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中欧环境治理项目



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中国西部环境维权能力建设项目
CLAPV-UNIBO-CHINA-EU

Environmental Law Survey

2013



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FOREWORD

Within the EGP Project “The Capacity Building of Environmental Justice and Guarding Environmental Rights in Western China”, the scholars of the University of Bologna, partner of the China University of Political Science and Law (CUPL) and its Center for Legal Assistance to Pollution Victims (CLAPV), have worked on an Environmental Law Survey so as to provide to the interested public – in particular, Chinese judges, lawyers, academics, and civil society as a whole – with the most interesting and recent judicial decisions or pieces of Environmental Law legislations developed in the most relevant legal fields. The choice has fallen on the scientific juridical disciplines of Administrative Law, Comparative Law, Criminal Law, EU Law and International Law (the latter with a particular focus on the case-law of the European Court of Human Rights in Strasbourg), since these express highly relevant perspectives for the promotion of an effective environmental protection within the European Union, European Countries, and the International Community. We hope that the carefully selected rulings and pieces of legislation may provide the Chinese interpreter, practitioner or judge involved in Environmental Law issues in China or concerning China, with legal reasoning and innovative juridical solutions which may inspire their extremely demanding daily activities, constantly involving a balance between the right to a clean and healthy environment of the citizens and the rights of economic operators and undertakings.

The Editor in Chief and the Scientific Committee of the University of Bologna

Administrative Law

THE SCOPE OF JUDICIAL REVIEW OVER THE PRELIMINARY EXAMINATION IN ADMINISTRATIVE DECISION-MAKING PROCEDURE

Micol Roversi Monaco

TABLE OF CONTENTS: 1. – Introduction. 2. – Council of State, Section V, No. 5299 of 17 October 2012: the case. 3. – The judgment. 4. – Conclusions.

1. Introduction.

The judgement of the Italian Council of State, V Section, No. 5299 of 17 October 2012, concerns the environmental impact assessment (hereinafter referred to as the “E.I.A.”) of a project for technological modernization and environmental upgrade of a biomass incineration plant, and the consequent permit to operate, named under Italian law “integrated environmental authorization” (hereinafter referred to as the “I.E.A.”).

The E.I.A. is a decision-making procedure to check the environmental compatibility of projects for construction works, installations various, schemes or other forms of intervention in natural surroundings and the landscape, which are likely to have significant effects on the environment or cultural heritage.

Such procedures at a national level are governed by Legislative Decree No. 156 of 3 April 2006, Articles 4-10 and 19-36, implementing Directive 2011/92/EU and, where they concern projects which fall within the jurisdiction of regional authorities, they are governed by regional laws¹.

¹ Article 7(4) of Legislative Decree No. 152 of 2006 establishes that projects listed in Annexes III and IV to the same legislative Decree are subject to E.I.A. under regional law; Article 7(7) establishes that regional laws discipline the procedure for regional E.I.A. and I.E.A. in accordance with general limits referred to in Legislative Decree No. 152 of 2006, in accordance with the general principles concerning E.I.A. and I.E.A. referred to in that same Legislative Decree, and in accordance with the rules concerning administrative decision-making procedure that are compulsory for regional and local authorities, as laid down in Art. 29 of Law No. 241 of 7 August 1990.

Legislative Decree No. 152 of 2006 enjoins that the proposer submit an environmental impact study to the authority. This study shall contain a description of the project, the information essential for an assessment, a description of the main alternatives and of the “zero alternative”, and details of monitoring measures (Art. 22 of Legislative Decree No. 152 of 2006).

The presentation of the environmental impact study is followed by a public consultation, during which anybody can access documents and submit comments, and during which public administrations can express their opinion.

This procedure ends with an environmental compatibility declaration, which states the conditions for execution of the project, and the monitoring and control measures.

The I.E.A., by contrast, is granted after a decision-making procedure to check the environmental compatibility of an activity. At a national level this procedure is governed by Articles 4-10, 29 bis-29 quattordecies, 33-36 of Legislative Decree No. 152 of 2006, implementing Directive 2010/75/UE; with regard to certain activities indicated in the same Legislative Decree, the I.E.A. is governed by regional laws².

If the project is subjected to E.I.A, the I.E.A. follows on the E.I.A. and, in specific circumstances, the E.I.A. may substitute for the I.E.A.

The authorization application contains, *inter alia*, a description of the installation and its activities, and the main alternatives to the proposed technology, techniques and measures as studied by the applicant.

At a later stage, there is a public consultation during which anybody can access documents and submit observations, and a consultation of public administrations involved in an “interdepartmental meeting”. The authorization establishes the operating conditions and, in particular, sets emission limit values for pollutant substances.

In E.I.A. and I.E.A. decision-making procedures³ the public administration exercises two kinds of discretion: technical discretion and administrative discretion.

² Article 7(4-ter) of Legislative Decree No. 152 of 2006 establishes that the I.E.A. for projects listed in Annex VIII that are not indicated in Annex XII is governed by regional laws; see footnote No. 1 for the limits of these laws.

³ In the Italian legal system, administrative decisions were originally unilateral decisions, and not subject to judicial review.

Administrative acts preceding adoption of a final administrative decision (the act that has legal impact upon third parties) were internal to the administration, because of the authoritarian concept of relations between State and citizen, in which safeguarding of the citizen in terms of knowing about and participating in administrative decision-making procedure was not held to be important and there was no judicial control over the final decision.

Technical discretion consists in the possibility of the public administration choosing controvertible and not certain technical and scientific criteria, via which to examine the factual situation.

After these technical assessments, the public administration with the final decision makes a choice - that is, it exercises administrative discretion - in which it balances interests, the primary public interest (i.e. the interest identified in the law conferring the power, precisely designed to pursue this interest) and the public and private secondary interests. According to case-law, «an E.I.A. is not to be interpreted as confined to checking the abstract environmental compatibility of an installation, but as a comparative analysis weighing the environmental sacrifice against the economic and social benefit, considering feasible alternatives and the zero alternative»⁴.

In carrying out this balancing feat, the public administration has to choose in accordance with the factors presented by the concrete situation.

If such balancing is lacking, the final decision is considered illegal, because it constitutes a “misuse of power”, and hence it can be annulled by administrative courts.

Ever since the 1930s, in case-law and in legal theory there has arisen the idea of an administrative decision-making procedure, based on the view that, to be valid, an administrative decision must pursue the general interest, entailing objectives defined in law. Hence, administrative acts preceding the adoption of a final administrative decision have become of legal significance, verifiable and subject to jurisdiction; in point of fact, the grounds of the administrative decision are formed in the course of those acts. The administrative decision-making procedure consists in a sequence of preparatory acts right up until the final decision, and an illegal act renders the final decision illegal.

The rules on administrative decision-making procedure have two main rationales. The first is to safeguard those who are the object of decision and persons involved in the procedure. For this reason they are allowed to participate in administrative decision-making procedures through representation of their interests (during the preliminary examination they may present observations and documents that the administration is bound to consider); and for this reason decisions are subject to judicial review, to verify whether the sequence of procedural acts was in conformity with the law.

The second rationale is based on the principle of good administration. This allows for consideration and a better evaluation of all facts and interests involved, as well as coordination between public administrations, which can present opinions, conclude agreements and consult together.

In 1990 the General Law on Administrative Procedure (Law No. 241 of 7 August 1990) was passed, governing the sequence of administrative procedural acts, and confirming the principles outlined by case-law. The content of this law complements other laws regulating individual procedures, such as environmental procedures.

⁴ *Consiglio di Stato*, sec. IV, 5 July 2010, No. 4246, in *Foro amministrativo Consiglio di Stato*, 2010, 7-8, 1419; in this judgment it is claimed that the public administration can arrive at “a negative solution if the intervention proposed causes an environmental sacrifice that is greater than is necessary to fulfil the scope of the project; for this reason a public administration may refuse to authorize projects that will cause an environmental sacrifice, and these can be substituted by more environmentally friendly solutions, in accordance with the principle of sustainable development, which rules the weighing of interests”.

There is a misuse of power when the public administration's decision has an aim other than that for which it was granted by law.

When checking for the presence of any such defect in the decision, the administrative court has to verify whether the public administration has weighed all the facts and interests involved, and if it has reasonably balanced them, following the administrative decision-making procedure.

That is the reason why the preliminary examination is central to the whole procedure: at this stage, the factual and legal particulars of the situation on which the administrative decision will bear, along with the interests involved, are identified and evaluated for final decision.

A defect in the preliminary examination of discretionary decisions makes the final decision illegal and annulable⁵. Case-law has identified symptoms of misuse of power, and states that these exist when facts are misinterpreted or the preliminary examination is incomplete.

All of the above refers to administrative discretion; case-law on the judicial review of technical discretion has evolved in its turn.

In actual fact, technical discretion was initially considered not subject to review by an administrative court, given that it was deemed to fall under "administrative opportuneness", which is the field in which public administration can choose the most opportune solution among several lawful solutions, and such choice is not subject to judicial review on the principle of separation of powers, according to which administrative power is to be exercised exclusively by public administration⁶.

In due course, technical discretion was lumped with administrative discretion, and became subject to extrinsic judicial review, from the standpoint of logicity and reasonableness; therefore, the court might only perceive the symptoms of misuse of power.

In this way the court restricted its power to examining documents, administrative acts preceding adoption of the final administrative decision, the final decision, and the reasoning behind adoption of the final decision, in order to note if there was any contradictory statement of reasons, manifest unreasonableness, or incorrect factual conditions: the technical evaluation by the public administration was

⁵ Law No. 241 of 1990, Art. 21 octies, establishes that a decision constituting a misuse of power can be annulled.

⁶ That is not the case for some subjects, listed in Art. 134 of Legislative Decree No. 104 of 2 July 2010 (Code of Administrative Procedure), on which the administrative court can review administrative opportuneness: these subjects concern the implementation of an enforceable judgment, the electoral process, financial penalties, disputes over field boundaries, refusal of cinematographic authorization.

considered to be based on expedience, which the court was not empowered to review.

The absence of any comprehensive review was also due to the inability of the court to order a technical expert's report⁷.

Subsequently, Legislative Decree No. 80 of 31 March 1998 as regards subjective rights, and Law No. 205 of 21 July 2000 as regards all disputes assigned to the administrative court, introduced the feature of the technical expert's report (now foreseen by Art. 67 of Legislative Decree No. 104 of 2010).

At this point, part of case-law⁸ argued it should be possible to assess the extent of any technical error in the public administration's evaluation, checking its reliability, the correctness of the technical criteria and of the procedure by which they have to be applied. It was asserted that the court has to know the facts on which a decision is based, in order to assess its lawfulness.

However, the majority view was that it is inadmissible for a court to override the technical assessment of a public administration: the court may only criticize the technical reliability of the public administration's evaluation⁹.

Furthermore, an intrinsic judicial review concerning discretion, via a technical expert's report, is only made if the extrinsic review on the reasoning is not sufficient to establish whether the decision is lawful.

Nevertheless, when it comes to environmental decision-making procedures, the administrative court limits its review¹⁰, affirming that «the environmental impact

⁷ In administrative procedure prior to 2000, the means of proof admissible were a request to public administration for clarification, a request for production of documents, and a request for verification from public administration of some aspects of the final decision.

⁸ *Consiglio di Stato*, sec. IV, No. 601 of 9 April 1999, in *Consiglio di Stato*, 1999, I, 584.

A relevant text here reads «the judicial review is not restricted to an extrinsic examination of the discretionary evaluation (using the criteria of logicity, adequacy and completeness of the preliminary examination of administrative decision-making procedure) but has to verify the correct assessment of facts, according to the parameters regulating the issue. From this point of view, and in application of the principle of effective legal protection, recognised by European law (as established by Art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms), on the one hand the court cannot replace the public administration, on the other hand the court has to evaluate if the public administration's evaluation is wrong» (*Consiglio di Stato*, sec. VI, No. 2461 of 27 April 2011, in *Foro Amministrativo Consiglio di Stato*, 2011, 4, 1333).

⁹ The text reads: «case-law concerning judicial review on points of technical discretion is in favour of the court knowing the full facts, in order to verify the logicity, reasonableness, proportionality and adequacy of the decision and its motivation, the regularity of the decision-making procedure and the completeness of the preliminary examination, although the court cannot express an autonomous decision, in that it lacks the power» (*Tribunale Amministrativo Regionale* [hereinafter referred to as *T.A.R.*] Roma, sec. I, No. 32354 of 20 September 2010, in *Foro Amministrativo - T.A.R.*, 2010, 9, 2810; likewise *T.A.R. Catania*, sec. II, No. 232 of 2 February 2011, in *Foro Amministrativo - T.A.R.*, 2011, 2, 655).

assessment [...] entails a high degree of administrative discretion that does not permit any judicial review, unless the decision is clearly illogical and incongruous». Hence the decision is only subject to judicial review «in case of evident illogicality or erroneous statement of facts, in which it is clear that the public administration exceeded the bounds of its discretion»¹¹, such as when «the preliminary examination is lacking or is inadequate»¹²; it has been stated that «a decision substantially cannot be subject to judicial review when it regards the prime importance of the landscape and the environment as recognized by the Constitution; thus in weighing private interest against public interest linked to protection of the landscape and environment, there is no obligation even to demonstrate that the sacrifice imposed on a private party is restricted to the minimum possible»¹³.

Case-law has affirmed that technical discretion may be subject to judicial review «within the bounds of incorrect use of power from the standpoint of inadequacy in the statement of reasons, marked illogicality or erroneous statement of facts and contradiction in the evaluation, but the illegality has to be macroscopic and manifest»¹⁴. In relation to such acts, «the administrative judicial review shall concern the regularity and completeness of the preliminary examination, the non-existence of erroneous statement of facts and the consistency of the final decision with preceding acts»¹⁵.

2. Council of State, Section V, No. 5299 of 17 October 2012: the case.

Some environmental organizations and private citizens brought an action for the annulment of the E.I.A. on a project for technological modernization and environmental upgrade, and of the I.E.A. issued by the Province of Grosseto for an biomass incineration plant. The applicants alleged *inter alia* that the preliminary examination in the decision-making procedure was inadequate with regard to identification and evaluation of the project's effects on environmental factors – as

¹⁰ Cf. R. FERRARA, *La valutazione di impatto ambientale fra discrezionalità dell'amministrazione e sindacato del giudice amministrativo*, in *Foro amministrativo - T.A.R.* 2010, 10, 3179.

¹¹ T.A.R. Toscana, sec. II, No. 986 of 20 April 2010, in *Riv. giur. edilizia*, 2010, 4, I, 1234; likewise T.A.R. Lecce, sec. I, No. 135 of 26 January 2011, in *Foro Amministrativo - T.A.R.*, 2011, 1, 256.

¹² T.A.R. Bari, sec. I, No. 1205 of 3 August 2011, in *Foro Amministrativo - T.A.R.*, 2011, 7-8, 2512.

¹³ *Consiglio di Stato*, sec. IV, No. 4246 of 5 July 2010, in *Rivista Giuridica dell'Ambiente* 2011, 1, 111; T.A.R. Cagliari, sec. I, No. 883 of 9 August 2011, in *Foro Amministrativo - T.A.R.*, 2011, 7-8, 2612.

¹⁴ T.A.R. Trieste, sec. I, No. 560 of 15 December 2011, in *Foro Amministrativo - T.A.R.*, 2011, 12, 3882.

¹⁵ T.A.R. Torino, sec. II, No. 611 of 24 March 2001, in *Ragusan*, 2001, 211-2, 174.

demonstrated by a number of requirements contained in the E.I.A. – and likewise the statement of reasons for the administrative decision.

The Province thereupon initiated a review procedure including a public enquiry. During this procedure analysis of the E.I.A. showed some deficiencies: specifically, deficiencies concerning: the right definition of the subject of the E.I.A., characterization of the climate and the current quality of the air, characterization of the current state of lands, characterization of the current quality of the water, the health impact assessment, impact assessment concerning the ecosystems and protected areas, impact assessment concerning local economic activities, and the agricultural productions impact assessment.

Furthermore, there proved to be some contradictions between the E.I.A. and the environmental impact study.

The outcome of this review procedure was a self-protective withdrawal of the environmental compatibility declaration, and a supplement to the preliminary examination of the E.I.A. decision-making procedure.

After approval of the preliminary examination supplement, the E.I.A. procedure ended with a declaration of environmental compatibility.

The applicants again impugned these acts, alleging that the preliminary examination was inadequate.

The regional administrative Court of Tuscany, considering that the grounds of appeal relating to inadequacy of the preliminary examination and insufficiency of motivation were well founded, upheld the appeal and annulled the E.I.A. decision and the I.E.A.

The company owner of the plant appealed to the Council of State.

The grounds of this last appeal were: an *error in iudicando* due to the lack of a proper preliminary investigation, erroneous statement of the facts and inconsistency in the statement of reasons.

In particular, the applicant argued that the judgment held the preliminary examination of the decision-making procedure to be insufficient, whereas it was complete, as shown by the documentation; furthermore, the appraisal by the judge was inadmissible: it was an appraisal which fell outside the scope of the Court's review; moreover the monitoring prescribed by the public authority would have been an appropriate cautionary measure ensuring a much-needed control over the functioning of the plant.

3. The judgment.

The Council of State dismissed that appeal.

The most interesting point in the judgment concerns the scope of a judicial review by the administrative court over the preliminary examination of an administrative decision-making procedure.

The Council of State declared that the judge of first instance, in considering inadequate the preliminary examination of the decision-making procedure, was not substituting his own evaluation for that of the public administration, but only pointing out an erroneous exercise of administrative power, since it was not sufficiently supported by a proper preliminary examination as required by law: in that way, the judge of first instance had correctly exercised his power of review.

In actual fact – the Council of State ruled – the lack of an exhaustive, full and reliable preliminary examination emerged from the reading of the supplement to the preliminary examination, and was not an independent evaluation by the judge.

The act of integration to the preliminary investigation did not diminish those deficiencies.

In particular, the supplement took account of the observations presented by the University of Florence, which noted that the kind of analysis utilized was unreliable, and the observations presented by the Regional Agency for the Protection of the Environment of Tuscany, in which certain omissions and imprecisions were revealed. The supplement observed that the complexity of the problem required more advanced tools, such as an integrated eco-toxicological procedure, different from those being used.

As regards the characterization of the current quality of the water and the health impact assessment, the supplement also highlighted the relevance of these points, and indicated ways to safeguard and contain them. Regarding the ecosystems and protected areas impact assessment, the supplement affirmed that, for a correct assessment, it would be necessary to acquire the results of monitoring before starting official operation of the plant; and it would be necessary, after the consideration of such results, to lay down a regular plan of further monitoring.

Hence, the insufficiency of the preliminary examination emerges from the supplement, which highlighted its inadequacies, and from the lack of any clear

indication of the situation (zero point) on which the project presented would have a bearing.

Furthermore, these inadequacies, rather than requiring an additional investigation, resulted in the decision to tighten up monitoring; this demonstrates the weaknesses of the preliminary examination.

In fact, even though monitoring is usually an adequate precautionary tool for stable control over the effects of plant functioning on the local environment, the increased number of prescriptions required during plant operation in order to remedy the shortcomings of the preliminary examination was tantamount, in the opinion of the judge, to contradicting the whole requirement that there be an adequate assessment of the environment via the E.I.A. procedure.

4. Conclusions.

This judgment follows the approach suggested by recent Italian case-law, which is that the court cannot substitute its evaluation for one by public administration, but may perceive, if it observes the symptoms, that a preliminary examination is not adequate, and that consequently there has been a misuse of power, causing the decision to be illegal.

In this particular case, the deficiency of the preliminary examination, according to the Council of State, emerged from a reading of the acts of the decision-making procedure, and, in particular, from the supplement to the preliminary examination, whereby the public administration noted that the type of analysis used was inadequate, but failed to arrange an additional investigation; secondly, from the provision of tightened monitoring, aimed at remedying the deficiencies of the preliminary examination.

Where there are such symptoms, the inadequacy of the preliminary examination does not emerge from an independent evaluation by the court, but from the acts of the decision-making procedure.

In this way it is confirmed that judicial review by the administrative court on discretionary decisions regarding environmental matters mainly consists in ascertaining the completeness of the preliminary examination.

In the words of a recent judgment¹⁶, judicial review by the administrative court, although originally focusing on final decisions, has extended its scope to the

¹⁶ *Consiglio di Stato*, sec. III, No. 26 of 8 January 2013, in *Foro Amministrativo Consiglio di Stato*, 2013, 1, 96.

whole administrative decision-making procedure, through the evaluation of misuse of power, interpreted as a shortcoming of that power and not of the single act, and in particular through the evaluation of symptoms of misuse of power, as the erroneous assessment of the situation in question and the lack of a proper preliminary investigation. Case-law has evolved here based on Arts. 24, 103 and 113 of the Italian Constitution, and has led to the view that, in order to verify whether there has been a misuse of power, the administrative court may examine, not the evaluation of interests, but the existence of these interests, the completeness of the preliminary investigation and the logical consistency of the evaluation.

The need of an intrinsic judicial review was later perceived, and this has become possible through new powers of inquiry permitting more penetrating verification of the facts and the reliability of technical operations.

The outcome of this evolution can be observed in the Code of Administrative Procedure, which establishes that «administrative courts shall ensure the full and effective protection of rights in accordance with the principles of the [Italian] Constitution and European law» (Art. 1).

In conclusion, evaluation of the reliability of technical choices of the public administration lies within the bounds of a modern judicial review by the administrative court.

THE OBLIGATION OF SEA PROCEDURE IN URBAN PLANNING ACTIVITY

Gabriele Torelli

TABLE OF CONTENTS: 1. – The rules of environmental protection: command and control and the authorizations system. 2. – Consiglio di Stato, sec. IV, 6 May 2013, no. 2446: the case. 3. – The sentence.

1. The rules of environmental protection: command and control and the authorizations system.

Public administration has to face an environmental matter in such a way because the environment is a pre-existence asset, meaning it existed before the construction of the local society and its institutions. This is the reason why its safeguard is guaranteed with special checks and balances that are very different from the standard ones used by our system in order to protect the public interest. In fact, the primary objective of the standard checks and balances (authoritative functions) is to maintain public order and social cohesion, and to restrict private people's will, imposing on them certain sacrifices and behaviour. On the contrary, the administrative system in environmental issues is set up to reconcile human activities with the safeguard of this asset. In short, the standard binding character of administrative power is less potent in this case.

In line with this purpose, environmental law is strictly subservient to a system of authorizations and controls that influence the activities of individuals in society: this restriction and regulation establishes a mechanism of protection which is typically preventative and precautionary. The restriction of certain activities encourages behaviour that benefits society as a whole.

The policy of “command and control” belongs to this kind of approach: it implies a strict monitoring of activities that pollute or threaten to pollute the environment. This process is an important environmental safeguard: public administration offers “premium bonuses” and other financial incentives in order to

encourage private undertakers and traders to behave in a certain way therefore keeping, for example, pollution levels within a desired limit. The final objective of these policies is to establish standards which must be adhered to by undertakers and traders if they wish to be rated favourably by public governing bodies. Exceeding the limits leads to consequences and the infliction of a sanction, generally a fine.

On the contrary, respecting these pollution restrictions provides benefits to undertakers (*e.g.* better taxation). Despite the fact that administration does not employ standard authoritative power, or rule by force, it is still able to establish guidelines of industrial activities in environmental matters. In fact undertakers are strongly encouraged to respect the limits of pollution because, if they did not, economic benefits are not gained and the price of their products would rise. This means that this indirect method adopted by public bodies leads, as a consequence, to address the choices of consumers, who are more likely to prefer cheaper goods.

In this way, traders and undertakers are made aware of their responsibility as an integral part in the protection of the environment: the success of their business and the protection of the environment have almost become inextricably linked. In other words, by concentrating on incentives in business, environmental policy can be enforced.

Besides the policy of standards, environmental safeguard is guaranteed by precautionary and preventive authorization procedures, which represent the real task of this paper.

In particular, the measure that allows potentially harmful activities to environment is a very awkward issue because the damages may not be reversible. The authorizations should testify that the activity does not conflict with environmental interest and the undertakers must ensure the respect of the binding conditions of the measure for the duration of the project, the breaking of such conditions resulting in the project being withdrawn from the undertakers.

One of the most important authorization procedures is SEA (Strategic Environmental Assessment), approved by Directive 2001/42 CE, and acknowledged by Italian legislator in d.lgs. n. 152/2006 (*i.e.* Italian *Codice ambiente*). SEA describes in detail several guidelines for the public body that has to produce a planning deed. More precisely, SEA proposes to consider, while the layout is being developed and before it is approved, any negative effects that might impact on the environment from the proposed activity outlined in the planning deed. In short, SEA is a specific procedure that supports and legitimises the final administrative measure, and the latter can be influenced by the former. In fact, art. 6 d. lgs. n. 152/2006 indicates

which planning activities necessarily require SEA during their development (these generally are activities that involve the most controversial areas: *e.g.* agriculture, transport, energy, industry, urban planning) and which ones do not (in this case SEA is discretionary). The distinction is important, because the final administrative measure must be reversed if it has not been submitted to SEA in all cases, according to art. 6, it is obligatory.

Therefore, the issue is slightly different if the public body decides a planning activity is contained within a local area. In fact, in these cases, art. 6 pt. 3 d. lgs. 152/2006 asserts that SEA procedure is discretionary, provided that administrative plans will not have a significant impact on the environment. On the contrary, if the public body considers that there will be negative effects on the environment, SEA is necessary regardless of the small dimensions of the area.

The following sentence of *Consiglio di Stato* (the highest Italian Court of Administrative law) states that an urban planning deed must be submitted to SEA even if it regards a local area. In fact, the decision of the city council, which would have repercussions for the current functioning of the department of town planning, changes the function of a particular area within the city, making it more compatible with local business. This causes, as a consequence, the necessity of SEA procedure, that in cases such as this is mandatory.

2. Consiglio di Stato, sec. IV, 6 May 2013, no. 2446: the case.

The company *Pentagramma Piemonte S.p.a.* appeals to *Consiglio di Stato* to reverse a judgement by *T.A.R.* (Administrative Regional Tribunal) Piemonte¹. The judge of first instance reversed the city council decision which had authorized a change in the town planning. This change had allowed *Pentagramma S.p.a.* to build an underground car park and a shopping centre in an area previously allocated to public interest activities, especially ecological preservation..

Consiglio di Stato is responsible for explaining whether SEA should (or should not) have been carried out in such a procedure.

¹ Piemonte is one of twenty Italian Regions. In the administrative judicial system there is at least one *T.A.R.* in every Region. The sentence stated by *T.A.R.* can be referred to the *Consiglio di Stato* for appeal.

3. The sentence.

Torino city council had ruled in favour of *Pentagramma S.p.a.* building a car park and a shopping centre without completing the SEA procedure. The politic body judged that this authorization, despite the change in the town planning, would not have had significant effects on the landscape and green belt. This is the reason why the city council believed the development of SEA was discretionary.

Nevertheless, *T.A.R. Piemonte* stated that this procedure was necessary because, in effect, the change in town planning, and the consequent building of an underground car park and a shopping centre, could have threatened the balance of the local park, river and landscape. Moreover, *T.A.R.* considered that the planning activity referred to an area that was not particularly small (60.000 sq). Therefore, SEA could not been considered, adherence to art. 6 pt. 3 d.lgs. n. 152/2006, discretionary.

In the appeal judgement, the *Consiglio di Stato* confirmed the previous sentence.

SEA's inclusion is necessary every time the city council permits one of the planning activities listed in Annex IV pt. 7 lect. b), d. lgs. n. 152/2006: the list contains also the building of a shopping centre and of a car park with more than 500 parking spaces (*Pentagramma S.p.a.* planned to build one bigger). Therefore, the decision of the city council must be reversed because the whole project must have obligatorily submitted to SEA. Moreover, the dimensions of the area are irrelevant, when considering the above point. The *Consiglio di Stato* considered that the law (Annex IV pt. 7 lect. b), d. lgs. n. 152/2006) had already indicated this kind of planning activity as a significant threat to the environment. In light of this, SEA is always necessary regardless of the dimensions of the area, in order to gain authorization for building a shopping centre and an underground car park bigger than 500 parking spaces.

In short, the *Consiglio di Stato* rightly believed that these planning activities should have been authorized only on the condition that the SEA procedure had been included. The effects on the environment are evident: the building of the shopping centre and the underground car park causes the influx of several visitors and customers, implying many negative effects on the impact to surrounding green belts. So the fundamental change in the status of the area (from green belt to commercial area) causes knock-on effects in the organisation of town planning and this is a further reason why SEA is necessary.

This is the best solution according to the principles of European law concerning the safeguard of the environment, which demands a high level of sensitivity and diligence in the foreseeing and prevention of potential future negative effects. SEA procedure – meaning to assess the compatibility between an activity and the surrounding area from the initiation of a project – allows the development of an effective assessment, including the comparative values of various approaches to completion of the project, which would otherwise be too complex a task.

Importantly, this method guarantees the fulfilling of the precautionary principle, which obliges the public bodies to adopt suitable measures in order to prevent any potential risk to public health, security, and the environment through the establishment of pre-emptive protection.

Obviously, the application of the precautionary principle should be objectively controlled, to prevent unnecessary restrictions on legitimate business activities. In fact, if the administrative system demanded the prevention of any potential risk to the environment, it would suffocate all business activities, and this is not a credible option. Industrial and commercial activities need protection and consideration too.

The balance between these two opposite interests is difficult to achieve, because the provision of both environmental safeguards and freedom of economic private enterprise are constitutional rights. For this reason every instance of a restriction on economic activities established in order to protect the environment, must be proportional and not overly severe. In line with this purpose, on one hand pre-emptive guidelines should ascertain if a certain activity could (or could not) have negative effects on the environment. On the other hand, the objective of these guidelines is to avoid public administration prohibiting an economic activity in the name of the precautionary principle, even if there is no real threat to the environment.

Public bodies could obstruct the development of an important business for political reasons alone (*e.g.* the city council does not authorize the building of a waste site, even if the undertaker has respected all the requirements, because it wishes to maintain its popularity with the electorate) and not because of real negative effects on the environment.

This means that once an initial decision on appropriate procedure (*e.g.* the SEA) has been taken, that procedure cannot then be manipulated to further restrict the activities of private enterprise to the personal benefit of an individual or individuals. On the contrary, public bodies should follow guidelines established by

the law, that must indicate in which cases prudent behaviour is recommended in order to protect the environment from potential risk. Public bodies should not add further concerns to those established by the law, because should they do so, they would have unlimited power in preventing regular business activities. In such a case, a certain activity could be permitted depending on the judgement of the public body in charge of the procedure, and not depending on the real risk to the environment.

For this reason, the precautionary principle favours the establishment of the pre-emptive guidelines as a law task.

THE PRINCIPLE OF TRANSPARENCY AND FREEDOM OF INFORMATION IN ENVIRONMENTAL ISSUES

Gabriele Torelli

TABLE OF CONTENTS: 1. – Introduction. 2. – Corte costituzionale, 22nd of May 2013, no. 93: the case. 3. – The sentence.

1. Introduction.

Environmental safeguard is guaranteed through a specific method which focuses on, as mentioned in the previous paper, the authorization system. Besides SEA, European environmental law, and as a consequence Italian law, has established another important procedure in order to authorize human activities that could have negative effects on the environment: EIA (Environmental impact assessment).

EIA procedure firstly requests that a scientific and technical analysis is performed, assessing the negative effects which might be incurred from the project. The results are then made available to the public body for scrutiny. Secondly, a comparative assessment is carried out that details the economic and social advantages of the realisation of the project and the disadvantages to the environment. In short, EIA is able to predict if the proposed project will be compatible or not with the environmental safeguard.

Despite the fact that SEA and EIA have a common purpose (*i.e.* limiting negative effects on the environment caused by a certain human activity), there is a significant difference between these two procedures. The latter is employed in order to assess the potential risk to the environment that has been already calculated by the undertaker, as their definitive project is being shown to the public body for final authorization. On the contrary, the former is involved from the beginning of a planning activity prior to any decisions being made. Any decision to involve EIA is made during the final step of the proceeding, the effect of which is that any change in the proposed activities in the project, requesting it to be brought in to line with the

standards established by the environmental safeguard, would be problematic to set up in practice.

Despite this particular difference, any conclusion reached through the EIA process is still valid if the planned project is compatible with the environmental protection safeguards. For this reason, the EIA procedure needs to analyze several aspects and criteria in order to develop an effective assessment, considering the project in its entirety. Due to this, European and Italian law decrees that a large number of guidelines should be established which are substantial enough to make EIA an effective procedure.

In fact, art. 4 pt. 3 directive no. 2011/92 UE asserts that several criteria must necessarily be considered by the public bodies in order to evaluate if a certain activity will have a negative impact on the environment: for example the use of natural resources, the waste output, pollution and environmental disturbances and the location of the proposed activity. In short, the directive implies that EIA is effectively able to identify real risk to the environment provided that national law establishes an adequate system of gathering all the necessary information. The establishment of several guidelines is required for a simple reason: European law states that a complete analysis of potential impacts on the environment must be developed before EIA authorization can permit the planned activity, in every country that is subject to European law.

This means that European guidelines should be closely adhered to not only by national but also regional law. This principle was introduced as part of an important Italian Constitutional reform in 2001: art. 117 pt. 1 of the Italian Constitution establishes that both national and regional Parliaments must promulgate their own laws in accordance with European guidelines. For this reason, Regional law no. 3/2012 formed by Marche, one of the twenty Italian Regions, that indicates which parameters the EIA procedure must follow in order to permit a planned activity, should consider very carefully the criteria established by European environmental law, specifically directive no. 2011/92 UE.

Therefore, both national and regional law are able to regulate in which cases EIA procedure must be followed and what requirements should be considered in order to reach an effective decision. This approach does not mean that EIA is requested every time a planned activity could have some potential effects on the environment. In fact, both the regional and national legislator have some discretion in assessing which projects need to be submitted to this kind of procedure and which do not, depending on the real impact on the environment (according to the

European directives, the term ‘impact’ concerns any alteration to the environment regardless of its characteristics and duration). Nevertheless, if EIA has been established by either regional or national law, each of them must take into consideration all the pre-empted guidelines.

EIA procedure should be regulated by the law at either a national or regional level, depending on the kind of the project which is shown to the relevant public body. Art. 7 pt. 3-4 d. lgs. no. 152/2006 (Italian *Codice ambiente*) expressly indicates specific projects that must be submitted, respectively, to national or regional EIA. Examples of such projects regulated by national EIA are asbestos extraction installation, the dismantling of nuclear power stations or the building of motorways and commercial harbours. Examples of such projects regulated by regional EIA are the building of a waste site of limited danger to the public, tourist harbours and pharmaceutical product installations.

Therefore, it is preferred that the projects that include the largest potential risk and serious threats are regulated by EIA procedure under national law. In this case, the relevant public body is the Environment Department, while in regional law, the relevant body can be one of a selection and will be chosen at the discretion of the law.

In short, whether or not the decision to employ EIA is taken at a regional or national level, the guidelines by which a proposed activity is assessed are the same. As detailed an assessment as possible is necessary in order to consider every single part of the project: for this reason national and regional law must acknowledge every criteria established in European directives. This is due to the fact that a correct assessment of the project, and as a consequence a correct assessment of environmental safeguard, strictly depends on the number of considered criteria: the more followed, the greater the probability that environmental damages are prevented.

Therefore, the respect of all the established guidelines is relevant for two reasons: on one hand it permits a more detailed assessment of the issue, on the other, it raises awareness of the potential risk to the environment associated with the project shown to the public body. For this reason the more information that is available, the greater the guarantee of an improved awareness and understanding of the project. These principles of transparency and freedom of information are fundamental to the effective functioning of the EIA procedure.

2. Corte costituzionale, 22nd of May 2013, no. 93: the case.

The Italian Prime Minister presented a constitutional conflict to the Italian Constitutional Court, contesting that the Regional law n. 3/2012 of Marche Region was not compatible with both the European directive 2011/92 and the Italian d. lgs. 152/2006 (Italian *Codice Ambiente*). The Prime Minister affirmed that the regional law 3/2012 did not follow the established regulations of EIA procedure closely enough, as dictated by European and national law.

3. The sentence.

The Italian Constitutional Court agrees with objections raised by the Italian Prime Minister against Marche regional law no. 3/2012. Firstly, the Court recognizes that Annexes A1, A2, B1 and B2 of regional law consider dimensional guidelines as the only parameter by which to assess whether a planned activity must be submitted to EIA procedure or not. Particular attention was drawn to the ruling that if the location of the area was smaller than a certain pre-defined dimension, EIA would not have been necessary.

In the opinion of the Constitutional Court, this part of the regional law is in contrast with art. 4 pt. 3 European directive no. 2011/92. Recalling the previous paragraph, art. 4 pt. 3 states that a number of guidelines must be followed by both national and regional law in order to establish whether a planned activity with potential risk to the environment should be submitted to EIA procedure. A wide-ranging assessment is required in order to allow a comprehensive consideration of the effective impact of the activity on the environment. Nevertheless, regional law no. 3/2012 is not in line with this specific directive, as it does not consider other pre-defined criteria established by European law .

The Constitutional Court believes that regional law no. 3/2012 does not respect the obligations of information requested by European directive no. 2011/92 also for different reasons. Contrary to the afore mentioned directive, art. 8 of regional law no. 3/2012 does not require the proposer of the project to specify a deadline by which time any interested party may voice their concerns and request information about the proposal. Moreover, art. 8 fails both to inform the interested parties on which course of action they can follow in order to obtain information and also does not oblige the specific reasons that the project has been submitted to EIA be made known.

This means that the principles of transparency and freedom of information requested by directive no. 2011/92 are not guaranteed. For this reason, the Constitutional Court declares regional law no. 3/2012 as unconstitutional as it is in conflict with the European directive.

Moreover, the regional law does not respect another important requirement by European environmental law, acknowledged by Italian *Codice Ambiente*. Art. 12 pt. 1 lect. c) regional law no. 3/2012 establishes that the proposer must insert in the formal request an additional copy of the proposed project to be published via press advertising. On the contrary, the Italian *Codice ambiente* requests, in line with European directives, that the proposer, in order to get the authorization to start their own business, must insert a copy of the application to the public body while at the same time being responsible for publishing an additional copy via press advertising themselves, thus allowing for the simultaneous scrutiny of the project by public body and individuals from the public alike.

The Constitutional Court also refers to a different argument to voice its opinion. Art. 24 d. lgs. 152/2006 (Italian *Codice Ambiente*), asserting that the presentation of the project to the relevant public body and its publication via press advertising must be simultaneous, gives a clear directive. According to the Court, if these two tasks are not done at the same moment by the proposer of the project, true environmental protection cannot be guaranteed as public knowledge of the beginning of the authorization procedure has been delayed.

Regional law does not put the proposer under the same obligation, and the lack of this directive is in conflict with the principle of transparency and freedom of information. European environmental law demands adherence to exhaustive measures in gathering as much information as possible in the event that this information should be requested due to the sensitiveness of this particular issue. In fact the principle of transparency and freedom of information are a pre-requisite in the guarantee of an effective participation in the decision-making activities by public bodies in environmental matters. This means that anyone who has an interest in a given project, without needing to specify their motives other than identifying potential threats to the environment, is able to participate and request information regarding the project. In environmental law this obligation is much more significant than in general administrative procedure, which does not guarantee the participation of every individual who asks, but only to people who demonstrate a personal and concrete interest.

In conclusion, principles of transparency and freedom of information implies two main consequences. On one hand the screening of planned activities with a significant impact on the environment should concern several aspects, and should not limit its consideration to the dimensional criteria. On the other hand, it is vital that regional and national law respect the principles of transparency and freedom of information, therefore any interested person is assured total participation in the authorization procedure.

In environmental matters, according to the 'whereas' no. 19 EU directive 2011/92, the «desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being» is a well-known fundamental principle that takes priority in terms of its protection.

Comparative Law

THE CONSEIL CONSTITUTIONNEL UPHOLDS THE FRENCH BAN ON FRACKING

Francesco Alongi

TABLE OF CONTENTS: 1. – Introduction. 2. – The facts of the case. 3. – The ruling of the Conseil Constitutionnel. 4. – The national and international relevance of the ruling.

1. Introduction.

The debate over the environmental impact of hydraulic fracturing (or “fracking”) has been raging for years, while lawmakers on both sides of the Atlantic have found different (and often unsatisfactory) solutions, ranging from permissivism to straightforward bans of this very controversial practice.

The economic interests involved in the exploitation of “non-conventional hydrocarbons” are considerable. It is generally recognized that hydraulic fracturing technology «has transformed America’s prospects as a hydrocarbons producer»¹, increasing domestic gas production by 30% since 2005 and allowing America to rival with Russia and Saudi Arabia in terms of oil and gas production². Moreover, relatively low oil and gas prices are likely to give a significant advantage to the American manufacturing industry over its European and Asian competitors³.

However, enthusiasm over a brave new world of more affordable oil and gas has been dampened by mounting concerns over the potentially very damaging impact of hydraulic fracturing on the environment. Just such concerns prompted the French government to ban hydraulic fracturing activities in 2011. On 11th October 2013, the

1 The Economist, *American industry and fracking - From sunset to new dawn*, 16 November 2013.

2 Ibid.

3 «European industry pays around three times as much for its gas as its American counterpart, and Japanese firms pay more than four times as much. A report this week by the International Energy Agency, a think-tank backed by energy-consuming rich countries, predicts that by 2015 America’s energy-intensive firms will have a cost advantage of 5-25% over rivals in other developed countries», The Economist, *American industry and fracking - From sunset to new dawn*, 16 November 2013.

Conseil constitutionnel confirmed the constitutionality of this ban⁴ in a ruling that is likely to have a profound influence on future European energy policy and on the ongoing discussions before the European Parliament⁵.

2. The facts of the case.

By hydraulic fracturing it is generally meant the fracturing of rock by a pressurized liquid in order to increase the flow of oil or gas from a well. A mixture of water and chemicals is injected into a shale formation, and the resulting pressure creates a network of fractures through which oil and gas can migrate to the production well⁶. The fractures are then held in place by “proppants” (such as sand, ceramic beads or aluminium oxide).

This procedure has been in use in the United States since the 1940s, however in recent times it has been employed on a much larger scale and to greater effect, turning unproductive rock formations into lucrative oil or gas fields⁷. Hydraulic fracturing has made it economically convenient to exploit non-conventional hydrocarbons such as tight oil or gas, coal bed methane, bituminous sands, shale oil and shale gas⁸.

However, environmental concerns raised by hydraulic fracturing include the risk of leaks and spills of contaminated water, the difficulty of disposing with considerable amounts of wastewater and the strain that these methods put on the available water supplies. Moreover, fracking might even cause small earthquakes (although they are generally too small to pose a serious threat to public safety)⁹.

4 Décision n°2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC [Interdiction de la fracturation hydraulique pour l’exploration et l’exploitation des hydrocarbures – Abrogation des permis de recherche], JORF du 13 octobre 2013, 16905, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-346-qpc/decision-n-2013-346-qpc-du-11-octobre-2013.138283.html>, (last visited January 2014).

5 European Parliament - News, *Shale gas: new fracking projects must pass environmental test*, available at: <http://www.europarl.europa.eu/news/en/news-room/content/20131004IPR21541/html/Shale-gas-new-fracking-projects-must-pass-environmental-test>, 9th October 2013, (last visited January 2014).

6 W.J. BRADY, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations*, in 39 *Vermont Journal of Environmental Law*, 39, 14, 2013, 40 and ff.

7 Ibid., 40.

8 Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2013346QPCccc_346qpc.pdf (last visited January 2014), 3.

9 EIA, US Energy Information Administration, *What is shale gas and why is it important?*, available at: http://www.eia.gov/energy_in_brief/article/about_shale_gas.cfm 5th December 2012, (last visited

It is worth noting that some authors have suggested that unconventional hydrocarbons might however have a positive impact on the efforts to reverse climate change, since cheap gas might displace coal as the main energy source in developing countries such as China¹⁰.

In Europe, France boasts the second largest shale gas reserves after Poland¹¹, however, in 2011 the French legislature passed a law which effectively banned hydraulic fracturing and revoked all research permits granted for projects which entailed the use of this method¹².

The American corporation Schuepbach Energy LLC challenged before the Administrative Tribunal of Cergy-Pontoise the legality of the annulment of two permits to carry out shale gas explorations in Nant and Villeneuve-de-Berg¹³, in the South of France, arguing that the Ministry of the Environment and the Ministry of the Economy had acted *ultra vires*¹⁴.

On 12th July 2013, the Conseil d'État¹⁵ made a preliminary reference to the Conseil Constitutionnel concerning the constitutionality of Articles 1 and 3 of the Law n°2011-835 banning exploration and exploitation of shale oil and gas through

January 2014); Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, p. 5. However, studies show that environmental impact of fracking has yet to be fully understood: see EPA, US Environmental Protection Agency, *Study of the potential impacts of hydraulic fracturing on drinking water resources*, EPA 601/R-12/011, available at: <http://www2.epa.gov/sites/production/files/documents/hf-report20121214.pdf>, December 2012 (last visited January 2014).

10 T.W. MERRIL, *Four questions about Fracking*, in *Case Western Reserve Law Review*, 63, 4, 2013, 993 and ff.

11 Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, 4.

12 «Article 1 - En application de la Charte de l'environnement de 2004 et du principe d'action préventive et de correction prévu à l'article L. 110-1 du code de l'environnement, l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par des forages suivis de fracturation hydraulique de la roche sont interdites sur le territoire national», LOI n° 2011-835 du 13 juillet 2011 visant à interdire l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par fracturation hydraulique et à abroger les permis exclusifs de recherches comportant des projets ayant recours à cette technique, NOR: DEVX1109929L, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024361355&categorieLien=id> (last visited January 2014).

13 Arrêté du 12 octobre 2011 portant publication de la liste des permis exclusifs de recherches de mines d'hydrocarbures liquides ou gazeux abrogés en application de la loi n° 2011-835 du 13 juillet 2011, NOR: EFIR1127839A, JORF n°0238 du 13 octobre 2011; Le Nouvel Observateur, *Gaz de schiste: la fracturation hydraulique reste interdite*, available at: <http://tempsreel.nouvelobs.com/planete/20131011.OBS0745/gaz-de-schiste-le-conseil-constitutionnel-se-prononce-ce-vendredi.html>, 11 October 2013 (last visited January 2014).

14 Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, 8.

15 Décision n° 367893 du 12 juillet 2013.

hydraulic fracturing¹⁶. Schuepbach argued that the annulment of the exploration permits had been prompted by an excessively strict application of the precautionary principle, and that Law n°2011-835 violates the principle of equality¹⁷, since it forbids hydraulic fracturing only for the purpose of the exploitation of shale gas, but not for the purpose of geothermal exploration¹⁸. The plaintiff further argued that the norm in question, by annulling the permits granted by the competent Ministries, compromised its acquired rights (*droits acquis*) and unlawfully curtailed its freedom of enterprise and its property rights¹⁹.

3. The ruling of the Conseil Constitutionnel.

The question prioritaire de constitutionnalité (preliminary reference) submitted to the Conseil Constitutionnel included several important issues raised by the Law n°2011-835. The Conseil rejected the questions raised by local authorities and associations which had joined the proceedings, as they were not justified by any specific interest (*intérêt spécial*) in the matter.

The Conseil constitutionnel also dismissed all the arguments raised by Schuepbach Energy LLC and confirmed the constitutionality of the ban on fracking.

Firstly, the Conseil argued that the exclusion of certain activities, such as geothermal exploration, from the ban on fracking had been thoroughly discussed by the French lawmakers (as recorded by the *travaux préparatoires* of the Law) and was

16 Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC.

17 Pursuant to Article 6 of the Déclaration des droits de l'homme et du citoyen of 1789, «[la loi] doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse».

18 Le Point, *Gaz de schiste: les Sages valident la loi interdisant la fracturation hydraulique*, available at : http://www.lepoint.fr/economie/gaz-de-schiste-les-sages-valident-la-loi-interdisant-la-fracturation-hydraulique-11-10-2013-1742601_28.php, 11 October 2013 (last visited January 2014).

19 «[Schuepbach Energy LLC] faisait également valoir que cette abrogation prive de leur droit de propriété les titulaires de ces permis. Or, cette privation de propriété sans qu'aucune indemnisation n'intervienne en contrepartie méconnaît les exigences de l'article 17 de la Déclaration de 1789. À titre subsidiaire, [...] la société requérante soutenait que les atteintes au droit de propriété seraient disproportionnées au regard du motif d'intérêt général poursuivi, et contraires à l'article 2 de la Déclaration de 1789. Enfin, devant le Conseil d'État, la société requérante avait invoqué, à l'encontre des articles 1er et 3 de la loi du 13 juillet 2011, l'article 6 de la Charte de l'environnement, qui prévoit la conciliation de la protection et la mise en valeur de l'environnement, du développement économique et du progrès social. Elle soutenait que cet article serait méconnu dans la mesure où «la prise en considération, pour le moins sommaire et expéditive, de la protection de l'environnement écarte toute prise en considération tant du développement économique que du progrès social»», Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, 8.

entirely justified by the fact that these operations pose fewer risks for the environment²⁰.

As regards the alleged curtailment of the plaintiff's freedom of enterprise²¹, the Conseil constitutionnel held that the restriction was justified by the competing public interest to the protection of the environment, and that the measure was entirely proportional to the goal pursued by the legislator²².

The other questions raised by the plaintiff provided the Conseil constitutionnel with a chance to examine in detail the workings of the Law n°2011-835. According to the plaintiff, the revocation of the exploitation permits compromised its acquired rights (and therefore fell foul of Article 16 of the 1789 Déclaration des droits de l'homme et du citoyen)²³ and could not be justified by any relevant public interest.

In its judgment, the Conseil argued that the Law set up a two-stage system: the owners of a permit must notify whether they intend to employ hydraulic fracturing, and only in case of a positive answer (or, in case of failure to comply, after two months) the competent administrative authorities will be empowered to revoke the permit²⁴. Therefore, the provision in question did not compromise acquired rights as much as it imposed new obligations to the right-holders²⁵.

The Conseil equally dismissed the plaintiff's claim that the provisions at issue compromised its property rights, arguing that nobody may claim a "property right" over a permit to carry out mining operations subject to a time limit. Therefore, the contentious provisions did not entail a curtailment of Schuepbach's property rights

20 Décision n°2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, JORF du 13 octobre 2013, p. 16905, para 9.

21 Sanctioned by Article 4 of the Déclaration des droits de l'homme et du citoyen of 1789.

22 Décision n°2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, JORF du 13 octobre 2013, p. 16905, para 12.

23 «Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution», Article 16, Déclaration des droits de l'homme et du citoyen, 1789.

24 Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, 8.

25 The Conseil held that «[...]en prévoyant que les permis exclusifs de recherches d'hydrocarbures sont abrogés lorsque leurs titulaires n'ont pas satisfait aux nouvelles obligations déclaratives ou ont mentionné recourir ou envisagé de recourir à des forages suivis de fracturation hydraulique de la roche, le paragraphe II de l'article 3 [of Law n°2011-835] tire les conséquences des nouvelles règles introduites par le législateur pour l'exploration et l'exploitation des hydrocarbures liquides ou gazeux; que, ce faisant, le paragraphe II de l'article 3 ne porte pas atteinte à une situation légalement acquise». Décision n°2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, JORF du 13 octobre 2013, p. 16905, para 16.

pursuant to Article 17 of the 1789 Declaration²⁶, nor a violation of Article 2 of said Declaration²⁷. This position is consistent with the case-law of the Conseil constitutionnel, which had already refused to consider subject to “property rights” authorizations and permits to provide public transport services²⁸.

Finally, the plaintiff argued that the law in question violates Articles 5 and 6 of the Charte de l’environnement²⁹.

The Conseil dismissed the claim that the Law n°2011-835 was based on an incorrect application of the precautionary principle enshrined in Article 5 of the Charte de l’environnement³⁰, arguing that this principle only applies to “provisional” measures, whereas the the prohibition in question is ostensibly permanent.

Finally, the Conseil held that Article 6 of the Charte, which requires the legislator to balance environmental protection with other concerns, such as economic development and social progress³¹, cannot be invoked to question the constitutionality of a law or statute³².

4. The national and international relevance of the ruling.

Two major events occurred in the last few months suggest that in Europe the tide might be turning against fracking: the announcement of the European Parliament’s intention to subject all hydraulic fracturing extraction activities to

26 «La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous la condition d’une juste et préalable indemnité» Article 17, Déclaration des droits de l’homme et du citoyen, 1789.

27 «Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l’homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l’oppression» Article 2, Déclaration des droits de l’homme et du citoyen, 1789. See Décision n°2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, JORF du 13 octobre 2013, p. 16905, para 17.

28 Décision n° 82-150 du 30 décembre 1982, *Loi d’orientation des transports intérieurs*.

29 Loi constitutionnelle n° 2005-205 du 1 mars 2005 relative à la Charte de l’environnement, JORF n°0051 du 2 mars 2005 3697.

30 «Lorsque la réalisation d’un dommage, bien qu’incertaine en l’état des connaissances scientifiques, pourrait affecter de manière grave et irréversible l’environnement, les autorités publiques veillent, par application du principe de précaution et dans leurs domaines d’attributions, à la mise en œuvre de procédures d’évaluation des risques et à l’adoption de mesures provisoires et proportionnées afin de parer à la réalisation du dommage», Article 5, Loi constitutionnelle n° 2005-205 du 1 mars 2005 relative à la Charte de l’environnement, JORF n°0051 du 2 mars 2005 3697.

31 «Les politiques publiques doivent promouvoir un développement durable. À cet effet, elles concilient la protection et la mise en valeur de l’environnement, le développement économique et le progrès social», Article 6, Loi constitutionnelle n° 2005-205 du 1 mars 2005 relative à la Charte de l’environnement, JORF n°0051 du 2 mars 2005 3697.

32 Décision n°2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, JORF du 13 octobre 2013, p. 16905, para 19.

environmental impact studies and the ruling of the Conseil constitutionnel on the French ban on fracking.

Hostility and skepticism towards this technology have been mounting even in the country which so far has most benefited from it: the United States. Some critics worry about the long-term profitability of shale gas and about the real dimension of the existing reserves of unconventional hydrocarbons³³.

Several countries and local authorities all over the world have imposed bans and moratoria on fracking, and others are likely to follow suit.

The solution adopted by the French lawmakers is rather different from the first draft of the Law n°2011-835. After lengthy discussions before the Assemblée Nationale, the drafters agreed to shift the focus from the nature of the hydrocarbons extracted (namely, unconventional hydrocarbons) to the techniques used to extract them, given the health and environmental risks entailed by these methods³⁴.

The approach which ultimately prevailed is rather prudent, and according to some commentators the final text of the Law is not incompatible with some form of experimentation with hydraulic fracturing³⁵.

Pursuant to Article 3 of Law n°2011-835, within two months from the promulgation of the measure the holders of exclusive gas and oil research permits had to deliver to the competent administrative authorities a report, describing the technologies and methods used in their operations. The use of hydraulic fracturing or the failure to comply with the notification requirements entail the revocation of the permit³⁶.

While the first draft of the Law decreed the revocation of all permits, this rather more cautious text implies that certain operators will be able to keep their permits, although they might not be able to use them effectively³⁷, since fracking is the only lucrative method to exploit unconventional oil and gas reserves.

This compromise solution largely reflects the indecisive approach adopted by legislators all over the world. In the United States, federal legislation on hydraulic

33 The Economist, *From sunset to new dawn – American industry and fracking*, 16th November 2013.

34 Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, 6.

35 Since the prohibition set out by Article 1 of Law n° 2011-835 du 13 juillet 2011 simply concerns hydraulic fracturing used for «l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux». See Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, 6.

36 Article 3, LOI n° 2011-835 du 13 juillet 2011, NOR: DEVX1109929L.

37 «Comme l'écrivaient les rapporteurs à l'Assemblée nationale: les titulaires de permis 'auront un permis dont ils ne pourront rien faire», Commentaire - Conseil constitutionnel, Décision n° 2013-346 QPC du 11 octobre 2013, Société Schuepbach Energy LLC, 7.

fracturing consists «of a string of ad hoc exemptions and little oversight»³⁸, while detailed regulation of the oil and gas industry has been delegated to State legislatures, which have inevitably adopted wildly divergent solutions.

The State of New York has forbidden the exploitation of a huge shale gas field³⁹, and New Jersey and Vermont have followed suit. In the US, the debate over the appropriate regulatory regime of hydraulic fracturing is inextricably linked with the debate over the role of the federal government and the prerogatives of the States⁴⁰. The advocates of the federalist position have been keen to emphasize the advantages of a uniform regulatory network, such as the possibility to address the problem of interstate externalities and to prevent a “race to the bottom” between States⁴¹. On the other hand, other authors have argued that decentralization increases democratic participation and gives greater relevance to local environmental and social conditions⁴².

So far the EU has done little to harmonize or even coordinate national legislation on hydraulic fracturing, in spite of the strategic importance of this issue for the European economy. By employing hydraulic fracturing, European gas production from unconventional sources could reach 200 billion cubic meters by 2025 and perhaps put an end to the EU’s dependence on Russian gas. Some authors have suggested that the strategic importance of Europe’s shale gas reserves might prompt the EU to follow the *laissez-faire* attitude of the United States in the field of hydraulic fracturing⁴³.

Just a few days before the ruling of the Conseil constitutionnel on the *Schuepbach* case, the European Parliament started discussions on the possibility to subject exploration and extraction activities involving hydraulic fracturing to environmental impact studies. Several Members of the European Parliament proposed amendments to the existing legislation in order to prevent conflicts of

38 W.J. BRADY, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations*, in *Vermont Journal of Environmental Law* 39, 14, 2012, 69 and ff.

39 Ibid., 56.

40 R.K. CRAIG, *Hydraulic Fracturing (Fracking), Federalism, and the Water-Energy Nexus*, in *Idaho Law Review*, 49, 2013, 261.

41 M. BURGER, *Fracking and Federalism Choice*, in *University of Pennsylvania Law Review Online*, 150, 161, 2013, 158.

42 Ibid., 159.

43 W.J. BRADY, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations*, in *Vermont Journal of Environmental Law*, 39, 14, 2012, 69 and ff.

interest between developers and experts and suggested measures to involve the public in the ongoing discussions⁴⁴.

Existing legislation covers only projects which extract at least 500.000 cubic metres of natural gas per day, however many shale gas operations involve smaller amounts and therefore are not subject to a environmental impact assessment requirements⁴⁵. The provisions currently being discussed by the European parliament would include all exploration or extraction activities concerning unconventional hydrocarbons in the scope of application of the Environmental Impact Assessment Directive⁴⁶.

On the wake of this announcement of the European Parliament, public interest groups and NGOs have renewed their efforts to inform the public of the environmental risks posed by hydraulic fracturing⁴⁷. The *Schuepbach* ruling is likely to have a very significant influence over EU policies on shale gas and oil, but it might also prove to be a major hurdle on the road to a coherent EU-wide legal framework.

44 European Parliament - News, *Shale gas: new fracking projects must pass environmental test*, available at: <http://www.europarl.europa.eu/news/en/news-room/content/20131004IPR21541/html/Shale-gas-new-fracking-projects-must-pass-environmental-test>, 9 October 2013 (last visited January 2013).

45 Article 4(1) and Annex I, Directive 2011/92/EU of the European Parliament and of the Council of 13th December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L26/8.

46 Directive 2011/92/EU of the European Parliament and of the Council of 13th December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L26/8.

47 Health and Environment Alliance, *EU Environmental Assessment Law must include Fracking, says HEAL*, available at: <http://www.env-health.org/resources/press-releases/article/eu-environmental-assessment-law>, 17 December 2013 (last visited January 2014).

THE *SHELL NIGERIA* CASE AND THE ENVIRONMENTAL LIABILITY OF PARENT COMPANIES FOR THE CONDUCT OF THEIR FOREIGN SUBSIDIARIES.

Francesco Alongi

TABLE OF CONTENTS: 1. – Introduction. 2. – The facts of the case. 3. – The ruling of the District Court of The Hague. 4. – Transnational liability claims: the question of jurisdiction.

1. Introduction.

In a long-awaited ruling handed down on 30th January 2013¹, the District Court of The Hague found Shell Petroleum Development Company of Nigeria Ltd (hereinafter also referred to as «SPDC»), the Nigerian subsidiary of Royal Dutch Shell plc, liable for the environmental damage caused by a series of oil spills occurred between 2006 and 2007. In this landmark judgment, the Dutch Court upheld its jurisdiction not only over the Dutch parent company, but also over the claims arising from the conduct of SPDC in Nigeria.

2. The facts of the case.

Over the last decades, intensive oil production operations in Nigeria have caused significant damage to the environment of the Niger Delta and to this day frequent oil spills pose a considerable threat to the health and subsistence of the local population².

The main causes of oil spills are inadequate, defective or obsolescent

1 *Friday Alfred Akpan and Vereniging Milieudéfensie v. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, District Court of The Hague [2013] ECLI:NL:RBDHA:2013:BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580. English translation available at: http://www.menschenrechte.uzh.ch/entscheide/Friday_Alfred.pdf (last visited December 2013).

2 See D.S. OLAWUYI, *Legal and Sustainable Development Impacts of Major Oil Spills*, in *Consilience: the Journal of Sustainable Development*, 9, 1, 2012, 4 and ff.

equipment and sabotage of pipelines or oil facilities in order to steal oil or obtain compensation from oil companies³.

Royal Dutch Shell plc operated through its wholly-owned subsidiary SPDC, a company established and headquartered in Nigeria, carrying out exploration and extraction activities.

Between August 2006 and September 2007, two main oil spills from facilities operated by SPDC occurred near the village of Ikot Ada Udo in the State of Akwa Ibom.

The work of the investigation team appointed by the local authorities and of SPDC personnel was hindered by strong opposition from the local population⁴, but by November 2007 the spill had been stemmed. Subsequent investigations pointed to sabotage and «tampering of the wellhead» as the likely causes of the oil spill⁵, suggesting that the valves of the «Christmas Tree»⁶ installed over the oil well had been purposefully opened.

In 2009, Friday Alfred Akpan, a farmer and fisherman who lived in the village of Ikot Ada Udo commenced proceedings against both SPDC and Royal Dutch Shell plc in The Hague, where the headquarters of the Shell Group are located. Mr Akpan's livelihood was entirely dependent on the exploitation of land and fish ponds which had been severely affected by the oil spills and he asked compensation for the damage that he had suffered as a result of the tort committed by Royal Dutch Shell plc and SPDC⁷.

Four other Nigerian nationals commenced separate proceedings, bringing similar claims against companies of the Shell Group⁸. The plaintiffs asked the District Court of The Hague to condemn the Shell Group to pay suitable compensation for the damage suffered, clean-up the pollution caused by the oil spill and enact more effective safety measures to protect its wells⁹.

3 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para. 2.1.

4 *Ibid.*, para. 2.6.

5 *Ibid.*, para. 2.7.

6 A Christmas tree is a steel structure with a number of pipes controlled by steel valves and used to control and regulate the flow of oil and gas from the well or to seal the well.

7 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para. 2.3.

8 I. SEKULARAC, A. DEUTSCH, *Dutch court says Shell responsible for Nigeria spills*, in *Reuters*, available at: <http://www.reuters.com/article/2013/01/30/us-shell-nigeria-lawsuit-idUSBRE90S16X20130130> 30 January 2013 (last visited December 2013).

9 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District

Their claims were supported by the environmental NGO «Friends of the Earth Netherlands» (also known as «Milieudefensie»), which joined the proceedings.

According to the plaintiffs, while sabotage could not be ruled out, the wellhead was defective and obsolete (having been installed in 1959) and had not been sufficiently protected by SPDC¹⁰.

3. The ruling of the District Court of The Hague.

On 30th January 2013, the District Court of The Hague held that pursuant to Section 7 of the Dutch Code of Civil Procedure it had jurisdiction not only over the claims brought against Royal Dutch Shell plc, but also over those brought against its Nigerian subsidiary, arguing that the close connection between the claims and reasons of economy and efficiency justified joint proceedings¹¹.

In their pleadings, the defendants invoked the *Painer* ruling¹², in which the European Court of Justice held that «a difference in legal basis between the actions brought against the various defendants does not, in itself, preclude the application of Article 6 (1) of Regulation No 44/2001, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled»¹³.

Shell argued that its Nigerian subsidiary could not have possibly foreseen that it would have been summoned before the District Court of The Hague in relation to its alleged liability for an oil spill occurred in Nigeria and that therefore Article 6 (1) of the Brussels Regulation¹⁴ could not be invoked to justify the jurisdiction of the

Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para. 3.1.

10 Ibid., para. 2.13.

11 Ibid., para. 4.1. On this issue, see also Allen & Overy, *The Shell Nigeria cases – an important precedent for transnational liability claims*, available at: <http://www.allenoverly.com/publications/engb/Pages/The-Shell-Nigeria-cases---an-important-precedent-for-transnational-liability-claims.aspx> 7 February 2013, (last visited December 2013).

12 Case C-145/10, ECJ (Third Chamber), 1st December 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, [2011] ECR 0000.

13 Ibid., para.81.

14 «A person domiciled in a Member State may also be sued: 1) where he is one of a number of defendants, in the courts for the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings», Article 6(1), Council Regulation 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16/01/2001 p 1-23.

Court over the claims brought against SPDC¹⁵.

The Dutch Court dismissed these arguments, ruling that the claims against both companies of the Shell Group had the same legal basis and arguing that «for quite some time there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign subsidiaries, in which the foreign subsidiary involved was also summoned together with the parent company on several occasions»¹⁶ and that therefore it was entirely foreseeable for SPDC that it might have been summoned before a court in the Netherlands to answer for the oil spill in question.

Moreover, the Court emphasized the fact that even if all the claims brought against Royal Dutch Shell plc had been rejected, this would have no bearing on the issue of jurisdiction, since Dutch international private law does not follow the doctrine of *forum non conveniens*¹⁷.

Since the event fell outside the temporal scope of Regulation 864/2007 («Rome II»)¹⁸, the Court of The Hague held that pursuant to the Dutch Conflict of Laws Act (*Wet Conflictenrecht Onrechtmatige Daad*)¹⁹, the claims brought by the plaintiffs should be assessed under Nigerian law (since both the oil spills and the alleged damage had occurred in Nigeria)²⁰, and in light of the English case-law on torts²¹.

Following the landmark *Donoghue v Stevenson*²² in 1932, English Courts have consistently upheld the principle that a tort of negligence is committed if the breach of a duty of care has resulted in damage for the plaintiff²³. Under English Law, the

15 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para. 4.4.

16 *Ibid.*, para. 4.5 [emphasis added].

17 *Ibid.*, para. 4.6. See also Allen & Overy, *The Shell Nigeria cases – an important precedent for transnational liability claims*, 7 February 2013.

18 Regulation 864/2007, OJ L 199, 31.7.2007, 40–49.

19 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.8.

20 The District Court of The Hague consulted English common law literature concerning the legal issues raised by the plaintiffs, arguing that «after all, Nigerian law is a common law system that is based on English law», see *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.10.

21 The Court argued that «decisions of English Courts that date from after Nigeria's independence in 1960 are not binding on the Nigerian Court, but do have persuasive authority and are therefore frequently followed in Nigerian case law», *Ibid.*, para 4.22.

22 *Donoghue v Stevenson* [1932] UKHL 100.

23 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013,

existence of a duty of care towards the plaintiff is assessed on a case-by-case basis²⁴ and according to the criteria set out by the House of Lords in *Caparo Industries plc v Dickman*.²⁵ foreseeability of the damage, «proximity» between the plaintiff and the defendant, and the fact that it was just and reasonable to assume the existence of a duty of care²⁶.

However, neither English nor Nigerian case-law recognize the existence of a general duty of care as regards the damage which the claimant might suffer as a result of the conduct of third parties²⁷. Indeed, in *Smith v Littlewoods*²⁸ the House of Lords held that the existence of a duty of care concerning the actions of third parties might be admitted only under certain very strict conditions²⁹. After a very extensive analysis of the relevant English and Nigerian case-law, the Court rejected all claims against the parent company Royal Dutch Shell plc, arguing that it was under no obligation to prevent its subsidiary from inflicting damage on third parties as a result of its operations and that the very narrow exception allowed by the *Smith v Littlewoods* case-law was not applicable in the case at issue.

The Court further held that the situation in the *Shell Nigeria* case could not be equated with the one in *Chandler v Cape plc*³⁰, where an English Court held that a parent company can have a duty of care towards the employees of a subsidiary where health and safety are concerned (in particular the *Chandler v Cape plc* case

C/09/337050/HA ZA 09/1580, para 4.23. The principle enshrined in *Donoghue v Stevenson* is often summarized in the words of Lord Atkin: «The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question», *Donoghue v Stevenson* [1932] UKHL 100. See also M. CHAPMAN, *The Snail and the Ginger Beer, the singular case of Donoghue vs. Stevenson*, Wildy, Simmonds & Hill Publishing, London, 2010, 40; and F. GALGANO, *Atlante di diritto privato comparato*, Bologna, 2006, 160.

24 *Friday Alfred Akpan and Vereniging Milieudéfensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.23.

25 *Caparo Industries plc v Dickman* [1990] UKHL 2.

26 *Ibid.*

27 *Friday Alfred Akpan and Vereniging Milieudéfensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.24.

28 *Maloco and Smith v Littlewoods Organisation Ltd*, [1987] UKHL 18 2 WLR 480.

29 See *Friday Alfred Akpan and Vereniging Milieudéfensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.24.

30 *Chandler v Cape plc* [2012] EWCA Civ 525.

involved damage caused by exposure to asbestos)³¹. On this issue, the Dutch Court found that «the special relation or proximity between a parent company and the employees of its subsidiary that operates in the same country cannot be unreservedly equated with the proximity between the parent company of an international group of oil companies and the people living in the vicinity of oil pipelines and oil facilities of its subsidiaries in other countries»³².

As regards the liability of the Nigerian subsidiary, SPDC, the underpinning of the Court's ruling is Section 11 (5) of the Nigerian Oil Pipelines Act of 1956, which provides that the pipeline operator shall pay compensation to any subject damaged «by reason of any neglect on the part of [the operator] or his agent, servants or workmen to protect, maintain or repair any work structure or thing executed under the license»³³.

On the basis of this provision, and of the relevant Nigerian case-law³⁴, the District Court of The Hague held that SPDC had committed a tort of negligence against Mr Akpan, having failed to take appropriate measures to secure and protect the well, in spite of the very high risk of sabotage of oil pipelines and facilities in the area³⁵.

The Court largely confirmed the claim made by Shell that the oil spill had been caused by sabotage or tampering with the wellhead³⁶, while recognizing that SPDC had committed a tort of negligence against Mr Akpan, having failed to take all necessary measures to protect the Christmas Tree of the wellhead from sabotage. According to the District Court of The Hague, the oil spills might have been prevented if SPDC had taken appropriate measures in this sense.

The Court consequently referred the plaintiffs and SPDC to separate

31 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.28.

32 *Ibid.*, para 4.29.

33 As quoted in: *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.29.

34 «This also follows from the Nigerian ruling in *Shell Petroleum Development Company (Nigeria) Limited v Otoko* (1990). After all, this ruling held that 'where the immediate cause of the [oil spill] is [sabotage], the [operator] is not liable, unless [the operator] [...] should have foreseen the sabotage and should have taken measures against this», *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para 4.41.

35 *Ibid.*, paras 4.43 and 4.46.

36 *Ibid.*, paras 4.21 and 4.22.

proceedings to determine the damages (so-called Schadestaatprocedure)³⁷.

All the other claims brought against the Shell Group by the four other Nigerian plaintiffs were dismissed³⁸, however Milieudéfensie has already appealed against the judgments³⁹.

4. Transnational liability claims: the question of jurisdiction.

The *Shell Nigeria* case represents a landmark in the field of environmental liability claims against transnational corporations. The most immediate consequence of the ruling of the District Court of The Hague is that injured parties wishing to bring claims based on tort against non-Dutch subsidiaries of Dutch transnational corporations will be able to establish jurisdiction of a Dutch court by bringing a claim also against the parent company headquartered in the Netherlands⁴⁰. Indeed, it was doubtlessly Milieudéfensie's intention to seek to establish a precedent in this sense.

Injured parties might have a strong interest in bringing claims simultaneously against the foreign subsidiary and the parent company before a EU jurisdiction if they believe that a EU court might offer them stronger guarantees of impartiality and independence, or if they fear that foreign jurisdictions might lack the necessary expertise to assess the case⁴¹. Moreover, NGOs and advocacy groups might see the advantages in term of visibility and press coverage of bringing claims before European courts.

As for the substantive law applicable to this type of claims, the Rome II Regulation states quite clearly that «the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country in which the damage occurs»⁴². This entails that the liability of the parent company based in the Netherlands for the

37 Van Swaaij Cassatie & Consultancy, *De Schadestaatprocedure*, available at: <http://www.vsc.nl/literatuur/de-schadestaatprocedure/> (last visited January 2013); Allen & Overy, *The Shell Nigeria cases – an important precedent for transnational liability claims*, 7 February 2013.

38 Rechtspraak, Press Release, *Dutch Judgments on Liability Shell*, available at: http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Documents/Persbericht_Shell_UK.pdf, 30 January 2013 (last visited December 2013).

39 Milieudéfensie, *Nigerians and Milieudéfensie appeal in Shell Case*, available at: <https://www.milieudéfensie.nl/english/shell/news/nigerians-and-milieudéfensie-appeal-in-shell-case>, 1 May 2013, (last visited December 2013).

40 Allen & Overy, *The Shell Nigeria cases – an important precedent for transnational liability claims*, 7 February 2013.

41 Ibid.

42 Article 4.1., Regulation 864/2007, OJ L 199, 31.7.2007, p. 40–49.

conduct of its foreign subsidiary is likely to be assessed under the law of the country of operation of the subsidiary⁴³. However, an important exception to the *lex loci damni* principle is set out by Article 7 of the Rome II Regulation, which states that the person seeking compensation for an environmental damage may choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred⁴⁴.

While the Shell Group has been keen to emphasize that this ruling did not represent in any way a precedent because its parent company was not held responsible for the oil spills⁴⁵, the consequences of the *Shell Nigeria* case are likely to be momentous.

As the District Court of The Hague has correctly observed, there has been an international trend to hold parent companies of multinationals liable before their home jurisdictions for the harmful practices of their foreign subsidiaries⁴⁶. The Shell Group itself is involved in a claim brought before an English court on behalf of almost 11.000 farmers and fishermen of the Bodo Community in Nigeria for the damage caused by the bursting of a major oil pipeline in 2008⁴⁷. A ruling is expected in the course of 2014.

However, this trend encountered a serious setback on 17th April 2013, when the US Supreme Court, ruling on the *Kiobel* case⁴⁸, upheld the presumption against extraterritoriality to claims brought under the Alien Tort Claims Act (or Alien Tort Statute, «ATS»), holding that the claims in question were not actionable, since they were brought «by foreigners against foreigners for conduct abroad»⁴⁹.

This decision, which has not failed to draw considerable criticism, concerned the 1789 Alien Tort Claims Act⁵⁰, according to which «the [US] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in

43 Allen & Overy, *The Shell Nigeria cases – an important precedent for transnational liability claims*, 7 February 2013.

44 Article 7, Regulation 864/2007, OJ L 199, 31.7.2007, p. 40–49.

45 I. SEKULARAC, A. DEUTSCH, *Dutch court says Shell responsible for Nigeria spills*, in Reuters 30 January 2013.

46 *Friday Alfred Akpan and Vereniging Milieudefensie v. Royal Dutch Shell PLC and SPDC Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580, para. 4.5.

47 J. VIDAL, *Niger Delta Oil Spill victims reject derisory Shell compensation offer*, in *The Guardian*, available at: <http://www.theguardian.com/global-development/2013/sep/13/niger-delta-oil-shell-compensation>, 13 September 2013 (last visited December 2013).

48 *Kiobel v. Royal Dutch Petroleum Co.* [2013] 133 S.Ct. 1659.

49 A.J. COLANGELO, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, in *Georgetown Journal of International Law* 44 2013, 1321.

50 Alien Tort Statute (also known as «Alien Tort Claims Act») 28 USC § 1350.

violation of the law of the nations or a treaty of the United States». The plaintiffs (a group of Nigerian nationals residing in the United States) brought claims before a US court on the basis of the Alien Tort Claims Act, alleging that certain European and Nigerian corporations had «aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria»⁵¹.

According to the plaintiffs, throughout the 1990s, Nigerian police and military forces systematically attacked Ogoni villages, «beating, raping, killing and arresting residents and destroying or looting property»⁵². Their complaint alleged that Nigerian and foreign oil companies provided the Nigerian forces with food, transportation and compensation, going as far as to allow the Nigerian military to use their property «as a staging ground for attacks»⁵³.

In April 2013, the US Supreme Court ruled, in line with its own case-law in *Morrison v National Australia Bank*⁵⁴, that a presumption against extraterritoriality should be observed when interpreting the ATS. According to this presumption, when a statute gives no clear indication of its extraterritorial scope of application, then it must be assumed that it has none. The US Supreme Court further held that even when claims based on the ATS «touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application»⁵⁵, to be admissible.

The likely effect of the *Kiobel* ruling will be to stem lawsuits brought under the Alien Tort Claims Act against US-based transnational corporations for violations of international law. This kind of litigation had been encouraged in 2004 by the US Supreme Court itself with its ruling in the *Sosa* case, where the Court established the main criteria to determine whether a tort constitutes a cause of action under the ATS⁵⁶.

While the *Kiobel* case concerned alleged human rights violations, this ruling is likely to constitute an extremely important precedent with regard to any kind of transnational direct liability claim.

51 *Kiobel v. Royal Dutch Petroleum Co.* [2013] 133 S.Ct. 1659, Opinion of the Court, I, 2.

52 *Ibid.*, I, 2.

53 *Ibid.*, I, 2. See also Linklaters, *Kiobel v Royal Dutch Petroleum Co et al.: the Supreme Court reins in private lawsuits involving entirely foreign conduct*, available at: <http://www.linklaters.com/Publications/US-Publications/Pages/Kiobel-Royal-Dutch-Petroleum-Coetal-Supreme-Court-Reins-Private-Law-suits-Entirely-Foreign-Conduct.aspx>, April 2013 (last visited December 2013).

54 *Morrison v. National Australia Bank* [2010] 561 US S.Ct.

55 *Kiobel v. Royal Dutch Petroleum Co.* [2013] 133 S.Ct. 1659, Opinion of the Court, IV.

56 *Sosa v. Alvarez-Machain* [2004] 542 US S.Ct. 692. See also Linklaters, *Kiobel v Royal Dutch Petroleum Co et al.: the Supreme Court reins in private lawsuits involving entirely foreign conduct*, April 2013.

The doctrine adopted by the District Court of The Hague in *Shell Nigeria* might receive a slightly warmer reception in the United Kingdom, where local courts will not be able to decline their jurisdiction over claims concerning foreign subsidiaries of British corporations on the basis of the *forum non conveniens* doctrine. Indeed, this issue has already been dealt with in the *Owusu v. Jackson* case⁵⁷, where the Court of Justice of the EU held that the Brussels Convention «precludes a court of a Contracting State from declining to exercise jurisdiction on the ground that a court in a non-Contracting State would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State»⁵⁸.

While the *Shell Nigeria* case is likely to represent a momentous precedent, the future of transnational environmental litigation is far from clear, and the impact of the ruling of the District Court of The Hague should be weighed against the new stance of the US Supreme Court heralded by the *Kiobel* judgment⁵⁹.

57 C-281/02, ECJ (Grand Chamber) 1st March 2005, *Andrew Owusu v. N.B. Jackson and others*, [2005] ECR I-1383.

58 *Ibid.*, para. 46.

59 For an in-depth overview of the contemporary trend towards foreign direct liability cases, see L.F.H. ENNEKING, *The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case*, in *Utrecht Law Review*, available at: <http://ssrn.com/abstract=2349557>, Forthcoming (last visited January 2014).

FEAR OF CONTRACTING DISEASE: A MILESTONE IN THE FULL COMPENSATION OF THE ENVIRONMENTAL DAMAGE

Barbara Verri

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1. The Seveso disaster.

On 10 July 1976, approximately 15 km north of Milan, a dense vapour cloud containing tetrachlorodibenzoparadioxin (TCDD), a type of dioxin, was released into the atmosphere after an explosion occurred in a reactor of a chemical plant manufacturing pesticides and herbicides. A significant quantity of dioxin, a carcinogen substance and lethal to man even in small quantity, spread very rapidly across the area closed to the factory.

The toxic cloud drifted over a region densely populated and several municipalities were directly contaminated; among these, Seveso was the most impacted community. Immediately after the accident the local population experienced various health problems such as nausea, blurred vision and, especially among children, a severe skin disorder known as chloracne that produced burn-like skin abrasions; more than 2000 cases of dioxin poisoning were diagnosed. The local fauna and flora were as well intensely affected: in the days following the spread of the toxic agent small animals (mostly poultry and rabbits) started to perish.

To tackle more effectively the pollution, the area was divided and subdivided in three zones (zone A, B and R¹) based on soil contamination levels; consequently,

¹ Zone A was completely evacuated being the most affected area characterized by an average dioxin concentration up to 580 micrograms per square meter; instead, in zones B, with an average concentration of 3 micrograms per square meter, and R (a buffer zone), with an average concentration

more than 600 people living in the most affected areas had to be evacuated. As a result of the environmental disaster the local population was also required to undergo constant health monitoring that lasted at least ten years after the accident.

In 1986 the criminal trial came to an end with the Supreme Court judgement that sentenced two managers of the chemical factory for negligently causing an environmental disaster according to article 449 of the Italian Criminal Code. Compensations for individuals' injuries were instead settled outside courts by separate agreements with the victims². However, further civil claims regarding non-economic damages – left outside the scope of the mentioned settlements – were filed in the years following the conclusion of the criminal trial. In fact, beside compensation for health and economic losses, many Seveso residents sought recovery for pain and suffering caused by the anxiety of contracting a disease and the emotional distress for being exposed to continuous clinic examinations.

2. Non-economic damages and environmental harm: novelty from the Italian Supreme Court judgement.

The judgment analysed in this paper³ arises from the tragic events above described. More than 30 years after the Seveso disaster⁴, the *Corte di Cassazione*, the Italian Supreme Court, was once more referred to rule whether the exposure to the toxic cloud could be a cause of action to award non-economic damages to the local population contaminated with dioxin.

The case started in 1995 when 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 highly 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. After a long trial, in 2003 the Tribunal of first instance⁵ ruled in favour of the plaintiffs, upon the basis that the

of 0.9 micrograms per square meter, were prohibited farming and consumption of local agricultural products and meats. Municipal ordinances required also the destruction of the vegetables, the slaughter of animals to prevent the dioxin from entering the food chain, and suggested to refrain from procreation.

² Around 7.000 victims received compensation for damages caused by the toxic cloud and almost 70.000 million Swiss franc were paid (see T. SCOVAZZI, *L'incidente Seveso e il "velo" delle società transazionali*, in *Rivista Giuridica dell'ambiente*, 1988, 283).

³ See Cassazione, 13 May 2009, n. 11059.

⁴ On the topic see B. POZZO (ed.), *Seveso trent'anni dopo: percorsi giurisprudenziali, sociologici e di ricerca*, Milano, 2008.

⁵ See Tribunale di Milano, 9 June 2003, n. 7825.

dioxin was scientifically recognized a cancer-causing agent and the fear of contracting a disease related to this substance affected seriously the day-to-day life of the local population. The Tribunal hence held the chemical industry liable for damages and granted the victims of the pollution € 5.000 each for having suffered emotional distress. The defendant, however, appealed on the basis that the existence of substantial damages lacked of enough evidences and the sum awarded was, in any case, vague and excessive; the Court of Appeal⁶ dismissed the case confirming entirely the first judgment.

The chemical industry then challenged again the ruling by bringing the case to the Supreme Court and presented seven arguments to reverse the Court of Appeal ruling. Among these, the appellant considered the constant medical examinations not a sufficient condition to prove the existence of the damage alleged by the plaintiffs who, as a matter of fact, did not establish with enough certainty that the pollution also caused them an emotional distress. In addition the appellant asserted that both the Tribunal and the Court of Appeal assessed the damages incorrectly since the sum awarded to each plaintiff was generally indicated in the same amount and, therefore, it was not based on a one-by-one plaintiff evaluation. Lastly, the appellant remarked that in a 2008 leading case⁷ the Supreme Court denied the compensation for non-economic damages related to the loss of enjoyment or value of life: consequently, given this new interpretation, the damages alleged by the Seveso residents were not anymore *per se* compensable in the Italian legal system.

The Supreme Court rejected all the arguments proposed by the chemical factory on the grounds that the Tribunal and Court of Appeal found in favour of the claimants accordingly to the evidence collected during trial. Specifically, the Supreme Court reminded that all the plaintiffs lived in the zone B and R of the contaminated site and because of this proximity to the polluted area they 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. The plaintiffs, thus, properly fulfilled the burden of proof even if the evidence of the damage was mainly based on presumptions: indeed, the Supreme Court concurred with both inferior courts which correctly recognized that the development 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. As a matter of fact, according to scientific studies that linked the dioxin exposure to contracting

⁶ See Corte d'Appello di Milano, 12 December 2005, n. 2829.

⁷ See Cassazione, Sezioni Unite, 11 November 2008, nn. 26972, 26973, 26974 and 26975; see also § 3.

possible severe illnesses, the chance of developing a disease was likely to follow in the given circumstances. The Supreme Court also pointed out that the awarded damages found their legal basis in the purpose of the violated criminal provision: indeed, article 449 of the Criminal Code is designated to protect the environment which consists in both a universal right responding to the public interest and a right of each individual to live in a safe and healthy environment. The latter right allowed the Court to affirm that the specific criminal offence also constituted a valid ground to award the non-economic damage, given the closed connection between the victims and the polluted environment. Lastly, regarding the argument concerning the new interpretation of non-economic damages after the 2008 leading case, the *Corte di Cassazione* affirmed that the category of the non-economic damages can embrace also the emotional distress consisting in any negative impacts on the individuals' lives but it is the judge's duty to identify each time the relevance of such negative impacts and determine whether the damage is not futile but it is justified by the seriousness of the injury inflicted. In the Seveso case, considering the gravity of the offense as well as its possible negative consequences for the residents' health and the extensive period of medical examinations, the Supreme Court found that the damages recognized by the inferior courts reached that seriousness threshold required by the 2008 interpretation decision and therefore they still deemed to be compensated. As for the equal sum of money awarded to each plaintiff, the Supreme Court affirmed that the Court of Appeal properly awarded each victim with € 5.000 on the basis that the assessment of non-economic damage may take the equitable form according to article 1226⁸ of the Civil Code and also according to the fact that non-pecuniary losses are, by their nature, difficult to be assessed and proven in their exact amount.

3. The concept of non-economic damages in the environmental liability field.

Within the Italian legal system, civil claims for environmental damages to private parties rely on the tort liability system as provided by the Civil Code⁹.

⁸ Article 1226 of the Civil Code states «Equitable measure of damages: If damages cannot be proved in their exact amount, they are equitably liquidated by the court»; English translation of relevant Italian provisions is available at <http://italiantortlaw.altervista.org/civilcode.html>.

⁹ For an analysis on the Italian tort law see F. GALGANO, *Trattato di Diritto Civile*, III, Padova, 2010, 109 and ff. and also R. SPITZMILLER, *Selected Areas of Italian Tort Law: Cases and Materials in a Comparative Perspective*, Fagnano Alto, 2011.

According to these rules if a person can establish liability for an environmental damage, he or she is entitled to receive compensation¹⁰.

Compensatory damages aim at restoring both the actual losses occurred to the environment and the expenses sustained to remedy such harms. As regard to the damages specifically occurred to individuals, they consist in damages to the property (as, for example, the damage to restore contaminated areas, the loss of value of property, lost of past and future profits) or damages regarding the impairment of body function (as, for example, the expenses to get the necessary medical treatments): these losses can be designated as economic damages¹¹ since they represent actual monetary losses directly borne by the victim. Besides, another head of damage that may arise from an environmental harm is the non-economic damage that refers to compensation for losses not economically measurable, consisting in emotional distress¹² and suffering (such as shock, nervousness, grief, emotional trauma and anxiety).

Within the Italian civil liability system, in tort cases article 2043 of the Civil Code¹³ sets down compensation for economic damages while article 2059¹⁴ sets down compensation for non-economic damages. Traditionally the notion of non-monetary losses stated in article 2059 of the Civil Code regarded only the damage occurred in case of a wrongful act constituting a crime: the strict application relied on the fact that the sole Italian rule that expressly allows non-economic damages is article 185 of the Criminal Code¹⁵. As a matter of fact, according to the latter rule the

¹⁰ Punitive damages (intended as damages to punish the wrongdoer in addition to actual damages) are not allowed in the Italian legal system.

¹¹ The components of the economic damage, derived from the Roman legal tradition, are *damnum emergens* (out-of-pocket expenses paid as a result of the harm) and *lucrum cessans* (lost profits); see R. SPITZMILLER, op. cit., 158 ff.

¹² In common law countries emotional distress usually indicates also the nervous shock while in the Italian legal system this head of damage is considered part of the health damage; therefore, to the end of this paper, the term emotional or mental distress should be understood as the suffering and mental anguish inflicted to the victim as a consequence of the tort.

¹³ Article 2043 of the Civil Code states «Compensation for unlawful acts: Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages»; English translation of relevant Italian provisions is available at <http://italiantortlaw.altervista.org/civilcode.html>.

¹⁴ Article 2059 of the Civil Code states «Non-patrimonial damages: Non-patrimonial damages shall be awarded only in cases provided by law»; English translation of relevant Italian provisions is available at <http://italiantortlaw.altervista.org/civilcode.html>.

¹⁵ Article 185 of the Criminal Code provides that «Restitution and compensation for damages: Every criminal offense requires restitution according to the civil rules of law. Any criminal offense which causes material or non-material harm obliges the wrongdoer, as well as any person who is responsible for the conduct of the wrongdoer according to civil law, to compensate for that harm»; English

wrongdoer of a criminal offence is held liable in compliance with the tort liability provisions of the Civil Code and must fully compensate the victim's harm by recovering both pecuniary and non-pecuniary losses. At the present time, however, this strict approach has been abandoned and the Italian courts regularly allows a broader interpretation of article 2059 of the Civil Code by affirming that non-economic damages can be awarded also in all those cases in which the wrongful behaviour violates a fundamental right protected by the Italian Constitution even if the tortfeasor's conduct does not constitute a crime¹⁶.

In order to understand what courts can award as non-economic damages in case of an environmental tort, a brief reconstruction of the general concept of non-pecuniary damages in the Italian legal system should be recalled. Indeed, in the past years the Italian case law fashioned a rather wide definition of the heads of damage that courts could award according to article 2049 of the Civil Code: in line with this trend, compensation for suffering and impairment of the victim's physical or mental health assumed rather unique patterns. In some cases, courts awarded 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 work¹⁷. In other cases, courts awarded the so-called "moral damage"¹⁸ in the event that the wrongful act also interfered with the victim's personal life by causing him or her an unlawful suffering¹⁹. Lastly, courts awarded damages related to the mere negative impact on lifestyle and personal relationships, like for example the loss of enjoyment of life, the injury of family harmony, or the enjoyment of living in a healthy environment²⁰. According to this copious case law, courts tended to award

translation of relevant Italian provisions is available at <http://italiantortlaw.altervista.org/penalcode.html>.

¹⁶ This principle was affirmed by the Supreme Court in the 2003 leading case (see Cassazione, 31 May 2003, n. 8827 and n. 8828).

¹⁷ Such restoration finds its legal basis on article 32, paragraph 1, of the Italian Constitution which provides «The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent»; an official translation of the Italian Constitution is available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

¹⁸ From a linguistic point of view, "moral damage" is the literal translation in English of the concept that in the Italian legal tradition is referred as *danno morale* and in the French legal tradition as *dommage moral*; however, this expression is not commonly used in English-speaking countries that rather used the notion of non-economic damage which is a broader category, inclusive of emotional distress, nervous shock and pain.

¹⁹ Such restoration finds its legal basis on article 2 of the Italian Constitution which states «The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled».

²⁰ In some jurisdictions (such as the U.S.) this type of damages could be compared to hedonic damage.

several heads of non-economic damages, which however resulted most of the time groundless. In order to put an end to the diffuse practice of recognizing non-monetary losses for all kinds of impairment, even the most futile ones, and to strengthen the fundamental rule that the compensatory damages have to be actual and tangible, in 2008 the Italian Supreme Court intervened with four decisions²¹ to reinstate a balance in the field of the damages without a pecuniary nature. In these judgements, the Supreme Court firstly reaffirmed that according to the Civil Code compensation is a dual system and consequently only two types of damage are allowed, i.e. economic and non-economic losses; furthermore, the latter one has to be intended as an all-embracing category which shall include damages done to the health itself (as the negative consequences of one's detriment of his or her body associated with some medical condition) and any emotional distress or suffering (as long as they constitute a serious offense to the victim).

In the environmental liability field, according to the most recent case law above described, non-economic damages are an all-embracing category of losses which 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 usually take into account some peculiar aspects relevant in cases of environmental tort liability, such as the detriment of the individual's health connected to a physical injury or a disease, 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 and the mental anguish caused by the fear of disease. The latter aspect, however, has most of the time arisen some concerns, especially in those cases where there is not an ascertainable medical condition. The major question emerging from these cases is whether asymptomatic victims, exposed to the pollution but lacking of any actual sign of a disease, should be entitled for compensation.

Addressing this issue from a more general perspective, most jurisdictions traditionally recognized compensatory damages for non-economic losses (and, specifically, emotional distress) only if the mental pain or suffering is associated with a medical condition resulting from a physical injury. In recent years, however, most jurisdictions recognize this head of damage independently of any actual medical

²¹ See fn. 7; for a commentary on these judgements see M. SELLA, *Responsabilità civile, I danni morali*, Torino, 2013, 12-14.

condition. Such result was also reached by the Italian Supreme Court that in 2002²² recognized the possibility to award damages for emotional distress related to the exposure to a toxic agent in absence of any physical injury (or any other event causing an economic damage). In this case the *Corte di Cassazione* ruled in favour of the plaintiffs, victims of a severe pollution, by affirming that the emotional distress is an independent damage to be granted even in absence of a disease, as long as it is a direct and immediate consequence of the polluting event. Indeed, the Supreme Court affirmed that article 185 of the Criminal Code does not require, beside the emotional distress, any another specific damage so it is acceptable to assure this compensation to victims who did not suffer any physical injuries or diseases. Ultimately, the significance of the 2002 judgement was that the Supreme Court affirmed for the first time that emotional distress may occur independently of any health damage.

According to this ruling, in the 2009 case the Supreme Court granted a compensation of € 5.000 to the victims of the Seveso disaster who were inflicted of emotional distress caused by the fear of contracting a disease related to the exposure to the dioxin. Following the same legal reasoning of the 2002 judgement, in this case the Supreme Court established the existence of the necessary conditions to award non-monetary damages independently of an actual medical condition. Specifically, the judges found that the chemical factory's negligent actions exposed the Seveso population to a highly toxic chemical substance that could reasonably cause some severe diseases (like cancer). The Court also remarked that the infected population certainly suffered emotional distress caused by the fear of contracting a future illness and the constant health monitoring that underwent at least ten years after the accident confirmed the seriousness of the risk and the high probability of developing a disease.

Based on all these elements the Supreme Court affirmed that the plaintiffs' anxiety, demonstrated during trial, could give rise to liability to pay compensation. From a more general perspective, this ruling means that in case of an environmental offense the damages to be awarded should concern both the harm caused to individual's health as protected by article 32 of the Constitution, and the harm caused to the person and his or her personality as protected by article 2 of the Constitution. It is important to observe that in this case the Supreme Court, without contravene the fundamental principle of substantial certainty of the damage (as set in the 2008

²² See Cassazione, Sezioni Unite, 21 February 2002, n. 2515. Before this judgement, in 1998 the Italian Supreme Court denied the compensation for emotional distress given the non-existence of a medical condition.

judgements), allowed without the evidence of any actual disease the compensation of the non-economic losses consisting in mental anguish for being exposed to continuous medical monitoring and for being forced to live with the constant fear of developing a fatal disease. This solution should be considered well greeted, especially in the field of the environmental tort liability where most of the time many obstacles can interfere with the full restoration of damages²³. From this point of view, the Supreme Court decision is also remarkable because without linking the recognition of emotional distress to an actual disease it gives a proper cause of action in all those cases where the effects of the exposure to hazardous substances are, on medical grounds, not definitive or still unknown, as it was actually the case of the dioxin exposure.

4. Looking abroad: short notes on the fear of contracting disease from a comparative perspective.

In other jurisdictions the compensability of the fear of contracting disease has been treated with different approaches; typically, these losses are considered while dealing with cases of toxic tort litigation, such as in occasion of asbestos contamination.

In common law jurisdictions emotional distress without physical injury (like the case of fear of future illness) has been compensated in a limited number of cases since the traditional tort doctrines require the presence of a physical harm. In the United States²⁴, depending from state to state, courts may accord compensation in absence of a real illness and allow damages for the fear of disease whether the illness is reasonably certain to follow according to objective medical criteria. This solution follows the common reasoning that claims concerning only emotional distress are difficult to prove and often represent futile matter leading, instead, to fraudulent claims. Nevertheless, some courts²⁵, taking into account the expansive judicial

²³ For example, obstacles are represented by the difficulty in identifying the causal link between the pollution and the damage or by the fact that the risks associated with the pollution could show after long time the harmful event and persist for a long period of time.

²⁴ See M. WARREN GRILL, *Recovery for Emotional Distress Due to Fear of AIDS: Exposing AIDSphobia*, in *Alabama Law Review*, 1998, 1009 and ff. and K. L. MCCALL, *Medical Monitoring Plaintiffs and Subsequent Claims for Disease*, in *University of Chicago Law Review*, 1999, 969-997.

²⁵ In *Woodrow Sterling v. Velsicol Chemical Corporation*, 1988 U.S. App. LEXIS 11811, a class action against a chemical factory was brought by some residents living near the factory's landfill seeking compensation for damages resulting from hazardous chemicals leaking from the landfill and contaminating the local water supply; the plaintiffs claimed compensation for the mental distress arising from the fear of increased risk of contracting cancer and other diseases. The Court of Appeal

recognition of independent emotional distress claims, have created new causes of action for plaintiffs who seek to recover for damages associated with exposure to toxic substances but have not yet developed any symptom of disease: in these cases the fear of disease is grounded on the theory of negligent infliction of emotional distress. Usually courts, however, require that plaintiffs must prove an increase superior to 50% of chance²⁶ of the risk to contract a disease associated with the substance they have been exposed to. This requirement is intended in order to make sure that the plaintiff's fear of developing a disease is based on a reasonableness criterion²⁷. The situation is different in the UK²⁸ in which the case law on the topic is not as copious as in the US and, moreover, it definitely adopts an almost opposite approach. In this jurisdiction courts usually do not award damages on the sole basis of the fear of contracting a disease or the anxiety caused after being exposed to a toxic substance. Therefore, in the UK victims must prove some kind of physical injury (or alternatively a concrete damage to their property) that is associated with their mental anguish of developing a future illness²⁹.

In France environmental tort liability consists in restoring the damage occurred to one's property or body as well as the moral damage³⁰. In this broad framework, French courts have also recognized to the victims exposed to toxic

confirmed the decision of the first instance court which ruled in favour of the plaintiffs by saying «Velsicol's conduct caused chemical contaminants to come in contact with or invade each particular plaintiff's body, and impacted upon his or her body. Because those contaminants were of such a nature as to cause the reported symptoms and cellular damage, and adverse biological change, (however slight), the Court considers that this ingestion, inhalation or contact caused emotional distress in each plaintiff. Moreover, plaintiffs are entitled to recover for fear, distress, or emotional injury because that fear or distress reasonably and naturally flowed or resulted from the disclosure of the nature and possible effects of those chemical contaminants. The Court has considered the nature, extent or duration of such fear of distress, since any award must compensate plaintiffs for any distress experienced since the disclosure of the contaminants in the water up to the present time, and even into the future, because the Court finds the medical and scientific evidence provided justifies the conclusion that such fear and apprehension has continued after disclosure and/or will continue into the future».

²⁶ See P. ZIMMERLY, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation*, in *Alabama Law Review*, 2008, 781 and ff.

²⁷ In *Norfolk & Western R. Co. v. Ayers*, 123 S.Ct. 1210 [2003] the U.S. Supreme Court affirmed that in order to compensate mental distress resulting from the fear of developing cancer after being exposed to asbestos, the plaintiff alleged fear has to be proven «genuine and serious».

²⁸ See C. HILSON, *Let's Get Physical: Civil Liability and the Perception of Risk*, in *Journal of Environmental Law*, 21:1, 2009, 33-57.

²⁹ However, in *Group B Plaintiffs v Medical Research Council* (1998) 41 BMLR 157, regarding the case of a children exposed to a hormone that carried with it a risk of developing Creutzfeldt-Jakob Disease (CJD), the court ruled in favour of the victim according compensation for having suffered a recognised psychiatric illness.

³⁰ For example, the *Cour d'appel* of Nancy (CA Nancy, April 11, 2000) recognized the moral damage caused by the shock of witnessing dead fishes floating over the polluted river.

substances a so-called *préjudice d'anxiété*³¹. In a recent case regarding an asbestos contamination³², the *Cour de Cassation* affirmed the compensability of damages consisting in the anxiety of some workers who were facing the risk of developing a disease related to asbestos. The Supreme Court declared that the restoration needed to be granted without any need to prove an actual disease since the compensation was intended to repair the anxiety itself and the seriousness of the risk was a sufficient cause of action to grant it.

³¹ See C. CORGAS-BERNARD, *Le préjudice d'angoisse consécutif à un dommage corporel: quel avenir?*, in *Responsabilité civile et assurances*, April 2010.

³² See Cour de Cassation, 25 September 2013; for an analysis on this case, see W. FRAISSE, *Amiante: consécration du préjudice spécifique d'anxiété*, in *Dalloz actualité*, 8 October 2013.

Criminal Law

THE DIRECTIVE 2008/99/EC ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

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1. Introduction.

Directive 2008/99/EC is the first directive in history which attempts to harmonize Member States' existing criminal law: indeed, it provides a duty to punish with criminal sanctions a set of specifically listed serious infringements of European environmental law, in order to reach a higher level of environmental protection.

The adoption of such a directive has been made possible after the European Court of Justice landmark decision of 2005, which paved the way for the Community's competence in criminal matters within the institutional context of the first Pillar¹. According to such decision, the recourse to criminal law measures at Community level is legitimate only if justified by its necessity to make the community policy in question fully effective and if used only as a last resort (*ultima ratio*), i.e. when the goals of environmental protection cannot be reached by less severe measures.

¹ ECJ, Case C-176/2003, Commission v Council (Grand Chamber), 13 September 2005. The judgment concerned the Framework Decision of 17 January 2003 on the protection of the environment through criminal law, which had been adopted by the Council notwithstanding the existing Commission's proposal for a Directive of 13 March 2001 on the same topic and which had led to an institutional conflict regarding the correct legal basis upon which environmental criminal legislation could be adopted. The so-called "annex competence" in criminal law thus established by this decision, has now been confirmed by the Treaty of Lisbon of 2009, which has abolished the division between the first and third pillar. Indeed art. 83 par. 2 TFUE now recites: «If the approximations of criminal law and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned».

This appears to be exactly the case in the field of environmental protection: the stringent need of a harmonized criminal law response is indeed apparent if one considers, on one side, the specific nature of environmental crime, which, both in the characteristics of its conduct and in its effects, is very often a transboundary crime, and, on the other side, the significant differences existing in the Member States' legislations related to environmental offences². Thus, an approximation of environmental criminal law would allow the development of stronger cooperation between police and judicial authorities in Member States in the fight against environmental criminality.

Furthermore, the use of criminal law for the protection of the environment is held to be essential as being the only instrument that has a sufficient dissuasive and deterrent effect, taking into consideration also the symbolic function of criminal penalties, which demonstrates a social disapproval of a qualitatively different nature compared to other administrative penalties³.

Therefore, the Directive, in search for a more efficient enforcement of environmental law provisions, establishes a minimum set of serious environmental offences that should be considered criminal throughout the Community, addressing both natural and legal persons. However, following another important ruling of the European Court of Justice of 2007⁴, it does not determine the type and level of criminal sanctions to be applied by the Member States, but only asserts the need to provide for «effective, proportionate and dissuasive criminal sanctions»⁵.

2. The criminal law provisions of the Directive.

The main aim of the Directive is to provide a duty to establish criminal offences, but only for a limited number of specifically listed activities. Such balanced approach, whereby criminal law only needs to be used in case of most serious infringements, must be positively welcomed since it is respectful of the subsidiarity principle enshrined in art. 5 TCE (now art. 5 §3 TUE), as well of the proportionality principle, which requires action at European level to set only the minimum standards

² G.M. VAGLIASINDI, *La direttiva 2008/99/CE e il Trattato di Lisbona: verso un nuovo volto del diritto penale italiano*, in *Dir. comm. inter.*, 3, 2010, 449 and ff.; F. COMTE, *Environmental crime and the police in Europe: a panorama and possible paths for future action*, in *European Environmental Law Review*, 2006, 190 and ff.

³ Directive, Preamble, recital 3.

⁴ ECJ, Case C- 440/05, *Commission v Council* (Grand Chamber), 23 October 2007, which found that setting the *quantum* of penalties does not fall within the Community legislator's competence.

⁵ Directive. art. 5.

of protection, leaving to the Member States the possibility of assuring further protection⁶.

The common features of the nine offences set forth in art. 3 of the Directive, on which we will focus before analyzing the specific offences, corroborate such balanced approach⁷.

First of all, in order to constitute a criminal offence, all conducts listed in art. 3 of the Directive must be «unlawful»⁸. In other words, they must be infringing the EC Community legislation on environmental protection enumerated in Annex A of the Directive or a national law, regulation or decision that implements such legislation⁹. This way of giving substance to the unlawfulness requirement, defined as «administrative dependence of environmental criminal law», demonstrates the fundamental role that administrative law plays in determining criminal liability¹⁰. Accordingly, no space is left for independent or autonomous crimes, i.e. crimes that punish very serious pollution regardless of whether there is an underlying regulatory violation¹¹. In addition, according to art. 4 of the Directive, inciting, aiding and abetting such conducts must be also considered a criminal offence.

At the same time, the offences must be committed «intentionally or with at least serious negligence»¹². Whereas such requirement takes the credit of further limiting the supranational intervention only to the most serious conducts also in relation to the subjective elements of the offences, however it introduces a rather ambiguous notion, precisely that of «serious negligence». Although it has been defined by the European Court of Justice as «an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge,

⁶ Such opinion is expressed by L. SIRACUSA, *L'attuazione della direttiva europea sulla tutela dell'ambiente*, available at <http://www.penalecontemporaneo.it/tipologia/4/-/-/406-l-attuazione-della-direttiva-europea-sulla-tutela-dell-ambiente-tramite-il-diritto-penale/>, 22 February 2011 (last visited January 2014).

⁷ It must be underlined that the general structure of the Directive comes from the Council of Europe's Convention on the protection of the environment through criminal law, adopted in Strasbourg on 4 November 1998, which represents the start of environmental criminal law in Europe, although a progressive enlargement of the foreseen infractions must be also pointed out; see D. FLORE, *Droit pénal européen – les enjeux d'une justice pénale en Europe*, Bruxelles, 2009, 206 and ff.

⁸ Directive, art. 3.

⁹ Directive, art. 2(a).

¹⁰ See M. FAURE, *The continuing story of environmental criminal law in Europe after 23 October 2007*, in *European Energy and Environmental Law Review*, 2008, 68 and ff.

¹¹ For a definition of these «severe pollution crimes» see M. FAURE, *Effective, proportional and dissuasive penalties in the implementation of the environmental crime and ship-source pollution directives: questions and challenges*, in *European Energy and Environmental Law Review*, 2010, 256 and ff.

¹² Directive, art. 3.

abilities and individual situation»¹³, nevertheless it can cause difficulties to Member States in the implementation process.

Coming now to the specific offences, which should be considered criminal, art. 3 of the Directive distinguishes nine different conducts: (a) the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil, or water; (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites and action taken as a “waste management”¹⁴; (c) the shipment of waste; (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances are stored or used; (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear material or other hazardous radioactive substances; (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species¹⁵; (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof¹⁶; (h) any conduct which causes the significant deterioration of a habitat within a protected site¹⁷; (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.

It must be stressed, however, that most of these activities are punishable only if a specific condition is met, that is if they «cause or are likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants»¹⁸. Notwithstanding the problems to which the notion of substantial damage leads, in so far as it implicates an evaluation of environmental damage which is still very controversial¹⁹, this so called “substantial damage or concrete harm clause” allows us two considerations.

Firstly, it appears that environment’s protection is deeply linked to the protection of another interest, in particular that of the human life and health. This suggests that environmental criminal offenses must be built as “pluri-offensive

¹³ ECJ, Case C-308/06 (Grand Chamber), 3 June 2008, §77.

¹⁴ Reference should be made here to the broad interpretation of the notion of «waste» given by the European Court of Justice, as well as to the Waste Framework Directive 2008/98/EC of 19 November 2008.

¹⁵ The notion of «protected wild fauna or flora species» is defined by art. 2(b) of the Directive, which refers to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora and to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

¹⁶ Here art. 2(b) refers to Council Regulation (EC) n. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein.

¹⁷ Defined by art. 2(c) of the Directive.

¹⁸ See Directive, art 3 (a), (b), (d) and (e).

¹⁹ See F. COMTE, *Environmental crime and the police in Europe*, *supra* note 2.

crimes”, meaning crimes that can affect various different values, and, as a consequence, that punishment can be graduated according to the importance of the affected value²⁰.

But, most importantly, this clause requires a specific consequence of the conduct (concrete harm or concrete endangerment) in order for it to be punished, that goes beyond the mere abstract endangerment caused by the unlawful activity, which is on the contrary often used in environmental criminal law in order to avoid the difficulties in demonstrating the existence of a causal link between the single activity and the environmental damage. Thus, all the offences contained in the Directive can be categorized as “concrete harm” or “concrete endangerment” crimes. Even the few offences that may be understood as “abstract endangerment crimes”, such as the shipment of waste, the killing or trading of protected wild fauna or flora and the production of ozone-depleting substances, require nevertheless some sort of potential harmfulness of the conduct on a quantitative level²¹. Indeed, these activities must be punished only if undertaken in a «non-negligible quantity»²² or, on the other hand, should not be punished if they concern a «negligible quantity of specimens or have a negligible impact»²³. Hence, by placing on top of the unlawfulness of the activity also the requirement of harming or concretely endangering the environment or public health, once again the Directive opts for confining its impact only to the most serious infringements, thus proving to be mindful of the subsidiarity and proportionality principles.

A last, very significant issue addressed by the Directive is the liability of legal entities²⁴. In fact, ensuring that also legal entities can be liable for such offences is a crucial aspect for the effectiveness of the punishing system proposed, especially from a general prevention point of view. Indeed, it has been proven that the most serious environmental crimes are genetically linked to economic activities: they are often committed by enterprises simply because they offer easy profit and permit financial benefits to be made.

²⁰ In this sense, M. FAURE, *Effective, proportional and dissuasive penalties*, *supra* note 11; the fundamental link between environment protection and human health emerges as well from art. 191 TFUE, which provides that «Union policy on the environment shall contribute to pursuit of the following objectives: [...] protecting human health».

²¹ In this sense see G.M. VAGLIASINDI, *La direttiva 2008/99/CE*, *supra* note 2.

²² See Directive, art. 3 (c).

²³ See Directive, art 3 (f) and (g).

²⁴ Defined by art. 2 (d) of the Directive as «any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations».

Art. 6 of the Directive states the two different situations in which Member States shall ensure that legal entities can be held liable for the offences listed in art. 3, as long as the offence has been committed for their benefit²⁵. Firstly, the legal entity shall be held liable when the criminal offence has been committed by a person who holds a leading position within it²⁶, acting either as an individual or as an organ of the legal person. Secondly, the legal entity's liability is triggered when the offence committed by a subordinate has been made possible by a lack of supervision or control by the person having a leading position in it. Finally, it is specified that legal entities' liability does not prevent the possibility to prosecute as well the natural person, author of the offence²⁷.

3. Critical assessment of the Directive's impact and possible future developments.

From the above it can be held that imposition of a true duty to incriminate the most serious environmental law breaches achieved through this Directive represents a positive step forward in the enforcement of environmental law and in environment protection, since it should bring an end to the existing disparate approaches in Member States as far as the repression of environmental law violations are concerned.

However, some critical aspects that limit the overall impact of the Directive have been pointed out.

In fact, the Directive recurs broadly to rather vague notions, such as «(non) negligible quantity», «serious negligence», «substantial damage», which can pose serious problems to Member States in the moment of implementing it. Most importantly, the wide margin of discretion left by these vague notions both to national legislators when implementing the Directive and to judges when applying the law, brings along dangerous repercussions at a supranational level, rousing a serious risk of further surviving disparities of protection among the Member States.

²⁵ In fact, art. 6 doesn't specify that sanctions must have criminal nature, due to the fact that some Member States' legal orders still do not foresee criminal liability of legal entities, according to the dictum *societas delinquere non potest*.

²⁶ According to art. 6 §1, such leading position can be identified either relying on law (when the person has the power of representation of the legal person or has an authority to take decisions on its behalf) or *de facto* (when the person has an authority to exercise control within the legal person).

²⁷ Directive, art. 6 §3.

The same can be said for the duty to impose «effective, proportionate and dissuasive sanctions» to the offences referred to in the Directive²⁸, an almost void formula borrowed from the European Court of Justice²⁹. Although some theoretical parameters that can guide Member States in actualizing such requirement have been identified³⁰, in fact a very wide margin on discretion is left to them, which can account for significant discrepancies in relation to the type and severity of penalties among the various legal orders.

The fact that no type or level of sanctions is imposed is the major shortcoming of the Directive, which significantly reduces not only its potential and desired harmonizing impact, but also the effectiveness of environmental protection through criminal law. Indeed, sanctions play a crucial role both at national level and in the cooperation between Member States³¹. As it has been said, significant differences of applicable penalties constitute an obstacle at the progressive acquirement of a scale of shared values, as well as common references for putting into effect the proportionality principle and thwart the *effet utile* of European laws attempting to create a single criminal response³².

Therefore, it is indeed this specific aspect of the harmonization of sanctions that further European action should focus on, now that the Lisbon Treaty has extended its competence also to penalties matters³³. Certainly, setting minimum but flexible binding rules on the type and level of sanctions to be applied to the offences referred to in the Directive will allow a much more consistent and effective answer to environment's protection.

²⁸ Directive, art. 5.

²⁹ ECJ Case C-68/88, *Commission v Greece*, 21 September 1989; it has been remarked how these properties of penalties condensate all the different theories of punishment, the retributive and the utilitarian ones, M. DELMAS-MARTY, *Harmonisation des sanctions et valeurs communes: la recherche d'indicateurs de gravité et d'efficacité*, in M. Delmas-Marty, G. Giudicelli-Delange, E. Lambert-Abdelgawad (editors), *L'harmonisation de sanctions pénales en Europe*, Paris, 2003, 585 and ff.

³⁰ G.M. VAGLIASINDI, *La direttiva 2008/99/CE*, supra note 2, suggests to refer to the grid of sanctions provided by the first Directive proposal 2007(COM)51; M. FAURE, *Effective, proportional and dissuasive penalties*, supra note 11, develops a «graduated punishment approach» system in relation to the peculiarities of environmental crime.

³¹ On the topic, A. GOURITIN-P. DE HERT, *Directive 2008/99/EC: a new start for criminal law in the European Community?*, in *ELNI Review*, 2009, 22 and ff.

³² A. BERNARDI, *L'harmonisation des sanctions pénales en Europe*, in M. Delmas-Marty, M. Pieth, U. Sieber (editors), *Les chemins de l'harmonisation pénale*, Paris, 2008, 289 and ff. Also stressed on the need of an harmonisation of sanctions G. GRASSO, *La formazione di un diritto penale dell'Unione Europea*, in *Prospettive di un diritto penale europeo*, G. Grasso (editor), Milan, 1998, 1 and ff.

³³ See art. 83 §1 TFUE.

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**NEW PERSPECTIVES FOR THE ENVIRONMENTAL IMPACT ASSESSMENT:
THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL AMENDING DIRECTIVE 2011/92/EU OF THE ASSESSMENT
OF THE EFFECTS OF CERTAIN PUBLIC AND PRIVATE PROJECTS ON THE
ENVIRONMENT**

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TABLE OF CONTENTS: 1. – The environmental impact assessment directive: the process of review. 2. – The Commission’s proposal on environmental impact assessment and the Parliament’s amendments.

1. The environmental impact assessment directive: the process of review.

Sustainable development implies the idea of meeting the needs of present generations without compromising the ability of the future generations to meet their own needs. It means, in other words, a better quality of life for everyone, for the present generation and for the generations to come. The principle shows a vision of progress that integrates immediate and longer-term objectives, local and global actions, and regards social, economic and environmental issues as inseparable and interdependent components of human progress¹.

The environmental impact assessment (EIA) is precisely the concrete expression of the need to balance different and opposing interests, ensuring that the environmental implications of the decisions are taken into account before they are made². It is a crosscutting environmental policy tool able to preventively identify the direct and indirect effects that certain public and private projects may produce on the environment in order to assess their compatibility with it and identify the most appropriate solutions for sustainable development.

It is a common belief that the environmental impact assessment was born in 1969 when the Congress of the United States approved the “National Environmental

¹ The definition is on <http://ec.europa.eu/environment/eussd/>.

² A. POLICE, *La valutazione d'impatto ambientale*, in P. Dell'Anno, E. Picozza (editors), *Trattato di Diritto dell'Ambiente*, Vol. II, 2013, 527 and ff.

Policy Act”, which requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. The environmental impact assessment was introduced in Europe only 16 years later, in 1985, when the directive n. 85/337/EEC was adopted by the Council. In the last 28 years the directive has been amended three times, in 1997, in 2003 and in 2009. The directive n. 97/11/EC sought to align the directive n. 85/337/EEC with the UN ECE Espoo Convention on environmental impact assessment in a trans-boundary context³. The directive n. 2003/35/EC aligned the provisions on public participation with the principles of Aarhus Convention on public participation in decision-making and access to justice in environmental matters⁴. The directive 2009/31/EC amended the Annexes I and II of the EIA directive, by adding other projects to submit to the EIA, such as those related to the transport or to the capture and storage of carbon dioxide (CO₂). The initial directive of 1985 and its three amendments were codified by the Directive 2011/92/EU of 13 December 2011.

Despite the fact the amendments made during the last years were quite significant, however, the structure and the fundamental characteristics of the original directive have not changed. According to the environmental impact assessment directive in force, the procedure can be summarized as follows. The assessment should be conducted on the basis of the appropriate information supplied by the developer, that may request the competent authority to determine the content and the extent of the matters to be covered in the environmental information to be submitted to that competent authority (“scoping stage”); the developer must provide information on the environmental impact of what he intends to realize, such as 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 his choice and a not technical summary of all the information (EIA

³ The above mentioned directive widened the field of application 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.

⁴ The Aarhus Convention (adopted on 25 June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference as part of the “Environment for Europe” process and into force on 30 October 2001) secures the right of every person of access to information, the right to public participation in decision-making and access to justice in environmental matters, so to speak cutting across all lines, thus affecting various EU instruments regarding the environment, including the EIA directive.

report); the environmental authorities and the public and, eventually, the affected Member States, must be informed and consulted; the competent authority takes its decision to grant or refuse the development consent having into consideration the results of consultations. The public is informed of the decision afterwards and can challenge the decision before the courts⁵.

An assessment is mandatory for projects listed in Annex I of the directive, which are considered as having significant effects on the environment⁶. Other projects, listed in Annex II are not automatically assessed: Member States 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), indicated in the Annex III. Those projects are submitted to a “screening procedure” in order to determine whether or not an EIA is required.

The directive provides also that 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 the EIA directive. Member States may provide for a single procedure in order to fulfil the requirements of the EIA directive and the requirements of directive 2008/1/EC concerning integrated pollution prevention and control (IPPC).

In the last years, it has become clear that the environmental impact assessment directive needed to be adapted to reflect the experience gained by the Commission and the Member States as well as changes in EU legislation and policy, and European Court of Justice case law⁷.

In July 2009, the Commission published a report on the application and effectiveness of the EIA directive⁸. The report outlined the strengths of the EIA directive: «Firstly, the EIA ensures that environmental considerations are taken into account as early as possible in the decision-making process. Secondly, by involving

⁵ L. KRAMER, *EU Environmental Law*, London, 2012, 155 and ff.

⁶ These projects include for example: long-distance railway lines, airports 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 per day), waste water treatment plants (with a capacity exceeding 150.000 population equivalent).

⁷The most important rulings of the European Union Court of Justice have been collected in the document “Environmental Impact Assessment of projects. Rulings of the Court of Justice”, European Union, available at http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf, 2013 (last visited January 2014).

⁸ (COM(2009)378).

the public, the EIA procedure ensures more transparency in environmental decision-making and, consequently, social acceptance. Even if most benefits of the EIA cannot be expressed in monetary terms, there is widespread agreement, confirmed by the studies available, that the benefits of carrying out an EIA outweigh the costs of preparing an EIA».

At the same time, the Commission highlighted the need to streamline the EIA proceeding and to take action on the main deficiencies emerged during application. The report identified the most important issues which urgently need to be corrected or improved, because, without any intervention, they can negatively affect the effectiveness of the directive across the European Union.

The most evident issue can be identified in an insufficient operation of the screening process. Failures to correctly apply the screening process constitute the most significant and recurring problem: it is evidenced by the fact that most of the judgments of the European Court of Justice concerns the screening phase and the decision as to whether or not to carry out an EIA. In some Member States, a high number of EIAs is carried out, even for projects with minor environmental impacts, with the consequence to impose unnecessary administrative burdens to the developer. In other States – such as Italy – certain projects with significant environmental impacts escape the EIA requirements. In some State Members (in Italy, again) it is quite common the so called “salami slicing” which means the artful division of a single project into sub-projects in order to avoid the obligation to an overall environmental assessment that would be taken if the developer had applied all the projects together to the procedure.

The report gave also evidence of a problem of quality related to the information used in the EIA documents and EIA process as well. Regarding the quality of information, most EIAs are characterized by a lack or a poor quality of data and analysis (including on new environmental issues such as climate changes, disaster risk or biodiversity), which make difficult to take informed decisions by the competent authority, and determine also delays and increasing litigation. Regarding the quality of the process, even if the directive establishes that the developer, among the other information, has to give «an outline of the main alternatives studied by the developer and an indication of the main for his choice», not in every State Members there is a legal obligation to provide alternatives. So, in many cases, the developer does not provide any alternative.

Another problem highlighted by the report concerns the lack of a reasonable fixed timeframe for granting the consent, the failure to indicate the duration of the

validity of the EIA and of the monitoring of the significant environmental effects connected to the implementation of the project. It has also to be appointed that the directive does not establish when the public has to be consulted during the EIA process, and what have to be the arrangements for informing and consulting the public. In the State Members there are very different rules, and in some of them there is clearly a lack or an ineffective participation.

In the report, the Commission highlighted also that, even if the EIA directive gives the State Members the task to decide how to involve other States in trans-boundary procedures, there are difficulties (risks of duplication, inconsistencies, burdens, etc.) arising from the lack of common rules.

The last issue concerns the lack of coordination between EIA procedure and other procedures such as SEA, IPPC, Habitats and Birds directives in order to avoid duplication and administrative burdens. The directive also ignores some new environmental issues such as biodiversity, climate change, disaster risk and the use of natural resources, which need to be considered in an assessment that is truly complete and accurate of the effects of a project or a work⁹.

2. The Commission's proposal on environmental impact assessment and the Parliament's amendments.

In June 2010, the Commission launched a wide public consultation. The consultation covered a broad variety of issues (e.g. quality of the EIA process, harmonization of assessment requirements between Member States, assessment of trans-boundary projects or projects with trans-boundary effects, role of the environmental authorities, and development of synergies with other EU policies). The phase of public consultation was concluded by a Conference for the 25th anniversary of the EIA directive¹⁰. The findings of the public consultation and the conclusions of the Conference gave a relevant contribution in the Commission's review process of the EIA directive.

As a result of the review process, on 26 October 2012, the Commission adopted a proposal for a new directive that would amend the current directive in line

⁹ "Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive" COM(2009)378 Final, Bruxelles 23.07.2009.

¹⁰ The Conference took place on 18-19 November 2010 in Leuven (Belgium) under the headline "25th Anniversary of the EIA Directive: Successes – Failures – Prospects".

with “Europe 2020” strategy¹¹, with a particular attention on the need of giving priority to a sustainable development. In October 2013, the European Parliament adopted amendments to the Commission’s proposal in order to further raising the quality of the process of the environmental impact assessment¹².

The original proposal of the Commission focused on the shortcomings reported in the report of 2009. The provisions contained in the proposal aim to strengthen the rules concerning the quality of the EIA in order to ensure that only projects with significant environmental impacts will be subjected to environmental impact assessment, including projects related to environmentally sensitive locations, or projects with potentially hazardous or irreversible effects. The EIA prefigured in the proposal will also assess the impact of projects taking count of the new environmental challenges (such as climate change and biodiversity), contributing, in this way, to a better protection of the environment. The rules foreshadowed by the proposal provide that, differently from what it is now, the scooping will be mandatory; the developer will be obliged to assess reasonable alternatives for projects; competent authorities will be asked to better and deeply justify their final decision; the monitoring will be required for projects which are likely to have significant negative effect to the environment; the various steps of the EIA procedure will be streamlined and harmonized with other assessment procedures and with all that cases in which other permissions are requested, in order to have more legal certainty.

During the exam of the proposal, the European Parliament expressed the need, in the light of experience acquired in certain Member States, to insert specific rules to avoid the conflict of interests that can arise between the developer of a project that is subject to environmental impact assessment and the competent authorities. In particular, the competent authorities should not also be the developer nor in any way be dependent on, linked to or subordinate to the developer (recital 13b of the proposed directive). The Parliament also proposed that the developer should have to provide more information on the risks to the health of the population affected by a given project, and on the possible effects on the surrounding landscape and cultural heritage. It encouraged more attention to the cumulative effect of the environmental impact of multiple projects in the same area, asking the Commission to field actions against the so-called “salami slicing”. So, if the developer wants to build a new opera, the cumulative effect of several projects in the same area should

¹¹ http://ec.europa.eu/europe2020/index_it.htm.

¹² (COM(2012)0628 – C7-0367/2012 – 2012/0297(COD)).

be evaluated, considering its specific contribution to pollution in relation to the structures that already exist or are going to be built in the same area.

Beginning with an examination of the most significant rules contained in the proposal, the proposed article 1(2) clarifies the definition of project, which now includes «the execution of construction or demolition works, or of other installations or schemes». The reference has been added as a result of a judgment of the European Court of Justice in C-50/09, *Commission v. Ireland*.

In its amendments, the European Parliament specified that projects, within the meaning of the directive, mean interventions in the natural surroundings and landscape including those involving the research and extraction of mineral resources. The reference to demolition works proposed by the Commission has been limited to those directly linked to the execution of construction works. The Parliament also clarified the definition of “development consent” that means the decision of the competent authority or authorities that entitles the developer to start the project.

The proposed article 1(3) limits the possibility not to apply the Directive to the projects with national defense purposes only when it is the sole objective of the project.

The proposed article 2(3) disciplines the so called “*EIA one stop shop*”. This means that the projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Union legislation will be subject to coordinated or joint procedures fulfilling the requirements of the relevant Union legislation. Under the *coordinated* procedure, the competent authority will coordinate the various individual assessments required by the Union legislation concerned and issued by several authorities; under the *joint* procedure, the competent authority will issue one environmental impact assessment, integrating the assessments of one or more authorities. Member States must appoint one authority, which will be responsible for facilitating the development consent procedure for each project.

The proposed article (3) takes into account the new environmental emergencies, such as biodiversity, climate change, use of natural resources. The assessment has to consider also the impact of the proposed project on all these issues.

Compared with the text currently in force, the rewritten article 4(3) clarifies, for projects listed in Annex II, what kind of information the developer has to provide in case it is necessary to evaluate whether to make or not an EIA, such as the characteristics of the project, the potential impact of the project on the environment,

the measures envisaged in order to avoid and reduce significant effects. The detailed information are listed in Annex II.A. The rewritten article 4(4) specified that the competent authority shall take into account the selection of criteria listed in Annex III related to the characteristics, and the location of the project and its potential environmental impact. In other terms, the proposed directive encourages tailor-made decisions about the need of submitting the project to a screening procedure. The proposed article 4(5) takes into account the decisions of the European Court of Justice about the need for «a sufficiently reasoned decision» (C-75/08) screening decision, which gives to the public all the information that makes it possible to verify that the decision is based on an adequate screening (C-87/02). More in particular, the decision needs to show how the criteria listed in Annex II have been taken into account; includes the reasons for requiring or not requiring an EIA; includes a description of the measures envisaged to avoid, prevent or reduce any significant impact on the environment, when it is decided that EIA is not necessary in that case. In this way the EIA is applicable only when there is a significant impact on the environment, with a clear effect of simplification. The proposed article 4(6) sets a time-frame for the adoption of screening decision.

The modified article (5) tries to reinforce the quality of the information in order to take informed decisions on the environmental impact assessment of the proposed project, taking into account a number of information to be provided by the developer which are specified in details in Annex IV. The significant novelty is that the scoping process becomes mandatory and the content of the opinion delivered by the competent authority is better specified. The new article provides mechanisms to guarantee the completeness and the sufficient quality of the environmental reports.

The European Parliament approved an amendment establishing that the competent authority shall ensure that the environmental report is verified by independent qualified and technically competent experts and/or committees of national experts whose names shall be made public. The purpose is to ensure that the experts who check the environmental reports have, due to their qualifications and experience, the necessary technical expertise to carry out the tasks set out in Directive 2011/92/EU in a scientifically objective manner and in total independence from the developer and the competent authorities themselves.

The new article 6(6) provides that a reasonable time-frame for the different phases of the procedure should be provided, allowing sufficient time for informing the other authorities and the public, and to give them an effective opportunity to

prepare and to participate in the environmental decision – making. The new article 6(7) provides also to indicate the time-frame for consulting the public concerned on the environmental report that cannot be shorter than 30 days or longer than 60 days with some exceptions. The European Parliament proposed amendments in order to ensure that the public would be fully informed and consulted. The public should have the contact information of and easy and quick access to the authority or authorities responsible for performing the duties arising from the directive. Due attention must be paid to the comments made and opinions expressed by the public.

The article (8) has also been substantially amended. Taking into account the European Court of Justice case-law (C-50/09), the paragraph 1 specifies in details the content of the decision to grant the development consent. In particular, it must indicate the description of the main measures to avoid, reduce and, if possible, offset significant adverse effects; the main reasons for choosing the project as adopted, in the light of the other alternative considered, including the likely evolution of the existing state of the environment without implementation of the project; the summary of the comments received by the public, the other authorities and the interested State Members; a statement summarizing how environmental considerations have been integrated into the development consent and how the results of the consultations and the information gathered have been incorporated or otherwise addressed. A new timeframe is also set in order to guarantee a certain and reasonable conclusion of the procedure.

When the competent authority decides to grant the development consent, it shall ensure that it includes measures to monitor the significant adverse environmental effects, in order to assess the implementation and the expected effectiveness of mitigation and compensation measures, and to identify any unforeseeable adverse effects.

The European Parliament introduced an amendment in the article (10) establishing that Member States lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to the directive. The penalties provided for must be effective, proportionate and dissuasive.

The proposed directive modifies also the Annexes I and II of the directive, enlarging the number of projects subjected to the EIA procedure (Annex I) and to the screening procedure (Annex II). The European Parliament introduced an amendment establishing that, in accordance with the precautionary principle, as called for by the European Parliament resolution of 21 November 2012 on the environmental impacts of shale gas and shale oil extraction activities, it would be

appropriate to include non-conventional hydrocarbons (shale gas and oil, “tight gas”, “coal bed methane”), defined according to their geological characteristics, in Annex I to Directive 2011/92/EU, regardless of the amount extracted, so that projects concerning such hydrocarbons shall be systematically made subject to environmental impact assessment. The effect of this change would be to remove the discretion that EU Member States currently have as to whether or not to require a full EIA as part of the permitting process for certain projects.

As the EIA directive was originally adopted following the EU’s ordinary legislative procedure, i.e. by a co-decision of the European Parliament and the Council of the European Union, after the European Parliament’s approval, the amendments now require the approval of the Council of the European Union before it can become law. There is currently no fixed timeframe for the Council to consider and vote on the amendment but it is expected that the new directive will enter into force in 2016.

THE ENVIRONMENTAL IMPACT ASSESSMENT AND THE VALUE OF MATERIAL ASSETS

Micol Roversi Monaco

TABLE OF CONTENTS: 1. Introduction. – 2. European Court of Justice (Fourth Chamber), 14 March 2013, C-420/11: the case. – 3. The judgment. – 4. Conclusions.

1. Introduction.

The E.I.A. is a decision-making procedure to check the environmental compatibility of projects of intervention which are likely to have significant effects on the environment²⁰¹.

Where the environmental effects of a project have to be assessed pursuant to the EIA Directive, but no such assessment is carried out, the project may not be implemented²⁰².

Furthermore, the Court has ruled that the Member State concerned is likewise required to compensate for any harm caused by failure to carry out an environmental impact assessment²⁰³.

There are two questions resolved in this judgement.

The first question is whether the environmental impact assessment must also include the effects which the project under examination has on the value of material assets.

The second question is if Member States also have to refund damages for loss of value of a property resulting from implementation of a project which has not been assessed.

²⁰¹ See *The scope of judicial review over the preliminary examination in administrative decision-making procedure*.

²⁰² European Court of Justice (Grand Chamber), 28 February 2012, C-41/11.

²⁰³ European Court of Justice (Fifth Chamber), 7 January 2004, C-201/02.

2. European Court of Justice (Fourth Chamber), 14 March 2013, C-420/11: the case.

This judgement examined the request for a preliminary ruling by the *Oberster Gerichtshof* (Supreme Court of Justice, Austria) in the proceedings brought by Ms Leth, owner of a property situated within the security zone of Vienna-Schwechat airport, in which she lives.

The Republic of Austria and the *Land Niederösterreich* (State of Lower Austria) have, without carrying out environmental impact assessments, consented to and completed several projects relating to the development and extension of the airport.

Ms Leth brought an action before the *Landesgericht für Zivilrechtssachen Wien* (Regional Civil Court, Vienna) against these entities to obtain compensation for the depreciation in the value of her property, in particular as a result of aircraft noise, and a declaration of liability for any future damage, including damage to her health, arising from the late and incomplete transposition of directives regarding the environmental impact assessment and public participation in decision-making in environmental matters (Directive 85/337, Directive 97/11 – currently Directive 2011/92 - and Directive 2003/35), and from the failure to carry out an E.I.A.

The action was dismissed in the first instance, in its entirety, on the ground that the rights it was based upon were time-barred; in the second instance, the judge confirmed the dismissal of the compensation claim, because it was related only to purely pecuniary damage, which did not come within the objective of protection pursued by the provisions of European Union law and by national law, and overruled the dismissal of the second claim, because it was found not to be time-barred.

An appeal was then brought before the *Oberster Gerichtshof*.

3. The judgment.

The *Oberster Gerichtshof* referred two questions to the Court of Justice for a preliminary ruling concerning interpretation of article 3 of Directive 85/337/EEC (currently Directive 2011/92): whether the environmental impact assessment includes assessment of the effects which the project under examination has on the value of material assets, and whether the fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, confers on an individual a right to compensation for purely pecuniary damage caused

by the decrease in the value of her property as a result of the environmental effects of that project.

With regard to the first request, the Court noted that the environmental impact assessment cannot be extended to the pecuniary value of material assets, because that 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, which is «to achieve one of the objectives of the Union in the sphere of the protection of the environment and the quality of life» (third recital in the preamble to Directive 85/337; currently fourth recital in the preamble to Directive 2011/92), and because «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» (eleventh recital in the preamble to Directive 85/337; currently fourteenth recital in the preamble to Directive 2011/92).

Nevertheless, pursuant to Article 3 of Directive 85/337 (currently Directive 2011/92), one needs to examine the direct and indirect effects of a project on, *inter alia*, human beings and material assets and, in accordance with the fourth subsection of that article, one also needs to examine such effects on the interaction between those two factors. Therefore, according to the Court, «it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings».

Consequently, in this case, one does need to assess the effects of the project in question on the use of buildings by human beings.

As regards the second request, in the case of failure to carry out an environmental impact assessment on a project, the possibility of claiming compensation for the harm suffered is an alternative, if the individual so agrees, to the possibility of revoking or suspending consent already granted in order to subject the project in question to an assessment of the project's environmental impact, in accordance with national law.

The Court states that the fact that the environmental impact assessment does not include an evaluation of the effects on the value of the material assets does not necessarily imply that the omission of an environmental impact assessment, or an assessment of the effects on other factors mentioned in the Directive, does not entitle an individual to compensation for pecuniary damage attributable to a decrease in the value of his/her material assets.

Indeed, according to the Court, one has to distinguish between damage which is the direct economic consequence of the environmental effects of a project which fall within the objective of protection pursued by Directive 85/337 and is therefore to be compensated, from economic damage which is not directly due those environmental effects and which, therefore, does not fall within the objective of protection pursued by that Directive and is hence not due for compensation.

Applying such reasoning to this case, the Court rules that where exposure to noise resulting from a project «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».

To obtain compensation for such pecuniary damage, due to a breach of European Union law, according to the Court's consolidated case-law, it is necessary that the following three conditions be met: the rule of European Union law infringed must be intended to confer rights on the claimant; 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 individual.

In regard the first condition, the Court observes that the Directive confers on the individuals concerned a right to have the effects on the environment caused by the project under examination assessed by the appropriate services, and that pecuniary damage, in so far as it is a direct economic result of the environmental effects of a project, does fall within the objective of protection pursued by that Directive.

In regard to the third condition, it is a matter for the national courts to ascertain whether a direct causal link exists between the breach in question and the damage sustained by the individual. In reality, breach of Article 3 of that Directive does not, in principle, by itself constitute the reason for devaluation of a property, because the Directive does not lay down the substantive rules in relation to weighing of environmental effects against other factors or prohibit completion of projects which are liable to have negative effects on the environment.

Consequently, according to the Court, «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».

4. Conclusions.

In this judgment the European Court of Justice clarifies that the environmental impact assessment cannot be extended to the pecuniary value of material assets.

The fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not 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.

Nevertheless, this statement, according to the Court of Justice, applies in principle.

The grounds for awarding compensation have to be decided by national courts, which have to ascertain whether there is a direct causal link between the breach alleged and the damage sustained.

In this way the European Court confirms that the E.I.A. decision-making procedure is discretionary: the environmental interest and the quality of life interest may be sacrificed in the name of other interests considered more important by public administration. And, as a consequence, the decision-making procedure may conclude with a positive evaluation of the project even if it has a negative impact on the environment.

The E.I.A. Directive only obliges Member States to assess according to a decision-making procedure; it does not say which way to balance the interests involved. As a result, there is «no right to have the discretion exercised in a particular way», according to advocate general Juliane Kokott, in the conclusions presented 8 November 2012 in this proceeding.

On this point, a remark by the advocate general deserves to be examined.

The advocate general states that, in order for claims for damages to exist, the public concerned must not have been adequately notified of the expected environmental effects resulting from errors in the application of the Directive.

In fact, the EIA Directive confers on the public concerned a right to have the effects of the project on the environment assessed and an opportunity to express their opinion.

The primary function of public participation is to identify environmental effects in advance, but it also has a *warning function* regarding the public concerned. Under Article 6(3) of the EIA Directive, *information* on the environmental effects of the project is part of public participation. The authorities in charge must allow access to all information which the developer is required to provide pursuant to Article 5 and also to all other relevant information in their possession.

The public involved may adapt their future behaviour accordingly, for example by minimising possible harm.

According to the advocate general, therefore, a violation of the EIA Directive which negatively impacts upon this warning function must in principle have the potential to allow claims for damages.

For example, an environmental impact assessment could erroneously rule out the possibility that a project might introduce certain toxic substances into the environment. If members of the public concerned are consequently unaware of the need to take preventative measures, and subsequently sustain harm from the corresponding emissions, this might render the State liable. The same applies where there is a failure to undertake a necessary environmental impact assessment which would have made the public aware of such risks. In cases such as this the errors in applying the EIA Directive have a sufficient causal link with the harm which follows.

In the case of increasing aircraft noise it is plausible to imagine that, with prior awareness, people would not choose to settle in the affected areas or would at least take precautions to ensure that there was appropriate noise reduction at the time of construction. However, if there is no prior information owing to the lack of the required environmental impact assessment, the right to bring claims for damages cannot be ruled out.

About the case submitted to the Court, there is no indication in the request for a preliminary ruling to show that the harm claimed in the main proceedings follows from a possible failure of the environmental impact assessment to serve a warning function. However, in this respect, the advocate general says that it is ultimately up to national courts to clarify the facts.

Furthermore, the pronouncement does not preclude Member States to discipline the State's liability, extending the possibility of compensating damage deriving from violation of the requirement to carry out an E.I.A.

HISTORICALLY CONTAMINATED SITES AND CAUSATION IN THE EUROPEAN ENVIRONMENTAL LIABILITY REGIME

Piergiorgio Novaro

TABLE OF CONTENTS: 1. – The case referred to the Court. 2. – Legal background. 3. – Application *ratione temporis* of the Environmental Liability Directive. 4. – Causation in historical pollution phenomena. 5. – The need for an interpretation in the light of the polluter-pays principle.

1. The case referred to the Court.

Case C-378/08 *ERG* is the first ruling issued by the European Court of Justice (Grand Chamber) based on interpretation of the Directive 2004/35/EC (ELD) in the lights of the “polluter pays” principle¹.

The present case moves from a reference for a preliminary ruling under article 234 EC made by Tribunale Amministrativo Regionale della Sicilia (Italy)². It concerns the so called Augusta roadstead in Sicily, an area affected by various events of contamination since 1960s, when it was established as a hub for petrochemical activities.

Before the mentioned Directive came into force, Italian competent public authorities declared the area to be a «site of National Interest for decontamination purposes»³. Therefore, those authorities initiated administrative proceedings in order

¹ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Moreover, the “polluter pays” principle is enshrined in article 191(2) TFEU.

² Administrative Court of first instance for the Sicily Region.

³ Article 252 of Italian legislative decree no. 152/2006 (also known as the Environmental Code) recognises a special category of sites qualified as “of national interest”. Two alternative procedures may be followed in order to make such a qualification. The first method is to issue a special legal provision. The second is by administrative order. More precisely, pursuant to article 252(2) the Minister for Environment may issue an order, after consulting with the relevant Region (or Regions). At the same time the order at issue should proceed with a consequent operation named “perimeteration”. It consists of defining the physical limits of site.

to impose remediation measures of cleanup to the operators located in the area. Since that time though several companies have been succeeded one another there. As a result, those operators have claimed an infringement of the European liability regime because they would have been held responsible for a historical contamination they did not concur to cause.

In fact, the referring Court states that the practice of the competent authorities consisted in holding the current operators responsible for the existing contamination, without any distinction being made between past and present contamination or even any proper assessment carried out in order to impute the direct liability of each specific undertaking concerned⁴. By the way, the same Court points out that it would be «not only impossible but also pointless» to determine precisely each individual share of responsibility, due to the succession of undertakings operating hazardous activities in that area during a long period of time⁵.

In the light of the foregoing, the referring Court reckons as crucial to determine if under the “polluter pays” principle the environmental liability regime requires strong justification about causation in the case of damages arising from pollution of a widespread character.

2. Legal background.

It must be noted that although the mentioned directive aims to apply to a large span of activities potentially dangerous to the environment, it does not stand for a definitive or complete legal framework. Article 2 sets forth a narrow definition of environmental damage⁶. Besides, article 3 explicitly limits the scope to occupational activities. Furthermore, those economic activities are divided into two separate categories, each one subject to a different liability regime. Any imminent threats or effective damages caused by any of those activities included in Annex III – such as petrochemical activities – are subject to a strict liability regime, while article 3(1)(b) explicitly establishes a fault-based liability mechanism for the rest of occupational activities.

Under article 11(2) public authorities are indeed the central figure upon which all the legal framework is based. Firstly, public authorities should establish the

⁴ ECJ case C-378/08 *ERG and Others* par. 27.

⁵ ECJ case C-378/08 *ERG. and Others* par. 28.

⁶ In fact environmental damage refers to three specific categories: a) damage to protected species and natural habitats; b) water damage; and c) land damage.

causal link between the damage occurred or yet to occur and the hazardous activity. Secondly, competent authorities are responsible for assessment of the magnitude of the actual or imminent damage. Thirdly, once the damage has been properly assessed competent authorities should decide which appropriate measure the polluter should take.

3. Application *ratione temporis* of the Environmental Liability Directive.

Preliminary to the core question referred by the Tribunale is the question of the application *ratione temporis* of ELD to the facts of the case.

Recital (30) explicitly states that the environmental liability mechanism should not apply to damage caused before the expiry of the implementation deadline, that is to say 30 April 2007 as provided for by article 19(1). Accordingly, with regard to temporal application article 17 excludes damage caused by an emission, an event or accident that took place before the same date as well as an activity completely carried out before that day.

On the basis of the wording of the mentioned provisions, some legal writers limited the field of temporal application of the present directive to environmental damages posterior to the implementation date⁷.

Actually, in the 2000 White Paper on environmental liability the European Commission was already inclined toward no retroactivity, although it would include in the scope of the future ELD those precedent damages that become known after the entry into force of the Act⁸. The reason behind such an option would have laid in the balance between three fundamental principles: on one hand the “polluter pays” principle, on the other the legal certainty and the legitimate expectation principles.

The White Paper showed an opening toward previous pollution even if the definition of it was not clear. In particular, it could seem ambiguous if the Directive would apply retroactively only with regard to previously unknown damages or rather to damages caused before the mentioned deadline, but still evolving, so that the real effects could not be known at that time.

Furthermore, regarding the examined exception to the temporal scope of ELD, the 2002 Proposal seemed to confirm such ambiguity since it pointed out the need for “appropriate measures” «for the situation where it is likely that the damage

⁷ K. H. FEHR, B. FRIEDRICH, S. SCHEIL, *Liability Directive – a Useful Tool for Nature Protection?*, JEEPL, 2007, 114; L. KRÄMER, *EU Environmental Law*, London, 2012, 176.

⁸ European Commission, *White Paper on environmental liability*, COM(2000) 66 final, par. 4.1.

was caused before the date of implementation of the regime but there is no certainty»⁹.

In the present case, AG Kokott refers to the latter circumstance as cumulative damage. The AG gives a restrictive interpretation of article 17 in the view of the schematic context of the directive, limiting its application to that part of the damage or imminent threat which occurred after 30 April 2007¹⁰.

On the contrary, the reasoning of the Court moves from an interpretation in negative terms of the aforementioned temporal application set out in article 17. Therefore, it concludes *a contrario* that any other temporal situation may be covered by the Act. In the view of the Court thus the environmental liability mechanism in question applies to damages caused by an event that occurs after the implementation day where it is caused not only by activities carried out in the same period of time but even by activities carried out previously and yet not finished after that date.

By virtue of its extensive interpretation of the provision set forth in article 17, the Grand Chamber brings the interpretative dilemma to an end. At the same time this expansion of the scope makes the environmental liability mechanism more effective over the short and medium term. In fact, it gives an answer to whom criticized this limitation, especially in respect to contaminated sites, whose cause of pollution often dates back further in time¹¹.

Nevertheless, in line with the procedural framework set by article 267 TFEU it is for the referring court to establish subject to the findings of fact whether a certain damage falls within the ELD scope.

4. Causation in historical pollution phenomena.

As is apparent from article 11(2) read in conjunction with Recital (13) it is crucial for the environmental liability scheme to be effective that the competent authority should establish a causal link between one or more identifiable polluter and concrete as well as quantifiable environmental damage, in accordance with national rules on evidence.

⁹ European Commission, *Proposal for a Directive of the European Parliament and Council on environmental liability with regard to prevention and remedying of environmental damage*, COM(2002) 17 final, par. 6.19.

¹⁰ Opinion of the Advocate General A. Kokott, 22 October 2009, par. 58.

¹¹ K. H. FEHR, B. FRIEDRICH, S. SCHEIL, *Liability Directive – a Useful Tool for Nature Protection?*, JEEPL, 2007, 114; L. KRÄMER, op. cit., 176, «the overall impression of the Directive is that it has a rather limited field of application. It more aims at the restoration of the environment after an industrial accident [...] than of restoring the damaged environment, despite the fact that the environment does not suffer mainly from accidents, but from the fact that it is sick».

In pursuance thereof, the public authority should carry out a prior investigation aimed to ascertain the origin and the extent of the pollution. Nevertheless, such an assessment could become extremely difficult just when the contamination dates back in time and a plurality of actors are involved. As a result, the present case provides a solution for two main problems: the extent of causation and the related burden of proof.

Firstly, according to the Recital (13) and article 4(5) it follows that the liability mechanism is not always a suitable instrument for dealing with pollution of a diffuse character. At least where it is impossible to link the negative environmental effects with certain activities of individual actors. In addition, the same concept of diffuse pollution is not further defined in the directive¹².

For this reason the Court makes a clear distinction between the proper diffuse pollution phenomena and what we call here “historical pollution”.

The early are damages caused mainly by the cumulative impact of hazardous activities, that is to say because of the aggregate effect of a number of polluting acts spread out in time and place, such as air pollution¹³. No specific polluter could be held liable for this peculiar form of environmental impairment, so that it is considered that an inclusion of such damage within the scope of the environmental liability regime would result as an excessive burden on taxpayers¹⁴. In effect, according to article 6(3) under those circumstances public authorities should take all necessary measures to restore the impaired environment as a means of last resort.

Conversely, the latter is characterized by two specific conditions: (a) it is confined to a particular area and period of time; (b) it is attributable to a limited number of operators. Since the area and the potentially liable operators are circumscribed, the Court considers theoretically possible for the competent authority to identify each share of responsibility.

In consequence thereof, this particular category of damage of a widespread character may fall within the scope of the ELD, only if and in so far the public authority may prove the concrete contribution of the single operator to the generation of the impairment.

Moreover, the same principle was already stated in the so called *Erika case*, on accidental oil spill. The Court considered then that the financial obligation may be

¹² Accordingly J.H. JANS, *European Environmental Law*, Groningen, 2012, 386. L. KRÄMER, op. cit., 175, considers it as a type of pollution caused by a multiplicity of pollution sources.

¹³ Commission of the European Communities, *Green paper on remedying environmental damage*, COM(93) 47 final, par. 2.1.5. The Commission refers to this type of damage as chronic damage.

¹⁴ L. KRÄMER, op. cit., 175.

imposed on the relevant operator in proportion to the causal contribution to the pollution or even the consequent risk of pollution¹⁵.

Having said that, the second of the aforementioned problem arises: i.e. how such a causal link is to be established.

Apparently the ELD does not indicate any positive criteria on the matter. For this reason, in the view of the Grand Chamber the causation may be based not only on concrete evidence but also on a rebuttable presumption¹⁶. In particular, the Court recognizes that competent authorities may presume the aforementioned causal link provided that they give adequate justification based on plausible evidence. To that end, subject to the findings of the case, the Court points out two conditions: (a) the fact that the operator's installation is located close to the pollution found, (b) a correlation between the pollutants identified and the substances used by the operator in connection with his activities.

5. The need for an interpretation in the light of the polluter-pays principle.

To sum up, the present case confirms that the entire European environmental liability regime need to be interpreted in the light of the “polluter-pays” principle.

Even in cases of strict liability – as the present – the competent authority must establish a causality relation between the operator and the polluting event. Otherwise, there would be a clear contrast with the general principles of tort law, if any undertakings could be held responsible for a damage not effectively related to their own activities.

Such a position, by the way, could be problematic when there is information asymmetry between the competent authority and the relevant operator. It holds true especially in cases where public authorities carry out complex investigations hinging on data and facts known only by the uncooperative operator because of its own occupational activity. The case at issue concerns an industrial area where activities hazardous to the environment came in succession for a long time. In cases like this it is very difficult to have concrete evidence that excessive levels of pollutants may be attributed effectively to a single operator, leaving the impaired environment with

¹⁵ ECJ case C-188/07 *Commune de Mesquer*, par. 77.

¹⁶ Before the present case came to the Court's attention, Italian administrative Courts stressed the need of a thorough investigation supported by concrete evidence not mere presumption. See Consiglio di Stato, sec. VI, 5 October 2005, no. 4525.

virtually no legal protection, but to involve public authorities directly in cleanup operations.

However, the conclusion reached by the Court in the present case is likely to have a major impact on the application of the European environmental liability scheme. Apart from the conditions indicated in the present case, the Grand Chamber sets a more general rule¹⁷. It opens to legitimate use of presumptions, while it safeguards the operator's position by giving the right to rebut that presumption. In fact it widens the powers competent authorities are entitled with in order to find a connection between an occupational activity and a pollution, yet in cases where a definitive evidence is hard to find because of a situation of historical pollution.

¹⁷ B. PARANCE, *The European Court of Justice hands down a series of decisions on March 9, 2010 that reduce the burden of proving causality in environmental liability suits in order to further the goal of protecting the environment*, available at www.regulatorylawreview.com, 2010 (last visited January 2014), «the fact of being in a certain place at a certain time obliges the corporation to intervene, unless it can refute the presumption of such an obligation. This obligation is above all a collective duty, a notion which is very familiar, both to regulatory law and to the economic analysis of law».

ACCESS TO INFORMATION IN ENVIRONMENTAL MATTERS AND PROTECTION OF CONFIDENTIAL COMMERCIAL OR INDUSTRIAL INFORMATION

Micol Roversi Monaco

TABLE OF CONTENTS: 1. – Introduction. 2. – European Court of Justice (Grand Chamber), 15 January 2013, C-416/10: the case. 3. – The judgment. 4. – Conclusions.

1. Introduction.

The right to access environmental information, at the European level is governed by Directive 2003/4/CE, stemming from accession by the European Union to the ONU/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention), approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005.

This right consists in the entitlement of any applicant to obtain environmental information¹ held by or on behalf of the public authorities, without that person having to show an interest.

This right was recognized in order to allow widespread social control over administrative environmental decisions, and hence in order to protect the environment, which is an object of general interest. The purpose is not that of satisfying personal claims, and hence a specific legitimacy, as the possession of a particular interest in having access to environmental information is not required.

The Aarhus Convention recognizes that, «in the field of the environment, improved access to information and public participation in decision-making enhance

¹ These are the information, in every form concerning the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it, concerning cost-benefit and economic analyses used within the framework of such measures or activities and also information on the state of human health and safety, including contamination of the food chain, human living conditions, cultural sites and buildings in so far as they are, or may be, affected by any such matters (tenth recital in the preamble to Directive 2003/4/CE, and Art. 2 (1)).

the quality and the implementation of decisions»; likewise, the first recital in the preamble to Directive 2003/4/CE states that «increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment».

Access to environmental information is therefore tied to participation by the public in the decision-making procedure on environmental matters.

One type of environmental information, recognized by Art. 2 (1) (c), regards «measures (including administrative measures), such as policies, legislation, plans, programs, environmental agreements, and activities» affecting or likely to affect environmental elements (such as, under (a), the air and atmosphere, water, soil, land, landscape and natural sites, biological diversity, interaction among these elements, and factors affecting or likely to affect the elements of the environment (such as, under (b), substances, energy, noise, radiation, waste, emissions, discharges and other releases into the environment), as well as measures or activities designed to protect those elements.

The purpose of public participation in environmental decision-making is to allow the public «to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken» (third recital in the preamble to Directive 2003/35/CE).

It is essential, in order for participation to be effective, to allow people access to relevant information in a timely fashion so as to be capable of influencing the decision.

In this sense Art. 6 (4) of the Aarhus Convention states that «each Party shall provide for early public participation, when all options are open and effective public participation can take place».

In European law participation is governed by Directive 2003/35/EC according to which, in relation to public participation in the drawing up of certain plans and programmes relating to the environment, Member States shall ensure that «the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programs» (Art. 2 (2)); by Directive 2001/42/CE which stipulates, with regard to proceedings for assessment of the effects of certain plans and programmes on the environment, that the public shall

have «an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or program and the accompanying environmental report before the adoption of the plan or program or its submission to the legislative procedure»; by Directive 2011/92/UE under which, with regard to assessment of the effects of certain public and private projects on the environment, the public shall have «early and effective opportunities to participate in the environmental decision-making [...] 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»; by Directive 2010/75/EU according to which, with regard to authorization to operate all or part of an installation or combustion plant, waste incineration plant or waste co-incineration plant, «the public shall be informed (by public notices or other appropriate means such as electronic media where available) [...] early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided», and Member States, detailing arrangements for informing the public and consulting the public concerned, shall provide «reasonable time-frames for the different phases [...], allowing sufficient time to inform the public and for the public concerned to prepare and participate effectively in environmental decision-making» (Annex IV).

Directive 2003/4/CE, Art. 4 (2) provides cases allowing Member States to refuse the request for environmental information.

Inter alia and in particular, Art. 4 (2) (d) recognizes this possibility in cases of confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy.

The reasons for refusal provided for in this article, as the Directive establishes, «shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, [...] provide for a request to be refused where the request relates to information on emissions into the environment».

In these cases, therefore, in agreement with the necessity highlighted by the seventeenth recital in the preamble to the Directive, to allow partial access «where it is possible to separate out any information falling within the scope of the exceptions from the rest of the information requested», Art. 4 (4) stipulates that «environmental information held by or for public authorities which has been requested by an

applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested».

2. European Court of Justice (Grand Chamber), 15 January 2013, C-416/10: the case.

The European Court of Justice judged a request for a preliminary ruling concerning interpretation of the Aarhus Convention, of Articles 191 and 267 TFEU, of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC, and of Directive 96/61/EC concerning integrated pollution prevention and control, as amended by Regulation (EC) No. 166/2006.

Ekologická skládka submitted to *inšpektorát* (which is the Slovak environment inspection authority of Bratislava) an application for an integrated permit for construction and operation of an installation.

Some residents of the town of Pezinok and the Pezinok Municipality submitted observations on this administrative decision-making procedure, highlighting the incomplete nature of this application in that it did not contain, as an annex required by Slovak law, the urban planning decision on the location of the landfill site.

Ekologická skládka thereupon provided the *inšpektorát* with that decision, but claimed the matter was commercially confidential. On the basis of that claim, the *inšpektorát* did not make the document available.

The *inšpektorát* issued *Ekologická skládka* with the integrated permit.

The Pezinok residents and Municipality appealed against the decision before the *inšpekcia* (which is the environmental protection body of second instance). That body decided to publish the urban planning decision on the location of the landfill site in the official list.

In the administrative procedure of second instance, the appellants relied, *inter alia*, on the error in law which consisted in the procedure being initiated without making available the urban planning decision on the location of the landfill site. The appellants also claimed that another error in law had been the fact that the urban planning decision was considered confidential commercial information.

The *inšpekcia* dismissed the appeal as unfounded.

The appellants brought an action against the *inšpekcia*'s decision before the *Krajský súd Bratislava* (Regional Court of Bratislava, that is, the administrative court of first instance), which dismissed the action.

The appellants lodged an appeal against that judgment before the *Najvyšší súd Slovenskej republiky* (Supreme Court of the Slovak Republic), which amended the judgment of the first instance and annulled the decision of the *inšpekcia* and the decision of the *inšpektorát*. The Court found that the authorities in charge had failed to observe the rules governing participation of the public concerned in the procedure, and had not sufficiently assessed the environmental impact of the construction of the landfill site.

Ekologická skládka appealed against the judgment of the *Najvyšší súd Slovenskej republiky* before the *Ústavný súd Slovenskej republiky* (Constitutional Court of the Slovak Republic), which held that the *Najvyšší súd Slovenskej republiky* had infringed *Ekologická skládka*'s fundamental right to legal protection, its fundamental right to property, both recognised in the Constitution, and its right to peaceful enjoyment of its property, recognised in Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

The *Najvyšší súd Slovenskej republiky*, to which the case was referred back by the *Ústavný súd Slovenskej republiky*, decided to refer, *inter alia*, the question to the Court of Justice for a preliminary ruling: «if is it possible to fulfill the basic objective of integrated prevention as defined, in particular, in recitals 8, 9 and 23 in the preamble to and Articles 1 and 15 of Directive [96/61], and, in general, in the [European Union legal] framework on the environment, that is, pollution prevention and control involving the public in order to achieve a high level of environmental protection as a whole, by means of a procedure where, on commencement of an integrated prevention procedure, the public concerned is not guaranteed access to all relevant documents (Article 6 in conjunction with Article 15 of Directive [96/61]), especially the decision on the location of a structure (landfill site), and where, subsequently, at first instance, the missing document is submitted by the applicant on condition that it is not disclosed to other parties to the proceedings in view of the fact that it constitutes trade secrets: can it reasonably be assumed that the location decision (in particular its statement of reasons) will significantly affect the submission of suggestions, observations or other comments».

The referring Court asked whether Directive 96/61 should be interpreted as requiring that the public, right from the beginning of the authorization procedure for

a landfill site, have access to an urban planning decision on the location of that installation, and whether the refusal to disclose that decision might be justified on the grounds of commercial confidentiality protecting the information contained in that decision, or, failing that, rectified by access to that decision offered to the public concerned during the administrative procedure of second instance.

3. The judgment.

The Court concluded that the European rules on public participation must be interpreted in the light of, and having regard to, the provisions of the Aarhus Convention, with which, as follows from recital 5 in the preamble to Directive 2003/35, European Union law should be «properly aligned»; again, regarding Article 6, the public concerned by the authorization procedure under the Directive must in principle have access to all information relevant to that procedure.

The urban planning decision on the location of the installation constitutes one of the measures on the basis of which the final decision whether or not to authorize that installation would be taken and therefore includes information on the environmental impact of the project, on the conditions imposed on the operator to limit that impact, on the objections raised by the parties to the urban planning decision and on the reasons for the choices made by the authorities to issue the said urban planning decision: for which reason, according to the Court, it must be considered to include relevant information to which the public concerned must therefore, in principle, be able to have access.

Nevertheless, Article 15 of Directive 96/61 states that participation by the public concerned may be limited by the restrictions laid down in Article 4(1), (2) and (4) of Directive 2003/4 (which replaced Directive 90/313).

Under Article 4 (1) (d) of Directive 2003/4, member States may allow a request for information to be refused if disclosure of the information would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest.

According to the Court, the refusal to make the urban planning decision concerning the location of the installation available to the public was not justified by this exception: even if certain features included in the grounds for an urban planning decision contain confidential commercial or industrial information, the protection of

the confidentiality of such information cannot be used to refuse the public all access, even partial.

Another question is whether the access to that decision given to the public during the administrative procedure of second instance was sufficient to rectify the procedural flaw of the administrative procedure of first instance and consequently rule out any breach of Article 15 of Directive 96/61.

The Court pointed out that in the absence of rules laid down in this field by European Union law, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under European Union law are a matter for the legal order of each Member State, provided, however, that they are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise rights conferred by the European Union law (the principle of effectiveness).

As regards the principle of effectiveness, while European Union law cannot prevent applicable national rules from, in certain cases, allowing regularization of operations or measures which are unlawful in the light of European Union law, such a possibility is subject to the condition that it should not offer those concerned an opportunity to circumvent the European Union rules or dispense with applying them, and that it should remain an exception.

In that regard, the Court noted that Article 15 of Directive 96/61 requires the Member States to ensure that the public concerned are given early and effective opportunities to participate in the procedure for issuing a permit. That provision, according to the Court, must be interpreted in the light of recital 23 in the preamble to that Directive, in accordance with which, before any decision is taken, the public must have access to information relating to applications for permits for new installations, and of Article 6 of the Aarhus Convention, which provides, first, for early public participation, that is to say, when all options are open and effective public participation can take place, and, second, for access to relevant information to be provided as soon as it becomes available: «it follows that the public concerned must have all of the relevant information from the stage of the administrative procedure at first instance, before a first decision has been adopted, to the extent that that information is available on the date of that stage of the procedure».

The principle of effectiveness, the judgment continued, «does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned the urban planning

decision at issue in the main proceedings during the administrative procedure at first instance, provided that all options and solutions remain possible and that rectification at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this being a matter for the national court to determine».

4. Conclusions.

This judgment is remarkable because it clarifies the boundaries of participation and of access to environmental information, linking them to the possibility of effectively influencing the final decision, and therefore extending them to urban-planning for the siting of installations which may affect the environment.

In this way, the judgment extends principles relating to environmental decision-making procedures to urban-planning, because such principles contain guarantees which become relevant every time that decisions on environment are taken².

² E. BOSCOLO, *Accesso alle informazioni ambientali e urbanistica ambientale*, in *Urb. e app.*, 2013, 5, 509 ff., argues that this phenomenon characterises present urban planning activity, which has become a tool of environmental protection. According to the author, one should confine implementation of participation to siting decisions as expressed by urban plans or variants thereof, excluding decisions of wide localization contained in land-use plans, for which, the author points out, the measures stipulated by Italian law, *i.e.* the need to submit observations on the plan adopted, would not be sufficient, as they occur at a time when the plan is already structured in the background setting and only slight corrections can still be made.

International Law

TĂȚAR v. ROMANIA (ECHR 67021/01, 27.01.2009) - THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE TO THE PROTECTION OF THE ENVIRONMENT

Francesco Cunsolo

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1. Introduction.

As we know, within the European Convention on Human Rights there isn't a specific legal provision regarding the protection of the environment. However, over the years, the right to a healthy and viable environment as a fundamental issue that needs to be regulated, has arisen through a rich and important case law: for this reason the ECHR (European Court of Human Rights) started to explain and to adopt the Convention in order to include and protect this fundamental right. Thanks to this new interpretation the Court gave to the Convention, this latest has become an excellent instrument on safety and protection of the environment.

Despite the absence of a norm expressly dedicated to the environment as a human right, the ECHR has used the Article 8 (Right to respect for private and family life)¹ as legal basis for the solution of cases regarding environmental pollution. In some other cases, even the Article 2 (The right to life)² played an important role on the protection of the environment.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, nov. 4, 1950, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last visited December 2013), art. 8: «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

² Id at art. 2: «1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is more than absolutely

In 1994, the case *López Ostra v. Spain*³ gave birth to the evolution of the environmental right within the European Convention on Human Rights. Since then, many other cases succeeded, enriching the Court's jurisprudence on environmental law. In particular: *Guerra v. Italy*⁴ (1998), *Hatton v. United Kingdom*⁵ (2003), *Fadeyeva v. Russia*⁶ (2005), and *Ledyayeva and Others v. Russia*⁷ (2006). In 2009 the Court pronounced another important judgment in matter of protection of the environment, which ended the case *Tătar v. Romania*⁸. This judgment has got an essential role inside the case law on environmental right, because, for the first time, the Court adopted the precautionary principle on a case regarding environmental protection. This principle is disciplined by Article 191 of the Treaty on the Functioning of the European Union (TFEU), and is considered one of the fundamental principles of the European policy on environmental protection. Let's see in details why this judgment is so important and, beside the reason indicated above, has been and still is matter of discussion.

2. The facts.

On July 17, 2000 two Romanian citizens, Vasile Gheorghe Tătar and Paul Tătar (father and son), made an application before the EHCR under Article 34 (Individual applications) of the Convention against the Romanian government, reporting that the technological procedure used by the company S.C. Aurul Baia Mare S.A., employed on mining, had put in danger their lives, especially after the environmental accident occurred on 30 January 2000. At that time, the applicants lived in Baia Mare, near the exploitation site of the gold mine belonged to the company Aurul and only 100 meters from the tailing pond Săsar. Moreover, the applicants complained that the Romanian authorities had been responsible of a badly passive behavior in this specific case, despite the many claims and requests made by the applicants over the years. Since the Romanian government had never taken the necessary precautions to protect the health of the population and the environment,

necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection».

³ *López Ostra v. Spain*, ECHR 09.12.1994, no. 16798/90.

⁴ *Guerra v. Italy*, ECHR 19.02.1998, no. 14967/89.

⁵ *Hatton v. United Kingdom*, EHCR (Grand Chamber) 08.07.2003, no. 36022/97.

⁶ *Fadeyeva v. Russia*, ECHR 09.06.2005, no. 55723/00.

⁷ *Ledyayeva and Others v. Russia*, EHCR 26.10.2006, no. 53157/99, 53247/99, 53695/00, 56850/00.

⁸ *Tătar v. Romania*, EHCR 27.01.2009, no. 67021/01.

the applicants complained before the Court the violation of Article 8 (Right to respect for private and family life). They also complained that the high levels of cyanide fumes (the sodium cyanide was an essential part of the technological process of extraction) had aggravated the asthma of one of the applicants.

The company S.C. Aurul Baia Mare S.A. was a corporation founded in April 1996. In December 2001 the company Aurul was substituted by a new company, the Transgold S.A., through a transfer of receivables. Then, in 2006, the process of ore-mining passed to another company, the S.C. Romalbyn Mining S.R.L.

Between 1993 and 2001 two environmental-impact assessments were carried out by the Ministry of the Environment's Research Institute. Both these reports stated the high level of pollution of the ground and the water in the region of Baia Mare (due to the strong presence of industrial powders and sulphur dioxide in the air, and several heavy metals into the ground), as well as in the extraction site where the Săsar factory was located. Even the World Health Organization (WHO) considered the level of pollution in Baia Mare a matter of concern, identifying the region «as a health risk hotspot»⁹.

The environmental-impact assessment realized in 1993 explained the process of using sodium cyanide. This report described how the technology was intended to operate: first, the sodium hydroxide and sodium cyanide were prepared in special containers by manually measuring the necessary quantities, and mixing the substances with industrial water. Then the barrels were transported by forklift truck to the upper part of the special containers, and opened in a special facility. After being emptied, the barrels were washed. Finally, the sodium cyanide was transferred to the CIL depots through a closed-circuit network.

The same report declared that there were uncertainties regarding the environmental impact of the use of this technology, arguing the difficulty to assess with any certainty the extent of the nuisance generated; the suspect was that such nuisance could consist of aerosols, dust, noise and vibrations. Anyway, the report declared the impossibility to determine the concentration of sodium cyanide in the solution that would have been decanted into the new Bozița pond. The Institute's specialists admitted that they had never encountered this method at national level, so they found consequently difficult to express an opinion. However, the specialists reported the risks connected to the use of this technology, especially the risk of

⁹ UNEP/OCHA, *Report on the Cyanide Spill at Baia Mare, Romania*, February 26 - March 6, 2000, 3, available at <http://archive.rec.org/REC/Publications/CyanideSpill/ENG/Cyanide.pdf> (last visited December 2013).

contamination of underground and superficial waters, which could have been possible as a consequence of an accident regarding the dams of the basin, with infiltrations of water polluted by cyanide in the pond, or losses of infected water through the ducts. Despite these risks, «the conclusions reached by the Institute's specialists were based on the numerous economic and social benefits and the fact that, since the Baia Mare region was already characterised by industries such as mining and the machining of non-ferrous ores and by the presence of a major road network, a high population density and agriculture, the activity in question would not affect "the region's current characteristics to any significant extent"»¹⁰.

On December 30, 1998 the Departments of Work and Health gave the company Aurul an operating license for the gold mine, and the authorization to use the sodium cyanide and other substances for the extraction process. «In accordance with paragraph 16 of the operating licence, the licence-holder was required to protect the environment through a series of measures such as using technology that did not pollute the water, treating waste water, and using a metal-extraction procedure that did not generate nuisance or hydrogen cyanide»¹¹.

Between November and December 1999, there were two public debates regarding the functioning of the company Aurul, and some participants complained the potential damages for the environment and the population health, resulting from the activity of the company and the risky process employed. However, the Authority for the Protection of the Environment rejected these questions, denying the existence of these risks and reassuring the population.

On December 23, 1999 the company Aurul started its activity.

On January 30, 2000 a serious environmental accident occurred. Here is the report of the mission UNEP/OCHA, designated to investigate the affected areas: «[...]there was a break in a dam encircling a tailings pond at a facility operated by Aurul S.A. Company in Baia Mare, northwest Romania. The result was a spill of about 100,000 cubic meters of liquid and suspended waste containing about 50 to 100 tonnes of cyanide, as well as copper and other heavy metals. The break was probably caused by a combination of design defects in the facilities set up by Aurul, unexpected operating conditions and bad weather. The contaminated spill travelled into the rivers Sasar, Lapus, Somes, Tisza and Danube before reaching the Black Sea

¹⁰ *Tătar v. Romania* (Admissibility decision), ECHR, 05.07.2007, no. 67021/01, § 4.15.

¹¹ *Id.* at § 2.1.6.

about four weeks later»¹². On June 2000 the Baia Mare Task Force was instituted, in order to pick up information about the impact of the accident on the territory; the Task Force reported that the dispersion of metals represents a serious menace for human health, and so «[...] the authorities should take immediate steps to ensure that adequate environmental protection arrangements are agreed [...]»¹³. The report said there was no evidence about the consequences on population health, but there were some doubts on the long-term effects of the accident, due to the dispersion of the sodium cyanide and the presence of heavy metals on the ground.

In 2001 another environmental-impact assessment was conducted on the territory: in relation to the impact that the sodium cyanide could have on human health, the authors stated that this substance could originate cardiovascular diseases and had an impact on the central nervous system. Moreover, the exposition of the breathing apparatus to the sodium cyanide could generate asthma. Despite these considerations and the fact that the presence of cyanide in the underground waters, after the accident, exceeded the threshold of pollution, the research didn't put in evidence any damaging effect on population health.

In August 2002 the Ministry of the Environment issued three environmental permits (*autorizația de mediu*) to the Transgold S.A. (the former company Aurul), for the exploitation of the tailing pond Săsar, the plant for the extraction of precious metals, and the transport of the minerals from the pond to the fabric.

3. The matters of law and the court's judgment.

After the accident Vasile Gheorghe Tătar filed various administrative complaints concerning the risk incurred by him and his family as a result of the use of sodium cyanide by S.C. Aurul S.A. in its extraction process. He also questioned the validity of the company's operating licence. The Ministry of the Environment, in November 2003, informed him that the company's activities did not constitute a public health hazard and that the same extraction technology was used in other countries. The first applicant also brought criminal proceedings, in 2000, complaining that the mining process was a health hazard for the inhabitants of Baia Mare, that it posed a threat to the environment and that it was aggravating his son's

¹² UNEP/OCHA, *Report on the Cyanide Spill at Baia Mare, Romania*, 26 February – 6 March 2000, available at <http://archive.rec.org/REC/Publications/CyanideSpill/ENGCyanide.pdf> (last visited December 2013).

¹³ *Report of the International Task Force for Assessing the Baia Mare Accident*, 26 December 2000, available at http://viso.jrc.ec.europa.eu/pecominex_ext/docs/bmtf_report.pdf (last visited December 2013).

medical condition, namely asthma. By an order of 20 November 2001 the Romanian courts discontinued the criminal proceedings concerning the accident of 30 January 2000 on the ground that the facts complained of did not constitute offences. No judicial order or decision concerning the other complaints has been issued to date»¹⁴.

Relying on Article 2 of the Convention (Right to life), the applicants complained that the technological process employing the sodium cyanide used at the S.C. Transgold S.A. Baia Mare plant (formerly S.C. Aurul S.A. Baia Mare) entailed a risk to their lives. They further complained that the authorities had remained passive in the face of the situation thus created, despite the numerous complaints lodged by the first applicant. For this reason, the Romanian Government violated the Article 8 of the Convention (Right to respect for private and family life), because it hadn't taken the necessary precautions to guarantee an appropriate protection of the environment and population's health. Furthermore, the Romanian Government hadn't accomplished the necessary control procedures to supervise and make safe the activity of the company Aurul, which was qualified dangerous by many official reports. This negligence would have been one of the cause of the environmental disaster occurred in January 2000.

Authorizing the functioning of the tailing ponds, the authorities had exposed the population to serious risks of infection due to the presence in the air and in the water of sodium cyanide, a substance hazardous to environment and health¹⁵. And this caused a deterioration of one of the applicant's health condition, affected by bronchial asthma. In support of their claim, the applicants recalled the judgment *Fadeyeva v. Russia*, where is said that «[...] the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention»¹⁶. The applicants also considered the inefficacy

¹⁴ *Tătar v. Romania* (Press release issued by the Registrar), ECHR 27.01.2009, no. 67021/01.

¹⁵ See the *International Chemical Safety Card* (ICSC no. 1118/1999), published by the UNEP/ILO/WHO.

¹⁶ *Fadeyeva v. Russia*, ECHR 09.06.2005, no. 55723/00, § 88.

of the domestic law¹⁷ dictated by the authorities, in particular for the prevention of a contamination of sodium cyanide, a clear violation of the precautionary principle.

On the other side the Government asserted that the application of the Article 8 (Right to respect for private and family life) regards only cases of serious pollution, directly attributed to the State (case *López Ostra v. Spain*)¹⁸. A thorough research is necessary to guarantee a good safeguard of the activity of a specific company. In this specific case, the Romanian authorities, differently from the case *López Ostra v. Spain*, had conducted two environmental-impact assessments (1993, 2001), both with negative results.

About the application of the Article 8 (Right to respect for private and family life) in cases regarding environmental pollution, the Court stated that the State is responsible whether it has caused the pollution directly, or because there aren't adequate normative provisions of domestic law for the protection of the environment in the private sector.

The duties for the State descending from the Article 8 are two: one negative (protect the person from arbitrary interferences by the State), and one positive (the respect for private and family life). In cases of environmental politics, the positive duty obliges the State to produce suitable and efficient norms in order to prevent potential damages to the environment and human health. In other terms, the State is obliged to guarantee safety and control of a specific activity, due to the risks connected to this activity, based on adequate studies and researches. In this specific case, the duties established by the Article 8 hadn't been respected: the Court observed that the two environmental-impact assessments conducted in 1993 and 2001 had stated a serious situation about the risks for the environment and human health; it was also noticed that «[...] after the environmental accident on 2000 several polluting elements (cyanides, lead, zinc, cadmium), exceeding the international and domestic thresholds, had been detected nearby the applicant's residence. And this was confirmed by the conclusions of the official reports made after the accident by the United Nations (UNEP/OCHA), the European Union (Task Force) and the Romanian Ministry for the Environment»¹⁹. While conducting its evaluations, the

¹⁷ Environmental Protection Act (Law no. 137), 29 December 1995, published in the Official Gazette (*Monitorul Oficial*), first part, no. 70, of 17 February 2000.

¹⁸ *López Ostra v. Spain*, ECHR 09.12.1994, no. 16798/90.

¹⁹ *Tătar v. Romania*, EHCR 27.01.2009, no. 67021/01, § 95: «[...]un certain laps de temps après l'accident écologique de janvier 2000 différents éléments polluants (cyanures, plomb, zinc, cadmium) dépassant les normes internes et internationales admises ont été présents dans l'environnement, notamment à proximité de l'habitation des requérants. C'est ce que confirment les conclusions des

Court encountered many difficulties due to the absence of internal decisions and any other official document clearly stating the level of danger that company Aurul's activity represented for human health and environment. Considering that the existence of risks for the environment caused by chemical and pollutant substances could be acquired from the environmental-impact assessments, the Court decided that «[...] the pollution produced by the fabric Săsar could have a prejudicial impact on the life quality of the neighborhood, in particular damaging the well-being of the applicants, depriving them of enjoying their domicile, in a way that would have been dangerous for their private and family life»²⁰.

The Article 8 (Right to respect for private and family life) found application in this case, because the State failed to respect the negative duty imposed by Article 8. In other words, the Romanian Government failed to conduct appropriate studies, useful to evaluate in advance and prevent the potentially damaging effects of the company Aurul's activity. The consequence was the violation of the Article 8, and this happened because the State hadn't observed the precautionary principle, as provided for by Article 191 of the Treaty on the Functioning of the European Union (TFEU). In regards to this principle, according to the jurisprudence of the European Court of Justice (ECJ), when «subsist doubts regarding the existence or the range of risks for people health, the institutions can take measures without waiting that reality and seriousness of these risks are fully demonstrated»²¹; and this because «precautionary principle means that preventive measures shall be taken even if there is not sufficient convincing evidence with respect to the link between activity and damage»²².

Regarding the aggravation of the second applicant's asthma, the Court rejected his claim due to the inability of the applicants to prove the existence of a casual link between the use of sodium cyanide during the technological process and the aggravation of asthma. Despite the unanimous recognition of the violation of Article 8 (Right to respect for private and family life), the Court made no award of compensation for the applicants, with regard to moral damage, without any

rapports officiels établis après l'accident par les Nations unies (UNEP/OCHA), l'Union européenne (Task Force) et le ministère roumain de l'Environnement».

²⁰ Id. at 97: «[...]la pollution générée par l'activité de l'usine Săsar pouvait causer une détérioration de la qualité de vie des riverains et, en particulier, affecter le bien-être des requérants et les priver de la jouissance de leur domicile de manière à nuire à leur vie privée et familiale».

²¹ ECJ, 5 May 1998, *Royaume Uni/Commission*, Aff C-180/96, Rec. I-2265, and ECJ, 5 May 1998, *National Farmer's Union*, C-157/96, Rec. I-2211.

²² S. MAHMOUDI, *Protection of the European Environment after the Amsterdam Treaty*, Stockholm Institute for Scandinavian Law, 1957-2009.

explanation. And this is one of the reasons that pushed judges Zupančič and Gyulimyan (members of the Court) to express a partly dissenting opinion to this judgment.

4. Conclusion - An eccentric judgement?

Judge Zupančič, at the end of his intervention where he expressed his disagreement to the Court's judgment on case *Tătar v. Romania*, asserted that, for the first time on a case of this kind, the Court refused to give any compensation to the applicants for the moral (non-pecuniary) damages they had suffered. This judgment has several interesting aspects, and this one has certainly raised many doubts. Anyway, the reference to the precautionary principle is the fundamental aspect of the judgment, because it made possible to recognize a violation of Article 8 (Right to respect for private and family life). Thanks to this principle, indeed, the "scientific uncertainty" is no more an easy way out that takes away the State from the duties of prevention (and also information) descending from Article 8. The precautionary principle expands the range of Article 8 including situations of scientific uncertainty, where the risk is simply supposed because there are no evidences to prove that the risk can become an actual danger. Reading Article 8 under the light of the precautionary principle means that the States cannot delay on taking preventive action, simply because there isn't the scientific certainty of a danger. For this reason «the Court held that Romania should have addressed in advance the potential risk of the mine on the environment and the health of the population»²³.

Assuming that a violation of the Article 8 of the Convention has occurred means to recognize that the applicants suffered, if not a material damage, a moral damage. And this one needs a fair compensation under Article 41 of the Convention (Just satisfaction). This didn't happen because the Court stated that the recognition of the violation was enough.

Some observations are deserved by the lacking compensation of the material prejudice suffered by the second applicant (the aggravation of the asthma), following the environmental accident on 2000; «the Court did not doubt the reality of the medical condition of Paul Tătar, who was diagnosed in 1996 and who required

²³ S. KRAVCHENKO, J.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 *Pacific McGeorge Global Business & Development Law Journal*, 245, 2012, 5.

medical assistance, nor that of the toxicity of sodium cyanide and of the pollution detected, in excess of the authorized norms, by international organizations in the vicinity of the applicants' home following the environmental accident. The Court noted that, in the light of what was currently known about the subject, the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. It observed, however, that the existence of a serious and material risk for the applicants' health and well-being entailed a duty on the part of the State to assess the risks, both at the time it granted the operating permit and subsequent to the accident, and to take the appropriate measures²⁴. In its judgment the Court says that «[...] the scientific uncertainty isn't supported by adequate and convincing statistic elements»²⁵; «according to a study entitled "Hydrogen Cyanide and Cyanides: Human Health Aspects", made on 2004 by the WHO, there aren't enough information about the harmful effects of the sodium cyanide on human health, except for its high toxicity»²⁶. What doesn't work, in the Court's evaluation, is the transition from the "statistic approach" to the "casual approach" (which doesn't admit the concept of "uncertainty"). Actually the decision of the Court is in some way embraceable: it's impossible to establish a link between the increase of the level of cyanide and the aggravation of *that* specific disease affecting *that* specific person; however, this can't prevent from asserting that the exposition of a population to a certain toxic source increases the risk of appearance of a certain disease within the population touched, or the aggravation of a preexisting disease. It's all based on a presumption, not confirmed by definite scientific data, but necessary to establish a statistic case. If it's not possible to determine exactly when the sodium cyanide is concretely harmful for human health, in the same way it's impossible to support the opposite thesis: that is to say the cyanide sodium, without certain scientific data, is basically harmless. It's important to notice that the absence of a casual link, which means to «[...] impose to the applicants an impossible burden (*probatio diabolica*), especially when there are no information about the noxious effects of the cyanide

²⁴ *Tătar v. Romania* (Press release issued by the Registrar), EHCR 27.01.2009, no. 67021/01.

²⁵ *Tătar v. Romania*, ECHR 27.01.2009, no 67021/01, § 106: «La Cour considère cependant qu'en l'espèce l'incertitude scientifique n'est pas accompagnée d'éléments statistiques suffisants et convaincants».

²⁶ Id. § 66: «Selon une étude intitulée "Hydrogen Cyanide and Cyanides: Human Health Aspects", réalisée en 2004 par l'OMS, il n'y aurait pas d'informations sur les éventuels effets nocifs du cyanure de sodium pour la santé humaine, hormis sa toxicité élevée».

sodium on the human organism»²⁷, can't prevent any attempt to obtain a fair compensation: there is always a scientific possibility, and it's a task of the judge to establish if this possibility is adequate to gain, if not the certainty, at least a plausible presumption.

Finally: an interesting judgment, with some interesting flaws.

²⁷ *Tătar v. Romania*, ECHR 27.01.2009, no 67021/01, *Partly dissenting opinion of judge Zupančič, enjoyed by the judge Gyulimyan*. «[...] imposer aux requérants un fardeau impossible (*probatio diabolica*), surtout en l'absence d'informations concernant les effets nocifs du cyanure de sodium sur l'organisme humain».

LEON AND AGNIESZKA KANIA V. POLAND (ECHR 12605/03, 21.07.2009) - THE UNREASONABLE LENGTH OF THE PROCEEDINGS AND THE ENVIRONMENTAL PROTECTION

Francesco Cunsolo

TABLE OF CONTENTS: 1. – The facts. 2. – The court’s judgment. 3. –Comment.

1. The facts.

In this case two Polish nationals, Mr Leon and Mrs Agnieszka Kania, on 7 April 2003 made an application before the European Court of Human Rights (ECHR) against the Republic of Poland, under Article 34 (“Individual Applications”) of the Convention for the Protection of Human Rights and Fundamental Freedoms¹. The application concerned noise and pollution problems that the applicants suffered over the years due to the activity of the craftsmen’s cooperative “Wielobranżowa”, founded in 1978 and established near their home. The applicants complained the alleged violation of three articles of the European Convention:

- Art. 6 n.1² - “Right to a fair trial” - applicants complained the violation of the “reasonable time” requirement, referring to the length of the administrative proceedings to have a final decision (in order to stop, in this specific case, the activity of the cooperative);
- Art. 13³ - “Right to an effective remedy” - applicants stated that «they had no effective domestic remedy in respect of the final decision’s non-implementation by competent authorities»⁴.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 34 Nov. 4, 1950, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last visited December 2013).

² Id. Section 1 of Article 6 provides: «In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal [...]».

³ Id. Art. 13: «Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity».

- Art. 8⁵ - “Right to respect for private and family life” - because of the continuous activities of the cooperative, the applicants complained that they suffered serious noise and pollution, which gave them many health problems, in term of heart and hearing diseases.

The activity of the cooperative “Wielobranżowa” consisted of several maintenance services for lorries, metal cutting and grinding machines, and some others small operations in the iron and steel industry. In 1985 the applicants asked, through an administrative proceeding, that the cooperative ceased its activities, because the levels of pollution and noise produced were intolerable. This brought the Mielec District Office, on 25 March 1986, to order the liquidation of the cooperative by the end of 1995; however, the cooperative could spend the remaining months of 1986 to conform its activities to the rules on the protection of environment and noise emission. This decision was upheld by the Director of the Department for Architecture of the Provincial Office in Rzeszów, on September of the same year; anyway, the applicants contested the lengthy period provided for the liquidation of the cooperative, and asked for its shutdown. Their appeal was dismissed by the Supreme Administrative Court on July 1987. On May 1988 the applicants complained again with the Provincial Office in Rzeszów, due to the operations of the cooperative producing «unbearable noise and were life-threatening for people living in the vicinity. On 3 June 1988 the Director of the Department for the Environment of the Provincial Office in Rzeszów issued a decision establishing the maximum level of noise to be emitted»⁶. The noise emissions of the cooperative didn't satisfy the new limits, so the cooperative was ordered to interrupt the activities of all its technical devices; the cooperative answered to this order with an appeal to the Minister of the Environment.

On 1997, as the time limit for the liquidation of the craftsmen's cooperative had already passed (1995), the applicants proceeded with a motion before the District Office in Mielec, in order to give execution to the decision of 5 September 1986. In response to their request, the Provincial Office in Rzeszów said that the decision

⁴ *Leon and Agnieszka Kania v. Poland*, ECHR 21-07-2009, no. 12605/03, § 85.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8: «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

⁶ *Leon and Agnieszka Kania v. Poland*, ECHR 21-07-2009, no. 12605/03, §§ 10-11.

they invoked couldn't be executed because the document containing it had been destroyed, and so many other documents belonging to the period between 1974 and 1986.

On 26 August 1997 the District Office in Mielec told the applicants about the absence of grounds for the cooperative's liquidation. It also asked the State Fire Services, the Provincial Inspectorate for Environmental Protection in Rzeszów, and the State Sanitary Inspectorate to conduct an inspection of the cooperative; the result of the inquiry was that the cooperative's activities did not cause a nuisance. However, a new inspection was made on March 1998, in order to check the emission of noise. The inspectors found that it exceeded the permissible threshold.

The consequence was an order from the District Office in Mielec to the cooperative: to reduce noise emissions, and adapt them to the established noise-levels.

Between 1998 and 2000 several other inspections were carried out, and all of them were negative: the level of noise emitted was in conformity with the permissible threshold. «On 12 July 1999 the Minister of Environment quashed the decision of 3 June 1988 and discontinued the proceedings in the case since, [...], the level of noise emitted by the cooperative was in conformity with the established noise threshold»⁷. This decision was confirmed on 5 August 1999. Anyway, the applicants insisted, asking for an enforcement of the proceedings, a re-exam of their case and appealing to the Supreme Administrative Court. «On 10 August 2000 the applicants lodged a motion [...] to have the decision of 5 September 1986 executed and the cooperative liquidated. They further requested that [...] a fine be imposed on the cooperative for non-implementation of a legally binding decision»⁸. On 5 September 2000 the District Construction Inspector asked the applicants to add an enforcement clause to their motion of 10 August 2000 with the decision of September 1986; the motion was returned on October 2000 because the applicants had been unable to submit those documents. On 17 November 2000 the Supreme Administrative Court revoked the decision of 5 August 1999, but the Minister of Environment again upheld it. And so on until 4 September 2001, when «the District Office in Mielec suspended the proceedings until the question whether the level of noise emitted by the cooperative was in conformity with the threshold had been examined by the Supreme Administrative Court»⁹.

⁷ Id. § 36.

⁸ Id. § 41.

⁹ Id. § 49.

On July 2003 the applicants presented a motion to District Office in Mielec, asking again for the enforcement of the decision of 25 March 1986 and the liquidation of the cooperative. On the same month, the District Prosecutor joined the proceedings for the cooperative's shutdown. «On 12 August 2003 the applicants lodged a complaint with the Principal Construction Inspector about the administrative authorities' inactivity with regard to the cooperative continuing its activities»¹⁰; this complaint about inactivity was accepted by the Regional Construction Inspector, and pushed him to ask for the enforcement of administrative proceedings. On 21 October 2003 the District Construction Inspector adopted the decision of 5 September 1986, and ordered the liquidation of the cooperative. «On 10 December 2003 an on-site inspection took place on the cooperative's premises. As a result of the above, [...] the District Construction Inspector stated that some of the cooperative's buildings had not been constructed in conformity with the law. [...] On 4 February 2004 the applicants lodged a complaint with the Principal Construction Inspector complaining about the excessive length of the enforcement proceedings, the inactivity of the District Building Inspector and, further, the authorities' failure to dismantle the cooperative's buildings»¹¹. The enforcement proceedings started on 24 February 2004; the District Construction Inspector imposed a fine on the cooperative, and ordered the dismantlement of the weighing equipment. On 25 September 2004 the cooperative terminated its commercial activities. Another on-site inspection was conducted on the cooperative's premises on November 2004: the inspection confirmed that the activities had been ceased. And this completed the proceedings.

2. The Court's judgment.

Regarding the alleged violation of Article 6 n.1 (Right to a fair trial), complained by the applicants, the Court noted that the proceedings had started in 1985; however, the period to consider had begun in 1993, when the right of individual petition took effect, and ended on November 2004. In other words, more than eleven years for three levels of jurisdiction. Against the objection of the Polish Government, based on the missed execution by the applicants of the domestic remedies available to them, as stated by Article 35 n.1 (Admissibility criteria) of the

¹⁰ Id. § 55.

¹¹ Id. §§ 61-63.

Convention¹², the Court observed that the applicants had experienced many complaints, reporting the inactivity on the part of the administrative authorities with the respective higher authority. The Court noted that «the applicants also had recourse to the remedy available under the Law on enforcement proceedings in administration of 1966¹³ [...]. It follows that the remedies the applicants used were adequate and sufficient to afford them redress in respect of the alleged breach»¹⁴. Finally the Court noted that Article 35, stating the exhaustion of the domestic remedies in order to bring the complaints before the Court, «does not require that, in cases where the national law provides for several parallel remedies in various branches of law, the person concerned, after an attempt to obtain redress through one such remedy, must try all other means»¹⁵. In this case, the Court concluded that the applicants had exhausted all the domestic remedies, in respect of the Article 35. In addition to this, it was stated that the length of the proceedings suffered by the applicants had been excessive; so there was effectively a breach of Article 6 n.1.

About the alleged violation of Article 13 (Right to an effective remedy), the Government contested this complaint, arguing that there were many remedies for the inactivity of the administrative authorities relatively the decision's implementation, and so for the proceeding's excessive length. The Court observed that «it has held on several occasions that the numerous remedies available to the applicants under the relevant domestic law [...] were designed to put the issue of length of the proceedings in question before the national authorities and seek their termination “within a reasonable time” [...]»¹⁶. The Court noted the applicants had used the remedies available to them inside the administrative procedure system; and these remedies had been effective and sufficient for the alleged violation. The Court's opinion was that there was no breach of Article 13.

Finally, the alleged violation of Article 8 (Right to respect for private and family life) of the Convention was based on the supposed noise and pollution produced by the activities of the cooperative, that caused serious health problems to the applicants. The Government observed that this case didn't concern a violation of the right to respect for the private life and home by the public authorities, but a

¹² *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 35: «1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law [...]».

¹³ *Law on enforcement proceedings in administration (ustawa o postępowaniu egzekucyjnym w administracji)*, Section III, 1966.

¹⁴ *Leon and Agnieszka Kania v. Poland*, ECHR 21-07-2009, no. 12605/03, §78.

¹⁵ *Id.* § 79.

¹⁶ *Id.* § 89.

failure to take action in order to stop third party breaches of the right relied on by the applicant. «[...] The Government stressed that the administrative authorities remained active and determined [...]. Most of the inspections which were carried out revealed that the cooperative's activities complied with the rules on the protection of the environment and that the level of noise emitted by it did not exceed the threshold of permissible noise established by competent authorities»¹⁷. Furthermore, even in case the pollution and noise produced by the cooperative had affected the applicants, this was not a sufficient condition for the application of Article 8, because it had to be proved that the nuisance had reached the minimum level of severity required to cause a violation of Article 8. That being so, the Government noted that the applicants did not produce any document or medical record in support of their claim, as a concrete evidence of the serious health problems they had suffered. «Furthermore, it could not be disregarded that eventually the applicants' claim had been satisfied and the cooperative ceased all of its commercial activities»¹⁸.

Stated that the Article 8 covers any issue regarding noise or other environmental pollution, the Court reiterated that «[...] Article 8 of the Convention may apply in environmental cases, regardless of whether the pollution is directly caused by the State or the State responsibility arises from failure to regulate private-sector activities properly»¹⁹. «Accordingly, as it stems from the Court's settled case-law in order to raise an issue under Article 8 of the Convention, the interference must directly affect the applicant's home, family or private life and the adverse effects of the environmental hazard must attain a certain minimum level of severity. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects»²⁰.

«Having this in mind, the Court notes that after the initial order of 1986 that the cooperative should adapt its activities to comply with the rules on the protection of the environment and the emission of noise, numerous inspections of the cooperative's premises were carried out [...]. They all resulted in the finding that the cooperative's activities did not cause a nuisance and did not exceed the permissible level of noise established for the applicants' neighboring area [...]. Further, the Court takes note that the cooperative eventually ceased all its activities [...]»²¹.

¹⁷ Id. § 95.

¹⁸ Id. § 96.

¹⁹ Id. § 99.

²⁰ Id. § 100.

²¹ Id. § 102.

Finally, the Court observed that the applicants hadn't submit a claim supported by a medical record that they had suffered long-term health problems, and heart and hearing complications due to the high level of noise produced by the company.

Accordingly, the Court confirmed the objections of the Government, and rejected the applicants' claim for the violation of the Article 8.

So the only complaint declared admissible by the Court was the violation of the Article 6, while the rest of the application was declined; the Court condemned the Polish Government to pay the applicants € 6,600, in respect of non-pecuniary damage.

3. Comment.

The reasons behind the judgment of the Court, especially the rejection of the complaint regarding the Article 8, are different: first of all, the Court reminds that there is no explicit right in the Convention dedicated to a healthy and clean environment, and any issue about this matter is regulated by Article 8. In support of this fundamental statement, the Court recalls some important cases on this topic, that is the interpretation and application of ECHR for the protection of the environment²². A very important question regarding the application of Article 8 for the protection of environmental rights, and finally identifying them as fundamental rights, is the involvement of the State when the cause of the pollution is a private company, not the State; and this is an essential issue, because the EHCR speaks to States, and assigns to States the duty to respect and safeguard the rights established in the Convention. The case *López Ostra v. Spain*²³, the first and maybe most important case about implementation of environmental protection in the human rights sphere, answered the question «whether Spain could be held liable when the most immediate cause of the pollution was a private company, not a State. The Court had no problem with finding that it could. Although the Spanish and local authorities were theoretically not directly responsible for the pollution, “the town allowed the plant to be built on its land and the State subsidised the plant’s construction”²⁴. [...] The Court appeared to consider that inaction by the State could be a ground for

²² See *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII; *López Ostra v. Spain*, ECHR 9-12-1994, Series A no. 303-C; *Powell and Rayner v. the United Kingdom*, ECHR 21-02-1990, Series A no. 172.

²³ *López Ostra v. Spain*, ECHR 9-12-1994, Series A no. 303-C.

²⁴ *Id.* § 55.

liability. [...] It found that the municipality failed to take steps to protect Mrs. López Ostra [...]. In addition, it found that other State authorities contributed to prolong the situation through participation in litigation on the side of the factory»²⁵. Years later, the Court confirmed this position establishing that «Article 8 not only forbids action by the State but also provides a remedy for inaction by the State»²⁶. That is, the right to respect for private and family life under Article 8 imposes a duty on the State to take positive, protective action in the environment field». So, the inability to provide effective protection to applicant's "right to respect for private and family life" is a violation of the positive obligation descending from Article 8.

This conclusion of the Court came years after another important case for environmental protection, *Guerra v. Italy*²⁷, where the applicants had complained the local authorities for inaction to reduce pollution produced by a chemical factory classified as "high risk", whose dangerous activity had caused a serious accident in 1976. The applicants argued that this lack of action breached the Article 2 (Right to life), connected to the violation of the Article 10 (Freedom of expression, and the relative right to be informed) of the Convention.

Back to the present case: the Court believed that there were no elements to think that the Polish Government hadn't taken reasonable measures to protect applicant's right under Article 8; and that's because, all over the years, several inspections of the cooperative's premises had been carried out, all with the same result: the cooperative's activity hadn't exceeded the noise threshold established for the area where the applicants lived. However, the Court considered possible that the daily operations of the cooperative had affected the applicants; but in the absence of any documents or medical records proving that the applicants had suffered serious long-term health problems, and without a prove that the nuisance had exceeded the minimum level of severity, any complain about a real violation of Article 8 had to be rejected.

The case-law on noise pollution is still at early stage; before the present one, there was another important case: *Hatton v. United Kingdom*²⁸, where the applicants complained excessive noise from aircraft activity at Heathrow Airport, which compromised their sleep. In this case, the Court considered that «national authorities

²⁵ S. KRAVCHENKO, J.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 *Pacific McGeorge Global Business & Development Law Journal*, 245, 2012, 5.

²⁶ Id. at 6.

²⁷ *Guerra v. Italy*, EHCR 19.02.1998, no. 14967/89.

²⁸ *Hatton v. United Kingdom*, ECHR 08.07.2003 before the Grand Chamber, no. 36022/97.

were in principle better placed than an international court to evaluate local needs and conditions»²⁹; the real challenge was to find a balance between the opposite interests of the individual and of the community, and considering the economic benefits of the United Kingdom descending from the late-night aircraft traffic, the Court stated the government could «take into account the individuals' ability to leave the area»³⁰. Most important, this case inspired an observation of the Court about the section 2 of Article 8, which is for a balancing test between competing interests.

Anyway, we have to consider that «noise pollution cases often turn on compliance with local environmental laws. Where the state conducts inspections and finds that the activities do not exceed permissible noise levels established for the area, at least in the absence of evidence of serious and long-term health problems, the Court is unlikely to find that the State failed to take reasonable measures to ensure the enjoyment of Article 8 rights. In other words, where no specific environmental quality is guaranteed by the constitution or applicable human rights instrument, the courts accord considerable deference to the level of protection enacted by state or local authorities»³¹.

In the present case, the only evidence that the applicants had suffered some serious damage from the cooperative's activity is determined by the excessive length of the proceedings (eleven years), and the several attempts they made to receive some kind of attention to their complain. It's a sort of psychological prove: who else would dare to engage eleven and more years of frustrating proceedings, many failed attempts for such a long time to get what he asked for, if he wouldn't have really suffered some serious pain that needs to be compensate? Can we consider the long-term proceedings not just a violation of a human right, but also a prove of long-term health problems? Perhaps this is not enough to produce a concrete evidence, but just a presumption of nuisance. Or maybe not?

²⁹ *Hatton v. United Kingdom*, ECHR 2003-VIII, § 216.

³⁰ *Id.* § 227.

³¹ D. SHELTON, *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration*, at *High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward*, Co-organized by UNEP and OHCHR, Nairobi, 30 November-1 December 2009.

“POSITIVE OBLIGATION” OF STATES IN TERMS OF PROTECTION OF ENVIRONMENT

Paola Maria Zilio

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1. Introduction.

The European Court of Human Rights (hereafter: “the Court”) confirms its previous cases’ view on the issue of environmental rights in terms of obligation for public authorities to intervene in safeguarding the environment. It is the so-called “positive obligation doctrine”, applied also in the case at hand, *Băcilă v. Romania*¹.

The applicant lived in Copșa Mică, Romania, near an industrial plant run by Sometra, at the time, producers of non-ferrous metals and the biggest employer in the town. Due to the large amounts of sulphur dioxide and dust containing heavy metals discharged in the atmosphere, the applicant requested public authorities to take the necessary measures to improve the venomous situation. The applicant’s position was supported by a large number of reports carried out by public and private organizations, showing a high rate of heavy metals in the town’s waterways, air, soil and vegetation and causing a spike in the rate of illness, in particularly respiratory conditions, which was seven times higher than the rest of the country². On December 1999, the local authorities informed the applicant that although the pollution had risen since the privatization of the company, the latter was willing to undertake a series of steps to reduce the level of pollution by 2003. However, the reclamation plan was not implemented because of lack of funds. Despite that, the local authorities refused to take short-term measures because inefficient and did not

¹ *Băcilă v. Romania*, European Court of Human Rights, Application no. 19234/04, ECHR. (In French)

² Id. § 11.

shut down the plant in order to avoid social problems³. The authorities granted a permit to the company, valid until 2003, allowing it to continue to produce. It is worthwhile to recall that at that time Romania was in negotiations to join the European Union; during those negotiations, the company in question obtained an exception from the conditions imposed by the European Council Directive 96/61/EC on dangerous activity⁴ until December 2014. Giving that, the company's permit was extended until 2006. The permit numbered, *inter alia*, 51 conformity measures to be taken in order to follow the environmental legislation standards. In 2007 the Regional Agency for the Protection of the Environment fined the company for not having respected those standards. Due to the economic crisis, the company shut down and fired 80% of its employees.

2. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: relationship between well-being and environment.

Since public authorities did not take any steps, on January, 24, 2004, the applicant filed a complaint to the Court. She claimed that the pollution generated by the plant caused severe damages to her health and her living environment⁵. She relied in particular on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "The Convention"). The Article reads:

«Everyone has the right to respect for his private and family life, his home and his correspondence»⁶.

The interpretation of Article 8, from the State perspective, is twofold: the State not only has the duty to abstain from interfering with individuals' private sphere (so called "negative obligations") but it has also the compelling duty to regulate the authorizations, operations and safety; to monitor hazardous activities and to intervene and guarantee the effective protection of citizens in those

³ Id. § 14.

⁴ The EC Directive aim was to reduce, control and prevent pollution due to dangerous activities. Member states authorize dangerous activity only if companies meet a series of compelling requirements. Complete text are available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0061:en:HTML> (last visited December 2013); summary is available at http://europa.eu/legislation_summaries/environment/waste_management/128045_en.htm (last visited December 2013).

⁵ Băcilă v. Romania, § 44.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms art.8, Nov. 4, 1950.

situations⁷. This is consistent with the widely accepted tenet of “positive obligation”. This provision was first discussed, in its general meaning, in two decisions of 1979, in which the Court said: «[A]lthough the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life»⁸. The Court reiterates that it is applicable also in the environmental field⁹; it adds that it should be established «whether the national authorities took the necessary steps to ensure effective protection of the applicants’ right»¹⁰. This position seems to be supported in the issue at hand. If on the one hand the Court recognizes that public authorities had undertaken some steps to improve and reduce environmental pollution caused by the plant¹¹; on the other hand it is also true that the State did not make sure that those plans were actually implemented in a specified timescale. The Court’s scrutiny does not concern whether or not it would have been appropriate to shut down the plant, but it observes that public authorities have been reluctant to undertake measures against the company¹². Arguably, the Court takes into account the necessity in maintaining the economic activity of one of the biggest employer of the town, but it contests the idea that the interest in ensuring economic stability and growth prevails over the inhabitants’ right to enjoy a healthy environment. Given the serious consequences on environment proven by private and public organizations and given the deterioration of health of the applicant, the Court unanimously considers that the State actions are both inefficient and indefensible and there has been, thus, a violation of Article 8 of the Convention.

⁷ *Băcilă v. Romania*, § 60.

⁸ See: *Airey v. Ireland*, application no. 6289/73, decision of 9 October 1979, § 32, ECHR.

⁹ See: *Guerra v. Italy*, application no. 116/1996/735/932, decision of 19 February 1998, ECHR [GC].

¹⁰ *Id.* § 58.

¹¹ In the permit granted to the company were specified a series of measure to be undertaken by the company in order to improve the situation.

¹² *Băcilă v. Romania*, § 69.

3. Right to a safe environment and causation principle: concurring opinion of Judge Zupančič.

Having determined the relevance of the normative regime of Article 8 to the issue at hand, the concurring opinion¹³ of Judge Zupančič merits attention.

Judge Zupančič opines, first of all, that all the cases related to environmental pollution and severe damages to health of individuals are linked by the so-called causation principle, which means that to an alleged pollution of environment it should be *vis-a-vis* linked a lamented deterioration of health of an individual. He also underlines that, in the environmental protection field, theories of causation are developing in other sub-principles such as the precautionary principle¹⁴ which is recognized, directly or indirectly, as a constitutional principle in several countries. Similarly, Article 8, as well as other dispositions, of the Convention may create new constitutional rights¹⁵. He proceeds raising the question of how is it possible to apply the precautionary principle in a given case, he affirms that: «[l]a substance de ce principe doit s'envisager sur le plan constitutionnel, voire politique, le plus abstrait. Nous en venons alors aisément à comprendre que le principe de précaution n'a d'autre finalité qu'un simple renversement de la charge de la preuve»¹⁶. In fact, if during the industrial revolution it was commonly accepted the presumption that any industrial activity is harmless to the environment and the individual, with the proliferation of environmentally harmful activities it was raised the awareness that «l'innocuité de pareilles activités ne peut plus se présumer»¹⁷, both at a political and a

¹³ Article 45 § 2 of the ECHR provides that: «[i]f a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion». In this article “separate opinion” means both concurring and dissenting opinion. While a dissenting opinion is a written opinion of a judge who dissents from the majority of the court, a concurring opinion is a statement of a judge who agrees with the decision made by other judges but for different legal or political reasons.

¹⁴ «The precautionary principle takes account of the fact that it is often difficult if not impossible, to assess the precise impact of human action on the environment and that some actions can cause irreparable harm. It requires that if there is a strong suspicion that a certain activity may have detrimental environmental consequences, it is better to control that activity now rather than to wait for incontrovertible scientific evidence. It has been, *inter alia*, included in the Rio Declaration, and it played a role in justifying import restrictions in the WTO regime arguing that products had not been produced in a sustainable manner», in *Manual on Human Rights and Environment*, Council of Europe Publishing, 2012, p. 139.

¹⁵ *Băcilă v. Romania*, Concurring Opinion of Judge Zupančič, § 3.

¹⁶«[T]he essence of this principle must be considered constitutionally or politically, more abstract. We then can easily to realize that the precautionary principle has no other purpose than a reversal of the burden of proof» (Author's translation).

¹⁷ *Id.*

juridical level. This awareness goes along with the reversal of the burden of proof; hence, it should compel the company engaged in a dangerous activity to prove that the activity will not have any detrimental consequences for environment and individuals. If that is the case, for the Judge it appears «absurde d'insister sur la preuve de la causalité pour ce qui est des dommages démontrables subis par l'individu alors que nous savons fort bien que le dommage n'est pas seulement structurel lorsqu'on en vient à la santé telle que la définit l'Organisation mondiale de la santé (c'est-à-dire le bien-être). De plus, l'émission de substances toxiques dans l'environnement va produire toute une série de "chaînes causales", par exemple dans la chaîne alimentaire et dans les écosystèmes de manière générale, avec pour conséquence une dégradation généralisée de la santé humaine, de telle sorte que nul ne pourra jamais en établir la preuve, directement ou indirectement, dans le cas d'un requérant individuel»¹⁸. As such, the archaic theory of causation prevents the Court from protecting properly those affected by environmental pollution in comparison with the legal protection guaranteed by the other basic human rights of the Convention. Arguably, Judge Zupančič adds: «Si demain quelqu'un venait à revendiquer son droit de l'homme à un environnement sain, alors que celui-ci se dégrade de toutes sortes de façons, il n'aurait aucune qualité pour se présenter devant notre Cour»¹⁹.

While the precautionary principle might mitigate this lack of protection, it is not enough to reverse the situation in cases like the *Băcilă v. Romania*. Judge Zupančič urges to reverse the burden of proof, because the State has all the means to demonstrate the safety of a plant; furthermore, he adds: «[l']individu requérant doit donc conserver son droit procédural fondamental à un renversement de la charge de la preuve. il est tout simplement équitable de renverser la présomption afin de protéger l'individu dans son intégrité physique et dans sa dignité humaine face à un environnement qui ne serait pas dangereusement dégradé si les barrières juridiques et

¹⁸ Id. § 6.

¹⁹ It appears «absurd to insist on proving causation in terms of demonstrable damage to the individual, when we know very well that the damage is not only structural when it comes to health as defines the World health Organization (i.e., well-being). In addition, the emission of toxic substances in the environment will produce a series of "causal chains", for example in the food chain and in ecosystems in general, resulting in a general deterioration of human health, so that no one could ever prove it, directly or indirectly, in a case addressed to this Court.», Id. § 7 (Author's translation).

factuelles dont dispose l'Etat étaient mises en place et fonctionnaient selon le principe de précaution»²⁰.

4. Conclusion.

The *Băcilă v. Romania* case appears to resume the Court's previous decisions in terms of relation between protection of environment and right to life. This clearly lends significant weight to the necessity to protect environment and to its increasingly important role in our society. What is instructive to stress, in this case, is the concurring opinion of Judge Zupančič who came to the reasonable conclusion that only a recognition of a right to clean environment and only the reverse of the burden of proof from individuals to States can properly guarantee a protection of environment and human life.

²⁰ «If tomorrow someone were to claim a human right to a healthy environment, while it is deteriorating in all kinds of ways, there would be no right to appear before this Court», Id. §9 (Author's translation).

ENVIRONMENT AS HUMAN RIGHTS ISSUE: A DEVELOPING JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHT IN THE *IVAN ATANASOV V. BULGARIA* CASE

Paola Maria Zilio

TABLE OF CONTENTS: 1. – Introduction. 2. – Right to a Healthy Environment Under the Convention. 3. – Relation Between Protection of Property and Protection of Environment: Article 1 of Protocol No. 1 of the Convention. 4. – Conclusions.

1. Introduction.

The European Court of Human Rights (Fifth Chamber) continues its consolidated trend to consider environmental issues as a trigger for the application of articles protecting human rights, namely the right to life and right to protection of property. In the *Ivan Atanasov v. Bulgaria* case¹, the Court underlines also the importance to prove the alleged violation of those rights with solid supporting evidence, bringing the discussion of safe environment from a theoretical level to a more concrete one. In the case at hand the applicant's complaint was turned down indeed because he did not produce any evidence in support of his claims.

On March 20, 2003, Mr. Ivan Atanasov instituted a proceeding before the European Court of Human Rights against the Republic of Bulgaria. Relying on Article 8 (right to respect for private and family life and home) and Article 1 of Protocol No. 1 (protection of property) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "the Convention"), the applicant complained about the pollution caused by a reclamation scheme for the tailings pond of a former copper-ore mine, alleging negative effects on his and his family's life and health, he also lamented a prevention of his rights to a peaceful enjoyment of his private property². He relied on Article 6 § 1 (right to a fair hearing)

¹ *Atanasov v. Bulgaria*, decision of 2 December 2010, No 12853/03, ECHR.

² The applicant's house was situated 1 km away from the tailings pond.

of the Convention because the Supreme Administrative Court refused to consider the merits of his application for judicial review; furthermore, the length of the proceeding represented a breach of the “reasonable time” requirements. Relying on Article 13 (right to an effective remedy), he questioned the decision of relevant authorities to grant the license to the scheme’s contractor because they did not take into account a negative opinion expressed by environmental authorities.

2. Right to a healthy environment under the Convention.

The pond was in operation until 1991. A reclamation scheme was approved but its implementation was stopped in 1999. Soon after, the Bulgarian Minister for Industry approved another reclamation scheme proposed by a contractor and granted him a license to implement it. All Mr. Atanasov’s domestic legal efforts to have the reclamation scheme halted were turned down. He thus filed an application to the Court. He complained against the Bulgarian authorities because they had “failed to comply with a number of legal requirements [...], putting his and his family at risk and preventing him from enjoying his home”³; the applicant relied on Article 8 of the Convention which reads:

«1. Everyone has the right to respect for his private and family life, his home and his correspondence»⁴.

In assessing the interrelation between Article 8 and a right to environment, the Court follows its previous jurisprudence. Even if, as it may be noted, the right to a healthy environment is not explicitly present in the Convention, the Court has been admitting cases concerning this issue. In a case decided in 1994, in fact, it stated that Article 8 is a material provision «[when] severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way to affect their private and family life adversely [...]»⁵. Since then «the Court has considered the question whether pollution can trigger the application of Article 8 in a number of cases»⁶. As scholar Alan Boyle points out, «all these cases have common

³ Id. § 58.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms art.8, Nov. 4, 1950.

⁵ *López Ostra v. Spain*, decision of 09 December 1994, No. 16798/90, ECHR, § 51.

⁶ *Atanasov v Bulgaria*, § 67. See: *López Ostra v. Spain*, 9 December 1994, *Guerra and Others v. Italy*, 19 February 1998, *Kyrtatos v. Greece*, no. 41666/98, *Taşkın and Others v. Turkey*, no. 46117/99, *Öçkan and Others v. Turkey*, no. 46771/99, *Ledyayeva and Others v. Russia* nos. 53157/99, 53247/99, 53695/00 and 56850/00 October 2006, *Fadeyeva v. Russia*, no. 55723/00 ECHR 2005-IV, etc.)

features»⁷, i.e. an environmental deterioration due to industrial nuisances and a failure to take adequate measures to control it, independently from the fact that the State itself owns or not the industry in question. In addition, the applicability of mentioned Article 8 depends on particular circumstances, a proven actual interference in applicant's private life and an attained «minimum level of severity»⁸. In the case at hand, although the Court identifies the existence of «an unpleasant situation»⁹ due to the tailing pond and even though it is ascertained that industrial waste water contains substances that may affect health, it is not satisfied by evidence produced by the applicant in proving the actual affection of his own private sphere: first and foremost because the applicant's house is situated at a considerable distance from the pond; secondly, since the unexpected deterioration of environmental situation is due to the production process and not by the pond, it reduces the risk to sudden release of toxic gases (in contrast with what happened in previous cases¹⁰; thirdly, there haven't been incidents affecting health and lives of the inhabitants of the surroundings. The applicant himself admitted he couldn't prove any actual environmental deterioration in the short-term, but he only «feared negative consequences in the long-term»¹¹. The Court's assessment to a violation of Article 8 of the Convention is thus negative. It is not surprising that the Court turned down Mr. Atanasov's complains. In previous similar cases, in fact, it subjected the application of Article 8 to three criteria: 1) the Convention does not provide a general protection of the environment *tout court*, which means that the applicant should be directly and personally affected by the environmental deterioration factors; 2) as a consequence the complainant should prove, beyond any reasonable doubt, the connection between the situation and his affected health or life. 3) It must be considered whether this negative impact have attained a certain threshold of harm.

Similarly, in a analogous case, the Court ruled «[T]he applicants have not brought forward any convincing arguments showing that the alleged damage [...] was of such as to directly affect their own rights under Article 8 § 1 of the Convention»¹². Similarly, since Mr. Atanasov could not prove any actual harm to his health, the Court stated: «[i]n the absence of proof of any direct impact impugned pollution on

⁷ BOYLE A., *Environment and Human Rights*, in *Max Planck Encyclopedia of Public International Law*, 2009, par. 17.

⁸ *Fedeyeva v Russia*, § 70.

⁹ *Atanasov v. Bulgaria*, § 76.

¹⁰ See *supra*, note 6.

¹¹ *Id.*

¹² *Kyrtatos v. Greece*, § 53.

the applicant or his family, the Court is not persuaded that Article 8 is applicable on the ground [...]»¹³.

In contrast, and as a further support to this legal interpretation, in *Dubetska v. Ukraine*¹⁴, the Court held a breach of Article 8, explaining that: «[a]ccording to a number of studies by governmental and non-governmental entities, the operation of the factory and the mine has had adverse environmental effects [...], the mine's and the factory's spoil heaps caused continuous infiltration of ground water[...]. According to an assessment commissioned by the State Committee for Geology and Mineral Resources Utilization, [...] the factory was a major contributor of the pollution of the ground water [...]»¹⁵.

3. Relation between protection of property and protection of environment: Article 1 of Protocol No. 1 of the Convention.

As for Article 8, in the context of a peaceful enjoyment of possessions, article 1 of protocol 1 of the convention «does not [explicitly] guarantee the right to continue to enjoy one's possessions in a pleasant environment»¹⁶. However, the Court has found that this article may impose specific obligation (positive and negative ones) on public authorities to ensure a pleasant enjoyment of one's possessions. Indeed, public authorities may on one hand intervene with positive means in order to protect this right, for instance in case of dangerous activities; or, on the other, simply abstain to interfere in the effective exercise of one's right¹⁷. In the case at hand, the applicant complained that the value of its property was affected by the reclamation scheme of the pond. If it is true that the Court's assessments in the case are to generally accept its previous positions, it reiterates that Mr. Atanasov «has not produced evidence to show that the reclamation scheme had any effect on his property or affected adversely its value [...]. Nor has he produced evidence to show the extent of the losses allegedly suffered by his agricultural business as a result of the reclamation scheme»¹⁸.

¹³ *Atanasov v. Bulgaria* § 78.

¹⁴ A case dealing with pollution of a coal-mining that did cause infiltration of ground water.

¹⁵ *Dubetska v Ukraine*, § 13.

¹⁶ *Atanasov v. Bulgaria*, § 83.

¹⁷ See further: *Manual on Human Rights and Environment*, Council of Europe Publishing, 2012, p. 21.

¹⁸ *Atanasov v. Bulgaria*, § 83.

4. Conclusions.

The European Court of Human Rights reiterates the increasingly importance of environment in both International and European law; it clarifies the limits of application of Article 8 and Article 1 Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms; the Article applies inasmuch as there is a proven and actual harm on one's life and/or possessions. It is not surprising, then, that protection and applicability of environmental rights is guaranteed by a cross-reference with substantive provisions such as Article 8 and Article 1 of Protocol no.1.

Although an evolving protection of environmental rights has developed in the European Court since 1994, it is unclear whether a recognition of environmental right as a general principle, rather than a "case-to-case" and "crossed-referenced provision" approach, would be a more effective and appropriate mean to fulfill protection for those rights.

**ENVIRONMENTAL RIGHTS AND PROCEDURAL RIGHTS IN THE
CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS: THE CASE OF HOULTOASEMA
MATTI EURÉN AND OTHERS V FINLAND**

Paola Maria Zilio

TABLE OF CONTENTS: 1. – Introduction. 2. – Are precautionary principle and environmental rights incompatible with the “reasonable time” requirement entailed in Article 6? 3. – Article 1 protocol 1 of the Convention. 4. – Conclusion.

1. Introduction.

On January 19, 2010 the Fourth Section of the European Court of Human Rights (hereafter: the Court) adopted an interesting decision on procedural aspects related to environmental issues. In *Houltosasma Matti Eurén and Others v. Finland*¹, the Court recognizes, in fact, that when decisions are related to the environment there might be also involved different rights than the substantive ones, i.e. procedural rights. Those rights are guaranteed by Article 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the Convention), respectively, the right to access to a court and the right to an effective remedy before national authorities in case of a arguable violation of the Convention. The case at hand concerns with procedural aspects, i.e. the application of Article 6 § 1.

Mr. Matti Vesa Eurén and Mr. Ari-Pekka Eurén (hereafter: the applicants) owned a service station in Nastola, Finland, since 1965. The service station was located in the industrial zone of the municipality, near a groundwater basin. When, in 1998, new Regulations concerning handling and storage of dangerous chemicals (including fuels for motor vehicles)² were introduced, service stations needed to comply a series of requirements. In order to fulfill those requirements, the applicants

¹ *Case of Houltosasma Matti Eurén and Others v Finland*, decision of 19 January 2010, Application No. 26654/08, ECHR.

² *Id.* § 5-6.

had to undertake certain restructuring work³. Moreover, in March 2000, the Environmental Protection Act entered into force, which required, among other things, to apply for “environmental permit” for dangerous activities. Since the applicants’ service station was included in those dangerous activities, they applied for a permit which was granted in March 2001 by the Nastola Environment Board. In 2003, the decision of the Board was challenged and appealed by administrative authorities because they feared that the applicants’ activities could have put at risk the quality of groundwater. Even though the local administrative court rejected the appeal, it attached a series of conditions in order to eliminate the risk of groundwater pollution. From 2003 to 2007 administrative authorities granted again a permit to applicants’ activity but the Supreme Administrative Court quashed two times the concession because «even though the protective measures proposed by the company diminished the risk of pollution of groundwater, they could not guarantee the protection of groundwater under all circumstances»⁴. As a consequence, since the company could not meet adequate requirements, it was ordered to close down the service station by the end of 2008.

2. Are precautionary principle and environmental rights incompatible with the “reasonable time” requirement entailed in Article 6?

Article 6 § 1 of the Convention reads:

«1. In the determination of his civil rights and obligations [...], everyone is entitled to a [...] hearing within reasonable time by [a] tribunal»⁵.

In order to better understand the circumstances under which Article 6 is applied, it is, perhaps, worthwhile to recall the Court’s case-law on the subject, in particular *Frydlender v. France*⁶, to which the Court itself refers. The Court opined that «for Article 6 § 1, in its “civil” limb, to be applicable there must be a dispute (contestation) over a “right” that can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious. It may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Moreover, the outcome of the proceedings must be directly decisive

³ Id.

⁴ Id. §17.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms art.6 §1, Nov. 4, 1950.

⁶ *Frydlender v. France*, Application No. 30979/96, decision of 27 June 2000, ECHR GC.

for the civil right in question»⁷. In the case at issue, the parties do agree on the existence of a civil rights of “reasonable time” of a dispute but the Government «maintained that there had been two sets of proceedings of which the first set had started *vis-à-vis* the applicants on 6 June 2001 when they submitted their statements on the appeal of the Regional Environment Centre and ended with the Supreme Administrative Court’s decision on 11 February 2003, lasting thus about one year and seven months at two levels of jurisdiction. On 29 April 2005 the applicants had submitted a new application for an environmental permit which had been granted on 13 December 2005. The second set of proceedings started *vis-à-vis* the applicants on 16 February 2006 when they submitted their statements on the second appeal of the Regional Environment Centre and ended with the Supreme Administrative Court’s second decision on 19 December 2007, lasting thus close to one year and eight months at two levels of jurisdiction. In the Government’s view the two sets of proceedings had not concerned the same environmental application throughout the proceedings»⁸.

The Court’s finding rejects the Government’s exception. The Court concludes that: «both applications concerned an environmental permit which was needed for the restructuring works of the service station. In the first application the applicants applied for an environmental permit for enlarging the storage capacity of liquid fuel, in the second one they wanted to reduce the said storage capacity. The Court finds this difference, however, irrelevant as the environmental permit was needed in any event to perform restructuring works on the site, which was a precondition for that the service station could continue functioning»⁹.

The proceedings, in the Court’s view, had begun on 6 June 2001 and lasted until 19 December 2007, with the final decision of the Supreme Administrative Court of Finland. According to the Court “reasonable time” requirement should be evaluated «in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute»; since the two proceedings to obtain a permit lasted almost 7 years, and since the applicants were forced to close their activity, the Court considers the entire proceeding excessive and «failed to meet the “reasonable time” requirements»¹⁰.

⁷ *Houlttoasema Matti Ewrén and Others v Finland*, § 27.

⁸ *Id.* § 23.

⁹ *Id.* § 27.

¹⁰ *Id.* § 33.

3. Article 1 protocol 1 of the Convention.

Having considered the procedural aspect of the case, the Court focuses on the substantial aspect. Article 1 of the Protocol No. 1 of the Convention reads:

«Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law».

The applicants complain that, given the rejection of the Administrative Supreme Court, they had to close down their activity, and this tantamount to a «interference with their right to peaceful enjoyment of their possessions, and that this interference had been unlawful and disproportionate»¹¹. The Court agrees with the applicants in the sense that the rejection of their application caused them severe economic damages which could be, in theory, interpreted as an interference with their right to use their property. Nevertheless, the alleged interference was based on the Environmental Protection Act, which had the aim of practical implementation of the precautionary principle¹² and it was «sufficiently clear, foreseeable and accessible to the public»¹³. Moreover, it is true that the applicants did apply for a permit but they did not have any legitimate expectation the latter would have been granted. Yet, their activity represented a potential dangerous one for the environment and the State and the Administrative Supreme Court had to take the necessary measures to avoid the risk of environmental pollution. It is, indeed, widely accepted the position according to which the State has wide margin of discretion in the context of protection of environment. As a result, the Court concludes that a fair balance was struck between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. Therefore, there is no violation of Article 1 Protocol No.1 of the Convention.

¹¹ Id. § 35.

¹² «The precautionary principle takes account of the fact that it is often difficult if not impossible, to assess the precise impact of human action on the environment and that some actions can cause irreparable harm. It requires that if there is a strong suspicion that a certain activity may have detrimental environmental consequences, it is better to control that activity now rather than to wait for incontrovertible scientific evidence. It has been, *inter alia*, included in the Rio Declaration, and it played a role in justifying import restrictions in the WTO regime arguing that products had not been produced in a sustainable manner», in *Manual on Human Rights and Environment*, Council of Europe Publishing, 2012, p. 139.

¹³ *Matti Eurén and Others v Finland*, § 36.

4. Conclusion.

The problem pointed out in the case at hand has procedural implications rather than substantial ones. It resumes the question on the need to balance environmental protection and economic development. If it is true that the Finnish Government legislation mirrors the precautionary principle requirements to limit the risk of environmental pollution for dangerous activities, at the same time the procedure to be followed in order to obtain a permit should meet “reasonable time” requirements as enshrined in Article 6 § 1 of the Convention.

ENVIRONMENTAL RIGHTS UNDER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: NATURE AND EXTENT OF THE DUTIES OF THE STATE

Giulia Bittoni

TABLE OF CONTENTS: 1. – Introduction. 2. – The facts of the case. 3. –The legal issues. 4. – The assesment of the ECtHR. 5. – Comments on the Court’s judgment. 6. –Conclusion.

1. Introduction.

The European Court on Human Rights (hereinafter: ECtHR), in its judgment *Dubetska and Others v. Ukraine*¹, has intervened on an important case related to the duties of the State under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: European Convention).

This essay aims to stress the main aspects of this ECtHR’s decision, in particular the duties of the State regarding to the protection of environmental rights.

2. The case.

The applicants were Ukrainian nationals living in the Lviv region (Ukraine). Five applicants were member of the Dubetska-Nayda family, residing in a house built in 1933. The other applicants were member of the Gavrylyuk-Vakiv family, residing in a house built in 1959.

In 1955 the State began building a coal mine and a spoil heap near the houses of the two families. The mine began operation in 1960. In its vicinity, the State also opened a coal processing factory and a spoil heap some years later.

The operation of the mine and factory had several environmental effects. In particular, infiltration of ground water, dust concentration, polluted water, soil

¹ *Dubetska and Others v. Ukraine*, no. 30499/03, 10 February 2011.

subsidence and flooding. The expert reports of governmental and non-governmental entities confirmed these effects.

The Ukrainian authorities² repeatedly ordered the mine and the factory to adopt and take measures to improve the environmental situation. Nevertheless, they did not take actions.

On 2000, the Ukrainian Ecological Safety Commission asked the Ministry of Fuel and Energy and local authorities to ensure the resettlement of the applicant's families. This decision remained unenforced.

Consequently, the applicants brought civil actions before national courts seeking to be resettled outside the polluted zone, but, in the end, they never had been resettled. Thus, they complained before the ECtHR, alleging several personal damages. They submitted that their houses were damaged as a result of soil subsidence. They also alleged health problems related to the lack of drinkable water and to air pollution. Finally, the applicants asserted that their frustration with environmental factors affected communication between family members.

3. The legal issues.

The applicants claimed a violation of Article 8 of the European Convention.

Article 8 read as follows: «1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

In particular, the applicants complained that the State authorities had failed to protect their home, private and family life from excessive pollution generated by the two State-owned industrial facilities.

The admissibility of the application was a preliminary important issue. In accordance with the international principle of non-retroactivity of treaties, ECtHR has competence *ratione temporis* only for breaches related to the period after the entry of the European Convention into force with respect to Ukraine (11 September 1997). Thus, while the mine and the factory were built and began operation before

² In particular the Sanitary Service and the State Commission for Technogenic and Ecological Safety and Emergencies.

this date, the applicants were still living in their close proximity at the date of the European Convention's entry into force. Consequently, the Court declared its competence to examine the applicants' complaints related to the period after this date.

Then, the Court considered the facts of the case to establish if Ukraine had breached Article 8. In order to achieve its analysis, the Court had to take into consideration several conditions.

Firstly, the Court had to determine whether the complaint fell within one of the rights protected by Article 8 and whether it reached a serious level of severity.

Secondly, if a serious level of severity was reached, the Court had to establish whether the State was somehow responsible for the environmental nuisance.

Nevertheless, not all interferences on the exercise of the private and family life by the State are sufficient to constitute a breach of Article 8. In fact, paragraph 2 of this Article provides justifications to the interference of the State of the right to respect for private and family life. Consequently, the Court had to determine whether a justification existed in the submitted case and whether the State had succeeded in striking a fair balance between the interests of the applicants and the whole community. A fair balance is not struck if national law is not respected or where procedural guarantees are lacking.

4. The assessment of the ECtHR.

The Court intervened first of all on the issues of the level of severity. The judges of Strasbourg found that «the applicants were living permanently in an area which, according to both the [Ukrainian] legislative framework and empirical studies, was unsafe for residential use on account of air and water pollution and soil subsidence resulting from the operation of two State-owned industrial facilities»³. Consequently, it considered that the environmental nuisance complained about attained a level of severity.

As regards the duties of the State, the Court found the existence of a «strong enough link between the pollutant emissions and the State to raise an issue of the State's responsibility under Article 8 of the Convention»⁴. The Court took into account several elements to determine the existence of a duty of the State under Article 8. Firstly, it noted that the State was responsible of the pollution of the area.

³ *Dubetska and Others v. Ukraine*, § 118.

⁴ *Dubetska and Others v. Ukraine*, § 123.

In fact, the coal mine and the factory were owned by the State and their spoil heaps were also in State ownership⁵. Secondly, the Court underlined that the State was well aware of the environmental effects of the operation of these industries.

Finally, it remarked that the State did not have effectively supported the resettlement of the families concerned. In the Court's opinion, the resettlement of the families would have been a difficult task without State support, because of the lack of demand for houses located in the proximity of pollutant industries.

Then, the Court examined the balance between different interests struck by Ukraine. It pointed out that «in cases involving environmental issues, the State must be allowed a wide margin of appreciation and be left a choice between different ways and means of meeting its obligations»⁶.

Margin of appreciation doctrine is one of the principles guiding the interpretation of the Convention by the Court⁷. Nevertheless, the Court has not yet developed a general theory about the margin of appreciation doctrine⁸. Although the Convention does not yet explicitly mention the «margin of appreciation», the Protocol No. 15 amending the Convention contains a reference to this term⁹. Thus, the new Preamble of the European Convention will provide explicitly that the States, in securing the rights and freedoms defined in the Convention «enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention»¹⁰. However, the new Protocol does not give a definition of the «margin of appreciation». Consequently, the content of this concept has to be drawn from the ECtHR's case-law¹¹. In essence, the «margin of appreciation» refers to the discretion of the State in fulfilling their obligations

⁵ The factory was State-owned at least until 2007. In 2007 a decision was taken to allow the factory to be privatized. However, it is not clear whether the factory has been privatized.

⁶ *Dubetska and Others v. Ukraine*, § 141.

⁷ E. BREMS, *The margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, in *Heidelberg Journal of International Law*, 56, 1996, 240 and ff.

⁸ *Ibidem*.

⁹ Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 24 June 2013, not yet entered into force, CETS No. 213. The Protocol will enter into force «on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol» (Article 7 of the Protocol).

¹⁰ The Preamble will also provide that the States, «in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto» (Article 1 of the Protocol No. 15).

¹¹ As regards the ECtHR case-law related to the margin of appreciation in environmental cases, see C. HILSON, *The margin of appreciation, domestic irregularity and domestic court rulings in ECHR environmental jurisprudence: Global legal pluralism in action*, in *Global Constitutionalism*, 2013, 262 and ff.

under the European Convention¹². This margin is not always the same, but varies from case to case «according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions»¹³.

In its analysis in *Dubetska and Others v. Ukraine*, the Court focused mainly on the decision-making process. Firstly, it examined whether the authorities had evaluated the risk related to the industrial activity. Secondly, it determined if the Ukrainian authorities had developed an adequate policy vis-à-vis polluters and if they had taken all necessary measures to enforce this policy. Finally, the Court determined whether the people affected by the authorities' policy were able to participate on the environmental decision-making.

The Court noted that Ukrainian authorities conceived measures to minimizing the effects of the mine and the factory on the applicant's households. They conceived the mitigation of the pollution effects and the facility of relocation of the applicants to a safe area. Nevertheless, the Court noted that «[Ukrainian authorities] have not been able to put in place an effective solution for the applicants' personal situation»¹⁴.

In light of the above, the Court held that the private life of the applicants was affected by the operation of the two industrial facilities. Thus, it concluded for breach of Article 8 of the European Convention.

As a consequence of the breach, the Court condemned Ukrainian Government to take appropriate measures to remedy the applicants' individual situation. Additionally, the Court acknowledged the existence of the applicant's non-pecuniary damage for the reason that «the applicants' prolonged exposure to industrial pollution caused them much inconvenience, psychological distress and even a degree of physical suffering»¹⁵.

5. Comment on the Court's judgment.

The European Convention does not provide explicitly for environmental rights. Nevertheless, the ECtHR protects them by adopting a wide interpretation of

¹² See M. LUGATO, *Riflessioni sulla base giuridica del margine di apprezzamento statale nella Convenzione europea dei diritti dell'uomo*, in *Studi sull'integrazione europea*, VII, 2012, 359 and ff. See also S. GREEN, *The margin of appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, Strasbourg, 2000.

¹³ *Connors v. United Kingdom*, No. 66746/01, § 82, 27 August 2004.

¹⁴ *Dubetska and Others v. Ukraine*, § 147.

¹⁵ *Dubetska and Others v. Ukraine*, § 165.

the right to a private and family life contained in Article 8 of the European Convention¹⁶.

The *Dubetska and Others v. Ukraine* allows to understand the role of the ECtHR in the field of environmental rights. In particular, this judgment reaffirms the ECtHR's subsidiary role. In fact, the Court should only intervene as a last resort. Although it has to examine whether the national decision-making process is fair, its power to revise the decisions of the domestic authorities is exceptional.

Thus, the Court only assesses whether the public authorities have approached the problem with due diligence and have taken into account the interests of individuals affected by the national policy and the interests of the whole community¹⁷.

The public authorities must strike a (fair) balance between these interests in order to take a decision, provided for by law, proportionate to one of the legitimate aim contained in paragraph 2 of Article 8.

In striking this balance, the public authorities enjoy a wide margin of appreciation¹⁸. In fact, the Court considers that domestic authorities have a better knowledge of national environmental issues and are thus best placed to determine their environmental policy¹⁹.

In this regard, it is interesting to note that Ukraine has a legal framework regarding environmental rights. The Constitution provides the right to an environment «that is safe for life and health»,²⁰ and establishes the duty of the State to ensure ecological safety²¹.

Nevertheless, these provisions are not sufficient to exclude a breach of Article 8 by Ukraine. In the *Dubetska and Others* judgment, the ECtHR stressed the need for the State to comply with these provisions.

The *Dubetska and Others v. Ukraine* shows clearly the duties of the State related to the protection of environmental rights.

¹⁶ See D. CHAUVET, *L'effectivité d'un droit à un environnement sain sous le prisme du droit au respect de la vie privée*, in C. Colard-Fabregoule, C. Cournil (editors), *Changements environnementaux globaux et Droits de l'Homme*, Bruxelles, 2012, 254. For more information about Article 8 and about environmental protection under the Convention, see I. ROAGNA, *Protecting the Right to respect for private and family life under the European Convention on Human Rights*, Strasbourg, 2012.

¹⁷ Council of Europe, *Manual on Human Rights and the Environment*, Strasbourg, 2012, 20.

¹⁸ *Dubetska and Others v. Ukraine*, § 141.

¹⁹ Council of Europe, *Manual on Human Rights and the Environment*, Strasbourg, 2012, 31.

²⁰ Article 50 of the Constitution of Ukraine.

²¹ Article 16 of the Constitution of Ukraine.

State's obligations are not limited to the prevention of the environmental nuisance. They are extended to procedural duties. Moreover, when a State creates or allows environmental nuisance reaching a certain level of severity and violating human rights, the State must take effective measures to reduce and/or eliminate pollution or to relocate persons affected by the environmental nuisance.

6. Conclusion.

The ECtHR makes a commendable effort to grant individuals' environmental rights under a wide interpretation of Article 8. Nevertheless, it might be useful to create a specific article in an additional Protocol to the Convention, dealing with the right to a healthy environment. On other occasions, the Council of Europe has adopted additional Protocols to protect rights not contained in the European Convention. The creation of a specific right to a healthy environment could better affirm the importance of this right at international level. It could also contribute to better protect it.

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING: THE GRIMKOVSKAYA CASE

Giulia Bittoni

TABLE OF CONTENTS: 1. – Introduction – 2. The facts of the case. – 3. The legal issues. 4. – The assesment of the ECtHR. 5. – Comments on the Court's judgment. 6. –Conclusion.

1. Introduction.

In the Grimkovskaya judgment of 21 July 2011, the European Court of Human Rights (hereinafter: ECtHR) rules in a case concerning the respect of environmental rights in Ukraine¹.

The present essay focuses on the most relevant aspects of this judgment, and, in particular, on the role of public participation in environmental decision-making.

2. The facts of the case.

The applicant, Mrs Grimkovskaya², was a Ukrainian national living, at the time of the ECtHR complaint, in Krasnodon (Ukraine) with her parents and her minor son. In 1998, Ukrainian authorities consented to the M04 motorway being routed via the street in which the house of the applicant was located. Nevertheless, this street was completely unsuitable for accommodating cross-town traffic (no drainage system, pavements or proper surfacing able to support heavy lorries).

The applicant complained several times to Ukrainian authorities. She claimed that vibrations provoked by the motorway damaged her house. She also claimed for the growth of air and soil pollution and for the intolerable levels of nuisance. She alleged that her father, mother and minor son were suffering from numerous health diseases caused by these environmental problems. The applicant complained, in

¹ *Grimkovskaya v. Ukraine*, no. 38182/03, 21 July 2011.

² The applicant, Mrs Grimkovskaya, was represented before the ECtHR by her mother, Mrs Grishchenko.

particular, to the Krasnodon Court. Following the rejection of her claim, she appealed the decision. The Court of Appeal dismissed the appeal and the Supreme Court of Ukraine rejected the request for leave to appeal in cassation.

3. The legal issues.

The applicant complained that Ukrainian municipal authorities were responsible for a breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: European Convention) before the ECtHR.

Article 8 of the European Convention states that: «1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

In order to establish the applicability of Article 8 in the present case, the Court had to determine whether the environmental hazard at issue «attains a level of severity resulting in significant impairment of the applicant's ability to enjoy her home, private or family life»³.

The Court had then to examine if the authorities had struck a fair balance between the interest of the applicant and the interest of the community. The applicant's interest was related to the right to enjoyment of home and private and family life. The community's interest was connected with the economic progress of Ukraine through infrastructure development.

4. The assessment of the ECtHR.

The Court considered the severity of the detriment suffered by the applicant because of the motorway. In order to assess the level of severity, the Court had to consider all the circumstances of the case, such as the level of the noise, the damages inflicted to applicants' house and her sufferings on account of the health diseases of her parents and son. The Court noted that there was an insufficient evidence to prove all the applicants' allegations, beyond reasonable doubt. Nevertheless, it held

³ *Grimkovskaya v. Ukraine*, § 58.

that «the cumulative effect of noise, vibration and air and soil pollution generated by the [...] motorway significantly deterred the applicant from enjoying her rights guaranteed by Article 8 of the Convention»⁴.

Thereafter, the Court examined whether the Ukrainians authorities had struck a fair balance between the applicants' and the community's interests. Consequently, the Court took into consideration the decision by which the Government allowed the passage of the motorway through the street in which the applicants' home was located. Then, the Court analysed the procedural aspects of relevant policymaking related to this decision.

The Court underlined that the State has a considerable margin of appreciation in the sphere of environmental policymaking⁵. In the Court's opinion, Article 8 does not establish a duty of the State to ensure that people enjoys housing that meets particular environmental standards.

With regard to procedural aspects of policymaking, the Court made several remarks.

Firstly, it stressed the absence of an «adequate feasibility study assessing the probability of compliance with applicable environmental standards and enabling interested parties, including [...] [the applicant], to contribute their views»⁶. Secondly, the Court found out that the Government did not take measures to mitigate the negative effects of the passage of the motorway. Thirdly, the Court considered that the applicant did not have the opportunity to contest the State authorities' policymaking and it pointed out the importance of public participation in environmental decision-making by quoting the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters)⁷. This Convention focuses on interactions between the

⁴ *Grimkovskaya v. Ukraine*, § 62.

⁵ For further information about the «margin of appreciation» and the theory related to it, see G. BITTONI, *Environmental Rights under Article 8 of the European Convention on Human Rights: Nature and Extent of the Duties of the State*, published in this volume.

⁶ *Grimkovskaya v. Ukraine*, § 67.

⁷ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 June 1998, entered into force on 30 October 2001, UNITED NATIONS, *Treaty Series*, vol. 2161, p. 447. As of 7 January 2014, there were 46 Parties to the Convention: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Tajikistan, The former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland.

public and public authorities in the environmental decision-making. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding 3 main pillars: access to information, public participation and access to justice⁸. The access to information concerns both the «“passive” or reactive aspect of access to information [...], and the “active” aspect dealing with other obligation relating to providing environmental information»⁹. The second pillar provides minimum requirements for public participation in various categories of environmental decision-making. The third pillar focuses on the access to justice in different contexts regarding environmental matters¹⁰.

In particular, in the present case, the Court found that the decision of the Court of Appeal, dismissing the applicant’s claim, did not contain any reference to the evidence which served as a basis for its conclusion. Moreover, the decision of the Court of Appeal did not respond to the main arguments of the applicant. For these reasons, the Court considered itself «unable to conclude that the applicant had a meaningful opportunity to adduce her viewpoints before an independent authority»¹¹. Thus, in the Court’s eyes, a fair balance was not struck in the present case. Consequently, the Court concluded for breach of Article 8 of the European Convention and it condemned Ukraine to pay to the applicant non-pecuniary damage.

The applicant also complained for breach of Article 6 of the Convention (concerning the right to a fair trial)¹², alleging that the civil proceedings in her case had been unfair. The Court stated that it had already analysed the lack of reasoning in the domestic court under Article 8. Thus, «it is not necessary to also examine the same facts under Article 6»¹³.

⁸ L. LAVRYSEN, *The Aarhus Convention : Between Environmental Protection and Human Rights*, in P. Martens, M. Bossuyt et al.(editors), *Liège, Strasbourg, Bruxelles: Parcours des Droits de l’Homme. Liber Amicorum Michel Melchior*, Limal, 2010, 649 and ff.

⁹ *Ibidem*

¹⁰ *Ibidem*. As regards the Access to justice, see A. TANZI, E. FASOLI, L. IAPICHINO, *La Convenzione di Aarhus e l’accesso alla giustizia in materia ambientale*, Bologna, 2011. For more information about the Aarhus Convention see UNITED NATIONS, *The Aarhus Convention: an Implementation Guide*, New York, 2013, available at http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf (last visited January 2014). See also M. PALLEMAERTS, *The Aarhus Convention at Ten: interactions and tensions between conventional international law and EU environmental law*, Groningen, 2011.

¹¹ *Grimkovskaya v. Ukraine*, § 71.

¹² Article 6, § 1, insofar as relevant provides: «In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]».

¹³ *Grimkovskaya v. Ukraine*, § 77.

5. Comments on the Court's judgment.

The Grimkovskaya case confirms the ECtHR jurisprudence related to environmental rights. These rights are not explicitly included in the European Convention. Nevertheless, in line with the wide interpretation of existing articles, the violation of environmental rights can lead the Court to condemn a State for breach of Article 8.

The Grimkovskaya judgment is characterized by the attention given to procedural rights, in particular to the right to public participation in environmental decision-making. In this decision it is stated that «[...] emphasising the importance of public participation in environmental decision-making as a procedural safeguard for ensuring rights protected by Article 8 of the Convention, the Court underlines that an essential element of this safeguard is an individual's ability to challenge an official act or omission affecting [his/] her rights in this sphere before an independent authority»¹⁴. Furthermore, the ECtHR mentioned point 143 of the Dubetska judgment to stress the central importance of the public participation. In this point, the Court considered that it would likewise examine «to what extent the individuals affected by the policy at issue were able to contribute to the decision-making, including access to relevant information and ability to challenge the authorities' decisions in an effective way»¹⁵.

In *Grimkovskaya v. Ukraine* the Court quoted the Aarhus Convention three times. Firstly, the ECtHR included the Aarhus Convention within the relevant international sources concerning environmental protection. Secondly, it stressed that as of 30 October 2001 the Aarhus Convention has entered into force with respect to Ukraine. Finally, the ECtHR took into account the principles of the Aarhus Convention to determine whether Ukrainian authorities struck a fair balance between the human rights of the applicant and the interests of the community.

The Court focused on the principles of the Aarhus Convention related to public participation. Although the applicant could claim before Ukrainian courts, the ECtHR considered that the judiciary authority did not really answer to the applicants' claims and did not give her the possibility to really challenge the authority's decision affecting her rights.

It is not unusual for the ECtHR to refer to international conventions in its judgments. The Court is increasingly using international treaties to better define the

¹⁴ *Grimkovskaya v. Ukraine*, § 69.

¹⁵ *Dubetska and Others v. Ukraine*, no. 30499/03, § 143, 10 February 2011.

human rights embodied in the European Convention and the duties of the States related to this rights. The explicit reference to the Aarhus Convention shows the importance that the Court attaches to this international treaty and the links between this treaty and the European Convention.

6. Conclusion.

The Grimkovskaya judgment brings further clarification of the rights protected by the European Convention. In particular, the ECtHR affirmed the crucial role of the respect of procedural rights in environmental decision-making, according to the Aarhus Convention. It is likely in the future that the Court will increasingly refer to the principles set out in this Convention in order to extend the right to home and private and family life.

**EXTENDING THE REACH OF ARTICLE 8 OF THE
EUROPEAN CONVENTION ON HUMAN RIGHTS TO
POTENTIAL RISKS.
THE INTERESTING CASE OF *HARDY AND MAILE V. UK***

Marco Parriciatu

TABLE OF CONTENTS. 1. – The relevance of the European Court on Human Rights' case-law. 2. – The legal and factual context behind the case. 3. – The ECtHR's decision on alleged violation of Article 8 of the Convention. 4. – Conclusions.

1. The relevance of the European Court on Human Rights' case-law.

On February 2012, the European Court of Human Rights¹ (ECtHR) gave a new decision concerning environmental rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)². The ECtHR put an end to long-lasting dispute, which confronted two British nationals, Ms. Hardy and Mr. Maile, with the Government of the United Kingdom in relation to the construction and operation of two liquefied natural gas (LNG) terminals on sites at Milford Haven harbour (Wales)³, the fourth largest port in the UK.

As it has been often observed, though nothing in the ECHR deals with environmental rights directly, this has not prevented the Strasbourg Court to establish a set of obligations for State Members directly connected with environmental issues. Admittedly, the ECtHR's decisions have been of great importance in fostering human rights protection in relation to environmental issues

¹ The European Court of Human Rights is an institution set to enforce the European Convention on Human Rights. It has its seat in Strasbourg (France) and was established in 1959 on the basis of Article 19 of the Convention itself. See the official website of the Court available at: <http://www.echr.coe.int/Pages/home.aspx?p=home> (last visited December 2013).

² The European Convention on Human Rights (ECHR) was adopted in Rome in 1950 and entered into force in 1953 within the framework of the Council of Europe, the latter being an international organization encouraging co-operation between European countries. As of today, the ECHR has been ratified by 47 countries of the entire continent. The official texts of the Convention are available at <http://www.echr.coe.int/Pages/home.aspx?p=basictexts> (last visited January 2014).

³ *Hardy and Maile v. United Kingdom*, no. 31965/07, 14 February 2012.

throughout the European Continent and, in some extent, even beyond. Within this context, the meaningful and consequential development of environmental rights under the current Convention⁴ offered an undeniable degree of protection following harmful environmental factors that may affect individual Convention rights. It must be made crystal clear that such a degree of protection accorded by the Court is better understood only if the evolutive approach to interpretation of its jurisprudence is taken into due account. Changing social values have thus been reflected in the jurisprudence of the Court pursuant to the classification of the Convention as a «[...] living instrument which [...] must be interpreted in the light of present-day conditions»⁵. It is nonetheless significant that within its case-law the Court repeatedly stated that States would violate the Convention if and when an adverse environmental factor would affect individual rights set forth in the Convention, namely Article 2 (right to life)⁶, Article 8 (right to respect for private and family life)⁷, Article 6 (right to a fair hearing), Article 13 (right to an effective remedy). In other words, the Court stressed that environmental factors may have an impact on individual rights in at least three different occasions⁸: for instance in case of toxic emissions or toxic wastes, where States have a positive obligation⁹ to take all adequate initiatives as to regulate and mitigate adverse environmental nuisance that may affect human rights, the aim is to protect humans from such harmful environmental impact, granted that public authorities have a wide discretion in their decision-making process for adopting initiatives to tackle adverse factors. This is the reason why violations of the Convention must be preferably prevented or remedied at the national level, with the Strasbourg Court intervening only as a court of last

⁴ See COUNCIL OF EUROPE, *Manual on Human Rights and the Environment*, Strasbourg, 2012.

⁵ See *Tyrer v. The United Kingdom*, no. 5856/72, 25 April 1978, ECHR Series A, 26, § 31.

⁶ Article 2 of the Convention provides as follows: «1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection».

⁷ Article 8 of the Convention provides as follows: «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

⁸ COUNCIL OF EUROPE, *op. cit.*

⁹ *Ibidem*, p. 35.

resort, in accordance with the principle of subsidiarity¹⁰. Second, harmful environmental factors may give rise to procedural rights for the individual concerned: public authorities are in fact under an obligation to make available information related to environmental risks, guarantee public participation in the decision-making process and access to effective remedies in environmental cases; third, individual rights may also be restricted when necessary for the protection of the environment: it is the so-called balancing of interests, that led the Court to focus on concept of balance, necessity and degree of interference¹¹.

2. The legal and factual context behind the case.

Before exploring the merits of the case at hand, a brief summary of the circumstances as well as of the relevant legal and factual framework must be made. The British applicable regulatory framework provides for a very complex and articulated regime when dealing with industrial project construction, hazardous activities operation and disclosure of environmental information.

On the one hand, construction of LNG terminals requires a prior approval by the relevant local authority, which is entitled to grant planning permission for any development of land¹². Such a power is subject to the so-called Environmental Impact Assessment (EIA) Regulations, which gives effect to Council Directive 85/337/EEC¹³ as amended, and prohibits to accord permission to projects likely to have a significant impact on the environment unless the planning authority has taken into account the relevant environmental information and an environmental impact assessment. Also, the EIA Regulations includes an obligation for States to make available to the public, within a reasonable time, any request for development consent and any available information in order for the public to express an opinion before the decision is taken. In any case, the planning consent is always subject to

¹⁰ The principle of subsidiarity is one of the most relevant principles upon which is founded the mechanism of the Convention. According to this principle, national authorities must first guarantee the protection of human rights under the Convention and offer redress. Subsequently, the Convention mechanism as well as the European Court of Human Rights should only be viewed as instances of last resort in cases where the domestic level has failed in assuring the protection or remedy needed.

¹¹ According to the Court's case-law, "interference" means any limitation to the enjoyment of a right set forth in the Convention, though not every limitation to the enjoyment of rights amounts to a violation of the Convention, this being the case of restrictions provided for the Convention itself.

¹² See the Town and Country Planning Act 1990, section 57. Text available at <http://www.legislation.gov.uk/ukpga/1990/8/contents> (last visited January 2014).

¹³ 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 L 175, 5.7.1985.

revocation or modification by the Welsh Ministers, who have the power to direct a local planning authority to revoke or modify a planning permission if they consider it expedient¹⁴; all decisions in this respect are susceptible to judicial review.

On the other hand, the operation of LNG terminals requires also a consent granted by the Hazardous Substances Authority (HSA), which is in turn obliged to consult the Health and Safety Executive (HSE) for advice on the risks that might derive from major hazards to people residing in the surroundings¹⁵. Consent is always susceptible to be revoked or modified, to the extent that the relevant authority considers it expedient, being in any event subject to judicial review. Moreover, LNG terminals are further subject to the Control of Major Accident Hazards (COMAH) Regulations, compliance with which is supervised by the HSE and its on-site controls as to reduce the risk of major accidents to the lower level. Accordingly, the operator must set out its policy to prevent major accidents as to grant a high level of protection for people and the environment, as well as prepare a safety report subject to review and revision at five-yearly intervals. Similarly, the marine vessels carrying LNG must obtain a certification compliant with international standards under the power of supervision of the Maritime and Coastguard Agency for England and Wales. Operators and vessels are also required to be in compliance with byelaws and directions issued by the Milford Haven Port Authority (MHPA) in relation to activities covered by MHPA's statutory duties such as the use of the haven, the movement of vessels and safety of navigation¹⁶.

A bundle of other regulations such as the Port Marin Safety Code and the Dangerous Substances in Harbour Areas Regulations 1987 are also in place requiring the MHPA to establish respectively a safety management system covering marine operations (based upon a formal risk assessment) and an emergency plan (based upon a continuous process of assessment)¹⁷. Additional international standards such as those provided from the SIGTTO¹⁸ enhance the promotion of high standards and best practises in relation to shipping and terminal operations for liquefied gases by providing technical advice. In particular, the SIGTTO LNG Operations in Port Areas Best Practices highlights the risks occasioned upon collision between vessels

¹⁴ *Hardy and Maile v. United Kingdom*, cit., § 134.

¹⁵ *Ibidem*, § 11.

¹⁶ *Hardy and Maile v. United Kingdom*, cit., § 154.

¹⁷ *Ibidem*, §§ 157-159.

¹⁸ SIGTTO is the acronym for Society of International Gas Tankers and Terminal Operators Limited, a non-profit-making company. For a general overview see the company's website at <http://www.sigtto.org> (last visited December 2013).

and the consequent hazards arising from a LNG's escape to atmosphere, which would potentially cause a gas cloud with a risk of fire or explosion¹⁹. Section 1.5 of the document stresses that there has never been an incident involving a LNG tanker's containment system thanks to the exemplary safety records of this class of ship, however the risk of an LNG tankers «[...] presents a very serious residual hazard in port areas if the vital structure of the tanker is penetrated»²⁰. Section 2 suggests that in those cases a risk exposure assessment should be carried out through a Quantitative Risk Assessment (QRA) study in order to provide the operator and the Authorities with convincing information that the risk is acceptable²¹.

With regard to the disclosure of environmental information to the public, apart from the abovementioned EIA and COMAH Regulations, the UK grants the right of access to information under the Environmental Information Regulations 2004 where the public authorities shall apply a presumption in favour of disclosure except when a higher interest - such as national security or public safety - emerges. In accordance with the Freedom of Information Act 2000, the Information Commissioner has a power to enforcement in case of a public authority's failure in allowing the public access to environmental information.

Within this context, it must be now outlined the factual circumstances of the case at hand. On 2002 the relevant local authority of Pembrokeshire County Council received application for planning permission to develop an LNG terminal on a site at Milford Haven (the so-called "Dragon Site"). Attached to the planning application there was the Environmental Statement which declared that the level of risk was tolerable²². Application was submitted by Petroplus, a specialised oil refiner. The planning application was duly publicised by the local authority in order for the public to intervene in the decision-making process and HSE and MHPA were consulted as required by the law²³. In particular, the MHPA concluded that the identified and agreed means of navigation and operation «[...] more that adequately contained the risks associated with such vessels»²⁴. At the end of the process, the local authority granted the permission at the Dragon Site. The site underwent additional extensions for which the same decision-making process was duly followed as well as always

¹⁹ *Hardy and Maile v. United Kingdom*, cit., §§ 160-170.

²⁰ *Ibidem*, § 166.

²¹ *Ibid.*, § 167-168.

²² The Environmental Statement identified the risks of fire and explosion that might have occurred in handling of LNG, included a hazard identification to recognize major hazards, a QRA in relation to the identified major hazards and calculation of levels of individual and societal risk. *Ibid.*, § 18-19.

²³ *Ibid.*, § 17.

²⁴ *Hardy and Maile v. United Kingdom*, cit., § 27.

advertised and publicised. Hazardous Substances Consent was also granted. Evidence showed that the public actively took part in the whole of the decision-making process²⁵.

Some months later, on April 2003, a second application for planning permission was submitted by Qatar Petroleum and ExxonMobil as to develop a LNG terminal at another site at Milford Haven harbour (the so-called “South Hook Site”). Operators applied to the Pembrokeshire County Council and to Pembrokeshire Coast National Park Authority and instructed an Environmental Statement. MHPA, as for the earlier project at Dragon Site, expressed its support for the project while HSE did not advise against it. Besides, a letter of objection from the public was received. On November 2003, the relevant local authorities granted permission. Hazardous Substances Consent was also granted in 2004 but some concerns arose in relation to the lack of a comprehensive structure for assessing the risks of the project; operators were therefore asked to address those issues at the time of the COMAH submission²⁶. HSE and MHPA both participated in the planning and hazardous substances consent process and carried out their own risk assessments, although HSE stated that the risk of an accident at sea was beyond its competence, while the MHPA made clear that its jurisdiction included responsibilities to regulate the use of the Haven as provided for in the relevant laws and regulations.

Ms Hardy and Mr. Maile were members of an informal group of people called “Safe Haven” which opposed the construction and operation of the two LNG terminals at Milford Haven, where the applicants resided. They lodged an application with the domestic High Court for leave to apply for judicial review, challenging the decisions by which planning permission and hazardous substances consent were granted by relevant local authorities in respect of both the South Hook Site and Dragon Site. Notably, they alleged a failure in carrying out a comprehensive environmental impact assessment of the project as a whole. However, leave to apply for judicial review was rejected, *inter alia*, on the ground that the challenge was not made timely. Nonetheless, the Judge accurately motivated his decision by commenting that the applicants’ complaints were directed toward the grant of the planning permissions rather than hazardous substances consent, to which the alleged

²⁵ For example, the Director of Development of Pembrokeshire County Council recorded that strong objections had been received from the population at the time Petroplus applied for hazardous substances consent for the storage of LNG.

²⁶ *Hardy and Maile v. United Kingdom*, cit., § 60.

lack of comprehensive risk assessment pertained to²⁷. Against the refusal to accord leave to apply for judicial review, applicants lodged with an application to the Court of Appeal, but even the latter refused permission to appeal since it disagreed that the risk assessment had been inadequate and that applicants' evidence did not demonstrate any lacuna in the challenged risks assessments. At the end of 2004, MHPA was formally asked by the applicants' solicitor to give access to environmental information as well to all risk assessments, though unsuccessfully. Only on 2006 the MHPA released a copy of the Environmental Assessment as well as two reports assessing the risk of explosion and gas release from LNG vessels (the "Milne Report") and excerpts encompassing other environmental information. A fresh application seeking judicial review in respect of MHPA's persistent refusal to make available information related to risk assessments was then filed. Permission was nevertheless refused on the grounds that an alternative remedy existed by virtue of the Environmental Information Regulations 2004. Consequently, for those environmental information that were not covered by the said Regulations, applicants have failed to «[...] demonstrate an arguable case that there was an obligation to provide the information arising from a positive duty on the authority under Articles 2 and 8»²⁸ of the ECHR in as much as activities could not be considered *dangerous*²⁹ such as to give rise to an obligation under the Convention to allow public access to the relevant information. On 2008, applicants produced an expert report where the expert shared the view that there were several gaps in the risk assessments carried out and that the information collected had never been studied in a comprehensive and analytic manner.

3. The ECtHR's decision on alleged violation of Article 8 of the Convention.

In the *Hardy and Maile* case, applicants alleged that the UK's failure to meet its obligations in regulating hazardous activities as well as disclosing environmental information amounted to a violation of Articles 2 and 8 of the Convention.

According to the well-established Court's case-law, a clear and direct causal link between the hazardous activities and the impact on the individuals' lives and homes is needed as well as an assessment on whether the adverse effects have

²⁷ *Ibidem*, § 76-84.

²⁸ *Hardy and Maile v. United Kingdom*, cit., § 93.

²⁹ Emphasis added.

attained a certain threshold of harm³⁰. However, remarkably the Court decided on the applicability of Article 8 on the basis of the subject-matter at hand (*i.e.*, hazardous activities) rather than by reason of some sort of investigation about the adequacy of terminals and/or whether the risks were higher than assessed. The Court simply stated that «[i]n the circumstances [...] the potential risks posed by the LNG terminals were such as to establish a sufficiently close link with the applicants' private lives and homes [...]»³¹ under Article 8. In doing so, the ECtHR based the applicability of Article 8 by only taking into consideration that the construction and operation of an LNG terminal required environmental impact assessments as well as the carrying out of a COMAH report. As a matter of fact, in the case at hand no actual pollution occurred and the risk of gas escaping from LNG tankers was found to be very low according to all the studies carried out.

With such a choice the Court dismissed the Government's objection. For the sake of clarity, the Government alleged that Article 8 was not applicable to the case at hand in as much as applicants' allegation were confined to *potential*³² risks and that the applicants would have been under the obligation to prove that for lack of appropriate measures taken by the authorities to prevent a harmful event, the degree of probability of the occurrence of damage was such that it could constitute a violation of the Convention, provided that the marine risks that might have resulted in adverse consequences were extremely small.

The causal nexus was hence satisfied by linking the potential risks posed by hazardous activities (*i.e.*, LNG terminals) and the applicants' private lives and homes. The nature, magnitude and hazardousness of the projects have played a significant role in the reasoning of the Court. It is subsequent that, according to the ECtHR's case-law, a serious and substantial threat to the applicants' well-being requires States to take all appropriate measures to protect the rights of those concerned. By covering cases where the risk of an adverse environmental factor deriving from hazardous activities is only potential, the ECtHR lowered the threshold according to which Article 8 can be invoked and therefore secured a higher level of protection for the health and safety of those concerned.

When the Court came to decide on the substantive merits of the alleged gaps of the marine risk assessments and about the alleged lack of information, the

³⁰ Evidence is needed as to demonstrate a breach of the quiet enjoyment of private and family life. Indeed, the Court has always required at least some scientific validity of the claim that a certain activity is dangerous to the environment and/or health.

³¹ *Hardy and Maile v. United Kingdom*, cit., § 192.

³² Emphasis added.

outcomes were not so in favour to the applicants. Indeed, the Court found that the UK did not violate its obligations under Article 8 of the Convention. As regards the assessment of risks related to LNG operations, it should be observed that, according to the long-established ECtHR's case-law, States have the power to appraise the necessity for an interference³³ in the individuals' rights under the Convention and it is to the Court's competence to ascertain that domestic authorities' decisions are in accordance with Article 8. At the same time, the Court has nonetheless indicated that the decision-making process leading to the initiatives of interference must be fair and must pay due respect to the interests granted to individuals under Article 8. In the case at stake, the Court found that the UK did not violate Article 8 under this specific aspect of the issue, but why? The answer lies in the fact that applicants have not provided domestic courts with evidence demonstrating that the assessments carried out were inadequate and have limited themselves, by means of their expert report, to express the opinion that there were several gaps and that a comprehensive and convincing analysis had always been missing³⁴. But under no circumstances public authorities are required to take decisions only when comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided, the Court stated³⁵. Investigation and studies must then be adequate but comprehensive and measurable data are not required on every issue. This is even more relevant if it is borne in mind that States have been allowed a wide margin of appreciation to pursue environmental aims provided they maintain a fair balance between the general interest of their communities and the protection of individuals' rights. On the contrary, by a combination of a coherent and thorough legislative and regulatory framework regulating the construction and operation of a major hazardous project such as LNG terminals, and the lengthy and satisfactory reports and studies that assessed risks, as well as the local authorities and domestic courts' satisfaction with the provided advice by the relevant authorities, the Court found that no manifest error of appreciation was made by local authorities in assessing a fair balance between the competing interests. The legal regime in place would have always allowed applicants to challenge the consents if new evidence provide support for their claims³⁶. This is what matters most to the Court, namely the existence of

³³ See note 11.

³⁴ *Hardy and Maile v. United Kingdom*, cit., § 228.

³⁵ *Ibidem*, § 219.

³⁶ *Ibid.*, § 228.

effective remedies such as to challenge decisions in environmental issues at the domestic level.

The second aspect of the merits pertains to the alleged lack of information disclosed with regard to the risk assessments. The Court's case-law provided the terrain where applicants founded their claim, namely on the *Guerra* case³⁷ and on the *Giacomelli* case³⁸, which both corroborate the positive duties of States to grant individuals access to environmental information. For its part, the Government affirmed, *inter alia*, that the right to access to information did not extend to a right to see all the studies which had been used in the assessment process. It was sufficient that the MHPA made the public aware of its conclusions of those studies and the conclusions of its risk assessments, coupled with information in the Environmental Statement accompanying the planning and hazardous substances applications. The Court, by restating the importance of informing the public³⁹, limited the right to access to information to the *conclusions*⁴⁰ of studies and assessments carried out as well as other kind of *essential*⁴¹ (that is to say absolutely necessary) information as to allow the public to evaluate the danger to which it may be exposed. Again, the applicants' failure to demonstrate that any relevant document had not been disclosed to them along with the factual abundance of documents containing environmental information successfully disseminated by the relevant local authorities and operators, led the Court to conclude that no violation of Article 8 occurred.

4. Conclusion.

The ECtHR has reinforced the reach of the applicability of Article 8 even in cases of potential risk, by therefore lowering the threshold according to which Article 8 (*i.e.*, the right to respect for private and family life) can be invoked and thus securing a higher level of protection for the health and safety of those concerned. Moreover, the judgment restated the subsidiary nature⁴² of the machinery of the ECHR in relation to the domestic level of human rights protection. As a consequence, where the Court ascertains that States have taken all measures as to fulfil their obligation under Article 8 of the Convention, then the Court would not go

³⁷ *Guerra v. Italy*, no. 14967/89, 19 February 1998, ECHR 1998-I, no. 64.

³⁸ *Giacomelli v. Italy*, no. 59909/00, 2 November 2006, ECHR 2006-XII.

³⁹ *Hardy and Maile v. United Kingdom*, cit., §§ 245-250.

⁴⁰ Emphasis added.

⁴¹ Emphasis added.

⁴² See note 10.

to assess the substantive merits of authorities' decision unless applicants have previously exhausted all local remedies and evidence of States' failure is given⁴³. Furthermore, States fulfil their procedural obligation under Article 8 where they grant the public the *conclusions* of studies as well as other *essential* information and no contrary evidence is provided by the applicants directly to the Court.

It could be upheld, finally, that the *Hardy and Maile* case clearly showed the Court's evolutive approach in action and a positive step in the path of the environmental rights' enforcement.

⁴³ It should be borne in mind that the burden of proof in showing the non-adequacy of the decisions is, in these cases, on the applicants.

THE *DI SARNO CASE*: A SIGNIFICANT STEP FORWARD IN THE CONSTRUCTION OF THE RIGHT TO A HEALTHY ENVIRONMENT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Marco Parriciatu

TABLE OF CONTENTS. 1. – The ECtHR’s evolutionary approach and the environmental priority. 2. – The Italian public authorities’ inability to deal with the waste crisis. 3. – The violation of Articles 8 and 13 of the European Convention on Human Rights. 4. – Conclusion.

1. The ECtHR’s evolutionary approach and the environmental priority.

The protracted inability showed by the Italian public authorities (both at the local and central level) to deal with the so-called “*waste crisis*” in the Campania region amounted to a violation of human rights, the European Court of Human Rights (hereinafter ECtHR) stated in an important judgement¹ delivered in early 2012. The Court of Strasbourg condemned Italy for having breached articles 8 and 13 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms² (hereinafter ECHR). Undoubtedly the ECHR, which operates within the framework of the Council of Europe³, has played an important role with regard to the protection of individual rights throughout Europe. The ECHR is enforced, above all, by the aforesaid ECtHR, whose decisions have been of uttermost

¹ *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012.

² The European Convention on Human Rights was signed in Rome in 1950 and entered into force in 1953. As of today, the ECHR has been ratified by 47 countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Norway, Netherlands, Poland, Portugal, Czech Republic, Romania, United Kingdom, Russia, San Marino, Serbia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine. The official texts of the Convention are available at <http://www.echr.coe.int/Pages/home.aspx?c=&p=basictexts> (last visited December 2013).

³ The Council of Europe is an international organisation based in Strasbourg and whose current 47 member states are signatory parties of the ECHR.

relevance, having contributed to the continuous development of human rights and, by means of an evolutive interpretation, having expanded the initial domain of the ECHR. All 47 member States of the Council of Europe accepted the jurisdiction of the Court, by providing the latter with a truly and effective remedy for the protection of rights and freedoms the Convention guarantees. Therefore, when the Court finds that the provisions of the Convention have been infringed upon by State members, it can award compensation to the claimants (both natural and legal persons) as well as condemn States to take steps of either an individual or general character.

The jurisprudence of the Court is fundamentally based on the ECHR interpreted in light of an evolutionary approach: the Court, in fact, often refers to the Convention as a “living instrument”. Though the Convention encompasses fundamentally civil and political rights and freedoms, one may argue that none of them contains an explicit reference to environmental rights as such. In fact, nothing in the Convention deal with environmental rights. However, this situation has not prevented the Court to find its way towards the development of environmental rights⁴ under the current Convention by indirectly offering a certain degree of protection following harmful environmental factors that may affect individual Convention rights: most notably under Article 2 (right to life)⁵, Article 8 (right to respect for private and family life)⁶, Article 6 (right to a fair hearing), Article 13 (right to an effective remedy)⁷. Such ECHR environmental-related rights, being available *only* to those affected (*no actio popularis*⁸ is admitted under the Convention), include:

⁴ See COUNCIL OF EUROPE, *Manual on Human Rights and the Environment*, Strasbourg, 2012.

⁵ Article 2 of the Convention provides as follows: «1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection».

⁶ Article 8 of the Convention provides as follows: «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

⁷ Article 13 of the Convention provides as follows: «Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity».

⁸ *Di Sarno and Others v. Italy*, cit., § 80. The institution of *actio popularis* can be traced back to Roman penal law, under which a citizen could request the courts to vindicate a public interest. Nowadays, the term, which is widely used in international law, is generally understood as a lawsuit brought by a third party who acts in the exclusive interest of the public, therefore unconnected to any specific victim

(i) the State's duty to take all necessary measures to regulate and control adverse environmental problems that may affect human rights under the ECHR, (ii) the public authorities' obligation to guarantee access to information, public participation and access to justice in environmental cases, moreover (iii) in the balancing of interests, individual rights may be restricted when necessary for the protection of the environment, though the Court's cautionary approach on this issue suggests that relevant States are best placed in the balancing of interests in environmental cases.

2. The Italian public authorities' inability to deal with the waste crisis.

Notably, the *Di Sarno case* is part of such Court's evolving case-law process, which takes a step forward in the construction of environmental-related rights under the ECHR. Before analysing the merit of the case at hand, a preliminary overview of the facts that generated adverse environmental factors must be done.

The waste crisis affected the Province of Naples where a state of emergency, declared by the Italian Government, was in place from 11 February 1994 to 31 December 2009 in order to tackle the inescapable threats to the human health as a consequence of the serious problems encountered with the collection, treatment, disposal and incineration of urban waste⁹. Amongst so many measures taken during the 15-years-long state of emergency, the 1997 regional waste disposal Plan adopted by the President of the Region acting as Deputy Commissioner, provided for the construction of five incinerators, five principals landfill sites and six secondary landfill sites. Thereafter, on 12 June 1998, a call to tender for a ten-year concession for the waste treatment and disposal service in the province of Naples¹⁰ was issued. The concession was awarded to a consortium of five companies and a Contract regarding construction and management of three waste sorting and fuel production facilities as well as setting up a waste-to-energy plant using refuse-derived fuel (RDF)

applicant. There is no *actio popularis* to protect the environment as such under the ECHR, see also *Perez v. France*, no.47287/99, § 70, ECHR 2004-I.

⁹ From 11 February 1994 to 23 May 2008, the Prime Minister appointed "deputy commissioners" to manage the said state of emergency, many of whom were serving as President of the Region. From 23 May 2008 until 31 December 2009, the Head of the Civil Protection, a government official, was appointed deputy commissioner.

¹⁰ *Di Sarno and Others v. Italy*, cit., § 11-12. The tender specifications provided for the construction and management of three waste sorting and fuel production facilities as well as setting up a waste-to-energy plant using refuse-derived fuel (RDF), by 31 December 2000, as well as the management of a proper reception of the collected waste, its sorting, conversion into RDF and incineration.

was signed on 7 June 2000¹¹. An additional call to tender was issued on 22 April 1999 for a concession regarding the waste disposal service in Campania. The winning tenderer was a Consortium which established the company FIBE Campania S.p.A. and a Contract was thereafter signed on 5 September 2001¹². In the meanwhile, the temporary shutting down of the Tufino landfill site provoked the suspension of waste disposal services in the province of Naples. Meanwhile, on 22 May 2001, the collection and transport of waste in the municipality of Somma Vesuviana (a town in the province of Naples) was awarded to a consortium of several private companies, though only three years later the management of such services were assigned to a public company.

However, the mismanagement, misconduct and wrongdoing in performing the aforementioned public Contracts by the contractors, along with organized crime's infiltrations¹³, culminated in criminal investigation in 2003¹⁴, when the public prosecutor's office started to enquire into the management of the waste disposal services in Campania after the stipulation of the two public Contracts signed on 7 June 2000 and 5 September 2001. Investigations resulted in the public prosecutor's request for trial of the directors and certain employees of the companies and of the deputy commissioner who was in charge from 2000 to 2004 as well as several officials from his office, on charge 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 and activities between 2001 and 2007. Furthermore, another criminal investigation was opened in 2006¹⁵ concerning the waste disposal activities carried out during the transitional period following the termination of the Contracts¹⁶. The concerned persons were charged with conspiracy to conduct

¹¹ The Contract provided for a 300 days term, starting from April 2000, for the hand-over of the three waste sorting and fuel production facilities and 24 months, starting from a date to be established thereafter, for the waste-to-energy plant.

¹² The Contract provided for the construction and management of seven RDF production sites and two incinerators. The winner was also required to ensure the reception of the collected waste, its sorting and treatment of waste of the Campania region.

¹³ *Di Sarno and Others v. Italy*, cit., § 59.

¹⁴ *Ibidem*, § 20-25.

¹⁵ *Ibid.*, § 48-51.

¹⁶ The termination of the concession Contracts was declared by the Decree-law n. 245/2005. Nonetheless, the concessionaires were obliged to continue their activities and operations until a new contract had had adjudicated, in order to ensure the continuity of the waste disposal services, but not later than the 31st of December 2007.

trafficking in waste, forging official documents, deception, misrepresentation of the facts in the performance of public duties and organised trafficking of waste.

Notwithstanding the seriousness of the situation suffered until that moment, a fresh outbreak of the waste crisis arose from the end of 2007 until May 2008, during which thousands of tonnes of waste were accumulated in the public roads of Naples as well as many other cities and towns of the province.

It must be noted that in the meantime the European Commission brought Italy before the Court of Justice of the European Union for failure to fulfil obligations, where the Court condemned Italy twice for the violation of the European Union directives on waste matter, but with no direct substantial implications for the people living in the region. In particular, the Court of Justice held that the fact that some 700 illegal waste tips were still operating as of the date of the judgment, allowed the Court to deduct that supervision and enforcement measures were not in place¹⁷. Moreover, according to the Court, Italy failed to establish a self sufficient integrated and adequate waste management network of disposal installations, provided that in 1997 the Italian government opted for the establishment of a regional waste management¹⁸.

3. The violation of Articles 8 and 13 of the European Convention on Human Rights.

Exhausted by the institutions' incapability to sort out the long-lasting waste crisis, 18 Italian citizens, 13 of whom live while the other 5 work in Somma Vesuviana, lodged an application with the ECtHR in accordance with Article 35 of the ECHR. Claimants, on the one hand, complained that either their right to life (Article 2) and their right to respect for private and family life (Article 8) have been infringed upon by the alleged Italy's omission to take all the necessary measures to guarantee the proper functioning of the public waste collection, treatment and

¹⁷ See case C-135/05, *Commission v. Italy*, [2007] ECR I-03475. In this case, the Court condemned Italy for generally and persistently failing to enforce a number of three waste Directives. The Directives cover landfills, hazardous waste and waste. The Court condemned Italy for the violation of Articles 4, 8 and 9 of Directive 91/156/EC, Article 2 para. 1 of Directive 91/689/EC and Article 14 lett. a)-c) of Directive 1999/31/EC.

¹⁸ See case C-297/08, *Commission v. Italy Republic*, [2010] ECR I-01749. The Court of Justice declared that Italy acted in breach of Directive 2006/12/EC during the waste crisis that affected Naples in 2007. Moreover, the Italian authorities acknowledged their failure and described the waste crisis as the result of a «widespread phenomenon in Campania run by sectors of organized crime». According to the Court, Italy violated Articles 4 and 5 of Directive.

disposal services, as well as the State's failure in adopting and putting into effect proper legislative and administrative policies. Notably, the pollution levels caused by the alleged State's responsibility would have posed a serious threat to the claimant's health and lives. On the other hand, applicants alleged that the Italian authorities' failure to put in place initiatives as to safeguard their rights, as well as the retard of the Italian judiciary in prosecuting the accused, amounted to a violation of Articles 6 (right to a fair hearing) and 13 (right to an effective remedy).

Beyond the issue of waste crisis *per se*, the *Di Sarno case* has significant implications especially with regard to the extent of States' responsibility under the ECHR. The Court proceeded with the examination of the case by dismissing the Government's preliminary objection concerning the status of "victims": in the Government's opinion, the applicants did not demonstrated to have lived or worked in proximity of landfill sites or waste stockpiles where the adverse factors could cause a damage to their health and wellbeing. According to the Court, the crucial element in determining the status of victims of a violation of Article 8 paragraph 1 is the existence of a harmful effect on a person's private and family life and not simply a general deterioration of the environment. In reality, the environmental damage complained of by the applicants had been such as to directly affect their own wellbeing since the town of Somma Vesuviana was hit by the waste crisis¹⁹, provided that for the Court the applicants were forced to live and work in an environment polluted by the piling-up of rubbish, a situation that led to a deterioration of their quality of life amounting to a violation of their right to respect for private life and family life under Article 8 paragraph 1 of the ECHR²⁰. One may argue that, in the reasoning of the Court, the link between the adverse environmental factors and the claimant's personal situation – where the first must have a true impact on the second one – seems here more suggested than proven. In fact, the Court seemed to pay attention more on identifying the factors that caused the large-scale difficulties in the management of waste disposal and the consequences suffered by the population of the entire region rather than limiting itself to assess their impact on each of the claimants. In doing so, the Court seems to admit that the adverse environmental factors that lead to a violation of the Convention can be grounded on the situation suffered by the whole population of Campania on a larger scale. The collective nature of the application promoted by 18 claimants seems to lead the Court to an implicit

¹⁹ *Di Sarno and Others v. Italy*, cit., § 80-81.

²⁰ *Ibidem*, § 108.

acceptance of a sort of environmentally sound *actio popularis*²¹ in relation to a local dimension. If confirmed, such an approach would inevitably narrow the border line between the notion of “general deterioration of the environment” – which is unlikely to violate the Convention *per se* – and the notion of “harmful effect on a person’s private or family life”, which is the only one upon which a violation of the Convention may occur. Undoubtedly, the nature of a collective complaint would create a sort of cumulation of different individuals rights aiming at the protection of *each* private or family life’s sphere, whose tendency would underpin the materialization of a right to the general protection of the environment *per se* considered within the local dimension where the group of claimants lives.

Another relevant aspect of the *Di Sarno case* is related to the Government’s alleged non-exhaustion of all domestic remedies as required by Article 35 paragraph 1²². The Court refused such preliminary objection on the basis that even admitting that an action for compensation might *in theory*²³ have resulted in compensation for the claimants, it would not have resulted in the removal of rubbish from the streets and other public places in practice²⁴; nor the Government had cited any civil, administrative or criminal court decision awarding compensation for damages in similar cases²⁵. In other words, the right to an effective remedy under Article 13 requires the existence and effectiveness of relevant remedies enabling the applicants to raise their complaints with the national authorities, whose absence in the domestic judicial framework amounted to a violation of the Convention causing Italy’s condemnation for having breached its obligations under Article 13²⁶.

However, the genuine core of the *Di Sarno case* is represented by the Court’s decision to examine the case in the light of Article 8 (right to respect for private or family life) observing a well-established case-law²⁷ and according to which adverse environmental factors may affect the wellbeing of those concerned and therefore

²¹ See note 8.

²² The Government maintained that claimants could have brought an action for compensation against the concessionaires in order to seek redress for the damage suffered because of their failure in performing the public contracts. *Di Sarno and Others v. Italy*, cit., § 82.

²³ Emphasis added.

²⁴ *Di Sarno and Others v. Italy*, cit., § 85-90.

²⁵ See on this point the dissenting opinion of Judge Sajò, who stated that it was impossible for Italy to demonstrate that an effective remedy existed without grating domestic courts a reasonable lapse of time to examine the case.

²⁶ *Di Sarno and Others v. Italy*, cit., § 118.

²⁷ COUNCIL OF EUROPE, op. cit.

their enjoyment of private and family life²⁸. Along with the Court's scrutiny on the fulfilment of positive obligations of protection against harmful activities and access to relevant information by the States, the said jurisprudence requires the Court to ascertain whether a causal link between the activity and the impact on the individual and whether the adverse effects have attained a certain threshold of harm exist. Evidence is therefore needed to demonstrate a breach of the quiet enjoyment of private and family life²⁹, though claimants are not required to prove a clear and direct causal link between the adverse factors and health problems. In the case at hand, applicants did not lament about any medical disturbance linked with their exposure to waste nor the Court could find that the claimants' health had been jeopardized³⁰. The Court came to these conclusions also on the basis of conflicting scientific studies produced by the parties in order to prove the existence of the above said causal link. In other words, in the *Di Sarno Case* no definitive evidence has been offered as to illustrate an infringement of Article 8 so as to constitute a danger to applicants' lives and health. Notwithstanding, the Court has remarkably held that constraining applicants to live and work in an environment polluted with the piling-up of rubbish at least from the end of 2007 until May 2008 has caused a general deterioration of their quality of life as well as a damage to their right to respect for private and family life and therefore a violation of article 8³¹. In doing so, the Court established a lower threshold to fall within the scope of the abovementioned Article 8.

As it has been pointed out above, States have not only a general obligation to protect individuals against external unmotivated interference with private life but also a set of positive obligations stemming from Article 8, that must be put in place by States themselves when dealing with harmful activities³². The positive obligation implies, as a corollary, procedural rights such as granting the public access to all relevant information allowing it to evaluate the danger to which it may be exposed³³, participation in decision-making processes and access to justice³⁴. Provided that the

²⁸ *Di Sarno and Others v. Italy*, cit., § 104-107. See also *Guerra v. Italy*, no. 14967/89, 19 February 1998, ECHR 1998-I, no. 64.

²⁹ See *López Ostra v. Spain*, no. 16798/90, 9 December 1994, ECHR, series A, 303 C.

³⁰ The conclusion of the ECtHR explicitly diverges from the one delivered by the Court of Justice of the European Union in the case *European Commission v. Italy*, case C-297/08 § 55-56 where the judges of Luxembourg held that a significant accumulation of waste on public roads or in temporary storage sites was liable to expose the population to a health risk. *Di Sarno and Others v. Italy*, cit., § 108.

³¹ *Ibidem*, § 108.

³² *Ibid.*, § 106.

³³ *Ibid.*, § 107.

³⁴ It should be noted that, remarkably, the ECtHR makes explicit use of an international instrument as the UNECE Convention on Access to Information, Public Participation in Decision-making and

management of waste collection, treatment, disposal and incineration fall within the domain of hazardous activities, under these circumstances States are under a positive obligation to take all necessary and reasonable measure to guarantee the protection of individuals' right to respect for private or family life and, in general terms, to a healthy and sound environment³⁵. Public authorities are therefore compelled to adopt adequate legislative and administrative policies with regard to the phases of authorization, activation, operation as well as safety policies as to exercise an effective protection of citizens' life³⁶. This obligation applies also to cases where the environmental harm derived from the private sector's activities (that being the case of Somma Vesuviana from 2000 until 2008), whereby Italian public authorities' can not be relieved from their responsibilities in exercising institutional supervision on those harmful activities under Article 8 of the Convention³⁷. Hence, by omitting for a long-lasting period to ensure the regular functioning of a complex and articulated process such as the waste management in the town of Somma Vesuviana, Italy violated the applicants' right to respect of their private lives and their homes³⁸. From this point of view, the Court attributes to waste management activities and their proper functioning a compulsory nature under the Convention in order to guarantee the protection of rights encompassed by the ECHR.

In spite of applicants' complaint concerning the lack of information in relation to harmful activities, the Court held that Italy has fulfilled its obligation to inform those concerned (included the persons affected) about the potential risks they were exposing themselves to by continuing to live in Campania, by publishing two studies in 2005 and 2008 commissioned by the civil emergency planning department³⁹: no violation of such a procedural right was therefore found by the Court.

Access to Justice in Environmental Matters also known as the Aarhus Convention; it was signed in Aarhus (Denmark) on 1998 and entered into force on 2001. The scope of the Aarhus Convention is to grant the public procedural rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice, but not the right to healthy environment as such. As of today, the Aarhus Convention has been ratified by 46 countries. Official texts of the Convention available at: <http://www.unece.org/env/pp/treatytext.html> (last visited December 2013). *Ibid.*, §§ 76 and 107.

³⁵ *Ibid.*, § 110.

³⁶ *Ibid.*, § 106.

³⁷ *Ibid.*, § 110. See also *López Ostra v. Spain*, cit.

³⁸ *Ibid.*, § 112.

³⁹ *Ibid.*, § 113.

4. Conclusion.

The dynamic and evolutive approach of the ECtHR's jurisprudence with regard to the environmental protection, whilst nothing in the text of the Convention makes reference to this subject, is nowadays very relevant in contributing to foster public awareness on the necessity to include new provisions enshrining environmental rights. Over the decades, the tireless interpretative activity of the ECtHR has finally come to put the environmental imperative at the forefront of its priorities.

By elevating the regular operation of the service for the collection, treatment and disposal of waste as necessary under the Convention, whose responsibility falls on public authorities of each State party, the *Di Sarno case* provides a further step towards the development of environmental rights under the current ECHR. Moreover, such an outcome takes even a stronger European surplus echoes given that both the Luxembourg and Strasbourg courts acted together here, although their approaches are not identical for obvious reasons. In any case, this interaction is remarkably significant also with regard to the use of international sources such the Aarhus Convention of 25 June 1998⁴⁰.

It could be affirmed, finally, that the future of environmental protection within the European continent, as a result of such judicial voluntarism, goes ahead under the best auspices.

⁴⁰ See note 34.

ENVIRONMENTAL NUISANCES IN THE RECENT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Eleonora Branca

TABLE OF CONTENTS: 1. – General Principles. 2. – The case Martínez Martínez and Pino Manzano v. Spain: the positive obligation of the State. 3. – The case Flamenbaum and others v. France: the negative obligation of the State.

1. General Principles.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not envisage a right to a sound, quiet and healthy environment as such. Other international legal instruments contain more specific and detailed environmental rights as, for example, the 1972 Stockholm Declaration¹, the 1981 Banjul Charter², the 1992 Rio Declaration³ and the 1998 Aarhus Convention⁴.

Nevertheless, the jurisprudence of the European Court of Human Rights (ECtHR) recognizes that in some cases environmental damages may affect directly the individual rights enshrined in the Convention, namely the right to respect for private and family life (Art. 8), the right to life (Art. 2) and the right to property (Art. 1 of Protocol n. 1).

1 *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/Conf.48/14/Rev. 1(1973), June 1972.

2 *The African Charter on Human and Peoples' Rights*, UNTS vol. 1520, no. 26363, 27 June 1988.

3 *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992.

4 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, UNTS vol. 2161, p. 447. Art. 1 of the Convention envisages the «the right of every person of present and future generations to live in an environment adequate to his or her health and well-being». For a perspective on environmental protection and human rights see also A. BOYLE, *Environment and Human Rights*, in *Max Planck Encyclopedia of Public International Law*, paras 16-18 and A. BOYLE, *Human Rights and the Environment: Where Next?*, in *The European Journal of International Law*, 23, 2012, 613 and ff.

In particular, the right to respect for private and family life represents the main path chosen by the ECtHR to secure some level of protection in environmental nuisances matters. The jurisprudence of the Court lays especially on the interpretation of the right to respect of everyone's home as set for in Art. 8, para 1⁵. In fact, the ECtHR has held that «the individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference»⁶.

Keeping a clear distinction between the right to life and the right to private and family life, the Court further specifies that a serious risk of environmental damage can infringe upon the enjoyment of the right granted by Art. 8 of the ECHR even without constituting a serious danger to the health of the individual in point⁷. Moreover, to constitute a breach of this right the environmental risk or damage must be direct and of a certain gravity, involving the private sphere of the individual. On the contrary, it cannot merely consist in a general situation of environmental deterioration⁸. In order to determine the threshold of gravity, the Court operates a case by case assessment taking into account the intensity and duration together with the physical and psychological consequences of the nuisances⁹.

The right to respect for private and family life calls on the Member State to comply with a twofold obligation: on the one hand, the State has the negative obligation to abstain from any interference in the private sphere of individuals, with the exception of actions provided for by law and necessary to achieve a public interest¹⁰; on the other hand, the State has the positive duty to set for adequate

5 ECHR, Art. 8, para 1: «Everyone has the right to respect for his private and family life, his home and his correspondence».

6 ECtHR, *Moreno Gómez v. Spain*, no. 4143/02, § 53, 16 November 2004. For a comprehensive analysis of the relevant jurisprudence of the European Court of Human Rights see A. MOWBRAY, *Cases, Materials, and Commentary on the European Convention on Human Rights*, Oxford, 2012, in particular at 549-557.

7 See, in particular, ECtHR, *Lopez Ostra v. Spain*, no. 16798/90, § 51, 9 December 1994.

8 ECtHR, *Martínez Martínez et Pino Manzano v. Spain*, no. 61654/08, § 42, 3 July 2012.

9 See, *ex pluris*, ECtHR, *Mileva and others v. Bulgaria*, nos. 43449/02 and 21475/04, § 90, 25 November 2010.

10 According to Art. 8, para 2 an interference by a State does not constitute a breach of the Convention when it «is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

regulations of the private sector activity to ensure the protection of the right in point.

With particular regard to the negative obligation, it must be noted that a wide margin of appreciation to determine the appropriate measures to ensure the respect of the Convention in environmental matters is afforded to the State. In other words, the Member State is entitled to strike the fair balance between the interests of the individual and the interests of the community as a whole. It has to be highlighted, however, that a wide margin of appreciation is not synonym of unappealable determination. In fact, the decision of the State which constitutes the interference in the claimant's right to private and family life, can be subjected to the review of the Court. In its judgment the ECtHR is entitled to assess, on the one hand, the merits of the State's decision and, on the other hand, the decision-making process undertaken to issue the given decision. As far as it concerns the merits, the Court investigates whether the measures adopted by the public authority were in compliance with domestic law and whether they were necessary to pursue a legitimate aim consisting in a public interest (e.g. economic well-being, public safety, etc.). In relation to the decision-making process, the Court considers, in the first place, if the State's decision has been preceded by appropriate field studies and inquiries; in the second place, if the relevant information have been made available and if the public has been allowed to submit observations to the public authority; in the third and last place, if the domestic system of the State under consideration provides for administrative and judicial remedies against the decisions of the public authorities¹¹.

On the condition that all these requirements are met, the ECtHR will conclude that the decision adopted by the public authority is striking a fair balance between individual and common interests and that the State has not exceeded the limits of its margin of appreciation. Therefore the interference of the public authority with the private sphere of the individual will have to be considered lawful and it will not constitute a breach of the right to respect for private and family life.

2. The case *Martínez Martínez and Pino Manzano v. Spain*: the positive obligation of the State.

Mr Martínez Martínez and Ms Pino Manzano are Spanish citizens living in

¹¹ ECtHR, *Flamenbaum and others v. France*, nos. 3675/04 and 23264/04, § 134-138, 13 December 2012.

the town of Redovan, in the province of Alicante. They built their house on a site earmarked for industrial use and the property was actually used also as textile workshop. The house is located 200 meters far from a stone quarry which, in October 1996, started to be exploited by a company that had obtained all the necessary permits from the municipality.

Since 1998, the couple brought several cases before various administrative and jurisdictional authorities, including the Constitutional Court, maintaining they were suffering from sleep disorders and other related disturbs as consequence of the noise and dust pollution caused by the quarry's exploitation.

In 1999, the claimants lodged a criminal law case denouncing an alleged environment crime related to the activity of the quarry. In the context of this criminal proceeding, the Nature Protection Department of the *Guardia Civil* issued a report establishing that night-time, inside the house of the couple, the noise level was four to six decibels above the legal limit of 30 decibels; while day-time the noise level respected the legal limit. As it concerns the dust pollution, the report found a layer just in the textile workshop, while no dust suspension was detected in the house. The criminal law case was thus dismissed as there was no evidence of an environmental offence.

Later, Ms Manzano and Mr Martínez sued the municipality of Redovan before the High Court of Justice of Valencia seeking compensation for the damages suffered from noise and dust pollution. The case was dismissed on several grounds: first, the municipality had acted lawfully concerning the authorization and supervision of the quarry's activity and second, as demonstrated by the police report, the nuisances denounced by the couple were not of sufficient gravity to submit a legitimate claim for damages.

Eventually, Mr Manzano Manzano and Ms Pino Martínez lodged an *amparo* appeal with the Constitutional Court, claiming the violation of the right to respect of home and the right to fair trial. The appeal was declared inadmissible.

Thus, the claimants filed the application before the ECtHR on 22 may 2008, maintaining that Spain has violated their right to life (Art. 2), their right to respect for private and family life (Art. 8) and their right to fair trial (Art. 6)¹².

As to the juridical qualification of the case, firstly, the Court has deemed more appropriate to examine the complaint only under the perspective of Art. 8, excluding the relevance of Art. 2¹³; secondly, it has pointed out that the case

12 ECtHR, *Martínez Martínez and Pino Manzano v. Spain*, cit.

13 *Idem*, § 24.

concerned the positive obligation of the State, not the mere negative obligation to abstain from interferences. In other words, the application was related to the alleged inactivity of the public authority in regulating the private activity that infringed upon the claimants' rights, not to the interference of the State in the private sphere¹⁴. In fact, according to the claimants' defence, Spain had breached their right to respect for private and family life (and home) by not preventing the quarry's activity that had caused the environmental nuisances.

The ECtHR has then recalled the general principles, mentioning in particular the interpretation of Art. 8 as the right to respect for everyone's home, which includes also the freedom from not concrete or physical entries such as noise, emissions, smells or other forms of interference¹⁵.

The reasoning of the Court develops along three main issues: in the first place, whether the environmental nuisances (noise and pollution) affected directly the claimants; in the second place, whether the nuisances have to be considered of a certain gravity, in the third and last place, whether the behavior of the public authority has to be judge as inactivity, for the purpose of Art. 8.

Concerning the nuisances, the Court accepted that Mr Martínez Martínez and Ms Pino Manzano had been directly affected by the noise pollution as the quarry was active 19 hours a day. But, regarding the gravity of the disturbances the Court, relying on the report of the Nature Protection Department of the *Guardia Nacional*, has held that the noise level in the couple's home was only 4 to 6 decibel above the legal limit. In considering this issue, the Court gave great importance to the circumstance that the house of the claimants was situated in an industrial area and, above all, to the fact that they had built it in violation of the domestic town planning regulation. The judges have therefore declared that Ms Pino Manzano and Mr Martínez Martínez have placed themselves in an unlawful situation and they have to bear the consequences thereof.

As to the alleged inactivity of the public authority, the Court has affirmed that the State had acted lawfully when issuing the permit for the quarry exploitation and had supervised promptly the quarry activity. Moreover the State had always taken into consideration the claimants' complaints, notwithstanding their unlawful situation. The Court has thus concluded that Spain had complied with its positive obligation to provide for adequate regulation and supervision of the private activity for the purpose of Art. 8 of the Convention.

14 *Idem*, § 44.

15 See *supra*, p. 1

For these reasons, the ECtHR has found that there had been no violation of the applicants' right to respect for private and family life in relation to the environmental nuisances caused by the quarry exploitation; as a consequence, the Court has not considered the alleged violation of Art. 6 of the Convention¹⁶.

3. The case *Flamenbaum and others v. France*: the negative obligation of the State.

Mr Flamenbaum and the other 18 applicants are inhabitants of Deauville in the Normandy region of France. Their houses are located between 500 meters and 2,5 kilometers away from the Deuville-Saint Gatien airport. In 1993 the main runway of the airport was extended to 2,550 meters to allow a more intensive exploitation of the site for commercial, touristic and military purposes.

The claimants have maintained this extension had caused an increase of noise disturbance in the surrounding area, affecting the quiet enjoyment of their houses and determining a decrease of the market value of their properties.

The events that had preceded the application to the ECtHR consisted of a long series of administrative orders and measures followed by related judicial review proceedings before the competent Administrative Courts. The present synthesis will mention only the facts strictly relevant to the judgment of the European Court of Human Rights.

The extension of the runway was authorised by a decree of the prefect of Calvados, which was in accordance of a previous authorisation by the Prime Minister of the general airport's aeronautical constraints clearance plan. Before issuing the decree, the prefect ordered a firm of experts to carry out an impact-assessment study on the effects of the planned works on the physical and biological environment, on the human activities sector as well as on noise nuisances. The study resulted in a positive evaluation of the planned extension, stressing in particular the economic benefits for the overall economy of the region. The prefect also ordered a public inquiry on the same subject-matter. The inquiry was carried out in 6 district councils and, as the previous study, it offered a positive assessment of the expansion of the airport. As to the noise disturbances, the public inquiry affirmed that the extension would not have determined a great increase of air traffic, nonetheless it suggested the stop of military training flights and the limitation of night-time take-offs.

¹⁶ ECtHR, *Martínez Martínez and Pino Manzano v. Spain*, cit., § 53.

Following these reports, in March 1991, the prefect authorised the extension of the runway to only 2,550 meters, instead of to the initially planned 2,720 meters.

The applicants then, constituted as association of local residents called “ADRAD”¹⁷, appealed the decree before the Caen Administrative Court claiming that the studies were insufficient as they did not envisaged the measures required to limit the noise disturbances. The case was dismissed as well as the appeal before Nantes Administrative Court of Appeal.

The works of extension were completed in October 1993 and the renewed airport became operational one month later.

In July 1994 the “ADRAD” lodged another complaint with the competent Administrative Court, requesting - *inter alia* - the appointment of an expert to determine whether the extension of the runway had generated an increase in air traffic and, as a consequence, in noise disturbances. This request was upheld by the Court and the expert was appointed with the mandate to conduct precise noise measurements. The expert presented his report in October 1997, recording, though a decrease in general air traffic, an increase in heavy traffic. He thus set a new noise exposure plan and recommended operational measures to be taken by the airport.

In 1998, on the basis of this last report, the claimants brought another case before the Administrative Court claiming for compensation for the damages suffered in relation to the enlargement of the airport. The application was dismissed on several grounds: in the first place the expert was deemed to have carried out the measurements not on adversarial basis and to have exceeded his mandate in setting a new plan, which was not required by the Court. In the second place, the Court found that the heavy air traffic, that allegedly caused the increase of noise disturbance, was not different from the one before the extension of the main runway. Therefore the nuisances denounced by the applicants cannot be considered a consequence of this extension. The appeal to this decision was dismissed by the Court of Appeal and the related appeal before the Council of State was declared inadmissible.

In January 2004 Mr Flamenbaum lodged the application with the ECtHR and the other 18 applicants submitted their application in June 2004. The cases were then joined by the Court. The claimants maintained France had breached their right to respect for private and family life (Art. 8) in consequence of the noise nuisances caused by the extension of the Deauville airport. They also affirmed Spain had violated their right to protection of property (Art. 1, Protocol n. 1) in relation to the

¹⁷ The acronym stands for: “Association de défense des riverains de l’aéroport de Deauville-Saint Gatien” (Association for the defence of the local residents of Deuville-Saint Gatien airport).

decrease of the market value of their houses affected by the noises caused by the airport¹⁸.

It must be highlighted that the case concerns the negative obligation of the State to abstain from any illegitimate interference with the individual right to respect for private and family life enshrined in Art. 8 of the ECHR. The interference would consist in the series decisions of the public authorities that had led to the extension of the main runway of the airport¹⁹.

It is worth to mention that, after the applications were lodged, the prefect of Basse-Normandie approved a new noise exposure plan in 2008 and one year later, the authorities implemented a new plan to reduce the noise of the air traffic, limiting the flyover of local residences.

In order to adjudge the case, the Court has had to verify, firstly, whether the environmental disturbances had directly affected the claimants; secondly, whether the nuisances suffered had been of sufficient gravity; thirdly, whether the interference of the public authority that had allowed the extension of the airport runway was legitimate.

Noting that the applicants were living from 250 to 2,500 meters from the Deauville airport and considering that it was not contested by the French government that the level of noise generated by the air traffic was high, the Court has established that the environmental nuisances had affected directly the claimants and that the disturbances had been of sufficient gravity to call upon the application of Art. 8 of the Convention²⁰.

As to the legitimacy of the interference, the Court has assessed whether the State had struck a fair balance between collective and individual interests, respecting the limits of its margin of appreciation²¹. For this purpose, the Court has evaluated both the merits and the decision-making process of the measures of the public authorities regarding the extension of the airport.

In relation to the merits, the Court has inquired whether the decisions had been issued in compliance with domestic law and whether they were necessary to pursue a legitimate aim consisting in a public interest. Relying on the rulings of the French Administrative Courts, the ECtHR has concluded that the decisions in point were law abiding, as they had been taken in full compliance with the prescribed

18 ECtHR, *Flamenbaum and others v. France*, cit.

19 *Idem*, § 141.

20 *Idem*, § 140.

21 See *supra*, p. 2.

procedures. Moreover, the Court has stated that the impact-assessment studies had proved the positive outcome of the airport extension for the economic well-being of the region. Therefore the decisions of the public authorities were aimed at seeking a public interest: i.e. the economic well being of the region.

As far as it concerns the decision-making process, the Court has observed that the administrative decisions had been preceded by several impact-assessment reports and by a public inquiry. Furthermore, the information related to the planned extension had been made available to the public that had been also entitled to submit observations to the inquiry commission. Eventually, the applicants had been granted access to justice both for the judicial review of the decisions of the public authorities and for compensation claims.

The Court has thus found that the interference of the French public authorities with the applicants' right to respect for private and family life were legitimate, as the State had struck the fair balance between individual and the common interests. Therefore there had been no violation of Art. 8.

Regarding the alleged breach of the right to property (Art. 1 of Protocol n. 1), the Court has recalled that its current interpretation does not grant the right to keep property in a pleasant environment. Further, the ECtHR has affirmed that the applicants had failed to give evidence of the drop in the market value of their property. In particular, the Court has held that the claimants had not complied with the Court's request to provide for more detailed allegations concerning the market price of theirs and similar properties, nor they had given evidence of the causal link between the extension of the airport runway and the decrease in the value of their dwellings.

The ECtHR has thus concluded that there had been no violation neither of Art. 1 of Protocol n. 1 of the Convention.

**THE TWO “BANKS” OF TRANSBOUNDARY
WATERCOURSES: ECONOMIC INTERESTS AND
ENVIRONMENTAL PROTECTION.
THE CASE OF PULP MILLS ON THE RIVER URUGUAY**

Ludovica Chiussi

TABLE OF CONTENTS: 1. – The facts: the construction of the mills and the obligation to inform. 2. – The judgment of the ICJ: which implications for the breach of procedural obligations? 3. – A Commentary: the EIA and the principle sustainable development.

1. The facts: the construction of the mills and the obligation to inform.

On May 4th 2006 Argentina submitted a claim against the Eastern Republic of Uruguay before the International Court of Justice (ICJ)¹, concerning the authorisation and the construction of two pulp mills on the River Uruguay. The River Uruguay² is an international natural boundary between Argentina and Uruguay, as it is recognized by the bilateral treaty signed by the two States in 1961 at Montevideo³. In particular, Article 7 of the Montevideo Treaty states that the parties must establish a regime in order to set the use of the river. Henceforth it was in 1975 that Argentina and Uruguay signed the Statute of the River Uruguay⁴, providing specific measures for the “regime” mentioned by the Montevideo Treaty. The Statute has the purpose of establishing «[t]he joint machinery necessary for the optimum and

¹ The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN), established in June 1945 by the Charter of the United Nations. The Court, (which is composed of 15 judges elected by the General Assembly and the Security Council), settles legal disputes submitted to it by States. It also gives advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

² River Uruguay is a transboundary watercourse. According to Art. 1 of the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 Mar 1992, entered into force 6 Oct 1996), “transboundary waters” «means any surface or ground waters which mark, cross or are located on boundaries between two or more States».

³ Treaty of Montevideo, Argentina-Uruguay, 7 April 1961, 635 UNTS 9074.

⁴ Statute of the River Uruguay, Argentina-Uruguay, 26 February 1975, 1295 UNTS 340.

rational utilization of the River Uruguay[...]»⁵ and of guaranteeing the safeguard of the river ecosystem.

In order to ensure a mutual administration of the common boundary, Article 49 of the Statute sets up the Administrative Commission of the River Uruguay (CARU), composed of an equal number of representatives of each State.

Among CARU's central responsibilities there are the safety of navigation on the River Uruguay, the prevention of pollution and the coordination of consultations between the two States with regard to the activities on the river. Thus, Article 7 of the 1975 Statute states that «[i]f one Party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the regime of the river or the quality of its waters, it shall notify the Commission [...]»⁶.

On May 14th 2003, Uruguay's National Directorate for the Environment (DINAMA) transmitted to CARU the documents submitted by the CMB⁷ regarding the Environment Impact Assessment (EIA)⁸ for the construction of a pulp mill on the left bank of the River Uruguay. After discussing the conditions of the EIA, CARU asked for more information, and meanwhile CMB obtained an initial environmental authorization from MVOTMA⁹, which promised CARU to send shortly a report on the project. Twenty days after, the initial EIA document was sent to Argentina, which then forwarded it to CARU. Almost six months later the Ministers of Foreign Affairs of the two States met. CARU scheduled an extraordinary meeting that took note of the ministerial understanding of the project, although later on the parties dispute the exact content of it. CARU approved a plan for monitoring water quality in the area of the pulp mills and in November 28, 2005 Uruguay authorized the preparatory work for the construction of the pulp mill. However, on September 21, 2006, CMB announced its intention to abandon the project.

The other pulp mill subject of dispute involved a plant built by the Finnish Company Botnia¹⁰, which has been operating since 2007. In 2004, Botnia submitted

⁵ Statute of the River Uruguay, Art. 1.

⁶ Statute of the River Uruguay, Art. 7.

⁷ Celulosas de M^Bopicuá S.A. (CMB), is a company formed by the Spanish company ENCE (Empresa Nacional de Celulosas de España).

⁸ The Environment Impact Assesment (EIA) is a procedure that entails considerations of potentially harmful consequences of a planned activity on the environment, before authorising the implementation of the project.

⁹ Uruguayan Ministry of Housing, Land, Use Planning and Environmental Affairs.

¹⁰ The Finnish company Oy Metsä-Botnia AB formed the two companies Botnia S.A. and Botnia Fray

to Uruguayan authorities a request for an environmental authorization to build a pulp mill on the left bank of the River Uruguay. Botnia representatives met several times with CARU members, who expressed the need for more information and made the same request also to Uruguay. At the beginning of 2005, MVOTMA granted Botnia the initial authorisation, which raised some questions at the CARU meeting. Indeed Argentina questioned whether the procedural rules under the 1975 Statute were being respected. In May 2005, after a meeting between the Presidents of the two States, a High Level Technical Group (GTAN) was created to solve the dispute arising from both CMB and Botnia Mills. Against this background, in July 2005 Uruguay had already authorised the construction of a port adjacent to the Botnia plant, a chimney and concrete foundations of the mill. After frequent requests issued by the Argentinean President to suspend the construction, in August Uruguay's President ordered the suspension of 90 days for CMB and 10 days for Botnia. On January 31st 2006, Uruguay stated that GTAN's negotiations failed, followed by a similar declaration made by Argentina few days later. On May 4th 2006, Argentina brought the case before the ICJ whilst Uruguay authorised Botnia to extract and use water from the river for industrial purposes.

Argentina claimed that, by authorizing the construction of the CMB mill and the construction and commissioning of the Botnia Mill, Uruguay had engaged its international responsibility to it. In particular, according to Argentina, Uruguay violated the obligations under 1975 Statute and other rules of International law, including:

1. the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay (ex art. 1 of the 1975 Statute);
2. the obligation to comply with the procedural duties imposed by the system of cooperation set by Articles 7 to 12 of the Statute of the River Uruguay, such as previous notification to CARU and consultation with Argentina;
3. the obligation to provide an exhaustive environmental impact assessment (EIA) before authorizing the construction of the mills;
4. the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution, and the obligation to protect biodiversity and fisheries (ex Article 36 and 41 of the 1975 Statute).

As a result, Argentina asked Uruguay to cease its wrongful conduct, to make full reparation for the injury caused by the breach of the incumbent obligation and to

Bentos S.A for the construction of the pulp mill.

provide guarantees of future compliance with the Statute of the River Uruguay.

2. The judgment of the ICJ: which implications for the breach of procedural obligations?

In this legal dispute that lasted for more than four years, two decisions on interim measures and the final judgement rendered by the ICJ provided relevant developments for international environmental law to point out. First, on July 13, 2006 the ICJ denied Argentina's request of provisional measures, which asked Uruguay to order the suspension of the construction of the mills. According to the Court, Argentina failed to prove that the construction of the mills posed an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or alternatively to the economic and social interest of the riparian inhabitants of the Argentine side of the river¹¹. Again, on January 23, 2007 the ICJ rejected Uruguay's request for provisional measures, based on the claim that some Argentine citizens had blocked a bridge over the river Uruguay, causing economic damages to the activities at the border. The Court found that those blockades did not cause any irreparable prejudice to the rights of Uruguay in the case¹².

After the incidental proceedings, on April 20th, 2010 the ICJ delivered its judgment on the case. The jurisdiction of the ICJ was based on Article 60 of the Statute of the River Uruguay, where the parties agree that any dispute concerning the application of the Treaty (which cannot be solved by negotiations), can be submitted by either State to the Court. The claims filed by Argentina were based on the grounds of breach of both procedural and substantive obligations of the Statute of the River Uruguay. According to Argentina, the non-compliance with the cooperation system set by Articles 7 to 12 implied the violation of the scope of the Statute set by Article 1 and the failure to comply with the duty to «protect and preserve the aquatic environment and, in particular, to prevent its pollution»¹³. In particular, the Court had to determine whether the violation of the procedural obligations amounted to the breach of substantive ones. The Court stated that the even though substantive and procedural duties «complement one another

¹¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p.113.

¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, p. 3.

¹³ Statute of the River Uruguay, 1975, Article 41.

perfectly»¹⁴, and there is a functional link between them, they still require separate consideration. Indeed complying with procedural obligations does not necessarily involve the fulfilment of the substantive ones and vice versa.

With respect to procedural duties the Court found that «the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute»¹⁵. The Court analysed the role of CARU, stating that «it is far from being a merely transmission mechanism between the parties»¹⁶, since it entails a preliminary assessment on whether an activity might cause significant damage to the river. Therefore, the failure to transmit the appropriate information to CARU does not only constitute a breach of the Statute, but also of the principle of prevention¹⁷. According to this principle, «[...] a State is thus obliged to use all of the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State»¹⁸. A breach of procedural duties has occurred also with regard the duty to inform Argentina, which did not receive full details of the plan before Uruguay granted the initial authorisation. The obligation to notify the environment impact assessment of the project is intended to create the conditions for successful cooperation between the parties and the EIA has to be transmitted before the initial authorisation to construct is issued. Hence the exchange of data regarding the measures to be taken in order to avoid transboundary impact is a central part of the general obligation to cooperate set by Article 8 of the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses (hereinafter referred to as the 1997 UN Watercourses Convention)¹⁹.

For the above-mentioned reasons the Court recognized that Uruguay did not notify CARU and Argentina before authorising the construction of the mills and

¹⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, *I.C.J. Reports 2010*, p. 14, para.77.

¹⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, cit., para.81.

¹⁶ *Ibid.*, para.87.

¹⁷ The principle of prevention establishes a State's responsibility to ensure that activities within its activity or control do not cause damage to the environment of other States or to areas beyond national jurisdiction or control. See Principle 21 of Stockholm Declaration on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14, at 2 and Corr.1 (1972) and Principle 2 of Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I.

¹⁸ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, cit., para.101.

¹⁹ United Nations Convention of the Law of Non-Navigational Use of International Watercourses, (UN Watercourses Convention), signed in New York on May 21, 1997, not entered into force yet.

therefore breached its procedural duties.

After ruling the violation of procedural obligations by Uruguay, the Court turned to the alleged violation of substantive obligations under the Statute signed by the two States in 1975. Once restricted its jurisdiction to the allegation of pollution connected to the river (and excluding noise, bad odours and air pollution from its jurisdiction), the Court recalled that *onus probandi incumbit actori*²⁰. According to this well-known principle, Argentina had to demonstrate the alleged violations of substantive obligations under the 1975 Statute. The alleged violation was the breach of the duty to guarantee an «optimum and rational utilization of the river», as imposed by Article 1 of the Statute. Argentina claimed that Uruguay failed to coordinate with it on measures necessary to avoid ecological change, and failed to take the measures necessary to prevent pollution, as it is prescribed by Article 41 of the 1975 Statute. The Court recognized that the principle of *optimum and rational utilization* constitute the basis of the system of cooperation established by the Statute. However, although it «informs the interpretation of the substantive obligations, it does not alone lay down specific rights and obligations for the parties»²¹. The Court held that the achievement of such an objective requires «a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other»²². Despite several dissenting opinions of the judges concerning the way technical evaluations²³ on prevention of pollution were made, the Court found that there wasn't any proof of the breach of article 41 by Uruguay.

Eventually the Court considered that «its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina»²⁴. According to the Court, the dismantling of the Orion

²⁰ This rule, which is recognized by all legal systems, asserts that it is for the party who asserts a proposition of a fact to prove it. Argentina instead claimed the reversal of the burden of the proof, in conformity with the *precautionary* approach. According to the precautionary principle, if an action or policy has a *suspected* risk of causing harm to the environment, it has to be avoided. The burden of proof that the activity is not harmful falls on those taking an action. See Principle 15 of 1992 UN Rio Declaration on Environment and Development.

²¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, cit., para. 173.

²² *Ibid.*, para.175.

²³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, declaration of Judge Yusuf.

According to Judge Yusuf, the Court should have resorted to expert assistance, (as provided in Article 50 of its Statute), in order to gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the Parties.

²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, cit., para. 269.

(Botnia) mill would not constitute an appropriate remedy for the breach of procedural obligations based on two reasons: 1) Uruguay was not under no-construction obligation after the expiration of the period for negotiation and 2) Argentina was unable to prove any violation of substantive duties.

3. A Commentary: the EIA and the principle sustainable development.

The issue raised in the environmental dispute between Argentina and Uruguay award *Pulp Mills* as one of the most relevant cases of international environmental law ever decided by the ICJ. Although the majority of controversial points are linked to the interpretation of the Statue of River Uruguay, this is not simply a case about a river treaty. Starting from an interpretation of the 1975 Treaty, the ICJ analysed and pointed out central notions of international environmental law, among whom the principle of sustainable development and the environmental impact assessments (EIA) are the most significant contributions.

That of sustainable development is without doubts one of the milestones of international environmental law. Its role of mediating paradigm between current economical needs and environment protection is already singled out by its definition as «development that meets the needs of the present without compromising the ability of future generations to meet their own needs»²⁵. Argentina totally embraced the definition, recalling that «[o]ne of the key elements of the principle of sustainable development is that meeting the developmental needs of current generations must not jeopardize the well-being of future generations»²⁶.

With regard to water law, the UN Watercourses Convention, in its Article 5 asserts that «[...] an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse»²⁷. The principle of equitable and reasonable utilization has to be interpreted, according to Article 5 of the 1997 UN Watercourses Convention, as the right of co-riparian States to a qualitatively equal use of the river, taking into account socio-economical factors. This is the background in which the Court tried to strike a balance between the economic

²⁵ UN, World Commission on Environment and Development (WCED), Brundtland Report *Our Common Future*, Transmitted to the General Assembly as an Annex to document A/42/427 - Development and International Cooperation: Environment, August 4, 1987.

²⁶ Memorial of Argentina, para. 3.

²⁷ UN Watercourses Convention, 1997, Article 5.

use of the River Uruguay and the protection of the river consistent with the objective of sustainable development. When affirming that each party is entitled to make equitable and reasonable use of the shared river for economic and commercial activities in accordance with Articles 1 and 27 of the Statute of the River Uruguay, the Court made a crucial reference to the concept of sustainable development. Hence Article 27²⁸ was found to represent the connection between equitable and reasonable utilization of a shared resource and the balance between economic development, human health and environmental protection. The Court recognized «[t]he need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States»²⁹.

It is not the first time that the ICJ found itself dealing with the concept of sustainable development. In the *Gabcikovo-Nagymaros* case (1997), which also concerns the interpretation of a treaty on the utilization of a transboundary watercourse (the Danube), the Court, after recalling that the «need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development», added that «[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty».³⁰ However, despite persistently mentioning sustainable development, the Court didn't clarify its function in the judgment, avoiding the complex debate on its legal value.

With respect to the Environment Impact Assessment (EIA), it is the first time that, at international judicial level, it is unequivocally stated that the EIA is required in cases of significant transboundary risk. The Court, as a matter of fact, found that although neither Argentina or Uruguay are parties to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context³¹, the Statute of the River Uruguay has to be interpreted «in accordance with a practice, which in recent years has gained so much acceptance among states that it may now be taken as a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial

²⁸ Article 27 of the Statute of the River Uruguay states that «[t]he right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in articles 7 to 12 when the use is liable to affect the regime of the river or the quality of its waters».

²⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Order of 13 July 2006*, cit. para 80.

³⁰ *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7.

³¹ UNECE, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), signed on February 25th 1991, entered into force on September 10th, 1997, 30 ILM 802.

activity may have a significant adverse impact in a transboundary context»³². The importance of the case is related to the fact that the Court essentially considers the EIA as a requirement of general international law in relation to shared watercourses. The EIA's role, as international custom, is thus to ensure consideration of the adverse effects of a planned activity on the environment. Despite recognizing its value, the Court did not determine the exact content of the EIA, underlying that «it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment»³³.

Through the EIA the Court understands the “no-harm principle”³⁴ postulated by the 1997 UN Watercourses Convention as a due diligence³⁵ obligation to avoid the harm, rather than an absolute obligation of result. This means that the harm caused doesn't necessarily have a central role in determining State responsibility, giving thus way to State diligent behaviour in preventing the harm. Hence, the role of EIA is considered critical to guarantee that all the environmental matters are taken into account *before authorising a project*, especially to the end of that *equitable and reasonable utilization* of the river, which is at the very heart of sustainable development.

In light of the critical role played by the EIA, it sounds reasonable to question whether its nature is merely procedural. If we accept that the EIA's function, together with the other cooperation duties set by Article 7 to 12 of the 1975 Statute, is to identify potential environmental hazards of a project, it becomes hard to draw a line that separates procedural duties from the substantive ones. This is confirmed by the fact that the 1975 Statute doesn't mention different legal effects for the two categories of obligations. Besides the UNECE Convention on the Protection

³² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, cit., para. 204.

³³ *Ibidem*, para. 205.

³⁴ “No harm” is a customary principle of international environmental law. See the United Nations Convention of the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention), New York, 1997. Article 7 requires that States, «in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States».

³⁵ Due Diligence is a general principle of international law, imposing an obligation of conduct on the subjects of International law. With regard to environmental law, it requires States to take appropriate measures in order to prevent transboundary harm and to minimize the risk of harmful consequences on the environment. See International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, 1998.

and Use of Transboundary Watercourses and International Lakes (UN Water Convention) numbers the EIA among the measures that should be adopted in order to «prevent, control and reduce transboundary impact»³⁶. Hereafter the Court itself, by underlying that it is by cooperating that the States can jointly manage the risks of damage to the environment, recognizes that the protection of the environment and the observance of procedural obligations are closely intertwined. In light of the above, as singled out by the dissenting opinion of Judges Simma and Al-Khasawneh, the decision to deal with substantive and procedural duties separately it is not easy to accept without reservations. The Court missed a golden opportunity to clarify the entity of interdependence between the two categories. If the cooperation machinery had been fully respected, «[i]t could have led to the choice of a more suitable site for the pulp mills. Conversely, in the absence of such compliance, the situation that was obtained was obviously no different from a *fait accompli*»³⁷. The lack of cooperation by Uruguay actually had an impact on the project, since it didn't allow the parties to look together at the effects on the environment, as it is prescribed by the Court itself in the *Gabcikovo-Nagymaros* case.

In conclusion, the steps taken by the ICJ towards the crystallization of crucial principles of environmental protection are unquestionably significant. However, a further effort could have been made in order to apply these concepts to the facts object of the dispute between Argentina and Uruguay. The Court decided not to specify the hybrid role of the EIA in the environmental protection of the River Uruguay. Secondly, it restricted its reference to the principle of sustainable development, without really going to the heart of it.

Sustainable development, equitable and reasonable utilization and the EIA have been amply embraced by the ICJ and by the subjects of international law. However, the ability to find an interface of these -often clashing- concepts, will be the next sensitive challenge of international water law.

³⁶ UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Article 3.

³⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Dissenting opinion of Judges Al-Khasawneh and Simma, para 26.

THE COSTA RICAN REQUEST OF PROVISIONAL MEASURES IN ORDER TO PREVENT AN IRREPARABLE PREJUDICE FOR THE ENVIRONMENT AND THE ICJ ORDER OF 8 MARCH 2011

Maria Sole Verruso

TABLE OF CONTENTS: 1. – Facts of the case. 2. – Request for the indication of provisional measures. 3. – The order of clearing out the disputed terror and exception for Costa Rican civilian personnel for environmental urgent reasons. 4. – The most interesting separate opinions. 5. – Conclusions.

1. Facts of the case.

On the border of Costa Rica and Nicaragua a small parcel of territory named Isla Portillos is located. It is the neck of a headland known also as Harbour Head near the Caribbean coastline. The most important characteristic of the area is the rainforest covering all over the Isla and for that reason the site of wetland had been designated as site of international importance under the Ramsar Convention on Wetlands¹. The Ramsar Convention is the only global environmental treaty addressed to a particular ecosystem. The mission of the Convention is the sustainable use of the wetlands, the protection and conservation of wetlands biodiversity, embracing fish as well as birds' species and habitat².

Recently, the site of Isla Portillos, very important from an environmental point of view, became the subject of a territorial dispute between Costa Rica and Nicaragua. As a matter of fact, Costa Rica decided to bring proceedings to the International Court of Justice (ICJ) on 18 November 2010, claiming that Nicaragua with its armed military forces had violated its rights of sovereignty having occupied

¹ The Convention on Wetlands of International Importance especially as Waterfowl Habitat is an international treaty for the conservation and sustainable utilization of wetlands. It is named after the city of Ramsar in Iran, where the Convention was signed in 1971. See the text in UN Treaty Series No. 14583, and at the official website of the Ramsar Convention http://www.ramsar.org/cda/en/ramsar-documents-texts/main/ramsar/1-31-38_4000_0__ (last visited December 2013).

² M.D. EVANS, *International Law*, Oxford, 2010, 600.

Isla Portillos. In addition, Costa Rica claimed that the construction of a canal and associated works on Isla Portillos made by Nicaragua were violations of international law due to the detrimental effect on the environment.³ Costa Rica stated that the «ongoing and planned dredging and the construction of the canal will seriously affect the flow of the water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region»⁴.

2. Request for the indication of provisional measures.

When Costa Rica filed its Application in the Registry of the Court, it also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of the Court.

In fact, the Statute includes a power of the Court to «indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party»⁵. The aim of a provisional measure is the preservation of the respective rights of the parties pending the ICJ decision and, therefore, the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible. There must be a threat to the rights of a party that is immediate in the sense that the final decision in the case could come too late to preserve those rights. If therefore it is to be expected that the case will have been decided before irreparable injury is caused, no measure will be indicated⁶.

Costa Rica asked the indication of provisional measures requiring Nicaragua to withdraw its troops and other personnel from the disputed area and cease any construction work, felling of trees, dumping of sediments and the dredging of the nearby River⁷. In particular, referring to the construction of the artificial canal across Isla Portillos over the entirety of which Costa Rica believed it was sovereign, Costa Rica contended that the defendant was destroying an area of primary rainforest and fragile wetlands in its territory. On the other hand, referring to the dredging operations on the San Juan River over which Nicaragua is sovereign, Costa Rica

³ J. HARRISON, *Significant International Environmental Cases: 2011-12*, in *Journal of Environmental Law*, 24, 2012, 559.

⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, ICJ Report 2011.

⁵ Article 41, Statute of International Court of Justice annexed to the Charter of the United Nation.

⁶ M.D. EVANS, *op. cit.*, 602.

⁷ J. HARRISON, *op. cit.*, 1.

stated it had regularly protested to Nicaragua and called on it not to carry out such works «until it can be established that the dredging operation will not damage the Colorado River or the Costa Rican territory»⁸. During the hearings, Nicaragua affirmed that the activities denounced by the applicant had taken place on Nicaraguan territory without any risk of irreparable harm to Costa Rica.

3. The order of the Court.

The Court delivered its Order on provisional measures on 8 March 2011. First of all, the Court affirmed that it had *prima facie* jurisdiction over the dispute adding that Costa Rica had made a plausible case that its rights were threatened by the actions complained of. In particular, the Court underlined the fact that, before deciding whether or not to indicate such measures, there was no need to satisfy itself in a definitive manner that it had jurisdiction as regards the merits of the case.

Analysing the Costa Rican request of cessation of the dredging programme to the detriment of its territory in violation of international law, the Court held that it had not been shown on the evidence presented by Costa Rica that the dredging was creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the San Juan River. Furthermore, the Court pointed out the need of 'imminent' risk, absent in the case, in order to indicate provisional measures.

Afterwards, the Court examined the stated violation of the Costa Rican rights of sovereignty over the island on the score of the construction of the canal by Nicaragua (including felling of trees, clearing of vegetation, removal of soil and the diversion of waters from the San Juan River) and its connection with permanent changes to the environment. The Court believed that provisional measures preventing Nicaragua from undertaking these activities were unnecessary since Nicaragua had given assurances to the International Court of Justice that the work had come to an end.

For this reason, the Court concluded that, in circumstances of the case as they were at the time, there was no need to indicate the measures requested by Costa Rica in its submissions and, in particular, that «Nicaragua shall not [...] engage in the construction or enlargement of the canal, fell trees or remove vegetation or soil,

⁸ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the indication of Provisional Measures, Summary Order of 8 March 2011, I.C.J. Summary 2011, 3.

dump sediment»⁹.

In the last paragraph of the Order, the Court indicated provisional measures ordering both parties to abstain from sending troops or personnel to the border area in order to prevent any kind of tensions. This provisional measure was indicated unanimously. However, the Court added a not unanimously supported exception whereby Costa Rica has been entitled to send civilian personnel to monitor any potential environmental damage to Isla Portillos. The Court pointed out that Costa Rica was internationally obliged to protect the area due to the presence of a wetland of international importance designated under the Ramsar Convention. The ICJ also specified that any visits by Costa Rica environmental personnel could be made only if necessary to prevent prejudice and after having consulted the Secretariat of the Ramsar Convention and given prior notice to Nicaragua¹⁰.

4. Some significant Declarations of the ICJ judges.

The exception indicated by the Court, whereby Costa Rican personnel in particular situations could be dispatched to the disputed area, was not approved by Judges like Skotnikov or Xue. In particular, Judge Xue in her Declaration pointed out that «[t]o allow one Party to dispatch to the disputed area personnel, even civilian and for environmental purpose, would very likely lead to undesired interpretation of the Order prejudging on the merits of the case, and, more seriously, it may incline to aggravate the situation on the ground». She also added that «[w]ith the good intention to prevent irreparable prejudice to the wetland for the protection of the ecological environment, the Court could have, pending the final decision on the merits, in my view, indicated the measure to both Parties with the assistance of the Secretariat of the Ramsar Convention, which is fully in line with the object and purpose of the Convention and at the same time devoid of any possibility of involving the merits of the case»¹¹.

Other interesting considerations are those stated by Judge Greenwood. In his Declaration, he affirmed that he «would have preferred the Court to have gone further than it has done in requiring the Parties to co-operate with each other, and with the Ramsar Secretariat, to guard against the risk of irreparable environmental

⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 paras. 73.*

¹⁰ *Ivi* p.561.

¹¹ Declaration of Judge Xue, at 53.

damage, recognizing that the disputed area cannot be entirely separated from the lagoon for these purposes». He also explained his personal opinion declaring that «an appropriate measure would have been one which required both Parties to attempt, in co-operation with the Ramsar Secretariat and taking account both of the Convention and the guidelines on co-operation to which the Ramsar advisory mission refers in its report, to devise and implement a set of protective measures. [...] Both Parties have assured the Court of their concern for the protection of the wetlands in this area. In practice it seems likely that that goal can only effectively be achieved by a co-operative approach and, pending the judgment on the merits in the present proceedings, the Parties need to look beyond their differences to co-operate in devising measures to guard against the risk of environmental damage»¹². The need of international cooperation to manage interconnected natural resources is underlined also in the Declaration of Judge *ad hoc* Guillaume. He pointed out that the protection of the environment in the Isla Portillos could not be separated from protection of the environment in the adjacent territories falling under the undisputed sovereignty of one State or the other part, and that it would have been preferable to entrust that protection to both States acting jointly¹³.

5. Conclusions.

The ICJ indicated provisional measures in order to avoid the escalation of tension in the dispute area. The Court indicated measures whereby the situation could not be worsened. Actually, it specified the possibility for civilian Costa Rican personnel to be dispatched to the territory only if it was necessary to avoid irreparable prejudice to the environment.

The Court chose not to grant provisional measures requested by Costa Rica to prevent Nicaragua from undertaken dredging operations in the main San Juan River adjacent to the disputed area. Costa Rica argued that Nicaragua was attempting to divert the flow of the San Juan River into the newly constructed river channel cutting across the neck of Isla Portillos and into Laguna Los Portillos. Nevertheless, the Court held that it could not be concluded from the evidence presented that the dredging was creating a risk of irreparable prejudice to Costa Rica's environment or that any such risk of irreparable damage was imminent, stressing the absence of two legal parameters for indicating provisional measures. The Court concluded its

¹² Declaration of Judge Greenwood, paras 15.

¹³ Declaration of Judge Guillaume, paras 19 ff.

decision by calling on both parties just to refrain from any provocative acts that may perpetuate the dispute. However, many observers have underlined that it is unclear whether Nicaragua's dredging activity might be qualified as such a «provocative act»¹⁴.

¹⁴ICJ *decides on provisional measures in Costa Rica-Nicaragua dispute*, in *Boundary news*, available at https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=11700&href=%2Fibru%2Fnews%2F&resubj=Boundary+news%20Headlines, 9 march 2011 (last visited January 2014).

THE WTO DISPUTES ON CHINESE NATURAL RESOURCES AND THE EU LITIGATION STRATEGY IN THE LIGHT OF THE LISBON TREATY

Elisa Baroncini

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1. Introduction.

On 23 July 2012, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) established a single panel to examine the complaints brought by the United States, the European Union and Japan against the Chinese export

restrictions on rare earth elements (REEs), tungsten and molybdenum¹. The controversy is very sensitive for at least three series of reasons: a) the economic and strategic relevance of the materials involved in the dispute (rare earths being essential, in particular, for high-tech information, military, and green industry); b) the difficult balance to find between mining and trading REEs while protecting the environment and thus respecting the principle of sustainable development enshrined in the Preamble of the Agreement establishing the WTO; c) the challenging task of defining the relation of the WTO-plus obligation to eliminate export duties, characterizing China's accession to the Marrakech system, with the multilateral public policy exceptions clause enshrined in GATT Article XX.

In this essay, we intend to offer a presentation of the above listed salient aspects of the *China – Rare Earths* controversy in the light of the recent *China – Raw Materials* case². In particular, we will concentrate on the necessity, for the Geneva jurisdictional pillar, to revisit the highly problematical conclusions reached last January by the Appellate Body (AB) in on the applicability of GATT Article XX to China's WTO Accession Protocol (AP). We are, in fact, convinced that the new

¹ *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for the Establishment of a Panel by the United States*, WT/DS431/6, 29 June 2012; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for the Establishment of a Panel by the European Union*, WT/DS432/61, 29 June 2012; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for the Establishment of a Panel by Japan*, WT/DS433/6, 29 June 2012. See G. ANDORNINO, *La controversia sulle "terre rare" si globalizza*, in *Orizzonte Cina*, July 2012, 2-3; *Disputes Roundup: Australian Plain Packaging Faces Third Challenge*, and *Rare Earths Panel Established*, in *Bridges Weekly Trade News Digest*, 25 July 2012; also WTO Press Release, *Panel Established on China's Rare Earths Exports*, 23 July 2012.

² Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012; Panel Report, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*, WT/DS394/R and Corr.1, WT/DS395/R and Corr.1, WT/DS398/R and Corr.1, adopted 22 February 2012 as modified by Appellate Body Report (WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R). For an analysis of the *China – Raw Materials* dispute see E. BARONCINI, *La politica cinese sulle esportazioni dinanzi al sistema di risoluzione delle controversie dell'OMC: il report del Panel nel caso China – Raw Materials*, in *Cuadernos de Derecho Transnacional*, Vol. 3, No. 2 (2011), 203-248, <http://www.uc3m.es/cdt>; E. BARONCINI, *Obblighi WTO-Plus, tutela dell'ambiente, della salute e preservazione delle risorse naturali: il Report del Panel nel caso China – Raw Materials*, in *Diritto comunitario e degli scambi internazionali*, 2011, 627-678; J.H.J. BOURGEOIS, *China and the WTO Dispute Settlement Mechanism*, in *Opinio Juris in Comparatione*, 2011, Vol. 2, Paper 2, 25 and ff.; J.F. DEMEDEIROS, *Global Trade Law – China's Export Restraints Found to Be Inconsistent with its Obligations as a Member of the World Trade Organization – China-Measures Related to the Exportation of Various Raw Materials*, WT/DS384/R, WT/DS395/R, WT/DS398/R, (July 5, 2011), in *Suffolk Transnational Law Review*, 2011, 101-117; J.Y. QIN, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, in *Chinese Journal of International Law*, 2012, 237-246; S.E. ROLLAND, *China-Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute*, in *Asil Insights*, Vol. 16, Issue no. 21, 19 June 2012.

mineral trade dispute may be positively – and durably – settled only if the under regulated area of WTO law on export restrictions is adequately addressed also at political level: and such a target may, of course, be considerably fostered, inspired and supported by a well-balanced interpretative activity of the WTO judiciary. Consequently, we will try in this essay to propose a different perspective on the way in which GATT public policy exceptions and China's Accession Protocol should be connected, grounding our suggested interpretative approach on each of the hermeneutic elements for treaty interpretation codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties³.

Finally, we will devote the last part of our essay to suggest that a litigation strategy entirely devoted to assess Chinese export restrictions on rare earths from the point of view of their alleged discriminatory and protectionist nature should be followed by the European Union in order to properly implement the principles of free and fair trade, sustainable development, and the commitment to the promotion of multilateral solutions to common problems, now codified in the Lisbon Treaty to guide the international action of Europe. Beyond fully respecting EU primary law principles for EU international action, such a different litigation strategy, entirely focused on substance instead of devoting considerable energy on the institutional topic of the availability of GATT Article XX to justify violations of the WTO-plus obligations, could also prove to be more fruitful with the strong Asian counterpart. In fact, recognizing the applicability of GATT Article XX to China's Accession Protocol rules would allow the Chinese ruling class, who fought to persuade Beijing to be full Member of the WTO system also accepting WTO-plus obligations, to show at national level that Marrakesh multilateral trade law is sustainable and flexible enough also with reference to WTO-plus duties, thus smoothing the conditions for win-win political negotiations on access to natural resources at EU/China bilateral level as well as at multilateral WTO level. Furthermore, the concrete application of GATT Article XX to Chinese export duties would impose a deep, detailed and severe analysis of Beijing legislation on natural resources under the very demanding requirements of the GATT general exceptions clause, a joint analysis in bilateral consultations and within the WTO system which could considerably promote a balanced settlement of one of the current thorniest issues for the global governance for sustainable trade.

³ *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, in *UNTS*, Vol. 1155, p. 331.

2. Facts of the new WTO dispute: the strategic relevance of rare earth elements for high-tech industry, the global monopoly of China and the supply difficulties for the manufacturing countries.

Having unique heat resistant, magnetic and phosphorescent properties, rare earths are critical ingredients for many high-tech information, military and green industrial goods -including medical equipment, lasers, laptops, cellular phones, flat screens and displays (LED, LCD, plasma), wind turbines, engines for electric and hybrid vehicles, energy-efficient bulbs, aircraft, satellite, and missile guidance systems.

In spite of their name, REEs are not rare, but widespread in the earth's crust. Their production, however, is almost exclusively concentrated in the People's Republic of China (PRC). In fact, Beijing currently extracts between 95 to 97 percent of REE world's supply⁴, providing also for the successive stages in the mining industry -i.e. smelting, separating and refining. China therefore holds the firm and undisputed global monopoly of rare earths. Such overall supremacy on these strategic supplies has been realized in particular in the last two decades⁵, as in 1990 PRC produced only 27% of REE total world output⁶: China overexploited its natural resources -amounting only at 30 percent of world rare earth reserves- exporting them also at cut-rate prices, with the consequence of driving out foreign competition, as third countries' mining plants frequently chose to close because of the too high costs brought about by the very demanding environmental and labour legislations imposed by industrialized States⁷.

While high-tech industries based in the US, the EU and Japan became particularly vulnerable to Beijing mineral policy⁸, China started suffering because of the environmental degradation and resource depletion provoked by its REE overexploitation. The Asian Country therefore began, in the second half of the last

⁴ *Times Topics – Rare Earths*, *The New York Times*, 13 March 2012.

⁵ It is very famous the Deng Xiao Ping's 1992 assertion that «the Middle East has oil; China has rare earth» reported *inter alia* by C. MAY, *Is America About to Become Even More Dependent on China? The Case for Domestic Rare Earth Elements (REEs) Exploration and Excavation*, National Policy Analysis No. 608, May 2010.

⁶ See P.K. TSE, *China's Rare-Earth Industry*, *US Geological Survey Open-File Report 2011-1042*, at p. 2.

⁷ On these aspects see E. BARONCINI, *La politica cinese sulle esportazioni dinanzi al sistema di risoluzione delle controversie dell'OMC: il report del Panel nel caso China – Raw Materials*, in *Cuadernos de Derecho Transnacional*, 2011, 203-248, available at <http://www.uc3m.es/cdt> (last visited December 2013); ID., *Obblighi WTO-Plus, tutela dell'ambiente, della salute e preservazione delle risorse naturali: il Report del Panel nel caso China – Raw Materials*, in *Diritto comunitario e degli scambi internazionali*, 2011, 627-678.

⁸ See K. BRADSHAW, S. CLIFFORD, *China Consolidates Grip on Rare Earths*, *The New York Times*, 16 September 2011; *WTO Suit Won't End China's Rare Earth Monopoly - Interview to Jeffery Green*, *The Critical Metals Report*, available at <http://www.theaureport.com/pub/na/13106>, 17 April 2012 (last visited May 2012).

decade, to limit rare earth exports, with the intention of reducing mining without cutting supplies to its domestic downstream factories – which, on the contrary, Beijing aims at developing and strengthening, incentivizing foreign companies in investing on and transferring know-how to Chinese industries.

The supply difficulties faced by the most technologically advanced non-Chinese companies in obtaining Beijing natural resources significantly worsened in 2010, following the intensification of the diplomatic dispute between Japan and China on the sovereignty over the Diaoyu or Senkaku Islands⁹. Subsequent to the imprisonment by the Japanese authorities of the captain of a Chinese vessel fishing in the waters of the disputed Islands¹⁰, China decided a marked 40% reduction on exports of rare earths¹¹. Such a move once more negatively affected the REE global supply market, with a very sharp increase of the prices of rare earths at international level¹² that, combined with a considerable lowering of REE domestic costs, amounting on average to nearly half of international prices, also created significant competitive advantages for the Chinese manufacturing industry to the detriment of foreign competitors¹³. Many foreign producers, therefore, have been even induced and are still under a considerable pressure to move their operations –together with jobs, investments and technologies- in China, as carrying on manufacturing in the original seats is too expensive and uncertain because of the unreliability of Beijing REEs at reasonable prices¹⁴.

⁹ China calls the Islands Diaoyu, while Japan uses the name Senkaku. On the territorial dispute between the two Asian countries on the Diaoyu/Senkaku Islands see C. RAMOS-MROSOVSKY, *International Law's Unhelpful Role in the Senkaku Islands*, in *University of Pennsylvania Journal of International Law*, 2008, 903-946.

¹⁰ On the diplomatic incident of September 2010 see L. ZHU, *Chinese Practice in Public International Law: 2010*, in *Chinese Journal of International Law*, 2011, 427-468, at 434-435; Note, *(In)Efficient Breach of International Trade Law: The State of the "Free Pass" after China's Rare Earths Export Embargo*, in *Harvard Law Review*, 2011, 602-625.

¹¹ Japan alone accounts for 50% of China exports of rare earth elements. For a complete overview of the economic, policy and legal aspects of the rare earths issue see B. GU, *Mineral Export Restraints and Sustainable Development – Are Rare Earths Testing the WTO's Loopholes?*, in *Journal of International Economic Law*, 2011, 765-805.

¹² For instance, the average export price of rare-earth oxides increased by 537% in 2011 compared to 2010. See J.M. FREEDMAN, *WTO to Investigate Chinese Curbs on Rare-Earth Exports*, *Bloomberg Businessweek*, 24 July 2012.

¹³ See Memo/12/182, *EU Challenges China's Export Restrictions on Rare Earths*, Brussels, 13 March 2012.

¹⁴ Cf. the considerations of the European Union in WTO Press Release, *China Blocks Panel Requests by the US, EU and Japan on "Rare Earths" Dispute*, 10 July 2012.

3. Reactions of the manufacturing countries and industries to Chinese export restrictions.

Manufacturing countries are trying to react to China's export restrictions of rare earths by (re)opening production sites on their territories or promoting the setting up of mines in other States. The site of Mountain Pass (California) -that had to close in 2002, after the leak of radioactive waste leading California to adopt stricter environmental standards, which made production costs too high- is thus active again. Other important factories have been opened on the east coast of Malaysia for treating rare earths imported from Australia, since in the northern State of Pahang legislation is more flexible than in the Anglo-Saxon country¹⁵, even if the Australian facilities have had to face opposition from the Malaysian residents on environmental grounds. Further projects of additional sites are being planned in South Africa, Brazil, Canada, Vietnam, Kazakhstan and Greenland, with Japan even considering the idea of offshore exploration for new rare earths' deposits¹⁶. In addition, high-tech industries are endeavoring to develop new techniques for saving REEs in the manufacturing process, for recycling already used rare earths, and for devising substitutes to such natural elements. However, the new researches are costly and just at their beginning, and remain largely insufficient even if combined with the efforts by the advanced economies to set up new mine plants of rare earths, equally requiring considerable time and funding¹⁷.

The US, the EU and Japan, in an unprecedented concerted action, also characterized by the fact that Tokyo for the first time is taking Beijing to the Geneva dispute settlement mechanism¹⁸, have therefore decided to introduce a WTO

¹⁵ The [re]opening of mining sites by other WTO countries has already been considered as producing effective competition by the major Chinese rare earth producers. Inner Mongolia Baotou Steel Rare Earth Hi-Tech Co., the largest REE company in China, has declared to expect rivalry in the international market «as resource exploitation picks up in Australia and the United States». Cf. MOFCOM Press Release, *Baotou Steel Rare-Earth Posts Hefty Profits*, 28 March 2012.

¹⁶ Gareth Hatch, analyst at the research firm "Technology Metals Research", has declared that currently there are more than 400 rare-earth projects in 36 countries. See Z. YANG, *Should the World Panic about the China's Control on Rare Earth Export?*, in USC Annenberg, School for Communication & Journalism, available at <http://ascjweb.org/moneymarketsmedia/?p=566>, 3 April 2012, (last visited July 2012).

¹⁷ C. BONTRON, *Peu d'alternatives au monopole chinois existent aujourd'hui*, in *Le Monde*, 20 July 2012, 6.

¹⁸ Such a choice demonstrates how essential are REEs for the Japanese economy. More generally, commentators observed that the Tokyo attitude to avoid initiating disputes against China in the WTO may be due to a) the fact that many Beijing exports are currently produced by foreign-invested enterprises, with a strong presence of Japanese financing, b) the persistent bilateral trade surplus of Japan with China, and c) the deep influence of Confucianism, the doctrine considering litigation as a means of last resort. On these aspects see W. ZHUANG, *An Empirical Study of China's Participation in the*

complaint, asserting that Chinese export restrictions are inconsistent with the General Agreement on Tariffs and Trade (GATT) 1994 and China's Accession Protocol to the WTO¹⁹. They are, in fact, very confident in a positive reaction by the Geneva judiciary, as the legal structure of the *China – Rare Earth* case is extremely similar to that of the *China – Raw Materials* case, where the WTO Appellate Body concluded that Chinese export restrictions on the 9 minerals and metals addressed in that controversy infringed the multilateral trade rules and could not be justified by any WTO public policy exceptions' clause²⁰.

4. Legal basis of the WTO complaints.

The three complainants claim, *inter alia*, that the Chinese REE export regime involve many quantitative restrictions not respecting the duty to eliminate export quotas, enshrined in GATT Article XI:1, and that the administration of the export measures contravenes GATT Article X:3, as the PRC authorities would not apply the challenged disciplines in «a uniform, impartial and reasonable manner».

In particular, the US, the EU and Japan argue that the Chinese export restrictions on rare earths infringe also a WTO-plus obligation – i.e. one of the stringent requirements significantly exceeding those accepted by the WTO original membership, undertaken by China, like all the new WTO Members, to gain access to the multilateral trade system. In fact, the export duties on rare earths, tungsten and molybdenum violate China's specific accession commitment to eliminate export tariffs codified at Paragraph 11.3 of the Accession Protocol²¹, as none of the

WTO Dispute Settlement Mechanism: 2001-2010, in *The Law and Development Review*, 2011, 223. See also C. GILLISPIE, S. PFEIFFER, *An Interview with Yufan Hao and Jane Nakano: The Debate over Rare Earths – Recent Developments in Industry and the WTO Case*, *The National Bureau of Asian Research*, 11 July 2012.

¹⁹ *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for consultations by the United States*, WT/DS431/1, 15 March 2012; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for consultations by the European Union*, 15 March 2012, WT/DS432/1; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for consultations by Japan*, WT/DS433/1, 15 March 2012. See EU Press Release, *EU Challenges China's Rare Earth Export Restrictions*, 13 March 2012; *US, EU, Japan Challenge China on Rare Earths*, in *Bridges*, 15 March 2012.

²⁰ For the indications on the AB Report in the *China - Raw Materials* case and the comments on the WTO judiciary findings in that dispute see *supra* footnote 2.

²¹ Pursuant to which «China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994». It is here to be remarked that within the general WTO system export tariffs are not bound, given that, on the basis of GATT Article II, the binding of tariffs applies only to tariffs on imports.

elements considered in the WTO complaints is listed in Annex 6 of such Protocol, contemplating the ad hoc exceptions to the China's WTO-plus obligation.

5. Beijing defence.

China claims that its export restrictions are perfectly “in line” with WTO rules²², in particular with the general exceptions clause of the GATT, i.e. Article XX. According to the official statements of the Ministry of Commerce (MOFCOM), Beijing rare earth policy «aims to protect resources and environment, and realize sustainable development», therefore excluding any Chinese «intention of restricting free trade or protecting domestic industries through trade-distorting measures»²³.

It must be underlined that, subsequent to the dispute in the *China – Raw Materials* case, where the Appellate Body concluded that GATT Article XX cannot be applied to justify violations of the WTO-plus obligation concerning the requirement to eliminate export *duties*, the Asian Country started to reframe and reformulate its rare earth mining policy constantly highlighting that the legal framework of the Chinese REE export regime is based on *quotas* –thus on measures which, if considered to violate GATT Article XI, may also be assessed to ascertain whether they are justifiable under GATT Article XX. Such export quotas are now conferred by the PRC authorities to the local companies mining, processing and distributing rare earths on the basis of their fulfillment of the severe standards fixed by the Chinese discipline. The Ministry of Commerce (MOFCOM) decides the amount and allocates the export quotas in batches, and twice per year²⁴. On 11 November 2011, MOFCOM has also established the specific qualifications necessary to Chinese “producers” and “distributors” to be entitled to export quotas, qualifications that

²² See *Rare Earths Policy “in Line with WTO”*, in *China Daily*, 15 March 2012. See also *No Discrimination in Rare Earth Supply*, in *Xinhuanet.com*, 5 February 2012; *West’s Rare Earth Accusation against China Unfair*, in *Xinhua*, 14 March 2012; MOFCOM Press Release, *Spokesman Comments on US, EU and Japan Requests to WTO About Setting Up A Panel on China’s Export Measures*, 3 July 2012.

²³ See MOFCOM Press Releases, *China’s Rare Earth Policy Justified*, 15 March 2012; *Earth Export Control at WTO*, 15 March 2012; *Comments by Head of MOFCOM Department Treaty and Law on Us, EU and Japan Requests of Consultations on China Rare Earth Export Control at WTO*, 15 March 2012; *China to Properly Deal with Request for WTO Panel on Rare Earth: Spokesman*, 29 June 2012.

²⁴ The strategic nature of rare earths involve of course the competences of many other PRC authorities. *Inter alia*, at central level, they are the Ministry of Land and Resources, the Ministry of Industry and Information, the State Development Reform Commission, and the Ministry of Environmental Protection and the Ministry of Health. For the best presentation of the Chinese discipline on REE export regime see H.W. LIU, P. LYFOUNG, J. MAUGHAN, *WTO Rules, Export Quotas and Sustainable Development: The Case of China Rare Earths*, Trade and Investment Law Clinic Papers, Centre for Trade and Economic Integration, The Graduate Institute, Geneva, 2012.

comprise the respect of environmental requirements for the mining and processing plants and the activities conducted therein, together with the compliance with social security requirements, and the absence of infringements of a consistent series of Chinese regulations²⁵.

Besides many new and articulated legislative measures, China has adopted two very significant policy documents, where it constantly stresses that the purpose of its rare earth legislation is implementing and complying with the principle of sustainable development, i.e. with the research of a proper equilibrium between economic activities and adequate environmental, conservation and health disciplines. In 2011 the State Council issued the “Guidelines on Promoting the Sustainable and Health Development of the Rare Earth Industry”²⁶; and, in June 2012, the Information Office of the State Council published the White Paper “Situation and Policies of China’s Rare Earth Industry”²⁷. Both in the Guidelines and in the White Paper, China tightened and announced the further strengthening of its discipline on rare earth mining, dressing, smelting and separating technologies, asserting that the reinforcement of the national legal framework is absolutely necessary to appropriately deal with a) the conservation problems of the natural resources – if not controlled, it has been predicted that Chinese rare earth reserves could be exhausted in 15–20 years; and b) the enormous environmental damages in the Provinces where REE activities are concentrated –Baotou of Inner Mongolia and Liangshan of Sichuan, together with Ganzhou of Jiangxi Province²⁸. In fact, rare earth minerals are naturally associated with many dangerous elements, like radioactive residues, large quantities of toxic and hazardous gases, making their mining and processing destructive for the soil and farmland – with landslides, clogged rivers and polluted aquifers.

Another relevant aspect of the new Beijing rare earth policy is the implementation of the strategy “large enterprises and large groups”. Indeed, as minerals can be mined in small quantities, there has been widespread private, illegal mining in China; and since such activities and private sales have always been difficult

²⁵ See the *2012 Rare Earth Export Quota Application Qualifications and Procedures*, issued on 11 November 2011 by MOFCOM.

²⁶ Cf. *Some Suggestions of the State Council on Promoting the Sustainable and Healthy Development of Rare Earth Industry*, issued by the State Council, No. 12(2011), available in the website of the Baotou China Rare Earth Industry Forum, <http://www.creidf.com>. See also *China Issues Guidelines for Rare Earth Industry*, in *China Daily*, 20 May 2011.

²⁷ *Situation and Policies of China's Rare Earth Industry*, June 2012, available at the website of Xinhuanet.com http://news.xinhuanet.com/english/business/2012-06/20/c_131665123.htm.

²⁸ Cf. *China “Building Up Rare Earth Reserves”*, in *Xinhuanet.com*, 16 July 2012.

for PRC authorities to keep track of, smuggling mining and processing, performed out of any public control, have been a leading cause of environmental pollution and resource depletion. Consequently, by imposing an entrepreneurial structure based on large groups, the PRC aims at having a better control on the observance of the new strict domestic rare earth legislation.

In spite of the remarkable efforts undertaken by China to review and to present its export quantitative restrictions on REEs as an absolutely necessary feature of its rare earth policy – wholly focused on the principle of sustainable development – it is by no means sure that the current Beijing REE export quotas regime can be justified under GATT Article XX. Lit. b) and lit. g) of the GATT general exceptions clause require that the measures to be justified are proven to be «necessary to protect human, animal or plant life or health», or «relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption». On the basis of the WTO case-law developed until now, it could be difficult to demonstrate that Chinese export quotas are “necessary”, as many specialists claim that less trade-restrictive, reasonably feasible alternatives are available.²⁹ Furthermore, there is a problem of evidence: since export quotas are defended as measures “necessary” or “relating to” the conservation of natural resources, objective data have to show that such quantitative restrictions lower domestic production or consumption of rare earths. Available data, however, suggest that both Chinese production and consumption of rare earths have risen³⁰.

6. The applicability of GATT Article XX to China’s Accession Protocol in the *China – Rare Earths* case: the need to overcome the negative interpretative result of the *China – Raw Materials* case.

As we have seen, the US, the EU and Japan also attacked the Chinese export duties imposed on various forms of rare earths, tungsten and molybdenum as they violate the obligation contemplated in Paragraph 11.3 of the Accession Protocol. The infringement of the WTO-plus obligation is very clear; and since none of the recalled materials is contemplated in the closed list of Annex 6 to the AP, concerning the ad

²⁹ See H.W. LIU, P. LYFOUNG, J. MAUGHAN, *WTO Rules, Export Quotas and Sustainable Development: The Case of China Rare Earths*, Trade and Investment Law Clinic Papers, Centre for Trade and Economic Integration, The Graduate Institute, Geneva, 2012, and the doctrine and reports quoted therein.

³⁰ P.K. TSE, *China’s Rare-Earth Industry, US Geological Survey Open-File Report 2011–1042*.

hoc exceptions to Paragraph 11.3, the only way China has to avoid being condemned with reference to export duties on rare earths is to try to justify the violation of the WTO-plus obligation relying on GATT Article XX.

Beijing will thus have to argue, for a second time and at a very short temporal distance, the applicability of the GATT general exceptions' clause to Paragraph 11.3 of the Accession Protocol - a claim that, as already mentioned, was poorly rejected by the Appellate Body in the *China – Raw Materials* case³¹. The Asian Country will have to illustrate all the elements and the negative consequences not taken into consideration by the WTO judiciary in the *China – Raw Materials* case, duly stressing the notable weaknesses characterizing the legal reasoning of the Appellate Body, so as to persuade the panel established for assessing the Chinese export restrictions on REEs to revisit the regrettable AB conclusions on the legal issue here considered. It is, in fact, to be underlined that, as very recently reaffirmed in the *US-Clove Cigarettes* Report, «[i]nterpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute»³², for the WTO system does not contemplate the principle of *stare decisis*³³. This does not mean that WTO precedents can be freely disregarded by a WTO judging body: the Geneva case-law has to be expression of the obligation to provide «security and predictability to the multilateral trading system» established by Article 3.2 of the DSU³⁴. Such a need for consistency and certainty in the WTO dispute mechanism through the development of a settled jurisprudence (*jurisprudence constante*, or *ständige Rechtsprechung*)³⁵ on similar legal issues has been interpreted as requiring to

³¹ For an extensive analysis of the inadequacy of the AB decision on the relation between GATT Article XX and Paragraph 11.3 of China's Accession Protocol see E. BARONCINI, *The Applicability of GATT Article XX to China's WTO Accession Protocol in the Appellate Body Report of the China – Raw Materials Case: Suggestions for a Different Interpretative Approach*, in *China-EU Law Journal*, 2012, Online First, Digital Object Identifier (DOI) 10.1007/s12689-012-0010-4. See also E. BARONCINI, *An Impossible Relationship? Article XX GATT and China's Accession Protocol in the China – Raw Materials Case*, in *BIORES*, May 2012, 18-22.

³² Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para. 258. For a comment see T. VOON, *The WTO Appellate Body Outlaws Discrimination in U.S. Flavored Cigarette Ban*, *Asil Insights*, 30 April 2012.

³³ On the role of precedent before international tribunals cf. G. GUILLAUME, *Le precedent dans la justice et l'arbitrage international*, in *Journal de droit international*, 2010, 685-703.

³⁴ «The dispute settlement system of the WTO is a central element in providing *security and predictability to the multilateral trading system*. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements». Article 3.2 of the DSU, emphasis added.

³⁵ See G. GUILLAUME, *The Use of Precedent by International Judges and Arbitrators*, in *Journal of International Dispute Settlement*, 2011, 6.

be in presence of «cogent reasons»³⁶ in order to depart from previous, adopted, AB reports. This is the point of equilibrium identified by the WTO judiciary between the duty to ensure, through the dispute settlement mechanism, «security and predictability to the multilateral trading system» under Article 3.2 of the DSU and the obligation on panels of conducting an «objective assessment» of the matter before them pursuant to Article 11 of the DSU.

Therefore, while WTO panels cannot disregard AB findings carelessly, they have, at the same time, to discontinue and diverge from previous, not persuasive conclusions of the Appellate Body when they reach the conviction -assessing the matter brought before them in good faith, as required by Article 31 of the Vienna Convention on the Law of Treaties- that there are new arguments and additional elements in the light of which a particular interpretative approach operated by the Appellate Body needs to be refined and /or revised. In the presence of «flaws» and «systemic difficulties with previous jurisprudence»³⁷, we deem that there are «cogent reasons» imposing, on a general basis, to depart from adopted WTO precedents. With specific reference to the applicability of GATT Article XX to Paragraph 11.3 of the Accession Protocol, we are persuaded that revising the negative interpretation of the Appellate Body in the *China - Raw Materials* case so as to reach a hermeneutic result fully respectful of the object and purpose of the WTO – i.e. the possibility to justify the violation of the WTO-plus obligation to eliminate export duties on the

³⁶ «It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. [...] This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. [...] Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring “security and predictability” in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent *cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent cases». Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (US – Stainless Steel (Mexico))*, WT/DS344/AB/R, adopted 20 May 2008, paras. 158 and 160, emphasis added.

³⁷ M. KOLSKY LEWIS, *Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement*, in *Stanford Journal of International Law*, 2012, 34. On the role of precedent in the WTO dispute settlement system see also G. SACERDOTI, *Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration Models*, in Arthur A. ROVINE (ED.), *International Arbitration and Mediation - The Fordham Papers 2010*, Leiden, Boston, 2011, 225-246.

basis of the GATT general exceptions clause- integrates a “cogent reason” to diverge from the recent unconvincing findings of the Appellate Body.

7. The unfortunate conclusions of the Appellate Body in the *China – Raw Materials* case on the applicability of GATT Article XX to Paragraph 11.3 of China’s WTO Accession Protocol.

Having considered that the WTO judiciary has to revisit the unsatisfactory conclusions of the Appellate Body in the *China – Raw Materials* case concerning the applicability of GATT Article XX to the Accession Protocol, it is now necessary to illustrate the unconvincing findings of the WTO permanent tribunal before presenting our different interpretative approach.

As already hinted, pursuant to Paragraph 11.3 of the Protocol, «China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994». While the latter concerns fees and charges imposed as payment for a service rendered, Annex 6 of the Protocol lists 84 products indicating for each of those goods the maximum export duty rate that Beijing may impose as export tariff. A Note to Annex 6 reaffirms that «the tariff levels included in this Annex are maximum levels which will not be exceeded», pointing out that «China ... would not increase the presently applied rates, except under exceptional circumstances». By also applying export duties to rare earths, China thus infringes Paragraph 11.3 of the Accession Protocol as none of the rare earths, object of the WTO complaints, is listed in Annex 6 of the China Protocol, contemplating the ad hoc exceptions to the China’s WTO-plus obligation.

In the *China – Raw Materials* case, the Appellate Body correctly reported that the Protocol has to be considered «an integral part» of the WTO Agreement, and thus interpreted in accordance with the customary rules of interpretation of public international law, as requested by Article 3.2. of the DSU³⁸. It also duly recalled Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, pursuant to which «a treaty [has to] be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose»³⁹. But then the WTO judiciary affirmed that GATT Article XX cannot be applied to Paragraph 11.3 of the Accession Protocol ignoring, in practice,

³⁸ Appellate Body Report, *China – Raw Materials*, para. 278.

³⁹ *Ibid.*

those two essential elements of the WTO system, founding its conclusions on a debatable interpretation of the text of the WTO-plus obligation, an unconvincing consideration of a very limited context of Paragraph 11.3, and a superficial evaluation of the Preamble of the WTO Agreement.

In particular, in few lines, the Appellate Body concluded that the absence of indications, in the wording of the WTO-plus obligation, on the applicability of GATT Article XX, together with the lack of any introductory clause similar to that of Paragraph 5.1 of the Protocol –pointing out that the right to import and export goods has to be guaranteed to all enterprises established in China «[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement» - «suggest ... that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3 of China’s Accession Protocol»⁴⁰, finding it «difficult to see how [the WTO-plus obligation] language could be read as indicating that China can have recourse to the provisions of Article XX of the GATT in order to justify imposition of export duties on products that are not listed in Annex 6 or the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6»⁴¹.

Turning to the immediate context – Paragraph 11.1⁴² and Paragraph 11.2⁴³ of the Protocol – the Appellate Body highlighted that Beijing guaranteed to WTO Members the application and administration of customs fees or charges and internal taxes and charges «in conformity with the GATT 1994», a phrase which is absent in Paragraph 11.3, specifically referred to the elimination of «taxes and charges applied to exports». Such silence, the AB argued, «further supports our interpretation that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3»; in fact, went on their reasoning, as China WTO-plus obligation «arises exclusively from China’s Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China’s Accession Protocol»⁴⁴.

⁴⁰ Appellate Body Report, *China – Raw Materials*, para. 291.

⁴¹ Appellate Body Report, *China – Raw Materials*, para. 284.

⁴² Pursuant to which «China shall ensure that customs fees or charges applied or administered by national or sub-national authorities, shall be *in conformity with the GATT 1994*» (emphasis added).

⁴³ In this passage the Accession Protocol states that «China shall ensure that internal taxes and charges, including value-added taxes, applied or administered by national or sub-national authorities shall be *in conformity with the GATT 1994*» (emphasis added).

⁴⁴ Appellate Body Report, *China – Raw Materials*, para. 293.

Finally, taking into consideration the WTO Preamble, the AB recalled that it contemplates various objectives, including «raising standards of living [...] seeking both to protect and preserve the environment [...] expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development», and ending with the resolution «to develop an integrated, more viable and durable multilateral trading system». Surprisingly, and without any further consideration or legal reasoning, the Appellate Body instantly affirmed that «none of the [considered] objectives, nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT is applicable to Paragraph 11.3 of China's Accession Protocol»; and it is because of such asserted absence of «specific guidance», in light of Beijing «explicit commitment» to eliminate export duties and «the lack of any textual reference to Article XX» in the China WTO-plus obligation, that the Appellate Body concluded to «see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3»⁴⁵.

8. Effects of the AB conclusion.

The austere interpretative approach adopted by the Appellate Body in the *China – Raw Materials* case produces a series of negative consequences. First of all, it renders the WTO-plus obligation to eliminate export duties “immune”⁴⁶ from any GATT public policy exception, while even the pillars of trade liberalisation -the most-favoured nation clause, the principle of national treatment- may be derogated by domestic measures necessary or related to the protection of one or more of the non-trade values enshrined in the WTO general exceptions clauses. Furthermore, denying the applicability of GATT Article XX to the WTO-plus obligation to eliminate export duties signifies quite a severe additional burden to the already heavy «entry fee» paid by China for acceding to the WTO, thus raising «a serious constitutional issue in the WTO jurisprudence»⁴⁷. The asymmetry characterizing the WTO-plus commitments is thus aggravated, an asymmetry which it is very difficult

⁴⁵ Appellate Body Report, *China – Raw Materials*, para. 306.

⁴⁶ J.Y. QIN, *Reforming Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection*, available at <http://ssrn.com/abstract=2030477>, 28 March, 2012 (last visited December 2013), 10.

⁴⁷ M. MATSUSHITA, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*, in *Trade, Law and Development*, 2011, 287.

to correct by amending the multilateral trade texts, as it is by no means clear which procedure should be followed to revise Accession Protocols, nor is it simple to satisfy the very demanding decisional mechanism -provided for by Article X of the WTO Agreement- should it be concluded that the WTO amending procedure has to be applied to modify WTO-plus obligations accepted by the WTO acceding Countries.

Moreover, the AB interpretation generates another “illogical result”⁴⁸. Being barred from using export duties -even though customs duties are considered in the WTO system as the less distorting and the most transparent obstacle to trade, and thus the preferred tool to have recourse to by a WTO Member in need to apply a trade remedy- China is forced to resort to bans and quotas in order to pursue its national environmental, conservation and health policies. Bans and quotas, nevertheless, are severely trade-distorting measures: compelling Beijing to have recourse primarily to such non-tariff obstacles is a very perverse outcome of the AB Report, as the WTO judiciary seems to promote the most trade-obstructing and distorting measures, instead of encouraging the most adequate and less trade-hindering discipline for pursuing non-trade values.

What is worse, the impossibility to apply GATT Article XX to Paragraph 11.3 of China’s Accession Protocol appears to be in contrast with the principle of sustainable development codified in the Preamble of the WTO Agreement and the model of sustainable economic development pursued by the Geneva based multilateral trade system, where no trade liberalization commitment is absolute, but may be derogated, obviously respecting the requirements of the general exceptions clauses while pursuing the non-trade values therein contemplated.

9. Suggestions for a different interpretative approach.

Having highlighted the serious undesirable consequences that the recent Geneva case-law provokes, it may be easily stated that the inability of the WTO judiciary to mitigate the inequity among WTO Members generated by the stand-alone export concessions leads to what Article 32(b) of the Vienna Convention defines as “a result which is manifestly absurd [and] unreasonable.”

Such inadequate scenario imposes an in-depth review of the difficult interpretative path that the Appellate Body has decided to embark on. It is, in fact,

⁴⁸ See, with reference to the applicability of GATT Article XX to the SCM Agreement, R. HOWSE, *Climate Mitigation Subsidies and the WTO Legal Framework - A Policy Analysis*, IISD Paper, May 2010, 17.

possible to define a connection between Paragraph 11.3 of the Protocol and Article XX capable of allowing China to invoke the GATT public policy exceptions for justifying derogations to the obligation to eliminate export duties beyond the goods listed and the limits contemplated in Annex 6 of the Protocol.

9.1. The text of Paragraph 11.3 of China's Accession Protocol and the Note to Annex 6.

Starting with the text of Paragraph 11.3, it has to be underlined that while there is no reference to GATT Article XX, it is also accurate to note that in such part of the Accession Protocol there is no express exclusion of the possibility to invoke the GATT public policy exceptions. The improvident silence of the negotiators – who would surely had done a more appreciable job had they drafted a special discipline to directly define the link between the Protocol and the WTO Agreements – may not, in any way, be automatically transformed into the most stringent prohibition of having recourse to the GATT general exceptions clause.

Furthermore, the scope of the two *ad hoc* exceptions to the obligation to eliminate export duties expressly contemplated in Paragraph 11.3 of the Accession Protocol should be reconstructed just in light of the wording of that Paragraph: negotiators clarified that the severe WTO-plus discipline does not concern charges imposed as payment for a service rendered (GATT Article VIII), nor does it affect the 84 products listed in Annex 6 of the Protocol, as export duties may still be levied on those goods, within the limits of the export duty rates provided for in that Annex. These clarifications cannot be read as expressing China renouncement to the right to have recourse to GATT Article XX with reference to export duties -i.e. with reference to the right to impose export duties on products not contemplated in the list of Annex 6, or to exceed the export duty rates contemplated for the 84 products quoted in Annex 6- of course provided that all the requirements imposed by the GATT general exceptions clause are respected, *in primis* the condition that the extra export duties pursue one of the non-trade values contemplated in Article XX.

Undeniably there is also the Note to Annex 6 to take into consideration, pursuant to which «China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded», and «that it would not increase the presently applied rates, except under *exceptional circumstances*»⁴⁹. In our view, this is an

⁴⁹ Emphasis added.

additional obligation undertaken by China in the form of a standstill clause, concerning the 84 products of Annex 6: Beijing committed not to raise the export tariffs applied to the listed goods at the moment of its accession to the WTO, in case those tariffs were lower with reference to the maximum duty rates established by Annex 6, provided that “exceptional circumstances” did not occur. Once again, the expression of “exceptional circumstances” should not be considered as unequivocally implying China’s intention to eliminate or restrict its right to have recourse to GATT Article XX. As remarked by the European Union in its submission to the Appellate Body, «the Note to Annex 6 resembles to some extent the situation envisaged in Article XXVIII of the GATT 1994 and Article XXI of the GATS (Modification of Schedules), which deal with changes in tariff bindings and changes in the Services Schedules of Specific Commitments»⁵⁰. In particular, the phrase “exceptional circumstances” of the Note could be approached to the “special circumstances” of GATT Article XXVIII:4, describing the procedure, applied principally under the 1947 multilateral system, for modifying or withdrawing a concession of a WTO Member Schedule at any time⁵¹, i.e. independently of the three-year period’s expiry normally required for changing a tariff binding.⁵² GATT 1947 practice⁵³ concerning

⁵⁰ Appellate Body Report, *China – Raw Materials*, footnote 558. On the GATT modifications of Schedules see A. HODA, *Tariff Negotiations and Renegotiations under the GATT and the WTO – Procedures and Practices*, Cambridge University Press, Cambridge, 2001, 11 and ff.; and, with reference also to GATS Schedules cf. P. VAN DEN BOSSCHE, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, Cambridge University Press, Cambridge, 2008, 401-428, and 490-493. The presentation of the discipline concerning the Schedules of WTO Members is also relevant to have a clear picture of these very technical multilateral trade aspects: see *Current Situation of Schedules of WTO Members*, available at http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm, accessed in May 2012.

⁵¹ «The CONTRACTING PARTIES may, at any time, in special circumstances, authorize ... a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement». GATT Article XXVIII:4.

⁵² «On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period [...] that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the “applicant contracting party”) may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest [...] (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the “contracting parties primarily concerned”), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest [...] in such concession, modify or withdraw a concession [...] included in the appropriate schedule annexed to this Agreement». GATT Article XXVIII:1.

⁵³ Currently, while paragraph 4 of GATT Article XXVIII has been maintained, WTO Members prefer to modify their Schedules under paragraph 5 of the same provision, allowing more relaxed conditions for changing their Schedules’ commitments provided they make an ad hoc reservation in this sense,

the meaning of such “special circumstances” does not reveal any detailed examination nor requirement for stringent and articulated grounds on which to base a successful request of renegotiations of tariff concessions. It was considered “inherent”⁵⁴ in the logic of Article XXVIII:4 that the “special circumstances” therein contemplated should also denote “an element of urgency”⁵⁵, calling for a revision of some tariff commitments beyond the timing disciplined at paragraph 1 of GATT Article XXVIII because of «internal reasons which precluded delay»⁵⁶. Pursuant to Article XVI:1 of the WTO Agreement, according to which «the WTO shall be guided by the decisions, procedures and customary practices» of GATT,⁵⁷ the flexibility characterizing the described GATT 1947 practice should be applied to the evaluation of the existence of the “exceptional circumstances” justifying the modifications of the export tariffs applied by China, at the moment of acceding the

and are ready to accept mirroring initiatives by those WTO Members with which they initially negotiated the concessions they intend to change.

⁵⁴ See the statement of the Representative of the United Kingdom reported in GATT/IC/SR.40, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 9 and 10 July 1958*, 21 July 1958, at p. 4.

⁵⁵ *Ibid.*

⁵⁶ See the statement of the Representative of Australia reported in GATT/IC/SR.47, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 20 April 1960 (Subject Discussed: Article XXVIII:4 – Requests by Australia (GATT/AIR/190(SECRET) and GATT/AIR/191(SECRET))*, 29 April 1960, at p. 1. On the GATT 1947 practice concerning Article XXVIII:4 renegotiations see also GATT/IC/SR.25, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, 9 May 1956 (Subjects Discussed: 1. Request by the United Kingdom for Authority to Renegotiate Four Items in Schedules XIX; 2. Request by the United States for Authority to Renegotiate One Item in Schedule XX)*, 22 May 1956; GATT/IC/SR.40, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 9 and 10 July 1958 (Subjects Discussed: Requests by Australia and the United States for Authority to Enter into Re-negotiations)*, 21 July 1958; GATT/IC/SR.43, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 11 February 1959*, 17 February 1959; GATT/IC/SR.46, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 14 March 1960 (Subject Discussed: Article XXVIII:4 – Request by Australia (GATT/AIR/182 (SECRET))*, 22 March 1960; GATT/IC/SR.48, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 26 April 1960 (Subject Discussed: Article XXVIII:4 – Request by Australia (GATT/AIR/193 (SECRET))*, 6 May 1960; GATT/C/M/2, *Minutes of Special Meeting Held at the Palais des Nations, Geneva on Thursday, 5 January 1961 (Subjects Discussed: 1. United States Request for Authority to Renegotiate under Article XXVIII:4; 2. Canadian Request for Authority to Renegotiate under Article XXVIII:4)*, 16 January 1961; GATT/C/M/22, *Minutes of Meeting Held at the Palais des Nations, Geneva, on 25 September 1964 (Subjects Discussed: 1. Australian Schedule – Request under Article XXVIII:4; 2. New Zealand Schedule – Request under Article XXVIII:4)*, 12 October 1964; GATT/L/6326, *Article XXVIII:4 Renegotiations – Schedules LXXXI – Morocco*, 22 April 1988.

⁵⁷ It is remarked here that the procedures for renegotiations under Article XXVIII of the GATT 1994 are still those adopted in 1980 under the GATT 1947 system. See GATT/C/113, *Procedures for Negotiations under Article XXVIII – Guidelines Proposed by the Committee on Tariff Concessions*, GATT Council 10 November 1980, and GATT/C/113/Corr.1, *Procedures for Negotiations under Article XXVIII – Guidelines Proposed by the Committee on Tariff Concessions - Corrigendum*, GATT Council 10 November 1980.

WTO, to the 84 goods listed in Annex 6 of the Protocol, thus avoiding any interference between the discipline of the Note to Annex 6 of China's AP and the content of GATT Article XX⁵⁸.

9.2. The silence of Paragraph 11.3 of China's Accession Protocol in the light of the principle of good faith.

Having ascertained that the mere text of the WTO-plus obligation at issue does not require the non-applicability of GATT Article XX to Paragraph 11.3 of the China's Accession Protocol, as it is *silent* on the point, the interpreter has to reconstruct the meaning of such *silence*. Pursuant to Article 31(1) of the Vienna Convention, such reconstruction has to be operated in "good faith", the general principle permeating the entire interpretative process of an international agreement⁵⁹. While it is difficult to give a definition of the very generic legal concept of good faith, it seems adequate to indicate that it expresses «a fundamental requirement of reasonableness»⁶⁰, thus calling for an interpretative result which is honest and fair⁶¹. It has therefore to be underlined that GATT public policy exceptions have "systemic importance" within the multilateral trade system, as the WTO membership has expressly and constantly attributed to them prevalence over all GATT obligations on liberalization of trade⁶². Such systemic importance impedes to consider the silence of Paragraph 11.3 as a clear refusal of having recourse to the defence of GATT Article XX. It cannot reasonably –hence in good faith- be stated that the silence of the

⁵⁸ The confidentiality still distinguishing contemporary modifications and/or withdrawals under GATT Article XXVIII has to be likewise respected. See section 1 of the 1980 *Procedures for Negotiations under Article XXVIII* (GATT/C/113): «[a] contracting party intending to negotiate for the modification or withdrawal of concessions in accordance with the procedures of Article XXVIII, paragraph 1 - which are also applicable to negotiations under paragraph 5 of that Article- should transmit a notification to that effect to the secretariat which will distribute the notification to all other contracting parties in a *secret document* [...] In the case of negotiations under paragraph 4 of Article XXVIII the request for authority to enter into negotiations should be transmitted to the secretariat to be circulated in a *secret document* and included in the agenda of the next meeting of the Council» (emphasis added).

⁵⁹ See R. GARDINER, *Treaty Interpretation*, Oxford University Press, Oxford, 2008, 147 and ff.

⁶⁰ O. DÖRR, *Article 31 - General Rule of Interpretation*, in O. DÖRR, K. SCHMALENBACH (EDS.), *Vienna Convention on the Law of Treaties – A Commentary*, Springer-Verlag, Berlin-Heidelberg, 2012, 548.

⁶¹ See M. E. VILLIGER, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission*, in E. CANNIZZARO (ED.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, 109.

⁶² See J.Y. QIN, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, available at SSRN: <http://ssrn.com/abstract=2041227>, 12 April 2012 (last visited December 2013), 6.

Accession Protocol indicates in the clearest way that China had the strongest intention to repudiate its right under GATT Article XX, whereas the other WTO Members were openly confident that Beijing would have agreed to such a most astonishing renounce. As the Appellate Body rightly remarked in the *Argentina – Footwear (EC)* case with reference to the omission, in the text of the Safeguard Agreement, of the “unforeseen developments” clause –a very important requirement for the application of trade defence measures, nevertheless present in GATT Article XIX, the provision devoted by the General Agreement to safeguards- «if they had intended to expressly omit this clause, the [...] negotiators would and could have said so in the Agreement on Safeguards. [But] they did not»⁶³. The WTO judiciary therefore considered the “unforeseen developments” clause as a requirement to be applied to the trade measures of the WTO Agreement on Safeguards, thus rejecting the thesis that a silence on the coordination among WTO pieces of legislations could be considered as an illogic denial of any connection between agreements that are both «integral parts of the same treaty, the WTO Agreement»⁶⁴.

Regrettably the Appellate Body in the *China – Raw Materials* case completely neglected any good faith reflection, nor did it consider the institutional feature of “single undertaking” characterizing the Marrakech Agreements and WTO Accession Protocols, which can all be qualified as “integral part” of the WTO Agreement. The AB Members, instead, went in the opposite direction, disconnecting China’s Accession Protocol from the other WTO Agreements, and inferring from the silence of Paragraph 11.3 an inexplicable renunciation to GATT public policy exceptions: «as China’s obligation to eliminate export duties arises exclusively from China’s Accession Protocol, and not from the GATT 1994, we consider it *reasonable* to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China’s Accession Protocol»⁶⁵.

⁶³ Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear (EC))*, WT/DS121/AB/R, adopted 12 January 2000, para. 88.

⁶⁴ Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

⁶⁵ Appellate Body Report, *China – Raw Materials*, para. 293, emphasis added.

9.3. The silence of Paragraph 11.3 of China's Accession Protocol in the light of its context.

«When the object of interpretation is the *absence* of a term» –in our case the absence of any express indication on the relationship between Paragraph 11.3 and the GATT- the implications of the lack of any phrasing have to «be interpreted *contextually*»⁶⁶. In fact, in order to attribute the proper meaning to the silence of Paragraph 11.3 on the GATT, the hermeneutic activity has to go on applying all the criteria provided for by the customary rules of treaty interpretation of public international law codified in the 1969 Vienna Convention, given that, as effectively highlighted by the same WTO Appellate Body, «treaty interpretation is an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise»⁶⁷.

Unanswered issues are recurrent in international treaties, since it is difficult to draft texts characterized by comprehensiveness -a quality, moreover, very demanding to be achieved, and of course susceptible of being temporally limited.⁶⁸ The incomplete nature of international agreements may be due to «harassed negotiators or inattentive draftsmen»⁶⁹, or carefully searched by treaty drafters, to provide the contracting parties with a flexible and lasting legal instrument, but also to arrange for the signatories an agreed text in spite of the lack of their complete convergence on the discipline for an issue of common interest. The interpreter is consequently faced with a very delicate activity when having to determine what silence signifies: as underlined always by the Appellate Body with reference to some provisions of the Anti-Dumping Agreement and the SCM Agreement, «the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement», because such absence of indications cannot be considered as «exclud[ing] the possibility that the

⁶⁶ See J.Y. QIN, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, available at SSRN: <http://ssrn.com/abstract=2041227>, 12 April 2012 (last visited December 2013), 6, emphasis added.

⁶⁷ Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology (US – Continued Zeroing)*, WT/DS350/AB/R, adopted 19 February 2009, para. 268; see also para. 273.

⁶⁸ On the interpretation of silence in the WTO Agreements see I. VAN DAMME, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, Oxford, 2009, 110 and ff.

⁶⁹ Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)*, WT/DS24/AB/R, adopted 25 February 1997, para. 42.

requirement was intended to be included by implication»⁷⁰. Hence, the lack of any reference to GATT Article XX in Paragraph 11.3 of China's Accession Protocol cannot be instantly deemed as prohibiting recourse to the GATT general exceptions' clause: the interpreter has to consider the text of the WTO-plus obligation in light of all the interpretive rules of the Vienna Convention rules, since «the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept»⁷¹.

Starting with the examination of the immediate context of the Protocol provision requesting China to eliminate export duties, –i.e. sections 1 and 2 of Paragraph 11- such context should be read keeping in mind that Paragraph 11.3 disciplines a WTO-plus obligation. It is thus only normal that the prescriptions there expressed –being *sui generis* and not reflecting the GATT fees, charges or internal taxes contemplated in Paragraph 11.1 and Paragraph 11.2 in order to reaffirm those traditional multilateral trade obligations with reference to the new WTO Member- are not accompanied by the expression «in conformity with GATT», which characterizes the immediate context of the WTO-plus obligation at issue. The General Agreement does not contemplate any general obligation to eliminate export duties. Consequently, the absence in Paragraph 11.3 of the phrase «in conformity with GATT» should be attributed to the fact that China could not possibly be asked to implement its WTO-plus commitment «in conformity» with an obligation ... not established by the GATT for the original WTO membership! It has hence to be concluded that the immediate context of Paragraph 11.3 does not allow to sustain that China renounced to resort to GATT Article XX as a defence to justify derogations to its WTO-plus commitment.⁷²

⁷⁰ Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US – Carbon Steel)*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 65.

⁷¹ *Brown v. Stott* [2003] 1 AC 681 at 703 (UK, Privy Council), quoted by R. GARDINER, *Treaty Interpretation*, Oxford University Press, Oxford, 2008, 147, and J.Y. QIN, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, cit., 5-6.

⁷² For this aspect see also H. SCHLOEMANN, *China – Raw Materials – Some Observations*, Power Point Presentation, ICTSD/WTO Advisors, Talking Disputes Vol. 2 - The *China – Raw Materials Case*, Geneva, 20 July 2011.

9.4. Extending the relevant context to the Preamble of the WTO Agreement and interpreting the silence of Paragraph 11.3 in light of the object and purpose of the WTO system.

Extending the analysis of the context to the Preamble of the WTO Agreement, it is finally possible to impart a positive meaning to the silence of Paragraph 11.3 of the China Accession Protocol, a positive meaning that may be tested also in the light of the “object and purpose” characterizing the whole WTO multilateral trade system, codified in the already recalled WTO Preamble. Far from being the final target of the Marrakech Agreements, trade liberalization is conceived and regulated within the WTO system as a tool «to rais[e] standards of living», constantly to be pursued «allowing for the optimal use of the world’s resources», and «in accordance with the objective of sustainable development, seeking both to protect and preserve the environment»⁷³. Trade liberalization commitments are consequently disciplined in the Geneva based multilateral system not as absolute duties and prohibitions, impossible to derogate, but as obligations which may be overcome to pursue the non-trade values contemplated in many WTO rules, in particular in the general exceptions clauses, respecting all the requirements and the equilibrium among conflicting needs and concerns expressed by those multilateral provisions. The attention devoted by the WTO Preamble to environmental protection and the optimal use of natural resources, together with the explicit acknowledgement of the principle of sustainable development evidently reveal that the signatories of the multilateral trade agreements chose a model of economic development capable of being sustainable, i.e. constantly conjugated with the respect of the environment and social progress.⁷⁴ Since the WTO Preamble informs all the

⁷³ See the Preamble of the WTO Agreement.

⁷⁴ The WTO Appellate Body has defined sustainable development as a concept that «has been generally accepted as integrating economic and social development and environmental protection» (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, footnote 107). For another very effective description of the tridimensional character of sustainable development see the formula expressed at paragraph 6 of the Copenhagen Declaration on Social Development, adopted at the 1995 World Summit for Social Development: «[w]e are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people» (*Copenhagen Declaration on Social Development*, available at <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/wssd.htm>, accessed on April 2012). Finally, attention should be reserved to what stated by the *International Law Association* (ILA) in the New Delhi Declaration on sustainable development, where such Association has expressed «the view that the objective of sustainable development involves a comprehensive and integrated approach to economic, social and

covered agreements –hence also Accession Protocols as integral parts of the WTO system- the meaning of Paragraph 11.3 has to be construed in order to be a coherent expression and articulation of the principles therein enshrined, and a proper implementation of the model of sustainable economic development therein shaped.

It follows that the text –and the silence- of Paragraph 11.3, considered in the light of the context of the WTO Preamble, and the object and purpose of the WTO treaty system, unequivocally indicates that China, while accepting the WTO-plus obligation to eliminate export duties, did not relinquish its right to regulate trade in a manner that promotes conservation of natural resources, environmental protection and public health also through the adoption of export tariffs, should these measures prove to be the most appropriate tool to realize its legitimate public policy purposes.

It may therefore be concluded that GATT Article XX is applicable to the WTO-plus obligation accepted by China to eliminate export duties. In fact, attributing this meaning to the silence of Paragraph 11.3 of the Accession Protocol is the only interpretative outcome capable of being in harmony with the principles and the model of sustainable economic development promoted by the WTO system, which, in our view, provide “specific guidance” to the treaty interpreter applying all the hermeneutic criteria expressed by the international customary rules on the interpretation of treaties.

political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations» (*ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2001, in *International Environmental Agreements: Politics, Law and Economics*, 2002, 212). On the principle of sustainable development see in the doctrine U. BEYERLIN, *Sustainable Development*, in *Max Planck Encyclopedia of Public International Law*, <http://www.mpepil.com>; A. COSBEY, *A Sustainable Development Roadmap for the WTO*, IISD, Geneva, 2009; F. FRANCONI, *Sviluppo sostenibile e principi di diritto internazionale nell'ambiente*, in P. FOIS (ED.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente*, Editoriale scientifica, Napoli, 2007, 41-61; G.P. SAMPSON, *The WTO and Sustainable Development*, United Nations University, New York, 2005; ID., *The WTO and Sustainable Development: A Reply to Robertson*, in *World Trade Review*, 2008, 467-471; N. SCHRIJVER, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, in *RCADI*, 2007, Vol. 329, 219-412; G. VAN CALSTER, *The Law(s) of Sustainable Development*, SSNP Series, 2008, in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147544.

9.5. The principle of permanent sovereignty over natural resources and Article 31(3)(c) of the Vienna Convention.

In addition, the applicability of GATT Article XX to Paragraph 11.3 of China's Accession Protocol is confirmed if the international customary law principle of permanent sovereignty over natural resources⁷⁵ is duly taken into consideration, hence applying the principle of systemic integration as required by Article 31(3)(c) of the Vienna Convention, according to which a treaty interpreter, when reading the provision of an agreement, has to take into account «any relevant rules of international law applicable in the relations between the parties»⁷⁶. In fact, any international agreement does not live in a legal vacuum,⁷⁷ but must be interpreted «against the whole background of international law»⁷⁸ which is binding for the contracting parties and applicable in their relations, in order to attribute to its provisions a meaning that is harmonious and coherent with such relevant international law.⁷⁹

⁷⁵ On this principle cf. N.J. SCHRIJVER, *Permanent Sovereignty over Natural Resources*, in *Max Planck Encyclopedia of Public International Law*, <http://www.mpepil.com>; V. ZAMBRANO, *Il principio di sovranità permanente dei popoli sulle risorse naturali tra vecchie e nuove violazioni*, Milano, 2009. The customary nature of the principle of permanent sovereignty over natural resources has also been asserted by the International Court of Justice: see ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, in *ICJ Reports*, 2005, p. 168, para. 244.

⁷⁶ On the principle of systemic integration and the Vienna Convention on the Law of Treaties see, *inter alia*, D. FRENCH, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, in *International & Comparative Law Quarterly*, 2006, 281-314; U. LINDERFALK, *Who are the "Parties"?: Article 31 Paragraph 3 (c) of the 1969 Vienna Convention and the "Principle of Systemic Integration" Revisited*, in *Netherlands International Law Review*, 2008, 343-364; C. MCLACHLAN, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, in *International & Comparative Law Quarterly*, 2005, 279-320.

⁷⁷ «International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms». A/CN.4/L.702, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Conclusions)*, Report of the Study Group of the International Law Commission, 18 July 2006, para. 1.

⁷⁸ M.E. VILLIGER, *Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights*, in J. BRÖHMER, R. BIEBER, C. CALLIESS, C. LAGENFELD, S. WEBER, J. WOLF, (EDS.), *Internationale Gemeinschaft und Menschenrechte - Festschrift für Georg Ress*, Carl Heymanns Verlag, Köln/Berlin/München, 2005, 317- 330. For a further analysis on the application of the principle of systemic integration in the ECHR system see W. KARL, *"Just Satisfaction" in Art 41 ECHR and Public International Law – Issues of Interpretation and Review of International Materials*, in A. FENYVES, E. KARNER, H. KOZIOL, E. STEINER (EDS.), *Tort Law in the Jurisprudence of the European Court of Human Rights*, de Gruyter, Berlin/Boston, 2011, 356 and ff.

⁷⁹ On the interpretation of WTO Agreements against the background of other international law see I. VAN DAMME, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, Oxford, 2009, at 355 and ff. See also the considerations expressed by the Study Group of the International Law Commission on the fragmentation of international law with specific reference to WTO adjudicators:

As it is well known, the principle of permanent sovereignty over natural resources has been initially formulated by the General Assembly of the United Nations as the right of States «freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development»⁸⁰, further clarified as a right also «of peoples» which must be exercised by the interested countries for the «well-being» of their population,⁸¹ and subsequently qualified as a right including «[i]n order to safeguard [natural] resources» the entitlement of each State to carry out «effective control over them and their exploitation with means suitable to its own situation»⁸². In particular, always within the UN system, the permanent sovereignty over natural resources has been considered as a basic human right under international law –since all peoples have been recognized the right «for their own ends [to] freely dispose of their natural wealth and resources»⁸³- and consequently as a right of the States which is inextricably linked to the «responsibility»⁸⁴ to properly manage those resources, so that each country has to responsibly exercise sovereignty when dealing with natural resources in the best interest of its population.

Whereas the content of the principle at issue is under constant evolution –in fact, the extent of the power countries may exercise in the management of their natural wealth is relentlessly considered by an always growing number of international law instruments regarding the duty of States to sustainably use natural resources in order to preserve them from extinction through adequate conservation

«when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties)». In fact, while it is true that «[t]he jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties [...] [a] limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties», with the consequence that «WTO covered treaties are creations of and constantly interact with other norms of international law». A/CN.4/L.682, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 13 April 2006, paras. 170 and 45.

⁸⁰ UN General Assembly, *Right to Exploit Freely Natural Wealth and Resources*, 21 December 1952, A/RES/626.

⁸¹ UN General Assembly, *Permanent Sovereignty Over Natural Resources*, 14 December 1962, A/RES/1803, para. 1.

⁸² UN General Assembly, *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, A/RES/S-6/3201, para. 4(e).

⁸³ See Articles 1.2 of the UN Covenant on Civil and Political Rights (done in New York, 16 December 1966, in *UNTS*, Vol. 999, p. 171) and of the UN Covenant on Economic, Social and Cultural Rights (done in New York, 16 December 1966, in *UNTS*, Vol. 993, p. 3).

⁸⁴ See UN General Assembly, *Charter of Economic Rights and Duties of States*, 12 December 1974, A/RES/29/3281, Article 7.

policies⁸⁵ - a stable feature of such principle is the “permanent” character of the sovereignty on natural resources. This sovereignty, in the words of the UN General Assembly, is “inalienable”⁸⁶, meaning that a State cannot perpetually derogate from «the essence of its sovereign rights over natural resources», but only accept «a partial [restraint] on the exercise of its sovereignty in respect of certain resources in particular areas for a specified and limited period of time»⁸⁷. Therefore, when having to attribute a meaning to the silence of Paragraph 11.3 with reference to its relationship with GATT Article XX, such silence cannot be interpreted as an overall and eternal abdication by China to dispose of its national resources by using export duties under the GATT general exceptions clause. A similar determination, in fact, would be in sharp contrast with the international customary law principle of permanent sovereignty over natural resources, which precludes a State to limit forever and unconditionally its right to dispose of its national wealth.⁸⁸

9.6. Supplementary means of interpretation: the circumstances of the conclusion of China’s Accession Protocol and the subsequent practice of States.

As already underlined, the highly questionable findings of the Appellate Body led to an interpretative result that, using the wording of Article 32 of the Vienna Convention, may be qualified as «manifestly absurd or unreasonable»⁸⁹. Pursuant to

⁸⁵ For the consequences of international agreements and soft law documents regarding conservation, preservation and sustainability issues on the principle of permanent sovereignty over natural resources see U. BEYERLIN, V. HOLZER, *Conservation of Natural Resources*, in *Max Planck Encyclopedia of Public International Law*, <http://www.mpepil.com>.

⁸⁶ See UN General Assembly, *Permanent Sovereignty Over Natural Resources*, 14 December 1962, A/RES/1803, para. 11 of the Preamble; UN General Assembly, *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, A/RES/S-6/3201, para. 4(e); UN General Assembly, *Charter of Economic Rights and Duties of States*, 12 December 1974, A/RES/29/3281, Article 1.

⁸⁷ See N.J. SCHRIJVER, *Sovereignty Over Natural Resources*, Cambridge University Press, Cambridge, 1997, 264.

⁸⁸ To use the words of George Abi-Saab, former member of the Appellate Body, «sovereignty is the rule and can be exercised at any time [...] limitations are the exception and cannot be permanent, but limited in scope and time». G. ABI-SAAB, *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order*, in UN Doc. A/39/504/Add.1, 23 October 1984, quoted in N.J. SCHRIJVER, *Sovereignty Over Natural Resources*, Cambridge University Press, Cambridge, 1997, 263.

⁸⁹ On this provision of the 1969 Vienna Convention on the Law of Treaties see Y. LE BOUTHILLIER, *Article 32 – Supplementary Means of Interpretation*, in O. CORTEN, P. KLEIN (EDS.), *The Vienna Conventions on the Law of Treaties – A Commentary*, Oxford University Press, Oxford, 2011, Vol. I, 841-863; O. DÖRR, *Article 32 - Supplementary Means of Interpretation*, in O. DÖRR, K. SCHMALENBACH (EDS.), *Vienna Convention on the Law of Treaties – A Commentary*, Springer-Verlag, Berlin-Heidelberg, 2012, 571-586; U.

such provision, supplementary means of interpretation may be brought into the hermeneutic process of a treaty text –and silence– to clarify its meaning. Unfortunately, another peculiar feature distinguishing the accession process of China to the WTO is that, up to now, there is no notice of accessible official records of the negotiations of the Protocol, with the consequence that one of the two types of the supplementary means of interpretation expressly mentioned by Article 32 of the Vienna Convention –i.e. that of the preparatory works, or *travaux préparatoires*– is not available in the case under consideration.⁹⁰ However, paying due attention to the “circumstances of the conclusion” of China’s Accession Protocol, the other auxiliary interpretative tool explicitly recalled by Article 32, may provide the treaty interpreter with further elements once again endorsing the appropriateness of considering GATT Article XX applicable to Paragraph 11.3 of the Accession Protocol, as we have tried to demonstrate in the previous paragraphs.

In fact, as underlined by the most authoritative doctrine, the circumstances of the conclusion of international agreements «include the political, social and cultural factors –the *milieu*– surrounding the treaty conclusion»⁹¹, that, together with the economic conditions characterizing the subjects participating to the negotiations, allow «to determine the reality of the situation which the parties wished to regulate by means of the treaty»⁹². Such supplementary mean of interpretation therefore permits to take into consideration the historical and the factual circumstances in which WTO accession negotiations occurred for identifying the proper meaning to attribute to the silence of Paragraph 11.3 on the question of whether GATT Article XX may be invoked as a defence for breaching the WTO-plus obligation to eliminate export duties. Reconstructing the circumstances in which Beijing negotiated its WTO Accession Protocol distinctly reveal that China did not have sufficient knowledge, expertise and experience in multilateral trade law and diplomacy: the acceptance of a

LINDERFALK, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Dordrecht, 2007, 235 and ff.; L. SBOLCI, *Supplementary Means of Interpretation*, in E. CANNIZZARO (ED.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, 145-163; M.E. VILLIGER, *The 1969 Vienna Convention on the Law of Treaties: 40 Years After*, in *RCADI*, 2009, Vol. 344, 125 and ff; ID., *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission*, in E. CANNIZZARO (ED.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, 105-122.

⁹⁰ J.Y. QIN, *The Challenge of Interpreting “WTO-Plus” Provisions*, in *Journal of World Trade*, 2010, 140.

⁹¹ M.E. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, Leiden, 2009, 445.

⁹² I. SINCLAIR, *The Vienna Convention on the Law of Treaties – Second Edition*, Manchester University Press, Manchester, 1984, 141.

treaty text such as that of the Protocol, with many lacunae and inaccurate provisions, can be explained only in the light of the political reality of an inadequate level of technical sophistication and competence on the Chinese side, beyond the fact that the Beijing Protocol was the first accession instrument to be heavily marked by so many, unprecedented, WTO-plus rules. It is thus difficult to imagine that China, questioned during the accession negotiations on whether it intended to completely renounce to the applicability of GATT Article XX to Paragraph 11.3, would have agreed on such an unreasonable and groundless request. Equally, it is not easy to envisage the incumbent WTO Members to advance such an arrogant claim «as there is absolutely no systemic or policy reason to deny the applicability of [GATT] exceptions to the export-duty commitments»⁹³.

Another supplementary means of interpretation recognized by the International Law Commission⁹⁴ and by the doctrine⁹⁵, that of the «subsequent practice of States» (in the case at issue of States when drafting and accepting new WTO Accession Protocols), further confirm what we have just inferred from the circumstances of the conclusion of the China's accession instrument. In fact, Vietnam, Ukraine and Russia – having concluded their accession packages after the issue of the applicability of GATT Article XX to China's Accession Protocol emerged within the WTO membership⁹⁶ – inserted in their accession instruments a clear reference to the GATT with the intention of explicitly establishing the applicability of the general and security exceptions clauses to the WTO-plus obligations enshrined in their Protocols.⁹⁷ No case is reported of any aversion to

⁹³ J.Y. QIN, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, cit., 8.

⁹⁴ Document A/5809, *Report of the International Law Commission Covering the Work of its Sixteenth Session, 11 May-24 July 1964*, in *YILC*, 1964, vol. II, at p. 204; Document A/CN.4/186 and Add.1-7, *Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, in *YILC*, 1966, Vol. II, p. 98.

⁹⁵ M.K. YASSEN, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, in *RCADI*, 1976, Vol. 151, 52 and 80.

⁹⁶ Starting from 2005, there are official WTO records documenting the thorny interpretative issue of the applicability of GATT Article XX to China's Accession Protocol. For instance, within the WTO Committee on Market Access and in front of the WTO Council for trade in goods, the United States asked China to explain how Beijing intended to have recourse to GATT Article XX, as the Chinese representative claimed that *Zhōngguó* had the right to restrict the importation or exportation of products to protect public morals, public interest and national security, quoting the general exceptions clause of the General Agreement. See G/MA/W/78, Committee on Market Access, *China's Transitional Review Mechanism - Communication from the United States*, 15 September 2006, para. 1; G/C/W/560, *Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol on the Accession of the People's Republic of China ("China") - Questions From the United States to China*, 6 November 2006, para. 4.

⁹⁷ «The representative of Viet Nam confirmed that Viet Nam would apply export duties, export fees and charges, as well as internal regulations and taxes applied on or in connection with exportation in conformity with the GATT 1994» (WT/ACC/VNM/48, *Accession of Viet Nam - Report of the Working*

such new provisions by the incumbent WTO membership, that predictably refrained from openly and publicly demanding new Members to give up to their rights to have recourse to public policy exceptions clauses, a move that would have been not only largely unpopular, but also wholly irreconcilable with the already illustrated object and purpose of the WTO system.

10. Looking for diplomatic settlements: China and a *de iure condendo* global solution on exports of natural resources.

As communicated by the Chairman of the Panel, the Panel Report on the high-profile *China – Rare Earths* dispute is expected by November 2013,⁹⁸ a time-space likely to be extended in case of appellate proceedings, and to which the WTO granted period for implementation should be added.

Of course, the preferred DSU option of reaching an amicable settlement of the controversy has always to be kept in mind and looked for by the disputants⁹⁹; in this respect, some US politicians have already suggested that Chinese authorities could be particularly sensitive to the claimants' requests and willing to a prompt settlement of the case under the threat of «US efforts to block Chinese-funded mining projects in the United States as well as World Bank financing for Chinese mining projects»¹⁰⁰.

Party on the Accession of VietNam, 27 October 2006, para. 260); «[t]he representative of Ukraine confirmed that [...] Ukraine would reduce export duties in accordance with the binding schedule contained in Table 20(b). He also confirmed that, as regards these products, Ukraine would not increase export duties, nor apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994» (WT/ACC/UKR/152, *Report of the Working Party on the Accession of Ukraine to the World Trade Organization*, 25 January 2008, para. 240); «[t]he Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, and not to reintroduce or increase them beyond the levels indicated in this schedule, except in accordance with the provisions with GATT 1994» (GATT Schedule CLXV, *The Russian Federation*, Introductory Note).

⁹⁸ See WT/DS431/8, WT/DS432/8, WT/DS433/8, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, *Communication from the Chairperson of the Panel*, 26 March 2013.

⁹⁹ As provided for by Article 3.7 of the DSU, pursuant to which «[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred». On the importance of diplomatic settlements of WTO controversies see E. BARONCINI, *The WTO Dispute Settlement Understanding as a Promoter of Transparent, Rule-Oriented, Mutually Agreed Solutions - A Study on the Value of DSU Consultations and their Positive Conclusion*, in P. MENGOZZI (ED.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, Milano, 1999, 153 – 302.

¹⁰⁰ «These two steps would get China's attention right away and force them [sic] to reconsider their [sic] unfair practices». Statements of the US Senator Charles Schumer, reported in J.T. AREDDY, S. REDDY, *Trade Fight Flares on China Minerals*, in *The Wall Street Journal*, 13 March 2012.

In case WTO proceedings go on, because a diplomatic solution cannot be arrived at, in our view China should concentrate on three fronts. At judicial level, as we tried to demonstrate in the preceding paragraphs, Beijing has the possibility to overturn the very unfortunate findings of the Appellate Body in the *China – Raw Materials* case on the non-applicability of GATT Article XX to Paragraph 11.3 of the Accession Protocol, showing that such an interpretative result is incompatible with the very object and purpose of the WTO system, i.e. that of promoting a model of economic development which is sustainable, and thus also respectful of the «optimal use of the world's resources», as clarified by the Preamble of the WTO Agreement.¹⁰¹ On the internal side, China should continue -even with greater determination- to reform its rare earth industrial policy in order to upgrade technology and the environmentally friendly management of the economic sector, investing also to remedy the environmental degradation inflicted to some parts of the PRC territories in the last decades of overexploitation. Finally, at international political level, Beijing should show leadership, and take the lead for devising an ad hoc legal solution at WTO level, multilaterally regulating exports for the entire WTO membership.

Such new set of international rules defining a common WTO export regime should, at the same time, a) re-establish an equilibrium between original WTO Members and new acceding Members -the former having no duty to eliminate export duties, the latter under the obligation to eliminate or significantly reduce them- and b) strike a balance between the interests of importing countries – essentially, to avoid shortage and price fluctuations in the supply of raw materials- and those of the exporting countries –to maintain sovereignty on, and thus control and preserve, their natural resources, also guaranteeing low prices for domestic needs with the purpose of advancing their industrialization process.

11. Assessing the EU litigation strategy in the light of the Lisbon Treaty principles for the EU international action: the need to change.

After the analysis undertaken in the previous paragraphs, we are at last in the position to assess the law enforcement strategy of the European Union in the WTO

¹⁰¹ On the environmental friendly approach now characterizing the Marrakech system, as represented by the new explicit WTO objective of sustainable development, codified in the Preamble of the WTO Agreement, see G. MARCEAU, J. WYATT, *Trade and the Environment: The WTO's Efforts to Balance Economic and Sustainable Development*, in R. TRIGO TRINDADE, P. HENRY and C. BOVET (EDS.), *Economie Environnement Ethique, de la responsabilité sociale et sociétale, Liber Amicorum Anne Petitpierre-Sauvain*, Schulthess, Zurich, Bâle, Genève, 2009, 225-235.

cases on Chinese raw materials and rare earths export restrictions. In fact, the Lisbon Treaty, entered into force on 1 December 2009, now codifies some core values and principles which have to be respected and promoted by Europe while developing its international action.¹⁰² Therefore, Article 3, para. 5, TEU states that «[i]n its relations with the wider world, the Union shall [...] contribute to [...] the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade», while Article 21 TEU declares that the European Union «shall promote multilateral solutions to common problems [and] [...] work for a high degree of cooperation in all fields of international relations [also] in order to: [...] f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, [...] to ensure sustainable development». If assessed in the light of the reported TEU provisions, it seems that the litigation strategy chosen by Europe of arguing, before the WTO judging bodies, the non-availability of GATT Article XX to China Accession Protocol does not respect the values and principles which have to characterize the EU international action on the basis of the Lisbon Treaty.

As we have tried to demonstrate *supra*, the AB report rejecting the application of the GATT general exceptions' clause to the WTO-plus provision to eliminate export duties is highly problematic as it seems in open contradiction with international treaty-law interpretation. It creates a very awkward rule of “jus cogens”: in practice, Paragraph 11.3 of China Accession Protocol cannot be derogated to protect and promote the non-trade values enshrined in Articles XX or XXI of the GATT 1994. Therefore, because of the AB bizarre interpretation, the WTO-plus obligation to eliminate export duties has for China the same legal value of peremptory norm attributed by the international legal system to the prohibition of torture or the prohibition of genocide: and such a situation pushes China towards export *quantitative* restrictions concerning minerals and metals to pursue its policies of preservation of natural resources and environmental and health protection. What is worse, the recent WTO Appellate report has provoked a “certain” irritation to Beijing, rightly convinced that the WTO reconstruction of the relation between the GATT public policy exceptions and the WTO-plus obligation to eliminate export duties unacceptably heightens the already worrying asymmetry of obligations penalizing the membership of new WTO acceding Members. These consequences, due also to the EU litigation strategy, run counter the general purposes of the Lisbon

¹⁰² On the values and principles guiding the EU external action see E. BARONCINI, S. CAFARO, C. Novi, *Le relazioni esterne dell'Unione europea*, Torino, 2012.

Treaty to «promote multilateral solutions to common problems», thus making such strategy incompatible with the recalled principle, put at the basis of the EU international action. For the time being, in fact, China reacted by going “unilateral”, favoring export *quantitative* restrictions, the most negative measures for the multilateral trade system, instead of cooperating to find a smooth solution to the management of rare earths, and thus moving away from the definition of common rules for a well-adjusted administration of finite natural resources.

In addition, pleading against the applicability of GATT Article XX to China Accession Protocol is in conflict with the principle of sustainable development enshrined in the WTO Preamble, as well as in the Lisbon Treaty, requiring the European Union to «contribute [...] to the sustainable development of the Earth», and to «help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development»¹⁰³. In fact, arguing that export duties can never be used by China to implement its conservation policy for raw materials and rare earths runs counter the principle of sustainable development as it deprives Beijing of an important tool to pursue some of the non-trade values contemplated in GATT Article XX while not excessively hindering and distorting international trade.

Moreover, the EU litigation strategy opposing the applicability of the GATT public policy exceptions to China Accession Protocol is incoherent with the duty to «seek to develop relations and build partnerships with third countries» for promoting common goals and values, always required by Article 21 TEU. Beijing reacted with crossness to the AB report, thus jeopardizing a collaboration with Europe on the crucial issue of access and management of natural resources. But, above all, the EU, by not focusing its litigation strategy on the substantive aspects of the Chinese export restrictions, i.e. alleged protectionism and discrimination in the *China – Raw Materials* and *China – Rare Earths* cases, is losing an important opportunity to request Beijing to be consistent in all the delicate issues of equilibrium between free trade and environmental protection, in particular in the fight against climate change. As it is very well known, China is highly critical of the EU aviation emission trading scheme (ETS),¹⁰⁴ the discipline developed by the Union in order to reduce CO₂ emissions, and involving any airline company having a flight landing in or taking off from a

¹⁰³ Article 21, para. 2, lit. f), TEU.

¹⁰⁴ See e.g. J. WATTS, *Chinese Airlines Refuse to Pay EU Carbon Tax*, *The Guardian*, 4 January 2012.

European airport,¹⁰⁵ claiming, *inter alia*, that such EU Aviation ETS has illegitimate extraterritorial effects, infringes WTO law and also the ICAO (International Civil Aviation Organization) system.¹⁰⁶ Of course, the EU would have much more political and logical strength against China in defending the EU unilateral climate change measure also in the light of the principle of sustainable development if Brussels did not argue, within the WTO dispute settlement mechanism, that Beijing can never justify a breach of its WTO-plus obligation to eliminate export duties in order to implement its conservation policies. The opening of China to sustainability in trade issues within the WTO cases involving raw materials and rare earths should have been welcomed by the European Union, in order to request Beijing to be coherent when faced by EU unilateral measures, like the EU Aviation ETS, and thus ready to consider the EU climate change disciplines in the light of the principle of sustainable development. Finally, devoting all its litigation efforts to analyze the restrictive Chinese disciplines –both tariff and non-tariff export restrictions- under the severe requirements for justification demanded by GATT Article XX would help Beijing in revising and setting up a more appropriate national legislation, with reference to the mining of natural resources, as China would be allowed, and/or also persuaded, to adequately privilege the most transparent trade obstacles, i.e. tariff instruments, for pursuing its non-trade values.

It has also to be taken into consideration that the EU's opposition to the applicability of the GATT public policy exceptions to China's WTO plus obligation is inconsistent with its proposal for a new WTO Agreement on Export Taxes within the non-agricultural market access (NAMA) negotiations of the Doha Round. The European Union, in fact, considers that paragraph 16 of the Doha Declaration - pursuant to which WTO Members have agreed «to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs,

¹⁰⁵ Directive no. 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ 2009 L8/3. On this very important piece of EU legislation concerning climate change cf. J. SCOTT, L. RAJAMANI, *EU Climate Change Unilateralism*, in *EJIL*, 2012, 469-494.

¹⁰⁶ L. BARTELS, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, in *EJIL*, 2012, 429-467; J. FABER, L. BRINKE, *The Inclusion of Aviation in the EU Emissions Trading System*, ICTSD Global Platform on Climate Change, Trade and Sustainable Energy, Issue Paper No. 5, September 2011; B. MAYER, *Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011*, in *CML Rev.*, 2012, 1113-1140; P. MANZINI, A. MASUTTI, *The application of the EU ETS system to the aviation sector: from legal disputes to international retaliations?*, in *Air & Space Law*, 2012, 307-324; J. MELZER, *Climate Change and Trade – The EU Aviation Directive and the WTO*, in *JIEL*, 2012, 111-156.

and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries»¹⁰⁷- includes in the Doha negotiating mandate also export taxes, export tariffs and export non-tariff barriers, as paragraph 16 of the DDA makes no reference as to whether tariffs and non-tariff barriers «are imposed on imports or exports»¹⁰⁸. Since export taxes are more and more frequently used by major supplier countries at prohibitive levels, making those export taxes equivalent to export quantitative restrictions or prohibitions, with distorting effects on global commodity trade and indirect subsidization of the processing industries of the WTO Members imposing export duties, the EU has proposed an *ad hoc* WTO Agreement on export taxes to eliminate unfair advantages and distortions.¹⁰⁹ In its proposal, the EU sets as final aim of the new WTO Agreement the elimination of export taxes, nevertheless allowing developing countries and least-developed WTO Members to maintain, within certain limits, export taxes «provided that such export taxes and their maximum levels are listed in Members' schedules of commitments»¹¹⁰. The EU thus suggests to treat export duties of the two categories of WTO Countries like import duties, binding their maximum amount in an *ad hoc* schedule of commitments. The EU proposed Agreement requests, in order to maintain export taxes, a “necessity test” -i.e. that export taxes «are necessary, in conjunction with domestic measures, to maintain financial stability, to satisfy fiscal needs, or to facilitate economic diversification and avoid excessive dependence on the export of primary products»¹¹¹- and an “adverse effects test” –meaning that export taxes do not have to «adversely affect international trade by limiting the availability of goods to WTO Members in general or by raising world market prices of any goods beyond the prices that would prevail in the absence of such measures».¹¹² Furthermore, export taxes may be maintained only provided that they do not cause «serious prejudice to the interests of developing country Members»¹¹³.

In its proposed new WTO Agreement, the EU clearly states that the duty to eliminate export taxes «shall not prevent [...] any Member from applying export

¹⁰⁷ WT/MIN(01)/DEC/1, *Ministerial Declaration Adopted on 14 November 2001*, 20 November 2001.

¹⁰⁸ TN/MA/W/103/Rev.3/Add.1, *Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations – Addendum*, 21 April 2011, at p. 69.

¹⁰⁹ TN/MA/W/11/Add.6, *Market Access for Non-Agricultural Products – Negotiating Proposal on Export Taxes – Communication from the European Communities*, 27 April 2006.

¹¹⁰ Article 2 of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

¹¹¹ Article 3, para. 1, lit. a), of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

¹¹² Article 3, para. 1, lit. b), of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

¹¹³ *Ibid.*

taxes in accordance with the rules applicable under GATT Article XX (General Exceptions) and Article XXI (Security Exceptions)»¹¹⁴. Such negotiating option is consequently in open contrast with the litigation strategy the EU opted for in the *China – Raw Materials* and *China – Rare Earths* cases, and reveals marked political contradictions in the EU attitude on the WTO availability of public policy exceptions for justifying export duties¹¹⁵. Such attitude is very far from the above illustrated Lisbon Treaty values and principles for the EU external relations. The constructive and cooperative approach which should characterize the EU global trade governance does not, of course, mean that the Union has to abstain from using the WTO dispute settlement mechanism. In parallel with what the same DSU asks for, when starting a WTO complaint and arguing a case before a panel or the Appellate Body in Geneva, the EU has always to exercise its judgment as to whether and how «action under these procedures would be *fruitful*»¹¹⁶. The legal arguments for discussing a WTO dispute have thus to be chosen so as «to secure a positive solution to a dispute», aware that the multilateral trade system has a clear preference for «a solution mutually acceptable to the parties»¹¹⁷. We therefore hope that the EU adjusts its litigation strategy on the current *China – Raw Materials* and *China – Rare Earths* disputes, focusing on the substance –i.e. the alleged protectionism and discriminatory nature of the Beijing export restrictions- instead of engaging in sterile sophistries which have no *raison d'être*. Thoroughly and constructively debating, within the WTO dispute settlement mechanism, on how Chinese health and conservation measures have to be revised in order to be justified under the GATT public policy exceptions will help Beijing in better achieving its non-trade value purposes, fostering the «raw materials diplomacy» and reinforcing the «dialogue [...] with emerging resource-rich economies such as China», which are one of the pillars of the EU Raw Materials Initiative¹¹⁸.

¹¹⁴ Article 5, lit. b), of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

¹¹⁵ Cf. C.H. WU, *Access to Raw Materials: The EU's Pursuit of Trade Disciplines on Export Control*, in B. VAN VOOREN, S. BLOCKMANS, J. WOUTERS (EDS.), *The EU's Role in Global Governance – The Legal Dimension*, Oxford University Press, Oxford, 2013, 178-192.

¹¹⁶ Article 3, para. 7, DSU.

¹¹⁷ *Ibid.*

¹¹⁸ COM(2008) 699 final, *Communication from the Commission to the European Parliament and the Council – The Raw Materials Initiative- Meeting our Critical Needs for Growth and Jobs in Europe*, 4.11.2008, at p. 6. See also COM(2011) 25 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling the Challenges in Commodity Markets and on Raw Materials*, 2.2.2011.

**NON-TRADE VALUES IN THE TBT AGREEMENT: THE
ANALYSIS OF THE “DOLPHIN-SAFE” LABELLING
SCHEME BY THE WTO APPELLATE BODY REPORT IN
THE *US – TUNA II (MEXICO)* CASE**

Elisa Baroncini

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1. Introduction.

Since more than twenty years, Mexico and the United States have been facing each other at international level on the method used by the Latin American fishermen to catch tuna in the Eastern Tropical Pacific Ocean (ETP).¹ Within the GATT 1947, the long-standing dispute accompanying the two countries produced two widely commented reports on the US ban on the imports of tuna caught with purse-seine nets endangering dolphins;² while, in the WTO system, the symbiosis between tuna and dolphins –the first ones constantly swimming together with the marine mammals that, once spotted by the Mexican vessels, are chased and encircled

¹ For a reconstruction of the Tuna/Dolphin dispute between Mexico and the United States, see D. D. MURPHY, *The Tuna-Dolphin Wars*, in *Journal of World Trade*, 2006, 597-617.

² GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155 (*US – Tuna (Mexico)*); GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted (*US – Tuna (EEC)*).

in order to more easily and abundantly catch the tuna beneath- has been considered also by the Appellate Body, in a report issued on 16 May 2012, and adopted by the Dispute Settlement Body (DSB) on 13 June 2012.³ In particular, the WTO Tribunal had to rule on the US “Dolphin-Safe” labelling scheme. This scheme, created and disciplined by the *Dolphin Protection Consumer Information Act* (DPCIA) of 28 November 1990⁴ and by its implementing regulations⁵, as interpreted by a US Federal Court in the so called “Hogarth ruling”⁶, has been considered as unjustified and discriminatory by Mexico, because, for tuna caught in the ETP, the Dolphin-Safe label may be used only provided that the catching of the fish occurs without intentionally deploying purse-seine nets. Such a discipline, in fact, prevents Mexican operators from marketing their tuna as caught safeguarding dolphins even if they abide by the standard developed under the Agreement on the International Dolphin Conservation Program (AIDCP), the treaty concluded in 1998, after many years of negotiations, and which also includes as Contracting Parties the United States and Mexico⁷. The AIDCP standard for dolphin-safe labelling have been agreed on in the

³ Appellate Body Report, *United States – Measures concerning the importation, marketing and sale of tuna and tuna products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted 13 June 2012.

⁴ *United States Code*, Title 16, Section 1385.

⁵ *United States Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92.

⁶ United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). Under the DPCIA, the certification that no purse-seine nets have been intentionally deployed on or used to encircle dolphins in order to catch tuna in the ETP is to be requested only if the US Secretary of Commerce finds that «the intentional deployment on or encirclement of dolphins with purse-seine nets is [...] having a significant adverse impact on any depleted stock» of dolphins in the ETP (DPCIA, subsection 1385 (h)). On 31 December 2002, the US administration made its final finding that «the intentional deployment on or encirclement of dolphins with purse seine nets [was] not having a significant adverse effect on any depleted dolphin stock in the ETP» (Panel Report, para. 2.18). However, such positive conclusions for the Mexican fleets, allowing their tuna to be eligible for the Dolphin-Safe label, were reversed by the just quoted Hogarth ruling, where the US Court of Appeals for the Ninth Circuit upheld the legal action submitted by the Earth Island Institute, a non-governmental organization claiming that the Secretary of commerce did not conduct all the scientific studies requested by the US discipline for assessing the dolphin-safety of fishing tuna operations, and that «the best available scientific evidence did not support the Secretary’s finding» (para. 176). As a result of the reported US federal case-law, tuna harvested in the ETP zone may be eligible for the US Dolphin-Safe label only provided that two certifications are produced: a) a certification by the captain of the fishing vessel and the independent observer approved and sent by the IDCP (the International Dolphin Conservation Program, on which see *infra* in the text and the accompanying footnotes) on the vessel that no dolphins were killed or seriously injured during the sets in which tuna were caught; and b) a certification that no purse-seine net was intentionally deployed on or used to encircle dolphins during the same fishing trip (see Panel Report, para. 2.20).

⁷ The AIDCP, which entered into force on 2 February 1999, has been concluded also by the European Union, and the text is thus available also in the EU Official Journal: see Council Decision of 26 April 1999 on the signature by the European Community of the Agreement on the International Dolphin Conservation Programme, OJ L132/1 of 27/05/1999. For a presentation of the AIDCP cf. C. HEDLEY, *The 1998 Agreement on the International Dolphin Conservation Program: Recent Developments in the*

“Procedures for AIDCP Dolphin Safe Tuna Certification”⁸, which establish, unlike the challenged US law, that tuna may be qualified as dolphin-safe just on the basis of statistical data on mortality and injury of the marine mammals during fishing operations, without taking into consideration any fishing method. The AIDCP standard thus admits the qualification of tuna as dolphin-safe even if purse-seine nets have been used in the ETP, provided that the independent observers monitoring the fishing activities on the Mexican boats may certify that there has been no “significant adverse impact” on the conservation of the popular cetaceans during their intentional encirclement to capture the underneath tuna⁹.

The AB report in the *US-Tuna II (Mexico)* case is of great interest as it intervenes on a host of issues central to international trade, also in the perspective of the relation between trade liberalization, the consumers’ right to information, and the protection of the health and welfare of animals, moreover interpreting a WTO Agreement -the Agreement on Technical Barriers to Trade (hereinafter: the TBT Agreement)-¹⁰ which, from the enter into force of the multilateral trade system in 1995, has been the subject of only four cases entirely resolved by applying its rules and under both sets of proceedings allowed by the Geneva mechanism¹¹.

Furthermore, as the object of the dispute here considered is a labelling system dedicated to the sustainability of the production process of the traded good – a market instrument increasingly used to highlight to the potential purchasers the respect for the environment and natural resources in production methods, as well as the ecological qualities that distinguish the composition of a commodity – the

Tuna-fishing Controversy in the Eastern Pacific Ocean, in Ocean Development and International Law: the Journal of Marina Affairs, 2001, 71-92.

⁸ AIDCP, *Procedures for AIDCP Dolphin Safe Tuna Certification* (amended, 20 October 2005), available at the link <https://www.iattc.org/PDFFiles2/AIDCP-Dolphin-Safe-certification-system-REV-Oct2005.pdf>.

⁹ See Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, para. 7.571.

¹⁰ On the TBT Agreement see, for a very accurate presentation, A. E. APPLETON, *The Agreement on Technical Barriers to Trade*, in P. F. J. MACRORY, A. E. APPLETON, M. G. PLUMMER (EDS.), *The World Trade Organization: Legal Economic and Political Analysis*, Vol. I, Springer, New York, 2005, 371-409; P. C. MAVROIDIS, M. WU, *The Law of the World Trade Organization (WTO): Documents, Cases & Analysis*, West Publishing, St Paul MN, 2013, 593-627; P. VAN DEN BOSSCHE, W. ZDOUC, *The Law and Policy of the World Trade Organization*, Cambridge University Press, Cambridge, 2013, 850-893.

¹¹ Beyond the dispute here illustrated, the reports of the Appellate Body focused on the TBT Agreement are Appellate Body Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/AB/R, adopted 23 October 2002; Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, WT/DS406/AB/R, adopted 24 April 2012; Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements (US – COOL)*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012.

important participation of civil society and stakeholders, distinguishing the *US-Tuna II (Mexico)* case, does not come as a surprise. Institutions and academics, non-governmental organizations dedicated to the protection of animals, private entities that promote the development of international standards, have thus presented their significant contribution to the WTO judicial bodies in the *US-Tuna II (Mexico)* dispute making use of the *amicus curiae* instrument¹², following a long-standing practice developed by the Appellate Body since its well-known report of the *US - Shrimp* case¹³.

This essay, therefore, intends to outline the most relevant aspects of the conclusions reached by the Appellate Body in the delicate interpretative issues emerged on the compatibility of the US Dolphin-Safe labelling scheme with the TBT Agreement. They concern the distinction between “regulation” and “standard”, the principles of non-discrimination and necessity with reference to trade restrictions, the definition of “international standardizing body”, and the identification of the legitimate purposes for the pursuit of which the WTO Members may adopt and / or maintain technical measures -purposes that the Appellate Body shows to consider as

¹² Among the *amici curiae* submitted in the dispute here commented cf. Humane Society International, American University - Washington College of Law, Program on International and Comparative Environmental Law, *Written Submission of Non-Party Amici Curiae*, 6 May 2010; Humane Society of the United States (HSUS), Humane Society International (HSI), American University's Washington College of Law (WCL), *Amicus Curiae Submission in the Matter of United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (WT/DS381)*, 2 February 2012; ASTM International, *Written Submission of Non-Party Amicus Curiae*, 2 February 2012; Robert Howse, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (AB-2012-2/DS381) - Amicus Curiae Submission*, 17 February 2012.

¹³ See Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products (US — Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, paras. 79-91; Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US — Lead Bars)*, WT/DS138/AB/R, adopted 7 June 2000, paras. 36-42. On the WTO case-law concerning *amicus curiae* cf. E. BARONCINI, *Società civile e sistema OMC di risoluzione delle controversie: gli Amici Curiae*, in F. FRANCONI, F. LENZERINI, M. MONTINI (a cura di), *Organizzazione mondiale del commercio e diritto della Comunità europea nella prospettiva della risoluzione delle controversie*, Milano, 2005, 75-116; L. BOISSON DE CHAZOURNES, M. M. MBENGUE, *L'amicus curiae devant l'Organe de règlement des différends de l'OMC*, in S. MALJEAN-DUBOIS (sous la direction de), *Droit de l'Organisation Mondiale du Commerce et protection de l'environnement*, Bruylant, Bruxelles, 2003, 400-443; J. B. CAWLEY, *Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Organizations*, in *Penn State International Law Review*, 2004, 47-78; J. DURLING, D. HARDIN, *Amicus Curiae Participation in WTO Dispute Settlement: Reflections on the Past Decade*, in R. YERXA, B. WILSON (EDS.), *Key Issues in WTO Dispute Settlement: the First Ten Years*, Cambridge University Press, Cambridge, 2005, 221-231; J. KELLER, *The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments*, in *International Journal of Legal Information*, 2005, 449-470; P. C. MAVROIDIS, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in A. VON BOGDANDY, P. C. MAVROIDIS, Y. MÉNY (EDS.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, Kluwer, The Hague, 2002, 317-329.

legitimate even when covering non-trade values concerning non-product related process and production methods (NPR-PPMs), a theme that, from the first GATT 1947 report in the *US – Tuna (Mexico)* case, catalyzed lively and articulated discussions, intensified with the possibility of including NPR-PPMs in the TBT Agreement.

2. The legal characterization of the Dolphin-Safe labelling scheme on the basis of the TBT Agreement: mandatory (regulation) or voluntary (standard) measure?

Mexico based its assertion of the incompatibility of the US legislation with the TBT Agreement invoking only some paragraphs of Article 2 of such Multilateral Agreement. The Latin American country was, in fact, convinced of the possibility of bringing the Dolphin-Safe Congress discipline, together with the implementing regulatory measures of the labelling scheme, as interpreted by the federal jurisprudence of the United States, within the TBT concept of “technical regulation” (“*règlement technique*”, or “*reglamento técnico*”, in the other two WTO official linguistic versions, French and Spanish, of the TBT Agreement) as defined in Annex 1.1 to the TBT Agreement –i.e.a measure, concerning product characteristics, as well as terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method, with which compliance is mandatory for the economic operators. Mexico, in particular, pointed out that, although it is not formally necessary to attach the “dolphin-safe” label on tuna products to enter the North American market, it is *de facto* indispensable to do it in order to obtain the consideration of US consumers, who do not buy tuna products without the “dolphin-safe” label. Furthermore, Mexico remarked that, even if the affixing of the “dolphin-safe” label is voluntary, the US scheme allows the qualification of the method for catching tuna marketed in the United States as respectful of the dolphins only if such method is provided for by the North American legislation. For the ETP area, where dolphins and tuna live in symbiosis and in which the operating fleet is almost exclusively Mexican, the fishing practice required by the US measure is the absence of the intentional deployment or use of purse-seine nets encircling dolphins, which, however, is the capture technique practiced by vessels of the Latin American country. Therefore, any other method protecting dolphins in tuna catching operations—including the practice adopted by the Mexican fleet, which observes the standards developed within the AIDCP system—does not allow access to the US

“dolphin-safe” label, nor is it possible to present the tuna caught in the ETP with purse-seine nets with a different, but essentially similar, wording declaring that Latin American tuna is respectful of the health and life of dolphins. Mexico consequently argued that, under the TBT Agreement, the “dolphin-safe” labelling scheme is not a voluntary measure (“standard”), but, on the contrary, a mandatory rule (i.e., a “technical regulation”), because it calls for compliance with its requirements in order to inform the US consumer on the “dolphin-safety” of tuna products.

The Appellate Body agreed with Mexico. Overcoming the objection of the United States, pursuant to which the voluntary nature of the “dolphin-safe” scheme would derive from the fact that such measure does not impose any obligation to affix the US label «in order to place the product for sale on the [US] market»¹⁴, the WTO judging body concluded that the US legislation is a technical regulation falling into the definition of Annex I of the TBT Agreement. In fact, in the United States, the labelling schemes certifying the dolphin-safety of tuna products without respecting the requirements of the North American discipline are prohibited by the latter, regardless of whether the possibility may be demonstrated that dolphins can be preserved during the tuna-catching operations of a fishing technique different from those imposed by the US measure in order to allow the use of the “dolphin-safe” label. For the Appellate Body, therefore, «the measure at issue establishes *a single definition of ‘dolphin-safe’* and treats any statement on a tuna product regarding ‘dolphin-safety’ that does not meet the conditions of the measure as a deceptive act or practice» which is sanctioned, through a specific enforcement mechanism, with seizure of the products and charges of false statement against the involved economic operators, with the consequence that «any producer, importer, exporter, distributor or seller of tuna products *must comply* with the measure at issue in order to make any ‘dolphin-safe’ claim»¹⁵. As the US scheme «sets out *a single and legally mandated definition of a ‘dolphin-safe’ tuna product* and disallows the use of other labels on tuna products that do not satisfy this definition», for the WTO appeal judges the North American legislation on the “dolphin-safe” label has a mandatory nature: «the US measure *prescribes* in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its “dolphin-safety”», a circumstance «characterizing the measure at issue as a ‘technical regulation’ within the meaning of Annex 1.1 to the TBT Agreement»¹⁶.

¹⁴ Appellate Body Report, *US–Tuna II (Mexico)*, para. 196.

¹⁵ *Id.*, paras. 195–196, emphasis added.

¹⁶ *Id.*, para. 199, emphasis added.

3. The legitimate objectives of Article 2, para. 2 of the TBT Agreement: the inclusion, by the Appellate Body, of goals connected with production processes not related to the physical characteristics of the final product (Non-Product Related Process and Production Methods, NPR-PPMs).

Having established the nature of “technical regulation” of the US Dolphin-Safe labelling scheme, the Appellate Body proceeded to verify its compatibility with various requirements codified in Article 2 of the TBT Agreement, providing also a valuable reconstruction of the technique to be followed to carry out the ascertainment of the “legitimate objectives” referred to in paragraph 2 of the recalled provision -namely the purposes for which a WTO Member may adopt technical measures even if they are likely to be detrimental to international trade. In fact, pursuant to Article 2, para. 2 of the TBT Agreement, technical regulations may not be «more trade-restrictive than necessary to fulfil a *legitimate objective*»¹⁷; and, continues the provision in question, legitimate objectives are to be considered «*inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment». Already in the *EC - Sardines* case it was found that, by virtue of the expression *inter alia*, the list of objectives following such expression is just a set of simple examples, that may be extended to other purposes, thus qualifying as legitimate objectives under Article 2, para. 2 of the TBT Agreement also aims not expressly resulting from the text of the TBT Agreement¹⁸. In the dispute *US - Tuna II*, the Appellate Body agreed with

¹⁷ Emphasis added.

¹⁸ «[G]iven the use of the term ‘*inter alia*’ in Article 2.2, the objectives covered by the term “legitimate objectives” in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2». See Appellate Body Report, *EC - Sardines*, para. 286. For a comment on this case, also with reference to the expression of “legitimate objectives” contemplated in Article 2, para. 2 of the TBT Agreement, see A. E. APPLETON, V. HEISKANEN, *The Sardines Decision: Fish Without Chips?*, in A. D. MITCHELL (ED.), *Challenges and Prospects for the WTO*, Cameron May, London, 2005, 165-192; E. BARONCINI, *The WTO Dispute between Peru and the European Community on the EC Trade Description of Sardines*, in *The Global Community - Yearbook of International Law and Jurisprudence*, Vol. III, 2003, edited by G. ZICCARDI CAPALDO, Oceana Publications, Dobbs Ferry, NY, USA, 2004, 159-194; H. HORN, J.H.H. WEILER, *European Communities: Trade Description of Sardines - Textualism and its Discontent*, in *The American Law Institute Reporters' Studies on WTO Case-law: Legal and Economic Analysis*, Cambridge University Press, Cambridge, 2007, 551-578; R. HOWSE, *The Sardines Panel and AB Rulings: Some Preliminary Reactions*, in S. HENSON, J. S. WILSON (EDS.), *The WTO and Technical Barriers to Trade*, Elgar, Cheltenham, 2005, 219-226; M. MATSUSHITA, “Sovereignty” Issues in Interpreting WTO Agreements: the *Sardines Case and Article 2.4 of the TBT Agreement*, in D. GEOGIEV, K. VAN DER BORGH (EDS.), *Reform and Development of the WTO Dispute Settlement System*, Cameron May, London, 2006, 191-199; R. MUÑOZ, *La Communauté entre les mains des normes internationales: les conséquences de la décision “Sardines” au sein de l’OMC*, in *Revue du droit de l’Union européenne*, 2003, 457-484.

the Panel's approach, according to which the two purposes declared by the US measure –i.e. a) the aim of ensuring that consumers are not deceived or misled on the presence, in the products purchased, of tuna caught using fishing methods harmful to dolphins (“consumer information objective”), and b) the goal to contribute to the protection of dolphins by ensuring that the US market is not used to encourage fleets to use catching techniques dangerous for those marine mammals (“dolphin protection objective”)- have been allocated, respectively, within the general purposes of the «prevention of deceptive practices» and the «protection of [...] animal [...] life or health , or the environment» contemplated by Article 2, para. 2 of the TBT Agreement, and, therefore, qualified as «legitimate objectives» within the meaning of that provision¹⁹.

Even if the aims of the US Dolphin-Safe provisions had been accepted as falling into the scope of two of the very general legitimate objectives expressly contemplated by the TBT Agreement, the Appellate Body did not pass up the opportunity to emphasize the possibility of a broad reading of the relevant expression – “legitimate objectives” – of the Agreement at issue, focusing on the interpretative technique to be followed to determine whether the reasons put by a WTO Member at the basis of an internal discipline formally hindering trade may be considered as “legitimate objectives” under WTO law also when such reasons are not codified in Article 2, para. 2 of the TBT Agreement. Therefore, for the case in which the goal pursued by a domestic technical measure may not fall within the scope of the expressly listed WTO purposes, the Appellate Body remarked that it is the duty of the Geneva judicial bodies to determine whether the stated goal can be considered as “legitimate” under Article 2, para. 2 of the TBT Agreement, using as a «reference point» the purposes expressly stated in that provision, the Preamble of the TBT Agreement, and «[the] objectives recognized in the provisions of other covered agreements [that] may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the TBT Agreement»²⁰. The WTO judiciary thus intends to guarantee a wide and dynamic approach to the characterization of a Member's interest as “legitimate”, while ensuring at the same time objectiveness, coherence and unity in the definition of non-trade values justifying the exceptions to the multilateral obligations to eliminate barriers to international exchanges. In fact, one of the most significant institutional features of the Uruguay Round results is that of the creation of «the WTO

¹⁹ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 302, 303, 313).

²⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

Agreement [as] a single treaty instrument which was accepted by the WTO Members as a “single undertaking”²¹ within which, therefore, all the rules of the multilateral system must be interpreted in an integrated and unified way in order to confer on that system depth and strength. But there is more. Considering as legitimate objectives the purposes of the Dolphin-Safe labelling system, in particular the «dolphin protection objective», the Appellate Body addressed, resolving it positively, even if implicitly, the sensitive issue of bringing, within the scope of TBT Agreement, technical measures concerning production methods unrelated to the product. In fact, NPR-PPMs measures have been the subject of great debate in the multilateral system, and fiercely contested particularly by the developing countries because of their extraterritorial nature, which imposes disciplines of the regulatory State to the exporting country significantly interfering in the internal policies of the latter, an interference which, in the opinion of the developing countries, would always be illegal and could never be justified on the basis of WTO Agreements²². Faced with the Mexican criticisms on the possibility of qualifying as a “legitimate objective” under Article 2, para. 2 of the TBT Agreement the purposes of the US legislation to contribute to the protection of dolphins by ensuring that the US market is not used to encourage fleets to employ catching tuna techniques which are considered dangerous for those marine mammals, as such qualification would result in a unilateral imposition of standards of animal welfare by the United States to third countries, the Appellate Body decided not to rule directly on these arguments of the Latin American country. The permanent WTO Tribunal, similarly to what it had already observed in the *US - Shrimp* case with regard to the extraterritorial scope of GATT Article XX,²³ simply and incontrovertibly stated that it is inherent in the

²¹ Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut (Brazil - Coconut)*, WT/DS22/AB/R, adopted 20 March 1997, para. 38.

²² For a detailed survey of the debate within the GATT 1947 and WTO systems of the possibility of justifying, within the multilateral trade system, measures concerning methods of production unrelated to the final physical composition of goods see C. R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals*, Cambridge University Press, Cambridge, 2011; R. HOWSE, D. Regan, *The Product / Process Distinction: An Illusory Basis for Disciplining Unilateralism in Trade Policy*, in *EJIL*, 2000, 249-289; M. REITERER, *The International Legal Aspects of Process and Production Methods*, in *World Competition*, 1993, 111-128.

²³ «[C]onditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that *requiring from exporting countries compliance with, or adoption of, certain policies* (although covered in principle by one or another of the exceptions) *prescribed by the importing country*, renders a measure *a priori*

nature of any WTO Member regulation the capacity to create barriers to trade –i.e. to impose unilateral policy choices of the importing country to the exporting country– which are nevertheless tolerated by the multilateral system within the limits specified in Article 2, para. 2 of the TBT Agreement. Therefore, concluded the Appellate Body, «the mere fact that a WTO Member adopts a measure that entails a burden on trade in order to pursue a particular objective cannot *per se* provide a sufficient basis to conclude that the objective that is being pursued is not a “legitimate objective” within the meaning of Article 2.2»²⁴. Accordingly, also technical measures concerning production processes unrelated to the physical composition of the final product may fall within the scope of the TBT Agreement, in particular where such measures are labelling schemes designed to certify the sustainability of the manufacturing method, whose purposes may be qualified as “legitimate objectives” under the TBT rules. It is evident that the interpretative approach chosen by the WTO Appellate Body with reference to the TBT rules significantly enhances the labelling schemes as a market tool less invasive and more suitable to balance trade liberalization with the protection of the environment as well as of other public policy objectives²⁵.

4. The less favourable treatment of Mexican tuna on the basis of Article 2, para. 1 of the TBT Agreement.

Having established the nature of “technical regulation” for the Dolphin-Safe label discipline, the Appellate Body has tested its compatibility with the principle of non-discrimination enshrined in Article 2, para. 1 of the TBT Agreement, pursuant to which «Members shall ensure that in respect of technical regulations, *products imported* from the territory of any Member shall be accorded *treatment no less favourable* than that accorded to like products of national origin and to like products originating in any other country»²⁶.

incapable of justification under Article XX. *Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply*». Appellate Body Report, *US – Shrimp*, para. 121, emphasis added.

²⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 338.

²⁵ On this aspect and, more generally, on the right of consumers information as a non-trade value which may be considered as protected within the WTO system see E. BARONCINI, *Il diritto di informazione del consumatore negli Accordi GATT e TBT: l'approccio dell'Unione europea*, in G. VENTURINI, G. COSCIA, M. VELLANO (a cura di), *Le nuove sfide per l'Organizzazione mondiale del commercio a dieci anni dalla sua istituzione*, Milano, 2005, 287-324.

²⁶ Emphasis added.

The Appellate Body confirmed the test for the no less favourable treatment already stated in the *US – Cloves Cigarettes* case, test which consists of a two-tier analysis. First, in order to declare that a WTO Member reserves a less favourable treatment to a group of imported products, it is required to check whether the attacked measure creates unequal conditions of competition to the detriment of that group of products. Therefore, it has to be determined whether the detrimental effect on imported products «stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products»²⁷. Applying such a two-tier test, the WTO judiciary reaffirmed the Panel conclusions about the fact that the impossibility for the Mexican tuna to bear a label attesting its dolphin-safety, because the fish has been caught by setting on dolphins with purse-seine nets, modifies the conditions of competition and produces «a detrimental impact on the competitive opportunities of Mexican tuna products in the US market»²⁸. In fact, the US label on the dolphin-safety of tuna has a significant commercial value in the US market, where it catalyzes the overwhelming consensus of distributors and final consumers: the possibility of having access to the label, therefore, constitutes an undoubted and significant competitive advantage in the US territory²⁹.

Once recognized the detrimental effect on Mexican tuna caused by its ineligibility to a dolphin-safe label in the US market, the Appellate Body examined whether there was a “legitimate regulatory distinction”, i.e. a valid reason to justify the damage suffered by the group of Latin American imported products because of the lack of access to the US Dolphin-Safe label, or the prohibition to use the AIDCP label, declaring the dolphin-safety of Mexican tuna exported in the North American territory. Recalling and considering correct the factual analysis accomplished by the Panel, the permanent WTO Tribunal remarked that there are clear indications of risk of injury to dolphins caused by fishing methods different from that practiced with the purse seine nets. Such different methods are mainly used by the US fleets, outside of the ETP. The US fleets, in fact, operate in the Western Central Pacific Ocean (WCPO), supply the 90% of the North American market, and can market as Dolphin-Safe tuna caught by catching techniques other than intentional encirclement with purse-seine nets, although it has been recorded, in the WCPO, a mortality of dolphins accidentally captured which is equal to or greater than that located in the

²⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 215.

²⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 235.

²⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 233.

ETP³⁰. Therefore, according to the Appellate Body, the United States has not been able to demonstrate that the different treatment in labelling conditions –the Dolphin-Safe label cannot be used for products containing tuna caught by setting on dolphins in the ETP, while it may be fixed on products containing tuna caught by other fishing methods outside the ETP, even if in the latter case dolphins are similarly harmed in the harvesting operations- «stems exclusively from a legitimate regulatory distinction»³¹. In fact, «the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does [...] not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP»³². The final consequence is that the Dolphin-Safe labelling scheme cannot be considered as “even-handed”³³, i.e. as a measure that is impartial, adjusted, defined, and assessed on the injury to which the marine mammals are likely to be exposed depending on the techniques for catching tuna. In the absence of such “legitimate regulatory distinction”, the different requirements asked for by the US legislation to release the Dolphin-Safe label depending on whether the tuna is caught by setting on dolphins inside the ETP, or with other fishing methods outside the ETP are unjustifiably discriminatory against the Mexican tuna fleet, and, therefore, inconsistent with Article 2, para. 1 of the TBT Agreement³⁴.

5. The adequacy of the Dolphin-Safe labelling scheme in the light of the purposes stated in the US discipline and the principle of necessity enshrined in Article 2, para. 2 of the TBT Agreement.

With reference to the principle of necessity enshrined in Article 2, para. 2 of the TBT Agreement, pursuant to which WTO Members do not have to prepare, adopt or apply their technical regulations «with a view to or with the effect of creating *unnecessary obstacles to international trade*»³⁵, and have to ensure that such technical measures are not «more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create», the Appellate Body has rejected the conclusions of the Panel. The latter stated that the coexistence of the US Dolphin-Safe scheme together with the possibility of certifying the

³⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 262.

³¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.

³² *Ibid.*

³³ *Ibid.*

³⁴ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 292-299.

³⁵ Emphasis added.

dolphin-safety of tuna products based on the standards elaborated within the AIDCP could represent an alternative measure “reasonably available” and less trade restrictive allowing nevertheless to reach the legitimate objectives proclaimed by the North American discipline. Therefore, according to the Panel, limiting the possibility of communicating the dolphin-safety of a tuna product just to the requirements of the US legislation represented an unnecessary restriction of international trade, hence a violation of Article 2, para. 2 of the TBT Agreement, which could nevertheless be easily overcome by permitting of presenting, on the US market, a tuna product as dolphin-safe also on the basis of the different conditions elaborated for dolphin protection by the AIDCP system³⁶.

For the permanent WTO Court the Panel’s analysis is incorrect because the coexistence of the US Dolphin-Safe label and the AIDCP label does not allow to realize the aims established by the US discipline. In fact, the definition of dolphin-safety adopted within the AIDCP treaty-system also includes tuna caught with purse-seine nets, as far as an independent observer certifies that during the fishing operations no dolphins have been killed or seriously injured. The capture of tuna through the encirclement of the marine mammals, however, also on the basis of the admissions of both the disputing parties, produces suffering for the dolphins «beyond observed mortalities»³⁷. Among the adverse effects on marine mammals detected because of the use of purse-seine nets, even in the absence of mortality or serious injury of such animals during the capture of tuna, there are the separation between mothers and their dependent calves, the weakening of the immune system and the reduced reproductive success as well as chronic health problems due to the acute stress provoked by the tuna fishing operations. Therefore, the coexistence of the two labels, considered an appropriate alternative measure by the Panel, for the Appellate Body does not guarantee, with reference to the ETP zone, the same level of protection for dolphins, nor does it ensure the full and correct information for the North American consumers. The latter, in particular, relying on one of the two labels, may purchase tuna fully convinced to choose a product whose production process preserves dolphins, while, on the contrary, such animals undergo sufferings because of the purse-seine nets, in spite of all the precautions used by the Mexican fleet in the ETP area, the only fleet that, in such zone, systematically uses the encirclement of dolphins to catch tuna. Furthermore, beyond the ETP, the proceedings before the Panel and the Appellate Body found that the current

³⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 324.

³⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 330.

management of the Dolphin-Safe label does not guarantee dolphin protection, and, therefore, does not preserve purchasers from deceptive practices. In fact, in the non-ETP fishery areas, where the catching techniques are other than those of setting on dolphins, tuna can nevertheless be labeled Dolphin-Safe according to US law, without the need of any declaration or certification, while there is scientific evidence about the damage to life and health of dolphins caused by fishing practices different from the methods of setting on dolphins³⁸. In essence, therefore, the Appellate Body concluded that the Dolphin-Safe labelling scheme is not adequate to realize the purposes –which, as already underlined *supra*, are “legitimate objectives” pursuant to Article 2, para. 2 of the TBT Agreement- for which it has been set up: in the way in which it is currently managed by the US authorities, the North American label does not guarantee proper and full information to consumers that the tuna they purchase has been caught with a dolphin preserving technique («consumer information objective»), nor does it contribute to the protection of the marine mammals, by ensuring that the US market is not used to encourage tuna fishing techniques harmful to dolphins (“dolphin protection objective”)³⁹.

6. The concept of international standardizing body and the value of the decisions of the WTO Committees.

A final issue addressed by the Appellate Body was that on the possibility to qualify the AIDCP standard as an international standard pursuant to Article 2, para. 4 of the TBT Agreement. In fact, according to this provision, «[w]here technical regulations are required and *relevant international standards* exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems»⁴⁰. Mexico argued that the US Dolphin-Safe measure also infringed the just recalled WTO multilateral provision, as such measure does not take into account the AIDCP standard. The latter, according to the Latin American government, represents a “relevant international standard”, therefore, a measure constructed by an appropriate standardizing body which,

³⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 327.

³⁹ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 324-331.

⁴⁰ Emphasis added.

although not binding, had nevertheless to be regarded by the US authorities “as a basis” –“comme base”, “como base” – for the definition of the Dolphin-Safe labelling scheme.

The Appellate Body formulated its answer starting from the concept of international standard. Reminding the relevant provisions of the TBT Agreement and the ISO/CEI 2 Guide⁴¹, referred to by the WTO Multilateral Agreement at issue, the Geneva Tribunal pointed out, first of all, that an international standard is a non-binding measure providing for guidelines and characteristics for products and their related processes and production methods, expressed by an international body or organization, made available to the public, and, in principle, “based on consensus”, as the Explanatory Note of Annex 1, Section 2 of the TBT Agreement points out that such Multilateral Agreement contemplates «also documents that are not based on consensus». The WTO Court found, therefore, that the characteristics of the entity approving a standard are, in the first place, the features conferring international character to such non-binding measure, thus focusing its analysis on the possibility to qualify the AIDPC as «an international standardizing body for the purposes of the TBT Agreement»⁴². In fact, if the system of the Agreement on the International Dolphin Conservation Program may not be considered as an international body or organization of standardization on the basis of the TBT Agreement, the standard elaborated within its scope on the requirements to be observed to ensure the dolphin-safety of tuna fished in the ETP cannot represent an international standard pursuant to Article 2, para. 4 of the TBT Agreement, with the consequence that the United States is not obliged to use the AIDCP standard “as a basis” for its Dolphin-Safe labelling provisions.

Regarding the type of entity that must approve an international standard, the WTO judiciary stated that it can be either a “body”, therefore, a public or private entity having specific tasks and composition, or an “organization”, i.e. an entity that is based on the participation and membership of other bodies or individuals which has its own statute and is equipped with its own administration⁴³. Such an entity has also to be an entity performing “activities in standardization” which have to be considered as “recognized”, and has to be “international”, as required by the definitions contained in the TBT Agreement and the ISO/CEI 2 Guide. In an initial

⁴¹ ISO/IESC Guide: 1991, *General Terms and their Definitions Concerning Standardization and Related Activities*.

⁴² Appellate Body Report, *US – Tuna II (Mexico)*, para. 356.

⁴³ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 354-356.

examination of the scope to be given to such notions, the Appellate Body stated that the activities of standardization do not necessarily imply the development, by the institution, of more than one standard, nor that that entity is primarily dedicated to the preparation, approval or adoption of standards, defining standardization as «the activity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context»⁴⁴. Regarding the requirement that the activity be “recognized”, the WTO Court first emphasized the meaning of the verb “to recognize”, describing it as the acknowledgement of the existence, legality or validity of an object or a situation, to which attention is paid treating them as worthy of consideration. Such definition, went on the Appellate Body, «fall[s] along a spectrum that ranges from *a factual end* (acknowledgement of the existence of something) to *a normative end* (acknowledgement of the validity or legality of something)», with the consequence that «[i]n interpreting ‘recognized activities in standardization’, we will therefore bear in mind both *the factual and the normative dimension of the concept of ‘recognition’*»⁴⁵. Turning to the requirement of internationality of standardizing bodies or organizations, in the first place the WTO judiciary recalls the definitions of the ISO/CEI 2 Guide, where it is specified that a standardizing organization is «international [...] if its membership is *open* to the relevant national body from every country»⁴⁶, as well as of Annex 1, para. 4 to the TBT Agreement, which defines an “international body” as a body «whose membership is open to the relevant bodies of at least all Members». Once again it is resumed the vocabulary definition of “open”, pointing out that «[t]he term “open” is defined as “accessible or available without hindrance”, “not confined or limited to a few; generally accessible or available”»⁴⁷. Therefore, continues the Appellate Court, «a body will be open if membership to the body is not restricted. It will not be open if membership is *a priori* limited to the relevant bodies of only some WTO Members»⁴⁸.

The WTO judiciary proceeds to further specify the concepts of internationalization and recognition of the standardization activity taking also into consideration the TBT Committee Decision on principles for the development of

⁴⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 360.

⁴⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 361, emphasis added.

⁴⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 358, emphasis added.

⁴⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 364.

⁴⁸ *Ibid.*

international standards⁴⁹. In fact, such Decision, which the TBT Committee adopted by consensus in November 2000 within the Second Triennial Review on the functioning and implementation of the TBT Agreement, sets out the characterizing features, of substantive and procedural nature, which standardizing bodies should adhere to when they develop international standards. The six principles of transparency, openness, impartiality and consensus, effectiveness and relevance, coherence and attention to the concerns and significant participation of developing countries in the establishment of international standards are considered – by the disputants as well as by the WTO Members intervened as third participants⁵⁰ – key requirements to qualify a voluntary measure as an international standard. The Decision encoding the six principles is considered by the WTO Members who participated to the appellate proceedings as an essential parameter in the light of which to interpret the concept of international standardizing body, since it reflects the “Members’ shared views”⁵¹ on the recognition and the openness that have to distinguish the international standardizing bodies. Therefore, the TBT Committee Decision «should inform the interpretation of the concept “international standardizing organization”»⁵².

Before analyzing the AIDCP system under the lens of the TBT Committee Decision, the Appellate Body appropriately focuses on the legal nature of such a decision, investigating the possibility of qualifying it as a «subsequent agreement between the parties regarding the interpretation of [a] treaty or the application of its provisions», “subsequent agreement” that, in compliance with customary international law codified in Article 31, para. 3, lett. a) of the Vienna Convention on the Law of Treaties, has to be taken into consideration by the interpreter when asked to establish the scope and meaning of a particular treaty provision. The WTO judiciary then emphasizes the temporal context and the procedural mechanism that distinguish the definition of the TBT Committee Decision: having been adopted in 2000, thus after the enter into force of the WTO system (1 January 1995), such Decision is *subsequent* to the conclusion of the TBT Agreement; furthermore, since it was approved by consensus within the TBT Committee, which includes the

⁴⁹ *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement*, in G/TBT/1/Rev.10, *Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995*, 9 June 2011, 46-48.

⁵⁰ Cf. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 367-369.

⁵¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 367.

⁵² Appellate Body Report, *US – Tuna II (Mexico)*, para. 369.

representatives of all WTO members, the Decision certainly involves the *entire membership* of the multilateral system. The Appellate Body finally noted that the TBT Committee specified to have undertaken the activities leading to the adoption of the Decision in question with the purpose of *promoting a better understanding* of international standards under the TBT Agreement, and to have elaborated the six principles also to ensure the effective implementation of the Multilateral Agreement and to reinforce the notion of international standard in the latter contemplated. In light of the underlined three characteristics, the WTO Tribunal thus concluded that «the TBT Committee Decision can be considered as a «subsequent agreement» within the meaning of Article 31(3)(a) of the *Vienna Convention*», pointing out immediately «[that t]he extent to which this Decision will inform the interpretation and application of a term or provision of the *TBT Agreement* in a specific case, however, will depend on the degree to which it “bears specifically” [...] on the interpretation and application of the respective term or provision»⁵³. Having established that the TBT Committee Decision is a “subsequent agreement” pursuant to Article 31, para. 3, lett. a) of the Vienna Convention, that the interpreter must take into consideration when reconstructing the scope of the provisions of the TBT Agreement, the Appellate Body also stated that such an act has a direct impact on the interpretation of the term “open” referred to in Annex 1, para. 4 of the TBT Agreement, as well as of the notion of «recognized activities in standardization activities», contemplated in the ISO/CEI 2 Guide⁵⁴.

Regarding the type of “openness” that should characterize a standardizing body in order to be considered as international, the WTO Tribunal recalls the Decision with regard to that principle. Under paragraph 6 of the TBT Committee Decision, «[m]embership of an international standardizing body should be *open on a non-discriminatory basis* to relevant bodies of at least *all WTO Members*. This would include openness without discrimination with respect to the participation at the policy development level and *at every stage* of standards development»⁵⁵. Hence, the openness of the standardizing entity has to be guaranteed for every stage of the planning and development of a voluntary measure, and must be implemented in full respect of the principle of non-discrimination, therefore in the absence of any *de jure* or *de facto* disadvantage among the relevant bodies of the WTO Members⁵⁶.

⁵³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 372, emphasis added.

⁵⁴ *Ibid.*

⁵⁵ Emphasis added.

⁵⁶ Cf. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 374-375.

Moving on the concept of “recognized activities in standardization”, the Appellate Body started its reasoning underlining that the WTO Members, through the adoption of the Decision by consensus within the TBT Committee, have decided that the principles outlined in it «should be observed»⁵⁷ in the development of international standards. The possibility to find that a standardizing body develops voluntary measures ensuring inclusiveness and representation of all interests (with particular reference to developing countries), transparency and access to relevant documents, effectiveness and impartiality of the standards elaborated, coherence and coordination with other bodies and mechanisms for implementation of voluntary measures based on consensus «would therefore be relevant for a determination of whether the body’s activities in standardization are “recognized” by WTO Members»⁵⁸. The respect of the principles of the TBT Committee Decision, thus, integrates «the factual [...] dimension of the concept of “recognition”», factual dimension which had already been identified by the WTO Tribunal when it indicated the scope attributable to the notion of “recognition” to establish when a standardizing body has to be considered as international. At the same time, compliance with the requirements of the TBT Committee Decision realizes «the [...] normative dimension of the concept of “recognition”»⁵⁹: «[i]n terms of the normative connotation of the concept of “recognition”», underlined the appeal judges, «we observe that, to the extent that a standardization body complies with the principles and procedures that WTO Members have decided “should be observed” in the development of international standards, it would be easier to find that the body has “recognized activities in standardization”»⁶⁰. In conclusion, «[b]y setting out principles and procedures that WTO Members have decided “should be observed” by international standardizing bodies, the TBT Committee Decision also assists in the determination of whether an international body’s activities in standardization are “recognized” by WTO Members»⁶¹.

Having pieced together the legal framework within which to make its own assessments about the international character of the AIDPC as a standardizing body, the Appellate Body finally addressed the issue, to quickly conclude that the AIDPC does not fulfill the requirement of internationality. In fact, the accession to the AIDCP may happen on invitation, adopted with the consensus of the AIDCP

⁵⁷ TBT Committee Decision, cit., para. 1.

⁵⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 376.

⁵⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 361.

⁶⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 376.

⁶¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 378.

Contracting Parties. As the interest expressed by a State or by its relevant bodies to accede to the AIDCP does not automatically entail the issuance of an invitation, the Appellate Body concluded that «the AIDCP is not an “international” body for the purposes of the TBT Agreement»⁶². Consequently, the standard for the preservation of dolphins realized within the AIDCP cannot be qualified as a «relevant international standard» under Article 2, para. 4 of the TBT Agreement⁶³, so that the United States, by not using “as a basis” the AIDCP standard for its Dolphin-Safe discipline, has not violated the just mentioned provision⁶⁴.

7. Concluding remarks and follow-up of the *US- Tuna II* dispute.

The analysis of the Dolphin-Safe labelling scheme and the standard developed within the AIDCP, together with the consideration of the factual aspects of the case of the Panel, reveal a highly relevant attention and a refined sensibility of the Appellate Body with respect to the purposes proclaimed by the US discipline, namely the safeguard of accurate consumer information and the protection of dolphins, avoiding that the North American market may be used to encourage fishing methods detrimental to the marine mammals. The same attitude, caring and sensitive, is maintained by the Geneva Tribunal in its interpretative approach to the TBT Agreement: the Appellate Body achieves a reading of the multilateral provisions aiming at discouraging a protectionist drift of the US regulatory discipline emphasizing, at the same time, the ability of the WTO rules on technical barriers to consider national rules authentically and effectively dedicated to the implementation of policies for the preservation of natural resources and the fairness of commercial transactions as fully compatible with the Marrakech system. The North American legislation is, in fact, considered to be incompatible with the WTO system because the discriminatory effects and the barriers to trade produced by such legislation prove unable to achieve the proclaimed purposes: the Dolphin-Safe label does not guarantee to the US consumer that he/she is purchasing tuna caught preserving dolphins, also because, in the great majority of cases, the use of the US label is granted without requiring to the fishermen any kind of certification on the absence of harm for dolphins in catching tuna operations different from the “setting on” dolphins, even if harm for the marine mammals is nevertheless present and has been

⁶² Appellate Body Report, *US – Tuna II (Mexico)*, para. 398.

⁶³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 399.

⁶⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 401.

documented with reference to fishing methods in non-ETP areas not involving the chasing and encircling of dolphins.

On 5 April 2013 the US Department of Commerce announced the proposal to amend the Dolphin-Safe labelling scheme.⁶⁵ In brief, the US administration does not intend to loosen the requirements for Dolphin-Safe label in the ETP, persevering in not accepting the alternative measure requested by Mexico, i.e. the dolphin-safety standard developed in the AIDCP. On the contrary, the government of Washington DC intends now to ask for a certificate declaring, also for tuna caught outside of the ETP zone, not only that fishing operations do not involve “setting on” dolphins, but also that no marine mammal has been killed or seriously injured while capturing tuna.

It is expected that, in principle, this certification may also be issued just by the captains of the boats, even if it is contemplated the possibility of involving an observer, or a representative of another country included in a cooperation program, to deliver such a document. The Mexican government has already submitted a detailed and articulated comment to the *National Marine Fisheries Service*, the US office charged with gathering all the observations of the subjects interested to the modifications proposed by the US.⁶⁶ The document of the Latin American country complains about the continuation of the discriminatory nature and the incapacity of US discipline, even if amended, to properly inform consumers and preserve dolphins. In fact, the demand for a substantial self-certification by the captain of the vessel on the absence of serious effects on marine mammals in fishing operations for tuna is considered “totally unverifiable” and unreliable, as such a declaration is performed by the person who has the greatest interest to state, regardless of what really happened, anything that it is necessary to gain the access on the US market for his tuna under the most favorable conditions for its sale, i.e. those permitting the use of the Dolphin-Safe label.

In the absence of substantial amendments to the proposed modifications of the Dolphin-Safe labelling provisions, Mexico seems thus determined to write another chapter in the already rich multilateral trade saga on the dolphin-safety of the tuna caught by the Latin American fleet.

⁶⁵ 50 CFR Part 216 – *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, in Federal Register, Vol. 78, No. 66, 5 April 2013, p. 20604).

⁶⁶ Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación, Comisión Nacional de Acuicultura y Pesca, *Comments of the Government of Mexico on Proposed Rule: Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, May 2013.

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