to a larger issue which goes to the heart of the problem: human rights protection benefits only the victims of a violation of convention rights. If the individual applicant's health, private life, property, or civil rights are not sufficiently affected by environmental loss, then he or she has no standing to proceed. There is, as Judge Loucaides has observed, no *actio popularis* under the ECHR (Loucaides 249). The IACommHR has taken a similar view, rejecting as inadmissible a claim on behalf of all the citizens of Panama to protect a nature reserve from development (*Metropolitan Nature Reserve v Panama* Case 11.533, para. 34; see also UN HRC, 'Communication No 1453/2006' *Brun v France*', para. 6.3).

Select Bibliography

LB Sohn 'Stockholm Declaration on the Human Environment' (1973) 14 HarvIntlLJ 423–515.

P-M Dupuy 'Le droit à la santé et la protection de l'environnement', in R-J Dupuy (ed), *The Right to Health as a Human Right* (Sijthoff & Noordhoff Alphen aan den Rijn 1979) 340–427.

P Alston 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29 NILR 307–22.

P Alston 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 AJIL 607–21.

I Brownlie ‘The Rights of Peoples in Modern International Law’, in J Crawford (ed), *The Rights of Peoples* (Clarendon Oxford 1988) 1–16.

D Shelton ‘Human Rights, Environmental Rights, and the Right to the Environment’ (1991–92) 28 StanJIntlL 103–38.

D Shelton ‘What Happened in Rio to Human Rights?’ (1992) 3 YIntlEnvL 75–93.

G Handl ‘Human Rights and Protection of the Environment: A Mildly “Revisionist” View’, in A Cançado Trindade (ed), *Human Rights, Sustainable Development and the Environment* (IIDH San José 1992) 117–142.

RS Pathak ‘The Human Rights System as a Conceptual Framework for Environmental Law’, in E Brown Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions* (UN University Press Tokyo 1992) 205–43.

SC McCaffrey ‘A Human Right to Water: Domestic and International Implications’ (1992–93) 5 GeoIntlEnvtlLRev 1–24.

E Benvenisti ‘Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law’ (1996) 90 AJIL 384–415.

N Popovic ‘In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment’ (1996) 27 ColumHumRtsLR 487–603.

MCR Craven, *The International Covenant on Economic, Social and Cultural Rights* (Clarendon Oxford 1995).

R Desgagné ‘Integrating Environmental Values into the European Convention on Human Rights’ (1995) 89 AJIL 263–94.

AE Boyle and MR Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Oxford 1996).

F Willis ‘Economic Development, Environmental Protection and the Right to Health’ (1996–97) 9 GeoIntlEnvtlLRev 195–220.

J Ebbesson ‘The Notion of Public Participation in International Environmental Law’ (1997) 8 YIntlEnvL 51–97.

BCA Toebes, *The Right to Health as a Human Right in International Law* (Intersentia Antwerpen 1999).

P Alston and J Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (CUP Cambridge 2000).

M Gavouneli ‘Access to Environmental Information: Delimitation of a Right’ (2000) 13 Tulane Environmental Law Journal 303–27.

S Leckie ‘The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform’, in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP Cambridge 2000) 129–44.

P Davies ‘Public Participation, the Aarhus Convention, and the European Community’, in DN Zillman, AR Lucas, and R Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP Oxford 2002) 155–85.

D Shelton ‘Decision Regarding Case 155/96’ (2002) 96 AJIL 937–42.

F Coomans ‘The Ogoni Case before the African Commission on Human and Peoples’ Rights’ (2003) 52 ICLQ 749–60.

M Fitzmaurice ‘Public Participation in the North American Agreement on Environmental Cooperation’ (2003) 52 ICLQ 333–68.

SR Tully ‘The Contribution of Human Rights to Freshwater Resource Management’ (2003) 14 YIntlEnvL 101–37.

L Loucaides ‘Environmental Protection through the Jurisprudence of the European Court Human Rights’ (2004) 75 BYIL 249–67.

SC McCaffrey ‘The Human Right to Water’, in E Brown Weiss, L Boisson de Chazournes, and N Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP Oxford 2005) 93–115.

M Fitzmaurice ‘The Human Right to Water’ (2007) 18 Fordham EnvLR 537–86.

V Koester ‘The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)’, in G Ulfstein (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (CUP Cambridge 2007) 179–217.

JG Merrills ‘Environmental Rights’, in D Bodansky, J Brunnée, and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP Oxford 2007) 663–80.

PW Birnie, AE Boyle, and C Redgwell, *International Law and the Environment* (3rd ed OUP Oxford 2009).

Select Documents

African Charter on Human and Peoples’ Rights (adopted 27 June1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter).

American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José).

COE, ‘Convention for the Protection of Human Rights and Fundamental Freedoms’ (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

COE (ed), *Manual of the Council of Europe: Structure, Functions and Achievements* (Stevens London 1970).

COE Committee of Experts for the Development of Human Rights, ‘Final Activity Report on Human Rights and the Environment’ (10 November 2005) DH-DEV(2005) 06rev.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (done 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

European Commission, ‘Final Report on Access to Justice in Environmental Matters’ (2002) Doc. ENVA.3/ETU/2002/0030.

Fadeyeva v Russia (ECtHR) Reports 2005-IV 255.

Fredin v Sweden (ECtHR) Series A No 192.

Guerra and Others v Italy (ECtHR) Reports 1998-I 210.

Hatton and others v United Kingdom (ECtHR) Reports 2003-VIII.

IACommHR, ‘Report on the Situation of Human Rights in Ecuador’ OEA/Ser L/V/II.96 doc.10 Rev 1 (1997) 77.

International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

International Labour Organization, ‘Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989’ (adopted 27 June 1989) 72 ILO Official Bulletin Series A 59.

Katsoulis and others v Greece (ECtHR) App 66742/01.

Kyrtatos v Greece (ECtHR) Reports 2003-VI 257.

LCB v United Kingdom (ECtHR) Reports 1998-III 1390.

López Ostra v Spain (ECtHR) Series A No 303 C.

Matos e Silva, Lda, and Others v Portugal (ECtHR) Reports 1996-IV 1092.

Maya Indigenous Community of the Toledo District v Belize Case 12.053 IACommHR Report No 40/04 OEA/Ser.L/V/II.122 Doc. 5 rev 1 vol 2 (2004) 727.

Mayagna (Sumo) Awas Tingni Community v Nicaragua IACtHR Series C No 79 (31 August 2001).

McGinley and Egan v the United Kingdom (ECtHR) Reports 1998-III 1334.

Metropolitan Nature Reserve v Panama Case 11.533 IACommHR Report No 88/03 OEA/Ser.L/V/II.118 doc.70 rev 2 vol 1 (2003) 524.

North American Agreement on Environmental Cooperation (1993) (signed 8 September 1993, entered into force 1 January 1994) (1992) 32 ILM 1482.

Öneryildiz v Turkey (ECtHR) Reports 2004-XII 79.

Pine Valley Developments Ltd and others v Ireland (ECtHR) Series A No 222.

Protocol on Strategic Environmental Assessment (adopted 21 May 2003, not yet entered into force).

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (ACommHPR 27 October 2001) Comm No 155/96 (2001) African Human Rights Law Reports 60.

Taskin v Turkey (ECtHR) Reports 2004-X 179.

UN Committee on Economic, Social and Cultural Rights, 'General Comment No 1: Reporting by States Parties' (27 February 1989) ESCOR (1989) Supp 4, 87.

UN Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties Obligations' (26 November–14 December 1990) ESCOR (1991) Supp 3, 83.

UN Committee on Economic, Social and Cultural Rights, 'General Comment No 14: The Right to the Highest Attainable Standards of Health (Art. 12)' (11 May 2000) ESCOR (2001) Supp 2, 128.

UN Committee on Economic, Social and Cultural Rights, 'General Comment No 15: The Right to Water (Arts 11 and 12)' (26 November 2002) ESCOR (2003) Supp 2, 120.

UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF. 151/26/Rev 1 vol I, 3.

UN Conference on the Human Environment, 'Stockholm Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev 1, 3.

UN Economic Commission for Europe (ed), *The Aarhus Convention: An Implementation Guide* (United Nations New York 2000) UN Doc ECE/CEP/72.

UN Economic Commission for Europe, 'Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes' (17 June 1999) UN Doc MP.WAT/2000/1.

UN Environment Programme and Office of the UN High Commissioner for Human Rights Joint Expert Seminar on Human Rights and the Environment, 'Background Papers 1–5' (14–16 January 2002).

UN HRC, 'Communication No 1453/2006' *Brun v France*' (18 October 2006) GAOR 62nd Session Supp 40 vol 2, 629.

UN HRC, 'Communication No 167/1984, *Ominayak, Chief of the Lubicon Lake Band v Canada*' (26 March 1990) GAOR 45th Session Supp 40 vol 2, 1.

UN HRC, 'Communication No 511/1992, *Länsman et al v Finland*' (26 October 1994) GAOR 50th Session Supp 40 vol 2, 66.

UN HRC, 'Communication No 547/1993, *Mahuika et al v New Zealand*' (27 October 2000) GAOR 56th Session Supp 40 vol 2, 11.

UN HRC, 'Communication No 645/1995, *Bordes et al v France*' (22 July 1996) GAOR 51st Session Supp 40 vol 2, 267.

UN HRC, 'Communication No 67/1980, *E H P v Canada*' (27 October 1982) in United Nations 'Selected Decisions of the Human Rights Committee under the Optional Protocol' vol 2 (United Nations New York 1990) 20.

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Special Rapporteur F Zohra Ksentini, 'Human Rights and the Environment (Progress Report)' (2 July 1992) UN Doc E/CN.4/Sub.2/1992/7.

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Special Rapporteur F Zohra Ksentini, 'Human Rights and the Environment (Second Progress Report)' (26 July 1993) UN Doc E/CN.4/Sub.2/1993/7.

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Special Rapporteur F Zohra Ksentini, 'Human Rights and the Environment (Final Report)' (6 July 1994) UN Doc E/CN.4/Sub.2/1994/9.

World Health Organization (ed), *The Right to Water* (World Health Organization Geneva 2003).

Yanomami Indians v Brazil Case 7615 IACommHR Report No 12/85 OEA/Ser L/V/II.66 doc.10 Rev 1 (1984–85) 24.

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Human Rights and the Environment: Where Next?

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Abstract

The relationship between human rights and environmental protection in international law is far from simple or straightforward. A new attempt to codify and develop international law on this subject was initiated by the UNHRC in 2011. What can it say that is new or that develops the existing corpus of human rights law? Three obvious possibilities are explored in this article. First, procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Secondly, a declaration or protocol could be an appropriate mechanism for articulating in some form the still controversial notion of a right to a decent environment. Thirdly, the difficult issue of extra-territorial application of existing human rights treaties to transboundary pollution and global climate change remains unresolved. The article concludes that the response of human rights law – if it is to have one – needs to be in global terms, treating the global environment and climate as the common concern of humanity.

1 Is the Environment a Human Rights Issue?

Why should environmental protection be treated as a human rights issue? There are several possible answers. Most obviously, and in contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general. It may serve to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life. Above all it helps to promote the rule of law in this context: governments become directly accountable for their failure to regulate and control environmental nuisances, including those caused by corporations, and for facilitating access to justice and enforcing environmental laws and judicial

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decisions. Lastly, the broadening of economic and social rights to embrace elements of the public interest in environmental protection has given new life to the idea that there is, or should be, in some form, a right to a decent environment.

Remarkably, the environmental dimensions are rarely discussed in general academic treatments of human rights law, where there is almost no debate on the relationship between human rights and the environment.[1] Thus the literature is mainly written by environmentalists or generalist international lawyers.[2] But the growing environmental caseload of human rights courts and treaty bodies nevertheless indicates the importance of the topic in mainstream human rights law. It is self-evident that insofar as we are concerned with the environmental dimensions of rights found in avowedly human rights treaties – the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (AmCHR), and the African Convention on Human and Peoples' Rights (AfCHPR) – then we are necessarily talking about a 'greening' of existing human rights law rather than the addition of new rights to existing treaties. The main focus of the case law has thus been the rights to life, private life, health, water, and property. Some of the main human rights treaties also have specifically environmental provisions,[3] usually phrased in relatively narrow terms focused on human health,[4] but others, including the ECHR and the ICCPR, do not. The greening of human rights law is not only a European phenomenon, but extends across the IACHR, AfCHPR, and ICCPR. Judge Higgins has drawn attention to the way human rights courts 'work consciously to co-ordinate their approaches.'[5] There is certainly evidence of convergence in the environmental case law and a cross-fertilization of ideas between the different human rights systems.[6]

1 P. Alston, H. Steiner, and R. Goodman, *International Human Rights in Context* (3rd edn, 2008) and O. De Schutter, *International Human Rights Law* (2010) refer to some of the precedents and list 'environment' in their indexes but there is no significant discussion of the precedents from an environmental perspective. Compare Loucaides, 'Environmental Protection through the Jurisprudence of the ECHR', 75 *BYBIL* (2004) 249 and Desgagné, 'Integrating Environmental Values into the ECHR', 89 *AJIL* (1995) 263.

2 See in particular D. Anton and D. Shelton, *Environmental Protection and Human Rights* (2011); Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; D. Bodansky, J. Brunnée, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), at chs 28 and 29; Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental L Rev* (2007) 471; A.E. Boyle and M.R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996). Even environmental lawyers can be blind to the human rights perspectives: there is no reference to them in C. Streck *et al.*, *Climate Change and Forests, Emerging Policy and Market Opportunities* (2010).

3 The most important is Art. 24, 1981 AfCHPR, on which see *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria ('SERAC v. Nigeria* – the *Ogoniland Case')*, AfCHPR, Communication 155/96 (2002), at paras. 52–53.

4 E.g., ICESCR 1966, Art. 12; European Social Charter 1961, Art. 11; Additional Protocol to the AmCHR 1988, Art. 11; Convention on the Rights of the Child 1989, Art. 24(2)(c). See Churchill, 'Environmental Rights in Existing Human Rights Treaties', in Boyle and Anderson (eds), *supra* note 2, at 89.

5 Higgins, 'A Babel of Judicial Voices?', 55 *ICLQ* (2006) 791, at 798. See also *Diallo Case (Guinea v. Democratic Republic of Congo)* [2010] ICJ Rep, at paras 64–68.

6 See Judge Trindade in *Caesar v. Trinidad and Tobago* (2005) IACHR Sers. C, No. 123, at paras 6–12: '[t]he converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection' (at para. 7).

The rapid development of environmental jurisprudence in Europe has resulted in the consistent rejection of proposals for an environmental protocol to be added to the ECHR.[7] However, a *Manual on Human Rights and the Environment* adopted by the Council of Europe in 2005 reviews the Court's decisions and sets out some general principles.[8] In summary, cases such as *Guerra*, *Lopez Ostra, Öneryildiz, Taskin, Fadeyeva, Budayeva,* and *Tatar* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information.[9] Both the right to life and the right to respect for private life and property entail more than a simple prohibition on government interference: governments additionally have a positive duty to take appropriate action to secure these rights.[10] That is why some of the environmental cases concern the failure of government to regulate or enforce the law (*Lopez Ostra, Guerra*, *Fadeyeva*) while others focus especially on the procedure of decision-making (*Taskin*).[11] However, although protection of the environment is a legitimate objective that can justify governments limiting certain rights, including the right to possessions and property, human rights law does not protect the environment *per se*.[12]

Early in 2011 the UN Human Rights Council initiated a study of the relationship between human rights and the environment.[13] This led in March 2012 to the appointment of an independent expert who was asked to make recommendations on human rights obligations relating to the enjoyment of a 'safe, clean, healthy and sustainable environment'.[14] We will look at the work of the UNHRC in section 2. UNEP has also considered much the same question, and an expert working group produced a draft declaration and commentary in 2009–2010.[15] An earlier UNHRC project to adopt a declaration on human rights and the environment terminated in 1994 with a report and the text of a declaration that failed to secure the backing of states.[16] With

[7] On 16 June 2010 the Committee of Ministers again decided not to add a right to a healthy and viable environment to the ECHR.

[8] See Council of Europe: *Final Activity Report on Human Rights and the Environment*, DH-DEV (2005) 006 rev, 10 Nov. 2005, App. II ('Council of Europe Report').

[9] *Lopez Ostra v. Spain,* 20 EHRR (1994) 277; *Guerra v. Italy,* 26 EHRR (1998) 357; *Fadeyeva v. Russia,* 45 EHRR (2007) 10; *Öneryildiz v. Turkey,* 41 EHRR (2005) 20; *Taskin v. Turkey,* 42 EHRR (2006) 50, at paras 113–119; *Tatar v. Romania* [2009] ECtHR, at para. 88; *Budayeva v. Russia* [2008] ECtHR.

[10] See *ibid.,* at paras 129–133; *Öneryildiz v. Turkey*, *supra* note 9, at paras 89–90. See also UNHRC, General Comment No. 6 on Article 6 of the ICCPR, 16th Session, 1982; *Villagram Morales et al. v. Guatemala* (1999) IACHR Sers. C, No. 63, at para. 144.

[11] See *infra*, section 3.

[12] See *infra*, section 4.

[13] UN Human Rights Council (UN HRC) res. 16/11, 'Human Rights and the Environment', 24 Mar. 2011.

[14] UNHRC res. 19/12, 'Human Rights and the Environment', 20 Mar. 2012.

[15] UNEP, High Level Expert Meeting on the New Future of Human Rights and Environment, Nairobi 2009. This draft declaration was completed in 2010 but has not been published. The author was co-rapporteur together with Prof. Dinah Shelton.

[16] Draft Declaration of Principles on Human Rights and the Environment, ECOSOC, *Human Rights and the Environment*, Final Report (1994) UN Doc E/CN 4/Sub 2/1994/9. The text of the draft declaration is reproduced in Boyle and Anderson, *supra* note 2, at 67–69. See Popovic, 'In Pursuit of Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment', 27 *Columbia Human Rts L Rev* (1996) 487.

hindsight it can be seen that this early work was premature and overly ambitious, and it made no headway in the UN. However, the relationship between human rights and environmental protection in international law is far from simple or straightforward. The topic is challenging for the agenda of human rights institutions, and for UNEP, partly because it straddles two competing bureaucratic hegemonies, but it also poses some difficult questions about basic principles of human rights law. We will explore these in later sections of this article.

The merits of any proposal for a declaration or protocol on this subject thus depend on how far it deals with fundamental problems or merely window dresses what we already know. There is little to be said in favour of simply codifying the application of the rights to life, private life and property in an environmental context. Making explicit in a declaration or protocol the greening of existing human rights that has already taken place would add nothing and clarify little. As Lauterpacht noted in 1949, '[c]odification which constitutes a record of the past rather than a creative use of the existing materials – legal and others – for the purpose of regulating the life of the community is a brake upon progress'.[17] If useful codification necessarily contains significant elements of progressive development and law reform, the real question is how far it is politic or prudent to go.[18] The question therefore is not whether a declaration or protocol on human rights and the environment should deal with existing civil and political rights, but how much more it should add. What can it say that is new or that develops the existing corpus of human rights law? There are three obvious possibilities.

First, procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Doing so would build on existing law, would endorse the value of procedural rights in an environmental context, and would clarify their precise content at a global level. In section 3 we consider whether it could also go further by developing a public interest model of accountability, more appropriate to the environmental context, and drawing in this respect on the 1998 Aarhus Convention.

Secondly, a declaration or protocol could be an appropriate mechanism for articulating in some form the still controversial notion of a right to a decent environment. Such a right would recognize the link between a satisfactory environment and the achievement of other civil, political, economic, and social rights. It would make more explicit the relationship between the environment, human rights, and sustainable development and address the conservation and sustainable use of nature and natural resources. Most importantly, it would offer some means of balancing environmental objectives against economic development. In section 4 we consider including such a right within the corpus of economic, social, and cultural rights.

[17] UN, *Survey of International Law in Relation to the Work of the ILC*, GAOR A/CN.4/Rev. 1 (1949), at paras 3–14 (hereafter 'UN Survey').

[18] *Ibid.*, at para 13.

Thirdly, in section 5 we consider the difficult issue of the extra-territorial application of existing human rights treaties. This is relevant to transboundary pollution and global environmental problems, such as climate change, because if human rights law does not have extraterritorial scope in environmental cases then we cannot easily use it to help protect the global environment. Even if we cross this hurdle, however, the problems remain considerable.

2 Environmental Rights and the UN Human Rights Institutions

Unlike human rights courts, it has not been clear until now how far the UN human rights community takes environmental issues seriously. There is no doubt that the UN institutions realize that civil, political, economic, and social rights have environmental implications that could help to guarantee some of the indispensable attributes of a decent environment. A 2009 report for the Office of the High Commissioner on Human Rights (OHCHR) emphasizes the key point that '[w]hile the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing'.[19]

The 2011 OHCHR Report notes that '[h]uman rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes',[20] but it does not attempt to set out any new vision for the relationship between human rights and the environment. It summarizes developments in the UN treaty bodies and human rights courts, and records what the UNHCR has already done in this field. Three theoretical approaches to the relationship between human rights and the environment are identified.[21] The first sees the environment as a 'precondition to the enjoyment of human rights'. The second views human rights as 'tools to address environmental issues, both procedurally and substantively'. The third integrates human rights and the environment under the concept of sustainable development. It identifies also 'the call from some quarters for the recognition of a human right to a healthy environment' and notes the alternative view that such a right in effect already exists.[22] The report recognizes that many forms of environmental damage are transnational in character, and that the extraterritorial application of human rights law in this context remains unsettled. It concludes that

[19] UN HRC, *Report of the OHCHR on the Relationship Between Climate Change and Human Rights* (hereafter 'OHCHR 2009 Report'), UN Doc. A/HRC/10/61, 15 Jan. 2009, at para. 18.

[20] OHCHR, *Analytical Study on the Relationship Between Human Rights and the Environment* (hereafter 'OHCHR 2011 Report'), UN Doc. A/HRC/19/34, 16 Dec. 2011, at para. 2.

[21] *Ibid.*, at paras 6–9.

[22] *Ibid.*, at para. 12.

'further guidance is needed to inform options for further development of the law in this area'.[23]

UNHRC Resolution 2005/60 (2005) also recognized the link between human rights, environmental protection, and sustainable development. *Inter alia*, it '[e]ncourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy'. Implementation of Rio Principle 10 is the most significant element here because, like the Aarhus Convention, it acknowledges the importance of public participation in environmental decision-making, access to information, and access to justice.

> The Council has made the connection between human rights and climate change:[24]
>
> *Noting* that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.

It is worth noting here that climate change is already regarded in international law as a 'common concern of humanity',[25] and thus as an issue in respect of which all states have legitimate concerns. The Human Rights Council is therefore right to take an interest in the matter. Nevertheless, before concluding that human rights law may provide answers to the problem of climate change, two observations in the 2009 OHCHR report are worth highlighting. First, '[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense'.[26] The report goes on to note how the multiplicity of causes for environmental degradation and the difficulty of relating specific effects to historic emissions in particular countries make attributing responsibility to any one state problematic. Secondly, 'human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasizes the need to avoid unnecessary delay in taking action to contain the threat of global warming'.[27] On the view set out here, a human rights perspective on climate change essentially serves to reinforce political pressure coming

[23] *Ibid.*, at paras 64–73.

[24] UNHRC res. 10/4 (2009) on Human Rights and Climate Change. See generally S. Humphreys (ed.), *Human Rights and Climate Change* (2009).

[25] See UN GA Res. 43/53 on Global Climate Change (1988); 1992 Convention on Climate Change, Preamble.

[26] OHCHR 2009 Report, *supra* note 19, at para. 70.

[27] *Ibid.*, at para. 91.

from the more vulnerable developing states. Its utility is rhetorical rather than juridical. We will return to this question later.

A final but important point is that the UNHRC has appointed special *rapporteurs* to report on various environmental issues.[28] A number of these independent reports have covered environmental conditions in specific countries,[29] but the most significant is the longstanding appointment of a special *rapporteur* on the illicit movement and dumping of toxic and dangerous products and wastes. The activity of the special *rapporteur* is confined to country visits and annual reports. The present incumbent does not paint an encouraging picture:

> The Special Rapporteur remains discouraged by the lack of attention paid to the mandate. During consultations with Member States, the Special Rapporteur is often confronted with arguments that issues of toxic waste management are more appropriately discussed in environmental forums than at the Human Rights Council. … He calls on the Human Rights Council to take this issue more seriously. He is discouraged by the limited number of States willing to engage in constructive dialogue with him on the mandate during the interactive sessions at the Human Rights Council.[30]

This report is revealing for what it says about the lack of priority given to the subject and sense that it is not really perceived as a human rights issue at all.

One possible explanation for the reluctance of UN human rights institutions to engage more directly with human rights and the environment is their long-standing project on corporate responsibility for human rights abuses. While the primary responsibility for promoting and protecting human rights lies with the state,[31] it has long been recognized that businesses and transnational corporations have contributed to or been complicit in the violation of human rights in various ways. Developing countries, especially, may lack the capacity to control foreign companies extracting minerals, oil, or other natural resources in a manner that harms both the local population and the environment. Weak government, poor regulation, lax enforcement, corruption, or simply a too-close relationship between business and government underlies the problem. Classic examples are Shell's impact on the environment, natural resources, health, and living standards of the Ogoni people in Nigeria,[32] or the health effects of toxic waste disposed of in Abidjan by a ship under charter to Trafigura, an oil trading company based in the EU.[33]

[28] For a full summary see OHCHR 2011 Report, *supra* note 20, at paras 41–55.

[29] See, e.g., UN HRC, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation in Costa Rica*, UN Doc. A/HRC/12/24/Add. 1, 23 June 2009; UN HRC, *Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/10/18, 24 Feb. 2009.

[30] UN HRC, *Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, UN Doc. A/HRC/9/22, 13 Aug. 2008, at para. 34.

[31] See, e.g., UN HRC Res. 17/4, 'Human rights and transnational corporations and other business enterprises', 6 July 2011.

[32] *SERAC v. Nigeria*, *supra note 3*.

[33] UNEP, *Report of 1st meeting of the Expanded Bureau of the 8th meeting of the Conference of the Parties to the Basel Convention* (2007) UNEP/SBC/BUREAU/8/1/7, sect. III.

In 2005, at the request of the UN Commission on Human Rights, the UN Secretary-General appointed Professor John Ruggie of Harvard University as his special representative on the issue of human rights and transnational corporations and other business enterprises. The 'Protect, Respect and Remedy Framework' adopted by the UN Human Rights Council[34] does not require us to presuppose that international human rights obligations apply to corporations directly. It focuses instead on the adverse impact of corporate activity on human rights and corporate complicity in breaches of human rights law by government.[35] There are three pillars: first the state's continuing duty to protect human rights against abuses by business;[36] secondly, the responsibility of corporations to respect human rights through the use of due diligence;[37] thirdly, individual access to remedy: governments must ensure that where human rights are harmed by business activities there is adequate accountability and effective redress, whether judicial or non-judicial.[38]

What should we make of this 'framework' for business and human rights when considering the current law on human rights and the environment? There is no doubt that states have a responsibility to protect human rights from environmental harm caused by business and industry. It is irrelevant that the state itself does not own or operate the plant or industry in question. As the ECtHR said in *Fadeyeva*, the state's responsibility in environmental cases 'may arise from a failure to regulate private industry'.[39] The state thus has a duty 'to take reasonable and appropriate measures' to secure rights under human rights conventions.[40] In *Öneryildiz* the ECtHR emphasized that '[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[41] The Court held that this obligation covered the licensing, setting up, operation, security, and supervision of dangerous activities, and required all those concerned to take 'practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'.[42]

Nor is this view of human rights law uniquely European. The *Ogoniland Case* is a reminder that unregulated foreign investment which contributes little to the welfare

[34] UNHRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/8/5, 7 Apr. 2008. *Guiding Principles on Business and Human Rights*, UN Doc. A/HRC/17/31, 21 Mar. 2011, are intended to provide guidance on implementation of the framework.

[35] UNHRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Annex: 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), at paras 73–74, 77.

[36] *Ibid.*, at paras 27–50.

[37] *Ibid.*, at paras 50–72.

[38] *Ibid.*, at paras 81–102.

[39] 45 EHRR (2007) 10, at para. 89.

[40] *Ibid.*

[41] 41 EHRR (2005) 20, at para. 89.

[42] *Ibid.*, at para. 90.

of the local population but instead harms its health, livelihood, property, and natural resources may amount to a denial of human rights for which the host government is responsible in international law.[43] As Shelton has observed, 'The result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights'.[44] It also shows how empowering national NGOs can provide the key to successful legal action.[45]

These examples do not in any sense invalidate the UN Framework's focus on the need for business to respect human rights, but they do serve to emphasize again that failure by states to respect their human rights obligations is the core of the problem, not the periphery. Even if we endorse the UN Framework on Business and Human Rights, it is still necessary to identify the relationship between human rights obligations and environmental protection in order to determine what environmental responsibilities we expect corporations to respect.

Overall, therefore, the record of the UNHRC and OHCHR on human rights and environment has been somewhat understated until now: human rights courts have contributed a great deal more to the subject than interstate environmental negotiations or the specialists of the UN human rights community. It is not immediately clear why this should be so, but of course it also begs the question what more the UN could contribute to the development of human rights approaches to environmental protection. To answer that question requires us to stand back and review the three difficult questions identified in section 1. These questions will form the subject of the rest of this article.

3 The Development of Procedural Rights in an Environmental Context

Not all 'environmental' rights are found in mainstream human rights treaties. Any consideration of human rights in an environmental context has to take into account the development of specifically environmental rights in other treaties, and it may be necessary to interpret and apply human rights treaties with that in mind.[46] The most obvious example is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted by the UN Economic Commission for Europe.[47] As Kofi Annan, formerly Secretary-General of the UN, observed, 'Although regional in scope, the significance

[43] *SERAC v. Nigeria*, *supra* note 3.

[44] Shelton, 'Decision Regarding case 155/96', 96 *AJIL* (2002) 937, at 942.

[45] *SERAC v. Nigeria*, *supra* note 3, at para. 49.

[46] 1969 Vienna Convention on the Law of Treaties (VCLT), Art. 31(3)(c); *Demir v. Turkey* [2008] ECtHR 1345. As 'living instruments' human rights treaties must be interpreted by reference to current conditions: see *Soering v. UK*, 11 EHRR (1989) 439, at para. 102; *Öcalan v. Turkey*, 37 EHRR (2003) 10; *Advisory Opinion on the Right to Information on Consular Assistance* (1999) IACHR Series A, No.16, at paras 114–115; *Advisory Opinion on the Interpretation of the American Declaration on the Rights and Duties of Man* (1989) IACHR Series A, No. 10, at para. 43; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) IACHR Ser. C, No. 20, at paras 146–148.

[47] See UNECE, *The Aarhus Convention – An Implementation Guide* (2000).

of the Aarhus Convention is global. . . [I]t is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations.'[48] In his view the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights'.[49] Its preamble not only recalls Principle 1 of the 1972 Stockholm Declaration on the Human Environment and recognizes that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself', but it also asserts that 'every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

However, these broad assertions of rights are somewhat misleading. The focus of the Aarhus Convention is in reality strictly procedural in content, limited to public participation in environmental decision-making and access to justice and information. It draws inspiration from Principle 10 of the 1992 Rio Declaration on Environment and Development, which gives explicit support in mandatory language to the same category of procedural rights.[50] Public participation is a central element in sustainable development, and the incorporation of Aarhus-style procedural rights into general human rights law significantly advances this objective.[51] In this context the emphasis on procedural rights in Articles 6–8 of Aarhus can be seen as a means of legitimizing decisions about sustainable development, rather than simply an exercise in extending participatory democracy or improving environmental governance.[52]

Aarhus is also significant insofar as Article 9 reinforces access to justice and the obligation of public authorities to enforce existing law. Under Article 9(3) applicants entitled to participate in decision-making will also have the right to seek administrative or judicial review of the legality of the resulting decision. A general failure to enforce environmental law will also violate Article 9(3).[53] Article 9(4) requires that adequate, fair, and effective remedies are provided. This reflects the decisions in *Lopez Ostra* and *Guerra* under Article 8 of the ECHR.[54]

Anyone who doubts that Aarhus is a human rights treaty should bear in mind three points. First, it builds upon the long-established human right of access to justice and

[48] *Ibid.*, 'Foreword', at p.v.

[49] *Ibid.*

[50] Principle 10 provides: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

[51] See 1992 UN Conference on Environment and Development, Agenda 21, ch. 23, especially at para. 23.2.

[52] OHCHR 2011 Report, *supra* note 20, at paras 2, 7–9.

[53] *Gatina, Gatin, Konyushkova – Findings and Recommendation with Regard to Compliance by Kazakhstan*, Compliance Committee, UNECE/MP.PP/C.1/2006/4/Add. 1 (2006), at paras 30–31.

[54] *Lopez Ostra v. Spain*, 20 EHRR (1994) 277; *Guerra v. Italy*, 26 EHRR (1998) 357.

on procedural elements that serve to protect the rights to life, health, and family life.[55] Secondly, it confers rights directly on individuals and not simply on states. Unusually for an environmental treaty the most innovative features of the 'non-confrontational, non-judicial and consultative' procedure established under Article 15 of the Convention are that members of the public and NGOs may bring complaints before a non-compliance committee the members of which are not only independent of the parties but may be nominated by NGOs.[56] The committee has given rulings which interpret and clarify provisions of the convention and a body of case law is emerging.[57] In all these respects it is closer to human rights treaty monitoring bodies than to the non-compliance procedures typically found in other multilateral environmental agreements.[58] Kravchenko concludes that 'independence, transparency, and NGO involvement in the Convention's novel compliance mechanism represent an ambitious effort to bring democracy and participation to the very heart of compliance itself.[59] Thirdly, the essential elements of the convention – access to information, public participation in environmental decision-making, and access to justice – have all been incorporated into European human rights law through the jurisprudence of the ECtHR.[60] In substance, the Aarhus Convention rights are also ECHR rights, enforceable in national law and through the Strasbourg Court like any other human rights. To some extent the same has happened under other human rights treaties, so the point is not simply a European one. For example, the right to 'meaningful consultation'

[55] See D. Zillman, A. Lucas, and G. Pring (eds), *Human Rights in Natural Resource Development* (2002), especially chs 1 and 4; Ebbesson, 'Public Participation', in Bodansky, Brunnée, and Hey, *supra* note 2, at Ch. 29; F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at chs 1 and 5; Lee and Abbott, 'Usual Suspects? Public Participation Under the Aarhus Convention', 66 *MLR* (2003) 80; Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yrbk Int'l Environmental L* (1997) 51.

[56] Aarhus Convention, Decision 1/7: Review of Compliance, *Report of 1st Mtg of Parties*, UN Doc ECE/MP.PP/2/Add. 8 (2004). See also Report of the Compliance Committee, UN Doc. ECE/MP.PP/2005/13 (2005) and generally Kravchenko, 'The Aarhus Convention and Innovations in Compliance with MEAs', 18 *Colorado J Int'l Environmental L & Policy* (2007) 1; Koester, 'The Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters', in G. Ulfstein, T. Marauhn, and A. Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007), at 179; Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1982 Convention on the Protection and Use of Transboundary Watercourses and International Lakes', in T. Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), at ch.14. The compliance procedure adopted in 2007 under the 1999 UNECE Protocol on Water and Health is modelled directly on the Aarhus procedure.

[57] See, e.g., *Bond Beter Leefmilieu Vlaanderen VZW*, Compliance Committee, UNECE/MP PP/C 1/2006/4/Add 2 (2006), at paras 33–36; *Bystre Deep-water Navigation Canal – Findings and Recommendation with Regard to Compliance by Ukraine*, Compliance Committee, UNECE/MP PP/C 1/2005/2/Add 3 (2005), at paras 26–28; *Gatina, Gatin, Konyushkova: Findings and Recommendation with Regard to Compliance by Kazakhstan*, Compliance Committee, UNECE/MP PP/C 1/2006/4/Add 1 (2006), at paras 30–31.

[58] Contrast the Montreal Protocol NCP and the Kyoto Protocol NCP and see UNEP, *Compliance Mechanisms Under Selected MEAs* (UNEP, 2007). On human rights treaty bodies see P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000), and on MEA non-compliance procedures see Treves *et al.* (eds), *supra* note 56.

[59] Kravchenko, *supra* note 56, at 49.

[60] *Taskin v. Turkey*, 42 EHRR (2006) 50; *Tatar v. Romania* [2009] ECtHR; *Öneryildiz v. Turkey*, 41 EHRR (2005) 20; *Lopez Ostra v. Spain*, 20 EHRR (1994) 277; *Guerra v. Italy*, 26 EHRR (1998) 357.

is upheld by the Inter-American Commission in the *Maya Indigenous Community of Toledo Case*,[61] and by the African Commission in the *Ogoniland Case*.[62]

The Aarhus Convention thus represents an important extension of environmental rights and of the corpus of human rights law. How important can best be explained by recalling the most important case, *Taskin v. Turkey*.[63] Turkey, it should be noted, is not a party to the Aarhus Convention. That did not stop the Strasbourg Court from reading Aarhus rights into the ECHR in a particularly extensive form. Two points stand out. First, participation in the decision-making process by those likely to be affected by environmental nuisances will be essential for compliance with Article 8 of the ECHR and Article 6 of the Aarhus Convention. The Court in *Taskin v. Turkey* held that 'whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8'.[64] The interests of those affected must on this view be taken into account and given appropriate weight when balancing them against the benefits of economic development.[65] Secondly, *Taskin* also envisages an informed process. The Court held that '[w]here a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake'.[66] The words 'environmental impact assessment' are not used here, but in many cases an EIA will be necessary to give effect to the evaluation process envisaged by the Court. Article 6 of Aarhus also has detailed provisions on the information to be made available.[67] As a comparison with Annex II to the 1991 Espoo Convention on EIA in a Transboundary Context shows, the matters listed in Article 6 of Aarhus are normally included in an EIA.[68]

[61] *Maya Indigenous Community of the Toledo District v. Belize* [2004] IACHR Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, at 727, paras 154–155. The Commission relies *inter alia* on the right to life and the right to private life, in addition to finding consultation a 'fundamental component of the State's obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied'. See also ILO Convention No. 169 Concerning Indigenous and Tribal Peoples and the UNHRC decision in *Ilmari Lansman et al. v. Finland* (1996) ICCPR Communication No. 511/1992, at para. 9.5, which stresses the need 'to ensure the effective participation of members of minority communities in decisions which affect them'.

[62] *SERAC v. Nigeria*, *supra* note 3, at para. 53: 'providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.

[63] 42 EHRR (2006) 50.

[64] *Taskin*, *supra* note 60, at para. 118. See also *Tatar v. Romania* [2009] ECtHR, at para. 88.

[65] See in particular *Hatton v. UK* [2003] ECtHR (Grand Chamber).

[66] *Taskin*, *supra* note 60, at para. 119.

[67] Aarhus Convention, Art. 6(6) requires, *inter alia*, a description of the site, the effects of the activity, preventive measures, and an outline of alternatives.

[68] Annex II to the Espoo Convention additionally includes an indication of predictive methods, underlying assumptions, relevant data, gaps in knowledge and uncertainties, as well as an outline of monitoring plans.

Like the *Ogoniland* and *Maya Indigenous Community* cases, *Taskin* thus suggests that the most important contribution existing human rights law has to offer with regard to environmental protection and sustainable development is the empowerment of individuals and groups affected by environmental problems, and for whom the opportunity to participate in decisions is the most useful and direct means of influencing the balance of environmental, social, and economic interests.[69] From this perspective the ICCPR and IACHR case law, which espouses participatory rights for indigenous peoples. appears simply as a particular manifestation of the broader principle. The key point is that these participatory rights represent the direction in which human rights law with regard to the environment has evolved since 1994.[70]

The Aarhus Convention is also important because, unlike human rights treaties, it provides for public interest activism by NGOs,[71] insofar as claimants with a 'sufficient interest' are empowered to engage in public interest litigation even when their own rights or the rights of victims of a violation are not in issue. Article 9 of Aarhus thus appears to go beyond the requirements of the ECHR. So does Article 6, which extends public participation rights to anyone having an 'interest' in the decision, including NGOs.[72] 'Sufficient interest' is not defined by the Convention but, in its first ruling, the Aarhus Compliance Committee held that, '[a]lthough what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention'.[73] Governments are not required to develop an *actio popularis*, but they must not use national law 'as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment'.[74] Access to such procedures 'should thus be the presumption, not the exception'.[75]

The contrast between the broader public interest approach of the Aarhus Convention and the narrower ECHR/ICCPR/AmCHR focus on the rights of victims of

[69] A point recognized by the OHCHR: see UN, *Claiming the Millennium Development Goals: A Human Rights Approach* (NY and Geneva, 2008), at VIII, Goal 7: 'a human rights approach to sustainable development emphasizes improving and implementing accountability systems, [and] access to information on environmental issues'.

[70] The present author gives a fuller account of the Convention in P. Birnie, A.E. Boyle, and C. Redgwell, *International Law and the Environment* (3rd edn, 2009), at 288–298.

[71] Arts 4(1)(a), 6, and 9. See Pedersen, 'European Environmental Human Rights', 21 *Georgetown Int'l Environmental L Rev* (2008) 73.

[72] Art. 6 participation rights are available to 'the public concerned', defined by Art. 2(5) as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.

[73] See UNECE, Compliance Committee, *Bond Beter Leefmilieu Vlaanderen VZW – Findings and Recommendation with Regard to Compliance by Belgium* (Comm. ACCC/C/2005/11) ECE/MP.PP/C.1/2006/4/Add. 2 (28 July 2006), at paras 33–36.

[74] *Ibid.*

[75] *Ibid*, at para 36. See also Art. 9(3).

a violation is evident in the case law.[76] This is a significant difference, with important implications for any debate about an autonomous right to a decent or satisfactory environment. Not only do environmental NGOs use access to information and lobbying to raise awareness of environmental concerns, but research has shown that they tend to have high success rates in enforcement actions and public interest litigation.[77] Moreover, the broader approach taken by Aarhus is followed in later European agreements. Thus, Article 8(1) of the 2003 UNECE Protocol on Strategic Environmental Assessment provides that '[e]ach party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes'. The public for this purpose includes relevant NGOs.[78]

The question therefore arises: should the ECtHR case law follow the public interest precedent set by Aarhus, as it has in so many other respects?[79] What purpose would public interest environmental litigation serve in a human rights context? NGOs are already entitled to protect the human rights of victims of violations, and there is no need to extend their standing for that purpose. Extending their standing in environmental matters makes sense only if the public interest in the environment itself is to be protected – that is the point of Aarhus. Answering the question in the negative would merely affirm the existing position that human rights law does not have anything to say about protection of the environment as such. Answering it in the affirmative would go some way towards opening the door for a right to a decent environment. That brings us to the question of greatest substance: do we want such a right? Do we want to expand rather than simply interpret the existing corpus of international human rights law? This is not simply a matter of European concern. Rather, it potentially affects all of the principal human rights treaties, given the way human rights courts 'work consciously to co-ordinate their approaches'.[80]

4 A Right to a Decent Environment?

What constitutes a decent environment is a value judgement, on which reasonable people will differ. Policy choices abound in this context: what weight should be given to natural resource exploitation over nature protection, to industrial development over air and water quality, to land-use development over conservation of forests and wetlands, to energy consumption over the risks of climate change, and so on? These

[76] See *Kyrtatos v. Greece* [2003] ECtHR 242, at para. 52; *Metropolitan Nature Reserve v. Panama* [2003] IACHR, Case 11.533, Report No. 88/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2, at 524, para. 34; *Brun v. France* [2006] ICCPR Communication No. 1453/2006, at para. 6.3. See sect. 4 below where these cases are further considered.

[77] See de Sadeleer, Roller, and Dross, *Access to Justice in Environmental Matters*, Final Report, Doc. ENVA.3/ETU/2002/0030, Part I, at sect. 3.

[78] UNECE Protocol on Strategic Environmental Assessment Art. 2(8).

[79] See Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts', 20 *J Environmental L* (2008) 417.

[80] *Supra* notes 5 and 6.

choices may result in wide diversities of policy and interpretation, as different governments and international organizations pursue their own priorities and make their own value judgements, moderated only to some extent by international agreements on such matters as climate change and the conservation of biological diversity. The virtue of looking at environmental protection through the impact of harmful activities on other human rights, such as life, private life, or property, is that it focuses attention on what matters most to individuals: the detriment to important, internationally protected values from uncontrolled environmental harm. This approach avoids the need to define such notions as a satisfactory or decent environment. Instead, it allows a court to balance respect for convention rights and economic development. The Strasbourg Court makes the point very cogently: 'national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore in reaching its judgments, the Court affords the national authorities in principle a wide discretion'.[81]

When I first wrote on this subject in 1996 I shared the scepticism of others towards the idea of a right to a decent environment.[82] Fundamentally it looked like an attempt to turn an essentially political question into a legal one. It would take power away from democratically accountable politicians and give it to courts or treaty bodies. Predictably, Western governments ensured that the idea was stillborn within the UN system. My own scepticism has not disappeared, but it has perhaps been tempered by an awareness of the significant value of such a right in countries whose environmental problems are more extreme than those affecting Western Europe.[83] Moreover, in many respects the basic elements of such a right already exist. There may therefore be some merit in revisiting the question, particularly in the context of climate change, where some vision of a decent environment has global implications.

Despite their evolutionary character, human rights treaties (with the exception of the African Convention) still do not guarantee a right to a decent or satisfactory environment if that *concept* is understood in qualitative terms unrelated to impacts on the rights of specific humans. As the ECtHR reiterated in *Kyrtatos*, 'neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such'.[84] This case involved the illegal draining of a wetland. The European Court could find no violation of the applicants' right to private life or enjoyment of property arising out of the destruction of the area in question. Although they lived nearby, the applicants' rights were not affected. They were not entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved. The applicants succeeded only insofar as the state's non-enforcement of a court judgment violated their Convention rights.

The Inter-American Commission on Human Rights has similarly rejected as inadmissible a claim on behalf of all the citizens of Panama to protect a nature reserve

[81] 2005 Council of Europe Report, *supra* note 8, App. II, 10, at para. [13].
[82] Boyle and Anderson, *supra* note 2, at ch. 3.
[83] Notably the *Ogoniland Case*, *supra* note 3, and the *Maya Indigenous Community Case*, *supra* note 61.
[84] *Kyrtatos v. Greece, supra* note 56, at para. 52.

from development.[85] Nor does the practice of the UN Human Rights Committee differ. In a case about genetically modified crops it held that 'no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant'.[86] None of these cases lends support to any conception of a free-standing individual right to a decent environment.

Should we then go the whole way and create a right to a decent environment in international human rights law? There are obvious problems of definition and anthropocentricity, well rehearsed in the literature.[87] But there are also deeper issues of legal architecture to be resolved. At the substantive level a decent or satisfactory environment should not be confused with the procedural innovations of the Aarhus Convention, or with the case law on the right to life, health, or private life. To do so would make it little more than a portmanteau for the greening of existing civil and political rights. The ample jurisprudence shows clearly that this is unnecessary and misconceived.[88] To be meaningful, a right to a decent environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights, a catalogue which for good reasons there is great reluctance to expand.[89] A right to a decent environment is best envisaged, not as a civil and political right, but within the context of economic and social rights, where to some extent it already finds expression through the right to water, food, and environmental hygiene.

The UN Committee on Economic, Social and Cultural Rights has adopted various General Comments relevant to the environment and sustainable development, notably General Comments 14 and 15, which interpret Articles 11 and 12 of the ICESCR to include access to sufficient, safe, and affordable water for domestic uses and sanitation.[90] They also cover the prevention and reduction of exposure to harmful substances including radiation and chemicals, or other detrimental environmental conditions that directly or indirectly impact upon human health. These are useful and important interpretations that have also had some impact on related areas of international law, including Article 10 of the 1997 UN Watercourses Convention, which gives priority to 'vital human needs' when allocating scarce water resources.[91] On this

[85] *Metropolitan Nature Reserve v. Panama* [2003] IACHR Case 11.533, at para. 34.

[86] *Brun v. France*, *supra* note 76, at para. 6.3.

[87] See, e.g., Handl, 'Human Rights and the Protection of the Environment: A Mildly Revisionist View', in A.C. Trindade (ed.), *Human Rights, Sustainable Development and the Environment* (1992), at 117; id, 'Human Rights Protection and the Environment', in A. Eide, C. Krause, and A. Rosas (eds), *Economic, Social and Cultural Rights* (2001), at 303–328; Boyle and Anderson, *supra* note 2, at chs 2–4. Contrast Shelton, 'Human Rights, Environmental Rights and the Right to the Environment', 28 *Stanford J Int'l L* (1991) 103.

[88] *Supra*, section 1.

[89] Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) 607.

[90] UNCESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc.E/C.12/2000/4 (2000); General Comment No. 15: The Right to Water, UN Doc.E/C.12/2002/11 (2003). The ICJ has held that 'great weight' should be attributed to interpretations adopted by independent treaty supervisory bodies: see *Diallo Case (Guinea v. DRC)*, *supra* note 5, at paras 66–67.

[91] See *Report of the 6th Committee Working Group*, GAOR A/51/869 (1997).

view, existing economic and social rights help to guarantee some of the indispensable attributes of a decent environment. What more would the explicit recognition of a right to a decent environment add?

Arguably, it would add what is currently lacking from the corpus of UN economic and social rights, namely a broader and more explicit focus on environmental quality which could be balanced directly against the covenant's economic and developmental priorities. Article 1 of the ICESCR reiterates the right of peoples 'freely [to] pursue their economic, social and cultural development' and 'freely [to] dispose of their natural wealth and resources', but other than to 'the improvement of all aspects of environmental and industrial hygiene' (Article 12), the Covenant makes no specific reference to protection of the environment. Despite the efforts of the treaty organs to invest the Covenant with greater environmental relevance, it still falls short of giving a decent environment recognition as a significant public interest. Lacking the status of a right means that the environment can be trumped by those values which have that status, including economic development and natural resource exploitation.[92] This is an omission which needs to be addressed if the environment as a public good is to receive the weight it deserves in the balance of economic, social, and cultural rights. That could be one way of using human rights law to address the impact of the greenhouse gas emitting activities which are causing climate change and adversely affecting the global environment.

The key question therefore is what values we think a covenant on economic and social rights should recognize in the modern world. Is the environment – or the global environment – a sufficiently important public good to merit economic and social rights status comparable to economic development? The answer endorsed repeatedly by the UN over the past 40 years is obviously yes: at Stockholm in 1972, at Rio in 1992, and at Johannesburg in 2002, the consensus of states has favoured sustainable development as the leading concept of international environmental policy. Although 'sustainable development' is used throughout the Rio Declaration, it was not until the 2002 World Summit on Sustainable Development that anything approaching a definition of the concept could be attempted by the UN. Three 'interdependent and mutually reinforcing pillars of sustainable development' were identified in the Johannesburg Declaration – economic development, social development, and environmental protection.[93] This seems tailor-made for a reformulation of the rights guaranteed in the ICESCR.

The challenge posed by sustainable development is to ensure that environmental protection is fully integrated into economic policy. Acknowledging that the environment is part of this equation, the 1992 Rio Declaration (Principle 3) and the 1993 Vienna Declaration on Human Rights (paragraph11) both emphasize that '[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations'. The ICJ has repeatedly referred

[92] Merrills, 'Environmental Rights', in Bodansky, Brunnée, and Hey, *supra* note 2, at 666.

[93] UN, *Report of the WSSD*, UN Doc. A/CONF.199/20 (2002), Res. 1, at para. 5.

to 'the need to reconcile economic development with protection of the environment [which] is aptly expressed in the concept of sustainable development'.[94] In the *Pulp Mills Case* the Court again noted the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection *that is the essence of sustainable development*'.[95] The essential point of these examples is that, while recognizing that the right to pursue economic development is an attribute of a state's sovereignty over its own natural resources and territory, it cannot lawfully be exercised without regard for the detrimental impact on the environment or on human rights. In *Pulp Mills* the Court's very limited focus was on whether Uruguay had complied with its international obligations when deciding to build the plant, and its references to integrating economic development and environmental protection have to be seen in that context. It did not attempt to decide whether a policy of building pulp mills was sustainable development in any other sense. In effect, the process of decision-making and compliance with environmental and human rights obligations, rather than the nature of the development itself, constitute the key legal tests of sustainable development in current international law.[96]

If the ICJ can handle questions of this kind then it might be said that it should not be beyond the capability of human rights courts also to do so. In a sense they already have: *Hatton*,[97] the case concerning night flights at Heathrow airport, is self-evidently a case about sustainable development as understood by the ICJ, albeit one in which the terms of the discussion are limited to balancing the direct impact on the health and family life of the applicants against the benefits to the community at large. Various decisions of the Inter-American Commission of Human Rights[98] and the UN Human Rights Committee[99] in cases concerning logging, oil extraction, and mining on land belonging to indigenous peoples can be viewed from the same perspective. The African Commission's decision in *Ogoniland* is by far the most important case to address the public interest in protecting the environment as such,[100] but it does so in

[94] *Gabcikovo Nagymaros Dam Case* [1997] ICJ Rep 7, at para. 140. See also *Iron Rhine Case* [2005] PCA and Higgins, 'Natural Resources in the Case Law of the International Court', in A.E. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (1999), at ch. 5.

[95] *Pulp Mills on the River Uruguay Case*, [2010] ICJ Rep, at para. 177.

[96] See Birnie, Boyle, and Redgwell, *supra* note 70, at 125–127.

[97] *Hatton v. UK* [2003] ECtHR (Grand Chamber). See also *Fägerskjöld v. Sweden* [2008] ECtHR (admissibility).

[98] See *Maya Indigenous Community v. Belize, supra* note 61, at para. 150.

[99] In *Ilmari Lansman et al. v. Finland, supra* note 61, at para. 9.4, the Committee concluded that Finland had taken adequate measures to minimize the impact on reindeer herding (at para. 9.7). Compare *Lubicon Lake Band v. Canada* (1990) ICCPR Comm. No. 167/1984, at para. 32.2, where the UNHRC found that the impact of oil and gas extraction on the applicants' traditional subsistence economy constituted a violation of Art. 27.

[100] *SERAC v. Nigeria, supra* note 3, and Shelton, *supra* note 44; Ebeku, 'The Right to a Satisfactory Environment and the African Commission', 3 *African Human Rts LJ* (2003) 149, at 163; Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter', 1 *African J Legal Studies* (2005) 129, at 139; Coomans, 'The Ogoni Case Before the ACHPR', 52 *ICLQ* (2003) 749.

a setting where environmental destruction had caused serious harm to the affected communities.

The decision in *Ogoniland* can be seen as a challenge to the sustainability of oil extraction in that part of Nigeria. Given the degree of environmental harm and a lack of material benefits for the Ogoni people, it is not surprising that the African Commission does not see this case simply as a failure to maintain a fair balance between public good and private rights. The decision gives some indication of how a right to a decent or satisfactory environment could be used, but its exceptional basis in Articles 21 and 24 of the African Convention has to be recalled. It is unique in adjudicating for the first time on the right of peoples to dispose freely of their own natural resources and in ordering extensive environmental clean-up measures to be taken.[101] Moreover, the rights created by the African Convention are peoples' rights, not individual rights, so the recognition of a public interest in environmental protection and sustainable development is less of an innovation. The African Convention is the only regional human rights treaty to combine economic, social, civil, and political rights and make them all justiciable before an international court.

Clearly there can be different views on what constitutes a fair balance between economic interests and individual or group rights in such cases, and any judgment is inevitably subjective. Moreover, neither environmental protection nor human rights necessarily trumps the right to economic development. In *Hatton*, the Grand Chamber's approach affords considerably greater deference towards government economic policy than at first instance, and leaves little room for the Court to substitute its own view of the extent to which the environment should be protected from development:[102] '[a]t the same time, the Court re-iterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.'[103] On this basis, decisions about where the public interest lies are mainly for politicians, not for courts, save in the most extreme cases where judicial review is easy to justify. That conclusion is not inconsistent with the *Ogoniland Case*, where the problems were undoubtedly of a more extreme kind. But *Ogoniland* shows that the right to a decent environment can be useful at the extremes,[104] which is why the debate becomes relevant to climate change.

Any comparison between *Hatton* and the *Ogoniland Case* will inevitably point to the more conservative approach of European law. But would we want other human rights courts deciding where the appropriate balance between economic and environmental objectives should lie? Should we let judges determine whether to allow the construction of coal-fired power stations instead of extending schemes for generating

[101] Although Art. 1(2) of the 1966 ICCPR also recognizes the right of peoples 'freely [to] dispose of their natural wealth and resources', it is not justiciable by the HRC under the procedure for individual complaints laid down in the Optional Protocol: see *Lubicon Lake Band v. Canada, supra* note 99, at para. 32.1.

[102] [2003] ECtHR (Grand Chamber), at paras 97–104.

[103] *Ibid.*, at para. 97.

[104] *Supra* note 100.

renewable energy? *Hatton* may suggest that, except at the extremes, human rights courts are not usually the best bodies to perform this balancing task, rather than national or international political institutions. Even if European human rights law did endorse the right to a decent environment, in whatever form, it seems unlikely that the outcome of *Hatton* would differ. On any view the balance would in principle be for governments to determine, and on the facts of that case any court or tribunal would probably have upheld the government's approach. This does not provide a good basis for tackling government policy on climate change from a human rights perspective.

As I have argued elsewhere,[105] the distinction between *Hatton* and *Taskin* is important in this context. *Hatton* shows understandable reluctance to allow the European Court of Human Rights to become a forum for appeals against the policy judgements of governments, provided they do not disproportionately affect individual rights. *Taskin* shows greater willingness to insist that decisions made by public authorities follow proper procedures involving adequate information, public participation, and access to judicial review. This remains a tenable and democratically defensible distinction. One would expect most judges of the European Court of Human Rights to be comfortable with it.

However, if we do take the view that judges are not the right people to decide what constitutes a decent or satisfactory environment, is there then no role for international human rights law in this debate? The obvious alternative would be to follow the logic of the ICESCR and revert to the UN human rights institutions and treaty bodies and allow them, rather than courts, to oversee the expansion of the corpus of economic and social rights to include a right to a decent environment. That would give the UN Committee on Economic, Social and Cultural Rights a mandate to review the scope of the Covenant in relation to the environment.[106] It would allow the balance between environmental protection and economic development to be argued in an inter-governmental forum, through a 'constructive dialogue' with states parties. Although the current UN monitoring process has 'built-in defects', including poor reporting and excessive deference to states,[107] two additional mechanisms now exist through which compliance can be scrutinized. First, as we noted earlier, the High Commissioner for Human Rights has power to appoint special *rapporteurs* to report on environmental conditions in individual countries or on specific topics.[108] Secondly, in 2009 an optional protocol for individual complaints under the Covenant was opened for signature.[109] Sceptics often question the value of all these monitoring processes, but if they do have value then the environment should be a larger part of the process.

[105] Birnie, Boyle and Redgwell, *supra* note 70, at 296.

[106] The Committee is composed of independent experts and was established by ECOSOC Res. 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to it in Part IV of the Covenant. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (1998), at ch. 2.

[107] Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform', in Alston and Crawford, *supra* note 58, at 129.

[108] *Supra* notes 29–30.

[109] UNGA Res. A/RES/63/117, 10 Dec. 2008.

Potentially, therefore, the ICESCR model could provide a mechanism for balancing environmental claims against competing economic objectives if the Covenant were to be amended in appropriate terms. While this would not expand the role of courts, it would expand the corpus of human rights law in a manner that fits comfortably into the existing system. It would modernize the Covenant, while also giving it greater coherence and consistency with contemporary international environmental law and policy. In that form it could give human rights law and the UN Committee on Economic and Social Rights something to contribute to the global challenge of climate change, and might help to counteract the evident inaction of states revealed by the Copenhagen and Cancun negotiations. It is this conclusion which most forcefully undermines the argument that a right to a decent environment is redundant and that general international environmental law is better placed to regulate global environmental problems.[110] What may have been persuasive in 1996 now looks increasingly threadbare, given the unimpressive record of too many states parties to the UN Convention on Climate Change.[111] Unrestrained carbon emissions are not a recipe for a decent environment of any kind.[112]

Incorporating a right to a decent environment in the ICESCR will not save the global climate by itself, but it may add to political pressure on governments to move further and faster towards goals already enshrined in the UN Framework Convention on Climate Change (UNFCCC) and in the commitments undertaken at Cancun in 2011. In common with the UNFCCC, this kind of human rights approach to climate change would recognize that the only viable perspective is a global one, focused not on the rights of individuals, or peoples, or states, but of humanity as whole. It would reconceptualize in the language of economic and social rights the idea of the environment as a common good or common concern of humanity. That would indeed mark '*[l]e passage d'un droit international de bon voisinage plutôt bilateral, territorial et fondé sur la reciprocité des droits et obligations, à un droit international plutôt multilateral, global, dans le cadre duquel les obligations sont souscrites au nom d'un intérêt commun*'.[113]

5 Human Rights, Transboundary Pollution and Climate Change

Does existing human rights law have any role in tackling transboundary pollution or global climate change? The simple, sceptical, answer is no, but only if we choose to locate the *lex specialis* in the customary international law on prevention and control

[110] Contrast the arguments I advanced in Boyle and Anderson, *supra* note 2, at ch. 3.

[111] See Boyle, 'The Challenge of Climate Change: International Law Perspectives', in S. Kingston (ed.), *European Perspectives on Environmental Law and Governance* (2012).

[112] See IPCC, *Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Summary* (Geneva, 2011). The full report will be published in 2012.

[113] Y. Kerbrat, S. Maljean-Dubois, and R. Mehdi (eds), *Le Droit International Face aux Enjeux Environnementaux* (2010), at 17 (footnotes omitted).

of transboundary harm,[114] or in global regulatory agreements such as the UNFCCC, with its associated protocols, non-binding accords, and decisions of the parties.[115] On this view the problem is properly addressed by international law at an interstate level, not at the level of human rights law. However, a more nuanced approach to such arguments is evident in the case law, and it is far from clear that the *lex specialis* principle operates in this way.[116] A mutually exclusive relationship between human rights law and general international law on transboundary and global environmental protection is consistent neither with the evolution of international environmental law as a whole nor with contemporary developments in international human rights law.

First, it harks back to the classical era when humans, whether at home or abroad, were still viewed as objects of international law, not as subjects meriting their own rights. It is unnecessary here to recall this debate, save only to remember that even today only governments can bring claims against another state for violations of general international law.[117] If human rights law has no application to environmentally harmful activities in one state that directly impact on humans in other states, then whatever right they may have to be protected from transboundary harm will be exercisable only by the state acting on their behalf. But, regardless of legal theory, real-world problems of pollution and the unsustainable use of renewable resources that are the core of most environmental problems do not suddenly stop at national borders, nor do they have any less impact on those who live beyond the border. Some of these problems may indeed be only transboundary in scale, like localized air pollution, affecting only two or three states or a particular region. But the climate system, forests and terrestrial ecosystems, and the marine environment are inevitably shared elements of a global ecological system – a fact recognized by the development of global environmental agreements and the evolution of concepts such as the sustainable use of natural resources, inter-generational equity, and common concern of humankind.[118] In the terminology of the law of state responsibility, much of the law relating to these global environmental problems – like climate change – falls squarely

[114] 1992 Rio Declaration on Environment and Development, Principle 2; 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Report of the ILC 53rd Session*, GAOR, A/56/10 (2001); 1982 UN Convention on the Law of the Sea, Arts 192–222; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, at para. 29; *Pulp Mills, supra* note 95, at paras 101, 187–197; *Advisory Opinion on Responsibilities and Obligations of States with Respect to Activities in the Area* [2011] ITLOS, at paras 111–131.

[115] In particular the 1997 Kyoto Protocol, the 2001 Marrakesh Accords, the 2010 Copenhagen Accords, the 2011 Cancun Agreements, and decisions adopted by the conference of the parties at Durban in 2011, on all of which see UNFCCC website, available at: http://unfccc.int.

[116] See *Nuclear Weapons Advisory Opinion*, *supra* note 114, at paras 25–34; I. Sinclair, *Vienna Convention on the Law of Treaties* (1982), 96; J. Pauwelyn, *Conflict of Norms in International Law* (2003), at 385–416; ILC, *Report of the Study Group on Fragmentation of International Law*, A/CN.4/L.682 (2006), at paras 56–122.

[117] See ILC Draft Articles on Diplomatic Protection, with Commentaries, 2006 II *Yrbk ILC*, Part Two, commentary to Art. 1. See also Gaja, 'The Position of Individuals in International Law: An ILC Perspective', 21 *EJIL* (2010) 11; Clapham, 'The Role of the Individual in International Law', 21 *EJIL* (2010) 25.

[118] See 1992 Rio Declaration on Environment and Development, and Birnie, Boyle and Redgwell, *supra* note 2, at ch. 3.

into the category of obligations owed to the international community as a whole.[119] So, of course, does international human rights law.[120]

Secondly, one significant trend of international environmental policy over the past 30 years, pursued initially in isolation from international human rights law but now in essence derived from it, has been the attempt to ensure non-discriminatory treatment, including access to justice and effective remedies, for those individuals or communities who are directly affected by transboundary pollution and environmental problems.[121] If nuisances do not stop at borders it makes little sense to treat the victims differently depending on where they happen to live. Making national remedies available to transboundary victims in these circumstances is consistent with the view that there are significant advantages in avoiding resort to interstate remedies for the resolution of transboundary environmental disputes wherever possible.[122] In this broader sense, transboundary claimants can be empowered to act as part of the enforcement structure of international environmental law by giving them access to the same information, decision-making processes, and legal procedures as nationals. The Aarhus Convention represents one element of this development, an element now firmly established within the pantheon of human rights law by the ECHR.[123] This development shows how victims of transboundary pollution already have rights in international law which they can exercise within the legal system of the polluting state; what remains uncertain is whether they also have human rights exercisable against the polluting state.

How far a state must respect the human rights of persons in other countries thus becomes an important question once we start to ask whether we can view climate change and transboundary pollution in human rights terms. That is the debate initiated by the UNHRC's characterization of climate change as a human rights issue.[124] It is also posed by the *Aerial Spraying Case*, initiated by Ecuador in 2007 following alleged cross-border spraying of herbicides by Colombian aircraft during anti-narcotic operations.[125] Ecuador argued, *inter alia*, that the resulting pollution violated the

[119] ILC, 2001 Articles on State Responsibility, Arts 42 and 48, and commentary in J. Crawford (ed.), *The ILC's Articles on State Responsibility* (2002), at 254–260, 276–280.

[120] *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)* [1970] ICJ Rep 3, at paras 33–34.

[121] Elaborated in OECD Council Recommendations C (74) 224 (1974); C(76) 55(1976); C (77) 28 (1977); C (78) 77 (1978); C (79) 116 (1979), reproduced in OECD, *OECD and the Environment* (1986). See generally OECD, *Legal Aspects of Transfrontier Pollution* (1977); Smets, 'Le principe de non-discrimination en matière de protection de l'environnement', *Revue Européenne de l'Environnement* (2000), 1; Birnie, Boyle, and Redgwell, *supra* note 2, at 304–311.

[122] A. Levin, *Protecting the Human Environment* (1977), at 31–38; Sand, 'The Settlement of Disputes in the Field of the International Law of the Environment', in OECD, *supra* note 121, at146; Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment', 144 *Recueil des Cours* (1975) 139, at 224. Handl, 'Environmental Security and Global Change: The Challenge to International Law', 1 *Yrbk Int'l Environmental L* (1990), 18ff.; Boyle, 'Globalising Environmental Liability: the Interplay of National and International Law', 17 *J Environmental L* (2005) 3.

[123] *Supra*, sect. 3.

[124] UNHRC res. 10/4 (2009, *supra* note 14, sect. 2.

[125] The case will be heard by the ICJ in 2013. The author is counsel for Ecuador, but the views expressed here are entirely his own.

human rights of indigenous people in Ecuador whose health, crops, and livestock had suffered.[126]

The extra-territorial application of human rights law is not itself novel, but it has normally arisen in the context of occupied territory or cross-border activities by state agents.[127] Although the ICCPR requires a state party only to secure the relevant rights and freedoms for everyone within its territory or subject to its jurisdiction,[128] in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ noted that:

> while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions.[129]

The ICESCR makes no reference to territory or jurisdiction, but it too was interpreted by the Court as applying extraterritorially to occupied territory.[130]

The IACHR has followed the ICJ's fairly broad interpretation of 'jurisdiction' in its reading of Article 1 of the American Convention,[131] and in cases concerning the American Declaration of Human Rights.[132] The case law on Article 1 of the European Convention is more cautiously worded, and extra-territorial application is ostensibly exceptional,[133]

[126] See Ecuador's ICJ application and UNHRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Rodolfo Stavenhagen): Mission to Ecuador, 25 April–4 May 2006*, UN Doc A/HRC/4/32/Add.2, 28 Dec. 2006; UNHRC, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Paul Hunt): Preliminary Note on Mission to Ecuador and Colombia, Addendum*, UN Doc A/HRC/7/11/Add.3, 4 Mar. 2007.

[127] See Meron, 'Extraterritoriality of Human Rights', 89 *AJIL* (1995) 78; Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), at 73; Cerna, 'Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law' (WP No. 6, Center for Human Rights and Global Justice, 2006); Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the *Bankovic* Case' [2006] *European Human Rts L Rev* 391; Wilde, 'The "Legal Space" or "Espace Juridique" of the ECHR: Is it Relevant to Extraterritorial State Action?', *European Human Rts L Rev* (2005) 115; Gondek, 'Extraterritorial Application of the ECHR: Territorial Focus in an Age of Globalisation', 52 *Netherlands Int'l L Rev* (2005) 349; King, 'The Extraterritorial Human Rights Obligations of States', 9 *Human Rs L Rev* (2009) 521; M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

[128] 1966 ICCPR, Art. 2. Art. 1 of the AmCHR and Art. 1 of the ECHR make no reference to territory, but require parties to ensure to everyone 'subject to' or 'within' their jurisdiction the rights set out therein. See generally O. De Schutter, *International Human Rights Law* (2010), at 142–179.

[129] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* ('*Palestine Wall Case*') [2004] ICJ Rep 136, at para. 109. See also General Comment No. 31 adopted by the UN Committee for Human Rights, UN Doc. HRI/GEN/1/Rev. 7, 192, at 194 ff, para. 10.

[130] *Palestine Wall Case*, *supra* note 129, at para. 112. See also the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures Order* [2008] ICJ Rep 386, at para. 109.

[131] *Ecuador v. Colombia (Admissibility)* [2010] IACHR Report No. 112/10, at paras 89–100.

[132] *Alejandre, Costa, de la Pena y Morales v. Republica de Cuba* [1999] IACHR Report No. 86/99, at para. 23; *Coard v. United States* [1999] IACHR Report 109/99, at para. 37.

[133] See *Bankovic v Belgium and Ors* [2001] ECtHR 333, at paras 59–82 where the Court found that aerial bombardment did not bring the applicants within the jurisdiction or control of the respondent states.

but it has nevertheless been applied in cases involving foreign arrests, military operations abroad, and occupation of foreign territory.[134]

The ratio of these and other similar cases is that where a state exercises control over territory or persons abroad, human rights obligations will follow. As the IACHR explained in a case involving the shooting down of civilian aircraft over the high seas:

> In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and nondiscrimination, 'without distinction as to race, nationality, creed, or sex.' Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.[135]

In *Al-Skeini* the European Court reiterated that '[t]he Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.'[136] It held the Convention applicable to deaths caused by the British Army during its occupation of Iraq.

None of these cases is environmental, but they give a good indication of the way international courts have approached the extra-territorial application of all the main human rights treaties. We also know from the human rights case law reviewed earlier in this article that a failure by the state to regulate or control environmental nuisances within its own territory may interfere with human rights.[137] How then should we answer the question whether the obligation to protect human rights from such environmental nuisances also applies extraterritorially? Can we conclude that the transboundary victims of nuisances with extraterritorial effects are within the 'jurisdiction' of the respondent state when the enjoyment of their human rights is affected? There are no precedents directly in point, but a good case can nevertheless be made for the extraterritorial application of human rights treaties to environmental nuisances. Given the failure of much of the literature to deal with this question in any depth (or even to ask it), it is worth doing so here.

[134] See *Al-Skeini v. United Kingdom* [2011] ECtHR, at paras 130–142; *Öcalan v. Turkey,* 41 EHRR (2005) 985, at para. 91; *Ilascu v. Moldova and Russia,* 40 EHRR (2005) 46, at paras 310–319, 376–394; *Issa et al. v. Turkey,* 41 EHRR (2004) 567, at para. 71; *Cyprus v. Turkey,* 35 EHRR (2002) 30, at para. 78.

[135] *Alejandre, Costa, de la Pena y Morales v. Republica de Cuba* [1999] IACHR Report No. 86/99, at para. 23 (footnotes omitted).

[136] *Al-Skeini v. United Kingdom* [2011] ECtHR, at para. 136.

[137] See the cases cited *supra*, in note 9.

First, the human rights case law is not consistent in its treatment of extra-territorial harm. At one extreme, the UN Human Rights Committee observed in *Delia Saldias de López v. Uruguay,* 'It would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[138] On this view any harmful effect on human rights anywhere is potentially within the 'jurisdiction' of the respondent state, insofar as courts have emphasized authority or control over the person rather than simply focusing on control of territory.[139] Nevertheless, that view was rejected in *Bankovic*, where the ECHR held that '[t]he Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. … The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction".'[140] However, *Bankovic* has not been followed in later cases,[141] nor is it supported by case law under other human rights treaties,[142] and it appears to be a decision particular to its own unusual circumstances.[143] Moreover, it is far removed on its facts from transboundary pollution cases.

Secondly, while it is less plausible to say that the polluting state 'controls' the territory of the state affected by pollution,[144] it is entirely plausible to conclude that the victims of transboundary pollution fall within the 'jurisdiction' of the polluting state – in the most straightforward sense of legal jurisdiction. The jurisdiction of national courts to hear cases involving transboundary harm to extraterritorial plaintiffs is recognized in private international law and in environmental liability conventions.[145] As we

[138] (1981) ICCPR Comm. No. 52/1979, at para. 12.3, referring to Art. 2 of the ICCPR. See also *Lilian Celiberti de Casariego v. Uruguay*, ICCPR Comm. No. 56/1979 (1981).

[139] See in particular King, 'The Extraterritorial Human Rights Obligations of States', 9 *Human Rts L Rev* (2009) 521; Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?',52 *Netherlands Int'l L Rev* (2005) 349, at 375.

[140] *Bankovic v. Belgium, supra* note 133, at para. 75.

[141] *Supra* note 134.

[142] *Supra* notes 131–132.

[143] See in particular Gondek, *supra* note 139, at 377; Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action? [2005] *European Human Rts L Rev* 115, at 120–124.

[144] Significant transboundary pollution is arguably a violation of the permanent sovereignty of a state (and its people) over its own natural resources, and in a serious case might amount to a *de facto* expropriation: see the preamble to the 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Report of the ILC on its 53rd Session*, GAOR, A/56/10 (2001), and *SERAC v. Nigeria, supra* note 3, at para. 55.

[145] See EC Council Reg. 44/2001 on Jurisdiction and Judgments, OJ (2001)L12/1, Art. 5; 2004 Kiev Protocol on Civil Liability and Compensation, Art. 13; 1993 Convention on Civil Liability for Damage to the Environment, Art. 19; 1997 Protocol to the Vienna Convention on Civil Liability for Nuclear Damage, Art. XI; 2004 Protocol to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, Art. 13. See generally C. McLachlan and P. Nygh (eds), *Transnational Tort Litigation* (1996), especially chs 1, 4, and 12.

noted at the beginning of this section, in such cases the Aarhus Convention and earlier OECD practice require the polluting state to make provision for non-discriminatory access to justice in its own legal system. Aarhus applies in general terms to the 'the public' or 'the public concerned', without distinguishing between those inside the state and others beyond its borders.[146] Article 3(9), the non-discrimination Article, requires that 'the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.' The principle of non-discrimination has also been adopted by the International Law Commission in its articles on transboundary harm,[147] by the UNECE in its environmental conventions,[148] and by MERCOSUR.[149] The IACtHR has held that 'the fundamental principle of equality and non-discrimination constitute a part of general international law'.[150] There is little point in requiring that national remedies be made available to transboundary claimants if they cannot also resort to international or regional human rights law when necessary to compel the polluting state to enforce its own court orders or laws or to assess and take adequate account of the harmful effects of activities which it authorizes and regulates. That is exactly how domestic claimants have successfully used human rights law in environmental cases.[151]

Moreover, where it is possible to take effective measures to prevent or mitigate transboundary harm to human rights then the argument that the state has no obligation to do so merely because the harm is extra-territorial is not a compelling one. On the contrary, the non-discrimination principle requires the polluting state to treat

[146] Art. 2(5). See UNECE, Compliance Committee, *Bystre Deep-water Navigation Canal – Findings and Recommendation with Regard to Compliance by Ukraine* (Comms. ACCC/C/2004/01 & 03) ECE/MP.PP/C.1/2005/2/Add. 3 (14 Mar. 2005), at paras 26–28; UNECE, *The Aarhus Convention – An Implementation Guide* (2000), at 41.

[147] *Supra* note 144. Art. 15 prohibits discrimination based on nationality, residence, or place of injury in granting access to judicial or other procedures, or compensation, in cases of significant transboundary harm: see *ILC Report* (2001) GAOR A/56/10, at 427–429. See to the same effect the ILC's 2006 Principles on Allocation of Loss, Principle 8(2), and the 1997 UN Convention on International Watercourses, Art. 32.

[148] In addition to the Aarhus Convention, it is listed in the preamble to the 1992 Convention on the Transboundary Effects of Industrial Accidents among 'principles of international law and custom'. See also 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Art. 2(6); 1992 Convention on the Transboundary Effects of Industrial Accidents, Art. 9.

[149] 1992 Las Leñas Protocol on Jurisdictional Cooperation and Assistance, ch III, Art. 3. The position in NAFTA is less clear. Transboundary plaintiffs appear to have equality of standing under some US environmental statutes: see Trans Alaska Pipeline Authorisation Act, 43 USC, § 1635(c)(1) of which allows 'any person or entity, public or private, *including those resident in Canada*' to invoke the Act's liability provisions. Art. 6 of the 1993 North American Agreement on Environmental Co-operation, which provides for 'interested persons' to have access to legal remedies for violation of environmental laws, may also apply to transboundary litigants. See generally Hsu and Parrish, 'Litigating Canada–U.S. Transboundary Harm', 48 *Virginia J Int'l L* (2007) 1.

[150] See *Juridical Situation and Rights of Undocumented Migrants* (17 Sept. 2003), IACtHR, OC-18/03, at para. 83.

[151] *Supra*, section 1.

extra-territorial nuisances no differently from domestic nuisances.[152] To deny transboundary pollution victims the protection afforded by human rights treaties when otherwise appropriate would for all these reasons be hard to reconcile with standards of equality of access to justice and non-discriminatory treatment required by these precedents.

On that basis a state which fails to control harmful activities within its own territory which cause or risk causing foreseeable environmental harm extraterritorially does owe certain human rights obligations to those affected, because they are within its jurisdiction and control, even if they are not within its territory. It is most likely to violate the human rights of those affected extra-territorially if it does not permit them equal access to environmental information and participation in EIA permitting procedures, or if it denies access to adequate and effective remedies within its own legal system.[153] Moreover, in keeping with the principle of non-discrimination, the environmental impact of activities in one country on the right to life, private life, or property in other countries should be taken into account and given due weight in the decision-making process.[154] There is no principled basis for suggesting that the outcome of cases such as *Hatton* should depend on whether those affected by excessive noise or any other environmental problem are in the same country or in other countries.[155] It seems entirely consistent with the case law and the 'living instrument' conception of human rights treaties to conclude that a state party must balance the rights of persons in other states against its own economic benefit, and must adopt and enforce environmental protection laws for their benefit, as well as for the protection of its own population. The same proposition applies just as much to other human rights treaties as to the European Convention.

However, even if this reasoning is correct in cases of transboundary pollution affecting individuals in a neighbouring state, it does not follow that it will be equally valid in cases of global environmental harm, such as climate change. Here the obvious problems are the multiplicity of states contributing to the problem and the difficulty of showing any direct connection to the victims. The inhabitants of sinking islands in the South Seas may justifiably complain of human rights violations, but who is responsible? Those states like the UK, US, and Germany whose historic emissions have unforeseeably caused the problem? Those states like China and India whose current

[152] See OECD Council Recommendations and the authors cited *supra*, in note 120, and Knox, 'Myth and Reality of Transboundary Environmental Impact Assessment', 96 *AJIL* (2002) 291.

[153] See ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Report of the ILC 2006*, GAOR A/61/10, at paras 51–67. Principle 6(1) sets out the core obligation: '[s]tates shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control'. See also Arts 3(9) and 9(4), 1998 Aarhus Convention.

[154] As they would have to be in transboundary environmental impact assessments: see 1991 Espoo Convention on EIA in a Transboundary Context, Art. 3(8).

[155] ILA, Committee on Transnational Enforcement of Environmental Law, Final Report, Rule 2, and commentary, *Report of 72nd Conference* (2006).

emissions are foreseeably making matters worse? Or those states like the US or Canada which have opted out of Kyoto and failed to take adequate measures to limit further emissions so as to stabilize global temperatures at 1990 levels? Or the governments of the Association of Small Island States, which may have conceded far too much when ratifying the Kyoto Protocol or in subsequent climate negotiations? It is much harder to frame such a problem in terms of jurisdiction or control over persons or territory as required by the human rights case law. It is also harder to contend that any of these governments have failed to strike the right balance between their own state's economic development and the right to life or private life in other states when they have either complied with or are exempt from greenhouse gas emissions reduction targets established by Kyoto and agreed by the international community as a whole.[156] Inadequately controlled transboundary pollution is clearly a breach of general international law,[157] and as I have argued here may also be a breach of human rights law. However, given the terms of the Kyoto Protocol and subsequent voluntary agreements it is far from clear that inadequately controlled climate change violates any treaty obligations or general international law.[158] In those circumstances the argument that it nevertheless violates existing human rights law is far harder to make.

At this point it may be better to accept, as the UNHRC appears to have done, that existing human rights law is not the right medium for addressing the shared problem of climate change and that further negotiations through the UNFCCC process are the only realistic answer, however unsatisfactory that might be. If it wants to take climate change seriously then it must find a better way of giving human rights concerns greater weight within the UNFCCC negotiating process, and, as we saw in the previous section, that can best be achieved by using the ICESCR and the notion of a right to a decent environment to pressurize governments.

6 Conclusions

Articulating a right to a decent or healthy environment within the context of economic, social, and cultural rights is not inherently problematic. Clarifying the existence of such a right would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development, but this could be achieved without doing damage to the fabric of human rights law, and in a manner which fully respects the wide margin of appreciation that states are entitled to exercise when balancing economic, environmental, and social policy objectives. It would build on existing precedents under the ICESCR, and reflect international policy on sustainable development endorsed at Rio in 1992 and in subsequent international conferences. The further elaboration of procedural rights, based on the Aarhus Convention,

[156] Greenhouse gas emissions reduction targets under Kyoto apply only to Annex I developed state parties, not to developing countries, including China, India, and Brazil. Compare 1997 Kyoto Protocol, Arts 2–9, which apply to annex I parties, and Art. 10, which applies to all parties.

[157] *Pulp Mills Case*, *supra* note 95, at paras 101, 187.

[158] *Supra*, note 111.

would facilitate the implementation of such a right, and give greater prominence globally to the role of NGOs in public interest litigation and advocacy. These two developments go hand in hand. They are not a necessary part of any declaration or protocol on human rights and the environment, but they do represent a logical extension of existing policies and would represent a real exercise in progressive development of the law. A declaration or protocol on human rights and the environment thus makes sense provided it brings together existing civil, political, economic, and social rights in one coherent whole, while at the same time reconceptualizing in the language of economic and social rights the idea of the environment as a common good. It would, in other words, recognize the global environment as a public interest that states have a responsibility to protect, even if they only implement that responsibility progressively and insofar as resources allow.

Using existing human rights law to grapple with climate change is more challenging. Giving human rights extraterritorial scope in environmental cases is not the problematic issue, however. As we have seen, the argument that transboundary victims come within the jurisdiction or control of the polluting state can be made, is consistent with existing human rights law, and is supported by developments in international environmental law. If that is correct then a state does have to take account of transboundary environmental impacts on human rights and it is obliged to facilitate access to remedies and other procedures. But climate change is a global problem. It cannot easily be addressed by the simple process of giving existing human rights law transboundary effect. It affects many states and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims. Moreover, much of the economic policy which drives greenhouse gas emissions worldwide is presently lawful and consistent with the terms of the UNFCCC and the Kyoto Protocol. It is no more likely to be derailed by human rights litigation based on ICCPR rights than the UK's policy on Heathrow airport in the *Hatton Case*. The response of human rights law – if it is to have one – needs to be in global terms, treating the global environment and climate as the common concern of humanity. That is why locating the right to a decent environment within the corpus and institutional structures of economic, social, and cultural rights makes more sense. In that context the policies of individual states on energy use, reduction of greenhouse gas emissions, land use, and deforestation could be scrutinized and balanced against the evidence of their global impact on human rights and the environment. This is not a panacea for deadlock in the UNFCCC negotiations, but it would give the rights of humanity as a whole a voice that at present is scarcely heard. Whether the UNHRC wishes to travel down this road is another question, for politicians to answer rather than lawyers, but that is where it must go if it wishes to do more than posture on climate change.

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Judicial Settlement of International Environmental Disputes: Current Problems

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Muddling through might be one way to describe the present state of international environmental litigation. The fragmented character of international environmental law results in significant jurisdictional problems whatever forum is chosen, but the solutions are far from obvious. When it comes to evidence and proof, all the systems examined here accept that environmental cases are to some degree special, but there is no consensus on how to handle them. Even public interest environmental litigation, a widely accepted concept in other legal systems, becomes more questionable when replicated in international law, where alternative forms of dispute resolution are available. Is the answer to create a specialist international environmental court? The idea receives little support in academic writing, and appeals only to activists. Despite the problems examined here, the existing structure of international courts has much to commend it. Rather than indulge in radical reform, it seems better to identify more modest changes that would make the present ad hoc system a better vehicle for the settlement of environmental disputes.

1. *Introduction*

The growth of inter-state environmental litigation is one of the more surprising features of the past decade.[1] In 2010 the ICJ gave judgment in *Pulp Mills on the River Uruguay*,[2] a dispute about the risk of transboundary pollution from a new pulp mill located on the banks of the Uruguay River. A year later, the Seabed Disputes Chamber of the ITLOS gave a lengthy *Advisory Opinion on the Responsibilities of States with Respect to Seabed Mining* under Part XI of the 1982 UN Convention on the Law of the Sea (UNCLOS), in which it offered detailed observations, *inter alia*, on the environmental duties of states

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[1] In addition to cases referred to here, the other contentious cases include: *MOX Plant Arbitration (Jurisdiction and Provisional Measures)* (2003) PCA; *Iron Rhine Railway Arbitration* (2005) PCA; *Pulp Mills Case (Provisional Measures)* (2006) ICJ Reports 113.

[2] *Case concerning Pulp Mills on the River Uruguay* (2010) ICJ Reports 14 [Hereafter '*Pulp Mills Case*'].

sponsoring seabed mining contractors.[3] Two further environmental disputes are scheduled for oral hearing in the ICJ in the second half of 2013. The *Whaling in the Antarctic Case* involves Australia and Japan in a dispute concerning compliance with the 1946 International Convention for the Regulation of Whaling (ICRW), with New Zealand intervening under Article 63 of the ICJ Statute.[4] The *Aerial Herbicide Spraying Case* is a dispute between Ecuador and Colombia about alleged transboundary pollution caused by aerial spraying of herbicides.[5] There are other inter-state environmental cases or arbitrations under way,[6] or in prospect, so the phenomenon is not merely transient.

Not all of these cases are initiated for sound environmental reasons. Several owe more to the domestic politics of the applicant state than to any real environmental risk, still less to any real prospect of success. One consequence of the volume of cases, however, is that we can now see more clearly than before what the strengths and weaknesses of international environmental litigation may be. Three issues stand out as transcending the particularities of individual cases. First, it is often difficult to frame an environmental case in terms which cover the totality of the dispute and engage all of the applicable law while remaining within the available bases of jurisdiction. Recent decisions requiring states to negotiate prior to bringing cases under otherwise applicable treaty provisions have exacerbated this problem.[7]

Secondly, we can also see the emergence of public interest litigation—cases which do not necessarily involve a violation of the applicant's territory or other rights but whose purpose is to ensure compliance with multilateral treaty obligations owed to all states parties. In this respect, environmental litigation offers an alternative to the non-compliance procedures (NCPs) found in many environmental treaties. How these two very different approaches to protecting the public interest interrelate is a matter which deserves further attention.

Thirdly, almost all of the cases require the introduction of expert evidence and scientific data. No other category of cases has generated such debate about how international courts should handle these evidential questions, although there is a widespread sense in the literature that they have in this respect not done a good job. These are not novel questions, but the literature mainly predates the current flurry of litigation, and by no means exhausts the subject. Other perspectives are possible.

[3] *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (2011) ITLOS, Seabed Disputes Chamber [Hereafter '*Seabed Activities Advisory Opinion*'].

[4] *Case concerning Whaling in the Antarctic (Australia v Japan)*: application filed on 31 May 2010 [Hereafter '*Whaling Case*'].

[5] *Case concerning Aerial Herbicide Spraying (Ecuador v Colombia)*: application filed on 31 March 2008 [Hereafter '*Aerial Spraying Case*'].

[6] Including *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*: application filed at the ICJ on 10 November 2010; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*: application filed at the ICJ on 21 December 2011; *Mauritius v United Kingdom Arbitration* (PCA): no details are published but the case concerns compatibility with UNCLOS of the 200 mile Marine Protected Area around the British Indian Ocean Territory and is due to be heard in 2014.

[7] See *Application of the CERD (Georgia v Russia)* (2011) ICJ Reports; *Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012) ICJ Reports, paras 54–55, discussed in Section 4 below.

As a preliminary to this discussion we begin by considering what is meant by the term 'environmental dispute' in an international context, since the parameters of the category are themselves unclear.

2. *What is an International Environmental Dispute?*

To some it may make no difference whether we refer to 'international environmental law',[8] or 'international law relating to the environment',[9] but in reality these are fundamentally different concepts. The former may be thought to imply an identifiable and conceptually distinct body of applicable law.[10] The latter implies merely an identifiable real-world problem which can be addressed, up to a point, by international law as whole. On this latter view, international law relating to the environment is 'nothing more, or less, than the application of public and private international law to environmental problems'.[11] This is not the place to pursue this discussion,[12] which resonates with the larger debate about the coherence or fragmentation of international law,[13] but it helps explain why the authors of this article take the view that it is illusory to believe that we can define what constitutes an international environmental dispute by reference to the applicable law, or that such disputes can be separated into a self-contained category for the purposes of litigation. It also explains why we remain unpersuaded of the need for an international environmental court. If we cannot even define the boundaries of its jurisdiction then such a court will lack one of the key characteristics of other specialized courts—clarity and certainty about its mandate.

Some of the literature discusses the question what is an environmental dispute, but rarely answers it convincingly.[14] Broadly, two approaches can be identified: the first tries to categorize the applicable rules, the second looks at the real-world problem the rules address. Hey offers the clearest exposition of the first approach: 'An international environmental dispute is a dispute that involves what is generally considered to be an environmental treaty . . .'.[15] But

[8] P Sands and J Peel, *Principles of International Environmental Law* (3rd edn, CUP 2012); D Bodansky, J Brunnée and E Hey, *Oxford Handbook of International Environmental Law* (OUP 2007).

[9] P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn, OUP 2009).

[10] See eg J Crawford and M Koskenniemi (eds), *International Law* (CUP 2012) 12, who in their introduction refer to Charlesworth's chapter for the proposition that environmental law is 'more or less self-contained, even self-sufficient', although Charlesworth in fact makes no such claim.

[11] Birnie, Boyle and Redgwell (n 9) 4; P-M Dupuy, 'Où en est le droit international de l'environnement à la fin du XXeme siècle?' (1997) 101 RGDIP 873, 899.

[12] But see Birnie, Boyle and Redgwell (n 9) Ch 1.

[13] See UN GA, *Fragmentation of International Law: Report of the Study Group of the ILC*, A/CN.4/L.682 (2006); M Koskenniemi, 'The Fate of Public International Law' (2007) 70 MLR 4–19, but contrast B Simma, 'Universality of International Law' (2009) 20 EJIL 265.

[14] See in particular T Stephens, *International Courts and Environmental Protection* (CUP 2009); C Romano, *The Peaceful Settlement of International Environmental Disputes* (Institut universitaire de hautes études internationales 2000); T Treves, 'Disputes in International Environmental law: Judicial Settlement and Alternative Methods' in Y Kerbrat and S Maljean-Dubois (eds), *The Transformation of International Environmental Law* (Pedone 2011) 285; N Klein, *Dispute Settlement in the Convention on the Law of the Sea* (CUP 2005); P Okowa, 'The Settlement of International Environmental Disputes: A Re-appraisal' in M Evans (ed), *Remedies in International Law* (OUP 1998) 157; L de Chazournes, 'La mise en oeuvre du droit international dans la domaine de l'environnement' (1995) 99 RGDIP 37; AV Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) Ch 15; C Romano, 'International Dispute Settlement' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 1036; D French, 'Environmental Dispute Settlement: The First (Hesitant) Signs of Spring' (2006) 19 Hague Ybk IL 1.

[15] E Hey, *Reflections on an Environmental Court* (Kluwer Law International 2000) 3.

she notes the obvious problems: many such treaties address multiple objectives, some of which are not 'generally considered' to be environmental. In UNCLOS or most modern river treaties, for example, the environmental provisions are only a small part of a larger whole. We might say that disputes under those provisions are environmental even if disputes about other articles are not, but even that can be problematic. The UN Fish Stocks Agreement has been described as the first treaty to adopt an 'environmental perspective' on fisheries conservation,[16] but should disputes arising under this treaty be categorized as environmental, or are they fisheries disputes, or simply law of the sea disputes, or all three? The point matters: UNCLOS Article 297(1) places the contravention of 'specified international rules for the protection and preservation of the marine environment . . .' within compulsory settlement under Part XV. But article 297(3)(a) excludes from compulsory settlement 'any dispute relating to . . . sovereign rights with respect to the living resources in the exclusive economic zone or their exercise'. Here a broad characterization of what is environmental to include sustainable use of natural resources risks undermining a decision of the negotiating states to exclude EEZ fisheries disputes from compulsory dispute settlement.[17] That decision implies a narrow view of what is 'environmental' for the purposes of UNCLOS, and on this view the Fish Stocks Agreement is not an environmental treaty.

Even if we accept that what constitutes an environmental treaty dispute may depend on the purpose, context and particular provisions of the treaty, the definition offered by Hey is plainly too limited since it says nothing about disputes under general or customary international law. Here too the characterization is not straightforward. The *Aerial Spraying Case* is a good example. Ecuador's case is based largely on customary international law relating to transboundary pollution. Because there is no environmental treaty in issue, this would not come within Hey's definition of an environmental dispute, even though transboundary environmental impact assessment (EIA) and the obligation to regulate and control transboundary pollution are the core elements of international environmental law.[18] The case is not limited to violations of customary international law, however. There are also human rights treaties in issue, which leaves the correct characterization of the case in doubt: is it to be regarded as a human rights case? Colombia argues that the applicable law is the 1988 UN Convention on Narcotic Drugs, since the aerial spraying is carried out as part of a programme of crop eradication for anti-narcotic purposes. The Narcotic Drugs Convention has not so far been 'generally considered to be an environmental treaty' and rightly so. It is largely about criminal co-operation. But what if the Court accepts Colombia's view of the applicable law, and then imports all of the relevant international environmental

[16] D Freestone and Z Makuch, 'The New International Environmental Law of Fisheries: The 1995 UN Straddling Stocks Convention' (1996) 7 Ybk Int Env L 3.

[17] MH Nordquist (ed), *1982 United Nations Convention on the Law of the Sea: A Commentary* (Martinus Nijhoff Publishers 1989) vol V, 87–94, 105; N Klein, *Dispute Settlement in the Law of the Sea Convention* (CUP 2004) 175.

[18] See *Pulp Mills*, paras 101, 197, 223; *Seabed Activities Advisory Opinion*. See D French, 'From the Depths: the Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) 26 IJMCL 525; Birnie, Boyle and Redgwell (n 9) Ch 3.

law and human rights law via an expansive reading of the second sentence of Article 14(2) of the 1988 Convention?[19] Interpreted this broadly, the 1988 Convention certainly has implications for the environment, and for human rights, but does that make it an environmental treaty?

Similar observations can be made about inter-state claims brought under trade rules that also raise environmental issues. There are a number of WTO disputes that have involved questions about the interaction of international trade law and international environmental law.[20] The best example is the *Shrimp-Turtle* case, where the WTO Appellate Body interpreted Article XX(g) of the GATT with reference to the Convention on International Trade in Endangered Species, the Convention on Biological Diversity, the Convention on Migratory Species, UNCLOS, and Agenda 21 of the Rio Conference on Environment and Development.[21] This and other WTO cases are not meaningfully disputes about environmental treaties, nor environmental law, however. Rather, they interpret and define the limits of the WTO treaty regime, whose principal aim is to further economic liberalization. Nevertheless, they are clearly concerned with delimiting the policy space available to states when taking measures to protect the environment, and international environmental law may be relevant to solving these disputes.[22] That does not make the WTO Agreement or any of the WTO covered agreements environmental treaties, however.

The obvious point is that most 'environmental disputes' raise many other legal issues, even if they also involve 'environmental' law, and Hey and other commentators recognize this. The *Gabčíkovo-Nagymaros Case* is the best example[23]: true, it is about environmental law, but it is also about the law of treaties, water resources law, state succession, state responsibility and so on. Like the *Pulp Mills Case*, it is also about sustainable development, and such cases focus in part on a balance between environmental protection and economic development. If protecting the environment is only part of the picture how can these cases be characterized as 'environmental' according to Hey's definition? As we have seen, much the same can also be said about the *Aerial Spraying Case*. Except for the *Whaling Case*, Hey's definition of an environmental dispute does not fit the core cases, and that is a fatal conclusion.[24]

[19] Article 14(2) provides: 'Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.' Compare *Oil Platforms Case* (2003) ICJ Reports 161, paras 31–45.

[20] WTO decisions include *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ['*Shrimp-Turtle Case*'] (1998) WTO Appellate Body (WT/DS58/AB/R) and *Art 21.5 Report* (2001) WTO Appellate Body (WT/DS58/AB/RW); *EC-Measures Concerning Meat And Meat Products ['Beef Hormones Case']* (1997) WTO Appellate Body (WT/DS26/AB/R); *EC-Measures Affecting Asbestos, etc ['EC-Asbestos']* (2001) WTO Appellate Body (WT/DS135/AB/R); *EC – Measures Affecting Approval and Marketing of Biotech Products* (2006) WTO Panel (WT/DS291/DS292/DS293/R).

[21] *Shrimp-Turtle Case*, paras 130, 132.

[22] At the same time, the simple fact that a trade or investment dispute relates to an environmental industry does not make it an environmental dispute if there are no questions of environmental law or policy: see *Canada – Certain Measures affecting the Renewable Energy Generation Sector* (2012) WTO Panel (WT/DS412/R), para 7.7.

[23] *Gabčíkovo-Nagymaros Case* (1997) ICJ Reports 7.

[24] Nor does it fit the *Iron Rhine Railway Arbitration* (2005) PCA; *Lac Lanoux Arbitration* (1957) 24 ILR 101; *Trail Smelter Arbitration* (1939) 33 AJIL 182 & (1941) 35 AJIL 684; *Nuclear Tests Cases (Australia & New Zealand v France) (Jurisdiction)* ICJ Reports (1974) 253 and 457; or the *Fisheries Jurisdiction Cases (UK and Germany v Iceland)* ICJ Reports (1974) 3 and 175.

To come back to the point made in opening this section, the fundamental problem with Hey's approach is that it focuses attention on the 'environmental' character of the legal rules at issue. This does not work: if international environmental law is 'nothing more, or less, than the application of public and private international law to environmental problems'[25] then we need to look instead at the substantive problems—ie to identify what is an environmental issue rather than what is 'environmental law'.

The second of these two approaches is the one taken by Bilder in his classic article on the subject, and it is followed implicitly in some of the literature.[26] On Bilder's view, a dispute is environmental when it relates to 'the alteration, through human intervention, of natural environmental systems'.[27] Here there are some easily identified components. Most of what we generally regard as 'environmental' concerns pollution of air, freshwater and oceans; climate change; unsustainable use of natural resources; loss of biodiversity, ecosystems and habitat; and conservation of endangered species and natural heritage. Even these concepts are not without difficulty, and there will always be a penumbra of uncertainty about so elusive a concept as 'the environment'.[28] But focusing on what we think matters most in an 'environmental' context offers a better starting point for any enquiry into environmental disputes than trying to identify which treaties or other rules are 'generally considered' as environmental. That is how we will use the term 'environmental disputes' in this article.

3. *Jurisdiction over Environmental Disputes*

The first and foremost problem facing any litigator trying to formulate an environmental case is the difficulty of finding an adequate jurisdictional basis. International environmental law, as already noted, is made up of multiple, overlapping, treaties, based on a framework of customary international law, interpreted and applied in conformity with a small number of general principles agreed by the international community. A case involving small island states affected by climate change, for example, might involve the Climate Change Convention, the Kyoto Protocol, UNCLOS, the Convention on Biological Diversity, the law of state responsibility, the customary obligation of due diligence, the precautionary principle, and even some human rights law. Each of the applicable treaties will have its own dispute settlement provisions or none at all; of the treaties mentioned, only UNCLOS provides for compulsory dispute settlement by courts or tribunals. Relatively few treaties provide for compulsory adjudication of environmental disputes, despite the recommendations of the World Commission on Environment and Development that greater use be made of compulsory dispute settlement.[29] Those that do will generally limit jurisdiction

[25] Crawford and Koskenniemi (n 10).
[26] See eg Stephens (n 14) 346.
[27] R Bilder, 'Settlement of Disputes in the Field of International Law of the Environment' (1975-I) 144 Recueil des Cours 153. See also P Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' in T Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff Publishers 2007) 313.
[28] See discussion in Birnie, Boyle and Redgwell (n 9) 1–6.
[29] The World Commission on Environment and Development, *Our Common Future* (OUP 1987) 334.

to disputes concerning interpretation or application of the treaty in which the dispute settlement clause is found. On that basis it may not be possible to formulate a case on which any one court or tribunal could adjudicate all of the relevant environmental issues. The outcome may be a case that is not really the one the applicant state would like to bring, but the one that it can bring. This is not a phenomenon unique to environmental disputes. It is inherent in a system of international dispute settlement based on the consent of the parties.[30] In the ideal world, we might prefer an environmental dispute settlement treaty which provided for a system of compulsory adjudication, with power to apply all the relevant treaties, customary law and general principles applicable in relations between the parties to the dispute. But we do not have such a system, and the result is that environmental cases viewed as a whole present a picture of jurisdictional incoherence and complexity. What is most remarkable in these circumstances is that there are any cases at all.

The limitations imposed by compromissory clauses in environmental claims are apparent in the *Pulp Mills Case*, where the ICJ's jurisdiction derived from the 1975 Statute for the River Uruguay. While the claims relating to pollution of the aquatic environment of the river fell within the scope of the treaty, the Court held that it did not have jurisdiction over noise or visual pollution, nor over the odours that Argentina claimed would be caused by the pulp mills. These problems were not covered by the Statute.[31] Whatever their merits, the Court could not consider them unless the parties agreed.

At the same time, the Court's limited jurisdiction did not mean that the judgment was only relevant to the specific issues arising under a bilateral instrument binding on only two states. The Court interpreted the Statute in a progressive way. In both the *Gabčíkovo-Nagymaros Case*[32] and the *Iron Rhine Railway Arbitration*,[33] it was stressed that treaty commitments must be implemented in the light of developments in international environmental law. What an environmental treaty covers is thus open-textured and capable of evolution in conformity with the text.[34] It was on this basis that in the *Pulp Mills Case*, the Court noted that it was necessary to interpret the Statute in light of relevant rules of customary international law. The Court thus made important findings concerning the scope of the obligation to negotiate,[35] and the content of the due diligence standard in customary law.[36] It also read into the Statute a requirement to carry out an EIA,[37] despite the absence of any reference to EIA in the text. These pronouncements of a general nature have the potential to influence other judicial bodies in the future, even if they are not strictly speaking binding beyond the parties to the dispute. This is clear from the *Seabed Activities Advisory Opinion*, where the Seabed Disputes Chamber

[30] One obvious example in an entirely different context is the *Lockerbie Case* (1992) ICJ Reports 114.
[31] *Pulp Mills Case*, para 52.
[32] *Gabčíkovo-Nagymaros Case*, para 140.
[33] *Iron Rhine Railway Arbitration*, para 58.
[34] But note Judge Bedjaoui's warning in the *Gabčíkovo-Nagymaros Case* that '"interpretation" is not the same as "substitution", for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed'. Bedjaoui, *sep op.*
[35] *Pulp Mills Case*, paras 146–47.
[36] ibid para 197.
[37] ibid para 204.

explicitly drew upon the ICJ judgment in the *Pulp Mills Case* in its own decision relating to the interpretation of UNCLOS and the Rules and Regulations adopted by the International Seabed Authority.[38] This decision illustrates the degree of cross-fertilization between courts and tribunals constituted under different regimes. A similar phenomenon can be observed in the recent *Kishenganga Arbitration* where the tribunal refers to the customary international rules relating to international watercourses in order to confirm its interpretation of the Indus Waters Treaty between Pakistan and India.[39] In doing so, the tribunal explicitly draws upon the *Gabčíkovo-Nagymaros Case* and the *Pulp Mills Case* to support its reasoning on the content of customary international law.[40]

Simma draws an analogy in this respect with the 'mainstreaming' of human rights law, 'in the sense of integrating this branch of the law into both the fabric of general international law and its various other branches.'[41] Thus, despite the jurisdictional limitations of the *Pulp Mills Case*, it is nevertheless an important decision on the scope of general international law relating to the environment, and not simply a judgment on how the 1975 Statute should be interpreted and applied. But had Argentina also wished to claim a violation of other applicable treaties, or any rules of customary international law, it could not have done so in these proceedings, however close the factual nexus with the operation of the pulp mill.

One consequence of the limited scope of treaty dispute settlement provisions is that it may lead to so-called 'cluster litigation', where different aspects of the same dispute are submitted to more than one court or tribunal.[42] This phenomenon increases the costs of litigation and it also raises the possibility of fragmentation, as different tribunals must decide on similar questions of fact and law. To date the *Swordfish Case* remains the best example, pursued briefly but simultaneously in the WTO under GATT and in the ITLOS under UNCLOS.[43] The problem should not be exaggerated: elements of the *Pulp Mills* dispute were argued before a MERCOSUR tribunal (bridge blockade) and the ombudsman of the International Finance Corporation (the IFC's EIA), and before the ICJ.[44] A complaint was also made to the Inter-American Court

[38] *Seabed Activities Advisory Opinion*, paras 111 (due diligence), 135 (precautionary approach) and 147 (environmental impact assessment).

[39] *Kishenganga Arbitration* (2013) PCA, Partial Award, paras 445, 453. The tribunal also refers to custom to contrast the contents of the treaty. Thus, in emphasizing that the rights of India should be given sufficient weight, the tribunal notes that 'given the significant rights enjoyed by India as the upstream riparian under customary international law, as well as the natural advantages enjoyed by the upstream riparian, the Court recognizes, in view of the acute need both of India and Pakistan for hydro-electric power, that India might not have entered into the Treaty at all had it not been accorded significant rights to the use of those waters to develop hydro-electric power on the Western Rivers'; ibid para 420.

[40] ibid paras 449–50.

[41] B Simma, 'Mainstreaming Human Rights: The Contribution of the ICJ' (2012) 3 JIDS 7, 27. See also J Viñuales, 'The Contribution of the ICJ to the Development of International Environmental Law' (2008) 32 Fordham ILJ 232, 258.

[42] A Nollkaemper, 'Cluster-Litigation in Cases of Transboundary Environmental Harm', in M Faure and S Ying (eds), *China and International Environmental Liability: Legal Remedies for Transboundary Pollution* (Edward Elgar 2008) 11.

[43] *Swordfish Case (Chile v EC)* (2001) ITLOS No 7. The case was discontinued and eventually settled by agreement.

[44] In addition to the ICJ merits decision in 2010, there were two ICJ provisional measures applications, one concerning the plant (2006), the other concerning the bridge blockade (2007). Argentina argued unsuccessfully

of Human Rights, and directors of the plant were prosecuted in an Argentine court. There was even a potential BIT arbitration had Uruguay lost the ICJ case. No national legal system could manage to combine all of these elements of a dispute into one unified process, and we cannot realistically expect the international legal system to do any better. Nevertheless, when the same activity may violate the pollution prevention provisions of a river treaty and the wildlife protection provisions of another treaty, it contributes little to the coherence of international law to compel states to litigate what is in effect the same case twice.

Such problems could of course be avoided if claims under different treaties were brought before a single forum. This may be possible where a state has given general consent to the settlement of international disputes, whether by an optional clause declaration under Article 36(2) of the ICJ Statute, or under the Pact of Bogotá.[45] In these circumstances, the judicial process may be able to take a more comprehensive approach to the dispute. Two pending ICJ cases both fall into this category. Although the *Whaling Case* concerns only compliance with the ICRW, jurisdiction is based on optional clause declarations by the parties. This could have given Australia the freedom to rely on all of the potentially applicable law, including UNCLOS, CITES and the Convention on Biological Diversity, had it wanted to do so and assuming that it had an arguable case. The *Aerial Spraying Case*, based on jurisdiction under the Pact of Bogotá, is a better example. As we saw earlier, Ecuador relies not only on customary international law, but also on the 1988 Convention on Narcotic Drugs and a range of human rights treaties to which both states are parties. Thus, it is possible for the Court, in theory, to assess the environmental issues in this case under different treaties and under general international law. Whatever the Court eventually decides, there is no jurisdictional obstacle to dealing with the dispute on the basis of what it may identify as the applicable law.

While such mechanisms provide a potential source for establishing comprehensive jurisdiction over environmental disputes, there are the obvious practical limitations to bear in mind. It remains the case that only a minority of states currently accept the ICJ's compulsory jurisdiction,[46] and many of these do so with extensive reservations. There is, for example, little point trying to sue the United States in inter-state environmental disputes as it rarely consents to the compulsory settlement of disputes.[47] Even fewer states accept the compulsory jurisdiction of the ITLOS with respect to disputes arising under UNCLOS,

in the latter application that the MERCOSUR treaty was the applicable law, not the 1975 Statute of the River Uruguay.

[45] The latter instrument has been invoked as the basis for jurisdiction in several environmental disputes: see *Construction of a Road along the San Juan River Case* (n 6), *Case concerning Certain Activities carried out by Nicaragua in the Border Area* (n 6) and *Aerial Spraying Case* (n 5).

[46] At the time of writing, 69 states had accepted the compulsory jurisdiction of the ICJ; see <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> accessed 4 March 2013.

[47] The United States has accepted compulsory adjudication for disputes arising under the WTO Agreement, or under its BITs and FTAs. The United States is also subject to special arbitration in respect of fisheries disputes under the 1995 UN Agreement on Straddling and Highly Migratory Fish Stocks and under a number of regional fisheries agreements.

although the default mechanism of Annex VII arbitration remains available and has been the basis for five cases that are in some degree environmental.[48] However, all but one have either settled or failed on jurisdictional grounds. Most states wishing to bring environmental cases before the ICJ, ITLOS or arbitration will thus be left to rely on whichever treaty provides the most favourable jurisdictional basis for their case, assuming there is one at all. In effect, the system encourages what has been described as forum-shopping.[49]

At this point, once jurisdiction on some basis is established, some claimant states have then sought to expand the applicable law to cover other elements of the dispute. An early example was the *MOX Plant Case*. Although in form an UNCLOS Annex VII arbitration, Ireland relied on the Convention's applicable law article (article 293) to argue that the arbitrators also had jurisdiction to apply other treaties and customary international law.[50] If this interpretation is correct then it has the potential effect of greatly expanding the jurisdiction of courts and tribunals beyond the narrow confines of the treaty under which proceedings have been brought. But is it correct? In its Order of 24 June 2003 in the *MOX Plant Arbitration*, the Annex VII tribunal held that:

> The Parties discussed at some length the question of the scope of Ireland's claims, in particular its claims arising under other treaties (e.g. the OSPAR Convention) or instruments (e.g. the Sintra Ministerial Statement, adopted at a meeting of the OSPAR Commission on 23 July 1998), having regard to articles 288 and 293 of the Convention. The Tribunal agrees with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand. It also agrees that, to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible.[51]

The same view was reiterated in the Partial Award in the *Eurotunnel* case, the Tribunal noting that 'this distinction between the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and the law which it will have to apply in doing so is a familiar one',[52] and in the *OSPAR Convention Case*. The arbitrators in the latter held that the applicable law provision did not 'transform it into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention'.[53]

Despite the compelling logic of this conclusion, and its endorsement by the ICJ, most recently in the *Genocide Convention Case*,[54] decisions of other

[48] *Mox Plant* and *Southern Bluefin Tuna* were dismissed for want of jurisdiction. *Swordfish* and *Land Reclamation* settled. *Mauritius v UK* will be heard in 2014, but jurisdiction is contested.

[49] See Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (OUP 2003), especially Ch 4.

[50] Article 293 provides 'a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention'.

[51] Para 19.

[52] *Eurotunnel (Channel Tunnel Group and France-Manche v UK and France)*, Partial Award of 30 January 2007, 132 ILR 1, para 152.

[53] *OSPAR Convention Case* (2003) XXIII *RIAA* 59, paras 84–85.

[54] *Application of the Genocide Convention Case* (2007) ICJ Reports, para 147: 'The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, 617-621, paras 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. . . . It has

UNCLOS tribunals have taken a contrary position. In the *M/V Saiga (No. 2) Case*, the ITLOS held that '...Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible...'.[55] The *Guyana/Suriname Arbitration* endorsed the approach taken by ITLOS, and concluded: 'In the view of this Tribunal this is a reasonable interpretation of Article 293 and therefore Suriname's contention that this Tribunal had "no jurisdiction to adjudicate alleged violations of the United Nations Charter and general international law" cannot be accepted.'[56]

It is difficult to reconcile the above statements with the ICJ's decided cases or with the other arbitral awards cited earlier. They represent two very different views of the extent to which other rules of international law can be relied upon in cases concerned only with the interpretation and application of a particular treaty. Neither *M/V Saiga (No. 2)* nor *Guyana/Suriname* are concerned simply with interpreting UNCLOS; both decisions apply general international law in addition to the Convention, and they do so via a provision concerned with applicable law rather than jurisdiction. Whereas other courts see jurisdiction controlling the applicable law, these decisions take the opposite view: in effect the applicable law expands jurisdiction. Either the ICJ is wrong, or these decisions are wrong. It is of course true that 'international courts can be very creative and capable of extending considerably the scope and reach of their jurisdiction and the rules they are entrusted to interpret'.[57] The expansive approach taken in *M/V Saiga (No. 2)* and *Guyana/Suriname* would enable courts with limited jurisdiction nevertheless to deal with all of the matters in dispute in a particular case, and that could be beneficial in some environmental cases. But it drives a coach and horses through the principle of consent-based jurisdiction. Parties who thought they had accepted a limited regime of compulsory adjudication based on interpretation and application of a treaty would then find themselves answering claims based not on the treaty but on other rules of general international law or other treaties which may themselves have no compulsory dispute settlement clause.

Whatever its theoretical merits, the more serious drawback of this expansive view of applicable law is that states will simply become even more cautious about accepting compulsory jurisdiction clauses in treaties, and may start to repudiate those they had previously been willing to accept. A carefully structured dispute settlement scheme, such as Part XV of UNCLOS, is unlikely to survive expansive rewriting of this kind. It is perhaps ironic that the

no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.' See also *Mavrommatis Palestine Concessions Case* (1924) PCIJ Reports, Series A, No 2, 15–16.

[55] *MV Saiga Case (Merits)* (1999) ITLOS No 2, para 155. For a criticism of the decision, see J Harrison, 'Judicial Law Making and the Developing Order of the Oceans' (2007) IJMCL 283, 299.

[56] *Maritime Delimitation (Guyana v Suriname)* (2008) 47 ILM 166, para 406.

[57] F Zarbiyev, 'Judicial Activism in International Law – A Conceptual Framework for Analysis' (2012) 3 JIDS 248.

best examples of fragmentation in the UNCLOS case law concern decisions on jurisdiction whose ostensible purpose is to give greater coherence to the handling of applicable law in treaty disputes. Responding to this challenging conflict is an urgent task for any international court or tribunal deciding UNCLOS cases. At present it adds only unpredictability and incoherence to the system.

4. *Public Interest International Litigation*

Most inter-state litigation is bilateral in character, focused on the rights and obligations of particular states. Some environmental cases fit neatly into this paradigm, including the *Trail Smelter Arbitration*, the *Pulp Mills Case* and the *Gabčíkovo-Nagymaros Case*. These cases are all concerned with transboundary problems. The emergence of environmental problems of a global character, affecting *inter alia* the climate, oceans and biological resources, may call for a different response to compliance with multilateral treaties and other rules of international law applicable in this context. We consider below the question of standing to enforce compliance with *erga omnes* treaties, but a perspective which accords rights only to 'injured states'[58] will be inappropriate to the public interest character of global environmental problems involving a multiplicity of states and interrelated issues.[59] Much of the academic literature has rightly focused on international regulatory regimes as the principal mechanism for addressing the broader public interest in global environmental protection, and on the use of NCPs as the most appropriate multilateral mechanism for settling disputes about treaty compliance.[60] Less attention has been paid to exploring the potential public interest role of international courts in ensuring treaty compliance.[61]

NCPs are unlike litigation in several respects.[62] They are designed to facilitate multilateral solutions to questions of treaty interpretation and allegations of breach or non-compliance with the treaty. The consent of the respondent state need not be obtained before the process is initiated. Standing is not required to make a complaint: in most cases any party to the treaty or the treaty secretariat may do so. In some cases, non-governmental organizations (NGOs) and members of the public may also complain and participate in

[58] *South West Africa Cases* (1966) ICJ Reports 6, paras 20–24; 2001 Articles on State Responsibility, Art 42. See generally, J Crawford, *The ILC's Articles on State Responsibility* (CUP 2002) 254; C Gray, *Judicial Remedies in International Law* (OUP 1987) 211.

[59] Compare L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard LR 353.

[60] See eg 1987 Montreal Protocol to the Ozone Convention, Art 8, and Annex IV; 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, Art 19; 1992 OSPAR Convention, Art 23; 1998 Aarhus Convention on Access to Information, Access to Justice, and Public Participation in Environmental Matters, Art 15; 2000 Protocol on Biosafety, Art 34; 2001 POPS Convention, Art 17; 2003 Protocol on Pollutant Release and Transfer Registers, Art 22. UNEP adopted Guidelines on Compliance with Multilateral Environmental Agreements (MEAs) in 2001. See generally UNEP, *Compliance Mechanisms under Selected MEAs* (UNEP 2007).

[61] See generally UNEP, *Study on Dispute Avoidance and Dispute Settlement in International Environmental Law*, UNEP/GC.20/INF/16 (1999), and literature cited n 14 above.

[62] See eg T Treves, 'The Settlement of Disputes and Non-Compliance Procedures' in T Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009) 499.

the process, or provide information to secretariats.[63] The process is thus potentially more inclusive than international litigation, an option only for states. It is also, in effect, a public interest process, not a bilateral one.

The inclusion of NCPs in a growing number of environmental treaties emphasizes the perceived importance of multilateral supervision by the parties in this context, while relatively weak dispute settlement clauses indicate the continuing opposition of some states to compulsory adjudication of environmental treaty disputes.[64] NCPs represent an important and potentially effective alternative to inter-state litigation,[65] but there is an inherent tension between these very different concepts of dispute settlement.[66] What is the relationship between these two approaches: are they complementary? Should we view litigation as an alternative means of promoting the public interest in treaty compliance—in effect another version of forum shopping? Or should one take precedence over and exclude resort to the other? If so, which should prevail?

Public interest litigation for environmental purposes is well established in many advanced legal systems, although not universally. It serves the instrumental purpose of enforcing the law when no-one is specifically injured and there is a public interest in protecting the environment. Responsibility for taking action in the public interest may rest primarily or exclusively with public authorities: in European Union law it is the European Commission's responsibility to ensure that member states comply with their environmental responsibilities,[67] and litigation by NGOs is discouraged by restrictive rules on standing.[68] At present the International Seabed Authority is the only other international body with power to sue member states, and only within its restricted field of competence over exploitation of the deep seabed and protection of the marine environment from seabed activities.[69] However, many national legal systems facilitate public interest litigation by NGOs and private parties when public authorities have either failed to act or lack the power or

[63] Notably the Aarhus Convention NCP. See A Epiney, 'The Role of NGOs in the Process of Ensuring Compliance with MEAs' in U Beyerlin, T Stoll and R Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements* (Martinus Nijhoff Publishers 2006) 319, and S Kravchenko, 'The Aarhus Convention and Innovations in Compliance with MEAs' (2007) 18 Colorado JIELP 1.

[64] One common provision is for negotiation followed by compulsory non-binding conciliation if agreement cannot be reached on any other means of settlement. See eg 1979 Convention on Long-range Transboundary Air Pollution, Art 9; 1985 Ozone Convention, Art 11; 1992 Convention on Climate Change, Art 14; 1992 Convention on Biological Diversity, Art 27; 1994 Convention to Combat Desertification, Art 28; 1994 Protocol on the Further Reduction of Sulphur Emissions, Art 9.

[65] See generally J Brunnée, M Doelle and L Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (CUP 2012); T Treves and others (eds), (n 62); U Beyerlin, T Stoll and R Wolfrum (eds), (n 63); M Fitzmaurice and C Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 NYIL 35; O Yoshida, 'Soft Enforcement of Treaties: The Montreal Non-Compliance Procedure and the Functions of the Internal International Institutions' (1999) 10 Colorado JIELP 95; E Brown Weiss and H Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Accords* (First MIT Press 1998); R Mitchell, 'Compliance Theory: Compliance, Effectiveness and Behaviour Change in International Environmental Law' in D Bodansky, J Brunnée and E Hey (eds), *Oxford Handbook of IEL* (OUP 2007) 893.

[66] See J Klabbers, 'Compliance Procedures' in D Bodansky, J Brunnée and E Hey (eds), ibid 996, 1000; Stephens (n 14) 10, 81.

[67] *Commission of the European Communities v Ireland* (2006) ECJ Case C-459/03.

[68] See *Stichting Greenpeace Council v EC Commission* (1998) ECR I-1651. But contrast the ECJ case law on access to *national* courts: see B Muller, 'Access to the Courts of Member States for NGOs in Environmental Matters under EU Law' (2011) 23 JEL 505.

[69] 1982 UNCLOS, Art 187(b)(i). The Authority is also able to sue contractors directly, as well as being competent to issue emergency orders in order to prevent, contain and minimize serious harm to the marine environment; 1982 UNCLOS, Arts 165(2)(k), 187(c)(ii).

resources to do so.[70] This more liberal version of the concept is promoted and facilitated by the Aarhus Convention insofar as NGOs are covered by the Convention's provisions on access to justice in national courts.[71]

At the international level, the ability of certain organs of the UN and other international organizations to seek advisory opinions from the ICJ (and in more limited circumstances from the ITLOS) gives these courts the opportunity to set out the law in general terms. The *Seabed Activities Advisory Opinion* provides the most comprehensive treatment of international environmental law by any international court or tribunal,[72] but the Seabed Dispute Chamber's ability to give such a ruling is entirely a function of the breadth of the questions posed by the International Seabed Authority.[73] Beyond articulating an authoritative restatement of the law, however, this case serves none of the other purposes usually associated with public interest litigation. Moreover, advisory opinions cannot be used to settle disputes between states or to adjudicate on non-compliance,[74] so they are not a law enforcement mechanism, nor can they be requested directly by states.[75] While there may be some merit in allowing individual states to request advisory opinions in certain circumstances,[76] that would require significant amendment to the ICJ and ITLOS Statutes. Whatever other uses they may have in their present form, it seems unconvincing to characterize advisory opinions as instruments of public interest law enforcement.

If the concept of public interest litigation is to have any real meaning in international environmental law it can therefore only come about through inter-state contentious litigation. International law recognizes the possibility that certain obligations have an *erga omnes* character in respect of which all states enjoy standing to bring claims.[77] Although Article 48(1)(b) of the ILC State Responsibility Articles avoids the term *erga omnes* it nevertheless acknowledges the existence of obligations owed to the 'international community as a whole'. How far environmental obligations fall into this category has never been addressed judicially, but the ILC Commentary gives examples

[70] See de Sadeleer/Roller/Dross, *Access to Justice in Environmental Matters*, Final Report, Doc ENVA.3/ETU/2002/0030, Pts I and II for Europe and for the rest of the world see Birnie, Boyle and Redgwell (n 9) 297.

[71] See 1998 Aarhus Convention, Arts 4(1)(a), 6 and 9; O Pedersen, 'European Environmental Human Rights' (2008) 21 Georgetown Int Env LR 73.

[72] French (n 18) 525. See also *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1996) ICJ Reports 226 (UNGA).

[73] For the text of the request, see ISBA Council Decision of 6 May 2010, Document ISBA/16/C/13. A similarly broad set of questions has recently been submitted to ITLOS by a Sub-Regional Fisheries Commission; see Press Release ITLOS/Press 190, 28 March 2013.

[74] *Western Sahara Advisory Opinion* (1975) ICJ Reports 12, paras 33–34; *Privileges and Immunities Advisory Opinion* (1989) ICJ Reports 177, para 27.

[75] ICJ Statute, Art 65.

[76] Eg to challenge the validity of the acts or decisions of international organizations and bodies such as the UNSC.

[77] *Barcelona Traction Case* (1970) ICJ Reports 3. See generally J Crawford, ILC Articles on State Responsibility, *1st Rept*, UN Doc A/CN4/490/Add.1 (1998) paras 69–71; C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005); M Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 1997); S Rosenne, 'Some Reflections Erga Omnes' in A Anghie and G Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International 1998) 509; B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours 293. Some authors are of the view, however, that not all states have standing to enforce erga omnes obligations; see eg Treves (n 62) 515.

which include protection of the marine environment.[78] Other multilateral treaties concerned with the protection of the global environment or of matters of common interest or concern, such as the World Heritage Convention, CITES and the Ozone Convention arguably fall into the same category. The terminology of 'common concern of mankind', found *inter alia* in the Climate Change and Biological Diversity Conventions,[79] certainly suggests that these two agreements are meant to create obligations whose intended beneficiaries are the international community of states as a whole. Several paragraphs of the ICRW preamble also lend support to the same idea.[80] All of these treaties present a comparable problem to the protection of human rights in that there might be no specially injured state entitled to hold other states responsible for a violation.

For any State wishing to resort to the ICJ or ITLOS as venues for public interest litigation, the critical issue is whether as a party it has standing to obtain an authoritative interpretation of the treaty, or a ruling on whether there has been a violation, regardless of whether its own rights are in dispute. Not all treaties and not all 'environmental' treaties will fall into this category, but the ICJ judgment in *Belgium v Senegal* provides clear authority for the proposition that all parties to *erga omnes* treaties have a collective and individual interest in their enforcement.[81] The Court noted that obligations under the Convention against Torture 'may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case',[82] and it concluded that:

> The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.[83]

The Court's focus on 'the common interest . . . of each State party' in ensuring compliance with *erga omnes* treaty obligations is what distinguishes this type of

[78] In that connection see 1982 UNCLOS Arts 192, 194(1) and 194(5). The 1974 *Nuclear Tests Cases* can be distinguished since the question of standing was not decided, and the cases were argued nearly 40 years ago, before the ILC Articles were drafted and before international environmental law had developed. See generally M Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 1997) 154.

[79] Birnie, Boyle and Redgwell (n 9) 128.

[80] 'Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks; . . . Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress . . . .' See the *Whaling Case*.

[81] *Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012) ICJ Reports, paras 68–70. See also Crawford, *ILC Articles on State Responsibility, Ist Report* (1998) UN Doc.A/CN.4/460, para 100; *SS Wimbledon,* PCIJ Ser A, No 1 (1923) 20, and C Gray, *Judicial Remedies in International Law* (OUP 1987) 211ff, but compare C Chinkin, *Third Parties in International Law* (OUP 1993) 282.

[82] *Belgium v Senegal*, para 68.

[83] ibid para 69. Some judges questioned the conclusions of the Court in this regard; see eg Separate Opinion of Judge Skotnikov and the Dissenting Opinion of Judge Xue.

case from advisory opinions, and from treaties where the obligations are merely reciprocal in character.[84] This is undoubtedly public interest litigation.

In these cases, any state party will thus have standing to invoke dispute settlement machinery without having to show that it is specially affected.[85] The *Whaling Case* initiated by Australia against Japan may be an example of public interest litigation of this kind in an environmental context[86]; no Australian rights are ostensibly in dispute and the case turns solely on interpretation of the object and purpose of the ICRW and whether Japanese special permit whaling is indeed carried out for scientific purposes.[87] As presented the case is about treaty compliance. In other treaties, this kind of issue might be referred to a NCP for a decision by the parties collectively, but no such procedure exists within the ICRW regime. When used in a treaty context it is not entirely clear that 'non-compliance' differs in any material sense from 'breach' or 'non-application'.[88] What is at issue is whether there has been a failure to meet the standard set by the treaty and at this level the distinction is merely terminological. What this case tells us is that international courts and treaty NCPs can serve the same purposes, even if the processes and mechanisms by which they do so differ radically.

That conclusion leaves open the possibility that States may choose to litigate bilaterally instead of pursuing an alternative multilateral non-compliance process. Should they be allowed to do so? Is there an argument for the judicial process deferring to the diplomatic, especially when the case is ostensibly one involving the public interest? The arguments are finely balanced, and they depend in part on what the purpose of NCPs is thought to be.[89] For those who see NCPs as a form of dispute avoidance, the underlying perception is that the scrutiny of other states in an inter-governmental forum may be more effective in securing a higher level of compliance than more confrontational methods involving litigation.[90] For those who characterize the preference for NCPs as 'managerialist'—in the sense that active management of compliance is required rather than enforcement[91]—the object is to create room for more flexible, negotiated, outcomes. It is possible for supervisory mechanisms to apply to this process experience and knowledge of the issues concerned. The treaty parties will usually seek to shape consensus on the issue in dispute, and the process is

[84] WTO agreements, for example, create a network of essentially bilateral trade relations: see 1994 GATT, Art XXIII and J Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 315.

[85] ILC, 2001 Articles on Sate Responsibility, commentary on Art 48, at paras (2) and (10).

[86] See comments by Judge Cançado Trindade, Separate Opinion, *Whaling Case, Declaration of Intervention by New Zealand*, Order of 6 February 2013, para 71: 'The [ICRW] concerns a matter of general or common interest, and is to be implemented collectively by States Parties, thus contributing to the public order of the oceans.' Earlier examples include the various phases of the 1974 *Nuclear Tests Cases*.

[87] However, the case is only concerned with Japan's Antarctic scientific whaling programme (JARPA II) and that takes place largely inside Australia's 200 mile Antarctic EEZ. Australia has not challenged Japanese scientific whaling in the North Pacific.

[88] See Fitzmaurice and Redgwell (n 65).

[89] See Klabbers (n 66) 1007.

[90] UNEP, *Study on Dispute Avoidance and Dispute Settlement in International Environmental Law*, UNEP/GC.20/INF/16 (1999).

[91] A Chayes, AH Chayes and R Mitchell, 'Managing Compliance: A Comparative Perspective' in E Brown Weiss and H Jacobson (eds), (n 63) 39. But for an important critique of this approach see J Brunnée, 'Multilateral Environmental Agreements and the Compliance Continuum' in G Winter (ed), *Multilevel Governance of Global Environmental Change* (CUP 2006) 387.

intended to reinforce the stability, transparency and legitimacy of the regime as a whole.[92] No court could achieve a comparably multilateral outcome.

Koskenniemi directs critical attention to what he regards as the essentially political character of NCPs and their potential for diluting the force of legal standards.[93] From this perspective, courts provide a better means for ensuring the rule of law. His criticism begs the question, however, whether maintaining normative coherence and strict adherence to law are more important than finding mechanisms that promote the object and purpose of the treaty and secure compliance with agreed commitments. If, as in the *Whaling Case*, the underlying dispute is ultimately about the future of a multilateral regulatory regime, it is not obvious that a judicial process involving only three of the treaty parties is the better way of answering the question.[94] A multilateral negotiating process would ensure that all parties agree on and are bound by any decision on what the treaty means and how it should be applied in future. In such circumstances, it will probably be wiser to invite the treaty parties collectively to decide on the construction of a Multilateral Environmental Agreement (MEA) than to take the matter to court.

These advantages might suggest that where resort to an NCP is possible, it should be used in preference to public interest litigation. Klabbers argues that that 'the non-compliance procedure finds its raison d'etre precisely in the attempts to defuse the adversarial or confrontational nature of dispute settlement, so why should it not be allowed to prevail?'[95] A court might then be invited to dismiss proceedings at the admissibility stage where there has been no attempt to settle the matter through the NCP. In this context, a parallel may be drawn with the ICJ's decision on jurisdiction in *Georgia v Russia*, where the case was dismissed because the parties had not negotiated first, as required by Article 22 of the Convention for the Elimination of Racial Discrimination (CERD).[96] Article 22 additionally prioritizes 'procedures expressly provided for in this Convention'.[97] This was interpreted by the Court as a precondition to jurisdiction over the dispute.[98] Although the Court dismissed the case because Georgia had not negotiated, it would seem to follow that it should also have dismissed the case if the Article 11-13 procedures had not been used. Article 281 of UNCLOS similarly requires parties to use any alternative dispute settlement procedures they have agreed and allows them to litigate only if those other procedures have not been successful. It seems quite likely that an appropriate NCP—if one existed—would meet the terms of Article 281.

The decision in *Georgia v Russia* turns on the wording of the dispute settlement clause in the CERD. We can observe at least one partly environmental treaty—UNCLOS[99]—adopting the same approach, but other environmental

[92] Chayes, Chayes and Mitchell (n 91) 43; Brunnée (n 91) 387.

[93] M Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 Ybk Int Env L 123.

[94] AV Lowe, 'The Function of Litigation in International Society' (2012) 61 ICLQ 209, 214. Having intervened in the case, New Zealand will be bound by whatever interpretation the Court chooses to endorse, but other parties to the treaty will not: ICJ Statute, Art 63(2).

[95] Klabbers (n 66) 1006.

[96] *Application of the CERD (Georgia v Russia)* (2011) ICJ Reports, paras 157–60. See also *Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012) ICJ Reports, paras 56–59, and 1982 UNCLOS Art 283.

[97] See ie the inter-state complaints procedure in Arts 11–13. Georgia did not invoke those procedures.

[98] *Georgia v Russia*, para 141.

[99] UNCLOS, Arts 281, 282.

treaties do not explicitly follow suit.[100] Ultimately the question may be one of policy, however. Should the legal system facilitate litigation even where other mechanisms serving the same purpose have been agreed and could be used? Or should it view international litigation as a last resort, to be invoked only when other options have been exhausted? Given the public interest context of this discussion, it seems difficult to argue convincingly that litigation should be preferred over a more multilateral and inclusive process (NCPs) whose outcome will satisfy all parties, at least to some degree.[101] This suggests that international litigation should thus be a last resort, available for public interest purposes in respect of *erga omnes* environmental obligations only when no other equally appropriate process is available or is likely to succeed. That conclusion would be consistent with the tendency of recent cases, and the rather clear indications provided by UNCLOS, but it would require a definite decision of the ICJ and ITLOS to move the present law in that direction.

5. *Participation in Public Interest Litigation*

Characterizing a case as being brought in the public interest not only has implications for who has standing to bring a claim. It may also affect who should be permitted to participate in the litigation as interveners or *amicus curiae*. If the purpose of public interest litigation is to protect collective values, one state cannot have a monopoly on representing the views of the international community. This was stressed by Judge Cançado Trindade in his Separate Opinion in the Order concerning the Declaration of Intervention by New Zealand in the *Whaling Case*, when he explained that 'intervention in legal proceedings, by providing additional elements to the Court for its consideration and reasoning, can contribute to the progressive development of international law itself, especially when matters of collective or common interest and collective guarantee are at stake'.[102]

Before the ICJ and the ITLOS, third parties may intervene as of right only if the interpretation or application of a treaty to which they are party is in question.[103] In this context, there is no need to demonstrate the existence of an individual interest in the case.[104] Intervention in such cases does not mean that the intervening state is a party to the proceedings. In the words of the ICJ, 'the limited object of the intervention is to allow a third State not party to the

[100] 1973 CITES, Art 28; 1980 Convention for the Conservation of Antarctic Marine Living Resources, Art 25; 1979 Convention on Long-range Transboundary Air Pollution, Art 9; 1985 Ozone Convention, Art 11; 1989 Basel Convention on the Regulation of Transboundary Movements of Hazardous Wastes, Art 20; 1991 Convention on Environmental Impact Assessment, Art 15; 1992 Convention on the Transboundary Effects of Industrial Accidents, Art 21; 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes, Art 22; 1992 Convention on Climate Change, Art 14; 1992 Convention on Biological Diversity, Art 27; 1995 Agreement on the Conservation of African-Eurasian Migratory Water Birds, Art 12; 1998 Aarhus Convention, Art 16.

[101] But for the contrary argument, based on the wording of the above provisions, see U Beyerlin and T Marauhn, *International Environmental Law* (Hart 2011) 386.

[102] Judge Cançado Trindade, Separate Opinion, *Whaling Case, Declaration of Intervention by New Zealand*, Order of 6 February 2013, para 76.

[103] Statute of the ICJ, Art 63; Statute of the ITLOS, Art 32. The WTO Agreement only permits intervention by a state with a 'substantial interest' in a dispute; Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures governing the Settlement of Disputes (DSU), Art 10.

[104] *Whaling Case, Declaration of Intervention by New Zealand*, Order of 6 February 2013, para 7.

proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention.'[105] New Zealand in the *Whaling Case* is the first state to have successfully relied on this provision.[106]

Yet, the *Whaling Case* also illustrates some of the problems that may arise from the participation of state interveners, particularly in relation to procedural fairness. Japan had argued that as New Zealand was intervening in support of Australia, the intervention affected the equality of the parties. This alleged unfairness arose from the fact that Australia had been permitted to appoint an ad hoc judge, whereas New Zealand already had a judge on the Court. Japan pointed out that if New Zealand was participating in the proceedings as a party alongside Australia, the two states would only have been permitted to nominate one judge.[107] The Court had little hesitation in dismissing these concerns, simply noting that, as New Zealand is only permitted to address the interpretation of the ICRW and not any other issues relating to the dispute, 'an intervention cannot affect the equality of the parties to the dispute.'[108] However, such a formalistic analysis, distinguishing interpretation and application of the law as two discrete processes, is possibly too simplistic, particularly if the arguments on interpretation advanced by New Zealand were to lead to a finding against Japan.[109] In any case, this issue demonstrates the challenges of managing multiple participants in adversarial proceedings.

In contrast to the situation before permanent international courts or tribunals, there are fewer opportunities for states to intervene in arbitral proceedings. However, this may depend on what rules govern the arbitration. There is no explicit rule that permits third-party intervention in the arbitral procedure in Annex VII of UNCLOS. In contrast, Article 84 of the 1907 Convention for the Pacific Settlement of International Disputes, relating to ad hoc arbitration under the auspices of the Permanent Court of Arbitration, provides that 'when it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time [and each] of these Powers is entitled to intervene in the case'.

It is not only interested states that may wish to participate in public interest litigation at the international level. If the purpose of intervention is to permit a court or tribunal to decide a case based upon all relevant information and arguments, it is also worth considering whether inter-governmental organizations (IGOs) and NGOs should be allowed to take part in litigation. In the case of IGOs, there are explicit provisions in the constituent instruments of the major international courts and tribunals that address this issue. For example, Article 34 of the ICJ Statute provides that 'The Court, subject to and in

[105] ibid.

[106] The Marshall Islands, Micronesia, Samoa, and the Solomon Islands tried unsuccessfully to intervene in the *Nuclear Tests Case* (1995) ICJ Reports on the ground that it concerned interpretation of the 1986 Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

[107] ICJ Statute, Art 31(6).

[108] *Whaling Case, Declaration of Intervention by New Zealand*, Order of 6 February 2013, at para 18.

[109] See Judge Owada, Separate Opinion, *Whaling Case, Declaration of Intervention by New Zealand*, Order of 6 February 2013, para 6.

conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative'.[110] This provision allows both the ICJ to request such information from organizations[111] and organizations to submit such information *proprio motu*.[112] Public international organizations are defined in the Rules of the Court as 'an international organization of States'.[113] While this would include all major IGOs, such as the UN and its specialized agencies, questions remain about the precise scope of the term and it is not clear whether it would cover organizations with a mixed membership of states and NGOs, such as the World Conservation Union (IUCN).[114] It is notable, however, that the IUCN was considered to be an IGO for the purposes of the advisory proceedings before the Seabed Disputes Chamber in the *Seabed Activities Advisory Opinion*, when it was permitted to submit information to the Chamber.[115]

It is not only IGOs that may be able to provide expertise and information to the settlement of a dispute concerning community interests. In the context of proceedings before treaty compliance bodies, it has been recognized that it is desirable to take advantage of NGOs' expertise on particular subjects.[116] Yet, there are often no explicit provisions which permit NGO participation in contentious proceedings. Of course, it is possible for information provided by NGOs to be included in the materials presented by states in their own submissions. This has been done in several cases, including the *Shrimp-Turtle*[117] and *Gabčíkovo-Nagymaros* cases.[118] But can an NGO independently submit factual information or legal arguments to an international court or tribunal seized with an inter-state dispute?

The statutes of the major international courts and tribunals would appear to provide little support for such a possibility. The definition of 'public international organization' as 'an organization of States' clearly excludes NGOs from the remit of Article 34 of the ICJ Statute. Even before the addition of this express definition to the ICJ Rules in 2005, the Court had taken a restrictive view on participation by NGOs, rejecting a request by the International League of the Rights of Man to participate in the *Asylum Case*

[110] Cf Art 66 of the ICJ Statute which would appear to permit a broader category of entities to provide information to the Court in advisory proceedings. However, see also Practice Direction XII which provides 'Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file'. Rather, such documentation is to be treated as publically available and it may be referred to by other states or public international organizations appearing in the advisory proceedings.

[111] Art 69(1) of the Rules of Court say that it is up to the Court to decide whether such information shall be presented orally or in writing.

[112] Such information may only be presented in writing in the form of a Memorial to be filed before the closure of written proceedings. However, the Court may request further participation of an organization at a later stage in the proceedings if it deems it appropriate; see Art 69(2) of the Rules of the Court.

[113] Art 69(4) of the Rules of Court.

[114] For a positive argument, see P-M Dupuy, 'Article 34' in A Zimmerman, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 548.

[115] See ITLOS Order 2010/3, 18 May 2010; *Seabed Activities Advisory Opinion*, paras 7, 11.

[116] See eg A Tanzi and C Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward' in T Treves and others (eds), (n 62) 577.

[117] *Shrimp – Turtle Case*, para 89.

[118] Y Ronen, 'Participation of Non-State Actors in ICJ Proceedings' (2012) 11 Law & PractInt'l L Courts & Trib 77, 84.

on the basis that it 'could not be characterized as [a] public international organization as envisaged by [the] Statute'.[119]

In contrast, other judicial bodies have in practice approached this issue pragmatically and allowed limited opportunities for NGOs to participate in proceedings. The WTO has in fact been the trail-blazer in this regard. In the *Shrimp-Turtle Case*, the Appellate Body drew attention to the wide power of WTO panels to 'seek information and technical advice from any individual or body' under Article 13 of the DSU.[120] The Appellate Body held that the authority conferred by this provision was sufficient to allow WTO panels to accept unsolicited amicus briefs from NGOs. It has been argued in the literature that the ICJ could also use its broad powers to collect evidence to accept unsolicited amicus briefs.[121]

An alternative justification for permitting unsolicited amicus briefs is the use of inherent judicial powers to control the proceedings.[122] In the *US – Lead and Bismuth* case, the WTO Appellate Body found that it had the authority to accept unsolicited amicus briefs, despite the fact that it did not possess an express power to seek information from independent parties.[123] The Appellate Body noted that neither the DSU nor the Appellate Working Procedures specifically permitted or prohibited the acceptance of amicus briefs. Taking the view that it had 'broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements',[124] the Appellate Body concluded that 'as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal'.[125] Given that the ICJ and the ITLOS also have broad powers to adopt their own rules of procedure and to make arrangements for the conduct of individual cases,[126] it is arguable that they could also accept amicus briefs from NGOs if they were of assistance in deciding a particular case.[127]

One argument against the acceptance of amicus briefs is that it may open the floodgates and impose an unsustainable burden on the court or tribunal.[128] However, experience at the WTO does not necessarily support this view. First, the Appellate Body has stressed that 'Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or

[119] See *Asylum Case*, Pleadings, Vol II, 228. See further Ronen (n 118) 83.

[120] Art 13(2) continues, 'panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter'.

[121] D Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 AJIL 611, 627.

[122] *Shrimp-Turtle Case*, para 107.

[123] Contrast the situation of WTO Panels whose power under Art 13 of the DSU to 'seek information and technical advice from any individual or body which it deems appropriate' has been interpreted to allow it to accept unsolicited amicus briefs from NGOs; *Shrimp-Turtle case*, para 107.

[124] *US – Lead and Bismuth* (2000) WTO Appellate Body (WT/DS138/AB/R), para 39.

[125] ibid.

[126] ICJ Statute, Arts 30 and 48; ITLOS Statute, Arts 16 and 27.

[127] Arguments to this end have been made before the Inter-American Court of Human Rights; see Shelton (n 121) 639.

[128] Ronen (n 118) 110.

organizations, not Members of the WTO'.[129] Indeed, it was stressed that any possible delay to the process was a factor to be taken into account in deciding whether to accept unsolicited information.[130]

A court or tribunal can of course adopt procedures to manage *amicus curiae* applications and to minimize the burden on the judges and the parties. Thus, in *EC – Asbestos*, the Appellate Body established a mechanism to deal with written submissions received from persons other than the parties and third parties to that dispute. Thereunder, anyone wishing to file a written brief with the Appellate Body had to apply for leave to file such a brief, specifying their interest in the proceedings and the way in which they could make a contribution to the resolution of the dispute that was not likely to be repetitive of what would been submitted by the parties.[131] This demonstrates that courts and tribunals can play a screening function to avoid 'opening the floodgates to participation by every individual and association interested in the proceedings'.[132] Moreover, being authorized to submit an amicus brief does not guarantee that it will be taken into account by the court or tribunal. Although the WTO jurisprudence suggests that amicus briefs are in principle acceptable, they are only rarely cited by the WTO dispute settlement organs in their reasoning.[133]

The reluctance of international courts and tribunals to consider *amicus curiae* briefs from NGOs may also stem from the view of their function in international dispute settlement. In relation to the ICJ, one commentator has explained that 'the Court's traditional stance [is] that it should limit itself to the evidence placed before it by the parties',[134] which is in turn a reflection of 'the Court's narrow reading of its role as confined strictly to umpiring the relative performances of the parties rather than to meting out justice between them'.[135] Such an approach may be appropriate in bilateral disputes. However, it is arguable that public interest litigation requires a change of mind-set, including a more liberal approach to the participation of *amicus curiae*, subject to the types of controls that have been discussed above.

6. *Do we Need Special Procedures for Evidence in Environmental Disputes?*

A common challenge faced by courts and tribunals in environmental disputes is the need to deal with scientific evidence relating to the existence of environmental harm or a threat of environmental harm. Thus, in cases concerning

[129] *US – Lead and Bismuth*, para 41.
[130] *Shrimp – Turtle Case*, paras 107–8.
[131] *EC – Asbestos*, para 52.
[132] Shelton (n 121) 624.
[133] *Shrimp – Turtle (Recourse to Article 21.5 by Malaysia)* (2001) WTO Appellate Body (WT/DS58/AB/RW), para 78; *US – Lead and Bismuth*, para 42; *Thailand – H Beams* (2001) WTO Appellate Body (WT/DS122/AB/R), para 78; *EC – Asbestos*, para 56; *EC – Sardines* (2002) WTO Appellate Body (WT/DS231/AB/R) para 160; *US – Soft Wood Lumber* (2004) WTO Appellate Body (WT/DS257/AB/R) para 9; *US – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012) WTO Appellate Body (WT/DS381/AB/R), para 8.
[134] Ronen (n 118) 81.
[135] ibid 85.

alleged pollution, it will be necessary for the claimant to prove that pollution has occurred and that the respondent did indeed cause it. Likewise, in cases where the risk of environmental harm must be weighed against other values, it will be necessary to demonstrate that the risk really does exist. It must be appreciated that it is not necessarily the role of the court or tribunal to establish whether or not there has been environmental harm. Rather, the court or tribunal is required to determine whether the claims made by the parties are supported by sufficient evidence. There are a number of issues and problems that may arise for courts and tribunals in carrying out that task.

First, it is necessary to determine which party has to prove the existence of certain facts. This is a relatively straightforward issue. The ICJ in the *Pulp Mills Case* made clear that the burden of proof was on the party asserting certain facts to establish their existence,[136] and this principle has been consistently applied by the Court and by other international courts and tribunals.[137] The significance of the *Pulp Mills Case*, however, is that the ICJ confirmed that in environmental disputes this general principle is not displaced by the so-called precautionary approach. Thus, the Court held that 'while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof'.[138] Whether or not there are scenarios in which the burden of proof should be reversed as a result of a precautionary approach is nevertheless still debated in the literature and some authors argue that the issue should be addressed on a case-by-case basis.[139] Much will depend on the wording of the treaty in question.[140]

Determining the standard of proof in international litigation is beset by differences of view among judges from different legal traditions, and it is not proposed to debate this complicated problem here.[141] As noted by Judge Greenwood in his Separate Opinion in the *Pulp Mills Case*, the standard of proof can vary from case-to-case depending upon the particular context and the allegations being made.[142] He held that for the purposes of that case the Court should accept the balance of probabilities as the standard of proof because, *inter alia*, 'the nature of environmental disputes is such that the application of the higher standard of proof would have the effect of making it all but impossible for a State to discharge the burden of proof.'[143] This appears to be the standard which the ICJ and ITLOS have applied in provisional

[136] *Pulp Mills Case*, para 162.

[137] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (2007) ICJ Reports 75, para 204: 'On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it . . .'; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (1984) ICJ Reports 437, para 101: 'it is the litigant seeking to establish a fact who bears the burden of proving it.'

[138] *Pulp Mills Case*, para 164.

[139] See eg C Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (CUP 2011) 240.

[140] Birnie, Boyle and Redgwell (n 9) 158.

[141] See A Riddell and B Plant, *Evidence Before the International Court of Justice* (BIICL 2009) 123ff; C Brown, *A Common Law of International Adjudication* (OUP 2007) 90; M Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Kluwer Law International 1996).

[142] See *Pulp Mills Case*, Separate Opinion of Judge Greenwood, paras 25–26. See also Judge Higgins' Separate Opinion in the *Oil Platforms Case* (2003) ICJ Reports 234, paras 30–34.

[143] ibid para 26.

measures cases, where decisions have been reached even when doubts have existed about the evidence.[144] Thus in the *Southern Bluefin Tuna (Provisional Measures) Cases* the ITLOS concluded that it 'cannot conclusively assess the scientific evidence presented by the parties',[145] but then went on to order that 'measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock'.[146] This seems to suggest a decision based on the balance of probabilities.[147]

Neither the ICJ nor the ITLOS has addressed the standard of proof in environmental cases. In maritime boundary cases, the scientific or technical evidence may be uncontroversial and the court will simply accept it if relevant.[148] The point has never quite arisen in environmental cases, but it should remain true in that context.[149] A great deal of contested scientific and technical evidence was submitted in the *Gabčíkovo-Nagymaros Case*, but the Court made relatively limited use of it, preferring instead to emphasize the importance of cooperation between the parties in managing environmental risks.[150] Both sides also made extensive use of technical reports in the *Pulp Mills Case*, and here the Court appears to have taken full account of the evidence submitted by the parties and made its own assessment.[151] Of particular relevance were the reports from Uruguay's water agency charged with monitoring water quality in the river. Argentina's own scientific report confirmed most of the Uruguayan findings. In the Court's assessment of the evidence Argentina had either not submitted any evidence on certain points,[152] or had failed to provide 'clear', 'convincing', 'conclusive' or 'sufficient' evidence of any contravention of the agreed water quality standards or of any of the other provisions of the Statute.[153] In a few instances, the Court found that on the evidence before it, Uruguay had complied with water quality or effluent discharge standards,[154] or that the evidence did not substantiate

[144] See R Wolfrum, 'Taking and Assessing Evidence in International Adjudication' in T Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law, and Settlement of Disputes* (Martinus Nijhoff Publishers 2007) 342.

[145] (1999) ITLOS Nos 3&4, para 80.

[146] ibid para 80.

[147] Compare the *Mox Plant (Provisional Measures) Case,* paras 72–81, and the *Pulp Mills (Provisional Measures) Case,* paras 47, 75–76, where the evidence was insufficient to persuade the ITLOS and the ICJ respectively of a serious threat of pollution.

[148] See eg *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh v Myanmar*) (2011) ITLOS, para 446: 'In view of uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings, the Tribunal is satisfied that there is a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm.'

[149] In the *Behring Sea Fur Seals Arbitration* (1898) 1 *Moore's Int Arbitration Awards* 755, reproduced in (1999) 1 Int Env L Reps the parties agreed on the facts, and the tribunal accepted this evidence, but there appears to have been no expert evidence.

[150] *Gabčíkovo-Nagymaros Case*, para 140: 'It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties - even if their conclusions are often contradictory - provide abundant evidence that this impact and these implications are considerable.'

[151] *Pulp Mills Case*, para 168: 'Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.' See also para 236: 'in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants . . . .'

[152] ibid paras 180, 225.

[153] ibid paras 225, 228, 254, 259, 262, 264, 265.

[154] ibid para 243.

Argentina's claims.[155] Almost all of these statements suggest a standard of proof higher than the balance of probabilities to which Judge Greenwood refers. Indeed the words 'clear' and 'convincing' are taken straight from the *Trail Smelter Arbitration*, an award long criticized for setting too high a standard of proof in environmental cases.[156] Given the subsequent acceptance of the precautionary approach, which explicitly invites states to take action notwithstanding scientific uncertainty in cases where there is a risk of serious or irreversible environmental harm,[157] the terminology used by the Court in *Pulp Mills* is potentially retrogressive. The best view of *Pulp Mills* on this point may be that Argentina would have lost on the evidence whatever the standard of proof,[158] and that the Court had no need to decide what standard to apply. Other cases may not be so easily decided, however, so the question of what standard of proof applies in environmental cases will not go away. Setting the standard too high is especially problematic when it is the risk of harm, rather than harm itself, that has to be proved. There is no point saying that States have an obligation of due diligence to take preventive measures, but only if there is clear and convincing proof of harm. Countering that view is precisely the reason for adopting the precautionary approach: without lowering the standard of proof nothing would have been done about ozone depletion, a problem which was far from convincingly established when the Ozone Convention was agreed in 1985.[159] The WTO correctly appreciates that point[160]; it remains uncertain whether the ICJ does.

Indeed, in environmental cases brought under human rights treaties, courts appear willing to accept a lower standard of proof. Although the ECtHR has stated that it requires evidence to be shown 'beyond reasonable doubt',[161] it must be wondered whether this is really what the ECtHR has done in practice. Rather, the ECtHR has explicitly said that 'such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact, and it has been the Court's practice to allow flexibility in that respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved'.[162] Thus, in *Dubetska and others v Ukraine*, the Court accepted that it was unable to establish quantifiable harm to the applicants, but it nevertheless agreed that living in an area marked by pollution in excess of minimum standards meant that the

[155] ibid para 257.

[156] *Trail Smelter Arbitration* (1941) 35 AJIL 684, 716. See J Read, 'The Trail Smelter Dispute' (1963) 1 Can Ybk IL 213; A Rubin, 'Pollution by Analogy: The Trail Smelter Arbitration' (1971) 50 Oregon LR 259; G Handl, 'Territorial Sovereignty and the Problem of Transnational Pollution' (1975) 69 AJIL 50.

[157] The 1992 Rio Declaration on Environment and Development, Principle 15, provides: 'In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' See also *Seabed Activities AO* (2011), para 131, which rightly treats the precautionary principle as 'an integral part of the general obligation of due diligence'.

[158] Even Judge Greenwood found that Argentina had failed to establish its case on a balance of probabilities, *sep op*, para 26.

[159] See the discussion of air pollution, ozone depletion and climate change in Birnie, Boyle and Redgwell (n 9) Ch 6.

[160] *Beef Hormones Case*, paras 120–25.

[161] *Fadeyeva v Russia* (2005) ECtHR, para 79.

[162] *Atanoasov v Bulgaria* (2010) ECtHR, para 75.

applicants had been unnecessarily exposed to increased health risks.[163] This willingness to accept circumstantial evidence may relate to the fact that individual claimants in human rights cases may not have the resources to carry out time-consuming and complex evidence collection. Moreover, the fact that human rights are at issue may itself suggest a slight easing of the requirements for scientific proof of causation. Nevertheless, the burden of proof remains on the claimant who must advance some evidence of harm linked to a breach of their rights. For example, in *Ivan Atanoasov v Bulgaria*, the applicant's case was dismissed partly because he was unable to prove any health detriments to himself or his family.[164]

Whether a court or tribunal should rely solely upon evidence presented by the parties in these types of cases is also an important issue in the litigation. As noted by one author, 'for an international court or tribunal, the evolution of a very large volume of partisan evidence will always be a challenge. The court must sift out the scientific issues, assess the quality and reliability of the evidence relevant to each issue and seek to reach findings accurately reflecting the state of current scientific knowledge.'[165] In carrying out this task, there are a number of different options available to a judicial body.

First, international courts and tribunals normally pay particular attention to reports and findings of international bodies drawn to their attention by a party or by the requesting organization in advisory proceedings.[166] The point about this evidence is that it comes from sources independent of the parties. In the *Aerial Spraying Case*, some of the evidence came from reports by UN special rapporteurs appointed to examine conditions in the Ecuador-Colombia border area. In the *Pulp Mills Case*, the evidence included two EIA reports on the plant commissioned by the International Finance Corporation, the principal funding body for the development. In the *Whaling Case*, the Court was referred to reports of the IWC Scientific Committee. As the ICJ noted in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 'evidence obtained' by independent persons 'experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention'.[167] Contesting the conclusions of such reports is likely to be difficult,[168] and for that reason they represent particularly cogent evidence.

Secondly, in environmental cases there will almost always be an important role for scientific and technical expertise presented by the parties.[169] Given the nature of these cases that is inevitable and desirable, but party appointed experts will usually give evidence that is as far as possible favourable to their

[163] *Dubetska and others v Ukraine* (2011) ECtHR, paras 106–8.
[164] *Atanoasov v Bulgaria*, para 76.
[165] Foster (n 139) 80.
[166] Riddell and Plant (n 141) 237, 364; K Del Mar, 'Weight of Evidence Generated through Intra-Institutional Fact-Finding before the ICJ' (2011) 2 JIDS 393.
[167] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Reports 168, para 61. The report under consideration was the report of the Porter Commission, which examined persons involved in the actions at issue in the case.
[168] Although not impossible: see *Kosovo Advisory Opinion* (2010) ICJ Reports, para 52.
[169] The *Gabčíkovo-Nagymaros Case*, *Mox Plant Case*, *Pulp Mills Case*, *Aerial Spraying Case*, and *Whaling Case* all involved experts submitting reports on behalf of the parties, giving oral evidence or acting as advocates.

own side.[170] The court then has to decide which experts it finds more credible. The problem is made more difficult if these experts present their views as counsel, in which case they are not subject to cross-examination, but may lack credibility. The more credible option is for expert witnesses to give oral evidence in open court, in which case they may be cross-examined by the other side. The latter process is modelled on common law trials; it is not inquisitorial. In the *Pulp Mills Case*, the ICJ expressed concern about the use of experts as counsel, saying that it considered 'those persons who provide evidence before the Court based upon their scientific and technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court'.[171] This suggests that the Court will discourage the use of experts as counsel in the future, which represents a significant change of practice for a court that had previously discouraged expert witness evidence during oral hearings.[172] At the same time, it must be noted that, unlike common law trials, there are usually time-limits imposed on the cross-examination of witnesses in international litigation, which may impede a full exploration of the issues.[173] Moreover, while the practice of using experts as counsel was inappropriate in *Pulp Mills*, it does not follow that it is never appropriate. There are other cases where experts have been used as counsel without objection or complaint and have assisted the court to understand complex technical issues, such as seabed geology.[174] Much may depend therefore on whether the expert is giving evidence that is likely to be contested by the other side, or whether the role of the party's expert is to assist the court to understand the issues rather than to prove a case.

A third mechanism available to a court or tribunal is the appointment of its own experts to assist in the evaluation of the evidence.[175] The Court was criticized for not doing so in the *Gabčíkovo-Nagymaros Case*,[176] although given its conclusion that the parties should negotiate, taking into account the environmental consequences, technical expertise was evidently not considered relevant to the outcome of the case. In the *Pulp Mills Case*, there was some disagreement among the judges about the propriety of relying solely upon the evidence produced by the parties themselves. Judges Simma and Al-Khasawneh in their joint dissenting opinion argued that 'the Court has evaluated the scientific evidence brought before it by the Parties in ways that we consider flawed methodologically'.[177] They suggested that 'the Court on its

[170] But not always: in the *Pulp Mills Case*, the scientific report presented by Argentina immediately before the hearings opened largely confirmed Uruguay's own expert evidence.

[171] *Pulp Mills Case*, para 167. Judges Simma and Al-Khasawneh went further, saying that 'we are not convinced by the claim that, in a case like the present one, scientific expertise can satisfactorily be supplied, and acted upon by the Court, by experts acting as counsel on behalf of the Parties under Article 43 of the Statute'; Joint Dissenting Opinion, para 6. See also the Separate Opinion of Judge Greenwood, para 27.

[172] In the *Whaling Case* and the *Aerial Spraying Case* the Court authorized the parties' experts to submit brief written and oral statements which would then be subject to cross-examination in court.

[173] See Foster (n 139) 92.

[174] See eg *Bangladesh v Myanmar* oral hearings (ITLOS, 2011)(Dr Lindsay Parsons); *Chile v Peru* oral hearings (ICJ, 2012)(Dr Robin Cleverly).

[175] ICJ Statute, Art 50; 1982 UNCLOS, Art 289.

[176] P Okawa, 'Environmental Dispute Settlement: Some Reflections on Recent Developments' in MD Evans (ed), *Remedies in International Law* (Hart 1998) 157, 167.

[177] *Pulp Mills Case*, Joint Dissenting Opinion of Judges Simma and Al-Khasawneh, para 2.

own is not in a position to assess and weigh complex scientific evidence of the type presented by the Parties',[178] and they advocated the appointment of experts by the Court under Article 50 of the ICJ Statute.[179] Judges Greenwood and Keith disagreed. In their view, the Court's task was to make its own judgment on the evidence and they had no difficulty doing so.[180] Both of these judges are experienced litigators before common law courts whose judges are used to assessing complex technical evidence, so their endorsement of the same approach is unsurprising. Neither is it any surprise that Judges Simma and Al-Kasawneh, from a very different background, took a different view. Evidently most of the Court agreed with Greenwood and Keith, and given the nature of the evidence[181] this seems the right approach to have taken in the circumstances of the case.

One of the dangers of relying on party-appointed experts is that examination and cross-examination can create further doubts about the evidence. For this reason, Foster has suggested that 'it may be more useful to introduce a procedure that also contains a strong investigative element, rather than relying solely on the process of examination and the complementary, usually deconstructive, process of cross-examination. An investigative procedure led by the court or tribunal, or a process where the experts are brought together for discussion before the court or tribunal, may better enable the court or tribunal to build up a solid and coherent understanding of the science'.[182] It is not the purpose of the current article to enter into a discussion of the most appropriate approach in any particular case, but there are various alternative models. For example, the WTO dispute settlement organs have developed sophisticated procedures for the appointment of independent experts and the collection and examination of scientific evidence. In doing so, they have also grappled with substantive questions of what constitutes sound scientific evidence,[183] and the requirements of due process for the appointment of independent experts.[184] Judges Simma and Al-Khasawneh expressly drew upon examples from the WTO and arbitral proceedings in their joint dissenting opinion in the *Pulp Mills Case* as inspiration for the way in which the ICJ could deal with similar challenges.

While independent experts may be able to assist courts and tribunals in fulfilling their fact-finding functions, there are also dangers in this approach. For a court to rely on experts of its own risks handing the decision over to those experts, and it is far from clear that states—or the Court—would or should be willing to take that risk.[185] It may be wiser to appoint experts as assessors who will sit and deliberate with the court.[186] The use of independent

[178] ibid para 4.
[179] ibid para 8.
[180] See in particular Judge Keith, paras 8–13, with whom Judge Greenwood agreed.
[181] Argentina did not contest the water quality monitoring data which showed that the plant's effluent emissions were within agreed limits set by the river commission (CARU).
[182] Foster (n 139) 101.
[183] *Australia – Apples from New Zealand* (2010) WTO Appellate Body (WT/DS367/AB/R), paras 220–21.
[184] *US – Continued Suspension of Obligations* (2008) WTO Appellate Body (WT/DS320/AB/R), para 436; see also *Beef Hormones Case*, para 148.
[185] Riddell and Plant (n 141) 334.
[186] ICJ Statute, Art 30; 1982 UNCLOS, Art 289. In the *Kishenganga Arbitration*, Partial Award, PCA 2013, one of the seven arbitrators was a scientist appointed for his directly relevant expertise in hydrology. The others

experts also has the potential to change the nature of the proceedings, from an adversarial contest where one party bears the burden of proving the facts underpinning its claim, to an investigative process where the court or tribunal is concerned with establishing the facts. The WTO Appellate Body has warned panels against using their fact-finding authority to find in favour of a complainant that had not itself established a *prima facie* case.[187] Such a procedure should, in their view, only be used to understand and evaluate the credibility of evidence submitted by the parties.

The oldest environmental precedent for the use of independent experts, however, is the *Trail Smelter Arbitration*, where scientists appointed by the arbitrators demonstrated that pollutants from the smelter had caused damage in the United States, and that technical measures could be adopted to eliminate their transboundary flux.[188] The ICJ rarely appoints experts,[189] and *Corfu Channel* remains the main example, but again the expert conclusions were decisive in establishing the key facts.[190] Unlike the WTO practice referred to above, in both of these cases the expert's role was to provide the court with vital evidence of facts otherwise within the territorial control of the respondent state, a situation which will typify many environmental cases, but unlikely to be relevant in WTO disputes. In both cases, the experts visited the relevant locations and were able to provide evidence the applicant State could not lawfully have obtained. Without this evidence the applicant's case could not have been proved. These are old precedents that might not be followed now, but it is hard to argue with an approach which clearly establishes the facts and settles the dispute. It may be that the WTO precedents are not inconsistent with these decisions, if we assume that before a court or tribunal orders the appointment of experts it will necessarily have concluded that the applicant already has a *prima facie* case. If so, then even the WTO practice would have supported the use of experts in *Trail Smelter* and *Corfu Channel*. Once again, however, the jurisprudence leaves the right way to handle these issues in some doubt.

7. *Conclusions: Is There a Better Way?*

Muddling through might be one way to describe the present state of international environmental litigation. The problems are easier to describe

were all international lawyers. The ICJ's practice of consulting '*experts phantômes*' is viewed with some doubt by parties. See Riddell and Plant (n 141) 334.

[187] *Japan – Agricultural Products* (1999) WTO Appellate Body (WT/DS76/AB/R), paras 129–30. See also the view of the WTO Panel in *EC – Asbestos* where it says 'information provided by the experts consulted by the Panel . . . can under no circumstances be used by a panel to rule in favour of a party which has not established a prima facie case based on specific legal claims or pleas asserted by it'. ((2000) WTO Panel (WT/DS135/R), para 8.81).

[188] See n 24 above.

[189] For a review of the Court's limited practice see Judge Keith's separate opinion in the *Pulp Mills Case*, and G White, 'The Use of Experts by the International Court of Justice' in V Lowe and M Fitzmaurice (eds) (n 14) 528.

[190] *Corfu Channel Case* (1949) ICJ Reports 4, 20–22, where it is seems that the experts provided evidence requested by the court. Contrast the use of expert evidence at 9, 14 and 16, where it merely confirms or rebuts the UK's evidence.

than the answers. It is apparent that environmental litigation encounters difficulties that make it different from many other cases in the ICJ or the ITLOS. In many of these cases, jurisdictional problems are considerable and the solutions far from obvious. Even public interest environmental litigation, a widely accepted concept in other legal systems, becomes more questionable when replicated in an environmental context, where there are often alternative forms of dispute resolution available. When it comes to evidence and proof all the systems examined here accept that environmental cases are to some degree special. That is true whether we look at human rights, WTO law, or interstate environmental cases in the ICJ, ITLOS or PCA. What we currently lack, however, is clarity about the best way to handle fact finding and scientific evidence in environmental cases.

Is the answer to these problems the creation of a specialist international environmental court? The idea receives little support in academic writing, and appeals only to activists.[191] It begs the question, which was considered in Section 2, of how to define an environmental dispute. If one party then disagreed on the characterization of the case, jurisdictional objections would inevitably follow. Yet it is also apparent that the proliferation of international courts and tribunals has not been the disaster feared by some commentators in the 1990s. Few would suggest now that the coherence of international law has been seriously threatened by the WTO Dispute Settlement Body, the ITLOS, the various international criminal courts and tribunals, or regional human right courts. It is thus difficult to oppose on principle the creation of new international courts. The question is more a pragmatic one: do we need such a court for environmental cases and would it do a better job than the existing eclectic structure whereby interstate environmental disputes can go to the ICJ, the ITLOS, arbitration or the WTO? The reasons for scepticism remain as valid now as they have always been, and despite the problems examined here, the existing structure of international courts has much to commend it, including the expertise and authority of the judges, an established reputation, and the ability to look at the law as a coherent whole.

Nor is the view that there should be a specialist environmental court, similar to ITLOS, borne out by experience or by any pressing need for an alternative forum.[192] Specialist tribunals are most useful when they have a special body of law to apply, usually a treaty such as the European Convention on Human Rights, UNCLOS or the WTO covered agreements. There is a case for such courts, not only because of their specialist expertise and procedures, but also because they relieve the ICJ of a burden of litigation it could not sustain. But as we saw when attempting to define an environmental dispute, international environmental law is not a distinct, codified system of this kind. Settling inter-state environmental disputes requires a wide-ranging grasp of international law as a whole; it is not a specialism which can readily be detached for the

[191] The arguments and the literature are reviewed by O Pedersen, 'An International Court and International Legalism' (2012) 24 JEL 547.

[192] See Stephens (n 14) 60; Hey (n 15). For a more positive view compare J Pauwelyn, 'Judicial Mechanisms: Is there a need for a World Environmental Court' in B Chambers and J Green (eds), *Reforming International Environmental Governance: from Institutional Limits to Innovative Reforms* (United Nations University 2005) 150.

purposes of litigation. The judges of such a court would be no different in their professional formation from those who currently staff the ICJ or ITLOS. Creating an environmental court might give environmental disputes more prominence, but it does not follow that its judges could give the environment more prominence. Judges apply the law, and existing international law is strongly focused on sustainable development with its emphasis on integrating economic development and environmental protection.[193] Even if we might like to change that balance, doing so is a political matter, for negotiation, not one for courts, however creative. A specialist court could do more to protect the global public interest in the environment only if it were given more power to do so, and its creation would make even more acute the question of its relation to various NCPs whose present constitution makes them arguably better suited for this role.

Rather than go down this route, it seems better to identify less radical changes that would make the present ad hoc system a better vehicle for the settlement of environmental disputes. To some degree, that is already happening. The ICJ has changed its approach to handling disputed evidence since the *Pulp Mills Case*, and subsequent environmental cases have been structured on the basis that experts will give evidence in writing and orally, and will be subject to cross-examination. Although there are legitimate criticisms of the way international courts have handled scientific and technical evidence, these developments suggest that the problems can be addressed within the existing system. In any case, even if we did have an international environmental court, the same questions would still have to be answered. The Permanent Court of Arbitration has also shown that it is possible to adapt existing procedures to reflect the particular characteristics of environmental disputes by allowing, *inter alia*, for expedited procedures, participation of non-state entities, and assistance from scientific experts.[194] The UN Compensation Commission's awards on environmental damage have demonstrated the value of combining specialist legal and valuation expertise when assessing claims for compensation,[195] and such a facility could be very useful in environmental damage cases. If the ICJ or ITLOS wishes to draw upon some of these precedents they have ample power under their Statutes to do so.

It should also be possible to deal more effectively with the problems of jurisdiction and applicable law referred to above. What might help is a protocol reforming the present haphazard provision for dispute settlement in environmental treaties. Most of these already permit the parties to take questions of interpretation or application of that treaty to the ICJ or to arbitration. Ideally such a protocol would of course make provision for compulsory jurisdiction, like the WTO Agreement or UNCLOS, but, whether judicial settlement or arbitration are pursued by compulsion or by agreement, what is needed is the ability to do so in a form that allows applicant states to join claims under

[193] See 1992 Rio Declaration on Environment and Development; UNGA Resolution 47/191 (1992); *Gabčíkovo-Nagymaros Case*, para 140 and *Pulp Mills Case*, paras 170–77, 183–85.

[194] 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources or the Environment and see the *Iron Rhine Arbitration* (2005) PCA.

[195] P Sand, 'Compensation for Environmental Damage from the 1991 Gulf War' (2005) 35 Env Pol & Law 244.

multiple treaties, and against multiple parties, in a single case. That should enable applicants more easily to formulate a case under all of the applicable treaties and rules of customary international law, and to present it to a court in a coherent and more manageable form. There may be something to learn in this respect from the WTO Dispute Settlement Understanding, which has created a unified system capable of consolidating in one procedure a dispute arising under several covered agreements.[196] Thus, although the case for creating a new environmental court is not convincing, there is significant scope for cross-fertilization in procedural innovations, similar to that taking place between courts and tribunals on substantive rules of international environmental law.

[196] 1994 Agreement Establishing the World Trade Organization, Annex 2. The 'single undertaking'—in which all parties accepted a single package deal—makes a unified dispute settlement system possible, but it did not otherwise deal with the resolution of conflicts between different covered agreements: see C Chase, 'Norm Conflict Between WTO Covered Agreements – Real, Apparent, or Avoided?' (2012) 61 ICLQ 791; Pauwelyn (n 84) 24.

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Compliance with European Environmental Law—Deficiencies and Approaches: The Role of the Court of Justice of the European Union

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Abstract
The article discusses the contribution of the ECJ to the reduction of compliance deficiencies with regard to European environmental law. The Court is not a specialised environmental court but the supreme court of the European multilevel legal system. Therefore its contribution is primarily characterised by a concern for effective and uniform application of EU law in general while specific environmental considerations do not figure as prominently.

Keywords
Compliance deficiencies, Court of Justice of the European Union, absence of specialisation, effective and uniform application of EU law, court procedures

1. Introduction

Compliance—deficiencies and approaches. The topic implies an investigation of compliance deficiencies and a discussion of approaches to remedy these in the best way. But, though the compliance deficit is a well-known topic of the discourse on environmental law and it has been studied and debated in significant depth, there does not seem to be a comprehensive body of data on

*) The content of this paper reflects exclusively the personal position of the author.

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non-compliance.[1] We neither know the extent of non-compliance nor the relevance of different types of non-compliance. There could be a lot of non-compliance or very little. And its impact on the state of the environment remains in the dark, in particular if the resilience of the environmental systems concerned has not yet been sufficiently studied and taken into account. In fact, it is disputed that EU law suffers a serious compliance deficit.[2] Even if we nevertheless assume that compliance with EU environmental law is insufficient, we do not know which approaches to non-compliance are most effective.[3]

One can study statistics from the Commission[4] and the Court[5] but they will only provide a very fragmentary insight into non-compliance. More evidence may be gathered by Member State authorities and NGOs,[6] by reviewing existing legislation, either in the context of reporting obligations laid down in the specific acts or by doing "fitness checks" of certain policy sectors,[7] or in consultations on new legislative proposals—e.g. in the context of white papers, green papers or impact assessments. However, by its very nature non-compliance will resist exhaustive exploration because rules will mostly not be broken in the open.

Therefore, this contribution will not apply the empirical method implied by the title but rely on general principles and assumptions. Moreover, it will be focussed on a very limited area that is well documented: the jurisprudence

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1) *Somsen*, Current Issues of Implementation, Compliance and Enforcement of EC Environmental Law, Liber amicorum Gerd Winter (2003), p 417 (418 et seq.), *Krämer*, Umsetzung und Vollzug des Umweltrechts, Gedenkschrift/Liber amicorum Betty Gebers, (2006), p 145 (149), *Demmke*, New Trends in Implementing and Enforcing European Environmental Law, 3 The Yearbook Of European Environmental Law 329 (333 et seq.) (T.F.M. Etty & H. Somsen, eds., Oxford University Press 2004).

2) *Börzel*, Non-Compliance in the European Union. Pathology or Statistical Artifact?, Robert Schuman Centre Working Paper No. 2001/28.

3) *Demmke*, *supra* n. 1, at 352 et seq., suggests the verification of effectiveness, also see *Krämer*, European Environmental Law, Innovative, Integrative—But Also Effective?, in Demaret et al., 30 Years of European Legal Studies at the College of Europe (2005), p 341 (343).

4) See the Annual reports on national implementation of EU law, currently at http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.

5) See the Annual Report, currently at http://curia.europa.eu/jcms/jcms/Jo2_7000/.

6) An interesting survey on compliance with certain climate protection measures has been published by *Ziehm*, Vollzugsdefizite im Bereich des Klimaschutzrechts, Zeitschrift für Umweltrecht 2010, 411 et seq.

7) See the Commission's note at http://ec.europa.eu/dgs/secretariat_general/evaluation/docs/fitness_check_en.pdf.

of the Court of Justice of the European Union. It highlights certain approaches to deficient compliance with European environmental law. These approaches mostly are characterised by the fact that the Court first and foremost is the supreme court of the EU multilevel legal system but not a specialised environmental court. Therefore the Court contributes very effectively to certain areas, has difficulties with others and should not be expected to exhaustively address all issues of non-compliance.

2. Facts, Principles and Assumptions Relating to Compliance Deficiencies

There are reasons to believe that compliance deficiencies with regard to European environmental law need to be addressed.

The starting point for any discussion of a court's role in this context should be the rule of law. Courts are the guardians of this principle. And this principle is incompatible with non-compliance. Therefore, non-compliance is anathema to any court. Of course, in real life the universal eradication of non-compliance may be impossible and perhaps even counterproductive.[8] Nevertheless, the rule of law should guide the practice of a court of law.

As regards European environmental law, a more specific argument underlines that it is at least desirable to improve compliance. A key message of the 2010 report of the European Environmental Agency on the state of the environment in Europe was that environmental policy in the European Union and its neighbours has delivered substantial improvements to the state of the environment. However, major environmental challenges remain which will have significant consequences for Europe if left unaddressed.[9] We must therefore assume that more needs to be done for the environment and that better compliance with European environmental law would help.

At the same time we should assume that European environmental law suffers significant compliance deficiencies. This assumption is based on its characteristics as European Union law and as environmental law.

Most of the time compliance with EU law must be guaranteed by Member States. Therefore it depends on at least 27 different legal and administrative systems as well as different cultural factors. Moreover, EU directives—the

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8) Cf. *Demmke*, *supra* n. 1.

9) *European Environment Agency*, The European environment—state and outlook 2010—Synthesis, key message (http://www.eea.europa.eu/soer/synthesis/synthesis/key-messages-1).

major part of EU environmental law—can only become fully effective after they have been integrated into the national system by way of transposition. This dependency adds significant opportunities not to comply. We know the categories: non-transposition, bad transposition as well as bad application of EU directives.

Additionally, environmental law as such is prone to non-compliance. If harm to the environment does not coincide with direct harm to humans there will not be a victim to complain.[10] In such cases non-compliance can only be found by active observation. Moreover, even if non-compliance has been identified it remains to be seen whether anybody is entitled and motivated to draw consequences.

3. The Court of Justice as an Institution

The Court of Justice of the European Union is one of the institutions that need to deal with compliance deficiencies. Its role within the European Union determines its *modus operandi*.

First of all, as a court the ECJ is an agent of the rule of law. However, a court does not adopt general or programmatic measures but decides specific legal disputes. Normally, it cannot choose these disputes but it must deal with the cases that arrive. This dependency limits the scope for strategic approaches to compliance deficiencies. Responses are *ad hoc* and piecemeal, depending on the individual case.

However, the ECJ also is a very special court. It is the supreme court of the European Union—a multilevel legal system. A key risk for such a system is fragmentation. It has already been mentioned that the EU comprises 27 different legal orders. All should follow EU rules. Therefore, the Court has always considered the effective and uniform application of EU law a priority. Consequently, it should not come as a surprise that some conceptual understanding with regard to issues of effective and uniform application of EU law underlies the jurisprudence. Such ideas will obviously affect the handling of non-compliance with European environmental law.

The objective of ensuring uniform application of EU law has another important implication for the handling of environmental law by the ECJ: The Court cannot be a specialised environmental court because it is responsible for

10) Cf. *Krämer*, *supra* n. 3, at 346 and 350.

all matters of EU law. Environmental law is only one sector of EU law among many others that are addressed by the Court. And with the expansion of EU powers the range has constantly been widened. While each area is important the Court cannot be expected to have specific expertise for all of them. For issues of environmental law this is of particular relevance because they can be very technical and complex in nature.[11]

An obvious response to this challenge could be specialisation, either within the Court or by transferring certain matters to specialised courts. However, the comprehensive responsibility for all issues of EU law is very important for a uniform and effective application because it allows the Court to develop and maintain a coherent legal system across all sectors of EU law.

Originally, this concept was much stronger expressed in the structure of the Court. Until the seventies almost all cases were decided by the plenary and this chamber continued to be used for more important cases until the Treaty of Nice. Today, the risk of divergence within the court has increased because most cases are dealt with by chambers of 5 judges and even the grand chamber does not comprise a majority of all 27 judges.[12] One strategy to avoid divergence is to limit specialisation of the chambers. If certain subject matters were allocated to special chambers there would be a risk that they developed a separate approach from the rest of the Court. This approach could even be a consequence of specific characteristics of these areas. For a specialised chamber such considerations might outweigh general considerations of EU law. Moreover these specific characteristics would not necessarily come to the attention of the whole Court and therefore their influence on the general development of EU law by the Court might be limited.

Nevertheless, there still is a certain degree of specialisation. In practice most judges repeatedly receive similar cases, e.g. many habitats and birds cases were the responsibility of Judge *Gulman* and his successor Judge *Bay Larsen*. As there also is a certain continuity in the composition of chambers, there is a chamber that often hears these matters. But other important areas of environmental law are dealt with by other judges and chambers.

There are of course other structural elements to ensure coherence within the Court. Very important is the general assembly of all members of the Court.

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11) Cf. *Demmke*, *supra* n. 1 at 334. On the situation of Member State courts see *Lavrysen*, The Role of National Judges in Environmental Law, Gedenkschrift/Liber amicorum Betty Gebers, (2006), p 81 et seq.

12) However, the Court has proposed to increase to 15 the number of judges constituting the grand chamber, see Council Document 8787/11 of 7 April 2011, 4 and 16.

For each case a report is drawn up and passed through the assembly. Therefore, all members of Court are informed about the cases and the approach envisaged by the reporting judge. Though the assembly only decides procedural issues, namely the chamber to decide the case and whether there will be an opinion as well as a hearing, members can raise the case for discussion if they have any observations. This happens in about 5% to 10% of the cases, in particular if there are doubts whether the proposed chamber appropriately reflects the importance of the case.

Another force to ensure coherence are of course the advocates general who provide independent opinions. They are not assigned to certain chambers and therefore they are more likely to take the output of all chambers into account. Their independence is underlined by their absence from the deliberations. Consequently, they will not be influenced by disputes within the chambers that were not expressed in the Court's reasoning. Finally, there is no formal specialisation among advocates general and certainly no specialisation for complete fields like environmental law. Nevertheless, advocates general also repeatedly receive similar cases. For example, Mrs. *Kokott* has been responsible for many habitats and birds cases since she came to the Court. However, in her case an obvious limit to this practice can also be seen: No member of the Court should be advocate general or reporting judge for a case from his or her Member State. Therefore, important habitats cases from Germany were given to other AGs.[13]

The absence of specific expertise in the diverse substantial fields could have encouraged the Court to rely on independent experts. They could be particularly useful in environmental cases. However, this did not happen. Today, the main reason probably is practical. The Court could not process the same number of cases if it tried to analyse all technical or scientific complexities in depth. At the same time the Court cannot refuse cases, not only because refusal is not foreseen, but also because the Court's decisions are necessary for the uniform application of EU law. And, in any event, if the Court started to pick and choose cases for an in depth treatment they would rarely be environmental in nature. The typology of cases that justify increased scrutiny in the eyes of the Court is illustrated by the choice of cases for the grand chamber. Between 2006 and 2011 the Court decided between 40 and 70 cases each year in this formation, 284 in total.[14] Only ten of these raised environmental questions.

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13) E.g. Case C-98/03 *Commission* v. *Germany* [2006] ECR I-53; Case C-226/08 *Stadt Papenburg*, nyr.

14) Annual report of the Court of Justice for 2010, *supra* n. 6, p 90.

The long and short of it is that the Court should not be expected to have particular expertise in dealing with specific environmental questions. It tends to focus on legal issues of European integration. Factual and scientific questions are only of secondary importance. For the environment this may appear worse than it really is. Procedurally the Court's exposure to the investigation of environmental issues is quite limited. And already the focus on effective and uniform application of EU law has helped to strengthen European environmental law significantly.

4. The Procedural Context

The priorities of the Court are reflected in the procedural context of environmental actions: the preliminary reference procedure under Art. 267 TFEU and the infringement procedure under Arts. 258 to 260 TFEU. The preliminary reference procedure aims to ensure uniform application of EU law by Member State courts. The infringement procedure allows the Commission to enforce the correct application of EU law by Member States. Both relegate questions of fact or science mostly to others, namely to referring courts and to the Commission. They comprise almost all environmental cases dealt with by the Court. Direct actions against EU measures under Art. 263 TFEU may become more important under the Aarhus Convention but up to now they have not figured prominently in the handling of compliance deficiencies with regard to EU environmental law.

4.1. *The Preliminary Reference Procedure*

The Court considers the preliminary reference procedure the most important instrument. This procedure embodies the general rule that EU law most of the time is applied by and in the Member States. One consequence is that the application of EU law is primarily controlled by Member State courts. The preliminary reference procedure aims to ensure the uniform application of EU law in these courts.[15] If questions of the interpretation of EU law must be resolved to decide a case these questions can or in some cases must be submitted to the ECJ. Obviously, such issues can only be raised if a case is brought to a Member State court. Therefore, this procedure will only affect a tiny proportion of all instances where EU environmental law is or should be applied.

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[15] Cf. Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraphs 29 et seq.

Nevertheless, this group of cases is susceptible to raise particularly contentious issues of non-compliance with EU environmental law.

The most important part of a reference is the question of EU law that is posed. However, a reference cannot be completely dissociated from the facts of the case. The ECJ must be aware of the substance of a dispute to decide on the interpretation of the EU rules at issue. If a reference does not sufficiently describe the background of the question it will be rejected as inadmissible.[16]

This means that the referring court must communicate the environmental problems at the heart of an environmental case to the ECJ. The ECJ will normally accept this communication as fact. The parties' observations can generally only help to clarify points that are already part of the reference. The ECJ will reject any attempt by the parties to change this factual basis.[17] Referring courts should be aware of this approach when they draft the reference. Obviously, they should try to explain the environmental background of the case as clearly and at the same time as completely as possible. And if parties assist the national court in drafting the reference they should also try to contribute to this objective.

A general problem for the preliminary reference procedure is its duration. It will add to the time it takes to decide the case before the referring court. Though the Court has considerably sped up its proceedings in recent years, they still take 16 months on average.[18] However, notably disputes about permits for projects that could affect the environment often are considered to be urgent. Delays can be very expensive for projects. Moreover, urgency can also exist on the part of the environment if harmful activities need to be stopped or measures to improve the environment are to be taken. Therefore, the Court occasionally is asked to accelerate the treatment of an environmental reference. However, the Court's position is that, as a general rule, such urgency should be addressed by the referring judge, if necessary by interim measures.[19]

The main reason for the reluctance to accelerate cases is not tied to issues of the environment but to the internal working of the Court. An accelerated procedure always delays other cases—not only by pushing them back but also by interrupting on-going work. Because of these interruptions the delay can

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16) Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Case C-470/04 *N* [2006] ECR I-7409, paragraph 69.

17) See for example Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraphs 31 and 32.

18) Annual report of the Court of Justice for 2010, *supra* n. 5, p 96.

19) Order of 23 octobre 2009 in Case C-240/09 *Lesoochranárske zoskupenie*, paragraph 12.

be out of proportion to any gains made in the accelerated case. However there are also substantive reasons to be reluctant with regard to acceleration: Because the Court has no special expertise for environmental issues any difficult question should only be solved after careful consideration and without undue time-pressure. Of course, this reasoning applies similarly to most other areas the Court deals with. As a consequence, acceleration is reserved for extraordinary situations that cannot be resolved temporarily, for example issues related to the custody of children.[20]

The almost inevitable delay of environmental cases is a disincentive to make references. Nevertheless, it is unlikely that this will keep disputes over practically important questions of European environmental law away from the ECJ. If one court does not refer another one will—either a lower or higher one of the same legal system or a court from another Member State. And every court that refuses to refer a case should be aware that it misses a chance to influence the development of European environmental law on the relevant issue. It may have an excellent understanding of the legal and environmental issues of the case but this understanding will only contribute to the development of EU law if a reference brings it to the attention of the ECJ.

4.2. *The Infringement Procedure*

The other important channel for environmental cases is the infringement procedure. It can be initiated by the Commission and by Member States though the latter rarely employ it. This procedure is an action for a declaratory judgement on an infringement of EU law by a Member State. Infringements by private parties can only indirectly be the object of this procedure; that is, if Member States fail to properly enforce EU law against the private party in question.[21] Within this framework, the procedure can address compliance deficiencies with regard to EU environmental law.

The infringement procedure requires a sophisticated and time consuming pre-trial procedure. The Commission first must give the State concerned the opportunity to submit observations—this is the so-called letter of formal

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[20] See for example Case C-491/10 PPU *Aguirre Zarraga* nyr.

[21] Cf. *A.B. Blomberg & F.C.M.A. Michiels*, Between Enforcement and Toleration of Breaches of Environmental Law - Dutch Policy Explained, in: 4 The Yearbook Of European Environmental Law 181, at 189 et seq. (T.F.M. Etty & H. Somsen, eds., Oxford University Press 2005), and the opinion of Advocate General *Kokott* in Case C-404/09 *Commission* v *Spain* nyr., paragraphs 104 et seq.

notice. Taking these observations into account the Commission can issue a reasoned opinion to demand that the Member State puts an end to the infringement. With both steps the Member State must be given a reasonable period to reply. Only if the State does not comply with the reasoned opinion within the period laid down, the Commission may bring the matter before the Court of Justice. These steps may seem excessively formalistic but they help to define the case, to clarify the issues and—to a large degree—to establish the facts. This is of particular importance in complex environmental cases because it helps to overcome the absence of specific expertise at the Court. The pre-trial procedure should help the Commission to identify the facts it needs to prove and the environmental issues it needs to explain.

Another important effect of the pre-trial procedure is that it allows to resolve the majority of cases without bringing them to Court.[22] The Member State can convince the Commission that there is no infringement or it can use the time to put an end to it. Without this effect the Court probably would be drowned in infringement proceedings.

In addition to the pre-trial stage, the Court procedure also takes time. If a case is disputed and in particular if other Member States join the dispute it can take significantly longer than a preliminary reference. Nevertheless, an accelerated procedure is as unlikely as in the preliminary reference procedure.[23] However, in recent years the Court's President has ordered interim measures in several environmental cases.[24] Any interim measure by the Court requires that urgency is demonstrated. Normally, this only is possible if the Commission had already expedited the pre-trial stage.[25]

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[22] The Commission reports, *supra* n. 5, only provide meaningful data on this up to the year 2005. From 2001 to 2005 each year 1000 to 1500 letters of formal notice were issued but only 150 to 200 actions were brought to the court (Annex II to the 23rd annual report on national implementation of EU law for the year 2005).

[23] Cf. the order of the President of 18 July 2007 in Case C-193/07 *Commission* v *Poland*, paragraph 13 et seq.

[24] See the orders of the President of the Court of 19 December 2006 in Case C-503/06 R *Commission* v *Italy*; of 18 April 2007 in Case C-193/07 R *Commission* v *Poland*; of 24 April 2008 in Case C-76/08 R *Commission* v *Malta*, as well as the critical analysis by *Hedemann-Robinson*, Enforcement of EU law and the Role of Interim Relief Measures, [2010] European Energy and Environmental Law Review 204, and *Wennerås*, The Enforcement of EC Environmental Law (2007), 260 et seq.

[25] Cf. the order of the President of the Court in Case C-57/89 R *Commission* v *Germany* ('*Leybucht*') [1989] ECR 2849, paragraph 16 et seq.

Though any judgement will only be declaratory, Art. 260 (1) TFEU requires the Member State to adopt the appropriate measure to put an end to any finding of non-compliance. Because this obligation was not always honoured by Member States the Treaty of Maastricht introduced an enforcement mechanism. Since then the Commission can initiate a second infringement procedure if it considers that a Member State does not comply with a judgement. If the Court agrees with the Commission it can order the Member State to pay a lump sum and/or a periodic penalty until the Member State complies with the first judgement. This procedure has been strengthened by the Treaty of Lisbon. The Commission no longer needs to issue a reasoned opinion in this second procedure. And if the infringement concerns the failure to communicate measures to transpose a directive the Commission already can apply to impose a lump sum or penalty payment in the first judgement of the Court.

There probably is scope to improve the infringement procedure as an instrument to address compliance deficiencies with regard to EU environmental law.[26] However, I would argue that within certain boundaries this procedure works very well[27] and that it would be unrealistic to expect substantial advances. Obviously, the Court cannot and should not enforce EU law in each and every case. Even with an extremely efficient procedure this would be impossible or at least disproportionate. But the mere existence of this enforcement procedure provides a strong incentive to avoid unnecessary compliance deficiencies.

If the infringement procedure is used purely as an instrument of enforcement it can be very effective, and also efficient. If obligations and facts are clear the infringement procedure can be dealt with very quickly and without disproportionate effort. This can be seen in cases of non-transposition or non-communication of reports. Obviously, even in these cases legal time-limits are infringed. But often such limits are more an expression of ambitious objectives than realistic estimates of the time needed. It remains to be seen whether the modifications by the Treaty of Lisbon will speed up transposition or lead to extended transposition periods and/or elaborate strategies to avoid a judgement for non-communication.

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[26] See for example the discussion by *Borzsák*, A Green Way Out? (2008), p 241 et seq., and the criticism of *Wennerås*, *supra* n. 24, at 290 et seq.

[27] Cf. *Krämer*, *supra* n. 3, at 346, and n. 1, at 156 et seq.

In contrast, strongly disputed infringement procedures will consume more time and resources. However, disputes over legal questions should justify this. They are pilot cases and deserve intense scrutiny. As such they pose certain challenges to the ECJ but it should be well equipped to address them.

The most problematic cases raise factual and scientific environmental questions, possibly but not necessarily in conjunction with legal issues. As we have seen, the Court is not best-suited to deal with such factual and scientific aspects. This poses certain risks for their treatment. The most obvious risk is that the Court rejects scientific hypotheses if they are not convincingly demonstrated. In a specialised environmental court the bar for convincing demonstration might be lower. On the other hand, it may be that the Court wrongly accepts reasoning as convincing that would be rejected by a more specialised court. In any event, it will be more difficult to succeed with very complex positions because they are less likely to be understood. These risks affect primarily the Commission because it bears the burden of proof. Moreover, in scientific or factual disputes the Commission is at a disadvantage compared to Member States who know the situation on the ground and usually have more experts to put on a case. However, Member States also may be caught in the complexity trap. For example, legally complex transposition measures can be difficult to defend, even if Member State authorities consider them to be appropriate in view of the environmental background of a case.

5. Examples from the Jurisprudence

The practical consequences of these considerations shall be illustrated by some examples. Basically, the Court's approach depends on the type of problem posed by the case. The Court will strongly rely on general systemic considerations with regard to problems of effective and uniform application. In contrast, it will approach specific substantial questions of environmental law more prudently by applying a very narrow focus.

5.1. *Uniform and Effective Application*

If the Court considers a case from the perspective of uniform and effective application it will rely on the existing arsenal of instruments that it has developed in the past. Many important developments of EU environmental law result from this approach. First and foremost the foundations of EU law—*effet utile*, precedence and direct effect, assisted by effective judicial

protection—should be mentioned. The recent jurisprudence on the Aarhus Convention demonstrates that these considerations have an important influence on environmental cases.

5.1.1. *Effet Utile—the Lever to Strengthen all Kinds of EU Law*

To start, a core principle the Court uses to achieve an effective application of EU law should be mentioned—the *effet utile*. The Court generally interprets EU law under the assumption that all provisions aim to have a practical effect. A very prominent expression of this assumption is that derogations to general provisions are to be interpreted restrictively.

This approach alone can strengthen environmental law significantly. It cannot be excluded that within Member State legal systems the interpretation of internal environmental provisions often is based on an inverse approach, in particular with regard to permit procedures. Environmental provisions often are late additions to well-established systems that aim to make projects possible. Within these procedures environmental law can appear to be the exception and may therefore be interpreted restrictively.[28] In contrast, if the ECJ is asked to interpret EU environmental law it does not start from an established system that needs to accommodate additional environmental rules. For the ECJ most environmental rules are characterised primarily by their own objectives that should be achieved by ensuring practical effect of the provision in question.

5.1.2. *The Invocation of EU Environmental Law*

Two other important elements of the Court's jurisprudence on uniform and effective application are quite old and apply to all sectors of EU law. They are precedence or supremacy[29] and direct effect.[30] Direct effect of sufficiently clear and unconditional provisions ensures that EU law can often be applied even in the absence of transposing legislation. And because of precedence EU law can be applied irrespective of opposing internal rules.

Both principles are supplemented by effective judicial protection. Though the organisation of access to justice—by and large—remains the domain of the Member States, they must guarantee a certain minimum standard with regard to EU law. Conditions of access to courts cannot be less favourable

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28) Illustrative *Krämer, supra* n. 3, at 351.

29) Case 6/64 *Costa* v *Enel* [1964] ECR 585.

30) Case 26/62 *Van Gend & Loos* [1963] ECR 1.

than those relating to similar actions of a domestic nature (principle of equivalence). Moreover, conditions and time-limits set up by the national legal system may not make it impossible in practice to exercise the rights which the national courts are obliged to protect (principle of effectiveness).[31]

This case law is driven by the consideration that the citizens are important agents for the effective and uniform application of EU law.[32] If they can rely on provisions of EU law to support their interests they will insist that Member States comply with these obligations.

5.1.3. *Application of Effective Judicial Protection on Environmental Issues*

This jurisprudence on effective judicial protection has already been applied to environmental cases, e.g. environmental impact assessment.[33] Moreover, the Court has extended this reasoning to the transposition of Art. 9 (2) of the Aarhus Convention though this provision creates its own rules on access to justice.

The *Trianel* case is illuminating: according to Art. 9 (2) of the Aarhus Convention and the transposing provisions of the EIA and IPPC directives NGOs can challenge the substantive and procedural legality of any decision coming under these directives. The Court underlines that NGOs can enforce compliance with EU environmental law but does not even mention Member State environmental law. The central passages begin with considerations related to the Aarhus Convention but continue into reasoning under the principle of effective application of EU law. And this reasoning is the basis for the subsequent development of the case.[34] This approach probably was influenced by a slightly earlier grand chamber decision on Art. 9 (3) of the Convention. There the Court relied on the general principles of EU law, in particular on effective judicial protection, to demonstrate that this part of the Convention was part of EU law though there is no specific EU measure to this effect.[35] This underlines the Court's preference for the well-established approaches to ensure effective application of EU law. It remains to be seen whether under the EU transposition of Art. 9 (2) of the Aarhus Convention NGOs also can raise issues of internal environmental law or whether such issues are excluded from the effects of EU law.

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31) Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5.
32) Case *Van Gend en Loos*, *supra* n. 30.
33) Case C-75/08 *Mellor* [2009] ECR I-3799, paragraph 59.
34) Case C-115/09 *Trianel Kohlekraftwerk Lünen* nyr., paragraphs 41 et seq.
35) Case C-240/09 *Lesoochranárske zoskupenie* nyr., in particular paragraphs 47 et seq.

5.2. *Specific Environmental Issues*

The robust approach to cases concerning effective application of EU law contrasts with cases where the Court must engage with the specific questions of environmental protection. As the ECJ has only limited expertise, textual reasoning in its different expressions will be more important: First and foremost the text of the rule in question will be studied, but the considerations and the drafting history of the text can also become important. If the text is not clear there is an increased risk of imbalanced, impractical or oversimplified solutions. However, it should be noted that such solutions are less likely to be cast in stone than findings in the area of integration law. Moreover, it is also possible that the Court arrives at solutions that are more consistent than approaches by more "realist" courts. This is highlighted by two issues, firstly the definition of waste and secondly the system of site protection under the Habitats directive.

5.2.1. *On the Definition of Waste*

The jurisprudence on the definition of waste is based on the text, namely the notion of "to discard". From the start, the Court interpreted this notion very broadly to ensure that the objectives of the waste legislation would not be undermined by excluding materials. However, it often is really difficult to objectively determine if materials are discarded. Therefore jurisprudence on these issues was not always very clear. In particular cases on petrol coke[36] and manure[37] do not seem to align perfectly with earlier jurisprudence. Another problem area is the recovery of waste. Two cases on the same waste incineration plant were necessary to define when waste ceases to be waste and becomes an economic good.[38]

5.2.2. *On Site Protection*

Site protection under Art. 6 of the Habitats Directive[39] was developed in a similar way, but has not been subject to comparable jitters. The foundations

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[36] Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005.

[37] Cases C-416/02 and C-121/03 *Commission* v *Spain* [2005] ECR I-7487 paragraphs 89 et seq. and ECR I-7567, paragraphs 60 et seq., see also *Sobotta*, Die Abgrenzung von Nebenprodukten und Produktionsabfällen in der Rechtsprechung des EuGH, Zeitschrift für Umweltrecht 2007, 188 (190 et seq.).

[38] Case C-317/07 *Lahti Energia* [2008] ECR I-9051; Case C-209/09 *Lahti Energia*, nyr.

[39] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p 7).

have been laid in the Waddenzee case.[40] The Court defined the thresholds for the conduct of an assessment of a project's effects on a protected site and for a regular authorisation. In both instances this threshold requires reasonable doubts with regard to the absence of significant effects. As long as there are such doubts an assessment must be undertaken and a regular authorisation is excluded. This threshold is implied by the condition for a regular permit: The authorities may only agree to a project after having *ascertained* that it will not adversely affect the integrity of the site. "Ascertained" means that certainty is required. For the assessment this standard does not clearly derive from the text. There only "projects likely to have significant effects" are mentioned. However, it would be inconsistent to require certainty for the authorisation but to do without an assessment in the absence of certainty. The Court underpinned this rather strict standard with the precautionary principle. But this principle does not prescribe a specific threshold for precautionary measures. Consequently, the threshold for site protection should be understood as primarily text based.

Incidentally, this interpretation of the provisions on site protection facilitates compliance monitoring. It is comparatively easy to verify whether reasonable doubt remains with regard to significant impacts on the site. And the need to prepare a complete assessment of the impacts helps to appreciate any balancing of interests in the authorisation of projects under Art. 6 (4) of the Habitats Directive. A more realistic discretion based test with regard to the assessment and the regular authorisation would be much more difficult to control.

6. Conclusion

These findings can help to deal with disputes over compliance with EU environmental law. It is quite pointless to ignore or even fight against the effective and uniform application of EU environmental law in general. When such questions come before the Court it will know how to address them. In contrast, special care should be taken with regard to purely or mostly environmental issues. They should be well-explained: clearly, comprehensively, but not

[40] Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, in particular paragraphs 44 and 56 et seq.

excessively complex. And this explanation should also address difficulties to guarantee compliance with the solutions under discussion.

From the Court's side the introduction of an *amicus curiae* mechanism could be helpful, at least in environmental cases. Friends of the Court could help to inject much needed environmental expertise. However, it is not likely that the Court or the Member States will take any initiative in this regard. Under current law, such friends can only participate if they are parties to an national case that is referred to the ECJ.

One worrying issue is the possible misallocation of resources that might result from the Court's jurisprudence. The limited capacities to protect or improve the environment could be focussed on the wrong issues. The most prominent indicator for this risk is the nature of most court cases. Preliminary references almost exclusively result from conflicts over specific projects and the same can be seen in many of the more interesting infringement procedures on the bad application of European environmental law. Though projects can have significant negative impacts on the environment they mostly concern only specific locations. Therefore, horizontal issues might be much more important: e.g. agricultural practices or programs to counter negative general developments. Corresponding obligations of European environmental law have been recognised[41] but they rarely are enforced. And it is unclear whether other parties than the Commission can go to court over them.

Another question is whether the jurisprudence guards the proper objectives. Would it be better to be lenient on some matters, e.g. nature conservation, in order to free up resources for more important measures, e.g. climate change? Obviously, these questions go beyond the competences of any court—including courts with specific technical expertise—but are political in nature. If the Court is too strict—or not strict enough—in the application of European environmental law the legislator must intervene.

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41) Case C-117/00 *Commission* v *Ireland* [2002] ECR I-5335, paragraph 15; Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 179; Case C-383/09 *Commission* v *France* (*Alsatian Hamster*) nyr., paragraphs 18 et seq.; Case C-165/09 to C-167/09 *Stichting Natuur en Milieu and others* nyr., paragraphs 102 and 103.

Case C-235/02

Criminal proceedings
against
Marco Antonio Saetti and Andrea Frediani

(Reference for a preliminary ruling from the Giudice per le indagini preliminari du Tribunale di Gela)

«(Article 104(3) of the Rules of Procedure – Directives 75/442/EEC and 91/156/EEC – Waste management – Definition of waste – Petroleum coke)»

Order of the Court (Third Chamber), 15 January 2004

Summary of the Order

1..

Preliminary rulings – Reference to the Court – National court or tribunal for the purposes of Article 234 EC – Judge investigating a criminal matter – Investigating magistrate

(Art. 234 EC)

2..

Preliminary rulings – Jurisdiction of the Court – Limits – Interpretation of a directive in the course of criminal proceedings for infringement of the national legislation transposing it – Determination of the consequences of the subsequent decriminalisation of the offences – Excluded

(Art. 234 EC)

3..

Preliminary rulings – Jurisdiction of the Court – Limits – Obviously irrelevant questions and hypothetical questions in a context which precludes any useful answer – Questions not related to the subject-matter of the main proceedings

(Art. 234 EC)

4..

Environment – Waste – Directive 75/442, as amended by Directive 91/156 – Definition – Substance which has been discarded – Criteria of assessment

(Council Directive 75/442, as amended by Directive 91/156, Art. 1(a))

5..

Environment – Waste – Directive 75/442, as amended by Directive 91/156 – Definition – Substance which has been discarded – Exception – Petroleum coke produced in an oil refinery – Effective use of that substance to meet the energy needs of the refinery

(Council Directive 75/442, as amended by Directive 91/156)

1.

The judge investigating a criminal matter or the investigating magistrate constitute a court or tribunal within the meaning of Article 234 EC, appointed to give a ruling, independently and in accordance with law, in cases coming within the jurisdiction conferred on them by law in proceedings intended to culminate in decisions of a judicial nature. see para. 23

2.

A directive may not of itself either impose obligations on a private individual and therefore be relied on as such against such a person, or have the effect, independently of a national law adopted by a Member State for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive. It is not for the Court, on a reference for a preliminary ruling on the interpretation of a directive, to interpret or apply national law in order to establish the effects of national legislation which no longer considers to be infringements the acts

which gave rise to the criminal proceedings before the national court, although it is common ground that, at the time when those acts were established, they could, where relevant, constitute offences punishable under national criminal law. see paras 25-26

3.

In the context of the cooperation between the Court of Justice and the national courts established by Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, wherethe questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. However, in exceptional circumstances, it falls to the Court to examine the conditions in which the case was referred to it by the national court, in order to decide whether it has jurisdiction. It may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. see paras 28-29

4.

The scope of the concept of waste depends on the meaning of the term discard used in Article 1(a) of Directive 75/442 on waste. The use of an operation listed in Annex II A or Annex II B to that directive does not of itself allow a substance or object to be classified as waste and, conversely, the concept of waste does not exclude substances and objects which are capable of further economic use. The system of supervision and management established by that directive is intended to cover all objects and substances discarded by their owner, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or further use. Certain circumstances may constitute evidence that the holder has discarded a substance or object or intends or is required to discard it within the meaning of

Article 1(a) of Directive 75/442. That will be the case, in particular, where the substance used is a production residue, that is to say a product not intended as such. However, a substance reuse of which is a certainty, without any prior processing, and as an integral part of the production process cannot be described as waste. Other evidence of the existence of waste within the meaning of that provision may lie in the fact that the treatment method for the substance in question is a standard waste treatment method or that the undertaking perceives the substance as waste and from the fact that, in the case of a production residue, it can be used only in a way that involves its disappearance or that its use must involve special measures to protect the environment. Those elements are not necessarily conclusive, and whether something is in fact waste must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. see paras 33-34, 36, 39-40

5.

Petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of Directive 75/442 on waste, as amended by Directive 91/156. see para. 47, operative part

ORDER OF THE COURT (Third Chamber)
15 January 2004 (1)

((Article 104(3) of the Rules of Procedure – Directives 75/442/EEC and 91/156/EEC – Waste management – Definition of waste – Petroleum coke))

In Case C-235/02,

REFERENCE to the Court under Article 234 EC by the Giudice per le indagini preliminari of the Tribunale di Gela (Italy) for a preliminary ruling in the criminal proceedings before that court against

Marco Antonio Saetti and**Andrea Frediani**

on the interpretation of Articles 1(a) and (f), 2(1)(b) and 4 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

THE COURT (Third Chamber),

composed of: C. Gulmann, acting as President of the Third Chamber, J.-P. Puissochet (Rapporteur) and F. Macken, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass, having informed the court of referral that the Court proposes to give its decision by a reasoned order in accordance with Article 104(3) of the Rules of Procedure, having invited the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations which they might wish to make in that regard,

after hearing the Advocate General, makes the following

Order

1
By order of 19 June 2002, received at the Court on 26 June 2002, the Giudice per le indagini preliminari (judge responsible for preliminary inquiries) of the

Tribunale di Gela (District Court, Gela) referred to the Court of Justice for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 1(a) and (f), 2(1)(b) and 4 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) (hereinafter Directive 75/442).

2

Those questions were raised in the course of criminal proceedings against Mr Saetti and Mr Frediani, the director and former director respectively of the Gela oil refinery operated by AGIP Petroli SpA, who are accused inter alia of having failed to comply with Italian legislation on waste.

Legal framework

Community legislation

3

The first subparagraph of Article 1(a) of Directive 75/442 defines waste as any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

4

Annex I to Directive 75/422, headed Categories of waste, includes, under category Q8, residues of industrial processes (e.g. slags, still bottoms, etc.) and, under category Q16, any materials, substances or products which are not contained in the above categories.

5

The second subparagraph of Article 1(a) of Directive 75/442 provides that the Commission of the European Communities is to draw up a list of wastes belonging to the categories listed in Annex I. That is the purpose of Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 1991 L 226, p. 3). That list was amended by Commission Decisions 2001/118/EC and 2001/119/EC and Council Decision 2001/573/EC, of 16 and 22 January and 23 July 2001 respectively (OJ 2001 L 47, p. 1 and p. 32, and L 203, p. 18) and

came into force on 1 January 2002. Chapter 05, section 01 thereof lists wastes from petroleum refining. That section sets out various types of waste and includes category 05 01 99, wastes not otherwise specified. The note introducing the list explains that it is a harmonised list which will be periodically reviewed but that the inclusion of a material in the list does not mean that the material is a waste in all circumstances. Materials are considered to be waste only where the definition of waste in Article 1(a) of Directive 75/442/EEC is met.

6

Article 1(c) of Directive 75/442 defines holder as the producer of the waste or the natural or legal person who is in possession of it.

7

Article 1(d) defines the management of waste as the collection, transport, recovery and disposal of waste, including the supervision of such operations and aftercare of disposal sites.

8

Article 1(e) and (f) defines the disposal and recovery of waste as any of the operations provided for in Annexes II A and II B thereto respectively. Those annexes were adapted to scientific and technical progress by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32). One of the recovery operations listed in Annex II B is R1, use principally as a fuel or other means to generate energy.

9

Article 2 provides: 1. The following shall be excluded from the scope of this directive:

(a)

gaseous effluents emitted into the atmosphere;

(b)

where they are already covered by other legislation:

...

(ii)

waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;

...

2.

Specific rules for particular instances or supplementing those of this directive on the management of particular categories of waste may be laid down by means of individual directives.

10

Article 3(1) of Directive 75/442 provides, inter alia, that Member States are to take appropriate steps to encourage the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials. Article 4 of the Directive provides that Member States are to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular without risk to water, air, soil and plants and animals and without adversely affecting the countryside.

11

Articles 9 and 10 of Directive 75/442 state that any establishment or undertaking which carries out waste disposal operations or operations which may lead to recovery must obtain a permit from the competent authority.

12

Nevertheless, Article 11 of Directive 75/442 provides for exemption from the permit requirement under certain conditions.

National legislation

13

Directive 75/442 was transposed into Italian law by Decreto legislativo 5 febbraio 1997, No 22, attuazione delle direttive 91/156/CEE sui rifiuti, 91/689/EEC sui rifiuti pericolosi e 94/62/CE sugli imballaggi e sui rifiuti di imballagio (Legislative Decree No 22, of 5 February 1997, implementing Directives 91/156/EEC on waste, 91/689/EEC on hazardous waste and 94/62/EC on packaging and packaging waste) (GURI of 15 February 1997, suppl. ord. No 38), subsequently amended by Decreto legislativo 8 novembre 1997, No 389 (GURI No 261, of 8 November 1997) (hereinafter Legislative Decree No 22/97).

14

Legislative Decree No 22/97 reproduces the definition of waste laid down in Directive 75/442. It requires an administrative permit for the management of certain types of waste. In those cases, the absence of a permit is subject to criminal penalties.

15

After the prosecution which forms the subject-matter of the main proceedings had commenced, Decreto legge 7 marzo 2002, No 22, recante disposizioni urgenti per l'individuazione della disciplina relativa all'utilizzazione del coke de petrolio (pet-coke) negli impianti de combustione (Decree-Law No 22, of 7 March 2002, laying down urgent provisions for regulation of the use of petroleum coke (pet-coke) in combustion plants) (GURI No 57, of 8 March 2002) was adopted. That legislation removed petroleum coke used as industrial fuel from the scope of Legislative Decree No 22/97 and regulated its use in combustion plants in the following manner:

1.

Petroleum coke with a sulphur content not exceeding 3% of mass may be used in combustion plants with a rated thermal input capacity equal to or greater than 50 MW per firing unit.

2.

Petroleum coke may be used at the production site ...

(even if its sulphur content exceeds 3%).

3.

Petroleum coke with a sulphur content not exceeding 6% of mass may be used in plants where at least 60% of sulphur compounds are fixed or combined with the production product.

4.

The use of petroleum coke in kilns producing lime for the food industry is strictly prohibited.

16

Decree-Law No 22 of 7 March 2002 was in turn amended by Legge 6 maggio 2002, No 82, conversione in legge, con modificazioni, del decreto legge 7 marzo 2002, No 22, recante disposizioni urgenti per l'individuazione delle disciplina relativa all'utilizzazione del coke de

petrolio (pet-coke) negli impianti de combustione (Law of 6 May 2002, No 82, implementing, following amendment, Decree-Law No 22 of 7 March 2002 concerning urgent provisions for regulation of the use of petroleum coke (pet-coke) in combustion plants) (GURI No 105 of 7 May 2002). It stated that petroleum coke used as fuel for production purposes was excluded from the scope of Legislative Decree No 22/97. Article 2(2) of that decree-law, cited in the preceding paragraph of this order, went on as follows: Petroleum coke may also be used at production sites in combustion processes intended to generate electrical or thermal energy for purposes not directly related to refining processes, provided that emissions do not exceed the limits fixed by the relevant provisions.

Main proceedings and the questions referred for a preliminary ruling

17

As a result of complaints concerning petroleum refinery activities at Gela, the Public Prosecutor of the Tribunale di Gela had a technical survey carried out in the installation. That survey determined that the refinery was using petroleum coke, resulting from the refining of crude oil, as fuel for its combined steam and electricity power station; most of the energy produced there is used by the refinery itself, but surplus electricity is sold to other industries or to the electricity company ENEL SpA.

18

The Public Prosecutor took the view that the petroleum coke constituted waste subject to Legislative Decree No 22/97 and, since it was being stored and used without the administrative permit required by that legislation, charged Mr Saetti and Mr Frediani with having failed to comply with that permitting requirement. In addition, at the request of the Public Prosecutor, the Giudice per le indagini preliminari sequestrated the two petroleum coke depots which supplied the refinery's combined heat and power station.

19

After the entry into force of Legislative Decree No 22/97 of 7 March 2002, referred to in paragraph 15 of this order, the public prosecutor ended the sequestration, since the new Italian legislation authorised the use of petroleum coke under certain conditions.

20

As regards the action to be taken in the proceedings following the entry into force of the Decree-Law of 6 May 2002, referred to in paragraph 16 of this order, the Giudice per le indagini preliminari essentially asks whether the Italian authorities are able to exclude petroleum coke used as fuel for industrial purposes and refinery operations from the scope of Legislative Decree No 22/97, in the light of Directive 75/442. In particular, he is inclined to take the view that petroleum coke constitutes waste within the meaning of Article 1(a) of Directive 75/442 and that, in the absence of Community legislation on petroleum coke, as provided for in Article 2(1)(b) of that directive, the national authorities could not exclude it from the scope of Legislative Decree No 22/97, which was adopted for the purpose of implementing that directive.

21

In those circumstances, the Giudice per le indagini preliminari decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1.

Does petroleum coke fall within the meaning of waste as provided in Article 1 of Directive 75/442/EEC?

2.

Does the use of petroleum coke as a fuel constitute a recovery operation within the meaning of Article 1 of Directive 75/442/EEC?

3.

Does petroleum coke used as a fuel for production purposes fall within the categories of waste which a Member State may exclude from the scope of Community legislation on waste, following the adoption of specific legislation in accordance with Article 2 of Directive 75/442/EEC?

4.

Does also allowing the use of petroleum coke at the production site for combustion processes intended to produce electrical or thermal energy for purposes not related to refinery processes, provided that emissions fall within the limits laid down in the relevant provisions, even where its sulphur content exceeds 3% of mass, constitute a necessary and sufficient

measure to ensure that such waste is recovered without endangering human health and without using processes or methods which could harm the environment, in accordance with Article 4 of Directive 75/442/EEC?

Admissibility

22

First, Mr Saetti and Mr Frediani contend that the proceedings in the context of which the Giudice per le indagini preliminari acted are not of a judicial nature which allows referral for a preliminary ruling to be made to the Court on the basis of Article 234 EC. They maintain that criminal proceedings take on that character only once they have been referred back to the court hearing the case, except in particular cases which are not relevant here.

23

That argument must be rejected. It is settled case-law that the judge investigating a criminal matter or the investigating magistrate constitutes a court or tribunal within the meaning of Article 234 EC, appointed to give a ruling, independently and in accordance with the law, in cases coming within the jurisdiction conferred on it by law in proceedings intended to culminate in decisions of a judicial nature (see, inter alia, Case 65/79 *Chatain* [1980] ECR 1345, and Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545, paragraph 7).

24

Secondly, Mr Saetti and Mr Frediani contend that the interpretation of Community law requested of the Court serves no purpose, inasmuch as following the adoption of Decree-Law No 22 of 7 March 2002 and the Law of 6 May 2002, they could no longer be found guilty under national law for the actions which gave rise to the main proceedings. However it is construed, Directive 75/442 is as such not enforceable against individuals and cannot itself directly serve as a basis for criminal proceedings. The latter must therefore be abandoned in any event, and the interpretation of the Directive has no bearing on it. For that reason as well, referral to the Court is inadmissible.

25

That argument must also be rejected. It is true that a directive may not of itself impose obligations on a private individual and may not therefore be relied on as such against such a person (see, inter alia, Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 20). Similarly, a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, inter alia, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 37).

26

In the present case, however, it is common ground that, at the time when the acts which gave rise to the criminal proceedings against Mr Saetti and Mr Frediani were established, those acts could, where relevant, constitute offenses punishable under criminal law. It is not for the Court to interpret or apply national law in order to establish the effects of the most recent national legislation, which no longer considers such acts to be infringements (see to that effect Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 42 and 43).

27

In addition, it is clear from the order for reference that the proceedings in question could, on the basis of the Court's interpretation of Directive 75/442, result in that connection in a referral to the Corte costituzionale (Italy) for the purpose of deciding the legality of the national legislation.

28

It must be remembered that it is solely for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community

law, the Court of Justice is, in principle, bound to give a ruling (see Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

29

While the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to decide whether it has jurisdiction, it pointed out that it may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39).

30

The questions referred for a preliminary ruling are accordingly admissible.

Questions referred for a preliminary ruling

31

Taking the view that the answer to the questions put to it may be deduced clearly from existing case-law, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give judgment by reasoned order and invited the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations which they might wish to make in that regard. Mr Saetti and Mr Frediani, the Italian and the Swedish Governments and the Commission stated that they had no objection to the use of that procedure.

First question

32

By this question, the national court asks whether petroleum coke constitutes waste within the meaning of Article 1(a) of Directive 75/442.

33

The scope of the concept of waste depends on the meaning of the term discard used in Article 1(a) of Directive 75/442. The Court has held that

the use of an operation listed in Annex II A or Annex II B to Directive 75/442 does not of itself allow a substance or object to be classified as waste and, conversely, that the concept of waste does not exclude substances and objects which are capable of further economic use. The system of supervision and management established by Directive 75/442 is intended to cover all objects and substances discarded by their owner, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or further use (Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, hereinafter *Palin Granit*, paragraphs 22, 27 and 29).

34

Certain circumstances may constitute evidence that the holder has discarded a substance or object or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442. That will be the case, in particular, where the substance used is a production residue, that is to say a product not intended as such (Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 84). The Court explained to that effect that waste-rock from granite quarrying, which is not the product primarily sought by the operator, in principle constitutes waste (*Palin Granit*, paragraphs 32 and 33).

35

However, one possible analysis which could be accepted is that goods, materials or raw materials resulting from a manufacturing or extraction process which is not primarily intended to produce that item may be regarded not as a residue but as a by-product which the undertaking does not wish to discard, within the meaning of the first paragraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without prior processing. Such an interpretation is not incompatible with the aims of Directive 75/442, for there is no reason to hold that the provisions of Directive 75/442, which are intended to regulate the disposal or recovery of waste, apply to goods, materials or raw materials which have an economic value as products, regardless of processing, and which as such are subject to

the legislation applicable to those products (*Palin Granit*, paragraphs 34 and 35).

36

However, having regard to the obligation to interpret the concept of waste widely in order to limit its inherent risks and pollution, recourse to the reasoning applicable to by-products should be confined to situations in which the further use of goods, materials or raw materials is not a mere possibility but a certainty, without any prior processing, and as an integral part of the production process (*Palin Granit*, paragraph 36).

37

In addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is waste for the purposes of Directive 75/442 is thus the likelihood that that substance will be further used without any prior processing. If, in addition to the mere possibility of further use of the substance, there is also a financial advantage to the holder in so doing, the likelihood of such further use is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to discard, but as a genuine product (*Palin Granit*, paragraph 37).

38

The Court therefore held that stone debris produced as mining residues which are lawfully used in the production process, without prior processing, in order to ensure the necessary filling in of underground galleries cannot be considered to be substances which the holder discards or intends to discard since, on the contrary, he needs them for his principal activity, subject, however, to the condition that he provides sufficient guarantees as to the identification and actual use of the substances (Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, paragraphs 36 to 39 and 43).

39

Other evidence of the existence of waste within the meaning of Article 1(a) of Directive 75/442 may lie in the fact that the treatment method for the substance in question is a standard waste treatment method or that the

undertaking perceives the substance as waste and from the fact that, in the case of a production residue, it can be used only in a way that involves its disappearance or that its use must involve special measures to protect the environment (*ARCO Chemie Nederland and Others*, cited above, paragraphs 69 to 72, 86 and 87).

40

However, those elements are not necessarily conclusive, and whether something is in fact waste must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined (*ARCO Chemie Nederland*, paragraph 88).

41

As regards petroleum coke produced and used in an oil refinery, it is necessary to take into account the information set out in the document published by the Commission in accordance with Article 16(2) of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), which concerns the exchange of information between Member States and the industries concerned on best available techniques in order to achieve a high level of protection for the environment as a whole, associated monitoring and developments and their progress in the field of oil and gas refining, a document commonly known as a BREF (BAT reference document), as well as the general conditions in the refinery concerned, which, where relevant, must be determined by the court to which a dispute is referred.

42

Petroleum coke, composed of solid carbon and variable amounts of impurities, which is one of the numerous substances resulting from the refining of petroleum, is, according to the observations submitted by Mr Saetti and Mr Frediani, intentionally produced at the Gela refinery, given the characteristics of the crude oil which is treated there. For its part, the BREF states, inter alia, that petroleum coke is widely used as fuel in the cement and steel industry. It can also be used as a fuel for power plants if the sulphur content is low enough. Coke also has non-fuel applications as a raw material for many carbon and graphite products.

43

Moreover, the file indicates that petroleum coke is used in Gela as the main component in the fuel used to power the integrated combined heat and power station which supplies the refinery's steam and electricity needs. Since the electricity generated is greater than the refinery's consumption, given the volume of vapour produced at the same time, the surplus is sold to other industries or to an electricity company.

44

If these conditions of production and use are established, the classification as waste within the meaning of Article 1(a) of Directive 75/442 can be excluded.

45

First, in those circumstances, petroleum coke cannot be classified as a production residue within the meaning of paragraph 34 of this order as the production of coke is the result of a technical choice (since petroleum coke is not necessarily produced during refinery operations), specifically intended for use as fuel, whose production costs are probably lower than the cost of other fuels which could be used to generate the steam and electricity which meet the needs of the refinery. Even if, as maintained by an adverse party in the main proceedings against Mr Saetti and Mr Frediani, the petroleum coke at issue automatically results from a technique which at the same time generates other petroleum substances which are the main results sought by the refinery's management, it is clear that, if it is certain that the coke production in its entirety will be used, mainly for the same purposes as the other substances, that petroleum coke is also a petroleum product, manufactured as such, and not a production residue. The file in the main proceedings sent to the Court appears to indicate that it is common ground that the petroleum coke is certain to be fully used as fuel in the production process and that all the resulting surplus electricity is sold.

46

Secondly, as regards the information referred to in paragraph 39 of this order, the fact that petroleum coke is used as a fuel for energy production, a use which is a standard waste recovery method, is not relevant, since

the purpose of a refinery is precisely to produce different types of fuel from crude oil. Moreover, possible evidence concerning, first, the absence of any use other than one which leads to the disappearance of the substance at issue (not established here, since petroleum coke may be used as a raw material to manufacture carbon- and graphite-based products) and, secondly, the fact that its use must involve special measures to protect the environment (here established) are also irrelevant, since those factors apply to production residues and the petroleum coke produced and used in the circumstances referred to above does not fit that classification, as follows from the preceding paragraph of this order. The evidence concerning the fact that the company considers petroleum coke to be waste, even if it is confirmed, is not sufficient to justify the inference that the petroleum coke at issue is waste, given the other circumstances previously mentioned. It could only be different if the refinery's management gave up the use of petroleum coke as the result of public opinion or was required to do so by a legal decision. In that case, it would be necessary to find that the holder of the petroleum coke is discarding it or intends to or is required to discard it.

47

The answer to the first question must therefore be that petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of Directive 75/442.

Second, third and fourth questions

48 Answers to these questions would be of use to the national court only if the petroleum coke at issue in the main proceedings had to be considered to be waste within the meaning of Directive 75/442. However, in the light of the information given in the order for reference and the observations submitted to the Court, which led to the answer to the first question, such does not appear to be the case. There is therefore no need to answer the second, third and fourth questions.

Costs 49 The costs incurred by the Italian, Austrian and Swedish

Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Giudice per le indagini preliminari of the Tribunale di Gela by order of 19 June 2002, hereby rules:

Petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991.

Luxembourg, 15 January 2004.

R. Grass V. Skouris

Registrar President

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1 –

Language of the case: Italian.

Case C-121/03

Commission of the European Communities

v

Kingdom of Spain

(Failure of a Member State to fulfil obligations – Directives 75/442/EEC and 91/156/EEC – Meaning of 'waste' – Directives 85/337/EEC and 97/11/EC – Assessment of the effects of certain public and private projects on the environment – Directive 80/68/EEC – Protection of groundwater against pollution caused by certain dangerous substances – Directive 80/778/EEC – Quality of water intended for human consumption)

Opinion of Advocate General Stix-Hackl delivered on 26 May 2005

Judgment of the Court (Third Chamber), 8 September 2005

Summary of the Judgment

1. *Environment — Waste — Directive 75/442 — Meaning — Substance which is discarded — Livestock effluent — Excluded — Conditions — Carcasses of animals being reared which die on the farm — Included*

   (Council Directive 75/442, as amended by Directive 91/156, Art. 1(a))

2. *Environment — Waste — Directive 75/442 — 'Other legislation' for the purposes of Article 2(1)(b) — Community or national legislation — Conditions*

   (Council Directive 75/442, as amended by Directive 91/156, Art. 2(1)(b))

3. *Environment — Assessment of the effects of certain projects on the environment — Directive 85/337 — Projects of the classes listed in Annex II to be made subject to assessment — Member States' discretion — Scope and limits*

   (Council Directive 85/337, as amended by Directive 97/11, Arts 2(1), 4(2), and Annex II)

4. *Environment — Protection of waters against pollution caused by nitrates from agricultural sources — Directive 91/676 — Scope — Livestock effluent — Included — Use of livestock effluent as agricultural fertiliser — Excluded from the system of protection of groundwater established by Directive 80/68*

   (Council Directives 80/68, Art. 5, and 91/676)

1. The scope of the term 'waste', for the purposes of Directive 75/442 on waste, as amended by Directive 91/156, turns on the meaning of the term 'discard' in the first subparagraph of Article 1(a) of that directive.

In that regard, in certain situations, goods, materials or raw materials resulting from an extraction or manufacturing process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not seek to 'discard', within the meaning of that provision, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse. In such a case, the provisions of that directive, which are intended to regulate the disposal or recovery of waste, do not apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products, provided that their reuse is not a mere possibility but a certainty, without any further processing prior to reuse, and as part of the continuing process of production.

Therefore, livestock effluent may, on the same terms, fall outside classification as waste, if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations. The fact that such effluent is not used on land forming part of the same agricultural holding as that which generated it, but to meet the needs of other economic operators, is, in that regard, irrelevant.

On the other hand, carcasses of animals being reared, where those animals died on the farm and were not slaughtered for human consumption, may in no case be used in conditions which would enable them not to be defined as waste within the meaning of that directive. The holder of those carcasses is certainly obliged to discard them, with the result that that matter must be regarded as waste.

(see paras 57-58, 60-62, 64)

2. The term 'other legislation', in Article 2(1)(b) of Directive 75/442 on waste, as amended by Directive 91/156, can refer to both Community legislation and national legislation covering a category of waste mentioned in that provision, provided that such legislation, Community or national, relates to the management of that waste as such and that it results in a level of protection of the environment at least equivalent to that aimed at by that directive.

(see para. 69)

3. Article 4(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11, provides that the Member States are to determine through a case-by-case examination or thresholds or criteria which they set whether the projects listed in Annex II to that directive should be made subject to an impact assessment. That provision has, in essence, the same scope as that of Article 4(2) of Directive 85/337, in its original version. It does not alter the general rule, set out in Article 2(1) of that directive, that projects likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location, are to be made subject to an assessment of their effects on the environment.

(see paras 91-92)

4. The system of protection of waters from pollution by livestock effluent is not based, at Community level, on Directive 80/68 on the protection of groundwater against

pollution caused by certain dangerous substances but on Directive 91/676 concerning the protection of waters against pollution caused by nitrate from agricultural sources. The latter's specific purpose is to counter water pollution resulting from the spreading or discharge of livestock effluent and from the excessive use of fertilisers. The scheme of protection for which it provides involves precise management measures which the Member States must impose on farmers and which take into account the more or less vulnerable nature of the environment receiving the effluent. If Article 5 of Directive 80/68 were interpreted as meaning that the Member States must subject to prior investigation, involving, in particular, a hydrogeological survey, any use of livestock effluent as agricultural fertiliser, the scheme of protection established by Directive 80/68 would be substituted in part for that specifically instituted by Directive 91/676.

(see paras 101-102)

JUDGMENT OF THE COURT (Third Chamber)

8 September 2005 (*)

(Failure of a Member State to fulfil obligations – Directives 75/442/EEC and 91/156/EEC – Meaning of 'waste' – Directives 85/337/EEC and 97/11/EC – Assessment of the effects of certain public and private projects on the environment – Directive 80/68/EEC – Protection of groundwater against pollution caused by certain dangerous substances – Directive 80/778/EEC – Quality of water intended for human consumption)

In Case C-121/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 March 2003,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet (Rapporteur), S. von Bahr, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 December 2004,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration by the Court that:

– by failing to adopt the measures necessary to comply with its obligations under Articles 4, 9 and 13 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) (hereinafter 'Directive 75/442'), by not taking the necessary measures to ensure that waste from the pig farms located in the Baix Ter (Lower Ter) area, in the Province of Gerona, is disposed of or recovered without endangering human health and without harming the environment, by allowing many of those farms to operate without the permit required by that directive and by failing to carry out the requisite periodic inspections of such farms,

– by failing to carry out a prior impact assessment on projects to create or alter such pig farms, contrary to the requirements of Articles 2 and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter 'Directive 85/337, in its original version'), or contrary to the provisions of that directive, as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5, hereinafter 'Directive 85/337'),

– by failing to carry out the requisite hydrogeological studies in the area affected by the pollution, in relation to the pig farms which are the subject of these proceedings, in accordance with Articles 3(b), 5(1) and 7 of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43),

– by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Annex IC to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11), contrary to Article 7(6) of that directive,

the Kingdom of Spain has failed to fulfil its obligations under those directives.

Relevant provisions

Legislation on waste

Community legislation

2 The first subparagraph of Article 1(a) of Directive 75/442 defines 'waste' as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

3 The second subparagraph of Article 1(a) entrusts the Commission with the task of drawing up 'a list of wastes belonging to the categories listed in Annex I'. By Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 (OJ 1994 L 5, p. 15), the Commission adopted a 'European Waste Catalogue' (EWC), in which the 'waste from agricultural … primary production' includes 'animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site'. The introductory note in the annex to that decision makes clear that that list of wastes is 'non-exhaustive', that 'the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances' and that 'the entry is only relevant when the definition of waste has been satisfied'.

4 Article 1(c) of Directive 75/442 defines 'holder' as 'the producer of the waste or the natural or legal person who is in possession of it'.

5 Article 2 of Directive 75/442 provides:

'1. The following shall be excluded from the scope of this Directive:

(a) gaseous effluents emitted into the atmosphere;

(b) where they are already covered by other legislation:

…

(iii) animal carcasses and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming;

…

2. Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.'

6 Article 4 of Directive 75/442 provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

– without risk to water, air, soil and plants and animals,

– without causing a nuisance through noise or odours,

– without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.'

7 According to Article 9 of Directive 75/442, for the purposes, in particular, of implementing Article 4, any establishment or undertaking which carries out the waste disposal operations specified in Annex II A must obtain from the competent authority a permit, which is to cover the types and quantities of waste, the technical requirements, the security precautions to be taken, the disposal site and the treatment method.

8 Article 13 of Directive 75/442 is worded as follows:

'Establishments or undertakings which carry out the operations referred to in Articles 9 to 12 shall be subject to appropriate periodic inspections by the competent authorities.'

National legislation

9 Article 2(2) of Law No 10/1998 of 21 April 1998 on waste (BOE of 22 April 1998) provides that 'this Law shall, supplementing other rules, apply to the matters referred to below as regards the aspects which it governs expressly by specific regulation:

…

(b) the disposal and processing of animal carcasses and of waste of animal origin, as governed by Royal Decree No 2224/1993 of 17 December 1993 on the hygiene standards relating to the disposal and processing of animal carcasses and of waste of animal origin and to protection against pathogens in feedstuffs …

(c) waste originating from agricultural holdings and livestock farms consisting of faecal matter and other natural non-harmful substances, used for the purposes of farming, as governed by Royal Decree No 261/1996 of 16 February 1996 concerning the protection of waters against pollution by nitrates from agricultural sources, and by the legislation to be adopted by the government in accordance with the fifth additional provision

…'

10 That fifth additional provision provides that the use as agricultural fertiliser of waste covered by Article 2(2)(c) is to be subject to the legislation which the government adopts for that purpose and to the additional standards adopted, as the case may be, by the autonomous communities. Under the fifth additional provision, that legislation lays down the type and quantity of waste which may be used as fertiliser as well as the circumstances in which the activity will not require authorisation, and requires that the abovementioned activity must be carried on without endangering human health and without using processes or methods capable of harming the environment, in particular by causing water pollution. Paragraph 3 of that additional provision also lays down that the use of waste in the circumstances it describes is not a discharge within the meaning of Article 92 of Law No 29/1985 of 2 August 1985 on water.

11 Pursuant to the statutory authorisation resulting from that fifth additional provision, the Spanish Government adopted Royal Decree No 324/2000 of 3 March 2000 (BOE of 8 March 2000) establishing the basic rules on the planning of pig farms. That royal decree provides that animal effluent from pig farms may be managed, in particular, by its recovery as organic mineral fertiliser and that the maximum amount of effluent so used and its nitrogen content must comply with the requirements of Royal Decree No 261/1996.

12 The Autonomous Community of Catalonia adopted, as regards itself, Law No 6/1993 of 15 July 1993 on waste. Article 4(2)(c) of that law excludes from its scope 'waste from agricultural holdings and livestock farms which is not dangerous and which is used exclusively for the purposes of farming'. Decree No 220/2001 of 1 August 2001 concerning the management of livestock excreta, which provides, in particular, for the obligation to draw up management plans and to keep registers, supplemented that legislation. That decree specifies that such waste must be managed in accordance with the code of good agricultural practice concerning nitrogen, which was adopted by an order of 22 October 1998.

Legislation relating to the assessment of the effects of certain projects on the environment

Community legislation

13 Article 2(1) of Directive 85/337, in its original version, provided:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

14 Under Article 4(2) of that directive, 'projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require'. Point 1(f) of Annex II mentioned pig-rearing installations.

15 Under Article 4(1) of Directive 85/337, 'projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10'.

16 Point 17(b) of Annex I mentions installations for the intensive rearing of pigs with more than 3 000 places for production pigs (over 30 kg) and point 17(c) thereof includes installations with more than 900 places for sows.

17 Article 4(2) of Directive 85/337 provides that, for projects listed in Annex II, the Member States are to determine through a case-by-case examination or thresholds or criteria set by the Member State 'whether the project shall be made subject to an assessment in accordance with Articles 5 to 10'. Article 4(3) states that, '[w]hen a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account'.

18 Point 1(e) of Annex II to Directive 85/337 lists '[i]ntensive livestock installations (projects not included in Annex I)' and point 13 of that annex covers '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'. Directive 85/337 had to be transposed by the Member States before 14 March 1999.

National legislation

19 Under Law No 3/1998 of 27 February 1998 of the Autonomous Community of Catalonia on the integration of environmental administration, as well as its implementing decree, namely Decree No 136/1999 of 18 May 1999, establishments of more than 2 000 production pigs or of 750 sows are subject to prior environmental consent, for which precise requirements for the management of livestock effluent and animal carcasses must be met. Establishments having 200 to 2 000 pigs must obtain, prior to their creation, environmental consent. The same law provides that existing pig farms without environmental consent must submit applications for consent, to regularise their position.

20 At national level, Law No 6/2001 of 8 May 2001, amending Royal Decree-Law No 1302/1986 of 28 June 1986 concerning environmental impact assessment (BOE of 9 May 2001), makes new installations for the intensive rearing of more than 2 000 production pigs and 750 sows subject to an environmental impact assessment.

Legislation on the protection of groundwater

Community legislation

21 Article 3 of Directive 80/68 provides:

'Member States shall take the necessary steps to:

…

(b) limit the introduction into groundwater of substances in list II so as to avoid pollution of this water by these substances.'

22 Point 3 of list II mentions '[s]ubstances which have a deleterious effect on the taste and/or odour of groundwater, and compounds liable to cause the formation of such substances in such water and to render it unfit for human consumption'.

23 Article 5 of Directive 80/68 provides, in particular, that Member States are to make discharges of substances in list II subject to prior investigation and may grant authorisations, provided that all the technical precautions for preventing groundwater pollution by those substances are observed.

24 Under Article 7 of Directive 80/68, 'the prior investigations referred to in Articles 4 and 5 shall include examination of the hydrogeological conditions of the area concerned, the possible purifying powers of the soil and subsoil and the risk of pollution and alteration of the quality of the groundwater from the discharge and shall establish whether the discharge of substances into groundwater is a satisfactory solution from the point of view of the environment'.

National legislation

25 No national legislation with the specific object of transposing Directive 80/68 has been brought to the Court's notice in the course of this case.

Legislation concerning the quality of water intended for human consumption

Community legislation

26 Article 2 of Directive 80/778 provides:

'For the purposes of this Directive, water intended for human consumption shall mean all water used for that purpose, either in its original state or after treatment, regardless of origin,

– whether supplied for consumption, or

– whether

  – used in a food production undertaking for the manufacture, processing, preservation or marketing of products or substances intended for human consumption and

  – affecting the wholesomeness of the foodstuff in its finished form.'

27 Article 7(1) of that directive reads as follows:

'Member States shall fix values applicable to water intended for human consumption for the parameters shown in Annex I.'

28 Article 7(6) thereof states that 'Member States shall take the steps necessary to ensure that water intended for human consumption at least meets the requirements specified in Annex I'.

29 Point 20 of Annex IC provides that the maximum admissible concentration for the nitrates parameter is to be 50 mg/l.

National legislation

30 The area covered by this action was declared a vulnerable zone under Decree No 283/1998 of 21 October 1998 of the Autonomous Community of Catalonia. In implementation of that enactment, Decree No 167/2000 of 2 May 2000 adopting exceptional measures in respect of public water supplies polluted by nitrates was adopted in order to guarantee the quality of water intended for human consumption.

Pre-litigation procedure

31 In 2000 the Commission received a complaint about the pollution of the aquifer in the Baix Ter, at the mouth of the River Ter, in the Province of Gerona, as well as of the water distributed in numerous communes in the Empordà, in that province. The complainant

maintained that that pollution by various substances, in particular nitrates, was due to the development of intensive pig farms, the effluent from which was directly discharged, without monitoring or treatment, into the aquatic environment. The complainant forwarded to the Commission the results of an analysis showing the nitrate content of the water concerned, but stated that the Health Department of Gerona had refused to disclose to him certain information relating to the quality of that water.

32 By letter of 2 May 2000, the Commission invited the Spanish authorities to submit their observations on that complaint and to send it information on the farms in question and on the state of the aquifer in the Baix Ter.

33 By letter of 13 July 2000, the Spanish authorities forwarded several reports drawn up by the Environment Directorate of the Autonomous Community of Catalonia. In their reply, they maintained that agricultural waste was excluded from the scope of Directive 75/442 and that the activities in question were not subject to the assessment procedure, required by Directive 85/337, as regards their environmental impact. Documents annexed to their reply showed that some enforcement action had been initiated as a result of monitoring of discharges from the livestock farms and that the pollution of the aquifer by nitrates had increased, half of the samples taken for the first quarter of 2000 exceeding the maximum concentration of 50 mg/l. As regards Directive 80/778, the Spanish authorities referred to Decree No 167/2000.

34 Since it considered that the Spanish authorities were failing to comply with Directives 75/442, 85/337 in its original and amended versions, 80/68 and 80/778, the Commission sent the Kingdom of Spain a letter of formal notice on 25 October 2000.

35 By letters of 1 and 15 February 2001, the Spanish authorities replied, forwarding to the Commission a report drawn up by the Environment Directorate of the Autonomous Community of Catalonia, in which the Catalan authorities stated that they were aware of the problem posed by the nitrate pollution in the Baix Ter. The Spanish authorities admitted, in particular, that in six communes on the aquifer concerned the nitrate concentration exceeded the threshold of 50 mg/l. However, they stated that Decree No 283/98 had designated the area in question as a vulnerable zone in Catalonia, as regards pollution by nitrates of agricultural origin, and that a programme of measures of water resources management in zones vulnerable to such pollution had been approved by the government on 3 April 2000. The Spanish authorities also stated that, in the zone concerned, the code of good agricultural practice adopted by the Decree of 22 October 1998 was mandatory, as was Decree No 205/2000 adopting the programme of agronomic measures applicable to vulnerable zones. As regards Directives 75/442 and 80/68, the Spanish authorities stated that they were not in breach, since all the pig farms concerned were subject to a procedure intended to ensure that they managed their waste correctly.

36 By letter of 15 March 2001, the Spanish authorities forwarded to the Commission a health report prepared by the Health and Social Security Directorate of the Autonomous Community of Catalonia, which showed that the maximum nitrate concentration of 50 mg/l was exceeded in several communes on the aquifer concerned, as well as in a large number of wells.

37 Since it considered that that those replies were still not satisfactory, the Commission sent the Kingdom of Spain a reasoned opinion by letter of 26 July 2001, calling on it to take the

measures necessary to comply with its obligations within a period of two months from the notification of that opinion.

38 By letter of 3 December 2001, the Spanish authorities replied to the reasoned opinion, forwarding to the Commission a further report drawn up by the Environment Directorate of the Autonomous Community of Catalonia. In that report, it was stated, first of all, that the procedures to regularise the position of the pig farms concerned were being applied and that the environmental reports established for that purpose, prior to the grant or refusal of approval, had been published. They also referred to the existence of an inspection plan for those farms and to the taking of enforcement action. They pointed out that all the new intensive pig farms with more than 2 000 pens for production pigs and 750 pens for sows were subject to an environmental impact assessment, in accordance with Law No 6/2001. Finally, they accepted that the maximum nitrate concentration was exceeded in five communes of the area in question, the population of which, according to a report of 14 September 2001 by the Public Health Directorate of the Autonomous Community of Catalonia, forwarded to the Commission, was only 1 424 inhabitants.

39 Since it considered that the Kingdom of Spain had still not taken the measures necessary to comply with its obligations, the Commission brought this action.

40 The Kingdom of Spain seeks the dismissal of the action and an order that the Commission pay the costs.

The action

The complaints alleging infringement of Directive 75/442

Arguments of the parties

41 The Commission submits that the farms in question produce waste in substantial quantity, particularly slurry and animal carcasses, and that that waste is, in the absence of other Community legislation specifically covering all the risks of damage to the environment it causes, governed by Directive 75/442.

42 According to the Commission, the pollution of the waters of the aquifer of the Baix Ter, admitted by the Spanish authorities in their letters of 1 and 15 February, 15 March and 3 December 2001, is due to the unmonitored and unmanaged discharge of an increasing volume of slurry, in breach of Article 4 of that directive. Several analyses confirm this. The average quantity of nitrates in the waters of the hydrogeological unit of the Baix Ter is 61 mg/l, which is above the maximum permitted concentration.

43 Moreover, the Commission maintains that, at the date fixed in the reasoned opinion, the pig farms concerned were operating without the permit required by Article 9 of that directive. The Spanish authorities admitted it by stating that the position of many of those farms is in the process of being regularised, which shows that the national legislation relied upon by those authorities is not being observed.

44 Finally, the pig farms in the area concerned, about 200 in number, have not been subject to the appropriate effective periodic inspections by the competent authorities, in breach of

Article 13 of Directive 75/442. The Spanish authorities have confined themselves to forwarding a table relating to the years 1994 to 1998 and describing a plan of inspections and some enforcement action.

45 The Spanish Government contests the classification of the pig slurry as waste within the meaning of Directive 75/442. The slurry is used as mineral organic soil fertiliser and is therefore not waste but a raw material. Such slurry so used as a raw material is in fact covered by Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1), which is intended to prevent pollution by nitrates from agricultural sources.

46 The Spanish Government states, in addition, that Directive 91/676 should be regarded, in any event, as 'other legislation', within the meaning of Article 2(1) of Directive 75/442, making the latter directive inapplicable to the pig slurry. If the expression 'other legislation' can be construed as including national legislation, Royal Decrees Nos 261/1996 and 324/2000 should be regarded as coming within that expression.

47 In the alternative, if the Court considers that the slurry comes within the scope of Directive 75/442, the Spanish Government submits that the Commission, which must establish that the facts which it alleges are true, has not established a failure to fulfil obligations under that directive. The competent Spanish authorities' action in the matter is resolute and has produced tangible results.

48 In its reply, the Commission maintains that the meaning of 'other legislation', for the purposes of Article 2(1) of Directive 75/442, refers only to other Community legislation, and does not include legislation of the Member States. The Court should therefore revisit the case-law resulting from the judgment in Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, by which the Court held that national legislation also could constitute 'other legislation'.

49 In any event, the Commission submits that the existing Spanish legislation, Royal Decrees Nos 261/1996 and 324/2000, do not ensure a level of protection of human health and of the environment comparable to that ensured by Directive 75/442. In addition, there is no Community legislation applicable to the slurry other than that directive. Directive 91/676 has a specific scope which does not cover environmental damage caused by livestock effluent. As regards animal carcasses, the Spanish Government makes no mention of them and Council Directive 90/667/EEC of 27 November 1990 laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin and amending Directive 90/425/EEC (OJ 1990 L 363, p. 51), which does not cover all damage caused by carcasses or all waste management activities, likewise cannot constitute 'other legislation'. Directive 75/442 alone is therefore applicable to the waste (slurry and animal carcasses) generated by pig farms.

50 Next, the Commission challenges the Spanish Government's argument that slurry is not waste but a raw material. The fact that pig slurry is subjected to recovery and that it is mentioned in the European Waste Catalogue supports the classification of that substance as waste. Only slurry used on the livestock farm as fertiliser in accordance with good agricultural practice could be regarded as a by-product. That is not the case in all the

livestock farms covered by this action, since the slurry is produced in too great a quantity to be kept for that use.

51 Finally, the Commission submits that it has established with sufficient evidence that the Spanish authorities have failed to fulfil the obligations arising under Directive 75/442.

52 In its rejoinder, the Spanish Government states that it does not seem to it to be relevant to challenge the Court's construction of the expression 'other legislation' in *AvestaPolarit Chrome,* cited above*.*

53 It maintains that all the applicable domestic legislation, namely, first at the national level, Royal Decree No 261/1996 for vulnerable zones and Royal Decree No 324/2000 for other areas, supplemented by Law No 10/1998, and secondly, the very wide-ranging rules adopted by the Autonomous Community of Catalonia in respect of animal excreta (management plans, management books, rules for spreading and for transport outside the farm, system of permits and penalties, etc.), is 'other legislation' within the meaning of Article 2(1)(b) of Directive 75/442 and that that directive does not therefore apply. The Commission is wrong to dwell on animal carcasses in its reply, since this action has always related to water pollution due to animal excreta.

54 The Spanish Government contends that, at Community level, Directive 91/676 regulates the recycling of livestock effluent in agriculture. Directive 90/667, on the other hand, is not applicable to slurry, since animal excreta is excluded from its scope. Slurry is a by-product, if it is recovered as fertiliser in accordance with good agricultural practice. The fact that it may readily be marketed, even outside its area of production, shows that it does not come within the definition of 'waste', for the purposes of Directive 75/442. As regards animal carcasses, it is Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ 2002 L 273, p. 1) which specifically applies.

55 Finally, the Spanish Government argues that the Catalan authorities have implemented training for farmers with a view to appropriate waste management of livestock effluent and that they encourage the setting up of composting works for the treatment of surplus excreta. 12 such works are already in operation and 10 are in the process of approval.

Findings of the Court

56 At the outset, it must be made clear that, in its action, the Commission expressly referred to animal carcasses among the waste generated by the pig farms in question. The complaints alleging infringement of Directive 75/442 therefore cover not only failure to fulfil obligations for which the Spanish authorities have made themselves liable in the management of pig slurry produced by those farms but also the failure to apply several provisions of that directive to animal carcasses.

57 It must be recalled that the scope of the term 'waste', for the purposes of Directive 75/442, turns on the meaning of the term 'discard' in the first subparagraph of Article 1(a) of that directive (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26).

58 In certain situations, goods, materials or raw materials resulting from an extraction or manufacturing process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not seek to 'discard', within the meaning of the first subparagraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse. There is, in such a case, no reason to hold that the provisions of that directive, which are intended to regulate the disposal or recovery of waste, apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products, provided that such reuse is not a mere possibility but a certainty, without any further processing prior to reuse, and as part of the continuing process of production (see Case C-9/00 *Palin Granitand Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraphs 34 to 36).

59 The Court has thus held that leftover rock and sand residue from ore-dressing operations in the working of a mine are not classified as waste for the purposes of Directive 75/442 where their holder uses them lawfully for the necessary filling-in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of those substances (see, to that effect, *AvestaPolarit Chrome*, paragraph 43). The Court has also ruled that petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of that directive (order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005, paragraph 47).

60 As the Spanish Government correctly maintains, livestock effluent may, on the same terms, fall outside classification as waste, if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations.

61 Contrary to the Commission's submission, it is not appropriate to limit that analysis to livestock effluent used as fertiliser on land forming part of the same agricultural holding as that which generated the effluent. As the Court has already held, it is possible for a substance not to be regarded as waste within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than that which produced it (see, to that effect, *Saetti and Frediani*, cited above, paragraph 47).

62 On the other hand, the analysis which allows, in certain situations, a production residue to be regarded not as waste but as a by-product or a raw material reusable within the continuing process of production cannot apply to carcasses of animals being reared, where those animals died on the farm and were not slaughtered for human consumption.

63 Such carcasses cannot, as a general rule, be reused for the purposes of human consumption. They are regarded by Community legislation, in particular by Directive 90/667, which was repealed, after the date fixed by the reasoned opinion, by Article 37 of Regulation No 1774/2002, as 'animal waste' and, furthermore, as waste within the category of 'high risk materials', which must be processed in factories approved by the Member States or disposed of by incineration or burial. That directive provides that such matter may be used in feedstuffs for animals which do not enter the human food chain,

but only by virtue of authorisations issued by the Member States and under the veterinary supervision of the competent authorities.

64 In no case may carcasses of animals which die on the farm in question therefore be used in conditions which would enable them not to be classified as waste within the meaning of Directive 75/442. The holder of those carcasses is certainly obliged to discard them, with the result that that matter must be regarded as waste.

65 In this case, as regards, first, the slurry generated by the livestock farms, it is clear from the contents of the case-file that the slurry is used as an agricultural fertiliser in the context of rules for spreading in accordance with good agricultural practice laid down by the Autonomous Community of Catalonia. The persons running those farms are not therefore seeking to discard it, with the result that the slurry is not 'waste' within the meaning of Directive 75/442.

66 The fact that in the European Waste Catalogue 'waste from agricultural primary production' includes 'animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site' is not such as to bring that conclusion into question. That general mention of the effluents from stock-rearing does not take into account the conditions in which the effluent is used and which are decisive for the purposes of assessing the meaning of 'waste'. In addition, the preliminary note in the annex to the European Waste Catalogue states that this list of waste is 'non-exhaustive', that 'the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances' and that 'the entry is only relevant when the definition of waste has been satisfied'.

67 Therefore, the complaints alleging infringement of Directive 75/442 must, in so far as they concern the management of pig slurry, be rejected.

68 As regards, secondly, the animal carcasses generated by the farms in question, which, as has been said in paragraph 64 of this judgment, must be regarded as waste within the meaning of Directive 75/442, the Spanish Government submits nonetheless that such carcasses are 'already covered by other legislation' and are therefore excluded from the scope of Directive 75/442 under Article 2(1)(b)(iii) thereof.

69 The Court has already held that the term 'other legislation' can refer to both Community legislation and national legislation covering a category of waste mentioned in Article 2(1)(b) of Directive 75/442 provided that such legislation, Community or national, relates to the management of that waste as such and that it results in a level of protection of the environment at least equivalent to that aimed at by that directive (see *AvestaPolarit Chrome*, paragraph 61).

70 Without it being necessary in this case to rule on the criticisms, made by the Commission at the hearing, of the judgment in *AvestaPolarit Chrome*, it must be observed that, with regard to the animal carcasses in question, for the purposes of Article 2(1)(b) of Directive 75/442 Community legislation other than that directive has been adopted by the Community legislature.

71 Directive 90/667 covers, in particular, the management of those carcasses as waste. It lays down precise rules applicable to that category of waste, by prescribing in particular

that it is processed in approved plants or disposed of by incineration or by burial. It defines, for example, the situations in which, if it cannot be processed, that waste must be incinerated or buried. Article 3(2) of that directive provides that such waste may be incinerated or buried particularly if 'the quantity and the distance to be covered do not justify collecting the waste' and that 'burial must be deep enough to prevent carnivorous animals from digging up the cadavers or waste and shall be in suitable ground so as to prevent contamination of water tables or any environmental nuisance. Before burial, the cadavers or waste shall be sprinkled as necessary with a suitable disinfectant authorised by the competent authority'. The same directive also prescribes the monitoring and inspections which the Member States must carry out and, in Article 12, provides that the Commission's veterinary experts may, in certain cases, in collaboration with the national authorities, make on-the-spot checks. Regulation No 1774/2002 entered into force after the date of expiry of the period fixed in the reasoned opinion and therefore does not apply to this case. Adopted following the 'mad cow disease' health crisis, it lays down even more precise requirements for the storage, processing and incineration of animal waste.

72 The provisions of Directive 90/667 govern the environmental effects arising from the handling of animal carcasses and, by their degree of precision, maintain a level of environmental protection at least equivalent to that set by Directive 75/442. They are therefore, contrary to the Commission's submission in its reply, 'other legislation' covering that category of waste, which permits it to be held that that category is excluded from the scope of Directive 75/442, without it being necessary to consider whether the national legislation relied upon by the Spanish Government itself constitutes such 'other legislation'.

73 Directive 75/442 does not therefore apply to the animal carcasses in question. Since the Commission has pleaded infringement of that directive alone, the complaints alleging breaches thereof must be rejected in so far as they refer to those carcasses.

74 Therefore, those complaints must be rejected in their entirety.

The complaints alleging infringement of Directive 85/337

Arguments of the parties

75 The Commission claims that, according to the Court's settled case-law, Article 4(2) of Directive 85/337, in its original and amended versions, does not empower the Member States to exclude completely and definitively from the assessment obligation one or more classes of projects listed in Annex II to that directive. The Member States' discretion in determining which projects listed in Annex II to designate is limited by the obligation to subject to an environmental assessment all projects capable of having significant effects on the environment, particularly because of their nature, size or location. The Court has already held that the Kingdom of Spain has failed to fulfil its obligations arising from those provisions (Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293).

76 In this case, in view of the negative effects of the pig farms on the environment, in particular water pollution and the stench, of the size and great proliferation of those farms in the same area, and of their location in a zone declared vulnerable under Directive 91/676 by the Spanish authorities themselves, prior assessments should have been

undertaken. The Spanish authorities admitted as much, in their report of 31 October 2001 accompanying their reply to the reasoned opinion.

77 The Commission therefore maintains that the Kingdom of Spain has failed to comply with Articles 2 and 4(2) of Directive 85/337, in its original and amended versions, depending on whether the date of the application for authorisation or alteration of the projects concerned was before or after 14 March 1999, the date on which the amendments by Directive 97/11 entered into force.

78 The Spanish Government submits that the Commission has not made clear which of the two versions of Directive 85/337 covers the failure to fulfil obligations and that the complaint is, as a result, inadmissible.

79 In the alternative, the government submits that that complaint should, in any event, be rejected. Twelve applications for authorisation or environmental consent were lodged by pig farmers in the area of the Baix Ter between 2000 and 2003, nine of those applications relating to the regularisation of existing farms. Only three cases thus actually concerned the creation of additional livestock capacities. Four of those applications have been rejected.

80 In its reply, the Commission argues that it stated clearly that the Spanish authorities had infringed Directive 85/337, in both its versions, depending on the date on which the farms were opened or extended. The complaint is therefore admissible. On the substance, the Spanish Government does not contest the arguments in support of that complaint.

81 In its rejoinder, the Spanish Government maintains that the Commission's allegations lack precision, in view of the number of farms concerned, namely 387 in 1989, and that the complaint is therefore inadmissible.

Findings of the Court

82 It must be recalled that the Commission is bound, in any application lodged under Article 226 EC, to state the precise complaints on which the Court of Justice is to adjudicate and also, at least briefly, the elements of law and of fact on which those complaints are based (see, in particular, Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 35, and Case C-202/99 *Commission* v *Italy* [2001] ECR I-9319, paragraph 20).

83 That is the case here.

84 The Commission stated that its complaints covered the lack of prior environmental impact assessment of the pig farms in the area of the Baix Ter, giving several specific examples of farms which should have been subject to such an assessment and stating that the directive alleged to have been infringed was Directive 85/337, or that directive in its original version, depending on whether the date of the application for authorisation or alteration of the projects concerned was before or after 14 March 1999, the date on which the amendments by Directive 97/11 entered into force.

85 Thus, those complaints were pleaded with sufficient precision to enable the Kingdom of Spain to present its defence and are, consequently, admissible.

86 On the substance, as regards, first, farms created or altered before 14 March 1999, the Commission correctly submits that projects for the creation or alteration of those farms, although mentioned in Annex II to Directive 85/337, in its original version, should have undergone a prior assessment of their impact on the environment, in view of their characteristics, under Article 2(1) of that directive.

87 While the second subparagraph of Article 4(2) of Directive 85/337, in its original version, conferred on the Member States a discretion to specify whether the classes of projects listed in Annex II to that directive should be made subject to an assessment and to set criteria and/or thresholds, that discretion was limited by the obligation, set out in Article 2(1) of that directive, to subject to an impact assessment projects likely to have significant effects on the environment, particularly by virtue of their nature, size or location (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 64; and *Commission* v *Spain*, cited above, paragraphs 30 and 31). As the Court has held, the Member States could not, in particular, exclude globally and definitively one or more classes of the projects mentioned in the said Annex II from the assessment requirement (see, to that effect, Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraphs 41 to 43).

88 Here, the characteristics of the farms concerned required that they be subjected to an impact assessment. The size of many of those farms, their geographical location in a zone declared vulnerable in 1998 by the Spanish authorities under Directive 91/676, their relatively high number in the same zone and the particular difficulties connected to that type of livestock farm necessitated that such assessments be undertaken.

89 The Spanish Government has not mentioned any prior assessment procedure which could have been applied to the pig farms in question before 14 March 1999. It thus explained, in the course of the pre-litigation procedure, that the national legislation then in force did not require that the activities in question be subjected to an assessment of their impact on the environment. Likewise, its arguments before the Court cover only the implementation in the area of the Baix Ter of national provisions which entered into force after 14 March 1999.

90 Therefore, the complaints alleging infringement of Directive 85/337, in its original version, must be upheld.

91 So far as concerns, secondly, livestock farms created or altered after 14 March 1999, the date on which the amendments made by Directive 97/11 entered into force, it must be observed that Article 4(2) of Directive 85/337 provides that the Member States are to determine through a case-by-case examination or thresholds or criteria which they set whether the projects listed in Annex II to that directive, which include installations for the intensive rearing of pigs, other than those mentioned in Annex I to the same directive, should be made subject to an impact assessment.

92 Those provisions have, in essence, the same scope as that of Article 4(2) of Directive 85/337, in its original version. They do not vary the general rule, set out in Article 2(1) of that directive, that projects likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location, are to be made subject to an assessment of their effects on the environment. As a result, the entry into force of the amendments made by

Directive 97/11 has not affected the Spanish authorities' obligation to ensure that such assessments are undertaken with regard to the livestock farms concerned.

93 However, the Spanish Government submits that, in accordance with Law No 3/1998 and the decree implementing it, establishments of more than 2 000 production pigs or of 750 sows are made subject to prior environmental authorisation, which imposes precise requirements for the management of livestock effluent and animal carcasses. Farms with from 200 to 2 000 pigs must obtain environmental consent prior to their creation. The same law provides that existing pig farms without environmental consent must submit applications for consent, to regularise their position.

94 According to the Spanish Government, only three applications submitted on the basis of that law cover the creation of new livestock-rearing facilities. All the new installations would therefore be subject to an application for authorisation or environmental consent, the largest among them being subject, on the basis of the criteria set out in paragraph 93 of this judgment, to an impact assessment.

95 The Spanish Government also states that the number of pig farms, in all the communes of the Baix Ter area concerned by this action, declined from 387 in 1989 to 197 in 1999. Since the latter year, even though that number is increasing slightly, the number of animals has certainly fallen, the decrease being 12 017 head. The Spanish authorities' activity is demonstrated particularly by the opening of 63 enforcement cases giving rise to pecuniary sanctions.

96 The Commission does not challenge the suitability of the thresholds set by the legislation adopted by the Autonomous Community of Catalonia. In addition, while it disputes the effectiveness of the measures taken on the basis of Law No 3/1998, it has not established that some farms were created or altered after 14 March 1999 without having been made the subject of an impact assessment. Contrary to the Commission's submission, the Spanish authorities have not admitted that some farms were in such a position, but only that some farms created before the entry into force of Law No 3/1998 and of its implementing decree had not been subjected to a study of their effects and that some of them were the subject of authorisation procedures leading, if appropriate, to regularisation.

97 In those circumstances, the failure of the Kingdom of Spain to fulfil its obligations under Articles 2 and 4(2) of Directive 85/337 is not proved. The complaints alleging infringement of those provisions must therefore be rejected.

98 It follows from the foregoing that the Commission's complaints alleging breach of the requirement for environmental impact assessments of the pig farms in the Baix Ter area are well founded only in so far as they relate to Articles 2 and 4(2) of Directive 85/337, in its original version.

The complaints alleging infringement of Directive 80/68

99 The Commission submits that slurry is a substance which has a deleterious effect on the taste and/or odour of groundwater and which therefore comes within list II in Directive 80/68. Authorisation procedures involving prior investigations and hydrogeological studies should, as a result, have been implemented in the areas affected by pollution where

pig-rearing farms were going to be built, in compliance with Articles 3(b), 5(1) and 7 of Directive 80/68, which did not happen. The existence of uncontrolled discharges and seepages of slurry is proved by the enforcement actions undertaken by the Spanish authorities against the managers of the farms in question.

100 However, it must be observed, first, that the use of slurry as fertiliser is an operation which usually complies with good agricultural practice, and is not 'disposal or tipping for the purposes of disposal of these substances' within the meaning of Article 5 of that directive.

101 Secondly, even if the spreading of the slurry has a deleterious effect on the taste and/or odour of the groundwater and could cause water pollution, the system of protection of waters from pollution by livestock effluent is not based, at Community level, on Directive 80/68 but on Directive 91/676. The latter's specific purpose is to counter water pollution resulting from the spreading or discharge of livestock effluent and from the excessive use of fertilisers. The scheme of protection for which it provides involves precise management measures which the Member States must impose on farmers and which take into account the more or less vulnerable nature of the environment receiving the effluent.

102 If Article 5 of Directive 80/68 were interpreted as meaning that the Member States must subject to prior investigation, involving, in particular, a hydrogeological survey, any use of slurry or, more generally, of livestock effluent as agricultural fertiliser, it would result in extensive investigation requirements, whatever the area concerned. Those requirements would be manifestly more rigorous than those which the Community legislature, by Directive 91/676, intended to impose on the Member States in agricultural matters. The scheme of protection established by Directive 80/68 would be substituted in part for that specifically instituted by Directive 91/676.

103 Such a construction of Directive 80/68 cannot therefore be upheld.

104 The Spanish authorities were not, as a result, bound, on the basis of that directive, to subject the agricultural use of slurry from the livestock farms in question to the authorisation procedure prescribed by the directive nor, in those circumstances, to undertake hydrogeological studies in the area concerned.

105 Therefore, the complaints alleging infringement of Directive 80/68 must be rejected.

The complaints alleging infringement of Directive 80/778

Arguments of the parties

106 The Commission claims that in several communes in the Baix Ter area, on several occasions, the maximum nitrate concentration of 50 mg/l fixed in point 20 of Annex IC to Directive 80/778 was exceeded, which the Spanish authorities admitted in their letters of 13 July 2000, 1 and 15 February, 15 March and 3 December 2001, and 29 January 2002.

107 The Spanish Government states that the Autonomous Community of Catalonia has initiated a plan to remedy the water pollution by nitrates, which is clear from research and numerous analyses and water-catchment protection measures, under the aegis of the Catalan Water Agency. A monitoring network, with 28 analysis points every three months, has been put in place in the Baix Ter region. In 2003, 73% of the analyses over that

network showed levels of nitrate concentration below 50 mg/l. Comparable efforts have been made as regards the presence of nitrogen compounds in the groundwater of the province of Gerona. The still insufficient results of all those actions are explained in part by the serious drought which Catalonia has experienced over recent years. In addition, the livestock farms have been the subject of stricter checks. Works were also undertaken in 2002 in several communes to remedy the problems in the public supply of drinking water. The problems found in the other networks should soon be resolved.

Findings of the Court

108 As the Court has held, Article 7(6) of Directive 80/778 does not establish a mere duty of due diligence but an obligation to achieve a particular result (Case C-316/00 *Commission* v *Ireland* [2002] ECR I-10527, paragraph 37).

109 The Spanish Government does not deny that between 30% and 40% of the water samples analysed in the area covered by this action reveal a nitrate concentration exceeding the threshold of 50 mg/l fixed in point 20 of Annex IC to Directive 80/778. The government admits, in particular, that in certain communes, and specifically those of Albons, Parlavà, Rupià and Foixà, the obligations arising from that directive are not being complied with as regards the nitrates parameter.

110 While they appear to have improved the overall quality of water intended for human consumption in the region of the Baix Ter, the measures adopted by the Spanish authorities are not such as to show compliance with the obligations arising from Article 7(6) of Directive 80/778.

111 As for the Spanish Government's contention that the health risk for the populations concerned has been reduced as a result of information campaigns, it in no way exonerates the Spanish authorities from the obligation to achieve a particular result which is theirs by virtue of Directive 80/778.

112 Accordingly, the complaints alleging infringement of Directive 80/778 are well founded.

113 It follows from all the foregoing that:

– by failing to carry out, prior to the construction of the pig farms in the Baix Ter area or their alteration, an impact assessment, contrary to the requirements of Articles 2 and 4(2) of Directive 85/337, in its original version,

– by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Annex IC to Directive 80/778, contrary to Article 7(6) of that directive,

the Kingdom of Spain has failed to fulfil its obligations under those directives.

114 The remainder of the action must be dismissed.

Costs

115 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, the Court may order that the costs be shared or decide that the parties are to bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

116 In this case, account should be taken of the fact that the action has not been upheld in respect of the entire infringement as defined by the Commission.

117 It is therefore appropriate to order the Kingdom of Spain to pay two thirds of all the costs. The Commission is ordered to bear the other third.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, by failing to carry out, prior to the construction of the pig farms in the Baix Ter area or their alteration, an impact assessment, contrary to the requirements of Articles 2 and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, and by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Annex IC to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, contrary to Article 7(6) of that directive, the Kingdom of Spain has failed to fulfil its obligations under those directives;**

2. **Dismisses the remainder of the action;**

3. **Orders the Kingdom of Spain to pay two thirds of all the costs and the Commission of the European Communities to bear the other third.**

[Signatures]

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* Language of the case: Spanish.

OPINION OF ADVOCATE GENERAL

STIX-HACKL
delivered on 26 May 2005 [1](1)

Case C-121/03

Commission of the European Communities
v
Kingdom of Spain

(Treaty infringement proceedings – Infringement of various environmental protection obligations in the Baix Ter area in the province of Gerona – Directive 75/442/EEC on waste – Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment – Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances – Directive 80/778/EEC relating to the quality of water intended for human consumption)

I – Introduction

1. In the present proceedings for failure to fulfil Treaty obligations the Commission alleges, having regard to a number of forms of environmental pollution in the area of Baix Ter (Gerona Province) which are essentially said to result from various intensive pig farms (hereinafter 'pig farms') which operate there, that the Kingdom of Spain has infringed various environmental protection directives.

2. With regard both to the directives concerned and to the legal questions raised the present case is closely connected to Case C-416/02 in which I delivered my Opinion on 12 May 2005. (2) To the extent that these cases overlap I have made reference therefore to my observations in that Opinion by indicating the relevant points therein.

3. The fact must not be overlooked, however, that even if three of the four complaints concern the same directives or provisions of those directives as in Case C-416/02, the present case simply on account of its factual background differs considerably from the former. Thus, Case C-416/02 was chiefly concerned with environmental pollution and legal infringements which were said to emanate from the activities of a single pig farm, whereas in the present case it is rather environmental pollution and legal infractions imputed to a large number of pig farms in a particular region which are at issue.

4. Examination of the existence of a Treaty infringement in the event of generalised defects or 'structural' shortcomings in the practical application of a directive in a Member State naturally requires, however, in parts a more 'global' approach than in a case in

which it is alleged on account of isolated facts or an individual case that a Member State has failed to take the necessary measures for the practical application of a directive. (3)

5. The Commission considers the following environmental protection directives to have been infringed:

Council Directive 75/442/EEC of 15 July 1975 on waste, (4) as amended by Council Directive 91/156/EEC of 18 March 1991 (5) ('the Waste Framework Directive').

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (6) ('Directive 85/337'), amended by Council Directive 97/11/EC of 3 March 1997 (7) ('Directive 97/11').

Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (8) ('the Groundwater Directive').

Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (9) ('the Drinking-Water Directive').

II – Legal framework

6. As regards the relevant provisions of the Waste Framework Directive, the Groundwater Directive, Directive 85/337 and Directive 97/11, I refer to points 3 to 6 of my Opinion in Case C-416/02.

7. Additionally, in the present case point 1(e) of Annex II to Directive 97/11 is of relevance. It provides as follows:

'Projects subject to Article 4(2)

1. Agriculture, silviculture and aquaculture

...

(e) Intensive livestock installations (projects not included in Annex I);'

8. The Drinking-Water Directive includes the following provision:

Article 7(6)

'Member States shall take the steps necessary to ensure that water intended for human consumption at least meets the requirements specified in Annex I.'

In Annex I, Table C which is headed 'Parameters concerning substances undesirable in excessive amounts' indicates at point 20 a guide level for nitrates of 25 mg/l and a maximum admissible concentration of 50 mg/l.

III – Facts

9. The affected area, Baix Ter in the province of Gerona, lies on the north-east coast of Spain in the region of Catalonia. That area, which includes the estuarine region of the River Ter as it flows into the Mediterranean Sea, has a large number of pig farms.

10. As the Commission has observed in specifying the subject-matter of the action, the complaints concerning the Waste Framework Directive, Directive 85/337 (or Directive 97/11) and the Groundwater Directive are connected with the construction, expansion and operation of the numerous pig farms in the region of Baix Ter. The complaints relating to the Groundwater Directive and the Drinking-Water Directive concern in addition the ensuing (nitrate) pollution – substantially acknowledged by the Spanish Government – of the groundwater in the Baix Ter area before the River Ter flows into the Mediterranean Sea and thus the pollution of drinking water which a number of municipalities in the Empordà take from that groundwater.

IV – Pre-litigation procedure and proceedings before the Court

11. Through a complaint lodged by an environmental protection group the Commission became aware in 2000 of pollution in the region concerned. Following consultations with the Spanish Government the Commission reached the conclusion that the Kingdom of Spain had infringed several environmental protection directives and in a letter of formal notice sent on 25 October 2000 called upon it to submit observations within two months.

12. The Commission, having taken the view that the response of the Spanish Government by letters of 1 February and 15 February 2001 had not allayed its suspicions of a Treaty infringement, sent the Spanish Government by letter of 26 July 2001 a reasoned opinion in which it complained of the infringement of the directives referred to in my introduction (10) and called upon the Kingdom of Spain to adopt the necessary measures within two months. The Spanish Government replied by letters of 3 December 2001 and 29 January 2002.

13. Considering that the Kingdom of Spain had not fulfilled its obligations, the Commission by application of 14 March 2003, lodged at the Court Registry on 19 March 2003, brought proceedings before the Court against the Kingdom of Spain under Article 226 EC.

14. The Commission claims that the Court should

(1) declare that:

(a) by failing to adopt the measures necessary to comply with its obligations under Articles 4, 9 and 13 of Directive 75/442, as amended by Directive 91/156, by not taking the necessary measures to ensure that waste from the pig farms located in the Baix Ter area of the province of Gerona is disposed of or recovered without endangering human health and without harming the environment, by allowing a large proportion of those farms not to have the permit required under the directive and by failing to carry out the periodic checks necessary for such farms;

(b) by failing to carry out an impact assessment prior to the construction of the projects in respect of those pig farms or their alteration, contrary to the

requirements of Articles 2 and 4(2) of Directive 85/337, either in its original wording or as amended by Directive 97/11;

(c) by failing to carry out the requisite hydrogeological studies in the area affected by pollution, in relation to the pig farms which are the subject of these proceedings, contrary to Articles 3(b), 5(1) and 7 of Council Directive 80/68;

(d) by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Table C of Annex I to Directive 80/778, contrary to Article 7(6) of that directive;

the Kingdom of Spain has failed to fulfil its obligations under the abovementioned directives; and

(2) order the Kingdom of Spain to pay the costs.

V – Infringement of the Waste Framework Directive

A – *Main arguments of the parties*

15. The *Commission* argues that the pig farms in question will produce large quantities of waste, in particular slurry and animal carcasses. In the absence of other more specific Community legislation the handling of that waste falls within the scope of the Waste Framework Directive.

16. The *Spanish Government* responds in general terms that the total number of pig farms in the relevant municipalities of Baix Ter fell from 387 in 1989 to 197 in 1999. Since 1999, even if the number is once again rising slightly, the headcount of animals has fallen by 12 017. The measures taken by the Spanish authorities have in addition included the application of procedures to penalise breaches in 63 cases.

17. It follows, in the *Commission's* view, from the groundwater pollution of Baix Ter, which is attributable in particular to the increasing volume of slurry produced by the pig farms and which has been acknowledged by the Spanish Government and confirmed by various analyses, that the waste from the pig farms in question has not been recovered or disposed of in accordance with the requirements of Article 4 of the Waste Framework Directive. Contrary to Article 9 of that directive the pig farms in question also do not possess the necessary waste permit. That follows from the information provided by the Spanish Government concerning the regularisation of the status of pig farms from which it is apparent that a large number of those farms at the date relevant for these proceedings did not possess a permit and that provisions of national law pleaded by the Spanish Government were not observed. Finally, the documents submitted by the Spanish Government to the Commission do not permit it to be concluded that with regard to all or at least a large proportion of the approximately 220 pig farms concerned appropriate periodic inspections within the meaning of Article 13 of the Waste Framework Directive were undertaken.

18. In the Commission's view, animal carcasses indubitably constitute waste within the meaning of the directive. It admits, however, that slurry which is recovered and utilised in the same farm as fertiliser in accordance with good agricultural practice may constitute an agricultural by-product which the farm does not intend to 'discard' within the meaning of the directive and is therefore not to be considered to be waste. In the present case, however, this is in any event not true in respect of all the pig farms at issue; the Spanish Government has never argued that all of the slurry is used *as fertiliser* on the pig farms concerned.

19. In response to the argument of the Spanish Government that the derogation set out in Article 2(1)(b) of the Waste Framework Directive would apply, the Commission states that there is no other relevant Community legislation and that therefore the derogation cannot apply. Simply as a general rule, provisions of national law do not constitute 'other legislation' within the meaning of that provision and moreover the various provisions pleaded by the Spanish Government do not satisfy the requirements set out in the directive.

20. In the view of the *Spanish Government*, the Waste Framework Directive does not apply to farms such as the pig farms at issue in this case. It takes the view that spreading slurry on agricultural land is a proven method of natural fertilisation and cannot be considered therefore to constitute disposal of waste within the meaning of Article 1(a) of the Directive.

21. Should the Court reach the conclusion that the Waste Framework Directive is in principle applicable, the Spanish Government argues that in any event the derogating provision of Article 2(1)(b) applies. Directive 91/676/EEC (11) constitutes 'other legislation' within the meaning of that derogation since that directive governs pollution caused by nitrates from agricultural sources and the polluting effect of spreading slurry on fields consists at most in the possibility of nitrate pollution of the groundwater. Furthermore, animal carcasses from pig farms are addressed by Regulation (EC) No 1774/2002. (12) Moreover, the derogation also applies if relevant national legislation exists. That is the case in Spain since pig farms fall within the scope of various Spanish provisions on waste.

22. Finally, the Spanish Government argues that the Commission has not furnished proof of the existence of the alleged infringements of the Waste Framework Directive. It points to the fact that the Catalan authorities have taken steps to train and inform farmers with regard to appropriate handling of slurry and have encouraged the construction of treatment plants for excess slurry. Twelve such plants are already operating and ten are in the process of being licensed.

B – *Appraisal*

1. Preliminary observation

23. By its first complaint the Commission alleges that the Kingdom of Spain has failed to take the necessary measures in the area of Baix Ter in order to comply with its obligations under Articles 4, 9 and 13 of the Waste Framework Directive. As in Case C-416/02 the alleged infringement relates not so much to the transposition of those provisions into Spanish domestic law as to the practical application of those provisions.

24. As I have already explained in my introduction to this Opinion, the present case differs, however, from Case C-416/02 in so far as the alleged infringement of the directives is not derived from the activities of a single farm but from a large number of farms within a specific area.

25. In the present case the Commission is not seeking to demonstrate therefore the extent to which an isolated fact, such as the disposal of slurry by a particular pig farm that is harmful to the environment and seemingly thus incompatible with the objectives of the Waste Framework Directive, in itself already establishes a failure to take the necessary measures to implement that directive, rather it is seeking to demonstrate a more global failure by the Spanish authorities in the practical application of the aforementioned provisions of the Waste Framework Directive as regards pig farms in the Baix Ter area. In order to conclude that there has been a Treaty infringement, it is unnecessary to prove in respect of every single pig farm in the Baix Ter area, therefore, that waste within the meaning of the Waste Framework Directive is involved and that the application of the Waste Framework Directive has not in practice been correct or effective.

2. Applicability of the Waste Framework Directive

26. The notion of ‘waste’ within the meaning of Article 1(a) of the Waste Framework Directive.

27. Before assessing whether Articles 4, 9 and 13 of the Waste Framework Directive have been infringed as the Commission alleges, it must first be decided whether and to what extent the substances which are at issue in the present case, that is to say slurry and animal carcasses, are ‘waste’ within the scope of the Waste Framework Directive.

a) Classification as ‘waste’ under the Waste Framework Directive

28. As I have already set out in my Opinion in Case C-416/02, the classification of substances such as animal carcasses and slurry as waste depends on whether the holder of a substance discards it or intends or is required to discard it, which must be determined in the light of all the circumstances, regard being had to the aim of the Waste Framework Directive and the need to ensure that its effectiveness is not undermined. (13)

29. I then went on to explain that according to settled case-law a substance resulting from a manufacturing process the primary aim of which is not the production of that item may constitute either a mere residue or under certain circumstances, however, a by-product which the undertaking does not intend to ‘discard’ and which therefore cannot be classified as waste. (14)

30. In the light of those observations I concluded in that Opinion that animal carcasses constitute a mere residue from pig farming and therefore as a matter of principle ‘waste’ within the meaning of Article 1(a) of the Waste Framework Directive. (15) That also holds true for the present case.

31. As regards slurry, it follows from my Opinion in Case C-416/02 that the answer to the question concerning its characterisation as waste must be of a more subtle nature. (16)

32. As I set out there, situations are in fact conceivable where slurry arising from farming operations would not be regarded as waste within the meaning of the directive, if it is certain that the slurry is re-used 'without any further processing prior to reuse and as an integral part of the production process' or for the benefit of agriculture, that is to say, is spread as fertiliser (no other appropriate use being generally conceivable). (17) However, if slurry is for example spread to an extent over and above that required for the use of fertiliser according to good farming practice or if it should be spread on a field that has no reason to be spread with fertiliser, for example, because it is not being cultivated at all or is lying fallow, this should be sufficient proof that it is the holder's intention to discard the slurry. (18)

33. As regards the present case, it is true that the possibility cannot be excluded therefore that in individual cases on certain of the pig farms at issue the slurry is spread as a fertiliser according to good agricultural practice and cannot be regarded therefore as waste within the meaning of the Waste Framework Directive. On the basis of the available information it must be concluded, however, that in the Baix Ter area there is a relatively dense concentration of operational pig farms, some of which are quite sizeable, and that therefore – as the Commission has argued without being contradicted – considerable quantities of slurry are produced. In the light of the submissions of the Spanish Government, it probably cannot be the case that all of that quantity of slurry is used as fertiliser on farms. Rather, the Spanish Government has referred to the operation and construction of a series of plants for the recovery or disposal of slurry. (19) Finally, the existence of nitrate pollution in the relevant area, which has been observed at several locations and has not been contested by the Spanish Government – a significant source other than agriculture has not been suggested in the present case – can be regarded as an indication at least of excessive use of fertiliser and thus of a fertilisation practice which does not correspond to good agricultural practice.

34. On account of these findings it can, in my view, be assumed that slurry emanating from the pig farms in question in Baix Ter constitutes in general terms a residue of pig farming which the farms at issue intend to discard and that it must be categorised therefore as waste within the meaning of the Waste Framework Directive.

35. In the light of the foregoing it must be concluded that both the animal carcasses and at least a certain proportion of the slurry produced by the pig farms in question constitute waste within the meaning of the Waste Framework Directive.

b) The derogation provided for by Article 2(1)(b)(iii) of the Waste Framework Directive

36. The derogation provided for by Article 2(1)(b)(iii) of the Waste Framework Directive relates to 'animal carcasses' generally and to 'agricultural waste' inasmuch as it consists of 'faecal matter and other natural, non-dangerous substances used in farming'.

37. Both pig carcasses and pig slurry fall as a matter of principle therefore within the scope of that derogation, so that for the directive to apply there must additionally be no 'other legislation' within the meaning of that provision which governs the said waste. (20)

38. In that regard the Spanish Government relies upon provisions of Community law, that is to say, the Nitrates Directive and Regulation No 1774/2002, and upon several pieces of national legislation.

39. According to the judgment in *AvestaPolarit* both specific Community legislation and specific national legislation (21) can constitute 'other legislation' within the meaning of the said derogation.

40. Irrespective of whether it is specific Community legislation or specific national legislation, it is not enough, in any event, for that legislation just to relate in some way to the waste in question. Such legislation must actually relate to its 'management' as waste within the meaning of Article 1(d) of the Waste Framework Directive, must pursue the same objects as that directive and must result in a level of protection of the environment which is at least equivalent to that pursued by the directive. (22)

41. As regards firstly the Nitrates Directive referred to by the Spanish Government, I have already demonstrated in my Opinion in Case C-416/02 that it does not satisfy the abovementioned requirements. (23)

42. As for Regulation No 1774/2002, it suffices to observe that at the relevant date for determining the existence of the Treaty infringement, that is to say, at the end of the period laid down in the reasoned opinion (24) that regulation was not yet in force. (25) It is therefore unnecessary to discuss the content of that regulation in the present context.

43. The Spanish Government then put forward several provisions of domestic law applying at national level to slurry (Royal Decrees No 261/1996 and No 324/2000 and the Spanish Law 10/1998 on Waste) and – at the hearing – two ministerial orders of 20 October 1980 and 22 February 2001 which concern animal carcasses.

44. As regards specifically Royal Decrees No 261/1996 and No 324/2000 and the ministerial orders invoked, I have already found in my Opinion in Case C-416/02 that those provisions are not to be regarded as legislation which governs the management of slurry or animal carcasses as waste within the meaning of Article 1(d) of the Waste Framework Directive. (26)

45. That also applies, in my view, to the Spanish Law 10/1998 on Waste to which the Spanish Government has referred in the present case and which it argues is applicable in a subsidiary manner. The arguments of the Spanish Government reveal inter alia that that law provides merely for waste treatment in connection with the Nitrates Directive and its implementing measures and that it does not provide for a permit procedure corresponding to the Waste Framework Directive which would apply to the spreading of slurry.

46. Finally, the Spanish Government has put forward a series of provisions applying at the regional level in Catalonia which concern slurry from various points of view (inter alia provisions on management plans and record-keeping relating to management, rules concerning fertilisation practice and the spreading of slurry, and specific permit requirements).

47. In my opinion the Spanish Government has not been able to demonstrate, however, that those regional provisions do not merely govern individual aspects of slurry and the management thereof but that they constitute a code that concerns the management of slurry within the meaning of Article 1(d) of the Waste Framework Directive and results in a level of protection for the environment equivalent to that pursued by the directive. The Spanish Government has also not contradicted in substance a detailed survey of the

Commission on that issue in which the latter came to the conclusion that the Catalonian provisions invoked – even when regarded as a whole – display various lacunae when compared to the Waste Framework Directive. Additionally, the Spanish Government has invoked only Catalonian provisions which concern slurry and not, however, provisions which concern animal carcasses.

48. Regardless of that, it must be observed in general terms that the Spanish Government has stated that as a matter of national law – in contrast to the position under the Waste Framework Directive, as I have set out above (27) – slurry is not regarded as waste, which in itself renders it doubtful that national law governs the 'management' of slurry as waste at all.

49. In conclusion, it must be found, therefore, that in the present case neither specific Community legislation nor specific domestic legislation – whether at national or at regional level – exists whose content satisfies the requirements of Article 2(1)(b)(iii) of the Waste Framework Directive.

50. The derogating provision of Article 2(1)(b)(iii) of the Waste Framework Directive does not therefore in any event apply in the present case. There is also no need to go into the arguments of the Commission that the case-law established by *AvestaPolarit* should be modified so that only Community law is to be regarded as 'other legislation' within the meaning of that derogation.

C – *Infringement of Articles 4, 9 and 13 of the Waste Framework Directive*

51. The substance of the Commission's complaint is that in respect of the pig farms in the Baix Ter area the Kingdom of Spain has failed to take the necessary measures in order to fulfil its obligations under Articles 4, 9 and 13 of the Waste Framework Directive.

52. As regards the content of those obligations, Member States are required under Article 4 of the Waste Framework Directive to ensure that waste is disposed of or recovered without endangering human health and harming the environment (Article 4(1)). In particular, Member States are required to take measures against the abandonment or dumping of waste (Article 4(2)).

53. In order to attain the objectives of that article undertakings which dispose of waste are required under Article 9 of the Waste Framework Directive to obtain a permit and are to be subjected under Article 13 to periodic inspections.

54. As to the question of whether the Kingdom of Spain has taken the necessary measures to fulfil those obligations, it must firstly be observed that the Spanish Government has not contested the Commission's submission that the approximately 200 pig farms operating in the Baix Ter area produce large quantities of slurry and animal carcasses. Furthermore, it is not disputed that numerous tests have revealed high nitrate levels in the groundwater of the Baix Ter, nor has the link between that nitrate pollution and the pig farming operations been questioned.

55. In my opinion, it is evident, therefore, that during the relevant period waste from the pig farms was not disposed of in a manner which was harmful neither to human health nor to the environment. Further support for this view results from the fact that according to the

Spanish Government the necessary capacity or plants to dispose of that waste are, in part, only at the planning or construction stage.

56. On the basis of documents obtained from the Spanish Government, the Commission has also observed that at the relevant date for determining the existence of a Treaty infringement a large proportion of the pig farms at issue did not possess a permit and that up to that date periodic inspections had not been undertaken.

57. The Spanish Government has not contested those observations as such, rather it has stated that in the meantime a number of regularisation procedures and various inspections have been carried out, leading to the application of sanctions. In my view that is not sufficient, however, to rebut the allegation of a failure to fulfil – at any rate at the relevant date for so determining – the obligations of authorisation and (periodic) inspection.

58. In the light of these findings I am not of the view that in respect of the pig farms in the Baix Ter area the Kingdom of Spain has taken the necessary measures in order to fulfil its obligations under Articles 4, 9 and 13 of the Waste Framework Directive.

59. I come to the conclusion, therefore, that the first complaint is well founded.

VI – Infringement of Directive 85/337

A – *Main arguments of the parties*

60. By its second complaint the *Commission* alleges that, by not conducting environmental impact assessments prior to the construction or subsequent alteration of the pig farms in question, the Kingdom of Spain has infringed Articles 2 and 4(2) of Directive 85/337 either in its original wording or as amended by Directive 97/11.

61. It argues that the discretion granted to Member States by Article 4(2) of those directives in determining which projects listed in Annex II to those directives are to be subject to an assessment does not empower Member States to exclude completely and definitively the possibility of assessing one or more classes of projects in Annex II. Rather, that discretion is limited by the duty to subject projects to an assessment of their effects where in particular on account of their nature, size or location significant effects on the environment are likely.

62. Accordingly, in the Commission's view, in the light of their adverse effect on the environment – in particular aquatic pollution and nasty odours – of their size and extreme proliferation in the affected region and of their location in an area designated as a vulnerable zone by the Spanish authorities under the Nitrates Directive, most of the pig farms in question should have been subject to a prior environmental impact assessment. In its response to the reasoned opinion the Spanish Government essentially conceded that the pig farms at issue in this case were not subject to an environmental impact assessment prior to their construction or extension.

63. The *Spanish Government* contests the admissibility of this complaint, arguing that the Commission has not specified which version of Directive 85/337 the infringement concerns.

64. It argues, in the alternative, that the complaint is not well founded, pointing out that in the period 2000 to 2003 12 projects concerning pig farms in the Baix Ter area were submitted for approval or environmental assessment of which 9 related to the regularisation of the position of existing pig farms. Thus only three of the projects concerned the construction of new capacity. In total four applications were rejected.

65. The Commission argues that the Kingdom of Spain has infringed Directive 85/337 both in its original form and as amended by Directive 97/11, according to when the respective pig farms were constructed or extended. The form of order sought by it is therefore sufficiently precise and admissible. As regards the substantive arguments of the Spanish Government, the Commission observes that the environmental impact assessment should in any event have taken place prior to the construction or extension of the relevant pig farm.

B – *Appraisal*

66. For the reasons which I have already set out in connection with the comparable objection of inadmissibility in Case C-416/02, I consider the present complaint also to be admissible and that questions concerning the date of the infringement and the applicability of each particular version of the directive must be dealt with when considering the substance of the complaint. (28)

67. As regards the substance of the complaint, however, I am not of the view in the present case that the Commission has provided the Court with the information which is necessary to determine with a sufficient degree of certainty whether the alleged Treaty infringement has been committed.

68. All that can be determined with a degree of certainty is that with regard to a large proportion of the pig farms in question in the Baix Ter area no environmental impact assessment appears to have been undertaken. It has been far from proven, however, in which respects and to what extent some or all of the pig farms at issue should, on account of their nature, size or location, have been subjected by the Kingdom of Spain at all to such an assessment under Article 4(2) of Directive 85/337, whether in its original wording or as amended by Directive 97/11.

69. Furthermore, there is no information as to when the farms in question were constructed or extended or to what degree, if any, there were extensions. It therefore also cannot be determined with a sufficient degree of precision whether, or to what extent, the Kingdom of Spain has infringed Directive 85/337 either in its original wording or as amended by Directive 97/11.

70. To determine on such a basis that the Treaty has been infringed as alleged would be to rely primarily on presumptions. According to the Court's consistent case-law, the Commission must however provide the Court with all the evidence necessary to enable it to establish that the obligation has not been fulfilled and may not rely on presumptions. (29)

71. I take the view, therefore, that the second complaint should be dismissed as unfounded.

VII – Infringement of the Groundwater Directive

A – *Main arguments of the parties*

72. The *Commission* takes the view that, as the area affected by the pig farms in question was not subject to a prior hydrogeological examination, the Kingdom of Spain has infringed Articles 3(b), 5(1) and 7 of the Groundwater Directive.

73. The hydrogeological examination was necessary since there have been uncontrolled discharges of slurry from the pig farms in question, a fact which is confirmed by the bringing of proceedings by the Spanish authorities to penalise them. Moreover, the Commission points to the nitrate pollution, serious in part, caused by the slurry, which has been confirmed by various investigations recognised by the Spanish Government, and by various analyses. The Commission takes the view that nitrates constitute dangerous substances within the meaning of the directive, since they fall within point 3 of List II contained in the annex to the directive.

74. The *Spanish Government* replies that national authorities commissioned studies concerning the hydrogeological conditions within the framework of measures taken on the basis of the Nitrates Directive to control nitrates from agricultural sources.

75. In addition, it argues that in the meanwhile substantial efforts have been made to reduce nitrate pollution and that for the most part they have been successful.

B – *Appraisal*

76. Under Article 3(b) of the Groundwater Directive, the Member States are to take the necessary steps to limit the introduction into groundwater of substances in List II of the annex to the directive so as to avoid pollution of this water by those substances. To comply with that obligation, the Member States must inter alia subject to prior investigation 'the disposal or tipping for the purpose of disposal of these substances which might lead to indirect discharge'. Under Article 7 of the directive that prior investigation must include a hydrogeological study.

77. In the present case the Commission has relied exclusively on the nitrate pollution recorded in the water of the affected area. It has not argued that any discharge into the groundwater occurred other than through spreading slurry on fields.

78. As I have already set out in my Opinion in Case C-416/02, nitrates are not, however, to be regarded as dangerous substances for the purposes of List II of the Groundwater Directive. (30)

79. In addition, I explained that the process of spreading slurry on fields generally cannot be regarded as the 'disposal ... of these substances which might lead to indirect discharge' within the meaning of the second indent of the first subparagraph of Article 5(1) of the Groundwater Directive. (31)

80. I therefore consider, for the same reasons as I set out in my Opinion in Case C-416/02, that the Groundwater Directive is also not relevant in the present context (32) and that the Commission's complaint that this directive has been infringed by failure to

carry out a hydrogeological examination is therefore unfounded, without it being necessary to examine additional questions such as the significance of the various hydrogeological studies referred to by the Spanish Government.

The third complaint is in my view, therefore, unfounded and should be dismissed.

VIII – Infringement of the Drinking-Water Directive

A – *Main arguments of the parties*

81. The *Commission* takes the view that, in failing to take the steps necessary to ensure that water intended for human consumption in the region concerned meets the requirements of Article 7(1) of the Drinking-Water Directive, the Spanish authorities have infringed Article 7(6) of the directive. The nitrate levels clearly exceed those permitted by Table C of Annex I to the Directive, that is to say, they exceed the maximum admissible concentration for nitrates of 50 mg/l. The Commission relies on a series of samples taken and on the fact that the Spanish authorities have conceded in respect of a number of municipalities in the Baix Ter region that the maximum admissible concentration has been exceeded. The Commission points out that the directive imposes an obligation to achieve a particular result.

82. The *Spanish Government* does not dispute the fact that in the water distribution networks of particular municipalities the maximum admissible concentration for nitrates has been exceeded. It states that in parts levels have meanwhile fallen noticeably. Furthermore, the Spanish authorities have taken what in their view is currently the only possible measure for fulfilling the objectives of the directive in that they have informed residents as to the water's suitability for consumption.

B – *Appraisal*

83. Under Article 7(6) of the Drinking-Water Directive, Member States are to take the necessary steps to ensure that the maximum admissible concentrations set out in Annex I are not exceeded.

84. The Spanish Government does not dispute the fact that at the material time, that is to say at the end of the period laid down in the reasoned opinion, nitrate levels observed at various measuring stations in the area concerned exceeded the maximum admissible concentration of 50 mg/l provided for by Annex I; rather it relies upon its efforts to reduce nitrate levels.

85. As the Court has already held, however, efforts made to improve the quality of drinking water in the territory of a Member State are irrelevant when assessing compliance with the Drinking-Water Directive. Article 7(6) of Directive 80/778 does not impose a duty of diligence upon Member States, but an obligation to achieve a particular result. (33)

86. It must be concluded, therefore, that the Commission is right in its complaint that because in several public water distribution networks in the Baix Ter area the maximum admissible concentration under the Drinking Water Directive for the nitrate parameter has been exceeded, the Kingdom of Spain has infringed Article 7(6) of the Drinking-Water Directive.

The fourth complaint is, therefore, well founded.

IX – Costs

87. Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. In the light of the fact that both parties have succeeded on some and failed on other heads and having regard to the merits of the arguments submitted by both parties or the absence thereof, I propose, as in Case C-416/02, that the parties should be ordered to bear their own costs.

X – Conclusion

88. In the light of the foregoing I propose that the Court should:

(1) declare that:

– by failing to adopt the measures necessary to comply with its obligations under Articles 4, 9 and 13 of Directive 75/442/EEC, as amended by Directive 91/156/EEC, by not taking the necessary measures to ensure that waste from the pig farms located in the Baix Ter area of the province of Gerona is disposed of or recovered without endangering human health and without harming the environment, by allowing a large proportion of those farms not to have the permit required under the directive and by failing to carry out the periodic checks necessary for such farms; and

– by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Table C of Annex I to Directive 80/778/EEC, contrary to Article 7(6) of that directive,

the Kingdom of Spain has failed to fulfil its obligations under the Treaty;

(2) dismiss the remainder of the application;

(3) order the Commission and the Kingdom of Spain to pay their own costs.

1 – Original language: German.

2 – Opinion of 12 May 2005 in Case C-416/02 *Commission* v *Spain* [2005] ECR I-0000.

3 – See the observations on establishing the existence of a ‘structural’ infringement of a directive in the Opinion of Advocate General Geelhoed in Case C-494/01 *Commission* v *Ireland* [2005] ECR I-0000, point 43 et seq.; see also below, points 23 to 25.

4 – OJ 1975 L 194, p. 39.

5 – OJ 1991 L 78, p. 32.

6 – OJ 1985 L 175, p. 40.

7 – OJ 1997 L 73, p. 5.

8 – OJ 1980 L 20, p. 43.

9 – OJ 1980 L 229, p. 11.

10 – See above, point 5.

11 – Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1; 'the Nitrates Directive').

12 – Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ 2002 L 273, p. 1).

13 – See points 24 to 28 of my Opinion in Case C-416/02.

14 – Ibid., points 29 and 30.

15 – Ibid., point 31.

16 – Ibid., point 32.

17 – Ibid., points 33 to 35.

18 – Ibid., points 38 and 39.

19 – As I stressed in point 42 of my Opinion in Case C-416/02, it cannot be concluded from the fact that a substance is used in a way that does not present any risk to the environment or to human health that this substance does not constitute waste. Admittedly, non-hazardous or non-detrimental use is significant in relation to satisfaction of the various obligations under the directive – that is to say, for example, in the context of the extent to which authorisation is obligatory or of the degree of control to be exercised – but it does not per se rule out the possibility of it being 'discarded'. Rather, disposal of slurry in special plants indicates that the slurry in question constitutes slurry which it is intended to discard.

20 – See points 45 to 47 of my Opinion in Case C-416/02.

21 – Case C-114/01 *AvestaPolarit* [2003] ECR I-8725, paragraphs 50 and 51.

22 – Ibid., paragraphs 51, 52 and 59.

23 – See point 51 of my Opinion in Case C-416/02.

24 – See, inter alia, Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26, and Case C-272/01 *Commission* v *Portugal* [2004] ECR I-0000, paragraph 29.

25 – The Treaty infringement relates to the period up until the end of September 2001. Under Article 38 of the regulation it came into force in Spain, however, only on 30 October 2002.

26 – See points 52 to 57 of my Opinion in Case C-416/02.

27 – See above, point 28 et seq.

28 – See points 79 to 85 of my Opinion in Case C-416/02.

29 – Inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 26, and Case C-431/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21.

30 – See points 110 to 116 of my Opinion in Case C-416/02.

31 – See points 117 to 121 of my Opinion in Case C-416/02.

32 – Cf. point 122 of my Opinion in Case C-416/02.

33 – Case C-316/00 *Commission* v *Ireland* [2002] ECR I-10527, paragraphs 37 and 38, and Case C-337/89 *Commission* v *United Kingdom* [1992] ECR I-6103, paragraph 21 et seq.

JUDGMENT OF THE COURT (Second Chamber)

4 December 2008 (*)

(Directive 2000/76/EC – Incineration of waste – Purification and combustion – Crude gas produced from waste – Definition of waste – Incineration plant – Co-incineration plant)

In Case C-317/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Korkein hallinto-oikeus (Finland), made by decision of 6 July 2007, received at the Court on 10 July 2007, in the proceedings brought by

Lahti Energia Oy,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk, L. Bay Larsen and C. Toader (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 July 2008,

after considering the observations submitted on behalf of:

– Lahti Energia Oy, by T. Rinne, asianajaja, and M. Kivelä and H. Takala, director and engineer respectively,

– Hämeen ympäristökeskus, by P. Mäkinen and E. Mecklin, acting as Agents,

– Salpausselän luonnonystävät ry, by M. Vikberg and S. Niemelä, asianajaja,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the Italian Government, by I. M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,

– the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Commission of the European Communities, by I. Koskinen and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3 of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (OJ 2000 L 332, p. 91).

2 The reference was made in the course of proceedings between Lahti Energia Oy ('Lahti Energia'), an undertaking owned by the municipality of Lahti, and Itä-Suomen ympäristölupavirasto (East Finland Environmental Permit Authority, 'ympäristölupavirasto') concerning whether a complex comprising a gas plant and a power plant is subject to the requirements of Directive 2000/76.

Legal context

Directive 2000/76

3 Recitals 5 and 27 in the preamble to Directive 2000/76 are worded as follows:

'(5) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, there is a need to take action at the level of the Community. The precautionary principle provides the basis for further measures. This Directive confines itself to minimum requirements for incineration and co-incineration plants.

…

(27) The co-incineration of waste in plants not primarily intended to incinerate waste should not be allowed to cause higher emissions of polluting substances in that part of the exhaust gas volume resulting from such co-incineration than those permitted for dedicated incineration plants and should therefore be subject to appropriate limitations.'

4 Under Article 3 of Directive 2000/76:

'For the purposes of this Directive:

1. "waste" means any solid or liquid waste as defined in Article 1(a) of [Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39)];

…

4. "incineration plant" means any stationary or mobile technical unit and equipment dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated. This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated.

This definition covers the site and the entire incineration plant including all incineration lines, waste reception, storage, on site pre-treatment facilities, waste-fuel and air-supply systems, boiler, facilities for the treatment of exhaust gases, on site facilities for

treatment or storage of residues and waste water, stack, devices and systems for controlling incineration operations, recording and monitoring incineration conditions;

5. "co-incineration plant" means any stationary or mobile plant whose main purpose is the generation of energy or production of material products and:

– which uses wastes as a regular or additional fuel; or

– in which waste is thermally treated for the purpose of disposal.

If co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant shall be regarded as an incineration plant within the meaning of point 4.

This definition covers the site and the entire plant including all co-incineration lines, waste reception, storage, on site pre-treatment facilities, waste-, fuel- and air-supply systems, boiler, facilities for the treatment of exhaust gases, on site facilities for treatment or storage of residues and waste water, stack devices and systems for controlling incineration operations, recording and monitoring incineration conditions;

…

12 "permit" means a written decision (or several such decisions) delivered by the competent authority granting authorisation to operate a plant, subject to certain conditions which guarantee that the plant complies with all the requirements of this Directive. A permit may cover one or more plants or parts of a plant on the same site operated by the same operator;

13. "residue" means any liquid or solid material (including bottom ash and slag, fly ash and boiler dust, solid reaction products from gas treatment, sewage sludge from the treatment of waste waters, spent catalysts and spent activated carbon) defined as waste in Article 1(a) of Directive 75/442/EEC, which is generated by the incineration or co-incineration process, the exhaust gas or waste water treatment or other processes within the incineration or co-incineration plant.'

5 Article 7 of Directive 2000/76, entitled 'Air emission limit values' provides:

'1. Incineration plants shall be designed, equipped, built and operated in such a way that the emission limit values set out in Annex V are not exceeded in the exhaust gas.

2. Co-incineration plants shall be designed, equipped, built and operated in such a way that the emission limit values determined according to or set out in Annex II are not exceeded in the exhaust gas.

…'

Directive 2006/12/EC

6 Under Article 1 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9) which, in order to clarify matters, codifies Directive 75/442, 'waste' is to mean 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 Lahti Energia applied to the ympäristölupavirasto for an environmental permit with respect to the activities of its gas and power plants. That permit concerns a complex with two separate plants on the same site: a plant producing gas from waste and a power plant whose steam boiler burns the purified gas which is produced in the gas plant.

8 The ympäristölupavirasto issued a provisional environmental permit to Lahti Energia and laid down the conditions pursuant to which that permit was granted. The ympäristölupavirasto thus took the view that the gas plant which produces gas and the power plant burning the gas together constitute a co-incineration plant within the meaning of Directive 2000/76.

9 Lahti Energia brought an appeal against that decision before the Vaasan hallinto-oikeus (Administrative Court, Vaasa) seeking a declaration that the combustion in a main boiler of gas purified and refined in a separate gas production plant was not to be regarded as co-incineration of waste within the meaning of Directive 2000/76.

10 The Vaasan hallinto-oikeus dismissed the appeal. It held in particular that attainment of the objectives of Directive 2000/76 might be prejudiced if its scope were interpreted so restrictively that its requirements were not applied to the combustion of pre-treated waste. However, the court held that, as a separate operation, the gas plant was not to be regarded as an incineration plant within the meaning of Directive 2000/76, because gasification is a thermal treatment and that, to be regarded as an incineration plant, a plant must have a line specifically for incineration.

11 Nevertheless, the Vaasan hallinto-oikeus held that the gas and power plants together constituted a co-incineration plant within the meaning of Directive 2000/76.

12 Lahti Energia therefore brought an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 3(1) of Directive 2000/76/EC to be interpreted as meaning that the directive does not apply to the combustion of gaseous waste?

(2) Is a gas plant where gas is generated from waste by means of pyrolysis to be regarded as an incineration plant within the meaning of Article 3(4) of Directive 2000/76/EC even if it has no incineration line?

(3) Is combustion in the boiler of a power plant of gas which is generated in the gas plant and purified after the gasification process to be regarded as an operation within the meaning of Article 3 of Directive 2000/76/EC? Does it have any bearing that the purified gas replaces the use of fossil fuels and that the emissions per unit of energy generated by the power plant would be lower when using purified gas generated from waste than when using other fuels? Is it of any relevance to the interpretation of the scope of Directive 2000/76/EC, first, whether the gas plant and the power plant form one plant having regard to the technical production aspects and the distance between them or, second, whether the purified gas generated at the gas plant is portable and may be used elsewhere, for example for energy production, as a fuel or for another purpose?

(4) Under what conditions may the purified gas generated in the gas plant be regarded as a product so that the rules on waste no longer apply to it?’

The questions referred for a preliminary ruling

The first question

13 By its first question, the referring court wishes to know whether the definition of 'waste' in Article 3(1) of Directive 2000/76 also covers gaseous substances.

14 In the context of the case in the main proceedings, that question must be understood as relating to whether the gas resulting from the pyrolysis, carried out in a gas plant, of solid waste of various kinds may be regarded as 'waste' within the meaning of Directive 200/76 so that that gaseous substance, used subsequently as a fuel in a power plant alongside other fuels, could therefore be considered to be either a substance which '[is] subsequently incinerated' within the meaning of the first subparagraph of Article 3(4) of that directive, or waste used as 'additional fuel' or 'thermally treated for the purpose of disposal' within the meaning of the first subparagraph of Article 3(5) thereof.

15 In that connection, as Lahti Energia, the Finnish and Italian Governments and the Commission of the European Communities have pointed out, it is evident that the clear wording of Article 3(1) of Directive 2000/76 defines 'waste' in the context of that directive as any 'solid' or 'liquid' waste as defined in Article 1(a) of Directive 75/442.

16 A literal interpretation of that provision is sufficient for a finding that only waste in solid or liquid form is covered by Directive 2000/76, and there is therefore no need to examine in addition whether the definition of 'waste' in Directive 75/442 itself covers waste in gaseous form.

17 Therefore, the answer to the first question must be that the definition of 'waste' in Article 3(1) of Directive 2000/76 does not cover gaseous substances.

The second question

18 By its second question, the referring court asks the Court of Justice whether the existence of an incineration line is a necessary condition of the classification of a unit, such as a plant producing gas from waste, as an 'incineration plant' within the meaning of Article 3(4) of Directive 2000/76.

19 In accordance with the first subparagraph of Article 3(4) of Directive 2000/76, the definition of incineration plant covers any technical unit and equipment dedicated to the thermal treatment of wastes, which includes the incineration by oxidation of waste as well as other thermal treatment processes such as, in particular, pyrolysis or gasification.

20 In that connection, as is clear from a comparison of the various language versions of Article 3(4) of Directive 2000/76, and as Lahti Energia, Hämeen ympäristökeskus, the Finnish Government and the Commission have submitted, a unit in which waste is thermally treated will be classified as an 'incineration plant' only if the substances resulting from the use of that thermal treatment process are subsequently incinerated.

21 As the Netherlands Government rightly observed, the list of technical elements in the second subparagraph of Article 3(4) of Directive 2000/76 cannot be regarded as either an exhaustive list of the elements which may constitute an incineration plant or as a list of the elements which are necessary to constitute such a plant. Therefore, the presence of an incineration line

is not a necessary condition for the purposes of the classification of a unit as an 'incineration plant'.

22 In those circumstances, the answer to the second question must be that the definition of 'incineration plant' in Article 3(4) of Directive 2000/76 relates to any technical unit and equipment in which waste is thermally treated, on condition that the substances resulting from the use of the thermal treatment process are subsequently incinerated and that, in that connection, the presence of an incineration line is not a necessary condition for the purposes of such classification.

The third question

23 By its third question, the referring court asks essentially how to classify, in the light of Article 3 of Directive 2000/76, a power-generating complex in which a gas plant, sited next to a power plant, provides the latter with purified gas which is obtained by the gasification of waste and used in the power plant as a fuel alongside fossil fuels. The referring court asks in particular about the relevance, for the purposes of classifying that complex, first, of the fact that the use of the purified gas by the power plant produces lower emissions as compared with the use of fossil fuels and, second, the fact that the functions of the two units making up that complex overlap to a certain extent in that the gas plant is intended partially to cover the fuel requirements of the power plant but, at the same time, the gas produced in the gas plant might be sold off site.

24 As a preliminary point, it must be stated that, for the purposes of applying Directive 2000/76, where a co-generation plant comprises a number of boilers, each boiler and its associated equipment are to be regarded as constituting a separate plant (Case C-251/07 *Gävle Kraftvärme* [2008] ECR I-0000, paragraph 33).

25 Therefore, in the same way, with respect to two units such as those at issue in the main proceedings, a separate examination of the gas plant and the power plant should in principle be carried out for the purposes of applying Directive 2000/76.

26 In accordance with the first subparagraph of Article 3(5) of Directive 2000/76, a plant whose main purpose is the generation of energy or production of material products, which either uses wastes as a regular or additional fuel or in which waste is thermally treated for the purpose of its disposal, is to be regarded as a co-incineration plant (see *Gävle Kraftvärme*, paragraph 35).

27 The second subparagraph of Article 3(5) states that, if co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant is to be regarded as an incineration plant within the meaning of Article 3(4) (*Gävle Kraftvärme*, paragraph 36).

28 Accordingly, it is clear from the wording of those provisions that a co-incineration plant constitutes a particular form of incineration plant and that it is on the basis of the main purpose of a plant that the assessment of whether it is an incineration plant or a co-incineration plant is to be made (*Gävle Kraftvärme*, paragraph 37).

The classification of the gas plant

29 In the case in the main proceedings, and subject to the findings of fact which are the prerogative of the referring court, it is apparent that in the gas plant waste is thermally treated

but the resulting substances are not incinerated there. The substances resulting from the thermal treatment, in this case crude gas, are filtered with the aid of a purifier which produces purified gas free from undesirable solid particles and therefore suitable for use as fuel.

30 Thus, in so far as the substances resulting from the thermal treatment of the waste are not incinerated at the gas plant, the operation and characteristics of such a plant do not permit it to be classified, as such, as an 'incineration plant' within the meaning of Article 3(4) of Directive 2000/76.

31 However, it is apparent that the main purpose of the gas plant is the production of a fuel, in this case a purified gas, and that within the plant waste is thermally treated for the purpose of disposal.

32 In that connection, while it is admittedly true, as stated in paragraph 28 of this judgment, that a co-incineration plant constitutes a particular form of incineration plant, the fact remains that the two types of plant have definitions which are particular to them. Thus, as the Advocate General stated in point 71 of her Opinion, although the condition relating to the thermal treatment of waste may be required in both cases, the wording of Article 3(5) of Directive 2000/76 does not, by contrast, as regards classification as a co-incineration plant, require that the resulting substances be subsequently incinerated.

33 It follows that, in accordance with the findings in paragraph 26 of this judgment, a gas plant such as that at issue in the main proceedings satisfies the conditions necessary for its classification as a co-incineration plant within the meaning of Article 3(5) of Directive 2000/76.

34 As regards purified gas resulting from the thermal treatment of waste, the Austrian Government submits that it could be considered that the purified gas thus produced by the gas plant corresponds to a substance which results from the thermal treatment of waste in that plant and that, in so far as the gas is then burnt in the power plant, the gas plant may be regarded as an incineration plant within the meaning of Article 3(4) of Directive 2000/76.

35 In that connection, first, as it appears from the information given by the referring court, the gas concerned, by reason in particular of its filtration in the purifier, has properties similar to a fossil fuel and thereby constitutes a gas suitable for use as a fuel for the production of energy both in the power plant for which the production of the gas plant is intended and in other power plants.

36 In those circumstances, there is no question of a substance resulting from the thermal treatment of waste in the gas plant which is incinerated in the power plant in order to complete a simple process of waste disposal. As the Finnish and Italian Governments have submitted, when the process is completed within the gas plant a product having the characteristics of a fuel is generated from waste.

37 Second, where, in a plant whose main purpose is to produce material products, in this case, gas products, waste is thermally treated in order to dispose of it, such a plant must be classified as a co-incineration plant in accordance with the scheme of Article 3(4) and (5) of Directive 2000/76 which makes the classification of a unit as an incineration or co-incineration plant dependent on its main purpose (see, to that effect, *Gävle Kraftvärme*, paragraph 40).

The classification of the power plant

38 As regards the activities of the power plant at issue in the main proceedings, it is apparent that its purpose is the production of energy through combustion of primary materials such as coal and, partly, of purified gas as produced by the gas plant. Therefore, it must be stated that the main purpose of such a plant is not the incineration of substances resulting from the thermal treatment of waste undertaken in the gas plant.

39 Furthermore, it cannot be argued that the combustion of the purified gas in the power plant together with fossil fuels constitutes thermal treatment of 'waste' within the meaning of Directive 2000/76 which would enable the power plant to be classified as an incineration plant.

40 As stated in paragraph 17 of this judgment, the directive does not in any way include gaseous substances in the category 'waste'. Therefore, it cannot be held that the combustion in the power plant of purified gas produced by the gas plant constitutes thermal treatment of waste.

41 It follows that, in circumstances such as those at issue in the main proceedings, where the purpose of the gas plant is to obtain products in gaseous form by thermally treating waste, which is sufficient for it to be classified as a co-incineration plant within the meaning of Article 3(5) of Directive 2000/76, the power plant which uses purified gas obtained by co-incinerating waste in the gas plant, as a replacement for fossil fuels principally used in its energy production, does not fall within the scope of that directive.

42 In that connection, for the purposes of classifying a unit as an incineration or co-incineration plant, there is no need to take account of which classification would enable the level of emissions most favourable to the environment to be achieved. That issue falls within the competence of the Community legislature, which has defined the conditions necessary for the legal classifications of plants and the level of emissions acceptable both for incineration and co-incineration plants and for large combustion plants. Accordingly, only the requirements set out in Article 3(4) and (5) of Directive 2000/76 are relevant for the national court dealing with such a question.

43 In light of the foregoing, the answer to the third question must be that, in circumstances such as those at issue in the main proceedings:

– a gas plant whose objective is to obtain products in gaseous form, in this case purified gas, by thermally treating waste must be classified as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76;

– a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, a purified gas obtained by the co-incineration of waste in a gas plant does not fall within the scope of that directive.

The fourth question

44 By its fourth question, the referring court asks as from which chemical state waste may be considered to become 'products'.

45 The referring court formulated such a question on the premiss that the gaseous substances obtained by the thermal treatment of waste in a gas plant such as that at issue in the main proceedings are themselves 'waste' within the meaning of Article 3(1) of Directive 2000/76.

46 In that connection, in the answer to the first question it was stated that the definition of 'waste' in that provision does not cover gaseous substances.

47 In those circumstances there is no need to answer the fourth question.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. The definition of 'waste' in Article 3(1) of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste does not cover gaseous substances.

2. The definition of 'incineration plant' in Article 3(4) of Directive 2000/76 relates to any technical unit and equipment in which waste is thermally treated, on condition that the substances resulting from the use of the thermal treatment process are subsequently incinerated and that, in that connection, the presence of an incineration line is not a necessary condition for the purposes of such classification.

3. In circumstances such as those at issue in the main proceedings:

– **a gas plant whose objective is to obtain products in gaseous form, in this case purified gas, by thermally treating waste must be classified as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76;**

– **a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, a purified gas obtained by the co-incineration of waste in a gas plant does not fall within the scope of that directive.**

[Signatures]

* Language of the case: Finnish.

JUDGMENT OF THE COURT (Eighth Chamber)

25 February 2010 (*)

(Directive 2000/76/EC – Incineration of waste – Incineration plant – Co-incineration plant – Complex comprising a gas plant and a power plant – Incineration in the power plant of non-purified gas produced from the thermal treatment of waste in the gas plant)

In Case C-209/09,

REFERENCE for a preliminary ruling under Article 234 EC, by the Korkein hallinto-oikeus (Finland), made by decision of 8 June 2009, received at the Court on 10 June 2009, in the proceedings brought by

Lahti Energia Oy,

THE COURT (Eighth Chamber),

composed of C. Toader (Rapporteur), President of the Chamber, C.W.A. Timmermans and K. Schiemann, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– Lahti Energia Oy, by J. Savelainen, Director-General,

– Salpausselän luonnonystävät ry, by M. Vikberg, Director,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the Belgian Government, by T. Materne and L. Van den Broeck, acting as Agents,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Commission of the European Communities, by I. Koskinen and A. Marghelis, acting as Agents,

– having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3 of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (OJ 2000 L 332, p. 91).

2 The reference was made in the course of proceedings between Lahti Energia Oy ('Lahti Energia'), an undertaking owned by the municipality of Lahti, and Itä-Suomen ympäristölupavirasto (East Finland Environmental Permit Authority, 'ympäristölupavirasto') concerning whether a complex comprising a gas plant and a power plant is subject to the requirements of Directive 2000/76.

Legal context

Directive 2000/76

3 Recitals 5 and 27 in the preamble to Directive 2000/76 are worded as follows:

'(5) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, there is a need to take action at the level of the Community. The precautionary principle provides the basis for further measures. This Directive confines itself to minimum requirements for incineration and co-incineration plants.

…

(27) The co-incineration of waste in plants not primarily intended to incinerate waste should not be allowed to cause higher emissions of polluting substances in that part of the exhaust gas volume resulting from such co-incineration than those permitted for dedicated incineration plants and should therefore be subject to appropriate limitations.'

4 Under Article 3 of the said Directive:

'For the purposes of this Directive:

(1) "waste" means any solid or liquid waste as defined in Article 1(a) of [Council] Directive 75/442/EEC [of 15 July 1975 on waste (OJ 1975 L 194, p. 39];

…

(4) "incineration plant" means any stationary or mobile technical unit and equipment dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated. This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated.

This definition covers the site and the entire incineration plant including all incineration lines, waste reception, storage, on site pretreatment facilities, waste-fuel and air-supply systems, boiler, facilities for the treatment of exhaust gases, on-site facilities for treatment or storage of residues and waste water, stack, devices and systems for controlling incineration operations, recording and monitoring incineration conditions;

(5) "co-incineration plant" means any stationary or mobile plant whose main purpose is the generation of energy or production of material products and:

– which uses wastes as a regular or additional fuel; or

– in which waste is thermally treated for the purpose of disposal.

If co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant shall be regarded as an incineration plant within the meaning of point 4.

This definition covers the site and the entire plant including all co-incineration lines, waste reception, storage, on site pretreatment facilities, waste-, fuel- and air-supply systems, boiler, facilities for the treatment of exhaust gases, on-site facilities for treatment or storage of residues and waste water, stack devices and systems for controlling incineration operations, recording and monitoring incineration conditions;

…

(12) "permit" means a written decision (or several such decisions) delivered by the competent authority granting authorisation to operate a plant, subject to certain conditions which guarantee that the plant complies with all the requirements of this Directive. A permit may cover one or more plants or parts of a plant on the same site operated by the same operator;

(13) "residue" means any liquid or solid material (including bottom ash and slag, fly ash and boiler dust, solid reaction products from gas treatment, sewage sludge from the treatment of waste waters, spent catalysts and spent activated carbon) defined as waste in Article 1(a) of Directive 75/442/EEC, which is generated by the incineration or co-incineration process, the exhaust gas or waste water treatment or other processes within the incineration or co-incineration plant.'

5 Article 7 of Directive 2000/76, entitled 'Air emission limit values', provides:

'1. Incineration plants shall be designed, equipped, built and operated in such a way that the emission limit values set out in Annex V are not exceeded in the exhaust gas.

2. Co-incineration plants shall be designed, equipped, built and operated in such a way that the emission limit values determined according to or set out in Annex II are not exceeded in the exhaust gas.

…'

Directive 2006/12/EC

6 Under Article 1 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9) which, in order to clarify matters, codifies Directive 75/442, 'waste' is to mean 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

The main proceedings and the reference for a preliminary ruling in Case C-317/07

7 Lahti Energia applied to the ympäristölupavirasto for an environmental permit with respect to the activities of its gas and power plants. That application concerned a complex with two

separate plants on the same site: a plant producing gas from waste and a power plant whose steam boiler was to burn the gas which was produced, and previously purified, in the gas plant.

8 The ympäristölupavirasto issued a provisional environmental permit to Lahti Energia and laid down the conditions pursuant to which that permit was granted. The ympäristölupavirasto thus took the view that the gas plant which produces gas and the power plant burning the gas together constituted a co-incineration plant within the meaning of Directive 2000/76.

9 Lahti Energia brought an appeal against that decision before the Vaasan hallinto-oikeus (Administrative Court, Vaasa) (Finland) seeking a declaration that the combustion in a main boiler of gas purified and refined in a separate gas production plant was not to be regarded as co-incineration of waste within the meaning of Directive 2000/76.

10 The Vaasan hallinto-oikeus dismissed the appeal. It held in particular that attainment of the objectives of Directive 2000/76 might be prejudiced if its scope were interpreted so restrictively that its requirements were not applied to the combustion of pre-treated waste. The court also held that, as a separate operation, the gas plant was not to be regarded as an incineration plant within the meaning of Directive 2000/76, because gasification is a thermal treatment and that, to be regarded as an incineration plant, a plant must have a line specifically for incineration.

11 Nevertheless, the Vaasan hallinto-oikeus held that the gas and power plants together constituted a co-incineration plant within the meaning of Directive 2000/76.

12 Lahti Energia therefore brought an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court) (Finland), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 3(1) of Directive 2000/76/EC to be interpreted as meaning that the directive does not apply to the combustion of gaseous waste?

(2) Is a gas plant where gas is generated from waste by means of pyrolysis to be regarded as an incineration plant within the meaning of Article 3(4) of Directive 2000/76/EC even if it has no incineration line?

(3) Is combustion in the boiler of a power plant of gas which is generated in the gas plant and purified after the gasification process to be regarded as an operation within the meaning of Article 3 of Directive 2000/76/EC? Does it have any bearing that the purified gas replaces the use of fossil fuels and that the emissions per unit of energy generated by the power plant would be lower when using purified gas generated from waste than when using other fuels? Is it of any relevance to the interpretation of the scope of Directive 2000/76/EC, first, whether the gas plant and the power plant form one plant having regard to the technical production aspects and the distance between them or, second, whether the purified gas generated at the gas plant is portable and may be used elsewhere, for example for energy production, as a fuel or for another purpose?

(4) Under what conditions may the purified gas generated in the gas plant be regarded as a product so that the rules on waste no longer apply to it?’

13 That reference for a preliminary ruling gave rise to the judgment in Case C-317/07 *Lahti Energia* [2008] ECR I-9051, in which the Court ruled:

‘1. The definition of “waste” in Article 3(1) of Directive 2000/76 … does not cover gaseous substances.

2. The definition of “incineration plant” in Article 3(4) of Directive 2000/76 relates to any technical unit and equipment in which waste is thermally treated, on condition that the substances resulting from the use of the thermal treatment process are subsequently incinerated and that, in that connection, the presence of an incineration line is not a necessary condition for the purposes of such classification.

3. In circumstances such as those at issue in the main proceedings:

– a gas plant whose objective is to obtain products in gaseous form, in this case purified gas, by thermally treating waste must be classified as a “co-incineration plant” within the meaning of Article 3(5) of Directive 2000/76;

– a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, a purified gas obtained by the co-incineration of waste in a gas plant does not fall within the scope of that directive.’

Developments in the main proceedings and the questions referred in the present case

14 Following the judgment in *Lahti Energia*, the Korkein hallinto-oikeus called upon the parties to the main proceedings to submit their observations.

15 At that point, Lahti Energia let it be known that, despite what it had said in its application for an environmental permit and in its appeals to the Vaasan hallinto-oikeus and to the court making the reference, it was no longer implementing the planned process of gas purification from the thermal treatment of waste in its gas plant. However, the applicant in the main proceedings argued that it could be deduced from the judgment in *Lahti Energia* that the combustion of a gaseous substance in a power plant cannot constitute the incineration of waste within the meaning of Directive 2000/76. In its view, such a power plant can be regarded as a co-incineration plant only if it uses for the most part synthesis gas obtained from waste. However, Lahti Energia’s power plant uses such gas only as an additional fuel, that is to say, in a residual manner, with the result that the power plant does not come within the scope of Directive 2000/76.

16 It was in those circumstances that the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is combustion as an additional fuel in the boiler of a power plant of gas generated in a gas plant to be regarded as an operation within the meaning of Article 3 of Directive 2000/76/EC, if the gas conducted for combustion is not purified after the gasification process?

2. If the reply to the first question is basically in the negative, does the quality of the waste for incineration, or the particle content of the gas conducted for incineration, or the content of other impurities in it, have any bearing on the matter when making an assessment?’

The questions referred

First question

17 By its first question, the national court seeks to ascertain whether Directive 2000/76 applies to a power plant which uses as an additional fuel, in addition to fossil fuels used for the most part in its production activities, a gas obtained from the thermal treatment of waste in a plant where the gas was not purified.

18 In that regard, as was correctly pointed out by the national court, the Finnish, Belgian and German Governments and the Commission of the European Communities, the answer to the third question in *Lahti Energia*, which excluded the activity of the power plant from the scope of Directive 2000/76, was related to the fact that the gas used in that power plant, although produced from waste, was to be purified in the gas plant as part of the process of co-incinerating that waste.

19 As the Court stated in paragraph 29 of that judgment, the substances resulting from the thermal treatment of waste in the gas plant, in this case crude gas, were to be filtered with the aid of a purifier, which would produce purified gas free from undesirable solid particles and therefore suitable for use as fuel.

20 As is apparent from paragraphs 35, 36 and 41 of that judgment, the Court held that, in such a situation, as the gas produced in the gas plant would, by reason in particular of its filtration in the purifier, have properties similar to a fossil fuel, the activity of the power plant could not fall within the scope of Directive 2000/76 merely because of the use of an additional fuel derived from waste.

21 On completion of the process within the gas plant, the purified gas used in the power plant was deemed to be a ‘product’ within the meaning of Article 3(5) of Directive 2000/76.

22 As Advocate General Kokott had remarked in points 91 and 93 of her Opinion in *Lahti Energia*, the burning in a power plant of a genuine ‘product’, even if it is obtained from waste, militated against recognising a technical and functional link between the gas plant and the power plant.

23 However, the situation is different where, as has become the case in the main proceedings, the gas obtained from thermal treatment of waste in the gas plant is no longer purified within that plant but is transported as it is to the power plant to serve as an additional fuel in the latter plant.

24 In such a situation, if the activity of the gas plant alone is considered, the process now being envisaged is not a simple process of waste disposal by thermal treatment which, if the substances obtained from it were subsequently incinerated, would allow such a plant to be regarded as an ‘incineration plant’ within the meaning of Article 3(4) of Directive 2000/76 (see, to that effect, *Lahti Energia*, paragraph 20).

25 Nor can the plant in question be regarded on its own as a co-incineration plant, that is to say, in accordance with the first subparagraph of Article 3(5) of Directive 2000/76, as a plant whose main purpose is the generation of energy or production of material products, which either uses wastes as a regular or additional fuel or in which waste is thermally treated for the

purpose of its disposal (see Case C-251/07 *Gävle Kraftvärme* [2008] ECR I-7047, paragraph 35, and *Lahti Energia*, paragraph 26).

26 In a situation such as the one now at issue in the main proceedings, contrary to what was stated in paragraph 36 of *Lahti Energia*, the process of thermal treatment of the waste, commenced in the gas plant, is no longer completed within that plant, since the gas is transported from the gas plant to the power plant where it is used to generate power, although it does not yet possess properties similar to a fossil fuel, particularly with regard to purity.

27 It is true that the activities of two distinct plants must be the subject of a separate examination for the purposes of applying Directive 2000/76 (see, to that effect, *Lahti Energia*, paragraphs 24 and 25).

28 However, in the situation which now exists in the main proceedings, the inevitable conclusion is that the gas plant and the power plant can in fact be regarded as a single entity whose objective is no longer to obtain a product but to generate power. In that entity, all the waste together is thermally treated, for the purpose of disposal, in a two-stage process, one stage taking place in the gas plant and consisting in thermal treatment of the waste, and the other taking place in the power plant and consisting in the burning of gaseous substances produced by the thermal treatment carried out in the gas plant.

29 In such a situation, as Advocate General Kokott envisaged in her Opinion in *Lahti Energia*, when the process of generating energy or producing a product is realised and terminated only when the gaseous substances obtained from the thermal treatment of the waste in the gas plant are transferred to the power plant, the complex comprising the gas plant and the power plant must be regarded jointly for the purposes of applying Directive 2000/76, by reason of the technical and functional link which then exists between the two installations. In addition, that outcome is justified by the fact that the harmful substances produced by the thermal treatment, commenced in the gas plant, to which the waste has been subjected are released and are discharged, at least in part, only when the crude gas has been transferred to the power plant.

30 With regard to Lahti Energia's argument that the power plant at issue in the main proceedings can be regarded as a 'co-incineration plant' only if, when generating energy, it uses, for the most part, non-purified gas produced in the gas plant, it must be recalled that, as is apparent from recital 27 to Directive 2000/76, the co-incineration of waste in plants not primarily intended to incinerate waste should not be allowed to cause higher emissions of polluting substances in that part of the exhaust gas volume resulting from such co-incineration than those permitted for dedicated incineration plants.

31 The answer to the first question therefore is that a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, gas obtained in a gas plant following thermal treatment of waste is to be regarded, jointly with that gas plant, as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76 when the gas in question has not been purified within the gas plant.

The second question

32 The Korkein hallinto-oikeus asked its second question only for the case in which its first question was answered in the negative.

33 Having regard to the answer provided to the first question, there is no need to rule on the national court's second question.

Costs

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

A power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, gas obtained in a gas plant following thermal treatment of waste is to be regarded, jointly with that gas plant, as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste when the gas in question has not been purified within the gas plant.

[Signatures]

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* Language of the case: Finnish.

JUDGMENT OF THE COURT (Fourth Chamber)

14 March 2013 (*)

(Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects on the environment – Consent for such a project without an appropriate assessment – Objectives of that assessment – Conditions to which the existence of a right to compensation are subject – Whether protection of individuals against pecuniary damage is included)

In Case C-420/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 21 July 2011, received at the Court on 10 August 2011, in the proceedings

Jutta Leth

v

Republik Österreich,

***Land* Niederösterreich,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, (Rapporteur), President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2012,

after considering the observations submitted on behalf of:

– Ms Leth, by W. Proksch, Rechtsanwalt,

– Republik Österreich, by C. Pesendorfer and P. Cede, acting as Agents,

– *Land* Niederösterreich, by C. Lind, Rechtsanwalt,

– the Czech Government, by D. Hadroušek and M. Smolek, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, assisted by E. Fitzsimons, SC,

– the Greek Government, by G. Karipsiades, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the Latvian Government, by I. Kalniņš and A. Nikolajeva, acting as Agents,

– the United Kingdom Government, by J. Beeko and L. Seeboruth, acting as Agents, assisted by E. Dixon, Barrister,

– the European Commission, by P. Oliver and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The request has been made in the course of proceedings between Ms Leth, on the one hand, and Republik Österreich (Republic of Austria) and *Land* Niederösterreich (State of Lower Austria), on the other, regarding her application for (i) compensation for the pecuniary damage which she claims to have sustained as a result of the decrease in the value of her home following the extension of Vienna-Schwechat airport (Austria) and (ii) a declaration that the defendants in the main proceedings will be liable for any future damage.

Legal context

European Union law

Directive 85/337

3 The first, third, sixth and eleventh recitals in the preamble to Directive 85/337 are worded as follows:

'… the … action programmes of the European Communities on the environment … stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects; … they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical-planning and decision-making processes; … to that end, they provide for the implementation of procedures to evaluate such effects;

…

… in addition, it is necessary to achieve one of the Community's objectives in the sphere of the protection of the environment and the quality of life;

…

… general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment;

… development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; … this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;

…

… the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

4 Article 1 of Directive 85/337 states:

'1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive:

"project" means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…'

5 Article 2(1) of Directive 85/337 provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.'

6 Article 3 of Directive 85/337 states:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.'

7 Under Article 4, paragraphs 1 to 3, of Directive 85/337:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.'

8 Article 5(1) and (3) of the Directive provides:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV …

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

…

– the data required to identify and assess the main effects which the project is likely to have on the environment,

…'

9 Among the projects referred to in Article 4(1) of Directive 85/337 are, according to Annex I, paragraphs 7(a) and 22, the '[c]onstruction of lines for long-distance railway traffic and of airports with a basic runway length of 2 100 m or more' and '[a]ny change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.'

10 The first indent of paragraph 13 of Annex II to Directive 85/337 includes, among the projects referred to in Article 4(2) of that directive, '[a]ny change or extension of projects listed in Annex I …, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)'.

11 Annex IV to the directive, entitled 'Information referred to in Article 5(1)' states, in paragraphs 3 to 5:

'3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description … of the likely significant effects of the proposed project on the environment resulting from:

– the existence of the project,

– the use of natural resources,

– the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the developer of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment.'

Austrian law

12 Directive 85/337 was transposed into Austrian law by the Law of 1993 on the environmental impact assessment (Umweltverträglichkeitsprüfungsgesetz 1993; 'UVP-G 1993'), which was in force from 1 July 1994 until the entry into force, on 11 August 2000, of the Law of 2000 on the environmental impact assessment (Umweltverträglichkeitsprüfungsgesetz 2000), which was designed to transpose Directive 97/11.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Since 1997, Ms Leth, the applicant in the main proceedings, has been the owner of a property situated within the security zone of Vienna-Schwechat airport. She lives in the house built on that property.

14 Since the accession of the Republic of Austria to the European Union, on 1 January 1995, the authorities of the defendants in the main proceedings have, without carrying out environmental impact assessments, consented to and completed several projects relating to the development and extension of Vienna-Schwechat airport. By decision of 21 August 2001, the Minister-President of *Land* Niederösterreich expressly stated that no environmental impact assessment procedure was necessary in relation to the continued development and certain extensions of that airport.

15 In 2009, Ms Leth brought an action before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) against the two defendants in the main proceedings, in which she sought payment by them of EUR 120 000 in respect of the decrease in the value of her property, in particular as a result of aircraft noise, and a declaration that the defendants will be liable for any future damage, including damage to her health, arising from the late and incomplete transposition of Directive 85/337, Directive 97/11, and Directive 2003/35, and

from the failure to carry out an environmental impact assessment before giving the various consents relating to the development of Vienna-Schwechat airport. The defendants in the main proceedings have contended that their authorities acted lawfully and without negligence, and that the claim brought is time-barred.

16 The Landesgericht für Zivilrechtssachen Wien dismissed the action in its entirety on the ground that the rights relied upon were time-barred. By way of a part-judgment on the appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna) confirmed the dismissal of the claim for payment of EUR 120 000, but set aside the dismissal of the claim in relation to the application for a declaration that the defendants in the main proceedings would be liable for future damage, referring the case back to the first-instance court in order for it to rule afresh on that latter application. In that respect, the Oberlandesgericht Wien found that the claim for payment of EUR 120 000 related only to purely pecuniary damage, which did not come within the objective of protection pursued by the provisions of European Union law, in particular those of the relevant directives, and by national law. As regards the application for a declaration of liability in respect of future damage, that court found that that application was not time-barred. Subsequently, an appeal on a point of law ('Revision') against the dismissal of the claim for that payment and an appeal against the referral back of the application for a declaration of liability were brought before the referring court.

17 The referring court takes the view that the decision on those claims, which are in any event not time-barred in their entirety, depends on whether the duty of the competent authorities of the Member State concerned to carry out an environmental impact assessment, laid down in both European Union law and national law, is liable to protect the individuals concerned against purely pecuniary damage caused by a project in respect of which such an assessment has not been carried out.

18 It is in that context that the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Is Article 3 of Directive 85/337 …, as amended by Directive 97/11 … and by Directive 2003/35 …, to be interpreted as meaning that:

1. the term 'material assets' covers only their substance or also their value;

2. the environmental impact assessment serves also to protect an individual against pecuniary damage as a result of a decrease in the value of his property?'

Procedure before the Court

19 By letter of 21 December 2012, the applicant in the main proceedings requested the reopening of the oral procedure, claiming, first, that, in examining – in her Opinion delivered on 8 November 2012 – the issue of whether the environmental impact assessment under Article 3 of Directive 85/337 includes the assessment of the effects of the project under examination on the value of material assets, the Advocate General introduced a new question which had not been posed by the referring court and which had not been the subject of an exchange of views between the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union, and, as a consequence, the first question as posed by the referring court was not answered. Secondly, she claims that those interested persons did not have the opportunity to exchange views on the consequences to be drawn from the

fact that the public concerned was not informed of the projects at issue and could not, therefore, participate in the decision-making process.

20 In that respect, it must be pointed out that, under Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where the case has to be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute.

21 In the present case, the Court considers that the request for a preliminary ruling does not need to be examined on the basis of an argument that has not yet been debated before it and that it has all the information necessary to deal with the request for a preliminary ruling.

22 The request by the applicant in the main proceedings that a new hearing be held and her alternative application for leave to submit additional written observations must therefore be dismissed.

The questions referred to the Court

23 By its questions, the referring court asks, in essence, whether Article 3 of Directive 85/337 must be interpreted as meaning, first, that the environmental impact assessment, as provided for in that article, includes the assessment of the effects of the project under examination on the value of material assets and, secondly, that the fact that an environmental impact assessment has not been carried out, in breach of Directive 85/337, confers on an individual a right to compensation for pecuniary damage caused by a decrease in the value of his property resulting from the environmental effects of the project under examination.

24 As regards the term 'material assets' within the meaning of Article 3 of Directive 85/337, it must be recalled that, according to settled case-law, it follows from the need for a uniform application of European Union law that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-497/10 PPU *Mercredi* [2010] ECR I-14309, paragraph 45).

25 Pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors. Therefore, it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings.

26 It follows that, in the assessment of projects such as those at issue in the main proceedings, which are liable to result in increased aircraft noise, it is necessary to assess the effects of the latter on the use of buildings by human beings.

27 However, as has correctly been pointed out by *Land* Niederösterreich and by several of the governments which have submitted observations to the Court, an extension of the environmental assessment to the pecuniary value of material assets cannot be inferred from

the wording of Article 3 of Directive 85/337 and would also not be in accordance with the purpose of that directive.

28 It follows from Article 1(1) of, and from the first, third, fifth and sixth recitals in the preamble to, Directive 85/337 that the purpose of that directive is an assessment of the effects of public and private projects on the environment in order to attain one of the Community's objectives in the sphere of the protection of the environment and the quality of life. The information which must be supplied by the developer in accordance with Article 5(1) of, and Annex IV to, Directive 85/337, as well as the criteria which enable Member States to determine whether small-scale projects, meeting the characteristics laid down in Annex III to that directive, require a environmental assessment, also relate to that purpose.

29 Consequently, it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment. Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.

30 It must therefore be held that the environmental impact assessment, as provided for in Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.

31 That finding, however, does not necessarily imply that Article 3 of Directive 85/337 must be interpreted as meaning that the fact that an environmental impact assessment has not been carried out, contrary to the requirements of that directive, in particular an assessment of the effects on one or more of the factors set out in that provision other than that of material assets, does not entitle an individual to any compensation for pecuniary damage which is attributable to a decrease in the value of his material assets.

32 It must be recalled, from the outset, that the Court has already ruled that an individual may, where appropriate, rely on the duty to carry out an environmental impact assessment under Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4 thereof (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 61). That directive thus confers on the individuals concerned a right to have the environmental effects of the project under examination assessed by the competent services and to be consulted in that respect.

33 Accordingly, it is necessary to examine whether Article 3 of Directive 85/337, read in conjunction with Article 2 thereof, is intended, in the event of an omission to carry out an environmental impact assessment, to confer on individuals a right to compensation for pecuniary damage such as that invoked by Ms Leth.

34 In that respect, it follows from the third and eleventh recitals in the preamble to Directive 85/337 that the purpose of that directive is to achieve one of the European Union's objectives in the sphere of the protection of the environment and the quality of life and that the effects of a project on the environment must be assessed in order to take account of the concerns to contribute by means of a better environment to the quality of life.

35 In circumstances where exposure to noise resulting from a project covered by Article 4 of Directive 85/337 has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of fulfilling its function and the individuals' environment,

quality of life and, potentially, health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment, this being a matter which must be examined on a case-by-case basis.

36 It must therefore be concluded that the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337. As such economic damage is a direct consequence of such effects, it must be distinguished from economic damage which does not have its direct source in the environmental effects and which, therefore, is not covered by the objective of protection pursued by that directive, such as, inter alia, certain competitive disadvantages.

37 As regards a right to compensation for such pecuniary damage, it follows from the Court's settled case-law that, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law. In that regard, the Court has already held that, in order to remedy the failure to carry out an environmental impact assessment of a project within the meaning of Article 2(1) of Directive 85/337, it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental impacts, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered (see *Wells*, paragraphs 66 to 69).

38 The detailed procedural rules that are applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see *Wells*, paragraph 67).

39 Thus, it is on the basis of the rules of national law on liability that the Member State must make reparation for the consequences of the loss or damage caused, provided that the conditions for reparation of that loss or damage laid down by national law ensure compliance with the principles of equivalence and effectiveness recalled in the previous paragraph (see Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 67).

40 It must, however, be pointed out that European Union law confers on individuals, under certain conditions, a right to compensation for damage caused by breaches of European Union law. According to the Court's settled case-law, the principle of State liability for loss or damage caused to individuals as a result of breaches of European Union law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (see Case C-429/09 *Fuß* [2010] ECR I-12167, paragraph 45 and the case-law cited).

41 In that respect, the Court has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of European Union law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by the

individuals (see, *Fuß*, paragraph 47, and Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* [2010] ECR I-12655, paragraph 87 and the case-law cited).

42 Those three conditions are necessary and sufficient to found a right in individuals to obtain redress on the basis of European Union law directly, although this does not mean that the Member State concerned cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame*, paragraph 66).

43 It is, in principle, for the national courts to apply the criteria, directly on the basis of European Union law, for establishing the liability of Member States for damage caused to individuals by breaches of European Union law, in accordance with the guidelines laid down by the Court for the application of those criteria (see Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 210 and the case-law cited).

44 In that regard, it has already been established, in paragraphs 32 and 36 of the present judgment, that Directive 85/337 confers on the individuals concerned a right to have the effects on the environment of the project under examination assessed by the competent services, and that pecuniary damage, in so far as it is a direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337.

45 However, as indicated in paragraph 41 of the present judgment, the existence of a direct causal link between the breach in question and the damage sustained by the individuals is, in addition to the determination that the breach of European Union law is sufficiently serious, an indispensable condition governing the right to compensation. The existence of that direct causal link is also a matter for the national courts to ascertain, in accordance with the guidelines laid down by the Court.

46 To that end, the nature of the rule breached must be taken into account. In the present case, that rule prescribes an assessment of the environmental impact of a public or private project, but does not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment. Those characteristics suggest that the breach of Article 3 of Directive 85/337, that is to say, in the present case, the failure to carry out the assessment prescribed by that article, does not, in principle, by itself constitute the reason for the decrease in the value of a property.

47 Consequently, it appears that, in accordance with European Union law, the fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not, in principle, by itself confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects. However, it is ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it, to determine whether the requirements of European Union law applicable to the right to compensation, in particular the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

48 The answer to the questions referred is therefore that Article 3 of Directive 85/337 must be interpreted as meaning that the environmental impact assessment, as provided for in that article, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage, in so far as it is the direct

economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337. The fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself, according to European Union law, and without prejudice to rules of national law which are less restrictive as regards State liability, confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project. However, it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that the environmental impact assessment, as provided for in that article, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337.

The fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself, according to European Union law, and without prejudice to rules of national law which are less restrictive as regards State liability, confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project. However, it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

[Signatures]

* Language of the case: German.

Environmental Impact Assessment of Projects

Annamaria De Michele

Kunming, July 1° 2013

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EIA IN EUROPE

Introduction

- Directive 2011/92/UE of the European Parliament and the Council of 13 December 2011, on the assessment of the effects of certain public and private project on the environment, requires that an environmental assessment to be carried out by the competent national (or regional/local) authority for certain projects which are likely to have significant effects on the environment by virtue, inter alia, of their nature, size, location, before development consent is given.
- The project may be proposed by a public or private person

Introduction

- The EIA Directive of 1985 has been **amended three times**, in 1997, in 2003 and in 2009:
- Directive 97/11/EC brought the Directive in line with the UN ECE Espoo Convention on EIA in a Transboundary Context. The Directive of 1997 widened the scope of the EIA Directive by increasing the types of projects covered, and the number of projects requiring mandatory environmental impact assessment (Annex I). It also provided for new screening arrangements, including new screening criteria (at Annex III) for Annex II projects, and established minimum information requirements.
- Directive 2003/35/EC was seeking to align the provisions on public participation with the Aarhus Convention on public participation in decision-making and access to justice in environmental matters.
- Directive 2009/31/EC amended the Annexes I and II of the EIA Directive, by adding projects related to the transport, capture and storage of carbon dioxide (CO2).
- **The initial Directive of 1985 and its three amendments have been codified by DIRECTIVE 2011/92/EU of 13 December 2011.**

Aims of the Directive

- The Directive aims to protect the environment and the quality of life, while ensuring approximation of national laws with regard to the assessment of the environmental effects of public and private projects. It is a key instrument of environmental integration, covering a wide range of projects and making them environmentally sustainable.
- The basic principles which EIA is based on are precautionary principle, and the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source, and that the polluter should pay.
- Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.

Main Characters

- Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out.
- That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.

Main Characters

- An assessment is obligatory for project listed in Annex I of the directive, which are considered as having significant effects on the environment. These projects include for example: long-distance railway lines, aiports with a basic runway length of 2100 m. or more, motorways, express road of four lines or more (of at list 10 km), waste disposal installations for hazardous waste, waste disposal installations for non hazardous waste (with a capacity of more than 100 tonnes per day), waste water treatment plants (with a capacity exceeding 150.000 population equivalent)
- Other projects, listed in Annex II are not automatically assessed: MS can decide to subject them to an environmental impact assessment on a case-by-case basis or according to thresholds or criteria, for example size, location (ecological sensitive areas) and potential impact (surface affected, duration).
- *"Screening"* is the part of the EIA process that determines whether an EIA is required. In some MS, an EIA is mandatory for some types of projects listed in Annex II or for other project categories in addition to those listed in Annexes I and II.

Main Characters

- Member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment on the basis of the significance of their environmental effects. Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis.
- When setting such thresholds or criteria or examining projects on a case-by-case basis, for the purpose of determining which projects should be subject to assessment on the basis of their significant environmental effects, Member States should take account of the relevant selection criteria set out in this Directive. In accordance with the subsidiarity principle, the Member States are in the best position to apply those criteria in specific instances.

General Contents OF EIA Directive

- The environmental impact assessment must identify the direct and indirect effects of a project on the following factors: human beings, the fauna, the flora, the soil, water, air, the climate, the landscape, the material assets and cultural heritage, as well as the interaction between these various elements.
- The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

General Contents OF EIA Directive

- The developer (the person who applied for development consent or the public authority which initiated the project) must provide the authority responsible for approving the project with the following information as a minimum: a description of the project (location, design and size); possible measures to reduce significant adverse effects; data required to assess the main effects of the project on the environment; the main alternatives considered by the developer and the main reasons for this choice; a summary of this information.
- *"Scoping"* is the stage of the EIA process that determines the content and extent of the matters to be covered in the environmental information to be submitted to a competent authority. It is an important feature of an adequate EIA regime, mainly because it improves the quality of the EIA. Many MS have gone further than the minimum requirements of the Directive, making scoping mandatory and providing for public consultation during scoping.

General Contents OF EIA Directive

- With due regard for rules and practices regarding commercial and industrial secrecy, this information must be made available to interested parties sufficiently early in the decision-making process:
- the competent environmental authorities likely to be consulted on the authorization of the project;
- the public, by the appropriate means (including electronically) at the same time as information (in particular) on the procedure for approving the project, details of the authority responsible for approving or rejecting the project and the possibility of public participation in the approval procedure;
- other Member States, if the project is likely to have transboundary effects. Each Member State must make this information available to interested parties on its territory to enable them to express an opinion.
- Reasonable time-limits must be provided for, allowing sufficient time for all the interested parties to participate in the environmental decision-making procedures and express their opinions. These opinions and the information gathered pursuant to consultations must be taken into account in the approval procedure.

General Contents OF EIA Directive

- The basic idea is that participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.

General Contents OF EIA Directive

- At the end of the procedure, the following information must be made available to the public and transmitted to the other Member States concerned:
  - the approval or rejection of the project and any conditions associated with it;
  - the principal arguments upon which the decision was based after examination of the results of the public consultation, including information on the process of public participation;
  - any measures to reduce the adverse effects of the project.

General Contents OF EIA Directive

- In accordance with national legislation, Member States must ensure that the interested parties can challenge the decision in court.
- Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

- have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Benefits of the EIA Directive

- Two major benefits have been identified.
- **Firstly, the EIA ensures that environmental considerations are taken into account as early as possible in the decision-making process.**
- **Secondly, by involving the public, the EIA procedure ensures more transparency in environmental decision-making and, consequently, social acceptance.**

Benefits of the EIA Directive

- Even if most benefits of the EIA cannot be expressed in monetary terms, there is widespread agreement that the benefits of carrying out an EIA outweigh the costs of preparing an EIA.
- In addition, the Commission's experience from the assessment of projects co-funded under the EU Regional Policy, in particular major projects, shows that EIAs have improved the project design and the decision-making process (including the participation of environmental authorities and the public) and have helped to improve the incorporation of environmental considerations.
- Finally, implementation of the Directive has created specific national dynamics. MS have often built on the minimum requirements of the Directive and have gone beyond them, by introducing more stringent provisions (on the basis of Article 176 of the EC Treaty), which aim to ensure better environmental protection and more transparency. Many MS have also developed their own guidance on good practice and on specific project categories and issues. These national experiences can be shared across the EU.
- The costs of preparing an EIA as a share of project costs typically range from 0.1% for large projects to 1.0% for small projects. These costs provide an initial perspective but obviously do not take into consideration other costs (e.g. subsequent amendments, reporting, delays).

MAIN PROBLEMS

- The main problems of the Directive are basically three:

1. concerns regarding the screening procedure
2. concerns regarding the quality of the EIA
3. lack of harmonized practices for public participation

Concerns regarding the screening procedure

- The EIA Directive gives MS broad discretionality to determine, through a case-by-case examination and/or through national thresholds or criteria, whether an EIA is required for projects listed in Annex II. When establishing those thresholds or criteria, MS must take into account the relevant selection criteria set out in Annex III.
- Implementation and case-law show that, when establishing thresholds, MS often exceed their margin of discretion, either by taking account only of some selection criteria in Annex III or by exempting some projects in advance. In addition, although the trend is on the increase, EIAs carried out in the various MS vary considerably (from fewer than 100 to 5 000), even when comparing MS of a similar size. The levels at which thresholds have been set has clear implications for the amount of EIA activity.

Concerns regarding the screening procedure

- Furthermore, there are still several cases in which cumulative effects are not taken into account, while problems remain when it comes to eliminating "salami-slicing" practices, especially for big investment plans.
- Thus, the screening mechanism should be simplified and clarified, for example, by detailing the selection criteria listed in Annex III and by establishing Community thresholds and criteria.
- The practice of dividing projects up into 2 or more separate entities so that each individual element does not require an EIA and thus the project as a whole is not assessed; or the practice of obtaining permission for a project that is below a threshold (and thus not subject to EIA) and at a later date extending that project or its capacity above the threshold limits.

Concerns regarding the quality of EIA

- The EIA Directive lays down essentially procedural requirements; it does not establish obligatory environmental standards.
- The competent authorities are obliged to take into consideration the results of consultations and the information gathered and to provide specific information at the end of the development consent procedure (Articles 8 and 9), **but they are not obliged to draw specific conclusions from the findings of the EIA.**
- The lack of sufficient quality in the information used in the EIA documentation is a problem.

Concerns regarding the quality of EIA

- The directive does not oblige a developer to study or have studied alternatives to the project for which he looks for a permit.
- With regard to **alternatives**, the Directive includes among the information to be provided in the EIA documentation *"an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice"*. However this clause is generally uderstood in the sense that the developer is not obliged to study alternatives; only where he has done so, he must submit information on them.
- Some MS have introduced a legal obligation to consider specific alternatives, while others have not. The competent authorities and the public may also contribute to the selection of alternatives for assessment.

Concerns regarding the quality of EIA

- The administration is not in any way obliged to avoid/or minimize the negative effects of a project on the enviroment, but may give development consent also where serious negative effects are to be expected.

Lack of harmonized pratices for public participation

- The public must be given early and effective opportunities to participate in the environmental decision-making process. There is no common reference point for the beginning of the consultation. In several MS, the public is already consulted at an early stage (at the screening stage or at the scoping stage).
- However, in most cases, the public is consulted for the first time on the information gathered pursuant to Article 5, which corresponds to the minimum requirement laid down by the Directive.

Other Problems

- The impact assessment need not, according to the general urdestanding, be made in writing, though it is difficult to see how one can describe the effect of a project otherwise than in writing.
- The lack of provisions in the Directive relating to reasonable timeframe and preferably fixed timeframe for granting development consent, to the duration of the **validity** of the EIA and to **monitoring** the significant environmental effects of the implementation of projects is also a cause for concern.
- The directive does not provide for consequences when an environmental impact assessment has not been made.
- This leads to large differences. While foe example, in the UK or in Italy the planning consent is void and the all procedure has to start anew, where an EIA has not been made, Geman courts consider the omission to make an EIA an administrative error which is normally irrelevant for the planning consent.

European Court of Justice

The role played by the European Union Court of Justice.

- For the purpose of European construction, the Member States concluded treaties creating first the European Communities and subsequently the European Union (EU), with institutions which adopt laws in specific fields. The Communities therefore produce their own legislation, known as regulations, directives and decisions.
- To ensure that the law is enforced, understood and uniformly in all Member States, a judicial institution is essential. That institution is **the Court of Justice of the European Union.**
- The Court constitutes the judicial authority of the EU and, in cooperation with the courts and tribunals of the Member States; it ensures the uniform application and interpretation of EU law. The Court of Justice of the European Union, which has its seat in Luxembourg, consists of three courts: the Court of Justice, the General Court (created in 1988) and the Civil Service Tribunal (created in 2004).

Actions for failure to fulfill obligation

- **The Court of Justice has jurisdiction on various categories of proceedings.**
- **Actions for failure to fulfil obligations - These actions enable the Court of Justice to** determine whether a Member State has fulfilled its obligations under EU law.
- Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it.
- If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice.
- The action may be brought by the Commission – as, in practice, is usually the case – or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay.
- If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty.

References for a preliminary Ruling

- **References for a preliminary ruling - The Court of Justice cooperates with all the courts of** the Member States, which are the ordinary courts in matters of EU law. To ensure the effective and uniform application of EU legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law.
- A reference for a preliminary ruling may also seek the review of the validity of an act of EU law. The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to it is addressed is, in deciding the dispute before it, bound by the interpretation given.
- The Court's judgment likewise binds other national courts before which the same problem is raised. It is thus through references for preliminary rulings that any European citizen can seek clarification of the EU rules which affect him. Although such a reference can be made only by a national court, all the parties to the proceedings before that court, the Member States and the institutions of the EU may take part in the proceedings before the Court of Justice.

EU Court Of Justice

How to search the rullings on your own

- Where you can find the rullings of the EU Court of Justice?

http://curia.europa.eu/jcms/jcms/j6/

- You can use the case number you will find after each rulling in the following slides.
- Other kinds of reserches are available.

ART. 1 - DEFINITION

- 1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.
- 2. For the purposes of this Directive, the following definitions shall apply:

(a) "project" means:

- - the execution of construction works or of other installations or schemes,
- - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

(b) "developer" means the applicant for authorisation for a private project or the public authority which initiates a project;

(c) "development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

(d) "public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

(e) "public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

(f) "competent authority or authorities" means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive.

- 3. Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on those purposes.

DEFINITIONS - PROJECT

- The term 'project' refers to **works and physical interventions in Article 1(2) of Directive 85/337.**

C-2/07 Abraham and Others, C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraph 20)

- The **renewal of an existing permit (to operate an airport) cannot, in the absence of any works or** interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337.

(C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraph 24; C-121/11, Pro-Braine and Others, paragraph 31)

DEFINITIONS - PROJECTS

- In its case-law, the Court has given a broad interpretation of the concept of 'construction', accepting that works for the refurbishment of an existing road may be equivalent, due to their size and the manner in which they are carried out, to the construction of a new road (Case C-142/07 Ecologistas en Acción-CODA [2008] ECR I-6097, paragraph 36).
- Similarly, the Court stated that also encompassing works to alter the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (Abraham and Others, paragraph 40).
- However, it is clear from reading those judgments that each of the cases which gave rise to them involved physical works, which is not the case in the main proceedings according to the information provided by the Raad van State.
- (…) a purposive interpretation of the directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union.
- It follows that, in any event, **the renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'construction' within the meaning of point 7(a) of Annex I to Directive 85/377.** (C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraphs 27-30)

DEFINITIONS - PROJECTS

- The **definitive decision relating to the carrying on of operations at an existing landfill site** does not constitute a 'consent' within the meaning of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, unless that decision authorizes a change to or extension of that installation or site, through **works or interventions involving alterations to its** physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337, and thus constitute a 'project' within the meaning of Article 1(2) of that Directive.

(C-121/11, Pro-Braine and Others, paragraph 38)

DEMOLITION WORKS

- As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition.
- It is true that, under Article 4 of Directive 85/337, for a project to require an environmental impact assessment, it must come within one of the categories in Annexes I and II to that directive. However, as Ireland contends, they make no express reference to demolition works except irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I.
- However, it must be borne in mind that **those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for.**
- **As an illustration it** may be noted, as did the Commission, that 'urban development projects' referred to in point 10(b) of Annex II often involve the demolition of existing structures.
- It follows that **demolition works come within the scope of Directive 85/337 and, in that respect,** may constitute a 'project' within the meaning of Article 1(2) thereof.

(C-50/09, Commission v. Ireland, paragraphs 97-101)

CONCEPT OF DEVELOPMENT CONSENT

- In a **consent procedure comprising several stages, that assessment must, in principle, be carried out** soon as it is possible to identify and assess all the effects which the project may have on the environment.

(C-201/02, Wells, paragraph 52-53, operative part 1)

- An **agreement signed between the public authority, a company in charge of the development and** promotion of an airport and an air freight company which provides for certain modifications to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year is **not a project within the meaning of the EIA Directive. However, it is for the national court to** determine, on the basis of the applicable national legislation, whether such an agreement constitutes a **development consent within the meaning of Article 1(2) of the EIA Directive. It is necessary, in that** context, to consider whether that consent forms **part of a procedure carried out in several stages** involving a principal decision and **implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.**

(C-2/07, Abraham and Others - *Liège airport, paragraph 28, operative part 1)*

Public Concerned

- Members of the "**public concerned**" must be able to have **access to a review procedure** to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.
- EIA directive leaves to national legislatures the task of determining the conditions which may be required in order for a non governmental organisation which promotes environmental protection to have a right of appeal, according to the principle of the "**wide access to justice**" in order to make **effective** the provisions of the EIA Directive on judicial remedies.
- Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.
- From that point of view, a national law may require that such an association, which intends to challenge a project covered by the EIA Directive through legal proceedings, has as its object the protection of nature and the environment. Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive and in particular the objective of facilitating judicial review of projects which fall within its scope.
- Therefore Article 10a of the EIA Directive precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental NGOs which have at least 2.000 members.

(C-263/08, Djurgården, paragraphs 39, 45-47, 52)

Project serving national defence purposes

- The Directive, as stated in Article 1(4) [1(3) as per codification], does not cover "**projects serving national defence purposes'. That provision thus excludes from the Directive's scope and, therefore,** from the assessment procedure for which it provides, projects intended to safeguard national defence. Such an exclusion introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted restrictively. **Only projects which mainly serve national defence purposes may therefore be excluded from the assessment obligation.**
- It follows that the Directive covers projects, such as that at issue in the main proceedings which, as the file shows, has the principal objective of restructuring an airport in order for it to be capable of commercial use, even though it may also be used for military purposes. Article 1(4) [1(3) as per codification] of the Directive is to be interpreted as meaning that an airport which may **simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.**

(C-435/97, WWF and Others, paragraphs 65-67)

Art. 2 - General Characters

1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.
2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.
4. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive. In that event, the Member States shall:
- (a) consider whether another form of assessment would be appropriate;
- (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;
- (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

Beginning of work and EIA

- **Article 2(1) of the EIA Directive must necessarily be understood as meaning that, unless the applicant** has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question.
- That analysis is valid for all projects within the scope of the EIA Directive, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

(C-215/06, Commission v. Ireland, paragraphs 51-53)

Beginning of works and EIA

- If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carrie out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure.

(C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraph 36)

Splitting of projects

- The purpose of the EIA Directive cannot be circumvented by the **splitting of projects and the failure** to take account of the **cumulative effect of several projects must not mean in practice that they all** escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.

(C-392/96, Commission v. Ireland, paragraphs, 76, 82; C-142/07, Ecologistas en Acción-CODA, paragraph 44 C-205/08, Umweltanwalt von Kärnten, paragraph 53; Abraham and Others, paragraph 27; C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraph 36)

Art. 3 - Scope and content of the EIA

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

(a) human beings, fauna and flora;

(b) soil, water, air, climate and the landscape;

(c) material assets and the cultural heritage;

(d) the interaction between the factors referred to in points (a), (b) and (c).

Description of effects

- As regards the content of the assessment of environmental effects, Article 3 of Directive 85/337 lays down that it must include a **description of the direct and indirect environmental impact of a project.**

(Ecologistas en Acción-CODA, paragraph 39; C-560/08, Commission v. Spain, paragraph 98)

The **list laid down in Article 3 of the EIA Directive of the factors to be taken into account, such** as the effect of the project on human beings, fauna and flora, soil, water, air or the cultural heritage, bshows, in itself, that the environmental impact whose assessment the EIA Directive is designed to enable is **not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out.**

(C-2/07, Abraham and Others - Liège airport, paragraph 44)

- Even a **small-scale project can have significant effects on the environment if it is in a location** where the environmental factors set out in Article 3 of the EIA Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.

(C-392/96, Commission v. Ireland, paragraph 66; C-435/09, Commission v Belgium, paragraph 50)

Leading Case C-420/11

- Pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors.
- Therefore, it is necessary to examine, in particular, the **effects of a project on the use of material assets by human beings.**
- It follows that, in the assessment of projects such as those at issue in the main proceedings, which are liable to result in increased aircraft noise, it is necessary to assess the effects of the latter on the use of buildings by human beings.

Leading Case C-420/11

- However, as has correctly been pointed out by Land Niederösterreich and by several of the governments which have submitted observations to the Court, **an extension of the environmenta assessment to the pecuniary value of material assets cannot be inferred from the wording of Article 3** of Directive 85/337 and would also not be in accordance with the purpose of that directive.
- It follows from Article 1(1) of, and from the first, third, fifth and sixth recitals in the preamble to, Directive 85/337 that **the purpose of that directive** is an assessment of the effects of public and private projects on the environment in order to attain one of the Community's objectives in the sphere of the protection of the environment and the quality of life. The information which must be supplied by the developer in accordance with Article 5(1) of, and Annex IV to, Directive 85/337, as well as the criteria which enable Member States to determine whether small-scale projects, meeting the characteristics laid down in Annex III to that directive, require a environmental assessment, also relate to that purpose.

Leading Case C-420/11

- Consequently, it **is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment.** Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.
- It must therefore be held that the environmental impact assessment, as provided for in **Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.**

Leading Case C-420/11

- That finding, however, does not necessarily imply that Article 3 of Directive 85/337 must be interpreted as meaning that the fact that an environmental impact assessment has not been carried out, contrary to the requirements of that directive, in particular an assessment of the effects on one or more of the factors set out in that provision other than that of material assets, does not entitle an individual to any compensation for pecuniary damage which is attributable to a decrease in the value of his material assets.
- In circumstances where exposure to noise resulting from a project covered by Article 4 of Directive 85/337 has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of fulfilling its function and the individuals' environment, quality of life and, potentially, health are affected, **a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment**, this being a matter which must be examined on a case-by-case basis.

Leading Case C-420/11

- It must therefore be concluded that the **prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337.**
- As such economic damage is a direct consequence of such effects, it must be distinguished from economic damage which does not have its direct source in the environmental effects and which, therefore, is not covered by the objective of protection pursued by that directive, such as, inter alia, certain competitive disadvantages.
- (C-420/11, Leth, paragraphs 25-30, 31, 35-36)

Art. 4 - Projects subject to EIA

1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.
2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.
4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.

Criteria and Thresholds

- As regards the **cumulative effect of projects, it is to be remembered that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual** characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain w**hole classes of projects listed in Annex II which may be envisaged on the territory of a Member** State.
- A Member State which, on the basis of **Article 4(2) of the EIA Directive, has established threshold** and/or criteria taking account **only the size of projects, without taking into consideration all the criteria listed in Annex III [i.e. nature and location of projects], exceeds the limits of its discretion** under Articles 2(1) and **4(2) of the EIA Directive.**

(C-392/96, Commission v. Ireland, paragraph 73)

Content of the screening decision

- A decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment **must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of the EIA Directive.**

(in this case Abruzzo Region decided to exempt a motorway project the project from EIA without any significant motivation)

(C-87/02, Commission v. Italian Republic, paragraph 49)

Content of the screening decision

- **Article 4 of the EIA Directive must be interpreted as not requiring that a determination, that it is** unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should **itself contain the reasons for the competent authority's decision that the latter** was unnecessary.
- However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents.
- If a negative screening decision of a Member State states the reasons on which it is based, that **determination is sufficiently reasoned where the reasons which it contains (added to factors** which have already been brought to the attention of interested parties, and supplemented by any necessary additional information that the competent national administration is required to provide to those interested parties at their request) can enable the interested parties to decide whether to appeal against that decision.

(C-75/08, Mellor, paragraphs 61, 66, operative part 1-2)

Art. 5 - Environmental impact Study And Scooping

1. In the case of projects which, pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment.

2. Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the information to be supplied by the developer in accordance with paragraph 1. The competent authority shall consult the developer and authorities referred to in Article 6(1) before it gives its opinion. The fact that the authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the developer to submit further information.

Member States may require the competent authorities to give such an opinion, irrespective of whether the developer so requests.

Environmental impact Study And Scooping

3. The information to be provided by the developer shall include at least:

(a) a description of the project comprising information on the site, design and size of the project;

(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;

(c) the data required to identify and assess the main effects which the project is likely to have on the environment;

(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;

(e) **a non-technical summary of the information referred to in points** (a) to (d).

Art. 6 - Participation of the Public

1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.
2. The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

Art. 6 - Participation of the Public

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [6], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.
5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.
6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.

Art. 6 - Participation of the Public

- While Article 6(1) and (2) of the EIA Directive require Member States to hold a consultation procedure, in which the authorities likely to be concerned by the project and the public are invited, respectively, to give their opinion, the fact remains that such a procedure is carried out, necessarily, before consent is granted. Such **opinions - and further opinions which Member States may stipulate - form part of the consent process and are aimed at assisting the competent body's decision on** granting or refusing development consent. They are therefore **preparatory in nature and not, generally, subject to appeal.**
- (C-332/04, Commission v. Spain, paragraph 54)

Participation of the public

- **Article 6(4) of Directive 85/337 guarantees the public concerned effective participation in** environmental decision-making procedures as regards projects likely to have significant effects on the environment.
- Participation in the decision-making procedure has no effect on the conditions for access to the review procedure.
- Participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may where appropriate, be directed at a decision adopted at the end of that procedure.
- (C-263/08, Djurgården, paragraphs 36 and 38)

Administrative fee

- The levying of an **administrative fee is not in itself incompatible with the purpose of the EIA** Directive.
- A fee cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective, in accordance with the objective pursued by it. This would be the case if, due to its amount, a fee were liable to constitute an **obstacle to the exercise of the rights of participation conferred by Article 6 of the EIA Directive. The amount of the fees at issue here, namely 20€ in** procedures before local authorities and 45€ at the Board level, cannot be regarded as constituting such an obstacle.

(C-216/05, Commission v. Ireland, paragraphs 37-38, 42-45)

Art 9 - Information on the decision to grant or refuse the permit

1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision and any conditions attached thereto;

(b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.

Information about the decision

- Under Article 9 of the EIA Directive the public is to be informed once the decision to grant or refuse development consent has been taken. The purpose of issuing this information is not merely to inform the public but also to enable persons who consider themselves harmed by the project to exercise their right of appeal within the appointed deadlines.
- By imposing, in Article 9, the obligation on Member States to inform the public when a decision granting or refusing development consent is adopted, the amended Directive 85/337/EEC is intended to involve the public concerned in supervising the implementation of these principles. Informing the public only of the content of the opinion which is to be taken into account by the competent authority before adopting its decision is a less effective way of involving the public in supervision than informing the public of the final decision which concludes the consent procedure.

(C-332/04, Commission v. Spain, paragraphs 55-59)

Reasons for the competent authority's decision

- Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.

(C-182/10, Solvay and Others, paragraph 64)

Art. 11 - Access to Justice

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Art. 11 - access to Justice

- 3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.
- 4. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.
- 5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Participatiobn in an environmental procedure as a condition to have access to a review procedure

- Article 10a [11 as per codification] of the EIA, taking account of the amendments introduced by Directive 2003/35 which is intended to implement the **Aarhus Convention, provides for members of** the public concerned who fulfil certain conditions to have access to a review procedure before a court of law or another independent body in order to challenge the substantive or procedural legality of decisions, acts or omissions which fall within its scope.
- The right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law.
- Second, **participation in an environmental decision-making procedure** under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 **is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a** decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

(C-263/08, Djurgården, paragraphs 32-39)

Cost of the review procedure

The principle that that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result.

Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

(C-260/11, David Edwards vs. Environment Agency)

Cost of the review procedure

- The national court called upon to give a ruling on costs must take into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.
- That assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.
- As regards the analysis of the financial situation of the person concerned, the assessment which must be carried out by the national court cannot be based exclusively on the estimated financial resources of an 'average' applicant, since such information may have little connection with the situation of the person concerned.
- The court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages (see, by analogy, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 61).
- It must also be stated that the fact, put forward by the Supreme Court of the United Kingdom, that the claimant has not been deterred, in practice, from asserting his or her claim is not in itself sufficient to establish that the proceedings are not, as far as that claimant is concerned, prohibitively expensive for the purpose (as set out above) of Directives 85/337 and 96/61.

(C-260/11, David Edwards vs. Environment Agency)

Access to justice for NGOs

- It is clear from Directive 85/337 that it distinguishes between the public concerned by one of the projects falling within its scope in a general manner and, on the other hand, a sub-group of natural or legal persons within the public concerned who, in view of their particular position vis-à-vis the project at issue, are, in accordance with **Article 10a [11 as per codification], to be entitled to challenge the decision which authorises it. The directive leaves it to national law to determine the conditions for the** admissibility of the action. Those conditions may be having 'sufficient interest' or 'impairment of right', and national laws generally use one or other of those two concepts.

(C-263/08, Djurgården, paragraphs 42-52)

Access to justice for NGOs

- As regards non-governmental organisations which promote environmental protection, Article 1(2) of Directive 85/337, read in conjunction with Article 10a thereof, requires that those organisations 'meeting any requirements under national law' are to be regarded either as having 'sufficient interest' or as having a right which is capable of being impaired by projects falling within the scope of that directive.
- A national law may require that such an association, which intends to challenge a project covered by the EIA Directive through legal proceedings, has as its object the protection of nature and the environment
- Furthermore, it is conceivable that the condition that an environmental protection association musthave a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, **the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of the EIA Directive and in particular the objective of facilitating judicial review of projects which fall within its scope.**

(in this case the national law required more than 2000 members to have access to justice) (C-263/08, Djurgården, paragraphs 42-52)

Injunction Relief

- **Injunctive relief can be considered an essential element for ensuring effective judicial protection, to avoid irreversible damage to the environment amongst other reasons.**
- **This has been confirmed by AG Kokott in case C-416/10 Križan (paragraphs 170-** 177), where she concluded that the right to effective access to justice under the Environmental Impact Assessment Directive and the IPPC Directive also includes the right to apply for injunctive relief.
- The Court went on to follow the Advocate-General in its ruling delivered (paragraphs 105-110).

EIA in Italy

EIA In Italy - Legislative Decree No. 152/2006

- Legislative Decree no. 152/2006 - which is also known as "Environmental Code" - was adopted in order to fulfill the obligations coming from a long list of EU directives (concerning integrated pollution prevention and control, water, waste, air pollution, noise pollution, reclamation of polluted sites, etc.).
- The Environmental Code dedicates to EIA articles from 19 to 29.
- EIA can be at a national level or at a regional/local level.
- Some Regions - as Emilia-Romagna Region - have their own procedural discipline.

Projects subject to the EIA

- The project subject to the national EIA are those listed in Annex II of Legislative Decree no. 152/2006. It concerns both projects of new works and changes or extensions of existing works, if they comply with any limits or thresholds established for different types of projects in such Annex II.
- Projects related to works and interventions intended solely for the purpose of national defense or taking actions on an urgent basis for the preservation of 'physical injury and the safety of property from imminent danger or as a result of a disaster can be excluded, subject to case-by-case basis by the competent authority.
- Projects for which the screening procedure (art. 20 Legislative Decree no. 152/2006) was completed with negative results are subject to EIA.
- State infrastructure projects and strategic plants with a major national interest referred to in Objective Law (L.443/2001) falling within the types of projects listed in Annex II to the Legislative Decree no. 152/2006They are subject to EIA in accordance with the formal procedures for the approval of strategic infrastructure projects planned by Legislative Decree no.163/2006

Subjects

- Ministry of Environment and Protection of Land and Sea - as the competent authority (in the figure of the Minister) in the State (Article 7, paragraph 3 of Legislative Decree no. 152/2006), which makes use of technical and scientific support of the Technical Commission of Verification of 'Environmental Impact Assessment - EIA and SEA (Article 8 D.Lgs.152/2006)
- Ministry of Heritage and Culture - Ministry works at preliminary activities, expresses the opinion of its competence and expresses the concert (in the figure of the Minister) with the competent authority within the provision of EIA;
- Regions, provinces and cities whose territory is only partly affected by the project or by the impact of its implementation (Article 23, paragraph 3 D.Lgs.152/2006). If they are totally affected, the EIA is at regional/local level). These subjects are informed of the procedure and also have the technical documentation accompanying the application. In addition to the territories corresponding with the geographical location of the project and any related works, those who may be affected by certain potential environmental impacts from the project, both during the construction phase and exercise, which are expressed in a wide area (eg, air emissions, supply / waste disposal, water, energy, landscape, etc..) therefore be considered, for the purposes of the transmission of the request and accompanying documentation.
- Other government departments / bodies competent to issue permits, agreements, licenses, opinions, clearances and consents under any name on the environment if needed for carrying out the project or for the pursuit of the work and specifically established by the related standards sector (Article 23, paragraph 2 of the. D.Lgs.152/2006 as amended).

Subjects - Public

- Public is informed of the procedure and may express its opinion to the Ministry of Environment and to the other ministries at which the documentation has been filed, both on the technical documentation accompanying the application and on the site.
- Anyone who is interested can inspect the project and its environmental study, submit observations, including by providing new or additional relevant information and assessment both writing or by certified mail within sixty days from the publication of newspapers.

Procedural Steps

- a) the performance of a screening of the project limited to cases in which EIA is not mandatory (screening). Italy has approved a list of projects which must be subjected to screening procedure and a list of indicators which public administration should take into account in order to decide whether EIA is necessary or not);

  b) the definition of the content of the environmental impact study (scooping);

  c) the submission and publication of the project;

  d) conducting consultations;

  f) the assessment of the environmental study and the results of the consultations;

  g) the decision;

  h) information on the decision;

  i) monitoring

- Italy has also decided to coordinate EIA procedure with IPPC procedure.

Italian Case Law

SCREENING

- T.A.R. Puglia Lecce Sez. I, 13-07-2011, n. 1295
- The environmental impact assessment involves an earlier assessment finalized, in the framework of the Community principles of precaution, to the preventive protection of the public environment, with the result that, in the presence of an environmental situation characterized by profiles of specific and documented sensitivity, even mere possibility of negative alteration should be considered a reasonable ground of opposition to the creation of a plant.
- The judge cannot review the discretionary choice of the public administration not to submit a constitutional primary good, such as that of environmental integrity, when such additional risk factors, with reference to the peculiarities of the area, may imply the possibility, not demonstrable positive but not capable of exclusion, events damaging.

SCREENING

T.A.R. Puglia Bari Sez. I, 19-02-2013, n. 242

- In making the evaluation of environmental impact assessment and to conduct the preliminary verification of subjection, the Administration exerts a very large technical discretion, objectionable only in the presence of macroscopic defects or misrepresentation of logical assumptions.
- According to the Italian judge, the contested decision, despite the claims made by the applicant, contains an adequate explanation that gives full account of the factual and legal reasons underlying the Administration's decision in relation to the results of the investigation, as required by art. 3 L. n. 241 of 1990 (in particular, with specific reference to the impacts legitimately considered "significant" and "negative ").

(the case was about a private who challenged the decision of the public administration (Region Puglia), adopted after the screening procedure, to make a wind farm project subject to EIA)

SCREENING

- Cons. Stato Sez. IV, 24-01-2013, n. 468

In the proceeding for the assessment of environmental impact, even in a relationship of dialogue and contradictory, the power of the PA which is not obliged to follow the proponent in the its assessment and findings remains intact.

The institution in question is aimed at the preventive protection of the environment is understood in its broadest sense, with reference to its various components: the landscape, natural resources, the living conditions of the inhabitants, the cultural aspects and in this respect **the Judge deems to share fully the claims of the constitutional and administrative judges about the nature of the choices which is substantially unquestionable**.

This is justified in the light of primary and absolute value recognized by the Constitution to the landscape and the environment.

In making the evaluation of environmental impact the administration has a very wide technical discretion objectionable only for macroscopic defects in the reasoning, for errors of fact or misrepresentation of assumptions.

SCREENING

- Cons. Stato Sez. V, 31-05-2012, n. 3254

As was recently repeated (CdS, sect. IV, 5 July 2010, n. 4246; sect. V, 22 June 2009, no. 4206, VI, 17 May 2006, n. 2851) according to the EU and national principles, as well as his own peculiar purpose, environmental impact assessment **does not consist in a mere verification of a technical nature about the abstract environmental work, but involves a complex and in-depth comparative analysis aimed at evaluating the sacrifice imposed to environmental in comparison with socio - economic usefullness, taking into account the possible alternatives and the effects on the same cd option - zero**.

In particular (CdS, sect. IV, 5 July 2010, n. 4245, cit.), it was noted that "the purely discretionary nature of the final decision (and the preliminary screening of the project), correspondent to a the technical and administrative power, makes physiological and obedient to the ratio of the institute that a negative solution is possible if the intervention proposed environmental causes a sacrifice exceeding that necessary to satisfy different interests underlying the initiative.

Hence the possibility to reject projects that may cause damages to the environment which are is not justified by production needs, but likely to not to be produced through solutions that are less impactful in accordance with the criteria of sustainable development and the logic of proportionality between consumption of natural resources and benefits for the community which must govern the balance instances of antagonistic

LACK OF EIA

- T.A.R. Toscana Firenze Sez. II, 25-05-2009, n. 881

The environmental impact assessment implies an earlier assessment, aimed, in the framework of the Community principle of precaution, to the preventive protection of the public environmental interest (CdS, Sec. VI, 4 April 2005, n. 1462).

Therefore, the act of approval of a project to be submitted to EIA is **illegitimate if the judgment of environmental compatibility required by law is lacked**. In this case even the landscape and environmental compatibility statement expressed by the Regional Board cannot make up for EIA

NGOS

- Cons. Stato Sez. IV, 11-11-2011, n. 5986

In our system, the right to challenge the public administration decision which is assumed capable to compromise environmental interests is recognized not only the associations (and stable committees) which that power has been conferred by law (art. 13 of law no. 349, 1986), but also to people, different from the past, be they individual or collective, and, in the latter case, even if they are mere committees arose spontaneously, mainly in order to protect the environment, health and / or the quality of life of local residents on a limited territory, or if they are individual natural persons in different position on the basis of the criterion of "vicinitas" as a factor determining the right to challenge

NGOs

Cons. Stato Sez. IV, 11-11-2011, n. 5986

- Outside the specific case under the art. 18 of law no. 349/1986 , the investigation on the existence of the right to challenge the public which is supposed to cause damages to the environment must be conducted with extreme rigor on the basis of a series of detector indications (such as: - institutional purpose set by its statute, the protection of a localized particular interest, having a strong territorial connection between the area of inherence of the institution and the area in which the (assumed) damaged interest is located, structural and organizational skills to achieve their goals in order to realize the activity in a stable, continuous and not occasional way), the possession of which associations must prove.

法院案件管辖与案件分配：
奥英意荷挪葡加七国的比较

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The Right Judge for Each Case

A study of case assignment and impartiality in six European judiciaries

Philip M. Langbroek and Marco Fabri

INTERSENTIA

METRO

Chapter II

INTERNAL CASE ASSIGNMENT AND JUDICIAL IMPARTIALITY: COMPARATIVE ANALYSIS

Philip M. Langbroek and Marco Fabri

1. Introduction

In this chapter we dissect perspectives and instruments used to pursue the values that we encountered in the case studies. The values concerning internal case assignment relate to the constitutional, organisational and judicial perspectives. It should be noted that sometimes constitutional rules may be considered as instruments to pursue another value, as is the case with the principle of the legal or natural judge. We first summarize the perspectives, values and instruments in Table 1, below, and describe them accordingly. In the next 3 sections of this chapter we present the relations of perspectives, values and instruments in order to show the tensions within court organisations that affect the case assignment systems.

2. Values

2.1. *Constitutional perspective: judicial independence, judicial impartiality, accountability*

In this study we do not consider all the variables that may affect judges' impartiality and independence, but only those that are related to the case assignment system according to case studies in this study. For the same reason, we will here consider only the concept of independence specifically related to judges, and not the concept in its more extensive acceptation of *independence of the judiciary*, as it may also be found in the literature.[1] Independence of the Judiciary as an institution is related to the conception

1 There is a vast body of literature on judicial independence in a broader sense; most handbooks on constitutional law deal with it. See, for more specific literature e.g. C. Schmitt, Verfassungslehre, Berlin 1928; E.g. O.W. Kägi, Zur entstehung, Wandlung und Problematik des Gewaltenteilungsprinzipes, Zürich 1937; J.C. Vile, Constitutio-

of the separation of powers and checks and balances. It needs a different conceptual framework, and was not the subject of this study.

Table 1. Values and instruments concerning case assignment

Perspective	Values	Instruments
Constitution	Independence& judges' impartiality	Immovability of judges Legal/natural judge - Ius de non-evocando
		Resignation/disqualification rules Rules on extrajudicial activities Transparency of court policies (restrictions on information) provisions in relation to judge shopping
	Accountability	Authority/ formal competences to organise courts External Transparency
Organisation	Efficiency, Flexibility	Organisational structure of the courts Task forces Transferability of judges Exchange of cases between judges
Professional	Judicial indefiniteness	Rules on prevention of bias, Random case assignment
	Autonomy	
	Equality among professional peers' 'professional fraternity'	Balanced caseloads, internal transparency
	Juridical quality and judicial quality	Judges' specialisation and qualification Judicial continuity in a case

There should be no outside interference with the assignment of cases or the allocation of judges to court units. Hence competence for case assignment should be vested within the court organisation. Where the head of court is fully competent with respect to case assignment, as in Italy, France and Denmark, either randomisation or external controls may be considered (e.g. by a council for the judiciary), especially in cases where the head of court has the power to install different court units. External organisational controls concerning case assignment, like in Italy, have, however, a bad effect on flexibility. Therefore, efficiency is probably best served with checks on case assignment within the court, whereas judicial independence is probably adequately served by enabling parties to challenge a judge because of (appearances of) bias.

Judicial impartiality demands from courts that they prevent judicial bias and the appearance thereof from occurring; judicial resignation and challenging a judge are

nalism and the separation of powers, Clarendonpress, Oxford 1967; T.Koopmans, Courts and Political Institutions, Cambridge University Press, 2003; Guillaume Delaloy, le pouvoir judiciaire, PUF, Paris 2005.

instrumental to that aim. If case assignment is randomised, guarding judicial impartiality is a primary judicial responsibility. This also holds true if case assignment takes place according to judicial specialisation. Judicial impartiality in small courts can be enhanced by enabling judges from other courts to function as a replacement judge, if the prevention of judicial bias in a case leads to resignation from a case.

Accountability is a necessity in any open and democratic society. For the judiciaries and the courts a distinction between political and public accountability is useful, as the courts may be subject to political accountability for the way they spend public money, but not so for the content of their judgements. Accountability concerning the prevention of judicial bias primarily belongs to the judicial domain. Judges and courts should operate public accountability for the way they protect their independence and impartiality - by communicating policies for the prevention of bias to the general public via easily accessible media. We would like to point out that when judges' impartiality and independence, are involved, the matter is not only if *they are impartial*, but also if *they appear* to be so before the parties and the public in general. Therefore the way in which independence and impartiality policies are implemented, communicated and perceived are a point of attention.

These values are pursued through the following *instruments*.

Ius de non evocando (right to the legal or natural judge) is thought to prevent non-judicial authorities from installing special courts for special subjects and therefore cannot be missed. Its application in Germany and Italy goes further than this general meaning; it is a reinforcement of independence and impartiality by tying judges to a court and a court unit by means of legal rules, in combination with the assumption that cases will be randomly allocated to court units. In relation to case assignment, the absence of this right will not automatically lead to judicial bias.

Rules on resignation from a case and rules on disqualification of judges concern the internal and external checks on (appearances of) judicial bias. They show that the preservation of judicial impartiality is a primary judicial responsibility. Only in the second instance, is the check in the hands of the parties as they may challenge a judge.

Rules on and restrictions of extrajudicial activities are used to prevent judicial bias. In some countries certain extrajudicial activities are forbidden, in others they are not, and in a third category judges should have permission from a 'higher' authority, e.g. the head of the court or the Judicial Council.

In order to pursue the value of *accountability*, the *authority and power* of case assignment must be attributed to an office in a court. Given the professional status of judges, the office assigning cases to judges should have enough authority over judges in order to make it efficient. Furthermore, this power should also comprise the possibility of transferring judges from one court unit to another, e.g. at the request of the judge or if variations in caseloads demands this. This authority should be derived from formally attributed competences and comprises, in the first place, professional respect so that

decisions to allocate judges and cases will be generally accepted. The competences and the conditions for exercising them are instrumental to internal judicial independence.

We differentiate between *internal and external transparency* (for internal transparency, see below under instruments to enhance professional values). *External transparency* concerns the communication to the general public of case assignment policies and the preservation of judicial independence concerning court-external and court-internal influences on judges that may give them the appearance of bias.

On the other hand, parties should not be able to 'shop for judges' in order to bring their case before a judge who would presumably be advantageous for them - as an auxiliary guarantee against judicial bias. But this is contrary to the rules for the disqualification of judges. These rules presume that parties know the identity of their judge in order to be able to see if there is a contamination of interest.

2.2. *Organisational perspective: efficiency, flexibility*

Court efficiency is a must in order to pursue the value of timeliness in court proceedings. Efficiency is maximised when the resources in a court are attuned to the variety of cases filed at a court and the aims to be reached by court proceedings. As resources are finite (naturally, court resources must be so), internal case assignment takes into account which action is appropriate to decide a specific case, as far as the choice of the kind of action is not left to the parties. Hence court efficiency is also related to rules of procedure and judicial competences to manage cases.

The value of *organisational flexibility* is related to the value of efficiency in allocating human resources within the organisation. How does one deal with changes in caseloads? Changes in caseloads in different types of cases may necessitate the possibility that judges are assigned to the court units where their work is needed most. This presumes some oversight of the judicial competence present in a court and the possibility of transferring judges from one unit to another within a court.

In practice striving for *flexibility* in case assignment or the allocation of judges in court organisations does not combine very well with measures to prevent (appearances of) bias on the part of judges, or to enhance judicial continuity in cases. Efficiency in court organisations is often opposed to values like independence, continuity, juridical quality and judicial autonomy.

The instruments used to enhance the *organisational values* in case assignment processes are as follows. The first one is the way in which the courts are structured. This also concerns the competence of the head of court to distribute cases amongst the judges. The more stringent the conditions are under which these competences are to be exercised, the less flexible and, presumably, the less efficient a court will be, e.g. Italy and Germany. But if this competence is almost unconditional like in England & Wales, Denmark and France, the operation of the court is much more flexible, and, presumably, efficient.

A second instrument is the transferability of judges. As many courts have specialized divisions or units, the flexibility of a court is enhanced when judges may be moved to another unit by their head of court, according to the kinds of cases that enter the courts. When judges function in a fixed position within the court organisation, the situation may occur that a judge in unit (a) has an easy job, whereas judges in unit (b) have backlogs. This is not efficient. In the Netherlands, judges are not only at the disposal of the management board of the court, but they can also be transferred relatively easily be transferred to another court when caseloads demand this.

Another instrument related to the last one is the establishment of task forces. Task forces are instrumental in dealing with backlogs in a court. Also within a (large) court organisation the possibility to keep judges and court clerks in a temporary position in a division or unit may greatly contribute to court efficiency, because they can be deployed where and when needed.

Last but not least, we should also mention that the focus on an organisational perspective allows the possibility to *exchange cases* between judges, which is an easy and non-time-consuming way to prevent judicial bias and to manage the caseload effectively.

2.3. *Professional perspective: judicial indefiniteness, judicial autonomy, equal recognition, judicial and juridical quality*

Judicial indefiniteness is an essential professional judicial value everywhere, meaning that it should not matter which judge will hear a case. This value is no doubt related to basic juridical norms of legal certainty and the equality of those seeking justice. This value is, of course, based on the presumption that all judges live up to equally high standards of skill and competence in managing cases, court hearings and the application of the law in a case. This has far-reaching consequences for the way a court functions, considering the degree of discretion in the application of legal rules to a case. And this 'way of functioning' concerns the management of judicial knowledge and internal coordination in order to achieve a certain level of legal unity regarding decisions in similar cases.

Judicial autonomy is a value of judicial professionals and it may be seen as the organisational aspect of judicial independence. The more a court functions as a 'normal' organisation, the more judges have to accept that judicial independence and impartiality are values that are different from professional autonomy - and adapt themselves to the needs of the organisation. But this does not mean that judicial autonomy may be made entirely subordinate to organisational needs. Organisational needs like efficiency and flexibility may not be applied to the detriment of independence and impartiality, and obstruct the requirement that judgements should live up to standards of juridical quality.

Organising internal transparency is a way to *equally recognise judges as professionals* in a court. Different judicial ranks (e.g. appointed versus other judges in Denmark) within a court are not necessarily contradictory to this, and neither is the idea of judicial

specialisation (e.g. the 'ticketing' in England & Wales). Balanced caseloads for judges of equal rank or specialisation do matter.

Juridical quality is an elementary professional value for judges; judges should apply the actual standards of what the law in the current state of development is. These juridical standards can e.g. be maintained by the exchange and discussion of judgements within a court (peer review), but applies also to the procedural management of a case. Organisational pressure for productivity can work to the detriment of these standards.

Judicial quality is mainly the result of selection and training processes. These processes may differ from country to country, but they certainly contribute to the internalisation of professional standards by judges as a part of the professional socialisation process[2].

The *instruments* that we found to pursue these values in our study are quite interesting. The first one deals with the *restrictions on the authority of the head of court over judges.* The more restricted the authority of a head of court is in relation to judges, the more autonomous judges are. In so far as this is concerned, we observe a strong relation between internal judicial independence and judicial autonomy.

Other instruments are *internal transparency and balanced caseloads.*

Internal transparency is strongly related to the equal treatment of judges within the court organisation in the case assignment process, and hence to the equal recognition of judges' qualifications – it is support for professional fraternity. The best way to show this recognition is to make case assignment completely transparent internally.

The *specialisation, or generalisation, of judges' competence* may also be seen as an instrument related to professional values. Actually, according to our study, generally, a division of court work into different areas of law (e.g. civil, criminal, administrative) is broadly accepted, but it is not self-evident everywhere that our society has become so complex that some specialisation within a jurisdiction is inevitable. Judicial omniscience seems to be an illusion everywhere, especially in Denmark. This is not only true because of the complexity of the law, but also because of the special skills sometimes needed in dealing with specific kinds of cases (e.g. in family law). Thus judicial human resources can also be more easily attuned to the specific demands of certain cases.

Nonetheless, there are always a variety of cases that can be dealt with by judicial generalists. In a court organisation a balance should be sought between judicial specialisation and judicial generalisation, also taking into consideration the specific caseload of each court.

Another instrument, which in the study emerged as important to maintain judicial quality, is *judicial continuity*, which concerns the involvement of the same judge in

2 See on this issue, e.g. Giusseppe Di Federico, Recruitment, professional evaluation and career of judges and prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain, Lo Scarabeo, Bologna 2005.

subsequent hearings of a case, also at the cost of efficiency. This is especially relevant where judicial familiarity with the details of a case are relevant, as in family matters.

3. The interactions between values and instruments in courts

In this section we describe how the different perspectives, with their values and related instruments, interact, creating a blend of solutions in each justice system that we have considered in this study. From the description of the interaction we will draw the major conclusions of our research as to what basic choices are to be made in court organisations when it comes to case assignment.

3.1. Independence and autonomy

The pursuit of the value of *external independence* is affected by two influences that may constitute a risk for that value: judge shopping and extrajudicial activities. This risk is counterbalanced by the rules on the resignation and disqualification of judges and by transparency policies of the court.

The regulation and practices concerning the *resignation of judges* and the parties' *disqualification* of a judge are mechanisms to pursue the external independence of the judges. Resignation and disqualification rules are, generally speaking, carefully listed in the procedural rules or codes and they appear quite similar in all the judiciaries considered here. Our study has shown that the self-regulating mechanisms work quite well in the countries of our sample. Among the countries considered, we notice a high level of sensitivity among judges on this issue, especially in Denmark, due also to a specific case that has changed the judges' attitude.

External controls of advocates and those seeking justice function as checks on judicial impartiality, especially in larger criminal cases, where often claims of bias are filed against particular judges. These claims of bias function as an extra check on judicial impartiality. This is often done for reasons outside the field of control of the judge who is subject to the claim, for example to have a court hearing delayed. Nonetheless, this makes judges very cautious when it comes to guarding their impartiality. This applies in Germany, Denmark, France, Italy and the Netherlands, but in England & Wales it seems not to be a point of attention.

Another matter to be included among the factors that affect the judges' external independence and then the case assignment system, are the *extrajudicial activities* that a judge may engage in and the visibility towards the public of such activities. It is intuitive that the number and the kind of activities (e.g. member of the executive board of a corporation, member of a Ministerial cabinet etc.) may jeopardize the substance and appearance of the judges' independence and their impartiality. As our research shows, only in France are extrajudicial activities not allowed, while only in Denmark and in the Netherlands are they supposed to be clearly published on the web. In other countries judges need permission or consent from their Judicial Council (Italy, Denmark) or from the ministry of justice (Germany). The case assignment system may take

these extrajudicial activities into account and avoid the assignment of the cases to judges who may have developed connections with one of the parties due to these activities.

The making public of these activities brings us to the other factor listed, which is the *transparency policy*. We think that the visibility of court policies helps to enforce the external independence of judges, or better, the appearance of impartiality, due to the visibility of the rules and practices used for the general public, lawyers and parties to a case. Generally speaking, the practices to make the court policies visible, including the case assignment criteria, are not really that much developed in the courts of most of the countries considered here. In most countries information about court policies, in particular about case assignment, seems difficult to find. Court organisations in Denmark, England & Wales and France do not communicate how cases are assigned to parties or to the general public. Public Prosecutors' offices are being informed on the continent, but that presumably is due to the way cases are planned to be heard. In Germany, and this is a country with one of the most formalized case assignment systems, the case assignment plan is published on the courts' websites. In Italy the visibility of the court schedules is not as enhanced as it could be due to the courts' uncoordinated communication policies – e.g. websites are not uniform and contain different kinds of information. In the Netherlands a process of making case assignment policies explicit has started, and this information is published on the courts' websites, but informal case assignment practices are still dominant in the courts.

A point of attention, that should be further investigated, and that is also related to the publicity of courts' policies, is also the discretion given to each court to implement local practices for its functioning. This possibility seems to be quite relevant in Denmark, England & Wales, France and the Netherlands, but not in Italy and Germany. The more local discretion there is, the more significant the role of the head of court may be in protecting judicial independence and impartiality from external threats. This is a point for further investigation.

Shopping for judges by a party is the last issue that we considered within the area of judicial *independence*. If the case assignment system allows some kind of choice to be made as to the judge who will her one's case (shopping for judges), there may be a serious problem of *independence* from actors outside the courts. The phenomenon, as described, has been mentioned only in the criminal courts in France and Italy, and it has been explicitly denied in the case studies on interviewees in the other countries considered in this study. Notwithstanding the apparent denial of the problem in some countries, we think that this is an issue to be empirically and constantly monitored, particularly in small courts. A point of attention is especially the working relationship with the public prosecutions office, which is often the first organisation to know the court schedule. As in continental countries the public prosecutions office often plans the cases in the court schedule, it knows – also when the court assigns the judges in the hearing schedule – when which judge will sit. At least it is in a position to plan cases in favour of winning their case. This contradicts the point of departure in most judiciaries that it should not make a difference which judge sits on a case. But it does, nonetheless, and all lawyers familiar with a specific court will know this.

From the perspective of external transparency this means that restrictive policies concerning informing parties on 'which judge sits when' should be applied. Here transparency on case assignment policies does not imply that this information should be given. But, of course, parties must have enough time to consider if the judges dealing with their case may be related to it in one way or another, otherwise the disqualification check mechanism may not function adequately. It is up to the courts to find the right balance in this respect.

Internal independence based on our empirical research concerns the immovability of judges and the principle of the legal/natural judge.

Immovability is a principle shared in all the judiciaries considered in our study, even though it has been constitutionalised only in Germany and Italy, where this principle has been extended not only to the judicial office in general, but also to the position of judges within their court organisation, their division and unit. Here the constitutionalisation of the principle has created a certain rigidity in the case assignment process, which is particularly evident in Italy, where changes in case assignment are allowed only after a specific written decision by the head of court and with the consent of the national Judicial Council. Judges in the other countries are appointed to a court, but can be asked to sit in all kinds of cases, according to the numbers and kind of cases brought before the courts. These mechanisms are not formalized at all in counties such as Denmark and England/Wales, where cases can be exchanged informally between judges. They are based on the discretion of the heads of courts in France and of the management boards of the courts in the Netherlands, who make court regulations. The rigid character of case assignment in Italy may affect court performance negatively in terms of productivity.

3.2. Skills and flexibility

Partly connected to immovability - we would like to emphasise again that we deal with these issues just within the framework of case assignment systems - is the *professional qualification* of judges, and the way in which *courts are structured.* In this context, professional qualification means that judges have acquired specific knowledge and skills to deal with specific matters and parties so that they can be considered *specialized.* Actually, if the court structure is highly fragmented in a large number of divisions and units for specific matters, and the judges are specialized accordingly, it is intuitive that a stringent immovability principle limits the courts' flexibility in case assignment even further. This is especially so in the country with the most rigid case assignment system, Italy, where changes in the case assignment plan need the consent of the Judicial Council. In Denmark, because of the unspecialized knowledge and skills of judges, and in England & Wales, thanks to the so-called 'ticketing systems', the case assignment system is quite flexible. The Netherlands and France lie somewhere in between, with a moderate, in comparison to the others, specialisation of both judges and court structure. In conclusion, specialisation in a court makes case assignment less flexible, but it may nonetheless contribute to increasing the court's productivity due to enhancing specific routines in handling specific cases.

In our research we also pointed out the importance of the *role of the head of court* in the case assignment system, which is related to the internal independence of the judges. Automation in case assignment, a low level of discretion in the assignment process by the head, such as in the cases of Germany, Italy and Denmark, increases the level of internal independence, but it may decrease the capacity of the courts to deal with the case in an efficient way. A more managerial role for the head, or the management, should call for the assignment of cases in a more effective and efficient way rather than a simple randomization. Theoretically, there is an 'efficient allocation' of a mix of cases, which should help the judges' and courts' productivity.

We have already mentioned how the *exchange of cases* between judges has been recognized as an informal but effective mechanism of coordination by mutual adjustment. As shown in our research this is not possible in the judiciaries (i.e. Germany, Italy, France) where the assignment process is highly formalized and is based on a legalistic approach. In the Netherlands, Denmark and England/Wales if the judges do not have reasons to resign from a case or there are no grounds for disqualification by the parties, cases can be informally exchanged, preserving both the judge's impartiality and court efficiency. The Netherlands seems to be the country of our sample with the largest spectrum of solutions implemented, where task forces – with different features – and the transferability of judges have been established to tackle the pick of caseload.

3.3. Fraternity, autonomy and impartiality

A major find in this study is that judges throughout Western Europe feel that they are entitled to a *balanced caseload*. This is an essential, but not very visible part of judicial working life. By giving all judges not only an equal share of bulk-cases but also of cases containing interesting juridical quandries or cases with great social significance, their status amongst their colleagues is confirmed. Hence it is also a policy which judges expect from their organisation, and internal transparency in the courts is a precondition for confirmation of this position. Of course, this attitude is contrary to the most efficient organisational solutions in courts, and it is also somewhat opposed to the specialisation of judges.

Internal transparency is a necessary means to reach the goal of a *balanced caseload*. The idea is that judges should get an equal mix of complex and simple cases for everybody in the court to see. This idea of professional equality, however, makes it more difficult to make a court work more efficiently. Dealing with a large number of simple cases asks for different skills than dealing with juridically complex cases. It is not self-evident that all judges in a court combine these skills, and hence it seems only rational that modern courts need a further stratification of judicial functions than the principle of equal professional fraternity allows.

The case assignment system also affects the court efficiency through striving for *judicial continuity* in dealing with the same case. But judicial continuity is based on the judgement that it is better for the quality of the treatment and the judgement of a case if the same judge deals with a case when a case needs several sessions and/or decisions. In

England/Wales judicial continuity is considered a 'privilege' in the actual overwhelming situation, and cases are assigned not considering judicial continuity, but by selecting the judge who has some time available for the case. On the contrary, we think that a case assignment system that also acknowledges the importance of judicial continuity can give a better service to the parties and increase the overall efficiency of the courts, since the judges do not need to study too many new cases from the beginning.

No doubt, the evolution of court organisations will inevitably reduce *professional autonomy*. We can already see an important reduction of professional autonomy in the courts in the Netherlands. This means that judges have to accept that they work within an organisation and that they have to abide with policies of the court organisation, also policies concerning case assignment. On the other hand, judges may expect active support for their work from the organisation they work in, even though some of them will see this as an unwelcome bureaucratisation of their job. But it is inevitable as public attention nowadays is also focussing on the courts and their performance in terms of judicial and juridical quality and efficiency: external transparency can no longer be avoided.

Judicial impartiality is indeed a point of attention from an internal organisational point of view, as far as case assignment is randomised. Persons other than legally appointed officers cannot involve themselves in case assignment processes. Judges and parties do not know which specific cases will be assigned to them, unless the court or unit is very small. Nevertheless, the professional value that judges should be assigned a balanced caseload seems to be more in the foreground within court organisations than judicial impartiality, as this latter value is not regarded as an organisational value, but as an *individual judicial responsibility*.

We consider the self-evidence of strong professional values like *impartiality* to be an asset for every court. However, when moving from an informal arrangement of internal case assignment to a formal arrangement, it may seem as if the responsible state institutions give the message that there are no longer any sufficient grounds for such self-evident trust in the judicial professionals - in other words, that they can no longer be trusted. This is to be avoided. Even so, the increased external transparency of courts as a result of modern means of communications and the increased interest of the press in the courts make it advisable that the courts develop clear policies on the assignment of cases, so that they can explain the way they apply and achieve a balance between their organisational and professional values and acceptable court performance. Thus, judges can share their professional responsibility in preventing bias from occurring.

4. Conclusion

4.1. Three major tensions for case assignment systems

Instrumentality versus constitutional values

Given the differences in the juridical and sociological approaches to organisational problems, the opposition between organisation and management, on the one hand, and

the juridical, normative approach on the other, it is not entirely surprising that we find this opposition also within court organisations. Formal steering competences, striving for efficiency, flexibility and, to a certain extent, transparency are inevitable in modern organisations. We have shown however, how dominant traditional juridical and judicial values still are in courts, also supported by traditional judicial professional values. These values have been partly summarized in article 6 ECHR and are also concerned with case management; they concern judicial impartiality, judicial expertise, equality of arms, timeliness and judicial continuity in a case.

Externally imposed versus internalised professional values
The most striking conclusion from this study is the strong contrast between the formal approaches in Germany and Italy versus the informal approaches in Denmark and England & Wales - where law typically does not prescribe the actual internal case assignment process. As a consequence, it is easier for the German and Italian courts to live up to formal requirements of accountability for the internal case assignment than for the Danish courts, while the French take the middle ground with a dominant function of the head of court; this middle ground has recently also been taken in the Netherlands, where the courts have started to develop internal guidelines for case assignment within the framework of internal court regulations.

Whereas in Germany and Italy the law seeks to support the professional values of the judges and the heads of courts, by preventing judicial bias and unequal treatment of judges by the head of court, in Denmark and England & Wales the professional values are apparently considered to be self-evident and internalised by the judicial services - and do not seem to have the need to lay down these values in the form of rules. This tension becomes especially apparent in the Netherlands where a formalization process of case assignment and transparency rules started in 2005, even though judges show a strong professional awareness of their most essential values and actively protect them.

Specialisation versus flexibility
The method of case assignment in France, Italy and Denmark suggests that judges can manage all juridical fields. Also the Dutch way of having judges in first instance courts change court division every four years is an exponent of that thought. But with the current complexity of law and society the demand that judges know is no longer reasonable. Courts with only generalists seem more flexible from an organisational perspective, but judges who appear not to be able to handle and judge cases adequately may also harm the public trust in the courts.

In England & Wales an effort to solve this problem has been made with the ticketing system, meaning that judges must have a certificate in order to be allowed to handle specific kinds of cases. In Germany a far-reaching juridical specialisation within the courts is considered normal. This reduces organisational flexibility, whereas it may be expected that public trust in the courts will be enhanced.

In conclusion, the values and the instruments emphasised in this study show how they must be reconciled in modern case assignment, keeping human rights and juridical quality unchallenged. In this respect, a firm constitutional and/or supranational legal

basis of juridical values remains a necessity; the countries in our sample show that this can be achieved in different ways. We think that it is a challenge for all judicial organisations to manage their cases not only from the perspective of judicial values, but of efficiency as well. This may need a constant rethinking of working processes within the court organisations - and also concerning the functioning of judicial organisations as a whole. This is a matter of the public accountability of the courts as organisations and a matter of judges avoiding delays in deciding cases.

4.2. *A final word on the relations between features of the legal system and case assignment*

We started this study by selecting countries with different legal traditions, assuming that we would have found some relations and consistency between the main feature of the legal system and its case assignment.

According to the typology of Zweigert and Kötz we would expect the Anglo-Saxon and Scandinavian systems of case assignment to be more flexible and the French and German more inflexible, starting from the way they were designed. Furthermore, we distinguish between legalistic legal systems (the Latin or French ones) where reference to legal rules is predominant in adjudication and jurisprudential legal systems where reference to jurisprudential precedent is predominant (the Anglo-Saxon ones). The role of legal rules in case assignment (formal/informal) is also a point of attention, as we expect the informal rules to lead to more flexibility than the formal rules.

From our research we can conclude that the most rigid system of case assignment can be found in Italy, followed by Germany, whereas the French system, although formal, is quite flexible. The Danish, Dutch, and English case assignment processes are also quite flexible.

The matrix below summarizes these properties. It shows that the distinctions between rigid and flexible legal systems and between continental, legalistic legal systems, on the one hand, and jurisprudential legal systems, on the other, do not relate entirely to the way case assignment is organised.

Table 2. Legal systems and the ways of case assignment

Legal system **Way of Case assignment**	**Legalistic**	**Based on law and precedent**	**Jurisprudential precedent**
Flexible, informal	Not in sample	Denmark, The Netherlands	England & Wales
Flexible, formal	France	Not in sample	Not in sample
Rigid, formal	Italy	Germany	Not in sample

England & Wales and Italy fully confirm the hypothesis, whereas it should be rejected for France altogether. German case assignment confirms the hypothesis in part, but is quite adaptable and contradicts it for that part. The Netherlands has an informal case

assignment, but is originally a French legal system, which is operated with quite some room for judicial precedent. Therefore, we positioned it with Denmark between legalistic and jurisprudential legal systems. We would expect both countries to be less formal than Germany and Italy and more formal than England & Wales in case assignment; and we would expect both countries to be more flexible than France and Italy, and less flexible than England & Wales. It appears that they are just as flexible and informal as England & Wales in their case assignment. So also the Dutch and Danish cases do not fit the hypothesis entirely.

An explanation for these finds could be that the distinction between legalistic and jurisprudential legal systems is artificial, as Merryman asserts.[3] Based on this outcome, we question whether a typology of legal systems can contribute to the explanation of the role of law in society and in organisations like courts.

As far as case assignment is concerned, the typology explains very little. The exchange between researchers from the countries in our sample gave us more insight into the actual methods of case assignment than only a legal comparative study based on this classical typology would have done. From our research we derived that comparison on the basis of interaction between scholars who studied the functioning of the legal rules that govern court organisations and their application is more fruitful than a comparison on the basis of traditional typology of legal systems, and it is probably about time to abandon this typology.

3 J.H. Merryman, 'The French Deviation', 1996, 44 American Journal of Comparative law, p. 109-119.

Access to justice in environmental matters across EU member States: review procedures, effective remedies, potential barriers

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1) Aarhus Convention, art. 9 (Access to justice).

CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS
Aarhus, Denmark, 25 June 1998
The full text of the Convention is available on the website:
http://www.unece.org/env/pp/treatytext.html

Article 9 – ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) Having a sufficient interest
or, alternatively,
(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,
have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

2) Important rulings of the Court of Justice of the European Union (CJEU) concerning standing, costs and effective remedies in environmental justice.

The CJEU has developed an extensive case-law on access to justice in environmental matters, providing important guidelines to member States on how their obligations under the Aarhus convention should be implemented. National courts have embraced this case-law, by giving effect to the rulings of the CJEU in domestic litigation. Some case-law relates to specific

issues like standing, costs and effective remedies. The summary below is, of course, not exhaustive.

To bring an action before a national court, a potential plaintiff must have entitlement to do so, (s)he must be granted "*locus standi*" or "**standing**". Many legal systems are restrictive as regard standing to bring challenges against decisions, acts or omissions of public authorities and this can be an obstacle to access to justice. The CJEU supports for a wide interpretation of the role of associations under existing access to justice provisions deriving from the Aarhus Convention:

Case C-237/07, *Janecek*. This case involved a citizen challenging a local administration's failure to adopt a required air quality plan. The CJEU invoked human health as a reason to give standing. This had wide implications given that human health concerns are reflected in EU water, waste and chemical legislation as well as in air quality legislation, and given that the environment can be especially important for the health of vulnerable members of society, such as children. So, the CJEU recognised the citizen's entitlement to challenge the absence of an air quality management plan, despite the fact that national law considered that the citizen had no standing to bring such a case and that there were no specific access to justice provisions in the relevant EU air legislation.
The Court stated: "(…) *42 The answer to the first question must therefore be that Article 7(3) of Directive 96/6229 must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.*"

Case C-240/09, *Slovak Brown Bears.* This case concerned an environmental association's entitlement to challenge a ministerial hunting derogation from the strict species protection provisions of the Habitats Directive. The Court found that Article 9(3) of the Aarhus Convention had no direct effect but that, despite the absence of access to justice provisions in the Habitats Directive, Member State courts should nevertheless facilitate access by environmental associations.
The Court stated: "47 *In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (…)*".

Case C-263/08, *Djurgarden*. The case involved a challenge to Swedish national rules which restricted standing to environmental associations with at least 2000 members. The CJEU held that the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of the EIA Directive and in particular the objective of facilitating judicial review of projects which fall within its scope.

The **cost** of bringing legal challenges is another potential obstacle to access to justice. The Aarhus convention requires procedures not to be prohibitively expensive. This stipulation is also found in EU directives for EIA (environmental impact assessment) and IPPC (integrated pollution prevention and control):

C-260/11, *Edwards* and *C-530/11, Commission v UK.* *Edwards* arose out of an unsuccessful challenge in the UK courts to an approval given to a cement works. The unsuccessful plaintiff was ordered to pay the costs of the national proceedings and, in this context, the UK Supreme Court introduced a preliminary reference focusing on the interpretation of the provison that costs should not be prohibitively expensive. In particular it asked whether there should be a "subjective" test (i.e. how much a specific plaintiff could afford) or an "objective" test (i.e. general affordability independent of the means of the actual plaintiff) or a combination of these. The CJEU found that the test can include subjective or case-specific criteria but that these should never be objectively unreasonable.
The Court ruled that: The requirement "*that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. (…) (...) the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime. (…)*".

Adequate and **effective remedies** are of paramount importance in environmental justice to avoid irreparable environmental damages during and after the legal challenge. The CJEU states the need for injunctive relief to form part of the measures to give effect to existing access to justice provisions.

Case C-201/02, Wells. In the context of a dispute related to the EIA Directive, the CJEU ruled that it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended, or alternatively, to grant compensation for the harm suffered.
The Court stated: "*70 (…) the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in (…in the EIA Directive). The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness). In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered*".

C-416/10, Križan**.** The CJEU held that by virtue of their procedural autonomy, the Member States have discretion in implementing Article 9 of the Aarhus Convention and Article 15a of Directive 96/61 (supposing by way of analogy that these provisions are applicable to the EIA Directive access to justice provisions), subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and

impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable. It must be added that the guarantee of effectiveness of the right to bring an action provided for in that Article 11 of the EIA Directive requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent pollution, including, where necessary, by the temporary suspension of a disputed permit pending the final decision.

3) National case-studies concerning the importance of effective remedies in environmental justice.

A specific study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the EU Member States (2013)[1] reports about some cases that – due to ineffective means for injunctive relief, high costs for cross-undertakings in damages or time consuming procedures – have been "won in court, but lost on the ground". In these cases the environment suffered damages (the projects/works were fully or partially realized) before the permits were cancelled by the courts:

The *M-30 Highway* case in Madrid (Spain).
The "M-30" highway is the major ring-shape motorway around Madrid. In January, 2005, The City Council of Madrid took the decision to perform a massive project to transform the "M-30". The local body decided to perform the project without performing a preliminary Environmental Impact Assessment (EIA), on the ground that the highway was classified as an "urban" road or street under Spanish law and "urban road construction projects" did not fall within the scope of the Spanish rules implementing the EIA Directive (by that time, a Royal Decree-law enacted in 1986). The question therefore arose whether the EIA Directive did actually cover such projects. A well-known environmental NGO challenged that decision. The competent court was a lower one, the uni-personal court No. 22 of Madrid, who, prompted by the NGO, decided to formulate a preliminary ruling to the European Court of Justice (ECJ). The ECJ clarified the interpretation of the above mentioned directive by holding that Directive 85/337/EEC was applicable to the project (Case C-142/07). After the ECJ ruling, the domestic court issued its ruling of 16 October 2008, declaring that the Madrid city council decisions were illegal. The City Council appealed this ruling before the Higher Regional court (administrative chamber of Madrid), but the appeal was dismissed and the ruling confirmed (*Ruling of the Higher Regional court of Madrid of 11 February 2011*).
It is worth mentioning that the domestic court did not stop the construction works when the challenge was filed. Several claimants had filed different lawsuits against the project, but none of the different courts that received the complaints dared to stop the works: the size, the price and the importance of the project (it was considered to be the biggest civil engineering project in Europe at the time) certainly played a key role in the reasoning of the courts in order to deny interim relief. In the prospect of suspending a comprehensive project, the courts were reluctant to grant interim relief.
The sad point is that, from a global appraisal, the national court decisions were useless and late: when the cases were adjudicated by the national court on the merits, the road project had already been inaugurated and was fully operational. It is true that the city council, following the indications of the DG Environment of the European Commission (there was an

[1] Study of the European Commission on Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (2013) – Summary report, http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/analytical-studies.html.

infringement procedure on the way) carried out some "ex post facto" studies and analysis, but the reality is that the project was already finalised.

The *Wattelez* case in France.

The case deals with a deposit of toxic waste, as a result of a tire recycling plant. It is a useful example of: the length of the judicial procedures; the lack of their effectiveness due to the reluctance to award injunctive measures; the environmental damage, despite the fact that there was a positive outcome for the environment in the final judgment.

From 1939 to 1976, the Wattelez Company operated a rubber recycling plant. In 1991 the company sold its business to another company ("called Eureca") but Wattelez remained the owner of the land. Following the bankruptcy of Eureca in 1991, a large deposit of toxic waste remained on the site, causing several incidents (fire, water pollution …). The Prefect formally called on the Wattelez Company to remove the waste. First cleaning-up operations were carried out by the State Agency of Environment and Energy Management. A first request was brought by the company before the administrative court, which was rejected in 1993 (May, 25). Contrary to the administrative Court, the administrative Court of Appeal gave a decision in favor of the applicant (1994, June 30), and the Council of State finally stated in February 1997. The Supreme Judge issued that the Wattelez Company should not be considered as responsible for the cleanup of the site, "only in its capacity of landowner".

Concretely and despite the judicial proceedings, in 1997 the waste still remained on the site. In 2007, the Mayor (in charge of waste management) instructed the landowner to remove the waste. There was another judicial review and the administrative Court of Appeal annulled the mayor's decision in 2009 (April, 6). After a judgment of the Council of State issued in 2011, the Court of Appeal confirmed the Superior Court's decision in March 2012 (the 1st). According to the final judgment, the landowner may be considered liable to remove the toxic waste, particularly in case of negligence and in the absence of another known holder/tenant. It is now more than two decades since the plant stopped its activity and no injunctive measures have been awarded. The landowner was also ordered to pay a fine by the criminal Court in 1994 but the criminal proceedings also lack effectiveness.

The *Fluxys Gas Pipeline* (Belgium).

This case illustrates that the conditions under which the Council of State can suspend administrative decisions and regulations (the requester should invoke serious pleas, i.e. pleas that seems to be founded on first sight and demonstrate a difficulty to repair serious detriment when the contested acts are immediately applied) are not always appropriately assessed in environmental matters. On 27 March 2008 a sub-regional environmental NGO introduced a demand for suspension of a land use plan assigning a "pipeline street" for the construction of a main pipeline in the area of Brakel-Haaltert, plan that has been approved by a decision of the Flemish government of 11 January 2008. The Council of State rejected the demand by a judgment of 9 October 2008 because it had becoming clear during the hearing of the case on 12 September 2008 that suspension had no sense anymore because in the meanwhile the pipeline had already been constructed (only the restoration works had still to be done), so that the contested environmental harm could not be avoided anymore. The same day a similar decision was taken with regard to the building permit of 12 February 2008, against which a demand for suspension was introduced on 10 April 2008. More than 2 years later both the land use plan and the building permit were annulled for violation of Art. 6(3) and 6(4) of the Habitats Directive and the corresponding provisions of regional law. The Council was – with reference to the relevant case law of the CJEU – of the opinion that a proper assessment was needed and that the assessment that was carried out in the context of the SEA was of a poor quality, not meeting the standards set by CJEU in this respect. Some potential impacts were

not taken into account in a sufficient way – especially the possible negative impacts on the habitats of the miller's thumb (Cottus Gobio fish) – and the suggested mitigating measures had proven to be insufficient and wrongly interpreted (the works were actually carried out in the period that precisely should have been avoided to minimize their impact). Off course the factual situation cannot be undone. From a legal point of view, the procedure should now be taken over again with a correct proper assessment. But has this any sense at all?

The *Eemscentrale* in the Netherlands.
There are cases where, due to reluctance to award injunctive relief, the environment has suffered considerable damages, despite the fact that there was a positive outcome for the applicants in the final judgment. An example is a permit for the building of a new power plant. The permit was quashed by the Council of State. However the authority tolerated that the building activities continued, even without a permit. When NGOs asked for an injunctive measure in interim relief, the President of the Council of State refused that. The reason for the refusal was that in the meantime the building was nearly finished and the detrimental effects to nature had already occurred and could no longer be prevented by granting the interim relief.

The D8 highway in Czech Republic.
This is also an example of a situation in which the environment suffers damages (the projects are fully or partially realized) before the permits are cancelled by the court. As regard D8 highway (through "České středohoří" protected area), the court refused both an NGO request for injunctive relief concerning the land use permit (with argument that there is no direct harm caused by this decision) and later concerning the building permits, arguing that granting the injunctive relief would in practice mean stopping the construction works, which would cause "*delays in the timetable of the highway constructions*", extra costs with "*serious impacts on public budgets*" and would influence the protection of life and health of the inhabitants of the affected municipalities. Finally, a land use permit for the highway was cancelled by court in 2009, after 7 years of litigation. At that time, most of the interventions into the environment (buildings) had been finished already.

4) Examples covering two typical situations in which article 9.3 and article 9.4 of the Aarhus Convention are applicable.

Environmental matters can be approached in different ways, depending on the national legislation and appeal routes. This paragraph shows how similar situations (two situations are pictured here) can be dealt with in different countries[2].

First situation: complaints concerning an on-going waste deposit (landfill) in breach of national legislation.

Sweden: The processing of this situation depends upon whether there is a permit for the landfill or not. However, in both cases, the complaint will be handled by the supervisory authority, which, most probably, will be the municipal Environmental Board. If there is a permit for the landfill, the authority will have to decide whether to take actions for the updating of the conditions therein, which will be done by application to the permit body. If there is no permit, the authority can enforce the legal requirements by a direct order to the operator. The Board will have to issue a written decision on whether to intervene or not and

[2] Source: Study of the European Commission on Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (2013) – National reports.

this decision is appealable by those individuals who are affected by the activity. The NGOs have no standing in either case here as these kinds of supervisory decisions are not covered by the Environmental Code. If the authority finds that there is an imminent risk of damage to the environment or to human health, it can mandate that the supervisory order shall take immediate effect, but this is very seldom done. The appeal is made in both cases to the County Administrative Board and then further on to the environmental courts.

France: Depending on the nature, amount or volume of waste or the surface area of the installation, a landfill is submitted either to permit or notification. It is a classified facility for the environmental protection. Two hypotheses may be distinguished:
1) If the operator of this landfill is still known, the Prefect can use his special police powers stemming from the classified facilities legislative act (formal notification to regularize the landfill functioning, obligation for the operator to carry out necessary works, suspension or even definitive closing of the site). In case of facility without a due permit, the Prefect must compel the operator to regularize his status.
In the case of an administration's insolvency to act, any person having legal interest may: a) introduce an administrative appeal in order for the administration to act; b) in case of a refusal, challenge the decision's lawfulness before the Administrative Court; c) in case of a prejudice suffered due to the landfill, engage the administration's liability for fault by omission (before the Administrative Court) and/or engage the operator's liability (before the Civil Court) on the ground of abnormal neighbourhood disturbances; d) A third party can also go before the civil judge for summary procedures to make ascertain the overtly unlawful disturbance he is suffering from; e) Another possibility is to go before the criminal judge (action for damages, parallel to prosecution) because the lack of a permit is a misdemeanour. Nevertheless most of these proceedings suffer from their slowness and cost (lawyer compulsory in full review proceedings, consignment of a sum of money in action for damages).
2) If the operator of this landfill is not known anymore, it is possible to engage the liability of the "waste's holder", on the ground of the special police of waste. Then it is up to the mayor of the municipality where the landfill is based to take necessary measures and to force the landowner on the waste evacuation, especially if he has been negligent. In case of the mayor's insolvency, the Prefect is also entitled to act. A claimant will be able to engage the municipal and/or state authorities' possible liability, under the same conditions as those seen previously.

Spain: The running of landfills is a competence of municipalities. If the landfill is illegal, a citizens or an NGO may file an application in the city council, asking for the closure or modification of the landfill. Once rejected by the council, a citizen or an NGO may go to court. They can also report the fact to the public prosecutor or to the regional environmental agency.

Italy: In Italy, the responsibility for waste collection and disposal is shared between the regional and provincial (disposal) and the local levels of government (collection). At present, landfills in particular are the responsibility of the Region, while their management is normally outsourced or partially outsourced through public-private partnerships. It is therefore the Region which should look after that the landfill is managed appropriately. Complaining to the Regional government may or may not be effective, depending on many factors, including the political clout of the complainant and whether or not the Region itself or some local authority are directly involved in management through public-private partnerships (in which case the Region could both take managerial measures to solve the problem or resist anything which could prove expensive). If the complaint is not answered or not answered satisfactorily, the concerned party could challenge the omission or the illegal decision in front of the

administrative courts. As explained above, however, in the case of omission all that the administrative courts can do is to issue a declaration as to existence of a duty to act, while when the measure is annulled, it is still up to the public administration to come up with a legal decision. Provided, as it is normally the case, that the environment and or human health are at stake, the most effective avenue would be probably to lodge a complaint with the public prosecutor with the criminal courts. This not so much to get a conviction – which will anyway take too long if ever – but to scare the officials responsible into action. Liability actions with the civil courts could also be a – very time consuming – option, but again, asking for damages in front of the criminal courts would be more effective (even if not normally popular with the responsible officials).

Second situation: the competent authority has failed to establish an air quality action plan for a municipality in breach of EU air quality norms, or an action plan has been adopted but will not sufficiently reduce the risk of exceeding air quality limits.

Sweden (the *Horns-gatan case*). Concerned individuals can ask the municipal authority to establish such a plan or to undertake any action on behalf of their interests. The authority's decision is appealable to the County Administrative Board and further to the environmental courts. For the subsequent procedure in the courts, see above at 1. Environmental NGOs have no standing in these cases. The inhabitants living on Hornsgatan, one of the main roads of Stockholm, have been challenging the local authorities' negligence to enforce the air quality standards for particulate matter and oxides of nitrogen in accordance with union law. The municipality of Stockholm has been unwilling to take any further action, but, following an administrative appeal, the County Administrative Board ordered additional measures to be taken in order to bring down the levels of PM10. The inhabitants have appealed this decision, asking the Environmental Court to strengthen the precautionary measures to protect their interests. This way, the final decision on how to protect the inhabitants' health will probably be dealt with by the Environmental Court of Appeal. However, for many years this possibility to challenge omissions did not apply when the supervisory authorities refrained from bringing actions for the updating of permits for environmentally hazardous activities, such as for IPPC installations. Such initiatives were regarded as the prerogative of the authorities. As such a view-point clearly is in breach of the Aarhus Convention and the implementing union law on access to justice, this case law was revoked by a judgment from the Environmental Court of Appeal in late 2011.

France: In the field of air quality protection, French Law provides the obligation, for administration, to prepare and to adopt: 1) Regional climate, air quality and energy plans, setting out guidelines to prevent and to reduce air pollution and to alleviate the effects of climate change (article L. 222-1 of the Environmental Code); 2) Atmospheric Protection Plans, where there is a risk of exceedence of relevant air quality standards (article L. 222-4 of the Environmental Code).
So, if the administration has failed to establish a plan in breach of European Union law: it is impossible for the claimant to apply to the judge for an injunction aimed at the adoption of such a plan. Two solutions remain possible: 1) any person suffering from a direct and certain prejudice due to administration inactivity can incur the liability of the administration. But the direct causal connection between the lack of planning and the prejudice will have to be proved. The cost may be high since the lawyer is compulsory in full review proceedings and since expertise will undoubtedly be needed; 2) any person having a legal interest can ask the Préfect (administrative appeal) to apply for the adoption of a plan (in alleging the compliance with European Union legislation). In case the Prefect refuses or keeps silent, the claimant will be

able to challenge this administrative decision before the judge (illegality proceeding) in alleging the non-compliance with European Union law. However slowness is a serious drawback for these proceedings.
Conversely, if the administration has adopted a plan but it is inadequate: the claimant having legal interest can apply to the judge for the annulment of the plan (within the timeframe of two months following its adoption). Atmospheric Protection Plans are indeed considered by the French administrative judge as acts that can be challenged. Slowness is a drawback for this proceeding too.

Spain: A citizens or an NGO may file an application in the city council, asking for the adoption of such a plan. Once rejected by the council, a citizen or an NGO may go to court, but there are few chances about the success of the challenge, for lack of standing and because the court has no authority to impose a precise plan on the city council. This is a defective aspect in the system.

Italy: Municipalities are competent for assuring appropriate air quality. After submitting a complaint with the Municipality (and with the local ombudsman if present and though to be effective), a complaint with the criminal courts assorted with a claim for damages will be the most effective venue; actions before administrative courts and damages actions before civil courts would be second and third best options.

5) Relevant website references.

- Study of the European Commission on Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (2013) – Summary report, http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/analytical-studies.html
- Study of the European Commission on Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (2013) – National reports
- Summary report on the inventory on the EU Member States' measures on access to justice in environmental matters. Milieu Environmental Law and Policy, Brussels 2007-09-17; see http://ec.europa.eu/environment/aarhus/study_access.htm
- Faure, M & Philipsen, N & Backes, C & Choukroune, L & Fernhout, F & Mühl, M: Possible Initiatives on Access to Justice in Environmental Matters and their Socio-Economic Implications. Maastricht University Faculty of Law, Metro Institute 2013-01-09; see http://ec.europa.eu/environment/aarhus/studies.htm
- Darpö, J: *On Costs in the Environmental Procedure*. 31 January 2011, published on: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/analytical-studies.html
- Yaffa Epstein, *Access to Justice: Remedies*, Geneva 2011-03-09 and *Approaches to Access: Ideas and Practices for Access to Justice in Environmental Matters in the Areas of the Loser Pays Principle, Legal Aid, and Criteria for Injunctions.* Study prepared for the 4th session of the Meeting of the Parties 29 Jun – 1 July 2011, both published on: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/analytical-studies.html
- Case-law of the Aarhus convention Compliance Committee (first and second edition); see: http://www.unece.org/env/pp/ccBackground.html
- The EU "Network for the implementation and enforcement of environmental law" (IMPEL), see http://impel.eu/

- EU "Forum of judges for the environment", see http://www.eufje.org/
- The Permanent court of arbitration, a "unified forum" for arbitrating environmental and natural resources disputes, see http://www.pca-cpa.org

6) Judicial organisation: allocation of cases within the Court and judges' impartiality. (annex 1)

This last topic concerns court's organization, in general. It refers to the rules and practices governing the allocation of cases within the courts and how they can contribute to preserve judge's impartiality and integrity. Such rules can concern, for example, the principle of immovability of judges, the principle of legal/natural judge, the resignation/disqualification powers, etc. These principles, that can be crucial for the correct and independent functioning of a court, are analysed in the chapter written by M. Fabri and P. Langbroek, "Internal case assignment and judicial impartiality: comparative analysis", in M. Fabri and P. Langbroek (eds.), *The right judge for each case*, Utrecht, 2007 (see annex 1).

环境纠纷处理和环境诉讼证据的收集与认定

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一、环境纠纷及其特点

环境纠纷是指环境法主体之间就其环境权利和义务而产生的争议。这种争议，既可以发生在公民之间、单位之间、公民与单位之间，也可以发生在这些主体和国家机关之间，还可以发生在国家、单位、个人与外国的国家、单位和个人之间。其争议的内容，通常涉及环境污染破坏的责任由谁承担，环境损害赔偿金额应为多少，环境行政管理机关的具体环境行政行为是否合法与公正等等。

环境纠纷与其它纠纷比较起来，有如下几个特点：

（一）环境纠纷的加害人一方往往是能够给当地创造利税和就业机会的污染企业

在众多的环境纠纷中，虽然也有一些因为邻里生活缺乏约束而产生的纠纷，如空调安装和运行产生的噪声纠纷，厨房油烟排放产生的空气污染纠纷，倒垃圾引起的恶臭污染纠纷等，但绝大多数的还是由于企业在生产、经营过程中由于不采取环境保护措施，超标排放污染物，污染危害他人而形成的环境纠纷。这些加害企业由于能够为当地创造一定的税收，甚至成为当地的利税大户，并为当地提供一些就业机会，往往成为当地政府的重点保护对象，从而使受害者较难从加害者那里得到赔偿。

（二）环境纠纷当事人中受害人一方往往人数众多。

由于环境污染、破坏属于社会公害，危害范围较广，那么在许多情况下，受环境损害的往往不是特定的某个人，而是不特定的许多人。

（三）环境纠纷具有复杂多样性

环境纠纷的复杂多样性表现在：一是引起环境纠纷的原因是复杂多样的；二是环境纠纷的当事人是多种多样的；三是环境纠纷的内容是复杂多样的。另外，环境损害致害原因的复杂多样性，也是使环境纠纷复杂多样的重要原因之一。

（四）环境纠纷处理难度较大

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由于环境纠纷具有上述复杂多样、涉及人数较多的特点，相应地就使环境纠纷的处理难度增大，许多环境纠纷往往几年甚至十几年得不到解决，有的环境纠纷一时解决了而又出现多次反复，有的环境纠纷需要许多部门甚至需要几级政府协调才能解决。

环境纠纷处理的困难性表现为：一是政策性强，社会影响大；二是环境损害致害原因复杂，确定损害责任比较困难；三是环境纠纷的受害人一方收集证据比较困难；四是环境纠纷处理结果的执行比较困难；五是环境纠纷处理的法律规范不健全。

二、我国环境纠纷的发生情况

中国一年到底有多少环境纠纷，目前尚没有一个确切的统计。根据国务院环境保护行政主管部门每年一度的环境统计公报的数据，仅反映到环保部门的环境纠纷，1999 年就达到 25 万多件，2000 年甚至超过 30 万件，2001 年则超过了 40 万件。

（一）环境纠纷的年度分布

下面是 1986 年至 2005 年中国因环境污染而导致来信来访的统计数字。

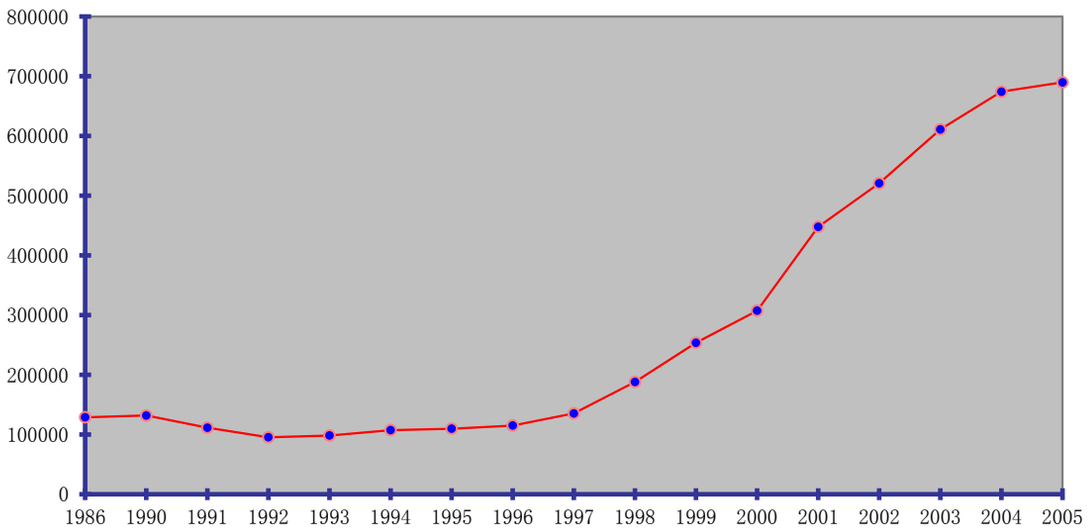
全国环境纠纷统计（1986～2005）

年份	环境纠纷总件数	污染赔偿总额（万元）	大气污染纠纷	水体污染纠纷	环境噪声纠纷	固体废物纠纷	其它环境纠纷
1986	128,823	5,265.00	39,752	33,644	30,500		
1990	131,851	9,743.00	48,878	32,654	33,423	8,208	7,125
1991	111,359	4,109.00	36,340	35,331	27,814	3,935	7,939
1992	95,309	5,190.00	35,027	21,606	28,517	3,079	7,080
1993	98,207	4,124.00	35,585	22,999	29,862	2,910	6,851
1994	107,338	4,451.10	33,537	59,848	35,410	3,322	6,903
1995	109,650	3,854.70	38,433	22,688	39,991	3,684	5,835
1996	114,982	2,624.40	40,432	19,885	43,025	3,978	7,009
1997	135,226	2,694.30	47,244	23,825	54,921	3,606	5,630
1998	187,924	1,851.66	63,739	28,279	85,017	4,618	6,271
1999	253656	2,116.32	89,273	33,892	116,645	7224	6,622
2000	307322	3,144.93	117,089	42,691	132,694	8,152	6,696
2001	450287	2,948.70	176,823	65,146	180,070	9,790	18,458
2002	520,725	2,629.7	198,066	62,876	200,399	11,440	4,7984

2003	611,016	1,999.10	228,738	76,601	227,524	15,613	62,440
2004	674,109	3,487.20	270,249	83,701	280,407	14,114	25,638
2005	689,720	2,373.80	269,521	82,594	283,585	14,435	39,585

由该表我们可以划出一条环境纠纷的年度曲线。

环境纠纷年度曲线

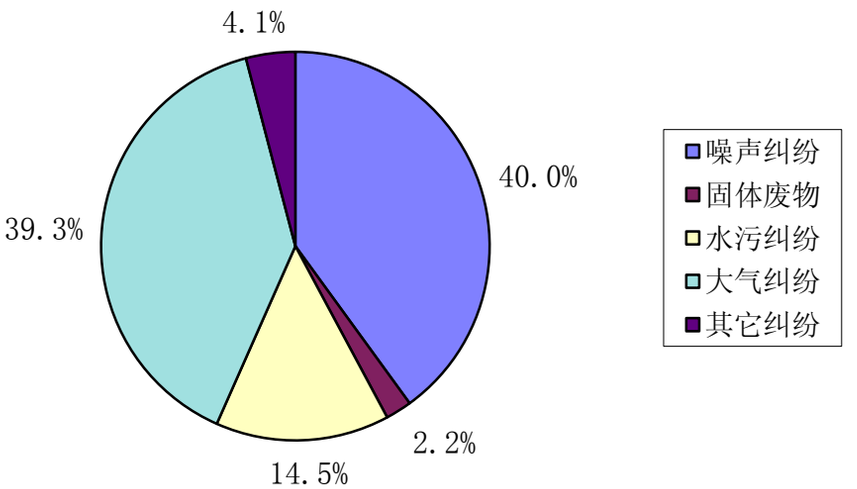


从这条曲线我们可以明显地看出，自 1993 年以后，我国的环境纠纷一直处于上升趋势，而且近年来上升的幅度越来越大。从 1996 年以来，每年上升的幅度超过 20%。

（二）环境纠纷的种类

从环境纠纷发生的种类来看，环境噪声污染纠纷从 1995 年以后，一直稳居首位，2001 年达到占整个污染纠纷的 40%。其次是大气污染，占 39.3%。这两种污染纠纷占了全部污染纠纷总数的 79.3%。2001 年各类污染纠纷的所占比例如下图：

各类纠纷所占比例图

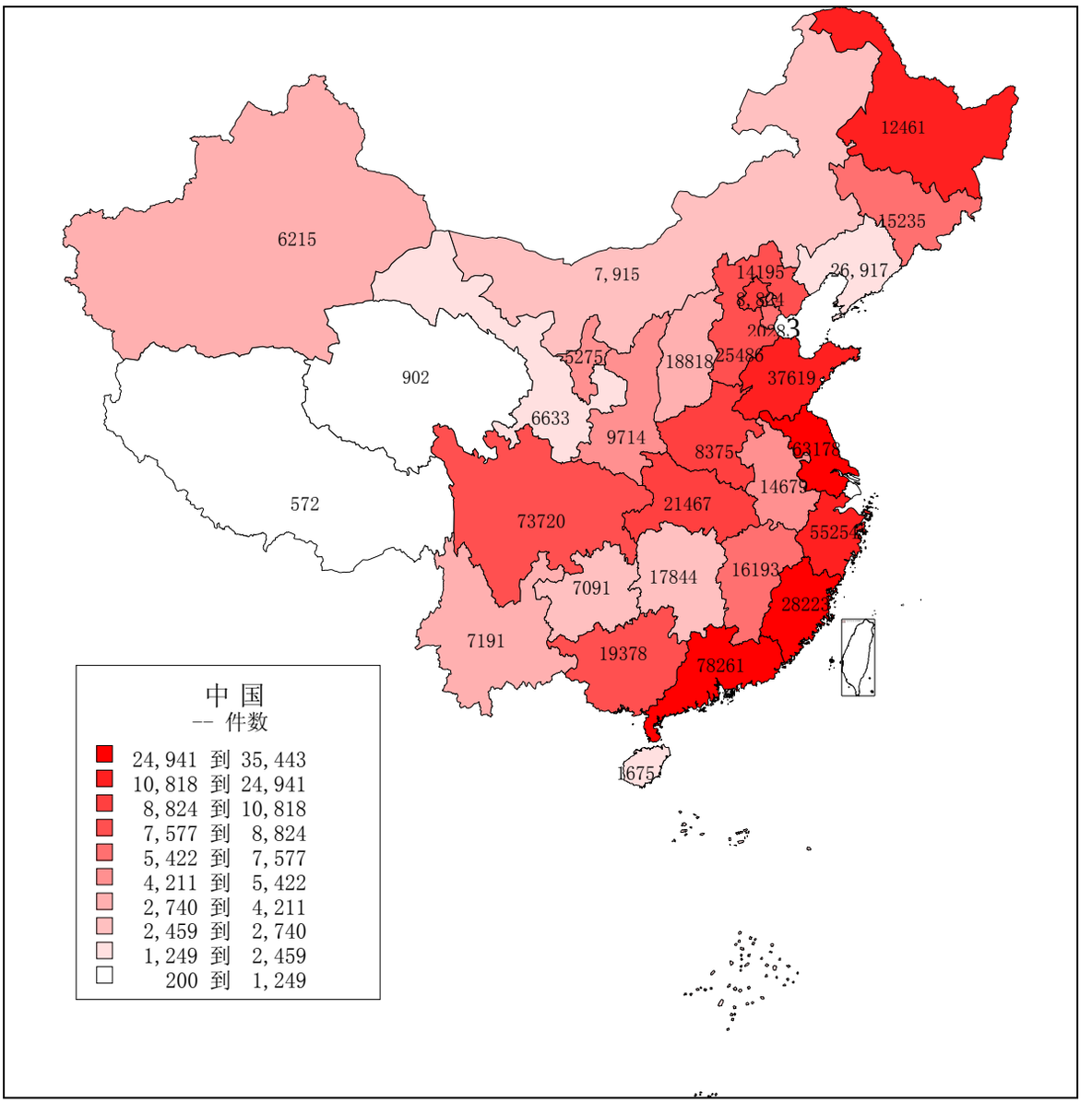


（三）环境纠纷的地区分布

从环境纠纷发生的地区分布情况看，在1999年的25万多件的环境纠纷中，其地区分布是不均衡的。各地区分布如下表：

2004年中国大陆环境纠纷地区分布情况表

地区	件数	地区	件数	地区	件数	地区	件数	地区	件数
北京	14195	黑龙江	12461	山东	37619	重庆	41022	青海	902
天津	20283	上海	58744	河南	8375	四川	32698	宁夏	5275
河北	25486	江苏	63178	湖北	21467	贵州	7091	新疆	6215
山西	18818	浙江	55254	湖南	17844	云南	7191		
内蒙	7915	安徽	14679	广东	78261	西藏	572		
辽宁	26917	福建	28223	广西	19378	陕西	9714		
吉林	15235	江西	16193	海南	1675	甘肃	6633	合计	682226



从这个图上我们可以看到，整个沿海地区都是环境纠纷的高发地区。据我分析，其原因主要有两个方面：一是沿海地区均是经济比较发达的地区，开发强度高，对环境的污染影响也大，因此较容易引起环境纠纷；二是沿海地区的人们生活水平较高，环境意识和权利意识也高，受到污染危害以后，往往能主动地向有关部门投诉，要求解决问题。

三、我国环境纠纷的解决途径

环境纠纷从性质上可以分为环境行政纠纷和环境民事纠纷。对于不同的环境纠纷，可以通过不同的途径加以解决。

环境行政纠纷，可以通过环境行政复议和环境行政诉讼加以解决。

对于环境民事纠纷，可以通过多种途径加以解决：

（—）纠纷双方自行和解

环境法主体之间发生了环境民事纠纷，双方当事人可以通过自行协商，在分清是非的基础上，约定互相让步，签订协议，解决其争议。其法律根据是我国《民事诉讼法》第 51 条“双方当事人可以自行和解”的规定和解可分为行政处理或诉讼前的和解与行政处理或诉讼中的和解。

（二）调解解决

调解是指由第三者主持并促成发生纠纷的双方当事人互相协商，达成协议的活动。通过调解的方法解决民间纠纷，在我国早已形成了一种制度，而且是息讼平争、增强人民团结的一种有效方法。现在，解决环境纠纷也普遍采用了调解的方法。环境纠纷的调解形式，概括起来有四类十二种。

第一类是民间调解。民间调解是相对于各种机关的有权调解而言的。包括人民群众自行调解、由律师主持调解和人民调解委员会调解。

第二类调解是行政调解。它是指由行政管理机关依法对环境纠纷进行的调解。这种调解，在实践中通常也有三种形式：一是由环境保护部门主持调解；二是由上级主管部门调解；三是由其他行政部门调解。

第三类调解是司法调解。环境纠纷起诉到人民法院，成为环境案件，人民法院也往往根据《民事诉讼法》的规定进行调解。

第四类调解是联合调解。联合调解是指由两个或两个以上的不同职能部门或单位组成临时调解组织对环境纠纷所进行的调解。在实践中一般有下列几种形式：一是由环保部门和其他行政管理部门联合调解；二是由环保部门和人民调解委员会联合调解；三是由其他行政管理部门和人民调解委员会联合调解；四是由人民法院和有关部门、单位联合调解，但这种调解是以人民法院为主，其他部门、单位处于协助的地位。

采取联合调解的方式解决环境纠纷，有利于发挥有关部门、单位在解决环境纠纷中的积极作用，促使当事人尽快达成协议，并自觉地履行协议。所以，在调解环境纠纷中，应充分利用联合调解的方式，尽量争取有关部门和单位的配合与协助，使环境纠纷得以解决。

（三）请求行政处理

环境纠纷的行政处理是指，有关人民政府或环境行政管理机关应纠纷当事人的请求，依法对环境纠纷做出处理决定的活动。由于环境行政管理机关处理环境纠纷时，往往先行调解，所以二者合在一起，被人们称为环境纠纷的行政调处。在我国，环境纠纷的行政处理已成为解决环境纠纷的一条主要途径。

1．环境纠纷行政处理的范围和管辖

我国《环境保护法》明确规定行政处理的环境纠纷有三种，一是跨行政区的环境污染和环境破坏纠纷，二是环境污染发生后的污染责任纠纷，三是赔偿金额纠纷。

跨行政区的环境污染和破坏纠纷，应当由有关人民政府协商解决；协商不成时，由上级人民政府协调解决，做出决定。

赔偿责任和赔偿金额纠纷，由环境保护行政主管部门或者其他依照法律规定行使环境监督管理权的部门负责处理。这里的其他部门是指：国家海事行政主管部门负责船舶污染海洋纠纷的处理；国家渔业行政主管部门负责渔业水域污染纠纷的处理；公安部门负责部分社会生活噪声纠纷的处理。

2．环境纠纷行政处理的程序

环境纠纷的行政处理可分为申请、受理、审理、决定、执行五个阶段。

3．行政处理的法律效力

环境行政管理机关对环境纠纷的行政处理，既不是必经程序，也不是最终程序。纠纷当事人可以不经行政处理而直接向人民法院起诉；经过处理，当事人对行政处理决定不服的，同样可以向人民法院起诉；如果一方当事人对处理决定不服，但却既不向人民法院起诉，又不履行义务，另一方当事人也可以向人民法院起诉。

然而，法律并没有赋予环境纠纷行政处理决定以强制执行的效力。也就是说，当纠纷的一方当事人不执行处理决定又不向人民法院起诉的情况下，做出处理决定的行政机关不能自行强制执行，也不能申请人民法院强制执行。另一方当事人也无权申请强制执行，而只能向人民法院起诉。

（四）环境纠纷的仲裁解决

仲裁，亦称公断，是指当事人双方之间的争议由第三者居中调解，作出判断或裁决的活动。对于环境纠纷的仲裁，我国既无专门的环境仲裁机构，亦无专门的环境仲裁法规。有明确规定的环境仲裁只适用于海洋环境污染纠纷，即发生了海洋环境污染损害纠纷后，当事人可以请求海事仲裁委员会仲裁。

1994 年 8 月颁布的《仲裁法》在仲裁范围上做出了“平等主体的公民、法人和其他组织之间发生的合同纠纷和其他财产权益纠纷，可以仲裁”的规定，那么，因环境损害赔偿而发生的环境纠纷，如果纠纷当事人之间达成采用仲裁方式解决纠纷的仲裁协议，就可以据此提交仲裁机构仲裁。

（五）自力解决

环境纠纷的自力解决，是指环境污染或破坏的受害者，在不能或无法通过正常的公力手段解决与加害人的环境纠纷时，为了保护其合法的环境权益，而自行对加害人及其设施造成适当损害的行为。该行为在环境法学界通常称为行使环境保护自卫权。但由于我国对行使环境自卫权

没有明确的规定，目前许多行使环境自卫权的行为往往以破坏生产经营罪、聚众扰乱社会秩序罪被定罪判刑。因此，用这种方式来解决环境纠纷对受害者来说具有相当的风险。因此，作为律师不要鼓励受害者用这种方式解决纠纷。

（六）诉讼解决

环境纠纷的诉讼解决，是指环境纠纷当事人通过向人民法院提起诉讼的方式使其争议得以解决的情况。这种诉讼统称为环境诉讼。它不仅是解决环境纠纷的一条重要途径，而且也是解决环境纠纷的最正式、最有效的一条途径。环境诉讼的内容异常复杂，下面作一专门论述。

四、环境诉讼

这里所说的环境诉讼，是指解决环境纠纷的环境行政诉讼和环境民事诉讼，而不包括环境刑事诉讼。

（一）环境行政诉讼的几个问题

作为律师，代理环境行政诉讼，主要涉及到当污染受害者起诉环境行政管理机关时，如何代理污染受害者或行政机关进行诉讼；当企业起诉环境行政管理机关时，如何代理企业或者行政机关进行诉讼。下面分别论述之。

1. 如何帮助污染受害者起诉负有环境保护法定职责的行政机关

污染受害者起诉行政机关，其主要的理由通常是由于行政机关不履行其环境保护的法定职责或者滥用职权给公民的环境权利造成了侵害。这就需要了解哪些机关具有哪些与公民环境权利维护有关的法定职责。

（1）人民政府的在环境保护方面的法定职责

《环境保护法》第 16 条明确规定：“地方各级人民政府，应当对本辖区的环境质量负责，采取措施改善环境质量。”因此，地方人民政府应当是环境保护法定职责的最大担当者。但根据现有的行政诉讼法和环境保护法律、法规的规定，能够把一个地方的人民政府告上法庭，作为环境行政诉讼的被告的，主要是下列几个方面：

A．对造成严重污染的企业事业单位，不限期治理。按照环保法的规定，对造成严重污染的企业事业单位进行限期治理，是县级以上人民政府的权力。如果应当限期治理的而人民政府不决定限期治理，就属于不履行法定职责。

B．对严重污染的小企业和土法生产的企业不依法取缔。按照《国务院关于环境保护若干问题的决定》的规定，“对现有年产 5000 吨以下的造纸厂、年产折牛皮 3 万张以下的制革厂、年产 500 吨以下的燃料厂，以及采用‘坑式’、和‘萍乡式’、‘天地罐’和‘敞开式’等落后方式炼焦、炼硫的企业，由县级以上人民政府责令取缔；对土法炼砷、炼汞、炼铅锌、炼油、选金和农药、漂染、电镀以及生产石棉制品、放射性制品等企业，由县级以上地方人民政府责令其关闭或停

产。”对污染受害者造成危害的，往往也都是这些小企业，如果有关地方人民政府不责令取缔、关闭或者停产这些小企业，就属于不履行法定职责。

C．对违禁采用禁止采用的生产工艺、设备者不责令停业、关闭。违反法律规定，生产、销售、进口或者使用禁止生产、销售、进口、使用的设备，或者采用禁止采用的工艺，情节严重的，人民政府应当根据经济综合主管部门的意见，在国务院规定的权限内责令停业、关闭。如果该停业的不停，该关闭的不关，就属于不履行法定职责。

（2）环境保护行政主管部门在环境保护方面的法定职责

环境保护行政主管部门作为对环境保护实施统一监督管理的机关，在环境保护方面，特别是污染防治方面负有主要的职责。只要其没有履行法定职责的行为使公民的环境权利受到了侵害，直接受到危害的人就可以向人民法院提起行政诉讼，要求其履行法定职责。环境保护行政主管部门涉及与污染受害者有关的法定职责主要有以下几个方面：

A．在建设项目建设时，县级以上人民政府环境保护行政主管部门有审查、审批环境影响报告书（表）的职责；对未履行环境影响报告书（表）审批手续的，有进行行政处罚的职责；国家环境保护总局对在环境影响评价中弄虚作假的评价工作单位有进行行政处罚的职责；县级以上人民政府环境保护行政主管部门有监督建设单位执行“三同时”并对不执行“三同时”规定者进行行政处罚的职责。

B．在企事业单位的生产经营过程中，县级以上人民政府环境保护行政主管部门有让排污者申报登记排污数量、种类、浓度以及污染治理情况的职责；对排污单位有收缴排污费和超标排污费的职责；对超标排放大气污染物者有进行行政处罚的职责；对不正常使用污染物处理设施或者擅自拆除、闲置污染物处理的，有进行行政处罚的职责；对污染源的排污情况有进行监督性监测的职责。

C．在环境污染危害发生后，有进行调查处理的职责。首先，污染事故发生以后，环境保护行政主管部门有进行调查处理、向上级环保部门报告、对发生事故单位进行处罚的职责；对污染情况有进行事故监测或者接受委托进行监测的职责；经环境纠纷当事人请求，有对污染责任纠纷和赔偿金额纠纷进行调解处理、做出处理决定的职责。

（3）其他有关部门在环境保护方面的法定职责

除了上述环境保护行政主管部门的职责外，县级以上人民政府和其他有关行政部门也有一些职责与污染受害者权利的维护有关。比如，城市规划部门，有对违反城市规划进行建设的产生环境污染的项目单位进行处罚的职责；工商部门有对未取得营业执照从事生产经营活动污染他人的企业进行行政处罚的职责；经济综合主管部门有对违反规定生产、销售、进口或者使用禁止生产、销售、进口、使用的设备，或者采用禁止采用的工艺的单位给予责令改正的职责，同时对情节严重者，有提出意见，报请同级人民政府责令停业、关闭的职责；公安部门对在城

市市区噪声敏感建筑物集中区域内使用高音广播喇叭、从家庭室内发出严重干扰周围居民生活的环境噪声的、在商业经营活动中使用高音广播喇叭或者采用其他发出高噪声的方法招揽顾客的行为有进行管理和处罚的职责；渔政管理机构对渔业污染事故有调查处理和处罚的职责。

除了要求行政机关履行法定职责之诉外，在公民环境权利维护方面往往还涉及到请求法院撤销行政机关的某一行政行为的诉讼。比如，按照规定，建设单位编制环境影响报告书应当征求所在地单位和居民的意见，但环保部门在没有看到建设项目所在地单位和居民意见的情况下，就批准了环境影响报告书，那么，受到这一审批行为影响的当事人就可以提起行政诉讼，要求法院撤销已从事的审批行为。

2003 年 8 月 27 日颁布的《行政许可法》第 36 条规定："行政机关对行政许可申请进行审查时，发现行政许可事项直接关系他人重大利益的应当告知利害关系人。申请人、利害关系人有权进行陈述和申辩。行政机关应当听取申请人、利害关系人的意见。"根据这一规定，当行政机关批准环境影响评价文件、发放排污许可证、"三同时"环保设施验收通过、颁发建设规划许可证时，如果涉及周围单位和个人的环境权益，行政机关就有义务告知可能受到影响的单位和个人，听取其意见。如果行政机关不履行告知和听取意见的义务，有关单位和个人就可依法对行政机关提起行政诉讼。目前在北京、深圳和一些其它地方已经有了这方面的诉讼。今后，这方面是律师的一个很大的业务领域。

2．如何在环境行政诉讼中当好环保部门的诉讼代理人

环保部门在行政诉讼中作为被告，通常有两个方面的原告人。一是我们上面所述的，认为环保部门没有履行环境保护的法定职责或者认为环保部门没有依法履行其法定职责的单位和个人。对于这方面的起诉，律师作为环保部门的代理人，主要应看环保部门是否真正具有某一法定职责。有时候，人们认为环保部门具有某一法定职责，但实际上环保部门并没有这一职责。比如限期治理权。

起诉环保部门的另一方面的原告是排污单位。他们通常因以下几个方面的原因起诉环保部门：

（1） 受到环境行政处罚；

（2） 环保部门拒发有关环保许可证或执照；

（3） 环保部门采取环保行政措施不当，而给行政相对人造成不应有的损失；

（4） 环保部门违反规定征收排污费或其它费用。

律师作为环保部门的代理人，在办理这类案件时，应着重审查环保部门做出的决定是否有法律依据。如果有法律依据，就可以坚持；如果没有法律依据，就可以让环保部门变更已做出的决定。在进行这种诉讼时，环保部门的决定没有一点根据的情况是很少见的。被诉的许多情况是：具体行政行为没有法律、法规的依据，但有行政规章和规范性文件作依据；法律、法规

规定的不清楚、不具体，环保部门根据自己对法律规定的理解而做出了某一具体行政行为。律师可以从我国环保立法的不健全、行政规章和规范性文件具有一定的法律效力、环保部门在按政府要求行事、环保部门具有自由裁量权等方面提出代理意见。

3．如何在环境行政诉讼中做好企业的诉讼代理人

企业作为环境保护行政管理的相对人，通常由于上面所述的四个方面的原因起诉环保部门。作为企业的法律顾问或者诉讼代理人，在起诉环保部门时，应着重从以下几个方面考虑问题：

（1）做出具体环境行政行为的程序是否合法。比如，是否履行了告知义务、应听证的是否进行了听证等。

（2）做出的具体环境行政行为是否有法律根据。特别应注意环境行政机关适用的位阶较低的规定是否与法律、法规相冲突。

（3）做出的具体行政行为是否在法定的期限内。

（4）环境行政管理机关做出的行政处罚决定是否显失公正。

一些环保部门，特别是基层环保部门的环境执法水平较低，违反程序执法、乱收费、乱罚款的情况时常发生，如果企业能够用法律的手段维护自己的合法权益，将能够促进环保部门依法执法，把环境保护管理真正纳入法治的轨道。

（二）环境民事诉讼的几个问题

1．环境民事诉讼的起诉人资格

我国《民事诉讼法》第 108 条在规定起诉资格时，其中有“原告是与本案有直接利害关系的公民、法人和其他组织”的规定。也就是说，公民、法人和其他组织，必须是为了自己的利益去起诉，而不能是为了只与自己有间接利害关系的社会、公众和他人的利益去起诉。这一限制条件，非常不利于环境诉讼。因为公民、法人和其他组织对大气、公共水域、海洋、风景名胜等环境因素都没有所有权和排他的使用权，所以，如果对污染、破坏这些环境要素的行为提起诉讼，就会被认定为与本案无直接利害关系。而且，为保护这些环境要素而提起诉讼也不可能完全是为了自己的利益，而只能或主要地是为了社会和公众的利益，那么，依照现行法律规定，也就不具有起诉资格。这样，无疑就限制了公众参与环境保护的权利。

为了解决这一问题，一些国家在环境诉讼的起诉人资格上比普通的民事诉讼放松了限制，规定了任何人均可对污染、破坏环境者提起诉讼，并在诉讼费、律师费的负担上做出了有利于起诉人的规定。

我国环境保护法规定一切单位和个人都有权对污染和破坏环境的单位和个人进行检举和控告。这里的控告权，应当包括起诉权，其中当然也包括民事起诉权。只不过是在我国的《民事诉讼法》中未能得到体现，执行起来还比较困难。今后的立法应将这种规定与诉讼法的规定协调起来。

我国现行的民事诉讼法中规定的“集团诉讼”和“代表人诉讼”制度，在一定意义上来说，也是对起诉人资格限制的放松，它非常有利于环境污染和破坏范围较大、受害人数较多的环境诉讼。因此，应充分利用这种诉讼制度提起环境民事诉讼。

2．环境民事诉讼的种类

在我国，环境民事诉讼主要有以下几种：

（1）停止侵害之诉。即要求已经从事或者正在从事环境污染破坏活动的单位和个人停止其活动的诉讼。这是一种积极的诉讼，提起这种诉讼可防止环境损害的进一步扩大。

（2）排除危害之诉。即受到环境污染破坏损害者，要求行为人消除已造成的环境危害的诉讼。它与停止侵害之诉的不同点在于，它不仅要求停止侵害，而且还要求行为人消除已造成的危害。

（3）消除危险之诉。这种诉讼是在环境侵害行为尚未现实发生，但已存在侵害发生的必然性的情况下提起的。

（4） 恢复环境原状之诉。这种诉讼是在环境侵权行为已经造成环境质量的恶化或环境因素的损害，且被恶化或损害的环境质量或环境因素是能够恢复的情况下提起的。

（5）损害赔偿之诉。这种诉讼是在环境侵权行为已经造成他人财产或人身的实际损害，而这种损害又不能通过恢复原状来弥补的情况下，受害人为获得赔偿而提起的。

在实践中，对于一起环境纠纷，并非只能提起一种诉讼，而是可以同时提出几种诉讼请求。比如，对于污染渔业水体的行为，如果已经造成了鱼的死亡，且污染仍在继续，那么，就可以提出停止侵害、恢复水体质量原状、赔偿损失等三种诉讼请求。

3．环境民事诉讼时效

诉讼时效是权利人通过诉讼程序请求人民法院保护其民事权利的有效期限。如果权利人不在法定期限内向人民法院提出诉讼请求，其胜诉权即行丧失。环境民事诉讼时效与普通的民事诉讼时效的不同之处在于，它实行较长的民事诉讼时效。我国《环境保护法》就规定：“因环境污染损害赔偿提起诉讼的时效期间为三年，从当事人知道或者应当知道受到污染损害时起计算。”它比《民法通则》规定的普通民事诉讼时效要长一年。之所以对环境民事诉讼规定较长的诉讼时效，是因为在环境污染损害赔偿案件中，环境污染损害有一个发生、发展、变化、积累的过程，有些污染还有较长的潜伏期，在短期内不易为人们所认识和发现，再加上科学技术水平的限制，人们对某些污染物的性质、迁移转化规律、毒理等还缺乏了解，从而较难确定造成污染损害后果的真正原因，也较难发现加害人。只有规定较长的诉讼时效，才能有效地保护受害人的合法权益。

环境民事诉讼的最长诉讼时效，法律没有专门规定。按照《民法通则》的规定，民事诉讼的最长时效为 20 年。那么，可以认为环境民事诉讼的最长诉讼时效期间也为 20 年。

环境诉讼时效期间的计算，从当事人知道或者应当知道受到污染损害时开始。

这里应当指出的一点是，也是特别应引起法院注意的一点是，环境纠纷案件往往是受害者先找政府部门协调解决，一协调就是几年。等到实在解决不了时，受害者才到法院起诉。许多法院就往往以已过诉讼时效为由拒绝受理，或者让受害者失去胜诉权。这是非常不合理的，也是不公正的。在污染危害发生以后，虽然受害者没有向法院起诉，但他们却一直主张权利。诉讼时效应当从其能够证明的最后一次在法院外主张权利的日期算起。

4．环境民事诉讼的举证责任

在诉讼中，由谁负责举证，会对案件的判决结果产生很大影响。负有举证责任的一方往往比无举证责任的一方处于更加不利的地位，因为负有举证责任的一方必须搜集到充分的证据才能使自己的主张成立，而不负举证责任的一方在对方拿不出充分证据时，就可以使自己的主张成立了。按照传统的民事诉讼制度，原告负有举证责任，即原告要使自己的诉讼主张成立，必须举出被告违法、原告受到损害、违法行为与损害后果之间存在因果关系、被告的行为是出于故意或过失的充分证据。这一要求适用于环境诉讼，就将使受到污染损害的原告人很难胜诉。因为在科学技术高度发达、生产工艺技术严格保密的情况下，要让无技术装备条件的受害人举出被告从事了何种侵害行为、其侵害行为与受害人所受损害之间有什么样的因果关系、以及侵害人主观上有无故意和过失的证据，将是十分困难的。在这种情况下，为了有效地保护环境，使污染受害者得到及时合理的赔偿，许多国家在环境诉讼中便减轻了原告的举证责任，转而由被告负举证责任。例如，英美等国家采用了“事实自证”制度。根据此制度，原告在污染损害赔偿之诉中，只要列举出污染损害事实即可，而被告要反驳原告的指控，就必须提出此污染损害不应由其承担责任的全部证据。这样一定程度上改变了污染受害人在诉讼中的不利地位。此制度被称为举证责任的转移或举证责任的倒置。

我国的民事诉讼法，对一般的民事诉讼实行的是双方平等地承担举证责任的制度，即“当事人对自己提出的主张，有责任提供证据。当事人及其诉讼代理人因客观原因不能自行收集的证据，或者人民法院认为审理案件需要的证据，人民法院应当调查收集。”对于环境民事诉讼，司法解释有特殊的规定。最高人民法院《关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》第 74 条中规定，“因环境污染引起的损害赔偿诉讼”，“对原告提出的侵权事实，被告否认的，由被告负举证责任”。2001 年 12 月 6 日《最高人民法院关于民事诉讼证据的若干规定》第四条也规定“因环境污染引起的损害赔偿诉讼，由加害人就法律规定的免责事由及其行为与损害结果之间不存在因果关系承担举证责任”。2004 年 12 月 29 日修订后的《固体废物污染环境防治法》第八十六条规定：“因固体废物污染环境引起的损害赔偿诉讼，由加害人就法律规定的免责事由及其行为与损害结果之间不存在因果关系承担举证责任。”以法律的形式第一次规定了被告举证制。这是我国环境立法的一大突破。由此可知，我国也已确立了环境诉讼中的

被告举证责任制度。但对于被告举证的程度和范围，法院、律师、学者们有着不同的看法。

5．环境民事诉讼中因果关系的确定

侵害行为和损害结果之间有因果关系，是使行为人负法律责任的必要条件之一。这一要求，在环境民事诉讼中也不例外。然而，因果关系的确定，却与传统的因果关系理论大不相同。传统的因果关系理论讲因果关系的客观性、必然性，而不讲因果关系的“推定”。但是，在环境破坏和环境污染的案件中，要证明因果关系的客观性和必然性是十分困难的。因为在一般的民事侵权行为中，行为人的行为是直接作用于受害人或其财产，而在环境侵权行为中，行为人的行为则先作用于一个载体——环境，然后再由环境作用于受害人或其财产。由于中间多了一个环节，就使得因果关系情况变得十分复杂。加之，环境科学尚不发达，人们对很多污染物的性质、迁移转化规律、毒理、累积情况还不十分清楚，对污染物的作用在认识上也有一个滞后性；暴露在污染物中的每个人对污染侵害的抵抗能力差别较大，年龄、职业、健康状况乃至性别的不同，都可能对同样的污染侵害有不同的反应，使得判断单个人健康受害的原因发生了困难；很多公害病都有很长的潜伏期，往往自排污之日起十几年乃至数十年才能表现出来。而且很多污染损害又是多因子的复合效应。在这种情况下，如果要求具有严格的因果关系证明，很可能要陷入科学裁判的泥沼之中，使许多案件长期悬而难决，使受害人难以得到赔偿。

为了解决这一困难，在一些国家的环境诉讼中便采用了“因果关系推定”的方法来确定污染行为与污染损害后果之间的因果关系。例如，日本神通川骨痛病、新泻水俣病、熊本水俣病、四日市哮喘病等四大公害案件的因果关系确定，均采用了这种推定方法。

因果关系推定采用的是比较可靠的“流行病统计学”的办法。只要符合下列条件，便推定污染行为与损害结果存在因果关系：

（1） 污染物在受害人发病前就存在；

（2） 该污染物在环境中的数量和浓度越大，该病的发病率越高；

（3） 该污染物含量（排量）少的地方，该病的发病率也低；

（4） 上述统计结果与实验和医学上的结论不矛盾。

具备以上四条，一般情况下都存在着必然因果关系。但在个别情况下，可能不存在因果关系，因为它毕竟是一种旁证方法，而且被告人还可以提出许多反证来证明不存在因果关系。尽管如此，这种因果关系推定方法还是被一些国家采用了。

我国环境法中尚未规定因果关系推定制度，但在一些环境纠纷案件处理的实践中，已有对这一方法的运用。为了有利于环境纠纷公正合理地解决，使环境污染受害者得到及时的赔偿，我国法律中也应尽快确立这一制度。

五、环境民事诉讼证据的收集和认定

在环境民事诉讼中，特别是在环境污染损害赔偿诉讼中，实行被告举证责任制，但并不是原告就没有一点举证责任了。特别是在被告举出不存在污染的情况下，原告举证反驳被告的证据，就显得尤为重要。

（一）原告应收集的证据

环境民事诉讼的原告应注意收集以下几个方面的证据：

1．证明污染事实存在的证据。包括对污染源的环境监测报告、有关的录像、录音、照片等。

2．证明污染危害事实存在的证据。包括被污染的土壤、水体、空气的检测、检验、监测报告，居民区的声环境质量监测报告，被污染致死的动物、植物的实物及其检测化验报告和相应的照片、录像等，人体受害的检验报告或公害病调查报告等。

3．证明污染损失大小的证据。包括受害动植物的数量的证据，如购买种苗的原始票据、物价部门或者市场管理机构出具的物品市场价格证明、鉴定评估机构对损失大小的评估报告等。

4．证明污染与损害后果之间因果关系的证据。主要就是鉴定机构或者有关专家出具的鉴定报告。

环境污染证据的收集具有困难性和复杂性。在看一个监测结果是否能够作为证据时，最主要的是要看其监测是否是按环境监测方法标准进行的监测，包括取样、样品的保存、化验、分析、报告等都有规定的程序和方法。违反规定所做的监测、检测报告便不能成为有效的证据。所使用的仪器、设备也必须是规定的仪器、设备；纳入强制检定目录的仪器、设备，必须取得有关部门的计量检定证书。

（二）被告应收集的证据

被告要否认污染损害后果是由其造成的，他就必须举出原告的损害是其排污以外的原因造成的证据。这种证据的收集也是非常困难的。一般来说，被告通常从两个方面来证明自己对污染危害不负有责任。

一是举证证明自己并不排放能够造成原告损害的污染物或者举证证明自己排放的污染物根本就不可能到达受害的地点。

二是通过鉴定机构或者有关专家提出鉴定报告，证明原告的损害是污染以外的原因造成的。

另外，被告在污染危害发生后，通常都极力否认其污染责任，而不注意对损失大小的核实，一旦污染责任成立，在赔偿时就只能任由受害者举证。实际上，在环境污染损害赔偿案件中，有些受害者往往夸大损失的程度，提出过高的赔偿要求。但由于被告没有相反的证据加以反驳，就只好低头认输。作为企业的法律顾问或者被告的律师，应当有清醒的头脑，要想到被告有可

能承担污染责任，责任的大小的证据在污染损害发生时就应当注意收集。

（三）法院对证据的认定

最高人民法院《关于民事诉讼证据的若干规定》专门有一部分规定“证据的审核认定”，但适用于环境诉讼证据的审核认定，仍然会有很大困难。比如对一些环境监测报告、鉴定评估报告如何看待，在什么情况下有证据效力，仍然需要我们专门研究。

1. 如何看待环境监测报告

环境监测分为日常例行监测、研究性监测和污染发生时的应急监测。

对于环境污染危害案件来说，只有污染发生时的监测数据才反映污染的真实情况，才真正能成为诉讼的证据。

在监测方面，排污单位很容易作假。其手段包括：

（1） 检测时不满负荷运行；

（2） 夜间偷排（特别是大气污染物）；

（3） 暗道排污；

（4） 稀释排放。

有时，监测单位也帮助排污单位作假：有的不让排污单位满负荷运行，有的选择环境条件好的时段监测，有的违反监测方法标准监测，有的在监测报告中不反映监测超标的物质。

2. 关于鉴定评估报告问题

目前我国没有建立专门的环境污染损害的鉴定评估机构。在司法鉴定的范围中，也没有环境污染损害的鉴定评估。

环境损害坚定评估实际上包括两个方面的内容：一是因果关系的鉴定。鉴定损害后果与排污行为或者开发建设行为有无因果关系。在这方面，有的人以为环境监测站就可以做，实际上环境监测站只能监测有无污染，对于损害与污染之间是否有因果关系，一般的环境监测站都难以做，而且也没有授予环境监测站这种资格，特别是公害病的因果关系鉴定，环境监测站就更无法做。二是损失大小的鉴定。现在也没有这方面的鉴定机构，许多案件就因为无法确定损失大小，法院判受害者败诉。农业部曾经发文，授予几十个渔业环境监测站进行渔业环境污染损失鉴定评估的资格，他们也确实做了一些鉴定。其他方面的损失，比如果树的损失、庄稼的损失、土地污染的损失等，都没有鉴定评估机构。为了解决案件，只好委托一些财产评估机构进行评估。因此，目前特别需要建立这样的技术服务机构。

在没有环境损害鉴定评估机构的情况下，我认为法院可以委托相应的专业科研机构就专门问题作为鉴定机构，只要其仪器是经过检定的就可以。

3. 监测鉴定报告有效的条件

（1）符合资格及业务范围；

（2）报告有无 CMA 章和骑缝章；

（3）人员有无资格证、上岗证；

（4）报告有无经手人和负责人签字；

（5）监测方法是否符合规范；

六、案件处理中的其他问题

1. 多家排污一家被起诉的问题

2. 多家合法排污的致害问题

3. 进入妨扰与自我致害问题

4. 所有人与使用人谁有权起诉问题

如何理解和适用举证责任倒置

—以刘德胜诉吉首农机局喷漆污染健康损害赔偿案为例

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大 纲

一. 概述
二. 吉首案例分析
三. 环境诉讼的证据法问题

一. 概述

1. 现状

石家庄市民起诉环保局
温州市民广场噪音对抗
兰州水污染事件

2. 纠纷解决方式

行政调解的“死亡”
环境司法的作用

二、案例分析

（一）. 案情简介

原告：刘德胜
被告：吉首市农机局
诉讼请求：停止侵害、排除妨碍，赔偿治疗费和精神损失。

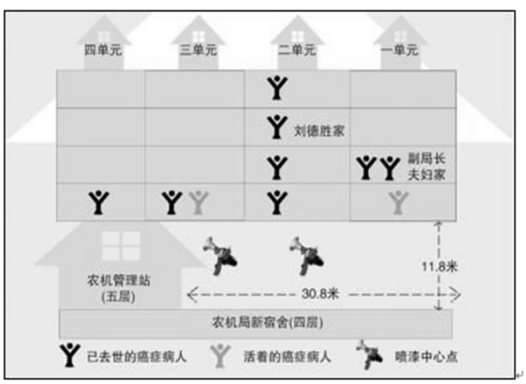
1. 基本事实

1981年，吉首市农机局先后修建了机关办公楼和南北两栋宿舍楼，形成一个封闭式小院，总占地面积只有365平方米。同年，刘家分得北栋宿舍楼三层的一套住房。

1982年起，农机局开始在院内对全市的农用机动车进行年检、维修、喷漆等作业，喷出的油漆形成雾状物弥散在院内、气味难闻，喷漆点对面的宿舍楼门窗被覆盖上厚厚的油漆。

- 刘德胜等居民多次向农机局及环保部门反映喷漆污染院内环境的情况。
- 1998年7月、2001年8月，当地环保部门曾向被告下达过《限期治理通知书》和《环境违法行为改正通知书》，认定被告行为给居民造成了污染，并责令被告限期搬迁、或者将“喷漆过程在室内进行，尽量减少恶臭气体溢出；尽快重新选址，使喷漆活动不在院内进行”。
- 至2002年6月，农机局一直在院内从事喷漆活动。

- 从1992年开始，居住在北栋宿舍楼里的20多户人家，先后有10人罹患癌症，其中，已有8人死亡。
- 2000年10月，一直奔波在投诉农机局污染事件中的刘德胜被确诊为罹患“非霍奇金氏恶性淋巴瘤（B细胞性）”，他从医生那里获知：油漆中含有的有害物质“苯”是世界卫生组织确定的易发致癌物质。
- 刘德胜坚定地认为“自己患上淋巴癌的致癌原因是喷漆过程中的“苯”造成的”。



2. 诉讼过程

- 2002年6月,刘德胜向吉首市法院提起环境污染损害赔偿诉讼，请求法院判令被告停止侵害、排除妨碍，并赔偿已花费的治疗费10万元。
- 庭审中，农机局承认在院内从事喷漆活动，但否认喷漆行为与刘德胜患癌症之间存在因果关系。
- 农机局认为：如果刘德胜仅凭一本学术书籍就可以起诉的话，那对农机局将是极大的不公平。同时，刘德胜患的是淋巴癌，如果他可以起诉的话，那么其他几个患癌病人，有乳腺癌，有鼻咽癌，这些人也都起诉的话，农机局是没办法赔偿的。

- 2002年9月，吉首法院作出一审判决。

一审判决认为:

- 农机局在生活区院内坪场进行农用机动车培训、维修、年检及喷漆作业，客观上对刘德胜及附近居民的生活环境造成了一定的污染损害，农机局应立即停止在市农机局院内的上述作业
- 虽然喷漆气体中含有害物质“苯”，但由于致癌的原因存在着多种可能性，故对刘德胜要求赔偿医疗费以及精神损失的诉讼请求，不予支持。

- 刘德胜上诉至湘西土家族苗族自治州中级法院。

案件受理后，法官建议刘德胜去专业的医疗机构鉴定查清所患癌症的真正原因。刘德胜找了几家医院，均被医生告知无法查清癌症病因。

- 2002年12月，中级人民法院作出二审判决。

二审判决认定:

农机局在其坪场内喷漆，使有害物质“苯”混浊于空气中，对刘德胜等住户及周围环境客观上造成了一定影响，应立即停止喷漆等作业。

刘德胜患淋巴癌是因喷漆造成的，缺乏扎实证据证实。驳回上诉、维持原判。

- 2003年，刘德胜向湘西土家族苗族自治州检察院提起申诉。
- 湖南省检察院审查后认为：因环境污染引起的损害赔偿属特殊侵权行为应适用无过错责任。刘已证明农机局有污染环境的行为和自己被诊断为患有淋巴癌的损害事实。根据举证责任分配原则，农机局有证明污染环境的行为与刘德胜患癌症之间不存在因果关系的举证责任。农机局没有举出该证据，应当承担败诉的责任。

- 2003年12月，湖南省检察院向湖南省高级人民法院提出抗诉。湖南省高级人民法院指令湘西土家族苗族自治州中级法院再审。
- 2004年8月17日，湘西土家族苗族自治州中级人民法院作出再审判决。

再审判决认为：

吉首市环保局发出的两个通知书不能作为认定污染事实的证据，刘德胜没有提出环境污染的事实，即使有损害结果的出现，也不能适用举证倒置的举证责任分配原则。

- 刘德胜又向最高人民检察院提出申诉。
- 最高检审查后认为，湘西土家族苗族自治州中级法院的再审判决在认定事实和适用法律方面均存在错误，因此，2006年1月11日，向最高人民法院提出抗诉。
- 2006年11月20日，刘德胜去世。
- 2007年2月，最高人民法院指定湖南省高级人民法院重审此案。
- 重审中，法院确认了农机局的污染事实。但是，围绕喷漆污染与致癌原因是否存在着因果关系，以及本案是否适用举证责任倒置，原、被告双方再次展开辩论。

- 2007年10月，湖南高院对此案做出终审判决。
- 法院认为，由于目前无法准确界定各种癌症的起因，在此情况下，如果适用举证责任倒置原则，以农机局举证不能为由，推定本案所涉及农机局环境污染行为与刘德胜患癌症损害结果之间存在必然的因果关系，缺乏事实依据．因此驳回申诉，维持原判。

（二）争议焦点及分析

1. 原告刘某患癌身故与被告污染行为之间是否具有因果关系？

[环境侵权因果关系及证明]

2. 本案应由谁承担“因果关系”的“举证责任”？

[环境侵权“举证责任倒置”的理解与适用]

1. 环境侵权因果关系推定：原则及方法

环境污染致人体健康损害的因果关系之特点：

第一，间接性。到达的因果关系与致害的因果关系。

第二、复杂性。特异性疾病的情况下，多因一果、多因多果、一因多果。非特异性疾病的因果关系更加复杂。

第三，侵权结果验证难（或根本不能验证）。敏感人群测定？特异性与非特异性疾病的损害赔偿范围？共同侵权责任分配？

第四，认定的科技要求高。某些情况下，存在科学不确定性。

- “如何利用自然的、真实的因果关系概念，使其成为适合人类社会约束(Social Control)之运用手段，便成为法学上因果关系理论之运用原则”
- **因果关系推定的原则**“妥当维持社会秩序，维护人类社会生活之价值作用。”
- **因果关系推定方法**：①疫学(流行病学调查)；②间接反证；③高度盖然性

- **本案因果关系之证明**

①污染物--苯***【疑问：是否对污染现场（刘居住地）的“苯”采样化验？】***

②苯是国际公认的易诱发癌症的化学污染物

③刘某等生活在苯的污染区内

④刘某接触史及接触量的证明？

【疑问:事实因果关系—多因一果；流行病调研?】

鉴定结论（监测、评估等）与法官判断的关系？

本案法官对科学鉴定结论过分依赖，错将科学判断作为法学裁判。

- **《民事诉讼法》第七十九条** 当事人可以申请人民法院通知有专门知识的人出庭，就鉴定人作出的鉴定意见或者专业问题提出意见。

2. 举证责任倒置的理解与适用

<u>举证责任的含义：</u>

《民事诉讼法》第六十四条第一款“当事人对自己提出的主张，有责任提供证据”

《最高人民法院关于民事诉讼证据的若干规定》第二条“当事人对自己提出的诉讼请求所依据的事实或者反驳对方诉讼请求所依据的事实有责任提供证据加以证明。没有证据或者证据不足以证明当事人的事实主张的，**由负有举证责任的当事人承担不利后果。**”

- **《最高人民法院关于民事诉讼证据的若干规定》第七十三条**

双方当事人对同一事实分别举出相反的证据，但都没有足够的依据否定对方证据的，人民法院应当结合案件情况，判断一方提供证据的证明力是否明显大于另一方提供证据的证明力，并对证明力较大的证据予以确认。

因证据证明力无法判断导致争议事实难以认定的，人民法院应当依据举证责任分配的规则作出裁判。

- **<u>举证责任倒置的意义：</u>**

因基于一般原则进行举证责任分配会出现明显的不公正或不合理，为减轻处于弱势一方当事人的举证负担（利益考量说 ），将按照一般举证责任分配原则应由己方当事人承担举证责任的事项，转由对方当事人承担举证责任。或者可以解释为“应由此方当事人承担的证明责任被免除，而由彼方当事人对本来的证明责任对象从相反的方向承担证明责任”

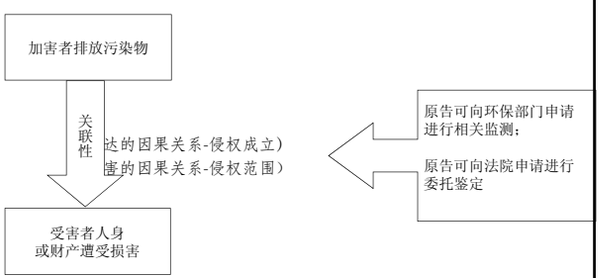
举证责任倒置是一种价值上的考虑，即保护诉讼中处于弱势的污染受害者。

环境诉讼举证责任倒置之规

- 2001年12月6日发布的**《最高人民法院关于民事诉讼证据的若干规定》第四条第三项规定**“下列侵权诉讼按照以下规定承担举证责任”、“（三）因环境污染引起的损害赔偿诉讼，由加害人就法律规定的免责事由及其行为与损害结果之间不存在因果关系承担举证责任”
- 2004年12月29日修订的**《中华人民共和国固体废物污染环境防治法》第八十六条规定**“因固体废物污染环境引起的损害赔偿诉讼，由加害人就法律规定的免责事由及其行为与损害结果之间不存在因果关系承担举证责任。”
- 2008年2月28日修订的**《中华人民共和国水污染防治法》第八十七条规定**“因水污染引起的损害赔偿诉讼，由排污方就法律规定的免责事由及其行为与损害结果之间不存在因果关系承担举证责任”

- 2009年12月26日颁布的**《侵权责任法》第六十六条规定**“因污染环境发生纠纷，污染者应当就法律规定的不承担责任或者减轻责任的情形及其行为与损害之间不存在因果关系承担举证责任。”
- **2014年4月24日新修订的《环境保护法》第六十四条** 因污染环境和破坏生态造成损害的，应当依照《中华人民共和国侵权责任法》的有关规定承担侵权责任。

➢ ***原告举证责任（排污行为与损害事实）***



➢ ***被告举证责任 （免责事由与因果关系）***

①排污行为的自证（排污因子、排污时间、排放方式、对危害后果的监测与预防等）

②发生不可抗力等法定免责事由的证明

③排污行为与损害结果之间不存在因果关系

（排污因子未到达原告所在地、排污因子与原告健康损害后果之间没有科学和事实关联等）

举证责任倒置就是要求被告提出的否定性因果关系的证据的证明力，必须高于（优于）原告提出的肯定性因果关系的证据的证明力。

- **本案刘德胜提供的证据**

*刘德胜居住环境遭受农机局喷漆污染

*刘德胜有苯的近距离暴露接触史

(1997年至2000年退休后的生活习惯)

*苯与“非霍奇金氏恶性淋巴瘤（B细胞性）”之间具有关联性。“苯”是世界卫生组织确定的易发致癌物。

- **本案农机局提供的证据**

*如果刘德胜仅凭一本学术书籍就可以起诉的话，那对农机局将是极大的不公平。

*刘德胜患的是淋巴癌，如果他可以起诉的话，其他几个患乳腺癌、鼻咽癌的也都起诉的话，农机局是没办法赔的。

也可能是刘德胜家里装修污染诱发了癌症。[有无对刘德胜装修情况进行过调查或提出了物证？]*

- **湖南省高院对本案的终审审判认为:**

*被告行为给原告及附近居民的生活造成污染

*被告使用喷漆气体中含有有害物质“苯”

*因致癌原因存在着多种可能性,无法准确界定各种癌病的起因.

*推定被告喷漆与原告损害结果之间存在“必然因果关系”，缺乏事实依据。

*本案不适用举证责任倒置原则

三.环境诉讼的证据法问题

1.证据取得

原告自行采集证据的注意事项,

当事人申请法院调取证据的条件

法院依职权调查取证的范围

2.证据审查

委托鉴定、鉴定人出庭作证、专家辅助人

3.证明标准

损害事实的证明标准，尤其是特异性健康损害事件、社会公共利益损害事件。

谢谢!

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LESSON 1

CLASS ACTIONS ON ENVIRONMENTAL DAMAGE: THE USA AND EUROPEAN EXPERIENCE

1) The proceeding role of the environmental associations in the USA judicial experience.

The class actions have made - and are still - a legal institution fundamental to the whole development of the U.S. legal system. The studies and discussions that took place around the institute are the most evident demonstration. To these must be added the significant jurisprudential analysis of cases, grouped by themes expressed.

In the United States the procedural rules are codified at the federal level (Federal Rule of Civil Procedure 23) and differently in each state.

At the federal level the procedure of the class action must be authorized by the Federal Court of first instance jurisdiction.

To obtain the authorization the actor or actors, which are proposed as class representatives (representatives of a whole class of damaged), must demonstrate that the procedure of the class action relates to a class of entities and that the class is so numerous as to make it impossible for the normal joinder, that there are questions of fact or law common to all class members, that the claims and allegations of the promoters of the action are typical and representative with respect to the members of the class, that the promoters of the action are able to properly and equally protect the interests of all class members.

Once established the procedure for its continuation and definition, these assumptions must continue to exist, and that it is proved that the collective procedure, in this case, present certain advantages with respect to the prosecution of individual cases, and that the commonality of issues, of fact or of law, to all members of the class are of such importance as to overcome the possible differentiation of individual positions to the end of the realization of the interest of justice.

In recent years the federal courts have frequently abandoned class actions already undertaken in the absence of proof that the collective procedure presented specific advantages over

the individual procedure in this case.

The Court implements the interest of all members of the class with specific provisions for the quick and correct performance of the judgment, by ensuring also that all relevant information, relating to the same judgement, reach to all interested, including potential ones, parties.

To protect the represented, even the abandonment of the action by the promoters or the transaction are subject to the approval of the Court.

Current legislation requires that all potential stakeholders are automatically part of the class unless they explicitly exclude themselves in order not to be bound by res judicata or to be able to act individually.

In particular it was noted that the U.S. experience, in cases involving a number of damaged mainsails (mass torts), individual cases, can have more economically favorable outcome to the individual and a shorter definition.

In severe cases, collective action led to failure of the defendant and the compensation is arrived at each damaged individual to the extent and the schedule resulting from the subsequent proceedings. It also stressed the risk resulting from subjecting the case of mass in front of a single panel, with the possibility of misjudgment or unfair by that popular organ.

To overcome the problem of the particularity of the individual positions, the class actions are sometimes only partially used to decide common general issues and mini-procedures are then made to decide individual cases: in this sense, instances of opening of collective action are accepted when the general issue concerns the definition of the liability of a defendant and mini-cases concern only the determination of the amount of damage and not when liability or causality issues must also be taken at the individual level.

The res judicata has effect for all members of the class, even if they have not explicitly joined in the proceedings, unless the absent can demonstrate that its interests were not sufficiently represented or that sufficient information has not been given to potential stakeholders.

It was also posed the problem of the lack of preparation of ordinary citizens to understand the meaning of a unified collective action to address their interests.

It is debatable whether the concerned individual who has explicitly refused to participate in the class action (ie opt out), may rely on the favorable deemed, but the prevailing opinion seems to exclude this possibility.

The legislative choice of the system of self-exclusion instead of the previous regime, which required adherence to procedure (opt in), is justified on the basis of which it was seen as many interested parties had no news of his timely action or situation of stakeholders. On the other hand they wanted also to avoid that the most waited for a favourable outcome before joining the cause.

The current evolution of the institute, in the U.S. case law develops, tends to significantly downsize the usefulness of the procedure excluding it for the great mass torts and mass accidents for the occurred inability to achieve economies of cost and time of judgment and to arrive at equitable solution for all damaged in the case of hundreds or thousands of people.

It has been observed that in some cases the poor response of interested parties to collective proceedings, for smallness of the economic individual interest, move the concrete objective of the action from the compensation of the damage to the sanction of the defendant's behaviour, which, however, remains entrusted to lawyers, promoters of the action, who, as private bounty hunters, are primarily interested in their own profit.

In order to protect the interest of consumers, the intervention of government agencies (FTC) of consumer is sometimes required as amicus curiae (adviser to the judge).

The U.S. model of class actions has been accepted in Canada and Australia.

The Australian legislation (Trade Practices Act 1974) provides for the possibility of promotion of the action by the *Australian Competition* and *Consumer Commission* (anti-trust Commission) representing damaged consumers in cases of violations of antitrust laws or put on the market defective products, provided that the action is instituted with the written consent of the injured parties represented by the Commission.

Particularly significant is the Brazilian legislation, which is more inclined to make effective the constitutional provisions for the protection of collective and prevaling rights, by providing as many as five ações civis públicas, typed in five different laws based on the interest to be protected: l. n. 7347 of 1985 for the damage caused to the environment, to properties of artistic, aesthetic, historical, touristic and landscape value; l. n. 7853 of 1989 about disabled people; l. n. 7913 of 1989 about liability for damage caused to investors in the financial market; the l. n. 8078 of 1990 about childhood and adolescence.

2) The cases of *Sierra Club vs Morton* and *Lujian vs Defenders of Wildlife*

Introduction

Article III Standing Background

Article III standing has emerged as an important threshold issue for litigation in federal courts, especially for claims involving environmental harms.

To begin, some review of the fundamentals of Article III standing may be useful. The general function of standing doctrine is to decide whether a particular person can bring a particular

claim at a particular time. [1]

The Supreme Court has instructed federal courts to apply two distinct lines of doctrine in adjudicating standing.[2]

First, a federal court must assess whether the plaintiff's claim falls within the constitutional limits of federal jurisdiction, which are grounded in Article III of the United States Constitution. Second, a federal court must assess whether, even if the constitutional requirements are met, it would comport with "prudential considerations that are part of judicial self-government"[3] for the court to accept the case.[4]

The two types of standing raise distinct issues. In this work we will focus exclusively on Article III standing because Article III standing has emerged as a particularly challenging requirement for environmental plaintiffs to meet.[5]

In reviewing Article III standing doctrine, the text of Article III is a logical starting place. However, the brief text of the article provides surprisingly little insight into the complexities of contemporary Article III jurisprudence, which has developed primarily through the accumulation of common law precedent. In relevant part, Article III provides:

> *The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.*[6]

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1 See Warth v. Seldin, 422 U.S. 490, 498 (1975) ("[I]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (3rd ed. 2006) (asking "whether a specific person is the proper party to bring a matter to the court for adjudication . . . .").

2 3.See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing."); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979) ("The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant . . . . Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." (citation omitted)). See generally CHEMERINSKY, supra note 2, at 50; 20 CHARLES ALA WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 14 (2011).

3 .Lujan v. Defendrs of Wildlife, 504 U.S. at 560.

4 This doctrine is ometimes called "prudential standing." See supra note 3

5 .See supra note 1.

6 U.S. CONST. art. III, § 2, cl. 1; Lujan v. Defenders of Wildlife, 504 U.S. at 560 ("One of those landmarks, setting apart

The Constitution, therefore, provides that federal courts have jurisdiction to hear both "cases" and "controversies," but provides no definition for either term.

Given this "slender textual base,"[7] Article III standing doctrine has taken its shape primarily through case law.[8]

A three-part rule articulated by the Supreme Court in Lujan has come to provide the current framework for analysis of Article III standing claims.[9]

First, there must be an "injury in fact" which is "concrete," "particularized," and "imminent."[10]

Second, there must be a causal connection between the injury and the defendant's conduct that is "fairly . . . trace[able] to the challenged action of the defendant."[11]

Third, it must be "likely" that the injury is redressable by a favorable decision.[12] These three requirements have been dubbed "injury," "causation," and "redressability."[13]

However, as a leading treatise observes, "the difficulty lies not in identifying the current requirements for standing, but in determining how each one of them applies."[14]

A. The case of Sierra Club vs Morton

In Sierra Club v. Morton[15] (the Mineral King case) the plaintiff conservation organization sought to enjoin the grant of federal permits to allow WaIt Disney Enterprises, Inc. to develop a

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the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,' is the doctrine of standing." (citation omitted)).

7 William Buzbee, The Story of Laidlaw, in ENVIRONMENTAL LAW STORIES 200, 205 (Richard Lazarus & Oliver A. Houck eds., 2005).

8 The historical origin of standing doctrine in American law is contested. One prominent view locates standing doctrine as "largely a phenomenon of the last half of the twentieth century." PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 1126 (10th ed. 2003); see also JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 55 (1978); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1290 (1976). Others have put forth the theory that standing doctrine dates back to the nineteenth century. See Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 STAN. L. REV. 1371, 1377 (1988).

9 10.Lujan v. Defenders of Wildlife, 504 U.S. at 560–61 (holding that past cases had created a minimum of three elements of standing and detailing those elements).

10 Id. at 560

11 Id.

12 Id.

13 See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998) ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement . . . ."); see also CEMERINSKY, supra note 2, at 63; WRIGHT & KANE, supra note 3, § 14.

14 WRIGHT & KANE, supra note 3, § 14.

15 405 U.S. 727 (1972). References herein to the Court's opinion are to the majority opinion of Mr. Justice Stewart. Justices Blackmun, Brennan and Douglas dissented. Justices Powell and Rehnquist did not participate. See Comment, Supreme Court Decides the Mineral King Case: Sierra Club v. Morton, 2 Environment Rptr. 10034 (1972). Blackmun, Brennan and Douglas dissented. Justices Powell and Rehnquist did not participate. See Comment, Supreme Court Decides the Mineral King Case: Sierra Club v. Morton, 2 Environment Rptr. 10034 (1972).

resort on National Forest land.[16]

The essence of the Sierra Club's complaint was that high density recreational development would impair some of the protected uses for which national park and forest lands are required by statute to be held.

The Supreme Court's decision, holding that the Sierra Club did not have standing to sue, is a warning to those federal courts that have been rapidly liberalizing the law of standing since 1965.[17]

In its narrowest application, to the Mineral King case itself, the Court's decision appears to have little importance.

The Court suggested explicitly that if the Sierra Club were to amend its complaint to allege that some of its members were users of Mineral King and would be adversely affected in their aesthetic and recreational use of the area, the Club would have standing not only as a representative of its member-users[18] but could then also "argue the public interest."[19]

The Sierra Club was subsequently permitted to amend its complaint so as to comply with the Supreme Court's rule on standing."[20]

The interest of the Mineral King decision thus turns on two broader questions: Is there any significant class of cases for which the Court's ruling on standing would bar judicial review?

And if there is, what real problems of litigation, if any, is the Court attempting to avert by its restrictive decision on standing to sue?

In seeking to illuminate the answers to these questions, let us begin by examining the line that the Court drew to distinguish those who have standing from those who do not.

A.1 - The Court’s test of standing to sue

The Court seems to distinguish two kinds of plaintiffs who would have standing in Mineral King from two who would not. An individual user of Mineral King could sue[21], and the Sierra Club could sue as a representative of members who are users.[22]

Conversely the Sierra Club could not sue on its own as an organization interested in and committed to the protection of areas like Mineral King,[23] nor could a nonusing individual citizen, similarly concerned, sue.[24]

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16 See 405 U.S. at 730, n. 2.

17 E.g., cases cited 405 U.S. at 739, n. 14.

18 405 U.S. at 736, n. 8.

19 405 U.S. at 740, n. 15; 405 U.S. at 737, n. 12.

20 Sierra Club v. Morton, 4 ERC 1561 (Sept. 12, 1972). See also Staff Report, Mineral King: The Battle Goes On, Sierra Club Bulletin, at 26 (May, 1972).

21 405 U.S. at 736; text at n. 8.

22 405 U.S. at 739; text following n. 14.

23 Id.

24 Id.

The Court's denial of standing to the Sierra Club as an organization, rather than as a representative of user-members, is based both on an interpretation of the relevant statute,[25] and upon a judgment about the impact of expanded citizen litigation on judicial administration.

The statutory analysis arises from an interpretation of the Administrative Procedure Act as requiring a plaintiff to sustain "injury in fact" in order to obtain judicial review of administrative action.[26]

The Court asserts that injury in fact means an effect on one's use of the area in question.[27] The central premise of the Court's opinion is thus its equation of "injury in fact" with being affected in the use of the area in question.

This merger of two quite distinct ideas is significant for the future of environmental cases and other private attorney general[28] litigation.

Before turning to an exploration of the Significance of the Court's analysis of standing as a statutory issue, let us note the policy reasons that the Court gives in support of its interpretation of the Administrative Procedure Act. First, the Court says, while the Sierra Club is large, long established and historically committed to the protection of natural resources, if its interest in the subject matter (as opposed to interest as a user or a representative of users) were enough to confer standing upon it:

> *[t]here would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.*[29]

Having raised this spectre, the Court concludes that its rule requiring interest as a user as a prerequisite to standing serves:

> *[a]s at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to . . . authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.*[30]

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25 The Administrative Procedure Act §10, 5 U.S.C. §702 (1971); 405 U.S. at 732.

26 405 U.S. at 733, text following n. 4. The Court seems to assume that the Sierra Club meets the constitutional test of standing, 405 U.S. at 732, n. 3; see 405 U.S. at 741, n. 1 (dissenting opinion).

27 405 U.S. at 735, n. 8.

28 405 U.S. at 737. The Mineral King opinion thus suggests that the "injury in fact" test is not as easy for the courts as has sometimes been suggested. See Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450, 468, 473 (1970).

29 405 U.S. at 739.

30 405 U.S. at 740.

A.2 - THE SIGNIFICANCE OF THE COURT'S DENIAL OF STANDING TO SPECIAL INTEREST, AS OPPOSED TO USER, PLAINTIFFS

The Mineral King opinion assumes that plaintiffs who do not have a user or property-type interest in a case are suing only to "vindicate their own value preferences" that to allow such suits would improperly politicize the courts.[31]

If and that the restriction of standing will not "prevent any public interests from being protected through the judicial process."[32]

Each of these assumptions is insupportable. It is plain that the Court's rule could prevent the litigation of important legal issues.

Consider the case of an organization composed of prominent citizens concerned with prison reform or mental health.

Were such an organization to challenge in court the legality of the conduct of those who administer such institutions, it would be clear that no member of the plaintiff organization would be "injured in fact" in the sense that the Court uses that phrase; that is, in the way that a prisoner or inmate would be injured.

Moreover, no inmate who is allegedly so injured may be a member of the plaintiff organization, so the problem cannot be avoided simply by joining inmates - the "users." Furthermore, inmates in such a situation may be unwilling to become plaintiffs for fear of retribution, or lack of resources.[33]

Similarly, an organization concerned with respiratory diseases might wish to sue to enforce air pollution control laws in a company town, where all the directly affected citizens are reluctant, for economic reasons, to become plaintiffs.[34]

Thus, there may well be important legal claims that would be effectively barred from the courts for lack of any willing plaintiff with standing under the Supreme Court's test.

Since the denial of organizational standing may well have important practical consequences, it becomes pertinent to ask if there is any good reason why such organizational standing should be denied.

The Court says that such suits would allow the judiciary to be used by those "who seek to do

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31 This is apparently the significance of the quotation from de Tocqueville, 405 U.S. at 740, n. 16.

32 405 U.S. at 740, n. 15.

33 To be sure, no such practical problem was presented in the Sierra Club case, see Staff Report supra note 6. The Court met this sort of problem only two months later. See Laird v. Tatum, 408 U.S. 1, 14, at n. 7 (1972) The recent proliferation of countersuits for damages against environmental plaintiffs makes fearfulness of participation a serious concern. Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Calif. 1972) is thus far the leading case dismissing such a suit.

34 Cf. J. Fallows, The Water Lords 109-112 (1971). See Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833, 841 (D.D.C. 1971): "It is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can." See also Jaffe, note 45, infra.

no more than vindicate their own value preferences. "[35]

The Court is speaking pejoratively rather than analytically. For plainly the Sierra Club was asking the Court to interpret the value preferences of Congress, as expressed in federal statutes.

The laws in question may not be easy to apply, any more than the law of due process is easy to apply.[36]

And such laws may well draw the Court into consideration of important social conflicts.

But if there is law to apply, which is quite a different question than that of standing-to-sue, it is hardly for the Supreme Court to tell the Congress that it may not (short of constitutional limitations)[37] engage the judiciary in litigation that requires resolution of difficult competing public issues.

A court may prefer construing mortgages to interpreting the scope of the right of privacy; but if the legislature has created legal rights, there is no excuse for the courts to back away from the challenge by creating procedural barriers like lack of standing-to-sue.

Even if one sympathized with the Court's reluctance to be drawn into value-laden controversies, it should be clear that the Mineral King opinion is poorly calculated to keep the Court out of this arena.[38]

For the Court's opinion explicitly states that a plaintiff who is an actual user of an area such as Mineral King (such as a hiker or fisherman) may not only challenge alleged violation of statutes insofar as they affect his aesthetic and recreational enjoyment of the area, but "may assert the interests of the general public."[39]

Thus, the Court agrees that it would entertain precisely the same sort of litigation the Sierra Club wanted to initiate, if only a "direct user" of Mineral King had been joined as a plaintiff, or if the Sierra Club had alleged that some of its members were direct users.

Thus, it is difficult to perceive what potential misuse of the judicial process the Court is avoiding by its decision in the Mineral King case.

Nothing in the Mineral King decision will insulate the courts from cases high in political content or "party spirit."[40]

Distinctions will in practice turn on considerations that are by no means clearly germane to

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35 405 U.S. at 740.

36 . Cf. Atlee v. Laird, 399 F. Supp. 1347, 1357 (E.D. Pa. 1972): "The complaint in this action presents not an airing of a 'generalized grievance' about the government, but an attack against a particular war, alleging that the prosecution of this war has not and does not conform to the requirements of law."

37 See note 12, supra.

38 405 U.S. at 738.

39 405 U.S. at 740, n. 15. The Court seems also to have crossed this barrier in the taxpayer standing case, Flast v. Cohen, 392 U.S. 83 (1968). But see Laird v. Tatum, 408 U.S. 1 (1972); United States v. Richardson, cert. granted 41 U.S. L.W. 3458 (U.S. Feb. 26, 1973). See also cases cited in note 37, infra, and Jaffe, note 38 infra, at 1043.

40 405 U.S. at 741, n. 16.

the question whether litigation is appropriate.

The prison and air pollution hypothetical cases will turn out to be litigable or not depending on the intensity of fear of retribution of the victims, on the persuasiveness of the organization in obtaining individual users-victims as plaintiffs, or on the structure of the organization as a membership organization of users or not.

As to this latter point, it is illustrative to recall that one of the environmental organizations that has been most engaged in litigation, the Environmental Defense Fund, began as a very small group of scientists and lawyers concerned about the environment.

It was only after it had achieved considerable success in litigation that it "went public," soliciting memberships from a broad range of citizens who would, in the Court's terms, qualify as users.

The change in organizational structure has had no perceivable impact on EDF's litigation program.[41]

Moreover, there is a powerful, though surely not deliberate, disingenuity in the distinction that the Court makes.

The opinion indicates that there is an important protection for the judicial process in putting the decision whether to go to court "in the hands of those who have a direct stake in the outcome," such as an actual user of the area in controversy.

In many instances, organization plaintiffs who could not obtain standing on their own will have no trouble in finding a user to join as a named plaintiff, a local property owner, fisherman or guide.

One need not be very sophisticated to know that such a named plaintiff, who would clearly have standing under the Court's test, will often be simply a front man whose participation in the decision making and financing of the lawsuit will be nil.[42]

Thus, the Court creates an untenable set of alternatives.

The barriers it imposes on standing to sue will at times be hurdled by the search for a local front man; if that search is capable of success, the litigation will go forward unchanged from what it would have been if the organization had been permitted to sue on its own.

If the organization is unable to find such a plaintiff, it proves nothing about the merits or nature of the suit sought to be instituted.

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41 The May, 1972 Environmental Defense Fund (EDF) Letter, distributed to members, contains the following comment: "As a result of the Mineral King decision, EDF may be required to explain to the courts specific ways EDF members will be harmed by the degradation EDF is opposing. Consequently, EDF attorneys may contact members with specific questions about their use of particular rivers, mountains, valleys, consumer products and other environmental assets or liabilities." 3 EDF Letter, No. 2, at 4.

42 The conceptual frailty of the Court's position is also revealed by cases like Securities and Exchange Comm'n v. Medical Comm. for Human Rights, 404 U.S. 403 (1972), where "a direct stake in the outcome," and thus standing, may apparently be purchased at the price of a single share of stock.

It may only suggest that no local person is willing or interested in suing.

The absence of a local user willing to sue hardly suggests that litigation is inappropriate.

Beyond the problem of the fearful local resident, mentioned earlier, there is the potential problem of an area sought to be preserved as a game sanctuary or scientific study area, in which the only present users are hunters whose interests are at odds with the preservationist claim an organizational plaintiff wishes to assert. Is the user interest in such a case the only legitimate litigable interest?

A.3 - THE COURT'S PRESENT USER-LITIGABLE INTEREST TEST

This brings us to the proposition that underlies the whole of the Court's decision, the notion that a litigable interest is limited to a direct user interest.[43] which alone is capable of sustaining an injury in fact.

Certainly the Court was not compelled to adopt its present user test by the Administrative Procedure Act. Indeed the Court freely interprets the A.P.A. to suit its own purposes. It takes the statutory language of "adversely affected or aggrieved," says that language means "injured in fact," and then interprets injury to mean harm to a present user.

Neither is the Court's interpretation the obvious result of examining the interests that Congress sought to protect in the governing substantive laws. One of the central statutes underlying cases like Mineral King is the law creating the National Park Service. That Law provides that the Park Service shall:[44]

> *[p]romote and regulate the use of the ... national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.*

It could hardly be clearer that Congress did not order the parks to be managed simply for the benefit of present users.

Thus, the question arises, who is an appropriate plaintiff to assure that the parks are protected "for the enjoyment of future generations"?

It would be difficult to conceive of a more appropriate plaintiff to fulfill that function than

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43 While the Court does not expressly speak of "present" use, this seems to be the only sort of interest the Court views as involving a "direct stake in the outcome."

44 Act of Aug. 25, 1916, 39 Stat. 535, 48 Stat. 389. The National Parks, Military Parks, Monuments and Seashore Act, 16 U.S.C. §1 (1970).

the Sierra Club.[45]

As indicated earlier, a present user of the parks may well have interests that are inconsistent with the mandate of future preservation.

A.4 - THE INADEQUACY OF THE USER TEST

Even if one were to accept the Court's "user equals standing" test, any attempt to apply that test intelligibly is doomed to failure.

Consider, for example, a suit brought to enforce the laws relating to management of a bird sanctuary.

Who, in the Court's terms, has "a direct stake in the outcome" of such litigation?

Only those who go birdwatching in the physical boundaries of the sanctuary?

Those who are birdwatchers and enjoy the birds that nest in the sanctuary during their migratory flights elsewhere?

Is a plaintiff birdwatcher in a worse position if he is unable to demonstrate that the birds he watches have nested in this very sanctuary during some particular period of time?

And what of the citizen who does not watch birds directly, but enjoys nature films and books based on the work of those who come into the sanctuary for source material?

Is his interest necessarily or significantly less a use than that of one who hikes occasionally in the sanctuary?

Would it be enough that one had contributed money to preserve the area, though he had not visited it personally, and did not intend to visit it?

Such a person certainly has an interest in enforcement of the law on the land acquired with his financial support.

The example is by no means fanciful, for it may be recalled that the Sierra Club attained national prominence following highly publicized campaigns to preserve the Grand Canyon and the California Redwoods.

Surely a great many people contributed to those campaigns who had never seen either site.

Perhaps their only interest was an uncertain future desire to visit them; or perhaps they felt no more "direct stake" in these resources than many Americans feel in the Liberty Bell or the original copy of the Constitution.

They consider these things to be a part of their American heritage that ought to be preserved, whether or not they have personally visited them or even intend to do so.

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45 The Court seems to assume that there is no constitutional barrier to such litigation. See note 12, supra.

These examples only begin to suggest how much more complicated the question of genuine interest and injury in fact is than the crude direct stake, present user test the Court seems to be adopting.

A citizen's concern about the long term protection of ocean resources from radioactive or chemical contamination, or about the maintenance of wildlife habitat, surely need not be contemptuously dismissed as the indulgence of a mere "value preference."[46]

If one's concern relates to the long range food supply of the earth, the maintenance of sufficient scientific study areas, or even the preservation of a stock of "aesthetic" resources for the enjoyment of his own and future generations, it is far from obvious that these are not real and important interests susceptible of being "injured in fact. "[47]

What is more, to limit standing to what the Court calls user interests is in an important sense to predetermine the merits of the controversy without ever reaching them.

One who seeks to restrain offshore oil drilling, or the dumping of toxic substances in the ocean, may not have any present user interest that is demonstrably threatened.

He may only be concerned for the protection of the long-range maintenance of the oceans for food supply.

It may well be in a given case that such concern is not within the zone of interest meant to be protected by the Congress, or that the evidence of harm the plaintiff could produce is too speculative to be of much evidentiary weight.

But surely these issues go to the merits of the controversy and should not be finessed by rules on standing to sue.

Nor, it would seem clear, should the courts determine by standing to sue rules that a present interest in fishing is *ipso facto* more important than a present interest in maintenance of long term food supplies, the latter being an issue which present commerical fishermen "users" may have no desire to litigate.

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46 The Court's view about such situations is ambiguous. This is a suggestion in the opinion that if the injury will "fall indiscriminately upon every citizen," 405 U.S. at 735, then every citizen may have standing. See also cases cited at 405 U.S. at 739, n. 14. If that is the Court's view, the Mineral King case may be understood as imposing a sort of "best plaintiff" rule, see 85.

47 Likewise in the jail example given earlier, in the text at 78-79, *supra*, the organizational interest in rehabilitation and reduced recidivism, assuming those are the interests protected by statutes governing jails, are real and capable of being injured-even though they may not be perfectly consistent with the interests of the inmates. Notably, to be able to assert those interests, the plaintiff organization need not be correct about the relationship between enforcement of laws governing jails and rehabilitation of criminals. There need merely be a rational nexus between the claim they make and the interest they seek to protect, and it must be a connection that has a basis in the law sought to be enforced (the zone of interest test). At least one commentator must have been very surprised by the Mineral King decision, for he wrote in 1971 that the Court had already adopted a position on standing in which "the principal harm in irrational or ultra vires governmental action or inaction is seen as the impairment of the functioning of the social system in its pursuit of chosen values, rather than as the disappointment of individual expectations. And the broader and more systemic the recognized impact of the agency position, the more imperative is an opportunity for resolution of doubts about its legality." Vining, Direct Judicial Review and tise Doctrine of Ripeness in Administrative Law, 69 Mich. L. Rev. 1443, 1475 (1971).

A.5 - THE INDIVIDUAL NON-USER PLAINTIFF-INJURY IN FACT TO ONE AS A MEMBER OF THE PUBLIC

Having thus noted the scope and significance of non-user interests, one might well ask why their protection ought to be limited even to such well-established organizations as the Sierra Club.

To the extent that the interests sought to be protected are those that inure to every member of the public, and that is certainly the implication of many of the statutes protecting natural resources[48], why should any individual concerned with the protection of those interests be less appropriate as a plaintiff than the individual who seeks to protect his (and others') interest as present users of the resource.

The Court implies that it would be improper to allow an individual citizen of Florida, for example, to sue to enforce laws protecting the Alaskan wilderness. Such a plaintiff would claim no status other than that of an interested citizen for whose benefit the Congress has enacted protective legislation.[49]

The plaintiff would allege that the injury to him is a reduction in the national heritage of resources that Congress seeks to protect for a variety of reasons, only one of which is immediate physical use and occupation, a national natural resource bank account of which he, along with every other citizen, is a legitimate account holder.[50]

A.6 - THE BEST PLAINTIFF PROBLEM

If the interests that have just been noted are accepted as real interests amenable to being injured in fact, no individual plaintiff, though he is merely a concerned member of the protected public, can properly be viewed as an interloper.

He is, indeed, the very person (though only one of many) for whose benefit the rights he asserts were created.

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48 For an explicit example, see The National Environmental Policy Act, §101(b)(1)-(6), 42 U.S.C. § 4331(b)(1)-(6) (1970).

49 If that were not the congressional purpose, the plaintiff would properly be denied standing as not meeting the "zone of interest" test. See, e.g., Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2nd Cir., 1971), cert. denied 404 U.S. 1004 (1971).

50 The seemingly more far-reaching approach in Stone, Should Trees Have Standing?-Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972), does not seem to me to illuminate the real issues in these cases. If Stone is saying only that we should take account of diffuse citizen interests not routinely represented-including the citizen interest in species preservation-I quite agree, and suggest that his elaborate "rights for objects" theory is a form of verbal overkill, despite his disclaimer. Stone, supra at 488. For I do not see how it advances our understanding to contemplate the rights of a river itself, as distinguished from a more spacious view of rights of citizens in the river. See Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1036, 1046 (1968). On the standing question, Stone's guardianship theory does not appear to solve the multiple suit and adequacy of representation problems (see text at note 42, infra). For if the interests are wide-ranging enough, no single guardian is likely to defend all of them-distinct and at times conflicting-in a fully satisfactory way. Sports fishing or deer hunting guardians may have rather different views from those of wilderness guardians, about the needs of the natural resources they seek to protect. See also Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833, 840-41 (D.D.C. 1971); Atlee v. Laird, 339 F. Supp. 1347, 1353-57 (E.D. Pa. 1972); compare with Meyers v. Nixon, 339 F. Supp. 1389 (S.D.N.Y. 1972).

Though they are different in a sense from the right of the present user, they are certainly not necessarily less important than the interest of a present user; nor are they necessarily sufficiently overlapping with present user interests that such users can be counted upon to vindicate them.

If, then, the Court's concern is with somehow identifying a best plaintiff, there is surely no reason to think that a hunter, hiker or a fisherman would be better plaintiffs in the Alaska wilderness, Mineral King or offshore oil situations than the Sierra Club or a concerned citizen from the other end of the country.[51]

The Court's notion that the present user somehow is to be preferred because he has a "direct stake in the outcome" only suggests that the Court did not adequately consider the extent and variety of the stakes in such controversies.[52]

A.7 - FEAR OF THE HARASSING PLAINTIFF

While the Court does not say so explicitly, perhaps there is a fear of harassment underlying its decision narrowing standing.

If so, the Court in future cases ought to inquire into the self-regulating aspect of litigation in situations like the Mineral King case where only declaratory and equitable relief is sought.[53]

The high cost and difficulty of initiating litigation without hope of reward is not a burden lightly undertaken.[54]

The plaintiff without a direct economic stake, the Court's greatest fear, is likely to exercise more self-restraint than an economically interested private plaintiff, or a well-established and well-financed organization.

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[51] See Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1037-38 (1968).

[52] The Court is not always so insensitive to broader rights, at least where the plaintiff is a state suing as sovereign or parens patriae. E.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972) (suggesting that the State would be entitled to seek injunctive relief for damage to the State's economy and prosperity); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 446 (1945) (Georgia allowed to seek injunctive relief to protect "matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected"); Illinois v. Milwaukee, 406 U.S. 91, 104 (1972) (the right of a state to sue to protect its sovereign interest in "the air over its territory . . . the forests on its mountains . . . the crops and orchards on its hills"); State v. Dexter, 32 Wash. 2d 551, 556-57, 202 P.2d 906, 908 (1949), aff'd per curan, 338 U.S. 863 (1949) (the right of the state to "use reasonable means to safeguard the economic structure upon which the good of all depends"). See generally 7A Wright & Miller, Federal Practice & Procedure § 1782. In such cases, the interest being asserted is recognized as more than an effort to effectuate a value preference. Surely it is no longer obvious that the effectuation of such interests is uniquely one for the state itself as a plaintiff; the old role that only the state may sue to enjoin a public nuisance is on the way out. Restatement of Torts 2d. § 821 (c) (Tent Draft No. 17, 1971).

[53] See Hawaii v. Standard Oil Co., 405 U.S. 251, 259 (1972), where the Court explicitly distinguished between a claim for injunctive relief and for damages in a suit broadly complaining of damage to the State's economy and prosperity. As to the special problems of class actions for damages, see Comment, Manageability of Notice and Damage Calculation in Consumer Class Actions, 70 Mich. L. Rev. 338 (1972); see also 7A Wright & Miller, Federal Practice & Procedure, § 1782, at 113-14.

[54] "By process of elimination those 'consumers' willing to shoulder the burdensome and costly processes . . . are likely to be the only ones 'having a sufficient interest' to challenge. . . . Always a restraining factor is the expense of participation . . . an economic reality which will operate to limit the number of those who will seek participation." Office of Communication, United Church of Christ v. F.C.C., 359 F.2d 994, 1005, 1006 (D.C. Cir., 1966).

A.8 - ADEQUACY OF REPRESENTATION

If the Court perceives a problem of inadequate representation by some self-appointed protector of the public interest, that problem can be attacked directly by reference to the rules governing adequacy of representation in class actions,[55] as well as by the rules governing joinder of parties.[56]

Should the Court fear that the legitimate concerns of present users might be forgotten if standing is allowed to special interest plaintiffs, the easy solution is to allow any such users free opportunity for intervention, either as plaintiffs or defendants.

If the Court worried about the possibility of collusive suits that might bind bonafide plaintiffs, there are also well established means for dealing with that problem.[57]

A.9 - NO GENERAL RIGHT TO ENFORCE ALL LAWS

Nothing in what has just been said suggests that every citizen ought to be allowed to enforce every law, from initiating criminal prosecutions to enforcing private contracts. Workable distinctions can be drawn.[58]

In the criminal area, where loss of personal freedom is at stake, we should maintain the practice of tempering rigorous law enforcement with compassionate restraint.

This is only possible practically by retaining a broad, though not absolute, discretion not to

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55 Fed. R. Civ. P. 23. It should be noted, however, that not every such case will be brought as a class action. While in many situations it is desirable for the plaintiff to institute a class action to assure that all members of the class will benefit from a decision against the defendant (as where termination of welfare benefits to many recipients is challenged, e.g., Serritella v. Engelman, 339 F. Supp. 738, [D.N.J. 1972]), a case like Mineral King does not require a class action; for all interested persons allied with the plaintiff will automatically benefit if the injunction sought is issued. In such situations, it may be the defendant or the court itself that desires the case to be deemed a class action, either to assure a binding effect if the defendant wins or to set the stage for promoting adequate representation. E.g., Sierra Club v. Hardin, 325 F. Supp. 99, 104 (D. Alas., 1971) where the judge designated the case a class action on motion of a defendant. See also 7 Wright & Miller, Federal Practice and Procedure, § 1754, at 544-45. The Supreme Court appears never to have decided whether a case can be made a class action at the instance of the defendant, or by the court sua sponte. If the case is not brought as a class action or cannot be made into one, the question arises whether the court is in a position to promote adequate representation. Note that in such a situation the issue is not adequate representation of the plaintiff class, but adequate representation of the broader interest that the plaintiff is litigating. While good representation of important issues is obviously desirable, there is no legal basis for requiring it, and it is, of course, quite common for very important precedents to be made in cases where one of the parties is just an ordinary "man in the street" who may or may not be skillfully represented by counsel. E.g., A. Lewis, Gideon's Trumpet; and Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450, 470 (1970). See also Jaffe, supra note 38, at 1041. In any event, the Court's user test of standing certainly does not assure quality representation of the "public interest." As to multiple litigation of environmental controversies, the fear greatly exceeds the reality. The reason is clear: The Wilderness Society, even if not bound by res fudicata, is not very likely to expend its limited funds to relitigate hopelessly a case the Sierra Club has just lost. See Comment, Michigan Environmental Protection Act: Multiplicity of Suits, 4 J. Law Reform 370 (1970). When the problem of duplicative litigation does arise, as happens occasionally in various formats, courts seem quite able to handle it; see, e.g., Township of Hopewell v. Volpe, 446 F.2d 167 (3rd Cir., 1971).

56 Fed. R. Civ. P. 19 (a).

57 Hansberry v. Lee, 311 U.S. 32 (1940).

58 Professor Jaffe suggests an approach designed to avoid empty sloganeering about standing, and to make the rules on standing responsive to the need for litigation in the matter before the court. Comment, Standing Again, 84 Harv. L. Rev. 633, 637-38 (1971).

prosecute.[59]

Likewise a very liberal law of standing need not be pushed to its ultimate extreme in civil cases, where there are important instances of the 'best plaintiff' problem.

In an ordinary contract dispute, the interests of the contracting parties are ordinarily much greater than that of any third party's[60] interest in seeing that agreements in the society are enforced.

To permit wide-open citizen standing in such cases could be a serious infringement of the need to allow individuals to build flexibility into contract arrangements. Courts should experience no difficulty in distinguishing such matters from the problem of standing to sue in cases like Sierra Club v. Morton.[61]

CONCLUSION

Perhaps the central significance of the Mineral King decision is the sense it gives that the Court sees the citizen plaintiff in such a case as essentially like the unrelated third-party who seeks to enforce a private contract between two other persons.

If he is not wholly an intermeddler, the Court implies, he certainly has an interest that is inconsiderably small compared to that of the user.

Thus, the Mineral King decision suggests that environmental controversies are really nothing more than struggles between developers and birdwatchers.

The Court majority seems oblivious to the central message of the current environmental literature, that the issues to engage our serious attention are risks of long-term, large scale, practically irreversible disruptions of ecosystems.

By denying to individuals who wish to assert those issues the right to come into court, and granting standing only to one who has a stake in his own present use and enjoyment, the Court reveals how little it appreciated the real meaning of the test case it had before it.

B. The case of Lujan vs Defenders of Wildlife

B.2 - Lujan and Procedural Rights

1. The Lujan Procedural Rights Standing Rule

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59 See generally Hall, Kamisar, LaFave & Israel, Modem Criminal Procedure, ch. 14 (1969).

60 This does not refer to the technical third party beneficiary to a contract, but to an unrelated outsider who evinces concern about other people keeping their promises. Cf. Nat'l Licorice Corp. v. N.L.R.B., 309 U.S. 350 (1940); Natural Resources Defense Council v. TVA, 340 F. Supp. 400, 407-08 (S.D.N.Y., 1971).

61 The distinction is made easy by the ability of the Sierra Club type plaintiff to point to a statute creating an explicit legal interest in members of the general public. One seeking to enforce others' private contracts would be within no such statutory zone of interest.

In Lujan, several environmental organizations challenged a regulation of the Department of the Interior (DOI) promulgated under the Endangered Species Act (ESA).

The regulation required federal agencies to consult with DOI about potential harms to endangered or threatened species if the proposed agency action was to occur in the United States or on the high seas but not if the action was to occur in a foreign country.[62]

The government sought to dismiss the case for lack of standing, but the Eighth Circuit held that the plaintiffs had standing to challenge the regulation.[63]

The government appealed the case to the Supreme Court, which issued an opinion dedicated almost entirely to Article III standing issues.[64]

The Court rejected the plaintiffs' claims of plans to visit the locations of various endangered species that might be affected by federal agencies' work abroad as too speculative.

Thus, the Court concluded that the plaintiffs had no concrete claims of injury.[65] The Court also rejected the argument that an alleged violation of the ESA's requirement of agency consultation with DOI, combined with the provision of the ESA authorizing citizens to sue the government for violating the ESA, could create a "procedural injury," which could, in and of itself, fulfill Article III's injury in fact requirement.[66]

The Court emphasized that even if plaintiffs seek to enforce a procedural requirement, those plaintiffs must demonstrate that "a separate concrete interest" is at stake.[67]

As the Lujan opinion intoned at its closing, "the concrete injury requirement must remain."[68]

However, moving beyond the concrete injury requirement, the Court did recognize that causation and redressability can be major hurdles for plaintiffs seeking to enforce procedural rights under a statute.

By definition, procedural rights are rights to a certain kind of process, not rights to a specific outcome.

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62 See Brief for the Respondents at 1–3, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (No. 90-1424), 1991 WL 577004 at *1–3; see also Lujan v. Defenders of Wildlife, 504 U.S. at 559. The relevant provision of the ESA reads: "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(2) (2006).

63 Defenders of Wildlife v. Lujan, 911 F.2d 117, 122 (8th Cir. 1990) (holding that "Defenders' evidence of both substantive and procedural injury . . . establish[es] standing sufficiently to survive both a motion to dismiss and to prevail on sumary judgment"), rev'd sub nom. 504 U.S. 555 (1992).

64 Id. at 560 (explaining the importance of Article III standing).

65 Id. at 562

66 Id. at 571–73 ("The [Court of Appeals] held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a 'procedural righ[t]' to consultation . . . so that anyone can . . . [challenge a] failure to follow . . . consultative procedure . . . . [However,] this is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs . . . . Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law. We reject this view." (citation omitted).

67 Id. at 572.

68 Id. at 578.

As a result, demonstrating that concrete injuries resulting from a flawed process would necessarily be redressed by a court order directing proper process may, in many circumstances, be difficult.[69]

The Lujan Court acknowledged this problem and developed a framework for analyzing Article III standing that takes into account some of the difficulties faced by plaintiffs bringing procedural rights claims.

The Court explained that "[t]here is this much truth to the assertion that 'procedural rights' are special:

The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy"[70]

2. The Lujan Procedural Rights Definition

Having assessed the implications of procedural rights for Article III standing analysis, the next step is to determine which types of claims qualify as "procedural rights" claims.

The Lujan Court did not provide a clear definition of a "procedural right," but it did present a hypothetical illuminating the operation of the rule. As the Court explained:

> *[O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement (EIS), even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.*[71]

As this hypothetical indicates, the EIS requirement of the National Environmental Policy Act (NEPA) provides a paradigm for what the Lujan Court had in mind when it discussed "procedural rights."

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69 See Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 MICH. L. REV. 163, 225 (1992) ("It is almost always the case that procedural rights have only speculative consequences for a litigant. If a judge is found to have ruled in favor of party A after taking a bribe from party A, it remains speculative whether an unbiased judge would have ruled for party B. Does party B therefore lack standing?").

70 24.Lujan v. Defenders of Wildlife, 504 U.S. at 572 n.7. This rule, elaborated in footnote seven of the Lujan opinion, has also been referred to as "footnote seven standing." See Bradford C. Mank, Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?, 34 COLUM. J. ENVTL. L. 1, 35 (2009); Robert A. Weinstock, The Lorax State: Parens Patriae and the Provision of Public Goods, 109 COLUM. L. REV. 798, 824 (2009); Kimberly N. Brown, Justiciable Generalized Grievances, 68 MD. L. REV. 221, 231 (2008); Bradford C. Mank, Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States, 49 WM. & MARY L. REV. 1701, 1716 (2008); Brian J. Gatchel, Informational and Procedural Standing After Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 91 (1995).

71 Id. at 573.

However, while the Lujan Court recognized NEPA as the source of a procedural right, the Court did not rule on whether the Lujan plaintiffs' claimed procedural right to an interagency consultation actually qualified as a procedural right.

The Court simply held that a violation of the interagency consultation requirement cannot alone fulfill the injury in fact requirement.[72]

But the Court provided no guidance on whether a claim of a violation of the interagency consultation requirement, if paired with an appropriate claim of a concrete injury, would be recognized as a "procedural rights" claim that should be accorded relaxed causation and redressability requirements.

3) Class actions' standing to sue in EU Directives

The evolution of the regulatory framework has been largely influenced by the simultaneous adoption of the Directive 2004/35/EC of 21 April 2004 "on environmental liability with regard to the prevention and remedying of environmental damage ".

The directive, which in some respects incorporates the principles adopted by the International Convention of Lugano on compensation of damage resulting from dangerous activities, approved by the Council of Europe on 21-22 June 1993 [73], indicates two different hypotheses in which occurs the liability for environmental damage, which stand for the object of protection, and for the characteristics of the activity that caused the damage, and for the criterion of imputation of responsibility.

In the first hypothesis environmental damage, or the imminent threat of such damage assumes importance, caused by an occupation potentially dangerous for the environment (Article 3, § 1, letter. a) [74].

The Directive defines the concept of environmental damage, which, to be relevant, must fall within one of the following types (art. 2, n. 1, letter. a, b and c):

- damage to protected species and natural habitats,
- damage to water
- danmage to land[75].

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72 See id. at 571–73.

73 The French text which is located in Riv. Leg. amb., 1994, p. 145 ff., For comments on the scope of the Convention never entered into force, see: T. TREVES, International aspects civil liability for environmental damage, in Riv. Leg. amb., 1994, p. 105 ff. F. GIAMPIETRO, Liability for damage to the environment. Italy between the Lugano Convention and the Green Paper of the European Union, in Giust. civ., 1995 II, p. 99 ff., M. RISE, New standards, cit., P. 463 ff.

74 The option adopted in the Directive with respect to this hypothesis largely follows the discipline provided by the Lugano Convention (art. 1, art. 2, paragraph 1) for damage to the environment caused by hazardous activities.

75 From this point of view, the directive appears to be less extensive than the detection of significant harm to the environment under the Lugano Convention, which was reference to a concept of environment that includes abiotic and biotic natural resources,such as air, water, soil, fauna, flora and their interaction, to the assets that make up cultural heritage and to the

Damage to protected species and natural habitats is relevant if it produces significant adverse effects on the achievement of favourable conservation status of habitats or species, protected by the Directives 79/409/EEC and 92/43/EEC, or which the Member State identifies for equivalent purposes as those pursued by those directives.

The water damage is defined as any damage that, in adversely, significantly affects the ecological, chemical and/or quantitative and/or ecological potential of waters, as defined by Directive 2000/60/EC.

The land damage is limited to contamination soil or subsoil that create a significant risk of adverse effects on human health.

From a subjective point of view, the individual or legal entity, who operates or controls the occupational activity (ie: an economic activity, trade or business, of public or private, or not-for-profit) that caused the damage (Article 8 § § 1 et seq.; Art. 2, nos. 6 s.), is responsible for the environmental damage.

But such liability occurs only if the economic activity is among those taken into account by sectoral disciplines of Community, due to their potential hazard for the environment and health, listed in Annex III of the Directive[76]: installations subject to authorization under regulations on prevention and reduction of pollution and fight against air pollution from industrial plants; management of waste in accordance with Community rules; discharges in surface water or groundwater or extraction activities, or water impoundment that require a permit, authorization or registration under Community directives on water protection; activities related to production, usage, storage, release of dangerous substances or transportation of dangerous or polluting goods indicated in the directives, use, release, transport or placing on the market of genetically modified organisms under Community discipline.

When environmental damage is caused by any of the above activities it goes through hypothesis of objective responsibility. [77].

The individual or legal entity who operates or controls the professional activity, the so-called operator, is exempt from liability only in the following cases (Article 8 § 3, lett. a and b)[78]:

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characteristic aspects of the landscape (Article 2, paragraph 10).

[76] In any case the activities that produce nuclear risks, activities whose main purpose is national defense or international security or having as sole purpose the protection against natural disaster are excluded from the Directive: art. 4, § § 2 and 6.

Also excluded from the application of the Directive, the activities subject to conventions internazioni to protect the marine environment from pollution by oil and toxic substances and harmful: on v. S.m. CARBONE, F. MUNARI, L. SCHIANO PEPPER, The environmental liability directive and liability for damage to the marine environment, in Environmental liability, 2008, p. 18 ff.

[77] The adoption of the criterion of strict liability and the list of specific clauses exemption are chosen in line with the principles adopted by the Lugano Convention (Article 5 et seq.)

[78] To these must be added the cases of exemption referred to in the directive which finds no application (Article 4, § § 1 and 5) damage caused by an act of armed conflict, hostilities, civil war, insurrection; damage caused by a natural phenomenon of an exceptional, inevitable and irresistible character; damage caused by pollution of a diffuse character for which it is not possible establish a causal link between the damage and the activities of the individual operator. The notion of pollution of a diffuse character

1. damage for which the operator can establish that it was caused by a third party and occurred despite the adoption of appropriate security measures;
2. damage for which the contractor demonstrates that it was caused in compliance with an order or instruction given by a public authority. The above exemption applies to both prevention measures, and remedial measures.

Member States shall, in addition, but only with reference to remedial measures, have the right to provide that the operator can be excused from liability if he proves his lack of guilt in these other cases (Article 8 § 4, lett. a e b):

1. damage caused by an emission or event expressly permitted by a license issued under disciplines implementation of EU regulations that govern the businesses involved;

2. damage caused by an emission, activity or any manner of use of a product during an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of technical and scientific knowledge at the time of the release of issue or task execution.

In the second hypothesis is relevant only damage to protected species and natural habitats, or the imminent threat of such damage, caused by work not included in those listed in Annex III of the Directive, as potentially dangerous for the environment and health: in this case the individual or legal entity who operates or controls the professional activity, the so-called operator, it is held liable only if a fault or negligence (Article 3, § 1, lett. B) has been committed.

The tasks of the implementation of the law on prevention and repair of environmental damage, in both cases, are assigned, by Directive, to a competent authority, which must be designated by each Member State (Article 11 § 1).

In the event that there is a threat of environmental damage, or that damage has already occurred, the operator has the obligation to inform the competent authority, which may ask the same operator to adopt needed measures to prevent and repair with a analytically motivated disposition, while providing precise instructions on the implementation of those measures, and if the operator does not comply, the competent authority has the power itself to adopt the necessary measures, even through third parties, charging the liable operators with related costs (Article 11 § § 2 and 4, Art. 5, § § 3 and 4, Art. 6, § § 2 and 3; art. 8, § 2).

The competent authority also has the power to adopt direct measures of prevention or remedying of environmental damage in the case where the operator can not be identified or demonstrates it is not responsible (art. 5 § 4 art. 6, § 3).

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is not in the Directive, but it can be inferred dall'esemplificazione contained in the White Paper in § 2.2, which indicates "the changes climate determined by the emissions of carbon monoxide and other substances, the death of forests due to acid rain, air pollution caused by traffic. " It should also be mentioned, as an example of pollution from "diffuse source" specifically regulated by other Community legislation, pollution caused by nitrates from agricultural sources (Directive 91/676/EEC of 12 December 1991).

Individuals or legal entities, entitled to report the existence of damage or threat of environmental damage and request the competent authority to adopt prevention and repair measures, according to art. 12, § 1, are those who:

a) are, or may be, affected by environmental damage,

b) have a sufficient interest in the decision-making process relating to the environment or, alternatively, if national law requires it, allege the infringement of a subjective legal situation.

In the sub b) are anyway included non-governmental organizations that promote environmental protection and who are in possession of all the requirements under national law.

The competent authority must assess claims of entitled individuals, jointly with the concerned operator, and shall notify the reasoned decision (art. 12, § § 2 et seq.).

The parties, entitled to request the competent authority of taking on measures to prevent and repair the damage, have the right to litigate proceedings before a court, or any other independent and impartial public authority, in order to request a reconsideration of procedural and substantive legality of decisions, acts and omissions of the competent authority (art. 13, § 1).

The remedial measures can be determined through two procedures (art. 7 § § 1 and 2): identification by the operator and approval by the competent authority; detection by the competent authority, in cooperation, where appropriate, with the operator.

These measures, in a first stage, are aimed at controlling and circumscribing the factors of damage and contaminants in order to limit and prevent further environmental damage and adverse effects on human health (art. 6 § 1, letter. A, § 2, letter. B).

In a later stage, problems and rules must be pursuant to the criteria laid down in the Directive, Annex II, where distinct objectives depending on the nature of the damaged goods are posed:

1) in the event of damage to water, protected species and natural habitats, it is necessary to restore the environment to its baseline condition and compensate for the failure to complete restoration of the original conditions and any temporary losses occurred until the completion recovery;
2) in the event of damage to land, we must act on contaminants so that the contaminated soil, taking into account its current or admitted use at the time of the damage, no longer presents a significant risk of causing adverse effects on human health. In order to recover the costs to prevent and repair the damage, the competent authority may act against the operator or third party within five years from the date on which the measures have been completed or, if later, the date on which it was identified the operator, or third party (art. 10).

The rules in question apply to damage caused by an occurrence or event occurring after the entry into force of the Directive within an activity that is still exercised at the time of entry into force of the Directive, in application of the principle of non-retroactivity. It is also expected - with a rule that will take practical relevance in a distant future - that there is no liability for the damage caused by an act that took place more than thirty years earlier (art. 17).

4) Standing to sue of environmental associations in European legal experience

In continental Europe a discipline similar to the North American has spread, with the aim of substantially exceed the constraint that the vast mass of litigation ends to be expressed, incongruously, in a multiplicity of individual actions.

Group actions, in fact, are gaining even more popularity throughout Europe.

The Directive n. 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, provides that "qualified entities", such as consumer associations or independent public authorities are empowered to act in court on behalf of a group of people harmed by the defendant's conduct.

In recent years, several EU countries have introduced rules on class action, to facilitate class actions. In particular:

4.1. The class action in the United Kingdom

Although less known, the English experience of group actions has seen, like North-American one, a long series of important collective actions about producer responsibility (pharmaceutical companies - food - tobacco industry), environmental pollution, occupational diseases and liability of financial intermediaries.

The discipline of Group Litigation follows, according to the spirit of the procedural reform of 1998 (Civil Procedure Rules), the flexible concept of case management by the court, according to the characteristics of the case, to better achieve the objectives of economy, brevity and efficient administration of justice.

The initiative of demanding the implementation of the special group procedure, to a number of similar cases, can be taken by the parties of one of those causes or by the court, after at least a number of similar actions are brought separately before the same court or other courts.

The action does not arise as a class action and therefore no one is candidated as representative of others’ interests as for the USA.

The conditions for the granting of the collective procedure are mainly the presence of a

sufficient number of plaintiffs, the commonality of questions of fact or law, the identifiability of the group in relation to the further proposal of new cases.

The Management court is determined after the grant of the authorization, which will appoint a judge with the task of managing and regulating all the preliminary investigation and the inclusion of new cases in the group and of deciding whether it is possible, given the characteristics of the case, to deal only with a few pilot cases to reach a decision with common value.

The court will also appoint a leader, among the lawyers, with the task of coordinating the defense of all cases of the group, keeping the register of claimants and procedural problems.

The competent court may also appoint a trustee with a mandate to ensure the protection of all members of the group regards to abuse or conflict of interest with the defenders or the prevalence of sectoral interests or economically stronger plaintiffs.

For the purposes of the good performance of the procedure, terms, for the possibility to join the group as part of new cases, are also set out. If new cases present later, they will to be decided individually or as part of a new collective procedure.

A particularly problematic aspect is regards the possibility of the applicants, chosen as pilot cases to be free to abandon or settle the dispute.

In this regard, it was considered appropriate to set limits to these chances, to prevent the possibility that the defendant seeks to neutralize the pilot causes in order to destabilize the dispute, subjecting any transaction authorization to the judge.

However the latter has the power to repress abuses and unfair action against the defendant, even with the expulsion of cases from the group.

The court decides about the complex distribution of costs between the parties in question.

4.2 The class action in Sweden, Norway and Denmark

These three jurisdictions have opted for compensatory collective protection compliances close to the traditional class action drawing from the U.S., Canadian and Australian experience.

Denoting a more liberal approach than the U.S. model, they welcomed open arms the idea of representative actions, distinguishing each other as far as the choice of the participatory mechanism to the class action is regarded; in fact Sweden and Norway joined the opt-in mechanism while Denmark joined opt-out one.

The measures, introduced in these three states, as well as presenting the rather similar procedures for managing the collective process, share also an open approach to the definition of active standing to sue subjects: in fact, they can also be private individuals and not just associations

or public authorities.

Besides they do not require particular qualifications of such subjects.

4.3 The class action in France and Spain

Unlike the specimen forms so far described, France and Spain have opted for much more modest solutions in the operational areas of compensatory collective actions therein developed (confined to the consumers' protection) and very far from class action echoes (from the locus standi, attributed exclusively in France, or mainly, in Spain, to consumers' associations, although only some of them).

With regard specifically to France, this, very modern as far as collective right protection of diffuse interests are regarded, has, on the side of the protection of the collective rights of the individual, very little legislation, and a absolutely embryonic stage of representative action.

The active standing to sue, moreover, belongs exclusively to recognized associations, however hindered by law to carry out any promoting activities and also subject to the condition of obtaining a real mandate from at least two consumers and that all others damaged people have been identified.

A recent bill was modified thanks to the influence of similar laws in other states.

It provides that, after an initial exequatur of the court on collective action elegibility, proposed by an association of consumers, any interested individual can individually bring a legal action asking to enforce the decision in principle obtained by the association.

While Spain, in article 11 of the Ley de Enjuiciamiento Civil, distinguishes three types of collective actions, this depending on the possibility of identifying individual members of the class, denoting a propensity to a model of collective protection entrusted mainly to associations.

• If the beneficiaries of the protection are directly associated with an organization of consumers or users, this association, without any prejudice to the entitlement of each individual, can be the promoter of collective action;

• If the members of the "class" are easily identifiable, the initiative of collective action is not only up and only to associations dedicated to the protection of consumers, but also to groups of individuals with same interests;

• If you can not identify the individual members of the class, solely and exclusively the associations identified by law are entitled to.

In particular, as far as compensation for environmental damage is regarded, the judgment of 22/11/2004 - Boliden Apirsa SL - The Spanish Supreme Court has sentenced an industry to the

environmental damage caused by discharges of waste water from the mine into the river Guadalimar, liquidated at the rate of about 40 million Euros, by applying the principle of civil liability for the performance of dangerous activities (risk criterion).

Lesson 1

Class actions on environmental damage

The USA and European experience

.1

The proceeding role of the environmental associations in the USA judicial experience.

- In the United States the procedural rules are codified at the federal level (Federal Rule of Civil Procedure and differently in each state.

- At federal level the procedure of the class action must be authorized by the Federal Court of first instance jurisdiction.

- In recent years the federal courts have frequently abandoned class actions already undertaken in the absence of proof that the collective procedure presented specific advantages over the individual procedure in the specific case.

- To obtain the authorization the actor or actors, which are proposed as class representatives must demonstrate that:

- the procedure of the class action relates to a class of entities;

- the class is so numerous as to make it impossible for the normal joinder;

- there are questions of fact or law common to all class members;

- the claims and allegations of the promoters of the action are typical and representative with respect to the members of the class;

- the promoters of the action are able to properly and equally protect the interests of all class members .

- To overcome the problem of the particularity of the individual positions, the class actions are sometimes only partially used to decide common general issues.
- Mini-procedures are then made to decide individual cases: in this sense, instances of opening collective action are accepted when the general issue concerns the definition of the liability of a defendant.
- Mini-cases concern only the determination of the amount of damage.

- The res judicata has effect for all members of the class, even if they have not explicitly joined in the proceedings, unless the absent can demonstrate that its interests were not sufficiently represented or that sufficient information has not been given to potential stakeholders
- It is debatable whether the concerned individual who has explicitly refused to participate in the class action (ie opt out), may rely on the favorable deemed, but the prevailing opinion seems to exclude this possibility.

- The legislative choice of the system of self-exclusion which required adherence to procedure (opt in), is justified on the basis of:
  - it was seen as many interested parties had no news of their timely action or situation of stakeholders.
  - they wanted also to avoid that the most waited for a favourable outcome before joining the cause.

- The current evolution of the institute, in the U.S. case law development, tends to significantly downsize the usefulness of the procedure:
  - for the great mass torts and mass accidents
  - for the occurred inability to achieve economies of cost and time of judgment and to arrive at equitable solution for all damaged in the case of hundreds or thousands of people

- 2

The cases of *Sierra Club vs Morton* and *Lujian vs Defenders of Wildlife*

A. The case of Sierra Club vs Morton

- The suit arose when the United States Forest Service permitted development of Mineral King near Sequoia National Park. The key issue in the case was whether the permitted development would cause the Sierra Club sufficient injury to give them standing to sue to block the permit.
- The Supreme Court held that the Sierra Club, in its corporate capacity, lacked standing, but that it may sue on behalf of any of its members who had individual standing because the government

- However, the Sierra Club had failed to state in its complaint that any of its members had ever visited Mineral King, even though several members had used it for recreational purposes and even owned property in the nearby area, and so it lost.
- Although the Sierra Club lost the case, as a practical matter they won the war. All any environmental group needs to assert standing in a natural resource matter is to find among their

B. The case of Lujan vs Defenders of Wildlife

B. The case of Lujan vs Defenders of Wildlife

- It was a case of United States of Supreme Court decided on June 12, 1992, in which the court held that a group of American Wildlife conservation and other enviromentl organization lacked standing to challenge regulation jointly issued by the U.S. Secretaries of the interior and Commerce, regarding the geographic area to which a particular section of the Endagered species act of 1973 applied. The case arose over issues of US funding of development projects in Aswan and Mahaveli

- In this decision, the Court made clear that plaintiffs must suffer a concrete, discernible injury—not a "conjectural or hypothetical one"—to be able to stand to sue in a Federal Court. It, in effect, made it more difficult for plaintiffs to challenge the actions of a government agency when the actions do not directly affect them.

- 3

Class actions' standing to sue in EU Directives

- From a subjective point of view, the individual or legal entity, who operates or controls the occupational activity (ie: an economic activity, trade or business, of public or private, or not-for-profit) that caused the damage (Article 8 § § 1 et seq.; Art. 2, nos. 6 s.), is responsible for the environmental damage.
- Such liability occurs only if the economic activity is among those taken into account by sectoral disciplines of Community, due to their

- Individuals or legal entities, entitled to report the existence of damage or threat of environmental damage and request the competent authority to adopt prevention and repair measures, according to art. 12, § 1, are those who:
- a) are, or may be, affected by environmental damage,
- b) have a sufficient interest in the decision-making process relating to the environment or

- 4

Standing to sue of environmental associations in European legal experience

4.1. The class action in the United Kingdom

- In continental Europe a discipline similar to the North American has spread, with the aim of substantially exceed the constraint that the vast mass of litigation ends to be expressed, incongruously, in a multiplicity of individual actions.
- Group actions, in fact, are gaining even more popularity throughout Europe. The Directive n. 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the

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Lesson 2

environmental damage AND STANDING TO SUE BY ENVIRONMENTAL ASSOCIATIONS IN ITALY

premises

·Finally understood the importance of an environmental regulation of the environmental offense, the legislator has intervened with the approval of the Law 8 July 1986, n. 349, establishing the Ministry of Environment and issuing rules about environmental damage.

· In particular, art. 18 provided for a specific case of civil liability for environmental damage, analytically specifying the elements, clarifying roles and powers of the State, local authorities and associations for the protection of the environment, as well as the criteria for determining the compensation, attributing jurisdiction on the ordinary courts.

·1

The legitimacy of local authorities to protect the collective interests

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·The reduction of the role of local authorities has been one of the most criticized in the after their reform, legislative decree n. 152/2006.

- After the approval of the legislative decree n. 152/2006, in fact the local authorities have lost the possibility of asserting public environmental damage, which authority was indeed acknowledged by virtue of repealed paragraph 3 of the art. 18.

- In light of the above mentioned repeal, the state remains the exclusively legitimate subject to assert in court (or through the issuing of Ministerial decree) the environmental damage to the community, with severe impairment of the prerogatives of the institutions closer to citizens.

- Municipalities, provinces and regions, according to Articles 309 and 310 of the T.U. keep the following limited powers:

  - a) presenting complaints and observations., that the Ministry of the Environment is required to assess, with the sole merely formal obligation to inform about the measures which it was decided to take in the proceedings leading to the adoption of precautionary prevention, and recovery measures, (art. 309);

  - b) taking up, according to general principles, (and therefore where they have a specific interest) the adopted acts and measures in contrast with the rules of the TU (Article 310);

  - c) holding silence breach of the Minister of the Environment, with the right to demand compensation for damages from delay, pursuant to art. 310 (which will be after examined in-depth);

  - d) applying to the ordinary courts in order to request, pursuant to art. 2043 cc, compensation for damages incurred on assets belonging to the State property or to the Local Government as a result of the event that produced environmental damage (Article 313, paragraph 7, last sentence).

- It is clear that the role of local authorities in environmental matters appears marginalized, in contrast to the recognition of the centrality of the local authorities contained in art. 114 of the Constitution, but especially so much in contradiction with the declared objective to achieve effective protection of the environment in accordance with the principles of subsidiarity and partnership with local authorities.

- The attribution of the power to take legal action to protect the environmental damage to the local authorities would be more consistent with the role played by these institutions, in particular by the Municipality and Province, who get the pulse on the situation of their territory under the powers granted to them by the legal system as far as construction, town planning, environmental protection and hygiene and public health are regarded.

- The granting of a monopoly of expertise in the field of environmental damage to the state, though setting in the centralist trend that has found fertile ground in the legislator in recent years, in this case has no plausible justification.

- The only likely outcomes will be slowing the environmental protection, as the process is made slow and bureaucratic, and above all depriving the process of the contribution of the private entities which are more familiar with the territory and are responsible for urban planning and environmental protection.

- 2

Article 18 of the Law 349/1986 and entitlement to compensation for environmental damage by environmental groups

- The legislative choice to exclude the legitimacy of environmental associations to act for compensation of environmental damage appears consistent with a model in which the duty of the State is to substitute, with compensatory measures, even temporary, losses of environmental utility, suffered by the community and when the State is entitled to claim compensation for.

- Against the legislator's choice, which locates the legitimizing situation in prior recognition of the association, initially the Administrative Law considered that the missed inclusion of an environmental organization in a ministerial list provided for the regulations mentioned above would result in a deficiency for the legitimacy to appeal against measures in environmental matters.

- the existence of legitimate, as recognized, associations does not preclude the court to determine, in each case, the legitimacy of a single non-accredited organization, provided that they exhibit elements of differentiation and a concrete and stable connection with the given territory, in order to clear establish the exponential interest

- When addressing the issue of environmental damage, it is not always given importance to the administrative process because you would rather dwell on compensatory matters, that belong to the ordinary jurisdiction.

- However, the administrative process is the privileged seat for environmental protection because there the prevention of environmental damage imposed by Community law is achieved.

- In conclusion it should be noted that the absence of the appropriate powers to compensate any inertia of the State Authorities caused a less effective protection when an environmental damage occurs.
- The situation was only partially changed with the entry in force of Art. 4, paragraph 3, Law no. 266/1999, then reformulated in art. 9, paragraph 3, Legislative Decree no. 267/2000, which introduced the so-called Popular Action of Environmental Protection Association, expecting that those entities could exercise, in front of the

- This rule was formally repealed thereby making ineffective the Institute of compensation for environmental damage.

- 3.

The legitimacy of environmental groups in civil COURT

- Beyond the limited role of the case, all the powers granted to local authorities, by articles 309 and 310 of the code, are also recognized to environmental groups.
- As far as the conditions to exercise the legal action by environmental groups are regarded, according to art. 2043 of the Civil Code, it is sufficient to recall what was already mentioned about the protection of common interests.

- It is up to the judge to assess whether the existence of the conditions to allow the legal action to environmental associations for direct or patrimonial injury of their interests, on the basis of the requirements, described earlier, of stability, representativeness and statutory purpose, without prejudice to the provisions of the right of those organizations recognized to participate in environmental evaluations, pursuant to art. 18, paragraph 5 of Law no. 349/1986

Lesson 3

The class action in legislative decree n. 152/2006

1. Ratio of Legislative Decree no. 152/2006

1.1. The definition of environmental damage in art. 300 of T.U.

As it is well known, with this decree the Italian legislator intended to give realization to the directive 2004/35/CE of the European Parliament and of the Council of April 21st, 2004, on the environmental responsibility on matters of prevention and repair of environment.[1]

The law contained in the part sixth of this decree, causing rules on matters of restitutory protection against environmental damages feels the effect, of the jurisprudential genesis of the environmental damage in Italy and has profiles of analogy with the text of the cancelled article 18 of the law 349 of 1986, whose only paragraph 5 was saved by the reform.

This decree has two rules containing the environmental damage definition.

The article n. 300 defines it as any direct or indirect significant and measurable deterioration of natural resource or of benefit insured by it.

The second paragraph of the same article, recalling the mentioned directive 2004/35/CE, specifies that the deterioration caused to species and natural habitats to the inland waters and coasts and the ground, with respect to the original conditions, constitutes environmental damage.

The rule has to be read in combined disposed with art. 311,

[1] B. Pozzo, La responsabilità ambientale. La nuova direttiva sulla responsabilità ambientale, in material di prevenzione e riparazione del danno ambientale, Giuffré

with which it is not, to tell the truth, well coordinate[2].

From a first exam of the paragraph 1 of the art. 300, an already diffuse setting in the Italian regulation emerges, by virtue of the interpretation which jurisprudence supplied with the current rules on matters of environmental damage.

Accordingly to norma-principio that doctrine[3] obtained from the system of the environmental damage, as interpreted by jurisprudence, the responsibility for such damage hypothesis consists in any modification in pejus of the conditions of good quality of natural components (biotic and abiotic) of the environment and their healthiness let alone the relative collective uses (e.g. bathing and irrigation, as far as water bodies are regarded), that are protected by the single laws.

The rule appears restrictive, according to the underlying theme which seems to have guided the legislator in all the TU.

The reference, in fact, to the measurability and significance of the deterioration could create not few problems to the Ministry of the Environment, or to the proceeding judge, in consideration of the difficulty of measurement and evaluation of such damage case, recognized by doctrine and giurisprudenza[4].

In the system, which was previously in force, the risk that the responsible subject could benefit of the difficulties of measurement of the damage had been in contrast with the power of the judge to determine the sum in equity.

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[2] Cfr. F. GIAMPIETRO, la nozione di ambiente e di illecito ambientale: la quantificazione del danno nel T.U.A. , www.giuristiambientalisti.it.

3 F. GIAMPIETRO, la responsabilità per danno all'ambiente in italia: sintesi di leggi e giurisprudenza messe a confronto con la direttiva 2004/35/CE e con il T.U.A, Riv. Giur. Ambiente 2006, 19.

4 P.G. MONATERI, illecito e responsabilità civile, Trattato di diritto privato right from M. BESSONE, which which highlighted: In the environmental matter a complete and minute damage test is objectively impossible. Before everything because some prejudicial effects, also constituting a certain prejudice, highlight themselves only with the time, second because some are of very difficult demonstration.
Also Cass ., sez. I e, September 1st, 1995, no. 9211, Corriere Giuridico 1995, 1146, highlights that the verifiable negative and prejudicial consequences for enviroment are only in the time and not sure contemporarily and contextually deposit the unlawful (in this case the decision was referring to a case of spill and toxic rubbish store).

The abrogation of paragraph 6 of art. 18 of the law no. 349 of 1986, that expected this power (together with the required measurability requirement, art. 300) will make certainly more difficult the execution of the principle “polluter pays”.

In order, at last, to the reference, contained in art. 300, to the benefit ensured by the damaged environmental resource, as refundable damage voice, it must be specified that this entry refers to the negative consequences on the collectivity deriving from the impossibility of using a collective good (for instance damages deriving from the lacked drinkable water grant for a certain period)[5].

1.2. The environmental crime case elements. The illicit fact, performed or dropped. The violation of laws, regulations or provisions.

Prevailing doctrine and jurisprudence (also constitutional one)[6] incline for an organization of the case of the environmental damage in the sphere of the not specified in the contract responsibility of which in art. 2043 c.c.

It follows that it is possible and opportune to proceed to the exam of the case of the environmental damage using the princeps concerning the not specified in the contract responsibility.

As it is well known, the verification of the case of crime not specified in the contract it is founded on the check of the constitutive structure elements, identified in the subjective element, in the causality connection, in the injustice of the damage and in the damage.

It is necessary, therefore, following traditional setting, verifying the compatibility with the structure with the environmental unlawful act, as set up by the legislator in art. 311 of the TU.

It was mentioned that the fact than art. 18 of the law 349/1986

5 F. GIAMPIETRO la responsabilità per danno all’ambiente in italia cit, which was considering as already refundable damage .i from impossibility of use of deriving collective environmental resource services (for instance for the temporary use loss of underground stratum to idropotabile use), that is from missed collective fruition of the resource until the date of the restoration of the same one.

6 Cfr. Cost court. n.641/1987 ; Cass. n.9211/1995 ; Cass. n.1087/1998 .

was expecting, as assumption of the environmental responsibility, violation of arrangements of law or of provisions adopted according to the law, requirement that for the Constitutional Court, determines the damage injustice[7].

In art. 311 the legislator increased the operating range of the case into examination:

"Whoever, accomplishing an illicit fact or omitting activity or fair behaviours, with violation of law, regulation or administrative provision, with neglicence, inexpertness, imprudence or technical rule violation, causes damage to the environment, changing it, damaging it or destroying it in everything or partly, is forced to the restoration of the previous situation, in the absence of it, to the equivalent patrimonial compensation towards the State".

Coming to the case in examination, first of all, the crime can be committed by any subject, physical or juridical person, private or publish administration, as already sanctioned by abrogated article 18, which had exceeded the fiscal formulation follwed by the Court of Accounts.

The behaviour must then consist in an crime, according to the terminology used by the legislator, that is understand as human act (the volitional aspect being important[8]), administrative act adopted by the public administration being included in the concept, too, with all what follows in terms of responsibility of a public agency for lesion of private legitimate interests[9].

The case can be set up, also, with an omitting behaviour, but accordingly to the princeps of the civil responsibility, it is necessary, that the omitting behaviour was due, that is there was a true and real obligation to be acted, deriving from a rule or a specific situation, as violation of the general beginning of prudence and diligence[10].

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[7] Constitutional Court. n.641/1987 .

[8] G. CIAN. A. TRABUCCHI, Commentario breve al codice civile, art. 2043;

9 M.LIBERTINI, la nuova disciplina del danno ambientale e problemi generali del diritto all'ambiente in Riv. Crit. Dir. Priv. , 1987, 581.

[10] P.G. MONATERI, Manuale della responsabilit à civile, UTET.

When art. 18 was previously in force, it was debated in doctrine what the arrangements of law were, whose violation started the environmental responsibility, in presence of the other presuppositions.

Someone think that, it is not necessary for the violated rule to have, among its specific purposes, the environmental protection, therefore also the highway code violation could found the responsibility in examination[11].

Another orientation accepts the broad thesis, but it fact requires that the violated rule, any way, shows to sanction the violation itself.[12]

Of different opinion, instead, it is who considers that the violated rules or the provisions must have for subject matter the protection of the environment, even if not sanctionated[13].

This rule is widely supporter of civil liberties for the individual who performs a crime. He/she will be able to go for free of responsibility, in absence of explicit regulation or administrative discipline for the protection of the environmental good, also in presence of an environmental damage.[14]

So it is up to the national and regional legislator and public

[11] M. LIBERTINI, cit., pag. 578.

[12] P. CENDON. P. ZIVIZ, L'art. 18 della legge 349/86 nel sistema di responsabilità civile, Riv. Crit. Dir. Priv., 1987, 533: Therefore they are not obstacles you to conclude for the full importance, at the purposes of the environmental responsibility, of every fact or behaviour which is adverse to a command. of a special law, of the civil code, of other codes. which in any way shows to ratify the fact itself. For the mentioned authors he notices also the violation of the rules of the civil code, conclusion, as he saw himself, opposed by another part of the doctrine.

[13] C. TENELLA SILLANI, Responsabilità per danno ambientale, in Digesto delle discipline privatistiche, Torino,1996, 374, for which: .Those specific damaging rules of behaviour which impose the respect of tolerance standards or subordinate to exercise activity regimes potentially have to be before considered as everything, that is they forbid certain crime behaviours considered seriously prejudicial for environment and as such integrating hypotheses. Furthermore I am to add those arrangements of more general character which, even if you do not ratify, outline models of behaviour which they must follow as they can, in several way, negatively carve of the environment.
Also G. MORBIDELLI, il danno ambientale nell'art. 18, l.n. 349/1986, considerazioni introduttive in Riv. Crit. Dir. Priv., 1987, the ricavare task attributes of the interpreter from the law purpose (also keeping the evolutionary interpretation criterion present) if it is referable to such juridical <<aree>> of environment tutelage //e//, reflexly, if the violation of the same one translates himself in enviromental damage.

[14] it effectively synthetizes the Corte Cost. principle. n.641/1987 cit: environment is, therefore, a juridical good as recognized and protected by rules.

administrations, in particula local entities, to take all the most opportune measurements to avoid that the principle "*polluter pays*" will be unapplied, even if a too restrictive interpretation of these rules is not hoped for, which reduces to the minimum the operating range of environmental illecit act[15].

However, the pure formal conformance to the rule is not sufficient to avoid incurring responsibility, being the solicitude specific of their activity sector on the operators.

It seems appropriate the removal of the recall to the adopted provisions, based on law, contained in the abrogated article 18, which does not seem compatible with the role attributed to the Environmental Ministry in the new environmental damage case, towards which that power of unappliance of the illegitimate provisions which had been instead considered as normal in the range of ordinary judge authority cannot be assumed.

1.3 Subjective element.

The matter of the subjective element of the environmental crime is one of the most discussed matter.

Taking the cue from it visions, also ideological, opposite about the most opportune and effective system to reach the objective of the environmental protection collide each other.

On one side there are the supporters of the necessity of preparing effective means of protection, which represent a real deterrent to thrust upon society of the negative externalities that characterize business activities[16].

They negatively judge the excessive attention to the subjective element of crime, preferring forms of objective liability.

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[15] P. MADDALENA, il danno all'ambiente tra giudice civile e giudice contabile, in Riv. Crit. Dir. Priv., 470, that per have himself an antijuridical environmental damage it is not sufficient, for instance, that you are a rural beauty, but it is necessary for beauty to be such been also declared such, for law, oo with formal administrative act.

[16] J.. E. STIGLITZ, Economia del settore pubblico, 1989, 120, which define the negative cases in which you drive them of an individual impose a cost to the communities, mentioning the classical chemical of the enterprise case which unloads the production residuals in the near river, imposing costs to the communities which need downstream.

In fact, they consider the latter more suitable to stimulate the subjects (above all the enterprises) to prepare all the cautions the science and the modern technique make possible to prevent all the environmental damages.

The opposite setting is more sensitive towards the demands not to burden the enterprises, and above all, pays for an ideological setting up that considers the environmental liability more a form of sanction (which supposes charge of the damage) than a form of repair for the unlawful act.

What written on the genesis of the environmental unlawful act, as public damage which arises from an evolution of the concept of revenue damage, allows to easily understand because the legislators in 1986 first, and the one in 2006 later seem to have chosen the second setting, even though in the mentioned directive 2004/35/CE the responsibility imputation criterion was objective.

Article 18, in fact, was requiring the fraud or the fault, while art. 311 of TU explicitly refers to negligence, inexperience, imprudence, and to the technical rule violation. However, during the period in which art. 18 was in force, we find in doctrine and jurisprudence opposite solutions, which marry the opposite demands which we mentioned.

On one side there are the supporters of the objective setting up, who thought that the culpable nature of the individual who performs environmental unlawful act could be incidental to the inobservance of the rules[17], starting a presumed[18] fault hypothesis, tending to facilitate the judge's work.

Also jurisprudence seems to be oriented towards substantially objective responsibility forms, evidently worried to supply with protection a good whose lesion turns out of difficult demonstration, thinking that the proof of the environmental damage has to consist in causing a damage to

[17] C. TENELLA SILLANI, Responsabilità per danno ambientale cit ., 376.

[18] A. COSTANZO. C.VERARDI, La responsabilità per danno ambientale, in Riv. Trim. Dir. E proc. Civ., 1988, 731: .We mention at last the doubts about the real range, the importance practises subjective element within of the case of damage as like that as structured in art. 18, presuming seeming in fact allowed the agent fault every time both tried behaviour the wrongfulness for juridical rule violation.

the enviroment[19].

There have been also opposite sign decisions, however, which have put the attention on the intentional subjective element in order to set the environmental offence and expressed themselves in terms of insufficiency of the pure modification, alteration or destruction of the natural environment. [20]

Even part of doctrine seems skeptical towards the possibility of applying to the case of the environmental damage the rules on the objective responsibility (also thought the most suitable in theory to protect the environment), letting a glimmer towards the rules which expect fault presumption forms (articles 2050, 2051 and 2052 c.c), reserve the hypotheses of special forthcoming rules[21].

That doctrine [22], which distinguishes between violations of sector ecological provision and of protective rules of different from the environment goods, proposed a compromise solution.

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[19] Cass. n.9211/1995 cit: .The violation is not enough purely form her of the law on matters of pollution, in the kind on matters of toxic rubbish, but is necessary that the state, or the territorial corporations, which carve the undergoing goods the prejudicial fact (cf. Cass). (February 12th, 1988 no. 1491), to the senses of the paragraph 3 dell.art. 18, infer environment the impairment occurred. If it is true, therefore, that probative the burner weighs on the damaged subject, is not true men which tries it of the environmental damage has to consist in the compromising environment itself.
He highlights this jurisprudential b tendency. Well, the environmental cit damage ., 732: .Si you only notice as the legislative rule which was based on a subjective responsibility imputation criterion and obligation for compensation partiality was rereaded by jurisprudence as objective and behind responsibility rule.
From finish cf. T.A.R. Liguria, 4.12.2007, no. 621, for which the responsibility foundation so acclimatize them based on the economic-legal internationalization criterion of the responsible costs deriving from the environment damages on the subjects any way, without then the necessary checking - for instance - of the fraud or the autor fact fault. In other words an exercise potentially appears a responsibility of objective nature getting recruitment of a connected enterprise risk damaging for environment.

[20] Cass. n.1087/1998 cit: It is necessary to remember that he, in environmental damage theme, is for the front facts to the law of 1986, regulated from the only article 2043 c.c., both for the next facts, disciplined of the art. 18 cit ., is not sufficient the modification, alteration or natural environment destruction considered by a pure objective point of view, in his materiality, but intentional subjective element, is necessary that the behaviour is <<dolosa o colposa>> and, for the special law, qualified by <<violazione di disposizioni di legge o di provvedimenti adottati in base a legge>>;
From finish cf. T.A.R. Sicily, Catania, 7.26.2007, no. 1254, for which the legislator of the 2006 accepted the beginning of the subjective responsibility.

[21] M. LIBERTINI, cit ., 577.

[22] P. CENDON. P. ZIVIZ, L' art. 18 cit ., 539.

In the first case, if it is about a violation of a real standard, the crime can be considered incidental to law violation; if it is about a violation of a protective general clause on the environment, it will be necessary to prove to have committed the unlawful act.

In the second case, for the guilty person the criterion of imputation of the ecological damage will remain the same, according to which the claim for damages is governed in the primary command.

On matters of civil law fault, doctrine and jurisprudence, which applied art. 2043 c.c. in absence of legislative fault definitions, founded on art. 43, paragraph 3, of the criminal code: the crime is culpable, or against the intention, when the event, even if foreseen, it is not wanted by the person who performs it and it happens because of negligence, or imprudence or inexpertness or for inobservance of laws, regulations, orders or disciplines.

Necessity to recall it is of obvious evidence only if we pay attention to the subjective element of the unlawful environmental act definite by the paragraph two of the mentioned art 311, which requires that the illicit fact is realized by negligence, inexpertness, imprudence or technical rule violation.

At this point it appears opportune the recall to penal doctrine[23], which, during comment at the mentioned paragraph 3, art. 43 c.p., distinguished between:

a) so-called generic fault, consisting in the violation of the not written behaviour rules, as social, praxeological rules, of solicitude (which prescribes to keep a positive behaviour), of prudence (which forbid certain actions) and of examination (which prescribes special technical rules for certain activity development);

b) so-called specific fault, for violation of written behaviour rules.

The civil law jurisprudence prefers to talk about negligence as violation of the social rules (not as mere carelessness), imprudence (as violation of the modality imposed by social rules for the execution of

[23] F. MANTOVANI, Diritto penale, 1992, 343.

certain activities) and inexpertness (as violation of the technical rules of determinate relational life sectors).[24]

To tell the truth, also the civil law doctrine referred to the content of the paragraph 3, art. 43 c.p. and to the generic and specific fault definition, even if it then divided on the opportunity to accept a subjective fault conception, of penal type, that recalls the psychological dimension of the performer, or a notion of objective fault, founded on the pure evaluation of standard deviation of behaviour by an ideal reference model.

In jurisprudence, however, the second setting seems to prevail, because it is considered more in conformity with the aim of the accident prevention, typical of the civil responsibility, which founds the civil fault on the violation of a solicitude standard and uses abstract objective evaluation criteria[25].

In particular the administrative jurisprudence accepted in an explicit way the objective notion of fault and recognized the responsibility of the public administration following the violation of an general rule, as the one contained in law no. 241/1990, which expects duty to communicate the start of the proceeding, which respect asks the administration a minimum effort.[26]

Also civil law seems oriented in the sense shown above, as shown in a decision on the subject matter, in which Court of Cassazione[27], after stating that it does not exist in the system any normative links

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[24] Cass ., sez. III, May 19th, 2004, no. 9471, Giust. Civ. Mass. 2004, f. 5.

[25] P.G. MONATERI, Manuale della responsabilit à civile, UTET, 2003, 47 and ss.

[26] Cons. Stato, sez. IV, June 14th, 2001, no. 3169: Indispensable .È, rather, directly accessing an objective knowledge of fault, what takes the vices which challenge the provision into account and in line with the indications of the community jurisprudence, of the gravity of the violation committed by the administration, also to the light of the ampleness of the discriminating evaluations fit again to the organ, some preceding of jurisprudence, some conditions concrete and the contribution possibly given by the private ones in the proceeding (v). Court Executes March 5th, 1996 there, assembled n.46 causes and 48 of 1993; (Id ., May 23rd, 1996, C-5/1994 causes). If a violation is the effect of an excusable authority mistake, it will be not possible to set up the fault requirement. S and instead, the violation appears heavy and if it ripens in a context on which to the administration address are formulated reasonable debits, kind on the solicitude and examination plan, the fault requirement will be able to call himself sussis tente. In the same sense: sez. IV, September 13th, 2001, no. 4786; sez. VI, April 3rd, 2003, no. 1716; T.A.R. Campania, Naples, VII, December 23rd, 2005, no. 20654.

27 Cass ., sez. III, February 9th, 2004, no. 2424, Giust. Civ. 2004, 2.

suitable to justify, in the matter (of the civil responsibility), differentiation between the position of Public Administration and that of other ruling subjects, and after stating, therefore, that it is not possible to leave the subjective responsibility requirement out of consideration, clarified that: La subsistence of this element will be referred not to the acting official, but to public administration as system, and will be configurable if the administrative act was adopted and executed in impartiality correctness and good administration rule violation, which the exercise of the administrative function must inspire, starting a hypothesis of objective fault.

This time the normative formulation helps the interpreter, specifying the required behaviour in order to be able to charge the environmental responsibility.

The rule expects, in fact, the two hypothesis of fault which penologists define generic (violation of the not written behaviour rules of solicitude, prudence and examination) and specification (written rule violation).

In the second case, the civil law doctrine clarified that, if the performer of the damaging fact violates rules which have the aim of damage prevention, the fault is presumed.

In virtue of the reference than art. 311 makes to technical rule violation, it is to be thought that such fault presumptuousness can set up only and exclusively in the hypothesis of lack of respect of rules, law or regulation, which expect analytical technical discipline, whose lack of respect is not admissible and gives automatically responsibility.

In other words, having the legislator (or public administration during regulatory office) specified the technical prescriptions to be adopted, there are no residual margins of choice for the operator, who must simply comply, without, besides, appealing to ignorance, which will be in his/her charge[28].

However as observed by jurisprudence and doctrine, it is not

[28] P.G. MONATERI, manual cit ., 63: These case in rule non-compliance is sufficient to prove the fault, that is, verified contrast objective between the agent and obligation behaviour imposed by the rule once, is not necessary verification of a special mental attitude of the suited in order that ex necessary psychological elementar art. 2043 c.c. subsists owes but treat himself of rules which have for purpose the one to prevent happening of damaging events as consequence of an action or omission.

sufficient for the operator to respect the technical rules, as the same one will be still obliged to respect the rules of common prudence in the sector in which he works. [29]

As to the generic fault, deriving from violation of the behaviour not written rules of solicitude, prudence and expertise, also in this case doctrine and jurisprudence interpreted the above-mentioned requirement in objective terms, setting up the responsibility for lack of adoption of the cautions which should have driven the operator behaviour.

In substance the operator is obliged to follow the common prudence rules (so-called general criterion of diligence[30]), which get more onerous when he is an entrepreneur, ex article 1176, paragraph 2 c.c., which requires a special solicitude when performing a professional activity.

The subject can be ratified not to have expected the damaging consequences of his/her action, despite having the possibility, the fault must be excluded if the fact happens by fortuitous chance, circumstances beyond one's control, or for causes which the damager was not able to avoid or did not have the duty to foresee[31].

It has been correctly noticed [32] that the creation and risk acceptance is not of for itself always despicable and cause of responsibility for fault, as it is clear that there is a socially accepted margin of risk that takes into account the industrial development demands.

It is, however, necessary that, in the hypothesis in which there are not rules or precepts which establish the minimum measurements aiming to reduce the risks to the maximum, the operator evaluates the probability and the gravity of the possible damage and takes the possible

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[29] Cost court. n.642/1987: Formal conformance .Il to the rule administrative exescise must not cover any behaviours of neglicence and mala fide, which are always forbidden and oppose with the constitutional beginnings of the good amministration trend and the social property function and of private initiative limits which in any case must not be violated.
Of the same P.G warning. MONATERI, manual cit ., 64: .Il damaging cannot go free of responsibility if he followed the law, but not also the normal prudence rules: waves to be diligent the pure rule observance is not sufficient.

[30] P.. TRIMARCHI, Istituzioni di diritto privato, that the general solicitude criterion recalls which content has to be specified in relation to the type of activity and taking into account an which of the situation particularities makes concrete.

[31] A. TORRENTE. P. SCHLESINGER, Manuale di diritto privato, 629.

[32] P. TRIMARCHI, cit Istituzioni di diritto privato.

measures in relation to best technical knowledge of the moment.

Summarizing, according to the more spread conception at present, the individual who consciously acts in a certain way, without the will to cause damage to others, though being able to expect the damaging event (according to criterion of the average solicitude and attention of the so-called bonus pater familias) which could be avoided through the adoption of appropriate measures or avoiding that action, can say himself/herself in fault.[33]

If one takes the motivations into account that pushed jurisprudence to prefer an objective notion of fault, such as the demands of trial economy, that would be seriously violated by the necessity of making an exhaustive verification of subjective circumstances (defined too doubtful and difficult[34]), the adoption of this criterion appears opportune also by proceeding public administration, which, as we will see, must perform the task to verify the responsibility presuppositions but it is destitute of the powers and the cultural and professional luggage of the judge.

1.4 The causality connection.

Doctrine and jurisprudence revealed perplexity as regards the necessity and chance, on environmental matters, to prove the causality connection between prejudicial event and damaging behaviour, in order to be able to recognize the responsibility of the damaging, according to a logical ideal thread and quite similar to that followed to solve the matter of the subjective element.

In fact, part of doctrine and jurisprudence has shown sensitiveness towards the difficulties of verification of the material causality relationship between behaviour and event and claimed that it is sufficient the culpable violation of the rule placed for the environmental protection to presume the environmental damage.

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[33] BUSNELLI - BIGLIAZZI GERI - NATOLI, Diritto civile, III, 704. Cass ., sez. III, May 19th, 2004, no. 9471.

[34] P. TRIMARCHI, cit Istituzioni.

They are prevalently decisions adopted by the criminal Cassation, even if they do not lack adhesions by the civil one[35].

However, the civil majority jurisprudence, also here with assents jurisprudence by that criminal and administrative one, expresses in opposite terms, specifically requiring the demonstration of the material and juridical causality connection between behaviour and event[36].

Jurisprudential and doctrinal prevailing uncertainty, when abrogated article 18 was in force, should be exceeded according to 303, paragraph 1, lett. h of the TU, which expressly expects that:. Part sixth of this decree does not apply to the environmental damage or such a upcoming threat caused by diffuse character pollution, if it was not possible to verify in any way a causal connection between the damage and the activity of the operating individuals.

To tell the truth the rule arises more than one perplexities, in the first place for the place of business in which it was inserted, as it would have been more opportune to expect it in the setting of art. 311, that makes the environmental damage case clear; secondly, requiring the causality connection test also for the case of upcoming threat of this damage hard makes the prevention measures applicable, because of the recognized difficulty in the test of this requirement.

In the check of the material causality relationship subsistence, the penal doctrine[37] is divided:

a) according to conditio sine qua non theory, it is not cause

[35] Cass. pen. June 10th, 2002, no. 22539; Cass. civ. n.9211/1995 cit ., the already recalled formula uses: .La test of the environmental damage has to consist in the environment compromising.

[36] Cass. May 27th, 1995, no. 5924, Giust. Civ. Mass. 1995, 1093, which recalls the princes of which to articles 40 and 41 of the criminal code, regulating the of causality and applicable, for jurisprudence costing relationship, in theme of civil extracontrattual ale responsibility; Cass. S.U. January 26th, 1971, no. 174; Cass ., III, September 25th, 1996, no. 5650, Italian Hole 1996, the, 3062, acclimatize them for, the causality connection between prejudicial event and the determinant behaviour must be ascertained, also for the not patrimonial damage; also Cass. pen ., sez. III, October 30th, 2001, no. 1145, concrete enviromental damage required that have happened, specifying what they do not give indemnity place as a rule violations merely form them; T.A.R. Sicily, Catania , no. 1254/2007 cit ., for which, also objective, such objective assumptive nature framing the environmental responsibility according to setting of the responsibility he does not certainly exclude that it is necessary to verify and to verify the causal presupposition of the same one, that is pollution occurred imputable as etiological connection and to his activity.

[37] G. FIANDACA. E. MUSCO, Diritto penale, to consult also for esam of the others theories of poor diffusion in the civil law world.

every condition of the event, or every antecedent without which the event one would be not verified, verification to be made ex-post according to the mental elimination proceeding: without that action the event does not happen;

b) according to the theory of the adequate causality, the cause is that condition which is typically suitable or adequate to produce the event, based on a foreseeableness criterion based on the id quod plerumque accidit, according to an ex-ante made judgement.

Even though in jurisprudence there are decisions which adhere to both main orientations, a so-called intermediate orientation appears very diffuse, which accepts the conditio sine qua non theory, with a corrective which excludes the causality connection in the hypothesis in which the event verifies because of a irregular deviation of the normal causal development; that is the causal relationship stops if, following a next fact, it places itself beyond the normal and predictable causal series development lines[38].

It is very interesting a decision of the cassation which excluded this causality relationship in case the environmental conditions or the natural factors that characterize the physical reality on which the behaviour chargeable with the man affects, they reveal themselves sufficient to determine the event of damage independently of the contribution of the imputable human behaviour.

As to the so-called juridical link, between fact and damaging consequences, art. 300 of this decree contains a reference, apparently wider with respect to art 1223 c.c limits, which only refers to the immediate and direct consequences, to the direct and indirect environmental deterioration.

In truth, jurisprudence already exceeded narrow limits set by the legislator, recognizing compensation also to some mediate and indirect damages, provided that they constitute normal effects of the illicit

[38] BUSNELLI - BIGLIAZZI GERI - NATOLI, diritto civile cit. III, 723; P.GM. MONATERI, manual cit ., 119, from finish also the administrative jurisprudence adheres to this thesis: cf. Cons. State, sez. V, March 8th, 2006, no. 1228.

fact according to the criterion of so-called causal regularity[39], therefore the specification does not assume a special value to the light of the mentioned jurisprudence.

Of special importance on matters, it is the principle, of community origin "*polluter pays*", which has the aim of laying on the subject responsible for the compromising of the environment, in order to internalize restoration costs[40].

The principle of who pollutes pays, in fact, undertakes the damage to the individual who is in the conditions to check the risks, charged to the person who has the possibility of making the so-called cost-benefit analysis, as he/she is, therefore, in a relevant situation to avoid the damage[41].

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[39] Cass. civ ., sez. II, January 28th, 2000, no. 971: . Article 1223 c.c. circumscribes the ambit of the refundable damage according to the criterion of the so-called "causal regularity", that is not only the damages which are immediate and direct but also whats are mediate and indirect, provided that they are included are refundable - according to a judgement of probable verification related to the appreciation of the ordinary solicitude man - in the series of the normal and ordinary fact consequences; Sez. III, May 9th, 2000, no. 5913: . In theme of compensation of the damages resulted illicit fact (or breach, in the contractual responsibility hypothesis) the causality connection has to be understood so as to reunderstand in the indemnity also the indirect and mediate damages they look as normal effect according to the principle of cd. causal, with the consequence regularity that, at the indemnity obligation rise purposes, the crime and event relationship can also not be direct and immediate if, still the other conditions remaining, the first would not have happened in absence of the second, that, in the moment in which the causing event is produced, the damaging consequences of it always do not completely appear unlikely (theory combination of " condicio sine here not " with the theory of the "adequate causality"); Sez. III, December 21st, 2001, no. 16163; Sez. III, August 19th, 2003, no. 12124; cf., also, T.A.R. Sicily, Catania, May 2nd, 2002, no. 798.

[40] Cfr. Cons. State, v, 6.16.2009 no. 3885: The principle who pollutes pays consists, in definitive, the imputation of the environmental costs (c.d). (externalities that is you cost social strangers to the ordinary enterprise accounting) to the subject which has caused the illicit ecological compromising (since an allowed ecological compromising given by the activity of industrial transformation of the environment which does not exceed the legal standards exists).
That, in an ex compensation logic post factum, and in a preventive logic die done damaging, since the principle expresses also the attempt dictates costs social and to stimulate - for enterprise risk calculation effect - their generalized incorporation in the good prices, and, then, in dynamics of cost market of alteration of the environment (with consequent lower good produced without incurring in the in predicted attributable social costs to the enterprises and getting indirect incentive for the enterprises not to damage the environment price).

[41] TAR Naples no. 6758/2009, which recalls the community beginning of the cost sustainability: which, in good substance, is correlated to that of proportionality. Similarly, like the beginning of precaution that finds origin in the community proceedings placed for the protection environment, is amministration proceeding take the necessary provisions whereas it fears the risk of a lesion to an interest protected also in the absence of a concrete risk: it is clear that this second principle must harmonize himself, on the versant of the concrete application, with the first, that is the beginning of proportionality, not the prevalence of the first canning clearly prefigure himself on the second, but their balanced balancing musting search for himself in relation to the public and private interests in game.

According to the most recent administrative jurisprudence, however, still remaining the necessity of making specific verifications direct towards identifying the responsible subjects of environmental damage, the proof of the damaging fact can be given also making use of simple presumptuousnesses (of which to article 2727 cod. civ.[42]).

The demand for effective protection of the environment and of fair prevention of the environmental damages (princes recalled expressly by the administrative judge[43]) concerns also the community judge, who has recognized the possibility for the national institution to presume the existence of a causality connection, in particular in the pollution hypotheses of spread nature, on the basis of the pure closeness of the systems to the polluted zone, in consideration of the probative difficulties that characterize these cases of damage (differently from the hypotheses of circumscribed pollution in space and time which is work of a limited number of operators).

However, the Constitutional Court clarified that this criterion must be supported by plausible evidence able to give foundation to it, really recalling the principle «who pollutes pays», without the institution itself being obliged to prove a fraudolent or culpable behaviour, nor a fraudolent intention of the subjects responsible for the environmental damage, where the activity is listed in community alleged III of the directive 35/2004[44].

2. Article 311 and the active legitimation during penalty of ecologist

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[42] Cons. State no. 3885/2009 cit: pollution imputability can happen for active behaviours but also omissive behaviours, and that tries it can be given in direct or indirect street, that is, in this last case, the public administration put before the environmental tutelage can make use also of simple presumptuousnesses of which to article. 2727 cod. civ. Taking into consideration fact elements which can draw heavy precise and concordant clues, what induce to be thought likely, second the. id quod plerumque accidit. that a pollution is verified and that this is attributable at certain authors.

[43] Cons. State no. 3885/2009 cit.

[44] Court of Justice we, sent. 9.3.2010 in C-378/2008, recalling throw suspicion of verified plant operator pollution closeness and the correspondence between the substances polluting found again and the components used by saying operator exercise of his activity.

associations

The case of the environmental damage contains a clear legislative reference to the necessity that the environmental unlawful act produces a damage. Such formulation was present in the previously in force article 18 and in article 311 it was preserved; it requires that the illicit fact causes a damage to environment, changing it, damaging it or destroying it in everything or partly.

The first problem we face concerns the definition of damage, in civil law sense, doctrinal notion which is still object of debates and divisions. On one side, in fact, the traditional doctrine considers damage as something further and different with respect to the lesion, to be proved in autonomous way; on the other side, it is noticed that damage coincides in the substance with the lesion of protected interest and does not have conceptual autonomy.

Both solutions appeared not very convincing to more recent jurisprudence and doctrine, which, in case of not patrimonial damage, not susceptible of economic evaluation, make the lesion coincide with the damage; in case of patrimonial damage, instead, it is thought that the proof of the damage is necessary, which would set up itself as something additional[45].

The rule of the TU provides, anyway, a piece of information on the damage features, linking it to the concepts of alteration, deterioration and destruction, that would seem to set up a damage crime, even if for jurisprudence art. 18 protected by itself the lesion of environmental good.[46]

[45] P.G. MONATERI, manual cit ., 178 ss. and Cass. October 21st, 1988, no. 5716 mentioned there.

[46] Cass. n.9211/1995 cit; .In the discipline of the environmental damage, in fact, considered in unitary sense, ordinament wanted to take not only of compensation profile, but also of the sanctionative one into account, that it foreground places as many the patrimonial consequences of the caused damage (c.d) not only and not. (consequence damages), but also and above all the same production event, and that is alteration, the deterioration, the destruction, in everything or partly environment, and that is the lesion in himself of the environmental good; for Cass. pen ., sez. III, April 5th, 2002, Giur. Ital. 2003, 694: .Il content itself of the environmental damage comes to coincide with the knowledge not of caused damage suffered but and the unjust damage to be indemnified one places in an indifferent way with respect to the damage production. consequences, the lesion being sufficient for his configurability in himself of wide and diffuse interest to the

Taking the cue from the criminal jurisprudence, formed during the interpretation and application of art. 734 of the criminal code, which contemplates the penalty crime of natural beauty destruction or disfigurement and contains in this case the reference to the concepts of destruction and of alteration, it is possible to try to make the content of above-mentioned concepts, actually of not simple definition, clear.

In respect to alteration, the jurisprudence of the criminal cassation clarified that:

a) Alteration is recognizable only when the intervention transforms in an important and relevant way, also under temporal profile, the features of the place submitted to the special environmental protection, that is to understand as a not necessarily detrimental modification of the environment[47];

b) it is not necessary for the alteration of the protected place to have primary nature, in fact unlawful work can be also follow by others and so compete to change the original conformation of landscape[48];

c) the event of the alteration of the natural beauties consists in the decrease of the aesthetic enjoyment the place was offering, and that happens also when the place, also remaining unchanged, is not enjoyable any more for the interposed obstacles. (In this case a park was reduced "to a public garage, busy by a massive and constant presence of cars left in stop")[49];

d) In the alteration of natural beauties the caused damage is not necessary to be irreparable, the crime also subsisting when the place beauty can be restored, nor is necessary for it to be of solid gravity, provided that the lesion is not purely temporary because in that case there is not relevant damage[50].

In other decision, however, concerning a case of sentence of a company

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environmental safeguard, according to rules and provision fix from the legislator. For the short, to supplement the illicit fact of which of the art. 18, a culpable behaviour of violation of the law placed for the protection is sufficient environment, setting up himself an assumptive lesion of the protected juridical value.

[47] Cass. pen. Sez. III, March 10th, 1999, no. 5062. 72 Cass. pen ., S.U., October 12th, 1993.

[48] Cass. pen ., S.U., October 12th, 1993.

[49] Cass. pen ., sez. III, December 10th, 1991.

[50] Cass. pen ., December 10th, 1991 cit.

to indemnity ex article 18, the judge considered as subsistent the environmental alteration because of air pollution, without noticing its transiency and appearing lack of lasting consequences, if however the concrete modality of the event reached an intense and state of urgency[51];

e) It is sufficient landscape alteration that involves disfigurement, even if realized without buildings, demolitions, destruction of vegetation, excavations, etc. but with the addition of elements which break the balance of the various component, as it happens in case of the appositions of advertising notices, of parabolic antennas or else[52];

f) Denounced alteration must be real and effective, such to disturb the sensation of aesthetic enjoyment which the natural beauties were offering the sight before the prejudicial act to their integrity, the alteration of the place, following any breaking, being not sufficient[53];

g) the fact of changing the panoramic or aesthetics vision, in any way, is sufficient; alteration can prove true also by total or partial view concealment but the alteration in itself and for itself of the place is not identified always with its modification, because if this happens in a way to leave the natural beauty unchanged, the crime is not configurable.[54]

Doctrine agrees in attributing modification value to the concept of alteration in qualitative terms of the environmental good[55].

With regards to the deterioration, which consists in a qualitative worsening[56] of the conditions of the environmental good, it is useful to recall the following principles:

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[51] Court Of Venice, office of the monocratic judge, sez. pen ., November 27th, 2002, no. 1286, Riv. giur. amb. 2003, 163.

[52] Cass. pen ., sez. III, June 6th, 1990.

[53] Cass. pen ., sez. II, January 31st, 1986.

[54] Cass. pen ., sez. III, June 16th, 1980.

[55] Benedetti F., il risarcimento del danno ambientale tra tutela giurisdizionale e poteri di autotutela amministrativa,, in Commento al testo Unico Ambientale, a cura di F. GIAMPIETRO, Ipsoa, 2006, 249; wider the definition of G. SCHIESARO, <<Chi inquina paga>> una nuova frontiera nella liquidazione del danno ambientale, , legge 349/1986, Riv. giur. amb ., 2003, 163, for which alteration is any modification, not necessarily pejorative nor irreversible, of a qualitative feature of the resource, independently of the state in which it was finding dell.aggressione before. It is a temporary good quality modification, without reference both from the duration of the induced both from the intensity modification; in similar Cass terms. pen ., sez. III, October 15th, 1999, no. 13716: Also from the temporary place state modifications he derives a qualifiable prejudice as environmental damage.

[56] Benedetti F., cit ., 249.

a) the crime in art. 734 c.p. is configurable when material unloading on the banks of a torrent, prolonged for long time, changes the bank state within a hundred and fifty meter strip from the stream, causing degradation of environment[57];

b) Excavation of a surface of over a hectare of land, submitted to landscape obligation, integrates the crime disfigurement of natural beauty.[58]

The destruction has smaller problematic nature in his definition, as it corresponds to an irreparable and definitive damaging of the environmental good, not recoverable in any way, if not with a complete replacement, which involves a definitive loss: the crime of which is configurable to article 734 c.p., when manure piles are of such entity to cause a definitive and irreversible change in the environment with regards to landscape[59].

Doctrine and jurisprudence, instead, do not agree as to the patrimonial or not patrimonial nature of such damage typology. On one side there is the opinion of Constitutional Court[60], which peremptorily stated that the environmental damage is certainly patrimonial.

The judge clarified that this damage assumes economic value on the escort of the economic consequences which this lesion causes on the community, which is burdened by economic unforeseen and necessary burdens for its restoration.

For the judge, it is possible, even if not appropriate, to attribute to the environmental good, a value of exchange and a price, being based on the administrative expenses, of recovery and damaging, independently of the remittal in pristine cost and of the damage to the public revenue; as clarified by the later cassation jurisprudence, the loss suffered by the community can not be identified as a detriment to revenue[61].

This setting was supported also in doctrine, which recognized

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[57] Cass. pen ., sez. III, February 9th, 1990.

[58] Cass. pen ., sez. II, December 17th, 1981. 28 entity which can involve a definitive and irreversible modification of the environmental situation with reference to the aspect landscape.

[59] Cass. pen. sez. III, December 7th, 1990.

[60] Const Court no. 641/1987 cit.

[61] Cass. n.440/1989 cit.

patrimonial value and the normal compensability of the damage consequent to the tolerance burden for restoration.[62]

The opposite opinion denies patrimonial value to the damage, in consideration of the fact than the environment is not for sale, and for this reason not liable to a sale evaluation according to the market prices, because it must be considered the usage value of the good.[63]

The recall in art. 300 T.U. to measurable of environmental damage, as well as the reference, in art 313, to the power of Minister of the Environment to order, after the result of the proceeding, the payment of an equal to the economic value sum of the assessed or remaining damage, could push towards the patrimonial nature of the environmental damage[64].

If, however, in the light of the disposed normative, it does not seem that the power to order the payment of the not patrimonial damage remains in head to p.a. proceeding, both because of the structure of the administrative proceeding aiming at issuing of the regulation which contemplates an evaluation in debate, also through technical advice, of the factual damage elements, and evident incompatibility of equitative evaluation with the powers of a public administration, it is reasonable to consider that such limitations do not involve the judge (civil, criminal, administrative or accounting) as involved in the environmental damage event.

A support in favour of the large possibility of recognizing also the not patrimonial damage can be in the recall than art. 300 makes to utilities assured by the environmental good, which can be economical, but also not patrimonial: please think of the consequences of the impossibility to enjoy an environmental beauty or enjoy a clean sea.

Such entry of damage, not liable of economic evaluation, will

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[62] M. LIBERTINI, la nuova disciplina del danno ambientale cit., 576,; F. GIAMPIETRO, prevenzione, ripristino, risarcimento dei danni all'ambiente nel d. lgs. n.152/2006. Exam of the arrangements of postponement to the reclamation, in the responsibility for care of the same author, Giuffré, 2006 environmental damage.

[63] Cass. n.9211/1995 cit., for which the evaluation of the environmental a verification involves damage which is not that of the pure patrimonial prejudice.

[64] F. GIAMPIETRO, la nozione di ambiente e di illecito ambientale: la quantificazione del danno nel T.U.A., www.giuristiambientali.it.

be possible to enforce by public subjects, the associations or private subjects by the ordinary judge in case of direct undergone and refundable damages according to the ordinary civil law tools.

The legislator of the 2006 removed the rules of art. 18 which assigned the competence on matters of environmental damage to the ordinary judge, let alone the remaining paragraphs (except for paragraph 5 concerning the ecologist association prerogatives) which fixed the criteria for damage evaluation.

In the code, it was contemplated that the Ministry of the Environment, the only one legitimated, acts exercising civil action, also in criminal court, for environmental damage compensation; with art. 315 it is approved, also, that the Minister of the Environment, who adopted the regulation of which in art. 313 cannot neither propose nor proceed further in the judgement for the environmental damage compensation, except for the possibility as individual offended by the crime in the criminal judgement.

By virtue of the abrogation of art. 18, in the part which concerns the jurisdiction, a system assembled on a discriminating choice power exclusively attributed to the Minister of the Environment, who, once informed of the existence of a case which can cause an environmental damage, is in front of the following options, emerges:

a) activating the judgement before the ordinary judge, in case of environmental damage caused by a private subject, who does not enjoy either current public affairs powers (by virtue of administrative concession, for instance) or public fundings, or by a public administration, which causes the damage by virtue of mere behaviours, referable to the exercise of public function, or acts without characteristics of public power [65];

b) sueing for damages in a criminal case in the activated criminal trial following environmental crime;

c) addressing the administrative judge for annulment of the administrative acts which caused the environmental damage, contextually requiring the compensation for damage before the same judge;

[65] Cost court. n.204 of 2004 and art. 7 of d. lgs. 2.7.2010 n. 104.

d) starting an administrative proceeding aiming at emanation of an ordinance of injunction to the indemnity, in specific form or for equivalent, transmitting the acts to Court of Accounts, in case a subject submitted to the jurisdiction of the accounting judge is involved.

Ex article 315 of the environmental code, once issued the regulation, the Ministry cannot address any more the ordinary judge (except for the possibility of suing for damages in a criminal trial), with consequent shifting of the jurisdiction before the judge for legitimate interest, by virtue of the disposed of art. 316, who is in charge to control the exercise of the administrative function, within limits deriving from the exclusive jurisdiction.

It comes out a system which involves the civil, criminal, administrative and accounting jurisdictions as to the same illicit environmental damage fact.

As to the competence of the minister, it was noticed as that would be in contrast with the principle of the function distinction, introduced in the State with Legislative Decree n. 29 of 1993, based on which management acts are reserved for the management, while acts of political address and of control of results are of exclusive jurisdiction of the political organs[66].

The relief only hits the target partly, as it is notorious that the on administrative matters, choices concern public profiles of chances which graze the administrative merit and above all, involve such important interests to justify the conservation in head to the minister of powers on environmental damage matters[67].

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[66] Benedetti F., cit.

[67] Court of Accounts, sez. centr. Contr. Legitimacy, January 15th, 2003, no. 1/P, Foro Amm. CDS 2003, 712: .La matter of the environmental damage sometimes involves state interests of importance which can not be able to refer to management evaluations but those organ of political-aministration top which it is due to propose the Premier some ministers to authorize the civil part constitution in criminal proceedings. The not case amenability to its expertise some managers, what outline into examination from d. lg. n.165 of 2001, descends also from the consideration that the same most one than referring to the sphere, suppose choices of political amministration character which as such lies outside the management tasks, still technical -estimative evaluations of the competent administrative services, remaining let alone organ help of legal advice indefectible; cf., also, T.A.R. Lombardy, sez. II, May 5th, 2006, no. 1139, Amm Hole. TAR 2006, 1589, which, as to a procedure of authorization of a draining system refuses (what environmental profile present considerable), highlighted that such reason .in for the numerous and important involved interests procedure (e.g. evaluation of environmental impact and town planning

If, therefore, the competence conservation for the minister appears opportune as to the choice profiles inherent the proceeding to be followed (if acting in administrative court or jurisdictional court) or the possible chance to come to an agreement, some perplexities actually remains as to the competence to issue the final regulation, which will be governed by the principles of administrative proceeding and will be not able to be conditioned by the logical juridical order followed by the management organs.

In other terms, if the presence of discretion, as to the choice of the way to be followed to obtain the relief of the environmental damage or about the transaction, is indisputable, chance profiles do not seem to be present in administrative proceeding aiming at the issue of the regulation.

This discretion, left to public administration, to choose the procedure which prefers pushed part of doctrine to be questioned about the theme if the power attributed to the minister does not allow him also to choose the judge, as he has the possibility of choosing the ordinary judge or administrative proceeding, that it will be evaluated (in unison to the final provision) by the administrative judge and if that is compatible with the constitutional principles.

Jurisprudence, for the truth, has highlighted several times as a thesis which leaves the recurring one the choice of the competent judge is unacceptable, also in light of art. 25 paragraph 1 of Costitution, which imposes for law pre-establishment of the natural judge.

However, apart from the fact than for the constitutional court the problem places itself faculty of choice of the judge is attributed after that the controversy is arisen, the matter has to be examined in detail verifying if the system so outlined places problems in relation to a smaller tutelage for the environmental good.

If you think about it, in fact, having been recognized to the administrative judge judge's dignity and taken the accomplished reality of his tutelage into account, positively organized as effective and the

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planning), involves connotate choices from wide discretion which have so strategic nature that the relative decisions cannot be thought of pure administrative management.

administration not being able to choose actually what judge will control its acts, one does not see what is the vulnus towards the environmental protection.

3. The sentence no. 554/2007 of the Criminal Cassation

An Italian non-profit organization (Verdi Ambiente e Società ONLUS) brought an action before the Italian Court of Cassation in order to obtain an annulment of a dismissal regarding a criminal proceeding (for illegal waste disposal activities) against unidentified individuals, pronounced by an investigating judge (GIP, Tribunale di Foggia).

The environmental organisation believed that it was entitled to participate in the procedure according to art. 91 of the Italian code of criminal procedure, which allows non-profit associations, protecting the interests injured by an offence, to exercise the same powers owed by the victim.

Thus, the environmental organisation stated that it had not been notified of the dismissal decision as it was done in favour of the victim according to art. 408 of the code of criminal procedure.

The case gave the Court the opportunity to specify the role played by environmental organisations in criminal proceedings.

The Court of Cassation stated that according to consolidated domestic case-law (see e.g. Cassazione penale, sez. III, 7 April 2006, n. 33887) which apply the 349/1986 law on 'Institution of the Ministry of Environment and Rules Regarding Environmental Damage' ('the 1986 law'), environmental associations are entitled to bring an action in order to be awarded for environmental damages.

Accordingly, they may also bring a civil action in criminal proceedings whenever they represent environmental interests ('collective legitimate interests') grounded on specific territory.

Environmental associations or organisations may bring such actions even if they are not inserted in the list of recognized entities by the Ministry of the Environment according to art. 13 of the law in question.

As an alternative, environmental associations could intervene in

criminal proceedings, but only upon consent of (and exercising the same powers of) the victim person, according to art. 92 of the code of criminal procedure.

In conclusion, since the non-profit organization did not legitimately intervene in the criminal procedure in question, the Court of Cassation stated that — absent the consent of the victim person — "Verdi Ambiente e Società ONLUS" was not entitled to the notification of the dismissal decree and consequently dismissed the claim.

4. The financial law of 2008 and the introduction of class action in Italy

4.1. The legitimation to act in collective form

Article 2, paragraph 446 of the Financial Law 2008, which inserts the discipline of the collective compensative action after article 140 of the consumption code of which to Legislative Decree September 6th, 2005 no. 206 to article 140 bis, attributes the legitimation to act, at the paragraph 1, only to the consumers and users associations of which at the paragraph 1 of article 139 of Legislative Decree no. 206/2005, and that is those consumers and users associations entered in the suitable list kept at the Ministry Of The Economic Development and the Productive Activities, and at the paragraph 2, to associations and consumers and users committees, "*adequately representative of the asserted collective interests".*

This reference, if from one side it does not leave doubts about the admissibility that the legitimated to act are still associations and committees, from the other side it lets an interpretative void on the concept of *"adequately representative of the asserted collective interests".*

In the previous bills and the preliminary amendment, the adequacy evaluation was subject to a formal procedure between Justice Minister with the Minister Of The Economic Development, according to the instructions of the competent parliamentary committees.

The legitimation to act, however, is contemplate only and exclusively to associative consumers and users forms.

Such solution, is actually places beyond a political address really aimed at the safeguard of the rights of the citizen, favouring the intervention of the associations with safeguard of the right of the consumer and excluding a group of citizens such as workers, disabled people and damaged ones from environmental damage, who could also access the institute of class actions.

The solution at last is in contrast with the elementary constitutional principles articulated by article 24 excluding the possibility of proposing a class action to individuals or groups of individuals, not joined to consumers and users associations.

That in contrast also with the discipline of Class Actions of the other countries and especially of the United States system, that ensures the double track, Public Enforcement and Private Enforcement, under which Federal Trade Commission and the Division Antitrust and every citizen which suffered prejudice in reason of a behaviour kept in antitrust law violation are legitimated to Class Action (on matters of antitrust).

The United States system, for instance, contemplates a public enforcement (public execution) of the antitrust right, that is also double, as exercised in contextual way by Federal Trade Commission and the Division Antitrust of Department of Justice, next to a private enforcement (private execution).

All this contributes to exclude those consumers whose detriment do not derive from mass contracts on which consumers and users associations intervened, such as, for example, the protection of disabled people, of workers and of those who undergo an environmental damage.

It would be better promoting a discipline, not limited exclusively to work inside politics of association of the consumers and some users, but a discipline which ensures the access to the justice, by means of the tool of the collective compensatory action, for every claim, potentially executable in representative form.

The legitimation to act must be, above all, attributed to each subject whose right, also collective, was damaged and extended to the category associations or to the current public affairs organisms, with the

aim of an improvement and expansion of the protection of the collective right and the representativeness of every citizen, consumer or user, being included in the category of the injured subjects, who did not act, or did not intervene, personally in the process.

4.2. The subjective and objectify limit of the collective compensatory action

It does not convince, in the law which introduced and disciplines the Italian class action, not even the way with which the subjective and objective limits of the collective compensatory action are faced.

With regard to the subjective sphere, it is contemplated only the hypothesis of the plurality of actors bound by the community of the asserted right. (so-called plantiff class action) and not also the hypothesis of a plurality of defendants bound by the community of asserting rights and of exceptions to reject the plaintiff's claim (so-called defendant class action), such as, for example, responsibility actions towards co-insurer or civil responsibility actions from report of broadcasters.

With regard to the objective sphere, under the aspect of the identification of the collective nature of the injured right, it is exclusively referred to the concept of lesion of the rights *"of a plurality of consumers or users",* neglecting a series of attached matters to the concept of community (such as the meaning of *"plurality*"), to the relationship between common and individual matters in the same trial, both in the activated one for the protection of a common claim than in the activated one for the protection of an individual claim, and to the conflict of the individual interests with common ones, and vice versa, which can be determined in the above-mentioned trials.

Maybe, it would be better to quantify the minimum number of common claims which legitimate the exercise of the collective action and contemplate that any way the action, if promoted as collective one, must exclude the individual interests (for which the party will always be able to act in a separate trial), and, if promoted as individual action, must avoid

"collectivizing" that special interest, suggesting the promotion of a suitable collective action which join to, also as a matter of course, the individual action, even if previously promoted.

Or, following the American experience, it would be better to introduce the so-called certification mechanism, resolving the option between the mechanism of "opt-in" and that of "opt-out", which doesn't fit generally to the Italian traditional system and, in particular, to the legal principle of a trial.

With regards to the identification of the acts which can originate a collective compensatory action, the contemplation of the action in consequence of illicit acts committed in the context of juridical relationships concerning contracts, of illicit acts not specified in the contract, of illicit commercial practices or anticompetitive behaviours, appears below exhaustive, even if increaseable.

4.3. The discipline of the communications to the consumers and to the act and some documents of the collective compensatory action users.

It is, at last, to notice that the law completely ignores the also importing matters of the discipline of the communications to the consumers and to the users and, anyway, to the citizens who could form the interested class.

The only reference, at paragraph 3 of article 140 bis inserted by the Financial Law of 2008, which leaves to the competent judge deciding the procedure to give suitable advertising to the proposed action contents, lets half view that it is up to the judge to decide, as a matter of course or in specific request acceptation, to choose the advertising procedure of the action, not only of the proposed action, but also the subsequent ones of publication of the sentence and potential accommodation report, about which the law, surprisingly, omits to refer to.

It would be instead necessary, to legislatively contemplate the suitable tools to pursue the informative aims which allow the adequate knowledge of the event, and to contemplate that such tools can be used in every time of the process and lets think about, for instance, to a proposal

of transaction, formally formulated in judicial hearing or to a anticipated sentence provisions.

Lesson 3

The class action in legislative decree n. 152/2006

.1.

Ratio of Legislative Decree no. 152/2006

1.1. The definition of environmental damage in art. 300 of T.U.

This decree has two rules containing the environmental damage definition.

The article n. 300 defines it as any direct or indirect significant and measurable deterioration of natural resource or of benefit insured by it.

The article n. 311 defines it as :

"Whoever, accomplishing an illicit fact or omitting activity or fair behaviours, with violation of law, regulation or administrative provision, with negligence, inexpertness, imprudence or technical rule violation, causes damage to the environment, changing it, damaging it or destroying it in everything or partly, is forced to the restoration of the previous situation, in the absence of it, to the equivalent patrimonial compensation towards the State".

1.2.

The environmental crime case elements.

The crime can be committed by any subject, physical or juridical person, private or publish administration.
The behaviour must then consist in an crime, according to the terminology used by the legislator, that is understand as human act administrative act adopted by the public administration being included in the concept, too, with all what follows in terms of responsibility of a public agency for lesion of private legitimate interests.
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.1.3.

Subjective element.

The matter of the subjective element of the environmental crime is one of the most discussed matter.
On one side there are the supporters of the necessity of preparing effective means of protection, which represent a real deterrent to thrust upon society of the negative externalities that characterize business activities.

They negatively judge the excessive attention to the subjective element of crime, preferring forms of objective liability.
In fact, they consider the latter more suitable to stimulate the subjects (above all the enterprises) to prepare all the cautions the science and the modern technique make possible to prevent all the environmental damages.

The opposite setting is more sensitive towards the demands not to burden the enterprises, and above all, pays for an ideological setting up that considers the environmental liability more a form of sanction (which supposes charge of the damage) than a form of repair for the unlawful act.

1.4

The causality connection.

- Doctrine and jurisprudence revealed perplexity as regards the necessity and chance, on environmental matters, to prove the causality connection between prejudicial event and damaging behaviour, in order to be able to recognize the responsibility of the damaging, according to a logical ideal thread and quite similar to that followed to solve the matter of the subjective element.

- Of special importance on matters, it is the principle, of community origin "*polluter pays*", which has the aim of laying on the subject responsible for the compromising of the environment, in order to internalize restoration costs .
- The principle of who pollutes pays, in fact, undertakes the damage to the individual who is in the conditions to check the risks, charged to the person who has the possibility of making the so-called cost-benefit analysis, as he/she is, therefore, in a relevant situation to avoid the damage

According to the most recent administrative jurisprudence, however, still remaining the necessity of making specific verifications direct towards identifying the responsible subjects of environmental damage, the proof of the damaging fact can be given also making use of simple presumptuousnesses (of which to article 2727 cod. civ.

The demand for effective protection of the environment and of fair prevention of the environmental damages (princes recalled expressly by the administrative judge) concerns also the community judge, who has recognized the possibility for the national institution to presume the existence of a causality connection, in particular in the pollution hypotheses of spread nature, on the basis of the pure closeness of the systems to the polluted zone, in consideration of the probative difficulties that characterize these cases of damage.

However, the Constitutional Court clarified that this criterion must be supported by plausible evidence able to give foundation to it, really recalling the principle «who pollutes pays», without the institution itself being obliged to prove a fraudolent or culpable behaviour, nor a fraudolent intention of the subjects responsible for the environmental damage, where the activity is listed in community alleged III of the directive 35/2004

2.
Article 311 and the active legitimation during penalty of ecologist associations

The case of the environmental damage contains a clear legislative reference to the necessity that the environmental unlawful act produces a damage. Such formulation was present in the previously in force article 18 and in article 311 it was preserved; it requires that the illicit fact causes a damage to environment, changing it, damaging it or destroying it in everything or partly.

- On one side, in fact, the traditional doctrine considers damage as something further and different with respect to the lesion, to be proved in autonomous way;
- on the other side, it is noticed that damage coincides in the substance with the lesion of protected interest and does not have conceptual autonomy.

The rule of the TU provides, anyway, a piece of information on the damage features, linking it to the concepts of alteration, deterioration and destruction, that would seem to set up a damage crime, even if for jurisprudence art. 18 protected by itself the lesion of environmental good.

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- Doctrine and jurisprudence do not agree as to the patrimonial or not patrimonial nature of such damage typology.

- On one side there is the opinion of Constitutional Court constitutional court no. 641/1987 cit., which peremptorily stated that the environmental damage is certainly patrimonial.
- The opposite opinion denies patrimonial value to the damage, in consideration of the fact than the environment is not for sale, and for this reason not liable to a sale evaluation according to the market prices, because it must be considered the usage value of the good.

A support in favour of the large possibility of recognizing also the not patrimonial damage can be in the recall than art. 300 makes to utilities assured by the environmental good, which can be economical, but also not patrimonial: please think of the consequences of the impossibility to enjoy an environmental beauty or enjoy a clean sea.

Such entry of damage, not liable of economic evaluation, will be possible to enforce by public subjects, the associations or private subjects by the ordinary judge in case of direct undergone and refundable damages according to the ordinary civil law tools.

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The sentence no. 554/2007

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to participate in the procedure according to art. 91 of the Italian code of criminal procedure, stated that it had not been notified of the dismissal decision as it was done in favour of the victim according to art. 408 of the code of criminal procedure by environmental organisations in criminal proceedings.

The case gave the Court the opportunity to specify the role playe

The environmental organisation, believing that it was entitled

Lesson 3

The class action in legislative decree n. 152/2006

The Court of Cassation stated that according to consolidated domestic case-law, environmental associations are entitled to bring an action in order to be awarded for environmental damages.
(Cassazione penale, sez. III, 7 April 2006, n. 33887)
-Environmental associations they may also bring a civil action in criminal proceedings.
- whenever they represent environmental interests ('collective legitimate interests') grounded on specific territory.
- even if they are not inserted in the list of recognized entities by the Ministry of the Environment according to art. 13 of the law in question.

- could intervene in criminal proceedings, but only upon consent of
- (and exercising the same powers of) the victim person, according to
- art. 92 of the code of criminal procedure.

- since the non-profit organization did not legitimately intervene in
- the criminal procedure in question, the Court of Cassation stated
- that — absent the consent of the victim person — "Verdi Ambiente
- e Società ONLUS" was not entitled to the notification of the dismissal
- decree and consequently dismissed the claim.

4.

the introduction of class action in Italy

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4.1.

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The legitimation to act, however, is contemplate only and exclusively to associative consumers and users forms.

Such solution, is actually places beyond a political address really aimed at the safeguard of the rights of the citizen, favouring the intervention of the associations with safeguard of the right of the consumer and excluding a group of citizens such as workers, disabled people and damaged ones from environmental damage, who could also access the institute of class actions.
constitutional principles articulated by article 24 excluding the possibility of proposing a class action to individuals or groups of individuals, not joined to consumers and users associations.
The solution at last is in contrast with the elementary

It would be better promoting a discipline, not limited exclusively to work inside politics of association of the consumers and some users, but a discipline which ensures the access to the justice, by means of the tool of the collective compensatory action, for every claim, potentially executable in representative form.

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With regard to the objective sphere, under the aspect of the identification of the collective nature of the injured right, it is exclusively referred to the concept of lesion of the rights *"of a plurality of consumers or users"*, neglecting a series of attached matters to the concept of community (such as the meaning of *"plurality*"), to the relationship between common and individual matters in the same trial, both in the activated one for the protection of a common claim than in the activated one for the protection of an individual claim, and to the conflict of the individual interests with common ones, and vice versa, which can be determined in the above-mentioned trials.

Maybe, it would be better to quantify the minimum number of common claims which legitimate the exercise of the collective action and contemplate that any way the action, if promoted as collective one, must exclude the individual interests (for which the party will always be able to act in a separate trial), and, if promoted as individual action, must avoid *"collectivizing*" that special interest, suggesting the promotion of a suitable collective action which join to, also as a matter of course, the individual action, even if previously promoted.

LESSON 4

THE JURIDICAL NATURE OF ENVIRONMENTAL ASSOCIATIONS AND THEIR STANDING TO SUE

Standing to sue of recognized Italian association: Italia Nostra

- The administrative jurisprudence initially denied enforceability of the diffuse interests from the current public affairs point of view, identifying an obstacle in the shortage of the requirement of the personality of the interest, of which to article 26 of T.U. Council of State, which refers to recourses having as object <<*an interest of individuals or minor juridical entity*>>.

- The restrictive setting of Council of State underwent a crisis exactly on matters of protection of the environmental values, which, as such, are hardly connectible to a individual subject and therefore, risk to remain without protection.
- In order to exceed the obstacle represented by the principle of the interest personality and to fulfil the pressing request for environment protection, the administrative jurisprudence modified its restrictive orientation, though not breaking off, at least formally, from the traditional principles, starting an operation of personalization of the diffuse interests referred to a few subjects and avoiding, this way, to recognize the existence of a new juridical protected position.

- The course changing was inaugurated by the Council of State with the decision no. 523 of 1970, in which it was identified the criterion, considered valid still today, of *vicinitas* or of the environmental link to the injured good, principle according to which the protection of the injured interest is exclusively up to the subject which is in a special physical spatial relation with the good which was affected by the administrative power.

- Emblematic case of torment lived from jurisprudence was that about the ecologist association
  - **"Italia Nostra"**
- At first, in fact, the Council of State recognized the legitimation of the above-mentioned association to impugning an administrative provision of a road building in a national park.

- Following, however, the intervention of the cassation, which declared the absolute jurisdiction defect of the administrative judge, the latter modified his orientation, however centring the matter on the legitimation defect to the impugning and recognizing to the judge of the legitimate interests the task to verify, case by case, if the exponential corporation was representative of the serial interests, selecting in every single hypothesis executable interests, on the basis of a few precise criteria, used still today by jurisprudence, founded on the fact that:

a) the exponential corporation had, among its purposes, the use of the good of which it was asking for protection;

b) the corporation was equipped with a stable organization, consistency and structure;

c) there was a stable environmental link between the corporation and the zone in which the collective fruition good was placed;

d) the corporation was equipped with representativeness

- This way the administrative jurisprudence accepted the legitimation of a trial also of the corporations of fact that were in possession of the above mentioned requirements, making protectable the diffuse interest which had the appearance of a collective interest.

- Also the ordinary judge dealt with the protection of the diffuse interests, following, however, a different direction, based on the split of the diffuse interest in a plurality of individual interests referring to every single component of the undifferentiated community and executable through the tool of the subjective right.

In particular, with the well-known decision no. 1463 of 1979, issued exactly on environmental matters, the Cassation Court distinguished between indivisible collective goods (such as, for instance, the public order), towards which it is not configurable a differentiated fruition and divisible collective goods, susceptible of directed fruition by the individuals.

With another decision of the same year, the Cassation Court, though preserving the link between right to health and right to environment, modifies the restrictive setting of the previous decision, recognizing right to environment as executable right from every subject, exceeding the narrow proprietary schemes.

The Supreme Court referred to another right of special interest in the environmental matter, interpreted what right to healthy environment, having a meta-individual dimension, but anyway as configurable as subjective right, to reach, then, in other decisions, the setting up of an autonomous right to the environment as personality right, separated by right to health.

- On the other hand jurisprudence recognized that, also in the system which was previously in force with respect to article 18 of the law no. 349/1986, the constitution and the general rule of article 2043 c.c. were preparing an organic complete protection to the environment.

- The accounting judge, in fact, sees the environment protection matter not in a private individualistic optics (as the cassation did) but, it follows an current public affairs setting, which takes into account the collective damage profiles to the environment, interpreted as community good, whose protection, as such, is up to the state, as maximum exponential corporation of the same community.

- The environment good is, therefore, seen as common good, whose lesion involves a public damage, susceptible of indemnity independently of the individual interest lesion, even if hooked to a patrimonial conception.

- The Court of Accounts gets to this through an extent of the notion of revenue damage, widened to the more general interest lesion, of eminently public nature (interesting all citizens' category) provided that susceptible of economic evaluation.

2. Standing to sue of committees and associations: The case of a not recognized association:

- The administrative cases promoted against the project of revamping of the cement factory Italcementi of Monselice by The Committees "Lasciateci respirare" and "E noi?", and by some individual citizens, closed with the rejection of the theses of the recurring ones, but with the confirmation of the committee legitimation to turn to the administrative judge for the environment protection (decision of the Council of State no. 1185 of 29.02.2012, that reformed the sentence of the Venetian TAR no. 803 of 9.5.2011).

- This recognition provides the opportunity to remember the jurisprudential and normative evolution which regarded this theme and try to outline the principles we came to.

- The matter of the possibility for the associations, established by reason of environmental protection, to resort to the judicial authority against administrative acts considered prejudicial to the environment, emerged, first of all, in jurisprudential court, especially during the 70s of the last century

- The problem to be faced was regarding, principally, the adaptation of typically prepared categories and tools of a trial for the individual interest protection, to protection requests moved forward by subjects who were expression of a lot of people and having for object enjoyable goods by the community.

An answer which marked the next jurisprudence trend came from the decision of the Plenary Meeting of the Council of State no. 24 of 19.10.1979, that (though denying, in that case, to "Italia Nostra" association the exponential function of the concrete interest of the local community to the protection of an area included in the national park of Abruzzo) affirmed that the interest of the belonging to an installed community in a determinate environment towards provisions which affect the definite arrangement of this, interest defined "diffuse", it is protectable before the administrative jurisdiction; and clarified that this interest is executable also by an association, as social formation (article 2 of the Constitution), also if not recognized, provided that the protection of that specific environment is included among its purposes.

- Two criteria led the recognition of the legitimation of the associations to promote the recourses: the so-called *vicinitas*, that is the localization of the subject who assumes oneself as bearer of the diffuse interest in the territory on which the administrative provision produces effects, that is one's specific link to that determinate environment (in defect, it was recognized to the associations the title of an interest of pure fact that legitimates them to intervene in a leaning judgement to support one of main parties of dispute); the faculty attributed by the law to intervene in the proceeding, by which the legitimation was made descend to impugn the act that conclude it.

  - To this course of action of the community and national legislator the consolidating of the orientation went along in jurisprudence, minority in origin, favourable to attribute the legitimation to impugn prejudicial acts to the environment also to associations, not legitimated by the law no. 349/1986.

- it is confirmed that the legitimation has to be recognized on the escort of a verification to perform case by case in relation to an indicator plurality: statutory aims; bigger or smaller existence, in the time, of the corporation; proved sphere or degree of representativeness; initiatives or undertaken actions for the protection of the interests of which it is bearer; participation to administrative proceedings; area of action linked to the zone in which the good to be protected is found

- The legitimation of committees temporarily instituted, with specific and limited purpose, is instead excluded, when they constitute pure projection of individuals' interests that are part of them and therefore that are not bearers in a continuative way of deep-rooted diffuse interests in the territory;
- To the gradual consolidation of the orientation that attributes the legitimation to act also to the local associations, not recognized by the Ministry of the Environment, it seems to help a progressive extent of the tutelage object.

In truth, also the interpretation of the concept of "environment" seems to be ripening an evolution: from a more strict and restrictive conception, according to which actions for the protection of the environment would be opportune only in respects for acts which directly influence goods which the law or the administration specifically and expressly recognizes an environmental value; to a "widened concept", that includes in the environmental interests, also the country cultural, historical and artistic property protection.

- To conclude, as to the legitimation to act of the associations which have as their aim the protection of the environmental interests, it seems to be justified to think that a favourable orientation is by now well-established, provided that are not extemporaneous aggregations or representative teams and the goods that they intend to protect have an environmental valence, even if by extension.
- It is rather to be wished that a similar evolution can happen even in the sensitivity with which the Administrative Judge faces the merit of the disputes moved by the associations, since the role and the value that the Constitution give to the environment is not always recognized

3. The legittimation of a citizens' organization: the case of a contested rubbish incinerator.

- An interesting case regards the annulment of the environmental integrated authorization for a rubbish incinerator.

The matter was submitted for the exam to TAR BOLOGNA (TAR Bologna, sez I, November 26th, 2007, no. 3365) in this case TAR for Emilia Romagna - Bologna had been called to pronounce itself as to the legitimacy of a determination of the Province of Modena with which an integrated environmental authorization was released for the system of incineration of urban, special not dangerous rubbish, and sanitary not dangerous and dangerous rubbish to only infectious risk with capacity higher than 3 tons per hour situated in Council of Modena.

- While granting the promoted appeals against the farmyard AIA provision by WWF associations and Italia Nostra, and by a committee of local and resident private citizens near the system, the Emilian administrative judge with the sentence no. 3365/2007 had opportunity to perform a few significant considerations on matters of legitimation of a trial, and to pronounce himself on themes of indisputable interest and topicality, as it is that of the integrated environmental authorization and its relationships with the environmental impact evaluation.

3.1. The legitimation of a trial of the committees and some private citizens to impugn L' A.I.A.

- 3.1.1. - As to the legitimation of a trial of the environmental associations established we must remember that at first the administrative jurisprudence oriented in the sense to recognize the legitimation to impugn the administrative provisions possibly prejudicial to the environment to the only protectionist associations expressly identified with Ministerial Decree, in accordance with the combined disposed of articles 13 and 18 of Law no. 349 of 1986

- Soon, however, among the administrative judges it is opportunely consolidated the orientation directed to recognize the legitimation to impugn administrative acts for the protection of the environment to local associations, independently of their juridical nature, provided that:

- a) statutorily pursue environmental protection objectives in a not occasional way;

- b) have an adequate degree of representativeness and stability;

- c) have an afference area connectable to the zone in which the injured collective fruition good is placed.

- So, the Bolognese administrative judges in the pronunciation noted there seem really to have adhered to the jurisprudential orientation last mentioned and, acknowledging the above-mentioned features (not by occasion, adequate representativeness, stable territorial localization) to the recurring committee, recognized the undoubted legitimation of a trial.

- 3.1.2. - As regards the legitimation of a trial of the private citizens the reference to the mentioned decision no. 1830/2007 of Sez V of the Council of State, in which the jurisprudential orientation according to which the pure proximity is not sufficient to determine the legitimation to act, appears once more significant.

So then, TAR Bologna supplied concrete application to the above-mentioned principles enunciated by the Council of State recognizing the legitimation of a trial (even if only to a party) of some private recurring citizens who had supplied the legitimacy of own interest to the recourse through the presentation of a relation concerning the distances of the property and residences of the recurring ones from the system and the estimated building market value reduction resulting from the working of the same system; relation which, as such, is proved to be suitable to highlight a profile of concrete prejudice which the interested subjects could have undergone for effect of the execution of the impugned provision.

3. 2. Relationships between V.I.A. and A.I.A.

- Even in the essentiality of the formulation, the pronunciation in comment contains significant affirmations of principle in theme of relationships between evaluation environmental of environmental impact and integrated environmental authorization, intended to have even trial consequences.

It is a provision which specifically influences the managerial system aspects, while the V.I.A. procedure influences more properly the localization and structural profiles.

So, - here is the consequence on the trial plan - the same integrated authorization can be autonomously impugned by who intends to act against prejudices deriving from the AIA farmyard system working, so regardless of the preventive impugning of the pronunciation of VIA whose omission does not involve the recourse inadmissibility.

3.3. Necessary evaluation of the system in the procedure of AIA farmyard in terms of "site"

- Finally, with specific reference to the waste disposal system, subject of the controversy, it must be remembered that article 2, paragraph 1, of Legislative Decree 133/05 defines incineration system "any unity and technical, fixed or mobile, equipment, destined to the rubbish heat-treating at the draining purposes, with or without recovery of the heat produced by the combustion".

The definition includes the site and the whole incineration system, including the incineration lines, the acceptance of the incoming rubbish in the factory and the storage, the in-place pre-treatment installations, the systems of rubbish fuel supply, of auxiliary fuel and combustion air, the heat generators, the equipment of treatment, handling and in-place storage of the reflowing waters and rubbish resulting from the incineration process, the equipment of treatment of the gaseous effluents, the fire-places, check devices and systems of various operations and of recording and monitoring of the incineration conditions".

- So, in light of the above-mentioned definitions, TAR Bologna, in consideration that the activity of a physical chemical treatment system of the liquid rubbish outgoing from the incinerator was structurally and functionally connected to the main activity of rubbish incineration so that the same one was setting up as integral part of the same incineration system (ex article 2 lett d Legislative Decree no. 133/2005), concluded that the farmyard procedure should necessarily have also interested, in addition to the system of incineration strictly interpreted, the system of physical chemical treatment situated in the same site and managed by the same manager.

4. A first class action example

- A first class action example in Italy regards the Court of Rome which declares admissible the first class action for the public administrator polluted water.
- The College of the Court of Rome, with two twin ordinances, deposited on May 2nd, 2013, declared admissible the class action promoted by a few citizens from Molise (and supported by consumers' associations) towards the Councils of Petacciato and Montenero di Bisaccia.

The action had been started following phenomena of heavy drinkable water pollution with trialometan (highly carcinogenic agent), in the area of Molise between the 2010 and the 2011.

- With the above-mentioned ordinances The Court of Rome, for the first time in Italy, considered well grounded the request of sentence to the repayment, for all the service, to users because those peoples having not been able to enjoy the water service for the months of December 2010 and January 2011
- The ordinances of the Court of Rome open some new protection spaces for many citizens who, without the tool of class action, had passively to suffer, in these years, pollution phenomena and to equally pay the water canon.

LESSON 4

THE JURIDICAL NATURE OF ENVIRONMENTAL ASSOCIATIONS AND THEIR STANDING TO SUE

Standing to sue of recognized Italian association: Italia Nostra

- The administrative jurisprudence initially denied enforceability of the diffuse interests from the current public affairs point of view, identifying an obstacle in the shortage of the requirement of the personality of the interest, of which to article 26 of T.U. Council of State, which refers to recourses having as object <<*an interest of individuals or minor juridical entity*>>.

- The restrictive setting of Council of State underwent a crisis exactly on matters of protection of the environmental values, which, as such, are hardly connectible to a individual subject and therefore, risk to remain without protection.
- In order to exceed the obstacle represented by the principle of the interest personality and to fulfil the pressing request for environment protection, the administrative jurisprudence modified its restrictive orientation, though not breaking off, at least formally, from the traditional principles, starting an operation of personalization of the diffuse interests referred to a few subjects and avoiding, this way, to recognize the existence of a new juridical protected position.

- The course changing was inaugurated by the Council of State with the decision no. 523 of 1970, in which it was identified the criterion, considered valid still today, of *vicinitas* or of the environmental link to the injured good, principle according to which the protection of the injured interest is exclusively up to the subject which is in a special physical spatial relation with the good which was affected by the administrative power.

- Emblematic case of torment lived from jurisprudence was that about the ecologist association
  - **"Italia Nostra"**
- At first, in fact, the Council of State recognized the legitimation of the above-mentioned association to impugning an administrative provision of a road building in a national park.

- Following, however, the intervention of the cassation, which declared the absolute jurisdiction defect of the administrative judge, the latter modified his orientation, however centring the matter on the legitimation defect to the impugning and recognizing to the judge of the legitimate interests the task to verify, case by case, if the exponential corporation was representative of the serial interests, selecting in every single hypothesis executable interests, on the basis of a few precise criteria, used still today by jurisprudence, founded on the fact that:

a) the exponential corporation had, among its purposes, the use of the good of which it was asking for protection;

b) the corporation was equipped with a stable organization, consistency and structure;

c) there was a stable environmental link between the corporation and the zone in which the collective fruition good was placed;

d) the corporation was equipped with representativeness

- This way the administrative jurisprudence accepted the legitimation of a trial also of the corporations of fact that were in possession of the above mentioned requirements, making protectable the diffuse interest which had the appearance of a collective interest.

- Also the ordinary judge dealt with the protection of the diffuse interests, following, however, a different direction, based on the split of the diffuse interest in a plurality of individual interests referring to every single component of the undifferentiated community and executable through the tool of the subjective right.

In particular, with the well-known decision no. 1463 of 1979, issued exactly on environmental matters, the Cassation Court distinguished between indivisible collective goods (such as, for instance, the public order), towards which it is not configurable a differentiated fruition and divisible collective goods, susceptible of directed fruition by the individuals.

With another decision of the same year, the Cassation Court, though preserving the link between right to health and right to environment, modifies the restrictive setting of the previous decision, recognizing right to environment as executable right from every subject, exceeding the narrow proprietary schemes.

The Supreme Court referred to another right of special interest in the environmental matter, interpreted what right to healthy environment, having a meta-individual dimension, but anyway as configurable as subjective right, to reach, then, in other decisions, the setting up of an autonomous right to the environment as personality right, separated by right to health.

- On the other hand jurisprudence recognized that, also in the system which was previously in force with respect to article 18 of the law no. 349/1986, the constitution and the general rule of article 2043 c.c. were preparing an organic complete protection to the environment.

- The accounting judge, in fact, sees the environment protection matter not in a private individualistic optics (as the cassation did) but, it follows an current public affairs setting, which takes into account the collective damage profiles to the environment, interpreted as community good, whose protection, as such, is up to the state, as maximum exponential corporation of the same community.

- The environment good is, therefore, seen as common good, whose lesion involves a public damage, susceptible of indemnity independently of the individual interest lesion, even if hooked to a patrimonial conception.

- The Court of Accounts gets to this through an extent of the notion of revenue damage, widened to the more general interest lesion, of eminently public nature (interesting all citizens' category) provided that susceptible of economic evaluation.

2. Standing to sue of committees and associations: The case of a not recognized association:

- The administrative cases promoted against the project of revamping of the cement factory Italcementi of Monselice by The Committees "Lasciateci respirare" and "E noi?", and by some individual citizens, closed with the rejection of the theses of the recurring ones, but with the confirmation of the committee legitimation to turn to the administrative judge for the environment protection (decision of the Council of State no. 1185 of 29.02.2012, that reformed the sentence of the Venetian TAR no. 803 of 9.5.2011).

- This recognition provides the opportunity to remember the jurisprudential and normative evolution which regarded this theme and try to outline the principles we came to.

- The matter of the possibility for the associations, established by reason of environmental protection, to resort to the judicial authority against administrative acts considered prejudicial to the environment, emerged, first of all, in jurisprudential court, especially during the 70s of the last century

- The problem to be faced was regarding, principally, the adaptation of typically prepared categories and tools of a trial for the individual interest protection, to protection requests moved forward by subjects who were expression of a lot of people and having for object enjoyable goods by the community.

An answer which marked the next jurisprudence trend came from the decision of the Plenary Meeting of the Council of State no. 24 of 19.10.1979, that (though denying, in that case, to "Italia Nostra" association the exponential function of the concrete interest of the local community to the protection of an area included in the national park of Abruzzo) affirmed that the interest of the belonging to an installed community in a determinate environment towards provisions which affect the definite arrangement of this, interest defined "diffuse", it is protectable before the administrative jurisdiction; and clarified that this interest is executable also by an association, as social formation (article 2 of the Constitution), also if not recognized, provided that the protection of that specific environment is included among its purposes.

- Two criteria led the recognition of the legitimation of the associations to promote the recourses: the so-called *vicinitas*, that is the localization of the subject who assumes oneself as bearer of the diffuse interest in the territory on which the administrative provision produces effects, that is one's specific link to that determinate environment (in defect, it was recognized to the associations the title of an interest of pure fact that legitimates them to intervene in a leaning judgement to support one of main parties of dispute); the faculty attributed by the law to intervene in the proceeding, by which the legitimation was made descend to impugn the act that conclude it.

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In truth, also the interpretation of the concept of "environment" seems to be ripening an evolution: from a more strict and restrictive conception, according to which actions for the protection of the environment would be opportune only in respects for acts which directly influence goods which the law or the administration specifically and expressly recognizes an environmental value; to a "widened concept", that includes in the environmental interests, also the country cultural, historical and artistic property protection.

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LESSON 5

The future prospects of collective action on the environment

Premise

Ever since its first debut in the Italian legal landscape, the discipline of class action, dictated for the first time with. 24.12.2007, n. 244, has experienced a rulemaking and application particularly difficult, as its original version is not never entered into force and the text of article 140 bis Consumer code in a few years has been the subject of two significant changes that have profoundly reshaped the regulatory framework[1].

The enthusiasm expressed by consumer associations for the modification, following the example of the U.S. experience that erected the class action as a bulwark of protection consumeristica, is not then paid into our system one significant application, considering that in 2012 the shares class proposals before the Italian courts do

[1] The literature on this issue now recorded a significant number of writings, among which we mention, among the most recent contributions, aa.vv., The rights of the consumer and the new class action, in PG Demarchi (ed.), Bologna, 2010; S. A. Cerrato, out of tune A debut for the new Italian class action, the Bank bag and tit.cred., 2010, 5, 619 ff. G. Constantine - C. Consolo, Prime pronunciations and some fixed point on the action class, in Corr. Leg., 2010, p. 985 ff. G. Constantine, protection class action, 2009, V, 388 ff. G. D'alfonso, sub art. 140a comment in aa.vv., Commentary short consumer law, in G. De Cristofaro and A. Zechariah (dir.), Milan, 2010, 957 ff., M. De Cristofaro, The class actions "class" systematic and procedural profiles, in Resp civ. and prev., 2010, 10, 1992.

not exceed the number of twenty and the vast majority of which has not even passed the preliminary screening for eligibility.

Despite the onset of the decidedly subdued Italian class action, the purpose for which the legislature has gradually moved, from its first operations in the field, it was the desire to bring an action for damages as much as possible near to the model class U.S., outlining a tool that would be able to induce changes "virtuous" by big business and, in this way, ensure the spontaneous observance of regulations relevant for the protection of consumers and users, without the same could longer rely on the fragmentation of individual initiatives inevitably destined to ebb in a significant decrease in the number of the question of justice[2].

It is in fact this value "promotional" that captures one of the main aims that motivated the Italian legislature to introduction to article 140 bis (Consumer Code) and subsequent changes to its original version, gradually shaping the institute towards what is also the ultimate goal of U.S. class actions matrix, ie their ability to "enabling litagation" and then to create the conditions for effectively become "justiciable" even legal positions that otherwise would remain without protection[3], the disincentive for the minimum value of the dispute, or in any case for a common rejection of the experience of the case.

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[2] The class action is so even in the intention of the legislature Italian, a tool for discouraging improper behavior, thus raising the rate of spontaneous compliance with the rules on public law as the foundation of market regulation to protect consumers and users (Legislative Decree no. 09.06.2005, no. 206 cd consumer Code) and all those provisions that regulate business activities related to public services (such as. Legislative Decree. 01/09/1993, n. 285, consolidated text on banking and credit and the Legislative Decree no. 24.02.1998, n. 58, Consolidated Law on financial Intermediation).

[3] Is in the common value and purpose of the class action and collective action for damages our local, that the doctrine more properly captures the direct derivation of one from the other.
The promotional function of the class action is in fact recognized by the unanimous doctrine of particular note, with no claim to completeness, P. Fiorio, the class action in the new art. 140-bis and the goals of deterrence and access to justice for consumers, aa.vv.; Consumers rights and the new class action, in P.G. Demarchi in various authors, A. Giussani, The bulk transaction for future damage: procedural economy, conflicts of interest and deterrence of illegal conduct in the regulation of class actions, in Foro it., 1998 IV, c. 175.

It is not a coincidence that the last change in order of time made to the text of Article 140 bis (Consumer Code), it was a part of a law (Law 24.03.2012, n. 27 conversion with changes 24.01.2012 dl, n. 1) aimed at promoting the liberalization of various sectors of the Italian economy, in order to make the national market more competitive than other models of the economy, not only of European derivation.

It is quite evident fact that in an economy of scale, which is now more projected in a global dimension, the national market will become more competitive, only when each jurisdiction from acquiring valuable tools aiming at enhancing trade practices by companies and contractual increasingly fair and honest, not only in relation to its competitors, but also against users.

The gradual process of massification of today's relations of production and exchange, which in modern dynamics of the market sees opposing an indeterminate number of persons who have positions that are similar with respect to a large enterprise, has meant that modern idea was abandoned the that the existing relations between individuals could conform to a narrowly individualistic model, in terms of direct comparison between only two legal subjectivity that arise between them on an equal footing, and space is made aware that among those who often move as opposing parties in scope merchant miss you, first, an equalization of economic power.

This is even more true when you consider that the introduction of specific tools discouraging unlawful conduct on the part of companies has been more than ever indispensable in view of the fact that often the authoritative intervention of the various Authorities, and in general of the Public Administration, the U.S. experience has shown, no less than in the Italian one, not to be able to effectively and efficiently pursue these unfair and abusive behavior of companies towards the audience of consumers and investors.

The need for our system to equip themselves of new means of collective protection is also taken of acknowledging not only by the

legislature that the asymmetry of economic power between the private and the large enterprise often achieves, in terms of the process, also an asymmetry of stakes and that poses a different in terms of cost-effectiveness between the two parties in establishing or growing a given action in court.

Practical experience has shown that the individual, when is opposed in court to large enterprise, is in most cases prompted by the wish to react to an injury suffered in value usually reduced, if not small, especially in comparison with the economic return that could have the firm to continue to consciously adopt a certain behavior that is detrimental, which is indexed to the latter interest to the entire pool of adverse events that can wrap up an endless number of people.

And 'in fact clear that it is precisely the diversity of the stakes to be the main source of opportunistic behavior or abusive by the company which, in the awareness of the modest damage done to the person individually, would most probably rely on a submissive attitude from the most undisturbed and so continue to reiterate their harmful behavior.

At the same time it has become more and more space the idea that the diversity of what is involved to ensure that the company, even in the face of judicial individual initiative, is likely to decide to invest in that single process, even though they are of little value, economic resources in abundance, even if only to avoid the formation of a previous or unfavorable for it also to discourage other individual based on assumptions similar.

For its part, the individual consumer who decides to establish an action against the large firm will in any case the same is not to have to deal on equal terms, due to the fact that his propensity to invest energy and money in the proceedings, will inevitably result anchored and directly proportional to the value of the dispute.

Faced with this state of affairs, the mechanisms devised by the Italian legislature in order to rebalance the resources that each party is interested in investing in the dispute, was to provide a set of tools, which are dictated articles 37, 139, 140 and finally article 140

bis of the Consumer Code, as worded prior to the reform of class actions carried out in 2009, to encourage spontaneous aggregation of many individuals in a group exponentially, thereby allocating only for the Entity representative the legitimation of the action for the protection of interests of the entire community members organized.

This mechanism, in ruling that individuals have access to judicial protection, to recognize the promote only in the hands of the representative bodies to more individuals, selected on the basis of their qualification or for their particular size, has contributed in the first place within the process to strengthen the leading position of the individual, as arranged, before the company and, simultaneously, their economic capacity in order to meet the costs of the proceedings, the Entity representative being able to trust in the economic contribution of its participants or external funders[4].

The tool outlined entification the protection of the collective interests of the members of a class is available both for the actions of inhibitory nature and limited to the protection of interests of a collective nature (Art. 140 of the Consumer Code) as specifically aimed at stopping the perpetration of the unlawful conduct of the undertaking and to prevent the continuation or recurrence, as well as for the actions of nature accertativi the right to compensation for damages (art. 140 bis of the Consumer Code).

Only with the reform implemented with the. 23.07.2009, n. 99, and that has completely rewritten the art. 140 bis of the Consumer Code, have been provided new means of protecting mass character this time to fully compensatory in nature and not just accertativa the right to compensation, so being realized in its maximum extension for promotional purposes to the spontaneous adoption of virtuous behavior by the company.

In fact is abundantly clear as the introduction of a tool to character fully compensatory deposit and in addition to institutions aimed to obtain a preliminary to simply inhibitory character of a certain behavior illegitimate undertaking, could more fully contribute

[4] A. Bellelli, From the action inhibitory action action suits, in N. Leg. civ. comm., 2009, II, 211 ff.

to strengthen quell'avvertita need rebalance the asymmetry of economic strength between individual consumers and the enterprise, and so encourage good behavior by the latter.

In fact is that from 2009 onwards, following the example drawn from the experience of the U.S. and some countries beyond the Alps, which already had recourse to the instrument of class action, it is explicitly introduced in our system the possibility of protection of individual rights homogeneous directly by the individual and not exclusively by agencies such exponential class interests.

This new type of action, encountering no longer the limit of one pronunciation generic to compensation, so they expand up to expect a real conviction to compensation that is paid within the class action in its actual amount.

The assumption of this important amendment to Article 140 bis of the Consumer Code, was the recognition, in addition to the active legitimacy obligation on institutions exponential, the possibility also by the individual consumer, as adequately representative of the class, to promote itself the actions of a compensatory nature, it became same representative of the entire category, just like it does in the model class action inspired by North American.

The promotional purposes of class action is thereby further enhanced by the reform, without leaving the entification the interests of the class, with the attribution of legitimacy to the action on the part of the individual, provided that proper representative of the class, strengthens protection action on the part of the individual, provided that proper representative of the class, strengthens the protection of individual interests homogeneous through the possibility of ending with a real pronunciation of condemnation.

The choice that the new class action liable to culminate in a real sentence then appeared inspired by the need for procedural economy, to avoid that the protection by the courts of a plurality of identical interests indefinite was activated with an indeterminate number of initiatives individual serial aimed to the same effect, with unduly burdening the judicial system.

The new art. 140 bis of the Consumer Code moves in the direction of fact discourage individual actions against big business, still possible but uncertain outcome, to favor the aggregation of multiple individual claims and accumulation of subjective positions, thus ensuring a load alleviation work of the judges as well as the decision-uniformity within a process susceptible to potentially solve any number of individual positions.

5.1. The progressive evolution of consumer protection from the collective interests to individual rights serial.

Outlined in the evolutionary process that has undergone the instrument of mass action, what interests us here point out, is that the front of preservation of individual positions before the large enterprise has gradually strengthened, moving from a predominantly inhibitory protection to a more complete defense of a compensatory nature, parallel to move the center of gravity of the object of his protection from the collective interests to those homogeneous individual.

The class action introduced with the 2009 reform is an instrument of collective protection, place a garrison of real serial individual rights or, with more precise terminology, isomorphic, meaning those rights which they have the same configuration and conformation[5].

The last step taken by the legislature with the latest dl 24.01.2012, n. 1, converted into l. 24.03.2012, n. 27, was eventually to extend the compensation claims prepared by the action of class, not only and not only homogeneous individual rights, but also to the collective interests of consumers, as well as had previously planned before the reform introduced in 2009.

[5] M. De Cristofaro, The class actions "class" systematic and procedural profiles, in Resp Civil and prev., 10, 2010, p. 1932 ff. D. Amadei, The Italian class action for the protection of individual rights homogeneous in Giur. about, 2008, p. 940 ff.

The new wording of art. 140a, 1st co., of the Consumer Code the outcome of the last novel of 2012, says that in fact

"Homogeneous individual rights of consumers and users referred to in paragraph 2 as well as the collective interests can be protected through the class action, according to the provisions of this Article."

As highlighted through the various stories made to the rules of the class action was tried gradually to widen the range of application of the protection, correspondingly trying to squeeze as much as possible the use of individual action for damages against the individual consumer of big business.

The evolutionary path has been articulated through a series of changes, which have first expected as the collective action for damages could be brought only by the bodies of exponential type and for the protection of the interests of eminently collective, and then moved with the reform in 2009 to a real thorough assessment is in “an” than in the “quantum” of the claim can be activated independently by the individual for the protection of individual rights only homogeneous, and then finally with the last reform of 2012, to extend the ability of a single component class act for the protection of interests eminently collective[6].

It is performed in this way, the decisive step towards a complete equivalence of the model class action adopted by our legal system, and the institution born from the U.S. experience, who knows a massive application especially having regard to the protection of interests of a collective nature by individuals.

The last news article 140 bis of the Consumer Code in terms of time, however, raised among the interpreters and legal practitioners a number of doubts and uncertainties, the doctrine that still has not been able to deal fully and directly that the involvement

[6] R. Caponi, Collective actions: protected interests and procedural models of protection, in Riv. dir. proc. civ., 2008, p. 1205 ss.

of the same legal category of collective interests and corresponding models of protection as well as up to now designed in our system.

It is essential at this point to go to deepen the ontological differences that arise between the legal position of serial individual rights and the collective interests and disseminated, as the issue does not play I note simply a character classification and basic but in order to understand the scope highly disruptive of the new discipline of the class action and the different attitudes of the ways of protecting these rights.

With the term collective interests traditionally identifies the formal category of interest that relate to a community of individuals organized and to which the law attaches importance normally[7].

This is the case dell'appartenente interest in an association, a trade union, to a professional.

From the point of view of its protection the concept of collective interest revolves around the organization, relying on the needs of the joint pursuit by several parties, the needs they have in common as the public interest would be based on a sort of solidarity of interests, "when the collaboration between stakeholders allows the achievement of good, and the satisfaction of needs of all, where only one of them could not achieve the same result.[8]"

In terms of the role of aggregation of the group, the collective interests should be distinguished from diffuse interests that, like, may be relevant for our system and become the object of protection by this but, compared to those, if they differ in the 'membership of the

[7] For a more detailed analysis of the subject of widespread interests, are taken into account, among numerous references, Various Authors, The actions to protect the collective interests, Proceedings of the Conference of Studio - Pavia June 11 to 12, 1974, Padova , 1976; Various Authors, The protection of diffuse interests in comparative law (especially with regard to environmental protection and consumer protection), edited by Gambaro, Milan, 1976; M. Cappelletti, Notes on the legal protection of collective interests and disseminated in Giur. en., 1975, IV, p. 49 ff. C. M. Bianca notes on common interests, in the judicial protection of the collective interests and widespread, edited by Lanfranchi, Turin, 2003, p. 67 ff. A. Carratta, Profiles procedural protection of the collective interests and disseminated, ibid, p. 79 ff. C. Punzi, Judicial protection of common interests and collective interests, ibid, 17 ff.

[8] F. Carnelutti, General Theory of Law, and III., Rome, 1951, p. 12, which he first stated that the public interest in essence, would not be to express nothing but a solidarity of interests, so "need of one can not be satisfied if it is satisfied the need of the other, then the probability of satisfying a need is determined and compared with respect to one another. "

person holding them to a community of individuals simply because of his status.

The legal interest is called "widespread interest" precisely because of its size supra, since, from the subjective point of view, it is of interest that are received by the subjective sphere of most individuals simply because of their qualification or as considered in their particular dimension, such as that of the consumer, saver, the user environment or user of a public service.

Membership in the group of its owner entails then, from an objective perspective, that the widespread interest is expressed and if they can capture the essence only with reference to a particular group, to a certain category of persons and therefore the single who is the bearer will protect only within the group, with the result that all initiatives to promote the defense of the spread must necessarily start from the group and not by the individual who, in this sense, there is little capacity to sue.

For this reason, the interest spread is also called "adespota" because, although formally attributable to a given individual, only in the group can be identified and protected, otherwise running the risk of being confused with other personal rights of individuals.

However, in the practical administration of justice, the differentiation between common interests and collective interests fades dramatically due to the restrictive assumption in the case law to open the judicial protection of common interests as such[9].

[9] According to the well-established case-law, the various interests can be protected in court only where there has been a legislative provision which expressly provides for and then if the legislature believes that an institution representing the locus standi for the protection of the interests of the individual components the jurisprudential forming a community has determined that "the various interests are those interests which, by the inadequacy of the subject (because of its nature) to be considered by individual exclusively, related to a subject, not as an individual, but as a member of a larger collective, coincident to the limit, with the majority of citizens, thus giving rise to a plurality of similar legal situations, so an administrative decision that affects them directly and does not affect in the current legal sphere of member and therefore is not subject to challenge in court by one or more belonging to such communities as such, even if associated entities with legal personality, because these legal persons - which lacks a precise and timely legislative provision which expressly the expected - can not be given the specific exponential function of the protection of concrete interest of the individual components of a community, a condition that is a prerequisite for legitimacy to the recognition of a social formation. "(See Tar Abruzzo, sect. Aquila, 12.11.1981, n. 409, Tar in 1982, I, 242 and Tar Sicily, sect. Catania 19.05.1982, n. 402, in Tar, 1982 I, 2276).

For the recognition of protection in the process of so-called diffuse interests, and in order to avoid the risk of proposed actions by the social formations of inadequately consistency and representativeness, the dominant law requires that an explicit rule of law stating the criteria and requirements according to which social groups are entitled to act to protect interests on them are individuals belonging to the community and refer to basic goods protected by the legal system to implement art. 2 of the Constitution.

In the most recent case law does not distinguish so sharply between common interests and collective interests, as for access to judicial protection is considered necessary that the various interests assurgano to the level of real interest "collective."[10]

Among other things, according to the forming of case law, the protection of common interests tend to remain absorbed in the individual right of the individual, even though they are homogeneous with respect to that of other individuals, whenever their injury results in physical harm or asset.

The tendency of the system, as well as the address emerging case law, therefore, is to consider detected for sorting the various interests, as an integral themselves of collective rights, which are of the same time as the status of widespread and homogeneous individual, remaining so engrossed in one or the different legal category[11].

The same evolutionary line is also found in consumer matters where, in the need to be able to fully protect the "widespread interests" of consumers, it was necessary to the express prediction with state law (with the first. 30.07.1998, n. 281 and then with the

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[10] In this regard, the Lazio Regional Administrative Court in its judgment of 19.01.1983, n. 47 on the Forum. Amm, 1983 I, p. 387, stated that "the phenomenon of widespread interests concerns identically and utilities that belong inseparably to a plurality of subjects, none of which therefore has the total availability; utility such as undifferentiated can find protection in the process, provided they are customized, that is represented and managed by a body, having them made emerge from indistinct legal, propose them as their own. "

[11] In legal history there are many examples of figures created as collective or diffuse interests and then gradually rise in the scale of values and social consciousness to the glories of true individual rights.
We think in that respect the right to health and the environment, at first confused with the public interest, and then hired individual rights in constitutional significance.

consumer code) about the possibility by organizations exponential, inserted into appropriate lists, to sue for their protection, centralizing “interests of the widespread” nature to real interests of a collective nature.

Subsequently, the reform of article 140 bis implemented in 2009 and always aim to exceed the footprint individualistic assigned by our system-procedural statements to the interests and actions, it is then passed through the recognition of inhibitory protection of the interests of a collective nature by agencies exponential, to a real recognition of the possibility of protection of rights of the subjective nature serial, but only insofar as the individual, which is recognized active legitimation action, it seems as adequately representative of the interests of the entire class.

The system of actions in the field of consumer is then passed from one type of protection of collective interests and eminently feasible through inhibitory actions (Article 139 and 140 of the Consumer Code) to a type of protection purely compensatory damages, which implies recognition in chief the acting subject of a true subjective right, even though serial (art. 140 bis of the Consumer Code, new formulation).

The last stage of evolution has been to recognize the amendment of 2012, art. 140 bis the Consumer Code per individual in the class, and as long as they once again proves adequately representative of the same, the locus standi for the protection of the interests of a collective nature, with a forecast of everything new in our system[12].

[12] In fact, contrary to the unitary conceptions that lead the collective interest only to the group itself - which community-exponential entificata or entity, and as a legal entity distinct from the individual, some authors had already discussed the possibility of imputation 'collective interest for the individual persons who belong to the target group. Among them are mentioned in particular the writings of N. Jaeger, Activities procedural rules and effectively safeguard the general interests (standard), in Studies in honor of Antonio Segni, III, Milan, 1967, p. 7, where the author states that "the holders of those - the collective interests-are always and exclusively the individual natural bearers of needs that require satisfaction." Likewise, P.G. Jaeger, The social interest, Milan, 1964, p. 8, in supporting the non-homogeneity of the concepts of individual interest and collective interest, says the inability to "oppose the collective interest to the individual, attributing the first to entities other than men, because only men have needs, and also the needs that seem to belong to a social organism are resolved in needs common to all individuals who are part of it. "

There is debate however, with respect to the type of judgment obtained by the individual belonging to the class the outcome of a class action that has been proposed for the protection of an interest in nature eminently collective, and in particular whether it can be a full pronunciation of condemnation of the business enterprise to the payment of a sum already determined in its concrete amount or, rather, whether the Court should confine itself-with a preliminary generic condemnation - to ascertain violations committed by the enterprise and the consequent right to compensation for damage, then leave to another judgment its actual liquidation.

The latter possibility seems supported by Article 140 bis of the Consumer Code, which the 1st paragraph, second sentence, states that the individual member of the class to act “for the determination of liability and the condemnation to damages and refunds”.

5.2. The class action and art. 140 bis of the Consumer Code in its new formulation.

Article 140 bis of the Consumer Code, as rewritten by. 49, 1st co., L. July 31, 2009, n. 176 entered into force on 1 January 2010, but art. 49, 2nd co., it is expected to be applied retroactively to all cases substantial occurring on or after August 16, 2009.

The disposition, as well as redesigned by the legislature in 2009, presented some significant changes from the previous version, so as to involve modification of the same heading of Article 140 bis of the Consumer Code that from "collective compensatory action" is now entitled to "class action".

With the reform of 2009, we wanted to first introduce an instrument for the protection of immediate nature of liquidated damages intended to compensate for the prejudice suffered by the individual and then condemn the company to compensation for the unfair advantage that has made, and this in contrast to the original

model designed by art. 140 bis of the Consumer Code, in which the Court in the case of acceptance of the application actress was limited to determining the standard criteria for calculating the liquidation, in separate proceedings, the amounts to be paid to individual consumers or users who had joined the class action, leaving open the question about the quantification of individual rights.

The Court, but only if it were possible to the state of the case files, the limit could determine the minimum amount to be paid to each consumer or user.

The legislator has therefore a strong impact in the decisive phase of judgment expressly providing for the 12th co. art. 140 bis of the Consumer Code, that

"if granting the application, the Court shall render a judgment of conviction with which liquid, pursuant to art. 1226 cc, the final amounts due to those who have joined the class action or set the homogeneous calculation criterion for clearance. "

Through the new class action strengthens the aim of creating instruments of procedural economy and decision-uniformity within a process susceptible to potentially solve any number of individual positions.

The new art. 140 bis of the Consumer Code moves it in the direction of ab initio aggregation of multiple individual claims, presenting as an object of the process, a thorough assessment of the claim, both that in order to the “an” that in order to the “quantum” of the amount due.

Even in the system redesigned as a result of the modification in question is still remained the possibility for the judge, instead of definitively liquidate the amounts attributable to individual members, than establishing the criteria for their determination, renewing - with regard to this second eventuality - uncertainties, doctrine had already arisen in regard to the previous version of the standard, as to

whether each consumer were to the point or not to promote an individual judgment of condemnation.

Also on the active legitimacy and on the mechanism of adhesion to the action are major changes from the previous discipline and who have even closer to our national institution in the U.S..

Article 140 bis of the Consumer Code recognizes today's active legitimacy to the individual representative of a class, whether consumer or user, aligning option U.S. that, unlike the previous model homegrown, gave legal standing to consumer associations "recognized associations or committees deemed by the judge adequately representing the collective interests".

Through this fundamental change was then placed a clear distinction with regard to collective actions for cessation provided for in Articles 139 and 140 of the Consumer Code who have been entrusted, not to individual representatives of a class, but to the representative associations of consumers included in the list provided for in Article 137.

Following the reform of further dl made with 24.01.2012 Art. 140 bis of the dividing line between class actions and injunctions has, however, markedly attenuated in the sense that the subject of compensation claims in the middle of class action can now be not only the rights but also the serial homogeneous collective interests like the actions planned to art. 139 and 140 of the Consumer Code.

In fact, according to the previous text of art. 140 bis of the Consumer Code as well as thought-out as a result of the reform of 2009, they remained strangers to the operation of class action, the collective interests and the common interests in the sense that their protection was still confined solely to the protection inhibitory (Articles 139 -140 cod. cons.).

With the latest reform in terms of time instead we went back to the previous version of Article 140 bis before the reform of 2009, which reported between legal situations whose damage legitimized the activation of the class remedy the explicit reference to the

interests of "collective interests", but as said the action was posing in a totally different both for the type of pronunciation obtainable, which was mere condemnation, both from the side of the active entitled to its promoting[13].

Following the 2009 reform and the introduction of the right of individuals to individually activate the class action to enforce individual positions, said return to the collective interests has had eventually turned into “rights of a plurality of consumers or users” .

Article 140 bis of the Consumer Code in its previous formulation then placed at the core of the protection of the individual right of a uniform plurality of consumers or users, while today the class action was speaking not only to protect individual rights but also the collective interests of consumers.

Also in terms of the mechanism of action of class membership, there is a significant change from the previous system in force before the reform of 2009.

Once the proposed action by the individual promoter and after the same has been recognized adequately representing the interests of the class as part of the initial screening for eligibility of the action, the individual consumer belonging to the class in order to benefit from the promoted (interruption of the limitation, the formation of a writ of execution to obtain the damages in the absence of an individual judgment), it must demonstrate its willingness to join the action.

Our system is inspired by the principle of "exclusivity" of the class action in the sense of non-repeatability of additional shares of class so once the first proposal "are not considered fit more class actions on the same facts and against the same company after the

[13] After all, it was also stated in the literature including M. Gorgons, The eligibility of class action between fixed points and ambiguity, Resp Civil and prev., 2011, 5, 1099 ff., that the original dimension "collective" class action was not finally abolished even with the 2009 reform of the species where the art. 140 bis of the Consumer Code requires that the promotion of the class's response to the "appearance" of protection of an interest of the class, a requirement to sift through now in the preliminary filter of admissibility of the action.
Somehow advised of the possibility of protection by the individual in the class also has an interest of a collective nature.

expiry of the deadline for joining assigned by the court under the 9th paragraph "(art. 140 bis, 14th co., cod. cons.).

In the field of class action exists so the rule of uniqueness and dell'irripetibilità of judgment for each individual class of shares serial, so once the first proposed class action will be precluded from engaging in other actions, all that will remain blocked due to the pronunciation of lis pendens.

The relief carries with it the further consequence that, and once the final judgment in relation to the first action, this decision will play enforceability, not all members of the class, but only in respect of those members, who will not be therefore no longer possible to start a second collective action, having now finally consumed against them the possibility of its exercise.

In fact, pursuant to art. 140 bis, 14th co., of the Consumer Code

"Final judgment in the judgment ago was also against the members. It is without prejudice to individual actions of those who do not adhere to collective action".

As a further corollary of the principle of exclusivity also provides for specific rules regulations regarding the required meeting, ex officio or upon reinstatement of further action - while always classy - which are pending before the deadline set by the court for declarations of accession[14].

The opportunity to say that the need to be incentivized the maximum number of participants possible through adequate advertising of collective action in the terms and manner as shall be specified by the Court itself is guaranteed under the 9th paragraph, where it is expected that "with the order in which the Court admits the action sets the terms and conditions for the most appropriate

[14] Article 140 bis, 14th co., Cod. cons. provides that class actions proposed by the deadline for the declaration of membership "met office if pending before the same court, otherwise the court first seised shall order the removal from the role, assigning a deadline of not more than sixty days for reinstatement before the first judge"

advertising for the purposes of timely adherence of belonging to the class."

The timely performance by the promoter of the burden advertising is doubly necessitated by the fact that, for the individual will become more difficult, nuanced the opportunity to join the class action, get protection for their rights, either because the individual process (or multitude of individual processes) do not draw on the collective benefits of exercise, and because the same collective action as a result of the limited membership could lose its ability to counteract the large enterprise, often being able to stop the tendency to inertia and acquiescence.

Is intuitive fact that much wider membership the greater the ability to counteract the described asymmetry of economic strength and if the collective action should be concluded with a final judgment of rejection of collective action, individual objects very left difficult to promote individual applications, since almost never an isolated subject can succeed where he failed the collective subject.

In the case of a positive decision to the applicant, the firm unsuccessful in all probability, to prevent their repeated summoning to court in the individual, by parties that on the plane will still be persuasive to invoke judged favorable to the class, will be induced to engage in a transaction table, even those who have been strangers for lack of opt-in, the first court case.

Just the forecast about the uniqueness of the approach further the structure of collective action of article 140 bis (consumer code) of the U.S. model, while different starting point as the latter, it is focused on the opt-out system , whereas in our national dall'opt built-in, repetition is excluded by express legislative provisions.

Among other things, the above is also to hypothesize, in accordance with the principle of oneness, that the joinder of the cases should take place already at the time of the assessment by the Court of the admissibility of the action, that being focused on the adequacy of representation, will be able to see the judge to choose

between the various actors that individual until that time we proposed the introductory question.

In the case of collective actions brought after the first ruling of eligibility and within the deadline for membership, the court must simply dispose of the meeting making them necessarily converge, in the one already "endorsed".

The individual proposed actions following the meeting then lose their individuality, having to tend to avoid joinder active "collective" of various actions of different classes, and so with a double level of cumulative effect.

At the same time, however, the dominant address, from the point of view of the type of protectable rights, favors a strict interpretation of the letter of paragraph 2 of Article 140 bis of the Consumer Code under which the new procedural instrument may only be used for the protection of the rights listed in the letter. a), b), c) of the provision, but not for the protection of all rights "recognized as fundamental" art. 2 Consumer Code, and although the rights expressly listed as an object of protection afforded by the action class can be attributed to fundamental rights, but without exhausting them entirely[15].

[15] So it is with the "contractual rights", which are also covered in art. 2, 2nd co., Letter e), where he establishes the right of consumers to fairness, transparency and equity in contractual relationships. The same correspondence is also found for defective products, which is implicitly attributed to the letter. a) and b) of art. 2, 2nd co., Cod. cons., where enshrines the right of consumers to protecting the health and safety of the product quality and services.
Even the damage from unfair trade practices is considered the letter. c-bis) of the same provision if it provides for the right of consumers to the exercise of trade practices according to the principles of good faith, fairness and loyalty.
The damage from anti-competitive behavior falls not on the list of Fundamental Rights of the Consumer Code, but the resolution on EU consumer protection dating back to 1975 included in the rights of consumers also, generally, the protection of economic interests, protection in the Charter reaffirmed of Fundamental Rights of the European Union, in which well may include claims arising from a breach of competition rules which have adverse effects for consumers.
If you then run other provisions contained in the Code of consumption, these rights must be added the rights of users affected by the operation of television broadcasting activities and the rights of users resulting from the dissemination of advertisements for medicinal products for human use, with the recognition of legitimacy to promote the inhibitory action on the associations listed in the ministerial list (Article 139 cod. cons.).

The class action is an instrument that, therefore, concern only some of the basic individual rights listed in Article 2 consumer code, not all consumer rights therein.

Given the contractual nature of the request, however, remain foreign to operation of class action claims for damages in tort pursuant to art. 2043 of the Civil Code.

Will consequently be excluded from the class action proposability convictions for violation of fundamental rights of the person, if not the result of a breach of a contractual nature, as in the case of medical liability in respect of the hospital, whose nature contract has long been clearly established by settled case-law.

The exclusion of the class action for damage to health by tort, with the exception of defective products which is rather explicitly contemplated the 2nd co., letter b) of art. 140 bis. Cod. cons., appeared the most unjustified, especially in view of the fact that the U.S. into branch, it is the protection of inalienable rights guaranteed by the Constitution, to be the most significant test case for the use of the class action.

Do not be extended proposability class action as to the protection of the individual right to health, which has been adversely affected by pollution or deterioration of the environment, as well as the right to the environment is understood as a collective right to the preservation of environmental assets, appeared to most people one of the major focal points and gaps in the discipline, nell'avvertita need to ensure that all victims of an environmental disaster an efficient and prompt remedy procedural compensation.

In the face of such convincing arguments, the legislator made in 2012 art. 140 bis cod. cons. seems to have wanted to pay her attention, opening the possibility that even in their collective interests, can today find protection with the class action, the protection of which is therefore not limited only to the inhibitory action of Articles 139 and 140 cod. cons.

5.3. The class action on the environment

Problems like that the environment have highlighted the insufficiency and inadequacy of the individual for the protection of individual interests destination.

There are several reasons for this: the strong economic inequality between the injured party and the company responsible for the pollution, the evidentiary difficulties imposed on the actor frequently making the final injury suffered from the weak, the high costs and legal proceedings.

The evolution economic-industrial, that has led to a mass production, has determined a plurality of case equal, that require procedural instruments such as to ensure a saving of judicial activity.

The fragmentary nature of individual initiatives, the contradiction between the collective nature of the interests to be protected and the atomized nature of the action brought, as well as the urgency of a ready overcoming the shortcomings of our system have led to state the need to take into account the experience of the class action.

At the moment it is believed that the class action is not operated for the environmental damage because it is the provision of the article 140 bis to exclude.

In fact, a careful reading of the differences, summarized above, between old and new collective action highlights the gap larger, and perhaps more seriously, the new provisions of art. 140 bis: the preclusion of class action for unlawful extracontractual against the eligibility, exclusively, for the contractual rights of consumers and users.

The legislature, in fact, did not consider that the procedural economy could reach its maximum expression by introducing the class action for the tort, which, currently, are protected only through

thousands of micro proceedings instituted, from time to time, in different courts.

The exclusion is even more non-trivial if it is contextualized in environmental matters.

The right environment is certainly counted among the fundamental rights of the person.

Yet in the Constitution (which - it should not be forgotten - reflects the culture of the forties of the twentieth century), you do not find an express reference to the environment and its protection, as it lies, instead, in Article 66 of the Portuguese Constitution of the 1976 Article 45 of the Spanish Constitution of 1978, Articles 72 and 73 of the Slovenian Constitution of 1991.

Yet the environment is a transversal value in the legal system that requires adequate protection, as primary for the well being and development of the human person.

To find a constitutional basis to environmental protection,

- One side has interpreted the wording of Article 9 remarkably extensive, expanding the meaning of the term "landscape" contained therein;

- On the other hand, it is extracted from the right to health generally understood (and protected by Article 32) the right to a healthy environment.

In fact, art. 32 of the Constitution is now considered fundamental for setting the right environment.

The binding value of this rule is now definitively acquired through cultural study of the indissoluble connection between individual health and environmental health: health, ie, can not be separated from the local context and environment in which we live, with the result that all the attacks to 'environment are in a more or less direct' injury 'of health, individual and collective, understood, according to the World Health Organization:

<< State of complete physical, mental and social and not merely the absence of disease or infirmity >>[16].

Doing so, the class action would also be characterized by the constitutional rights protected.

The Constitutional Court has defined indirectly the rights of the environment (in the judgment of 28 May 1987 no. 210) starting from the definition of the damage done to this right as "injury caused by any negligent or voluntary activity, the person, animals, plants and natural resources (water, air, land, sea), which constitutes an offense to every citizen who has the right, individually and collectively.

These are values that the Constitution provides in substance and guarantees (Articles 9 and 32 of the Constitution), be considered as such, the rules of forecasting need of a more modern interpretation. "

The issue of compensation for the damage to the environment is intrinsically linked to the notion of right to the environment and to its legal form.

In this regard, the Constitutional Court again denied (in the judgment of 30 December 1987 no. 641) that the environment can be "subject to a subjective situation of appropriative type: but, belonging to the category of so-called free goods, can be enjoyed by the community and the individual.

Out different forms of enjoyment afforded statutory protection which, moreover, is further support in the constitutional precept that circumscribes private economic initiative (Article 41 of the Constitution) and that recognizes the right of ownership, but with the limits of utility and social function (Article 42 of the Constitution).

Is also specifically provided that the good may suffer damage. It is identified as impaired (environment), that is, alteration, damage or destruction occasioned by the facts of commission or omission, intentional or negligent, violators of the laws of protection and for the protection and the measures adopted on the basis thereof.

[16] AA. VV., Environmental protection in the Constitution, in the five-year economic program and in European documents, in Giust. and the Constitution, V, 1971 55.

The responsibility that contracts are properly included within the scheme of protection and tort (art. 2043. Civ.).

It is not easy to solve the problem of membership of an asset for its intangible nature, such as the environment and then identify what the person who owns the right to compensation if the right environment suffers an injury.

The environment is a multi-dimensional, so that "the environmental damage has a threefold dimension: personal (as an infringement of the fundamental right of every human environment), social (as an infringement of the fundamental right in the social environment in which it develops the human personality, art. 2 of the Constitution); public (as an infringement of the right and duty of the public central and local authorities with specific environmental responsibilities). "

In 2008, the Supreme Court has emphasized the nature of the non-pecuniary damage to the environment, based on the consideration that the impairment of the environment transcends the mere prejudice to individual assets derived from assets that are part of it, as the public good must be considered as a unit for the value in use by the community as a key determinant of the quality of life of the person (judgment of 10 October 2008 n. 25010).

The financial nature of the damage to the environment does not of itself mean that serious pollution, as well as damage to the environment, can cause other forms of compensable damage.

You can, for example, believe that, by such phenomena, one can derive that the Court has defined as existential damage, namely the non-pecuniary damage arising from injury to person's values guaranteed by the Constitution.

If you think that the right environment to be part of such rights, you must reach the conclusion that the lesion of the right to the environment can also lead to non-pecuniary damage those that are defined as existential.

The right to compensation for such damage certainly competes pollution or to individuals who have been harmed by the

ecological disaster (being forced, for example, to change accommodation: see the judgment of the Court of Appeal of Milan on 15 April 1994, no. 667, on the well-known case "Seveso").

But this right may also be given to collective action.

But there are those who believe that such remedies for the protection, in areas falling cd. "Border line", it is necessary to identify the basis of liability (contract / tort claim) of each offense to ascertain the eligibility of the action.

In essence, if the offense can be "contracted" the protection applies, otherwise is excluded.

Significant in this regard is the finding of the Court of Appeal of Florence, in the order of 14.11.2011, where in specifying that the class action is admissible only in the presence of a contractual relationship formalized and may be brought only in the presence of a contractual relationship directly subsisting between the parties, has not viewed the exception with which the applicants were trying to bring the case deducted (whether in tort) to the figure of the cd. "Social contact", ie to the figure with which it indicates a relationship between two or more subject which, while devoid of contractual regulation, involves the emergence of a number of duties of collaboration, aimed at safeguarding the respective positions and the corresponding expectations.

It is therefore necessary to further a new legislative intervention aimed at the reintroduction objective in the context of the protection of the tort class even with the consequence that would find refreshment "class" all those to whom someone else has caused undue damage (by reason of art. 2043 cc).

The premises are all there: the decision of Turin asbestos (which recognized the disaster and willful negligence), or the final ruling on the case "Ilva" (which found entries harassing and harmful dust ... greater environmental contamination), which are not an example of opening a new page as regards, more generally, environmental crimes and related environmental issues.

More specifically, referring to the case "Ilva": if the entries harassing and harmful dust create a damage to the environment and the surrounding residents because they do not enable them to act together, reducing the time of action, disrupting some “lawer's lobbies” and break down costs of justice?

As things stand, it is not clear how it is still possible to exclude from protection under Article 140 bis of the consequences of such actions and behaviors considered that the environmental damage already receives protection from art. 18 of Law no. 349 of 1986 and by Legislative Decree no. 152/2006 and subsequent amendments.

LESSON 5

The future prospects of collective action on the environment

1. THE NEW RULES OF CLASS ACTION IN ITALY

Ever since its first debut in the Italian legal landscape, the discipline of class action, dictated for the first time with. 24.12.2007, n. 244, has experienced a rulemaking and application particularly difficult, as its original version is not never entered into force and the text of article 140 bis Consumer code in a few years has been the subject of two significant changes that have profoundly reshaped the regulatory framework.

Despite the onset of the decidedly subdued Italian class action, the purpose for which the legislature has gradually moved, from its first operations in the field, it was the desire to bring an action for damages as much as possible near to the model class U.S., outlining a tool that would be able to induce changes "virtuous" by big business and, in this way, ensure the spontaneous observance of regulations relevant for the protection of consumers and users, without the same could longer rely on the fragmentation of individual initiatives inevitably destined to ebb in a significant decrease in the number of the question of justice.

It is in fact this value "promotional" that captures one of the main aims that motivated the Italian legislature to introduction to article 140 bis (Consumer Code) and subsequent changes to its original version, gradually shaping the institute towards what is also the ultimate goal of U.S. class actions matrix, ie their ability to "enabling litagation" and then to create the conditions for effectively become "justiciable" even legal positions that otherwise would remain without protection, the disincentive for the minimum value of the dispute, or in any case for a common rejection of the experience of the case.

2. The progressive evolution of consumer protection from the collective interests to individual rights serial.

Outlined in the evolutionary process that has undergone the instrument of mass action, what interests us here point out, is that the front of preservation of individual positions before the large enterprise has gradually strengthened, moving from a predominantly inhibitory protection to a more complete defense of a compensatory nature, parallel to move the center of gravity of the object of his protection from the collective interests to those homogeneous individual.

The class action introduced with the 2009 reform is an instrument of collective protection, place a garrison of real serial individual rights or, with more precise terminology, isomorphic, meaning those rights which they have the same configuration and conformation.

The last step taken by the legislature with the latest dl 24.01.2012, n. 1, converted into l. 24.03.2012, n. 27, was eventually to extend the compensation claims prepared by the action of class, not only and not only homogeneous individual rights, but also to the collective interests of consumers, as well as had previously planned before the reform introduced in 2009.

The evolutionary path has been articulated through a series of changes, which have first expected as the collective action for damages could be brought only by the bodies of exponential type and for the protection of the interests of eminently collective, and then moved with the reform in 2009 to a real thorough assessment is in "an" than in the "quantum" of the claim can be activated independently by the individual for the protection of individual rights only homogeneous, and then finally with the last reform of 2012, to extend the ability of a single component class act for the protection of interests eminently collective.

It is performed in this way, the decisive step towards a complete equivalence of the model class action adopted by our legal system, and the institution born from the U.S. experience, who knows a massive application especially having regard to the protection of interests of a collective nature by individuals.

It is essential at this point to go to deepen the ontological differences that arise between the legal position of serial individual rights and the collective interests and disseminated, as the issue does not play I note simply a character classification and basic but in order to understand the scope highly disruptive of the new discipline of the class action and the different attitudes of the ways of protecting these rights.

- The environment good is, therefore, seen as common good, whose lesion involves a public damage, susceptible of indemnity independently of the individual interest lesion, even if hooked to a patrimonial conception.

- The Court of Accounts gets to this through an extent of the notion of revenue damage, widened to the more general interest lesion, of eminently public nature (interesting all citizens' category) provided that susceptible of economic evaluation.

THE COLLECTIVE INTERESTS

With the term collective interests traditionally identifies the formal category of interest that relate to a community of individuals organized and to which the law attaches importance normally.
From the point of view of its protection the concept of collective interest revolves around the organization, relying on the needs of the joint pursuit by several parties, the needs they have in common as the public interest would be based on a sort of solidarity of interests, "when the collaboration between stakeholders allows the achievement of good, and the satisfaction of needs of all, where only one of them could not achieve the same result.

THE DIFFUSE INTERESTS

In terms of the role of aggregation of the group, the collective interests should be distinguished from diffuse interests that, like, may be relevant for our system and become the object of protection by this but, compared to those, if they differ in the 'membership of the person holding them to a community of individuals simply because of his status.

The legal interest is called "widespread interest" precisely because of its size supra, since, from the subjective point of view, it is of interest that are received by the subjective sphere of most individuals simply because of their qualification or as considered in their particular dimension, such as that of the consumer, saver, the user environment or user of a public service.

However, in the practical administration of justice, the differentiation between common interests and collective interests fades dramatically due to the restrictive assumption in the case law to open the judicial protection of common interests as such.
For the recognition of protection in the process of so-called diffuse interests, and in order to avoid the risk of proposed actions by the social formations of inadequately consistency and representativeness, the dominant law requires that an explicit rule of law stating the criteria and requirements according to which social groups are entitled to act to protect interests on them are individuals belonging to the community and refer to basic goods protected by the legal system to implement art. 2 of the Constitution.

In the most recent case law does not distinguish so sharply between common interests and collective interests, as for access to judicial protection is considered necessary that the various interests assurgano to the level of real interest "collective.
The tendency of the system, as well as the address emerging case law, therefore, is to consider detected for sorting the various interests, as an integral themselves of collective rights, which are of the same time as the status of widespread and homogeneous individual, remaining so engrossed in one or the different legal category.

The reform of article 140 bis implemented in 2009 and always aim to exceed the footprint individualistic assigned by our system-procedural statements to the interests and actions, it is then passed through the recognition of inhibitory protection of the interests of a collective nature by agencies exponential, to a real recognition of the possibility of protection of rights of the subjective nature serial, but only insofar as the individual, which is recognized active legitimation action.

The system of actions in the field of consumer is then passed from one type of protection of collective interests and eminently feasible through inhibitory actions (Article 139 and 140 of the Consumer Code) to a type of protection purely compensatory damages, which implies recognition in chief the acting subject of a true subjective right, even though serial (art. 140 bis of the Consumer Code, new formulation.

The last stage of evolution has been to recognize the amendment of 2012, art. 140 bis the Consumer Code per individual in the class, and as long as they once again proves adequately representative of the same, the locus standi for the protection of the interests of a collective nature, with a forecast of everything new in our system.

3. THE CLASS ACTION AND ART. 140 BIS OF THE CONSUMER CODE IN ITS NEW FORMULATION.

Article 140 bis of the Consumer Code, as rewritten by. 49, 1st co., L. July 31, 2009, n. 176 entered into force on 1 January 2010, but art. 49, 2nd co., it is expected to be applied retroactively to all cases substantial occurring on or after August 16, 2009.

With the reform of 2009, we wanted to first introduce an instrument for the protection of immediate nature of liquidated damages intended to compensate for the prejudice suffered by the individual and then condemn the company to compensation for the unfair advantage that has made, and this in contrast to the original model designed by art. 140 bis of the Consumer Code, in which the Court in the case of acceptance of the application actress was limited to determining the standard criteria for calculating the liquidation, in separate proceedings, the amounts to be paid to individual consumers or users who had joined the class action, leaving open the question about the quantification of individual rights.
The Court, but only if it were possible to the state of the case files, the limit could determine the minimum amount to be paid to each consumer or user.

Even in the system redesigned as a result of the modification in question is still remained the possibility for the judge, instead of definitively liquidate the amounts attributable to individual members, than establishing the criteria for their determination, renewing - with regard to this second eventuality - uncertainties, doctrine had already arisen in regard to the previous version of the standard, as to whether each consumer were to the point or not to promote an individual judgment of condemnation.

On the active legitimacy article 140 bis of the Consumer Code recognizes today's active legitimacy to the individual representative of a class, whether consumer or user, aligning option U.S. that, unlike the previous model homegrown, gave legal standing to consumer associations "recognized associations or committees deemed by the judge adequately representing the collective interests"

Through this fundamental change was then placed a clear distinction with regard to collective actions for cessation provided for in Articles 139 and 140 of the Consumer Code who have been entrusted, not to individual representatives of a class, but to the representative associations of consumers included in the list provided for in Article 137.

Following the reform of further dl made, with 24.01.2012 Art. 140 bis of the dividing line between class actions and injunctions has, however, markedly attenuated in the sense that the subject of compensation claims in the middle of class action can now be not only the rights but also the serial homogeneous collective interests like the actions planned to art. 139 and 140 of the Consumer Code.

Also in terms of the mechanism of action of class membership, there is a significant change from the previous system in force before the reform of 2009.

Once the proposed action by the individual promoter and after the same has been recognized adequately representing the interests of the class as part of the initial screening for eligibility of the action, the individual consumer belonging to the class in order to benefit from the promoted (interruption of the limitation, the formation of a writ of execution to obtain the damages in the absence of an individual judgment), it must demonstrate its willingness to join the action.

Our system is inspired by the principle of "exclusivity" of the class action in the sense of non-repeatability of additional shares of class so once the first proposal "are not considered fit more class actions on the same facts and against the same company after the expiry of the deadline for joining assigned by the court under the 9th paragraph "(art. 140 bis, 14th co., cod. cons.).

The relief carries with it the further consequence that, and once the final judgment in relation to the first action, this decision will play enforceability, not all members of the class, but only in respect of those members, who will not be therefore no longer possible to start a second collective action, having now finally consumed against them the possibility of its exercise.

The opportunity to say that the need to be incentivized the maximum number of participants possible through adequate advertising of collective action in the terms and manner as shall be specified by the Court itself is guaranteed under the 9th paragraph, where it is expected that "with the order in which the Court admits the action sets the terms and conditions for the most appropriate advertising for the purposes of timely adherence of belonging to the class."

Is intuitive fact that much wider membership the greater the ability to counteract the described asymmetry of economic strength and if the collective action should be concluded with a final judgment of rejection of collective action, individual objects very left difficult to promote individual applications, since almost never an isolated subject can succeed where he failed the collective subject.

In the case of a positive decision to the applicant, the firm unsuccessful in all probability, to prevent their repeated summoning to court in the individual, by parties that on the plane will still be persuasive to invoke judged favorable to the class, will be induced to engage in a transaction table, even those who have been strangers for lack of opt-in, the first court case.

The class action is an instrument that, therefore, concern only some of the basic individual rights listed in Article 2 consumer code, not all consumer rights therein.

Given the contractual nature of the request, however, remain foreign to operation of class action claims for damages in tort pursuant to art. 2043 of the Civil Code.

Will consequently be excluded from the class action proposability convictions for violation of fundamental rights of the person, if not the result of a breach of a contractual nature.

Do not be extended proposability class action as to the protection of the individual right to health, which has been adversely affected by pollution or deterioration of the environment, as well as the right to the environment is understood as a collective right to the preservation of environmental assets, appeared to most people one of the major focal points and gaps in the discipline, nell'avvertita need to ensure that all victims of an environmental disaster an efficient and prompt remedy procedural compensation.

4. THE CLASS ACTION IN ITALY ON THE ENVIRONMENT

A careful reading of the differences, summarized above, between old and new collective action highlights the gap larger, and perhaps more seriously, the new provisions of art. 140 bis: the preclusion of class action for unlawful extracontractual against the eligibility, exclusively, for the contractual rights of consumers and users.

The legislature, in fact, did not consider that the procedural economy could reach its maximum expression by introducing the class action for the tort, which, currently, are protected only through thousands of micro proceedings instituted, from time to time, in different courts.

The exclusion is even more non-trivial if it is contextualized in environmental matters.

The right environment is certainly counted among the fundamental rights of the person.

The environment is a transversal value in the legal system that requires adequate protection, as primary for the well being and development of the human person.

To find a constitutional basis to environmental protection,

- One side has interpreted the wording of Article 9 remarkably extensive, expanding the meaning of the term "landscape" contained therein;
- On the other hand, it is extracted from the right to health generally understood (and protected by Article 32) the right to a healthy environment.

In fact, art. 32 of the Constitution is now considered fundamental for setting the right environment.

The binding value of this rule is now definitively acquired through cultural study of the indissoluble connection between individual health and environmental health: health, ie, can not be separated from the local context and environment in which we live, with the result that all the attacks to 'environment are in a more or less direct' injury 'of health, individual and collective, understood, according to the World Health Organization: << State of complete physical, mental and social and not merely the absence of disease or infirmity >>.

Doing so, the class action would also be characterized by the constitutional rights protected.

The issue of compensation for the damage to the environment is intrinsically linked to the notion of right to the environment and to its legal form.
The responsibility that contracts are properly included within the scheme of protection and tort (art. 2043. Civ.).

It is not easy to solve the problem of membership of an asset for its intangible nature, such as the environment and then identify what the person who owns the right to compensation if the right environment suffers an injury.

The financial nature of the damage to the environment does not of itself mean that serious pollution, as well as damage to the environment, can cause other forms of compensable damage. The right to compensation for such damage certainly competes pollution or to individuals who have been harmed by the ecological disaster .

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The premises are all there: the decision of Turin asbestos (which recognized the disaster and willful negligence), or the final ruling on the case "Ilva" (which found entries harassing and harmful dust ... greater environmental contamination), which are not an example of opening a new page as regards, more generally, environmental crimes and related environmental issues.

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LESSON 2

ENVIRONMENTAL DAMAGE AND STANDING TO SUE BY ENVIRONMENTAL ASSOCIATIONS IN ITALY

Premises

Finally understood the importance of an environmental regulation of the environmental offense, the legislator has intervened with the approval of the Law 8 July 1986, n. 349, establishing the Ministry of Environment and issuing rules about environmental damage.

In particular, art. 18 provided for a specific case of civil liability for environmental damage, analytically specifying the elements, clarifying roles and powers of the State, local authorities and associations for the protection of the environment, as well as the criteria for determining the compensation, attributing jurisdiction on the ordinary courts.

The development of case law of the Court of Auditors, has strongly influenced the legislator, who has accepted the concept of public damage operated by state and local authorities, while denying the jurisdiction of the accounting court in favour of the of the ordinary courts, considered the natural judge in the matter of compensation damage.

The Court, however, suffered from the repercussion and raised the question of the constitutionality of Article 18 of the Act of 1986 in so far as it did not recognize its jurisdiction in the matter.

The event gave occasion to the Constitutional Court to issue the note and key decision n. 641 of 1987[1], which represents a milestone in the field of environmental damage, in accordance with the principles, there crystallized, essential to properly frame the institution in question:

1) the environment is considered an intangible unit asset, although with various components, each of which may also constitute, individually and separately, the object of care and protection, but they all, collectively, are attributable to unit;

2) The environment becomes the primary and absolute value, protected as a definite element of quality of life, the protection of which is founded in the articles 9 e 32 of the Constitution;

3) the liability resulting from the injury of the environmental good, protected by the law n. 349/1986, is correctly inserted in the environment and in the scheme of tort protection (art. 2043. Civil Code);

4) The damage is certainly patrimonial, although it is free from an arithmetic accounting conception.

The Court states a central point: the environmental good, although not subject to appropriation, as enjoyed by all, it is susceptible to economic valuation and has an exchange value, measured by the cost of management, preservation, recovery and damage, irrespective of both the cost of reinstatement and the reduction of the financial resources of the State and the local authorities;

5) the legitimacy of the state and local institutions is based not on economic loss, suffered as a result of the offense by the same environment, but on their function that is protecting the communities.

For the Court, the protection of citizens who suffered harm from environmental damage remains, however, the most important concern.

The above mentioned legal principles guide the interpretation of the precepts contained in the Testo Unico on the environment, making everyone understand that the environmental damage, subject to

[1] Constitutional Court, 30.12.1987, 641.

legislative provision, has its own peculiarities, which make it take on a punitive and sanctioning value, with the purpose of prevention, which is still valid.

The whole system of public environmental damage does not deprive individuals and associations of the protection, who still preserve, as we shall see, albeit reduced role, in the system, by virtue of the already exposed general principles.

In coeval decision 210 of 1987, the judge of the law, after confirming the preservation of the environment as a fundamental human right and fundamental interests of society, gives a clear definition of environmental damage as injury caused by any negligent or voluntary activity, persons, their animals, plants and natural resources (water, air, land, sea), which constitutes an offense to every citizen who has the right, individually and collectively, confirming the unitary concept.

The two important decisions represent the consecration of the right of the individual and the community (represented by the state and local authorities) to the protection of the environmental good, susceptible of ample protection and economic evaluation and the final overcoming of private perspective, which remains on the background, but it is still operable by individual legal entities, individually injured by the wrongful conduct of the damager.

The environment is well qualified as a united and collective good, enforceable in all its components, thanks to specific obligations imposed on the public entities, identified as exponential entities of environmental interest, as a genuine public interest, thereby overcoming the thesis that saw the concept of environment so divided[2].

The above concepts are confirmed and insight into the decisions of the Supreme Court.

[2] Cfr. L. PRATI, Diritto alla salubrità dell'ambiente e danno esistenziale in rapporto alla direttiva 35/2004/CE, in La responsabilità per danno all'ambiente a cura di F. GIAMPIETRO, Giuffré, 2006, 77 ss.

In particular, in this brief review of the main judgments in the field of environmental damage, the decision of the United Sections n. 440 of 1989[3] is worthy of note.

It, after confirming also the nature of the environment as an intangible asset, but legally recognized and protected in its unity, clarifies that:

1) the environment lesion may be associated with the impairment of other assets or interests linked to the profiles in which a single entity that can be decomposed:

a) the environment as land use;

b) the environment as a wealth of natural resources;

c) the environment as a landscape in its aesthetic and cultural value;

d) The environment as a condition of healthy life.

In its judgment, the Court of Cassation clarifies the principle already mentioned (as clearly stated in the last sentence of paragraph 7 of article 313 of the Environmental Code), according to which the legislator has centered on the State, as the highest institution representing the national community, the ownership of competence in the field, although this does not preclude other actors are denied their rights, property or personal, to apply to the ordinary courts against the environmental offender, citing the possibility of further damage to the statal heritage or property of local authorities, patrimonial damages to private parties or the case of violation of the right to health, such as individual subjective right, also recently confirmed approach[4].

[3] Cass. S.U. civili, 25.1.1989, n. 440, Foro Italiano, 1990, I, 232.

[4] Cass. , sez. III, 17 aprile 2008, n. 10118: restoring the state of places does not eliminate the injury lasted for nine years.
On the other hand (Cass. n. 9211 del 1995) this Court decided that, as far as the compensatory act for environmental damage is regarded, promoted by a municipality according to the L. n. 349/1986, art. 18, in the proof of the indicated damage must distinguish between damage to the individual assets owned by public or private, individual or subject positions, which find protection in the ordinary rules, and damage to the environment considered in unitary sense in which the terms of penalties, against

On the other hand, the doctrine[5] has made it clear that the action envisaged by art. 18 in question is added (but not overlapping) to the other remedies provided for by the legal system in favour of those who are in relation to the environmental good in a legally relevant relationship (eg property rights).

In light of the above, some authors[6], in the regime under Law 349/1986, have distinguished between three different cases:

a) the case where the damaged good is owned by a private individual, case in which the owner can use the tools provided by art. 2043 et ff. of civil code; action of the private entity may flank that of the public, pursuant to art. 18 Law 349/1986;

b) the event that the damaged environmental asset should be owned by a public entity, pursuant to art. 822 cc, in which case the public subject will have to choose between the exercise of art. 2043 of the Civil Code or art. 18. which do not appear cumulative to authors .[7]

c) finally, the case of damage to environmental assets not included in the cases referred to in points a) and b) (res communes omnium), eg. the atmosphere: in this case the public entity can only use the tool at art. 18 in examination.

The provisions of art. 18 represented a typical tort hypothesis, in view of the fact that the responsibility is constituted in violation of the

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the harmful act of good environmental, involves an investigation which is not that of mere prejudice sheet, but the degradation of the environment, namely the lesion "in itself" of the environmental good.
So (Cass. n. 1087 del 1988) in similar cases a patrimonial damage can happen to single private or public good , or an environmental damage, a good of a public unitary and intangible nature.

[5] L. FRANCARIO, Il risarcimento del danno all'ambiente dopo la legge 349 del 1986, Riv. Critica dir. priv. 1987, 484, according to which the damage to the environment can not be identified with the financial losses suffered by individual ownership (both public and private).

[6] A. COSTANZO - C. VERARDI, La responsabilità per danno ambientale , Riv. trim. dir. e proc. civ. 1988, 721.

[7] This solution seems not to be shared in L. BIGLIAZZI GERI, Quale futuro dell'art. 18 legge 8 luglio 1986, n. 349, Riv. Crit. Dir. Priv. 1987, 685 ss., according to which, for the hypotheses that do not fall within Article. 18, only the private sector could operate the art. 2043 of the Civil Code, but not the public sector.

provisions of the law or of measures adopted on the basis of the law[8], and due to the fact that the offense concerned the infringement of a certain legal asset.[9]

It was brought within non-contractual liability of art. 2043 cc, although it presented not perfectly comparable peculiarities, in particular due to the absence of the element of injustice of the damage.

1) The protection of objective positions in Italy: the role of the State and Local Government

The reduction of the role of local authorities has been one of the most criticized in the after their reform.

Indeed, this new set of skills was reductive towards local authorities where, when art. 18 of Law 349/1986, was in force, entitlement to exercise the right of compensation for environmental damage, was recognised to those entities.

According to reform commentators, since the environment is increasingly recognized as a value, and not a subject matter, it would seem appropriate to ensure the same forms of protection at both central and peripheral level.

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[8] C. CASTRONUOVO, Il danno all'ambiente nel sistema di responsabilità civile, Riv. Crit. Dir. Priv. 1987, 512;
L. BIGLIAZZI GERI, Quale futuro dell'art. 18 legge 8 luglio 1986, n. 349? , Riv. Crit. Dir. Priv. 1987;
C. TENELLA SILLANI, Responsabilità per danno ambientale, Digesto delle discipline privatistiche, sezione civile, XVII,.;
M. FRANZONI, Il danno all'ambiente, Contratto e impresa, 1992;
M. LIBERTINI, la nuova disciplina del danno ambientale e i problemi generali del diritto dell'ambiente , Riv. Crit. Dir. Priv. 1987, 547 ss., according to which among the violated regulations referred to art. 18 may not reenter the code rules.

[9] P. MADDALENA, Il danno all' ambiente tra giudice civile e giudice contabile, Rivista critica di diritto privato 1987, 445 ss.469.

After the approval of the legislative decree n. 152/2006, in fact the local authorities have lost the possibility of asserting public environmental damage, which authority was indeed acknowledged by virtue of repealed paragraph 3 of the art. 18.

In light of the above mentioned repeal, the state remains the exclusively legitimate subject to assert in court (or through the issuing of Ministerial decree) the environmental damage to the community, with severe impairment of the prerogatives of the institutions closer to citizens.

However, municipalities, provinces and regions, according to Articles 309 and 310 of the T.U. keep the following limited powers:

a) presenting complaints and observations., that the Ministry of the Environment is required to assess, with the sole merely formal obligation to inform about the measures which it was decided to take in the proceedings leading to the adoption of precautionary prevention, and recovery measures, (art. 309);

b) taking up, according to general principles, (and therefore where they have a specific interest) the adopted acts and measures in contrast with the rules of the T.U. (Article 310);

c) holding silence breach of the Minister of the Environment, with the right to demand compensation for damages from delay, pursuant to art. 310 (which will be after examined in-depth);

d) applying to the ordinary courts in order to request, pursuant to art. 2043 cc, compensation for damages incurred on assets belonging to the State property or to the Local Government as a result of the event that produced environmental damage (Article 313, paragraph 7, last sentence).

It is clear that the role of local authorities in environmental matters appears marginalized, in contrast to the recognition of the centrality of the local authorities contained in art. 114 of the Constitution, but especially so much in contradiction with the declared objective to achieve effective protection of the environment in accordance with the principles of subsidiarity and partnership with local authorities.

Local authorities are the closest to citizens public entities, who apply first of all to the municipalities (and then to other local authorities) in all situations in which a right, related to the environment, is threatened.

The practice shows that, for any uncomfortable situation, citizens apply to the mayor of their town of residence, without being able to detect the expertise on the subject, by virtue of the possibility of easy and immediate access to the organs of this institution, especially in small and medium realities.

It seems clear, therefore, that it would be better to leave this concurring power also to territorial entity, which has a greater interest in taking action for the protection of the environmental good, as pushed by the local community, which has greater ability to exercise legitimate pressures on local administrators, as well as in consideration of the direct perception of the damage to the territory by that entity.

It is proved, in fact, that Article 117 of the Constitution reserves protection of the environment, the ecosystem and cultural heritage to the exclusive legislation of the state.

But it is also true that the government of the territory and the protection of health are subject matter of concurring legislation; and so the environment because it is which is considered a cross subject matter.

In fact, there are intertwined skills that involve different levels of government; this idea is consistent with the approach of constitutional jurisprudence that configures the environment as a value and not as a subject in the technical sense.

The attribution of the power to take legal action to protect the environmental damage to the local authorities would be more consistent with the role played by these institutions, in particular by the Municipality and Province, who get the pulse on the situation of their territory under the powers granted to them by the legal system as far as construction, town planning, environmental protection and hygiene and public health are regarded.

The centralist motivation is therefore absolutely unjustified and incompatible with the nature of general purposes authority granted to the Municipality, as well as it clashes with the wide range of environmental expertise recognized to the Province by Legislative Decree n. 267/2000.

It is about protection of the soil, and enhancement of the environment, water and energy resources, protection of flora and fauna, parks and nature reserves.

The legislative choice does not take also into account the fact that the legal status of local authorities in the exercise of the environmental damage is a uncontroversial legal reality, which has its foundation in the Constitution through the combined provisions (Articles 2,3,9,41 and 42) that concern the individual and the community in their economic, social and environmental habitat.

The granting of a monopoly of expertise in the field of environmental damage to the state, though setting in the centralist trend that has found fertile ground in the legislator in recent years, in this case has no plausible justification.

The only likely outcomes will be slowing the environmental protection, as the process is made slow and bureaucratic, and above all depriving the process of the contribution of the private entities which are more familiar with the territory and are responsible for urban planning and environmental protection.

It is somewhat inconsistent to recognize the role of the Municipality as competent authority to protect the interests of the community; to represent local interests or to qualify it as a stakeholder of the safeguard in its territory and the health of its citizens; and then deny to the local authority the expertise in the field of environmental damage.

The doctrinal thesis, that saw, in the term of art. 18, the exercise of state intervention as procedural power of substitution for all possible subjects who suffer environmental damage is, at this point, of particular interest.

Then the State which managed to obtain compensation, has the consequent obligation to transfer the raised money in favour of damaged local communities.

As already mentioned, the possibility to apply to the court still remains to the territorial entity.

In the event of directly suffered damage to their state property or assets, the Municipality is the institution which represents the interests of its community.

So it was decided that the municipality itself is legitimate to apply to the courts against acts that are detrimental of substantial situations that are related to the functions and position of the municipality as public local authority, and therefore, whenever, in the applicant opinion, the illegality of the act will result in a concrete injury or a loss in utilities attributable to the Municipality itself, both as an representing institution and as an administrative agency (see, in particular, Cons.St., IV, 5 September 1990, n. 630; Section VI. September 17, 1984, no. 501 and December 31, 1987, n. 1059, Section IV., March 8, 1983, n. 102; Cass., SS.UU. penal code, April 21, 1979; TAR Sicily, Catania, 14 June 1985, n. 607).

In the case dealt with by the TAR Friuli, however, the judge declared the appeal inadmissible as lacking the proof, by the municipality, of injury (primarily environmental, with a direct bearing on public health) arising from the opposite actual landfill project.

In relation to the question of the legitimacy of regional and local authorities to take an action for liability for environmental damage, the Court, however, opens a window, noting that the contested rule that regulates, in terms of alternative nature, the relationship between the two instruments (administrative and judicial), with which the state government can answer to environmental damage, does not recognize such right, but it does not explicitly exclude it, highlighting then that recognition of the legitimacy of the State does not exclude that of the regions, and vice versa.

The reference to criteria of uniformity and consistency in the environmental protection, if it may appear acceptable in relation to the preventive protection, does not seem to hold up to careful criticism in relation to the legitimacy to take a compensatory action for environmental damage, because the solution seems to be too negative biased in favour of the State, without any valid argument that can support the decision to relegate the position of local authorities in a context of marginalization, contrasting with the role recognized to them by the Constitution in the light of the principle of subsidiarity.

If the goal of the legislator, which the judge refers to, is to ensure an optimal level of environmental protection, it does not seem that the exclusion of local authorities about this subject matter is consistent with this purpose, if we consider the greater proximity of them to the environmental needs.

2) Article 18 of the Law 349/1986 and the participation in the procedure administrative of environmental groups

The legislative choice to exclude the legitimacy of environmental associations to act for compensation of environmental damage appears consistent with a model in which the duty of the State is to substitute, with compensatory measures, even temporary, losses of environmental utility, suffered by the community and when the State is entitled to claim compensation for.

Environmental associations, identified on the basis of art. 13 law 349/86, have the right to intervene in trials for environmental damage, under the in force art. 18 paragraph 5 l. 349/86.

The regulation under consideration immediately engendered doubts of interpretation in order to the, exclusive or not, nature of the legitimacy

attributed to the associations identified with the mentioned ministerial decree.

Against the legislator's choice, which locates the legitimizing situation in prior recognition of the association, initially the Administrative Law considered that the missed inclusion of an environmental organization in a ministerial list provided for the regulations mentioned above would result in a deficiency for the legitimacy to appeal against measures in environmental matters.

It is noted, however, that the legislation under consideration defines a further title of legitimacy, taking however into account the selective criteria previously produced by legislation itself.

So, the existence of legitimate, as recognized, associations does not preclude the court to determine, in each case, the legitimacy of a single non-accredited organization, provided that they exhibit elements of differentiation and a concrete and stable connection with the given territory, in order to clear establish the exceptional/exponential interest.

Because of the power of such a precise emphatic choice, the regulation has introduced a double track under which the assessment of the degree of representativeness of the association or the committee may be made once and for all in administrative judicial branch and, for each case, in judicial review.

So the ministerial power to identify the organizations, enabled to apply, does not elide the power of the administrative judge, which is typical of every judge, to verify the legitimacy of the collective organization.

Moreover, once recognized traceability of the collective interest in the genus legitimate interest, supporting that only associations identified by the Ministry may apply to the administrative courts would be in conflict with articles 24, 103, 113 of the Italian Constitution, because first of all the administration would have the exclusive power to select the individuals entitled to act against their own actions especially when these come from the state.

It would thus precluded the judicial protection to a subject with differentiated and qualified interest, such as collective interest, every time that the Ministry of Environment unlawfully rejects the application for recognition or has not yet examined it.

Ascertained that, under certain circumstances, even the associations not included in the ministerial list are legitimated to apply, another problem of urgent actuality arises.

It is necessary to identify the acts that can be appealed and the faults that can be reported to the environmental associations entitled to apply.

As sustained by the jurisprudence of the State Council (Council of State, sect. IV, 9 November 2004, n. 7246):

<< the combined provisions of articles 13 e 18 July 8, Law n. 349/1986, which gives the locus standi in this matter to the environmental associations, recognized with decree by the Minister of the Environment, has to be understood as attributive of an exceptional legitimation – as it derogates to the ordinary process of legalization of interests de facto in legal interests.

It should also be defined in relationship to the qualification of substantial interest provided by the Regulations of the Law.

The legitimacy of environmental associations to stand to sue for common interests, lato sensu, on environmental matters, is to be recognized on the basis of concrete connection with the territory, so as to link that exponential interest to that territory, or of subjective situations recognized by law in administrative proceedings .

In order to be recognized (exceptional) legitimacy on the part of the environmentalist associations it is needed, in any case, that the measure you intend to appeal against harms directly and immediately the environmental interest.

Such legitimacy, vice versa does not allow the proposition of reasons having a direct urbanistic-building value, and that only by

instrumental and indirect, and not for the violation of the regulations on protection of the environment, can also determine an useful effect to the goals of the protection of the environmental values >>.

When addressing the issue of environmental damage, it is not always given importance to the administrative process because you would rather dwell on compensatory matters, that belong to the ordinary jurisdiction.

In particular, it is relevant, too often, to the criminal process, where the Associations of Environmental Protection have statistically chosen to act in spite of the many difficulties, now overcome by an important rule which gives them the power to act, even if only in pure replacement of inactive local authorities (article 9, paragraph 3 of Legislative Decree no. 26/7/2000).

This, beyond the great awareness demonstrated by penal justice, is due to a practical reason: the excessive cost of administrative judgment and greater technical-legal difficulties to access it.

However, the administrative process is the privileged seat for environmental protection because there the prevention of environmental damage imposed by Community law is achieved.

In fact it is not observed in action the preventive protection for compensation of environmental damage neither before the Civil Judge nor in criminal proceedings.

It is also still controversial whether the intervention of environmental associations is or is not subject to the consent of the plaintiff, pursuant to art. 92 c.p.p..

In jurisprudence, nevertheless, it is prevalent the orientation that legitimates the environmental associations to the constitution of civil part in the penal judgments to ask for the compensation for the environmental damage, when they think to be entitled in a diversified subjective situation in comparison to the damaged environmental good.

According to this jurisprudence it would not be remarkable the interest of the components to the enjoyment of the utilities that derive from the natural resource but the interest of the association to the fulfillment of its own institutional aims of preservation of the environmental good, for which the association was constituted or has developed its activity.

There are two reasons for the legitimation of the associations to enter on a civil lawsuit apart from the possibility of the intervention.

First there is the need to allow associations to participate in the criminal proceedings even when neither the state, nor local entities, enter on a civil lawsuit so that the judge can order the offender to restore at least the former state of places.

In this perspective the recognition of the right to promote the reinstating action allows to elude the missed prediction of specific tools to pursue the finalities of enforcement, such as replacement action, which would have enabled the entitled party to urge the intervention of the authority, entitled to the compensation of the environmental damage.

The replacement action in question was, indeed, provided for in art. 9 of law 142/1990, with which it was allowed to environmental groups to claim compensation for the damage due to the local authorities; while an action has been recognized by the art. 18 paragraph 3, for the environmental damage in favour of the State, to local authorities.

This action, that can be exercised by local authorities, seem to be a replacement action, even if it was stated, in jurisprudence, the case law which grants local authorities the right to act iure proprio.

However, we have to observe that both provisions about replacement actions have been expressly abrogated by art. 318 paragraph 2 Legislative Decree no. 152/06.

Besides, the possibility offered to the environmental associations of a civil action aims to the opportunity to recover the court costs.

In other words, in this way environmental groups would be allowed to get State contributions for the payment of the costs of the exercise of the powers conferred by art. 18, Law 349/86.

In conclusion it should be noted that the absence of the appropriate powers to compensate any inertia of the State Authorities caused a less effective protection when an environmental damage occurrs and the situation was only partially changed with the entry in force of Art. 4, paragraph 3, Law no. 266/1999, then reformulated in art. 9, paragraph 3, Legislative Decree no. 267/2000, which introduced the so-called Popular Action of Environmental Protection Association, expecting that those entities could exercise, in front of the Ordinary Judge, actions resulting from an environmental damage, in charge of Municipality and Province, and that any compensation is payed to the local authority and litigation costs are settled in favour or in charge of the association.

This rule was formally repealed thereby making ineffective the Institute of compensation for environmental damage.

3. The standing to sue of environmental groups in civil court

The role of environmental groups scaled out by the reform, mainly as a result of the abrogation of art. 9, paragraph 3, of the legislative decree no. 267/2000, which allowed the environmental groups to replace procedurally to the Municipality or Province as far as damages actions for environmental damage were regarded, remaining only to such organizations the power to intervene in judicial decisions for the damage in question, by virtue of paragraph 5, art. 18 of Law no. 349 of 1986, explicitly reserved by T.U.

Beyond the limited role of the case, all the powers granted to local authorities, by articles 309 and 310 of the code, are also recognized to environmental groups.

As far as the conditions to exercise the legal action by environmental groups are regarded, according to art. 2043 of the Civil Code, I t is up to the judge to assess whether the existence of the conditions to allow the legal action to environmental associations for direct or patrimonial injury of their interests, on the basis of the requirements, described earlier, of stability, representativeness and statutory purpose, without prejudice to the provisions of the right of those organizations recognized to participate in environmental evaluations, pursuant to art. 18, paragraph 5 of Law no. 349/1986.[10]

Paragraph 5 is the only art. 18 of Law no. 349 of 1986 not repealed by T.U. and provides that

"*Associations identified on the basis of art. 13 of this Act may intervene in judicial decisions for environmental damages and have recourse to administrative jurisdiction for the annulment of unlawful acts".*

Article 318 T.U. instead of 2006 repealed art. 9, paragraph 3, of the d. lgs. August 18, 2000, no. 267 (T.U.E.L.) that, proposing the homologus norm in art. 4, paragraph 3, of the Law of 3 August 1999, no. 265, allowed to environmental protection associations in art. 13 of the Law of 8 July 1986, no. 349, to propose actions for compensation damages attributable to the ordinary courts belonging to the Municipality and the Province as a result of environmental damage, with settlement of any award in favor of the institution replaced and court costs in favor or against the association.

The amendment by the T.U. has not touched, then, the ability of associations to intervene in civil[11] or criminal[12] process for environmental

[10] Cfr. Cass. pen., sez. III, 2 December 2004, n. 46746, according to which the environmental organizations have legitimacy when they have suffered a criminal offense by the infringement of a right of a financial nature (eg, for the costs incurred in carrying out activities to prevent injury to the territory or for propaganda) or asset.

[11] Which takes the form of intervention "ad adiuvandum", as can be seen, incidentally, by Cass. Pen. Sect. III, 26 February 1991, n. 2603 and Cass. Pen. Sect. III, 11 April 1992, n. 4487.

damage, but it has touched the legitimacy their right to enter into a civil lawsuit for compensation damage resulting from environmental damage in place of local authorities[13].

It is, of course, the result of the centralization of the action on the State for compensation for environmental damage and loss of opportunity for the local authorities other than the State to bring a separate action for compensation of environmental damage of a public nature.

Furthermore, both before[14] and after the T.U.[15], It was excluded that environmental groups can exercise "iure proprio" the action of a

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[12] According to the provisions of Articles 91-94 cpp, which outline a precise relation to the rights and powers of institutions and associations representing the interests injured by the offense.

[13] Without need for their consent, as recognized by Cass. pen. , Sect. III, 11 June 2004, n. 38748. Court Reggio Emilia, sect. pen. , Sent. n. 474 of 08/06/2000, in Riv. Leg. Amb. , N. 1/2001, with note by Beltrame, said that "a civil associations of environmental protection is not subject, in accordance with art. 4, paragraph 3, of 3 August 1999, n. 265, the consent of the local authority replaced and assumptions legitimizing the action for damages to the environment are the legal recognition of the association and the inertia of the local replaced ", specifying in this regard:" that that substitution was provided for the primary purpose to remedy the failure to exercise an action for damages on the part of local authorities in whose territory the product is environmental damage (often participates, even if indirectly, the same intervention detrimental). A kind, in short, a substitute inaction of local authorities. "He dismissed the relevance of the reasons for this inertia, Cass. pen., Sec. III, 24 March 2009, n. 19081, while Cass. pen., sec. II, 28 March 2007, n. 20681, considered "legitimate plaintiffs more environmental groups, each with its own counsel, for the exercise of the compensation payable to the City and Province, so that each of those groups should be given the right to be admitted to legal aid and the right of the State to pay the costs of the proceedings. "

[14] Ex multis, cf. Cass. pen., sec. III, 10 November 1993, n. 439, that "the leggitimazione of environmental organizations, art. 18 Law of 8 July 1986. 349, with regard to environmental damage, has procedural purposes only and impulse social control. These associations can ask the civil court in the autonomous or the criminal court in the case of a civil recovery of the situation of the places expense of the, where it is of course possible. The same associations, however, can not obtain liquidation of environmental damage in monetary terms, pursuant to art. 18 Law no. 349 of 1986, as such liquidation must be made in favor of the State and other public entities territorial and it is not conceivable that a payment of compensation for damage of a public nature in favor of non-public bodies, while the right to reimbursement of court costs is perfectly legitimate, since the intervention of the associations is required by law and expenses by the losing party in favor of all the parties otherwise entitled to pursue the question. "Compliant, as the last stage prior to the TU, Cass. pen., sec. III, 2 December 2004, no. 46746, in Criminal Law and Process, 2005, 1365, with a note of TORTI, The locus of entities exponential for the protection of the collective environmental health.

[15] See Cass. pen., sec. III, 11 February 2010, n. 14828 and ref therein.

public nature and the interpretative debate - in truth only developed in the criminal side, with respect to the plaintiffs - focused on the legitimacy of these institutions to action for compensation damage (other) incurred as a result of environmental impairment.

Before T.U., some decisions[16] of the Supreme Court excluded for environmental associations the opportunity to bring an action for damages "iure proprio", because, based on textual data of articles 91-94 c.p.p. and the provisions of article 212 of the implementing rules and coordination c.p.p.[17], attributed to them only a power to intervene, with powers to be identical - for "fictio iuris" - to those of the victim.

A second orientation believed, however, that the environmental groups had, for the purposes of the proceedings, a mere impulse function and social control, for which they hold a civil action atypical, in the sense that they could not obtain compensation for the damage, but only the reimbursement of costs[18].

This perspective received new impetus as a result of the express provisions of art. 9, paragraph 3, T.U.E.L., considered in some decisions the only case in which it was possible for associations enter into a civil lawsuit, in proceedings for environmental crimes, with the result that themselves could not apply for and obtain an order requiring the defendant to pay compensation for damage to property in their favor and/or moral which may be consequential, while the only reimbursement of court costs, and compensation for any environmental damage had to be liquidated in favor of the institution replaced[19].

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[16] Cass. pen., sec. IV, 17 December 1988, n. 12659; sect. III, 28 October 1993, n. 9727, sect. III, 23 June 1994, n. 7275.

[17] According to which: "When laws or decrees allowing the establishment of a civil or criminal action in the process outside of the assumptions referred to in art. 74 of the Code, the operation is allowed only within the limits and under the conditions laid down in Articles. 91, 92, 93, 94 of the code. "

[18] Cass. pen., sec. III, 26 February 1991, n. 2603, sect. III, 1 April 1992, n. 4487 and sect. III, 10 November 1993, n. 439.

[19] Cass. pen., sec. III, 3 December 2002, n. 43238; sect. III, 24 October 2005, no. 38936.

The orientation that has emerged over time - confirmed after T.U. of 2006 *"notwithstanding the repeal of the provisions of the law authorizing associations to propose, in the event of inaction of local authorities, the actions for compensation for environmental damage"*[20] - is that the same are entitled to act "iure proprio" for compensation the damage resulting from the environmental offense.

In this perspective, we started the interpretation of article 18, paragraph 5, of Law no. 349/1986, in a non-literal and restrictive and it has been argued that the rule, by granting on these institutions the power to intervene in the proceedings for environmental damage, he wanted to synthetize up their right to be present in any type of proceedings (civil, criminal, administrative) for environmental damage and that in criminal proceedings, in which are not known forms of joinder and intervention "ad adiuvandum", exclusive of civil law, there is no procedural instrument other than the plaintiffs to implement the intervention[21].

It is true, that

"the exercise of rights and powers pertaining to institutions and associations non-profit organization, whose purpose is to protect the interests injured by the offense, is subject - according to article 92 c.p.p - *The consent of the victim, to be obtained in the manner indicated in the same rule of law, but it is also true that the law n. 349/1986 has*

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[20] Cass. pen., sec. III, 11 March 2009, n. 19883 (in application of this principle, the court found legitimate constitution in its regional headquarters of an association, when the property affected is situated within the region, "as a stable connection with a particular area of interest constitutes an element symptomatic of the possible existence of a real and present injury "). The legitimacy "iure proprio" of environmental groups to the establishment of a civil trial for environmental crimes was also accepted by Cass. pen., sec. III, 11 February 2010, n. 14828 (in the case that legitimacy was recognized at the Circolo Legambiente and WWF Italy, and was denied a nation as "the bearer of merely common interests - common to most people and not subject to the individual appropriation - which are not likely to judicial protection, in order to detect, requires that the associations are exponential environmental interests concretely individualized, that is legitimate collective interests ").

[21] Cass. Pen. sect. III, n. 2603 of 26/02/1991; sect. III, n. 4487 of 11/04/1992; sect. V, 5 April 1996, n. 2361, sect. III, 6 April 1996, n. 3503, sect. III, 19 November 1996, n. 9837.

recognized these institutions and associations, which pursue the objective of supporting the activities of the State in protecting the environment, the right to intervene in all the times you play in the recognition of the right to compensation for damage resulting in actual or potential harm that a certain conduct may have done to the environment, or to one of the essential components of it, what is the territory.

Therefore, it must be considered to be the same positive law to offer the generalized prior consent of the State to those associations or entities which (...) can therefore claim before the ordinary judge their demands[22]*.*

The legitimacy "iure proprio" however, was soon, based on the applicability of the general rules on compensation damages and on plaintiffs civil[23] and "the undisputed principle that all associations or organizations, recognized or not, may bring a civil action, if they have sustained an injury of a subjective right (or even an interest of a legal, according to the judgment of the S.S.U.U. no. 500 of 1999) of the association of the criminal action.[24]

Consequently, it is accepted that associations, both recognized that in fact, and also its "local office, which represents a significant group of affiliates, and who has given proof of the continuity and the importance of its contribution to environmental protection"[25] may bring a civil action whenever the widespread interest, which they pursued, it is aimed at the protection of a detailed historical situation, which has been endorsed as specific purpose of the association.

[22] Cass. pen., sec. III, sect. III, 3 December 2002, n. 43238, 24 October 2005, n. 38936.

[23] Cass. pen., sec. II, 28 March 2007, n. 20681 and ref therein.

[24] Cass. Pen., Sec. III, 2 December 2004, no. 46746, cit.

[25] Cass. Pen., Sec. III, 2 December 2004, no. 46746, cit.

Any prejudice to this objective, which expresses the “affectio societatis”, including impairment of frustration and distress of the members.

The plaintiffs, therefore, is possible when, from offense to interest, resulting in a direct and immediate way “infringement of a right of a patrimonial nature (example, for the costs incurred in carrying out activities to prevent injury to the territory or for propaganda) or not patrimonial (for example, relating to the personality of the association to discredit resulting from the failure to achieve institutional goals that would lead the members to deprive the local authorities of their personal and financial support).

No compensation competes, however, when repeated at a mere ideological connection with the asset you want to protect, that is when the associations are to have an interest that, to be characterized by a simple interconnection with the public, it remains widespread and, as such, not just of the association and is not compensable.[26]”

From this perspective, it is required[27] that the associations are “statutory stakeholder environmental territorially determined and concretely harmed by an illegal activity, with a right to compensation commensurate with the specific lesion represented the collective interests”, while specifying[28] that “the relationship between territory, the historical situation specific and defined environmental organization and should not necessarily be found in the prediction of the protection of that

[26] Cass. Pen., Sec. III, 2 December 2004, no. 46746, cit.

[27] Cass. pen., sec. III, April 7, 2006, no. 33887, in Dir Leg. agr., alim. and the environment, 2008, 206, with note by Di Pinto, Environmental crimes and bringing civil authorities exponential collective interests. Cass says. pen., sec. III, 2 December 2004, no. 46746, cit. "Why an association can be regarded as an institution representing the community in which the property is situated object of protection, it needs to have as essential statutory purpose of protecting the environment which becomes the reason of the institution, is rooted in the locality through offices local, is representative of a significant group of subsidiaries, had demonstrated a continuity of its action and importance of his contribution to the defense of the territory. "

[28] Cass. pen., sec. III, 6 April 1996, n. 3503, cited above.

area in the primary and essential statutory purpose of the association, but (also can be inferred) from the work done by the provincial sections, such as those rooted in the territory, in the implementation of its statutory wider and relating to the protection of individual rights absolute fixed or determinable, relating to a community, but not limited to a single zone and to a single well, but inclusive of the whole province, provided they are not interest indeterminate and abstract."

The conditions for the "subjectivism or corporatisation of the interests diffuse (..) collective interests (..) susceptible to judicial protection[29]" are identified on the basis of administrative law, the two elements of the territorial connection under which the locus act against the P.A. should be recognized only to the persons and organizations of various interests that are rooted in the territory in which it takes effect the administrative decision to hold "and the participation in proceedings" under which the right of action before the administrative judge is up to all organizations that are eligible to participate in the administrative procedure aimed enactment of the measure gripping , noting that" a mere ideological connection with the public interest, there remains a widespread interest, as such does not own the association and therefore also not compensable.[30]"

The assessment of the injury, "being briefed to the historical situation, is for the motivated appreciation of the trial court.[31]"

[29] Which is created when "the interest in protection of the environment does not remain an abstract category, but takes the form of a historical reality of which the association has made its own purpose, so that it ceases to be common to the generality of the associates" (Court of Cassation pen., sect. III, 2 December 2004, no. 46746, cit.).

[30] On this point, Cass. pen., sec. III, 28 October 1993, n. 9727.

[31] Cass. Pen., Sec. III, 13 November 1992, n. 10956; sect. III, 21 May 1993, n. 5230

Environmental protection within the European context:
Case-study on concept and evolution of the environmental liability

dr. Barbara Verri

Environmental Liability

- environmental liability is a civil liability but a special one
- dual aspect of **environmental liability**:
  A. laws on environmental liability that have the aim to protect the landscape or the water, soil, and air and hold liable who damage these resources
  B. laws on environmental liability that have the aim to protect the property or the body of the individuals, which are basically the law of torts of each country
- dual aspect of **environmental damage**:
  A. environmental damage for itself = pure ecological damage
  B. environmental damage affecting private parties based on traditional systems of civil liability; the environment is merely a source that allow for compensation to the damaged party but it is not protected itself.

Law on environmental liability

- European Union framework on environmental liability and analysis of a relevant case
- overview on the environmental damage in some European States; national case-law about the environmental damage
- national frameworks on compensation of the damage to individuals in case of environmental liability; focus on the Italian case law on compensation damages and how courts assess the non-economic damage in environmental cases

Sources of law:

- Lisbon Treaty
- Directive 2004/35
- Case-law C-378/08

EUROPEAN UNION

DIRECTIVE 2004/35

- establish a common European framework of environmental liability based on the principle that the 'polluter pays' in order to prevent and remedy environmental damage to water, land, protected species and natural resources
- **goals**:
  1. create a common environmental liability regime for all Member States and establish common criteria to be implemented at national level
  2. ensure the application of the polluter pays principle
- **polluter pays principle**
  1. liability exists only if the polluter is identifiable
  2. operators causing the damage or imminent threat of damage have to prevent and remedy the damage and to bear the necessary costs
  3. polluter must undertake or pay for 'compensation in kind'; monetary compensation is NOT permitted

DIRECTIVE 2004/35

- **environmental damage**:
  a. damage to protected species and natural habitats, which is any damage that has significant adverse effects on the conservation of such habitats or species;
  b. water damage, which is any damage that significantly adversely affects the ecological, chemical or quantitative status of the waters;
  c. land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, organisms or micro-organisms.
- damage also to the utility of the resource
  the utility can be represented not only by the economic use but also by the beauty, the landscape, the enjoyment of nature
- **narrow definition** of environmental damage:
  - it does not take into consideration the environmental damage from a general perspective
  - only concerns the harm to natural resources, so private losses to individuals are not compensable under the directive

DIRECTIVE 2004/35

- **dual system** of liability:
  - A. strict liability
    environmental damage caused by any of the activities listed by the directive (for example, risky activities which discharge heavy metals into water or the air, installations producing dangerous chemical substances, waste management activities)
  - B. special regime of fault based liability
    damage to protected species and natural habitats caused by any occupational activities other than those listed in the directive whenever the operator has been at fault or negligent

DIRECTIVE 2004/35

- **remedy**:
  - restoration of the damaged asset, as it was before it was damaged
  - For example, the damaged natural resources must be restored or replaced by identical, similar or equivalent natural resources and it can be restore at the same site of the incident or, if necessary, at an alternative site
  - polluter bears the costs of remediation
- no rules about fundamental issues such as the identification of causal link and its burden of proof

CASE C- 378/08

- Raffinerie Mediterranee (ERG) Spa, et al. v. Ministero dello Sviluppo Economico et al.
- the case concerns the joint or several liability, and the issue of the causal link between the pollution and the industries and precisely whether the State can prove this causal link just on the basis of a presumption
- Augusta roadstead in Sicily has been affected by repeated incidents of environmental pollution, dating back as far as the 1960s

CASE C- 378/08

- a number of undertakings operated at the same time in the roadstead and succeeded one another in operating in the industrial and hydrocarbons sector
- The result of such activities was that the sea-bed in the area was heavily contaminated
- Italian authorities required the undertakings currently operating in the Augusta roadstead to clean up the contaminated sea-beds.
- In doing so the authorities did not differentiate between previous and current pollution and it did not assess the extent to which each individual undertaking was responsible for the pollution which has occurred.

CASE C- 378/08

- the case was brought before the national court
- Italian Court pointed out that there has been a whole succession of petrochemical undertakings in the area, so that it would be not only impossible but also pointless to determine each individual's share of responsibility
- according to Italian law, operators should be held liable only if his fault was proven

CASE C- 378/08

- operators argued that the Italian rule on the environmental liability is based on a fault liability system
- on the contrary, the Italian administration imposed the reparation measures merely taking into account the activities and the position of the undertakings without proving their fault
- the undertakings claimed that in the period in which the pollution occurred, a number of undertakings operated in parallel in the Augusta roadstead and succeeded one another so that it is not possible to unequivocally identify the party responsible for the pollution.
- contrary to the "polluter pays" principle established in the Environmental Liability Directive.

CASE C- 378/08

- since the conflict between Italian law and EU law the case was brought to the Court of Justice

CASE C- 378/08 - JUDGMENT

About the liability regime:

- the Court of Justice ruled that operators activities were in the energy and chemical industry sectors, so falling within the hazardous activities listed in the Directive 2004/35, therefore remedial measures could be imposed on such operators without there being any need for the competent authority to establish that they are at fault or negligent

CASE C- 378/08 - JUDGMENT

- Regarding the **causal link** the Court gave some important indication for Member States:
  1. Firstly, the Court of Justice affirmed that it is necessary for the national authority to establish a causal link in order to impose remedial measures on operators.
  2. Nevertheless in case of diffuse pollution such as the one in the Augusta site it could be difficult to establish causation. So in these cases the legislation of a Member State may provide that the national authority has the power to impose remedying measures just on the basis of the presumption that there is a causal link between the pollution and the activities of the operators
  3. However, the 'polluter pays' principle requires that the obligation to take remedial measures is imposed on operators only because of their contribution to the creation of pollution or the risk of pollution.
  4. So in accordance with this principle, in order to presume a causal link, the national authority must have plausible evidence capable of justifying its **presumption**, such as the fact that the operator's installation is located close to the pollution found and that there is a relationship between the pollutants and the substances used by the operator in its activities.
  5. Only when the competent authority has such evidence, it is thus in a position to establish a causal link between the operators' activities and the diffuse pollution and so to held liable the polluters.

CASE C- 378/08 - JUDGMENT

- the Court of Justice used its ruling power to fill the gaps of the directive on the issue of causation and require that even if the national law provides a presumption of the causality link between the pollution and the operators activities, the plaintiff has nevertheless to give a **plausible evidence** capable of justifying such presumption.
- the court affirmed that the evidence of the presumption must be accurate, consistent and conclusive.
  In this case the court finds that evidence of the following elements:
  1. the proximity of the operators plant to the polluted site
  2. the fact that it was found that the polluting substances found on the damaged site were also substances used by the operator in its activity
- this plausible evidence was meant to keep the balance between the two parties otherwise there would be a disparity between them, considering also that the strict liability regime is already a good advantage for the plaintiff

ITALY

Sources of law:

- Civil Code
- Environmental Code

PROTECTION OF THE ENVIRONMENT

- the introduction of the environmental damage was not made with a statue but it was through two judgments at the beginning of the '80s: the first one of the Italian Council of State and the second of the Supreme Court. These cases concerned the pollution of a natural park (owned by the state) and for the first time in the judgment the protection of the environment becomes relevant to held liable the defendant
- Italy was one of the first European country that adopted a specific law concerning the environmental liability in 1986 BUT there was no definition of environment in this law
- the main problems for lawyers is:
  a) give a definition of environment, in order to determine when there is an environmental damage
  b) find a distinction between the damage suffered by the owner of the polluted site and the damage to the environment itself.

PROTECTION OF THE ENVIRONMENT

- The first question that lawyer need to handle is who has suffered the damage.
- Traditionally, there is liability and the right to compensation only if there is a individual that has property rights over the damaged asset.
  example: If a land has been contaminated or trees or vegetation has perished or a river has been polluted, the owner of these assets has the right to bring a claim and obtain compensation according to the principle of civil liability.
- Why was the environmental damage introduced?
  Because first the courts and then the legislation recognized that environment is a common value: it satisfies not just the interest of the owner but also the interest of the community; everyone has the rights to enjoy the landscape, the wood, river, waterfall, ...

LEGAL NATURE OF ENVIRONMENT

- environment is a "**common good**" not just public good: Supreme Court judgment (Cassazione, 10 October 2008, n. 25010)
- case concerning a pollution produced by an alteration and destruction of the vegetation and the soil and the deviation of watercourse
- the Supreme Court said that:
  "the harm of the environment goes beyond a mere economic damage to the individual's assets because the common good (which includes use of land, the natural resources, the landscape as an aesthetic and cultural value and as a condition of a healthy life) should be considered for its value for the community as it is fundamental good for the quality of life of the person"

DEFINITION OF ENVIRONMENT

- concerning the definition of environment, since there was no statute law, the case-law adopted a wide definition
  for example, environment is the protection of air, water and soil, and it concerns noises, waste disposal, protected natural areas, nature, landscape, etc.
- in the 2006 the **Environmental Code** was introduced and it contains the majority of Italian environmental legislation is today contained
- it contains also the provisions of the Directive on environmental liability
- Today, definition of environmental damage corresponds to the definition given by the EU directive

ENVIRONMENTAL CODE

- **main features** of the environmental liability
- regarding the **definition** of environmental damage:
  - **article 300** of the Environmental Code gives a very long definition
  - the environmental damage is the damage concerning the habitats, the natural resources, the water and the land or the utility of these resources (the beauty, the landscape, the enjoyment of nature ...)
  - according to courts interpretation the environmental damage consists in any degradation of the status of natural resources and diminution of their use.

ENVIRONMENTAL CODE

concerning the **type of liability**

- fault-based liability regime
- **Article 311:**
  "whoever harms the environment, through fault or negligence, in violation of provisions of the law or provisions adopted by law, causing damage to it, [...] has the duty to restore it as it was before the damage or when it is not possible to compensate the State for the damage"
- in addition operator cannot be held liable if he can demonstrates that the event was not likely to cause environmental damage according to the state of scientific and technological knowledge.

ENVIRONMENTAL CODE

concerning the **remedy** the environmental damage:

- rules on civil liability provides generally the compensation of damage as the first remedy measure
  restoration to the original situation as the damage had not occurred is the exception
- in the environmental damage the first rule is to **restore** the site or the natural resource as if the damage had not happened;
  only if it is not possible than the polluter will have to pay for compensation.
- the reason is that the object of the protection is not the property of the good BUT the habitat, the landscape, the beauty of the nature which are priceless assets. So the only solution to fully remedy the damage is by restoring the damaged asset.
- When the restoration is not possible, the harm has to be compensated according to the provisions of the environmental code:
  - the sum awarded will be equal to the costs for the restoration measures
  - the law impose that the sum awarded as monetary compensation must be used for the environmental protection
    (for example the State cannot use the money to build a hospital but it can use it for improving the forests)
  - this monetary compensation is more a punitive damage because it is bound to the protection of the environment

ENVIRONMENTAL CODE

concerning the **quantification** of the damage:

- according to civil liability rules the compensatory damage will be equal to the difference between the value before and after the harm ("before and after rule")
- In the field of the environmental damage the "before and after rule" is not applied
- the damage is calculated on the basis of the costs necessary to restore the damaged resource; many times the costs to restore the damage are higher that the market value of the damaged asset

ENVIRONMENTAL CODE

Who is **entitle to bring a claim** for environmental damage

- the subject entitled is only the State and precisely the Ministry of the Environment
- the reason is the environment is an interest of all the community and it is a common good. So since it is impossible that each citizen brings its own claim, the State is the only one entitle to act for the protection of the environment BUT not because he is the owner of the resource but because it is the entity that represents all the citizens.
- the **owner** of the natural resources may file a compensation claims BUT only according to the civil code
  art. 313 of the Environmental Code affirms that "in any case, individuals damaged by the event that caused the environmental damage have the right to bring a claim for compensation against the polluter"
- the claim of the State and the claim of the owner will be different and separate because the cause of action and the rights protected are different and both the State and the owner are entitled to restoration of the damage.
- This is the proof that the environmental damage is different from the damage to the property and it has very special characteristics with respect to the traditional civil liability
  environmental liability has its origin in the tort liability but now it is more related to the administrative law even if it still uses the instruments of the civil liability (rules on causation, fault, joint liability); it is a hybrid of both civil and administrative law.

UNITED KINGDOM

Sources of law:

- Law of torts
- Environmental Protection Act

STATUTE LAW

- Being the first nation involved in the industrial revolution and its attendant urbanization, it was also one of the first European countries to experience the environmental problems. The UK has a long history of laws on environmental protection and so the environmental damage is a well established concept in the legal system
- many statutes:
  1. 1981 Wildlife and Countryside Act
  2. 1991 Water Resources Act
  3. 1999 Pollution Act
- The most relevant statute is the **1990 Environmental Protection Act** that covers a wide range of areas of environmental concern: pollution control, provisions for contaminated land, nature conservation;
  it contains the provisions of the Directive on environmental liability

POLLUTER PAYS PRINCIPLE

R (on the application of National Grid Gas plc (formerly Transco plc)) v. Environment Agency [2007] UKHL 30

- land pollution happened in Yorkshire; this area belonged to several Gas Companies from the beginning of 1900 and it was used for the production of coal gas. On 1952 the production of gas stopped and after that it was used as a depot
- Part of the site since it was not used anymore for gas industry was sold to a firm of house builders
- in the 80s National Grid (defendant) acquired the gas transportation and storage undertaking
- the production of gas produced tars which were very toxic and could cause cancer; this liquid was storage underground.
- In the 60s the firm of house builders bought the land and started to build houses BUT the underground storage tanks containing tars were never removed.
- It was only in 2001 when a resident of the housing estate was digging in the garden that a tar tank was discovered and found out that the land on which 11 houses stood was contaminated
- tar tanks in gardens presented an obvious threat of significant harm to human health, the tar pits were also leaking into underground water and the was causing pollution of this groundwater
- according to the English law the determination of contaminated land can lead to a remediation order to the companies that caused the pollution to clean up the site
- section 78 of the Environmental Protection Act says that the appropriate person who shall clean up the site is the one who "caused or knowingly permitted the substances […] to be in, on or under that land"
- the problem was that:
  1. all the gas companies that were responsible for storage the tars shutdown after the production of gas stopped;
  2. the house builders that failed to remove the tars from the site were as well out of business;
  3. the Company that used it for deposit had never occupied the site so in theory it could not be held responsible for a site sold years before

POLLUTER PAYS PRINCIPLE

- Environment Agency files a suit saying that National Grid Gas is the appropriate person who should bear the costs of remediation;
- National Grid did not cause or knowingly permit any substances to be in, on or under the land and it was not the polluter because it has never been in the business of producing coal gas. That was done by the predecessor gas undertakers many years before National Grid came into existence.
- The Environment Agency argued that a liability passed down to National Grid: so even if the polluter should pay, National Grid should be regarded as standing in the shoes of the polluter because the person who caused or knowingly permitted should be intended as to include every person who became the successor to the liabilities of the actual polluters
- Environmental protection Act is based on principle that the polluter should pay and that innocent owners of contaminated land should not have to pay. Therefore the National Grid as the successor of the polluter should pay

POLLUTER PAYS PRINCIPLE

- The House of Lords ruled that:
  - the predecessor gas undertakers would, if they had still been in existence, have been appropriate persons because they were the actual polluters
  - section 78 only refers to the actual polluter
  - there are no arguments for extending "the polluter pays" principle to a company which has acquired the site of business of the polluter; it would give rise to an unreasonable if it was rendered retrospectively liable for the cost of decontaminating land, which it had never occupied or contaminated, simply because the land had been contaminated by an entity whose business happens to have been acquired by a predecessor of National Grid many years ago.
  - by acquiring all the assets of the polluter, the company could be said to be, in commercial terms, the successor of the polluter, or to stand in some respects in the shoes of the polluter. However, the imposition of such a liability might appear to be an unjustifiable and unfair extension of the polluter pays principle. Whether it would be right to extend the concept of a polluter paying in such a way is a matter of policy for the legislature, not for the courts. The role of the courts is to interpret the relevant statutory provisions which the legislature has enacted, in order to determine whether they have that effect
  - no-one could be made to clean up the estate
- after the Supreme Court dismissed the case, the clean-up was funded at public expense

UNITED KINGDOM

Sources of law:

- Law of torts
- Environmental Protection Act

COMMON LAW

- tort law historically principal mechanism for remedying harms to the environment
- types of torts:
  1. Rylands v. Fletcher rule
  2. negligence
  3. tort of nuisance

RYLANDS V. FLETCHER

- Rylands v. Fletcher was a decision by the House of Lords which is the basis of the concept of strict liability in English law.
- **Facts**: Rylands (Defendant) possessed a piece of property but did not have rights to the mines of coal under the surface. Fletcher (Plaintiff) possessed coal mines located near Ryland's property. Rylands constructed an artificial lake on his property above an abandoned coal mine that was connected to the Plaintiff's mines below the surface. The channels of the abandoned mine below Defendant's property had been filled in with soil and Rylands did not know or suspect that there was an abandoned mine below the surface.
- When the artificial lake was filled, the water broke through the channels of the abandoned coal mine and flooded into Fletcher's mines causing the mine to shut down. Fletcher then sued Rylands for damages and lost profits.
- So the main issue is: if the party did not know of the defect of his land, can he/she be liable for damage caused to the land of another, if the damage is a result of this defect of the land?
- the House of Lords said that by building the artificial lake, Rylands' use of its land was a lawful activity BUT it should be considered a **"non-natural" use**; considering its place and manner, it was an unusual, extraordinary, or inappropriate use of his land.
- when the owner of land, without intention or negligence, uses his land in the ordinary manner of its use he will not be liable in damages, if he harms his neighbour. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become harmful, even if he may act without intention or negligence, he will be liable in damages for any harm thereby occasioned.

RYLANDS V. FLETCHER

- This rule was further developed by English courts, and made an immediate impact on the law
- In 1994 the House of Lord in Cambridge Water Co Ltd v. Eastern Counties Leather plc ruled that the harm must be foreseeable.
  - The defendant owned a leather tanning business. Spillages of small quantities of solvents occurred over a long period of time and the solvents leaked through the floor of the building into the soil below an then to the waterhole owned by the Claimant water company. The waterhole was used for supplying water to local residents but the water was so contaminated that Water company had to cease using the waterhole.
  - Water company brought a claim based on the rule in Rylands v. Fletcher
  - The House of Lord stated that Company was not liable as the damage was too remote. It was not reasonably foreseeable that the spillages would result in the closing of the waterhole. The foreseeability of the type of damage is a pre-requisite of liability in actions of nuisance and claims based on the rule in Rylands v Fletcher.
- now claimants must prove that the defendant has done something which he can recognize with the standards knowledge relevant at the time and notwithstanding this knowledge he gives rise to a high risk of danger

NEGLIGENCE

- A negligence claim may be brought to recover for injury to land if the plaintiff establishes a fault of the defendant.
- To succeed in negligence a plaintiff must prove:
  1. the existence of a duty of care
  2. a breach of that duty leading to damage
  3. casual link between the breach of the duty and the damage
- For example, in Scott-Whitehead v. National Coal Board (1987) the defendant, a regional water authority, was found to be negligent in failing to warn a farmer that the water he was abstracting from a river to irrigate his crops contained a strong polluting solution. The farmer's potato crop was damaged as a consequence of using the contaminated water and the court held that the water authority was liable in negligence.

TORT OF NUISANCE

- it concerns those disturbances which involve interference with the right of property. Nuisance theory is the primary common law tort used to remedy an environmental harm.
- Nuisance gives those with an interest in land a remedy (monetary compensation or an injunction) when there is an unreasonable interference with the use of land.
- It has the advantage of flexibility: the notion of "unreasonable interference" depends on the situation and can adapt quickly to cover new kinds of pollution or environmental damage
- since the environmental damage must be "reasonably foreseeable", the defendant could always relies on the defense that he used of best available technology or that he started to use the land before the plaintiff

TORT OF NUISANCE

Anthony & Ors v Coal Authority [2005] EWHC 1654 (QB)

- case about a villages affected by air pollution caused by a fire from a coal tip
- The Coal Authority sold a disused tip as open land to a group of private individuals. In 1996, fire broke out at the tip. The fire burned for more than three years, resulting in clouds of smoke and fumes. The motorway closed down on several occasions due to poor visibility; the fire made life unbearable for the local residents.
- The local residents went to court and claimed for nuisance caused to them due to loss of the use and enjoyment of their homes. Some of them suffered breathing difficulties as a result of the smoke.
- The Coal Authority argued that at the time the tip was sold, there was little risk of it becoming a fire hazard and that they had taken reasonable measures to prevent a spontaneous fire outbreak.
- The court dismissed the Coal Authority's arguments and found it liable in nuisance for causing an "unreasonable interference" to the residents. The claimants, who were homeowners in neighboring villages, were each awarded 3,500 £.

TORT OF NUISANCE

Dennis v Ministry of Defence

- case concerns the effect of noise from military jets flying upon the claimant's neighboring estate
- claimants were the owner of the houses closed to a training military base and they alleged a serious noise pollution when pilots are flying their training circuits. Those noise levels are sufficiently high as to cause disturbance to the occupants and material interference with normal domestic and business activities
- Although the Minister of Defense accepted that operations caused noise and disturbance, it raised a defense that the training was for the public interest and that they had priority right over the land as the claimants bought their property at a time when the base was already established

TORT OF NUISANCE

the House of Lords held that:

- the noise from the jets constituted a nuisance and a serious interference with the claimants' enjoyment of their land
- Military training is important for the public security but the Minister of Defense must do it reasonably and avoid damaging the interests of others
- private rights must be subjugated to the public interest, but it might well be unjust that claimants should suffer the damage for the benefit of all. The principles underlying these considerations are that public interest should be considered and that selected individuals should not bear the cost of the public benefit.
- The court refused to treat the training as an ordinary use of land and held that although there was a public benefit represented by the military training, the claimants should not be required to bear the cost of the public benefit
- The court refused to grant the injunction to stop the training but awarded damages of £950,000, representing
  a. loss of capital value
  b. past and future loss of use and past
  c. future loss of amenity
- damages for losses of value calculated on the basis of a study by two experts. For example the experts agreed that, without the airbase the area had some business potential (for example, for entertaining business, conferences, small business meetings, weddings); each expert worked out the number of days he thought could reasonably be utilised and the possible income and therefore the damage was equal to the loss of a chance to earn this income.

ITALY

Sources of law:

- Civil Code
- Environmental Code

CIVIL CODE

- the law of the civil code are the first forms of protection of environment
- **art. 844** of the civil code prohibits the emissions exceeding acceptable limits
- Emissions exceeding normal limits that cannot be eliminated because they are indispensable to manufactory industries are considered illegal and so subject to payment of compensatory damages.
- To determine the limit courts need to take into considerations the circumstances of the specific case (such as for example whether the area is an industrial district); however courts usually do not establish a coincidence between exceeding acceptable limits and limits established in pollution control regulations.

CIVIL CODE

- At more general level, regarding civil liability rules, the fundamental provision is **art. 2043** according to which "anyone causing damage by fault or negligence must provide reparation for the damage"
- Basically art. 2043 entitles individuals to claim compensation for personal injury or property damage caused by an environmentally harmful act or omission when proving fault or negligence of the liable party.
- even if the Italian system of environmental liability is a fault-based liability regime, the courts interpreted art. 2043 together with another provision of the Italian civil code which is **art. 2050** that provides a strict liability regime by saying that whoever, in the course of dangerous activity, cause harm to another person, shall provide compensation for the damage, if he is not able to prove that he has taken also the necessary measures to avoid the damage
- according to this provision, in case of dangerous activities there is a presumption of the polluter's liability in case of damage

DAMAGES

- **kinds of damage**:
  A. property
    - economic damage = represent actual monetary losses directly borne by the victim
    - for example, the damage to restore contaminated areas, the loss of value of property, lost of past and future profits

  B. physical injury:
    - damage resulting in a medical condition that could be a illness or a injure
    - it can be constitute of:
      a) economic damage = the costs incurred for treat the illness or the injure (medical expenses)
      b) non-economic damage = damages that refer to compensation for losses not economically measurable, consisting in damage to health, emotional distress and suffering (such as shock, nervousness, grief, emotional trauma and anxiety)

QUANTIFICATION OF THE DAMAGE

Economic damage

- loss of value of the damaged asset according to the "before and after" criteria
- According to the rule of before and after, damages for the destruction of property are measured by taking the difference in the property's market value immediately before and after the injury.
- If the property is totally destroyed, then the decrease in market value is the market value of the property at the time of destruction.

QUANTIFICATION OF THE DAMAGE

non-economic damage

damage to the health

- damages related to the victim's health, i.e. the individual's physical or mental detriment certified as a medical condition, regardless of any impact on the individual's ability to work
- calculation
  - evaluation by a legal medical expert who will assess the damage to the health by calculating the permanent impairment to the body associated with the disease and express this permanent impairment in a percentage
  - the expert will indicate the disease affecting the victim and then will use a schedule to indicate the percentage
    for example, limb loss is equal to 40% of permanent impairment
  - the judge will have to determine the amount of compensation related to the percentage of the permanent impairment
  - the most used instrument to calculate compensation is a schedule that was created by the Tribunal of Milan

QUANTIFICATION OF THE DAMAGE

AGE

Percentage of permanent impairment

Invalidità	Punto biologico 2008 riv. al 2011	aumento	Punto danno "non patrimoniale" 2011	Risarcimento: fasce di età 31-40										aumento personalizzato	Invalidità
				31	32	33	34	35	36	37	38	39	40		
				Demoltiplicatore											
				0,850	0,845	0,840	0,835	0,830	0,825	0,820	0,815	0,810	0,805		
34	4.329,90	50%	6.494,84	187.701,00	186.597,00	185.493,00	184.389,00	183.284,00	182.180,00	181.076,00	179.972,00	178.868,00	177.764,00	+ max 25%	34
35	4.424,74	50%	6.637,11	197.454,00	196.293,00	195.131,00	193.970,00	192.808,00	191.647,00	190.485,00	189.324,00	188.162,00	187.001,00	+ max 25%	35
36	4.518,90	50%	6.778,35	207.417,00	206.197,00	204.977,00	203.757,00	202.537,00	201.317,00	200.097,00	198.877,00	197.657,00	196.437,00	+ max 25%	36
37	4.613,74	50%	6.920,62	217.653,00	216.373,00	215.093,00	213.812,00	212.532,00	211.252,00	209.971,00	208.691,00	207.411,00	206.131,00	+ max 25%	37
38	4.707,90	50%	7.061,85	228.098,00	226.756,00	225.414,00	224.073,00	222.731,00	221.389,00	220.047,00	218.706,00	217.364,00	216.022,00	+ max 25%	38
39	4.802,75	50%	7.204,12	238.817,00	237.412,00	236.007,00	234.602,00	233.197,00	231.793,00	230.388,00	228.983,00	227.578,00	226.173,00	+ max 25%	39
40	4.896,91	50%	7.345,36	249.742,00	248.273,00	246.804,00	245.335,00	243.866,00	242.397,00	240.928,00	239.459,00	237.990,00	236.521,00	+ max 25%	40
41	4.991,75	50%	7.487,63	260.944,00	259.409,00	257.874,00	256.339,00	254.804,00	253.269,00	251.734,00	250.199,00	248.664,00	247.129,00	+ max 25%	41
42	5.085,91	50%	7.628,86	272.350,00	270.748,00	269.146,00	267.544,00	265.942,00	264.340,00	262.738,00	261.136,00	259.534,00	257.932,00	+ max 25%	42
43	5.180,75	50%	7.771,13	284.035,00	282.364,00	280.693,00	279.022,00	277.352,00	275.681,00	274.010,00	272.339,00	270.668,00	268.998,00	+ max 25%	43
44	5.274,91	50%	7.912,37	295.923,00	294.182,00	292.441,00	290.700,00	288.960,00	287.219,00	285.478,00	283.738,00	281.997,00	280.256,00	+ max 25%	44
45	5.369,76	50%	8.054,64	308.090,00	306.278,00	304.465,00	302.653,00	300.841,00	299.028,00	297.216,00	295.404,00	293.591,00	291.779,00	+ max 25%	45
46	5.463,92	50%	8.195,87	320.459,00	318.574,00	316.689,00	314.803,00	312.918,00	311.033,00	309.148,00	307.263,00	305.378,00	303.493,00	+ max 25%	46
47	5.558,76	50%	8.338,14	333.109,00	331.149,00	329.190,00	327.230,00	325.271,00	323.311,00	321.352,00	319.392,00	317.433,00	315.474,00	+ max 25%	47
48	5.652,92	50%	8.479,38	345.959,00	343.924,00	341.889,00	339.853,00	337.818,00	335.783,00	333.748,00	331.713,00	329.678,00	327.643,00	+ max 25%	48
49	5.747,76	50%	8.621,65	359.092,00	356.979,00	354.867,00	352.755,00	350.642,00	348.530,00	346.418,00	344.305,00	342.193,00	340.081,00	+ max 25%	49
50	5.841,92	50%	8.762,88	372.423,00	370.232,00	368.041,00	365.850,00	363.660,00	361.469,00	359.278,00	357.087,00	354.897,00	352.706,00	+ max 25%	50
51	5.933,33	50%	8.900,00	385.815,00	383.545,00	381.276,00	379.006,00	376.737,00	374.467,00	372.198,00	369.928,00	367.659,00	365.389,00	+ max 25%	51
52	6.021,30	50%	9.031,96	399.212,00	396.864,00	394.516,00	392.167,00	389.819,00	387.471,00	385.123,00	382.774,00	380.426,00	378.078,00	+ max 25%	52
53	6.106,53	50%	9.159,79	412.649,00	410.221,00	407.794,00	405.367,00	402.939,00	400.512,00	398.084,00	395.657,00	393.230,00	390.802,00	+ max 25%	53
54	6.188,31	50%	9.282,47	426.065,00	423.559,00	421.053,00	418.547,00	416.040,00	413.534,00	411.028,00	408.522,00	406.015,00	403.509,00	+ max 25%	54
55	6.267,35	50%	9.401,03	439.498,00	436.913,00	434.327,00	431.742,00	429.157,00	426.572,00	423.986,00	421.401,00	418.816,00	416.230,00	+ max 25%	55
56	6.343,64	50%	9.515,46	452.936,00	450.272,00	447.607,00	444.943,00	442.279,00	439.614,00	436.950,00	434.286,00	431.621,00	428.957,00	+ max 25%	56
57	6.416,49	50%	9.624,74	466.319,00	463.576,00	460.832,00	458.089,00	455.346,00	452.603,00	449.860,00	447.117,00	444.374,00	441.631,00	+ max 25%	57
58	6.486,60	50%	9.729,89	479.684,00	476.862,00	474.040,00	471.219,00	468.397,00	465.575,00	462.754,00	459.932,00	457.110,00	454.289,00	+ max 25%	58
59	6.553,95	50%	9.830,92	493.021,00	490.121,00	487.221,00	484.320,00	481.420,00	478.520,00	475.620,00	472.720,00	469.820,00	466.920,00	+ max 25%	59
60	6.618,55	50%	9.927,83	506.319,00	503.341,00	500.363,00	497.384,00	494.406,00	491.428,00	488.449,00	485.471,00	482.493,00	479.514,00	+ max 25%	60
61	6.680,41	50%	10.020,61	519.569,00	516.513,00	513.456,00	510.400,00	507.344,00	504.287,00	501.231,00	498.175,00	495.119,00	492.062,00	+ max 25%	61
62	6.738,83	50%	10.108,24	532.704,00	529.571,00	526.437,00	523.304,00	520.170,00	517.037,00	513.903,00	510.770,00	507.636,00	504.502,00	+ max 25%	62
63	6.795,19	50%	10.192,78	545.823,00	542.613,00	539.402,00	536.191,00	532.980,00	529.770,00	526.559,00	523.348,00	520.138,00	516.927,00	+ max 25%	63
64	6.849,48	50%	10.274,22	558.918,00	555.630,00	552.342,00	549.054,00	545.767,00	542.479,00	539.191,00	535.903,00	532.616,00	529.328,00	+ max 25%	64
65	6.900,34	50%	10.350,51	571.866,00	568.502,00	565.138,00	561.774,00	558.410,00	555.046,00	551.682,00	548.318,00	544.954,00	541.591,00	+ max 25%	65
66	6.949,14	50%	10.423,71	584.770,00	581.330,00	577.890,00	574.451,00	571.011,00	567.571,00	564.131,00	560.691,00	557.251,00	553.812,00	+ max 25%	66
				31	32	33	34	35	36	37	38	39	40		

QUANTIFICATION OF THE DAMAGE

emotional distress or moral damage

- the wrongful act also interfered with the victim's personal life by causing him or her an unlawful suffering
- they are usually equitably liquidated by judges
- can they be recognize in environmental tort?
- according to the most recent case law non-economic damages can be recognized when the polluting behaviour constitutes a crime or contravenes a fundamental right protected by the Constitution
- In determining the amount of money to grant for non-pecuniary damages, judges needs to take into account the emotional distress for being exposed to a toxic substance, and the increased risk of contracting an illness, which also includes the emotional distress for being exposed to medical monitoring for early detection of diseases and the mental anguish caused by the fear of contracting a disease
- Italian Courts trials environmental cases on such legal basis, it is interesting to point out that the assessment of damage is quite broad in coverage

SEVESO CASE

- This case is about a spilling from a factory of a highly toxic compound, specifically dioxin; the compound spread all over the city of Seveso nearby this factory.
- in 1995 eighty-five residents of the area near to the chemical plant filed a lawsuit to recover damages for emotional distress.
- Claims were based on the fact that after the exposure to the toxic agent the plaintiffs were forced to undergo continuous medical examinations and lived in the constant fear of contracting a fatal disease associated with the dioxin

SEVESO CASE

- after a very long trial, in 2009 the Supreme Court ruled that the plaintiffs were entitled to be awarded with non-economic damages for having suffered emotional distress on the basis that:

1. the plaintiffs lived very closed to the chemical plant; because of this proximity to the polluted area the claimants were treated as individuals exposed to a high level risk of contracting a disease, and they were hence forced to constant health monitoring for several years after the accident.
2. scientific studies linked the dioxin exposure to contracting possible severe illnesses, so the chance of developing a disease was likely to follow in the given circumstances.

SEVESO CASE

Italian Supreme Court
(Corte di Cassazione)

- On the basis of this presumption, the court said that the damage was proven; the court in fact recognized that the develop of an illness was reasonably foreseeable and, therefore, the possibility of a disease was a sufficient legal basis to accord non-economic damages related to pain and emotional distress
- The Supreme Court said that "The person responsible environmental disaster must compensate the moral damage to the local residents as their health being at risk: the injury to be restored consists in the fear of getting sick as a result of the crime under article 449 criminal code [environmental disaster]"
- the court awarded as emotional distress damage 5.000 € each according to equity criteria

COURT OF APPEAL OF NAPLES

Corte di Appello di Napoli, 19 January 2011, n. 90

- case about a house building company that built illegally houses, hotels and car park over a protected area and therefore destroyed part of the forest, illegally discharge waste and permanent deviation of watercourses
- the court held liable the building company and so impose to the building company to pay compensation equal to the profits gained from the buildings since the restoration of the site
- the court also awarded the non economic damage because the State suffered a damage to its reputation represented by the impairment of its prestige and the citizens trust in the power of control and management of the State

GERMANY

Sources of law:

- BGB (Civil Code)
- Umwelthaftungsgesetz - UHG (Environmental Liability Act)
- Federal Soil Protection Act

GERMANY

- Germany is a densely populated country with a strong industrial sector. As a response of the environmental issue, since the beginning of the 1970s Germany has pursued a stringent environmental policies and it became one of the leading nation in Europe in this field
- Today several legal provisions come into consideration as the private law basis of liability for harmful effects on the environment
- **BGB** (German civil code) there is not a specific section dedicated to environmental liability but it is necessary to fall back on general provision of the law of torts and the law of property

§ 823 BGB and ENVIRONMENT PROTECTION

- According to the first paragraph 823 a party must pay compensation for damage if he intentionally commits an unlawful violation of the specific interests protected by § 823
- according to § 823 BGB specific interests are: 1) life, body, health; 2) freedom; 3) ownership; 4) any other right to which another person is entitled (such as the general right to personality or the right to an established business)
- environment is not on the list so the main legal basis for the environmental damage was to define the environment as the right of the person to live in a clean environment so that protection of the environment means the protection of health and ownership
- claims under 823 are subject to fault-based liability and the party who has suffered damage must prove that the party who inflicted the damage acted with negligence. Usually, however, the party who suffered damage finds great difficulties in this task because he lacks of important information
- By reason of these problems of proof, case-law has created an alleviation of the burden of proof on the party who has suffered damage.
- **case-law:** see *BGH, NJW 1997, 2748 et seq.*
  the court ruled that the operator of an installation must prove that he took all necessary and economically reasonable measures to ward off damage to third parties

BGB (CIVIL CODE)

- paragraph **906** which regulates the private law control between the neighbors and in particular emission that affect the use of the neighbor land
- Compensation will only be paid for the damage caused by the overstepping of limits of what may reasonably be expected to be tolerated and therefore its application is quite limited
- But **case-law** extended its application. For example, some Courts decisions declared that the acceptability of emissions is measured according to thresholds set in administrative provisions and technical instructions

ENVIRONMENTAL LIABILITY ACT UMWELTHAFTUNGSGESETZ (UHG)

- enacted in response to the pollution of the Rhine, one of the most important German river, involved in a serious environmental accident in 1986
- legal basis to claim for environmental damage

ENVIRONMENTAL LIABILITY ACT UMWELTHAFTUNGSGESETZ (UHG)

- choice of liability:
  strict liability on operators of industrial facilities listed in the Act
- special licensing requirement
- burden of proof:
  - victim needs to prove that the installation is likely to cause damage of the kind that has occurred
  - presumption of casual link:
    if appears likely that an installation has caused the damage (given the circumstances of the case)
    it is a shift of burden of proof on causality link
- scope:
  damage to natural resources that are subject to property rights (depends on the legal status of the natural resources)
- special measure of damages:
  quantum of damages is assessed on the costs incurred in restoring the injured natural resources to baseline condition

ENVIRONMENTAL LIABILITY ACT (UHG)

- Environmental Liability Act imposes strict liability damage caused to the environment by operators of certain industrial facilities particularly dangerous (such as heating plants, waste treatment plants, installations for paint production or metal processing and storage facilities for hazardous substances)
- it only covers damage to natural resources that are subject to property rights
- The Environmental Liability Act aims to ease the plaintiff's burden of proof. For instance, it is presumed that an installation has caused the damage if it appears likely, given the circumstances of the case, that it caused the damage (such as the type of installation operation, the type and concentration of the materials used, ...)
- The party who has suffered the damage only needs to prove that the installation is likely to cause damage of the kind that has occurred. If the damaged party can prove this, the operator of the installation then has to prove that he has operated according to the license, and with duties in order to prevent environmental damage
- The owner of these natural resources will be entitled to have the natural resources restored; it is stipulated that the damages are calculated on the costs incurred for restoring the injured natural resources to baseline condition.
- It also stipulated that restoration costs are only recoverable if these are reasonable but it is actually possible that the cost of restoration may be higher than the market value of the damaged property
- If it is technically or economically impossible to take restoration measures, the owner of the property may file a claim for damages but compensation will be assessed on the basis of the Civil code.

环境标准的分类和作用

朱晓勤　　厦门大学法学院

2014年6月26日

- 一、特征和分级
- 二、各类标准的作用
- 三、垃圾焚烧困局

- 沧州“红豆”局长
- 河北省沧县张官屯乡小朱庄村地下水污染（2013年4月）
- 井水变红，癌症村
- 化工厂长达25年超标排污污染地下水

一、特征和分级

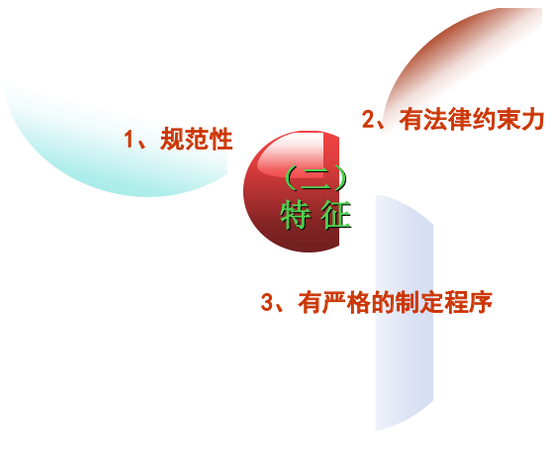
（一）概念

国家为了维护环境质量、控制污染，从而保护人体健康和维持生态平衡，按照法定程序制定的各种技术规范的总称

- 环境标准是具有法律性质的技术规范。
- 其主要内容是技术要求和各种量值规定。
- 《环境标准管理办法》（原国家环境保护总局颁布，1999年4月生效）

环境标准的作用——

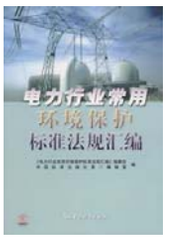
- 是强化环境管理的技术基础
- 是制定环境规划和计划的定量化依据
- 是制定和实施各种环境法规的重要依据
- 是推动科技进步的动力
- 是我国环境法律体系的重要组成部分



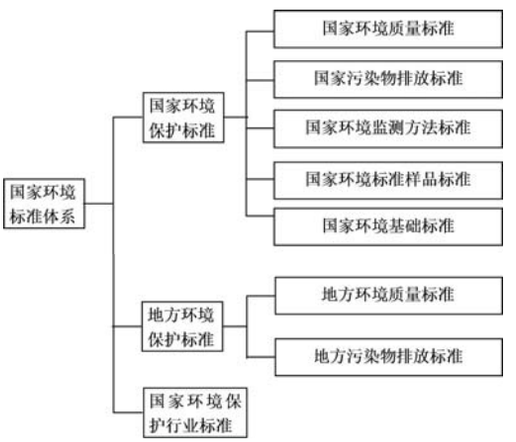
（三）分级

- 环境标准分为三级：国家环境标准、地方环境标准和国家环境保护部标准（环境保护行业标准）
- 国家环境标准包括五类：国家环境质量标准、国家污染物排放标准(或控制标准)、国家环境监测方法标准、国家环境标准样品标准和国家环境基础标准（在具体实施监测、测定和技术分析时，要按照一定的科学方法来进行）。
- 地方环境标准包括两类：地方环境质量标准和地方污染物排放标准(或控制标准)。

- 国家环境保护部标准是在行业范围内统一执行的环境标准，是对国家标准的补充，已有国家标准的不制定行业标准。
- 例如，化工行业、造纸行业、电镀行业、酿造行业、建材行业、电力行业、印染行业等环境标准



- 国家环境标准和国家环境行业标准在全国范围内执行。国家环境标准发布后，相应的国家环境行业标准自行废止。
- 地方环境标准在颁布该标准的省、自治区、直辖市辖区范围内执行。



环境标准分为强制性标准和推荐性标准。

环境质量标准、污染物排放标准和法律、行政法规规定必须执行的其他环境标准属于强制性标准（强制性国家标准代号为：GB，强制性环保行业标准代号为：HJ）。

强制性环境标准以外的环境标准属于推荐性环境标准（推荐性国家环境标准的代号为：GB/T，推荐性环保行业性标准的代号为：HJ/T）。

（四）地方政府权限

*省级政府对国家环境质量标准中未作规定的项目，可以制定地方环境质量标准，报国家环境保护部备案；

*对于污染物排放标准，省级政府可以对国家排放标准未作规定的项目，制定地方污染物排放标准，对国家污染物排放标准中已作规定的项目，可以制定严于国家排放标准的地方排放标准。

*向已有地方标准的区域排放污染物的，优先执行地方环境标准。（地方标准优于国家标准）

- （四）环境标准的管理与实施
  - 环境标准由国家环保部统一归口管理
  - 国家环保部负责制定国家和行业环境标准并具有解释权，同时负责地方环境标准的备案审查，指导地方环境标准的管理工作。
  - 省、自治区、直辖市政府负责地方环境标准的制定
  - 县级以上人民政府环境保护行政主管部门负责本行政区域内的环境标准管理工作，负责组织实施国家环境标准、行业环境标准。

例：水环境标准体系

- **水环境质量标准：**
  - 《地表水环境质量标准》（GB3838-2002）
  - 《海水水质标准》（GB3097-1997）
  - 《地下水质量标准》（GB/T 14848-1993）
- **污染物排放标准：**
  - 《污水综合排放标准》（GB8978-1996）
- **有关基础标准**

二、各类环境标准的作用

（一）环境质量标准

- 规定各种有害物质（或因素）在一定环境空间的最高允许含量。
- 如《地表水环境质量标准》GB3838-2002‘水域功能分类’
- 依据地表水水域使用目的和保护目标将其划分为五类：
- Ⅰ类　主要适用于源头水、国家自然保护区。
- Ⅱ类　主要适用于集中式生活饮用水水源地一级保护区、珍贵鱼类保护区、鱼虾产卵场等。
- Ⅲ类　主要适用于集中式生活饮用水水源地二级保护区、一般鱼类保护区及游泳区。
- Ⅳ类　主要适用于一般工业用水区及人体非直接接触的娱乐用水区。
- Ⅴ类　主要适用于农业用水区及一般景观要求水域。 同一水域兼有多类功能的，依最高功能划分类别。有季节性功能的，可分季划分类别。
- 对五类水质分别规定了硫酸盐、氯化物、溶解性铁、溶解氧、化学需氧量(COD）、生化需氧量(BOD)等污染物质的最高限值

主要环境质量标准

新修订的《环境空气质量标准》

- 新华社北京2012年2月29日电
- 国务院总理温家宝今日主持召开国务院常务会议，同意发布新修订的《环境空气质量标准》（GB3095-2012），部署加强大气污染综合防治重点工作。
- 为使环境空气质量评价结果更加符合实际状况，更加接近人民群众切身感受，会议同意发布新修订的《环境空气质量标准》，2016年1月1日起实施。
- 新标准增加了细颗粒物(PM2.5)和臭氧(O3)8小时浓度限值监测指标。会议要求2012年在京津冀、长三角、珠三角等重点区域以及直辖市和省会城市开展细颗粒物与臭氧等项目监测，2013年在113个环境保护重点城市和国家环境保护模范城市开展监测，2015年覆盖所有地级以上城市。

- 《环境空气质量标准 》
- （ GB 309[—2012代替GB 309[—199[GB 9137—88 201[-01-01实施）
-
- 为贯彻《中华人民共和国环境保护法》和《中华人民共和国大气污染防治法》，保护和改善生活环境、生态环境，保障人体健康，制定本标准。本标准规定了环境空气功能区分类、标准分级、污染物项目、平均时间及浓度限值、监测方法、数据统计的有效性规定及实施与监督等内容。各省、自治区、直辖市人民政府对本标准中未作规定的污染物项目，可以制定地方环境空气质量标准。本标准中的污染物浓度均为质量浓度。本标准首次发布于1982年。199[年第一次修订，2000年第二次修订，本次为第三次修订。本标准将根据国家经济社会发展状况和环境保护要求适时修订。

大气环境质量标准

- 环境空气质量标准
- GB 309[—2012
- 2012-2-29
- 201[-1-1
-
- 乘用车内空气质量评价指南
- GB/T 27[30-2011
- 2011-10-27
- 2012-3-1
-
- 室内空气质量标准
- GB/T 18883-2002
- 2002-11-19
- 2003-3-1
-

作　用

- 体现了环境目标的要求，是评价环境是否受到污染的依据
- 制定污染物排放标准的主要依据之一

环境污染是指某地区的环境质量达不到适用的环境质量标准的状况

（二）污染物排放标准

- 又称控制标准。规定污染源排放到环境中的污染物的浓度或数量。其目的是为了控制污染物的排放量，达到环境质量的要求。

主要污染物排放标准

大气污染物排放标准

- 大气污染物综合排放标准
- GB 1[297-199[
- 199[-4-12 /1997-1-1
-
- 水泥工业大气污染物排放标准
- GB 491[-2013代替GB 491[—2004
- 2013-12-27 /2014-3-1
-
-
- 轻型汽车污染物排放限值及测量方法（中国第五阶段）
- GB 183[2.[—2013代替 GB183[2.3-200[
- 2013-9-17 /2018-1-1
-

国家污染物排放标准分为跨行业综合性排放标准（如污水综合排放标准、大气污染物综合排放标准等）和行业性排放标准（如火电厂大气污染物排放标准、造纸工业水污染物排放标准等）。

综合性排放标准与行业性排放标准不交叉执行。即：有行业性排放标准的执行行业性排放标准，没有行业性排放标准的执行综合性排放标准。

作 用

1、为排污收费服务

- 《排污费征收使用管理条例》（2003年7月1日起施行）第十二条（二）：向水体排放污染物超过国家或者地方规定的排放标准的，按照排放污染物的种类、数量加倍缴纳排污费。
- （四）依照环境噪声污染防治法的规定，产生环境噪声污染超过国家环境噪声标准的，按照排放噪声的超标声级缴纳排污费。

2、是确认某排污行为是否合法的根据

- 污染物排放标准是为污染源规定的最高容许排污限额。排污者如以符合排污标准的方式排放污染物则其行为是合法的，反之则是非法排污。
- 《大气污染防治法》第四十八条： 违反本法规定，向大气排放污染物超过国家和地方规定排放标准的，应当限期治理，并由所在地县级以上地方人民政府环境保护行政主管部门处一万元以上十万元以下罚款。

- 《海洋环境保护法》第十二条： 对超过污染物排放标准的，或者在规定的期限内未完成污染物排放削减任务的，或者造成海洋环境严重污染损害的，应当限期治理。
- 《水污染防治法》第七十四条： 违反本法规定，排放水污染物超过国家或者地方规定的水污染物排放标准，或者超过重点水污染物排放总量控制指标的，由县级以上人民政府环境保护主管部门按照权限责令限期治理，处应缴纳排污费数额二倍以上五倍以下的罚款。

- 《环境保护法》修订案 第六十条：

- 企业事业单位和其他生产经营者超过污染物排放标准或者超过重点污染物排放总量控制指标排放污染物的，县级以上人民政府环境保护主管部门可以责令其采取限制生产、停产整治等措施；情节严重的，报经有批准权的人民政府批准，责令停业、关闭。

(三)其他标准

- 环境监测方法标准
- 为监测环境质量和污染物排放，规范采样、分析测试、数据处理等技术而制定的标准。
- 环境标准样品标准
- 为保证监测数据的准确、可靠，对用于量值传递或质量控制的材料、实物样品而制定的标准。
- 环境基础标准
- 对环境保护工作中需要统一的技术术语、符号、代码、图形、指南、导则及信息编码等而制定的标准。

大气监测规范、方法标准

- **环境空气质量监测点位布设技术规范（试行）**
- HJ 664-2013
- 2013-9-22 /2013-10-1
- **环境空气质量评价技术规范（试行）**
- HJ 663-2013
- 2013-9-22/ 2013-10-1
- **环境空气颗粒物（PM10和PM2.5）采样器技术要求及检测方法**
- HJ 93-2013**代替** HJ/T 93-2003
- 2013-7-30 / 2013-8-1

作　用

- 具有程序上的法律意义。
- 在认定污染物排放是否超标问题上发生分歧时，可以在诉讼中作为证明监测方法是否合法的判断依据。
- 案例：噪声污染案 （厦门市海沧区法院一审，厦门市中院二审）

- 原告：厦门某食品公司[illegible]位员工
- 被告：某电气公司
- 请求：1.判令被告立即停止噪声侵害
- 2.判令被告赔偿精神损失[illegible]000元
- 3.判令被告承担本案诉讼费用

- 争议焦点问题：被告排放噪声是否超标？
- 《环境噪声污染防治法》第二条：本法所称环境噪声污染，是指所产生的环境噪声超过国家规定的环境噪声排放标准，并干扰他人正常生活、工作和学习的现象。
- 第六十一条　受到环境噪声污染危害的单位和个人，有权要求加害人排除危害；造成损失的，依法赔偿损失。

- 《工业企业厂界噪声测量方法》
- 2.[illegible].1测点(即传声器位置。下同)应选在法定厂界外1m，高度1.2m以上的噪声敏感处。如厂界有围墙，测点应高于围墙。

三、垃圾焚烧困局:
我国环境标准存在的问题

- **（一）日本：垃圾焚烧环保实用不扰民**

- （英国记者）“我住在伦敦南部，几乎每天我都要乘火车经过位于德特福德的垃圾焚烧厂。该垃圾焚烧厂每年焚烧大约42万吨城市居民的垃圾，并把它转换成热能和电能供应给当地居民。我不认为该垃圾处理厂对我的健康构成威胁。相反，我认为这是对城市垃圾有效的利用。否则它们将被倒进垃圾填埋场，释放甲烷等有毒气体。”

（二）中国的“邻避”运动

-
- 一方面，垃圾焚烧渐成中国大中城市处理垃圾的方向。据《中国城市建设统计年鉴》，2012年中国垃圾焚烧厂数量达138座，日处理量超过12万吨，较之2001年日处理量仅20吨，已增加十几倍。在北京、天津、长三角和珠三角地区，焚烧已成为处理城市生活垃圾主要手段之一。
-

- 另一方面，因垃圾焚烧引发的公众邻避事件，此起彼伏，一再发生。这一西方发达国家建于城市市区甚至市中心的设施，却无法被众多中国公众容许建于城市市郊。
- 2009年10月，广州番禺发起抗议垃圾焚烧厂活动。
- 2014年7月10日，为抗议建造垃圾焚烧发电厂，浙江省杭州市余杭区部分民众集聚堵路，并发生了打砸事件。
- 2014年3月，武汉市汉阳区居民在锅顶山垃圾焚烧发电厂前持续抗议，警民对峙。

争议点：

- 垃圾焚烧的标准是否意味着安全？
- 二噁英对人体健康是否存在安全阈值？
- 如何确保污染控制？
- ？“中国民众觉悟低”？
- 垃圾焚烧标准落后是此领域邻避运动产生的一个重要原因

（三）新标：生活垃圾焚烧污染控制标准

- (GB 18485-2014 令松 GB 18485-2001 0 2014-07-01 审景)
- 为贯彻《中华人民共和国环境保护法》、《中华人民共和国固体废物污染环境防治法》、《中华人民共和国大气污染防治法》、《中华人民共和国水污染防治法》等法律，保护环境，防治污染，促进生活垃圾焚烧处理技术的进步，制定本标准。本标准规定了生活垃圾焚烧厂的选址要求、技术要求、入炉废物要求、运行要求、排放控制要求、监测要求、实施与监督等内容。本标准首次发布于2000年，2001年第一次修订，本次为第二次修订。

-
- 垃圾焚烧标准，一直是主烧派和反烧派争议的焦点之一。
- 欧盟垃圾焚烧标准EU2000/76/EC(下称欧标)是欧盟在2000年通过、至今仍在使用的烟气排放标准。
- 中国现行标准GB18485-2001在各项排放指标上，均与之差距显著。

-
- 例如重金属汞排放量，中国标准是欧盟的4倍;颗粒物，中国(测定均值)是欧盟(日均值)的8倍;而最受关注的二恶英类，中国标准则是其10倍。烟气排放标准远远落后于西方发达国家，引发中国公众不满，已成业界共识。

-
- 新标在上述诸多落后指标上作出大幅改进，“目前已接近欧盟标准”。
- 新标中，颗粒物、酸性气体、重金属和二恶英的排放限值均有收紧，例如：颗粒物由现行80毫克/立方米(测定均值)收至20毫克/立方米(日均值);二氧化硫(小时均值)由260毫克/立方米收至100毫克/立方米。

-
- 对人体有毒害作用、并且能在食物链中沉积下来的重金属，限制也更加严格。汞由0.2毫克/立方米收至0.1毫克/立方米，铅及其它由1.6毫克/立方米收至1.0毫克/立方米。
- 最受关注的二恶英由现行1.0ng-TEQ/m3(每立方米纳克毒性当量值)收紧至0.1ng-TEQ/m3。这已与欧盟标准一致。
- 新标除了在尾端控制上，收紧排放浓度限制，在过程监测方面也有所创新，比如增加一氧化碳等控制指标，采用“小时均值”和“日均值”相结合的控制限值。

- 环保部测算，通过实施新标准，生活垃圾焚烧产生的氮氧化物可减排25%，二氧化硫可减排62%，二恶英类可减排90%。
- 反烧派对这部“史上最严标准”并不放心。二次征求意见稿出台后，16家环保组织曾将十多条意见写成联名信，提交至环保部官网，至今未得回复。
- 联名信指出，氮氧化物和重金属标准较松，没有达到欧盟标准;二恶英标准尽管与欧盟相当，为0.1ng-TEQ/m3，但监测手段有问题，测定为一年一次，很可能测时造假、长年超标，应改为每月一次，连续采样。
- 解决垃圾焚烧标准落后问题，是化解邻避运动的第一步。

谢 谢 ！

EU-China
Environmental Governance Programme
Training Course

Training on Environmental Justice
环境司法培训班
Kunming
30th,June- 7th, July 2013

Environmental Damage Assessment Methodologies
环境污染损害鉴定与评估

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GOPA

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   环境污染损害鉴定评估现状：国别比较
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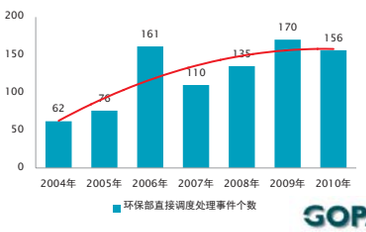
1.Why EDA is important for Environmental Justice?
中国开展环境损害鉴定评估的必要性

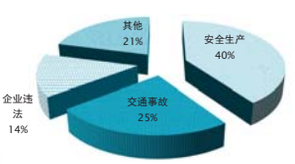
中国开展环境损害鉴定评估的必要性

- 环境污染事件呈高发态势
- 污染责任追究制度尚不健全
- 环境污染损害得不到有效赔偿与修复
- 环境污染损害案件判决与行政处罚缺乏依据

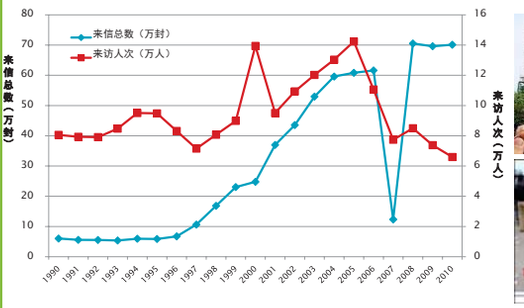
环境污染事件呈高发态势

事故类型	2004年	2005年	2006年	2007年	2008年	2009年	2010年
安全生产	24	21	78	39	57	63	69
交通事故	18	25	36	28	25	52	28
企业违法	15	12	22	14	23	22	17
其他	5	18	25	29	30	33	42
合计	62	76	161	110	135	170	156





环境问题成为影响社会稳定的重要因素



因环境污染发生的冲突事件频频发生，因环境污染上访数量接近土地问题上访数量。

水污染事件引发的饮用水安全问题尤为突出

- 2001年~2010年期间，我国共发生环境污染及破坏事故11069起，其中水污染事故5790起，占52%。
- “十一五”期间，环境保护部接报处置的232起较大以上突发环境事件，突发性水环境污染事件有142起，其中90起涉及群众饮用水安全问题。

Year	Incidents	Water pollution	Air pollution	Direct loss/ ten thousand Yuan
2005	1406	693	538	14515
2006	842	482	232	13471
2007	462	178	134	3278
2008	474	198	141	18186
2009	418	116	130	43354
2010	420	135	157	2256.9





城市发展工业搬迁污染场地

国家实施的“退二进三”政策导致城市出现大量遗留、遗弃场地，亟待开展风险评估与修复治理。

广州市：2007年以来，147家大型工业企业关闭、停产和搬迁	沈阳市：2008年，56家污染企业搬迁；2009年，搬迁改造城区内所有重污染企业	重庆市：2010年，主城区的112家污染企业实施“环保搬迁”

矿区开采导致的生态环境破坏触目惊心




污染责任追究制度尚不健全

中美环境污染事故责任对比

墨西哥湾油污事件

根据美国相关法律规定主动进行赔付。2010年8月9日，美国司法部和BP宣布，双方谈妥共计200亿美元的墨西哥湾漏油赔偿基金的方案。截止2012年3月底，总赔偿金额已经超过67亿美金，赔付将持续到2013年。同时，出资5亿美元建立海湾沿岸研究院，并提供150万美元支持时效性数据收集，之后再次提供1.125亿美元支持70多个研究机构对水质、生态环境保护和海滨恢复力等进行为期3年的研究。截止2012年3月1日，BP公司已经向超过20万的个人和商业团体支付了大约65亿美元的资金。2012年3月2日，BP公司就私益诉讼部分与原告方达成和解协议，支付总额大约78亿美元赔偿。其中23亿美元将用来赔偿墨西哥湾海产产业相关的经济损失，另一部分则用来赔偿基于医疗症状及为期21年的医疗咨询方案的医疗索赔。此外BP公司将提供1.05亿美元来增加墨西哥湾地区的医院数量，扩大医院的规模并提高医疗水平。
截止2012年4月2日，BP公司向美国政府共支付了13.51亿美元的赔偿经费，其中，政府预付应急清理费用为5.28亿美元，政府应急清理费用约为8亿，税收损失约为0.28亿，增加的公共服务费用为231万美元。

大连输油管道爆炸事件

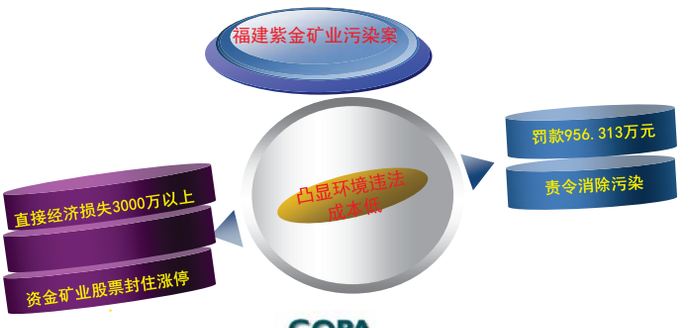
周边养殖和旅游业遭受直接经济损失，估计石油泄漏对海洋生物和生态环境造成的破坏和影响可能持续几年、甚至几十年。至今，事故造成的损害赔偿事宜未提上日程，未追究责任方民事责任。

环境污染损害得不到有效赔偿与修复

- 重金属、POPs等长期累积性污染所引发的公众群体事件时有发生，近年陕西、湖南、甘肃、河南等局部地区多有报道；
- 在现实中，公众的私益损害无法获得足额赔偿。


环境污染损害案件判决与行政处罚缺乏依据

大量的环境污染健康损害案件无法得到有效解决，面临“告状难、受理难、判决难、执行难”等问题。



损害赔偿与实际损害不成比例 The compensation for damages is disproportionate to actual damages.

2. Status of EDA in China

中国的环境污染损害鉴定评估研究与工作现状

研究现状

- **宏观环境经济经济核算（污染损失）在国际处于领先地位**
- **环境事件的环境污染损害评估技术相对落后**
  - 基础数据匮乏，健康损害评估停滞于研究层面
  - 海洋与渔业的生态环境资源损害评估研究取得一定进展，并付诸于实践
  - 国内有学者关注到中国相关法律对环境与财产的交叉界定，提出了区分财产与环境损害的基本原则以及污染损害经济损失的构成
- **法学层面关于完善环境污染损害赔偿相关立法的研究比较深入全面**

工作现状

- **农业部**
  - **管理办法与技术规定**
    - 2000年颁布了《渔业污染事故调查鉴定资格管理办法》（农渔发［2000］7号）
    - 2008年颁布了《渔业污染事故经济损失计算方法》（GB/T 21678-2008）
    - 2007年颁布了《农业环境污染事故损失评价技术准则》（NY/T 1263-2007）
  - **鉴定评估机构**
    - 农业生态环境及农产品质量安全司法鉴定中心
    - 农业部长江中上游渔业生态环境监测中心
  - **鉴定类别：微量物证鉴定**

工作现状

- **国家海洋局**
  - **技术规定**
    - 1997年颁布《海面溢油鉴别系统规范》
    - 2007年颁布《海洋溢油生态损害评估技术导则》（HY/T 095-2007）
  - **鉴定评估机构**
    - 国家海洋环境监测中心司法鉴定所

工作现状

- **司法部**
  - **管理办法**
    - 2005年全国人大颁布并实施《关于司法鉴定管理问题的决定》
  - **鉴定评估机构**
    - 山东海事司法鉴定中心
    - 北京市劳保所室内环境司法鉴定中心
    - 福建力普环境司法鉴定所
  - **鉴定类别：环境监测鉴定及微量物证鉴定**

工作现状

- **环境保护部**
  - **管理办法与技术规定**
    - 2010年颁布《关于开展环境污染损害鉴定评估工作的若干意见》（环发[2011] 60号）、《环境污染事故损失数额计算推荐方法》
  - **鉴定评估机构（未获司法鉴定资质）**
    - 环境规划院环境风险与损害鉴定评估研究中心
    - 中国环境监测总站环境污染损害鉴定技术中心
    - 中国环境科学学会环境污染损害鉴定评估中心
  - **鉴定类别：其他类**

2.1 环保部工作进展

环保部内技术支持

部门	2011年	2012年
政策法规司	关于开展环境污染损害鉴定评估工作的若干意见 “十二五”环境损害鉴定评估能力建设规划 关于构建环境污染损害评估司法鉴定体系的建议	2012年环境污染损害鉴定评估 工作要点
应急中心	化工石化建设项目环境风险评审方案 《关于建立健全重大决策社会稳定风险评估机制的指导意见（试行）》工作方案	建设项目环境风险评估评审指南（草稿） 突发环境事件污染损害鉴定评估工作规程（草稿）
污防司	铅污染环境损害评估技术指南	
其他		跨界环境污染损害赔偿处理办法（草稿）

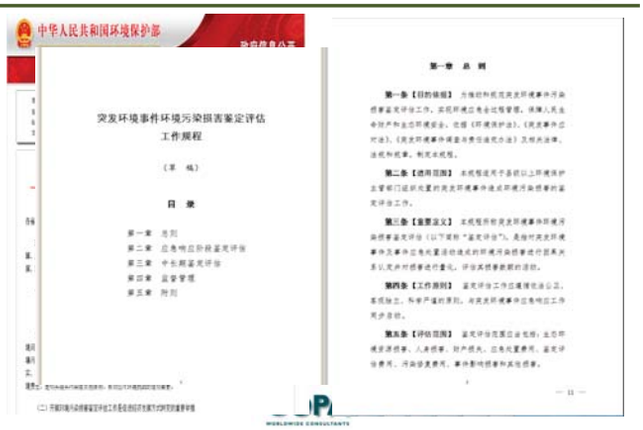
近期技术支持工作

- 1、与司法部协商开展环境损害评估资质协同管理（拟联合下发通知）；
- 2、配合部里关于刑法338条关于“严重污染环境” 和“后果特别严重” 司法解释修订起草工作；
- 3、配合应急中心编制《**突发环境事件污染损害评估工作程序规定（试行）**》已通过部长专题会；
- 4、《环境污染损害鉴定评估资格管理办法》（征求意见稿）；
- 5、《环境污染损害鉴定评估收费标准（草稿）》；
- 6、《环境污染损害鉴定评估人与鉴定评估机构标准化建设指南（草稿）》；
- 7、《关于环境领域司法鉴定范围的建议》，正在征求高法的意见。

正在编制的相关文件

序号	名 称	类 型	状 态
1	《环境污染损害数额计算推荐方法（第Ⅱ版）》	环境保护部文件	准备中
2	《铅污染环境损害鉴定评估技术指南》（草稿）	技术文件	待征求意见
3	《环境污染事件损害评估调查技术规范（国家环保标准）》	行业标准	立项编制中
4	《环境污染损害鉴定评估技术指南-总纲（国家环保标准）》	行业标准	立项编制中
5	《突发水环境事件污染损害快速评估技术规范》（草稿）	技术文件	编制中
6	《污染场地环境损害勘查监测与鉴定评估技术指南》（草稿）	技术文件	编制中

风险损害中心完成工作



地方技术服务

序号	名 称	类 型	进 度
1	太浦河江浙跨省断面二氯甲烷污染事件（江苏省环保厅）	突发水污染事件	2013.3已完成
2	四会权盛陶瓷有限公司酚水泄漏环境污染事件 （四会市环保局）	突发水污染事件	2013.6已启动
3	“沧县小朱庄建新化工厂污染环境案”环境污染案（沧州市公安局）	地下水污染纠纷	2013.5启动中
4	云南曲靖铬渣非法倾倒案（自然之友）	土壤和地下水污染	2013.6仅支持
5	湖南永兴重金属污染环境风险与损害调查评估（风险防控规划编制）	区域重金属污染	2013.1
6	广西河池涉重企业环境风险等级划分	区域重金属污染	2013.4

环境风险与损害鉴定评估工作平台建设

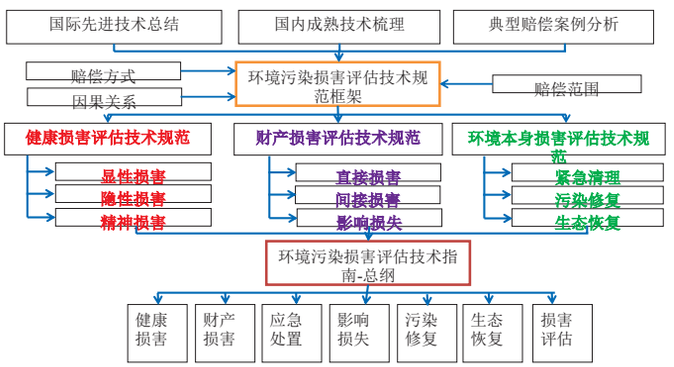
- 开发环境风险与损害鉴定评估专家库
- 开发环境风险与损害鉴定评估案例库
- 开发环境风险与损害鉴定评估网站
- 开展环境污染损害鉴定评估实验室硬件建设
- 开发突发性水污染事件环境损害鉴定评估软件

2012年试点工作情况

试点省份	是否成立机构	机构依托单位	是否独立机构	是否具有司法鉴定资质	2012案例情况（件）
河北	是	环境工程评估中心 环境监测中心站	否	否	——
江苏	是	环境科学学会 环境监测中心	是	是	6
山东	是	环境规划院	否	否	5
河南	是	环境科学研究院	否	否	1
湖南	是	环境科学研究院	否	否	5
重庆	是	环境工程评估中心 环境科学研究院	否	是	6
昆明	是	环境科学研究院	是	是	7

- 深圳加入2013年试点工作；
- 山西省环保厅下发《关于加强环境风险评估与污染损害鉴定工作的通知》；
- 湖北省环保厅请求对环境损害鉴定评估工作给予支持。

环境损害评估技术规范



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按环境要素和生态系统类型

- **生态系统**：耕地、草地、湿地、森林、海洋（海岸带）
- **环境要素**：大气环境、水环境、土壤环境、声环境、光环境

按污染事件类型分

- **事件原因**：生产安全事故、交通运输事故、企业偷排（偶然、长期）
- **污染物**：重金属、化学品、石油类、等
- **影响受体**：大气、水、沉积物、土壤、生态系统，等

关键节点技术

- 现场勘查与监测分析技术
- 因果关系判定技术
- 污染时空范围界定技术
- 生态环境基线确定技术
- 损害评估适用标准体系
- 健康损害鉴定评估技术
- 生态环境损害鉴定评估技术
- 调查技术（事故影响、财产、应急处置费用）
- .....等

工作进展：技术方法

生态功能	生产有机物质	调节大气	涵养水源	水分调节	水土保持	营养物质循环	净化污染	野生生物栖息地	干扰调节
森林	√	√				√	√	√	
湿地	√	√	√	√	√	√	√	√	√
草地	√	√	√		√	√			
耕地	×	×	×		×	×			
海洋	×	×		×		×	×	×	×

河口和海洋（海水）	
A.潮间带的	*B.潮线下的*
1.多岩石海岸	1.岩石底层
2.卵石碎石海滩	2.卵石碎石底层
3.沙质海滩	3.沙质底层
4.泥沼地	4.淤泥底层
5.盐沼泽	5.大藻（巨藻）海床
6.红树林沼泽	6.软体动物礁石
7.大藻类海床	7.珊瑚礁
8.软体动物礁石	8.海草海床
9.珊瑚礁	
10.海草海床	

美国相关技术导则

技术导则	编制部门	主要内容
1986年DOI NRDA规范	DOI	提出了针对大型环境污染事件的Type B评估导则
1986年DOI NRDA	DOI	等值分析合适度模型使用技术导则
1987年NRDAM/CME模型	DOI	内政部针对Type A的海岸带和海洋环境损害评估模型
1987年DOI NRDA规范	DOI	提出了针对小型环境污染事件的Type A评估导则
1994年DOI NRDA规范	DOI	**1994年**俄亥俄诉美国内政部案后修订
1996年NRDAM/GLE模型	DOI	内政部针对Type A的五大湖区域环境损害评估模型
1996年DOI NRDA规范	DOI	NRDAM/CME模型修订
1996年NOAA NRDA导则	NOAA	包括预评估、恢复计划、恢复行动三个阶段技术导则
2002年模型	NOAA	SIMAP溢油和CHEMMAP化学品泄漏评估模型
2003年手册	DOI	土地管理局（BLM）NRDAR工作手册
2008年手册	DOI	国家公园管理局（NPS）NRDAR工作手册

工作进展：技术方法

污染场地损害鉴定评估技术方法体系研究	中科院地理科学与资源研究所 《污染场地（土壤、地下水）环境损害鉴定评估技术框架》研究报告； 《废弃物（废水）倾倒污染场地环境损害鉴定评估技术指南》
海岸带突发环境事件污染损害鉴定评估技术方法体系研究	中科院烟台海岸带研究所 《海岸带突发环境事件环境污染损害鉴定评估技术体系框架》研究报告
典型陆地生态系统污染损害鉴定评估技术方法体系研究	北京师范大学、中科院土壤所 《典型陆地生态系统环境损害鉴定评估技术框架》研究报告 《典型陆地生态系统环境损害发生机理》研究报告 《基于遥感手段的陆地生态系统环境损害评估技术体系》研究报告
内陆河突发水环境事件损害鉴定评估技术方法体系研究	清华大学 《内陆突发水环境事件环境污染损害鉴定评估技术集成与实例》研究报告； 《内陆突发水环境事件环境污染损害鉴定评估适用模型与技术手册》。
噪声与振动环境污染损害鉴定评估技术方法体系研究	中国环境科学学会 《噪声及振动污染环境损害鉴定评估技术框架研究》报告

2.2 环保部研究进展

研究一 我国环境保护案件的特征及立法建议

年份	刑事一审：破坏环境资源保护罪结案	民事一审：环境污染损害赔偿案件结案	行政一审：环保案件结案	合计	刑事一审：环境监管失职罪结案	刑事一审：重大环境污染事故罪结案
2002	5605	1473	1075	8153	——	4
2003	5983	1540	619	8142	——	3
2004	5331	4453	698	10483	1	6
2005	6176	1545	1220	8945	4	13
2006	7885	2146	1183	11217	3	7
2007	8759	1085	2584	12438	10	2
2008	10075	1509	1601	13198	13	11
2009	9904	1783	2628	14338	23	18
2010	9985	2033	1894	13927	15	19
2011	11732	1883	2220	15846	11	26

研究一 我国环境保护案件的特征及立法建议

- **环境案件数量较少，占全部案件的比重小，增长缓慢，大量环境污染纠纷没有进入诉讼程序，未反映当前环境纠纷多发的现状**
- **破坏环境资源类刑事案件数量最多、环境污染罪较少，环境案件类型呈多样性、地区性分布**
  - 破坏环境资源保护与环境监管失职罪等刑事案件占环境案件的69.86%
  - 环境污染损害赔偿案件占环境案件的16.67%
  - 环保处罚和环保行政强制纠纷类行政案件占环境案件的13.47%。

研究一 我国环境保护案件的特征及立法建议

- **单一诉讼较多，以个体纠纷为主，共同诉讼逐渐增多，公益诉讼不断出现；**
- **环境案件从当事人来看，是起诉难，举证难、胜诉更难，从法院来看，是审理难，判决难，执行难；**
- **环境保护个别案件存在法律适用不一致的现象**

研究一 我国环境保护案件的特征及立法建议

刑事案件
- 《刑法修正案（八）》第338条需要配套司法解释。
- 自然资源犯罪的刑事立法与司法解释需要加强（在刑法中增加破坏草原犯罪的法条，扩大野生动物法律保护的范围）
- 环境刑事立法与司法中要贯彻“宽严相济”刑事政策。
- 环境刑事裁判方式需要创新

民事案件
- 环境侵权行为责任的认定标准。
- 环境侵权案件的举证责任。
- 环境侵权损害赔偿范围有待明确。

行政案件
- 环境行政诉讼的受案范围过于狭窄。
- 环境行政诉讼的原告起诉资格过于严格，原告主体资格确定难。
- 环境行政诉讼中由被告承担举证责任过于僵化，被告举证难。
- 环境非诉行政强制执行案件量大且“执行难”。

主要研究结论

完善相关环境污染损害赔偿法律规定

完善现有法律体系关于环境污染导致人身财产损害赔偿的规定	对现有法律体系进行“绿化”，弥补生态资源环境损害赔偿缺漏
明确并理顺认定环境侵权的前提与条件	在《民法通则》等有关法律中原则性规定关于生态资源环境价值保护的原则规定
细化因果关系的判定原则与举证责任分配原则	在民事诉讼法修订中明确将生态损害赔偿纳入诉讼范围
扩大环境污染导致的人身损害赔偿范围	在《环境保护法》修改中明确规定环境损害鉴定评估制度
明确环境污染致传统损害的救济赔偿机制	制定并出台《生态环境损害赔偿法》，若条件允许

条件允许时，制定专门的《环境责任法》或《环境损害赔偿法》，对环境污染所致传统损害与生态环境资源损害的诉讼制度、因果关系鉴定与举证责任、损害评估与赔偿、赔偿金管理、赔偿社会化分担方式等做出一揽子规定。

GOPA

研究二
建立环境污染损害司法鉴定管理制度

EU-CHINA

依据	《全国人大常委会关于司法鉴定管理问题的决定》
特点	统一性　双重性　层级性
主体	司法行政机关　环境保护行业部门
客体	鉴定人　鉴定机构　鉴定活动
内容	准入管理　资质管理　业务管理　监督
机制	受理、鉴定程序与步骤、鉴定结论异议及其救济等

研究二、建立环境污染损害司法鉴定管理制度

管理主体	管理模式	行业+行政
	主体层次	中央、地方两级
		中央一级
	部门	环保部门
		与环境要素相关各部门
管理内容	准入	标准、考核、审批
	执业	方法、标准、程序、培训、鉴定人与委托人纠纷解决
	退出	违法查处
资质条件	机构	名称住所、资金、业务范围、设备仪器、实验室
	人员	技术职称、学历专业背景、执业资格、工作经历
	申请	程序
	资质等级	
工作程序	委托与受理要求	
	鉴定人员回避	
	报告出具及内容要求	
保障	规范性法律文件制定	

具体建议与设想

EU-CHINA

GOPA

研究三
工作规程-主要规定事项

EU-CHINA

总则	目的依据、适用范围、重要定义、工作原则、评估范围、评估机构、评估依据要求、公众参与、评估费用、纪律要求
应急处置阶段鉴定评估	启动、委托、方案制定、现场勘测、访谈与问卷调查、损害确认与评估、评估报告出具与应用
中长期鉴定评估	启动、时限、现场勘测、计划制定、损害鉴定评估、鉴定评估报告出具与应用、后评估
监督管理	备案管理、监督检查、责任追究

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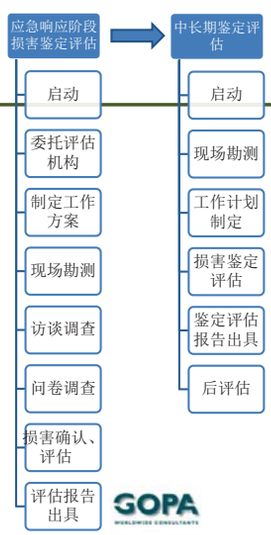
流程图



GOPA

研究四、环境污染损害鉴定评估工作技术指南

环境污染损害鉴定评估工作流程

预评估期
进行事件原因调查与信息收集，初步判定污染是否超过环境基准或标准，是否会对人体健康、自然资源或生态环境造成损害。

评估计划期
确定损害范围和鉴定评估方法，制定进一步监测和实验方案，确定需要开展的课题研究计划，为损害评估工作的开展奠定基础。

评估期
重点对生态环境资源及其服务功能的潜在损害进行评估，提出污染修复方案，出具环境污染损害评估结论

后评估期
在修复计划（含自然修复）实施后，定期监测自然资源和生态服务功能的恢复情况，评估修复方案是否成功，是否需要采取补充性修复措施

损害鉴定评估准备工作

组建损害评估团队

- 选择相关专业机构和个人组成环境损害评估团队
- 参与人员：行政管理部门、环境化学、环境物理学、环境经济学、环境修复领域专家

建立合作机制

- 公共管理部门之间的协作
- 与应急机构之间的协作
- 与污染事件责任方之间的协作

建立数据管理系统

- 现场调查数据
- 现场监测数据
- 历史文献资料
- 其他相关知识

鉴定评估资金

- 资金来源
责任方支付的鉴定评估费用等
- 资金管理
成立资金管理组
规划资金支出方案
- 资金用途
人工成本、差旅费、数据及样品采集分析费等

预评估期

- 根据调查与现场勘查与监测结果，初步评估污染造成的人身损害、财产损害、应急处置费用、影响损害、生态环境资源损害
- 对污染物排放量、污染暴露途径、污染浓度水平、环境污染损害程度进行定性或半定量化分析
- 确定是否进入长期环境损害的评估

评估计划期

主要工作

1. 预评估期信息汇总
2. 确定环境污染损害鉴定评估对象与范围
3. 开展环境污染损害鉴定评估现场勘查与监测
4. 确定损害评估及修复的适用基准和目标指标体系
5. 编写评估计划，发布环境污染损害鉴定评估及修复意向通告

编写环境污染损害鉴定评估工作计划

- 执行概要
- 目的与评估需求
- 损害的鉴定评估
- 专项研究计划
- 备选修复方案

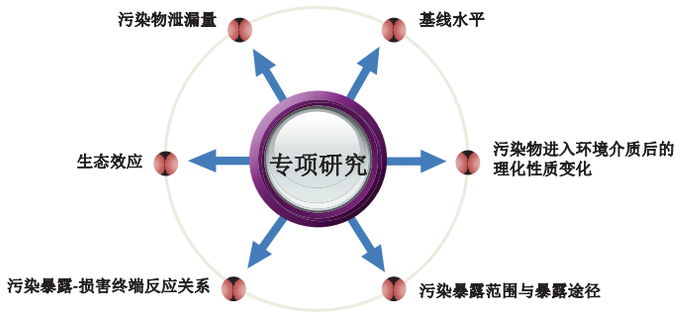
评估期——工作内容

对各项环境污染损害、主要是生态环境资源及其服务功能的损害进行评估，提出污染修复和生态恢复方案，出具环境污染损害评估结论。

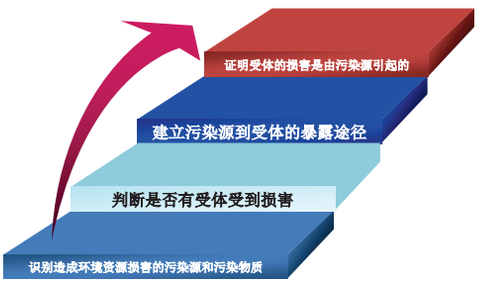
环境污染损害鉴定评估

工作内容

评估期——专项研究



评估期-因果关系判定

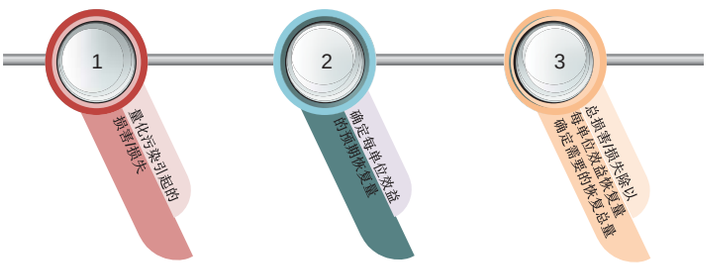


因果关系判定的影响因素

- 概率
- 时间顺序
- 影响的强度
- 专一性
- 重复性
- 推测性能
- 一致性

评估期-替代等值分析

生态环境资源损害包括：
物种、栖息地、生态服务功能及人类使用和非使用价值不利影响。



"资源对等法""服务对等法"等值分析法

评估期——确定环境修复方案

编制环境污染损害评估报告

1.确定修复目标

2.列出修复清单

3.根据修复行动提供的生态环境资源和服务与损失的生态环境资源和服务的类型、质量以及价值，将修复行动进行分类

4.选择评估方法以确定基本修复行动的规模，将受损害的生态环境资源和损失的服务恢复到基线水平，并设计研究方案来收集必要的数据

5.选择评估方法以确定补偿修复行动的规模，针对生态环境资源和服务的期间损失向公众提供补偿，并设计研究方案来收集必要的数据

- 正文

1、鉴定评估机构与人员的基本情况
2、污染事件的基本情况
3、工作目标、技术路线、组织实施
4、鉴定评估所依据的法律、法规、规章和规范性技术文件
5、损害范围界定（原则、方法、依据、范围）
6、问卷调查
7、损害评估方法与专项研究
8、损害评估
9、修复方案：包括备选修复方案、修复方案确定标准、预期修复效果等内容（可选）
10、结论与建议（鉴定评估结论、事故定级、赔偿与修复方案建议）
11、评估的起始日期
12、相关人员的签名和盖章

- 附件

1、鉴定评估机构与人员的资格证明文件的复印件
2、双方签订的授权委托书
3、调查表与调查工作总结
4、专项研究与实验报告
5、相关评估方法和标准及其说明
6、其他与鉴定评估工作有关的技术文件

评估期——损害评估技术方法

文献回顾
现场调查法
实验研究
模型模拟

地下水环境污染损害评估
地表水环境污染损害评估
环境空气污染损害评估
土壤污染损害评估
生物资源损害评估

揭示支付意愿法
- 市场价值法
- 生产率法
- 隐含价格法
- 旅行费用法

虚拟支付意愿法
- 避免损害成本法
- 恢复费用法
- 人力资本法

陈述支付意愿法
效益转移法

后评估期

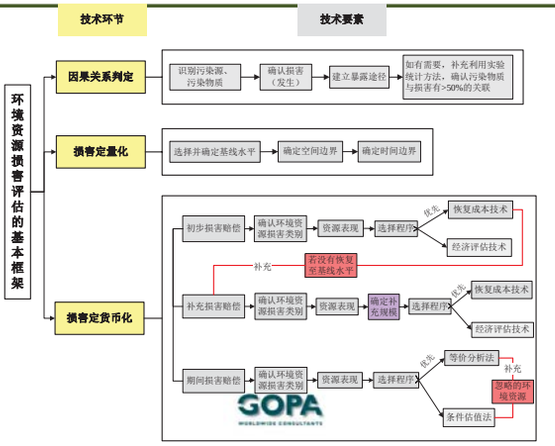
1 **数据监测与分析**
定期汇报监测结果，建立相应数据库，对比分析监测结果的变化趋势，推断生态环境资源修复恢复趋势，计算期间损失，适当调整补偿性修复/恢复方案

2 **开展满意度调查**
在影响区域内进行环境应急和修复行动效果的满意度调查。收集整理环境应急和恢复行动的意见与建议，进行信息公开，及时调整修复与恢复方案

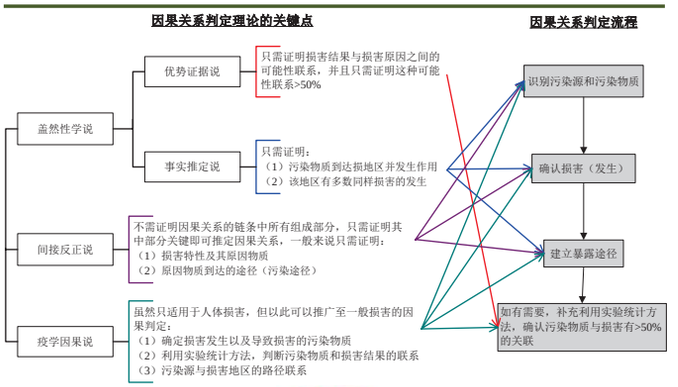
3 **后评估报告**
围绕修复/恢复方案是否被正确执行，修复/恢复目标是否达到，恢复行动实施期间是否再次照成二次损害等内容编写《环境污染修复/恢复后评估报告》

研究五、水污染事件的环境损害评估程序与模型开发

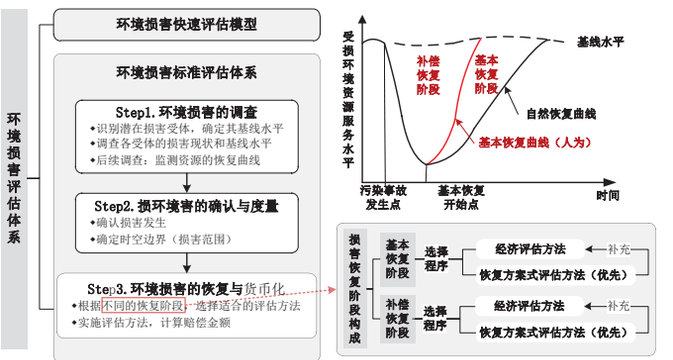
环境资源损害评估基本框架



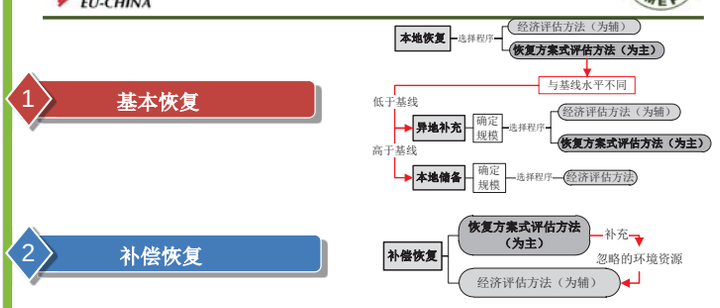
因果关系判定



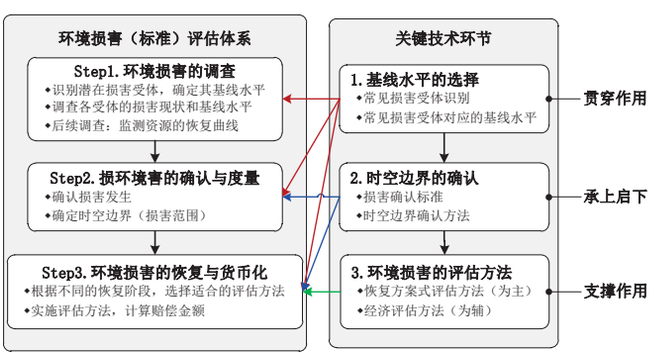
环境损害评估体系构建



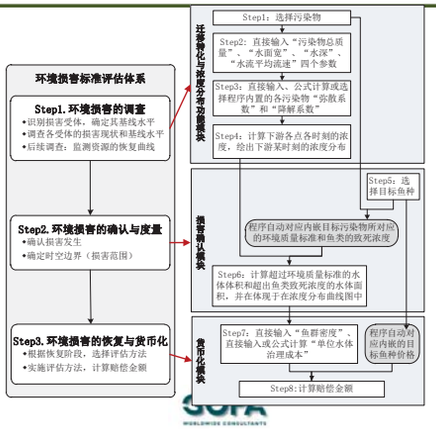
损害恢复与货币化



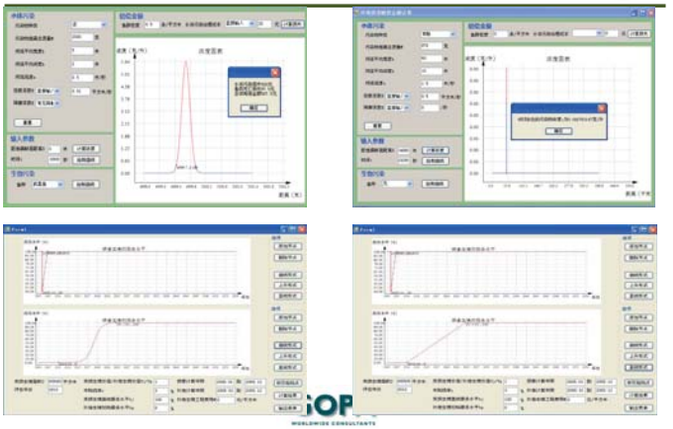
环境污染损害鉴定评估技术体系关键技术环节



小型水污染事件
环境损害评估模型系统与功能设计



小型水污染事件
环境损害评估模型展示

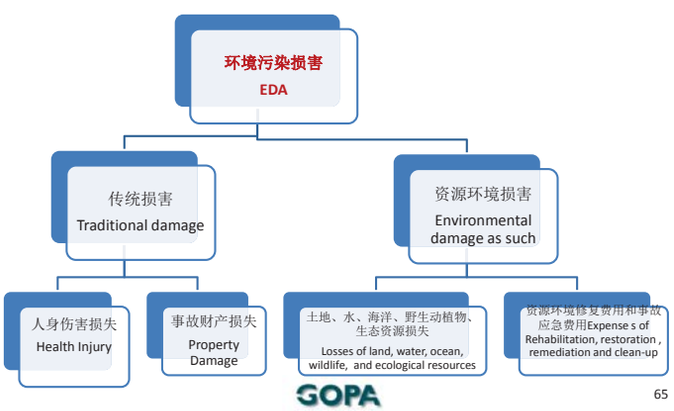


小结

- 环境损害评估的立法与方法研究滞后于现实需求
- 缺乏关于环境损害范围与方法的顶层设计
  - 农业、环保与海洋部门各有侧重
  - 现有技术导则存在缺陷
  - 环保部提出的损害计算推荐方法相对先进

3.环境污染损害评估现状：国别比较

环境污染损害的类型



法律体系国别比较

损害类型	美国	欧盟	日本	中国
传统损害	普通法中的环境侵权诉讼针对人身或财产损害	各成员国内部法律	主要针对环境公害健康损害的认定与赔偿责任、赔偿标准、纠纷处理方式等做了全面的规定	相关法律都仅对环境污染损害的责任进行了较为原则性的规定，主要关注私益损害
生态环境资源损害	《石油污染法》OPA 《清洁水法》CWA 《超级基金法》CERCLA	《环境责任指令（2004/35/EC）》ELD	矿害防止对策法	只有《海洋环境保护法》对海洋生态环境损害进行了明确规定

法律体系国别比较

项目 Items	美国 U.S.	欧盟 EU	日本 Japan	中国 China
法律体系	**优点：**相关法律对环境污染致传统损害和生态环境资源损害进行调整，发生环境污染时能够采取有效的预防性措施和程序；实施严格赔偿责任，坚持利益相关方的信息披露和参与。 **缺点：**环境法律方面仍有缺陷；法庭审理程序漫长且成本高；存在企业掩盖污染行为的现象。	**优点：**欧盟具有推动其成员国采取严格的环境标准和责任标准的能力；关于环境责任制定了具体的、综合性指令；要求信息公开和利益相关者参与；制定了标准性的修复目标。 **缺点：**“合理的”排污行动引起的环境损害，得不到赔偿，诸多问题由成员国自行解决。	**优点：**公害健康损害行政救济制度能够保障公害疾病患者的长期治疗，具有迅速、及时救济公害健康被害人的作用。同时，**建立了健全成熟的环境权益维护制度** **缺点：**损害程度的认定具有主观性，导致公害诉讼不断。	**优点：**已有广泛的环境法律；对造成“重大环境污染”的违法行为可提起刑事诉讼；环境纠纷可通过协商和调节机制解决。 **缺点：**关于生态环境损害没有明确规定；利益相关方在应对环境突发事件时作用有限；相关机构和司法机关在评价环境损害时的法律规定和程序不够明确；环境损害保险和/或经济担保制度不够健全。

工作体系国别比较

项目 Items	美国 U.S.	欧盟 EU	日本 Japan	中国 China
工作体系	相关联邦和州自然资源管理部门组织开展NRDA，具体的NRDA工作由管理部门或责任方委托具有相应技术力量和专业知识的环境咨询公司或科研机构开展。	由各成员国自行组织实施。以意大利（大陆法系）为例，环境、领土与海洋部为环境损害评估的主管部门，意大利环境保护与研究院（ISPRA）是意大利唯一的环境损害评估专业机构；英国（英美法系）与美国类似，实施专家证人制度。	厚生省配合环境省制定相关制度与标准，损害和赔偿标准的认定由各都、道、府、县设置的公害认定审查委员会和诊疗报酬审查委员会。石棉类疾病由中央委员会认定。	实施“鉴定人制度”，目前农业、渔业和海洋生态环境损害由具有相关资质的机构或具有专业知识的科研机构承担，经济损失由物价部门核定。总体来看，没有形成统一规范的工作机制。

技术方法体系国别比较

项目 Items	美国 U.S.	欧盟 EU	日本 Japan	中国 China
技术方法	对于生态环境资源损害，首先推荐“资源对等法”和“服务对等法”，其次推荐价值评价方法。	同美国。	通过指定地区、指定疾病和暴露期限三个要件认定损害受体，并根据症状的不同确定赔偿标准。	农业、渔业、海洋和环境保护部门提出了不同的损害评估范围与评估方法。

资金保障制度国别比较

项目 Items	美国 U.S.	欧盟 EU	日本 Japan	中国 China
资金保障	通过环境基金和环境污染责任保险保障环境污染损害得到赔偿，其中超级基金、DOI恢复基金主要用于污染修复与生态恢复，石油责任信托基金同时用于传统损害、生态环境资源损害与纯经济损失赔偿，环境污染责任保险主要用于传统损害的补偿。	新环境保护法（2007）要求环境责任保险同时承担传统损害赔偿和环境污染治理的费用。 要求成员国分别建立“保证金”和“治理基金”制度，保证矿山环境管理有稳定的资金渠道。	综合采用排污税、国家与地方财政补偿金、公积金、污染企业设立基金等方式赔偿公害健康损害、恢复生态环境，并由独立机构负责基金的核算与支出管理。	环境责任保险承保范围过窄，没有建立完善的污染损害赔偿资金保障体系。

环境污染损害赔偿实践

项目 Items	美国 U.S.	欧盟 EU	日本 Japan	中国 China
实践	已开展了一千多个污染场地或污染事件的NRDA。	由于责任指令2004年刚颁布，尚无专门针对环境污染事件的损害赔偿案例。	保障公害疾病患者得到显性疾患的快速救济以及隐形疾患的长期治疗，使公害疾病患者基本得到比较妥善的处置。	传统的民事环境侵权有赔偿案例，生态环境资源损害赔偿尚无成功案例。

小结

- **法律体系方面**
  - 中国目前虽然对环境损害具有比较明确的上位法规定，但相关法律还主要关注环境污染造成的人身财产损失，没有专门针对生态环境资源损害立法，且关于环境污染私益损害的举证责任、损害赔偿与公益诉讼等相关机制不健全，缺乏具体可操作的实体法和程序法规定。
  - 从实体规定来看，不仅缺乏生态环境资源损害评估的管理及工作机制规定，也缺乏基于污染修复的赔偿机制；
  - 从程序规定来看，环境公益诉讼机制尚不健全，环境行政救济机制未充分发挥作用。

小结

- **工作机制方面**
  - 中国生态环境资源的管理权责散落在环保、农业、海洋、林业等不同部门，目前只有《海洋环境保护法》赋予了“行使海洋环境监督管理权的部门代表国家对责任者提出了损害赔偿要求”的权利，其他部门的生态环境资源管辖权不明确。
  - 中国施行的侵权损害鉴定人制度还需要厘清司法部与其他环境或资源主管部门的职责分工。
  - 在传统损害评估方面，由于环境损害鉴定评估特有的专业性与技术复杂性，一般科研机构难以独立承担

小结

- **技术方法方面**
  - 国外广泛采用的环境资源价值评估法与替代等值分析法尚未得到立法与行政主管部门的认可；
  - 环保、农业、海洋、林业等部门分别针对本部门管辖权内的污染事故类型、各有侧重地提出了不同的损害评估范围与评估方法，没有形成统一规范的评估程序与技术导则；
  - 导致不同部门和机构的评估结果差异大，难以被法院采信。

小结

- **资金保障方面**
  - 中国目前仅有部分省与城市试行环境污染责任保险与矿山环境治理恢复保证金等制度，前者由于缺乏上位法支持以及企业环境责任的淡薄，导致投保企业少、费率低、保费不具规模、承保范围狭窄，没有起到转移企业环境风险与有效赔付环境损害的作用；
  - 后者仅用于矿区环境治理与生态恢复，实践中由于资金规模有限大多仅用于植被恢复，没有涉及矿区公众健康损害与河道、生物多样性的恢复；
  - 总体来看，由于尚未建立有效的环境损害赔偿资金保障制度，导致环境损害赔偿远不到位。

4.Policy Recommendations

政策建议

政策建议

- 完善环境污染损害赔偿法律体系
- 建立环境污染损害评估司法鉴定制度
- 规范环境污染损害鉴定评估技术与方法
- 加强资金保障等相关环境经济政策的研究

4.1 完善环境污染损害赔偿法律体系

- **在《民法通则》等相关法律的修订中**
  - 明确定义环境污染损害的内涵与外延
- **在《环境保护法》的修订中**
  - 明确规定环境损害鉴定评估制度，明确部门职责
- **在《民事诉讼法》等相关法律的修订中**
  - 明确将生态环境资源损害等赔偿内容纳入诉讼范围，并对诉讼主体、因果关系认定、费用承担、赔偿金管理等做出原则性规定
- **制定专门的《环境污染损害赔偿法》或《环境污染责任法》**
  - 研究环境污染损害在赔偿范围、赔偿责任、诉讼主体、鉴定评估技术、环境修复、公益诉讼性质、赔偿数额巨大、公众参与等方面的特殊要求，专门立法

4.2 建立环境污染损害评估司法鉴定制度

- **在《民法通则》等相关法律的修订中**
  - 明确定义环境污染损害的内涵与外延
- **在《环境保护法》的修订中**
  - 明确规定环境损害鉴定评估制度，明确部门职责
- **在《民事诉讼法》等相关法律的修订中**
  - 明确将生态环境资源损害等赔偿内容纳入诉讼范围，并对诉讼主体、因果关系认定、费用承担、赔偿金管理等做出原则性规定
- **制定专门的《环境污染损害赔偿法》或《环境污染责任法》**
  - 研究环境污染损害在赔偿范围、赔偿责任、诉讼主体、鉴定评估技术、环境修复、公益诉讼性质、赔偿数额巨大、公众参与等方面的特殊要求，专门立法,

4.2 建立环境污染损害评估司法鉴定制度

- **明确环境污染损害鉴定评估的业务属性**
- **按照“两级二元”管理模式对环境污染损害鉴定评估进行管理**
  - 中央层面，建议由环保部门负责技术管理；司法部门负责行政管理。
  - 地方层面，具体负责环境污染损害鉴定评估机构的审核，报国家行政机关备案。
- **明确环境污染损害鉴定评估机构与专家的资质条件**

4.3 规范环境污染损害鉴定评估技术与方法

- **重视制度体系与技术方法的顶层设计**
- **Pay attention to the top-level design of institutional system and techniques**
  - 明确中央相关部门的职责以及中央和地方相关机构的权利与义务
- **加强基础科学研究与环境监测能力**
- **Enhance the capacity of fundamental research and environmental monitoring**
- **逐步规范环境污染损害鉴定评估标准与技术方法**
- **Standardize environmental damage assessment standards and methodologies step by step**

4.4 加强资金保障等相关环境经济政策的研究

- **建立环境损害赔偿或责任基金制度**
- **Establish environmental damage compensation or liability fund system**
  - 责任主体明确：企业污染损害赔偿基金
  - 责任主体不明确：专门的国家赔偿基金
  - 重大环境污染事故高发行业：行业环境污染责任基金
- **完善环境责任保险制度**
- **Improve the environmental liability insurance system**
  - 对高环境风险行业实行强制性投保
  - 保险范围：逐步从突发环境污染事故延伸至累积性环境污染事件，从传统损害扩展到污染治理费
- **建立矿区生态环境恢复资金保障制度**
- **Establish fund guarantee system for environmental restoration in mining area**
- **协调开展环境损害评估相关环境经济政策研究**
- **Conduct coordinated study on environmental economic policies related to environmental damage assessment**

问题Questions?

✓ 在法律短期突破困难以及部门分割管理的现状下，如何开展环境污染损害鉴定评估工作？
- •部门规章
- •国务院内参：获得高层认知
- •重点开展技术方法体系的储备

✓ 环保部门的工作重点
- •应急处置费用
- •污染清除费用
- •环境修复费用
- •生态环境资源损害、生态恢复
- •健康损害 health damage

Thanks for Attention

Questions ??

中国西部法官检察官环境法律实务研习班

教师培训效果反馈表

请对每一位授课人的授课效果进行评价，以便我们今后选择优秀的授课教师。请对每一项按 10 分制打分。

授课人	授课内容	知识性	实用性	趣味性	条理性	表达技巧	整体效果		
							优	良	差
王夙理	中国环境保护立法和主要环境法律制度								
Elisa Baroncini	有关健康环境权利的国际案例								
Anna Maria De Michele	环境评估的程序：以欧盟和意大利的案例为例								
Daniela Cavallini	Civil procedure law 民事诉讼法								
Sofia Mirandola	Criminal procedure law 刑事诉讼法								
杨素娟	如何适用因果关系推定与举证责任倒置的案例分析								
Barbara Verri	欧洲环境保护：环境污染损害的概念及其演变的案例分析								
朱小勤	我国环境标准的分类与作用								
王灿发	环境诉讼及其证据的收集与认定								
於方	环境损害的鉴定和评估								
刘明	贵州清镇环境公益诉讼和环境法庭								
毛江波	环境刑事责任追究								
关丽	环境污染损害赔偿案件若干问题								
刘湘	环境案件的模拟审判与研讨								

中国西部法官检察官环境法律实务研习班培训效果反馈表

各位参加研习班的法官检察官：

感谢您拨冗参加中国西部法官检察官环境法律实务研习班的学习。为了推进中国环境法的实施，更有效地开展此类培训和研讨，请您填写本表，留下您宝贵的意见。您的意见和建议对我们非常重要。

中国政法大学环境资源法研究和服务中心

2014 年 6 月

1．您是_____

①法官　　②检察官　　③环保官员　④其他

2．您认为此类培训是_____

①非常必要的　　②必要的　　③可有可无的

3．您认为本期研习班课程的安排_____

①完全符合实际需要　　②大部分符合实际需要

③大部分不符合实际需要　　④一点也不符合实际需要

您的补充建议：_____

4．您认为老师的授课_____

①全部都很好　　②大部分很好　　③少数很好　　④全都不好

您认为最有帮助的内容是：_____

5．您认为培训时间_____

①太长　　②太短　　③适中　　您希望的培训时间是_____天

6．通过培训，您的收获_____

①很大　　②比较大　　③有一些　　④很小　　⑤完全没有

如果有收获，表现在：_____

7．您对教学设施条件_____

①很满意　　②满意　　③比较满意　　④不满意　　⑤很不满意

8．您认为食宿安排_____

①很好　　②比较好　　③过得去　　④比较差　　⑤很差

9．您对研习班工作人员的服务_____

①很满意　　②满意　　③比较满意　　④不满意　　⑤很不满意

10．您对今后办好此类培训和培训后续活动的建议：

Environmental Law Practice Seminar for Judges and Procurators from Western China

Feedback Form of Training Effect

To all judges and procurators attending the seminar:

Thank you for finding time to attend the Environmental Law Practice Seminar for Judges and Procurators from Western China. In order to promote the implementation of Chinese environmental laws and more effectively carry out such training and seminar, please complete this form and give your valuable opinions. Your opinions and suggestions are very important to us.

Environmental and Resource Law Research and Service Center

China University of Political Science and Law

1. You are_____

   a. Judge b. Procurator c. Environmental protection officer d. Others

2. You think such training is_____

   a. Very necessary b. Necessary c. Dispensable

3. You think the curriculum of this seminar_____

   a. Fully tallies with actual need b. Largely tallies with actual need

   c. Largely does not tally with actual need d. Does not tally with actual need at all

   Your supplementary suggestions:_____

4. You think teacher's teaching is_____

   a. All very good b. Very good in majority c. Very good in minority d. Not good

   You think the most helpful content is:_____

5. You think training duration is_____

   a. Too long b. Too short c. Moderate

   The training duration you prefer is _____ days

6. From the training, you benefit_____

   a. A lot b. Much c. Some d. Little e. Nothing at all

   If there is any benefit, it is shown in:_____

7. You are_____ with teaching facilities and conditions

   a. Very satisfied b. Satisfied c. Relatively satisfied d. Dissatisfied e. Very dissatisfied

8. You think board and lodging are_____

   a. Very good b. Good c. So so d. Poor e. Very poor

9. You are _____with the service of seminar staff

   a. Very satisfied b. Satisfied c. Relatively satisfied d. Dissatisfied e. Very dissatisfied

10. Your suggestions on better holding of such training and follow-up activities in the future:

中国西部法官检察官环境法律实务研习班问卷调查

2014 年 6 月

一、 您为什么要参加环境法律实务研习班的学习？（可多选）

① 为更好办理环境案件
② 为提高自身知识积累，提升业务水平
③ 为以后办理环境案件做准备
④ 为结识更多的同行朋友
⑤ 其他，请列明_____

二、 您是否办理过环境案件？如果办理过请您简单叙述您所在的地区及办理过的案件的类型及结果。你在办理此案时遇到的最大困难是什么？

三、您以前对环境法的了解程度如何？您所知道的环境法的特殊性在什么方面？环境诉讼的特点有哪些？环境民事责任的承担有什么特殊性？

四、您对参加此次研习班寄予的希望是什么？

五、请列举您所办理过的诉讼案件及行政复议案件

Environmental Law Practice Seminar for Judges and Procurators from Western China

Questionnaire

三、 Why do you attend the Environmental Law Practice Seminar? (Multiple choice)

a) Handle environmental cases better

b) Accumulate more knowledge and raise professional level

c) Make preparation for future handling of environmental cases

d) Get to know more peers

e) Others, please state_____

四、 Have you ever handled environmental cases? If yes, please briefly introduce the place you are from and the types and results of the cases you have handled. What is the biggest difficulty you encountered when handling such cases?

IV. How much do you know environmental law before? As far as you know, what is the particularity of environmental law? What are the features of environmental litigation? What is the particularity of assumption of environmental civil liability?

V. What hope do you place on attending this seminar?

VI. Please list the lawsuits and administrative reconsideration cases you have handled