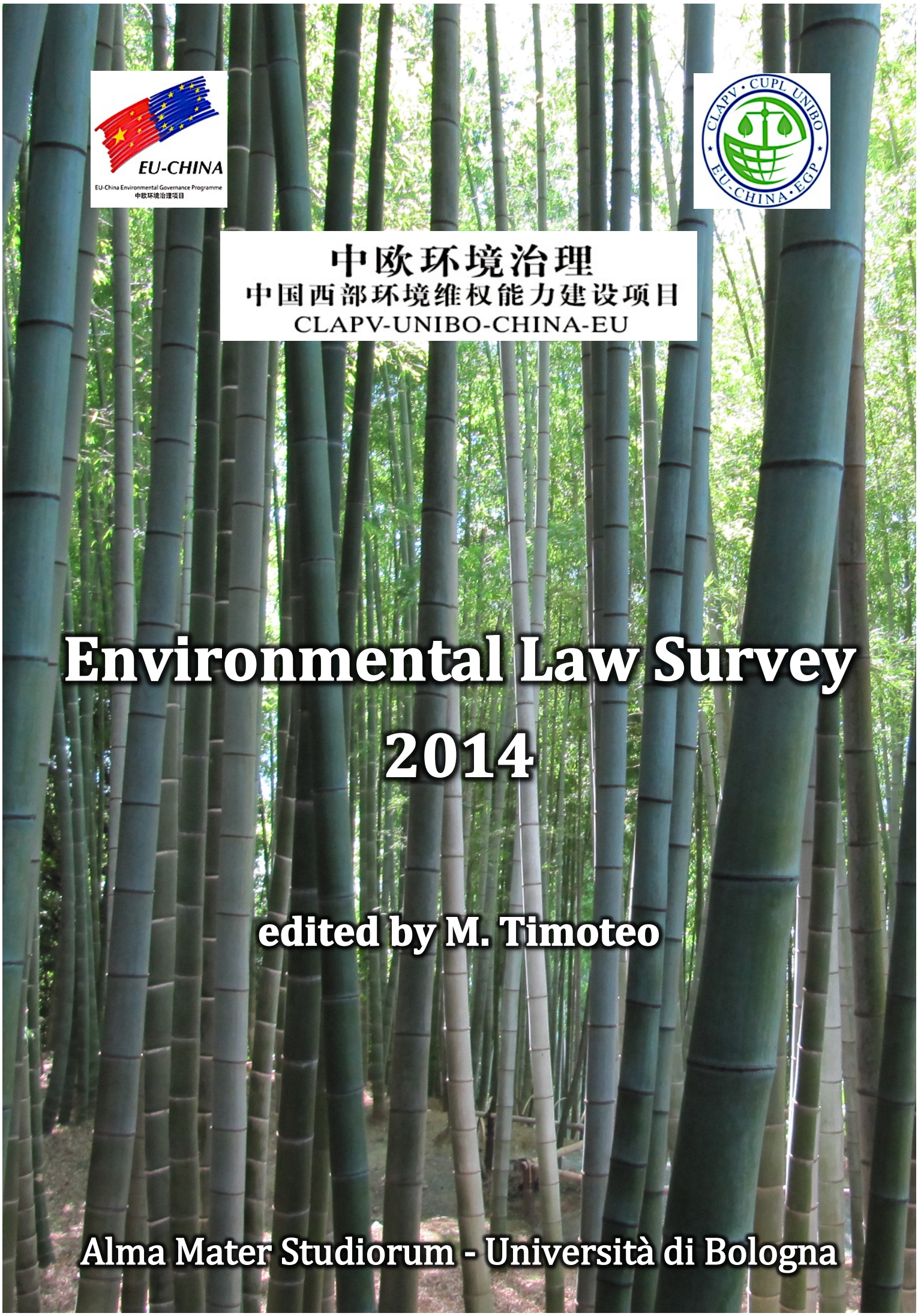

Environmental Law Survey 2014

edited by M. Timoteo

Alma Mater Studiorum - Università di Bologna

EU-China Environmental Governance Programme
中欧环境治理项目

中欧环境治理
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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, Civil Procedural Law, Comparative Law, Criminal Procedural Law, EU Law and International Law, since these disciplines 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 and EU Law

JOINING THE MARKET: STATE AID AND RENEWABLE ENERGY IN THE EU

Francesco Alongi

CONTENTS: 1. – Introduction. 2. – The New Guidelines: an Overview. 3. – State Aid and Renewable Energy.

1. Introduction.

According to a study recently released by the European Commission, in 2012 the total value of public funding of the energy sector in the EU was around 120 - 140 billion euro and the largest share of these subsidies went to renewable energy production[1].

While hardly surprising, these results offer a clearer picture of the profound impact that State funding had on the European energy markets and of the key role it played in the development of the European renewable energy industry.

On 9th April 2014, after a round of stakeholder consultations begun a few months earlier[2], the Commission adopted the new Guidelines on State aid for environmental protection and energy for the period 2014- 2020[3].

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1 S. ALBERICI, S. BOEVE, P. VAN BREEVOORT et al., *Subsidies and costs of EU energy – An interim report*, European Commission, Directorate General for Energy, available at: http://ec.europa.eu/energy/studies/doc/20141013_subsidies_costs_eu_energy.pdf, 10th October 2014 (last visited October 2014), p. 9.

2 European Commission, Press Release, *State aid: Commission consults on draft rules for state support in energy and environmental field*, available at: http://europa.eu/rapid/press-release_IP-13-1282_en.htm, 18th December 2013 (last visited August 2014).

3 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, available at: http://eur-lex.europa.eu/legal-

The stated goal of the new State aid regulatory framework is to contribute to the achievement of the EU's ambitious climate objectives for 2020, while «ensuring that European companies and consumers have access to more affordable energy» and «avoiding any waste of taxpayers' money and distortions of competition in the EU internal market»[4].

The most significant feature of the new Guidelines, which entered into force on 1st July 2014, is certainly the full integration of climate policy with the rules governing public financing of the energy sector[5].

2. The New Guidelines: an Overview.

The new Guidelines, which replaced the Commission's 2008 Guidelines on State aid for environmental protection, are an integral part of the Commission's State Aid Modernisation initiative[6].

The purpose of the Guidelines is to help Member States to design State aid measures and policies in order to achieve the Union's 2020 climate targets[7] and to foster smart, inclusive and sustainable growth without causing distortions of competition or a fragmentation of the internal market.

The Guidelines set out the criteria that the Commission will employ to assess which environmental and energy financing measures amount to State aid

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content/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN, 9 April 2014 (last visited August 2014).

4 European Commission, Press Release, *State aid: Commission consults on draft rules for state support in energy and environmental field*, available at: http://europa.eu/rapid/press-release_IP-13-1282_en.htm, 18th December 2013 (last visited August 2014).

5 Linklaters, *European Commission adopts environmental and energy State aid guidelines for 2014-2020*, available at: http://www.linklaters.com/Insights/Pages/European-Commission-adopts-environmental-energy-State-aid.aspx, April 2014 (last visited August 2014).

6 European Commission, Press Release, *State Aid: Commission launches major initiative to modernise state aid control*, available at: http://europa.eu/rapid/press-release_IP-12-458_en.htm., 8th May 2012 (last visited September 2014).

7 The 2020 Strategy provides for a 20% reduction in EU greenhouse gas emissions from 1990 levels, raising the share of EU energy consumption produced from renewable resources to 20% and a 20% improvement in the EU's energy efficiency.

and must therefore be notified under Article 108 (3) TFEU.

Under EU Law, Member States must notify all measures deemed to constitute State aid and which do not benefit from a block exemption to the European Commission for approval. Any aid granted without prior authorization is incompatible with EU Law and the Commission may therefore order Member States to recover it from the beneficiaries.

While the Guidelines do not spell out which measures amount to State aid, the Commission has tabled a draft Notice to this effect, listing the constitutive elements of the notion of State aid, such as the presence of an economic activity, the imputability of the measure to the State, the financing of said aid through State resources, the presence of an economic advantage for the beneficiary, the selectivity of the measure and its effect on trade and competition[8].

The fact that a measure fulfills all the above mentioned conditions, does not however necessarily entails that it needs to be notified. Measures that are block exempted or which do not exceed the threshold of 200.000 Euro per company over three years are not considered notifiable aid (the so-called *de minimis* rule).

The Commission recently intervened to redefine the scope of the block exemption, with a Regulation which came into force on 1st July 2014[9].

While the 2008 Guidelines already addressed certain energy issues which where inextricably linked with environmental policy, the scope of the

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8 European Commission, Press Release, *State aid: Commission consults on draft guidance on notion of aid*, available at: http://europa.eu/rapid/press-release_IP-14-30_en.htm, 17th January 2014 (last visited September 2014). «As with any measure imputable to public authorities, an environmental support measure is considered to be a state aid measure as defined under Article 107 (1) TFEU if it fulfills all the following four criteria: (1) Transfer of state resources; (2) Advantage for the undertakings; (3) Selectivity; and (4) Distortion to competition and effect on trade between Member States», L. HANCHER, T. OTTERVANGER, P.J. SLOT, *EU State Aids*, Sweet & Maxwell, Fourth Edition, 2012, p. 813.

9 Commission Regulation n. 651/2014 of 17th June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.06.2014, p. 1–78, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN (last visited September 2014).

new Guidelines is considerably wider, and it includes aid measures for energy infrastructure projects, generation adequacy and carbon capture and storage.

Moreover, the 2014-2020 Guidelines considerably simplified the assessment criteria of matters which were already covered by the previous Guidelines, such as energy efficiency and cogeneration of heat and power.

Significantly, the text of the Guidelines adopted by the Commission on April 2014 left out the question of State aid to nuclear energy sources, which will therefore be assessed by the Commission on a case-by-case basis.

In its assessment of the compatibility of a notified aid measure with the internal market, the Commission seeks to determine whether the positive impact of the aid (on an objective of common interest, such as the protection of the environment) exceeds its potentially detrimental effects on trade and competition[10].

According to the new Guidelines, State aid measures can be considered compatible with the internal market only if they satisfy certain criteria:

(a) the measure must contribute to a well-defined objective of common interest in accordance with Article 107 (3) TFEU;

(b) it must be necessary to bring about a material improvement that the market alone cannot deliver, for example by remedying a market failure;

(c) the measure must be the appropriate policy instrument to address the objective of common interest;

(d) it must constitute an incentive for the undertakings concerned to change their behavior;

(e) it must be proportionate;

(f) it must avoid any undue negative effects on competition and trade between Member States;

(g) it must be transparent.

The assessment principles adopted by the Commission therefore recognize the important role which State aid measures can play in correcting market failures – such as externalities, asymmetric information and

10 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 11.

coordination failures - and achieving objectives of common interest. State aid should therefore «be targeted towards situations where aid can bring a material improvement that the market cannot alone deliver»[11].

The 2014 Guidelines apply the assessment principles to several categories of environmental and energy aid measures (some of which had already been addressed by the previous Guidelines).

As regards State aid to renewable energy sources[12], the Guidelines tried to deal with some of the concerns raised by the inefficient functioning of the market[13]. Pursuant to the new Guidelines, the implementation of market instruments should ensure that subsidies are reduced to a minimum as a step towards a complete phasing out.

However, for the transitional period, the Guidelines state that aid should be granted as a premium in addition to the market price and that the aid recipients should be subject to standard balancing responsibilities.

Moreover, aid should be granted in a competitive bidding process and on the basis of clear, transparent and non-discriminatory criteria.

Finally, the Commission will authorize aid schemes for periods up to 10 years, after which Member States will have to re-notify the measure, if they do not intend to discontinue it.

The Guidelines further address energy efficiency measures, stating that «in order to ensure that aid contributes to a higher level of environmental protection, aid for district heating and district cooling and cogeneration of heat

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11 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 13.

12 «Renewable energy sources means the following renewable non-fossil energy sources: wind, solar aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases», European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 6.

13 «[...] in recent years there has also been an increasing awareness that heavy public support of [renewable energy sources] may lead to overcompensation, increased consumer prices, and thus ultimately to inefficiently functioning energy markets», Linklaters, *European Commission adopts environmental and energy State aid Guidelines for 2014-2020*, April 2014, available at http://www.linklaters.com/Publications/Pages/European-Commission-adopts-environmental-energy-State-aid.aspx (last visited in September 2014).

and electricity ("CHP") will only be considered compatible with the internal market if granted for investment […] to high-efficient CHP and energy-efficient district heating and district cooling»[14].

The new Guidelines also make specific reference to the fact that State aid to waste management plants can make a positive contribution to environmental protection. The Commission therefore states that it will consider State aid for waste management to serve a common interest provided that the investment is aimed at reducing waste generated by other undertakings and does not extend to waste generated by the beneficiary of the aid, that the aid does not – directly or indirectly – relieve polluters from their burdens under EU or national law and provided that the materials treated would otherwise be processed in a less environmentally friendly manner.

Similarly, the Commission considers aid for carbon capture and storage to be instrumental in solving negative externalities with serious implications for the environment.

With regard to aid given in the form of reductions or exemption from environmental taxes, the Commission argues that these measures may be considered necessary where the beneficiaries would otherwise be placed at such a competitive disadvantage that it would not be economically feasible to introduce the environmental tax in the first place[15].

Moreover, the 2014 Guidelines make a distinction between harmonised and non-harmonised environmental taxes. With regard to the former, the Commission will consider aid in the form of tax reductions necessary and

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14 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 28.

15 «Indeed, granting a more favourable tax treatment to some undertakings may facilitate a higher general level of environmental taxes. Accordingly, reductions in or exemptions from environmental taxes, including tax refunds can at least indirectly contribute to a higher level of environmental protection. However, the overall objective of the environmental tax to discourage environmentally harmful behaviour should not be undermined. The tax reductions should be necessary and based on objective, transparent and non-discriminatory criteria, and the undertakings concerned should make a contribution towards increasing environmental protection», European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 32.

proportional provided that its beneficiaries pay at least the EU minimum tax level set by the relevant Directive, that the choice of beneficiaries is based on objective and transparent criteria and that the aid is granted in the same way for all competitors in the same sector (if their respective situations are comparable)[16].

With regard to non-harmonised taxes, the Commission will assess the necessity and proportionality of each measure according to the criteria set out in the Guidelines[17].

The Commission further acknowledges that «a modern energy infrastructure is crucial for an integrated energy market, which is key to ensuring energy security in the Union, and to enable the Union to meet its broader climate and energy goals»[18].

According to the Commission's own estimate, the investment in energy infrastructures of European significance needed to achieve the 2020 targets amounts to about 200 billion Euro. Where market operators are unable to provide funding for the infrastructure needed, State aid may therefore be essential in order to solve market failures.

As regards infrastructure projects as defined by Regulation (EC) 237/2013, smart grids and infrastructure investments in assisted areas, the Commission will carry out a case-by-case assessment of the need for State aid[19].

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16 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 32.

17 Linklaters, European Commission adopts environmental and energy State aid Guidelines for 2014-2020, April 2014, available at: http://www.linklaters.com/Publications/Pages/European-Commission-adopts-environmental-energy-State-aid.aspx (last visited in September 2014).

18 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 36.

19 «In its assessment, the Commission will consider the following factors: (i) to what extent a market failure leads to a sub-optimal provision of the necessary infrastructure; (ii) to what extent the infrastructure is open to third party access and subject to tariff regulations; and (iii) to what extent the project contributes to the Union's security of energy supply». European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 37.

With the rapid increase of the share of renewable energy sources, electricity generation is in many Member States «shifting from a system of relatively stable and continuous supply towards a system with more numerous and small-scale supply of variable sources»[20].

Such a shift raises considerable challenges to ensure generation adequacy. Several Member States have therefore put in place measures to ensure generation adequacy by granting support to generators on the basis of the mere availability of generation capacity.

Finally, the Guidelines address the issue of aid given in the form of tradable permits issued by public authorities. The Commission will consider tradable permits schemes to be compatible with the Internal Market provided they are set up « in such a way as to achieve environmental objectives beyond those intended to be achieved on the basis of Union standards that are mandatory for the undertakings concerned », that the allocation is carried out in a transparent way and according to objective criteria, that the allocation methodology does not unduly favour certain undertakings or sector and that new entrants are not to receive permits on more favourable conditions than incumbent beneficiaries operating on the same markets[21].

3. State Aid and Renewable Energy.

The new Guidelines require Member States to take into account competition and market distortions in designing renewable energy support schemes (while leaving considerable discretion to national legislators).

Moreover, pursuant to the Guidelines, from 1st January 2016 market-based support schemes will replace feed-in tariffs for all installations with an electricity capacity in excess of 500 kW, while, as we have seen, eligibility for funding will be determined on the basis of competitive, transparent and non-

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20 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 38.

21 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 41.

discriminatory bidding processes[22].

While in principle these bidding processes should be open to all operators producing electricity from renewable sources on a non-discriminatory basis, the Commission accepts that they can be limited to specific technologies where a process open to all generators would lead to suboptimal results[23].

Several energy intensive industries will therefore be allowed to receive some state support even under the new Guidelines.

The rationale behind this gradual move to market-based support schemes for renewable energy is the need to meet the ambitious climate policy goals «at the least possible cost for taxpayers and without undue distortions of competition in the Single market».[24]

The Commission's decision to emphasize market-based instruments and to let price signals drive the allocation of public funds was prompted by concerns that the high energy prices might be seriously harming the EU's competitiveness.

The Guidelines came into force on 1st July 2014, and are therefore applicable to all notified aid measures on which the Commission had yet to

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22 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 26. See also Baker & McKenzie, *New EU Guidelines on environmental and energy state aid – Implications for the renewable energy industry*, available at: http://www.bakermckenzie.com/files/Publication/7eea4b32-c7b8-4ea5-8c20-7f4f16b9a792/Presentation/PublicationAttachment/5bb902bd-c655-437a-b090-80f6fd6cb69f/ALGermanyEnergy9Apr2014.pdf, April 2014 (last visited September 2014).

23 «The bidding process can be limited to specific technologies where a process open to all generators would lead to a suboptimal result which cannot be addressed in the process design in view of, in particular: (a) the longer-term potential of a given new and innovative technology; or (b) the need to achieve diversification; or (c) network constraints and grid stability; or (d) system (integration) costs; or (e) the need to avoid distortions on the raw material markets from biomass support», European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 26.

24 European Commission, Press Release, *State aid: Commission adopts new rules on public support for environmental protection and energy*, available at: http://europa.eu/rapid/press-release_IP-14-400_en.htm 9th April 2014 (last visited October 2014).

rule as of that day.

Indeed, only a few weeks after their entry into force, the Commission assessed Germany's 2014 Renewable Energy Act (*Erneuerbare-Energien-Gesetz*, "EEG") under the new Guidelines and found it to be in compliance with EU State aid rules. The new scheme – with an annual budget of approximately 20 billion Euro – entered into force last August[25].

Under to the 2014 EEG, all producers of renewable electricity – with the exception of small installations (i.e. below 100 kW), who will benefit from feed-in tariffs – will be obliged to sell their output on the market, and support will be provided in the form of market premiums paid in addition to the market price for electricity.

The Commission will also apply the new Guidelines in the pending investigation on the 2012 German Renewable Energy Act to assess whether the reduction granted to energy-intensive companies on a surcharge levied to finance renewable energy sources is compatible with EU State Aid rules[26].

According to the Commission, the surcharge reductions for energy intensive companies appear to be financed from State resources and seem to give the beneficiaries a selective advantage which is likely to distort competition within the Internal Market. However, the 2014 Guidelines admit – under certain conditions - this kind of reduction in order to prevent carbon

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25 European Commission, Press Release, *State aid: Commission approves German renewable energy law EEG 2014,* available at http://europa.eu/rapid/press-release_IP-14-867_en.htm, 23rd July 2014 (last visited September 2014).

26 European Commission, Press Release, *State aid: Commission opens in-depth inquiry into support for energy-intensive companies benefitting from a reduced renewables surcharge*, available at http://europa.eu/rapid/press-release_IP-13-1283_en.htm, 18th December 2013 (last visited September 2014). The 1998 scheme was based on a purchase obligation and the Court of Justice (in the Case C-379/99, 13th March 2001, *PreussenElektra AG v Schleswag* AG [2001] ECR I-2099) ruled that it did not amount to State aid. «In the *PreussenElektra* case, the Court of Justice decided that no transfer of state resources is involved where private electricity distributors have to pay a higher feed-in price for electricity generated from renewable sources. This landmark decision by the Court opened the door for the establishment of advantageous financial systems to support the local green electricity production, without the restraints of state aid control and procedures», L. HANCHER, T. OTTERVANGER, P.J. SLOT, *EU State Aids*, Sweet & Maxwell, Fourth Edition, 2012, p. 814.

leakage[27].

The pending investigation will also focus on the so-called "green electricity privilege", granted by the 2012 EEG, that is the reduction on the surcharge granted when a supplier draws 50% of his electricity portfolio from domestic renewable electricity produced in plants that have not been in operation for more than 20 years[28]. According to the Commission, this provision could result in discriminatory taxation between domestic and imported electricity.[29]

These investigations will play a very important role in clarifying in what way the decisional practices of the Commission will be shaped by the Guidelines on State aid for environmental protection and energy for the period 2014 -2020.

However, the impact of the new Guidelines on the European energy market is likely to be seriously limited not only by the considerable leeway still enjoyed by the Member States in designing their aid measures, but – much more importantly – by the exclusion of nuclear energy from their scope of application.

Rather controversially, the exclusion of State aid to nuclear energy producers from the scope of application of the Guidelines came only a few months before the Commission approved the aid provided by the United Kingdom to the Hinkley Point nuclear power plant, one of the largest such projects in years[30].

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27 European Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ 2014/C, 200/01, p. 34. See also Linklaters, *European Commission adopts environmental and energy State aid guidelines for 2014-2020*, available at: http://www.linklaters.com/Insights/Pages/European-Commission-adopts-environmental-energy-State-aid.aspx, April 2014 (last visited August 2014).

28 European Commission, Press Release, *State aid: Commission opens in-depth inquiry into support for energy-intensive companies benefitting from a reduced renewables surcharge*, IP/13/1283, available at http://europa.eu/rapid/press-release_IP-13-1283_en.htm, 18th December 2013 (last visited September 2014).

29 European Commission, Press Release, *State aid: Commission opens in-depth inquiry into support for energy-intensive companies benefitting from a reduced renewables surcharge*, IP/13/1283, 18th December 2013.

30 Commission Decision A.34947 *Support to Hinkley Point C Nuclear Power Station*, 8th October 2014, JOCE C/69/2014.

Perhaps in view of this renewed interest for nuclear energy, it would have been advisable for the Commission to clarify the role which public funds can play in the development of one of the most important – and controversial – low carbon energy sources.

GETTING GREENER, NOT CLOSER: THE *ÅLANDS VINDKRAFT* AND *ESSENT BELGIUM* JUDGMENTS

Francesco Alongi

CONTENTS: 1. – Introduction. 2. – The Ålands Vindkraft Ruling. 3. – The Public Interest Justification. 4. – The National Renewable Support Schemes.

1. Introduction.

Over the last few months, the Court of Justice of the EU handed down two landmark judgments[1] on two strikingly similar cases where it had the chance to confirm the compatibility of national renewable energy support schemes with the Treaty provisions on free movement of goods.

According to the Court, the restrictions to the free movement of goods across the Union entailed by the discriminatory nature of green certificate schemes (which generally privilege domestic producers) are fully justifiable on public interest grounds under Article 36 TFEU, since their purpose is to support the European renewable energy industry and achieve the Union's ambitious environmental targets for 2020.

However, in spite of their significance – especially from a policy perspective – these rulings represent another missed opportunity to clarify the role of environmental protection as a justification for discriminatory measures which hinder free movement of goods.

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1 Case C-573/12, 1st July 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014]; Joined Cases C-204/12 to C-208/12, 11th September 2014, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014].

2. The Ålands Vindkraft Ruling.

The Finnish company Ålands Vindkraft AB operates on the Ålands archipelago in Finland wind farms which are connected to the Swedish electricity grid.

In 2009 the company applied to the competent Swedish authority for green electricity certificates. The Swedish electricity certificate scheme required domestic electricity suppliers and certain users to purchase certificates corresponding to a share of their supplies or use, without any requirement to also purchase electricity from the same source. The electricity certificates granted by the competent Swedish authority are proof that a certain volume of electricity has been produced from renewable energy sources.

Through the sale of these certificates, green electricity producers receive additional income beside the revenue deriving from the sale of electricity.

The application filed by the Finnish company was however turned down on the grounds that under Swedish law electricity certificates could be awarded exclusively to green electricity plants located in Sweden.

Ålands Vindkraft AB therefore brought an action before the Förvaltningsrätten (Administrative Court) of Linköping for the annulment of the decision, alleging an infringement of Article 34 TFEU[2].

According to the plaintiff, the electricity certificate scheme implemented by Sweden was discriminatory, since it reserved a significant proportion of the Swedish electricity market to electricity producers located in Sweden, to the detriment of their competitors operating in other Member States.

The plaintiff further argued that such a barrier to transnational trade could not be justified by environmental concerns, since green electricity consumption in Sweden could be equally well promoted by awarding

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2 Article 34 TFEU (former Article 28 TEC), «Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States».

certificates for electricity produced in other Member States.

The first question submitted by the referring Court concerned therefore the admissibility, under Article 3(3) of Directive 2009/28/EC (the "Renewables Directive")[3], of a national support scheme from which only domestic electricity producers may benefit.

If such a scheme were to be regarded as constituting a quantitative restriction on imports or a measure having equivalent effect, the Court would have to determine whether such a restriction might be compatible with Article 34 TFEU in light of its objective of promoting green electricity production.

In their attempt to strike a balance between the principle of the free movement of goods and environmental protection, the Court of Justice and the Advocate General took radically different views.

According to Advocate General Bot[4], while the Swedish support scheme can be considered compatible with the Renewables Directive, it is Article 3 (3) of said Directive that should be considered invalid since it confers on Member States the power to exclude from their support schemes producers whose green electricity production plants are located in another Member State.

In his Opinion, Mr. Bot argued that national legislation constituting a measure having equivalent effect to quantitative restrictions may potentially be justified by the overriding requirement of environmental protection even if it is discriminatory, subject to a rigorous (or "reinforced") proportionality test[5].

However, he went on to argue that – in the case at issue - the risk that national support schemes would be disrupted by being made accessible to electricity producers located in other Member States had not been satisfactorily

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3 «Without prejudice to Articles 87 and 88 of the Treaty, Member States shall have the right to decide, in accordance with Article 5 to 11 of this Directive, to which extent they support energy from renewable sources which is produced in a different Member State» (Article 3 (3), Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 05.06.2009, p. 16–62).

4 Case C-573/12, Opinion of Mr Advocate General Bot of 28th January 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014].

5 Case C-573/12, Opinion of Mr Advocate General Bot of 28th January 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014], para. 79.

demonstrated[6].

In its ruling, the Court took the view that Article 3 (3) of the Renewables Directive must indeed be interpreted as allowing Member States to set up support schemes which provide for the award of tradable certificates only to domestic producers.

Such a scheme is certainly capable of «hindering – at least indirectly and potentially – imports of electricity, especially green electricity, from other Member States»[7] and can therefore be considered – according to the *Dassonville* case-law[8] - a measure having equivalent effect to quantitative restrictions on imports and in principle incompatible with Article 34 TFEU.

However, these measures might be justified on one of the public interest grounds listed by Article 36 TFEU [9] or by other overriding requirements, provided that such measures are proportional and appropriate for the attainment of the objective pursued[10].

The Court of Justice emphasized, in line with its own case law[11] and with recital 1 of Directive 2009/28/EC, that the increase in the use of renewable energy sources represents one of the key components of the Union's climate policy and plays a key role in protecting «the health and life of humans, animals and plants, which are among the public interest grounds listed

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6 Case C-573/12, Opinion of Mr Advocate General Bot of 28th January 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014], para. 97.

7 Case C-573/12,1st July 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014], para. 67.

8 Case 8/74, 11 July 1974, *Procureur du Roi v Benoît and Gustave Dassonville*, [1974] ECR 00837.

9 Article 36 TFEU (former Article 30 TEC): «The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States».

10 Case C-524/07, 11th December 2008, *European Commission v Austria* [2008] ECR I-00187, para. 54.

11 Case C-379/99, 13th March 2001, *PreussenElektra AG v Schleswag* AG [2001] ECR I-2099, para. 73.

in Article 36 TFEU»[12].

Having established that the public interest objective of promoting the use of renewable energy sources is in principle capable of justifying barriers to the free movement of goods within the Internal Market, the Court went on to determine that the territorial limitation of the Swedish green energy support scheme can be regarded as necessary and proportional to its objective[13].

The Court, deviating from the Advocate General's Opinion, therefore ruled that Article 34 TFEU should be interpreted as not precluding Member States from awarding tradable certificates exclusively to domestic green electricity producers and placing suppliers under a legal obligation to surrender a certain number of certificates corresponding to a proportion of the total volume of the electricity supplied.

3. The Public Interest Justification.

Only a few months after the *Ålands Vindkraft* ruling, the Court confirmed its stance on national renewable energy support schemes in a preliminary ruling concerning a similar measure implemented by the Belgian legislator[14].

In his assessment of the *Essent Belgium* case, Advocate General Bot raised serious doubts about the actual risk which green electricity imported from abroad represented for the achievement of national environmental targets.

In his Opinion, Mr Bot emphasized that, according to the Commission, national targets are defined in terms of the consumption of renewable electricity from renewable energy sources as a percentage of total national electricity consumption, and that electricity consumption should be defined as

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12 Case C-573/12,1st July 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014], para. 80.

13 Case C-573/12,1st July 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014], para. 104.

14 Joined Cases C-204/12 to C-208/12, 11th September 2014, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014].

national production plus imports, minus exports (in order to avoid double counting)[15].

He then went on to argue that since environmental protection is a EU concern, «it is therefore necessary to take into account also the advantages that may arise from trade in green electricity within the European Union»[16]. The advantages of a more rational allocation of resources and power plants might indeed offset the possibility that some Member States may not meet their targets.

In a ruling which largely mirrors the *Ålands Vindkraft* case, the Court tipped the balance of the competing policy interests of removing barriers to free movement of goods and fostering the fledgling European renewable energy industry decidedly in favour of the latter.

It should be noted that while in the *Essent Belgium* case the Court was asked to assess the legality of the Belgian support scheme under Articles 3 and 5 of Directive 2001/77/EC (which has been repealed but was nonetheless applicable, *ratione temporis*, to the matter at issue), the same provisions can be found (to some extent) in Directive 2009/28/EC.

In the *Essent Belgium* ruling the Court held that a renewable energy support scheme which, much like the Swedish scheme, did not allow electricity suppliers to fulfil their obligation to surrender a certain number of green certificates to the competent national authority by using guarantees of origin originating from other Member States, might be justified under Article 36 TFEU, provided that mechanisms are put in place to ensure that it is possible for suppliers to obtain certificates under fair terms[17].

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15 European Commission, Communication from the Commission to the Council and the European Parliament, Commission Report in accordance with Article 3 of Directive 2001/77/EC, evaluation of the effect of legislative instruments and other Community policies on the development of the contribution of renewable energy sources in the EU and proposals for concrete action, 25th June 2004, COM(2004) 366 final, page 17.

16 Opinion of Advocate General Bot, Joined Cases C-204/12 to C-208/12, 8th May 2013, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014], para. 109.

17 «It is therefore important that mechanisms be established which ensure the creation of a genuine market for certificates in which supply can match demand,

In its judgement, the Court emphasized the difference, under Directive 2001/77/EC, between tradable green certificates and guarantees of origin, underlining that the latter do not imply a right to benefit from national support mechanisms in other Member States and that their purpose is simply to indicate the country in which the electricity producer operates[18].

As we have explained, while both the Swedish and the Belgian support scheme were openly discriminatory and had the potential to seriously hinder the free movement of goods between Member States, the Court found a justification for these measures on public interest grounds.

The undeniable discriminatory and distinctly applicable nature of the scheme under discussion is perhaps the most significant feature of the *Ålands Vindkraft* ruling, since it forced the Court to seek a justification for these measures under Article 36 TFEU rather than under its mandatory requirements doctrine (which encompass other justifications which find their legal basis in the Court's own case-law).

The main difference in scope between the derogations listed by Article 36 TFEU and mandatory (or imperative) requirements is that «only measures which are applicable to goods or services without distinction, whatever their origin, can be justified on grounds of imperative requirements relating to the public interest»[19].

If however a measure is discriminatory, then it can be justified only by one of the derogations expressly listed under Article 36 TFEU.

Since environmental protection is not mentioned by Article 36 TFEU, the Court has recognized it as an imperative public interest capable of justifying only non-discriminatory measures.

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reaching some kind of balance, so that it is actually possible for the relevant suppliers to obtain certificates under fair terms (see, to that effect, *Ålands Vindkraft,* EU:C:2014:2037, paragraph 114)», Joined Cases C-204/12 to C-208/12, 11th September 2014, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014], para. 112.

18 Joined Cases C-204/12 to C-208/12, 11th September 2014, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014], para. 63.

19 Opinion of Advocate General Bot, Joined Cases C-204/12 to C-208/12, 8th May 2013, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014], para. 87.

In its case-law, the Court has attempted to extend the possibility to rely on environmental protection objectives to derogate to Article 34 TFEU either by denying the discriminatory nature of a national measure or by avoiding a close examination of whether or not the measure is discriminatory[20].

In the *Walloon waste* case[21], which concerned the prohibition to treat in Wallonia waste originating in another Member State or in another region of Belgium, the Court held that the measure adopted by the Belgian legislator could not be regarded as discriminatory in view of the specific characteristics of waste, which must be disposed of as close as possible to the place of production.

A different solution was found in the *PreussenElektra* case[22], where the Court, instead of neutralizing the discriminatory nature of the measure (which would have been extremely difficult to do, since the measure in question clearly favoured domestic green electricity producers), ruled that it was justified on public interest grounds, since its objective was to protect the health and life of humans, animals and plants (one of the grounds listed by Article 36 TFEU), and in light of the specific features of electricity[23].

In its Opinion on the *Essent Belgium* case, Advocate General Bot regrets that « the exception to the rule that only express derogating provisions can justify a discriminatory measure does not appear expressly in the case-law of the Court, but rather emerges, surreptitiously, from case-by-case reasoning along different lines »[24] and expresses the need to clarify the situation by giving

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20 Opinion of Advocate General Bot, Joined Cases C-204/12 to C-208/12, 8th May 2013, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014], para. 91.

21 Case C-2/90, 9th July 1992, *European Commission v Belgium* [1992] ECLI 310.

22 Case C-379/99, 13th March 2001, *PreussenElektra AG v Schleswag* AG [2001] ECR I-2099.

23 According to the Court, « once [electricity] has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced » Case C-379/99, 13th March 2001, *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099, para 79.

24 Opinion of Advocate General Bot, Joined Cases C-204/12 to C-208/12, 8th May 2013, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014], para. 92.

formal recognition to the possibility of invoking environmental protection as a justification for discriminatory measures which hinder free movement of goods[25].

From this point of view, the *Ålands Vindkraft* ruling represents a lost opportunity, since in it the Court, instead of addressing the limitations of its own imperative requirements doctrine, reverted to the arguments put forward in the *PreussenElektra* case, ruling that the measures under scrutiny were designed to protect the health and life of humans, animals and plants[26].

The main flaw of this argument is that by adopting such a broad interpretation of one of the derogations listed under Article 36 TFEU, the Court is not just muddying the waters as regards the distinction between these derogations and mandatory requirements, but it is effectively amending the Treaty on the Functioning of the European Union.

Indeed, it could be argued that by choosing to interpret the public interest to «protect the health and life of humans, animals and plants» as encompassing the climate policy pursued by the Union, the Court acted *ultra vires*, disregarding the exhaustive character of the list set out by Article 36 TFEU.

However, such a broad interpretation of the provision of a treaty in order to extend its scope to cover environmental concerns is not entirely without precedents in Europe.

The European Court of Human Rights, in a case concerning leakage from a waste disposal plant, justified the application of Article 8 ECHR[27] by

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25 «[S]uch recognition appears to me to be dictated by a concern for legal certainty, since it offers the advantage of removing any doubts that may subsist regarding the possibility of invoking environmental protection as an imperative requirement relating to the public interest in order to justify a discriminatory measure» (Opinion of Advocate General Bot, Joined Cases C-204/12 to C-208/12, 8th May 2013, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmark*t, [2014], para. 93).

26 Case C-573/12,1st July 2014, *Ålands Vindkraft AB v Energimyndigheten*, [2014], para. 80.

27 Article 8 ECHR: «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

arguing that severe environmental pollution may indeed affect the individuals' well-being and «prevent them from enjoying their homes in such a way as to affect their private and family life adversely without however seriously endangering their health»[28].

4. The National Renewable Support Schemes.

From a policy perspective, these rulings represent an important confirmation of the compatibility of national renewable support schemes with EU Law. Moreover, by upholding these schemes the Court ensured their viability, since an obligation to open up national support schemes to foreign energy producers would have entailed a considerable financial burden for national budgets.

However, the provisions on free movement of goods are not the only ones which come into play where national support schemes are concerned.

In the *Essent Netwerk* judgment[29], on a case which concerned a price surcharge imposed by a national legislator on transmitted electricity, the Court stressed the need to assess the legality of national support schemes under Articles 30[30] and 110 TFEU[31].

In his Opinion on the *Essent Netwerk* case, Advocate General Mengozzi

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law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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».

28 ECHR Case of *Lopez Ostra v Spain*, 9th December 1994, 41/1993/436/515.

29 Case C-206/06, 17th July 2008, *Essent Netwerk Noord BV and others*, [2008] ECR I-05497.

30 Article 30 (ex Article 25 TFEU): «Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature».

31 Article 110 (ex Article 90 TFEU): «No Member State shall impose, directly or indirectly, on the products of other Member State any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products».

argued that «a price surcharge, such as the surcharge at issue in the main proceedings, which is imposed, without discrimination and subject to the same conditions, on the transmission of both national and imported electricity, constitutes a charge having equivalent effect to a customs duty, prohibited by Article 25 EC [now Article 30 TFEU], where the revenue from that surcharge is intended to finance activities for the benefit of the domestic product alone, and the resulting advantages offset in full the financial burden on that product. If the advantages offset the financial burden on that product in part only, then that surcharge constitutes discriminatory internal taxation, which is prohibited under Article 90 EC [now Article 110 TFEU]»[32].

The issue of the compatibility of renewable energy support schemes with Articles 30 and 110 TFEU was recently raised by the European Commission in connection to a surcharge for the financing of renewable energy sources applied pursuant to the German 2012 Renewable Energy Act (*Erneuerbare-Energien-Gesetz*, «EEG»).

According to the European Commission, the EEG may have a discriminatory effect, since it provides for a reduced rate of the surcharge in the case of electricity purchased from domestic renewable energy producers[33], and would therefore represent, *prima facie*, a measure having an effect equivalent to customs duties or a form of discriminatory taxation, in breach of Article 30 or Article 110 TFEU.

While it failed to find a satisfactory solution to the problems posed by the national renewable energy support schemes, the recent case-law of the Court of Justice contributed to shed light on the shortcomings of EU policy in the field of renewable energy.

From a policy perspective, the only solution to the problem of the compatibility of national support schemes with the rules governing the Internal Market is the implementation of a coherent and comprehensive policy at EU

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32 Opinion of Advocate General Mengozzi, Case C-206/06, 24th January 2008, *Essent Netwerk Noord BV and others*, [2008] ECR I-05497, para. 74.

33 European Commission, Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union, State aid – Germany – State aid SA.33995 (2013/C), OJ 2014/C, 37/07.

level to support renewable energy production.

So long as the support of green energy production remains largely the province of Member States, the Court will have to struggle with the difficulties of striking a balance between the competing interests of achieving the Union's environmental targets and protecting the Internal Market, or, in other words, between a greener and a closer Union.

THE IMPORTANCE OF PROCEDURAL LEGALITY OF ENVIRONMENTAL DECISIONS IN EU LAW

Micol Roversi Monaco

CONTENTS: 1. – Introduction. 2. – European Court of Justice, 7 November 2013, C-72/12: the Case. 3. – The Judgment. 4. – Conclusion.

1. Introduction.

Public administration in European legal systems makes decisions through a decision-making procedure, which consists of a sequence of preparatory acts right up until the final decision (the act that has legal impact upon third parties).

The main preparatory steps are those of the "preliminary examination". This is a phase in which public administration learns about the factual situation and interests of the persons and public bodies involved – who may present observations and documents that the administration is bound to consider – and evaluates them for the final decision.

Compliance with this procedure is important when the law allows public administration to choose what decision to take. In this case the decision is called "discretionary". Decisions on environmental matters are mostly discretionary. Thus, the environmental interest may be sacrificed in the name of other interests considered more important by public administration. As a result, the decision-making proceeding may conclude with a positive evaluation of projects even if they have a negative impact on the environment.

The large degree of administrative discretion conferred by environmental legislation means that courts occupy an extremely important

role in ensuring that discretion is not exercised in an arbitrary or capricious manner[1].

In general, the object of judicial review, however, is the lawfulness of an administrative decision, not its merits. In point of fact, in European legal systems there is the principle of the separation of powers, according to which the administrative power is to be exercised exclusively by public administration, excepting some cases provided by law[2]. Hence, though the degree of supervision exercised by the judicial review of administrative action is different in each Member State, generally courts cannot exercise power or discretion themselves; they cannot substitute their own decision for that of the public administration[3]. Courts are required to balance between allowing decision-makers discretionary freedom and upholding the principle of legality[4].

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[1] R. MOULES, *Environmental judicial review*, Hart Publishing, Oxford-Portland, 2011, 39.

[2] J. SCHWARZE noted that the judicial review of administrative action touches on a matter of principle, namely the interrelationship which prevails among state authorities, and «the fact that administrative discretion is so strongly rooted in the individual constitutional systems sets clearly defined limits to any future approximation of the various national rules governing the use and control of discretion. It is to be expected that the constitutional separation and balance of powers among the Parliament, the administration and the courts […] will prove resistant to change and will hamper efforts to achieve convergence among the various administrative law rules» (J. SCHWARZE, *European Administrative Law*, London, Sweet and Maxwell, 2006, 294).
The degree of supervision exercised by the judicial review of administrative action is different in each Member State. See J. SCHWARZE, *European Administrative Law*, cit., Chapter 2 and Chapter 3, part 3, section 1; S. GALERA (editor), *Judicial review. A comparative analysis inside the European legal system*, Council of Europe Publishing, Strasbourg, 2010.

[3] And the same happens within the European Union legal system, in which the Courts reduce the intensity of their review to application of manifest error, misuse of powers, or clear excess of discretion: cf. P. CRAIG, *EU Administrative law*, Oxford, Oxford University Press, 2012, chapter 13. Nevertheless, when the European Union Institutions have a margin of appreciation in establishing and evaluating the relevant facts, in particular in the area of competition law and risk regulation, a more searching review is applied: see A.H. TÜRK, *Judicial Review in EU Law*, Cheltenham, Northampton, MA, USA, Edward Elgar, 2009, 145 ff.

[4] R. MOULES, op. cit., p. 39.

According to European Union law[5], which implemented the Århus Convention[6], Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned (a) having a sufficient interest, or alternatively, (b) claiming the impairment of a right (where administrative procedural law of a Member State requires this as a precondition) have access to a review proceeding to challenge the substantive or procedural legality of environmental decisions open to public participation, i.e. assessment of the effects of certain public and private projects on the

[5] Starting from Directive 2003/35, whose objective is to contribute to implementation of the obligations arising under the Århus Convention and the amended Directive 85/337 on assessment of the effects of certain public and private projects on the environment (repealed and replaced by Directive 2011/92, amended by Directive 2014/52), and Directive 96/61 concerning integrated pollution prevention and control (repealed and replaced by Directive 2010/75).

[6] Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005.
Article 9 stipulates that «each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 [a) "decisions on whether to permit proposed activities listed in annex I"; b) decisions "on proposed activities not listed in annex I which may have a significant effect on the environment" to which each Party "shall, in accordance with its national law, also apply the provisions of this article"; c) excluding decisions on proposed activities serving national defence purposes, to which each Party "may decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article […] if that Party deems that such application would have an adverse effect on these purposes"] and, where so provided for under national law […] of other relevant provisions of this Convention.
What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention […].
In addition […] each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment».

environment (Article 11 of Directive 2011/92) and permits for installations (Art. 25 of Directive 2010/75/EU).

Thus, according to European Union law, the grounds for challenging such decisions, which have to be recognized by Member States, are illegality of substance and illegality of procedure.

According to case-law at the European Court of Justice, in implementing the above provisions Member States in principle have discretion, due to their procedural autonomy.

The detailed procedural rules applicable are a matter for domestic legal regulation by each Member State, under the principle of procedural autonomy of Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render it impossible in practice or excessively difficult to exercise rights conferred by the Community legal system (principle of effectiveness)[7].

Moreover, European Union law does not prescribe in detail the scope of the judicial review, nor are the exact grounds of environmental judicial review clearly defined.

There is substantive illegality whenever the content of the decision is unlawful. Procedural illegality, on the other hand, consists of the infringement of procedural requirements.

In this regard, since they express a sort of vision common to the Member States of the Union, the criteria developed by the European Court of Justice upon Article 263 of the Treaty on the functioning of the European Union may serve as a guide. This Article states that the «infringement of an essential procedural requirement» is ground for judicial review of acts of European Union institutions and bodies (legislative acts, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, acts of the European Parliament and of the European Council, acts of bodies, offices or agencies of the Union).

[7] See, inter alia, European Court of Justice, 14 December 1995, C-312/93; 16 May 2000, C-78/98; 7 January 2004, C-201/02; 18 October 2011, C-128/09; 12 May 2011, C-115/09.

According to the European Court of Justice, an infringement of very important procedural requirements makes the act void[8], whereas infringement of less important procedural requirements makes it invalid if the violation had an effect on the content of the act[9].

These procedural requirements may be stated in Treaties, in secondary legislation, or, in the absence of statutory provisions, developed on the basis of general principles of law[10]. They are of even more fundamental importance where the European Union institutions have discretion or power of appraisal. And, according to the European Court of Justice, they include a duty by the competent institution to examine carefully and impartially all the relevant

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[8] For example, «due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality, disregard of which means that the measure concerned is void» (European Court of Justice, 29 October 1980, C-138/79).

[9] «The procedural irregularity would involve the annulment in whole or in part of the decision only if it were shown that in the absence of such irregularity the contested decision might have been different» (European Court of Justice, 29 October 1980, C-209/78). But the applicant does not have to demonstrate that the decision would have been different in content, «but rather that it would have been better able to ensure its defence if had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure» (European Court of Justice, 2 October 2003,C-194/99; 15 October 2002, C-238/99; 8 July 1999, Case C-51/92).

[10] Cf. A.H. TÜRK, op.cit., p. 113, 117 and ff.

The right to a hearing, according to European Court of Justice case-law, is a general principle of law. See, for example, European Court of Justice, 21 November 1991, C-269/90, about the power of appraisal in the procedure where the Commission, on a decision establishing that the conditions for duty-free importation of an apparatus are not met, consults the Member States and, if necessary, a group of experts: «it must be stated that Regulation No 2784/79 does not provide any opportunity for the person concerned, the importer of scientific apparatus, to explain his position to the group of experts or to comment on the information before the group or to take a position on the group's recommendation. However, it is the importing institution which is best aware of the technical characteristics which the scientific apparatus must have in view of the work for which it is intended. The comparison between the imported apparatus and the instruments originating in the Community must, consequently, be made according to the information about the intended research projects and the actual intended use of the apparatus provided by the person concerned. The right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution».

aspects of the individual case, the right of the person concerned to make his/her views known and to have an adequately reasoned decision[11], as well as the right of the institutions or the administrations which form part of the decision-making (in having to submit a proposal or an opinion) to participate[12].

According to the European Court of Justice, therefore, a defect in the preliminary examination of decision-making is a case of procedural illegality, because public administration has infringed its obligation to examine all the relevant aspects of the case in point carefully and impartially.

And likewise with the statement of reasons, which is an obligation of national administrations in reaching their decisions, under Art. 41 of the Charter of fundamental rights of the European Union: according to the European Court of Justice[13], it is a procedural requirement. The statement of reasons discloses the reasoning followed by public administration in adopting the decision, and has two aims. One aim is to make the persons concerned aware of the reasons for the decision and thus able to defend their rights. Another aim is to enable courts to exercise their supervisory jurisdiction[14]: in point of fact, only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.

It is noted[15] that there is an interrelationship between procedural and substantive review: procedural duty ensures that the final decision is not substantively arbitrary, hence procedural rights can facilitate substantive review

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[11] See European Court of Justice, 21 November 1991, C-269/90.
[12] See European Court of Justice, 23 February 1988, C-68/86; 29 October 1980, C-138/79; 30 March 1995, C-65/93; 7 July 1982, C-119/81.
[13] See, inter alia, European Court of Justice, 30 March 2000, C-265/97, according to which infringement of Art. 296 of the Treaty on the functioning of the European Union - which states that legal acts shall state the reasons on which they are based - is an "infringement of an essential procedural requirement" under Article 263 of the Treaty.
[14] This is settled case-law: see, inter alia, European Court of Justice, 10 April 2014, C-269/13; 8 May 2013, C-508/11; 19 July 2012, C-628/10; 29 September 2011, C-521/09; 1 July 2008, C-341/06; 15 July 2004, C-501/00; 2 April 1998, C-367/95; European Court of First Instance 25 June 1998, T-394/94.
[15] P. CRAIG, op.cit., 353 and ff.

(for example, the requirement of scientific advice with a view to ensuring that the resultant regulation is not substantively arbitrary[16], and the obligation to give reasons enables courts to determine whether the administration acted for improper purposes[17]), and procedural rights can be a means to consider the substance of the case (for example, if the administration has not accorded full rights of access to the file, courts may consider whether the document was relevant for the individual's case and whether disclosure of it might have made a difference to the decision reached[18]).

2. European Court of Justice, 7 November 2013, C-72/12: the Case.

In terms of disciplining procedural illegality German law provides the most important model of European legal systems. Under that discipline in no case may a formally or procedurally illegal decision be annulled by a court, if it is plain that the infringement did not affect the contents of the decision.

In this context, German Law on Environmental Impact Assessments stipulates that an application for annulment of a decision on the lawfulness of a project may be made if an environmental impact assessment has not been carried out and the omission has not been made good. But this law doesn't provide that an action may be brought in the case of a procedural illegality of the assessment.

Recently, an action was brought for the annulment of a regional authority's decision to approve plans for the construction of a flood retention scheme covering over 300 hectares of a former Rhine floodplain. In challenging that decision, they claimed that the environmental impact assessment carried out was inadequate.

The administrative courts dismissed the action, taking the view that German law only allows an action to be brought in the case of pure and simple

[16] See European Court of First Instance, 11 September 2002, T-13/99.
[17] See European Court of First Instance, 24 January 1992, T-44/90; 29 June 1993, T-7/92; 26 November 2002, T-74/00. Cf. J. SCHWARZE, op. cit., 1402 ff.
[18] European Court of Justice, 7 January 2004, C-204/00.

failure to carry out an environmental assessment and this would not therefore apply to a mere irregularity in the environmental assessment.

The Federal Administrative Court referred to the European Court of Justice for a preliminary ruling as to whether German law correctly implements the Directive on environmental impact assessments, which requires that there be a right to challenge the legality of decisions vitiated by procedural irregularities.

3. The Judgment.

The European Court of Justice, 7 November 2013, C-72/12 stated that Article 10a of Directive 337 of 1985, as amended by Directive 35 of 2003, regarding public participation and access to justice, must be interpreted as precluding Member States from carrying out such a limitation. If we exclude the possibility of legal remedy in cases where, though carried out, an environmental impact assessment is found to be vitiated by even serious defects, that would render the provisions of Directive virtually meaningless.

In point of fact, one of the objectives of that directive is to create procedural guarantees to ensure the public is better informed of, and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment. For this reason, it is particularly important to ascertain whether the procedural rules governing that area have been complied with.

As observed by the Advocate General Pedro Cruz Villalon in giving his opinion on this case, since Article 10a of Directive 337 of 1985 implements the Århus Convention, that Convention provides useful references for interpreting it. Under Article 1, the Convention is deemed «to contribute to the protection of 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 this purpose, the Convention provided certain procedural rules (access to information, public participation in decision-making) and effective access to justice.

Recitals 7 and 8 of the Convention clarify the context of the right of access to justice in environmental matters. Citizens must have access to justice in environmental matters to be able to assert the right to live in an environment adequate to their health and well-being and observe the duty, both individually and in association with others, of protecting and improving the environment for the benefit of present and future generations.

From this, said the Advocate General, it follows that «the procedural rules and their respect play a substantial role for the protection of rights conferred. This explains the growing importance of rights to participate in decision-making in environmental law. These rights are seen today not only as a factor of legitimacy of decisions, but also as a means of improving the protection of the environment. This concept of the decision-making proceeding also clarifies the value of the proper conduct of an EIA. In this context, it becomes clear why Article 10a of Directive 337 of 1985 cites jointly the review of the procedural and substantive legality».

On the other hand, the Århus Convention does not recommend that protection of the environment be a specific function of non-governmental organizations created for this purpose, but considers the individual to hold the right and the obligation to pursue environmental issues (Recital 7 and 8 of the Århus Convention). Such provisions by the Århus Convention leave it to the citizenry itself as a "body" to ensure implementation of environmental protection[19].

Nevertheless, the Directive stipulates two conditions where action is admissible: "a sufficient interest in bringing the action" or "the impairment of a right", depending on which of these conditions is adopted in national legislation.

The Directive states that what constitutes impairment of a right is to be determined by Member States; on the other hand, procedural rules of Member

[19] See European Court of Justice, 5 February 1963, C-26/62: «The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States».

States, in accordance with the principle of effectiveness, must not make it impossible or excessively difficult to exercise rights conferred by Union law[20].

Under German law it is in general incumbent on the applicant to prove that the contested decision suffers from the procedural defect in question ("the condition of causality").

According to the European Court of Justice, that shifting of the burden of proof onto the person bringing the action makes the exercise of rights excessively difficult, especially because environmental impact assessments are complex and technical.

Thus, the European Court of Justice stated that the Directive does not preclude national courts from refusing to recognise impairment of a right if it is established that the contested decision would not have been different without the procedural defect alleged by the applicant.

Nonetheless, that will only be the case if the court makes its ruling on the basis of the evidence provided by the developer or the authorities and, more generally, on the basis of all documents submitted to it. In making that assessment, «it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337».

4. Conclusion.

This ruling by the European Court of Justice is significant in that it bears on a situation where Member States are diversified as to identification of procedural defects and their relevance concerning the validity of administrative decisions[21].

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[20] See European Court of Justice, 12 May 2011, C-115/09.
[21] See J.H. JANS, R. MACRORY, A.M. MORENO MOLINA (ed.), *National Courts and EU Environmental Law*, Europa Law Publishing, Groningen, 2013, 21-33.

According to the Court, such procedural defects can remove the standing, even in the case of discretional decisions, but never in the case where the procedural defect consists in violation of procedural rules that allow participation in the procedure.

In this way great power still attaches to the court required to verify the validity of an environmental decision submitted to it; a power that constitutes an exception to the principle of separation of powers, since the judge, in reviewing the decision and the procedure leading to it in order to see if in practice that might have been the only practicable course, takes on the role of public administration.

This great power has the constraint that it respect the guarantee of participation in proceedings for the persons concerned: the judge cannot deprive this procedural rule of effectiveness – it being a cardinal principle in environmental law – by ruling that the administrative decision could not have been different if the persons concerned had participated.

This conclusion by the European judge seems most acceptable and balanced, because, in addition to ensuring the right of persons concerned to participate in the procedure for adoption of an environmental decision, it recognizes that one cannot predict the outcome of the procedure following the contribution of the person participating, which may involve not only items of interest, but also elements of knowledge of the facts, in addition to 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 / EC).

PUBLIC AUTHORITIES REQUIRED TO MAKE ENVIRONMENTAL INFORMATION AVAILABLE

Micol Roversi Monaco

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1. Introduction.

Directive 2003/4/CE, which brings European law in line (fifth recital in the preamble to the Directive) with the "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" ("Aarhus Convention"), signed by the European Community on 25 June 1998, recognizes the right of access to environmental information[1] held by or on behalf of the public authorities, without showing 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 administration is not the

[1] This means 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).

owner of the environment and it is therefore reasonable that such information is shared»[2]. 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 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, whose purpose is to allow the public «to express, and the decision-maker to take account

[2] L. KRÄMER, *Access to Environmental Information in an Open European Society - Directive 2003/4*, in *Research papers in law of College of Europe*, 5, 2003, 12, available at http://aei.pitt.edu/39391/ (last visited December 2014). According to the Author, «though in all EC Member States, the task to protect the environment is given to the administration, it is obvious that the administration is not the owner of the environment. The environment is everybody's. It is for this reason that administrative decisions that affect the environment must be transparent, open and must strike a balance between the general interest to preserve, protect and improve the quality of the environment on the one hand, the satisfying of specific private or public interests on the other hand. In order to allow at least a certain control of whether the administration strikes the right balance between the need to protect the environment and other legitimate or less legitimate needs, it appears normal and self-evident that information on the environment which is in the hands of public authorities, be also made available to the public and to citizens»; and «the concept of open decision-making presupposes that public authorities lay open the facts and data, studies and findings, research and monitoring results on which they intend to base their decisions - including their decisions to remain passive. As neither the environment nor future generations have a voice, such an openness enables citizens and organisations to participate in the decision- making on the environment which means to discuss the facts, the necessity as well as the opportunity to take this or that decision and to give, if any possible, a voice to the environment and to future generations».

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).

In the definitions given by the Aarhus Convention and Directive 2003/4, we can distinguish three categories of "public authorities", that is, entities which have to make environmental information available to the public: the "structural authorities", the "functional authorities with powers", and the "controlled authorities"[3].

In Article 2(2), the Aarhus Convention, actually identifies four categories of "public authority", but the last is assimilable to the first. The first category (subparagraph a) is constituted by the «government at national, regional and other level». The fourth category (d) is represented by «the institutions of any regional economic integration organisation referred to in Article 17» (constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect of these matters), «which is a Party to this Convention»; thus inevitably an administrative authority strictly speaking (a "structural authority").

Likewise, within the European Union Law, Article 2(2) of Directive 2003/4 identifies, as a first category of public authority (subparagraph a), «government or other public administration, including public advisory bodies, at national, regional or local level».

This first category includes Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State, that is legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.

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[3] A. GRATANI, *Quando le imprese sono "autorità pubbliche"?*, in *Rivista giuridica dell'ambiente*, 2014, 2, 205.

These are entities that may not have specific responsibilities for the environment, to take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities.

The Aarhus Convention includes in the second category (subparagraph b) «natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment».

Likewise, Directive 2003/4 includes in the second category (subparagraph b) «any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment».

These are the administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with performing services of public interest, inter alia in the environmental field.

The third category identified by the Aarhus Convention, subparagraph c), consists of «any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above».

In a similar way, subparagraph c of the European Directive identifies this third category as «any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)».

The Aarhus Convention excludes *tout court* from its scope bodies or institutions acting in a judicial or legislative capacity.

This exclusion is justified by the need to allow Member States to ensure the smooth running of the legislative process as provided for by national constitutional rules, with the result that, since this need is no longer present once that process has come to an end, the exclusion may be applied only before the end

of the process[4].

The European Directive, otherwise, states that Member States may decide that the definition given by the Directive does not include bodies or institutions acting in a judicial or legislative capacity, in such a way that they may not provide for this exclusion in the legislation transposing the Directive[5].

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[4] The purpose of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 is to allow Member States to lay down appropriate rules to ensure that the process for the adoption of legislation runs smoothly, taking into account the fact that, in the various Member States, the provision of information to citizens is, usually, adequately ensured in the legislative process (European Court of Justice, Grand Chamber, 14 February 2012, C-204/09, Para. 43).

[5] In Italy, Legislative Decree no. 19 August 2005, n. 195, "Implementation of Directive 2003/4 / EC on public access to environmental information" defines public authority as «the state government, the regional government, the local government, state corporations and public corporations, public bodies and concessionaires of public services, and any natural or legal person who performs public functions related to environmental issues or exercises administrative responsibilities under the control of a public body» without excluding the bodies or institutions acting in a judicial or legislative capacity (art. 2 co. 1, letter. b). However, Art. 5 among the cases of exclusion from the right of access, in accordance with Article 4 of the Aarhus Convention, cites the case in which disclosure of environmental information would adversely affect the confidentiality of the proceedings of public authorities, according to the provisions in force on the subject (Art. 5, Para. 2, letter a), or the course of justice or the ability of the public authority to conduct investigations to ascertain illicit acts (Art. 5, Para. 2, letter c); in these cases there is not a total exclusion of the right, as the same article states that the public authority shall apply the provisions which establish the exclusion of the right «in a restrictive manner, carrying out, in relation to each access request, an evaluation weighted between the public interest in environmental information and the interest protected by the exclusion from access» (art. 5, Para. 3).
In general, the Court stated that the provision which permits Member States to depart from the general rules laid down by that directive, may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure, and the scope of any derogation which it adopts must be determined in the light of the aims pursued by the Directive (European Court of Justice, Grand Chamber, 14 February 2012, C-204/09, Para. 38).
According to the case law of the European Court of Justice, moreover, in order to ensure the effectiveness of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, a broad interpretation of "legislative process" needs to be adopted, including the different stages of that process until promulgation of any law that may be

2. European Court of Justice (Grand Chamber), 19 December 2013, C-279/12: the Case.

The dispute from which the pronouncement of the Court arises stems from a refusal of requests for access to certain information relating to sewerage and water supply made by Fish Legal and Mrs Shirley to United Utilities Water plc., Yorkshire Water Services Ltd and Southern Water Services Ltd.

Since Fish Legal and Mrs Shirley had not received the information requested from the water companies concerned within the periods prescribed by the Environmental Information Regulations 2004 (the "EIR", which are designed to transpose Directive 2003/4 into United Kingdom law), they both complained to the Information Commissioner.

According to Fish Legal and Mrs Shirley, the water companies concerned must be classified as "public authorities" within the meaning of Article 2(2)(b) or (c) of Directive 2003/4 since they perform public administrative functions and are, in any event, closely controlled by a State body.

The Information Commissioner held that the water companies concerned were not public authorities for the purposes of the EIR 2004 and that he hence could not adjudicate on their complaints.

According to the Information Commissioner, the water companies do not carry out functions of public administration, and the control to which the water companies are subject is insufficient since it concerns only the functions associated with regulation: the concept of "control" concerns command or even compulsion,

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adopted in that process, with the result that one can exclude from the definition of public authority required to allow access to environmental information «ministries which, pursuant to national law, are responsible for tabling draft laws, presenting them to Parliament and participating in the legislative process, in particular by formulating opinions» (European Court of Justice, Grand Chamber, 14 February 2012, C-204/09, Para. 49); but not when these ministries formulate and adopt regulations having a lower rank than a law (European Court of Justice, sec. II, 18 July 2013, C-515/11).

and the power to determine not just ends but the means to achieve those ends.

Fish Legal and Mrs Shirley then appealed against the decision to the First-tier Tribunal (General Regulatory Chambers, Information Rights), which dismissed the appeals; they thus appealed to the Upper Tribunal (Administrative Appeals Chamber).

3. The Judgement.

The Upper Tribunal decided to stay the proceedings and to refer certain questions to the Court for a preliminary ruling as to the interpretation of Article 2(2) of Directive 2003/4/EC.

The pronouncement of the court consisted of four statements.

3.1. Preliminarily, the Court clarified the criteria for interpreting the notion of public authority required to allow access to environmental information, stating that for the purposes of interpreting Directive 2003/4, account should be taken of the wording and aim of the Aarhus Convention, which that directive is designed to implement in European Union law. In point of fact, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by or for public authorities, and, as recital 5 in the preamble to Directive 2003/4 confirms, in adopting that directive the European Union legislature intended to ensure the consistency of European Union law with the Aarhus Convention.

The Court of Justice referred to these criteria, at the time when it dealt with the problem of whether the phrase "under national law" contained in Art. 2(2) subparagraph b) of the Directive (according to which a public authority is

«any natural or legal person performing public administrative functions under national law […]») is to be construed as an express reference to national law – here, to United Kingdom law – for the purpose of interpreting the concept of "public administrative functions".

The Court noted in this respect that the objective set out in the seventh recital of Directive 2003/4, is to prevent disparities between the laws in force concerning access to environmental information and inequalities within the European Union as regards access to such information or as regards conditions of competition. This objective requires that determination of the persons obliged to grant access to environmental information to the public be subject to the same conditions throughout the European Union, and therefore the concept of "public administrative functions", within the meaning of Article 2(2)(b) of Directive 2003/4, cannot vary according to the applicable national law.

The phrase "under national law" means, according to the Court, «that there needs to be a legal basis for the performance of the functions under [Article 2(2)(b)]», this subparagraph covering «[a]ny person authorised by law to perform a public function». It follows that only entities which, by virtue of a legal basis specifically defined in the national legislation that is applicable to them, are empowered to perform public administrative functions, are capable of falling within the category of public authorities that is referred to in Article 2(2)(b) of Directive 2003/4. On the other hand, the question whether the functions vested in such entities under national law constitute "public administrative functions" within the meaning of that provision must be examined in the light of European Union law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept.

3.2. Secondly, the Court dealt with the question of whether the water companies concerned fall under the second category of public authorities, defined

in Article 2(2)(b) of Directive 2003/4: according to the Court, these are entities, be they legal persons governed by public law or by private law, that are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, «and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law» (paragraph 52).

In the United Kingdom, particularly, by enactment of the Water Act 1989, the water supply and sewerage sector was privatised: the functions, powers, property and other assets of the water authorities were divided between, first, the National Rivers Authority (now, since the entry into force of the Environment Act 1995, called the Environment Agency), and second, water companies providing water supply and sewerage services as commercial undertakings.

Under the legislation in force, in particular the Water Industry Act 1991, water companies are appointed as the sewerage undertaker and/or water undertaker for a given area of England and Wales by the Water Services Regulatory Authority (OFWAT). That authority is also, by itself or, in certain circumstances, jointly with the Secretary of State (the minister responsible for environmental matters), the authority with primary responsibility for supervising those companies. The water companies are set up as a public limited company or a limited company. They are run by a board of directors responsible to shareholders and are operated on normal commercial principles, as set out in their memorandum and articles of association, with the aim of generating profits for distribution to shareholders as dividends and for reinvestment in the business. They also hold certain statutory powers, which include powers of compulsory purchase, the right to make byelaws relating to waterways and land in their ownership, the power to discharge water, including into private watercourses, the right to impose temporary hosepipe bans and the power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water.

These duties and powers are set out in the instrument of appointment ("licence") of each company. The licence may also include other conditions, such as a condition requiring payment of a fee to the Secretary of State. The Secretary of State and/or OFWAT ensure that the terms of the licence are complied with. The companies may be required to carry out specific actions or measures. The licence can only be terminated on 25 years' notice, with stated reasons. It may be modified by OFWAT with the company's consent or after a Competition Commission report. Finally, the legal regime to which the water companies are subject also provides for the possibility of financial penalties being imposed upon them and partly takes them outside the ordinary provisions for the dissolution of companies.

The European Court of Justice in this regard notes that the water companies concerned are entrusted, under the applicable national law, in particular WIA 1991, with services of public interest, namely maintenance and development of the water and sewerage infrastructure as well as water supply and sewage treatment. It is also clear from the information provided by the reporting tribunal that, in order to perform those functions and provide those services, the water companies concerned have certain powers under the applicable national law, such as the power of compulsory purchase, the power to make byelaws relating to waterways and land in their ownership, the power to discharge water in certain circumstances, including into private watercourses, the right to impose temporary hosepipe bans and the power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water.

According to the Court, however, it is for the referring tribunal to determine whether, having regard to the specific rules attaching to them in the applicable national legislation, these rights and powers accorded to the water companies concerned can be classified as special powers.

3.3. The third consideration of the Court concerns the criteria for determining whether entities such as the water companies concerned - which, it is not disputed, provide public services relating to the environment - are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive.

The question is whether the existence of a regime such as that laid down by WIA 1991, inasmuch as it places supervision of the water companies concerned in the hands of the Secretary of State and OFWAT - bodies which, it is not disputed, are public authorities referred to in Article 2(2)(a) of Directive 2003/4 - means that those companies are 'under the control' of those bodies, within the meaning of Article 2(2)(c) of the directive.

In their written observations, the Information Commissioner, the water companies concerned and the United Kingdom Government submit that the fact that the water companies concerned are subject to an, admittedly relatively strict, system of regulation does not mean that they are subject to "control" within the meaning of Article 2(2)(c) of Directive 2003/4. They submit that a fundamental difference exists between a system of "regulation", which includes only the power for the regulator to determine the objectives that must be pursued by the regulated entity, and a system of 'control', which enables the regulator additionally to determine the way in which those objectives must be attained by the entity concerned.

The European Court of Justice stated by contrast that control may also be regulatory control.

The precise meaning of the concept of control in Article 2(2)(c) of Directive 2003/4 must also be sought, however, with reference to that Directive's own objectives.

It is apparent from Article 1(a) and (b) of Directive 2003/4 that its objectives are, in particular, to guarantee the right of access to environmental

information held by or for public authorities, to set out the basic terms and conditions of, and practical arrangements for, exercise of that right and to achieve the widest possible systematic availability and dissemination to the public of such information.

Hence, in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State.

Those factors lead to the adoption of an interpretation of "control", within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the Directive is in a position to exert decisive influence on the entity's action in that field.

Exactly how such a public authority may exert decisive influence pursuant to the powers that it has been allotted by the national legislature is irrelevant in this connection. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence.

The mere fact that the entity in question is, like the water companies concerned, a commercial company subject to a specific system of regulation for the sector in question cannot exclude control within the meaning of Article 2(2)(c) of Directive 2003/4 if there are these conditions.

In point of fact, if the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of issuing orders or imposing fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even though the latter is no longer, following privatisation of the sector in question, able to determine their day-to-day management.

According to the Court, it is for the referring tribunal to decide whether, in the cases in the main proceedings, the system laid down by WIA 1991 means that the water companies concerned do not have genuine autonomy *vis-à-vis* the supervisory authorities, in this instance the Secretary of State and OFWAT.

3.4. Another issue raised by the court regards the question of whether Article 2(2)(b) and (c) of Directive 2003/4 must be interpreted as meaning that, where a person falls within that provision in respect of some of its functions, responsibilities or services, that person constitutes a public authority only in respect of the environmental information which it holds in the context of those functions, responsibilities and services, the result being that it would be obliged to disclose only environmental information held by them in the performance of those functions.

According to the Court, persons covered by Article 2(2)(b) of Directive 2003/4 must be regarded, for the purposes of the Directive, as public authorities in respect of all the environmental information that they hold.

The Court argued that, apart from the fact that a hybrid interpretation of the concept of a public authority is liable to give rise to significant uncertainty and practical problems in the effective implementation of Directive 2003/4, that

approach does not, as such, find support in the wording or the scheme of that Directive or of the Aarhus Convention. On the contrary, such an approach conflicts with the foundations of both Directive 2003/4 and the Aarhus Convention as regards the way in which the scope of the access regime laid down by them is set out, a regime which is designed to achieve the widest possible systematic availability and dissemination to the public of environmental information held by or for public authorities. As is clear from Article 3(1) of Directive 2003/4 (the Directive's central provision which is essentially identical with Article 4(1) of the Aarhus Convention), if an entity is classified as a public authority for the purposes of one of the three categories referred to in Article 2(2) of that Directive, it is obliged to disclose to any applicant all the environmental information that is held by or for it.

On the other hand, the Court adopted a hybrid solution for public authorities "under control", i.e. those referred to in Article 2 (2) subparagraph c) of Directive 2003/4, which are required to provide only the environmental information held carrying out an activity under public control.

In this case, commercial companies such as the water companies concerned are capable of being a public authority by virtue of that provision only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and thus are required to disclose only environmental information which they hold in the context of supplying those public services. On the other hand, those companies are not required to provide environmental information if it is not disputed that the information does not relate to the provision of those public services. If it remains uncertain that that is the case, according to the Court the information in question must be provided.

4. Conclusions.

This judgment confirms the consolidated case law of the Court, which adopts a substantive notion of public administration whenever necessary to ensure the effectiveness of European legislation, that is to pursue the objectives of European legislation beyond the formal qualifications varying within individual Member States. This substantive notion is used in the field of direct applicability of European directives not transposed. In this context, the Court stated that, where a person is able to rely on a directive as against the State, he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority, because in either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law[6]. The Court subsequently extended this substantial notion of State to organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals: tax authorities[7], local or regional authorities[8], constitutionally independent authorities responsible for the maintenance of public order and safety[9], public authorities providing public health services[10], and bodies which, whatever their legal form, have been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and for that purpose have special powers beyond those resulting from the normal rules applicable in relations between individuals[11].

[6] European Court of Justice, 26 February 1986, C-152/84.
[7] European Court of Justice, 19 January 1982, C-8/81, and 22 February 1990, C-221/88.
[8] European Court of Justice, 22 June 1989, C-103/88.
[9] European Court of Justice, 15 May 1986, C-222/84.
[10] European Court of Justice, 26 February 1986, C-152/84.
[11] European Court of Justice, 12 July 1990, C-188/89.

This substantive notion, is echoed by the legislation on public procurement, for which there was developed the concept of a body governed by public law, subject to whatever legal form falls within the scope of the Directives on public procurement as a contracting authority (art. 2, Para. 1, No. 4, Directive 2014/24/EU on public procurement)[12].

By this judgement the European Court of Justice interprets the concept of "public administrative functions" (under Art. 2(2)(b) of the Directive) to include all activities, including the task of providing services in the public interest, carried out exercising special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. And it clarifies the notion of entities under the control of a "public authorities" (under Article 2(2)(c) of the Directive): this means entities that do not determine in a genuinely autonomous manner the way in which they perform the functions which are vested in them, because there are rules determining how they should perform them and providing direct administrative supervision to ensure that those rules are effectively respected, possibly giving orders or imposing penalties. Finally, the last

[12] These are entities that are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, that have legal personality, and that are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law or that are subject to management supervision by those authorities or bodies or that have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.
As the tenth recital of this Directive states, the notion of "bodies governed by public law" has been examined repeatedly in the case-law of the Court of Justice of the European Union, which has explained that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character. Moreover, the Court has also examined the condition relating to the origin of the funding of the body considered, and has clarified inter alia that being financed for "the most part" means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.

consideration of the Court is that only the entities referred to in Article 2(2)(b) of the Directive must, for the purposes of this Directive, be treated as public authorities in relation to all the environmental information they hold, while public authorities "controlled", that is those in Article 2(2)(c) of the Directive, are required to provide only the environmental information held carrying out an activity under public control. This is because outside this activity such entities cannot be qualified as a public authority, and the "special" regime of accessibility is only applicable at the time when they act as a public authority.

It can be concluded, by way of comment on this judgment, that the implementation of access to environmental information remains controversial especially as concerns interpretation of the scope of access to environmental information. There are in point of fact no clearly defined exceptions[13], and identification of the notion of public authority is approached with caution by the Court, which remits to the national court how it should verify its autonomy, indicating parameters that are not sufficiently precise or unambiguous.

The objective pursued by the Court in this judgment, however, needs to be contextualized within a "closed society"[14], and gives an answer of great impact,

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[13] M. LEE, *EU Environmental Law, governance and decision-making*, Hart Publishing, Oxford, 2014, 197-198, which also notes that access to environmental information is designed to interest groups, rather than for individuals (201-201).

[14] L. KRÄMER, *The EU, access to environmental information and the open society*, in *Environmental Law Network International*, 2013, 38-43. According to the Author, «public administrations need a space, where they can reflect, discuss among themselves and reach decisions without too much interference from outside. There will therefore always be a tension between the request for more openness and transparency and the concern for administrative efficiency and effectiveness. However, at present, the balance at EU level is, in the environmental sector, clearly biased in favour of confidentiality, secrecy and non-transparency»; «administrative inertia, professional or commercial secrets, the power which is given to superior knowledge, all these contribute to the present "mafia of silence"»; and in «this situation it is all the more unacceptable that access to information and participation in decision-making in the environmental field is much easier for vested interest groups - car and chemicals industries, agricultural groups, transport and energy industries, etc. - than for citizens and civil society».

tending in the direction of extending the scope of the discipline. Indeed, as a result of that judgment, within the definition of public authority referred to in subparagraph c, national courts may consider all providers of public services, just as the European Commission had tried to insert among the public authorities during its revision of Directive 90/313 as Directive 2003/4/EC, only at the time this proposal was not accepted[15].

[15] L. KRÄMER, *Access to Environmental Information in an Open European Society,* cit., 12: «The Commission had suggested to include in the notion of "public authorities" any person that was entrusted by law, or under arrangements with a public authority «services of general economic interest which affect or are likely to affect the state of elements of the environment». It had explained that some services, such as gas, electricity, water or transport, were in some Member States performed by public authorities or utilities while in other member States, they were performed by private bodies. An unequal treatment of access to information was, however, not justified as these services were essentially the same, all the more as such differentiation between private and public services could occur within the same Member State. The Commission therefore considered it necessary to go beyond the wording of the Aarhus Convention and to include all bodies which provided general interest services in the definition of "public authorities"».
The Author agrees with the decision not to follow the proposal, because «there should be a differentiation between public administration and private bodies»: «public bodies have general interests to take care of, while private bodies have in principle their own interests to consider. Obliging private bodies to grant access to information on the environment would just create new difficulties between private bodies which act in the general economic interest and private bodies which do not - and this differentiation is even less easy to operate».

THE TRANSPOSITION OF THE ELD IN ITALY

Annamaria De Michele

CONTENTS: 1. – The Transposition of the ELD in Italy: the Main Steps. 2. – The Infringement Procedure No. 2007/4679 and the Reform of 2009. 3. – The Article 25 of the Law No. 97 of 2013.

1. The Transposition of the ELD in Italy: the Main Steps.

The Environmental Liability Directive (Directive no. 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 or, simply, ELD) aims to ensure that operators focus on the environmental effects of their activities, by encouraging them to avoid causing environmental damage and to proactively remediate such damage once it occurs. It is based on the polluter-pays principle, which means that the original polluter pays for remediation of the environmental damage, and not the taxpayer. For these purposes, the ELD aims to establish a common liability framework throughout the EU for environmental damage, to prevent businesses taking advantage of less stringent environmental protection legislation by relocating to another Member State.

The main objective of the ELD is to prevent and remedy 'environmental damage'. This is defined as damage to protected species and natural habitats (nature), damage to water and damage to land (soil). The liable party is in principle the 'operator' who carries out occupational activities. Operators who carry out certain dangerous activities, as listed in Annex III of the ELD, are strictly liable (without fault) for environmental damage. Operators carrying out other occupational activities are liable for any fault-

based damage they cause to nature. The establishment of a causal link between the activity and the damage is always required[1]. Operators may benefit directly from certain exceptions and defences (for example force majeure, armed conflict, third party intervention) and defences introduced via transposition (for example permit defence, state of the art defense). Operators have to take preventive action if there is an imminent threat of environmental damage[2]. They are likewise under an obligation to remedy environmental damage once it has occurred and to bear the costs (according to the 'polluter pays' principle)[3]. In specific cases where the operators fail to do so, or are not identifiable, or have invoked defences, the competent authority may step in and carry out the necessary preventive or remedial measures. Affected natural or legal persons and environmental NGOs have the right to request the competent authority to take remedial action if they deem it necessary[4].

Prior to the transposition of the ELD, Italian law imposed liability for preventing and remediating damage to land, water and general environment. The article no. 18 of law no. 349/1986 of 8 July 1986 imposed fault based liability on a person who willfully or negligently breached the Italian law resulting in damage to the terrestrial or marine environment (also called environmental damage or ecological damage) for remediating the damage if possible, or for paying a compensation if not. The article no. 17 of law no.

[1] European Union Court of Justice stated that Directive 2004/35 precludes liability for environmental damage irrespective of any causal contribution only in so far as such liability would affect the primary liability of the polluting operator (in C-308/08, Raffinerie Mediterranee SpA (ERG), Polimeri Europa SpA, Syndial SpA v. Ministero dello Sviluppo Economico and Others).

[2] Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures and, in certain cases, inform the competent authority of all relevant aspects of the situation, as soon as possible.

[3] Where environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take: (a) all practicable steps to I immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services, and (b) the necessary remedial measures, in accordance with the relevant provisions of the ELD.

[4] L. KRAMER, *Environmental Law,* Sweet & Maxwell, London, 2012, 7th edition, 173 ss.

22/1997 of 5 February 1997 (also known as Waste Management Act or the Ronchi Decree) imposed strict liability on a person who caused an imminent threat of, or actual, damage to soil, surface water or ground water that exceeded specified limits for contaminants or that resulted in a significant risk to human health.

The ELD had to be transposed by 2007. However, many Member States did not meet the deadline (i.e. U.K.). The Italian Government transposed it about one year ahead of the deadline, and was one of the first Member States to complete harmonization of its national legislation with the EU rules, with the enactment of the legislative decree no. 152/2006 of 3 April 2006, which introduced the Environmental Code. The specific regulation that transposed the directive is set out in Part VI of the Code, which is entitled provisions related to compensatory protection against environmental damages. Despite that, looking more closely, the process of effectively implementing the ELD has been tortuous, inasmuch influenced by the existing national provisions on environmental liability for the remedying of environmental damage, and by the technical requirements established by the Directive which, on implementation, were found to be particularly burdensome from the technical, institutional and financial viewpoint.

What has been said before is confirmed by the fact that, in 2008, the European Commission opened an infringement procedure no. 2007/4679 to point out the non-compliance of the Italian rules on environmental liability with the provisions contained in the ELD. For this reason, in the subsequent year, the Italian environmental liability discipline was subjected to an attempt to reform, contained in the decree no. 135/2009 of 25 September 2009, converted in law no. 166/2009 of 20 November 2009, with the clear aim to close the infringement procedure[5]. Despite of the objective, the reform of 2009 was not considered enough by the European Commission: in 2009 e 2012, the

[5] Italian Government answered with two remarks on the 1st and the 2nd of December 2009 and a remark in remark on the 2nd of February 2010.

European Commission sent two opinions[6] which clearly explained the reasons why Italy still did not comply with the European regulation.

Only in 2013, Italy substantially modified the environmental liability discipline contained in the Environmental Code. The law no. 97/2013 of 6 August 2013, "European Law 2013" fulfills the provisions of the Directive no. 2004/34/EC, finally obtaining the infringement procedure to be closed.

2. The Infringement Procedure No. 2007/4679 and the Reform of 2009.

Although many provisions of the ELD have been correctly transposed, according to the European Commission some of the rules contained in the Environmental Code were not entirely compatible with the European regulation. The infringement procedure and the following opinions evidenced that: 1) the Italian environmental liability was always a fault – based liability, while the directive provides for two distinct but complementary liability regimes (strict liability[7] and fault-based liability[8] regimes); 2) the Italian legislation (article no. 311(2)) established a monetary compensation for environmental damage, while the directive sets only compensation in kind (identifying primary, complementary and compensatory remediation as the only possible remedial measures when an environmental damage occurs); 3) Italian legislation admitted exceptions not contemplated by the ELD: i.e. exclusion of forms of compensation of the environmental damage in the cases

[6] Opinion dated 23 November 2009 and opinion (C-2012/228 final).

[7] The first liability regime applies to operators who professionally conduct risky or potentially risky activities listed in Annex III: these activities include, among others, industrial and agricultural activities requiring permits under the 1996 Integrated Pollution Prevention and Control Directive, waste management operations, the release of pollutants into water or into the air, the production, storage, use and release of dangerous chemicals, and the transport, use and release of genetically modified organisms (GMOs). Under this regime, an operator can be held liable even of he has not committed any fault, though there are a few cases in which he can be exempted from liability

[8] The second liability regime applies to all professional activities, including those outside Annex III, but an operator will only be held liable if s/he was at fault or negligent and if s/he has caused damage to species and natural habitats protected at EU level under the 1992 Habitats and 1979 Birds Directives.

in which cleaning up procedures have been initiated or in which a cleaning up procedure has been initiated or completed according to the laws in force, with the exception of the case in which there were environmental damages left after the cleaning up procedure.

The reform of 2009 tried to give a partial solution to the reported problems, but without success. It focused, in particular, on the article no. 311(2) of the Environmental Code. The norm was modified establishing that any person, who performs an unlawful act, or who omits mandatory activities or behaviors, in breach of law, regulations or administrative provisions, with negligence, lack of skill, carelessness or breach of technical standards, causes damages to the environment by altering, impairing or destroying it, in whole or in part, shall be obliged to the actual restoration of the situation which existed previously and failing that to the adoption of complementary and compensatory remediation measures under ELD, in accordance to that provided under Annex II of the Directive, within the deadline set out by article no. 314(2) of this Decree. When the actual restoration or the adoption of complementary and compensatory remediation measures turns out to be totally or partially omitted, impossible or excessively onerous within the meaning of the article no. 2058 Civil Code, or implemented partially or in a different way from the one prescribed, the operator shall alternatively pay compensation to the State by way of the proprietary equivalent determined under section 3 of the article, in order to finance operations ex article no. 315(5)[9].

The European Commission criticized the Italian reform for three orders of reasons : 1) the violation of the general rule of the strict liability: the Directive doesn't allow a fault-based liability when the damage is connected to one of the activities listed in Annex III, while Italian regulation still admitted a fault-based liability for that kind of activities; 2) even if there are some improvements, there was still the possibility for an operator to compensate the

[9] G.D. COMPORTI, *Il danno ambientale e l'operazione rimediale*, in *Dir.Amm.*, 2013, 2-3, 117 ff.: A. D'ADDA, *Danno ambientale e tecniche rimediali*, in *Nuova Giur. Civ.*, 2013, 7-8, 407 ff.; M. BENOZZO, *La responsabilità oggettiva del danno ambientale nel codice dell'ambiente*, in *Ambiente e Sviluppo*, 2011, 10, 860 ff.

environmental damage with money; 3) the reform did not clarify the relationship between the environmental damage discipline and the cleaning up procedure.

3. The Article 25 of the Law No. 97 of 2013.

Italy definitively faced the problems raised by the infringement procedure in 2013. The article no. 25 of the law no. 97/2013 considerably changed the environmental damage discipline in force, taking action on liability regime, criteria of compensation of the environmental damage, relationship between cleaning up discipline and environmental damage discipline, and also on other relevant aspects which have determined interpretative issues[10].

First of all, the new regulation modified the liability regime, which has definitely aligned with the Directive regime. The new article no. 298-*bis*, introduced by the article 25, provides the strict liability as general regime for all the professional activities listed in the Annex III of the Directive. Similarly to the Directive, the article no. 298-*bis* specifies that the discipline of the environmental liability is applicable: 1) to the environmental damage, or to an imminent threat, caused by one of the professional activities listed in the Annex V of the Sixth Part; 2) to the environmental damage caused, or to an imminent threat, caused by an activity different from those listed in the Annex V, as a consequence of a guilty behavior.

The same regulation modified also the article no. 311, eliminating any reference to compensation by money. The new article no. 311 now establishes that, when there is an environmental damage, whether it is caused by operators whose activities are listed in Annex 5 (which corresponds to the Annex III of the Directive), whether it is caused also by anyone else who causes environmental damage with intent or gross negligence, the responsible is obliged primarily: to adopt remedial measures set out in Annex 3 to the Sixth

[10] F. GIAMPIETRO, *Danno ambientale e bonifica dopo la legge europea 97/2013*, in *Ambiente e Sviluppo*, 2013, 12, 973 ff.; A. QUARANTA, *Danno ambientale. La nuova normativa e quella che verrà,* in *Ambiente e Sicurezza sul lavoro*, 2014, 6, 57 ff.

Part of the Code, according to the criteria laid down therein. Only in the event that the adoption of the aforementioned remedial measures results in whole or in part omitted, or at least made in an incomplete or dissimilar way to the terms and conditions prescribed, the Minister of the Environment and Protection of Natural Resources determines the costs of activities necessary to fulfilling the full and correct implementation, and acts against the party responsible for the payment of the corresponding sums. In other words, the operator may be asked to pay not for a compensation by money but the costs of the measures requested to fully repair the environment. In this sense, the regulation can be deemed to be in accordance with the European discipline.

The prescription about the exclusion of forms of compensation of the environmental damage in case the cleaning up procedure is already started or completed (article no 303, par. 1, let. i) has been finally eliminated. It has been also clarified the relationship between the environmental damage discipline and the cleaning up discipline, specifying that the interventions to clean up polluted soils and subsoil and to repair ground waters are entirely subjected to the rules of the cleaning up procedures.

In January 2014, the European Commission has finally closed the infringement procedure against Italy, positively assessing the changes described above to the discipline of environmental damage.

WHAT HAS CHANGED ON ITALIAN ENVIRONMENTAL LIABILITY AFTER THE 2013 EUROPEAN LAW?

Wu Lan

CONTENTS: 1. – A brief overview on the 2013 European Law. 2. – The Environmental Liability Directive and implementation in Italy. 2.1 – The Directive 2004/35/EC in the European environmental law. 2.2. – Selected implementation in Italy before the 2013 European law. 2.3. – Infringement procedure against Italy. 3. – Liability for environmental damage after the 2013 European Law. 3.1. – General principles of environmental liability. 3.2. – The criteria of imputation of environmental liability. 3.3. – Compensation for environmental damage. 4. – Conclusion.

1. A Brief Overview on the 2013 European Law.

On 6 August 2013, the Italian parliament passed a new law, known as the "2013 European Law"[1], in order to fulfill the duties deriving from the belonging of Italy to the European Union. The 2013 European Law, effective on 4 September 2013, is composed by six chapters and 34 articles involving the laws in the fields of environment, tax, public health, labor and other affairs. In the field of environmental law, there are 9 articles in total which has significantly modified the Legislative Decree No 152/2006[2] (the so-called Environmental Code) and promoted the Italian environmental law in accordance to the EU environmental law, particularly the EU directive ELD[3].

[1] Legge 6 Agosto 2013, n. 97, "Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2013".
[2] Decreto Legislativo 3 aprile 2006, n. 152 "Norme in materia ambientale".
[3] The ELD is the abbreviation of EU Directive on "Environmental Liability with regard to the Prevention and Remedying of Environmental Damage", 2004/35/CE,

The evident changes brought into the Italian environmental law through the 2013 European Law are: (1) first of all, it has finally transposed the strict liability for environmental damage[4] provided in Article 3 (1) and Article 6 of the Directive 2004/35/EC in the Italian environmental law; (2) the L. 97/2013 has eliminated the application of pecuniary compensation that has been provided together with the remediation in the Article 311 of the L.D. 152/2006; (3) it has been introduced the Article 298-*bis* which stipulates the general principles applied in the VI part of L. D. 152/2006; (4) the Environmental Ministry is entitled to enact a decree providing the adequate measures adopted to repair the environmental damage in 60 days, cooperating with the Ministry of Economical Development[5]. These changes in the field of environmental damage, to a certain extent, rectify the Italian environmental law back to the correct orbit.

2. The Environmental Liability Directive and Implementation in Italy.

For many years Italy has falled to regularly and promptly apply European environmental law[6]. The European Commission has adopted many legal actions against Italy because of its bad performance on implementing the EU environmental law[7]. Regarding the rules on environmental liability, the

passed by the European Parliament and the Council, which is the most important statute of EU in the field of the liability for environmental damage in recent years.

[4] Second the Article 3, paragraph 1 of the ELD, strict liability is provided to remedy the damage caused by EC regulated dangerous and the fault-based liability is only offered to remedy the damage caused by non-dangerous activities.

[5] The environmental liability amended by the L. 97/2013 will be discussed in the last part of this article.

[6] G. DI COSIMO, *L'Italia Inadempiente: La difficile attuazione del diritto europeo in materia ambientale,* Milano, CEDAM, 2012, p. 13.

[7] In 2006, The European Commission adopted legal action in five cases where Italy is breaching EU laws to protect the environment and human health. In 2010, the EU decided to take Italy back to Court and to ask the fines imposed because of non-implementation of the 2004 Judgment. In September 2011, the EC sent a letter of formal notice in order to remind Italy of its obligations in the field of implementing

transposition of ELD in Italy was incorrect and incomplete before the 2013 European Law[8].

2.1. The Directive 2004/35/EC in the European Environmental Law.

To establish a European environmental liability regime[9], the European Parliament and the Council of the EU finally adopted an Environmental

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the relative directive on the waste and the 2010 Judgment made by the European Court of Justice. In the next November, another letter of formal notice was sent to indicate that Italy did not transpose the relative directive on waste. The similar infringement cases concerning the implementation of EU environmental law also appeared in 2013 and 2014. The last case is that the European Commission opened infringement proceedings against Italy for its failure to ensure that water intended for human consumption meets European standards on 10 July 2014. These cases are available at http://ec.europa.eu/environment/legal/law/press_en.htm (last visited December 2014).

[8] In 2012, the European Commission was attended that Italy had incorrectly implemented EU legislation on environmental liability, leading to insufficient protection for Italian citizens; therefore the EC sent Italy an additional reasoned opinion to ask it to adjust its national legislation accordingly.

[9] In fact, prior to the development phase of the ELD, the very first impulse behind the EC interest in giving birth to the idea of creating a harmonized civil liability regime for environmental damage can be traced back to the early 1970s. The first attempt of the EC is the first Environmental Action Programme that adopted the EC environmental principles - the Polluter pays principle and the Principle of Prevention, as guiding EC Principles. The ambitious of EC on the civil liability for environmental damage began from the single sector of waste. However until 1991 the EC had to face the failure of its attempts to create a harmonized civil liability regime for environmental damage in the waste sector. At the same time, this idea was still "alive" but reformed toward a more general and gradual approach in creating a harmonized environmental civil liability regime under the same mechanism. On these considerations, the so called Lugano Convention (Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment) was approved by the Council of Europe in June 1993. Even through the Convention is based on tort law: it was a very innovative and advanced piece of legal text for that time, even though it has not yet entered into force. At the beginning of the 1990s, the design of civil liability as a consequence of environmental damage was different in the systems so-called *Civil law* and *Common law* (such as the UK) which could cause obstacles to the functioning of the EU internal market. For which reason, the Commission published the "Green Paper on Compensation for Environmental Harm" on the 17 March 1993. However, the next "White Paper" in the year of 2000 reshaped really the design of the EU liability rules and pushed the legislation of EU on the civil liability for

Liability Directive on 21 April 2004 that is famous Directive 2004/35/EC on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage. The ELD is concerned with the prevention of, and remedying of, environmental damage, and the overall ambitious objective of the ELD is to establish a common European framework of environmental liability for environmental damage to air, water, land and protected species and natural resources[10].

The ELD is based on the principle of Polluter-pays and must respect, at the same time, the Subsidiarity principle. In contrast to the White Paper[11], the environmental damage covered by the ELD is really restricted which includes three types of natural resources: (1) damage to protected species and habitats;

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environmental damage into a new and quick stage. In order to realize the EU civil liability regime, the Commission enacted the 2002 Proposal for a Directive of the European Parliament and of the Council on Environmental liability with regards to the prevention and remedying of environmental damage which is considered a clear step back compared to the Lugano Convention and the White Paper, but its goal was to find common solutions attracting the consensus of all Member States rather than the willingness to design an effective environmental liability regime. The ambitious of the EU on establishing a framework of civil liability regime was achieved finally through the ELD of 2004 that was characterized by both Green and White Papers. See L. KRÄMER, *Focus on European environmental law,* Sweet & Maxwell, 1992, 143 and ff.; M. LARSSON, *The Law of Environmental Damage: Liability and Reparation,* Martinus Nijhoff Publishers, 1999, 222 and ff.; B. POZZO, *La Nuova Direttiva sulla Prevenzione e il Risarcimento del Danno all'Ambiente*, in *Quaderni della Rivista Giuridica dell'Ambiente,* 2002, 273-292; L. BERGKAMP, *The Proposed Environmental Liability Directive*, in *European Environmental Law Review,* November 2002, 204-214; S. CASSOTTA, *Environmental Damage and Liability Problems in a Multilevel Context,* Wolters Kluwer, 2012, 51-107.

[10] See S. CASSOTTA, *Environmental Damage and Liability Problems in a Multilevel Context,* 142.

[11] The White Paper on Liability for Environmental Damage, passed by the EU Community in the year 2000, which offers the four different options in order to establish a European environmental liability regime and to harmonize the statutes of Member States in the field of the environmental liability. Concerning the four options, the EU Commission has presented advantages and disadvantages and concluded that the most appropriate option would be a framework directive that was a strong impulse in law-making process of the birth of the ELD. The White Paper, COM (2000) 66 final, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52000DC0066 (last visited December 2014).

(2) damage to water; (3) damage to land[12], and does not cover the damage to goods or individuals that is called traditional damage in the White Paper, nor the damage to such as "the environment". Particularly, the ELD underlines that «…this directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent treaty of such damage»[13]. Hence, these damages are difficult to regulate through the mechanism of civil liability.

Regarding the liability for environmental damage defined by the ELD, the Article 3 provides for a dual system of liability based on fault based liability and strict liability. Generally speaking, the EU legislator has chosen the strict liability as the consequence of environmental damage caused by occupational activities[14] indicated in Annex III[15]; in contrast, the fault based (fault or negligent) liability is provided to the biodiversity damage caused by the activities other than those listed in Annex III[16]. To achieve the functions of preventing and remedying the environmental damage, the ELD prescribes that competent authorities and operator undertake all the measures of prevention[17] and reparation[18] as a consequence of environmental damage. In the case of the ELD, the competent authorities are called "active claimants" in contrast to the

[12] Article 2, paragraph 1 of the ELD defines the conception of environmental damage in this Directive.
[13] Article 3, paragraph 3 of the Directive.
[14] At the same time, the ELD defines the "occupational activity" as any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character in the Article 2, Paragraph 7.
[15] The Article 3, Paragraph 1 (a) provides that strict liability for environmental damage is also applied to «any imminent threat of such damage occurring by reason of any of those activities».
[16] The same paragraph 1 (b) stipulates that: «damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent», that is the liability in the case of damage to biodiversity is extended to "any" kind of professional activities.
[17] Article 5 of the ELD.
[18] Article 6 of the ELD.

operators[19] - "passive subjects" who must bear the costs of reparation as a consequence of environmental harm.

According to the ELD, the operators have to adopt all of the measures for reparations after the environmental damage has been occurred[20]. Annex II separates the remedial measures according to the different types of remediation (Primary, Secondary (or Complementary in the ELD) and Compensatory) in order to repair environmental damage correctly and completely. The Primary Remediation indicates that any measure adopted to return the damaged natural resources and/or impaired services to baseline conditions[21], in case of the damage to land, the operator should also adopt minimum necessary measures to guarantee the polluting substances are removed or controlled or decreased in a way which the land does not present a significant risk to human health[22]. Where the Primary Remediation cannot return the damaged natural resources to the baseline conditions, the Secondary Remediation that aims to provide a similar level of natural resources and/or services, as appropriate, at an alternative site will be undertaken[23]. The Compensatory Remediation has to be understood as a compensation for "interim losses" of natural resources which is just a temporary compensation[24]. Based on the European reparation scheme, the ELD offers a structured liability system for environmental damage to natural resources and land, even though it is sometime not clear which needs to be followed between the Secondary and Compensatory Remediation[25].

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19 According to the definition of the ELD, the "operator" means any natural or legal, private or public person who operates or controls the occupational activity, that is who must bear the environmental liability.
20 Article 6, Paragraph 1 of the ELD.
21 Annex II, Title 1 of the ELD.
22 In Annex II, "Remediation of Land Damage" of the ELD.
23 Annex II, Purpose of Complementary Remediation (1.2.1) of the ELD.
24 See S. CASSOTTA, op. cit., p. 174.
25 The ELD does not outline clearly when the environmental damage is compensable, that is the Secondary Remediation, compared to the Compensatory Remediation, is also aimed at compensating. B. POZZO, *La Responsabilità Ambientale*, in *Diritto ed Economica dell'Ambiente,* 2005.

2.2. Selected Implementation in Italy Before the 2013 European Law.

To transpose the ELD in Italy and to re-organize the national legislation, new provisions regulating the environmental liability were gathered into a single law in 2006: Legislative Decree No. 152/2006, as known as the Environmental Code[26], in which the Part VI (*Provisions on compensation for environmental damage*) introduces the rules of liability for environmental damage stipulated by the ELD. According to the Italian report[27] presented to the EC, the Italy was the one of the first Member States to complete harmonization of its national legislation with the EU rules. However, the implementation of the ELD in Italy was selected and incomplete, further speaking, the implementation concerning the imputation of liability was incorrect.

According to the Italian report, the national choices made when transposing the ELD have overall produced a more extensive framework than the EU one. The Article 300 of the Code defines the environmental damage as «any significant and measurable, direct or indirect impairment of a natural resource or of its potential for use», which is broader than the definition provided in the Directive 2004/35/EC[28]. Therefore the Polluter-pays principle underlined in the Directive could be applied to more types of environmental damages, particularly the damage to air and to groundwater. Indeed, the Article 300 reproduced the definition of environmental damage furnished by the ELD, except that in the Italian law the environmental damage has to be "significant" that was present in the 2002 Environmental liability proposal but was dropped out in the final text of the ELD. In contrast to the ELD, the Italian definition excludes the damage caused by airborne that is composed in

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[26] Decreto Legislativo 3 aprile 2006, n. 152 "Norme in materia ambientale", pubblicato nella *Gazzetta Ufficiale* n. 88 del 14 aprile 2006-Supplemento Ordinario n. 96.

[27] With the reference to the Article 18 of the ELD, Member States shall report to the Commission on the experience gained in the application of this Directive. The report of Italian was presented on 29 July 2013.

[28] The definition in Article 2 (1) of the Directive 2004/35/EC has been transposed into Italian law by Article 300 (2) of Legislative Decree No 152/2006.

the ELD. Obviously, the implementation of the European provision in Italy "shrinks" the extent of environmental damage protected by the ELD[29].

Regarding the passive subject (the operator in the ELD) who must to bear the liability for environmental damage and the imputable activities, the Italian Environmental Code quoted the definition of "the operators" furnished by the ELD[30] but dropped to enumerate the activities determining environmental damage, specifically, the absence of the technical Annex III of the ELD. Therefore, the Italian law, indeed, partially implemented the ELD: the missing of specific activities means that all the activities of operators will be taken into consideration without differentiating in the process of compensation that is one of the basic conditions for the fault based liability in the Italian environmental law.

Article 311, Paragraph 2[31] of the Italian law of implementation introduced the fault based liability for environmental damage that was the same choice as the Article 18 of the law 349/1986[32] which is the very first law of Italy

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[29] B. POZZO, *La Direttiva 2004/35/CE e Il suo Recepimento in Italia*, in *Rivista Giuridica dell'Ambiente,* n. 1, 2010, p. 62.

[30] The Article 302 (5) of the Decreto Legge 152/2006 defines the operators as «any natural or legal, private or public person who operates or controls the occupational activity having environmental relevance, or to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity», that is the transposition of the Article 2 (6) of the Directive.

[31] According to the Article 5-*bis* of the Decreto Legge n. 135/2009, the Article 311 (2) has been amended as: «Anyone, who carrys out an unlawful act, or an omitting activity or dutiful behavior, in violation of the law, regulations, or administrative provisions, with negligence, incompetence, recklessness or breaching the technical regulations, causes damage to the environment, altering, deteriorating or destroying it entirely or in part, is obliged to return it to the baseline condition and, if failing that, to compensate it with equivalent asset in front of the State». We can see from this new article introducing the environmental liability is very similar with the following Article 18 of Legge n. 349/1986. The fault based liability for the environmental damage was persisted by the Italian legislators until the 2013 European Law.

[32] Article 18 of Legge n. 349/1986 provided that: «Any act committed with fault or negligence, in violation of provisions of the law or measures adopted based on the law which compromises the environment, causing damage to it, altering, deteriorating or destroying it entirely or in part, obliges the responsible party to compensate for it in front of the State».

furnishing the civil liability for environmental damage[33]. The type of liability chosen by the Italian law of implementation was a serious violation of the ELD that, in contrast, establishes the strict liability for environmental damage caused by the activities described in the Annex III of the Directive. However, in the case of Italy, the operators cannot assume the liability if it is not proved that he/she/it was at fault or the environmental damaging event is caused by an emission or an event expressly permitted by authorization. In addition, the operators cannot be imputable for environmental damage caused by an emission or activity or any manner of use of a product in the course of an activity which the operators demonstrate that was not considered likely to cause environmental damage according to the state of scientific and technical knowledge[34].

From Article 305 to Article 307 are the criteria for reparation as a consequence of environmental damage in the Italian law of implementation. However, the Italian law of implementation did not correctly transpose the "hierarchy" of remediation provided in the technical Annex II of the ELD[35]. According to Article 305-307 and 311 (*Azione risarcitoria in forma specifica e per equivalente patrimoniale*) of the Italian Environmental Law (152/2006), the operator should adopt the measures of Primary Remediation to return the

[33] Legge 8 Luglio 1986, n. 349, "Istituzione del Ministero dell'ambiente e norme in materia di danno ambientale", for the very first time, introduced in Italy a Ministry of the Environment which was non-existent before. At the same time, this law is considered a "futurist law", recognized the compensability of environmental damage which, as an object protected by law, was independent from the damages to health and property. Therefore, the Italian legislator adopted a broad and unitary notion of the environment, not only as a whole notion including in the biodiversity, environmental property, but also as in conceiving the environment an essential element for the well being of general public. The article 18 of the law, setting up the civil liability for environmental damage, to a certain extent has even changed the structure of tort established by the article 2043 of civil code. See M. ALBERTON, *Dalla Definizione di Danno Ambientale alla Costruzione di Un Sistema di Responsabilità: Riflessioni sui Recenti Sviluppi del Diritto Europeo*, in *Rivista Giuridica dell'Ambiente,* 2006, p. 622; S. CASSOTTA, op. cit., p. 95.

[34] See S. CASSOTTA, op. cit., p. 230.

[35] The ELD comprehends the Primary Remediation (baseline condition), Secondary Remediation (the replaced natural resources) and Compensatory Remediation (equivalent pecuniary) for environmental damage that we have discussed before.

resources to the baseline conditions, and when the environmental damage cannot be repaired by Primary Remediation, the pecuniary (equivalent) compensation will be asked by the Ministry of the Environment. Obviously, this arrangement was considered that the Italian legislators did not furnish sufficient remediation to repair the environmental damage and certainly, did not meet the requirement of the ELD[36]. This was another motive why the EC adopted the infringement procedures against Italy.

2.3. Infringement Procedure Against Italy.

Since the bad performance of Italy in implementing of the ELD, particularly, the persistence of the fault based liability for environmental damage and insufficient remediation adopted to repair the environmental damage, on various occasions, the EU Commission expressed its disappointment and concerned about the way Italy implemented the ELD into domestic law. On 31 January 2008 the European Commission initiated the infringement procedure 2007/4679 against the Italian government because of its incorrect implementation of the Directive 2004/35/EC[37]. The Commission indicated that the Part IV ("Measures of compensation as a consequence of environmental damage"), Title V ("Restoration of contaminated sites") and the Part VI ("Measures on waste management and restoration of contaminated sites") did not correctly transpose the ELD[38].

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[36] The Commission admitted that the provisions of the Italian law of implementation in its original version permitted the measures of reparation to be achieved with monetary remediation through the equivalent method, even though measures of Primary Remediation were not previously adopted.

[37] The infringement procedure, called also "action against Member State", regards the proceeding of a direct legal action in response to a breach of duties provided by the EU Treaty.

[38] According to the Commission, the main motives of infringement procedure are: (1) the Italian provisions of implementation breach article 3 and 6 of the ELD which provide the strict liability as the consequence of environmental damage caused by the professional activities described in the Annex III (art. 3) and the measures that should be adopted by the operators and the competent authorities to repair the environmental damage (art. 6); (2) the Article 303 of D. L. 152/2006 breaches the Article 4 of the ELD, since the exception of imputation was not accepted by the

To respond the criticisms from the EU Commission and to get rid of the infringement procedure, the Italian Government introduced some changes through the Article 5-*bis* of the Law 166/2009[39]. The Article 5-*bis* provided (1) new criteria for the reparation of environmental damage which are more in line with those contained in the ELD[40]; (2) re-introduction of individual-liability on the obligation of the passive subject that has to restore the environmental damage; and (3) the plan to set-up future enactments for criteria to quality environmental damage[41].

However, in the Commission's view Italy did not solve the major breaches of the Directive: the Law 166/2009 did not change the preference of Italian law to the fault-based liability that, indeed, restricted the application of environmental liability determined by the ELD and reduced the effective remedies for environmental damage. Finally the EU Commission sent Italy a reasoned opinion on 23 November 2009 and an additional reasoned opinion

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ELD; (3) the Articles 311 and 313 breach the Article 1 and 7 and Annex II of the Directive, since several provisions of the Italian law of implementation allowed that the measures of Remediation could be substituted by pecuniary measure of compensation. See B. POZZO, *La Direttiva 2004/35/CE e Il suo Recepimento in Italia*, p. 76-77.

[39] Legge 20 Novembre 2009, n. 166, "Conversione in legge, con modificazioni, del decreto-legge 25 settembre 2009, n. 135, recante disposizioni urgenti per l'attuazione di obblighi comunitari e per l'esecuzione di sentenze della Corte di giustizia delle Comunità europee", has converted the Decreto-Legge 25 settembre 2009.

[40] With regards to the new criteria of remediation, the Article 5-*bis* of law 166/2009 underlines the application of Secondary and Compensatory Remediation and only if the Secondary and Compensatory Remediation turn out to be «in all or partly omitted, impossible or excessively expensive or carried out in an incomplete way or differently as to what prescribed, the polluter is obliged, subsidiarily, to compensate and bring about remedial actions that should be able to render natural resources of the same kind equivalent both in term of quality and quantity…».

[41] See S. CASSOTTA & C. VERDURE, *Recent Developments Regarding the EU Environmental Liability for Enterprises: Lessons Learned from Italian's Implementation With the "Raffinerie Mediterranee" Cases,* Jean-Monnet Working Paper Series-Environment and Internal Market, Vol. 2012/2, available at http://www.tradevenvironment.eu/uploads/working_papers/6.cassotta-verdure-working_paper-2012-2.pdf (last visited December 2014).

on 26 January 2012 to ask it to adjust its national legislation accordingly [42] which is a very strong impulse for the enactment of new 2013 European Law.

3. Liability for Environmental Damage After the 2013 European Law.

Now we return to the beginning of this article. On 6 August 2013 the Italian legislator enacted the 2013 European Law, in which the Article 25 amended considerably the rules of environmental liability in the Environmental Code (152/2006) and in the Law 166/2009. The main changes made by the 2013 European Law have been mentioned in the first part of this article and the liability for environmental damage in Italy after the 2013 European Law will be discussed in this part.

3.1 General Principles of Environmental Liability

(1) Dual liability for environmental damage

The 2013 European Law introduced Article 298-*bis* that provides two general principles guiding the application of Part VI (*Norme in materia di tutela risarcitoria contro i danni all'ambiente*) of the Environmental Code[43]. According to this article, the provisions of Part VI are applied to (1) the environmental damage caused by one of the occupational activities listed in Annex 5 pertaining to the same Part VI and to any imminent threat of such damage occurring by reason of any of those activities; and (2) the environmental

[42] According to *Supplementary Reasoned Opinion-Infringement 2007/4679* (C 2012) of the EU Commission, the Commission considered that Italy did non transpose correctly the articles 1, 3, 4, 6 and 7 and the Annex II of the ELD into the national legislation of Italy. This document is available at http://www.mi.camcom.it/c/document_library/get_file?uuid=d28d28ba-0291-4e6e-8efb-aedd6d562979&groupId=10157 (last visited December 2014).

[43] Parliamentary Report on the Law 97/2013, in *Atti Parlamentari,* N. 588, p. 30, available at http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/700298/index.html?part=ddlpres_ddlpres1-relpres_relpres1&spart=si&parse=si (last visited December 2014).

damage caused by activities other than those mentioned in Annex 5 relating to the same Part VI and to any imminent threat of such damage occurring by reason of any of those activities, in the event of fault or negligence. This is the first principle that finally introduces strict liability for environmental damage caused by dangerous activities into the Italian law; at the same time, it also provides the Annex 5 composed by the professional activities determining the environmental damage that are reproduced from the Annex III of the ELD.

(2) Hierarchical scheme of remediation

The Article 298-*bis* (2) provides that the reparation of environmental damage must be in compliance with the criteria established in the Annex 3 of Part VI (reproduced from the Annex II of the ELD), if necessary, through the procedural experiment, the resources covering the costs of remedial measures should taken and not implemented by the person who caused the damage, or the imminent threat of damage, is achieved from the same person. This principle underlines the criteria of reparation provided in the Annex II of the Directive (hierarchical scheme of Primary, Secondary and Compensatory Remediation) which was also reintroduced in the Law 166/2009.

These two general principles provided in the Article 298-*bis* are also implemented in the following Article 311 (2), Article 314 (2) and (3) and Article 317 (5).

3.2 The Criteria of Imputation of the Liability.

The most important innovation in the so-called 2013 European Law is the strict liability for environmental damage caused by the professional activities exampled in the new Annex 5. Thanks to the infringement procedure 2007/4679 and continuous urgings from the EU Commission, finally the Italian legislator gave up the fault based liability for environmental damage caused by the occupational activities and introduced the Annex 5 in order to

identity these dangerous activities. Under the strict liability, the psychological state of operator (fault or no) is not considered any more as a necessary condition to impute the environmental liability.

Amended Article 311, Paragraph 2 of the Environmental Code[44] is the legal basis of strict liability for environmental damage caused by occupational activities which provides that: «When the environmental damage is caused by operators who are involved in occupational activities listed in Annex 5 of this Part VI, they are obliged to adopt the necessary remedial measures set-out in Annex 3 of the same Part VI according to the criteria set forth therein, to be carried out within the time period established by Article 314, paragraph 2 of this Decree…». That means in the case of pollution, it only needs to be proved the causality between the damage caused and the professional activity conducted by the operator. The only way in which it could be possible to avoid the liability, is to satisfy the burden of proof required by Article 308 of the Environmental Code[45].

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[44] The original Article 311 Paragraph 2 has been substituted by Article 25, Paragraph 7 of the 2013 European Law with «2. Quando si verifica un danno ambientale cagionato dagli operatori le cui attività sono elencate nell'allegato 5 alla presente Parte sesta, gli stessi sono obbligati all'adozione delle misure di riparazione di cui all'allegato 3 alla medesima Parte sesta secondo i criteri ivi previsti, da effettuare entro il termine congruo di cui all'articolo 314, comma 2, del presente decreto. Ai medesimi obblighi è tenuto chiunque altro cagioni un danno ambientale con dolo o colpa. Solo quando l'adozione delle misure di riparazione anzidette risulti in tutto o in parte omessa, o comunque realizzata in modo incompleto o difforme dai termini e modalità prescritti, il Ministro dell'ambiente e della tutela del territorio e del mare determina i costi delle attività necessarie a conseguirne la completa e corretta attuazione e agisce nei confronti del soggetto obbligato per ottenere il pagamento delle somme corrispondenti».

[45] Article 308, Paragraph 4 and 5 (from Article 8 of the ELD) of the Environmental Code provide the particular circumstances in which the operators would avoid obligations. That is whenever it can be proved that the operator is not at fault or negligent and that the environmental damage was caused by: (1) the third party; (2) an emission or event expressly authorized by and in full accordance with the conditions of an authorization conferred by the relevant Authorities under the applicable laws and regulations; (3) an emission or activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

Under strict liability established by the new version of Article 311, the operator essentially pays a price for conducting a particular activity which is extremely likely to lead to environmental damage. In the view of social safety and the development in the technology and commerce industries, the operators should ultimately accept the risk and thus assume a role of responsibility regarding the prevention and remediation of said damage, because they possess the means to manage them. In fact, compared to fault based liability the strict liability is similar to a price-based instrument for pollution control and a perfect expression of the Polluter-pay Principle persisted by the ELD.

Article 311, Paragraph 2 also provides the fault-based liability for environmental damage caused by the other activities. In contrast to the strict rule, a polluter should be held liable for damages only if he/she/it were deemed to have been fault or negligence in conducting the activity. In absence of the fault or negligence, the operator should not be liable for the damage caused by his/her/its activities[46].

3.3 Compensation for Environmental Damage.

In the view of the EU Commission, even if the Law 166/2009 has evidently amended and promoted the provisions regarding compensation for environmental damage in the Italian law of implementation through Article 5-*bis*, the Italian Environmental Code, particularly Article 311, Paragraph 2 and 3, still breached the Directive 2004/35/CE[47]. In order to ultimately solve the

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[46] The other half of the new Article 311, Paragraph 2 is that: «ai medesimi obblighi è tenuto chiunque altro cagioni un danno ambientale con dolo o colpa. Solo quando l'adozione delle misure di riparazione anzidette risulti in tutto o in parte omessa, o comunque realizzata in modo incompleto o difforme dai termini e modalità prescritti, il Ministro dell'ambiente e della tutela del territorio e del mare determina i costi delle attività necessarie a conseguirne la completa e corretta attuazione e agisce nei confronti del soggetto obbligato per ottenere il pagamento delle somme corrispondenti».

[47] See *Supplementary Reasoned Opinion-Infringement 2007/4679* (C 2012) of the EU Commission, available at http://www.mi.camcom.it/c/document_library/get_file?uuid=d28d28ba-0291-4e6e-8efb-aedd6d562979&groupId=10157 (last visited December 2014).

infringement procedure started by the Commission against Italy Government, the 2013 European Law amended again the relative provisions in the Environmental Code in accordance to the ELD.

In the new version of Article 311, all the references to the equivalent monetary compensation are cancelled including the title of this article that has been instead of «action for environmental damage in special form»[48]. The Paragraph 2 underlines the measures adopted by the operator to repair environmental damage should be in conformity with the criteria in the Annex 3 of Part VI which provides the obligations to adopt measures of Primary, Secondary and Compensatory Remediation. Only in the circumstance that the adopted measures of remediation turn out to be «in all or partly omitted, or carried out in an incomplete way or differently as to what prescribed», the Ministry of Environment would decide and require the costs of the necessary activities to repair the environmental damage in the correct and complete way from the operator[49]. However, according to the Italian legislator, the costs for achieving the correct and complete reparation are not the monetary compensation that is prohibited by the Directive 2004/35/CE[50]. It means that

[48] The original title of this article was «action for environmental damage in special form and in equivalent monetary form».

[49] The original context of Article 311, Paragraph 2 was that: «Chiunque realizzando un fatto illecito, o omettendo attività o comportamenti doverosi, con violazione di legge, di regolamento, o di provvedimento amministrativo, con negligenza, imperizia, imprudenza o violazione di norme tecniche, arrechi danno all'ambiente, alterandolo, deteriorandolo o distruggendolo in tutto o in parte, è obbligato all'effettivo ripristino a sue spese della precedente situazione e, in mancanza, all'adozione di misure di riparazione complementare e compensativa di cui alla direttiva 2004/35/CE del Parlamento europeo e del Consiglio, del 21 aprile 2004, secondo le modalità prescritte dall'Allegato II alla medesima direttiva, da effettuare entro il termine congruo di cui all'articolo 314, comma 2, del presente decreto. Quando l'effettivo ripristino o l'adozione di misure di riparazione complementare o compensativa risultino in tutto o in parte omessi, impossibili o eccessivamente onerosi ai sensi dell'articolo 2058 del codice civile o comunque attuati in modo incompleto o difforme rispetto a quelli prescritti, il danneggiante è obbligato in via sostitutiva al risarcimento per equivalente patrimoniale nei confronti dello Stato, determinato conformemente al comma 3 del presente articolo, per finanziare gli interventi di cui all'articolo 317, comma 5».

[50] See F. BONELLI, *Il Risarcimento del Danno all'Ambiente Dopo Le Modifiche del 2009 e del 2013 al T.U. 152/2006*, in *Diritto del Commercio Internazional,* n. 1, 2014, 9.

the monetary compensation in the Italian law of implementation has been definitively abolished through the 2013 European Law.

Article 311, Paragraph 3 emphasizes that the Ministry of Environment decides and applies the measures of remediation in accordance with the criteria provided by Annex 3 and 4 of Part VI, in which the measures of reparation must be the Primary, Secondary and Compensatory Remediation while the monetary compensation is abolished at all. At the same time, in cooperation with the Ministry of Economical Development, the Ministry of Environment is entitled to enact a decree in which will be provided the criteria and methods for deciding the measures of reparation in the concrete cases. According to this paragraph, this decree has the so-called retroactive effect and is also applied to the cases already proposed but not sentenced before this decree. [51] In fact, this provision is going, essentially, to ascribe the retroactive effect to the amended Italian law of implementation[52]. Certainly, in the view of preventing and remedying the environmental damage, the retroactive effect of the 2013 European Law is a good choice.

4. Conclusion.

Article 25 of the 2013 European Law has brought some evident innovations into the Italian Environmental Code (Law 152/2006), particularly in the field of implementation of the ELD (Directive 2004/35/CE on the

[51] Article 311, Paragraph 3 provides that: «these criteria and methods are also applied to the cases that have been proposed but are not yet sentenced before this decree ».

[52] The new version of Article 303, Paragraph 6 provides that: «Part VI of this decree is not applied to the environmental damage caused by an emission, an event or an incident verified before the date of entry into force» which means that the monetary compensation could be still applied to substitute the obligation of reparation before the 2013 European Law entering into force. However the decree enacted by the Ministry of Environment that is asked to conform to the hierarchical scheme of remediation furnished by the Directive 2004/35/CE, should be applied to the cases already proposed but not yet sentenced. Hence, it means that the monetary compensation for environmental damage is prohibited to apply even to the cases proposed before the 2013 European Law. Essentially, the provisions regarding the hierarchical scheme of remediation are retroactive.

Environmental Liability). Since the 2013 European Law has amended the Italian law of implementation in conformity with the ELD, the European Commission closed the infringement procedure 2007/4679 against Italy Government on the 23/24 January 2014[53]. According to the new rules, strict liability for the environmental damage caused by professional activities has been finally introduced into the Italian law, under which the care of operators is not considered any more in the process of imputing the liability. The monetary compensation that has been considered as a substitution of correct measures of reparation is abolished in the Italian law of implementation. All these amendments in the 2013 European Law rebuild our hope that environmental protection of Italy will be greatly improved.

[53] The news is available at http://www.politicheeuropee.it/attivita/18806/infrazioni-aggiornamento-del-23-gennaio-2014(last visited December 2014).

ENVIRONMENTAL DAMAGE AND LIABILITY: THE LATEST CASE LAW OF THE ITALIAN COUNCIL OF STATE

Ginevra Gaspari

CONTENTS: 1. – Council of State, Sec. IV, 10 March 2014, No. 1105: the Case. 2. – The Reasons of the Appeal. 3. Environment and Damage Liability. 4. – Conclusions.

1. Council of State, Sec. IV, 10 March 2014, No. 1105: the Case.

The case brought to the attention of the Italian Council of State is based on the concept of "acquisitive occupation", which was applied to a plot of land in the district of Moliterno, Basilicata, Italy, for the construction of a landfill.

The applicant, owner of the plot of land, undergoes a forced expropriation, which gives the matter for the request.

The case was firstly brought to the judgment of the regional Tribunal of Basilicata, also called TAR Basilicata, but the judge retained that the question of the private citizen was not founded on legitimate rights, for two specific reasons: first of all, since the "acquisitive occupation" already took place, and the land had been destined to a definitive different role, with no possibility of bringing it back to its original use, it would be impossible to return the object of the matter to its previous owner; secondly, the prescription of the right to a compensation, for the loss of the land, had already took place, because the five years long term had already expired.

Therefore, the owner of the land filed the appeal, in front of the Appellate Body for the Italian jurisdiction, against the first instance judgment

with the goal of voiding the TAR's decision and, finally, having its right to a compensation realized.

The ruling of the Council of State, after a detailed analysis of the general case, was based on three main facts.

The case was examined on a prospective underling the fact that the good (specifically, the land) had underwent a legal transformation and therefore it could not be returned to its previous occupation.

Then, the prospective switched to the five-years statute limitation of the right to request compensation for damages arisen from illegitimate occupation, and the concern was based on the fact that, since the term was already expired, the limitation had been effective under all aspects.

There also was a doubt about the placement of a landfill in that specific spot of land, because «the measure of localization of such a public service can be contested only after a secure demonstration of a peculiar prejudice that the landfill could cause».

The decision was took in respect of the issues analyzed in the pleading and the Court reached the conclusion that the right to regain the land was effectively expired, specifically because of the permanent character of the expropriation, but the Court confirmed that the private owner had right of legitimate compensation.

2. The Reasons of the Appeal.

The Council of the State's decision was funded on the following arguments.

The first point of the appeal is based on the analysis od Article 1 of the Regional Law of Basilicata No. 22/1986, under which the appellant stated that the chosen collocation for the landfill was not rightful, because the city of Moliterno wasn't equipped enough to host such a service, plus, contrary to Article 8, letter c), of the same law, the Rural Community Alto-Agri Villa d'Agri selected the land for the landfill trough a drawing system.

The Council of the State rejected this argument, since the disposition on the drawing method of selection was not an imperative one.

The second circumstance brought by the appellant to reinforce its claim was based on Articles 7, 8 and 21-octies of the Law No. 241 of 1990, stating that the public power had to notify the expropriation, through a notice of initiation, to the private citizen. The appellant contested that, for this specific episode, the process was not conducted under the rules, and was not concluded successfully.

But the Court, starting from Art. 10 of the Law No. 865 of 1971, confirmed that the process was conducted under the rules, especially because the expropriation was filed and published on the local strategic plan and was publicized in accordance to the law.

In fact, the obligation to disclose the procedure, according to Art. 7 of the Law No. 241 of 1990, cannot be the only means on which it is possible to base the overruling of the decision of first instance.

As a matter of fact, case law has highlighted that the communication is not relevant in specific cases like this one, since it does not produce any impact on the actions of the individual, who is, in any case, deprived of his property, and since this is an act of mere implementation of the measure declaring the public utility and the urgency of the action. This complaint is, therefor, considered illegitimate by Section IV of the State Council.

Moreover, the prior notice regarding the beginning of the procedure is not required by Art. 7.1, Law No. 241/1990, because «there are reasons of impediment arising from particular requirements for speed of the proceedings»[1], as therefore, in *re ipsa* in the case of emergency occupation.

The urgency of the decision on the matter appears connected to the serious situation in which the wastes' management was conducted: here laid the reason of the particular needs of rapidity of the procedure, as it is ruled by Art. 7 of the above mentioned Law.

[1] Cons. St., Sec. IV, 15 July 2013, No. 3861.

Another point on which the appellant based its complaint was the incorrect declaration of the five-year prescription of the right of compensation for damages suffered as a result of the loss of soil.

On this matter, case law has developed the concept of "appropriative occupation" characterized by an abnormal expropriation proceeding: the procedure, actually, lacks of a formal ablative act that justifies the transformation of the fund of private property for reasons of public utility.

The European Court of Human Rights has ruled, in this regard, with the well-known judgment on 30 May 2000, No. 24.638, which declared the unconstitutionality of Art. 43 of Presidential Decree June 8, 2001, No. 327. The article states that in case of an acquisitive occupation, damages could be asked, in place of reinstatement, to the administrative court. The European Court recalled this principle also in the *Guiso-Gallisay v Italy* case, in which reverse accession was declared to be contrary to the principles of legality of the ECHR. Therefore, the transfer of ownership from private to public cannot be legitimized, if a proper expropriation proceeding is absent.

Given the elaboration of the new case law trends mentioned above, the irreversible transformation of the property unlawfully occupied is to be considered as an offense of permanent nature, therefore not susceptible to statute barred. It should also be considered that the occupation *sine titulo* by the Public Administration is a permanent offense[2].

Therefore, the argument of the appellant, in our case, was accepted. The proceeding of request of the compensation for damage could begin and the damage, for the area in question, was fixed in euro 8.607 for each hectar subject of occupation.

[2] Court of Cassation, Joint Chambers, No. 8065/90 «the apprehension or maintenance without title of a soil property, needed for the implementation of walkway, for a plant of conduct, or other artifact involving a servitude of fact, no determines the constitution of a servitude, according to the scheme of the so-called occupation acquisitive, whose extremes are not discernible with regard to the rights of real alien king» but «configure an offense to permanent character that endures until come removed the artifact, or terminates your exercise, or is constituted regulating servitude».

Furthermore, the appellant contested some elements of geological, hydrological and lithological nature, that did not allow the location of the landfill in the site chosen by the local administration. But this reason, based both on the legitimacy of the system by which the land was expropriated and on the fact that the landfill in this specific area could cause environmental damages, was rejected both by the Court of first instance and by the Council of the State, since the suitability of the site was challenged on the basis of investigations carried out by two qualified experts appointed by the Courts.

As a matter of fact, the suitability of the site as a possible location of a landfill is recognized.

The identification of a proper lot on which to build a landfill must be chosen following specific criteria. In fact, such a decision needs to take into consideration the environmental impact assessment, «[which] does not consist in a mere technical verification about the abstract environmental work», but is based on the comparison between «the imposed environmental sacrifice and the socio-economic utility»[3]. The environmental impact assessment must include the enactment of a measure that will ensure the proper use of the land and, moreover, the respect of the balance between conflicting public and private interests[4].

To strengthen this interpretation, Judgment No. 39 of January 9th 2014, of the Council of State, is examined. In fact, Section IV sets out that, in order to safeguard the environment, the most important fact is considering it as a primary and absolute good. The concept of nature in general has a rational value: in fact, it regards everything that surrounds us.

The measure that rules over the location of a landfill can be challenged only if it causes a significant damage, not justified by production needs; this specific concept may challenge the logic of proportionality between the use of natural resources and the community's benefit.

Competence in the field of waste management is devolved to the Administrative Court, which has the goal to preserve the public interest and

[3] See Cons. St., Sec. V, 2 October 2014, No. 4928.
[4] *Ibid.*

needs to ensure that the proposed project does not cause unnecessary damages[5].

Therefore the plea is rejected, since the method used to elect the proper location of a landfill and the system of the draw is not contrary to law dispositions.

3. Environment and Damage Liability.

The last argument that was brought in front of the Court by the appellant, must be analyzed more deeply, especially because it regards the environmental damage, that could be caused by siting the landfill in the territory of Moliterno, Basilicata, Italy.

The concept of environment has been discussed in international and European arenas and includes the conservation, rational management and improvement of natural conditions, like air, water, soil and all its components, and the need for the preservation of heritage land and sea, of all animal and plant species that live in it and ultimately the human being in all its outward expressions[6].

The environmental damage[7] occurs with great frequency, causing many inconveniences, at times irreparable, as we have already said; this is why it is necessary to realize and make efficient a solid legal system in this field.

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[5] See Cons. St., A. P. No. 24/1979; recently Cons. St., sec. V, No. 1830/2007; see *ex multis*, Cons. St., sez. VI, No. 4123/2001; T.A.R. Liguria, sec. I, No. 267/2004; Cons. St., sec. VI, No. 657/2002.

[6] For a deep study of the notion of "Environment" and "Environmental Damage" in EU sources, see B. POZZO, *Environmental Protection in EU Law*, in M. TIMOTEO (ed.), *Environmental Law in Action. EU and China Perspectives*, Bologna, Bononia University Press, 2012, 259 and ff.; see also A. CARPI, *Environmental Liability within the European Context: Definitory Problems*, in F. ANLING, W. CANFA, M. TIMOTEO (editors), *Legislative and Judicial Remedies for Environmental Tort Victims. A Study in the Framework of EU-China Cooperation*, Bologna, BUP, 2013, 41 and ff.

[7] The definition given in Art. 2 of Directive 2004/35 is «for the purpose of this Directive the following definitions shall apply: "environmental damage" means: a) damage to protected species and natural habitats, which is any damage that has significant adverse effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I (…)».

In order to have an adequate answer, the standards of liability for environmental damage[8] must be determined. This aspect causes a series of problems related to the circumstances that can result from different kind of facts, such as the following. First of all, the quantification of the damage, since the damage itself, especially for what concerns the environment, has as object water resources or the air, that are goods not available on the market, not subject to exchange and therefor whose loss is hardly possible to evaluate in economic terms. Nevertheless, the damage has an economic consequence on those responsible. Second of all, the formal aspect, that causes more problems as far as case law is concerned, is relevant in order to determine the voluntariness of the actor causing the damage and its consequences, but is not always foreseeable. In fact, evidence of intentionality in the making process of an act is unlikely to be investigated, since it could involve a complex set of technical production processes[9].

In the Italian law, the profile relating to damages is still complex and unclear, despite the succession, over the years, from 2006 to current times, of several provisions.

Initially, it was highlighted an infringement of the EU directive by the national Italian legislation. The discipline of the European Union was therefore misunderstood, specifically its Directive 2004/35/CE, which had sought to put a common framework for harmonization of responsibility and liability in order to prevent damage to animals, plants, habitat in general and specific damages that could affect water and soils.

The goal of the new EU directive was to implement the principles of prevention, precaution, correction and reduction of pollution, but, still, the directive remained vague on civil liability and other aspects that needed an implementation, especially speaking of the well-known principle of "polluter pays", so that «the operator whose activity had caused environmental damage or the imminent threat of such damage will be held financially responsible, and

[8] "Environmental damage", as defined in the italian Legislative Decree No. 152/2006, means any significant and measurable deterioration, direct or indirect, of a natural resource or a utility guaranteed to the latter.
[9] See S. RODOTÀ, *Il problema della responsabilità civile,* Milano, Giuffrè, 1964, 64.

in order to induce operators to adopt measures and develop practices to reduce the minimum the risk of environmental damage»[10].

Therefore, the EU Legislation provided two criteria in order to solve this problem: a solution with an objective character, the other with a subjective one, based on the fact that those options relate on the costs of the restoration and the prevention of damages; so professional operators were reconnected to the obligation of restoration and environmental prevention , while "everyone else" had to burden the damages.

A dual responsibility of Italy has taken credits starting from the violation of the Community Directive, since the Italian legislation does not provide for liability, but it is only based on a subjective character.

In this sense, Art. 311, paragraph 2, of Legislative Decree No. 152/2006 (the Italian Environmental Code) defines responsible anyone that has caused the damage, in the exercise of a specific act or job, and, by contrast, it will not retain responsible public operators. This issue gives rise to the infringement proceedings for breach of the Directive on the issue of liability.

Other charges brought by the Commission against the Italian law regarded the monetary compensation in place of reparation; therefore, repairing means, when it is possible, to implement the basic principle of "polluter pays", whose actions would be greatly devitalized by the possible substitution of the damages.

The legislator with the new Art. 5a of Law 166/2009, modified Art. 311, paragraphs 2 and 3, of Legislative Decree 152/2006 and introduces the complementary and compensatory repair.

On the other hand, keeping the clause as it was previously forecasted, imposing the obligation of a compensation for damages, means that a complementary or compensatory remedial would be impossible or prohibitively expensive.

Following the obligations arising to Italy from the European Union, the new Law of 6 August 2013, No. 97, the so called European Law 2013, at Article 25, has made significant changes to Part VI of the Italian

[10] Directive 2004/35/CE.

Environmental Code (Legislative Decree No. 152/2006); in particular, the changes focused on the type of environmental damage caused in the exercise of professional activity, due to a fault or a negligent action. This provision wanted to address the various infringement proceedings opened by the Commission against Italy[11].

The mentioned amendments have taken the concept of equivalent compensation for damage and reparation to a whole new level.

The reformed Art. 25, letter i), scheduled in Article 313, is designed to eliminate the part where it was previously stated the possibility of claiming damages instead of the restoration as the latter resulted, entirely or in part, impossible or excessively expensive.

The Italian Ministry of Environment has intervened in the matter, stating that if the person cannot provide all or part of the recovery, it is a duty of the Ministry to determine the costs necessary to achieve recovery, within sixty days of the communication of the damage.

The amended Italian Legislation is driving many reforms in terms of environmental offense, no longer subject only to the tort system provided under Article 2043 of civil code[12], or to the Law of 1987[13]. The main arguments, at that time, were the liability of environmental damage to a public interest, the deterioration which had to be repaired, seeing its primary nature and its belonging to the community, and not seeing it in the same way as the lesion of property belonging to individuals.

The actual conduct in terms of compensation has to be seen in a way that relies between the protection of private and the kind of public law, turning to a prospect of an almost exclusive state protection.

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[11] See C. BOVINO, *La legge europea 2013 introduce la responsabilità oggettiva per danno ambientale,* in *Quotidiano giuridico*, Milano, 2013.

[12] Art. 2043, Civil Code, "Punitive damages": «any given malicious or unintentional fact, that causes to others an unjust damage, obliges who committed the fact to the reparation of the damage».

[13] Law July 8th 1989, No. 1986, sentenced «any given malicious or unintentional fact, committed in violation of law's dispositions or arguments adopted following a specific environmental law, causing damages to the environment, altering it, deteriorating it, or destroying it, in part or totally, obliges the author of the fact to the reparation of the damage». The reparatory action will fall under the competence of the State.

It is an activity directly exercised by the State rather than by the person harmed and therefor, the environmental damage is introduced as an administrative offence, punishable by using the restore *quo ante* or through remedial measures.

The changes made to Part VI of the Environmental Code give a definition of environmental offense, in terms administrative and criminal law, focusing on the presence of three carriers such as public, personal and social. There will then be criminal offense to the extent that this is a *condicio sine qua non* of the offense behavior of others. As expressly governed by article 2 of the Italian Constitution, the environment is one of the fundamental rights worthy of protection.

There will be, in terms of compensation, a determination under Art. 1226[14] and 2056, paragraph 2 of the Civil Code[15] under which the judge will have the burden to counterbalance the presumptive evidence or circumstantial evidence, as a result of the injury.

4. Conclusions.

The case in words deals with the main problem of the rightful compensation whenever a property right has been expropriated and transformed for public utility reasons, specifically a landfill. The two Courts that we took in consideration, the TAR of Basilicata and the Council of State, gave different decisions. This is a sign that the case was controversial, for two reasons. As we already said, the acquisitive occupation produced a series of problems linked to its rightful application, the expropriation itself and the right of the private citizen to see, or not, restored its previous economic situation. The second reason, and the fundamental one for our scientific purposes, is about the environmental damage. As we have seen throughout the discussion, the concept was not always clear, and in the decision of first instance the point

[14] Art. 1226, Civil Code, "valutazione equitativa": «if the damage cannot be proven in its precise amount , is dismissed by the court with equitable evaluation».
[15] Art. 2056, Para. 2, Civil Code: «the loss of profit is assessed by the judge in equity of the circumstances of the case».

was not fully considered; differently, in the second instance judgment, the issue was brought to a higher level, being analyzed with more attention.

Therefore, through this legal text, we can affirm that the definitions of environment and environmental liability are often crucial issues in administrative law cases and the environmental impact is relevant specially whenever it produces serious damages to the environment in general.

PUBLIC AUTHORITIES IN THE ITALIAN REGULATION ON CLEANUP OF CONTAMINATED SITES

Piergiorgio Novaro

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1. Introduction.

In early 2000 European Environmental Agency (EEA) claims contamination of sites, regarding the soil as well as surface and underground water, as a Europe-wide problem posing a mayor risk for both human health and the environment in general. Due mostly to past industrialization policies and not sufficiently strict regulation on the handling of hazardous substances, all European Countries present today a huge number of contaminated sites[1].

Contamination of sites is surely one of many environmental protection and remedying issues, the importance of which is revealed by the potential risks both to human and animal health as stated in the same proposal for a directive on environmental liability in January 2002[2].

[1] EEA, *Management of contaminated sites in Western Europe*, 2000, p. 15.
[2] COMMISSION OF THE EUROPEAN COMMUNITIES, *Proposal for a Directive of the European parliament and of the Council on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage*, COM (2002) 17 final, p. 4. In addition, land contamination is considered as a priority from an economic point of view: the

In response to that, European Union issues Directive 2004/35/EC on prevention and remedying of environmental damage. Public authorities are at the centre of the legal framework on environmental liability, having major powers for its effective implementation and enforcement.

At first, in order to place the discussion in context, this contribution focuses on the environmental liability directive. In particular, it describes how the European directive shapes public authorities' powers and duties in order to fulfil their primary mission. Afterwards, it analyses the implementation of Community law in Italy, the first Member State who notified complete transposition. Italy maintains a specific regulation for cleanup of contaminated sites, so that it is important to establish whether these special provisions fit within the European regulatory scheme. Eventually, this article focuses on the role of public authorities in the Italian cleanup regulatory scheme.

2. The Competent Authority in EU Environmental Liability Regime.

At European level, among special legislations on environmental matters Directive 2004/35 holds a peculiar place, since it is considered the main horizontal regulation regarding environmental protection today.

At the root of the entire regulatory system set forth by the Directive is the concept that the environment is a public, not a private interest good[3]. The peculiar legal nature of environment characterizes the European law on the matter to such an extent environmental liability regime is generally considered as a public law regime rather than ordinary tort law regime[4].

First of all, the current directive fully implements the prevention principle bringing forward the protection moment to an early stage where the

estimated economic effort for the clean-up of these sites arising between 0.6% and 1.25% of the EU GDP.

[3] L. KRÄMER, *EU Environmental Law*, London, 2012, 174.

[4] K. DE SMEDT, *The Implementation of the Environmental Liability Directive*, [2009] *European Energy and Environmental Law Review*, p. 2 «the ELD does not offer a real civil liability regime, but a mainly public law regime to be enforced by competent authorities, combined with private law aspect as strict liability or fault-based liability».

damage has not yet occurred[5]. In particular, article 5 provides for a preventive action. The relevant operator is already obliged to act without significant delay, when it is aware of an imminent threat of environmental damage. This circumstance exposes the operator to a form of economic liability that would not be taken into consideration in a traditional tort liability scheme, due to the lack of effective damage.

Moreover, according to Recital (18) and polluter-pays principle, the polluter should bear the cost of preventive or remedial measures. Polluter's liability is not limited to damage suffered by people or properties – as in a traditional civil liability perspective – but it is extended to the whole process of restoring the imbalanced environment. The environment is thus regarded as a public good, worthy of legal protection by itself, irrespectively of other private interests involved. In fact Recital (11) clearly confirms that Community policy pursuits directly to prevent or remedy environmental damage, leaving to national legislation other forms of compensation traditionally granted by tort law liability schemes.

In the light of the foregoing, public authorities are indeed the central figure upon which all the legal framework is based[6]. As recognized in Recital (16) public authorities play an essential part in ensuring its correct implementation and enforcement.

At the same time, Community law endows them with a wide administrative discretion aimed to regulate effectively the entire process of restoration of potential or actual impairment. In this case a certain degree of administrative discretion appears necessary, given the complexity of the mission vested in public authorities. Nevertheless, in order to partially restrain such discretion, directive 2004/35 provides for a list of duties public authorities should comply with. In pursuance thereof article 11(2) sets on competent authorities three major duties.

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[5] Prevention principle is set by art. 191(2) TFEU.

[6] J. H. JANS – H. VEDDER, *European Environmental Law*, Gronigen, 2012, 387 «The current directive has opted for a system of public liability, with a competent authority being primarily responsible for making environmental liability work in practice».

Firstly, prior to any effective restoration or prevention of the impairment caused to a particular environment, public authorities should identify the relevant operator on a case-by-case basis.

Directive 2004/35 proposes a functional definition of operator depending on the concrete relation between the hazardous activity and the subject legally bound to it[7]. Public authorities should therefore look at national law regulating the peculiar activity involved in order to verify which subjects are legally liable. This could lead to substantial differences in the application of the environmental liability regime within the European Community, since it depends mostly on property law as well as on contract law systems adopted by each Member State.

Secondly, competent authorities are responsible for assessment of the magnitude of the damage. Articles 5 and 6 explicitly entitle competent authorities only to require information held by the operator or third persons. Nevertheless, it is apparent that the current duty implies more general powers of inquiry as an expression of the administrative discretion above mentioned. Environmental protection would be ineffective if we interpreted restrictively the powers vested in articles 5 and 6 on preventive and remedial actions. Again, the complete set of powers given to competent authorities has to be sought in combination with national law. Yet the lack of specificity theoretically opens to a wide gulf between national regimes, given to the discretion left to Member States in this matter.

Thirdly, competent authorities should impose appropriate measures on the polluter. This task sets a typical command and control scheme. Public authorities hold a wide range of powers, going from a simple power of approval of the action about to be taken by the relevant operator up to the power to act as a substitute of the latter. In fact the liability scheme seems to seek a certain degree of cooperation between the two subjects in question. The

[7] According to article 2(6), liability falls on the person who operates the occupational activity that caused the damage or on the person that holds economic or legal power over such an activity. Instead, no distinctions at all are made about the nature of the subject being private as well as public, natural or legal person.

ratio behind those provisions aims to involve the polluter in the protection process, in order to find shared solutions.

Direct intervention by public authorities seems to be *extrema ratio*. According to the polluter-pays principle, the relevant operator itself should preferably bear the burden of the entire remediation, in addition to the cost of it. However, articles 5 and 6 entail a general power of intervention on the authorities. In two particular cases, article 5(4) and article 6(3) allow the competent authority to act in place of the subject held responsible.

The earlier occurs each time the operator fails to comply with given directions. Yet the cost of the action shall not fall on taxpayers, since article 8(2) permits to recover the costs incurred by the authority via security over property or other guarantees from the operator.

The latter occurs instead in the event of so called diffuse or historical pollution, as to say in any case when it is impossible to identify a liable operator or it is impossible to determine a causal link. Recital (13) seems to exclude the application of the present liability mechanism in such cases, even if – as we see below – case law has been giving a quite restrictive interpretation of the circumstances.

Contrary to article 5(4) on preventive action, article 6(3) on remedial action expressly defines the duty to act as a substitute as « a means of last resort ». This slight textual difference could lead to a problem of interpretation. Moving from this difference in respective provisions, some Authors come to the conclusion that in remedial actions the competent authority may just substitute for the relevant operator when it is a measure of last resort, opening to a general power of intervention in preventive actions[8]. Such a distinction, however, could lead again to an antinomy between article 5(3)(d) and article 5(4). The first provision establishes that the authority may at any time « itself take the necessary preventive measures », whilst the following paragraph (4) submits intervention to three conditions, basically absence or inactivity by the operator. A provision similar to the first is found in article 6(2)(e).

[8] J. H. JANS – H. VEDDER, *European Environmental Law*, Gronigen, 2012, 387.

By the way, a correct interpretation of the mentioned provisions might be given in the light of the cooperative approach pursued by the EU legislator. It follows that articles 5(2)(d) and 6(2)(e) provide for a form of complementary action. The public authority may not only act as a substitute of the inactive operator then, but also it may integrate those measures when it does not suffice. In consequence thereof, such provisions seek a balance between the need of effective protection and the polluter-pays principle. When a preventive action is requested, the urgency to avoid an environmental damage allows public authorities alternatively to integrate or to anticipate necessary measures. On the opposite, when a damage had already occurred, article 6 sets a list of priorities, leaving the public intervention as a means of last resort.

Anyway, the competence of public authorities is not only shaped by their statutory powers. Further limitations may be found in the overall environmental liability regime indeed. On one hand, Directive 2004/35 presents several limitations regarding both the scope and the actors involved. On the other, it provides for a minimum set of regulation, leaving each Member State the power to introduce further instruments of protection in compliance with the principle of subsidiarity.

Having regard to limitations of the object, article 2 sets forth a narrow definition of environmental damage. At the same time article 3 explicitly limits the scope to occupational activities[9].

Furthermore, the competence of public authorities is limited in a temporal perspective to those damages originated by an event that takes place after the deadline for implementation[10].

3. Cleanup of Contaminated Sites in Italian Environmental Code.

In order to adopt directive 2004/35/CE, Italy issued legislative decree no. 152 of 2006 – also known as the Environmental Code – updating all

[9] J. H. JANS – H. VEDDER, *European Environmental Law*, Gronigen, 2012, p. 385 «This definition may be problematic with regard to public entities that are active in the field of environmental protection, as they may not be involved in an economic activity».
[10] That is to say 30 April 2007, according to article 17.

previous regulations on environmental liability in the light of the scheme provided by the directive. The Environmental Code is the central piece of legislation on environmental liability, since it gathers all existing regulations on environmental protection under one act of primary legislation.

As the majority of national law systems in the Community, before European Institutions adopted the current directive Italian law already dealt with a proper form of environmental damage regulation. Italian law presented in the past a dual regulatory system. In particular, national rules on environmental liability were first introduced by article 18 of *legge* no. 349/1986, providing for a fault-based liability regime derived from a traditional tort law approach. Besides, legislative decree no. 22 of 1997 introduced a further form of environmental protection in case of contamination of sites.

According to the EU Treaties and the same Directive, Member States' competence to legislate on environmental matters does not cease after the adoption of an EU legislative act ([11]). In conformity with that, Italy maintains two different regimes on the matter of prevention and remediation of environmental damage. On one hand, Part VI of the Environmental Code (articles 299 to 318) sets a general framework for environmental liability; On the other, Part IV, Chapter V (articles 239 to 253) still holds a special framework regarding the peculiar case of cleanup of contaminated sites.

As a result, such a duplicity of regulations raises two important questions.

The first question is whether the latter regime falls within the scope of the directive.

The 2006 Act inserts cleanup provisions in Part IV, concerning waste management and the cleanup of contaminated sites. At first, such positioning could lead to the conclusion that the provisions in question do not attaint to

[11] Accordingly L. KRÄMER, *EU Environmental Law*, London, 2012, p. 113. In particular, when protective measures are adopted on environmental matters, article 193 TFEU empowers Member States to maintain or to introduce more stringent measures on the condition that those measures are compatible with the Treaties. Under the same principle article 16 of directive 2004/35 regulates the relationship with national law.

environmental liability as regulated in Part VI of the same Code. In reality, such dissimilarity is likely caused by a miscalculation. Article 240 (1) (p) indeed defines cleanup as a combination of measures aimed to eliminate (or to contain at least) unspecified sources of pollution: it does not refer to contamination caused by waste disposal, but to all kinds of contaminants potentially able to deteriorate in a significant measure a particular site.

Most of Italian Scholars agree that the inclusion in different Parts is essentially due to the multi-layered composition of the Code itself[12].

Anyway, no doubt comes from community law about the inclusion of the Italian cleanup regulation within the European environmental liability framework.

Actually, contaminated sites hold a central position in the scope of directive 2004/35/CE. First of all, as we mentioned at the beginning, Community Institutions refer to them at Recital (1), claiming the contamination as one of the major environmental problems the Union has to face. In addition, since 2000 the White paper on environmental liability claims the harmonisation of the special law most Member States already possessed on the matter of land contamination and, subsequently, the implementation of a proper Community regime as essential for an effective environmental protection at Community level[13].

Moreover, in case C-378/08 *ERG*, the EU Court of Justice clearly recognizes Italian law on cleanup of contaminated sites as a specific implementation of the general scheme set by the mentioned directive. For that reason, it has to be interpreted in the light of those principles.

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[12] See *ex multis* P. DELL'ANNO, *La bonifica dei siti contaminati,* in *Gazzetta Ambiente*, 2006, 16; U. SALANITRO, *La bonifica dei siti contaminati nel sistema della responsabilità ambientale*, in *Giornale di diritto amministrativo*, 2006, 1263; G. TADDEI, *Il rapporto tra bonifica e risarcimento del danno ambientale*, in *Ambiente & Sviluppo*, 2009, 417; F. GIAMPIETRO, *Codice dell'ambiente: l'(incoerente) attuazione di principi ambientali in materia di bonifica e danno ambientale*, in *Ambiente & Sviluppo*, 2009, 333.

[13] EUROPEAN COMMISSION, *White paper on environmental liability*, COM(2000) 66 final, point 4.5.2.

In the light of the above, the second question arises. Having a dual regulatory regime on the matter of environmental liability the problem is what relationship may be found between Part IV and VI of Environmental Code.

To that end a preliminary remark has to be made. Being part of the environmental liability system, the scope of the two regulations under consideration tends to overlap each time any environmental damages – or its immediate threats – result from a contamination caused by a polluting source. Actually, they do not overlap completely. In one way, cleanup regulation has got a wider scope, as it also applies in cases when contamination is not provoked by occupational activities hazardous to human health or to the environment. In another way, the scope here is narrower than the one of Part VI regulation, because Part VI applies even in case of damaging facts other than contamination by pollutants, for instance loss of bio-diversity or accidental explosions etc.… [14].

Having said that, in the event of an environmental impairment due to pollutant factors, both regulations could theoretically apply, creating a coordination problem.

It is possible to find a solution to this problem in article 303(1)(i). It establishes that Part VI should not apply in those circumstances of contamination where cleanup proceedings have already effectively started (or completed), with the exception of the so called residual damage. That is to say, the environmental liability scheme would thus apply limited to that damage not fully recovered once the cleanup proceeding has ended.

Therefore, Environmental Code clearly sets up an order of priorities. This option appears perfectly in line with environmental liability principles. On one hand, it covers preventive measures; on the other, it entails a peculiar form of restitution in kind. In fact, pursuant to Annex II the remediation provided

[14] See U. SALANITRO, *La bonifica dei siti contaminati nel sistema della responsabilità ambientale*, in *Giornale di diritto amministrativo*, 2006, 1265. On the other hand, F. GIAMPIETRO, *La responsabilità per danno all'ambiente e bonifica dei siti contaminati. La linea evolutiva del testo approvato con il d. lgs. n. 152/2006 alla luce della direttiva n. 2004/35/CE*, in F. GIAMPIETRO (ed.), *La responsabilità per danno all'ambiente.*

by the regulation at issue aims to restore the damaged natural resources toward the baseline condition.

3.1. Cleanup of Contaminated Sites: the Actions.

Under the expression « cleanup of contaminated sites » Part IV, Chapter V of the Environmental Code refers to a complex regulatory scheme both in a technical and a legal perspective.

At the root of the cleanup proceeding is a preliminary two step assessment, specified in article 242 and relative annexes. Annex 5 to Part IV provides for the criteria concerning the so called "Contamination Threshold Concentrations" (CTCs). CTCs constitute tabular screening levels of the relevant environmental factors used for identification of potentially contaminated sites. When even one of those concentration levels exceeded a characterization of the site is necessary[15]. It follows a site-specific risk assessment in order to identify on a case-by-case basis the relevant Risk Threshold Concentrations (RTCs). Contrary to CTCs, RTCs are risk-based levels used as a reference for the definition of one particular site as contaminated and to target cleanup levels[16].

Alongside the cleanup proceeding in a strict sense, Chapter V regulates ancillary restoration actions as well as alternative containment actions[17]. Once the site-specific risk assessment has revealed a contamination, it presents three different categories of remedies.

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[15] Under Annex 2 to Chapter V characterization is defined as a set of actions consenting to recreate any contamination phenomenon in order to recollect all available information upon which to take decisions on clean-up or containment actions.

[16] See F. F. QUERCIA – D. VIDOJEVIC, *Clean Soil and Safe Water*, Dordrecht, 2012, 78.

[17] M. BENOZZO – F. BRUNO, *Le regole dei siti inquinati tra Decreto Ronchi e nuovo Codice dell'Ambiente*, in *Contratto & Impresa*, 2006, 761 point out that new rules of the Environmental Code provide for an autonomous series of proceedings involving the relevant operator – or other subject held responsible – and the owner of the site. This approach changes totally the single proceeding established by legislative decree no. 22 of 1997.

Firstly, the main and priority remedy is the cleanup proceeding in the strict sense. Environmental Code provides for an "operational" definition of cleanup[18]. Cleanup proceeding aims to bring the concentration level below RTCs and eventually to remedy the environmental impairment.

Secondly, complementary to that is restoration proceeding. This particular action seeks to restore the current use or approved use of the contaminated site[19].

Thirdly, article 242 provides for containment actions. Although alternative, containment measures are nonetheless subordinated to cleanup measures. The reason for this minor role is that those measures do not target at the remediation of the environmental damage, but they are intended to restrain risks to human health or, in addition, the risk of an increase in existing damage.

Hence article 240 defines three containment action. The first is the emergency containment. According to article 240(1)(m) it includes any measures taken in order to hinder accidental or unpredictable contaminations, in anticipation of further cleanup measures or other containment actions. Being urgent measures, this particular containment action entails at the same time a remedial measure or a preventive one. At a later stage article 240(1)(n) and article 240(1)(o) define respectively operational containment and permanent containment. Those actions are both remedial. The difference between the two is found in the peculiar condition of the contaminated site. If the site is still in use the operational containment ensures an appropriate level of protection to human health and the environment in anticipation of further

[18] See S. LEONI, *La bonifica dei siti contaminati*, in A. PIEROBON (ed.), *Nuovo manuale di diritto dell'ambiente*, Rimini, p. 639. According to article 240(1)(p) it is defined as a sequence of actions aiming to eliminate any polluting substances or, alternatively as a minimum, to diminish the concentrations of them.

[19] This action appears in line with § 2 of Annex II (*Remediation of land damage*) of the current directive which precisely states « the necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health ».

permanent containment or, if it is the case, clean-up measures once the productive activities are over.

Moreover, the regulatory scheme under consideration provides for preventive actions. Article 242(1) extends the protection to those events potentially capable of causing a contamination. In the face of such an event, the relevant operator should take all necessary preventive measure in order to avoid the impairment and give notice to the competent authority without any further delay.

3.2. Clean-Up of Contaminated Sites: Procedural Aspects.

Proceedings concerning the actions described above are entirely regulated by article 242 of the Environmental Code.

When a potential contaminating event occurs, the relevant operator should take appropriate preventive measures within 24 hours. Contextually, it should give notice to the competent authority. Immediately afterwards, the operator should carry out a preliminary assessment in order to verify whether CTCs are exceeded or not. If CTCs are below risk level the operator makes a declaration to the competent authority. Otherwise, if the result is positive, even for one parameter, the operator should submit for approval a characterization plan to the competent authority within the next 30 days[20]. Then, the competent Region calls to an interdepartmental meeting for the purpose of approving such a characterization plan and the final regional authorization.

According to case law on the point, the regional approval may impose further emergency containment measures to the relevant operator. In such an event, the competent Region is required to adequately justify them on the basis of the urgency, the risks to human health and, eventually, the inappropriateness of the measures already taken[21].

[20] According to article 240(1)(p) it is defined as a sequence of actions aiming to eliminate any polluting substances or, alternatively as a minimum, to diminish the concentrations of them.
[21] TAR Toscana, sec. II, 19 September 2012, no. 1551.

Subsequently, the liable operator should carry out a site-specific risk assessment based on the approved characterization plan. Depending on the outcome of this site-specific risk assessment, article 242 provides for two different procedural solutions. If the assessment reveals that the concentration of contaminants is effectively below RTCs, the meeting then should approve the assessment report and it should declare the proceeding positively concluded[22]. On the opposite, the relevant operator should submit for approval this time an operational plan to the competent authority. Such a plan differs from the previous characterization plan because of the object. In fact the operational plan should indicate specifically what concrete measures the operator intends to take on the basis of the Best Available Technology Not Entailing Excessive Costs model (BATNEEC).

As a result, article 242 puts upon the relevant operator the primary task to take such measures.

The question now is what happens when no liable operator is properly identified by public authorities or the latter does not comply with the provisions under consideration. As a solution, article 244 provides for a complementary *ex officio* proceeding.

In particular, according to article 244 in exercising their own mission any public authorities should give notice to the to the competent local authority as soon as they ascertain a contamination level higher than CTCs. The latter should thus carry out a proper investigation in order to establish which operator is susceptible of the cleanup operation. National case law on the point clearly states that the power of issuing orders rests on polluter-pays principle, so that it requires competent authorities to verify thoroughly on a case-by-case basis what person should be held liable[23].

At this point the competent authority may issue an order to comply with the regulation under consideration against the operator liable of the potential contamination. In this case article 244 entitles the competent local

[22] In this case it may provide for a monitoring program on the site.
[23] TAR Lazio, Latina, sec. I, 18 June 2012, no. 494; TAR Puglia, Lecce, sec. I, 2 November 2011, no. 1901; TAR Piemonte, Torino, sec. II, 29 October 2010, no. 3933; TAR Calabria, sec. I, 20 October 2009, no. 1118.

authority with the power to issue an order imposing the relevant operator the specific cleanup measures it should undertake. At the same time, the local authority should also notify the order in question to the proprietor or occupant of the site.

The critical point here is to better understand the exact position of the landowner within the proceeding we are about to describe. That is to say whether the provision should be interpreted as empowering public authorities to impose measures also to the landowner, because of its proprietary right on the contaminated site or not.

Administrative Courts reckon that the competent authority has the duty to give notice to the owner of the site for the purpose of making it aware of possible restrictions on the site due to the cleanup operation. By no means, the competent authority may impose any cleanup measures without having proved that the landowner is liable along with the relevant operator[24].

For the same reason, case law considers as in breach of article 244 and polluter-pays principle an order issued against the proprietor, if the competent authorities fail to prove a causal link between the proprietor's conduct and the potentially polluting event. More precisely, administrative courts consider in breach of the mentioned provisions an order based exclusively on the property right concerning the relevant site[25].

Nonetheless, according to the same administrative Courts the proprietor is involved in the cleanup proceeding anyway, although it is not held liable of the contamination[26]. Firstly, the landowner is under the obligation to take necessary preventive measures once it notices a potential contamination. The latter, by the way, may recover all the costs to the relevant operator. Secondly, the proprietor (or occupant) is allowed of the site to take itself the appropriate measures: it may at any time take voluntarily containment or

[24] Consiglio di Stato, sec. II, 30 April 2012, no. 2263; TAR Friuli Venezia Giulia, sec. I, 13 June 2011, no. 6.
[25] TAR Sicilia, Catania, sec. I, 30 December 2011, no. 3235; TAR Calabria, Catanzaro, sec. I, 20 October 2009, no. 1118.
[26] Consiglio di Stato, sec. II, 30 April 2012, no. 2263; Consiglio di Stato, sec. VI, 18 April 2011, no. 2376; TAR Liguria, sec. II, 9 May 2013, no. 773; TAR Toscana, sec. II, 19 September 2012, no. 1551; TAR Lazio, Rome, sec. I, 3 July 2012, n. 6033.

cleanup measures when the relevant operator fails to do so. Thirdly, the landowner may be subject to a restriction on its property rights on the site, where public authorities bare the cost of the operation, as we discuss below.

Finally, article 245(1) foresees a third proceeding. This provision entitles third persons to activate the proceedings at issue under two conditions: a) they should not be liable otherwise, and b) they should be vested with a qualified interest. In general, if third persons are interested in the restoration of the environmental impairment, article 246 allows them to enter into an agreement with the competent authority in cases where it is impossible to determine a liable operator or the latter fails to comply with its obligations.

The *ratio* here is to allow third persons interested in an economic use of the site to take all necessary measures in place of the inactive operator.

4. The Competent Authority in Italian Cleanup Regulatory Scheme.

Article 11(1) of Directive 2004/35/CE leaves to national legislation the task to determine which administrative authority is competent. To that end Italian law on cleanup of contaminated sites opts for an implementation under two fundamental principles: principle of differentiation and principle of cooperation.

Under the first principle, Part IV distinguishes the competence between authorities at different territorial level, depending on the relevance of the specific site.

In general, article 242 of the Code gives to Region the primary competence on the matter. Each stage of the described cleanup proceeding should be submitted for approval to the Region where the specific contaminated site is placed[27]. Without any further provisions, though, the circumstances under consideration fall under the regional competence.

On the other hand, article 252 regulates a special case where the state authority steps in. In particular, article 252 recognises a special category of so

[27] The Italian Constitutional Court confirmed the central role played by Regions in the regulation at issue in *arrêt* 24 July 2009, no. 247.

called "sites of national interest". Unlike the previous general category those sites are subject to the Minister for Environment's competence.

The main difference between the two categories just lies here, given that article 252(2) expressly refers to article 242 for proceedings[28].

Having said that, two alternative procedures may be followed in order to qualify a site as of "national interest". The first method is to issue a special legal provision. In this case the legislation itself points out a specific site. On the opposite, the second method is by administrative act. More precisely, pursuant to article 252(2) by order the Minister for Environment may proceed with an operation named "perimeteration", the relevant Region (or Regions) been consulted. It consists of defining the physical limits of the site.

In addition, the same article 252(2) establishes a detailed list of principles and criteria for the ministerial order. In essence, the national relevance of the site may be found in three major aspects. Firstly, there are risk factors: it may depend then on particularly high risk for human health or environment in highly populated areas as well as it may depend on the extension of the same area. Secondly, there are economic and social factors, owing to the impact of pollution on economic activities, but also on population on-site and off-site. Thirdly, the relevance of the site may derive from the artistic or historical importance of it.

To sum up, Environmental Code presents a clear distinction between regional competence and ministerial competence, depending on the importance of the site or the degree of the contamination.

The experience so far, nonetheless, proved an insufficient application of the mentioned administrative method in order to identify a "site of national interest". Up to date, almost every site of national interest has been identified by special legislative provisions. Being an evident exercise of legislative power, the present option not even avoids any administrative discretion on the matter, but also it nullifies the procedural fairness principles on which article 252 is ultimately based. In fact, before issuing the mentioned order, the Minister for

[28] Article 252(4) though endows Minister for Environment with the same duties article 242 puts on Regions.

Environment should take into consideration all positions expressed by interested persons by way of a hearing.

The same conclusion is reached pursuant to the provisions of article 242 on sites of regional interest. Based on general principles on administrative proceedings in Italy, even competent Regions should exercise their power after consulting with relevant public or private persons[29].

This kind of participation is of utmost importance in order to solve information asymmetry problems. It is apparent that in cases of pollution caused by contaminants used in production processes the operator could hold key data, essential for the purpose of selecting adequate measures. In other words, such participation is crucial to build up profitable relationships between regulator and regulated operators.

4.1 Powers of Public Authorities within the Cleanup Regulatory Scheme.

Public authorities are entitled with significant powers in order to ensure the enforcement of the current provisions.

First of all, a general power of control on procedural aspects. It leads to a different range of specific powers depending on the precise stage of the proceeding. As soon as public authorities receive the notice of a likely contaminant event, competent authorities may alternatively: a) ask the operator to give further information, b) order it to take specific measures, and c) adopt themselves those measures in place of the operator.

Thereafter competent authorities still hold significant conforming powers. Even in cases of remedying measures, they may give directions to the relevant operator about which measures are considered appropriate for the upcoming cleanup. All the prescribed acts made by the operator are submitted to the competent authority for approval. Therefore, by way of authorizing each measures the relevant operator proposes, public authorities may effectively direct the cleanup proceeding.

[29] More precisely art. 7 s. *legge* no. 241/1990 on administrative proceeding.

Case law specifies to what extent this power of approval may condition the cleanup proceeding. As *Consiglio di Stato*[30] put it, the power under consideration obliges competent authorities to compare benefits and drawbacks of all the solutions likely to be taken. To do so administrations should also give adequate justification of that comparison, especially from a cost-benefit analysis point of view[31]. The operator's proposal could thus be rejected, on the condition that competent authorities justify adequately the refusal.

Moreover, according to article 242 cleanup proceedings generally start on operator own initiative, so that an environmental protection problem could arise in case of operator's inactivity. Actually, this could be a likely critical point of the present regulatory scheme Environmental Code tries to overcome entrusting public authorities with the following powers.

Furthermore, article 244 provides for a power of injunction. The local authority is thus allowed to exercise the current power at the very first stage of cleanup proceeding. It has important consequences in relation with the relevance of the site. In fact, it does not specify if the local authority is empowered to issue an order in cases where the Minister of the Environment is competent.

The problem here is if an administrative act issued by a local government may be effective in circumstances shifted at national level. In an important case *Consiglio di Stato* claims definitively that the provision at issue applies with regards to sites of national interest as well[32]. The Court bases its reasoning on three points. First, article 244 does not make any distinction between sites of national interest and sites of regional interest. Second, Minister's competence concerns the proper cleanup proceeding, that is a stage of the proceeding subsequent to the stage when the provision applies. In fact, article 244 is generally considered to regard preventive measure or, at least, containment measures due to avoid further contamination risks. Third, urgency

[30] The Italian supreme administrative court.
[31] Lately, Consiglio di Stato, sec. VI, 9 January 2013, no. 56.
[32] Consiglio di Stato, sec. VI, 12 April 2011, no. 2249

reasons justify the intervention by the local authority, because it is the closest authority to the (potentially) contaminated land, so that it may assure a better and more rapid intervention.

At last, according to article 250 public authorities are entrusted with the power to act as a substitute of the relevant operator. In particular, in cases where the relevant operator fails to comply with the provisions at issue or it cannot be identified, the competent authority should itself take the necessary measures. Hence, in line with article 6 of Directive 2004/35/CE, article 250 provides for this power when all other options have been exhausted.

On the other hand, the power does not apply just in case of remedial measures. In fact, on the base of precautionary principle administrative courts claim that competent authorities may exercise the power in question even when there is an imminent threat of contamination. In case of extreme urgency and contextual inactivity of the relevant operator competent authorities are required to take the necessary preventive measures, given that in this case public action is undoubtedly considered as last resort [33].

Furthermore, article 250 leads to a distinction. Where public authorities take action, they may ask for compensation of the sum they spent from the polluter itself. Otherwise, if no person may be proved susceptible with the restoration obligation or rather it is insolvent, public authorities have the ultimate duty to restore the impairment at their own expense. The *ratio* is here evident. At the end of the day, public authorities are vested with the general interest to preserve and improve the quality of the environment.

Likewise, the goal is to avoid that the cost of the action should lie on taxpayers. For that reason the regulatory scheme in question provides for two supplementary provisions. Firstly, under the same article 250 the competent authority may invite tenders for carrying out the cleanup[34]. As an alternative, it

[33] Consiglio di Stato, sec. V, 16 June 2009, no. 3885. The Court builds up its legal reasoning directly on the basis of the Rio de Janeiro Declaration on Environment and Development, June 1992, Principle 15.

[34] That competitive tendering procedure is more specifically regulated by *legge* no. 179/2002 at article 18. In particular, public authority may carry through a public procurement procedure.

may award an exclusive right for economic utilisation of the site. Secondly, once the cleanup proceeding has successfully ended, in the light of article 253, the landowner is susceptible with compensation as – and within – unjust enrichment, if not liable otherwise.

4.2. The Duty to Establish the Causal Link.

In accordance with the polluter-pays principle, national Courts state that article 242 read in conjunction with article 244 imposes on competent authorities the duty to investigate and to identify the liable person[35].

Under the same principle is case C-378/08 *ERG*, in a preliminary ruling on interpretation of Italian provisions regarding cleanup of contaminated sites. The Court of Justice states that the authority should «carry out a prior investigation into the origin of the pollution found, and has a discretion as to the procedures, means to be employed and length of such an investigation»[36]. In order to fulfil this particular duty, the authority is entitled with wide discretionary powers to assess the significance of the impairment and the most appropriate measures to be taken[37]. Hence, « in exercising that discretion, the competent authority is nevertheless required, in such circumstances, to examine carefully and impartially all the relevant aspects of the individual case»[38].

Seeing that public authority are empowered to identify the liable operator, preliminary question is to better understand which liability regime the regulation under consideration provides for. As a matter of fact, no provisions in Part IV set it forth expressly.

Article 242 just refers to the liable operator, without thereof any further specification. Not to mention, Part VI on environmental liability. Manifestly in breach of Directive 2004/35 regulatory scheme, article 311(2) provides for a fault-based liability regime even in case of occupational activities listed in

[35] Consiglio di Stato, sec. V, 16 June 2009, no. 3885, at point 4.
[36] EU Court of Justice, case C-380/08 *ERG* at point 65.
[37] EU Court of Justice joined cases C-379/08 and C-380/08 *ERG and ENI*, point 59.
[38] *Ibidem*, at point 61.

Annex III of the mentioned Directive. For this reason European Commission opened the ongoing infringement procedure no. 2007/4679[39].

In consequence thereof, immediately after the Environmental Code was issued, some Authors assert that cleanup of contaminated site regulation rested on fault-based liability as well[40]. Although other Authors considered later on that in this case European provisions should function as interpretative parameter for the purpose of qualifying the appropriate liability regime[41].

On the contrary, the aforementioned case C-378/08 *ERG* definitively includes Italian regulation on the matter within the general framework of Community environmental liability. That is to say it has to be interpreted as a strict liability regime, at least for those activities listed in Annex III[42].

Consistent with this interpretation, Italian administrative Courts go further in extending the current strict liability regime to all activities subject in principle to cleanup regulation[43]. After all, this position does not contrast with the scope of the aforementioned directive, since – as the same Court of Justice puts it - article 16(1) of Directive 2004/35 does not to prevent Member States from adopting more stringent measures. That provision also indicates that «such measures may include, *inter alia*, the identification of, first, additional

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[39] EUROPEAN COMMISSION, C(2012) 228 final.

[40] L. PRATI, *Il danno ambientale e la bonifica dei siti inquinati*, Milan, 2008, 52.

[41] U. SALANITRO, *La bonifica dei siti contaminati nel sistema della responsabilità ambientale*, in *Giornale di diritto amministrativo*, 2006, 1265. Accordingly, D. DIMA, *Bonifica dei siti inquinati: criteri di imputazione e mezzi di accertamento della responsabilità*, in *Giornale di diritto amministrativo*, 2009, 1331. On the other hand, F. GIAMPIETRO, *La responsabilità per danno all'ambiente e bonifica dei siti contaminati. La linea evolutiva del testo approvato con il d. lgs. n. 152/2006 alla luce della direttiva n. 2004/35/CE*, in F. GIAMPIETRO (ed.), *La responsabilità per danno all'ambiente*, Milan, 2006, 279 opts for a strict liability regime on the basis that art. 239 refers to community law principles – particularly polluter-pays principle – so that in the absence of an explicit national provision of implementation regarding a fault-based liability regime.

[42] EU Court of Justice, case C-380/08 *ERG* at point 65 states that «when deciding to impose remedial measures on operators whose activities fall within Annex III to the directive, the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage».

[43] Consiglio di Stato, sec. V, 16 June 2009, no. 3885; Consiglio di Stato, sec. VI, 9 January 2013, no. 56.

activities to be subject to the requirements of the directive and, second, additional responsible parties»[44].

As a result, for the strict liability mechanism to be effective, competent authorities need to establish a causal link between the activities carried out by one or more identifiable polluter and concrete and quantifiable environmental damage, in accordance with national rules on evidence[45].

At this point, the question that follows is to what extent burden of proof lies on public authorities.

At first, Italian administrative Courts stressed the need of a thorough investigation supported by concrete evidence not mere presumption[46]. Such a position, by the way, poses a problem once again 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. Later, in response to this problem *Consiglio di Stato* allows public authorities to base their assessment on presumptions in conformity with Italian rules on evidence. Their priority is to seek concrete evidence. In turn, moving from factual elements they may infer a plausible evidence that a contamination is attributable to an operator according to *id quod plerumque accidit*. In this way *Consiglio di Stato* opens up to a general use of presumption in order to establish the causal link in this matter.

Consistent with this principle the aforementioned case C-378/08 *ERG*. In particular EU Court of Justice considers, as plausible evidence capable of justifying its presumption, the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with its activities[47].

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[44] EU Court of Justice, case C-380/08 *ERG* at point 69.
[45] See EU Court of Justice, case C-380/08 *ERG* at points 52 and 65.
[46] Consiglio di Stato, sec. VI, 5 October 2005, no. 4525. Lately and in contrast with less recent but leading case law: Consiglio di Stato, sec. VI, 9 January 2013, no. 56.
[47] EU Court of Justice, case C-380/08 *ERG* at point 57.

Such conclusion is likely to have a major impact on the application of the examined provisions, since it expands the means competent authorities are empowered with in order to identify a connection between an occupational activity and a pollution, even in cases where a definitive evidence is hard to find because of a situation of historical or diffuse pollution.

In fact, the case at issue concerns an industrial area where activities potentially hazardous to the environment come in succession for a long time. In cases like this it is very difficult to prove that excessive levels of pollutants may be attributed effectively to a single operator, leaving the impaired environment with virtually no legal protection, but to directly involve public authorities in cleanup operations.

COULD THE NON-LIABLE OWNER OF A POLLUTED LAND TO REMEDY BE OBLIGED TO ADOPT ANY USEFUL MEASURE TO PREVENT AN INCREASING CONTAMINATION?

Gabriele Torelli

CONTENTS: 1. – The Judicial Controversy. 2. – The Two Contrasting Case Laws. 3. – The Judicial Order.

1. The Judicial Controversy.

The Italian Environmental Department had previously forced some companies, owners of contaminated areas, to adopt all the necessary measures to prevent further risks and damages for the surroundings. No other options were taken into consideration because of the impossibility to identify a real responsible for the site pollution. For this reason the Department decided that the most appropriate and rapid solution would be to impose to land owners the urgent implementation of safety standards and soil remediation. The administrative decision was based on art. 240, d.lgs. No. 152 of 3 April 2006 (Italian Environmental Code), which lists all the permitted interventions on a polluted land. In particular, art. 240 pt. 1 includes, on one side, in let. m) securing procedures to be applied immediately after the contamination detection in order to deal with the emergency; on the other in let. p) actions to eliminate the polluting sources and dangerous substances from soil.

The administrative measure that ordered the rehabilitation of the area was clearly necessary, and the parts of the trial are not discussing about this specific profile of the issue, indeed. Much more uncertain is the question if the same imposition could legitimately be required to non-liable companies, owners of polluted lands. As a matter of fact art. 242 of the Italian

Environmental Code introduces the principle of liability, establishing that the adoption of all necessary measures to prevent further risks and damages can be demanded to the person who has caused the contamination or, eventually, to the land owner, in case of *intentional* or negligent behaviour. As a consequence, the owner of the contaminated area cannot be obliged to adopt remedies only because he/she has the assets property.

The three private companies involved in the trial, which should have to adopt the recovery measures, contested the decision of the Environmental Department, underlining the statement of the previous rule. The Court of First Instance[1] recognized its unlawfulness, establishing that public bodies cannot impose upon non-liable owners any emergency measure. For this reason, the Environmental Department appealed the sentence to the Consiglio di Stato, questioning several points of the judgement. First of all, the judicial decision obliges the Public Administration to eliminate the contamination effects and to restore the territories on its own, bearing all the costs of the operations and therefore committing a huge amount of public finances. Moreover, the Department asserted that the "polluter pays" principle is supposed to allow the imposition of any necessary urgent remedy for environmental safeguard due to the relation between the polluted site and the owner, regardless if the event has been caused by intentional or negligent behaviour. In particular, this kind of interpretation of the principle would be in line with the aspects of prevention and protection that are typical of the urgent securing procedures listed in art. 240 pt. 1, let. m) of the Italian Environmental Code. Lastly, the Department contested the sentence underlining that the precautionary principle, that requires to the public bodies to realise preventive actions in order to reduce any predictable risk and damage, permits to impose such an administrative measure to the non-liable owner, so that the land contamination is limited as much as possible.

[1] T.A.R. Toscana, sec. II, No. 1659 of 19 October 2012.

2. The Two Contrasting Case Laws.

The Consiglio di Stato is aware that the whole issue is still uncertain: several judgements of Italian Administrative Courts show contrasting opinions. Specifically, sometimes judges have established that the non-liable owner is obliged to adopt any useful measure to prevent an increasing contamination[2]; but most of the times they rejected this idea, asserting that there is no reason to tolerate this imposition on anyone but the real responsible of contamination[3]. The former is certainly the minority opinion, while the latter is undoubtedly the main one, also because it is supported by one of the most important Italian experts in the subject[4]. Moreover, the same disposition could be assumed considering the previous legal regime of the issue (now totally repealed by the Environmental Code) and comparing it with the actual: art. 17, d.lgs. No. 22/1997, which allowed the Public Administration to establish any decision to limit contamination. Therefore, according to this rule, public bodies could provide important measures to prevent further risks and damages. As a consequence, it was reasonably believed that they could enforce anyone (even the non-liable owners) to adopt securing procedures. For this reason it was widely thought that art. 17 introduced a kind of objective responsibility, that could oblige the owner of a polluted land to be responsible also for unlawful actions committed by third parties. On the contrary, the Italian Environmental Code does not establish similar rules: this aspect is very important, because it is supposed that the lack of the same previsions included in art. 17 indicates the

[2] It is possible to list some of these judgments of the Consiglio di Stato and T.A.R. (Administrative Regional Tribunal, *i.e.* the Court of First Instance, set in every Italian Region): Cons. St., sec. V, No. 6055 of 5 December 2008; Cons. St., sec. V, No. 6406 of 16 November 2005; T.A.R. Lazio, sec. I, No. 2263 of 14 March 2011; T.A.R. Lazio, sec. II-*bis*, No. 4214 of 16 May 2011; T.A.R. Lazio, sec. II-*bis* No. 6251 of 10 July 2012.

[3] Cons. St., sec. VI, No. 2736 of 18 April 2011; Cons. St., sec. VI, No. 56 of 9 January 2013; Cons. St., sec. II, No. 2038 of 23 November 2012; Cons. St., sec. V, No. 1612 of 19 March 2009; T.A.R. Lombardia, Milano, sec. IV, No. 791 of 2 April 2008; T.A.R. Lombardia, Milano, sec. IV, No. 5782 of 7 September 2007.

[4] P. DELL'ANNO, *Diritto dell'ambiente*, Padova, 2014, 296.

wish of Italian legislator to refuse objective liability in contamination issues, and connect it to a negligent or intentional behaviour.

Beyond any consideration about the comparison between the previous and the current legal regime, the Consiglio di Stato analyses the main points of both opposite national case laws.

The first case law strongly affirms that the non-liable owner of a polluted land can be obliged to adopt emergency measures, because the "polluter pays" principle demands that this imposition must be released from any kind of negligence and must be simply based on the property of the land. In other words, in a cost-benefit analysis, the owner is supposed to be granted for gains, but at the same time he/she should tolerate economic dangers and damages: this is a clear example of objective liability, similar to the previous one suggested by the repealed art. 17, d.lgs. No. 22/1997. Moreover, following this first opinion analysed by the Court, the owner should be considered responsible also according to art. 245 pt. 1 of the Italian Environmental Code: this rule allows his/her voluntary intervention in order to adopt both the urgent secure procedures and definitive remedies. Consequently, art. 245 could also suggest that the owner should be involved to prevent an increasing soil contamination as much as possible, no matter of his/her effective liability.

On the contrary, the second case law considered by Consiglio di Stato firmly refuses the obligation for the non-liable owner to adopt the necessary measures to prevent further risks and damages, because of the lack of rules imposing this specific action. The opinion is strengthened with further considerations. First of all, it is reiterated that the "polluter pays" principle should implement a personal liability and at the same time exclude the objective one. Secondly, art. 244 pt. 3 of the Italian Environmental Code establishes that the administrative order to adopt emergency measures (listed in art. 240) must be notified not only to the responsible for pollution (if the person is known), but also to the owner of the polluted area. Nevertheless this order is communicated not to impose the adoption of the measures to the latter, but just to inform that, according to art. 253, the costs bore by the Public Administration to prevent contamination constitute a burden on the

land. This means the charges paid by the public body to restore the area must be registered in the intended-use-certificate of the field, so that they could represent a secured preferential claim for the creditor (*i.e.* Public Administration). Eventually, according to art. 253 pt. 3, the Public Administration is able to enforce in a second moment the original claim on the non-liable owner, under condition that the competent authority adopts a further administrative measure which declares the impossibility to identify the real responsible for pollution, or the unsuccessful attempts to bring an action for damages against him/her. Therefore, the Consiglio di Stato explains that, following this line, art. 244 pt. 3 in conjunction with art. 253 would not allow to impose with priority to the non-liable owner any adoption of emergency measures to prevent an increasing contamination.

Finally, this case law motivates its position also focusing on art. 245 of the Italian Environmental Code, which lists the obligations for not liable people in case of contamination. Beyond the voluntary intervention allowed in art. 245 pt. 1 discussed above, art. 245 pt. 2 establishes that the non-liable owner must communicate to the competent authorities (the Region, the Province and the Municipality) the detected contamination and adopt the necessary prevention measures, listed in art. 304 of the Italian Environmental Code. These are different from those listed in art. 240: as a matter of fact, the prevention measures (art. 304) have to be adopted within 24 hours after the detection of a contamination risk, and the economic effort for the land owner is much less hard than the one requested for the adoption of emergency and restore remedies established in art. 240 let. m) and p). Consequently, by the law (*i.e.* Italian Environmental Code) the non-liable owner is requested to adopt the less hard obligations listed in art. 304, instead of those imposed by art. 240.

3. The Judicial Order.

After the brief summary of the main points of these contrasting case laws, the Consiglio di Stato affirms that the Public Administration, according to the current legal national regime established in the Environmental Code,

cannot impose onto the non-liable owner of a polluted land to adopt the securing procedures listed in art. 240 let. m) and p) after the discovery of contamination, in order to prevent further pollution risks and damages. The reason is that there are no specific rules which expressly justify this order. Therefore, the only requirements for the non-liable owner are the adoption of the preventive measures listed in art. 304 and the obligation to communicate the detected contamination to the competent authorities, in accordance with art. 245 pt. 2. Consequently, the adoption of secure procedures to deal with the emergency (established in art. 240 let. m) and of remedies to eliminate pollution sources (established in art. 240 let. p) could be ordered only to the effective contamination responsible. This thesis is confirmed by art. 250 of the Italian Environmental Code: if the responsible is not identified or does not execute the order or simply cannot, the Municipality has to fulfil these obligations.

This means that the non-liable owner could be obliged to bear the costs for the area restore only after the primary intervention of Public Administration, under condition that this adopts the administrative measures in accordance with art. 253 pt. 3, as explained before.

The Consiglio di Stato believes that this represents the fairest solution, also because the claim of objective liability is not relevant. As a matter of fact if the non-liable owner were directly obliged to adopt any useful measure to prevent an increasing contamination, he/she would be responsible not for an objective liability but for a "position liability", that is a liability depending on his/her position as owner. In other words, while the objective liability does not require a negligent or intentional behaviour and depends only on the cause and effect relationship, the "position liability" cannot be related neither to the subjective nor to the objective aspect, because the contamination is completely independent from any owners' activity.

Although the Consiglio di Stato expresses its own opinion on this matter, uncertainty still remains. For this reason the highest Italian Administrative Court decides to raise a question of preliminary ruling to the European Court of Justice (ECJ) about the compatibility of artt. 244, 245, 253

of the Italian Environmental Code with EU law. Specifically, the Court wishes to know if the European principles on the question – in particular the "polluter pays" principle, the precautionary principle, the preventive action principle and the priority rectification of damages at source principle (listed in art. 191, par. 2, Treaty on the Functioning of European Union) – hinder the application of the previous Italian rules, which do not permit the Public Administration to order the non-liable owner the urgent adoption of measures to prevent an increasing contamination. In other words, the Consiglio di Stato needs this preliminary question to be solved, in order to be able to pronounce the final judgement: the ECJ is of course the only appropriate institutional body to establish the exact interpretation and meaning of European environmental principles and their relationship with Italian environmental rules. Obviously the Consiglio di Stato also explains its main reasons to raise the question to the ECJ.

First of all, in relation to the "polluter pays" principle the uncertainty regards the opportunity of internalising the costs to bear to restore the polluted area. Internalising means to avoid that the community bears the remedy costs: it is preferable to request payments to the land owner, even if he/she is not responsible at all. In this way the "polluter pays" principle would allow to demand him/her the damage restoration: not only to save public funds, but also because the owner is considered the best subject to control the risks. Following this line, the owner should accept advantages and disadvantages deriving from the land property, especially if there is a business activity. Therefore the owner cannot be obliged to adopt emergency measures only under condition that he/she furnishes the proof that pollution has been caused by third parties[5].

Secondly, the precautionary principle and the preventive action principle legitimate an anticipatory environmental safeguard. The former permits the adoption of pre-emptive strategies even though contamination is not effective and there is no any certainty that it will be: risks are partly unknown. The latter intends to prevent damages deriving from risks already

[5] In accordance with art. 8 par. 3 let. a, Directive No. 2004/35/EU.

known and scientifically proven. The sense of both principles clearly permits the intervention of public bodies also in case of doubtful scientific situations: as a matter of fact a preventive protection is necessary to avoid risks of irreversible damages. For this reason the Consiglio di Stato admits that the same sense is referred not only if the damage is uncertain, but also if the responsible of an effective pollution is still unknown. Consequently both the precautionary principle and the preventive action principle would allow to order the non-liable owner to urgently adopt any necessary remedy listed in art. 240 of the Italian Environmental Code, in order to prevent the increasing contamination just because he/she is in the best position for doing it.

Finally, there are some doubts related to the priority rectification of damages at source principle, which demands that damages must be limited after the pollution as quickly as possible. In case it is impossible to identify the real responsible, the owner could be reasonably supposed to be the closest person to pollution sources and consequently the only one who can restore the area immediately.

Although the Consiglio di Stato underlines the reasons of its uncertainty on the question, it asserts once more that the non-liable owner could not be obliged neither to adopt any necessary measure to prevent increasing contamination nor to restore the area, and that the European environmental principles do not hinder the application of Italian rules. This opinion is supported by a similar previous case law: ECJ, Grand Chamber, 9 March 2010, C-378/08. In this circumstance the European Court affirmed that the "polluter pays" principle excludes that the owner must bear the remedy costs for a polluted area if he/she has not any kind of responsibility for the contamination. In other words he/she must respond only in case of contribution to the damage: therefore the cause and effect relationship is an essential element to establish him/her liability[6]. Moreover this relationship should be demonstrated by the competent public body, which must investigate to prove it. Therefore it is not acceptable that the non-liable owner is claimed with priority to restore the area only because of his/her land property.

[6] A similar pronounce is ECJ, 24 of June 2008, C-188/07.

Anyway, the Consiglio di Stato does not mean to absolutely prohibit the forced adoption of necessary measures to subjects who are not effective responsible, because it would contrast with the final goal of ensuring a high level of environmental safeguard. The "polluter pays" principle is not supposed to limit protection, but it seems to prevent that liability is always independent from the cause and effect relationship. For this reason a correct balance between environmental safeguard and personal economic interests is necessary: the non-liable owner could be involved in the remedy works only as a last resort. Considering this point of view, in its final analysis the Consiglio di Stato believes that the European environmental principles do not definitely exclude a liability totally separated from the cause and effect relationship; but at the same time they do not impose it. For this reason the Italian legislator is legitimately free to establish if the non-liable land owner could be obliged or not to adopt emergency and/or remedy measures.

In conclusion, although the Consiglio di Stato has expressed its own opinion on the issue, it raises a question of preliminary ruling, in order to have a definite answer on the matter from the ECJ. For this reason the Italian judges require on one hand the exact interpretation of European environmental principles listed in art. 191 par. 2 TFEU and in art. 1 Directive No. 2004/35/EU; on the other, if these principles hinder the application of art. 244, 245, 253 of the Italian Environmental Code, which do not permit to impose the non-liable owner of a polluted land neither to urgently adopt any necessary measure to prevent an increasing contamination, nor to restore the area as soon as possible.

At this time, the ECJ has not pronounced the final judgement yet[7].

[7] It is still possible to monitor the evolution of the judicial issue, because the action was registered as case ECJ, C-534/2013.

ACCESS TO JUDICIAL REVIEW OF DECISIONS REGARDING ENVIRONMENTAL IMPACT ASSESSMENT IN THE VIEW OF THE EUROPEAN COURT OF JUSTICE

Piergiorgio Novaro

CONTENTS: 1. – Introduction. 2. – The Århus Convention and Its Implementation in EU Environmental Law. 3. – Limits of Legal Standing Requirements. 4. – A Special Status of Environmental NGOs. 5. – A More Extensive Application of the EIA Directive. 6. – Awards of Costs for the Unsuccessful Claimant.

1. Introduction.

Access to judicial review in environmental matters represents even today one of the main and most disputed topics within the European environmental debate. Yet recently, the EU Environment Action Programme to 2020 indicates it as a priority objective owing to maximize the benefits of Union environmental legislation by improving implementation. Under § 62, «Union citizens will have effective access to justice in environmental matters and effective legal protection, in line with the Aarhus Convention and developments brought about by the entry into force of the Lisbon Treaty and recent case law of the Court of Justice of the European Union»[1].

Although in the European Union all present regulations on access to judicial review regarding environmental matters are ultimately based on the principles set forth by the Århus Convention of 1998, so far the EU environmental law has proceeded just to a partial implementation of those

[1] Decision no. 1386/2013/EU of 20 November 2013 on a *General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'*, §§ 62, 65 (e) and (v).

provisions[2]. The most complete of which lies in the field of assessment of the effects of certain projects on the environment by mean of the so called EU Public Participation Directive.

Furthermore, as recognized in the same Environment Action Programme, the Court of Justice has been playing an extremely important role in the definition of a more detailed application of the provisions set by the mentioned directive. Besides, the general opinion among the scholars is that the emerging seam of case law on the matter is relevant to the entire the spectrum of EU legislation on access to environmental justice, not simply confined to provisions derived from the legislative provision, given the similarity of wording and function of access to justice[3].

In order to place the discussion in context, the first part of this contribution focuses on the legal background. It gives a brief overview of the tenets of the Århus Convention and it analyses the steep path of its implementation in the EU environmental law framework.

Afterwards, the second part concentrates on the ECJ case law on the matter. In particular, it highlights three main problems the Court had dealt with. The first problem regards the limits of standing requirements as well as the special legal status the regulatory framework entitles environmental NGOs with. The second problem concerns the extension of the object of the review gradually reached by the same Court. The third and final problem involves the delicate question of awarding legal costs in the light of the principle of wide access to justice.

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[2] Convention on access to information, public participation in decision-making and access to justice in environmental matters done at Aarhus, Denmark, on 25 June 1998. It is primarily considered as a regional agreement, because it has been adopted within the United Nations Commission for Europe. Nevertheless, the Convention has been ratified to date by 46 European and Asian Countries plus the European Union.

[3] M. HEDEMANN-ROBINSON, *EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 2*, EELR 2014, 155.

2. The Århus Convention and Its Implementation in EU Environmental Law.

As already mentioned, the entire EU regulatory framework on access to judicial review in environmental matters is grounded on the Århus Convention. Ambitious objective of the Convention is to set the basis for an exhaustive system of rights for the public concerned with the overall environmental protection process. For that reason, it rests on three pillars: I. Access to information, II. Public participation in decision-making, III. Access to justice.

Having regard to the latter, it holds the principle of wide access to justice. As the same Preamble states it, the Parties must strive to render effective judicial mechanisms accessible to the public, including organizations.

In this perspective, article 2 gives a broad definition of the public concerned with the environmental protection process as any natural or legal person affected or likely to be affected by, or having an interest to challenge any of those decisions[4].

Plus, article 9 provides for a general access to a review procedure before a court of law or other independent and impartial body against a large span of administrative decisions relating to information or activities affecting the environment. In that regard, the Convention sets two requirements. On one hand, the decision may be final, that is to say it excludes the possibility of further appeal or the period for lodging an appeal has expired. On the other, such a decision may be binding on public authorities.

At the same time, under article 9(3) each Party shall ensure that, where they meet the criteria, if any, laid down in its national law members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. The provision leaves wide discretion on contracting parties as to set *locus standi* requirements,

[4] V. REDENHOFF, *The Aarhus Convention and its implementation for the 'Institutions' of the European Community*, RECIEL 11(3) 2002, 344, « the term the public is not used in the sense of public sphere or forum, but rather as the sum total of all of society's potential actors».

whereas it does not require the parties to establish a general citizen's right of action or *actio popularis* to enforce environmental law[5].

At European Union level, in 2003 European Institutions make an initial attempt to generally implement the Convention's third pillar by proposing a directive on access to justice in environmental matters[6]. According to its explanatory memorandum, the draft directive pursuits a double objective. On one hand, the aim is to give a general implementation of the Convention capable of transversal application across EU environmental regulations. On the other, the aim is to eliminate shortcomings due to scarce financial private interest in enforcing environmental law[7].

Nonetheless, the proposal has never come into force, given that a substantial majority of Member States deem such an instrument as an excessive intrusion in the organization of judicial procedures before national courts, exclusive competence of each State under the principle of subsidiarity[8].

Up to date, the most advanced example of implementation is certainly Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive)[9]. It codifies in a single act all previous regulations on environmental impact assessment in the light of the tenets of the Århus Convention.

In particular, article 1 reproduces exactly the broad definition of the 'public concerned' already found in article 2 of the Convention.

On the other hand, article 11 leaves to national law the task to ensure that members of the public have access to a review before a court of law. In order to fully implement the Directive, such an access must turn out: on one hand, adequate and effective; on the other, fair equitable timely and not

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[5] M. HEDEMANN-ROBINSON, *EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1*, EELR 2014, 105.
[6] COM(2003) 624 final, *Commission proposal for a Directive on access to justice in environmental matters*.
[7] COM(2003) 624 final, *Explanatory Memorandum*, § 1.1.
[8] L. KRÄMER, *EU Environmental Law*, London, 2012, 113.
[9] As amended by Directive 2014/52/EU of 16 April 2014 *amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment*.

prohibitively expensive. Moreover, the article at issue extends the scope of the regulatory framework by giving the right to challenge both substantive or procedural legality of decision, acts as well as omissions.

With regard to the legal standing requirements, the Directive gives an alternative. In order to appeal an administrative decision, the claimant may prove to have a sufficient interest or to maintain an impairment of a right. What is considered as sufficient interest or impairment is left to national law.

3. Limits of Legal Standing Requirements.

Locus standi requirements appear to differ conspicuously among national systems, some of them adopts extensive regimes whilst others require more restrictive conditions[10]. In fact, the limited access of the public to challenge decisions which do not concern them directly or individually is a cornerstone of the efficacy of administrative action in public law theory, aimed essentially to avoid a judicial control of executive or judicial choices[11].

In the recent case C-72/12 *Altrip* the Court rules on the extent of discretion imposing limitations to *locus standi* at national level[12].

The dispute concerns an action for annulment brought before a German administrative court by a group of owners and tenants of land against a regional authority's decision approving a project of construction activity. The applicants then claims the EIA as inadequate.

In that regard, the relevant national act of legislation establishes the right to bring action against a decision only in the case of lack of EIA, whilst it does not apply in the case of a mere irregularity in that assessment.

For this reason, the referring court raises the question if a provision in such terms is compatible with the aforementioned article 11, under which the

[10] B. DETTE, *Access to Justice in Environmental Matters: a Fundamental Right*, in M. ONIDA (ed. by), *Europe and the Environment: Legal Essays in Honour of Ludwig Kramer*, Groningen, 2004, 11.
[11] A. S. MATHIESEN, *Public Participation in Decision-making and Access to Justice in EC Case Law: the Case of Certain Plans and Programmes*, EELR 2003, 48.
[12] ECJ 7 November 2013 *Altrip*, C-72/12.

public has a right of action against the substantial or procedural legality of decisions on the matter.

As a consequence of the previous problem is the correct interpretation of the 'impairment of a right' condition. More specifically, the problem is whether that condition implies an *ex post* justification that the decision would have reached a different conclusion without the procedural irregularity.

The ECJ reckons that no restriction at all of the pleas in question may be found in the provision set by article 11 of EIA Directive. What's more, in the opinion of the Court excluding applicability of the mentioned provisions in cases where, having been carried out, an EIA is vitiated by defects would render largely nugatory the provisions of the EIA Directive relating to public participation[13].

In other words, the ECJ clearly states that Member States have wide discretion in shaping conditions for access to judicial review in environmental matters according to their legal systems. However, standing requirements set forth by the EIA Directive, read in the light of the principle of wide access to justice, provide a minimum level of protection of the right to trigger action, below which Member States are not allowed to stray.

Consistent with the same tenet the solution to the second problem given by the Court. That is to say, what exactly constitutes 'impairment of a right' is to be fixed by each national law, according to the general principle of wide access to justice.

Under article 11 Member States are entitled to lay down detailed procedural rules owing to protect effectively the right above.

To that end, the Court gives two considerations. On one hand, since Member States are empowered to implement a right established by EU law, but not precisely defined, two more general principles apply: principle of equivalence and principle of effectiveness. That is to say, national law may grant the same procedural rights as provided for domestic actions and the exercise of those rights may not be impossible or excessively difficult[14]. On the

[13] *Ibidem*, §37.
[14] *Ibidem*, §45.

other, the Court recognizes that the same article 11 gives Member States a significant degree of discretion and it opens to the possibility that some procedural defects may not be considered by national systems as impairment of a right.

In consequence thereof, it could be admissible a rule excluding from the application of the EIA Directive those procedural defects that do not alter the final decision.

By the way, such a rule is theoretically admissible only if and insofar it is for the national court to prove that the final decision would not have been different, given the circumstances of the case. In order to do so, the national court may reach the conclusion in the light of the condition of causality and on the basis of evidence provided by the competent authority or the same developer of the assessed project.

In any case the burden of proof may fall on the claimant. Otherwise that rule would be in breach of the principle of effectiveness as well as the principle of wide access to justice, seeing as it would be excessively difficult for the claimant to safeguard its right.

4. The Special Status of Environmental NGOs.

In the light of the general objectives set by the Århus Convention, NGOs promoting environmental protection appear to play a special role in rendering its provisions effective. The Convention explicitly requires the States to ensure an active and constructive participation of NGOs in the environmental protection process. In particular, the contracting States must ensure that requirements for NGOs to participate in that process are not overly burdensome or politically motivated[15]. In addition, the Parties may set requirements for NGOs under national law consistent with the Convention's

[15] UNECE, *The Aarhus Convention: an implementation guide*, New York and Geneva, 2000, 40.

principle of non discrimination and avoidance of technical and financial barriers on registration[16].

Article 3(4) on general provisions demands each Party to provide for an appropriate recognition and support to organizations promoting environmental protection. According to the Convention's implementation guide, such a recognition and support run throughout the regulatory scheme in question. Articles 2, 5, 6 and 9(2) all together establish a special status for environmental NGOs[17].

Moreover, such provisions are undoubtedly a huge accomplishment for the purpose of facilitating NGOs access to judicial review in environmental matters.

Previously, the ECJ interpreted very strictly standing requirements under article 230 of the EC Treaty (now article 263 TFEU). As well known, art. 263 TFEU entitles the ECJ to review the legality of acts of bodies, offices or agencies of the Union. In order to do so any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, under the conditions laid down in the first and second paragraphs.

In the famous *Greenpeace* case of 1998 the Court claimed the organization not entitled to bring action, just because of the lack of direct and individual interest[18].

The case regarded the consent given by the Spanish authorities to the building of two power stations in the Canary Islands. The project was financed by the European Commission, but it lacked of a proper environmental impact assessment. Greenpeace brought action against the decision before the Spanish Courts, and at the same time before the ECJ for the annulment of the Commission decision on funding.

In the view of the ECJ an environmental NGO is an association formed for the protection of the collective interests of a category of persons

16 *Ibidem*, 41.
17 *Ibidem*, 44.
18 ECJ 2 April 1998 *Greenpeace and Others v Commission*, C-321/95.

and it is therefore not entitled to bring an action for annulment where its members may not do so individually. According to the ECJ thus those NGOs could not be considered directly and individually concerned by a measure affecting the general interest of that category, since they were qualified as mere representative bodies[19].

On the contrary, consistent with the objectives of the Århus Convention, the EIA Directive provides a presumption of interest for environmental NGOs. Precisely, article 11(3) states that NGOs promoting environmental protection and meeting any requirements under national law shall be deemed to have interest. In other words, Member States have no discretion in determining whether an environmental NGO has *locus standi* or not.

In consequence thereof, the new regulatory scheme confers environmental NGOs an autonomous interest to challenge the decisions at issue merely because of its own legal qualification and irrespectively of the individual interest of their members.

Nonetheless, problems may arise when Member States set further requirements in order to qualify an organization as an environmental NGO within the scope of the Directive. As some scholars reckon it, the major criticism of this approach is just the wide margin of discretion Member States ultimately have in providing for broad or narrow recognition of environmental NGOs[20] [21].

The ECJ dealt with this important aspect of the legal standing problem in case C-263/08 *Djurgården*[22].

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[19] *Ibidem*, § 29.
[20] M. HEDEMANN-ROBINSON, *EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 2*, EELR 2014, 153.
[21] For instance, in Italy standing requirements are established by the Environmental code, legislative decree no. 156/2006. In principle, any environmental NGO must seek ministerial recognition, which is granted under the following conditions: (a) it operates at national level or at least in 5 regions, (b) it has democratic internal rules, (c) it pursues objectives of environmental protection, (d) it is continuously active.
[22] ECJ 15 October 2009 *Djurgården*, C-263/08.

The dispute concerned a contract for the construction of a tunnel concluded by the Municipality of Stockholm and an electric company. The NGO took no part in the proceeding, but instead it brought action against the relevant decision given by the Municipality on the basis of an EIA. The claim was to be held inadmissible by the National Court since in breach of a condition established by the Swedish Environmental Act. That is a rule of a minimum of 2000 members for an association to bring an appeal.

As a consequence, the National Court refers two questions to the Court of Justice for a preliminary ruling. Firstly, if participation in the decision-making procedure is condition for access to judicial review. Secondly, if the condition of a minimum number of members is consistent with the principles of the Directive.

With reference to the earlier, the point is if an organization has a right to judicially challenge an administrative decision even in cases where it has previously refused the opportunity to express its views during the environmental impact assessment proceedings.

In that regard, the Court gives a positive response. Participation in the decision-making proceeding is separate from and has different purpose of a legal review. Therefore, it has no effect on the conditions for access. The first seeks development of consent through an administrative decision. The second aims to verify judicially whether the decision adopted at the end of that procedure is legitimate or not.

Otherwise, any contrary interpretation would be in breach of the right of access established by the same article 11.

With reference to the latter, the Court claims that such a condition is in principle legitimate for the purpose of ensuring that an association in fact exists and it is active.

Nevertheless, according to the Court a condition that allows exclusively regional or national organizations to challenge a decision may run counter the objectives of the EIA Directive. The Directive concerns also projects limited in size, which locally based organizations are better placed to deal with.

In the reasoning of the judges the Swedish provision brings two negative consequences. First, large associations entitled to trigger the action may not have an interest in small-scale projects. Second, they would be likely to receive numerous request by local organizations, so that they would have to select those requests on the basis of criteria not subject to review.

However, it is for the national Court to verify if the specific condition aims to nullify the objective of widening the access to justice. In that regard it has to be borne in mind that in case C-240/09 *Lesoochranárske Zoskupenie* the ECJ already stated that it is for the National Court to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9(3) of the Århus convention[23].

On another occasion, case C-115/09 *Arnsberg*, the Court specifies the limits of national procedural law in determining conditions for access of environmental NGOs to judicial review[24].

The dispute regards a preliminary decision issued by the Arnsberg District Administration (North Rhine-Westphalia, Germany) in the context of the environmental impact assessment for construction and operation of a coal-fired power station. A local environmental NGO brings appeal before the regional Administrative Court for the annulment of that decision.

Under the domestic law, the right of action accorded to non-governmental organisations is comparable with that provided for under the general rules of administrative procedural law governing actions for annulment. That is to say, an action challenging an administrative measure may be admissible only if the administrative decision affects the claimant's individual public law rights.

The point is if the aforementioned regulatory scheme precludes national legislations to prevent NGOs promoting environmental protection from relying before the courts, on the infringement of a rule which protects only the interests of the general public and not the interests of individuals.

[23] ECJ 8 March 2011 *Lesoochranárske Zoskupenie*, C-240/09.
[24] ECJ 11 May 2011 *Arnsberg*, C-115/09.

In that regard, the Court held that although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings, such a limitation cannot be applied to environmental protection organisations without disregarding the tenets of the EIA Directive[25]. *Id est*, in the opinion of the Court a domestic legislation providing those organisations with equal rights as individuals is contrary to the objective of giving the public concerned wide access to justice in the light of the principle of effectiveness[26].

Afterwards, the ECJ considers the provision at article 11(3) of direct application. In line with precedent case law, where a Member State has failed to implement the directive into domestic law before the expiring date or it has failed to implement the directive correctly, national courts may apply directly those provisions of a directive who are unconditional and sufficiently precise[27].

5. A More Extensive Application of the EIA Directive.

In the *Boxus and others* case, the Grand Chamber ruled on the scope of the Directive[28].

In this case, appeals against six authorizations concerning installations at the Brussels Airport are pending before the Belgian *Conseil d'État* (High Administrative Court), when the Walloon Parliament validates them by legislative act for «overriding reasons in the general interest»[29]. Hence, the defendants argue that as a legislative act replaces those controversial decisions the referring Court is deprived *ipso facto* of its jurisdiction in favour of the

[25] *Ibidem*, § 45.
[26] In addition, the Court come to the conclusion that «the concept of 'impairment of a right' cannot depend on conditions which only other physical or legal persons can fulfill, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation's operation», ECJ 11 May 2011 *Arnsberg*, C-115/09 § 47.
[27] ECJ 12 February 2009 *Cobelfret*, C-138/07 § 58.
[28] ECJ 18 October 2011 *Boxus and others*, Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09.
[29] Precisely, a decree of the Walloon Parliament. ECJ 18 October 2011 *Boxus and others*, § 11.

Belgian *Cour Consitutionelle* (Constitutional Court), the only judicial body competent to annul legislative acts.

For that reason, the *Conseil d'État* decides to refer concurrently several questions to the *Cour Consitutionelle* about the constitutionality of that decree and to the ECJ about the application of the EIA Directive.

The point here is may exclude the application of the Directive an act of legislation merely 'ratifying' an administrative decision?

In fact, under article 11(3) the public concerned may challenge the substantive or procedural legality of decisions issued by public authorities. It is of utmost importance, thus to correctly understand what should be considered as a public authority within the overall regulatory framework at issue.

Once more, the first step is to look at the tenets of the Århus Convention. Pursuant to article 2(2), the definition of public authority does not include bodies or institutions acting in a judicial or legislative capacity[30]. According to the Convention Implementation Guide, such an exclusion is due to «the fundamentally different character of decision-making either in a legislative capacity, where elected representatives are more directly accountable to the public through the election process, or in a judicial capacity, where tribunals must apply the law impartially and professionally without regard to public opinion»[31].

Consistently, Recital (22) and article 1(4) of the EIA Directive exclude its application to those projects the details of which are adopted by a specific act of national legislation. The *ratio* here appears to be that the information and participation goals of the regulation in question are supposedly achieved through the legislative process.

The Court gives a strict interpretation of those provisions. It claims that a project adopted by a legislative act is excluded from the Directive's

[30] UNECE, *The Aarhus Convention: an implementation guide*, New York and Geneva, 2000, 32, « The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes ».

[31] UNECE, *The Aarhus Convention: an implementation guide*, New York and Geneva, 2000, 34.

ambit only if and insofar the objectives of the Directive are effectively achieved by the legislative process.

More precisely, the ECJ infers two distinct conditions from the mentioned provisions.

Firstly, the project must be adopted by a specific legislative act, under each national constitutional system. By the way, in order to be excluded from the application of the EIA Directive, it must show the same characteristics of a consent given by an ordinary administrative decision: most of all, to grant the right to carry out a determined project.

In addition, such a project must have a sufficient level of detail, so that all the elements of the project likely to have an impact on the environment are taken into consideration. Otherwise, if the legislative act does not include the elements necessary to assess the environmental impact of the project or if the adoption of other measures is needed in order for the developer to proceed with the project, the latter cannot be considered as adopted by legislative act under article 1(4) of the Directive[32].

Secondly, the Directive provides that a project undergoes an environmental impact assessment before consent is given. That assessment requires information held by the project developer as well as other people concerned, in addition to the information gathered by the competent authority. In particular, there is a minimum of information that only the developer itself may provide, such as the description of the project under Annex IV.

Having said that, the Court recognizes that under the regulatory scheme at issue the legislative procedure for the approval of a project could be theoretically split into two different proceedings, considered as a whole. In other words, the EIA Directive does not preclude national legislatures to adopt the final legislative act, on the basis of the information gathered by administrative decision[33].

In the opinion of the Court, the mere existence of such an administrative procedure is not sufficient to contravene the provisions in

[32] ECJ 18 October 2011 *Boxus and others*, § 40.
[33] *Ibidem*, § 44.

analysis. However, « a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process which enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act » for the purpose of the EIA Directive[34].

In conclusion, a mere validation by a legislative act of a previous administrative decision does not prevent the national Court to review it. In any case, it is for the national Court to decide on the subsistence of those conditions.

Besides, it follows from the above a more general duty on Member States. Consistent with their procedural autonomy the Court demand Member States to provide for a review procedure before a Court of law or other impartial body those acts which do not fulfil the aforementioned conditions.

6. Awards of Costs for the Unsuccessful Claimant.

In case C-260/11 *Edwards*, the ECJ rules on the correct application of article 11(4) of EIA Directive. Under that provision, Member States shall ensure that review procedure are «fair, equitable, timely and not prohibitively expensive»[35].

The dispute in the main proceeding regards a decision issued by the English Environmental Agency. Two claimants bring action against an administrative approval of waste incineration activity, based on lack of EIA. Whilst the action is dismissed both on first instance and on appeal, the question of the awards of costs is brought before the Supreme Court and, afterwards, it is referred to the ECJ for a preliminary ruling.

In more general terms, as recalled by the same National Court, in a previous case the ECJ has already held that the mentioned article does not prevent the national courts from making an order for costs[36]. On this basis

[34] *Ibidem*, § 45.
[35] ECJ 11 April 2013 *Edwards*, C-260/11.
[36] *Ibidem* § 25. See ECJ 16 July 2009 *Commission v. Ireland*, C-427/07, § 92 « the procedures … must not be prohibitively expensive. That covers only the costs arising

thus the referring Court raises two subsequent questions: primarily, how national courts should approach the issue of awarding costs to the unsuccessful claimant and, secondarily, if the 'not prohibitively expensive' requirement implies an objective approach or a subjective approach.

In the opinion of the Court the mentioned requirement must be read in accordance with the general principle of wide access to justice and the principle of equality.

The earlier requires that the prohibitive nature of costs is to be intended as a whole, that is to say as covering all the costs effectively borne by the party[37].

The latter expresses the need for a uniform interpretation of the European Union law, so that the assessment is not to be left to national legislations. In fact, consistent with settled case law of the Grand Chamber, each European law provision not expressly referring to national law requires a uniform application within all the European Union territory[38].

In this perspective, the requirement at issue is interpreted seeking a balance between the private interest in pursuing judicial review and the public interest in protecting the environment. The first compels a sustainable financial burden in order not to prevent the subject to defend his right before a court of law. The second, on the opposite, seeks to prevent an abuse of judicial review to the detriment of public environmental protection activity.

Moreover, having regard to the criteria aimed to assess the costs, the Court of Justice adopts an intermediate solution. It leaves to national legislation the primary task to ensure effective judicial review without excessive costs in the field of environmental law, consistent with the already stated principle. By the way, the Court gives a hint of how those criteria should be. It identifies a double criteria for the assessment of costs. On one hand the

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from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement ».

[37] *Ibidem*, § 28.

[38] See ECJ 14 February 2012 *Flachglas Torgau*, C-240/09, § 37 and ECJ 9 September 2003 *Monsanto Agricoltura Italia and Others*, C-236/01, § 72.

assessment should be carried out on the basis of the financial situation of the unsuccessful claimant, on the other it should be carried out on the basis of an objective analysis of the overall cost of the judicial proceeding. Provided that those criteria are met, thus, such costs «neither exceed the financial resources of the person concerned, nor appear, in any event, to be objectively unreasonable».

RECENT DEVELOPMENTS IN STANDING REQUIREMENTS FOR ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Piergiorgio Novaro

CONTENTS: 1. – The Case Referred to the Court. 2. – The Legal Background. 3. – Legal Standing Requirements. 4. – A More Stringent Definition of Impairment of a Right.

1. The Case Referred to the Court.

Case C-72/12 *Altrip* is of the utmost importance for the solution of one of the major problems regarding access to justice against decisions based on environmental impact assessment in the European regulatory framework[1]. More precisely, the Court rules on the extent of discretion Directive 2011/92/EU leaves to Member States in imposing limitations to *locus standi* at national level.

The dispute concerns an action for annulment brought before a German administrative court by a group of owners and tenants of land against a regional authority's decision approving a project of construction activity. The applicants claim the relevant EIA as inadequate for the purpose of authorizing such an activity.

In that regard, German legislation establishes the right to bring action against such a decision only in the case of lack of EIA, whilst it does not apply in the case of a mere irregularity in that assessment. In other words, according to the German law on the matter the public concerned may have interest to challenge those decisions only and insofar there is a complete absence of EIA,

[1] ECJ 7 November 2013 *Altrip*, C-72/12.

while if an assessment has been carried out – no matter if incomplete or irregular – it is not for third parties to bring action before a court of law.

For this reason, the referring court raises the question if a provision in such terms is compatible with the overall European regulatory scheme, under which members of the public have a right of action against the substantial or the procedural legality of decisions on the matter.

2. The Legal Background.

The EU regulatory framework on access to judicial review in environmental matters is grounded on the third pillar of Århus Convention, regarding access to justice[2]. This pillar establishes a set of regulations under the general principle of wide access to justice.

That is clearly recognized by the same Preamble, where it declares the Parties must strive to render effective judicial mechanisms accessible to the public, including organizations.

In this perspective, article 2 gives a broad definition of the public concerned with the environmental protection process as any natural or legal person affected or likely to be affected by, or having an interest to challenge any of those decisions[3].

Moreover, article 9 provides for a general access to a review procedure before a court of law or other independent and impartial body against a large span of administrative decisions relating to information or activities affecting the environment. In that regard, the Convention sets two requirements. On one hand, the decision may be final, that is to say it excludes the possibility of

[2] Convention on access to information, public participation in decision-making and access to justice in environmental matters done at Aarhus, Denmark, on 25 June 1998. It is primarily considered as a regional agreement, because it has been adopted within the United Nations Commission for Europe. Nevertheless, the Convention has been ratified to date by 46 European and Asian Countries plus the European Union.

[3] V. REDENHOFF, *The Aarhus Convention and its implementation for the 'Institutions' of the European Community*, RECIEL 11(3) 2002, 344, «the term the public is not used in the sense of public sphere or forum, but rather as the sum total of all of society's potential actors».

further appeal or the period for lodging an appeal has expired. On the other, such a decision may be binding on public authorities.

At the same time, under article 9(3) each Party shall ensure that, where they meet the criteria, if any, laid down in its national law members of the public have access to administrative or judicial procedures for the purpose of challenging acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. The provision leaves wide discretion on the contracting parties as to set *locus standi* requirements, whereas it does not require the parties to establish a general citizen's right of action or *actio popularis* to enforce environmental law[4].

At European Union level, Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive) is certainly the most advanced implementation of the Århus Convention[5]. It codifies in a single act all previous regulations on environmental impact assessment in the light of the tenets provided by it.

In particular, article 1 reproduces exactly the broad definition of the 'public concerned' already found in article 2 of the Convention.

On the other hand, article 11 leaves to national law the task to ensure that members of the public have access to a review before a court of law. In order to fully implement the Directive, such an access must turn out: on one hand, adequate and effective; on the other, fair equitable timely and not prohibitively expensive. Moreover, the article at issue extends the scope of the regulatory framework by giving the right to challenge both substantive or procedural legality of decision, acts as well as omissions.

With regard to the legal standing requirements, the Directive gives an alternative. In order to appeal an administrative decision, the claimant may prove to have a sufficient interest or to maintain an impairment of a right. What is considered as sufficient interest or impairment is left to national law.

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[4] M. HEDEMANN-ROBINSON, *EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1*, EELR 2014, 105.

[5] As amended by Directive 2014/52/EU of 16 April 2014 *amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.*

3. Legal Standing Requirements.

As previously stated, article 11 of the EIA Directive gives a good degree of discretion to Member States in order to specify legal standing requirements consistently with national regulations on judicial review.

Under those circumstances, *locus standi* requirements appear to differ conspicuously among national systems: some of them adopts extensive regimes whilst others require more restrictive conditions[6]. In fact, limited access of the public to challenge decisions which do not concern them directly or individually is a cornerstone of the efficacy of administrative action in public law theory, aimed essentially to avoid a judicial control of executive or judicial choices[7].

In consequence thereof, it becomes of the utmost importance to correctly balance, on one hand, the traditional public law approach as described above and, on the other, the aforementioned principle of wide access to justice set forth by the EIA Directive.

In the light of the foregoing, the referring court expresses some doubts about the lawfulness of the German provision at issue. That is to say, if a provision limiting the right of action in those circumstances where an EIA has not been carried out correctly transposes the EU provision allowing to challenge the legality of decisions vitiated by procedural irregularities[8].

The solution given by the Court of Justice appears to favour mostly the latter to the detriment of the traditional approach. Actually, the Court gives a very extensive interpretation of the principle of wide access to justice, since it

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[6] B. DETTE, *Access to Justice in Environmental Matters: a Fundamental Right*, in M. ONIDA (ed. by), *Europe and the Environment: Legal Essays in Honour of Ludwig Kramer*, Groningen, 2004, 11.
[7] A. S. MATHIESEN, *Public Participation in Decision-making and Access to Justice in EC Case Law: the Case of Certain Plans and Programmes*, EELR 2003, 48.
[8] ECJ 7 November 2013 *Altrip*, C-72/12, § 19.

reckons that no restriction at all of the pleas in question may be found in the provision set by article 11 of the EIA Directive.

Conversely, in the opinion of the Court excluding applicability of the mentioned provisions in cases where, having been carried out, an EIA is vitiated by defects would render largely nugatory the provisions of the EIA Directive relating to public participation[9].

The position of the Judges on the point seems perfectly in line with the overall *ratio* of the EIA Directive. The provision in question must be read thus in conjunction with the other articles of the directive.

The ultimate objective of the regulatory framework at issue is to promote and to facilitate public participation in the environmental decision-making process as well as, more generally, in the environmental protection process. Having said that, it is quite obvious that a fundamental part of such a process is the possibility for third parties equally interested in the environmental process to challenge before a court of law or other administrative body the legality of decision capable of having a negative impact on that process.

On the contrary, the contested national provision narrows unjustifiably the access to justice. It is hard to understand why the public concerned should be able to challenge a decision took without a previous EIA, but not those decisions based on an EIA supposedly irregular. In this case, it should be considered a decision made on illegitimate evaluations as excluded by any review, so that such an outcome would be clearly in breach of the general principle of public law in the European Union.

In conclusion, the Court of Justice clearly states that Member States have wide discretion in shaping conditions for access to judicial review in environmental matters according to their legal systems. However, standing requirements set forth by the EIA Directive, read in the light of the principle of wide access to justice, provide a minimum level of protection of the right to trigger action, below which Member States are not allowed to stray.

[9] *Ibidem*, §37.

4. A More Stringent Definition of Impairment of a Right.

Following the above, the correct interpretation of the 'impairment of a right' condition becomes central to the solution of the problem at issue.

In particular, article 11(1) of the EIA Directive requires Member States to ensure that members of the public concerned have access to a review procedure before a court of law under the following alternative conditions: (a) having sufficient interest, or (b) maintaining the impairment of a right. Whether those conditions are met is to be established in accordance with the relevant national legal system. As a consequence, under article 11 Member States are entitled to lay down detailed procedural rules owing to ensure an effective access to justice.

As described above, the German procedural rules on environmental matters opts for the condition of impairment of a right subordinate to a more stringent circumstance of absolute lack of environmental impact assessment.

In addition to the previous problem, another question now arises according to the referring court. That is, whether the condition of impairment of a right implies an *ex post* justification that the decision would have reached a different conclusion without the procedural irregularity.

Consistent with the tenet above, the solution to the second problem given by the European Court of Justice. In the Judge's opinion, what exactly constitutes 'impairment of a right' is to be fixed by each national law, according to the general principle of wide access to justice.

To that end, the referred Court gives two considerations.

On one hand, since Member States are empowered to implement a right established by EU law, but not precisely defined, two more general principles apply: principle of equivalence and principle of effectiveness. Under the earlier, national law may grant the same procedural rights as provided for domestic actions, so that in any case a right grant by EU law may have less protection means before a national court of law. Under the latter, Member

States may ensure the exercise of those rights is not impossible or excessively difficult[10].

On the other, the Court recognizes that the same article 11 gives Member States a significant degree of discretion and it opens to the possibility that some procedural defects may not be considered by national systems as an impairment of a right. By this way of reasoning, no provisions in the EIA Directive preclude Member States to admit a rule excluding from the application of the same Directive those procedural defects that do not alter the final decision.

Given that a rule allowing the mentioned *ex post* justification is consistent with the EU regulatory scheme, that conclusion imposes to determine which subject should bear the burden of proof.

In fact, such a rule is theoretically admissible only if and insofar it is for the national court to prove that the final decision would not have been different, given the circumstances of the case. In order to do so, the national court may reach the conclusion in the light of the condition of causality and on the basis of evidence provided by the competent authority or the same developer of the assessed project.

In any case the burden of proof may fall on the claimant. Otherwise that rule would be in breach of the principle of effectiveness as well as the principle of wide access to justice, seeing as it would be excessively difficult for the claimant to safeguard its right.

To sum up, the interpretation given by the Court of Justice of the 'impairment of a right' condition seems to protect adequately the right to challenge an administrative decision before a court of law in the light of the tenets and the provisions, respectively, of the Århus Convention and the EIA Directive. It declares unlawful a national rule that precludes to review the irregularity of an EIA.

At the same time, it is in line with the discretion given to the Member States in order to implement those EU conditions for access in accordance with national procedural rules. In that regard, the Court choice on burden of

[10] *Ibidem*, §45.

proof reflects a highly accurate balance between the need to guarantee that discretion and the effectiveness of the right given to the public concerned.

Civil Procedural Law

THE 2013 STUDY OF THE EUROPEAN COMMISSION ON THE IMPLEMENTATION OF ARTICLES 9.3 AND 9.4 OF THE AARHUS CONVENTION: ACCESS TO JUSTICE AND EFFECTIVE REMEDIES

Bartolomeo Cappellina e Daniela Cavallini[1]

CONTENTS: 1. – Introduction. 2. – Access to justice according to the Aarhus Convention. 3. – Peculiar features of environmental justice. 4. – The role of the judiciary and the debate on specialist judges. 5. – Overview of the existing models and practices of environmental justice: administrative and judicial appeal in environmental matters. 5.1 – Judicial proceedings before civil and criminal courts. 5.2 – Judicial appeal before administrative courts. 5.3 – Judicial review before specialised environmental courts. 6 – Final remarks.

1. Introduction.

The protection of the environment is a dynamic issue which includes various topics like human rights, right to information and public participation, access to justice and effective remedies, international principles like the environmental impact assessment, the polluter-pay principle, etc. The environment itself is an integrated whole, requiring an integrated scheme of regulatory protection. The right to a healthy and quality environment has now its own standing within the «third generation» human rights and this confluence of human rights and environmental law has been reinforced by international conventions, national constitutions and other legal provisions[2].

[1] Paragraphs 1-2-3-4-5.3-6 have been written by Daniela Cavallini; paragraphs 5-5.1-5.2 have been written by Bartolomeo Cappellina.

[2] The "third generation" human rights integrate the «first generation» (civil and political rights) and the "second generation" human rights (social, economic, cultural rights). The 1972 Stockholm declaration of the UN Conference on the human environment states that: «Man has the fundamental right to freedom, equality and

The quality of the environment, moreover, is often seen as in conflict with more traditional socio-economic values, including personal property rights, employment, economic development and growth. Very different sets of values, laws and expectations actually confront in this field and need to find a balance: economic growth should not overwhelm nature conservation but, at the same time, it is needed to support a higher and healthier standard of living around the world[3]. Environmental law has become very complex and it often relies on very complicated and conflicting technical and economical evidence, based on the ability to predict short-term and long-term outcomes.

In the past 30 years the EU and international organizations have adopted many measures to improve the quality of the environment and the quality of life. The regulatory apparatus is now huge, burdensome and sometimes overlapping. Member States, on their turn, are required to properly implement the legislation they have signed up to. Lack of knowledge, of relevant skills and information with regard to environmental regulation is one of the principal causes that hinder effective implementation, development and enforcement of environmental law[4]. So, one of the new challenges is to effectively implement this massive legislation.

Other measures, moreover, can be useful for the protection of the environment. In the EU context, for example, the cooperation between national authorities and the European Commission is facilitated by a «Technical Platform for cooperation on the environment». It aims at bringing together practitioners from local and regional administrations in the EU, experts, stakeholders, EU officials, as well as other interested members. Its work is mainly carried out through meetings[5].

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adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations […]» (Principle 1).

[3] G. PRING - C. PRING, *Specialized environmental courts and tribunals at the confluence of human rights and the environment*, 2009, available at http://www.law.du.edu/documents/ect-study/ORIL-Article-FINAL.pdf (last visited December 2014).

[4] R. MACRORY - M. WOODS, *Modernising environmental justice. Regulation and the role of an environmental tribunal*, University College, London, 2003, 6.

[5] The Technical Platform is a new forum set up by the Committee of the Regions' Commission for Environment, Climate Change and Energy (ENVE) and the

The EU «Network for the implementation and enforcement of environmental law» (IMPEL) is another network of environmental authorities that provides a framework for policy makers, environmental inspectors and enforcement officers to exchange ideas and encourage the development of enforcement structures and best practices[6]. Similar objectives are pursued also by the EU «Forum of judges for the environment», which helps judges to improve their knowledge about environmental law[7]. Environmental matters are dealt with by arbitration and mediation bodies as well. The Permanent court of arbitration, for example, is an intergovernmental organization of over 100 member States. It has developed a "unified forum" for arbitrating environmental and natural resources disputes[8].

The role of national authorities (parliaments, governments, administrative authorities, regional and local bodies) is crucial to ensure effective implementation and enforcement of environmental legislation. It is up to national courts, however, to enforce on a daily basis the rights and obligations deriving from environmental laws. In some countries Constitutional courts may decide on important matters concerning the environment as well.

Being aware of this, the European Commission promoted an important survey in the member States on the implementation of articles 9.3 and 9.4 of the Aarhus Convention (concerning access to justice and effective remedies in environmental matters). The final documents were uploaded in 2013 on the Commission's website and they consist of a summary report and of 28 national

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Directorate-General for the Environment of the European Commission. It was launched on the 5th December 2012 to foster dialogue on local and regional problems and solutions in the application of EU environment law (http://ec.europa.eu/environment/legal/platform_en.htm).

[6] Most of the work within IMPEL is done through projects. Currently it has 47 members from 33 countries including all EU Member States, the former Republic of Macedonia, Turkey, Iceland, Switzerland and Norway (http://impel.eu/).

[7] The Forum was created in Paris on February 28th, 2004, to increase the awareness of judges of the key role of the judicial function in the effectiveness of sustainable development. Its work is carried out through meetings and annual conferences (http://www.eufje.org/).

[8] http://www.pca-cpa.org.

reports provided for by the member States[9]. These documents are important sources to understand how environmental justice is carried out in Europe and which barriers and difficulties may hinder the full implementation of the Aarhus Convention's obligations. The reports, in fact, focus on some crucial aspects regarding the effectiveness of environmental protection like standing requirements (who is entitled to bring a claim to the court to protect the environment?), effective remedies, such as injunctive relief or other forms of inhibition of dangerous activities while the legal action is pending, procedural costs and other potential barriers to effective access to justice. For all these reasons, the 2013 study on the implementation of articles 9.3 and 9.4 of the Aarhus Convention deserves high attention, maximum visibility and broad dissemination beyond Europe, as an important reference tool to discuss and improve access to justice in environmental matters[10].

On the basis of the above mentioned documents, the current paper will provide some examples about the organisation of environmental justice in the EU member States. A few case-studies have been selected to represent the main trends. Conversely, it will deal neither with the substantive regulations and principles on environmental protection, nor with the decision-making procedures of political authorities. Some preliminary remarks will be devoted to the Aarhus Convention and to the debate on courts' specialization.

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[9] http://ec.europa.eu/environment/aarhus/studies.htm. See also the former reports of 2007 (Milieu Ltd, *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Brussels, 2007, available at http://ec.europa.eu/environment/aarhus/studies.htm, last visited December 2014) and of 2012 (J. DARPÖ, *Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in 17 of the Member States of the European Union*, 2012, available at http://www.jandarpo.se/inenglish.asp, last visited December 2014).

[10] Further important studies are available on the matter. See for example the UN report on «Possible initiatives on access to justice in environmental matters and their socio-economic implications», 2013; the Case Law of the Aarhus Convention Compliance Committee 2004-2011; D. SHELTON - A. KISS, *Judicial Handbook on Environmental Law*, United Nations Environment Programme (Unep), Hertfordshire, UK, 2005; Y. EPSTEIN, *Access to justice: remedies*, 2011, available at http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Remedies_ReportYE_100311.pdf (last visited December 2014).

2. Access to Justice According to the Aarhus Convention.

The Aarhus Convention (1998) establishes a number of rights of the public (individuals and associations) with regard to the environment. More precisely, it sets out basic standards on information, public participation in decision-making and access to justice in environmental matters[11]. The parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional or local level) will contribute these rights to become effective.

The Aarhus Convention focuses on three areas ("pillars") concerning: *1)* the right of everyone to receive environmental information that is held by public authorities ("access to environmental information")[12]; *2)* the right of the public to participate in environmental decision-making («public participation in environmental decision-making»)[13]; *3)* the right of the public to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general («access to justice»).

Access to justice is better sketched out in article 9. This article has a twofold meaning: on the one side it guarantees the effectiveness of the first two pillars: if the provisions of the two pillars are breached, access to justice must be provided (article 9.1 and 9.2)[14]. On the other side, it provides for more

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[11] The (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereafter Aarhus Convention) was adopted on June 25th, 1998, in the Danish city of Aarhus. It entered into force on the 30th of October 2001, and on the 17th of February 2005 it was ratified also by the European Commission (http://ec.europa.eu/environment/aarhus/).

[12] This can include information on the state of the environment, on policies or measures taken, on the state of human health and safety where this can be affected by the state of the environment. Additionally, public authorities are obliged to actively disseminate environmental information in their possession.

[13] «Arrangements have to be made by public authorities to enable the public affected and non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, being these comments taken into due account in decision-making and being information provided on the final decisions and the reasons for it».

[14] «Any person who considers that his or her request for information […] has been ignored, wrongfully refused, inadequately answered, or otherwise not dealt with in

general criteria to be set out in national legislation to allow members of the public to access judicial or administrative procedures in environmental matters (article 9.3). Article 9.3 basically upholds the application of national environmental law: in case of violation of such law by private persons or public authorities the members of the public shall have the opportunity to access judicial or administrative procedures[15]. These procedures, moreover, must be fair, equitable and timely; they must offer sufficient and effective remedies, including injunctive relief, and must not imply prohibitive costs; the decisions are given or recorded in writing and are publicly accessible (art. 9.4). These are minimum quality standards to be met in all the procedures and remedies[16]. Finally, the public shall be given information on access to administrative and judicial review procedures and appropriate assistance mechanisms shall be established to remove or reduce barriers to access to justice (article 9.5).

Article 9 basically stresses the role of the public in protecting the environment by guaranteeing, *inter alia*, legal actions in front of national courts. Aarhus ideas, in general, breaks with the traditions of Western Europe societies and the belief in public authorities as being the sole defenders of

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accordance with the provisions of the Convention has access to a review procedure before a court of law or another independent and impartial body established by law (article 9.1). Members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision» (article 9.2).

15 «In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment» (article 9.3).

16 Aarhus Convention, Implementation guide, available at ttp://www.unece.org/env/pp/implementation_guide.html (last visited December 2014).

environmental interests[17]. Increasing attention to participatory elements in international environmental policy and law had already been paid by the 1992 Rio Declaration (United Nations Declaration on Environment and Development), which also guarantees effective access to judicial and administrative proceedings, including redress and remedies (article 10).

In 2003 the European Commission proposed three Directives to implement the three pillars of the Aarhus Convention. While two Directives were adopted as regards access to information and public participation in decision-making (Directives 2003/4/EC and 2003/35/EC), no actions were undertaken to implement the third pillar (access to justice)[18]. Such Directive appeared to be very complicated, due to the variety of the systems in which it should be implemented[19]. Since then the European Court of Justice has started to develop an extensive case-law on access to justice in environmental matters, filling - to some extent - the gap left by EU legislation. National courts have generally embraced this case law, by giving effect to the rulings of the European Court of Justice in domestic cases. The European Commission itself observed that: «the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aaruhs Convention»[20].

Actually, each pillar of the Aarhus Convention provides access to justice rules. The review procedure may concern both the substantive and the procedural legality of a decision, act or omission. It does not exclude the possibility of a preliminary review procedure before an administrative authority, nor does it affect the requirement of exhausting administrative review procedures prior to recourse to courts, where such requirement exists.

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[17] J. DARPÖ, *Justice through Environmental Courts? Lessons Learned from the Swedish Experience*, 2007, available at http://www.jandarpo.se/inenglish.asp, 9-10 (last visited December 2014).

[18] The Directive proposal remained pending, see COM (2003)624 of October 24th, 2003.

[19] M. WIKLUND - J. DARPÖ, *Access to justice in French environmental law*, Vårterminen, 2011, available at http://www.jandarpo.se/upload/Wiklund,%20M_Access%20to%20Justice%20in%20French%20Environmental%20Law.pdf (last visited December 2014).

[20] COM (2012)95 of March 7th, 2012.

Standing requirements (like «sufficient interest» or «impairment of a right») shall be determined by national law, in accordance with the Convention, to give the public concerned «wide access to justice». To this end, the interest of non-governmental organizations promoting environmental protection and meeting any requirements under national law (see article 2, par. 5 of the Convention) shall be deemed sufficient. The Convention finally remains vague in prescribing available remedies and costs[21]. Potential barriers to access to justice may relate to: financial barriers, strict limitation on standing, difficulty in obtaining legal counsel, unclear review procedures, lack of awareness within the review body and weak enforcement of judgements[22].

Reconsideration and administrative review are alternative mechanisms to court review. They can be faster and less expensive (but also less effective). Reconsideration means that the same body goes over the decision once again to ensure its accuracy. Administrative review is generally carried out by a higher administrative body than the one that made the original decision. Usually, after administrative review the applicant still has the opportunity to bring the case to the court. In some countries, moreover, the Ombudsman (a public officer in charge of solving disputes fairly and quickly) works as an independent and impartial review body for violations of administrative law against citizens. Depending on how it is structured within the national appeal system, the Ombudsman may or may not fully meet the criteria under article 9[23].

Access to justice is also regulated by other international provisions. Even though the different provisions are formally independent, they can influence each other, on a general or specific level. Environmental decisions, for example, invariably involve «civil rights and obligations» within the meaning of Article 6 of the European Convention on Human Rights (ECHR). Therefore, somewhere the appeal route has to include a court or another «independent and impartial» tribunal and a «fair trial», which implies the right to request a public hearing before that body. The decision of the court must be

[21] J. EBBESSON (ed.), *Access to justice in environmental matters in the EU*, Kluwer law international, The Hague (The Netherlands), 2002, 13.
[22] Aarhus Convention, Implementation guide.
[23] Aarhus Convention, Implementation guide.

binding, prohibiting the government or other authorities to have it set aside[24]. The EU Directive 2004/35/CE on environmental liability also prescribes that member States shall designate the authority responsible for fulfilling the duties provided for by the Directive (art. 11). Natural or legal persons shall be entitled to submit to the competent authority any observations relating to environmental damage and to request to take actions, on conditions that: *a)* they are affected or are likely to be affected by environmental damage, or *b)* they have a sufficient interest in environmental decision making relating to the damage, or, alternatively, *c)* they allege the impairment of a right, where administrative procedural law of the member State requires this as precondition (art. 12). The above mentioned persons shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under the directive (art. 13).

3. Peculiar Features of Environmental Justice.

The different sets of values, laws and expectations concerning environmental protection mirror in environmental justice, which is usually featured by a high degree of complexity and by the strong impact of judicial decisions on the political, economic and social order.

In particular, environmental justice is usually marked by the *complexity* of the technical/scientific questions involved (such as pathways of exposure to pollution, effects of chemicals on human health, etc.). The nature of the science involved is often characterised by uncertainties and the judge has to rely on very complicated and conflicting technical evidence, based on the ability to predict short term and long term outcomes[25].

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[24] J. DARPÖ, *Justice through Environmental Courts? Lessons Learned from the Swedish Experience*, 2007, available at http://www.jandarpo.se/inenglish.asp (last visited December 2014).

[25] Environmental issues can range from very technically complex issues to more simple issues, such as neighbourhood noise nuisance. R. MACRORY - M. WOODS, *Modernising environmental justice. Regulation and the role of an environmental tribunal*, University College, London, 2003, 18.

Environmental protection is also featured by the *overlapping of possible remedies* (administrative, civil and criminal) as well as interests and values (public and private). Somehow, it is beyond the traditional dichotomy private/public because it often implies collective, diffuse and fragmented interests[26]. Therefore, there can be different appeal routes against decisions/acts/behaviours violating environmental laws and they can address civil, criminal or administrative jurisdictions. Appeals may concern disputes between private parties or between the citizen (an individual or a company) and the State, in the form of central government, local government or a specialised agency. In some cases the pattern can be very complicated, with more than one appellate body involved[27].

The complexity also comes from the *international and European regulatory dimension*. The massive and increasing network of environmental legislation, soft law, international treaties, rulings of international courts led to the emerging of fundamental principles (like the polluter-pays principle, procedural transparency, sustainable development) with which the judges should become familiar[28]. Not all the appeals in the environmental field explicitly raise supranational issues, the competent bodies, however, need to be fully aware of the international dimension and the underlying objectives of international regulation.

Even more than in other matters, the environmental field is characterised by a strong *imbalance of power between actors*[29]. Large organisations with great experience in permit-procedures and trials for damages, vast resources and all kinds of technical, economic and legal expertise can confront with individual litigants or small organizations with little financial resources

[26] J. EBBESSON (ed.), *Access to justice in environmental matters in the EU*, Kluwer law international, The Hague (The Netherlands), 2002, 4.
[27] R. MACRORY - M. WOODS, *Modernising environmental justice. Regulation and the role of an environmental tribunal*, University College, London, 2003, 12-20.
[28] *Ibidem*.
[29] J. DARPÖ, *Justice through Environmental Courts? Lessons Learned from the Swedish Experience*, 2007, available at http://www.jandarpo.se/inenglish.asp (last visited December 2014).

and often little access to legal or scientific advice. The work of non-governmental organisations is still generally based on voluntary effort.

Access to justice is also influenced by environmental decision-making activity and public participation. Usually, the decisions concerning an activity or installation are made in different phases: large activities often comprise several administrative decisions from planning to the actual permit. In the early stage neither the stakeholders nor the concerned interests can be clearly identified[30]. Therefore, the position of the public is «affected by *disintegrated decision-making* and a *multilevel approach*, which sometimes makes it very difficult to file an appeal against an early decision»[31].

Finally, *standing and remedies* (including injunctive relief to avoid irreparable damage while legal action is pending) are crucial aspects of environmental justice.

Standing (i.e. entitlement to file a case) can be very open or very restricted, thus influencing access to justice (it is generally known that «the fish can't go to court»). On the one side, important subjects with a real stake (like the poor, indigenous people, NGOs, etc.) or important public values (such as endanger species, climate change, etc.) should not be excluded. On the other side, frivolous lawsuits should be prevented to safeguard the court's efficiency (the judge, for example, could be given authority to dismiss the case or penalize improper filings[32]). Providing standing for environmental NGOs,

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[30] In Sweden, for example, the Government first decides the permissibility of some larger projects (infra-structures, mines and such) and that decision is binding for the subsequent permit procedure. The Government's decision is taken at such an early stage that stakeholders cannot be identified yet; consequently, they are *de facto* deprived of the power to launch a judicial review on the initial decision. This state of affairs seems to be incompatible with both the ECHR and the Aarhus Convention (J. DARPÖ, *Justice through Environmental Courts? Lessons Learned from the Swedish Experience*, 2007, available at http://www.jandarpo.se/inenglish.asp, 9-10, last visited December 2014).

[31] *Ibidem*. The interests of the public concerned should be included as early as possible in the decision-making activity.

[32] G. PRING - C. PRING, *Greening justice. Creating and improving environmental courts and tribunals*, The Access Initiative (TAI) report, 2009, available at http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf (last visited December 2014), 33.

whose lawyers are familiar with courts and procedures, or providing «*actio popularis*» can increase access to justice, while providing standing only to «concerned parties» may narrow it. Reducing too much the filing of claims can be counter-productive, as it might lead to loss of public confidence and social unrest[33]. Standing, therefore, can be a possible barrier to the public's access to environmental justice. The Aarhus Convention leaves room for national divergences, although within the spirit of the Convention[34]. The attitude of the courts differs from one country to another. In some Member States the courts take a lead position in trying to improve access to justice for the public concerned. In others, the courts give a more conservative interpretation of individual «rights» and have been quite reluctant to widen access to justice «on behalf of the environment».

As far as remedies are concerned, the ultimate objective of any administrative or judicial appeal is to obtain a remedy for a transgression of law. Under the Aarhus Convention, the parties must ensure that the review bodies provide «adequate and effective» remedies, including injunctive relief. Injunctive relief avoids the occurring of irreparable damages before the judicial process has run its course. The procedure should be easily available and speedy[35]. When irreversible damage has already occurred, the remedy often takes the form of criminal sanction or monetary compensation, even though compensation in such cases is often inadequate. When damages may still happen and the violation is continuing, the court (or other body) may issue an order to stop the violation or undertake certain actions, like maintaining the *status quo* or restore the situation to an earlier condition. This remedy is called «injunctive relief» or «interim relief» and it can be crucial in environmental cases to avoid imminent threats to human health and the environment[36].

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[33] *Ibidem*.
[34] Aarhus Convention Implementation Guide.
[35] G. PRING - C. PRING, *Specialized environmental courts and tribunals at the confluence of human rights and the environment*, 2009, available at http://www.law.du.edu/documents/ect-study/ORIL-Article-FINAL.pdf (last visited December 2014).
[36] Aarhus Convention Implementation Guide.

4. The Role of the Judiciary and the Debate on Specialist Judges.

Adjudication in environmental disputes often requires specific skill, competence and expertise about procedural solutions and techniques. In such disputes both the legislation and the technical, natural and scientific issues can be extremely complicated. The system must also be effective: if environmental law, policies and regulations are not implemented the environmental protection is basically vain. Thus, a multilevel approach is necessary: on the one hand, public institutions and agencies, private companies and individuals are primarily responsible for the application of environmental laws. On the other hand, when a violation has occurred, the enforcement of environmental rights ultimately depends on the role of the judiciary. The judiciary is crucial for the interpretation and the enforcement of environmental laws, including the decision on how to balance private and public interests or conflicting public interests. For all these reasons, environmental judges need to be properly equipped with adequate skills and expertise. The creation of specialised courts/court divisions can be very helpful to improve the processing of cases that are very complex and/or require special expertise beyond the law. Specialization can therefore «improve the quality of the decisions both for litigants and the society»[37] and enhance the effectiveness of environmental protection. Judicial specialization generally means that judges have special knowledge and expertise in a particular area of the law which, by its particular nature, requires a special treatment, possibly even separately form the rest of the cases[38].

[37] D. B. ROTTMAN, *Does effective therapeutic jurisprudence require specialized courts (and do specialized courts imply specialist judges?),* 2000, available at http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9Rottman.pdf (last visited December 2014).

[38] H. GRAMCKOW - B. WALSH, *Developing Specialized Court Services. International Experiences and Lessons Learned*, in Justice&development, working paper series, 24/2013, 1; F. CARPI, *Specialization of judges as an efficiency factor in civil justice*, in *Recent trends in economy and efficiency of civil procedure*, Materials of International Conference, Vilnius, 2013, 9.

Specialist judges or specialised courts are common phenomena in EU member States in different fields (tax law, family law, intellectual property law, economic and financial law, competition law, etc.). Depending on the legal and organizational framework, specialisation can be reached either through specialist courts, which are separate from the general organization of the judiciary, or specialist chambers which are part of the general judicial system. Specialist courts or chambers may include lay judges (usually they represent a group of interests, e.g. employers or employees; landlords and tenants, or they have a specific expertise in the concerned matter). Professional judges may also become specialist judges by several means: experience gained as a specialist lawyer before appointment; specialist work performed as a judge; specific training. The decisional levels can be at one, two, or all three stages from trial to the Supreme Court. Actually, the expertise provided by a specialized court is more crucial at the first instance trial, whereas some flexibility should be guaranteed at the appellate level, to avoid that a too narrow group of specialist judges can be in the position to impose their view in a certain field[39].

The benefits of specialization, in a general perspective, are stressed in several studies[40] and they are usually referred to:

- efficiency: specialization can reduce decisional time; it allows the court to adapt to frequent changes in the law; it can reduce the backlog of the ordinary courts; of course, specialization is only possible when the courts and the workload reach a sufficient volume, smaller courts may find it impossible to set up specialist chambers;

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[39] Opinion no. 15 on the specialization of judges, adopted by the Consultative council of European judges (Ccje), 2012.

[40] G. PRING - C. PRING, *Specialized environmental courts and tribunals at the confluence of human rights and the environment*, 2009; D.J. GOELZ, *China's environmental problems: is a specialized court the solution?,* 2009, available at http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/522/18PacRimLPolyJ155.pdf (last visited December 2014); H. GRAMCKOW - B. WALSH, *Developing Specialized Court Services. International Experiences and Lessons Learned*, in Justice&development, working paper series, 24/2013; E. MAK, *Balancing Territoriality and Functionality: Specialization as a Tool for Reforming Jurisdiction in the Netherlands, France and Germany*, *International Journal for Court Administration*, 2008, available at http://www.iaca.ws/files/LWB-Elaine_Mak.pdf (last visited December 2014); Opinion no. 15 on the specialization of judges, 2012.

- expertise: specialization provides more professionalism (legislation is often vague and ambiguous and it is often made of sectorial provisions); it improves the quality of judicial decisions and therefore the courts' authority; expertise is improved by the repetition of cases; continuous education is also necessary;
- uniformity: specialization can increase consistency in the case-law and legal certainty (inconsistency, as we know, usually leads to the proliferation of litigation); it brings coherence to the system, thus enhancing public trust in the courts; it prevents forum-shopping (i.e. parties picking forum they think more likely to give them a favourable judgement);
- access to justice: a specialized court will provide a clearly identified forum for citizens to address their claims; it increases public awareness about environmental rights;
- public confidence and visibility: specialized courts increase public confidence in the government's policies/commitment and in the courts' role by having a visible, transparent, effective, expert decisional body;
- accountability: potential review by independent specialized courts encourages Government agencies or branch (like Ministries/Departments of the Environment) to be fair and transparent in their decision-making; the Government itself can become more accountable when particular conflicts are overseen by independent specialist courts;
- problem-solving approach: judicial specialization and expertise can allow more flexible ways to solve disputes than the traditional process and the strict legalistic adjudication, including ADR, enforcement options, innovative solutions, collaborative planning, etc.;
- clear statistics: comprehensive statistics are possible and easier, if specialized cases are separated from the rest.

Some risks and dangers are also linked to specialization and should be prevented. Specialization, in fact, can lead to excessive isolation of specialist judges from the general body of judges, to fragmentation of law and procedure, to possible pressure on specialist judges. Specialist judges may be seen as an élite group of judges and they can be exposed to pressure from

parties, interested groups or State powers. Special interests can more easily influence and control a small court than the general court system. Moreover, the impression of an excessive proximity among judges, lawyers and prosecutors, all of them specializing in the same field, can undermine the image of judicial independence and impartiality. This can increase also the risk of corruption [41] . Specialized courts may also require extra costs (due to voluminous files, length of trials and judgements, the need of staff, space, and training) and cause public confusion if their competence is not clear enough or is too fragmented.

Another important question concerns the *status* of specialist judges and their position in the judicial system. Specialized courts, like all judges, shall meet the requirements of international conventions, like judicial independence and impartiality, due process, right to a fair hearing and to a final decision within reasonable time. Independence is mainly fostered by an unbiased judicial selection process, the protection of judges from political pressure or punitive consequences for their decisions and the institutional separation from the agency whose decisions are being reviewed. Specialized judges should benefit from adequate human, organizational and material resources to perform their work, without detriment to other courts, and they should be entitled to change court or specialization during their career, or even to move from specialist to generalist duties (or vice-versa)[42]. The principle of equal *status* for generalist and specialist judges should apply also to salary. Conversely, the creation of different judicial bodies (with separate budgets) according to a particular specialization could result in different judges being subject to different rules in different organisations. Separate hierarchies may complicate judicial administration and access to justice[43].

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[41] H. GRAMCKOW - B. WALSH, *Developing Specialized Court Services. International Experiences and Lessons Learned*, in Justice&development, working paper series, 24/2013, 8.

[42] Where the expected caseload for specialist courts is small in comparison to other courts, resources and technologies can be developed and used collectively by several specialist courts or by all courts, Opinion no. 15 on the specialization of judges (2012).

[43] Opinion no. 15 on the specialization of judges (2012).

As far as environmental justice is concerned, in most European countries environmental cases fall within the competence of administrative courts (see par. 5). The institution of administrative courts is a form of specialization that can be well represented by the German court system, which includes five separate specialized jurisdictions (civil and criminal, administrative, financial, labour and social) each having its own hierarchy of appeal courts. Administrative courts, however, usually are competent for a large number of cases ranging from public contracts to environmental cases and the latter are often handled in the same way as all the other «administrative cases». In Italy, for example, the specialization of judges in the environmental field is quite new and it is mainly achieved on a personal basis, meaning that it often comes either from the personal experience gained in the daily work as a judge, or from specific training in environmental matters (if any and if the judge is willing to participate), or from personal interest in environmental protection. This means that some judges may have environmental specialist knowledge, while others do not, thus being the specialization of the judge «a matter of chance». Specialization is also improved by the use of experts/technicians who are appointed by the courts or the parties. As *peritus peritorum* (i.e. the expert among the experts) the judge is responsible for the final decision but sometimes, due to the complexity of the evaluation, the judgment seems to be too much dependent on the expert's opinion. A stronger form of specialization can be found in those countries where autonomous environmental courts exist. An interesting example is offered by Sweden (see par. 5.3).

5. Overview of the Existing Models and Practices of Environmental Justice: Administrative and Judicial Appeal in Environmental Matters.

In the following paragraphs, the analysis will focus on the different procedures in environmental matters that characterize the European countries. Considering the difficulties that an in-depth analysis of each country would represent, we decided to outline three procedural models that acceptably

resume the various existing proceedings in the European scenario. In order to describe more broadly the principal aspects and features that characterize each model, the description of a case study for each of them will be envisaged.

First, a common trait that involve almost all European countries in terms of procedures in environmental matters exists[44]. While the way in which judicial proceedings start varies between countries, all European citizens dispose of a national authority towards which they can report the actions or decisions supposedly endangering the environment, without much difference in the prerequisites and procedures involved. Notably, this authority belongs to the administration. Therefore, the first way to challenge a decision of an administrative authority (*i.e.*, central authorities, local authorities, public officers and establishments, privates exerting a public authority's prerogatives) is to resort that decision to the hierarchical superior to the one that issued the decision or to an administrative authority responsible for the supervision of administrative decisions in environmental matters, if any. This form of appeal – in some countries called hierarchical and non-contentious appeal in order to distinguish it from the typically contentious judicial proceedings – permits to a citizen believing that his/her right or legitimate interest have been wronged by an administrative decision to challenge that decision to a superior authority in the administration[45]. The number and type of administrative bodies entitled to receive appeals vary among countries, but normally they involve from one to

[44] The current analysis is mainly based on the information and data provided for by the studies: Milieu Ltd., *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Brussels, 2007 and J. DARPÖ, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, 2013, available at http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf (last visited December 2014).

[45] Milieu Ltd., *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Brussels, 2007, 5. Some countries are provided with administrative authorities specialized in the domain of environmental protection and natural resources administration such as the Environmental Appeal Board and the Nature Appeal Board in Denmark, or, in the disputes concerning administrative acts and omissions, the Administrative Dispute Commissions in Lithuania. However, the majority of countries simply refers to the hierarchical superior to the authority that issued the non-definitive decision as the responsible body for receiving appeals.

three authorities constituted on a local, provincial/regional and national basis, specialized in matters such as planning, waste management, water and air disposal, and environmental protection.

Moreover, in some countries[46], an appeal to administrative bodies is necessary before involving judicial authorities on the contested decision. Finally, in general terms, the administrative procedures in environmental matters do not differ from the general ones in other administrative subjects. For example, when challenging not acts, but omissions of the administration, an implicit or explicit refusal to act of the administrative body concerned need to be evident before resorting to the superior administrative bodies or to courts[47].

Besides the administrative appeal, another alternative route exists in some countries. The figure of the Ombudsman, while common to all countries, has very different functions depending on the country analysed. In some EU Member States (Austria, Finland, Greece, Hungary, Poland, Romania, Spain and Sweden), the Ombudsman offers an alternative way to appeal the decisions of administrative authorities. Following the forefather Swedish model, «a complaint to the Parliamentary Ombudsmen can be made by anybody who feels that he or she or someone else has been treated wrongly or unjustly by a public authority or an official employed by the civil service or local government»[48]. Generally speaking, the Ombudsman has the capacity to conduct investigations and express leading opinions and recommendations to the administrative authority or public official under investigation, that anyway do not qualify it as an effective remedy according to Article 9.4 of the Aarhus Convention[49]. In most European countries, in fact, the Ombudsman has the

[46] Austria, Czech Republic, Finland, Germany, Latvia, Poland and Slovakia.
[47] Milieu Ltd., *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Brussels, 2007, 5.
[48] Source: site of the Swedish Parliamentary Ombudsmen, http://www.jo.se/en/How-to-complain/.
[49] J. DARPÖ, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, 2013, available at http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf (last visited December 2014), 22.

power to issue non-legally binding opinions to the administration. Only in limited cases, the Ombudsman can initiate legal proceeding in either civil, criminal or administrative courts for misuse of power or misadministration and therefore, it may effectively challenge the decisions of administrative bodies in environmental matters.

Finally, the third way of contesting a decision in environmental matters is judicial appeal/review. The challenges before court can involve four possible jurisdictions depending on the institutional architecture of the judicial system in the country, and on the type of violation brought to the court. The four types of jurisdictions are: the civil and criminal courts (that we will treat together in the forthcoming paragraph); the administrative courts, where the majority of cases relapses [50], and finally, the specialized jurisdiction in environmental matters, normally a branch either of the administrative or the civil judiciary, with few examples in the European scenario.

As stated at the beginning, we will illustrate the main appeal routes in environmental matters relating each of them to a case study that well represents the main stages of the proceeding. For the civil and criminal proceedings, we will take into consideration the case of Ireland[51] and Spain. Ireland is an example of the common law model, where administrative cases are dealt with in ordinary courts. Spain is traditionally part of the civil law family and, therefore, it is characterised by the separation between civil and administrative jurisdictions. Yet, while being environmental matters essentially treated in the administrative jurisdiction, the criminal action seems to be more significant than in the European civil law homologues. In fact, the European countries normally provide for criminal prosecution only for very serious

[50] In this matter too, the traditional split between civil law and common law countries directly influences the possibility of finding or not an administrative jurisdiction in the country.

[51] The UK would have proved a better case, but consequently to the introduction of an Administrative Court in 2000, most cases related to environmental issues now follow the path of the administrative specialized jurisdiction. This introduction partially answered the shared belief: «private civil law remedies are not an adequate form of resolving environmental disputes» (P. STOOKES, *Civil law aspects of environmental justice*, Environmental Law Foundation, London, 2003).

violations of the law, while Spain presents a slightly expanded number of crimes related to the protection of the environment. Secondly, with regard to administrative courts, France, the ancestor of the civil law model, will be the focus of the analysis. Finally, we will overview the specific characteristics of the Swedish environmental court system as an example of a specialized jurisdiction in environmental matters.

5.1. Judicial Proceedings Before Civil and Criminal Courts.

The treatment of environmental cases in civil and criminal courts is common to almost all European countries when the violation concerns civil obligations (*e.g.*, a litigation on noise pollution between neighbours) or constitutes a crime (such as environmental disaster or voluntary water contamination). However, in a reduced number of European countries – the common law countries[52] and a bunch of other limited exceptions like Spain – the role of civil and criminal courts as responsible for adjudicating on environmental law breaks is more important than elsewhere. Notably, in common law legal tradition there is no separation between civil and administrative jurisdiction. Consequently, in common law countries all the cases that civil law countries allocate to administrative courts tend to relapse on the ordinary ones, which cover both civil and criminal jurisdictions. Thus, environmental cases are mainly adjudicated by ordinary courts.

Ireland[53], after adopting an act imposing that judges should take notice of the Aarhus Convention when deciding cases involving the environment[54],

[52] The European countries traditionally linked to common law tradition are UK, Ireland and Malta. However, following the institution of an administrative court in England and Wales in 2000, the UK has partially departed from its traditional model.

[53] Most of the information comes from the Ireland's national report elaborated by the cited Milieu Ltd. in 2007, afterwards updated by prof. Ryall in 2012, and from the website of the Citizens Information Board, a public service information agency of the Irish administration: http://www.citizensinformation.ie/en/environment/environmental_law/judicial_review_in_planning_and_environmental_matters.html (last visited December 2014).

gave effect to some of the Aarhus Convention provisions through the Environment Act (2011), and finally, ratified the Convention in 2012 reaching all other EU Member States. The Irish environmental law framework provides many different legal procedures to access the justice system. Most of them are in regulatory codes that set the different means through which legal persons (including NGOs) can challenge an act that is esteemed to break environmental law[55]. The regulatory codes are composed of acts issued by various authorities, both at local and national level, in different sectors such as planning and development (2000), waste management (1996), IPPC licence (1992), water (1977) and air pollution (1987). They also provide for the institution of an Environment Protection Agency (1992). The Protection of the Environment Act of 2003 and the Environment Act of 2011 amended and harmonised all these acts and contextually introduced Aarhus provisions in the Irish law framework. Moreover, some decisions of the courts concerning their application have further clarified the ways of access to environmental justice.

Local authorities - like planning, waste and water authorities - are granted responsibilities both for decision-making and enforcement. Besides them, there are two national administrative bodies. The first one (the Environmental Protection Agency) oversights local authorities and it is the competent authority in environmental liability matters; moreover, it is responsible for overall policies concerning the environment like IPPC; waste; waste water discharges; GMOs; emissions trading, volatile organic compounds; and dumping at sea. The second one (An Board Pleanála) is the appellate body for the decisions concerning planning activities and represents the only administrative appeal route available in the Irish legal framework. The decisions of the planning board can be appealed by way of judicial review[56].

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[54] M. VELICOGNA, *Electronic access to justice: from theory to practice and back*, in *Droit et cultures*, 2011, vol. 61, n. 1, Dossier: Technologies, Droit et Justice.

[55] Milieu IE, *Measures on access to justice in environmental matters* – Country report for Ireland, Brussels, 2007, 9.

[56] As a general rule, when an administrative appeal is specifically provided for by the legislation (so, for example, a right of appeal to An Board Pleanála), it must be exhausted before going to courts.

In Ireland, there are no specialist administrative courts or environmental courts. The structure of the court system presents a first level of Circuit and District Courts that have local and limited jurisdiction. On a second stage, there is a High Court working both as national first instance court of general jurisdiction and appellate court for the judgements taken at the local level. At the top of the system, there is a Supreme Court as court of final appeal. A parallel structure exists in criminal matters. The Court of Criminal Appeal hears claims in criminal matters from the Circuit Courts and the High Courts. The appeal varies widely depending on the case: in some situations it is on point of law only, in other situations, it can allow for a full re-hearing on the merits. In some others, finally, both avenues are open[57].

Cases involving environmental matters are managed by ordinary (civil or criminal) courts. The decision to admit a complaint is taken on a case-by-case basis by the relative court. Any party of the proceeding who disagrees with any aspect of the judge's decision can lodge an appeal to the superior court. Finally, the Supreme Court can be resorted only on point of law, after either the authorization by the High Court or the leave granted by the Supreme Court itself. The local courts' judgements can be appealed to the High Court on the merits, with a right to a full re-hearing.

The challenges to the decisions (or omissions) by public authorities can be presented to local courts or directly to the High Court by individuals or associations. The High Court reviews the legality of the contested decision and not the substance of it, as it is not entitled to interfere with administrative decisions (for example on the grounds that it would have raised different conclusions from the facts). The substance of a planning or environmental decision may be challenged only "indirectly", if the decision is deemed "unreasonable or irrational". It is rare, however, for the Court to annul a decision on the grounds of "unreasonableness or irrationality" (these criteria have been interpreted narrowly by the Court). The admissibility of the challenges is subject to some principles that relate to the verification of the

[57] Milieu IE, *Measures on access to justice in environmental matters* – Country report for Ireland, Brussels, 2007, 14-15.

lawfulness in the decision-making process and/or to the demonstration of a sufficient interest (in practice, liberally interpreted as a wide interest for the public). If they abide with some pre-requisites, NGOs could even stand before court without demonstrating a sufficient interest[58]. The High Court may then quash the decision (*certiorari*), or even order the decision-maker, who was obliged to make a decision but has failed or refused to do so, to actually take specific steps (*mandamus*). Finally, an order of prohibition to take specific steps may also be granted in appropriate circumstances. Other possible judgements include recommendations, injunctions or an award of damages, when such instruments may apply to the case.

The costs of the legal procedures are not fixed and they depend on the type of procedure required and on the costs of solicitors and barristers (they notably have different fees)[59]. As a general rule, each party bears its own costs. However, in particular situations, some costs may be charged on the applicant or on the defendant where the court considers doing so. Moreover, Ireland has gradually introduced a number of statutory provisions to satisfy the obligation arising under the Aarhus Convention and EU environmental law concerning affordable legal costs. Despite these efforts, some potential barriers to access to justice remain in consideration of the very limited extent to which legal aid is guaranteed (a "merits test" is also prescribed: notably, the applicant must have reasonable ground to proceed and good probability of success)[60].

In conclusion, Ireland does not provide any special way of access to justice that separates environmental matters from other administrative, civil or criminal issues. However, it recognises a broad legal standing right, opening it to NGOs and other legal persons without any limit, but the capacity to support the costs of the procedure and to demonstrate a sufficient interest. The environmental cases follow the common path of ordinary proceedings and

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[58] A. RYALL, *Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in 17 of the Member States of the European Union*, Ireland, 2012, 24-25.
[59] For example, obtaining an injunction relief of a decision could require the deposit of a significant sum as caution for the subject affected by the suspension.
[60] A. RYALL, *Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in 17 of the Member States of the European Union*, Ireland, 2012, 34-39.

they dispose of two possible appeals: to the High Court and, on point of law, to the Supreme Court. However, Ireland has only recently ratified the Aarhus Convention. The interpretation of the new rules by the courts and some new legislation will probably modify this picture towards a more thorough implementation of Article 9(3) and 9(4) of the Aarhus Convention.

As far as Spain is concerned, the right to «enjoy an environment suitable for the development of the person, as well as the duty to preserve it» is written in article 45 of the Spanish Constitution and obliges public authorities to commit towards a rational use of natural resources for the protection and improvement of the quality of life. The constitutional provision relies first on collective solidarity, and then on criminal or, where applicable, administrative sanctions as instruments to enforce this right or punish its violation. Notwithstanding, the Constitutional Court has excluded the right to enjoy a healthy environment from the subjective rights, in consideration of its position in the Constitution among the «guiding principles of policy» and not in the part concerning the fundamental rights[61]. Therefore, its violation cannot give rise to the special procedure (*amparo*) that permits to resort the Constitutional Court in presence of a breach of a constitutionally recognised fundamental right. On the contrary, the right to a healthy environment has been recognized as a «legitimate interest» of the citizen and, therefore, it grants the right of standing to every single person whose interest has been damaged. It also compels the decision-makers and the administration to take it into account in their decisions.

The scope of environmental law has been established by article 18 of the Law 27/2006, concerning the implementation of the Aarhus Convention in Spain. This article not only explicitly indicates the areas of interest of environmental law[62], but it also establishes the specific standing rules for

[61] A. M. MORENO MOLINA, *Study on aspects of access to justice in relation to EU environmental law – the situation in Spain*, 2012, 2, available at http://ec.europa.eu/environment/aarhus/studies.htm (last visited December 2014).
[62] Respectively: (a) water protection; (b) noise protection; (c) soil protection; (d) atmospheric pollution; (e) town and county planning and land use; (f) nature conservation and biological diversity; (g) mountains and forest management; (h) waste management; (i) chemicals including biocides and pesticides; (j) biotechnology; (k)

environmental associations to facilitate access to justice, for both administrative appeal and judicial review[63]. The law recognises that associations meeting certain criteria can challenge actions and omissions by public authorities even without showing an interest or the violation of a right, and they can benefit from legal aid if they fulfil the conditions for it. Moreover, in some specific matters[64], legislation has included the instrument of *actio popularis*, permitting to a single legal person to address the court in the interest of public order.

The administrative appeal established in Spanish regulations provides those typical instruments already outlined in the paragraphs above and, in particular, appeal before the hierarchical superior authority. If no hierarchical superior authority exists, the appeal can be presented to the same authority that issued the decision. In any case, the possibilities of administrative appeal must be exhausted before going to court. Therefore, administrative appeal and judicial review cannot be employed concurrently, the former must always precede the latter.

The Spanish court system has a very complicated structure. At the top is located a Supreme Court with jurisdiction over the whole country and organised in five chambers (civil, criminal, administrative, social and military). Other two courts are constituted on a national basis – the Central Court (first instance) and the National Audience (appellate court) – for matters of national relevance such as smuggling and terrorism, and for violations committed by central administration. A similar system of courts is constituted at regional level in each *Comunidad Autonoma* (there are 17 Autonomous Communities). Every CA presents at the bottom a number of local audiences (civil and criminal) and courts (with specialized divisions in administrative, commercial, family, gender,

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other emission, discharges and releases in the environment; (l) environmental impact assessment; (m) access to information, public participation in decision-making and access to justice in environmental matters; (n) any other area established by the legislation (Milieu, 2007).

[63] Milieu ES, *Measures on access to justice in environmental matters* – Country report for Spain, Brussels, 2007, 1.

[64] Land use planning act, Coastal waters act and Law for the protection of Flora and Fauna in national parks.

juvenile and social matters). At the top, there is a Superior Court of Justice as appellate court for violations committed in the territory of the CA.

The institutional structure provides three ways of access to courts in environmental matters that reflect the traditional organisation of civil law countries: appeal to ordinary courts – administrative or civil divisions – and criminal prosecution. Particular attention is devoted to criminal prosecution and to judicial review before the administrative divisions.

In Spain a criminal procedure can be initiated not only for violations committed by privates or public officers, but also in relation to other violations that in most European countries are considered misdemeanours. In particular, three articles of the Criminal Code (Art. 320, 322 and 329) provide for a criminal liability of the administration for misuse of power in matter of land-use planning, national heritages and licences for polluting activities. This misuse of power must result in concessions granted despite manifestly illegal situations or in the omission to report a violation of the provisions regulating these activities[65]. The path in criminal courts depends on the level at which the crime has been committed. When an individual or a local authority is involved in a supposed criminal offence, the proceeding will follow the regional route from local audiences to the Superior Court of Justice and eventually the Supreme Court in their criminal branches. On the contrary, when national administration is implicated, the first instance competent court is the National Audience. A possible appeal to the Supreme Court is then available.

Access to administrative courts (*rectius* administrative divisions within the ordinary courts) is granted to those «legal and natural persons claiming to have a right or a legitimate interest» which results adversely affected by the administrative decision, or the lack of it (general rule on standing). Legal standing is open to legal persons that can prove the violation of an interest covered by the objective of the association, which clearly may include NGOs acting in the protection of the environment. It also comprises *actio popularis*, which frees the recurrent from the burden of proving the violation of an

[65] Milieu ES, *Measures on access to justice in environmental matters* – Country report for Spain, Brussels, 2007, 22.

interest[66]. Even if judicial control is limited to the "legality" of the administrative action, the powers of the judges are large. In fact, they can not only annul the administrative decision, but also: recognize an individual situation or right; order the agency to do or to cease doing something; order the agency to compensate the applicant for the damages suffered.

As stated before, access to courts in environmental matters seems to meet the provisions established by the Aarhus Convention. However, counterbalancing barriers exist as to the costs connected with the procedure, especially in the case in which an interim relief is demanded[67]. Likewise, an important barrier is the unbearable length of judicial procedures – a common problem to the whole Spanish judicial system – which indirectly makes access to court for minor cases (i.e. disputes where economic or value interests are not extremely relevant) not convenient. Additionally, direct access to criminal courts is banned for individuals and NGOs, who may only intervene at the preliminary stages, by way of reporting the criminal breaches to the public prosecutor´s office, that will then represent the public or offended interests in the proceeding[68].

Spain provides a reinforced protection of the right to a healthy environment allowing applicants to complain against various illegal acts or

[66] After Law 27/2006, an «*actio popularis*» has been established in favour of «non-profit, legal persons» as long as they meet certain requirements: (a) two years of activity, prior to the judicial challenge; (b) they have environmental protection as their founding goal; (c) their activity takes place within in a geographical area, which coincides with the territory where the contested decision has been taken. However, if an NGO does not meet such criteria, it may still invoke the general standing grounds established in the 1998 General law on Administrative Justice (A.M. MORENO MOLINA, *Study on aspects of access to justice in relation to EU environmental law – the situation in Spain*, 2012, 13-15).

[67] *Ibidem*. The injunction relief instrument exists in Spanish administrative law. The claimant must convince the judge that, if the project is not stopped, or the license not suspended, the environment will suffer a serious and irreversible damage. The courts, on the other hand, have to make a balance between the possible public costs and the benefits of issuing a motion to stop or suspend a project or plan, before eventually granting it. Moreover, in case of potential damages coming from the injunction the court may impose on the plaintiff a warranty for the potential damage.

[68] A. M. MORENO MOLINA, *Study on aspects of access to justice in relation to EU environmental law – the situation in Spain*, 2012, 10-18.

omissions committed by the administration before the prosecutor's office. However, data show that, even if prosecutors specialized in environmental protection have been established in many areas, nowadays the number of cases that reaches criminal courts is very limited[69]. Anyway, this factual data do not change the general framework that, matching broad standing rights (*actio popularis for* NGOs, legal aid) and multiple appeal routes established by law, configures the Spanish system as one with the most extensive environmental protection through law and courts among EU countries. Removing the structural limits towards a timely and effective judicial system represents the main challenge to further improve access to justice in environmental matters.

5.2. Judicial Appeal Before Administrative Courts.

In most European countries environmental cases fall within the competence of administrative courts. A strict regulation of environmental matters by the State implies that most acts that can be dangerous for the environment involve in some ways the powers of the public administration. The validity of a decision/act by a public authority can be reviewed before the administrative courts, which usually deal with disputes between private parties and public authorities. The country we have selected to represent this model is France.

While environmental issues have crossed the threshold of codes and laws only in relatively recent times, the institutionalization of specialized administrative courts is deep-rooted in European civil law countries and saw its debut in the French post-revolutionary judicial organisation, spreading afterwards all over Europe in the Napoleonic era. Nowadays, most of the acts concerning the environment are by law subject to approval or control of the administration and therefore, the review of these acts is conferred to administrative courts.

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[69] A. M. MORENO MOLINA, *Study on aspects of access to justice in relation to EU environmental law – the situation in Spain*, 2012, 5.

In France, the most important reference in the topic is the Charter for the Environment attached to the French Constitution in 2005. This Charter establishes the duty for each citizen to participate in the preservation of the environment. The Charter abides also by two of the three pillars of the Aarhus Convention (access to information and public participation), but omits to discipline access to justice in environmental matters. Besides the Charter, all the provisions connected with the preservation and the protection of the environment are collected in the Environmental Code. In most cases, the law applicable to environmental justice is the general procedural law in administrative matters, which can be found in the Code of Administrative Justice. Other laws of general application concern the citizens' rights and legal aid. They are completed by procedural provisions included in environmental acts, such as Law 95/101 (Title IV, on the associations for environmental protection), Law 76/663 on facilities, Law 76/629 on nature protection and Law 83/630 on public investigation and protection of the environment. Other Codes, such as the Code for Urbanism, the Code for Forestry or the General Code for Territorial Communities, include provisions relevant for the protection of the environment as well. Finally, case law is an important source regarding access to justice in environmental matters either[70].

As almost all the EU Member States, France has both an administrative and a judicial way of appeal against administrative decisions concerning the environment. Decisions taken by the administration can be challenged in first instance to the same authority that held the decision (*recours gracieux*) or to the hierarchical superior to that authority (*recours hiérarchique*). The latter can be lodged directly after the contested decision or following the non-contentious appeal. In cases related to the environment, no preliminary filing of an administrative appeal is demanded before recurring to court. However, the law and regulation increasingly requires the preliminary filing of an administrative appeal (so called "obligatory prior administrative appeal") in order to stop the explosive growth of litigation. The French administrative framework regarding

[70] Milieu FR, *Measures on access to justice in environmental matters* – Country report for France, Brussels, 2007, 13 and ff.

environmental matters has four levels of government (national, regional, provincial, municipal). At the top, at national level, there is the Ministry of Ecology, Sustainable Development and Land Use Planning (MEDAD), which is responsible for policies regarding water, nature, air and waste. In this context, it supervises two decentralised regional directorates: the DRIRE (24 *Directions Régional de l'Industrie, de la Recherche et de l'Environnement*), which is competent for classified facilities, air pollution, waste and major industrial risks, and the DIREN (26 *Directions Régional de l'Environnement*), responsible for the enforcement of laws relating to nature, natural sites and landscapes. The MEDAD supervises other central authorities such as water agencies, national parks, the National institute of Industrial Environment and Risk, and, in partnership with other Ministries, the National Hunting and Wildlife Office and the Agency for Environment and Energy Management. The third level of implementation of national policies is the *département* (county), where a number of local ministry agencies operate under control of the departmental Prefect. Finally, the Mayor and the municipality are responsible with some general police and policy powers over water supplies, waste management and pollution, as well as for local zoning plans and building permits. Thus, an appeal against a decision taken by an administrative authority follows the same line of hierarchy from the bottom to the top of the French administration, depending on the level at which the contested decision has been issued. The right of appeal against an administrative decision is open to all parties having an interest in challenging the decision. The interest is defined by the rights, obligations and duties created by the decision. This can include any person, natural or legal, including associations and NGOs, with the only limit that they can prove a direct interest.

Besides administrative appeal, acts and omissions of public authorities in the exercise of their public mission can be challenged, directly or following administrative appeal, before administrative courts[71].

The structure of the French judicial system presents two branches (and various specialized jurisdictions): the ordinary courts, with civil and criminal

[71] *Ibidem.*

competence, and the administrative courts[72]. The ordinary courts are composed of three courts of first instance (civil jurisdiction): the proximity judge (*Juge de proximité*), the Court of Instance (*Tribunal d'Instance*), the Court of Great Instance (*Tribunal de Grande Instance*), depending on the type and value of the case. In the criminal jurisdiction, the first instance courts are: the Police courts (*Tribunal de Police*), the Correctional courts (*Cour Correctionnelle*) and the Assize Courts, depending on the gravity of the offence committed. Both systems refer then to an Appeal Court (*Cour d'Appel*) with chambers specialised in civil and criminal jurisdiction. Then, the final appeal is provided by the Supreme Court (*Cour de Cassation*), but only on point of law. The administrative courts are organised on three levels with Administrative Tribunals at the bottom, an Administrative Court of Appeal (*Cour Administrative d'Appel*) at the intermediate level, and a Supreme Court for final appeals (*Conseil d'Etat*) at the top. The *Conseil d'Etat* judges on point of law on the appeals against decisions from lower courts and on merits, as court of unique instance, for contestation related to acts issued by the most important public authorities (*e.g.* presidential or prime ministerial decrees).

As said before, the majority of environmental cases follows the path of judicial review before administrative courts. The procedure is written and inquisitorial (*i.e.* led by the judge), and contradictory (*i.e.*, based on a dialogue between the parties)[73]. Four types of actions are available: illegality proceedings, full review, interpretation proceedings and repression proceedings. In environmental matters the most important are the illegality proceeding – the judge can annul the decision for illegality and, in some cases but not sistematically, compel the authority to issue a new decision – and the full review, in which the judge can annul the decision, but also pronounce on damages and even rewrite the act if he/she estimates so. Each proceedings has

[72] Other minor specialised courts exist in the civil order. For completion, they are: the *Conseil des Prud'hommes* (for labour cases), the *Tribunal des Affaires de Sécurité Sociale* (for social security matters), the *Tribunal de Commerce* (for trade issues) and the *Tribunal Paritaire des Baux ruraux* (for land tenure issues). Source: https://www.justice.gouv.fr

[73] Milieu FR, *Measures on access to justice in environmental matters* – Country report for France, Brussels, 2007, 24.

its own principles and standing rules. For the illegality one, every natural or legal person can be admitted on two conditions. First, the contested decision should be an administrative act that can possibly damage the claimant's material or moral interests. Secondly, the interest of the claimant has to be proved personal and pertinent (i.e. sufficient for the annulment of the decision; if the decision is individual, the person to whom the decision is addressed is automatically granted legal standing)[74]. Generally speaking, the case law shows that the interpretation of these principles is quite broad and the admission of appeals for the protection of collective interests is permitted too[75]. The full review proceeding is linked by the Environmental code to classified facilities, *i.e.*, authorisations and refusals of permits, specific prescriptions, administrative sanctions and similar acts. Both the person who asked for the authorisation, the user of the facility and natural or legal persons (interested municipalities or associations of municipalities) can address the administrative court. In general, only individuals can apply for damages, while associations can be admitted to this application only if the appealed illegal act obstructs the association's objectives[76]. Further appeal can be presented to the Administrative Court of Appeal and eventually to the *Conseil d'Etat,* on points of law.

The appeal (both administrative appeal and judicial review) has no suspensive effect; however a suspension of the appealed decision (*référé-suspension*) could be disposed by the judge for summary procedures either when the decision's execution would cause the claimant grave and immediate prejudice or when the legality of the decision raises serious doubts. An appeal against the decision of the judge for summary procedures can be presented to the *Conseil d'Etat* within 15 days after the decision is taken.

No formal barriers exist in the right of appeal. However, a potential limit could be represented by the costs of the procedure, which are essentially

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[74] A third limit is established for associations representing a collective interest. To be accepted, they should exercise their statutory activities in the geographical area of interest. Moreover, they should exist since three years and their statute should be connected with the protection of the environment endangered.

[75] J. MAKOWIAK, *Study on factual aspects of access to justice in relation to EU environmental law*, national report, France, 2012, 8-11.

[76] *Ibidem*.

made of lawyers and experts fees. A small fee is required to initiate the procedure and broad legal aid coverage is granted for claimants whose financial resources fall under certain thresholds according to the law[77]. Associations could be granted legal aid only in «exceptional cases».

In conclusion, France recognises the protection of the environment as a crucial sector necessitating a specialised structure of administration and a specific legal framework, principally enclosed in the Environmental Code. However, France does not provide a special way of adjudicating environmental cases, conferring most of them to the traditional administrative courts. This choice characterises most of European countries, including Italy, Germany and Spain. Access to justice in environmental matters is quite broad, with a potential limit represented by costs related to the proceedings (lawyers and experts), especially for small associations and NGOs.

5.3. Judicial Review Before Specialised Environmental Courts.

Sweden is a peculiar example in the European context as environmental cases are allocated to specific «environmental courts». The Swedish judicial system is composed of ordinary courts (48 district courts, 6 courts of appeal and the Supreme Court) and administrative courts (12 county administrative courts, 4 administrative courts of appeal and the Supreme Administrative Court)[78]. The administrative courts hear cases concerning disputes between individuals and administrative authorities, for example tax cases and social insurance cases. They decide on the merits and have the authority to replace the appealed decision with a new one (so called «reformatory procedure»). The ordinary courts deal with criminal cases, civil cases and a number of non-contentious matters. In 1999, specialized courts were established for environmental matters: five Environmental courts and one Environmental Court of Appeal. They are divisions within the ordinary

[77] Milieu FR, *Measures on access to justice in environmental matters* – Country report for France, Brussels, 2007, 22-23.
[78] http://www.government.se/content/1/c6/16/65/79/c2777e20.pdf.

courts, but they «essentially act as administrative courts for environmental cases», meaning that they usually review decisions of the administrative authorities[79].

In 1999, Sweden adopted an Environmental Code, which harmonised the general rules and principles in the field. The Code applies to all human activities that might harm the environment[80]. It reflects EU environmental laws and its core subject is administrative law (regarding the power of environmental authorities to regulate any activity or measure that entails a risk for men or the environment), but it also contains private elements, such as provisions concerning compensation for damages. Despite the Code, certain activities have regulations on their own, like planning and building issues (see the 2010 Planning and Building Act), infrastructure installations (i.e. railroads and highways), mining, forestry, fauna (within the hunting law).

Environmental decision-making activity is split among different levels of government. At the local level, the Municipalities and the Local environmental boards act as supervisory authorities. The former issue plans and permits under the Planning and Building Act, the latter are political bodies, independent from the government, in charge of applying environmental law. In addition, the County administrative boards are entrusted with supervision concerning water-related activities and larger industrial activities; they issue permits for dangerous activities, landfills, chemical activities, waste transportation and disposal. Moreover, the Environmental Courts issue permits for installations and activities involving a substantial environmental impact and for all kinds of water operations. In such a role, they perform «administrative»

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79 J. DARPÖ, *Sweden*, 2012, available at http://ec.europa.eu/environment/aarhus/access_studies.htm (last visited December 2014). The Environmental courts replaced the National Licensing board for environmental protection and the Water courts.

80 See: http://www.government.se/sb/d/3704. The Code contains both general environmental principles and specific provisions about environmental quality, environmental impact assessments, nature protection, flora and fauna, genetically modified organisms, chemicals and waste. Specific water operations, industrial undertakings and other hazardous activities are subject to permit or notification requirements. J. DARPÖ, *Summary report on the inventory of EU member States' measures on access to justice in environmental matters*, Milieu, 2007, Environmental law and policy.

functions [81]. Other authorities are located at national level, like the Environmental Protection Agency, the Chemicals Agency, the National Board of Health and Welfare, the National Transport Administration and Geological Survey of Sweden, the Swedish Forest Agency. Some larger projects (nuclear activities, major infrastructural projects and wind farms) require a preliminary governmental decision on «permissibility» before a permit can be granted.

Both the Parliamentary Ombudsman and the Chancellor of Justice ensure that public authorities comply with laws and other statutes. They have a disciplinary function and operate through opinions and – rarely – prosecution for administrative misconduct[82]. The Ombudsman cannot intervene in an individual case and therefore it is not regarded as an effective remedy according to the Aarhus Convention. It can only examine a case after it has been decided and the scrutiny is limited to the handling of the case. However, his/her opinions have great importance.

Environmental justice is provided both by Environmental courts and by administrative courts (for example, according to the Local Government Act, some municipal statutes and decisions can be challenged through a «legality-control» procedure in the administrative courts by any member of the municipality). The main appeal route, however, is represented by the Environmental courts. Their competence covers all kinds of decisions pursuant to the Environmental Code and the Planning and Building Act. They are also competent in cases concerning damages and private actions against dangerous activities[83].

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[81] *Ibidem*.

[82] In the *Enköping case* (Stockholm Court of Appeal), 6 politicians were prosecuted for administrative misconduct for not having fulfilled their supervisory responsibilities as members of the local environmental board. They were convicted for refraining from deciding to issue sanctions fees and notifying the Attorney General of suspected environmental crimes in a number of cases involving local enterprises (J. DARPÖ, *Justice through Environmental Courts? Lessons Learned from the Swedish Experience*, 2007, available at http://www.jandarpo.se/inenglish.asp, last visited December 2014).

[83] Persons who have suffered bodily injury, material damage or pecuniary loss can bring a claim in the Environmental Court. They can also ask the court to order the operator of an activity to undertake precautionary measures or to stop the activity. As far as criminal justice is concerned, the public has very limited access to criminal

The first-instance Environmental courts are divisions within five ordinary district courts, but their jurisdiction is regional. They consist of one professional judge, one environmental technician and two expert members nominated by industry and national public authorities. Thanks to its composition, the court is well equipped with experts/technicians. The procedure is reformatory: the contested decision can be challenged on the full-merits and it may be replaced by the judgement. This kind of appeal is extensive in comparison to the «cassatory procedure», in which only the legality of the decision can be reviewed and the court cannot replace the estimation of the competent authority[84]. The Environmental court of appeal is composed of three professional judges and one technician. All members of the courts have an equal vote. The experts in Environmental courts are supposed to provide their experience of municipal, industrial operations or public environment supervision in all stages of the proceedings and in all levels of the jurisdiction (except in the Supreme Court).

Cases starting with a decision by a public authority (so called «administrative cases») may be brought to the Environmental Court and finally to the Environmental Court of Appeal (in rare occasions the Court of appeal allows for an appeal to the Supreme Court). Cases starting in the Environmental Court can be appealed to the Environmental Court of Appeal and ultimately to the Supreme Court. Leave of appeal is required to bring an appeal both to the Environmental Court of Appeal and to the Supreme Court.

The creation of Environmental courts has enhanced consistency in the environmental case-law, since all type of cases are dealt with by five courts: permits, supervisory decisions, all kinds of charges, enforcement, cost recovery and damages. Too many routes of appeal usually have a constraining effect on the possibilities to challenge environmental decisions and they also lead to

courts, as the power to prosecute is the prerogative of the Attorney General. It is possible to file an administrative complaint to higher authority on a decision not to prosecute, but this is rarely done (J. DARPÖ, *Sweden*, 2012, available at http://ec.europa.eu/environment/aarhus/access_studies.htm, last visited December 2014).

[84] J. DARPÖ, *Justice through Environmental Courts? Lessons Learned from the Swedish Experience*, 2007, available at http://www.jandarpo.se/inenglish.asp.

divergences in the case law. Moreover, the expertise of the deciding body can avoid weaker parties becoming entirely dependent on private technical consultants and lawyers. The consistency is further granted by the role of the Environmental court of appeal and the mechanism of leave. The Court of appeal opens the door to almost 25% of appeal cases (out of 300 per year), whereas the Supreme Court allows only five or six cases per year. Almost 80% of all cases are «administrative cases» that cannot go to the Supreme Court. The Court of appeal also hears about 130 cases per year that do not require leave[85].

The environmental procedure is easily accessible for the public, first of all because it is free of charge. No costs have to be paid by the parties: no court fees, no obligation to pay the opponent's costs, no witness or expert's fees (the responsibility to investigate the case follows the «ex officio-principle» and lies with the administration and the environmental courts, which both have technicians participating in the decision making activity). On the other hand, when applicants want to be represented by counsels or use experts of their own, they will have to bear the relative costs, which cannot be remunerated from the losing opponent. Although there is no obligation to use lawyers in court – not even in the environmental Court of Appeal or the Supreme Court – sometimes it is necessary to protect one's interests effectively[86].

According to the Environmental Code, appeals can be made by anyone who is «concerned by the decision or judgment if it affects him or her adversely». Other definitions are used in environmental legislation relating to «an interest which is protected by the law» or even «rights that have been infringed»[87]. In concrete, the courts' attitude is quite generous and decisive factors to appeal permit decisions are the distance to the activity, the nature of

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85 *Ibidem*.

86 J. DARPÖ, *Sweden*, 2012, available at http://ec.europa.eu/environment/aarhus/access_studies.htm (last visited December 2014).

87 This is true also for administrative omissions. According to a basic principle of administrative procedure, all parties that are affected by an administrative decision and its preparation are able to participate and – consequently – to appeal the final outcome.

the emissions (discharged substances) and their likely effects. Mere public interests, however, do not suffice for individual standing[88]. Standing is also granted to non-profit associations whose purpose according to their statutes is to promote nature conservation, environmental protection or outdoor recreation interests. Such NGOs, in addition, must have been active for at least 3 years in Sweden and must have at least 100 members or show otherwise that they have «support from the public»[89]. The courts' interpretation of standing requirements for NGOs has been quite restrictive. The most common appeals made by environmental NGOs have been concerning permits to industrial installations and water works, exemptions to species and habitats protection, shore protection[90].

As a general rule, a permit cannot be utilized until the possibility of appeal has passed. Accordingly, an appeal has suspensive effect on a permit decision. However, such decisions are often combined with a «go-ahead decision» allowing the applicant to start his/her activity. If a go-ahead decision has been granted, the public concerned can ask the court for an injunction. Such «inhibition» shall be granted when the prospects for the success of the

[88] Standing, for example, has been granted to «each person who may suffer any damage or nuisance from an activity, if the risk of such an impact concerns a legally protected interest and is not merely theoretical or insignificant» or to «individuals living 5 km away from an incineration plant and thus at risk of being affected by air pollution». If a permit concerns water operations such as a marina, neighbours who will be affected by the road traffic to the marina are allowed to appeal. See the case-law reported by J. DARPÖ, *Sweden*, 2012, available at http://ec.europa.eu/environment/aarhus/access_studies.htm (last visited December 2014).

[89] The possibility for NGOs to appeal environmental decisions was originally established in the 1999 Environmental Code, although then the numeric criterion was 2.000 members. Due to the judgment by the CJEU in the *DLV case* (C-263/09), the legislation was reformed in 2010.

[90] Groups and NGOs also have a right of civil action according to the Act on Group Action (2002). A private person representing the interest of a group can initiate a group action. Non-profit associations that according to their statutes are defending the interests of nature conservation, environment protection or associations of professionals within the fishing, agricultural, or forestry sector can initiate an NGO action.

appeal are good, but also if the appellant has a legitimate interest in having the decision scrutinized by the court or there are vital interests at stake[91].

Access to justice seems to be very open in Sweden: the environmental courts are a clearly identified *forum* for citizens to address their claims; they are intended to provide expertise and professionalism; the procedure is free of charge and follows the "reformatory model"; the consistency of the case law is guaranteed by the system. The restrictive interpretation by the courts of standing requirements (especially for NGOs) seems to be the only barrier to access to justice, even though the European Court of justice has recently contributed to mitigate it.

6. Final Remarks.

The study promoted by the European Commission on the implementation of articles 9.3 and 9.4 of the Aarhus Convention has the merit of having adopted a shared, universal language to describe different legal and judicial systems that, in many circumstances, cannot easily «communicate». Since the national procedures in environmental justice, the courts' organization and the domestic case-law are very specific and diversified, the comparison is extremely difficult or risks to result in a superficial analysis. The papers provided by the countries, on the contrary, are a good compromise between synthesis and details, general framework and concrete examples, focusing on the most important issues concerning access to justice in environmental matters. They certainly provide the appropriate knowledge that is necessary to design any future directive or reform under EU legislation aiming at harmonizing access to justice in the environmental sector. But they can also simply serve as an important reference tool for any person (practitioner, scholar, professor) trying to explore the concrete functioning of environmental justice, with particular reference to proceedings and remedies. The picture can

91 J. DARPÖ, *Sweden*, 2012, available at http://ec.europa.eu/environment/aarhus/access_studies.htm (last visited December 2014).

be integrated by other reports and documents concerning specific aspects of environmental justice, like, for example: Possible initiatives on access to justice in environmental matters and their socio-economic implications (2013); the Case Law of the Aarhus Convention Compliance Committee 2004-2011; Access to justice: remedies (2011); Paper on Costs in Environmental Procedure (2011); Study on environmental complaint-handling and mediation mechanisms at national level (2013)[92].

In all the countries analysed, environmental law and justice are recognized as a specialized area of law which deserves growing attention. Notwithstanding, only few countries devote to environmental justice specialized courts, with separate and exclusive jurisdiction in the field. In most countries, on the contrary, environmental cases are dealt with by single judges or panels sitting in the administrative courts, which usually hear a large amount of disputes concerning the public administration and the citizens. The procedure is the same used for the majority of the cases, with few adaptations. The specialization, therefore, generally refers to single judges or panels and is mainly achieved, on an individual basis, through the daily work in environmental matters or through specific training (if present and if the judge is willing to participate). External experts can be appointed by the courts or the parties as well. This is a very flexible solution because the number of judges devoted to environmental cases can vary according to the volume of the caseload and no particular organizational efforts or costs are required. Thus, for the moment, environmental courts (in the strong sense of word, meaning specific and specialized courts in environmental matters) are not a common phenomenon in Europe, being environmental cases generally allocated to the existing administrative courts.

Due to the different political and judicial systems and the various mechanisms that can open or limit access to justice, it is difficult to assess the overall capacity of a single country to effectively implement the Aarhus

[92] Most of them are available at http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/analytical-studies.html (last visited December 2014).

convention's obligations. Nor can we easily understand which appeal route is more effective for the protection of the environment. In some cases, for example, the administrative appeal (the hierarchical appeal, for example) is described as a successful procedure, with low costs, simple rules and timely procedure, whereas, in others, it is considered not effective and the decision of an external and impartial court has to be preferred. The powers of the court, moreover, can vary a lot (depending also on the institutional principle of the separation of powers), as the court in some countries can fully replace the decision of the administration, while in others it can not, being the administration the only responsible for the decision on the merits. This can have a strong impact on the quick and effective protection of the environment. The national reports give more information about the effectiveness of the different procedures, but a comprehensive assessment is still very challenging.

Anyway, what we can due, on the basis of the 2013 study, is to deal with the weak aspects of environmental justice, with the possible barriers and obstacles that in each country - directly or indirectly – may hinder or simply dissuade people from going to court. Most of them are recurring themes, since they are common to several countries. The excessive length of judicial review is the main obstacle to access to justice: it not only leads to a general reluctance to bring disputes before the courts (especially for minor cases), but it also frustrates the purpose of judicial review and of the final decision, which, unless interim measures are adopted, risks to become useless, vain. Other identified barriers are: the excessive costs of the procedure (included the costs for lawyers and for experts), the strict interpretation of standing requirements (above all to the detriment of minor organizations and NGOs), the strict criteria to obtain injunctive relief, the complexity of environmental law and the poor resources for legal aid.

A common debate on these issues can foster new solutions, ideas and remedies to be adopted in the different countries. Each country can find inspiration looking at other experiences. National judges and prosecutors should be involved as well, offering their experience and expertise in the field. Reducing the existing barriers to access to environmental justice is the first step

to raise the level of environmental protection in Europe, regardless of new possible European directives or reforms.

Comparative Law

ANALYSIS ON THE JUDICIAL PRACTICE OF ENVIRONMENTAL LIABILITY IN CHINESE TORT LAW

Li Yixian

CONTENTS: 1. – Brief of the Case. 2. – Comments. 2.1. – Environmental Pollution Cases in Tort Law. 2.2. – Determination of Causal Connection. 2.3. – Liability for Contractors. 2.4. – The Principle of Liability.

1. Brief of the Case.

On September 21, 2010, Du Zengshen brought a lawsuit against Yubo Company and China Railway 12th Bureau in the Court of Yuzhou, claiming that a reconstruction project of the defendants caused an economic loss to his poultry farm.[1] Yushen poultry farm was established by the plaintiff in 1994. After years of development, it became one of the primary poultry farms in Yuzhou city. In 2010, a project reconstructing Yubo railway was carried out by Yubo Company and China Railway 12th Bureau. The field of the project was only 300 meters from the poultry farm. During the reconstruction, trucks and tractors continually passed by the poultry farm, making much noise, raising clouds of dust, and having their lights glaring down directly on the chicken house. Without taking any preventive measure, a large number of breeding hens died, the productivity of eggs declined and the residual egg rates increased. Therefore, the plaintiff requested Yubo Company and China Railway 12th Bureau to stop their infringing act immediately, compensate for

[1] *Du Zengshen vs Henan Yubo Company and China Railway 12th Bureau Group Co., Ltd* (2014), 豫法民提字 2004 年第 00094 号, 11/ June 2014, available at http://vip.chinalawinfo.com/ (last visited October 2014).

his direct economic loss of ¥750,000 and repay the relocation expenses accompanied with the indirect loss of ¥2,824,274.

Arguing that there was no tortious act and the relocation of the poultry farm was not necessary, China Railway 12th Bureau refused to pay for the economic loss suffered by the plaintiff and asked the court to overrule the request.[2] Meanwhile, Yubo Company presented two reasons to reject the claims: the description of the facts was false and the causal connection between its conduct and the loss of poultry farm did not exist.

In the proceedings, the Court of Yuzhou confirmed the following facts: the Yushen poultry farm, with an annual output of 280 tons and 32,000 livestock, was a well-developed farm run by Du Zengshen. For years, the poultry farm was identified by the Animal Husbandry Bureau of Henan province as one of pollution-free agricultural production bases. In June 2010, Yubo Company and China Railway 12th Bureau started the reconstruction project of Yubo railway. The building site located only 290 meters from the poultry farm. During June 21-23, 2010, trucks and tractors for the reconstruction project constantly passed by the poultry farm. According to the production record presented by the plaintiff, a lot of chickens showed depression and stressed behavior. Meanwhile, the productivity of eggs reduced and the death rate of the chickens increased. After taking a scene investigation, the Yuzhou Animal Disease Control and Prevention Center drew the conclusion from the anatomy of the dead chickens that: the mass mortality of the chickens was caused by the stressed reactions and the complications caused by the hard light and the noisy and dusty environment. Finally, the court confirmed that the reduction of the productivity, the increasing of the residual eggs and the depression symptoms of the chickens resulted in a direct economic loss of ¥ 603,726.06. In the meanwhile, according to an appraisal report issued by Bordon Assets Appraisal Co., Ltd., the relocation costs of the poultry farm was ¥ 2,824,274.

[2] China Railway 12th Bureau Group Co., Ltd is a wholly-owned subsidiary of China Railway Investments Group with a monopolization of using resources and large amount of profits.

The court of first instance thus confirmed that as the consequences of the activities carried out by the defendants during the reconstruction project, a large amount of chickens died, the productivity of eggs reduced and the rate of residual eggs increased. According to the investigation of local authority, there was a causal connection between the reconstruction project of the railway and the mass mortality and sickness of the chicken. Thus, the defendants should be responsible for the damage suffered by the plaintiff.

As regards to the evidence presented by the plaintiff, although the production record was made by the workers of the poultry farm, as it was impossible for a third party to predict the occurrence of the tortious event and present an objective and accurate record, the court accepted the production record as valid and effective evidence. In calculating the amount of damages, the court held that the plaintiff's request of ¥ 750,000 surpassed the amount of the real loss and confirmed the actual damages amounted to ¥ 603,726.

In addition, the court confirmed that, the poultry farm was qualified as one of pollution-free eggs production bases in the city. According to the provisions of the "Quality Standards of the Poultry Farm Environment" issued by the Department of Agriculture of China, the area less than or equal to 500 meters to the yard of livestock farms shall be deemed as a protective area protected against any external contamination. Meanwhile, according to the "Measures for the Examination of Animal Epidemic Prevention", the reasonable distance between livestock farms and main traffic routes such as roads and railways is more than 500 meters. In this case, the railway was only 290 meters from the avian farm. It meant that the location of the railway reconstruction project did not conform to the standards issued by the Department of Agriculture, and it was necessary for the plaintiff to relocate his poultry farm. According to the assessment of Xuchang Boda Assets Appraisal Company, the costs of the relocation of the poultry farm were ¥ 2,824,274. On December 29, 2011, the court of Yuzhou decided that China Railway 12th Bureau should pay for the loss amounting to ¥ 603,726 , and Yubo Company should pay the relocation fees of the poultry farm amounting to ¥ 2,824,274.

China Railway 12th Bureau appealed against the judgment of the local court to the People's Intermediate Court of Xuchang, claiming that the procedure of the first instance was illegal, the ascertainment of the fact was unclear and the law was incorrectly applied. The appellant asserted that, according to a contract concluded by it with the local government and some residents of the village, the delivery work was assigned to the local government and other contractors. China Railway 12th Bureau claimed that even if the fact of environmental pollution was confirmed, the responsible party should be the local government or contractors who were in charge of concrete transport works.

Yubo Company also appealed to the Intermediate Court on the basis of two reasons: firstly, there was a mistake in the recognition of the legal relationship in the first instance judgment. According to the theory of tort liability, it was necessary to prove the causation between the tortious act and the damage in constructing the tort liability. In this case, to support his allegation, the plaintiff should prove that the pollutants discharged by the defendants were unsanitary and unsafe and the discharging act caused the damage. However, the plaintiff did not present any evidence to prove the existence of the causal connection between the act and the damage. Secondly, the old Yubo railway was built over 40 years ago and kept working until 2009. Obviously, the existence of the railway was earlier than the poultry farm which was built in 1994. Moreover, the poultry farm was situated near several villages and driveways where cars and trucks frequently passed by in the past. Besides, there was a vast expanse of cultivated land near the poultry farm and the noises produced by the farming machines for harvesting the crops can be clearly heard from the poultry farm. However, the plaintiff had never complained about the negative effects of such a noisy environment.

Consequently, Yubo Company claimed that the judge of first instance made mistakes in the judgment and requested the judgment to be rescinded according to the law. Du Zengshen replied that the facts were clearly ascertained and the law was correctly applied in the first instance judgment, so the appeal shall be rejected and the first instance judgment shall be sustained.

The Intermediate People's Court of Xuchang held that the fact was clearly ascertained by the court of first instance and the procedure of the first instance was lawful, because the allocation of liabilities was based on a reasonable consideration depending on the different roles played by the two appellants. According to Article 41 of Environmental Protection Law of the PRC, «a person that caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the individual that suffered direct loss». Although the delivery work of the reconstruction project was not executed directly by China Railway 12th Bureau, the appellant could not be free from an obligation or liability based on the contract between the appellant and the person in charge of the delivery work.

In accordance with Article 23 of the Law on Prevention and Control of Pollution From Environmental Noise, «every project under construction, renovation or expansion must conform to the regulations of the State governing environmental protection. Where a construction project might cause environmental noise pollution, the person undertaking the project must prepare an environmental impact statement which includes the measures it takes to prevent and control such pollution, and submit it, following the procedures prescribed by the State, to the competent administrative department for environmental protection for approval. The environmental impact statement shall include the comments and suggestions of the units and residents in the place where the construction project is located»[3]. In the present case, Yubo Company did not obtain an effective approval from the environmental protection office; neither did it take the local residents' suggestions. Actually, the noise standards made by the environmental protection office were usually used to decide the liability of the polluter. According to the tort law, where any damage was caused to other people by environmental pollution, the polluter shall assume the tort liability. According to the documents submitted by the anti-epidemic station of Yuzhou, since the

[3] The Law of the People's Republic of China on Prevention and Control of Pollution From Environmental Noise was adopted at the 22nd Meeting of the standing Committee of the Tenth National people's Congress in 1997.

reconstructed railway located less than 300 meters from the poultry farm, it was impossible for the environment of the poultry farm to meet the environmental quality standards and the requirements for animal epidemic prevention set by the Animal Husbandry and Veterinary Administrative Department under the State Council. In order to obtain the animal epidemic prevention certification, the relocation of the poultry farm was inevitable. As managers and beneficiaries of Yubo railway, the two appellants should be responsible for the pollution damages caused by their reconstruction activities.

On July 6, 2012, the Intermediate Court of Xuchang decided with the n.156 judgment that: since the facts were clearly ascertained and the law was correctly applied in the judgment of the first instance, the appeal was rejected and the first instance judgment was sustained.

Yubo Company appealed to the High Court of Henan province and presented the petition for a retrial. On February 7, the High Court of Henan Province made a decision (n.01796, 2012) which specified the Intermediate Court of Xuchang to conduct a trial de novo.

In the retrial, the Intermediate Court confirmed that the facts ascertained in the first and second instances were correct. Besides, the court ascertained the following facts: the narrow railway from Xuchang to Yuzhou built in 1964 was under the charge of Xuchang railway sub-administration of the Henan Railway Bureau. During the reform of the state-owned enterprises,[4] Xuchang railway sub-administration was transferred to Henan Zhonghang Railway Development Co.Ltd. In 2009, Henan Zhonghang Company and Henan Luozhoujie Highway Co.Ltd. jointly established Yubo Company and started a reconstruction project to the narrow railway from Xuchang to Yuzhou. During the reconstruction, the location of the new railway was moved 200 meters to south due to the abandonment of old railway bridge. The reconstruction project of Yubo railway was finally completed in June, 2013. Yushen Poultry Farm was established in Chuhe Village, Yuzhou City in 1994,

[4] As China's market economic system continuously developed, the reform and restructuring of state-owned enterprises had entered a practical stage. The process of reform was under a long and complicate process, the reform of the Xuchang railway sub-administration was completed during 2002 to 2008 in the present case.

and suspended its business in 2011. Through the forensic assessment in the first instance, the relocation fee of the poultry farm was about ¥ 2,824,274.

The Intermediate Court of Xuchang confirmed the fact that, as one of key projects of Xuchang city, the reconstruction program of Xuyu narrow railway had obtained a qualified environmental impact assessment report from the local environmental protection departments. However, the content of the report only referred to an area within a radius of 120 meters to the railway. After the construction of the new railway bridge, the railway was less than 300 meters to the poultry farm. The position change of the new railway directly led to a change of the neighboring environment of the farm, and finally made the relocation of the poultry farm unavoidable. As a result, the existence of the damage was an undeniable fact. According to the principle of fair and reasonable, as a benefited party from the management of the new railway, Yubo Company should be responsible for the relocation costs and pay economic compensation to Du Zengshen.

On October 15, 2013, the judicial committee of the Intermediate Court made a decision (n.17, 2013) which upheld the judgment of the first trial and changed the relocation fee to ¥2,471,764.

Not satisfied with the verdict, Yubo company made an appeal to the high court of Henan Province, claiming that the first instance judgment was based on unclear facts, since Du Zengshen had not proved that there was a causal connection between the tortious activities and his economic loss, and it is improper to apply the Tort Liability Law of PRC in such an environmental pollution case.

In the retrial, the high court held that the key problem of the case was the casual connection between the act of the two appellants and the loss of the poultry farm. Although at the beginning, the reconstruction project had already obtained an official approval from the environmental protection department, considering the special requirement of the railway industry, the removal of the location of the railway bridge had actually changed the neighboring environment of the poultry farm. So there was a necessary causal connection between the act of reconstruction and the economic loss of the poultry farm.

As to the applying of the law, the high court held that it was proper for the first instance judgment to apply the regulations of tort law in the case: according to Article 65- Article 68 of the Tort Liability Law of PRC, if any harm was caused by environmental pollution, the polluter should assume the compensational liability.

To conclude, the High Court of Henan Province held that the facts were clearly ascertained and the law and regulations were correctly applied in the first instance judgment. On July 11, 2014, according to the provisions of Chinese civil procedure law, the court made the final decision which sustained the decision of the Xuchang Intermediate Court.

2. Comments.

2.1. Environmental Pollution Cases and the Tort Law.

In this case, the appellant claimed that judges should exclude the applications of the provisions of the Tort Liability Law in environmental pollution cases. The high court of Henan province disagreed to his allegation and rejected his appeal. Although the value of environmental protection is generally proclaimed by public laws, further protections provided for the victims' interests in environmental pollution cases are accomplished by applying tort law in practice.

Different from public laws, the essential character of private law is to regulate the relationship between individuals by balancing private interests, and the fundamental function of tort law is to protect legal interests from the interference of tortious acts. Therefore, where individual rights and interests are infringed by an environmental polluting activity, the victim can file an action in the court and request for protecting his private interests according to the tort law. Undoubtedly, the case of *Du Zengshen v.Yubo Company and China Railway 12th Bureau (2014)* referred to the problem of environmental protection to individuals in private law, so the application of the Tort Liability Law in this case was reasonable and necessary.

As a law concentrated on comprehensive protection of individual rights and interests, the Tort Liability Law of PRC was passed by the twelfth session of the Standing Committee of the Eleventh National People's Congress in 2009, and came into force on July 1, 2010. In the part of special provisions of Tort Liability Law of PRC, seven types of liabilities were regulated under universal principles including the liability of environmental pollution.

With respect to environmental hazards, the Tort Liability Law of PRC provides that where pollution causes injury, the defendant shall bear tort liability. Undoubtedly, the provision of Tort Liability Law has broadened the previous environmental regulations where the liability was primarily based on the violation of environmental laws.

On April 24, 2014, the Environment Protection Law of the People's Republic of China was revised by the PRC Government,[5] which imposes stricter obligations on enterprises regarding pollution prevention and control. The legislative reform in the field of environmental law has a significant meaning to the development of environment law of China. On one hand, the Environment Protection Law provides severe penalties to the polluters from the sight of public interest; on the other hand, the application of Tort Liability Law in practice could offer individual victims a comprehensive and effective protection through the system of compensation from the environmental pollution activities.

2.2. Determination of Causal Connection.

The problem of causality in the law is always highly scientific and complicate. In tort law, the problem of causal connection is not a matter of fact but a legal issue, for which its essence is to determine the establishment and the scope of liability.

[5] The Revised Law will come into force on January 1, 2015 and apply to almost every article of the current law. With regard to public policy, the Revised Law specifies that the Government shall support the development of the environment industry and shall encourage enterprises to take environmental protection measures. Furthermore, the Revised Law allows for environment public-interest litigation.

In civil law countries, the adequacy theory of cause is widely accepted in determining the existence of the causal connection between the tortious activities and the damage.[6] However, the complexity of real life determines that there is no single and simple way in practice to resolve all issues of causality, especially in certain fields.

In consideration of the nature of environmental pollution activities, a special rule of "causal connection presumption" was adopted by Chinese legislators. Concretely speaking, according to the Tort Liability Law, where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that he should not be liable or his liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between his conduct and the harm. Where the conductor cannot prove that the damage is not caused by his conducts, the causal relationship between the infringer's act and the damage shall be presumed as exist, and the conductor shall be liable for the damage in these cases. In terms of the comparative law, most European civil law countries also adopt special rule of the causality presumption in the environmental pollution cases.

The presumption of causal connection has a justification: in most environmental pollution cases, it usually takes a long time for the victims to realize the existence of their damage; and in order to provide a valid evidence of the necessary causal connection between the tortious act and the damage, the victims often need to acquire adequate scientific knowledge and instruments. Furthermore, even with the modern science and techniques, the necessary causal connection between the act and the damage is hard to be determined in many cases.

Therefore, in order to alleviate the victim's burden of proof and provide more comprehensive protection to the victim in environmental

[6] The "relative causation theory" was proposed by Professor Johame Von Kries in 1980' from the University of Freiburg. Based on the theory, on the one hand, there shall be an indispensable "conditional relationship" between the acts and the damages (the "but for" test in common law), and on the other hand, the causal connection itself must have sufficiency, which means the connection between the acts and damages are correspondence with a social commonsense.

pollution cases, the legislator of the Tort Liability Law adopted the rule of "causal connection presumption".

Besides, in determining the existence of the causal relation, the judges usually adopt the policy consideration in practice. The acceptance of the policy consideration means that the judge may consider several important factors in the decision-making process. For instance, whether the tortfeasor committed his conduct deliberately or the interests and rights involved are worth good protection. Where the infringed rights and interests are extremely important, it is possible for the judge to presume the existence of necessary causal connection between the act and the damage.

In this case, the defendants of the first instance claimed that the plaintiff did not present adequate evidence to prove the existence of necessary causal connection between the reconstruction activities and the economic loss of the farm. On this issue, the judge in the first instance applied the provision of Article 66 of the Tort Liability Law, based on which «the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm»[7].

2.3. Liability for Contractors in Tort.

The independent contractor's right of immunity was individualized as an interesting topic in this case. In the second trial, China Railway 12th Bureau defended that he should not assume any liability, since the concrete transport work was executed by local residents during the reconstruction process, and he acted only as the principal of the contract for service, not as an employer. Instead of answering the appellant's question directly, the judge quoted the provision of Chinese Civil Procedure Law to reject his claim: «in environmental pollution case, the conductor should burden the proof of the causal relationship between the conduct and the damage». Actually, the claim

[7] Available at http://www.doc88.com/p-5456119434729.html (last visited October 2014).

of appellant concerned the question of differences between the contract of service and the one for service.

Compared with other types of contracts, the recognition of the contract agreement is a matter more frequently dealt with in the field of vicarious liability. Generally speaking, the doctrines and case-law definitely exclude the application of vicarious liability in the contract agreement, since the autonomy status of the contractor is deemed to be a direct antithesis of the relationship of employment. However, such exclusion does not mean that the principal will be exempted from every tort liability for damage caused by the contractor. When the contractor simply executes the orders of the principal and behaves as a nudus minister who carries out specific directives without possibility of making a choice, the principal should be directly liable for all the torts committed during the execution of the work.

Generally speaking, the term "employment" means a person who contracts for services of an independent contractor. Different from the employee, the contractor in contract agreement has his own autonomy in the execution of the task--this is the key issue which leads to the exclusion of vicarious liability in this field. In other words, the identification of contract agreement itself could be seen as an exclusion of the application of vicarious liability[8].

According to the contract concluded by the two parties, when the workers had total freedom to organize the work and determine their working hour, manner and place without any interference from the corporation, the workers are independent contractors and the principal will be exempted from any liability, since the contract had established full autonomy for the transport workers. In this case, although the appellant (China Railway 12th Bureau)

[8] However, the autonomy on this matter is understood with different meanings. For example, some judges consider that the autonomy means that the contractor carries on activities with his own organization and instruments; some emphasize the fact that the contactor behaves in his own way in the execution of the work; some bring forward that the autonomy should derive from the operating activities carried out on the contractor's own risk which is inherent to the execution of the work, etc. Under certain circumstance, it is still a difficult task for judges to distinguish the status of an independent contractor from an employee.

entrusted the tasks as a part of reconstruction process to a group of transport workers, the workers carried out the work in a fixed time and route under the surveillance of the appellant. Under such a consideration, the rule of independent contractor could not be applied in the case, and the appellant could not be exempted from the liability.

2.4. The Principle of Liability.

The axiom "no liability without fault" is a principle widely applied in the law. In the field of penal law, it is accepted as a general standard for the imputation of penal liability[9]. Such a principle may not be considered as a dominant rule in the field of civil liability, although from the traditional point of view, the expression of civil liability is always evoked with the idea of culpability[10]. In considering the nature and function of the civil liability, the concept of civil liability corresponds to a legal situation by which a subject receives compensation of the damage produced by others according to the normative criterion of imputation. From this point, the objection of the civil liability law is to provide possible protection to the victims in the tortious event, so the indemnification of the damage is deemed as instrumental for the distribution of the loss suffered by the victim.

The Tort Liability Law of PRC provides the general clause of fault liability and no-fault liability and concrete regulations of special types of tort liabilities, including the vicarious liability for the conduct of others (Article 34-

[9] It is confirmed that the penal sanction to the crime will only be initiated when the conductor committed his activity with a conscience and will, and the sanction towards the felony requires the presence of a willful misconduct, whereas concerns the misdemeanor offense, the subjective element indifferently assume the willful misconduct and the negligence. Consequently, in the field of penal liability, a subject will be responsible only when his conduct is culpable.

[10] The reason for the different positions of the fault principle in civil law and in penal law is that the two liabilities are established on different foundations, the former is to compensate the damages, whereas the latter is to provide necessary sanction. Since the foundation of civil liability is not always and necessarily connected with the reprehensibility of the conduct, it is not surprising that the principle of fault is not the dominant standard for the imputation.

Article 35), the liability for motor vehicle traffic accident (Article 48-Article 53), the liability for environmental pollution (Article 65-Article 68), the liability for ultrahazardous activity(Article 48-Article 53) and the liability for harm caused by domestic animal(Article 78-Article 84), etc. Therefore, the China legal system of civil liability can be characterized by a double-tracked model which is established on the basis of fault liability (Article 6) and no-fault liability (Article 7). Besides, liability without fault is also proclaimed by some special law statutes, such as the Law of Environmental Protection and the Law of Road Traffic Safety[11].

At first glance, the Chinese model of liability seems similar to the Italian double-tracked model which distinguishes the objective liability from the subjective one. It is well know that the double-tracked model of civil liability system are usually based on deep understandings of the essence of civil liability which means to transfer the damage from the victim to some others according to the criterion either of fault or of risk. However, through observations to the development of Chinese tort liability system, many scholars pointed out that the "double-tracked model" of China tort law is actually based on a summary of the past experiences of applying the fragmented legislations on tort liability[12]. It is not a result of the deliberation of the essence of civil liability. The existence of no-fault liability in environmental pollution case is explained by the legal doctrine as a natural result of an industrialized society[13].

In tort law, the polluter might be held liable even if his act has complied with the relative requirements of the environmental law. In this case, the appellant claimed that their reconstruction work did not produce an excessive noise based on the required noise standard made by the local environmental protection office. Actually, the noise standards issued by the environmental protection office were only used to control the discharge of

[11] It should be noted that all these statutes provide no-fault liability without considering the foundation of these liabilities and the possible conflicts among them.
[12] See L. WANG (王利明)， Y. ZHOU (周友□), et.al., *Textbook on the Tort Liability Law of China*, The People's Court Press, 2010, 120-180.
[13] Actually, one of the most serious problems of Chinese tort law is that the legal doctrine is yet to be further developed in order to explain, direct and act as a part of the law.

pollutants. What's more, the appellant of the case did not obtain an effective approval from competent environmental protection department, neither listen to the comments and suggestions of the units and residents in the place where the construction project was located. Consequently, the judge of the first instance made his decision according to the provision of the Tort Liability Law: «any damage has been caused to others by environmental pollution, the polluter shall assume the tort liability»

In this case, in explaining the reasons why the two defendants should be liable for the victim's loss, the court's reference of the concept "beneficiaries" implied that the judges considered the foundation of liability on the basis of the "risk and profit" theory with an exploitation of the old legal maxim *cuis comoda eius et incommoda*[14]. According to the theory, the conductor should be held liable for the risks involved in his productive activities. In other words, since the two defendants expanded their businesses and profit expectations through the reconstruction project, they should burden both the negative and positive consequences derived from such activities. Finally, the judge held that the two appellants should be liable for their environmental pollution activities, considering that the enterprises should take on the risks they created and from which they benefitted.

[14] The meaning of this Latin maxim is that the party which profits from a situation, should also burden the results of such a situation (*chi trae vantaggio da una situazione, deve sopportarne anche i pesi*). Such a principle indicates that the liability should be assumed by the one who had benefited from the activity. J. STEELE, *Tort law: Text, Cases, and Materials,* Oxford, 2007, 563 and ff.

THE REVISION OF CHINA ENVIRONMENTAL PROTECTION LAW AND ENVIRONMENTAL PUBLIC INTEREST LITIGATION IN CHINA: STANDING OF ENGOs

Junhong Li

CONTENTS: 1. – Introduction. 2. – The Case. 3. – The Sentence. 4. – Conclusion.

1. Introduction.

Environmental protection non-governmental organizations (hereinafter as "ENGOs") in China are mainly divided into four types: ENGOs established and sponsored by governments, such as China Society of Environmental Science, All-China Environmental Federation (ACEF), China Environmental Protection Foundation, Environmental Volunteers Association of Liaoning Province; ENGOs established by the public, such as Friend of Nature, Earth Village, Environmental Volunteers Group, Saunders Gull Protection Association in Panjin City; ENGOs established by the students, including the internal environmental groups at universities; China office of foreign or international NGOs such as World Nature Foundation[1]. In the past decades, China ENGOs have developed largely[2] and played an important role in

[1] ACEF, *Report on the status quo of the development of China Environmental Protection Organizations*, in *Environmental Protection*(in Chinese), vol.10, 2006.

[2] According to Ministry of Civil Affairs of China, compared with 2011, in 2012 there were 6816 social organizations on environmental protection (increased by 6.3%) and 1065 private non-enterprises units on environmental and ecological protection (increased by 10.1%), totally 7887 ENGOs in 2012. See *The Development of Social Service in 2012 Statistical Bulletin,* available at

improving the consciousness of the public about their environmental rights, supervising and publicizing the illegal discharge of pollutants by the industries, enhancing the disclosure of environmental information from the environmental protection administrative agencies (hereinafter as "EPA")[3]. The standing of ENGOs in environmental public interest litigation takes a long period of time to be recognized by Chinese environmental law though.

The first version of China Environmental Protection Law (hereinafter as "CEPL") was adopted in 1989, which prescribes that «(A)ll units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment»[4]. This general provision conforms to the framework nature of the CEPL and has been always quoted as the legal basis of standing of units or citizens in environmental public interest litigation[5]. However, this provision does not provide an explicit legal basis for the standing of an ENGO in an environmental public litigation[6].

The revised China Civil Procedure Law (CCPL), which took effect in January 2013, prescribes in its article 55 that «(W)here environment is polluted, the lawful rights and interests of a throng of consumers are infringed upon, or other acts impairing the public interest are committed, the organs stipulated by

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http://cws.mca.gov.cn/article/tjbg/201306/20130600474746.shtml, 19 June 2013 (last visited September 2014).

[3] For the discussion on the roles of the ENGOs, see, for example, Z. JU, *Status Quo and future development problems of ENGOs*, in *Environmental Protection and Circular Economy* (in Chinese), vol.7, 2011, 71-73; Q. ZHOU, *Characteristics of the activities of ENGOs in recent years*, in *Environmental Education* (in Chinese), vol. 2, 2011.

[4] Article 6, China Environmental Protection Law (1989). It was adopted and took effect on 26 December 1989. Both Chinese and English version of this law can be found in http://wenku.baidu.com/link?url=fzcsKL23McRWIKVN4Zyjf7fzRvTym0rECX4mwds6Hg_TYIpBQ-1JjQ0OgANqpNdiMEBOnF7BsKEMWbyXVjAM-P6puZOf-_6DYK_TwhNFSdy (last visited September 2014).

[5] This can be reflected in the following case. Actually this always happened to the environmental cases brought by the ENGOs before the adoption of the new CEPL. For the examples of the cases, see note 15 below.

[6] This provision is further discussed in the third section of this article.

law and relevant organizations may bring actions to the people's court»[7]. This provision can be regarded to offer a legal basis for the establishment of a civil public interest system and a solution to the problem of the qualification of the plaintiff although it explicitly deprives individuals of their right of action. Regarding the scope of the organizations which could have the right of action[8], it is suggested that such organizations should meet the following requirements: a. Lawfully registered non-profit environmental protection organization or consumers association; b. Specializing in environmental protection or consumers' rights protection in practice for public interest for long time in accordance with its rules; c. Possessing more than 10 full-time technical and legal staff for the protection of environment or consumers' rights; d. The litigation the organization filed should conform with its aim, scope of its service and its professional scope listed by its rule[9]. According to this suggestion, however, few environmental protection organizations could be qualified as the plaintiff of environmental public interest litigation since many ENGOs possess less or none of legal staff[10]. Moreover, due to the too general provision of the revised CCPL, none of the cases brought by the ACEF in

[7] Article 55, Civil Procedure of Law of People's Republic of China, amended on 31 August 2012. The English version can be found on http://wenku.baidu.com/link?url=M14auuwHD20NajTOScPaPGIhazyhxBhHnuc9EVQaN4MG4GEPB7BjqtQNrTl5DpxSemFuuS_LK0zGp-WIEe_wRxdm7itRPjBWMH68a7Up2JW (last visited September 2014).

[8] "The organs by law" currently according to the China Civil Procedure Law are only the organs with marine environment supervision and management power in accordance with the provisions of Marine Environmental Protection Law of China. Marine Environmental Protection Law of China, Article 90.2.

[9] G. MINZHI, *Understanding and application of civil public interest litigation*, *People's Court Newspaper*, 7 December 2012, available at http://www.chinacourt.org/article/detail/2012/12/id/799020.shtml (last visited September 2014). This is always considered as the interpretation of the Supreme Court about this issue in China.

[10] According to the investigation, in China, 76.1% of ENGOs have no fixed financial sources, 22.5% raised little fund, 81.5% had the fund lower than 50,000RMB. Due to financial shortage, more than 60% ENGOs could not afford their own office space, 43.9% of full-time staff in ENGOs rarely have wages and 72.5% ENGOs have no capacity to provide welfare such as unemployment, medical insurance for their employees. ACEF, *Report on Status Quo of China Environmental Protection Organizations*, in *Environmental Protection*, vol.10, 2006.

2013 after the come-into-force of the CCPL(2012) was accepted by the court as a result[11].

As a response to the revision of the CCPL, CEPL, which started its revision since 2011, in article 48 of the second review of its draft publicized in August 2013 prescribes that "(T)o the behaviors that damage the public interest including the pollution of the environment, destruction of the ecology, All-China Environmental Federation (ACEF) and such associations at provincial level may file an action to the court." This provision confines the standing of the environmental public interest litigation to the ACEF or its divisions at provincial level, which was questioned by many experts and organizations as the special provision of the ACEF[12]. As such, the third review of the draft CEPL in October 2013 stipulates that the organization to have the right to sue shall be « at national level with good reputation, specializing in non-profit environmental protection activities for 5 years consecutively and having been registered at civil administrative department».

The newly revised China Environmental Protection Law, which was approved on 24 April 2014 and will take effect since 1 January 2015, accepted the provision of the CCPL (2012) on this issue. Its article 58 stipulates the requirements for an ENGO to sue against the polluter to the court.

Article 58 The organizations that may bring a lawsuit to the court against the activities which have caused pollution to the environment, destruction of the ecology and/or damage to public interest shall meet the following requirements:

(a) registered in accordance with the law in the districts and municipal people's governments above the civil affairs department;

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[11] After the effective date of the CCPL, ACEF filed 7 lawsuits relating to water pollution by Weifang Legang food Ltd., environmental tort of Housing Security and Urban Construction Management Bureau in Yuanping City, Shanxi Province, water pollution by Shuangqing Barium sulfate Co. Ltd.of Chongqing City, water pollution by Jinyuan Mining Co. Ltd.in Lingbao County, water pollution by Tiangong Biological Engineering Co. Ltd. In Hainan Province, water pollution by Luoniu Mountain Pig Breeding Co. Ltd. In Hainan Province, environmental administrative illegality of State Bureau of Oceanography.

[12] Q. XIE, *Environmental Public Interest Litigation to be formally ice-broken*, in *Focus Monthly* (in Chinese), 18.

(b) specializing in environmental protection activities on behalf of public interest for five consecutive years with no illegal records.

Proceedings of the social organizations shall not reap economic benefits through litigation.

It should be noted that besides other improvements[13], public interest litigation is prescribed in law for the first time. However, this provision still could not ensure the standing of many ENGOs because of the registration requirement – many ENGOs in China are not registered at civil administrative department[14].

Whilst the influence of the new CEPL has not yet been manifested, the shortcomings of the environmental protection law in China did not prevent the ENGOs from participating in environmental public interest litigation based on national law and local regulations[15]. The case of *All-China*

[13] The newly revised China Environmental Protection Law established several new systems or measures, compared with its first version. For instance, this law for the first time set up the red line for ecological protection (art.29), continuous penalty counted by day to the polluter (art.59), early warning mechanism of public monitoring of environmental pollution (art.47), power of supervision department to seal and/or detain the equipment of the polluter enterprises (art.25) and the introduction of permit management system (art.45).

[14] According to China Regulation on the registration management of social organizations (CRRMSO), establishing a social organization shall have appropriate competent department. But for China grass ENGOs and foreign ENGOs, it is not easy for them to find their competent department. Besides, the CRRMSO also regulates that a social organization at national level shall have more than 100,000 RMB available for their activities, a local organization shall have at least 30,000 RMB activity fund, and a social organization shall have more than 50 individual members, which seems too restrictive to public interest and non-profit EMGOs. Thus, many ENGOs could not register at civil administrative department but industrial and commercial administrative department. Only a few (approximately 23.3%) were registered at civil administration department. Notably, the newly publicized *Interpretation on related application problems regarding the judgment of environmental civil public interest litigation by the Supreme Court of China (draft)* issued on 30th September2014 further clarifies in its article 2 the types of social organization that may be entitled to file an environmental public interest litigation, including ENGOs registered at civil affairs department and foundation. For the Interpretation, see http://www.lawxp.com/statute/s1755731.html (last visited October 2014).

[15] From 1995 to 2012, there have been 53 cases for public interest, among which 8 cases were filed or co-filed by the ENGOs, including the case to be discussed at the second section of this article. The other 7 cases are ACEF vs. Jiangyin Port Container

Environmental Federation, Guiyang Public Environmental Education Center vs. Guiyang A paper mill sentenced by Qingzhen People's court which established the first environmental protection tribunal in China is one of the most representative cases in which ENGOs could play an important role. This case is discussed below as an example to illustrate the influence of the new CEPL could have and challenges the new law would face in the future practice.

2. The Case.

All-China Environmental Federation (hereinafter as "ACEF"), together with Guiyang Public Environmental Education Center (hereinafter as "GPEEC"), brought an action against Guiyang A paper mill (hereinafter as "A mill") about water pollution in 2010. The applicants alleged that A mill shall stop the discharge of industrial waste water so as to eliminate the damage to its down stream Nanming River and Wu River, pay them reasonable fee such as lawyers fee 10,000RMB and bear the legal fare[16]. The defendant admitted the fact of the discharge and is willing to bear the liability, but explained that it discharged waste water only because its equipment broke down which led to its inability to dispose the waste water.

In this case, the defendant A mill situated the bank of the downstream of Nanming River, Guiyang City. According to the discharge permit issued by the local EPA, A mill is not allowed to discharge waste water. However, since 2003 the defendant has been always fined and mandated to modify during the limited period by the local EPA several times because of its secrete illegal

Co. Ltd. Of Jiangsu City (2009), ACEF vs.Land and Resources Administration Agency of Qingzhen City (2009), Qujing EPA, Friend of Nature, Green Volunteers Association of Chongqing City vs. Luliang Peaceful Technology Co. Ltd.(2011), ACEF vs.Xiuwen County EPA (2011), ACEF, Guiyang Public Environmental Education Center vs. Haoyiduo Milk Products Co. Ltd.(2012), ACEF vs. Dayakou Coal mine of Zhazuo, Xiuwen County(2012), and ACEF vs.Hui Mountain Scenic Region Management Committee (2012).

[16] *All-China Environmental Federation, Guiyang Public Environmental Education Center vs. Guiyang A Paper Mill*, in Z. JUN (editor), *Selected Cases regarding Ecological Protection in Guiyang*, Renmin Courts Publishing, July 2013, 7-16.

discharging industrial waste water into the Nanming River[17]. As such, to ensure its zero discharge of industrial waste water, the defendant promised to the local EPA that it would close its industry itself if the direct discharge of waste water into Nanming River occurs in the future.

Nevertheless, the defendant did not keep its promise. It was found by the plaintiff and the court that the defendant's illegal discharge activities continued. At daytime, the defendant pumped the sewage generated during the day into the reservoir and stored it there temporarily. In the evening from 6pm into 7am the next day, the sewage was introduced into the cave through concealed trench and then directly discharged into the Nanming River. According to the technology report and the legal representative of the defendant, by this way, the defendant discharged the industrial waste water into the Nanming River by 600 tons per day. The sample report of the waste water, inspected by Guiyang Municipal Environmental Monitor Center, showed that the ammonia nitrogen content in the waste water is 8.2 mg / L, chemical oxygen demand of 967 mg / L, the chromaticity is 200 times, biochemical oxygen demand of 330 mg / L. All these data seriously exceeded the national discharge standards.

The plaintiff alleged that the defendant had breached the relevant provisions of China Environmental Protection Law as well as China Water Pollution Prevention and Control Law since it discharged waste water without discharge permit and its discharged sewage substantially exceeded the national permitted standards, which resulted in the severe pollution to the Nanming River and damaged public environmental right of Guiyang citizens. On behalf of environmental public interest, the plaintiff filed the action to the court.

[17] For instance, in November 2003, the defendant was ordered to correct its illegal activities within certain period; in March 2004, it was fined 1000RMB due to its circulating water tank leakage and un-use of boiler desulfurization facilities; in March 2005, the defendant was fined again 9000RMB because of its illegal discharge of waste water into Nanming River. Ibid, 9.

3. The Sentence.

Based on the facts and evidences, the court sentenced that the defendant breached the law, namely, article XX.1 & XX.3 of China Water Pollution Prevention and Control Law[18], which stipulates that pollution discharge permission license system is established, any enterprises or institutions without such license or in breach of provisions relating to such license are prohibited to discharge waste water or sewage into the water body. As such, the defendant shall obtain pollution discharge permission license in order to discharge the sewage or industrial waste water. However, the license the defendant obtained only allows it to discharge SO2 and smoke dust, excluding the sewage.

The court further sentenced that the defendant also breached article XXII.2 of China Water Pollution Prevention and Control Law, which provides that it is prohibited to discharge water pollutants through kangaroo underground pipes or other ways in order to avoid supervision, and the defendant shall bear the civil liability for damage to the Nanming River, stop discharging sewage and eliminate such damage. The defendant argued that it discharged waste water because its equipment was broken. This was rejected by the court who believed that the equipment should be fixed within reasonable period but the evidences showed that the defendant kept illegally discharging waste water for long period of time, which had seriously polluted Nanming River and damaged the environment and public interest.

The court thus sentenced that the defendant shall stop discharging waste water to the Nanming River, eliminate the damage, pay the lawyers' fee RMB 10,000 pre-paid by the ACEF and the testing fee RMB 1,500 pre-paid by the Guiyang Municipal Two-lakes-one-reservoir Foundation within 10 days since the effective date of the judgment, and bear the case acceptance fee RMB60.

[18] It was amended for the third time in 2008. Its English version can be found at http://www.lawinfochina.com/display.aspx?id=39&lib=law&SearchKeyword=&SearchCKeyword= (last visited on 25 December 2014)

As far as the standing of the plaintiff is concerned, the court respectively quoted provisions of CEPL (1989) and *Guiyang Municipal Regulation on Promoting Ecological Civilization Construction*. According to article 6 of CEPL(1989) which stipulates that any organization and individuals have the obligation to protect the environment and are entitled to impeach and accuse any units or individuals who polluted or damage the environment, the court judged that filing a public interest litigation by the units against the polluter is one way of realizing such right. Also, article 23 of *Guiyang Municipal Regulation on Promoting Ecological Civilization Construction* provides that ENGOs may bring a lawsuit in accordance with the law against the pollution of the environment and/or destruction of resources and request the relevant liable bodies to stop the infringement, remove the obstruction, eliminate the dangers, reinstate the damaged environment, and so on.

Based on these provisions, the court sentenced that the plaintiffs, namely, the ACEF and GPEEC are both legally registered environmental protection organizations and the public interest litigation brought by the plaintiffs, on behalf of injured public environmental right wherever there are no specific victims, is one way of exercising the right of supervision and complaint in accordance with the law and regulations, which reflected that the environmental protection organizations and units are participating in the environmental management, supervising the implementation of environmental protection law, pushing the environmental protection and thus playing a positive role.

If this case is only based on article 6 of the CEPL (1989), it should be noted that this article does not explicitly provide a legal basis for an environmental NGO to gain the standing in a public interest litigation. Moreover, before the come-into-force of the CCPL(2012), the plaintiff could only bring a lawsuit to a court when his own interest or right was infringed. Thus, according to the CCPL before 2013 when its revision came into force, it is hard to conclude that an ENGO could have the standing to file an action against the polluter directly on behalf of public interest. The only legal basis for the standing of the plaintiff in this case is the local regulation, which explicitly

prescribes the right of an ENGO to file an environmental public interest litigation and largely expanded the scope of such ENGOs.

Should the case be judged after the effective date of the CEPL(2013), it has to be noted that in this case, only the ACEF is qualified to bring the lawsuit to the court because the GPEEC, although registered at the civil administration department, was only founded in March 2010, which does not meet the requirements prescribed in the CEPL (2013). Also, such NGOs as the Center for Legal Assistance to Pollution Victims (CLAPV) that have rich experience in environmental litigation acting on behalf of the victims for the public interest could not gain the standing according to the new CEPL[19]. In fact, regardless of the limited number of the ENGOs registered at civil administration department, it is reported only 30% of the investigated ENGOs expressed their willingness to use public interest litigation as the utmost means of safeguarding environmental rights and less than 14% of the surveyed ENGOs had such experience in participating in environmental public interest litigation[20]. Reasons behind include the insufficient capacity of filing an action due to limited or none full-time legal staff and high cost due to time-consuming process[21]. In China, many ENGOs especially purely grass-root ENGOs are not quite familiar with China environmental protection law and could not participate in the legislation for environmental protection in China. All these factors largely limited the number of the ENGOs that are qualified to bring an environmental lawsuit to a court for the public interest.

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[19] Such ENGOs as the CLAPV that has rich experience in environmental public interest litigation are quite few in China though. The CLAPV is registered at China University of Political Science and Law. For the information of the CLAPV, see www.clapv.org.

[20] W. SHEKUN, *Survey Report on the roles of ENGOs in environmental public interest litigation*, January 2014, 10-11. This project has been funded by the ACEF and Natural Resources Defense Council (NRDC).

[21] For the problem of limited or lacking of legal staff and the shortage of financial support, see supra note 10. Also, the survey found that 48% of the surveyed ENGOs have no professional legal unit and apart from several ENGOs, most of the investigated ENGOs have very low capacity to organize and bring a lawsuit to the court. On the other hand, only 4% of the surveyed ENGOs could afford the cost of environmental public interest litigation. Ibid, 11-12.

4. Conclusion.

In March 2010, *Guiyang Municipal Regulation on Promoting Ecological Civilization Construction* took effect, which clearly mentioned public interest litigation for the first time. Meanwhile, Guiyang Municipal Intermediate People's Court and Qingzhen Municipal People's Court together published *Implementation advice on the environmental public interest litigation to promote the ecological civilization construction*, which clarifies that any citizen, legal person and other organizations are entitled to supervise, report and accuse the activities that caused pollution to the environment and have the right to require the environmental protection administration to conduct timely investigation[22]. This case discussed in this article is the first public interest litigation accepted by the court based on the provisions of *Guiyang Municipal Regulation on Promoting Ecological Civilization Construction* since its effect, according to which the court confirmed the standing of the environmental protection organizations.

Compared with the CEPL (2013), these regulations enlarged and specified the scope of the standing of ENGOs, which largely facilitated the acceptance of the environmental public interest litigation brought by the ENGOs. The local practice showed that environmental public interest cases could be relatively easily accepted and paid much attention to in the regions where the regulations clarified the standing of the ENGOs[23]. On the other side, however, the new CEPL set too many limitations about the scope of the ENGOs that could bring an environmental lawsuit on behalf of the public interest[24]. Considering the urgent demand for protecting and reinstating the

[22] Implementation advice on the environmental public interest litigation to promote the ecological civilization construction, Article 7. Its Article 12 also clearly put forward that in public interest litigation cases, the litigation fee could be postponed or freed, expert testimony verdict could be accepted, the expenses for testing or monitoring could be pre-paid or funded by the environmental protection foundation, and other new measures.

[23] These regions include several provinces such as Guizhou province, Yunnan Province and Jiangsu Province. These provinces normally established environmental tribunals at different level and possess better environment compared with other provinces.

[24] See the discussions in section 1 *Introduction* and section 3 *Sentence*.

deteriorating environment in China, several improvements should be made in order to facilitate more ENGOs to participate in the environmental public interest litigation. For instance, for more ENGOs to meet the first requirement about the standing of the ENGOs prescribed in the new CEPL, some changes have to be made to the *Regulation on Registration Management of Social Organizations* and I*nterim Regulation on Registration Management of Private non-profit Enterprises*, which should clarify the competent authority of the ENGOs especially the grass-root ENGOs so that more ENGOs could register at civil administration department[25]. Also, to enhance the capacity of ENGOs in filing an environmental public interest litigation, besides the training of more ENGOs staff on China environmental protection law, borrowing the practice in this case, public environmental fund, the expenditure of which can be supervised by the ENGOs, could be established by the court or the competent authority for the reinstatement of the environment and solve the problem of the high cost of such litigation[26].

[25] The current Regulation on Registration Management of Social Organizations stipulates that to be registered at the civil administration department, the social organization shall be approved by its competent authority. However, so far rare competent authority can be found because of no explicit related regulations.

[26] This could also solve the problem of who would accept the compensation for damage to the environment through environmental public interest litigation.

THE SOLID WASTES CASE AND CHINESE JURIDICAL PRACTICE OF THE CAUSATION PRESUMPTION

Lun Bai

CONTENTS: 1. – Preface. 2. – A Typical Environmental Tort Case. 2.1. – Facts of the Case. – 2.2. – First Instance of the Case. 2.3. – Appellate Instance of the Case. 3. – Comments on this Case. 3.1. – The Causation Between the Infringement Act and the Harm. 3.2. – Victim's Proprietary Interests. 3.3. – Other Issues. 4. – Conclusion.

1. Preface.

Along with the contemporary development of the legal pluralism in the private sectors, environmental protection is generally considered as a social need pursued by the civil law, especially the law of torts. In China, in order to make the tort law instrumental in protecting the environment, the environmental tort is distinguished from the other torts in applying special rules such as the no-fault liability and the causation presumption. More specifically, the Tort Liability Law of China proclaimed in Article 65 and 66 that where any harm is caused by environmental pollution, the polluter shall assume the tort liability; where any dispute arises over an environmental pollution incident, the polluter shall assume the burden to prove that he should not be liable or its liability could be mitigated under certain circumstances as provided by law or to prove that there is no causation between his conduct and the harm. According to these provisions, the polluter is liable for the damage from which his neighbor suffers if his conduct has contributed to the caused damage, and the burden of proving the causation between the infringement act and the damage is shifted from the victim to the polluter.

In an optimal situation, proper applications of these provisions in environmental tort cases would develop the traditional tort law into a green one. That is to say, the value of environmental protection would be effectively embedded into a pluralistic law of torts. Ideally, in such a pluralistic legal system, the value of environmental protection should be in harmony with other values pursued by the law, especially the needs of economic development. However, in current legal practice, it is still questionable whether or not the applications of these provisions can achieve the goal of environmental protection. For instance, although the Tort Liability Law of China explicitly proclaimed the rule of shifting the burden of proving causation to the defendant, different readings of this rule are still found in concrete cases. The problematic applications of the law make it difficult to accomplish the goal.

In order to realize the legislative aim of the environmental tort norms, a fundamental question to ponder over is how the mechanism of the causation presumption has applied in environmental tort cases. Divergent answers to the nature of causation in the law may lead to different results in the legal practice.

2. A Typical Environmental Tort Case.

2.1. Facts of the Case.

The case Lizhen Zhang vs. Qiyun Zhan (2014)[1] was a typical example of applying the aforementioned norms in environmental tort cases. On October 8, 2003, Yanming Yang concluded a contract of the right to the contracted management of land[2] with the Villagers' Committee of Black Village

[1] (2014) 玉中□民□字第 2 号, 9 January 2014, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=120711656&keyword=%e5%bc%a0%e4%b8%bd%e7%8f%8d&EncodingName=&Search_Mode=accurate (last visited October 2014)

[2] The right to the contracted management of land provided in Article 125 of the Real Rights Law refers to the holder's right to possess, use and seek proceeds from the cultivation land, wood land and grassland, etc. under the contracted management

(Hongta District, Yuxi City, Yunnan). The key contents of the agreement are as follows: 1) Yanming Yang obtained the right to the contracted management of the 21.5 mus of land located in the South Ditch Area near the Rainbow Road, mainly for plant seedling and breeding; 2) the contract was valid for 15 years; 3) the contract fee was ¥800 per mu every year. In 2005, Yanming Yang subcontracted a part of the land to Qiyun Zhan (the defendant), and an air-brick workshop was built on the subcontracted land. In 2010, Yanming Yang subcontracted another 10 mus of the land on the south of the air-brick workshop to Lizhen Zhang (the plaintiff). The latter used the land to build rose cultivation greenhouses. The ground of the rose cultivation greenhouses lay lower than that of the air-brick workshop.

In the afternoon of July 12, 2013, a heavy rain flooded Lizhen Zhang's rose cultivation greenhouses and 95% of her roses withered. Believing that the fading of her roses was caused by the solid wastes such as cements, stone powder and coke powder produced by the air-bricks workshop and washed into the rose field by the rain, Lizhen Zhang brought a lawsuit of environmental tort against Qiyun Zhan in the local court for the damages of ¥50,000 on October 9, 2013. On February 26, 2014, she modified the litigious claims increasing the amount of the damages to ¥1,497,408 and adding a request for restoring the original condition of the rose cultivation field. Qiyun Zhan replied that his business did not cause any pollution and requested the plaintiff's claims to be overruled. In the proceedings, by the consent of both parties, the Justice Department of Technology of the local Court commissioned Yunnan Qiansheng Judicial Expertise Center (the center) to prove the causal relation between the solid wastes and the harm. On February 18, the center submitted the report indicating that the commission could not be completed because of technical reasons.

In calculating the damages, the court approved that Lizhen Zhang's rose cultivation field had a total area of 7.24 mus. After being flooded, 95 percent of the plaintiff's roses withered to various degrees. Under normal

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thereof, and have the right to engage in planting, forestry, stockbreeding or other agricultural production activities.

circumstances, every mu would yield 12,000 buds of rose. According to the documents provided by Kunming International Flower Auction Trading Center Co., Ltd., the average price of the plaintiff's roses was ¥1.41/bud during August 6 - August 12, 2013. Accordingly, the total price of such a quantity of these kinds of roses was ¥122,500. Deducted the amount that the plaintiff already gained in August which equaled to ¥8,758.62, the damages amounted to ¥113,741.38.

2.2. First Instance of the Case.

The court of first instance held that the plaintiff's claims were lacking in supporting evidence and thus unsupportable.

According to the court, the decision of this case was made according to the following legal provisions: 1) Article 65 and 66 of the Tort Liability Law of China; 2) Article 64. Para. 1 of the Civil Procedure Law which specifies that a party shall have the responsibility to provide evidence in support of its own propositions; 3) Article 2 of the «some Provisions of the Supreme People's Court on Evidence in Civil Procedures»[3] which prescribes that the parties concerned shall be responsible for producing evidences to prove the facts on which their own allegations are based and the facts on which the allegations of the other party are refuted. Where a party cannot produce evidence or the evidence produced cannot support the facts on which allegations are based, the party concerned that bears the burden of proof should undertake unfavorable consequences; 4) Article 4. Para1(3) of the document above which proclaimed that in a compensation lawsuit for damage caused by environmental pollution the infringing party shall be responsible for producing evidence to prove the existence of exemptions of liabilities as provided in laws or that there is no causal relations between his act and the consequences.

In deciding this case, the court noted that the plaintiff, asserting that the solid wastes produced by the defendant's air-brick workshop had caused

[3] It is a judicial interpretation made by the Supreme People's Court which has the same effect as the law in China.

her damage, could not produce any material evidence to prove the causation between the solid wastes and the roses' fading away. Although it is prescribed by the law that the burden of proving the causal relations was shifted to the defendant, the court believed that proving the causation is still a professional issue that shall be answered by experts. When it came out that the question was scientifically unanswerable and thus the reasons why the roses withered remained unknowable, the court decided against the plaintiff and overruled all her claims since the facts on which her claims were based were not proved.

2.3. Appellate Instance of the Case.

Lizhen Zhang was not satisfied with the decision of the trial court and made an appeal to the intermediate court of Yuxi City. The case was heard by the intermediate court on August 12, 2014. In the appellate procedure, Lizhen Zhang claimed to rescind the judgment of the trial court, asked for damages amounting to ¥1,497,408.00 and requested for the restoration of the original state of her rose cultivation field. The reasons given by the appellant are listed as follows: 1) the trial court made obvious mistakes of fact. The court pointed out that the appellant failed to provide evidence to prove that the solid wastes produced by the air-brick workshop were washed by the rain to the rose cultivation field. However, it is an order of the nature that water flows downwards. Besides, the oral testimony provided in the first trial proved that the appellant had dug a drainage ditch between the workshop and her rose field but the ditch was later destroyed by the appellee. 2) The court misapplied the norms specified in Article 66 of the Tort Liability Law. The provision should be interpreted as a presumption of causation. According to the provision, if the appellee cannot provide evidence to prove that there are no causal relations between his conduct and the harm, the causation shall be deemed as existent. The same rule is proclaimed by Article 4. Para1(3) of the "Some Provisions of the Supreme People's Court on Evidence".

In interpreting Article 65 and 66 of the Tort Law and other legal provisions concerned, the appellate court stated that where any harm is caused

by environmental pollution, according to the tort law, the polluter shall undertake tort liabilities, including removal of endangerment, compensation of damage, restoration to the original condition, and etc. The liability for environmental pollution is individualized since the principle of no-fault liability is fixed by the legislator. Where any dispute arises over an environmental pollution incident, the polluter shall assume the burden to prove that he should not be liable or his liability could be mitigated under certain circumstances as provided by law or to prove that there is no causation between his conduct and the harm. To trigger the shift of the burden of proof, the plaintiff has to provide initial evidence to prove the probability of the causal relation between the conduct of the defendant and the harm caused. Besides, the parties can resort to an expert testimony to prove the facts on which their allegations are based. If the application is made by the parties, they can jointly decide a judicial expert center or, when the consent is not made, the court can designate a judicial expert center for them.

In this case, Lizhen Zhang, the appellant, believing that the solid wastes produced by the appellee have caused her losses, claimed in the appellate court for the damage compensation. The defendant refused the claims and asserted that no causation existed between his conduct and the damage consequences. On commission of the trial court, an expert testimony has been carried out and finished without result for technical reasons. Different from the trial court, under such circumstances, considering that the expert testimony is not the only form of evidence, the appellate court believed that the case could be decided on the bases of the facts ascertained by the court and «the order of nature or basic common sense».

According to the court, the affirmed facts of the case are as follows: Lizhen Zhang's roses were flooded in water for 2 hours after the heavy rain in the afternoon at 6 o'clock, July 12, 2013. Three day after the rain, 95% of the roses began to show symptoms of fading. The main materials used in making air-bricks were cement and sand. In consideration of that the rose garden was situated lower than the air-brick workshop and the lack of any drainage device between them, the solid wastes on the ground of the workshop were

undoubtedly washed into the rose cultivation field on that rainy day. The experts' verbal evidence confirmed that the fading of the roses would have been caused by a variety of reasons. Among those reasons the flood from the heavy rain may play the primary role and the pollution of the solid wastes generated by the workshop might play the role as a secondary cause. In a normal situation, the roses will not wither merely because of being flooded if the rose seedlings are healthy and the roses are properly treated after being drowned, such as drainage, pruning, medicine, and etc.

The evidence produced by the appellee could not exclude the possibility of the existence of the causation between the solid wastes produced by the air-brick workshop and the roses' fading. In absence of the expert proof, "basic common sense" could be used as a form of evidence to prove the causation. Therefore, the trial court's decision against Lizhen Zhang and its reasons were unsupported. The appellant's claims should not have been completely overruled. However, the solid wastes washed into the rose field and the lack of the drainage device between the workshop and the rose cultivation greenhouses were to be regarded only as secondary causes for the harmful consequence, so the claim for damages was only partly supported. More specifically, only 20% of the total loss was supported at last.

Additionally, the appellant's claim for restitution was not supported as the continuing harmful consequence caused by the solid wastes was not proved.

According to the reasons above-mentioned and the provisions of Article 170. Para.1(2) of the Civil Procedure Law of China and Article 65, Article 66 and Article 67 of the Tort Liability Law of China, the appellate court decided to rescind the original judgment and asked the appellee to pay the damages of ¥22,748.28 to the appellant within 30 days from the effective date of this judgment. Other claims were overruled.

3. Comments on This Case.

The victim advanced two claims in this case: the claim for damages is based on Article 65 and 66 of the Tort Liability Law of China; the claim for restoring the victim's land's original situation could be based on the Tort Law and the Real Rights Law. The two issues will be discussed respectively as follows.

3.1. The Causation Between the Infringement Act and the Harm.

As regards to the claim for damages, the focus of the dispute lay in the interpretation of Article 66 of the Tort Liability Law of China which proclaimed that the polluter shall assume the burden to prove that there is no causation between his conduct and the harm.

As far as the court of first instance is concerned, the court did not interpret the norm contained in Article 66 of the Tort Law as a presumption of causation. On the contrary, the court believed that the defendant's conduct should be proved as the "necessary cause" of the damage in constructing the defendant's tort liability, no matter who assumed the burden to prove the causation. Therefore, although the defendant could not prove that there was no causation between his conduct and the harm, the court has sought advice from the experts to prove the causation. As long as even the experts could not prove any factual causal relations between the defendant's act and the harm, the court decided to reject the plaintiff's claim.

As the appellant pointed out, the trial court misapplied the law. The court did not interpret the norm provided by Article 66 as a presumption of causation. According to the court, although the burden of proof was shifted to the defendant at the beginning of the trial, it would finally make the decision on the basis of experts' proof. Obviously, such an interpretation of the law makes little sense, because the meaning of Article 66 is to allow the judge to presume the existence of the causation where no evidence to the contrary exists. But it is worthy for us to pay attention to the reasons given by the court

in the judgment: the court believed that only experts might have the ability to prove the factual causation in many environmental tort cases since it is usually very difficult to be proved for technical reasons. If the causation is scientifically unable to be proved, the court will decide against the plaintiff as there is no causation between the conduct and the harm. The court's tendency to confuse causation in the law with the factual one is rather obvious in its reasoning.

The appellate court had a different idea on the plaintiff's claim for damages. It expressed in the judgment that «considering that expert testimony is not the only form of evidence, the case can be decided on the basis of the facts ascertained by the court and the order of nature or the basic common sense». Although the appellate court did support at least a part of the appellant's claims on the basis of the causation presumption, its judgment is still questionable in many aspects. Without reckoning the percentage of damages supported by the court which will be discussed later in the paper, the reason for the court's rejection of the victim's claim for restitution seems hard to understand as it was obviously in conflict with its attitude to the claim for damages. Actually, the two claims did have the same factual basis. From the judgment it can be seen that, on one hand the rule of causation presumption was applied in supporting the victim's claim for damages; on the other hand the same rule was very quickly forgotten by the same court – as the court said, since the continuing harmful consequence caused by the solid wastes was not proved, the claim for restitution was denied. The court's self-contradictory attitude towards the two claims reflected its ambiguity in its attitude to the issue of causation.

It is likely that the appellate court actually tended to support the trial court's idea on causation: as a rule, the "but-for rule" must be carried out in proving the causation between the injurious act and the harm in order to support the victim's claims, no matter on whom the burden of proof is imposed by the law. The court has wavered in deciding to support the claim for damages, but it came immediately back to the idea of "but-for rule" in dealing with the claim for restitution. Even in supporting the claim for damages, the reasons given by the court were somehow vague: it was

expressed in the judgment that the causation was identified in this case because «expert testimony is not the only evidence for proving the causation» once the experts failed to prove the factual causation, the causation could still be identified by «the order of nature or basic common sense». The court's logic was erroneous firstly because of its confusion about the relation between the expert testimony and «the order of nature or basic common sense». First, since experts were supposed to make their final reports exactly on the basis of «the order of nature», the court would not confirm «the order of nature» unknown to the experts. Second, strictly speaking, the dispute arose exactly because there was no «common sense» that could help resolve the problem of causation. All the evidence in this case could only prove a certain degree of probability of causation. On this point, the function of «common sense» is not very different from that of the judicial expertise.

The court's logic is questionable secondly because that it did not tell the real reason for its identification of the causation in this case. In fact, "common sense" does have its special role to play in proving causal connections, as it is a condition for shifting the burden of proof. The victim may use "common sense" to prove the probability of causation and to trigger the shift of the burden of proof. Therefore, the causation was proved in this case not because "common sense" could be regarded as a substitute for the judicial expertise in proving the factual causation, but because all these evidence, including the judicial expertise and "common sense", have proved the probability of causation which was enough to construct tort liability in environmental tort cases. In a word, the reason for the causation presumption did not lie in the function of "the common sense", but in the evaluation of the legislator.

It appears that the appellate court also tended to simply equalize causation in the law with factual one. In fact, such a misunderstanding of causal relations in the tort law is quite normal in China. In the 1980s and 1990s, a very outdated theory of "necessary cause" was generally accepted by Chinese civil jurists. According to the theory, the term of causation is used in the law to indicate the "inherent, essential and necessary" connection between

the infringement act and the harm. Moreover, a cause is distinguished from a condition as the latter is used to indicate the "external, occasional" connection between the act and the harm. As a result, the external and occasional condition of the harm is excluded from the range of causes in the traditional Chinese law of torts. Apparently, the "necessary cause theory" confounds causation in the law with the one in Marxist philosophy[4]. Modern theories of causation in the law have been gradually introduced into China since the end of last century, and it is nowadays generally accepted by Chinese civil jurists that causation in the law is actually based on legal policies[5]. In interpreting the rule of the causation presumption provided by Article 66 of the Tort Liability Law, Chinese jurists generally note that the causation in the environmental tort cases is different from that in other cases, since the former can be proved by the judge's "common sense" or "life experiences"[6]. Such causation is rather subjective. However, the impact of the old theory of "necessary cause" considering causation as a matter of fact can still be found in the juridical practices. Although the rule of the causation presumption is supposed to be applied in environmental tort cases, the courts still tend to confuse causation in the law with the factual one.

The situation may be explained at least partly by the outdated understanding of the function of civil liability: the wrongdoer is to be punished for his wrongdoing through the law of torts. [7]In fact, in the traditional model of tort law, "civil wrong" is established as a core element of civil liabilities.

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[4] On the traditional theory of "necessary cause", see X. CHENG (程□), *The Tort Liability Law*, Law Press China, 181-182; X. CHENG, *The Causation in the Tort Liability for the False Statements in the Security Market*, Cited from the website http://www.civillaw.com.cn/article/default.asp?id=13794 (last visited November 2014).

[5] See X. CHENG, *The Tort Liability Law*, 176-178; L. WANG (王利明), Y. ZHOU（周友□） et al., *The Tort Liability Law of China*, The People's Court Press 2010, 255-257.

[6] L. WANG, Y. ZHOU, et al., *Ibid*, 253-255.

[7] Actually, the punitive function of the tort law is explicitly proclaimed by the legislator in Article 1 of the Tort Liability Law of China in spite of many civil jurists' opposition. See X. CHENG, *The Tort Liability Law*, 22; see also the Civil Law Office of the Legislative Affairs Commission of the Standing Committee of the National People's Congress of China ed., *The Legislative Backgrounds and Ideas of the Tort Liability Law,* Law Press China 2010, 43, 111.

Such conception is deeply rooted in the traditional idea of identifying compensation with sanction of civil wrong (punitive justice model). It is generally said that there are two bases in this model: the first one is that the compensation for damage is the only general form of civil remedies. Consequently, it becomes a general pattern of the remedies for any civil wrongdoing which is to be punished. The second one is the widely acknowledged ethical principle that civil liabilities should be assumed by the person whose wrongdoing has caused the damage. The wrongful act thus becomes an element of the culpability[8].

In the punitive justice model of tort law, the function of civil liability is to find the person whose act has caused the damage (the wrongdoer) and let him burden the damage suffered by the victim. This cannot only explain why the principle of fault liability becomes the only criterion of imputation in the traditional tort law, but also explain the general misunderstanding of causation as a matter of fact: the liable person of torts must be the one who has caused the harm; and he is going to be punished by the law because of his wrongdoing. We can find the same logic in the judgments of the courts: if the causal connection between Qiyun Zhan's conduct and the damage were not proved as a matter of fact, the court would hesitate to make him liable for the damage suffered by the victim[9].

The modern civil law scholars believe that the function of civil liability is not to find the real actor whose conduct has caused the damage, but to fix certain criteria by which the burden of damage can be shifted from the victim to some others (restorative justice model), and the criteria are to be fixed on the basis of certain legal values protected by the law.[10] In a normal situation, everyone lives at his own risk. But if the risk or damage is involved in another person's conduct, it may violate corrective justice if the victim is not

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[8] C. SALVI, *La Responsabilità Civile*, Giuffrè Editore, Milano, 1998, 4-5.
[9] As mentioned above, the appellate court rejected the appellant's claim for restitution because there was no evidence to prove that the harmful effect was caused by the solid wastes.
[10] See S. RODOTÀ, *Il Problema della Responsabilità Civile,* Giuffrè Editore, Milano, 1967, 73-78.

compensated by that person. However, the foundation of civil liability is not always and necessarily connected with the reprehensibility of an act, and the principle of fault is not necessary to be the dominant standard for imputation.

With the same logic, the function of causation is not to find the real person who causes the damage, but to shift the burden of loss from the victim to the one who deserves it from the legal point of view. This liable person may be but not necessary the one who actually causes the harm. That is exactly the basis and starting point of the civil liability for the environmental infringement. Obviously, the causation here is normative rather than factual[11].

3.2. Victim's Proprietary Interests.

Generally speaking, the environmental tort is concerned with the unlawful interference with a person's use or enjoyment of land, or of some rights over or in connection with that land[12]. It is generally believed that this definition illustrates one of the primary distinctions between the environmental tort and other torts, in that the civil liability imposed by the law is directed towards protecting proprietary interests rather than controlling an individual's conduct[13]. This conclusion might be questionable if the contemporary law of torts is concerned, but it does reveal a very important distinction between the punitive justice model and the restorative justice model of tort law.

In the case discussed above, if the court had based its reasoning on the restorative justice model, it would have paid more attention to protecting the proprietary interests of the victim rather than finding the real causes of the harm. Consequently, it would not have neglected that the case also involved the application of the Real Rights Law of China. The related provisions of the Real Rights Law are as follows: Article 92 provides that where the right holder

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[11] It is notable that some jurists believe that the activities for proving factual causation are also value-oriented. See W. MALONE, *Ruminations on Cause-in-Fact*, in *Stan. L. Rev.,* 1956, 9, 60-62, in C. CHEN (□□富), *The Causation and the Damages*, Peking University Press 2006, 42-47.

[12] S. BELL, D. MCGILIVRAY, etc., *Environmental Law*, 8th ed., Oxford University Press, 2013, 360-361.

[13] *Ibid,* 360.

of a realty has to use a neighboring realty by virtue of using water, drainage, passage or laying pipelines, and etc., he shall make more efforts to avoid causing any damage to the right holder of the neighboring realty; He shall make corresponding compensations in case any damage is caused. Article 35 proclaimed that in case a real right is under obstruction or may be obstructed, the right holder may require the removing of the impediment or the termination of the danger. Article 36 stipulates that in case a realty or chattel is damaged, the right holder may require the repairing, remaking, changing or the restoration of the original state. Article 37 indicates that in case the infringement upon a real right causes losses to the right holder, the right holder may require the compensation for the losses or the assuming of any other civil liability. Article 38 provides that the ways for protecting real right as prescribed in the present Law may apply either independently or jointly in light of the specific situation of an injury of real right.

In this case, the victim's claim for restitution of the land's original state could have been very well supported by these provisions of the Real Rights Law without the need to prove the existence of any damage. However, neither did the trial court nor the appellate court even mention the provisions of the Real Rights Law in their judgments. Their neglecting of the Real Rights Law reflects the profound effects of the punitive model of torts in the courts. Actually, the courts focused nearly all their attention on finding the real reasons for the damage; while the demand to have the proprietary interests protected was somehow overlooked by them.

3.3. Other Issues.

In considering that protecting property rights can normally have the incidental effect of providing a general benefit to the wider community by achieving improvements in environmental quality[14], the courts' neglecting of the Real Rights Law also implied that they ignored the value of environmental protection. In its essence, a green tort law means that the principles of the

[14] *Ibid.*, 360-361.

environmental law can be used to interpret the provisions contained in the tort law. The new Environmental Protection Law of China 2014 proclaimed in Art.5 the significant principle of precaution. Technically, the reason for the causation presumption in environmental tort cases could be very well explained by this principle, since precaution is exactly based on the probability of danger involved in certain activities. In practice, it is quite normal in environmental tort cases that proving the causation is technically difficult and very costly. The infringement acts in these cases use to be broad, continuous and hidden, and the harmful consequences might appear only after a long period. In some cases, it is even impossible to find the causes of the harm under the condition of modern techniques. Under such circumstances, it would be unreasonable to ask the victim to produce evidence concerning causation to support their claims. Thus it can be seen that the presumption of causation is a rather useful legal technique to prevent the possible damage, and it is an inherent requirement of the principle of precaution provided by Article.5 of the Environmental Protection Law.

Finally, the appellate court did not clarify in the judgment why the victim's claim for damages was only partly supported and how the percentage (20%) was calculated. In fact, even though the dominant legal theories and practices upon causation in the Tort Liability Law of China do not distinguish legal causation from factual one, nor do them distinguish the causation for limiting the tort liability from the one for constructing tort liability, it is generally accepted that if a person's conduct has materially increased the probability of the harm, or the harm is predictable, or the conduct is generally regarded as adequate to cause the harm, he should be liable for the harm if there is no excuse for him to mitigate his responsibility. As ascertained during the action, roses generally will not wither only because of being flooded if the rose seedlings are healthy and the roses are properly treated after being drowned. Common sense tells us that the solid wastes produced in making air-blocks increased the probability of doing harm to the roses, and the result was predictable as the victim had dug the drainage ditch between the workshop and her rose field to avoid the harm. Besides, there was not a third party involved

in causing the damage. All these facts were in conflict with the court's judgment that the solid wastes were merely the secondary cause of the damage. On the contrary, if the victim could have proved that her seedlings were healthy and proper measures were done after the rain, it would be reasonable to deem the solid wastes washed into the rose cultivation field as an adequate cause for the caused damage. As a result, the defendant/appellee should be liable for all the damage suffered by the victim.

4. Conclusion.

Accordingly, the profound influence of the traditional punitive model of the tort law and of the Chinese "necessary-cause theory" of 1980s to many of Chinese courts has constructed an obstacle for the environmental tort norms to function properly. To a certain extent this is due to the deficiency of Chinese civil law studies on the function of civil liability and on causation in the law.

In fact, in many environmental tort cases, the liability for environmental infringements is attributed to the defendant not because his conduct has materially caused the damage, but because his business involves a risk of pollution. Identification of the causation for constructing polluters' tort liability is not a value-free activity. It is carried out on the basis of normative values predefined by the legislator.

In addition, all the laws of a country should be regarded as a uniform system in logic as well as in values. Remedies for infringement of proprietary interests concerning a person's use or enjoyment of land in private sectors can be found in the tort law as well as in the real rights law; moreover, although not functioning as legal sources in private litigations, some principles proclaimed by public laws, such as the principle of precaution provided by the Environmental Protection Law, might still be useful in interpreting specific legal rules of private laws. Such a legal reasoning is in practice to be done on the basis of an internal system of the law which is made of principles and values protected by the legal order of a country.

Criminal Procedural Law

THE CASE OF THE ILVA PLANT IN TARANTO: HOW TO FIND THE PROPER BALANCE BETWEEN THE SAFEGUARD OF HEALTH AND THE PROTECTION OF THE ECONOMY?

Sofia Mirandola

CONTENTS: 1. – Introduction. 2. – What is Ilva? 3. – Criminal Proceedings for Damages to Environment and Health. 4. – The Seizure Order. 5. – The Government's Intervention: the "Save Ilva" Decree. 6. – The Judiciary's Reactions: the Issue of Constitutionality. 7. – Concluding Remarks and Considerations.

1. Introduction.

The criminal proceedings initiated in relation to the activities of Ilva, a steel plant operating in Taranto, Italy, can be considered of interest in the field of environmental criminal justice in the light of the various relevant problems they aroused, both of legal and political nature. The first issue regards the need to strike a fair balance between contrasting principles, both equally recognized by law. On the one side, there is the health of the population of an entire city, under threat because of the pollution of the air produced by the steel plant; on the other, there is the economy of a town almost entirely based on that factory's activity, which can be irremediably undermined in case its production is considerably reduced. This has inevitably led to a clash between the need to protect the citizens' health and the need to preserve the economy of a region.

The second issue concerns which subject is better placed to adopt the necessary decision and find the proper balance in the prevention of environmental crimes. Is it up to the judiciary to decide, or to the Government? This case shows that, sometimes, when the executive refrains

from acting for many years, the intervention of the judiciary appears to be the only solution left. At the same time, the action of the judiciary lacks the necessary flexibility and thus risks bearing irremediable side effects on the system's economy. This is especially true in a legal system, like the Italian criminal justice system, which is strictly ruled by the legality principle, where the judiciary is independent from the executive and is subject only to the law[1].

This case indeed allows us to consider the complex interplay between these different subjects in the prevention of environmental crimes, and the inevitable interlacing of the traditional function of criminal justice, consisting in the establishment of crimes and liabilities, with aspects of management and administration of complex situations that involve different and hardly appeasable interests, yet all deserving consideration.

2. What is Ilva?

Ilva S.p.a. is located in Taranto, a city in southern Italy, and is the biggest steel plant in Europe. In December 2013 Ilva S.p.a. employed about sixteen thousands workers[2]. It was built in 1961 and until 1995 it was owned by the State[3], but then it was sold to a private company, the Riva Group, who still presently owns it.

Since the beginning, however, the activities of Ilva had given rise to concerns of pollution and environmental dangers. As soon as July 1997, the Government declared Ilva an area of high danger of environmental crisis, and in 1998 Taranto was classified as a site of national interest that needed

[1] Article 101 paragraph 2 of the Constitution states that «judges are subject only to the law», and article 104 provides that «the judiciary constitutes an autonomous order, independent from any other power». See M. CAIANIELLO, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. Luna, M. Wade (editors), *Transnational Perspectives on Prosecutorial Power,* Oxford Un. Press, 2012, 250 and ff.; G. ILLUMINATI, *The Role of the Public Prosecutor in the Italian System*, in J. Peter, P. Tak (editors), *Tasks and Powers of the Prosecution Services in the EU Member States*, Wolf Legal Publishers, 2004, vol. I, 308–10.
[2] See www.gruppoilva.com (last visited July 2014).
[3] At the time it was called *Italsider*.

reclamation, as it was found that the mortality rates for lung and bladder cancer were higher than the average in the region[4].

The continuing situation of pollution in the area of Taranto led the judicial authorities to open a criminal investigation in the end of the 90's, which then ended in 2005 with the conviction of several managers of Ilva for emission of big quantities of mineral dusts and dioxin and omission of any actions for preventing it[5].

However, the already alarming environmental and sanitary situation kept on escalating over the years: various studies reported high rates of cancer mortality in the area, cases of presence of dioxin in mother's milk, and the killing of thousands of livestock. The mayor of Taranto even ordered the temporary closing of public gardens in a part of the city, due to the presence of dioxin in the grass. Such studies established that the cause of the pollution were the harmful emissions coming from the plant of Ilva, that in 2008 was established to produce quantities of dioxin that were eleven times higher than the maximum level permitted at global level[6].

In this worrying scenario, on 4 August 2011, the Ministry of the Environment, after five years of preliminary discussions and controls, released to Ilva the first so-called "A.I.A." or "Autorizzazione Integrata Ambientale", an integrated environmental authorisation regulated by the Italian Code of the environment[7].

The A.I.A. is an administrative authorization required for the exercise of certain industrial plants (such as, for example, chemical implants, metal production plants, waste management plants) whose activities have a potential negative impact on the environment. The authorization, in particular, sets out requirements and obligations to be met in order to ensure compliance with the

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[4] See report of the «Parliamentary inquest commission on the illicit activities connected to the cycle of waste» with regards to the Region of Puglia, approved on 17 October 2012.

[5] See Cass. Pen., sez. III, n. 38936, Riva, in Giust. Pen., 2006, 545.

[6] See, G. ARCONZO, *Note critiche sul "decreto legge* ad Ilvam*", tra legislazione provvedimentale, riserva di funzione giurisdizionale e dovere di repressione e prevenzione dei reati*, in *Dir. pen. cont.*, 2013, no. 1, 16 and ff.

[7] See section 29 *sexies* of the legislative decree no. 152 of 2006.

so-called «integrated pollution prevention and control principles»[8] and avoid or minimise as far as possible the detrimental effects of the productive activity on the environment and reach a higher level of environmental protection.

To this end, the A.I.A. prescribes the adoption of the best possible techniques and practices in relation to the specific activities involved, and is released by the relevant authorities only upon adoption of such techniques[9]. For example, the A.I.A. sets the maximum values of emissions of polluting substances and the requirements of control of such emissions to which the plant must adapt in order to operate lawfully.

3. Criminal Proceedings for Damages to Environment and Health.

In this context of environmental danger, in 2010 the judicial authorities opened new criminal investigations into the activities of Ilva for crimes against the public safety upon charges of environmental disaster[10]. Such charges concerned the poisoning of substances fit for human consumption and the negligent omission of precautionary measures safeguarding the health of the workers on their work place. According to the prosecution, these conducts had been continuing since 1995 and had been committed through emissions of harmful dusts and gases in the atmosphere.

Although all these crimes are qualified by law as "abstract endangerment crimes", which means that the described conducts are punishable for the simple endangerment of the public safety, even if they do not cause any effective harm, the prosecution claimed that in the instant case

[8] Such principles were first introduced by Directive 96/61/CE and are now finally regulated by Directive 2010/75/UE, the industrial emissions directive.
[9] The A.I.A. is normally issued by the Regions, but for the biggest plants, such as Ilva, it is released by the Ministry of the Environment, see section 7, paragraph 4 *bis* and 4 *ter* of the code of the environment. It needs to be renovated every five years.
[10] In fact, section 434 of the criminal code punishes "disasters" in general that endanger public safety, but the case-law has hold that also environmental disasters fall into this provision. However, the Italian Parliament is now examining a draft law (n. 1345 of 26 February 2014) that introduces the specific crime of "environmental disaster".

the activities of Ilva have also produced a concrete and significant harm to the environment and health of the population[11].

The elements collected during the investigations were then hold as sufficient to support the charges and therefore on 7 March 2014 the prosecutor asked the judge of the preliminary investigations for the leave to prosecute fifty individuals, among which the managers of Ilva, the directors of the plants, the owners, but also political and administrative authorities, and three companies, for criminal conspiracy aimed at environmental disaster[12].

The Ilva case is also of interest because it is the first time that some preventive measures available against legal persons under the specific legislation on criminal liability of legal entities have been applied for the prosecution of environmental crimes[13]. In fact, the Directive 2008/99/EC on environmental protection through criminal law was implemented in Italy through the Legislative Decree no. 121 of 2011 that extended legal entities' criminal liability also to environmental crimes, not previously foreseen by Italian legislation.

The most striking aspect of this case is what happened before the opening of the prosecution and during the investigation phase, through the adoption of judicial measures for the prevention of future and further environmental damages.

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[11] See, D. PULITANÒ, *Fra giustizia penale e gestione amministrativa: riflessioni a margine del caso Ilva*, in *Dir. pen. cont.*, 2013, no. 1, 44 and ff.

[12] Indeed, in Italy, even though the prosecutor has the constitutional power to prosecute, he needs to request the authorization to the judge of the preliminary investigations, who must assess in an adversarial hearing whether the prosecution is founded *prima facie* (section 416 of the code of criminal procedure). It is a form of guarantee of impartiality of the prosecution. See, G. ILLUMINATI, *Italy,* in T. Vander Beken, M. Kilchling (editors), *The role of the public prosecutor in the European criminal justice system*, 2000, 113 and ff.

[13] Namely, the seizure of the equivalent of the proceeds of the crime foreseen by section 19 and 53 of legislative decree no. 231 of 2001, adopted on 22 May 2013; see, L. GABRIELE, *Caso Ilva: il d.lgs. n. 231 del 2001, il problema occupazionale ed i poteri del giudice penale*, available at http://www.penalecontemporaneo.it/materia/5-/-/-/2668-caso_ilva__il_d_lgs__n__231_del_2001__il_problema_occupazionale_ed_i_poteri_del_giudice_penale/ (last visited September 2014).

4. The Seizure Order.

In July 2012, the prosecutor filed a request for the preventive seizure of a significant part of the plant of Ilva, which was then disposed by the judge for preliminary investigations on 25 July 2012[14]. Indeed, the data collected during the investigations, notably two independent expert reports, a chemical-environmental one and a medical-epidemiologic one, established that the dangerous polluting emissions were coming from the plants of Ilva.

According to the law, such preventive measure is aimed at stopping the prosecution of an alleged criminal activity when two conditions are met: firstly, there must be a reasonable suspicion of existence of a crime, and secondly, a danger that, pending criminal proceedings, the protected good would be further damaged. To this end, the seizure order stated that «the outcomes of the inquiry denounce the existence of a situation of sanitary and environmental emergency, caused by the polluting emissions diffused by the plant Ilva S.p.a.»[15].

The crucial aspect of the seizure order was that it prohibited the use of the seized plants and that it accordingly appointed four custodians for Ilva, assigning them the task to «immediately carry out the technical and security procedures for the interruption of the production and the complete arrest of the plants», thus prohibiting the continuation of any productive activity.

In substance, the seizure of the plants without any possibility of their use was ordered on the ground that the continuing of the productive activity would have worsen the environmental pollution already ascertained by the expert tests and would have caused further damages to the health of the population. However, in order to stop an alleged criminal activity that harmed

[14] The preventive seizure is regulated by section 321 of the code of criminal procedure and it's a preventive measure that can be adopted by the Judge for preliminary investigations upon request of the Prosecutor «when there is a danger that the availability of a good related to a crime could worsen or protract the consequences of a crime or facilitate the commission of other crimes».

[15] The judicial order of preventive seizure is available at http://www.scribd.com/doc/106494971/Decreto-Di-Sequestro-Preventivo (last visited September 2014).

environment and public health, such preventive measure affected, on the other hand, the administration and management of that plant, thus potentially jeopardising its production and employment.

For this reason, the CEO of Ilva lodged an appeal against the seizure order in front of the "Tribunale del Riesame", the provincial court competent to re-examine the lawfulness of already adopted preventive measures such as seizures[16]. By a judgment of 7 August 2012, the court rejected the appeal and upheld the seizure order, stressing that «the harmful emissions are still ongoing».

However, the court was not convinced that the complete arrest of the plants was the only way for attaining the termination of the harmful emissions. Therefore, it afforded to the appointed custodians, under the prosecutor's supervision, the task of assessing and deciding what were the better strategies to reach such goal, according to the best practices available. In substance, the court afforded more decision-making power to the custodian, nevertheless maintaining the prohibition of using the plants for productive ends, an objective which might have been feasible only in the future, after the complete end of the harmful emissions.

Notwithstanding the seizure order and the ban of using the plants, Ilva continued in the production, while the custodians adopted some prescriptive measures in order to reduce the level of polluting emissions and the workers organized major strikes and manifestations against the seizure and its negative impact on the productive activities.

The Government, on its side, reacted to what was held as an «activism of the judges in industrial politics, which was creating a confusion of roles»[17] announcing that the Minister of the Environment would proceed to the revision of the A.I.A. afforded to Ilva in 2011. This means an update of the prescriptions of the old A.I.A. and the introduction of new and stricter ones, in order to reduce the level of the harmful emission caused by the productive

[16] See, section 322 and 324 of the code of criminal procedure.
[17] See the statements of the Vice-secretary to the Presidence of the Committee of Ministers, in R. GIOVANNINI, *Ilva, il Governo ricorre alla Consulta*, in *La Stampa*, 14 August 2012.

activity of Ilva. In particular, the Government announced that, in the new authorization, it would introduce all the stricter prescriptions provided in the judicial seizure order, apart from the requirement of total arrest of the plants[18].

On 27 October 2012 the revised A.I.A. was published: it provided that Ilva was authorized to carry on in the production only in so far as it complied with all the new provisions contained in it. Such provisions were very similar to those contained in the judicial seizure order. In addition, they also imposed to Ilva the adoption of the best practices for the production of steel and iron outlined in decision no. 2012/135/UE of 28 February 2012 of the European Commission, even though this had not yet entered into force. However, their implementation timing was significantly wider from what was ordered through the seizure: while the judicial order imposed the immediate adoption of all such measures, the revised A.I.A. provided for deadlines ranging from six to thirty-six months[19].

In November 2012 Ilva presented to the Government an operational project for the implementation of the new A.I.A., though specifying that it could not carry out such plan as long as the plants were under seizure and not available to Ilva. Therefore, on 20 November 2012, Ilva filed before the Court of Taranto a request for the release of the plants from seizure, maintaining that an eventual refusal would have lead to the definitive closing of the plant. This led to new strikes of the workers of all the plants of the Riva Group and to demonstrations in the whole country[20].

Only a few days after, on 26 November 2012, while such request was still pending, the judge for the preliminary investigations of Taranto issued a new seizure order, this time affecting the articles produced by Ilva after the seizure of the plants in July. According to the judge, such products were the «fruits of an unlawful activity» and a criminal asset, as they had been produced

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[18] V. PICCOLILLO, *L'Ilva: per la bonifica pronti 146 milioni. Nuovo appello ai giudici*, in *Corriere della Sera*, 18 August 2012.

[19] The complete text of the A.I.A. is available at http://aia.minambiente.it/Ilva.aspx (last visited September 2014).

[20] For an in-depth reconstruction of the facts, see G. ARCONZO, *Note critiche sul "decreto legge* ad Ilvam*", supra* note 6.

after the judicial seizure banning the use of the plants for productive ends. Therefore such products could be seized on the basis of the second paragraph of section 321 of the code of criminal procedure, which provides for the possibility to seize the proceeds of crime in the view of a future confiscation. In front of this further measure, Ilva reacted announcing the termination of all its productive activities and the closing of the plant of Taranto as well as of all the other plants that were supplied by such plant.

On 30 November 2012, the judge for the preliminary investigations rejected Ilva's request for the release the plants from seizure. He specified that «the revision of the A.I.A. does not prove that the situation of serious and actual danger in front of which the seizure had been order has come to an end», on the grounds that «the deadlines for the implementation of the measures provided with the A.I.A. are conflicting with the urgent needs of protection of the local population and workers» and that «the A.I.A. does not take into the due consideration the currency of the danger and seriousness of the consequences on the health and the environment attributable to the harmful emissions coming from the steel plant».

It appears, therefore, that the judges took a proactive action for an immediate safeguard of the environment and health of the population of Taranto, overlooking however the negative implications that this decision could have had on the economy and employment in the area. Such determination is perfectly understandable and legitimate, as in a judicial system strictly ruled by the legality principle as the Italian criminal one, the judges are called to take into consideration only the interests protected by the criminal law provisions they are applying, which in the present case were the environment and public health[21]. The prosecutors and the judges should not worry about the further side effects that their decision may entail on other relevant interest that, to the contrary, are not protected by those criminal

[21] These indeed, are the interests protected by the criminal provisions punishing environmental disaster and the other charges upon which the prosecution started, see above paragraph 3.

provisions, such as the production and employment levels[22]. However, from a more general perspective, it is clear that the protection of employment and economy are nevertheless important interests that deserve some kind of consideration, even if not on the judges' part.

5. The Government's Intervention: the "Save Ilva" Decree.

On the same day the Government decided to take action through the adoption of law decree no. 207 of 2012, which, although containing general provisions applicable also to future cases, was expressly aimed at ensuring the prosecution of the productive activities of Ilva, and was therefore called the "save Ilva" decree. It entered into force on 3 December 2012 and was then converted into law by the Parliament with the law of 24 December 2012, no. 231[23].

In particular, the Government acknowledged that the continuation of the productive activities of Ilva represented a «strategic priority of national interest», on the grounds of the needs of protection of the environment and health, but also on the need to preserve the levels of employment and public safety[24]. In this perspective, it considered that the revised A.I.A. indeed ensured the immediate execution of measures aimed at the protection of health and environment, as well as provided further and gradual measures of intervention directed at the progressive recovery of the plants. For those reasons, the Government held that it was extraordinarily necessary and urgent to enable the Ministry of Environment to authorize the continuation of the productive activities of an industrial plant of national strategic interest for a

[22] To this regard, L. GABRIELE, *Il caso Ilva: il d.lgs. n. 231 del 2001*, *supra* note 13, who maintains that criminal law practitioners always focus on an individual dimension, not only when criminal liability comes into play, but also when considering the effects of judges' decisions.
[23] Decreto legge 3 dicembre 2012 n. 207, *Disposizioni urgenti a tutela della salute, dell'ambiente e dei livelli di occupazione in caso di crisi di stabilimenti industriali di interesse strategico nazionale*, in *Gazzetta Ufficiale*, 3 December 2012, no. 282.
[24] See, Preamble of law decree no. 207 of 2012.

limited period of time whenever there is an absolute need of ensuring employment and production through the revision of it's A.I.A[25].

But how did the Government decide to handle this emergency situation in an effort to satisfy all the opposite needs and interest? Through the adoption of such law, politics have burst into a scene in which the judiciary had already intervened, in order to adequately protect also the other interests at stake, completely neglected by the judges who were required to strictly apply criminal law protecting public safety.

When taking a look at the content of the law decree, section 1 provides that the Government can individuate which are the «plants of strategic national interest», a new juridical category that can operate only for plants employing at least more than two hundreds workers for at least one year. Only for such plants, when there is an absolute need of ensuring employment and production, the Ministry of the Environment, when revising the A.I.A., can authorize the prosecution of its activities for no longer than thirty-six months provided all the A.I.A. provisions are respected[26]. Furthermore, such authorization can be issued even in cases when judicial authorities have already issued seizure orders affecting the goods and facilities of the business. It is indeed specified that seizures orders do not hinder the continuation of the activities[27]. At the same time, however, the law introduces stricter controls on the protraction of the activities: heavy pecuniary sanctions are foreseen in case the company does not comply with the provisions of the A.I.A. and the Ministry of Environment has the duty to report to the Parliament on the state of compliance to the provisions of A.I.A. every six months[28].

While such provisions have an abstract and general nature, section 3 of the law decree is devoted to apply the abovementioned provisions to the specific case of Ilva, thus making the decree an individually tailored law.

[25] See, Preamble of law decree no. 207 of 2012.
[26] Section 1, paragraph 1 of law decree no. 207 of 2012.
[27] Section 1, paragraph 4 of law decree no. 207 of 2012. This provision clearly legitimates *ex post* what has already occurred in fact, stating that when there is a conflict between the A.I.A. and the seizure order, it is the A.I.A. that prevails.
[28] Section 1, paragraph 2 and 5 of law decree no. 207 of 2012.

Namely, it defines Ilva as a plant of strategic national interest and it acknowledges that the revised A.I.A. of October 2012 contains the requirements aimed at ensuring the continuation of its activities. It is thus clear how this provision contrasts and frustrates the effects of the seizure order previously adopted, precluding that it may hinder the productive activities of Ilva. Not only, but the law decree also expressly states that Ilva is authorized to continue in its activities in so far as it complies with the provision of the A.I.A., and calls for the facilities of the plants to be made available to Ilva. Finally, it authorizes the company to sell its products, thus depriving of its effects also the second seizure order adopted by the judicial authorities[29].

Certainly, such provisions also had the indirect effect of removing the custodian appointed for the management of Ilva by the seizure order. Indeed, paragraph 4 of section 3 appoints an independent Commissioner with no coercive powers, who is charged with the monitoring and supervision of the implementation and respect of the A.I.A. provision on the part of Ilva and refers to the Government on any problematic issues, while suggesting measures for their solution[30].

It is clear that the crucial aspect of this piece of legislation is that it has directly influenced the exercise of the judiciary function, frustrating the effects of the orders already adopted by the judge of the preliminary investigations: this appears to be its main objective[31]. In fact, the adoption of such law decree uncovered the existence of a latent conflict between the different powers – judicial and political-administrative - who both claim exclusive competence in coping with such complex situations and in operating the necessary balance between the opposing interests involved[32]. They both support two opposite

[29] Section 3, paragraph 3 of law decree no. 207 of 2012.
[30] Section 3, paragraph 4 and 6 of law decree no. 207 of 2012.
[31] In this sense, G. AZZARITI, *Decreto Ilva: auspicabile l'intervento della Corte costituzionale*, in http://www.penalecontemporaneo.it/area/3-societa/-/-/1928-decreto_ilva__auspicabile_l_intervento_della_corte_costituzionale/ (last visited September 2014).
[32] In this sense, also F. VIGANÒ, *Il caso ILVA (e molto altro) nel nuovo numero della Rivista trimestrale*, in *Dir. pen. cont.*, 2013, no. 1, 1 and ff; and, R. BIN, *Giurisdizione o amministrazione, chi deve prevenire i reati ambientali?*, in *Giur. Cost.*, 2013, n. 3, 1505 and ff.

models of intervention: on the one side, there is the judiciary, who holds itself entitled to set an ultimate limit to the political powers of balancing core values in the name of overriding fundamental rights such as life and health of the population that claim protection even against the decisions of the majority. On the other, the "save Ilva" law outlines a completely opposite approach, centred on the administrative powers of regulation.

6. The Judiciary's Reactions: the Issue of Constitutionality.

Following the publication of the law decree, on 5 December 2012 the prosecutors of Taranto did not revoke the seizure order, but solely conceded to Ilva the availability of its plants, and refused to release from seizure the products of Ilva, holding that the law decree could not have any retroactive effects[33]. Not only, but they also raised a "conflict of attributions" claim in front of the Constitutional Court[34]. This having been declared inadmissible, on 15 and 21 January 2013 both the "Tribunale del riesame" and the judge for the preliminary investigations of Taranto questioned the constitutionality of the provisions of the law decree in front of the Constitutional Court[35]. This referral gave the Court the opportunity to clarify, somehow, whether there are any constitutional imperatives that demand or exclude one type of intervention or the other in the prevention of environmental crimes. The judgment of the Constitutional Court was released on 9 May 2013 and it rejected all the arguments submitted by the applicants, therefore declaring the compatibility

[33] See G. ARCONZO, *Note critiche sul "decreto legge* ad Ilvam*"*, *supra* note 6.
[34] Pursuant to article 134 of the Constitution, the Constitutional Court is competent to judge on "conflict of attributions", i.e. claims brought by one of the State's powers against an act of another power when it is argued that the last one has intruded the other power's sphere of competence.
[35] In the Italian legal system there is no right to individual petition before the Constitutional court, but only when a judicial authority during a judicial proceeding has a «not manifestly ill-founded doubt» that a law provisions he needs to apply for solving the case may not be in conformity with the Constitution, he has to refer the issue to the Constitutional court, who will then decide (section 23 of law no. 87 of 1953). If the Court declares that the law provision is unconstitutional, the law provision is abolished with a general effect (article 136 of the Constitution).

with the Constitution of the provisions contained in the "save Ilva" law[36]. But let's consider what the most important arguments in this perspective were.

The first and most substantive issue submitted by the judges was that the solution adopted by the law had completely neglected the fundamental rights to health and to a healthy environment, enshrined in Article 32 of the Constitution, in favour of the protection of the economy and employment, protected by Articles 41 and 4 of the Constitution. The law, therefore, was conflicting with the hierarchy of values imposed by the Constitution, where – in the judges' view – the right to health has a primary role, overriding all the other rights[37].

The Court, however, observed that there is no such strict hierarchy among constitutional values, but that all of them are on the same level, with the consequence that there is no absolute constitutional right that must always prevail. To the contrary the legislator must always ponder the different constitutional values involved in a particular situation in order to find a reasonable equilibrium[38]. In this perspective, the "save Ilva" law has sought to find such equilibrium through a reasonable balance of all the rights involved, in order to avoid a very serious employment crisis, while bearing in mind at the same time the need to protect the environment and the health of the people living in the area[39].

Other complaints regarded, furthermore, more procedural aspects. The judges claimed that the law allows a company to continue its productive activity for thirty-six months even though such activity constitutes a crime. Therefore, this quashing of the effects of any judicial preventive measure, even future, which attempts at preventing harmful effects in front of a continuing illicit activity, constitutes an "expropriation" of the judicial function. Indeed, the judicial authorities in such cases are deprived of any means to prevent the criminal activities implied with the prosecution of the production in order to protect the interest safeguarded by criminal law. In the judges' view, the

[36] Constitutional Court, judgment of 9 May 2013, no. 85.
[37] Constitutional Court, judgment of 9 May 2013, no. 85, paragraph 1.2.
[38] Constitutional Court, judgment of 9 May 2013, no. 85, paragraph 9.
[39] Constitutional Court, judgment of 9 May 2013, no. 85, paragraph 10.3.

legislator would be acting as a sort of superior instance judge, who can bring to nothing the decisions of the judges, thus creating a sort of absolute impunity from criminal laws, both substantial and procedural. This would represent a violation of the principles of separation of the functions (implicit in Articles 102 and 104 of the Constitution) and would be in contrast with the constitutional duty of punishment of crimes, established by Article 112 of the Constitution[40].

The Court however, has considered such objection ill-founded. According to the Court, the law does not introduce any immunity and does not hamper the investigations in any way; on the contrary it strengthens the controls on the polluting activity. Therefore, what was unlawful before is still unlawful now and still can be prosecuted. The only effect of the law on this issue is avoiding that seizure orders, current or future, may prevent the prosecution of the productive activity. Hence the constitutionally relevant power and duty of the prosecutor to punish crimes is not hampered, but simply needs to be exercised in accordance to the new law, which provides that the activity carried on in compliance with the provisions and conditions of the revised A.I.A. is to be considered lawful, on the grounds that this administrative act has introduced a path of environmental recovery, inspired to the balancing of all the interests involved[41]. On the other hand, the Court held that the law has not intruded into the competence area constitutionally reserved to the judiciary and therefore no violation of the principle of separation of functions has been found. Indeed, Article 112 of the Constitution reserves to the judiciary – better, the prosecutor – the power and duty to investigate and prosecute criminal offences, which is the duty to establish the commission of criminal offences and their liability. The Ilva law however did not intrude in this function, as it did not bear any effect, directly or indirectly, on the ongoing proceedings aimed at ascribing the responsibilities for the alleged criminal offences and their outcomes[42]. To the contrary, it had

[40] Constitutional Court, judgment of 9 May 2013, no. 85, paragraph 1.2 and 1.4.
[41] Constitutional Court, judgment of 9 May 2013, no. 85, paragraph 8.1.
[42] Constitutional Court, judgment of 9 May 2013, no. 85, paragraph 12.5

effects only on the preventive measures adopted by the prosecutors: a preventive measure which was not aiming at ensuring evidence for the forthcoming proceedings, so that it did not have any impact on the outcomes of such proceedings. Indeed, the affected preventive measure was aimed solely at thwarting a worsening of the consequences of the offence and the commission of other crimes and this activity is not included in the area constitutionally reserved to the judiciary[43]. The judiciary always needs to exercise this power in accordance to the law, also when the law changes, as in the present case, and considers that the activity is unlawful. In this sense, the "save Ilva" law has introduced a «waiver» to the ordinary regulation of seizure orders provided by section 321 of the code of criminal procedure: it provides that, with regards to plants of strategic national interest, when the A.I.A. is revised, seizure orders cannot forbid the use of the seized premises as long as the A.I.A. provisions are complied with, out of the consideration that such activity is now lawful[44].

This implies that it is to the legislator, and therefore to the administration, to regulate environmentally dangerous activities, and not to the judiciary, whose preventive measures must adapt to such decisions. Therefore, according to the decision of the Constitutional Court, on 15 May 2013 the Judge for the preliminary investigations of Taranto released from seizure the products of Ilva.

7. Concluding Remarks and Considerations.

The outcomes of the Constitutional Court's decision, and more in general the whole Ilva case, allow us two kinds of considerations.

First of all, what role can the judiciary play in the fight against environmental crime in a State governed by the rule of law? It seems that the role of the judicial authorities, especially in a field such as the environmental one, can no longer be confined to the traditional one of establishment and

[43] Constitutional Court, judgment of 9 May 2013, no. 85, paragraph 12.6.
[44] D. PULITANÒ, *Fra giustizia penale e gestione amministrativa*, *supra* note 11.

prosecution of already committed criminal offences. It appears clearly that this is no longer the case. Judges are invested – by the law itself – of preventive functions, of proactive instruments in defence of particular rights and interests against the dangers that threaten them, even before they have turned into actual damages. From a procedural perspective, it is again the law itself that assigns to prosecutors the possibility to adopt several preventive measures that are exclusively aimed at the prevention of other crimes and at the thwarting or confining the further and more serious consequences of the crimes. This was exactly the case with the preventive seizure targeting Ilva.

In this field, more than others, criminal law is conceived as an instrument of preventive protection of fundamental rights, rather than a simple reaction against damages already produced[45]. This entails, on the one side, what can be perceived as a sort of «loss of impartiality» of the judicial authorities, in a way that brings them closer to the the tasks of the administration. Indeed, despite the fact that the administration's activity, according to the general principles of the Italian system, must operate impartially, its impartiality is much different from that of the judiciary, as the former is required to operate proactively in the pursuit of the public good. In a similar way, the judiciary in the Ilva case were no longer simply applying the law being above all interests involved, but they were, to the contrary, pursuing the protection of the endangered fundamental right, that is the health and the environment, thus assuming public functions of prevention[46]. When judicial measures are aimed at the social defence from dangers, there is some kind of «repressive finalism» that alters the normal structure of criminal proceedings[47]. Certainly, this entails on a procedural level that criminal proceedings are no longer exclusively oriented to the discovery of already committed crimes, but are also aimed at preventing future crimes or at least restraining the harmful effects of the crimes committed, a function which is gaining increasingly in importance. And this observation entails a twofold implication.

[45] F. VIGANÒ, *Il caso ILVA (e molto altro)*, *supra* note 31.
[46] R. BIN, *Giurisdizione o amministrazione*, *supra* note 31.
[47] D. PULITANÒ, *Fra giustizia penale e gestione amministrativa*, *supra* note 11.

Firstly, this should bring about a change in our way of understanding this preventive phase and the role of the judge in it[48]. At least in such phase, it can no longer be true, as we have mentioned before, that judges are not required to take into consideration the other different interests involved that may be affected by the strict application of criminal law provisions. Indeed, recent case-law has acknowledged that, «when adopting a seizure order of big firms and businesses, the judge can take into consideration also other needs, as the production or the employment, and he can accordingly appoint as a custodian of the seized goods also a manager of the business itself, who will have the power to manage the business according to the directives coming from the judge»[49]. Such conclusion shows how vital it is that the judge takes into consideration all conflicting interests when adopting preventive measures, especially since they are usually only temporary measures, which can be very afflictive. This means, however, that some kind of discretional activity is demanded from the judge, which brings his function even more close to the typical role of the administration[50].

In such a way it is inevitable – and this is the second implication - that the judiciary will enter into an area and a function which traditionally belongs to the executive and the Government. Indeed, all these activities are placed in a border area between the judiciary function and the administrative and political function, where the exact borders remain uncertain, especially when the interests at stake are of collective nature like in the environmental field[51].

The main issue, therefore, is finding the borderline between the role of the judicial and the one of the political authorities in appreciating the future effects of a dangerous activity. In this quest, one should start from the

[48] Such phase, indeed, is situated at the crossing between the judiciary function and the management of current problems, where the prevention of crimes is only one of them. In this sense, D. PULITANÒ, *Fra giustizia penale e gestione amministrativa*, *supra* note 11.

[49] Cass. pen., sez. III, 6 October 2010, judgment no. 35801.

[50] Such opinion is shared by L. GABRIELE, *Il caso Ilva: il d.lgs. n. 231 del 2001*, *supra* note 13; and F. VIGANÒ, *Il caso ILVA (e molto altro)*, *supra* note 31.

[51] V. ONIDA, *Un conflitto fra poteri sotto la veste di questione di costituzionalità: amministrazione e giurisdizione per la tutela dell'ambiente. Note a Corte costituzionale, sentenza n. 85 del 2013*, in *Riv. Ass. Ita. Cost.*, 2013, no. 3.

consideration that the connection with a criminal offence, while entitling a judicial authorities' intervention in an area that on the contrary would be reserved to the administration, does not afford to the judiciary the monopoly on the powers and duties of intervention[52].

From this case, a possible solution comes into light: a judicial preventive measure may be conceivable as long as it anticipates the definition of a critical situation linked to a crime, which will then be definitively set and regulated in a general way by the competent administrative authorities. Indeed, it cannot be accepted that this discretionary evaluation on the future risks of an activity may be taken at last from a judicial authority: this, exactly to the contrary of what had been argued by the judges before the Constitutional court, would be in breach of the separation of powers[53].

A last consideration, however, is needed. In many cases, and the Ilva one is only the most serious example, the above considerations are impaired by the fact that there often is a general inertia and inactivity on the part of the administrative authorities in relation to the controls on the environmental conditions, as these often omit to take any effective action.

Unfortunately, this appears to be the case in Italy, where there has been a general lack of efficiency in the governance of the territory and environment over the years on the part of the authorities, which is now coming to the surface, thanks to several applications pending before the European Court of Human Rights, also in relation to the Ilva case[54].

As a consequence, the recourse to judicial intervention and protection appears to be inevitable as the only possible remedy to call the administrative authorities back to order, exactly as happened in the Ilva case[55]. This however

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[52] D. PULITANÒ, *Fra giustizia penale e gestione amministrativa*, *supra* note 11.
[53] V. ONIDA, *Un conflitto fra poteri sotto la veste di questione di costituzionalità, supra* note 50.
[54] Reference is made here to *Smaltini v. Italy*, application no. 43961/09. Several other applications have been lodged in relation to the State's omission of taking any preventive measures for the prevention of environmental disasters (i.e, *Viviani and others v. Italy*, application no. 9713/13, on the danger of an eruption of the Vesuvio volcano in Naples and many others complaints on the so-called "Terra dei fuochi" in southern Italy).
[55] V. ONIDA, *Un conflitto fra poteri sotto la veste di questione di costituzionalità, supra* note 50.

is suggestive of a pathological situation, and cannot be regarded as the ordinary and ideal situation. But on the other hand, it is striking that in the end this "judiciary activism" has in effect encouraged the long required response from the administrative authorities. Perhaps, after all and although not meant to be so, criminal law and criminal proceedings have become in the practice effective tools, which indirectly act upon the administration's inactivity.

International Law

WHALING IN THE ANTARCTIC: THE STANDARD OF REVIEW IN ENVIRONMENTAL DISPUTES ACCORDING TO THE ICJ IN THE 2014 AUSTRALIAN VS JAPAN CASE

Francesco Cunsolo

CONTENTS: 1. – A Brief History. 1.1 – From the International Convention for Regulation of Whaling (1946) to the Implementation of Japan's Whaling Research Programs. 1.2 – The Application Before the International Court of Justice (2010). 2. – The Court's Judgment, Between Scientific and Juridical Matters. 2.1 – A Mere Problem of Delimitation Area? 2.2 – The New Standard of Review Introduced by the Court. 3. – Final Considerations: an Audacious Judgment.

1. A Brief History.

1.1. From the International Convention for Regulation of Whaling (1946) to the Implementation of Japan's Whaling Research Programs.

The protection of whales from over-exploitation, and their conservation for their own safeguard, are tasks that have employed the international community for over one hundred years. The importance and sensitivity of this matter brought to the sign in 1946 of the International Convention for the Regulation of Whaling (ICRW), an international environmental agreement established in order «[...] to provide for the proper conservation of whale stocks and thus make possible the orderly development of whale industry»[1]. The main objectives of the Convention are the safeguard

[1] International Convention for the Protection of Whaling, Dec. 2, 1946, Washington, available at https://archive.iwc.int/pages/view.php?ref=3607&k=, and also in UNTS, 1953, vol. 161, pp. 72-111.

of the great natural resources represented by the whale stocks for future generations, and the establishment of «[...] a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks [...]»[2]; in order to achieve these objectives, the Convention established the International Whaling Commission (IWC), a global intergovernmental body charged with the conservation of whales and the management of whaling. The Commission performs its tasks by making revisions to the Schedule that accomplishes the text of the Convention, and entrusting the governments parties, after accurate evaluations and exams, the right to carry out scientific research which involves killing of whales.

Since its birth, the works of the Commission have always been very intense, especially regarding the contest between two different approaches to the matter: whaling states and anti-whaling states, limited whaling and no whaling. Australia and Japan, both members of the ICRW, are two important leading figures of these schools of thought, with a longstanding dispute behind them. In 1982 the IWC adopted the so-called "zero catch quota" amendment to the Schedule, which was a moratorium on commercial whaling. This amendment encountered the opposition of Japan, the pro whaling state, which lodged an objection under Article V of the ICRW[3], thus rendering the amendment inapplicable to Japan. Later, due to pressure from United States, which threatened to punish Japan by cutting Japanese fishing in the U.S. exclusive economic zone, Japan withdrew its objection and stopped commercial whaling at the end of 1987. In the same year, Japan started its whale research program conducted in the Antarctic Ocean: this program was

[2] Id. at § 1.
[3] International Convention for the Protection of Whaling, art. 5 par. 3: «3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that *(a)* if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; [...] *(c)* thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn».

called "JARPA", and was based on special permits that granted Japan to conduct whale researches in the Southern Ocean Whale Sanctuary, a protected zone surrounding the continent of Antarctica, created by the IWC with an amendment to the Schedule on 1994; in this maritime zone commercial whaling is prohibited, regardless of the conservation status of whale stocks. This amendment encountered the objection of Japan with regard to minke whales, but not humpback or fin whales (two of the most threatened whale's species). Anyway, the JARPA whaling program, which covered an eighteen years period from 1987 to 2005, was introduced by Japan for purposes of scientific research, so under the protection and application of Article VIII[4] of the ICRW; this article «[...] provides that despite anything else in the Convention (including the moratorium), a party may issue a "special permit" authorizing whaling for "scientific research", subject to such conditions as the party "thinks fit" [...]»[5]. Under the JARPA whaling program, in the period of its implementation, over 6800 Antarctic minke whales were taken; these were numbers that received a lot of criticisms from Australia and warnings from IWC, which showed concerns about the fact that «[...] more than 6,800 Antarctic minke whales (*Balaenoptera bonaerensis*) have been killed in Antarctic waters under the 18 years of JARPA, compared with a total of 840 whales killed globally by Japan for scientific research in the 31 year period prior to the moratorium [...]»[6]. In 2003, the Commission adopted a resolution asking Japan

[4] ICRW, art. 8 par. 1: «1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted».

[5] D. K. ANTON, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)*, in *ASIL Insights*, available at http://www.asil.org/insights/volume/14/issue/20/dispute-concerning-japan%E2%80%99s-jarpa-ii-program-%E2%80%9Cscientific-whaling%E2%80%9D#_edn1, vol. 14, 20, July 2010 (last visited December 2014).

[6] IWC, *Resolution on JARPA II*, 2005-1 (2005), available at

to halt JARPA, or at least to ensure that the whaling program was limited to non-lethal research[7]. In 2005 introduced the second phase of JARPA's whaling program, under the name of JARPA II. The new program provided a more intensive annual take of minke whales (bringing the annual sampling size to a maximum of 850 minke whales, with an allowance of ±10%), and introduced the possibility to adopt lethal methods (which implied the death of the sample) for the study of humpback and fin whales. In 2005 and 2007, IWC adopted two further resolutions expressing concern about the special permit system introduced by Japan, as well as skepticism about the scientific objectives of JARPA II. With the 2005 resolution IWC invited Japan not to proceed with lethal whaling under JARPA II[8], and then to interrupt the lethal aspects of JARPA II conducted in the Southern Ocean Whale Sanctuary[9]. Despite these warnings, Japan decided to continue with its scientific research whaling.

1.2. The Application Before the International Court of Justice (2010).

On May 31 2010, Australia, a longtime opponent to Japan's whaling activities, presented its application before the International Court of Justice[10], reporting that the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) was a «[...] breach of obligations assumed by Japan under the International Convention for the

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https://archive.iwc.int/pages/view.php?ref=2080&search=%21collection72&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=5 (last visited December 2014).

[7] IWC, *Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling*, 2003-3 (2003), available at https://archive.iwc.int/pages/view.php?ref=2078&search=%21collection72&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=7 (last visited December 2014).

[8] See *supra* note 6.

[9] IWC, *Resolution on JARPA*, 2007-1 (2007), available at https://archive.iwc.int/pages/view.php?ref=2082&search=%21collection72&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=3 (last visited December 2014).

[10] *Whaling in the Antarctic - Australia v. Japan* (Application instituting proceedings), ICJ, 31.05.2010, no. 148.

Regulation of Whaling, as well as its other international obligations for the preservation of marine mammals and the marine environment»[11]. Speaking about the "other international obligations", Australia was referring to the Convention on International Trade in Endangered Species (CITES, 1973), and the Convention on Biological Diversity (CBD, 1992). The content of the claim stated what we have already described in the precedent paragraph, but is useful to reaffirm in some critical points, regarding the moratorium on whaling for commercial purpose, the institution of the Southern Ocean Sanctuary, and the objection of Japan to both of the initiatives: «in 1982 the IWC adopted under Article V (l) (e) of the ICRW a "moratorium" on whaling for commercial purposes, fixing the maximum catch of whales to be taken in any one season at zero. This was brought into effect by the addition of paragraph 10 (e) to the Schedule to the ICRW [...]. Japan objected to paragraph 10 (e) within the prescribed period but subsequently withdrew its objection. In 1994 the IWC adopted under Article V (l) (c) of the ICRW the Southern Ocean Sanctuary. This was brought into effect by the addition of paragraph 7 (b) of the Schedule to the ICRW which provides that: "commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary. [...] This prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary [...]". Japan objected to paragraph 7 (b) within the prescribed period in relation to Antarctic minke whale stocks and has not subsequently withdrawn its objection»[12].

Therefore, considering the binding provisions of the Schedule to the ICRW, Japan was obliged to refrain from killing all whale stocks for commercial purposes [paragraph 10 (e)], and to refrain from commercial whaling in the Southern Ocean Sanctuary for all whale stocks other than minke whale stocks [paragraph 7 (b)]. Furthermore «in accordance with Article 26 of the Vienna Convention on the Law of Treaties and with customary

[11] Id. at § 2.
[12] Id. at § 5, 6.

international law, Japan is obliged to perform those obligations in good faith»[13]. According to the application presented by Australia, «[...] Japan ostensibly ceased whaling for commercial purposes. But at virtually the same time Japan launched the "Japanese Whale Research Program under Special Permit in the Antarctic" ("JARPA I") which it purported to justify by reference to Article VIII of the ICRW, under which a Contracting Government may issue special permits to its nationals authorizing that national to "kill, take and treat whales *for the purposes of scientific research* […]"»[14]. The application also described in detail the development of JARPA and JARPA II, specifying the growing catches of minke whales, and the fact that whale meat caught over the years, since the introduction of the first JARPA program, had been sold commercially in Japan.

These were the alleged violations reported by Australia through its application. Four years later, the International Court of Justice pronounced its judgment on the case.

2. The Court's Judgment, Between Scientific and Juridical Matters.

2.1 A Mere Problem of Delimitation Area?

As we know, «on 31 May 2010 Australia filed in the Registry of the Court an Application instituting proceedings against Japan in respect of a dispute concerning "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II'), in breach of obligations assumed by Japan under the International obligations for the preservation of marine mammals and the marine environment"»[15]. Australia invoked as the basis for the jurisdiction of the Court the declarations made by Australia on 22 March 2002 and by Japan on 9 July 2007, according to Article 36, paragraph 2,

[13] Id. at § 8.
[14] Id. at § 9.
[15] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ 31.03.2014, no. 148, § 1.

of the Statute of the Court[16], recognizing the jurisdiction of the Court as compulsory *ipso facto*, and without any special agreement. Later, on November 2012, New Zealand filed in the Registry of the Court a Declaration of Intervention in the case, stating its decision to intervene as a non-party in the proceeding brought by Australia against Japan. Both Australia and Japan accepted New Zealand's Declaration of Intervention. In addition to the claims expressed in its application, and regarding the alleged violations of its international obligations committed by Japan in implementing the JARPA II program in the Southern Ocean, Australia requested the Court to declare that «[...] JARPA II is not a program for purposes of scientific research within the meaning of Article VIII of the International Convention for the Regulation of Whaling. Further, the Court is requested to adjudge and declare that Japan shall:

a) refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII;

b) cease with immediate effect the implementation of JARPA II; and

c) revoke any authorization, permit or license that allows the implementation of JARPA II»[17].

On its side, Japan asked the Court to reject the claims of Australia, maintaining that its activities were lawful because the special permits were issued for "purposes of scientific research", as provided by Article VIII of the ICRW. Secondly, Japan contested the jurisdiction of the Court because, in its declaration of recognition of the Court's jurisdiction, Australia excluded it with

[16] Statute of the International Court of Justice, June 1945, art. 36, par. 2: «2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.»

[17] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ 31.03.2014, no. 148, § 24.

regard to «[...] any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation»[18]. According to Japan, the dispute submitted by Australia regarding JARPA II related to the exploitation of a maritime zone claimed by Australia itself, or of an area adjacent to such zone. Japan maintained that «[...] this would be the case under Australia's characterization of JARPA II as a programme for the commercial exploitation of whales, as well as under Japan's own characterization of JARPA II as a scientific research programme, given that the research conducted under JARPA II is "an element of the process leading to exploitation"»[19]. For this reason, Japan sustained that the dispute submitted by Australia with regard to JARPA II fell within Australia's reservation (b), with the consequence to exclude the Court's jurisdiction. The Court recalled that «[...] when interpreting a declaration accepting its compulsory jurisdiction, it "must seek the interpretation which is in harmony with a natural and reasonable way of reading text, having due regard to the intention" of the declaring State»[20]. In this case, according to the interpretation given by the Court, the reservation (b) must be read in the light of "delimitation of maritime zones", which is the "key word" of the reservation, which then regards only disputes concerning delimitation matters. The second part of the reservation ("arising out, concerning, or relating to the exploitation of any disputed area") is strictly connected to the first ("maritime delimitation"), and should be read in that key.

The dispute submitted by Australia regarding JARPA II involved the exploitation of an area which was not the subject of a dispute relating the

[18] Declaration Recognizing the Jurisdiction of the Court as Compulsory (Australia), March 22, 2002, reservation *(b)*.
[19] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ 31.03.2014, no. 148, § 32.
[20] Id. at § 36, recalling the *Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment I.C.J. Reports 1952*, § 104.

delimitation of that area, or of an area adjacent to it. For this reason the Court rejected Japan's objection to the Court's jurisdiction.

2.2. The New Standard of Review Introduced by the Court.

Then the judgment of the Court moved on the interpretation of Article VIII, paragraph 1, of the ICRW, in order to establish the compliance of the JARPA II program, and in general Japan's conduct. The Court noted that «[...] Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention, including the Schedule. However, since Article VIII, paragraph 1, specifies that "killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention", whaling conducted under a special permit which meets the conditions of Article VIII is not subject to the obligations under the Schedule concerning the moratorium on the catching of whales for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary and the moratorium relating to factory ships»[21]. Then the Court analyzed the relationship between Article VIII and the object and purposes of the Convention. Considering the preamble of the ICRW, which pursues the purpose to ensure an effective conservation of whaling, and at the same time to allow their sustainable exploitation, the Court noted that programs for purposes of scientific research fall outside of these objectives, because they should pursue different aims from conservation or sustainable exploitation of whale stocks. These programs for purposes of scientific research, like JARPA II, should foster scientific knowledge. «This is also reflected in the Guidelines issued by the IWC for the review of scientific permit proposals by the Scientific Committee. In particular, the

Guidelines initially applicable to JARPA II, Annex Y, referred not only to programmes that "contribute information essential for rational management of the stock" or those that are relevant

[21] Id. at § 55.

for "conduct[ing] the comprehensive assessment" of the moratorium on commercial whaling, but also those responding to "other critically important research needs"»[22].

With regard to the issuance of special permits, Japan maintained that, according to Article VIII, the State of nationality of the person or entity requesting a special permit for purposes of scientific research is the only State competent to issue a permit. So, according to the interpretation given by Japan to Article VIII, the issuance of special permits enjoys discretion. On the other hand, both Australia and New Zealand affirmed that «the requirements for granting a special permit set out in the Convention provide a standard of an objective nature to which the State of nationality has to conform»[23]. The Court recognized that Article VIII gives discretion to a State to reject the request for a special permit, or to indicate the conditions under which the permit will be granted. However, the State's discretion is not sufficient for granting a special permit regarding killing, taking and treating whales for purposes of scientific research. A standard of review is necessary, which means to determine some evaluation criteria in order to judge the good discretion of the State.

In order to review the grant of a special permit authorizing the killing, taking and treating of whales, the Court opted to take into account two aspects:

1. to assess if the program under which these activities occurred involved scientific research;

2. to find out «[...] if the killing, taking and treating of whales is "for purposes of" scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives»[24].

Considering that the dispute between Australia and Japan arose from a State party to the ICRW (Japan) to grant special permits under Article VIII of the Convention, the standard of review introduced by the Court needed to

[22] Id. at § 58.
[23] Id. at § 60.
[24] Id. at § 67.

consider on which objective basis the authorizing State had granted the special permits. The Court specified it wasn't a matter of scientific or whaling policy; it was just to determine if the special permits granted in relation to JARPA II fell under the scope of Article VIII, paragraph 1, of the Convention.

In order to make the standard of review effective, and to find out if Article VIII had been respected, the Court tried to specify the meaning of the phrase "for purposes of scientific research", starting from the premise that the two elements - "scientific research" and "for purposes of" - have different meaning and characteristics, but still closely related, which means they need to be read together. The Court noted that the term "scientific research" is not defined in the Convention, so it considered the definition given by one of the scientific experts called by Australia: « Australia, relying primarily on the views of one of the scientific experts that it called, Mr. Mangel, maintains that scientific research (in the context of the Convention) has four essential characteristics: defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; "appropriate methods", including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; peer review; and the avoidance of adverse effects on stock»[25]. Anyway the Court wasn't convinced by the four criteria advanced by Australia, stating that these elements just reflected the opinion of one expert regarding the implementation of a well-conceived scientific research, but they were useless for the interpretation of the term used in the Convention. However, the Court seemed unable to find out an alternative definition, or different criteria, of the term "scientific research", preferring to focus its attention on the term "for purposes of". «In order to ascertain, in particular, whether a programme's use of lethal methods is "for purposes of" scientific research, the Court considers whether the elements of such a programme's design and implementation are reasonable in relation to its stated research objectives. As shown by the arguments of the Parties, these elements may include: decisions regarding the use of lethal methods; the scale of the programme's use of lethal

[25] Id. at § 74.

sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme co-ordinates its activities with related research projects»[26].

That being so, the Court stated the JARPA II could be characterized as "scientific research". Anyway, in order to confirm its compliance with Article VIII, paragraph 1, of the ICRW, it was necessary to judge if its design and implementation were reasonable with regard to achieving the program's stated research objectives. First of all, comparing the Research Plans in JARPA II and JARPA, its predecessor program, the Court noted a considerable overlap between the two program' subjects, objectives, and used methods; this aspect casted many doubts relating to the argument presented by Japan, regarding alleged "new features" of JARPA II which imposed a significant increase in the minke whale sample size, and the introduction of lethal sampling for two additional species (fin whales and humpback whales).

Moreover, the Court noted some weaknesses in JARPA II, and in the explanations presented by Japan: for example, the Court observed that Japan had launched JARPA II without waiting for the final review of JARPA by the Scientific Committee, a body established by the International Whaling Commission created under the Convention, whose task is to analyze the results of research conducted under special permits, and to review on special permits before any issuance by State parties. In addition, «after an extensive examination of the determination of species-specific sample sizes, the Court notes that the evidence relating to JARPA II provides scant analysis and justification for the underlying decisions that generate the overall sample size, raising further concerns about whether the design of JARPA II is reasonable in relation to achieving its stated research objectives»[27]. Lastly, the Court found out other aspects that raised doubts about its nature as a program for purposes of scientific research, like its open-ended time frame, its limited scientific

[26] Id. at § 88.
[27] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Press Release (unofficial), ICJ 31.03.2014, No. 2014/14, § 3.

output, and the lack of cooperation between JARPA II and the other researching program operating in the Antarctic Ocean.

«Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research, but that "the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives". The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention»[28]. In light of this conclusion, the Court found that Japan had breached several provisions of the Schedule to the Convention: the moratorium on commercial whaling in the period during which it had set zero catch limits for minke whales, fin whales and humpback whales under JARPA II[29]; the factory ship moratorium over the seasons during which fin whales were taken, killed or treated under JARPA II[30]; the prohibition of commercial whaling in the Southern Ocean Sanctuary in the period during which JARPA II was implemented[31]. Regarding the alleged violation of paragraph 30 of the Schedule[32], the Court stated that JARPA II Research Plan had fulfilled all the information specified by that provision, meeting the requirements of paragraph 30.

Therefore, the Court ordered Japan to terminate all aspects of JARPA II, revoking any authorization still in use, permit or licence to kill, take or treat whales in relation to JARPA II, and stopping from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that program.

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[28] Id. at § 3.
[29] International Convention for the Regulation of Whaling, Schedule (as amended by the Commission at the 64th Annual Meeting Panama City, Panama, July 2012), paragraph 7 (*b*).
[30] Id. at paragraph 10 (*d*).
[31] Id at. paragraph 10 (*e*).
[32] ICRW, Schedule, paragraph 30: «A Contracting Government shall provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them».

3. Final Considerations: an Audacious Judgment.

The final judgment of the International Court of Justice on the case "Whaling in the Antarctic" between Australia and Japan represents an important progress and an historic moment in the jurisprudence of the ICJ on environmental disputes, for several reasons. The most important step forward regards the approach to environmental controversies, based on the introduction of an efficient method in order to face the scientific aspects of the dispute: in this specific case, the Court had the merit to have found and applied a way to use the experts' opinions presented by the parties in order to clarify the judges' understandings. Thank to this method, the Court was able to identify «[...] an analytical approach that distinguishes the judge's role from the scientist's, respecting both»[33]. This important contribute given by the Court's judgment finds its raison d'etre in the use of the concept of "standard of review", an instrument often used by other international tribunals (especially in the range of protection of human rights - by the European Court of Human Rights, for example), but that had never received much attention by the ICJ, until now. The notion of "standard of review" is a little bit evanescent, even because «[...] is rarely determined by the relevant legal provisions (e.g. a treaty constituting a particular court), and it remains a task of a specific court or tribunal to develop an appropriate methodology»[34]; it can be defined «[...] the nature and intensity of review by a [international] court or tribunal of decisions [or other actions] taken by [national] governmental authority»[35]. «The applicable standard of review may concern either factual determinations (e.g.

[33] C.R. PAYNE, *Australia v. Japan: ICJ Halts Antarctic Whaling*, in *ASIL Insights*, available at http://www.asil.org/insights/volume/18/issue/9/australia-v-japan-icj-halts-antarctic-whaling, vol. 18, 9, April 2014 (last visited December 2014).
[34] *Standard of Review in International Courts and Tribunals: Rethinking the Fragmentation and Constitutionalization of International Law*, 26-27 October 2012 - a workshop sponsored by COST Action IS1003, International Law Between Constitutionalization and Fragmentation, and University of Seville, Faculty of Law.
[35] J. BOHANES, N. LOCKHART, *Standard of review in WTO law*, in *The Oxford handbook of international law*, 2009, 378-436.

deciding whether a national measure is supported by sufficient scientific evidence) or political and legal determinations made at the national level (e.g. whether a measure is necessary to attain specific objective). Consequently, standard of review determines the extent of discretionary powers enjoyed by national authorities in making certain determinations»[36]. In the light of these definitions, it's clear that "standard of review" is not a defined instrument, but a method, or approach, to a specific matter; and it's an approach that finds its own characteristics on the basis of the practice. This specific case regarding the Japan's whaling program in the Antarctic Ocean, and the consequent controversy, was the first historical occasion for the International Court of Justice to find and apply an adequate "standard of review" to an environmental dispute; and the new approach developed by the Court involved all the elements necessary to find an effective "standard of review". The first, and maybe most important of these elements, was the International Convention for the Regulation of Whaling, and the interpretation that the Court gave to Article VIII, regarding in particular the meaning of the phrase "for purposes of scientific research". In this sense, the text of the Article VIII wasn't very helpful, not only with respect to the meaning of the term "scientific research", but also because it doesn't specify which organ is designated (the State, the Court, the control organs established by the Convention?) to determine the existence of an interest of scientific nature, in order to identify its constitutional elements and their relevance for a judgment regarding the compliance of the grant of permits to conventional law.

The Court declared that, in order to prove the existence of an interest of scientific nature that justifies the coverage of Article VIII, it's necessary to demonstrate not only that the whaling program pursues objectives of scientific research, but (most important) that the declared scientific interest on which the program is based is the *only* purpose pursued by the program; and that it doesn't leave doubts about any other purposes (of commercial nature, for example) hidden behind an alleged "scientific interest".

[36] See *supra* note 34.

This is the reason that pushed the Court to pay much more attention to the phrase "for purposes of", than to the term "scientific research"; because it's the exclusive purpose of scientific interest to determine the application of Article VIII, paragraph 1. In order to gain, if not the assurance, at least the presumption that a whaling program is conducted for purposes of scientific research, the Court stated that the methods and the procedures on which the program is built don't have to leave doubts about the centrality of the "scientific interest", rather than different purposes that breach Article VIII. In this sense, the standard of review introduced by the Court is based not on an objective parameter, but takes into account the criterion of "reasonableness". In fact, the Court says in its judgement: «To this end and in light of the applicable standard of review [...], the Court will examine whether the design and implementation of JARPA II are *reasonable* in relation to achieving the programme's stated research objectives [...]»[37].

However, the standard of review of "reasonableness" found by the Court is weak under one aspect: it doesn't solve the limits of the Article VIII, paragraph 1, which leaves to the discretion of the State party the possibility to grant special permits authorizing «[...] that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit [...]»[38].

So the Court solved the ambiguity of the Article VIII with another ambiguity: it's still all up to the discretion (and the good faith) of the State. In this specific case, «[...] the Court considers that JARPA II involves activities that can broadly be characterized as scientific research [...], but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of

[37] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ 31.03.2014, no. 148, § 127. See also *supra*, notes 24, 26.
[38] ICRW, *supra* note 4.

scientific research" pursuant to Article VIII, paragraph 1, of the Convention»[39]. The Court came to this conclusion because it noted a big imbalance between the number of whales taken and the number of whales killed since the JARPA II program had started, which was in contrast with the "scientific purposes" declared in the program; and this is only concrete element on which the Court fundamentally based its conclusions. The consequence of this conclusion, in case Japan had declared to pursue with JARPA II different purposes (scientific research) than the real ones (commercial objectives), was the possibility that Japanese government had violated the principle *pacta sunt servanda*[40]. Aside from the fact that the good faith of the State, not the bad faith, should be presumed in the interpretation of the treaties (unless it is proved that the State has consciously breached its international obligations), this important aspect should have deserved more attention from the Court.

We also must consider the dissenting opinion to the judgment of the Court expressed by judge Owada, who criticizes the role assumed by the Court with the introduction and application of a standard of review in this dispute, taking into account the scientific merits of the case rather than the legal issues. According to his words «the judgment nevertheless seems to dwell upon this distinction between "scientific research" and activities "for purposes of scientific research" with a view to establishing that an activity that may contain elements of "scientific research" cannot always be accepted as an activity "for purposes of scientific research". To me such a distinction is so artificial that it loses any sense of reality when applied to a concrete situation. The Court should focus purely and simply on the issue of the scope of what constitutes activities "for purposes of scientific research" according to the plain and ordinary meaning of the phrase. On the question of what constitutes activities "for purposes of scientific research", it must first of all be said in all frankness

[39] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ 31.03.2014, no. 148, § 227.

[40] Vienna Convention on the Law of Treaties, May 23, 1969, Vienna, art. 26: «Every treaty in force is binding upon the parties to it and must be performed by them in good faith». Also art. 31: «1. A treaty shall 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».

that this Court, as a court of law, is not professionally qualified to give a scientifically meaningful answer, and should not try to pretend that it can, even though there may be certain elements in the concept that the Court may legitimately and usefully offer as salient from the viewpoint of legal analysis»[41]. Moreover, the element of "reasonableness" found by the Court as an objective condition necessary to determine if the activities conducted under JARPA and JARPA II programmes were congruent with the declared purposes of scientific research, is vague, because it's hard to understand in which context this "reasonableness" must be judged: legal context, or scientific context? Speaking of legal context, the answer is the Convention itself, which leaves the point to the good faith of the Contracting Party that undertakes the research in question. On the other hand, regarding the scientific context, «[...] it would impossible for the Court to establish that certain activities are objectively reasonable or not, from a scientific point of view, without getting into a techno-scientific examination and assessment of the design and implementation of JARPA/JARPA II, a task which this Court could not and should not attempt to do»[42]. So, under a certain point of view, judge Owada doesn't criticize the standard of review established by the Court, but the fact that the Court established a standard of review; and surely his arguments are correct, because the Court is a judicial institution designated to interpret and apply the provisions of the Convention from a legal point of view, and cannot interfere with the regulatory régime established by the Article VIII of the Convention, which leaves to the discretion (so the good faith) of the Contracting Party to determine how the scientific research should be designed and implemented in a given situation; and to the IWC and the Scientific Committee the task of carrying out the process of review and critical comments on the whaling activities conducted by the Contracting Party. In any case, speaking both of legal and scientific questions, everything brings back to the Convention. And this means a serious paradox for the Court, bound to its

41 *Dissenting opinion of Judge Owada*, available at http://www.icj-cij.org/docket/files/148/18138.pdf, § 23, 24.
42 Id. at § 25.

role of interpreter and applier of a Convention, with no other basis than the Convention itself.

Anyway, despite its flaws and the questions arisen, the importance of this judgment is unmistakable, and represents a fundamental benchmark for future environmental disputes before the International Court of Justice.

HOW MUCH MAY JUDICIAL PROCEEDINGS IN AN ENVIRONMENTAL MATTERS COST?
THE ANSWER OF THE EUROPEAN COURT OF JUSTICE

Giulia Bittoni

CONTENTS: 1. – Introduction. 2. – The Facts of the Case. 3. – The Legal Issues. 4. – The Assessment of the European Court of Justice. 5. – Comments on the Court's Judgment. 6. – Conclusion.

1. Introduction.

In the judgment C-260/11 of 11 April 2013 (Edwards et Pallikaropoulos)[1], the Court of Justice of the European Union (hereinafter: Court of Justice or ECJ) ruled on a request of preliminary ruling concerning the interpretation of Article 9 (4) of the Aarhus Convention as implemented by the Council Directives 85/337/EEC and 96/61/EC[2].

[1] Court of Justice of the European Union, Judgment, Fourth Chamber, Case C-260/11, Edwards and Pallikaropoulos, 11 April 2013, ECLI:EU:C:2013:221, not yet published, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=136149&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=251440 (last visited September 2014).

[2] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p.40). Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26). Directive 2011/92/UE of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p.1) codified Directive 85/337. Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p.8) codified Directive 96/61.

Council Directive 85/337/EEC, of 27 June 1985, concerns the assessment of the effects of certain public and private projects on the environment. Council Directive 96/61/EC, of 24 September 1996, deals with integrated pollution prevention and control.

The focal point of this case can be summarised as follows: «[h]ow much may judicial proceedings in an environmental matter cost?»[3].

The present essay focuses on the reasoning of the Court of Justice - answering that question. In particular, it aims to consider the notion of not «prohibitively expensive» judicial proceedings.

2. The Facts of the Case.

The present case originated following the decision of the United Kingdom Environment Agency approving the operation of cement works, including waste incineration.

Mr Edwards applied for judicial review of this decision arguing, particularly, that the project had not been subjected to an environmental impact assessment. In the first degree of jurisdiction Mr Edwards was granted legal aid.

At first instance, the application was dismissed. Mr Edwards appealed against this decision to the Court of Appeal and then he withdrew it. Mrs Pallikaropoulos was added as an appellant in the remainder of the proceedings.

The Court of Appeal dismissed the appeal and ordered Mrs Pallikaropoulos to bear her own costs and to pay the opposing parties' costs.

Mrs Pallikaropoulos then appealed to the House of Lords. At the outset of the proceedings she applied for a protective costs order[4], by which

[3] Advocate General Kokott, Opinion delivered on 18 October 2012 in Case C-260/11, ECLI:EU:C:2012:645.

[4] A Protective costs order is an Order made at the outset of the proceedings in question which provides that the party applying for the Order shall, regardless of the outcome of the proceedings, either not be liable at all for the other party's costs or be liable only for a fixed proportion thereof but if successful may be entitled to recover all or part of his costs from the other party. P. HAVERS, *Protective costs orders. Fair play in action or a complainers' charter?* available at

she sought a cap on her liability for costs in that appeal[5]. The House of Lords refused her application.

By decision of 16 April 2008, the House of Lords affirmed the decision of the Court of Appeal to dismiss the appeal and ordered Ms Pallikaroupolos to pay the entire costs of the appeal to the House of Lords.

The jurisdiction of the House of Lords was transferred to the Supreme Court of the United Kingdom. In the context of those proceedings, the Supreme Court referred 5 questions to the Court of Justice for a preliminary ruling.

3. The Legal Issues.

The Supreme Court asked to the Court of Justice the followings questions:

«1) How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by Article 10a [of Directive 85/337] and Article 15a of [Directive 96/61]?

2) Should the question whether the cost of the litigation is or is not "prohibitively expensive" within the meaning of Article 9(4) of the Aarhus Convention as implemented by [those] directives be decided on an objective basis […], or should it be decided on a subjective basis […] or upon some combination of these two bases?

3) Or is this entirely a matter for the national law of the Member State subject only to achieving the result laid down by [those] directives, namely that the proceedings in question are not "prohibitively expensive"?

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http://www.1cor.com/1155/records/1212/PH%20public%20law%20handout.pdf, 13 May 2009, (last visited September 2014). For more details on protective costs order, see, *ex plurimis*, A. ZUCKERMAN, *New rules for costs capping orders: feeding the costs litigation frenzy?,* in *Civil Justice Quarterly*, 28(3), 2009, 289 and ff.

[5] On the changes made to UK Civil Procedure Rules after April 2013, see O. W PEDERSEN, *The Price is Right: Aarhus and Access to Justice*, in *Civil Justice Quarterly*, 33 (1), 2014, 13 and ff.

4) In considering whether proceedings are, or are not, "prohibitively expensive", is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?

5) Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?»[6].

Thus, the Court of Justice was asked to interpret Article 9 (4) of the Aarhus Convention, as implemented by Article 10a of Directive 85/337 and by Article 15a of Directive 96/61.

The Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) was set out by the United Nations Economic Commission for Europe (UNECE). It was adopted on 25 June 1998 and entered into force on 30 October 2001[7].

This Convention concerns the rights of the public with regard to the environment. It also imposes on Parties and public authorities some obligations. These rights and obligations refer to three main pillars: access to information, public participation and access to justice[8]. The first pillar concerns both the «"passive" or reactive aspect of access to information […], and the "active" aspect dealing with other obligation relating to providing

[6] Court of Justice of the European Union, Case C-260/11, *Ibid.*, § 23.

[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.

[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.

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 matters[10].

The European Union (former European Community) signed the Aarhus Convention on 25 June 1998 and approved it on 17 February 2005, through the Council Decision 2005/370/EC[11].

Before its approval, the European Union adopted two directives (Council Directives 2003/4 and 2003/35) in order to render its legislation consistent with the Aarhus Convention with a view to its conclusion[12].

The Directive 2003/4/EC extended the access to environmental information and repealed Council Directive 90/313/ECC[13]. Thus, it implemented the first pillar of the Aarhus Convention (public access to information).

The Directive 2003/35/EC was adopted to enforce the second and the third pillars of the Aarhus Convention (public participation in decision-making and access to justice). In particular, this Directive provided for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.

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[9] *Ibid.*

[10] *Ibid.* 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. See also M. PALLEMAERTS, *The Aarhus Convention at Ten: interactions and tensions between conventional international law and EU environmental law*, Groningen, 2011.

[11] Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p.1).

[12] See Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, p.26), Recital 5. Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, p.17), Recital 5.

[13] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, (OJ L 158, p. 56).

These last two mentioned directives above implement more specifically the article 9(4) of the Aarhus Convention which requires that the review procedures, before a court of law or another independent and impartial body established by law, «shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive […]».

Similarly, Article 10a of the Directive 85/337 and Article 15a of the Directive 96/61 provide that review procedures «[…] shall be fair, equitable, timely and not prohibitively expensive».

In particular, the British Supreme Court, in its reference for a preliminary ruling, did not limit its questions to the interpretation of a provision of an international convention ratified by the European Union. It also asked for the interpretation of the European Union instruments which had implemented this provision.

Nevertheless, these provisions do not specify what a not «prohibitively expensive» procedure consists of. Neither do they establish how the cost of judicial proceedings should be assessed vis-à-vis «prohibitively expensive» proceedings.

Consequently, the Court was asked to clarify the meaning of the notion of not «prohibitively expensive» proceedings. It also had to rule on the criteria which a national court may apply when deciding on costs arising from participation in judicial proceedings in environmental matters.

4. The Assessment of the European Court of Justice.

Firstly, the Court of Justice gave some precise indications on the extent of the requirement that the judicial procedures should not be «prohibitively expensive».

Indeed, it stressed that this requirement applies to all the costs arising from participation in the judicial proceedings.

Secondly, as regards to the third question of the national court, the ECJ stated that the assessment in order to establish whether a procedure is «prohibitively expensive» cannot be a matter for national law alone.

In this view, the Court of Justice highlighted that (wide) access to justice in environmental matters is an objective of the European Union legislature in order to preserve, protect and improve the quality of the environment.

Then, the ECJ briefly analysed the other legal basis of the requirement that the preceding costs should be not «prohibitively expensive».

Its exam is based on two main elements: the right to an effective remedy contained in Article 47 of the Charter of Fundamental Rights of the European Union and the principle of effectiveness [14].

In accordance with the principle of effectiveness, detailed procedural rules governing actions for safeguarding an individual's right under European Union law must not make in practice impossible or excessively difficult to exercise rights conferred by the European Union.

In its reasoning, the Court of Justice not only referred to EU rights and principles but it also evoked an international document. In fact, it mentioned the Aarhus Convention Implementation Guide, published in 2000 by the UNECE.

The Aarhus Convention Implementation Guide is intended as «a convenient non-legally binding and user-friendly reference tool to assist policymakers, legislators and public authorities in their daily work of

[14] Article 47 of the Charter of fundamental rights of the European Union provides: «Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice».

implementing the Convention […]»[15]. The Court recognised that this instrument is not binding. Nevertheless it used it in order to specify that the cost of bringing a challenge under the Aarhus Convention must not be so expensive as to prevent the public from seeking review in appropriate cases.

The Court concluded that judicial proceedings should not be «prohibitively expensive», in the context of environmental matters, means that a person «should not be prevented from seeking, or pursuing a claim for, a review by the courts […] by reason of the financial burden that might arise as a result»[16].

Thus, the Court established the criteria that a national court should take into account when called upon to make an order for costs or when required to state its views on a possible capping of the costs for which the unsuccessful party must be liable. The Court stated that the national court has to take into account both the interest of the person defending her/ his rights and the public interest.

Then, the Court tried to elaborate the criteria for assessing the requirement that the cost of the judicial proceeding be not «prohibitively expensive». Firstly, the Court stated that all the relevant provisions of national law have to be taken into account (i.e. national legal aid or costs protection regime).

Secondly, the national courts have to consider both the personal interest and the public interest in protecting the environment.

Thirdly, the assessment has to be based on two elements: the subjective financial situation of the person involved and the objective amount of the costs. Consequently, the costs cannot exceed the financial resources of the person involved and cannot appear to be objectively unreasonable.

The Court of Justice elaborated on other elements to help the national court in this assessment. The latter may also take into account, for example, «whether the claimant has a reasonable prospect of success, the importance of

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15 Aarhus Convention Implementation Guide, p. 9, available at http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf (last visited September 2014).

16 Court of Justice of the European Union, Case C-260/11, *Ibid.*, § 35.

what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentiality frivolous nature of the claim […]»[17].

Finally, the Court stressed the fact that the applicant has not been deterred from asserting her/his claim is not sufficient to establish that the judicial proceeding is not «prohibitively expensive» for her/him.

It also highlighted that this assessment cannot be conducted according to different criteria depending when the assessment is conducted (first-instance proceedings, appeal or second appeal).

5. Comments on the Court's Judgment.

In this judgment, the Court clarified the meaning of not «prohibitively expensive» judicial procedures considering this notion as an autonomous concept of EU law[18]. The Court also gave some criteria in order to concretely help national courts to assess the requirement that the cost be not «prohibitively expensive».

In the absence of such a notion in the text of the Article 9 of the Aarhus Convention and on the Directives 85/337 and 96/61, the Court based its interpretation on other legal basis.

Thus, the general principle of effectiveness and Article 47 of the Charter of Fundamental Rights are used in the reasoning of the Court of Justice.

The reference to the Charter demonstrates that it is an instrument of high and operative value. The right to an effective remedy contained in Article 47 of the Charter is used to explain and to strengthen the provisions of the secondary law (Directive 85/337 and Directive 96/61).

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17 *Ibid.*, § 42, 43.

18 A. BOUVERESSE, *Notion de coût non prohibitif de la procédure*, in *Europe. Actualité du droit de l'Union européenne*, 6, 2013, 39 and ff. On judgment C-260/11. See also F. GUELLA, *Le connessioni tra diritto sostanziale e un ambiente salubre e diritto processuale a una tutela giurisdizionale effettiva*, in *Diritto pubblico comparato ed europeo*, 3, 2013, 1027 and ff.

In its interpretation, the Court also referred expressly to a non-binding international document, the Aarhus Convention Implementation Guide.

In a previous judgment, C-182/10, the Court commented on the value of this document[19]. In this case, the referring court had asked to the Court of Justice whether article 9(4) of the Aarhus Convention must be interpreted in accordance with the guidance in this Implementation Guide.

The Court of Justice answered to this question stressing that the Guide may be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant materials for the purpose of interpreting the Convention.

Therefore, for the interpretation of the provisions of the Aarhus Convention, «it is permissible to take the Aarhus Convention Implementation Guide into consideration but that Guide has no binding force and does not have the normative effect of the provisions of the Aarhus Convention»[20].

6. Conclusion.

As the Court stressed in its decision, this case is deeply based on the link between the access to justice and the improvement of environmental protection[21].

Thus, in order to improve this protection, the definition of the notion of not «prohibitively expensive» procedure is of fundamental importance.

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[19] Court of Justice of the European Union, Judgment, Fourth Chamber, C-182/10, Solvay and Others, 16 February 2012, ECLI:EU:C:2012:82, ECR I-0000. In this sense, see also Court of Justice of the European Union, Judgment, Grand Chamber, C-279/12, Fish Legal and Emily Shirley,19 December 2013, ECLI:EU:C:2013:853, § 38, not yet published, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=145904&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76012 (last visited September 2014) and Court of Justice of the European Union, Judgment, Grand Chamber, C-204/09, Flachglas Torgau, 14 February 2012, ECLI:EU:C:2012:71, § 35-36, published in the electronic Reports of Cases (Court Reports - general) http://curia.europa.eu/jcms/jcms/P_106320/?rec=RG&jur=C&anchor=201202C0013#201202C0013.

[20] Court of Justice of the European Union, Judgment, C-182/10, *Ibid.*, § 28.

[21] Court of Justice of the European Union, Judgment, Case C-260/11, *Ibid.*, § 32, 44.

Through its reasoning, the Court gave a concrete content to Article 9 (4) of the Aarhus Convention, as implemented by the secondary law of the European Union, to ensure an effective protection of individuals' rights.

THE RIGHT TO A SAFE ENVIRONMENT IN INVESTMENT ARBITRATION DECISIONS: THE CASE OF CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY V. THE REPUBLIC OF ECUADOR (PERMANENT COURT OF ARBITRATION, CASE NO. 2009-23, FIRST PARTIAL AWARD OF 17 SEPTEMBER 2013).

Giorgia Galli

CONTENTS: 1. – Introduction. 2. – The Factual and Legal Context of the Chevron Case. 3. – The Investment Tribunal's Interpretation of the Right to a Safe Environment in the Partial Award of 17 September 2013. 4. – Comment.

1. Introduction.

As it is known, the right to a safe and healthy environment does not enjoy legal recognition as a specific human right under general international law and is not found in pioneering human rights agreements. Nevertheless, since the adoption of the 1972 Stockholm Declaration, the first document in international environmental law recognizing the right to a healthy environment, progress has been made towards the recognition of the relevance of the linkage between human rights and environmental protection and of the idea that the latter constitutes a necessary pre-requisite for the enjoyment of human rights.

Besides some regional instruments directly establishing the right to a safe environment (e.g. Article 11 of the "Additional Protocol to the American Convention on Human Rights", also known as "Protocol of San Salvador"[1],

[1] Additional Protocol to The American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), adopted on 17 November 1988 at San Salvador (El Salvador), entered into force on 16 November 1999; OAS, TREATY SERIES, NO. 69. Article 11 ("Right to a Healthy

which expressly recognizes this right as an individual right, and Article 24 of the "African Charter on Human and Peoples' Rights"[2]), in other regional systems it is possible to invoke indirectly the observance of standards of environmental protection as an essential precondition for the compliance with other fundamental rights explicitly recognized, as the right to property, the right to health and the right to life. In this vein, the European Court of Human Rights, the European Committee on Social Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples Rights, have issued decisions in cases involving this subject. Furthermore, at the national level several countries include the right to a safe environment in their constitutions[3].

With the case of Chevron Corporation and Texaco Petroleum Company v. Ecuador[4], the theme of the right to a safe environment reaches an investment tribunal for the first time. Through the partial award of 17 September 2013[5], an arbitral tribunal established under the auges of the Permanent Court of Arbitration (PCA) adds one piece to the multi-forum saga involving, on the one hand, the Chevron Corporation and its subsidiary, the Texaco Petroleum Company (hereinafter:TexPet), responsible of environmental and human health damages resulting from its work in the western part of the Amazon River basin in 1970s and 1980s, and, on the other hand, the Republic of Ecuador. Although other investor-state arbitrations

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Environment"): «1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment».

[2] *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981 ("Banjul Charter"), entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Article 24: «*All peoples shall have the right to a general satisfactory environment favourable to their development*».

[3] See D.R. BOYD, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, Vancouver: University of British Columbia Press, 2012.

[4] See generally *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, available at http://www.italaw.com/cases/257 (last visited December 2014).

[5] First Partial Award on Track I, Sep 17, 2013, Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, available at http://italaw.com/cases/257 (last visited December 2014).

have dealt with environmental issues, the uniqueness of the decision at stake is due to the fact that an arbitral tribunal, established to resolve investment dispute, is called to investigate a disposition of domestic law concerning the right to a healthy environment[6].

The present work aims to stress the steps of the Chevron case and the most relevant aspects of this arbitral award, in particular, the restrictive interpretation provided by the Tribunal and the role of environmental rights in the field of investment-treaty arbitrations.

2. The Factual and Legal Context of the Chevron Case.

In order to understand the arbitral decision, it is necessary to outline the main steps of Chevron/Ecuador dispute[7]. In 1993, a group of Ecuadorian indigenous people filed a class action lawsuit in US federal court against oil giant TexPet (Aguinda v. Texaco Inc.)[8]. The plaintiffs alleged that, between the 1964 and 1992, Texaco's oil operations led to massive environmental pollution and caused irreversible damages to the people living in proximity to oil fields

[6] G. D'AGNONE, *Il riconoscimento dei diritti umani nelle decisioni arbitrali in materia d'investimenti, Diritti umani e diritto internazionale*, 8, 2014, 183-187. It is important to clarify that the lawsuit at stake is not totally focused on the interpretation of the right to a healthy environment which is just a secondary question, as we will see in next paragraphs.

[7] This overview is based on: C. GIORGIETTI, *Mass Tort claims in International Investment Proceedings: what are the lessons from the Ecuador-Chevron Dispute?,* in *Journal of International Law, 34,* available at http://scholarship.law.upenn.edu/jil/vol34/iss4/5 (last visited December 2014); G. D'AGNONE, *Il riconoscimento dei diritti umani nelle decisioni arbitrali in materia d'investimenti,* in *Diritti umani e diritto internazionale*, 2014, 8, 183-187.; L. LAMBERT, *At the Crossroads of Environmental and Human Rights standards: Aguinda v. Texaco. Using the alien tort claims act to hold multinational corporate violators of International Laws Accountable in U.S. Courts*, in *Journal of Transnational Law and Policy*, 10, 2000, 109-132; E.C. BLACK, *Litigation as a Tool for Development: the Environment, Human Rights, and the Case of Texaco in Ecuador*, in *Journal of Public and International Affairs,* 15, 2004, 142-164; A. PIGRAU, *The Texaco-Chevron Case in Ecuador: law and justice at the age of globalization, Revista catalana de dret ambiental,* 5, 1, 2014, 1-43. See also the history of events prepared by the Arbitration Tribunal (Third Interim Award on Jurisdiction and Admissibility, Chevron Corp. v. Republic of Ecuador, No. 2009--23, Permanent Court of Arbitration, 27 february 2012, available at http://italaw.com/cases/257).

[8] Aguinda v. Texaco*, Inc.*,1994 WL 142006, (S.D.N.Y. 1994).

because of illegal technologies used during drilling process resulting in the discharge of 19 billion gallons of toxic wastewaters into the area.

In 2002, the US court dismissed the suit on the grounds of *forum non conveniens'* argument and identified the Ecuadorean tribunals as a more appropriate venue for litigating that claims[9]. It is significant to note that in 1999 the government of Ecuador enacted a new environmental statute – the 1999 Environmental Management Act (EMA)[10] – that introduces a new regulation of remedies and environmental reparations in cases of violations of the right to a safe environment codified by Article 19, paragraph 2, of Ecuadorian Constitution[11]. Although the new law cannot be used to challenge pre-1999 conduct since it has no retroactive application, in 2003, the Ecuadorean claimants re-filed their class action against Texaco – acquired by the US oil company Chevron Corporation in 2001 – in Lago Agrio, Ecuador (Lago Agrio Litigation)[12]. On 14 February 2011, the judge issued a ruling whereby the giant Chevron-Texaco was ordered to pay $8.6 billion in damages and clean up costs, with this amount increasing to $18 billion if Chevron does not issue a public apology[13]. On 3 January 2012 a panel of temporary judges presiding the Provincial Court of Justice of Sucumbios upheld the ruling against the Company[14]. Finally, on 12 November 2013, the Ecuador's highest

[9] See Aguinda v. Texaco, Inc., 142 *F. Supp. 2d 534 (S.D.N.Y. 2001);* Aguinda v. Texaco Inc.*, 303 F. 3d 470 (2d Cir. 2002). Forum non conveniens* means "inconvenient forum." In the Aguinda case, New York was determined to be an inconvenient forum to hold the trial when compared to Ecuador, where the plaintiffs live and where the events occurred.

[10] Ley No. 37. RO/ 245 de 30 de Julio de 1999, Environmental Management Act of 1999 (Ley de Manejo Ambiental de 1999), Ecuador.

[11] Basically, the 1999 EMA purports to allow any Ecuadorean resident to file suit for environmental reparations on behalf of the collectivity. See *History of Texaco and Chevron in Ecuador* available at https://www.texaco.com/sitelets/ecuador/en/history/default.aspx (last visited December 2014).

[12] Complaint, Aguinda v. Chevron Corp., No. 002-2003 ,Super. Ct. of Nueva Loja, 7 May 2003, Ecuador.

[13] Aguinda v. Chevron Corp., No. 002-2003,Super. Ct. of Nueva Loja, 14 February 2011, Ecuador. .

[14] Aguinda v. Chevron Corp., No. 002-2003, Provincial Just. Ct. of Sucumbíos, 3 January, 2012, Ecuador.

Court confirmed the previous decision but reduced damages to $9.51 billion[15]. Since Chevron had no more assets in Ecuador, enforcing the ruling abroad became the purpose of Ecuadorian plaintiffs[16].

While the Lago Agrio Plaintiffs' claims were being discussed in Ecuador's courts, Chevron and TexPet filed the above-mentioned investor-State dispute against Ecuador, (PCA Case No. 2009-23)[17].

In 2009, in fact, the Company and its subsidiary applied for an investment arbitration before the Permanent Court of Arbitration (PCA), in accordance to the 1976 UNCITRAL Rules of Arbitration at the PCA and the 1993 Ecuador-U.S. Bilateral Investment Treaty, entered into force in 1997 ("BIT")[18]. Essentially, Chevron aimed to oppose the ongoing Ecuadorean proceeding and to avoid enforceability of any coming Ecuadorean court's judgement in the Lago Agrio litigation. The claimants argued that international law and its rights as a foreign investors were being violated by its treatment in the Ecuadorean courts, alleging that Ecuador violated the BIT and some 1990's written agreements between TexPet and Ecuador. In particular, Chevron asserted that the Ecuador's obligations under investment agreements, – such as the positive obligation to provide claimants' investment fair and equitable treatment[19] and the duty to provide them with due process and effective means of asserting claims and enforcing rights – had been violated by

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[15] National Court of Ecuador ,Ruling No.174-2012 of 12 November 2013.

[16] See generally M.A. GOMEZ, *The Global Chase: Seeking the Recognition and the Enforcement of the Lago Agrio Judgment Outside of Ecuador*, in *Stanford Journal of Complex Litigation*, 1, 2013, 429-466.

[17] Chevron Corp. v. Republic of Ecuador, UNCITRAL Arb., PCA Case No. 2009-23, available at http://www.italaw.com/cases/257. There are two arbitrations pending at the PCA between Chevron/Texaco and Ecuador: the first suit, filed in 2007, relates to issues of denial of justice, and in 2011 resulted in a final award of $96 million in favor of Chevron. The second, filed in 2009, is still pending. In addition, it is important to consider that the international investment arbitration places Chevron/Texaco in opposition to Ecuador and does not directly involve the plaintiffs in related domestic proceedings.

[18] *Id.*

[19] Article II (3) (a) of U.S.-Ecuador BIT («Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law»).

Ecuador[20]. Although the investment tribunal did not granted the full set of relief requested by Chevron, arbitral decisions were in favour of the Company and its subsidiary. During the pendency of the arbitral proceeding, the tribunal ordered Ecuador «to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio case»[21]. By issuing four interim awards[22], the Tribunal decided it had jurisdiction to proceed to the merits and pointed out that Ecuador had not complied with the order. The tribunal decided to adopt a "twin-track" procedure[23]: the first track concerns preliminary legal issues arising from the Settlement Agreement of 1995[24]; the second addresses all extant issues which may be required to resolve the dispute[25].

The above-mentioned Partial Award of 17 September 2013, which will be analyzed in the next paragraph, affects the first track of the arbitral proceeding at issue.

3. The Investment Tribunal's Interpretation of the Right to a Safe Environment in the Partial Award of 17 September 2013.

The Partial Award addresses the dispute concerning the legal interpretation and legal effect of an agreement signed by TexPet and Ecuador

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[20] *Id.*

[21] Order for Interim Measures of 9 February 2011, at 4, available at http://www.italaw.com/sites/default/files/case-documents/ita0167.pdf (last visited December 2014).

[22] First Interim Award on Interim Measures of 25 January 2012; Second Interim Award on Interim Measures of 16 February 2012; Third Interim Award on Jurisdiction and Admissibility of 27 February 2012; Fourth Interim Award on Interim Measures of 25 January 2012; Fourth Interim Award on Interim Measures of 7 February 2013. All of these awards are available at http://www.italaw.com/cases/documents/268.

[23] Procedural Order no. 10, 9 April 2012, at 2, available at http://www.italaw.com/sites/default/files/case-documents/ita0913.pdf.

[24] The legal issues arising from the 1995 Settlement Agreement will be discussed in the next paragraph.

[25] See note 23, at 2. It is important to note that the arbitral proceeding is still pending.

in 1995, of which Chevron was not a signatory Party (N.B. Chevron acquired TexPet six years later)[26]. With this agreement entitled "Contract for Implementing on Environmental, Remedial, Work and Release from Obligations, Liability and Claims" (hereinafter: the 1995 Settlement Agreement), Texpet was required to conduct environmental remediation as well as as community development projects[27]. At the same time, Ecuador granted Texpet a complete release of all further claims, liabilities and obligations associated with Texpet's operations in Ecuador, included causes of action under Article 19-2 of 1978 Ecuadorian Constitution[28]. In particular, Article 5-1 of 1995 Settlement Agreement provided that «the Government…shall hereby release, acquit and forever discharge TexPet […] of all […] claims […] against the Releases for Environmental Impact»[29]; Article 5-2 clarified that the previous obligation covered «all claims, rights to claims, debts, liens, common or civil law or equitable causes of actions and penalties […] including, but not limited to, causes of action under Article 19-2 of the Political Constitution of Ecuador»[30]. Therefore, on the one hand, TexPet had the right to be fully released and discharged from any claims for environmental impact arising from oilfield activities. On the other hand, Article 19-2 of 1978 Ecuadorian Constitution codified the right to a healthy environment and the State's duty to safeguard this right.

The arbitral tribunal had to clarify the range of Ecuador's obligations under the 1995 Settlement Agreement, or rather the range of the Respondent's duty to guarantee Claimants against any sort of litigation and causes of action under Article 19-2 of Ecuadorian Constitution for environmental liability and damages[31]. The arbitral tribunal had to decide whether or not the 1995 Settlement Agreement establishing State's obligation to refrain from taking any

[26] See First Partial Award on Track I, *supra* note 5, "Part B: Principal documents" and "Appendix 1: The 1995 Settlement Agreement (Spanish version only)", at 9.
[27] *Id,* at 10.
[28] *Id.,* at 11.
[29] *Id.*, at 12.
[30] *Id.,* 39.
[31] *See also* G. D'AGNONE, *Il riconoscimento dei diritti umani nelle decisioni arbitrali in materia d'investimenti, supra* note 6, 185.

legal action against Texaco – included lawsuits linked with the constitutional right to a healthy environment –constituted adequate legal instrument in order to outlaw claims for environmental damage, such as Lago Agrio Paintiffs claims. Moreover the Court had to settle whether or not Chevron, who was not a signatory party, could be considered a indirectly beneficiary (a "Releasee") of the contractual rights fixed in the Agreement[32]. Regarding the last issue, the Tribunal pointed out that Chevron, as a parent company of TexPet, was a part of the agreement and thus could enjoy and enforce its contractual rights under Article 5 in the same way and to the same extent as TexPet[33].

Regarding the main issue, the Tribunal considered that Article 5 of 1995 Settlement Agreement was intended to preclude the Respondent from itself making any claims against Chevron under Article 19-2[34]. The Tribunal made a distinction between individual rights and diffuse (or collective) rights. Firstly, it was clarified that the release under the agreement did not encompass claims made by third persons in respect of their own individual rights separate form the Respondent[35]. A person must have the ability do dispose of claims in respect of its own individual rights and the State had no right to dispose of such an individual claim for personal harm. In Tribunal's view, an individual claiming damages for personal harm remained free to do so, even where that person invoked Article 19-2 in support of an individual claim for damages in respect of personal harm, since the release in Article 5 did not amount to a settlement with *erga omnes* effects[36]. Secondly, the tribunal wondered whether or not «an individual could make a claim in respect of harm arising out of the alleged violation of a diffuse right under Article 19-2 of the Constitution without claiming to have suffered any personal harm»[37]. The Court highlighted that diffuse rights are indivisible entitlements that pertain to the community as

[32] First Partial Award on Track I, *supra* note *5*, at 36.
[33] I*d.* at 37.
[34] *Id.* at 37.
[35] *Id.*
[36] I*d.,* 39,40,41,42.
[37] *Id.*

a whole, «such as the community's collective right to live in a healthy and uncontaminated environment»[38]. In Court's opinion, the right to a healthy environment established by Article 19-2 constituted «a diffuse and indivisible right because of the owner of that right was the entire community of Ecuadorian citizens»[39]. The Court pointed out that, even if Article 19-2 was not framed in terms that explicitly conferred any right of action, «it did confer a right to a pollution-free environment guaranteed by the State»[40]. Under domestic law as at the time when the 1995 Settlement agreement was executed, in the Tribunal's view, «under the Ecuadorian law, only the State could bring a diffuse claim under Article 19-2 to safeguard the right of citizens to live in a environment free from contamination»[41]. Therefore, except for claims in respect of their own personal harms, individuals or group of individuals could not make a claim in respect of harm arising out of the alleged violation of a diffuse right under Article 19-2, because «only the State had the legal capacity to make and settle a diffuse claim under Article 19-2»[42] as at 1995. As a result, the tribunal stated that any claim invoking the diffuse right to a safe environment on the basis of Article 19-2 of 1978 Ecuadorian Constitution against Chevron and Texaco was precluded by Article 5 of the 1995 Settlement Agreement[43].

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] «The Tribunal considers that, as at 1995, such a claim by such an individual was not possible under Ecuadorian law, that cause of action being confined under Article 19.2 to the Respondent alone»; i*d.,* at 42.
[43] «The Tribunal concludes that, under Ecuadorian law, Article 5 of the 1995 Settlement Agreement and article IV of the Final Release preclude any claim by the Respondent against any Release invoking the diffuse constitutional right under Article 19-2 of the Constitution, but that these releases also preclude any third person making a claim against a Releasee invoking the same diffuse constitutional right under Article 19-2, not being a separate and different claim for personal harm (whether actual or threatened)»; *id,* at 42-43.

4. Comment.

Although the tribunal did not discuss the nature of Lago Agrio Litigation, some considerations have to be done about the restrictive interpretation of the right to a safe environment adopted by the investment tribunal. From an international law prospective, as analyzed in the essay's introduction, this interpretation seems to be in contrast with the current tendency to value the right to a safe environment as a human right. Even if this goal has not been reached yet, the investment tribunal could have read the constitutional right recognized by Article 19-2 of Ecuadorian constitution as an individual right [44]. Furthermore, even assuming the mentioned article establishes a diffuse right to live in a healthy and uncontaminated environment, it does not necessarily imply that the State is the only one allowed to exercise the right to bring a legal action asserting that kind of right. At the current stage of international law, the right to a safe environment should be considered a fundamental right that cannot be renounced by the State with *erga omnes* effects[45]. In addition, it is important to note that the international arbitration has only indirect effects in the context of tort claims for environmental damages. In the case at issue, the Lago Agrio plaintiffs are not part of the litigation and the arbitral proceeding cannot bring direct redress to them[46]. The partial award at issue shows the tension between the international investor-state arbitration, which affects investor's rights, and human rights, in particular the right to a safe environment.

[44] G. D'AGNONE, *Il riconoscimento dei diritti umani nelle decisioni arbitrali in materia d'investimenti, supra* note *6,* 186.
[45] *Id.*
[46] See C. GIORGIETTI, *Mass Tort claims in International Investment Proceedings: what are the lessons from the Ecuador-Chevron Dispute?, supra* note *7,* 791.

THE RIGHT OF INDIGENOUS PEOPLE TO FREE, PRIOR AND INFORMED CONSENT IN STATE OIL CONCESSION INVOLVING FOREIGN INVESTMENTS: THE SARAYAKU V. ECUADOR CASE BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Maria Sole Verruso

CONTENTS: 1. – Introduction. 2. – Facts of the Case and Arguments of the Parties. 3. – The Legal Issue. 4. – The Decision of the Inter-American Court of Human Rights. 5. – Considerations on Sarayaku Decision. 6. – Implications for Future Cases and Relations with the Principle of Sustainable Development.

1. Introduction.

The last few years have seen a surge of interest in foreign acquisition of land for agricultural use and natural resource exploitation in developing countries. Currently, these large-scale development projects can represent a threat to people's livelihoods and ecological sustainability. Even though some of the land-lease agreements have provisions concerning projects of rural development, these deals are usually not written on equal terms between the investors and local communities. Indigenous peoples who live in the lands object of the investments often do not play any role in the decision-making process that led to their consent. On the contrary, from a sustainable development perspective, which is defined as the policy imperative to balance economic, environmental and social considerations so as to meet «the needs of the present without compromising the ability of future generations to meet

their own need»[1], foreign direct investments have to be high-quality ones improving local livelihoods while protecting the environment.

Where indigenous and tribal peoples are involved, there has been growing tendency in International Law to recognize the free prior and informed consent. This principle, stated also in the United Nations Declaration on the Rights of Indigenous People[2], refers to the right of local communities to participate in decision making about issues impacting them. The right of indigenous people to be consulted about legal or administrative measures that will affect them directly has become a general principle of International Law and it is consistent with sustainable development.

This was the matter of complaint in the case of Sarayaku indigenous community who was not consulted by the State of Ecuador when it granted oil concessions in the community's ancestral lands. The complaint on the infringement of indigenous people's free prior and informed consent by Ecuador was launched in April 2003 by the Association of the Kichwa People of Sarayaku (Tayjasaruta), the Centre for Economic and Social Rights (Centro de Derechos Económicos y Sociales) and the Centre for Justice and International Rights against the Republic of Ecuador. The decision of the Inter-American Court of Human Rights issued on 27th June 2012 delivered a landmark decision, finding international responsibility of Ecuador for having breached both domestic and international human right obligations by allowing an Argentine oil company to drill on indigenous land without consulting the resident community first.

2. Facts of the Case and Arguments of the Parties.

The Sarayaku Kichwa indigenous people are one of the twenty-eight ancestral communities to whom Ecuador awarded an undivided parcel of land

[1] UN, "Report of the World Commission on environment and development: Our common future", Annex to UN doc A/42/427, August 4, 1987, IV.1, available at http://www.un-documents.net/wced-ocf.htm (last visited December 2014).
[2] United Nations, The Declaration on the Rights of Indigenous People, 13 September 2007.

in the Amazonian region along the Bobonaza River in 1992. Four years later, in 1996, Ecuador signed a contract with an Argentinean oil company (Compañia General de Combustibles, hereinafter the "CGC") and the Empresa Estatal de Petróleos del Ecuador (PETROECUADOR) for oil exploration and exploitation on lands that included the ancestral territory of Sarayaku community. The 65% of the so called "Block 23" was within the Sarayaku lands. According to the contract, the CGC had the obligation to prepare an Environmental Impact Assessment[3] and obtain all the permits needed.

The seismic exploration phase started in 2002 when the EIA for seismic prospection was updated and approved. Between 2002 and 2003, in order to conduct seismic exploration, the CGC entered Sarayaku territory without consulting the community or obtaining its permission. The CGC's activity in the ancestral lands created a situation of risk for the population, given that for a time they were prevented from practicing their traditional subsistence activities and their freedom of movement and cultural expression were curtailed. Actually, the Sarayaku People subsist on family-based collective farming, hunting, fishing and gathering within their territory, in accordance with their traditions and ancestral customs. Around 90% of their nutritional needs come from products obtained from their own land and the remaining 10% come from outside the community. Furthermore, the CGC's activity in the ancestral lands provoked negative consequences also on the environment: part of the *Kausa Sawach*, a sacred living rainforest for the Kichwa Peolple, was destroyed.

For several months the CGC, protected by soldiers and private security guards who set up four military bases in Amazonia, carried out detonation, fell trees, buried approximately 1433 kg of high grade explosives in wells and polluted the environment with its activities. Several sacred sites for the community were destructed and the Kichwa People declared an "emergency",

[3] The Environment Impact Assessment (EIA) is a procedure that entails considerations of potentially harmful consequences of a planned activity on the environment, before authorizing the implementation of the project.

during which the community stopped its everyday economic, administrative and education activities for a period of 4 to 6 months. In order to protect the boundaries of its territory and prevent the entry of the CGC, the Sarayaku community organized six so-called "Peace and Life Camps" on the edges of the territory, each comprising 60 to 100 people, including men, women and young people. It was so claimed, and not refused by the State, that the members of the Sarayaku headed into the jungle to reach the camps set up on the borders of the territory, including children old enough to walk and pregnant women or those with babies. The only people who did not participate in this surveillance were the elderly, the sick and very young children (toddlers), who stayed in Sarayaku Center. During this period, the Community members lived in the jungle; the crops and food ran out and, during several months, the families survived exclusively on resources from the forest[4].

3. The Legal Issue.

The Court had to determine whether the State of Ecuador adequately respected and guaranteed the rights of the Sarayaku People that were allegedly violated, in granting the contract of oil exploitation on their territory to a private company, in implementing the said contract and causing a series of related events[5]. The controversial issue was to understand the date on which the state's obligation to consult with the indigenous people should have taken place. Even though the State acknowledged that it did not carry out prior consultations, it pointed out that the duty was introduced in 1998 or 1999 by the ratification of the International Labor Organization (ILO) Convention 169[6], two or three years after the contract with CGC. On the other hand, the petitioners and the Inter-American Commission on Human Rights argued that

[4] Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-American Court of Human Rights (ser. C) N. 245 (June 27, 2012), 28.
[5] *Id*, p. 34
[6] International Labour Organization, Convention n. 169, Indigenous and Tribal Peoples Convention, 27 June 1989.

the consultations should have begun from the moment of the contract's stipulation.

The representatives of the Sarayaku Community and the Commission argued that the failure to inform and consult about the project by the State constituted a violation of the right to property, in relation to the obligation to respect the right to freedom of thought and expression and political rights, enshrined in Article 21[7] of the American Convention, in relation to Articles 1(1)[8], 13[9], and 23[10] thereof, to the detriment of the Community and its members. Furthermore, it was argued that the inability of the Sarayaku People to move freely within their own territory and their inability to leave it due to the military posts and the placement of explosives, all with the acquiescence and participation of the State agents, made the State responsible for the violation of the right to free movement, protected under Article 22[11] of the

[7] Article 21 of the American Convention establishes: «1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law [...]».

[8] Article 1(1) of the American Convention establishes: «The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition».

[9] Article 13(1) of the American Convention states: «Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice».

[10] Article 23 of the American Convention states: «1. Every citizen shall enjoy the following rights and opportunities: a) to take part in the conduct of public affairs, directly or through freely chosen representatives [...]».

[11] Article 22 of the American Convention states: «1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right lo leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest [...]».

American Convention. Moreover, the petitioners denounced the violation of their right to life and to personal integrity recognized by Article 4[12] and 5[13] of the Convention, as long as the State had allowed the burial of explosives in their territory creating a permanent danger that threatens the life and survival of its members.

While representatives of the Sarayaku Community and the Commission cited the American Convention on Human Rights and evolving international legal norms, Ecuador based its argument on the Vienna Convention on the Law of Treaties and the specific enunciation of the obligation to consult provided in ILO Convention n. 169.[14] In particular, Ecuador pointed out that, having signed the contract for oil exploration with CGC in 1996, it was not obliged to initiate a consultation process, or obtain the free, prior and informed consent of the Sarayaku People, as long as it had not yet ratified the ILO Convention 169 and considering the fact that the Constitution at the time made no provision to that effect. It was added that, based on Article 28 of the Vienna Convention on the Law of Treaties, this was a legally non-existent obligation for Ecuador. Actually, the State had adjudicated the territory to the Sarayaku People, but it would not be considered an unlimited property title. In fact, the State's power to build roads or other infrastructure is not restricted and its institutions and Security Forces have free access to the territory to fulfill their constitutional obligations. Furthermore, Ecuador affirmed that underground natural resources belong to the State, which may exploit these without interference provided that it does so in accordance with environmental protection standards.[15]

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[12] Article 4.1 of the American Convention states: «Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life».

[13] Article 5 of the American Convention states: «1. Every person has the right to have his physical, mental and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person [...]».

[14] L. BRUNNER and K. QUINTANA, *The Duty to Consult in the Inter.American System: Legal Standards after the Sarayaku*, in *ASIL Insights*, 16, Issue 35, 2012.

[15] Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-American Court of Human Rights (ser. C) N. 245 (June 27, 2012) p. 35

4. The Decision of the Inter-American Court of Human Rights.

The Inter-American Court of Human Rights declared that the State, by failing to consult and guarantee the participation of the Sarayaku People on the execution of the project, was responsible for the violation of the right to communal property of the indigenous people, recognized in Article 21 of the Convention, in relation to the right to cultural identity, under the terms of Articles 1(1) and (2) thereof. Since the provisional measures to remove explosive material that constituted a serious risk to the life and the integrity of Sarayaku People were ordered in June 2005 and the State removed just a small part of it, Ecuador was considered responsible for having gravely put at risk the rights to life and physical integrity of the petitioners. For the foregoing reason, the Court recognized the violation of Article 4(1) and 5(1) of the American Convention, in relation to the obligation to guarantee the right to communal property, under the terms of Articles 1(1) and 21 thereof. Lastly, the Court found also the violation of Article 8(1)[16] of the Convention for having the State not guaranteed an effective remedy to address the juridical situation infringed to detriment of the Sarayaku People. Consequently, the Court deemed appropriate to set the amount of US $1,250,000.00 for the Sarayaku People as compensation for non-pecuniary damages and US $90,000.00 as compensation for pecuniary damages. The State was ordered to neutralize, deactivate and completely remove the surface pentolite and the Court requested the consultation of the population Sarayaku appropriately in the decisions to be taken in the future, and the adoption of proper domestic legislation to give effect to the right to prior, free and informed consultation of indigenous peoples.

[16] Article 8.1 of the American Convention states: «1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature».

5. Considerations on the Sarayaku Decision.

The sentence is landmark for several aspects. For instance, for the first time in the history of the Inter-American Court's judicial practice, a delegation of Judges conducted a proceeding at the site of the events visiting the territory of the Sarayaku People. Furthermore, the judgment touches many aspects of interest, in particular recognizing the right of information and consultation. As a matter of fact, the Court focused the origin of the obligation and then clarified the essential elements in order to consider a process of effective and proper consultation. The Court had, actually, seen the indigenous and tribal people's right to effective participation in decision-making that concerns their territory as deriving from the right to property (Article 21 of American Convention and Article XXIII of the American Declaration of the Right and Duties of Man), the right to be free from discrimination and the right to partecipate in government (Article 23 of the American Convention). Moreover, the Court several times referred to ILO Convention n. 169 that had enshrined the rights of indigenous people to have a full realization of the human rights, including economic, social, and cultural rights, without discrimination, and to partecipate in decision-making when state actions may directly affect them.[17] Because various Member States of the Organization of American States had incorporated these standards into their domestic legislation and through there highest courts, the Court considered the obligation to consult «a general principle of International Law […] and an obligation that has been clearly recognized»[18].

Later, the Court «has established that in order to ensure effective participation by members of an indigenous community or people in development or investment plans within their territory, the State has the duty to consult the community in an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous

[17] ILO Convention N. 169, Article 2.
[18] Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-American Court of Human Rights (ser. C) N. 245 (June 27, 2012) para 164, 165, p. 48.

communication between the parties. Moreover, these consultations should be undertaken in good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community»[19]. The Judges «emphasized that the obligation to consult is the responsibility of the State, and therefore the planning and carrying out of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the same company that is interested in exploiting the resources in the territory of the community that is the subject of the consultation»[20]. In addition, the Court «has established that Environmental Impact Studies must be carried out in conformity with international standards and best practices, must respect the indigenous peoples' traditions and culture and must be completed prior to the granting of the concession, given that one of the purposes for requiring such studies is to guarantee the right of indigenous people to be informed about all proposed projects in their territory»[21]. It is evident that all these requirements are completely absent in the Sarayaku case. Finally, referring to the date on which the state obligation to consult with began, the Court specified that «given that ILO Convention 169 applies to the subsequent impacts and decisions stemming from oil projects, even though these had been contracted prior to its entry into force, it is clear that at least since May 1999 the State was under the obligation to guarantee the Sarayaku People's right to prior consultation, in relation to their right to communal property and cultural identity, in order to ensure that the

[19] Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-American Court of Human Rights (ser. C) N. 245 (June 27, 2012) para 177, p. 53.
[20] *Id,* para 187, p. 56.
[21] *Id,* para 206, p. 62.

implementation of the oil concession would not compromise their ancestral lands, livelihood or survival as an indigenous people»[22].

6. Implications for Future Cases and Relations with the Principle Sustainable Development.

The Sarayaku sentence has far-reaching effects on state and non-state actors in the Americas and beyond. Also referring to ongoing large-scale developments projects on indigenous lands in Americas, the landmark decision has shown how the state's ratification of the American Convention could be a significant element in order to determine its obligation. As we have seen, another important factor will be the ratification of ILO Convention n. 169. Notwithstanding, in order to determine the state responsibility for indigenous' rights to consultation, the ratification of the two conventions will not be determinative having the Court concluded that the obligation to consult is a general principle of International Law.

The Court's verdict has also large repercussions for the intense debate that has been raging in the last few years about the scope of the right to consultation and territorial rights of indigenous peoples. The Court's jurisprudence that has concluded that the obligation to engage in consultations with indigenous communities has become a general principle of International Law will be persuasive beyond the American Courts. Its influence will reach not only worldwide Courts but also multinational corporations, whose transnational activities have always to deal with states' duties. As a consequence of far-reaching impact of litigation such as the Sarayaku case, the evolution of international standards on duty to consult is significant for a wide range of actors[23].

The Sarayaku decision represents an important goal in achieving sustainable development. As a matter of fact, fair and high-quality investments

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[22] *Id,* para 175, p.52.
[23] L. BRUNNER and K. QUINTANA,*The Duty to Consult in the Inter.American System: Legal Standards after the Sarayaku*, in *ASIL Insights*, 16, 2012.

that address social aspects minimizing negative impacts on people's lives are considered by the scholars as the means in order to reach the Sustainable Development. In conclusion, investments on indigenous lands which are the results of genuine dialogue as a part of a participatory process with indigenous people are essential requirement for sustainable development.

IMPACT OF THE INVESTMENT TREATIES ON STATES' ENVIRONMENTAL POLICY: THE DISPUTE VATTENFALL V. GERMANY (II)

Irene Pozzi

CONTENTS: 1. – Introduction. 2. – Vattenfall v. Germany (II): Background on the Conflict. 3. – Legal Ground of the Dispute: Forecasts and Considerations. 4. – Vattenfall v. Germany (I): a Case Conducted with Greater Transparency.
5. – Transparency of the Arbitration Proceeding According to the ICSID Arbitration Rules. 6. – Final Considerations.

1. Introduction.

International investment treaties can have a significant impact on environmental policy and environmental regulation in the States parties to the treaties. As a matter of fact, investment treaties give individual investors or private entities the right of bringing claims against the host State for alleged violations of obligations under the treaty. In particular, investors from one State are enabled to sue regulatory measures that could have negative effects on their investment directly before international arbitration tribunals. Therefore, there is a constant tension between investor rights and public welfare interests, which should be carefully balanced by the arbitral tribunals.

In order to present such issue as well as to shed light on some of the matters at stake, the present survey analyzes the new dispute Vattenfall v. Germany (II).

The dispute was registered on May 2012, when a Swedish energy company, Vattenfall, filed a request for arbitration against Germany at the

International Centre for the Settlement of Investment Disputes (ICSID) because of the Germany's decision to abandon the use of nuclear energy. In spite of the great public interest arose by the dispute, especially from the perspective of sustainable development, the case has not been conducted with the greatest possible transparency and public scrutiny, at least until now. This survey provides the background on the conflict, trying to better understand this particular case as well as the investment law and policy it relies on. It also provides a comparison with the first 2009-2011 Vattenfall v. Germany arbitration that was conducted with greater transparency.

2. Vattenfall V. Germany (II): Background on the Conflict.

On 31 May 2012, Vattenfall, a Swedish energy company, submitted a request for arbitration against the Federal Republic of Germany. The dispute between Vattenfall and the German federal government initiated in response to Germany's decision to phase out nuclear energy in the wake of the nuclear disaster in Fukushima. As a matter of fact, during the summer 2011, the German Parliament decided to abandon the use of nuclear energy by the year 2022[1]. Such decision[2], however, was taken only few months after the German government lengthened permits for the operating lives of the older power plants beyond the deadline already set by the previous government[3], so as to lead energy companies to further invest in that field[4].

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[1] On 30 May 2011, the government decided to phase-out and close all reactors by 2022. Subsequently, the German Bundestag (Parliament) passed the amendment of the Atomic Energy Act (AtG – ref. no. 17/6070) with a clear majority of 513 to 79 votes and 8 abstentions at the end of June, and the Bundesrat vote on 8 July confirmed this.

[2] The Thirteenth Amendment to the Atomic Energy Act came into effect on August 6, 2011.

[3] On 28th October 2010, the 11th amendment of the Atomic Energy Act, with the aim of extending the life span of nuclear energy plants, was passed with 308 to 289 by the lower house of German parliament. The content of this act was to extend the life span of 17 German nuclear reactors by approximately 12 years. The act came into law after it was signed by the President on 8th December 2010. See G. BENZOV, *German parliament passes law to extend use of nuclear power*. Deutsche Welle, 2010, available at

The new Atomic Energy Act disposed the immediate closure (August 6, 2011) for the oldest of the 17 nuclear power plants (among others, Brunsbuttel and Krummel which are owned by Vattenfall). As for the remaining plants, on the other hand, it was established their gradual closure by 2022.

As, from Vattenfall's point of view, the German government's decision to abandon nuclear power had made the investment worthless and even destroyed the value of its assets, the Swedish company sued Germany.

The claim has initiated before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) under the terms of the Energy Charter Treaty.

The Energy Charter Treaty (ECT)[5] has the fundamental aim to strengthen the rule of law on energy issues by providing a set of rules to be observed by all the participating governments. In addition to that, it also offers a dispute settlement mechanism which allows investors to initiate a legal action direcly against states[6] for alleged violations of obligations under the treaty, bypassing the domestic court system. In particular, investors from one State are enabled to sue for indirect expropriation of their property before an international tribunal, namely when the Host State's government implements regulations or other activities that significantly diminish the value of investments. Therefore, such arbitration often involves challenges to regulatory measures that may consist – as in the present case – in decisions concerning the protection of environment, human health and safety. There is a permanent tension between investor rights and state right to regulate public welfare interests, which could potentially bring about the detriment of the latter. Indeed, even if public welfare interests may be considered in an arbitral

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http://www.dw-world.de/dw/article/0,,6162732,00.html (last visited September 2014).

[4] Vattenfall said it invested 700 million euro as a consequence of the government's plan to lengthen the operating lives of older plants.

[5] The Energy Charter Treaty is a multilateral treaty which was signed in December 1994 and entered into legal force in April 1998. To date, it has been signed by fifty-two states, the European Community and Euratom.

[6] Article 26: settlement of disputes between an investor and a contracting party.

decision, the investment treaties primarily aim to facilitate foreign direct investments safeguarding them against "political" risks and, consequently, focus almost exclusively on investor interests. In such a context, if the arbitral tribunal recognizes the breach of an investment protection standard, the state involved may be condemned to pay high amounts in compensation to the claimant. Besides, the final decision released by the arbitral tribunal constitutes the definitive and binding ruling on the case since there is not any appeal system. Thus, arbitrators have the power to give a binding decision on public interests issues following the challenge by a foreign investor of regulatory measures taken by a State.

The impact of the investment treaties on states' public policy is evident: the mere threat of a claim and a possible conviction to high payments might even restrain states on the adoption or implementation of regulatory measures to protect sensitive public interests, such as the environment.

In the matter of the dispute at stake, notably, Vattenfall claims over euro 3.7 billion in compensation. However, as key documents concerning this case are not publicly available, the exact claims made by Vattenfall remain unknown[7]. Moreover, to this day, the Tribunal has issued a decision on jurisdiction which has not been made public[8]. However, it has to be in favour of the claimant since the case is still pending and proceeds to merits.

3. Legal Ground of the Dispute: Forecasts and Considerations.

It is likely that Vattenfall is suing the Federal Republic of Germany grounding primarily on the provisions of the Energy Charter Treaty for protection against expropriation without compensation (Article 13)[9], the

[7] On 20 December 2013 and 11 February 2014, the Tribunal issued Procedural Orders No. 2 and 3 concerning the confidentiality of documents. And even recently, *i.e.* on 27 February 2014 and 18 March 2014, the tribunal issued Procedural Orders No. 4 and 5 concerning the confidentiality of documents too.

[8] The Tribunal issued a decision on the respondent's Rule 41(5) objections on 2 July 2013.

[9] See ahead in the paragraph.

obligation on fair and equitable treatment (Article 10)[10], and also the umbrella clause (Article 10)[11]. One of the most significant provisions of the investment protection regime of the ECT is Article 13, which foresees the principle of full compensation following expropriation. According to the provision, «Investments of Investors of a Contracting Party in the area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation». The article provides foreign investors for protection both against outright takings of investments by the host state and the various forms of indirect or creeping expropriation, such as regulations or confiscatory taxation that undermaines the value of the investment[12].

Notably, the ECT has not closely defined the concept of expropriation. As a consequence, it is not easy to predict whether the arbitral tribunal would qualify the new Atomic Energy Act as an indirect expropriation. In any case, even in the event that the Tribunal rejected the complaint concerning alleged expropriation as unfounded, Vattenfall might still be successful on the basis of the fair and equitable treatment provision. Article 10(1) of the ECT requires the contracting parties to maintain a favourable investment climate for investments by committing themselves «to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment». The principle of "fair and equitable treatment"[13] is a vague and flexible concept which has been interpreted very differently by arbitration tribunals.

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[10] See ahead in the paragraph.
[11] See ahead in the paragraph.
[12] C. Schreuer, *The concept of Expropriation under the ECT and other Investment Protection Treaties*, 20 May 2005, 1-39, available at www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (last visited December 2014).
[13] For a detailed description of the concept of fair and equitable treatment, see: C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, in 6 Journal World Investment & Trade (2005); C. Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law,* OECD *Working Papers on International Investment* (2004) No. 3; B. Kingsbury and S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (2009), *New York University Public Law and Legal Theory Working Papers,* Paper 146, retreived via: http://lsr.nellco.org/nyu_plltwp/146/ last visited on 10th September 2014.

Nevertheless, tribunals applying the fair and equitable treatment standard usually find it to include principles such as the protection of legitimate investor expectations to the retention of a stable legal and business environment by the host state, the principle of due process, transparency, proportionality and the prohibition on arbitrariness[14]. Pursuant to these interpretations, it is possible to give a more detail content to the concept of fair and equitable treatment. As to the present case, it is likely that the Swedish company will refer to its "legitimate expectations", since it has invested some euro 700 million on the nuclear power plants Krummel and Brunsbuttel, basing on the legitimate expectation that the legal extension of the older power plants' lives would remain in force. On the other hand, it may be observed that the Energy Charter Treaty does contain certain references to safeguard environment in its preamble, which the arbitral tribunal should take into account as well. In addition, Article 10(1) of the ECT includes the umbrella clause, so as to make the principle *pacta sunt servanda* an obligation of each Contracting Party[15]. Precisely, the article obliges each Contracting Party to «observe any obligations it has entered into with an Investor or an Investment of an Investor of any other contracting party». In this way, a violation of such an obligation covered by Article 10(1) may constitute a breach of a Contracting Party's obligation under the ECT. In other words, the umbrella clause is a general rule of contract compliance which, if invoked in an investor-state dispute settlement case, elevates a contractual or other public law obligation to the international level. As some states have seen this internationalization of all obligations a step too far, they did not give their consent to the automatic application of the

[14] For instance, ICSID Case No. ARB/01/7 *MTD, Equity Sdn. Bhd. & MTD Chile S.A. v. Chile* (Malaysia/Chile BIT) (25 May 2004); ICSID Case No. ARB(AF)/97/1 *Metaclad Corporation v. Mexico* (NAFTA) (30 August 2000); ICSID Case No. ARB(AF)/00/2, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (Spain/Mexico BIT) (29 May 2003); ICSID Case No. ARB/01/8 CMS *Gas Transmission Company v. Argentina* (United States/Argentina BIT) (12 May 2005).

[15] For a deeper analysis of the concept of "umbrella clause", see: C. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements,* OECD *Working Papers on International Investment* (2006) No. 3.

umbrella clause to investor-state dispute settlement[16]. Considered that Germany has not made such reservation, however, Vattenfall could invoke this clause. In particular, the company might argue that the lifetime extension of the older power plants agreed in September 2010 represents a German commitment to Vattenfall that, if not met, brings about a violation of the Energy Charter Treaty. Unfortunately, all the considerations above made are only hypothesis that, until the proceeding details remain confidential, will not be possible to verify.

4. Vattenfall v. Germany (I): a Case Conducted with Greater Transparency.

It is interesting to make a comparison between the dispute at issue and a previous case involving the same disputing parties, but conducted with greater transparency: the Vattenfall I dispute case. On 2 April 2009, Vattenfall AB, Vattenfall Europe AG and Vattenfall Europe Generation AG submitted a request for arbitration against the Federal Republic of Germany at the ICSID under the terms of the Energy Charter Treaty[17]. The challenge constitutes the first (known) investor-state arbitration procedure against Germany. At issue was the construction of a coal-fired power plant by Vattenfall along the banks of the Elbe River. In 2007, the City of Hamburg agreed to a provisional contract with the Swedish company for the realization of a new power plant. The terms of the contract depended on a final permit that was approved nearly one year later, when the Hamburg Environmental Authority issued a license including additional restrictions with regard to the volume of cooling water, temperature and oxygen levels on the power plant's impact on the Elbe River. Such water use permit, according to Vattenfall, was extremely severe and clearly deviated from what had been agreed in the contract with the City of

[16] Australia, Canada, Hungary and Norway have made the reservation in Annex IA that the last sentence of Article 10(1) of the Energy Charter Treaty (the umbrella clause) does not automatically apply to investor-state dispute settlement.
[17] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6.

Hamburg. As a result, the corporation proceeded to file a compensation claim against Germany arguing that the permit breached the provisions set out in Chapter III of the Energy Charter Treaty. The case was settled on March 2011, with Germany agreeing to a weakened environmental license in favour of the company[18]. Unlike the pending Vattenfall dispute case, the proceeding details of the Vattenfall I have been made publicly accessible[19]. The different way of conducting the two proceedings under the profile of transparency probably depends on the circumstance that, while in Vattenfall I the parties have agreed upon the final resolution of the dispute[20], the pending case is more conflicting and maybe still too far from an agreement.

5. Transparency of the Arbitration Proceeding According to the ICSID Arbitration Rules.

The different transparency standard of the two disputes at stake is possible because public disclosure of arbitration proceedings under the ICSID Rules closely depends on the will of the parties. In order to better understand the extent to which the disputing parties are able to affect public openness of ICSID disputes, it is useful to provide an overview of the transparency standard ensured by the ICSID Arbitration Rules. First of all, the ICSID Administrative and Financial Regulations guarantee public knowledge of the very existence of ICSID cases, by requiring the Secretary-General to publish certain information about the disputes, once they are registered[21]. Such

[18] See Roda Verheyen (2012, April 11th). Briefing Note: the Coal-fired Power Plant Hamburg-Moorburg, ICSID proceedings by Vattenfall under the Energy Charter Treaty and the result for environmental standards.
[19] Both the Request for Arbitration (30 March 2009) and the Award (11 March 2011) have been published and are currently available at http://www.italaw.com/cases/1148.
[20] Actually, On August 25, 2010, the parties signed an agreement for the final and binding resolution of their dispute and discontinuance of the proceedings. In February 2011, after having fulfilled the conditions for a full settlement of the dispute established in the agreement, the parties requested the Tribunal to embody the terms of the agreement in an award on the basis of the ICSID Arbitration Rules.
[21] Artt. 22 – 23 of the ICSID Administrative and Financial Regulations.

obligation, however, does not include the request of arbitration itself, which might remain confidential. In the second place, an adequate transparency standard should permit to interested non disputing-parties the chance of attending, or at least observing, hearings. Although ICSID Arbitration Rules currently enable arbitral tribunals to open up hearings to additional categories of people, they also contemplate a veto power of the disputing parties over the attendance of hearings, so that the parties still may prevent open hearings[22].

In relation to public disclosure of the final award, then, the recent amendments to ICSID Rules[23] have improved the openness of arbitration proceedings and ensure a *minimum* level of transparency.

Actually, even if the consent of the disputing parties keeps on being necessary for making the award public, the ICSID Secretariat is currently under the obligation to publish "excerpts of the legal reasoning" supporting the award[24].

In addition, a satisfactory transparency standard has to be combined with public participation: when the proceedings involve issues of significant public interest, civil society should be enabled to collaborate with the arbitral tribunals. To this end, the institution of *amicus curiae*[25] may represent the means for feeding the trial dialectics without burden the time of the dispute resolution process and the position of the parties. In particular, the possibility for *amici curiae* to submit a brief would bring additional factual and legal considerations related to important public interests (*e.g.* the environment), thus, expanding the scope of investment arbitration. Subsequently to the revision process of 2006, the ICSID Rules expressly empower tribunals to permit non-disputing parties to file written *amicus curiae* submissions[26]. Moreover, the amended provisions

[22] Rule 32(2) of the ICSID Arbitration Rules.
[23] The ICSID Rules were amended on 10 April 2006.
[24] Rule 48(4) of the ICSID Arbitration Rules.
[25] For a deeper analysis of the concept of *amicus curiae,* see: E. BARONCINI, *Società civile e sistema OMC di risoluzione delle controversie: gli Amici Curiae,* in *Organizzazione Mondiale del Commercio e Diritto della Comunità Europea nella Prospettiva della Risoluzione delle Controversie*, Giuffrè, Milano, 2005, 79-80; and K.F. GOMEZ, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, in *Fordham International Law Journal*, 4 June 2011, Vol. 35, 518-524.
[26] Rule 37 of the ICSID Arbitration Rules.

include some procedural considerations as well as a non-exhaustive set of criteria to be considered by tribunals in deciding whether to allow the filing of such briefs[27]. Even though the ICSID Rules seem to ensure a satisfactory standard of public participation, they are still inadequate. Indeed, public participation without an exhaustive knowledge of the proceeding details risks to become meaningless.

6. Final Considerations.

Once verified that the ICSID Arbitration Rules are still far from the achievement of an adequate transparency standard, it is recommended that cases arising important public interests, like the one at issue, will be conducted with the greatest possible public scrutiny and transparency.

In investor-state disputes, indeed, the arbitral tribunals are often required to balance conflicting sensitive interests: on the one hand, they have to consider the applicable investment treaty and guarantee foreign investors the due protection; on the other, especially when regulatory measures are at stake, they should assess the public interests involved and the impact their decision could have on the right of states to regulate.

In pursuance of such a thorny task, transparency and public participation might function as the key for diminishing the tension between the investor rights and state right to regulate in the public interest. Transparency would permit the general public to be aware of the way by which their interests are appreciated and protected and, at the same time, public participation would permit tribunals to broaden their view and acquire a proper consideration of the non-economic interests involved.

[27] Rule 37(2) of the ICSID Arbitration Rules.

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