

# International Responsibility and Liability for Damage Caused by Environmental Interferences

by Johan G Lammers\*

International environmental law has shown in the last half century a tremendous development as a mere glance at the collections of international environmental agreements prove. Starting with a few early conventions, namely for the preservation of fauna and flora or concerning the use of international watercourses, international environmental agreements now also cover marine pollution in many forms, air pollution, ozone depletion, climate change, Antarctica, hazardous substances, technology and wastes, trade and armed conflict related environmental issues, and such cross-sectoral matters of international cooperation as notification, exchange of information, environmental impact assessment and consultation or mechanisms for global environmental funding. In fact, a whole new chapter has been added to international law, the importance of which is also demonstrated by the fact that many universities have now created a special professorship to deal with international environmental law.

Although it might have been tempting to give a general evaluation of international environmental law with its strengths and weaknesses as it has developed and stands at the threshold of the third millennium, we intend to discuss in this paper only specific aspects and, in particular, certain, mostly recent developments of what may be designated as *international responsibility and liability for damage caused by environmental interferences*, a topic vital for the effectiveness of international environmental

law and of increasing relevance in international negotiations.

To our knowledge there exists no generally accepted definition of the concepts of “responsibility” and “liability”. In order to give some guidance we will, however, in this paper understand by “responsibility” the consequences which a given legal system attaches to a breach of norms of that system, and by “liability” the obligation imposed by a legal system to compensate for damage caused whether or not as a result of a breach of norms of the legal system concerned. The damage which we have in mind here is, as already noted, the damage resulting from environmental interferences.

By *environmental interferences* we will understand – inspired by the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes – adverse effects, directly or indirectly caused by human conduct, on the environment, including effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; such adverse effects may also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors.

Such an environmental interference may, but need not necessarily, be of a transboundary nature in the sense that its source is located beyond an international border. The source of the adverse effect and the adverse effect itself may be located entirely within the area under the national jurisdiction of a State, in which case we are dealing with a national interference, or entirely beyond such an area, in which case we are confronted with an international interference.

---

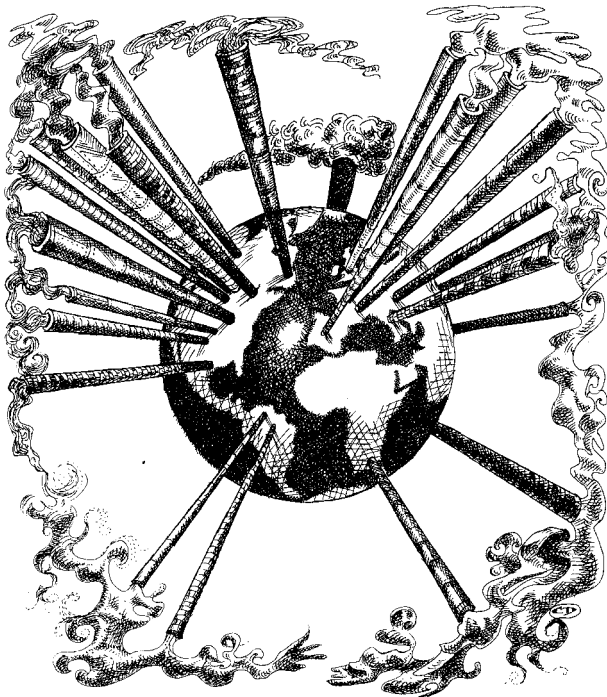
\* Legal Adviser, Netherlands Ministry of Foreign Affairs, Professor of International Environmental Law, Centre of Environmental Law, University of Amsterdam.

Why this concern for responsibility and liability for damage caused by environmental interferences?

First, it is believed that responsibility and liability are potentially important instruments to promote *compliance* with norms designed to protect the environment, enhance the implementation of the *precautionary principle* and promote *prevention* of environmental interferences. This is, for instance, recognized in Article 16 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, which provides:

Consistent with the objectives of this Protocol for the comprehensive protection of the Antarctic environment... the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty Area and covered by this Protocol... (my emphasis).

This does, of course, not mean that responsibility and liability are the only or even the most adequate instruments to protect the environment. The setting of so-called "primary" norms and standards and the establishment of monitoring, implementing and cooperation obligations



Courtesy: Financial Times

and mechanisms in order to avoid environmental interferences remain of primary importance. Indeed, responsibility and liability will only be effective instruments if the origin of a breach or the persons or entities that cause the environmental interference can be identified, and – where necessary – the damage can be properly assessed and the causal connection between source and interference established. Keeping this in mind, it is, however, more and more recognized that responsibility and liability

are becoming important supplementary means to promote the avoidance of environmental interferences.

Second, apart from the promotion of compliance with environmental norms and prevention of environmental interferences, responsibility and liability are also indispensable instruments to give effect to the *polluter pays principle*, which in the above-mentioned 1992 Helsinki Convention (Article 2(5)(b)) has been defined as the principle "by virtue of which costs of pollution, prevention, control and reduction measures shall be borne by the polluter".

Third, responsibility and liability may be looked upon as important instruments to *restore the balance*, i.e. to require the cessation of a wrongful act or as means to repair the damage in the case of a breach of a legal obligation or even in the absence of such a breach.

The need to restore the balance is, of course, evident in the case of the breach of a legal norm. But even in the absence of such a breach considerations of equity and fairness may in conjunction with the polluter pays principle be deemed to call for an obligation on the part of the person or entity which permits or undertakes an activity that is beneficial for him or it, but causes harm to others or to the environment, to restore as much as possible the original situation and/or pay compensation, instead of leaving things as they are and compelling others or the environment to accept the detrimental effects of those activities without enjoying the benefits of those activities.

The question of responsibility and liability for damage caused by environmental interferences may arise in many contexts and at many levels. Let us, for example, take the case of a serious pollution of the Rhine, which as we know is one of the most important international rivers in Europe.

We may look at this case as a problem between States to be approached and solved on the basis of rules and principles of *public international law*.

As a substantial part of the drainage basin of the Rhine is located in the territory of member States of the European Union, there is the possibility that at least for those member States and their inhabitants *European Community law* will also become a relevant legal framework within which issues of responsibility and liability may arise.

Such issues may, of course, also arise at the level of the *national legal orders* of the riparian States of the Rhine or of perhaps other States when their interests or the interests of their inhabitants or nationals are affected by the pollution of the Rhine. Rules of civil, administrative or even penal laws of the national legal systems of the various States involved in the pollution may then come into the picture as well as rules of private international law, as is clearly illustrated by the various legal proceedings which have taken place because of the salinization of the Rhine by, *inter alia*, the Potassium Mines in Alsace in France.

It would, of course, be interesting to look at issues of responsibility and liability for damage caused by environmental interferences at all levels and in all legal or-

ders, but it will be clear that such an endeavour would go far beyond what is possible within the framework of this paper.

We will therefore limit ourselves to specific aspects and certain, mostly recent, developments of what we would like to designate as *international* responsibility and liability for damage caused by environmental interferences.

We will first look at certain aspects and developments of responsibility and liability of States *inter se* in public international law for damage caused by environmental interferences. Thereafter, we will briefly look at what *European Community law* has to offer in this respect.

Finally, and this will constitute the major part of our paper, we will see to what extent issues of responsibility and liability have been dealt with in *international agreements involving the responsibility and liability of natural or legal persons* who have caused damage by environmental interferences.

## 1. Responsibility and liability of States in public international law

The International Law Commission (ILC) – a commission consisting of eminent international law experts established by the UN General Assembly to codify or develop international law – has been working since 1955 on the topic of the international responsibility of States. This work has now almost reached its final stage with the provisional adoption of the latest version of the Draft Articles on State Responsibility in August 2000 by the Drafting Committee of the ILC.<sup>1</sup> The topic constitutes a fundamental chapter of public international law in general and is hence also of crucial importance for international environmental law as a part of general international law.

According to the Draft Articles (August 2000 version), in principle, every breach by a State of an obligation under international law – and hence also those concerning environmental interferences – whether customary, conventional or other in origin, gives rise to an internationally wrongful act of that State and will henceforth entail its international responsibility.

The position of the organ of the State responsible for the breach of the international obligation is irrelevant. That organ may belong to the constituent, legislative, executive, judicial or other power. Its functions may be of an international or internal character and its position in the organization of the State may be of a superior or subordinate nature.

Organs involving the responsibility of a State may also be organs of a territorial governmental entity within a State, such as a province, a *canton*, *land* or a municipality.

So the question then is whether in the case of a particular environmental interference a rule of public international law relevant for the protection of the environment has been breached and what the consequences will be for the State that is responsible for the internationally wrongful act and for the State or States *vis-à-vis* whom

the wrongful act has been committed. Another question is whether all internationally wrongful acts are to be dealt with in the same way or whether a distinction between certain categories should be made, with, of course, also a distinction in legal consequences.

To begin with the latter question, in a set of Draft Articles on State Responsibility (Part I) already adopted by the ILC in 1980<sup>2</sup> a distinction was made (in Article 19) between “international delicts” and “international crimes”. An international crime was defined as “an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole”.

Of particular interest for our topic is that according to the 1980 version of the Draft Articles:

an international crime may result, *inter alia*, from:...(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

This implied that serious breaches of essential international obligations for the safeguarding and preservation of the environment were to be regarded as international crimes and that breaches of less fundamental environmental norms would qualify as international delicts. Whether an international crime or not, the differences in legal consequences for the responsible State were not of great importance, except in that the proportionality requirement in the case of a re-establishment of the environment in its state before the wrongful act did not apply in the case of an international environmental crime.

The idea that not only natural persons, but also States could commit crimes appeared, however, very controversial both within the Commission and among States and that is the reason why in the latest version of the Draft Articles on State Responsibility provisionally adopted in August 2000 the concept of “international crime” no longer appears. By way of compromise the notion of “a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests” has now been proposed. A breach of such an obligation may be regarded as “serious”, “if it involves a gross or systematic failure by the responsible State to fulfil the obligation, risking substantial harm to the fundamental interests protected thereby”.

Even though the concept of “international crime” as such has now disappeared from the Draft Articles, it seems to me that the examples of crimes against the environment given in the 1980 version of the Draft Articles such as unlawful massive pollution of the air and the seas may well be considered as examples of the notion of a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests proposed in the latest version of the Draft Articles.

However, whether a serious breach of an essential obligation owed to the international community as a whole or another breach of an international obligation for the protection of the environment, certain legal consequences will in any event follow for the responsible State.

First of all, it is obvious that the responsible State must *cease the wrongful act*, if it is a continuing act. As many breaches of environmental norms are of a continuing character, the obligation to cease the wrongful act is particularly important. Appropriate assurances and guarantees of non-repetition, if circumstances so require, must also be offered by the responsible State.

In addition, the responsible State is under an obligation to make full reparation for the injury – which may consist material and/or moral damage – caused by its wrongful act. Full reparation may take various forms, *i.e.* restitution, compensation or satisfaction, either singly or in combination. Restitution is a form of reparation which is particularly important in the case of unlawful environmental interferences. It entails the obligation to re-establish the situation which existed before the wrongful act was committed, unless such restitution is materially impossible or would involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. Indeed, in cases of environmental degradation *compensation* for the damage caused is the second best form of reparation if such damage cannot be made good by measures of restitution.

According to the latest Draft Articles, the compensation shall cover “any financially assessable damage including loss of profits insofar as it is established”.

In the case of an unlawful environmental interference, this may be deemed to include loss of life or personal injury or loss of property or damage to property and any consequential economic loss arising therefrom as a result of the unlawful environmental interference.

It may also be deemed to include the costs of reasonable measures of reinstatement of the impaired environment or loss of profits deriving from an economic interest in the use or enjoyment of the environment incurred as a result of a significant impairment of that environment, or the costs of preventive measures to prevent or minimize damage after an incident has taken place endangering the environment.

Whether irreparable damage to the environment may also give rise to a claim for compensation is uncertain in view of the requirement that the damage must be “financially assessable” in order to be fit for compensation.

The third form of reparation to which a responsible State will be obliged is *satisfaction* which is especially appropriate to “compensate” for non-material damage, but less important in the case of breaches of environmental norms.

It may consist an acknowledgement by the responsible State of the breach, an expression of regret, a formal apology or another appropriate modality.

The above-mentioned consequences will also apply in the case of the crypto-international crimes which are now indicated in the latest Draft Articles as “serious breaches of essential obligations to the international com-

munity as a whole”. The Draft Articles, however, provide somewhat cryptically that in the case of such a serious breach “damages reflecting the gravity of the breach” *may be involved* for the responsible State. According to the Drafting Committee of the ILC, the phrase is intended to reckon with the fact that there may be situations in which the gravity of the breach calls for heavy financial consequences. The question whether damages reflecting the gravity of the breach were additional to those that were owed by the responsible State in the case of an “ordinary” international wrongful act was left open. In any event the notion of punitive damages remained very controversial even in the case of a serious breach of an essential obligation to the international community as a whole.

Special obligations also arise for States other than the responsible State in the case of such a serious breach, *i.e.* not to recognize as lawful the situation created by the breach, or not to render aid or assistance to the responsible State in maintaining the unlawful situation or not to cooperate as far as possible with other States to bring the breach to an end.

Having regard to the diversity of international obligations for the protection of the environment, the question arises which State may be entitled to invoke the responsibility of a State which has, for instance, been in breach of an obligation to preserve the marine environment beyond the limits of national jurisdiction of coastal States or to prevent or abate a significant pollution of an international watercourse or to take adequate measures to prevent the extinction of a non-migratory animal species within its own territory, such as for instance the tiger or the panda bear.

For example, in the case of a significant pollution of the waters of an international watercourse which the responsible State “shares” with another State, it is clear that in such a situation the other riparian State should be entitled to invoke the responsibility of the polluting State and may ask not only for a cessation of a continuing wrongful act, but also seek all forms of reparation, *i.e.* restitution, compensation and perhaps satisfaction from the polluting State. More complicated, however, is the situation when the responsible State has polluted a particular marine area beyond the limits of national jurisdiction of coastal States in breach of its obligations assumed under a multilateral convention, such as the 1982 UN Convention on the Law of the Sea.

Should all other States which are party to that convention be in the same position with regard to seeking reparation from the responsible State? In that case, it seems to be fair that only the contracting States parties *which are specifically affected* by the breach of the convention will be in a position to claim restitution or compensation in respect of themselves for the damage caused by the breach of the convention. The same may be true in the case of a breach of an international obligation owed to the international community as a whole, including the case of a serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests. —

Does that mean that the other States, which are contracting parties to the convention or part of the international community as a whole, but are not specially affected by the breach, should not be in a position to invoke in any way the responsibility of the responsible State? The answer to this question must be in the negative and the latest Draft Articles on State Responsibility provide that even such not specially affected States should be able to seek from the responsible State a cessation of the wrongful act and assurances and guarantees of non-repetition as well as compliance with the obligation of reparation *albeit in the interest of the specially affected State or of the beneficiaries of the obligation breached*.

In such cases the latest Draft Articles on State Responsibility also foresee the possibility for such States to take counter-measures against the responsible State *at the request and on behalf of any State specially affected by the wrongful act*. In the case of a serious breach by the responsible State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, any State may, however, even without the request of a specifically affected State, take counter-measures in the interest of the beneficiaries of the obligation breached.

It follows from the foregoing that in the case of a State which breaches an international obligation imposed by a multilateral convention to take adequate measures to prevent the extinction of a non-migratory animal species within its territory, other States have only limited possibilities to invoke the responsibility of the wrongdoing State, *i.e.* in the form of seeking cessation of the wrongful act and assurances and guarantees of non-repetition, and in the form of compliance with reparation obligations, provided at least that the animals concerned threatened with extinction may be regarded as "beneficiaries of the obligation breached". In any event compensation must be deemed to be excluded in such a case, because the other States cannot be deemed to have themselves sustained physical damage.

While the remedies provided by public international law in the case of a breach of an international obligation by a State as proposed in the latest Draft Articles on State Responsibility appear to be adequate in themselves, there are certain inherent difficulties to be faced even by a specially affected State if it wishes to invoke the responsibility of another State.

First of all, a State must prove that the responsible State has breached an international obligation, which in the case of environmental interferences may not be easy, especially in view of the fact that most obligations in international environmental law are due diligence or due care obligations and not obligations guaranteeing the non-occurrence of the environmental interference.

Apart from that, many obligations in environmental law have sometimes been phrased in extremely soft terms. What to think, for instance, of the many obligations in the 1992 Convention on Biological Diversity which start with the phrase: "Each Contracting Party shall, as far as possible and as appropriate ..." and where, moreover, developing country parties have made compliance with their

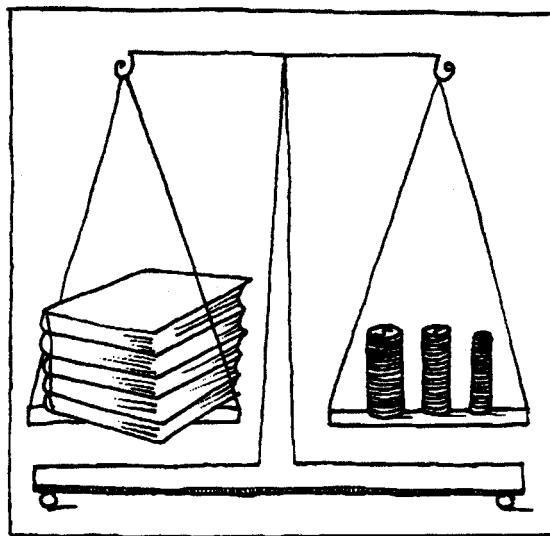
obligations dependent on the provision of financial resources and transfer of technology by the developed country parties.

Another serious problem may be to prove the existence of the necessary causal link between the author of the damage and the damage itself, especially in the case of environmental interferences such as ozone depletion and climate change. Great problems may also arise with regard to the financial assessment of the damage.

Further, as we have seen, States not specially affected themselves by a breach of an international obligation have only limited possibilities to invoke the responsibility of the State which committed the wrongful act. Such possibilities must perhaps, under the latest Draft Articles on State Responsibility, even be deemed to have completely disappeared when the specially affected State has validly waived a claim for reparation in an unequivocal manner or must by reason of its conduct be deemed to have validly acquiesced in the lapse of the claim.

For these reasons it may be far from easy to hold another State responsible for a breach of a norm of international environmental law.

The question may now be raised whether, apart from treaty obligations such as those laid down in the 1972 Convention on the International Liability for Damage caused by Space Objects, there exists in public international law an obligation for a State to pay compensation for significant environmental harm caused within another



Courtesy: Neue Zürcher Zeitung

State as a result of a transboundary *interference even though the State of origin has not committed an internationally wrongful act*, so that the rules of State responsibility which we have just discussed do not apply.

As we have already noted, the duty of States under existing public international law to prevent or abate the causing of significant transboundary harm through environmental interferences is not an absolute obligation in the sense that the State of origin must be deemed to have

committed an internationally wrongful act every time it has not been able to prevent or abate the causing of such harm.

There is normally only a due diligence or due care obligation to take reasonable measures to prevent or abate such harm and when such reasonable measures have been taken no breach of an international obligation will have taken place and no State responsibility will arise if the harm nevertheless occurs.

Normally the taking of reasonable measures of prevention or abatement will prevent the (further) occurrence of significant transboundary harm. Scientific and technological developments have, however, given rise to so-called inherently dangerous activities which are beneficial, but may still involve a risk of causing significant transboundary harm even though all reasonable measures to prevent such harm have been taken by the State within which such activities take place.

Normally, such activities are not prohibited by international law and hence do not involve the State responsibility of the State which allows such activities to take place within its territory.

The question which, however, remains is whether that State should not be obliged to compensate the affected State and the victims within that State when in spite of all reasonable precautionary measures the risk nevertheless materializes and significant transboundary harm is caused, e.g. as a result of an incident involving a nuclear power installation within its territory.

A question which also arises in this connection is whether, having regard to the often highly complex technical nature of the inherently dangerous activity concerned, it is still reasonable to expect the affected State and its victims to prove that the State of origin has been negligent in not taking reasonable measures to prevent the incident.

In brief, should the State which permits such inherently dangerous activities within its territory not be financially liable *vis-à-vis* the affected State and its victims, regardless of whether or not it has taken reasonable precautionary measures and hence even when it would be able to prove that it had taken such measures?

We speak in such a situation of State liability for risk or strict State liability for significant transboundary harm arising from activities not prohibited by international law or at least arising from activities the unlawfulness of which need not be proved by the affected State.

Such strict State liability under international law for inherently dangerous activities seems in my view to be absolutely fair, since the State which allows such activities within its territory and is under international law permitted to allow and continue such activities, provided it takes the necessary precautionary measures, should not be permitted to reap the economic and other benefits of such activities without being obliged to compensate for the significant transboundary harm which such activities may eventually cause.

Unfortunately, such strict State liability appears to be highly controversial, not only among States, but also within the ILC, which since 1978 has been dealing with

the topic under the laborious title of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law". Not able to come to grips with the question of the financial liability with regard to such acts, the ILC eventually decided in 1997 to deal first only with the question of "Prevention of transboundary damage from hazardous activities".

This was not really what we have been waiting for and it remains to be seen whether the Commission, once it has completed its work on "prevention", which is not far away, will again take on the issue of the financial liability for inherently dangerous activities.

If it appears impossible to reach agreement within the Commission and among States on the question of strict liability of States *vis-à-vis* other States for significant transboundary damage caused by not unlawful hazardous activities in their territory, it is to be hoped that State practice will develop in a direction that States permitting such activities within their territory shall under international law be obliged to ensure that the victims abroad of such activities will at least be able to hold the operators of the dangerous activities in their territory strictly liable to receive an adequate compensation. If such an obligation becomes generally accepted, but a proper remedy for the victims is nevertheless not provided for by the State of origin of the harm, State responsibility for a breach of an obligation would arise, so that compensation at the inter-State level may then be claimed on the basis of an internationally wrongful act committed by the State of origin of the harm.

Having discussed to what extent responsibility and liability for damage caused by environmental interferences exists for States in public international law, we will now turn to the issue of responsibility and liability in European Community law.

## 2. European Community law

European Community law concerning environmental interferences is based on the Treaty Establishing the European Community, last amended by the Treaty of Amsterdam which entered into force on 1 May 1999 (hereinafter: EC Treaty) and on implementing secondary legislation in the form of directives and regulations.

Addressees of Community environmental legal norms in the form of directives are foremost the member States. A special feature of the European Community legal order is that a case involving a breach of a norm of Community environmental law may be brought before the European Court of Justice in Luxembourg by the European Commission on the basis of Article 226 (ex-Article 169) of the EC Treaty or – but in practice much less often – even by another member State on the basis of Article 228 (ex-Article 171) of the EC Treaty.

Originally this could only lead to a declaratory finding by the European Court that a member State had failed to fulfil an obligation under the EC Treaty and was required to take the necessary means to comply with the judgment of the Court. However, pursuant to the entry

into force of the Maastricht Treaty on 1 November 1993, the Commission may now institute a follow-up action against any member State which fails to comply with the judgment of the Court and ask the Court to impose a lump sum or penalty payment upon the offending member State (Article 228 (ex-Article 171) of the EC Treaty).

The Commission has, for instance, started a follow-up action against Greece before the European Court for non-compliance with an earlier judgment of the Court in April 1992, asking the Court to impose a penalty on Greece of 24,600 ecu per day as long as Greece does not take the necessary measures to ensure that toxic wastes are removed in the area around Chanià on Crete without endangering human health and the environment.

In its judgment of 4 July 2000<sup>3</sup> the Court indeed ordered Greece to pay a penalty of 20,000 euro per day until it had complied with the Court's judgment of April 1992.

In two communications<sup>4</sup> the Commission has also set forth its future policy with regard to lump sum and penalty payments which it will ask the Court to impose on member States which have failed to implement rulings finding them in breach of Community law and with regard to the method of calculation thereof. In order to calculate the amount of penalty payments the Commission will start from a uniform flat rate amount of 500 euro per day of delay multiplied by two coefficients, one reflecting the seriousness of the infringement and the other the duration, the result then being multiplied by a special factor reflecting the ability to pay of the member State concerned and the number of votes it has in the Council. The object of the exercise is to ensure that the penalty has a deterrent effect in all cases. The potential penalty payment may then be considerable, e.g. for the Netherlands it might vary from 3,800 to 228,000 euro per day.

Enforcement of Community environmental law *vis-à-vis* a member State or natural or legal persons within such a State may also take place in proceedings before national courts of member States. According to the case law of the Court based on Article 10 (ex-Article 5) of the EC Treaty, member States are required to provide for enforcement measures in the case of a breach of environmental directives or regulations. Sometimes a directive provides itself for a specific enforcement measure, e.g. Article 12(1) of Council Directive 94/67/EC of 16 December 1994 on the incineration of hazardous waste (Dioxin Directive), which prescribes the closing down of a plant as long as it does not comply with the emission limit values laid down in the directive. Penal sanctions are usually provided for in national legislation.

Provided directives contain provisions which must be deemed to have direct effect – such as e.g. certain water or air quality directives – natural and legal persons can also complain about non-compliance with such directives

by State organs, leading to non-application of national legislation which is not compatible with those directives, and – as a consequence of the judgment of the European Court in the *Francovich* case<sup>5</sup> – even to liability of the State organ concerned for sustained damage, if the directive concerned can be deemed to give rights to such persons, the State organ concerned should have known that its conduct was incompatible with Community law, and



Courtesy: FAZ

the existence of a proper causal connection between the damage and the breach of Community law can be demonstrated.

Having dealt with the aspect of responsibility for a breach of a norm of European environmental law we will now deal more specifically with the question of liability for damage caused by environmental interferences under European Community law, other than in situations possibly covered by the *Francovich* doctrine.

European Community law does not at present appear to contain any rule imposing such liability on member States of the Community *vis-à-vis* one another for transboundary environmental harm.

It is true that as a result of the entry into force of the Single European Act on 1 July 1987 the polluter pays principle was inserted in the EC Treaty (Article 174(2), ex-Article 130r(2)), which, as we have seen, basically means that the polluter – and not the general public – should bear the cost of preventing and abating environmental pollution, but further elaboration via secondary legislation is, however, required in order to make it an effective liability and compensation principle.

The Community has, however, up until now not been very effective in the field of liability for environmental damage. A proposal for a directive put forward by the Commission in October 1989 to make producers of waste liable for damage including costs of prevention and rein-

statement measures for impaired environment caused by waste, in accordance with the principle of strict liability, remained without effect.

In April 1994 the European Parliament adopted a resolution calling upon the Commission to submit a proposal for a directive regulating liability for environmental damage, but no such proposal has so far been presented by the Commission.

In order to stimulate the discussion of environmental liability in the European Community, the Commission however, had in May 1993 presented a Green Paper on Remedying Environmental Damage. The ensuing discussions and comments submitted to the Commission by experts from member States and other interested parties, such as industry and agriculture, did not lead, however, to new concrete proposals by the Commission.

In February 2000 – almost six years after the 1994 European Parliament resolution – the Commission presented a new communication, the White Paper on Environmental Liability,<sup>6</sup> exploring possible features of a European Community environmental liability regime designed to implement the polluter pays principle and to promote the effectiveness of other key environmental principles in the EC Treaty, such as the precautionary principle and the principle of preventive action (Article 174(2) EC Treaty). Different options for Community action are presented and assessed in that paper, among which Community accession to the 1993 Council of Europe Liability for Dangerous Activities Convention with which we will deal more fully later.

The White Paper concludes, however, that the most appropriate option would be a non-retroactive framework directive providing for strict liability for damage caused by Community regulated dangerous activities, covering both traditional damage (*i.e.* harm to health and property) and environmental damage (such as contaminated sites as well as damage to biodiversity) and fault-based liability for damage to biodiversity caused by non-dangerous activities.

The scope of this paper does not permit discussion of the Commission's White Paper in more detail, but it is clear that it has again opened the door for a discussion on the propriety, nature and form of a Community-wide environmental liability regime. It is likely that in 2001 negotiations on a EC directive will start after research on several topics has been completed.

While, in principle, the idea and the approach proposed in a future Community directive on environmental liability must be applauded, a few critical remarks may nevertheless be made.

If it is not possible for the Community to become a party to the Council of Europe Liability for Dangerous Activities Convention, as this Convention is thought to be too broad in scope and in certain respects too vague to be generally acceptable by member States, it would still be preferable not to deviate too much from the approach followed in that Convention. A point of concern is also that, as far as environmental damage is concerned, the Commission proposes to limit the scope of the future directive only to designated nature areas which are at present

protected by Community law under the Council Directive on the Conservation of Wild Birds and the Council Directive on the Conservation of Natural Habitats of Wild Fauna and Flora, which together are expected to cover only around 10 per cent of Community territory. It seems to me that the exclusion of around 90 per cent of the Community's natural environment from the scope of the directive is hardly justifiable.

Finally, it seems to me that one must be critical of the Commission's proposal to exclude liability *vis-à-vis* third parties for even significant damage entirely and exclusively caused by emissions which are explicitly allowed by a permit granted by public authorities.

### 3. International agreements involving responsibility or liability of natural or legal persons

Having dealt with the question of responsibility and liability in European Community law for damage caused by environmental interferences, we will now examine to what extent responsibility or liability of natural and legal persons – as opposed to States as such *inter se* – for such damage has been envisaged in international agreements.

#### 3.1 Criminal responsibility agreement

With regard to the question of responsibility, mention should be made of the Council of Europe Convention on the Protection of the Environment through Criminal Law, which was concluded in November 1998.

*The convention explicitly obliges the parties to establish as criminal offences under their domestic law.*

The [intentional] discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which:

- (i) causes death or serious injury to any person, or
- (ii) creates a significant risk of causing death or serious injury to any person...

It further requires the parties to establish as criminal offences under their domestic law a number of unlawful acts when committed intentionally, such as *e.g.* the unlawful discharge of a quantity of substances or ionizing radiation into air, soil or water, which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants. The same applies to unlawful acts regarding hazardous wastes, the unlawful operation of a plant in which a dangerous activity is carried out or the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances. Such acts shall also be established as criminal offences when committed with gross negligence or negligence.

In the case of a number of other unlawful acts involving environmental interferences parties have the option



to establish them either as criminal offences or administrative offences. Where the Convention refers to “unlawful” it means “infringing a law, an administrative regulation or a decision taken by a competent authority aiming at the protection of environment”.

The sanctions to be imposed shall include imprisonment and pecuniary sanctions and may include reinstatement of the environment. Each party shall also adopt such appropriate measures as may be necessary to enable it to confiscate instrumentalities and proceeds, or property the value of which corresponds to such proceeds. Each party shall further adopt such appropriate measures as may be necessary to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence has been committed.

The Council of Europe Convention on the Protection of the Environment through Criminal Law is to my knowledge the only international agreement dealing especially with criminal responsibility to be imposed on natural and

legal persons, who cause damage by environmental interferences.



*(To be continued in the next issue)*

### Notes:

<sup>1</sup> State Responsibility, Draft Articles provisionally adopted by the Drafting Committee on second reading, International Law Commission, Fifty-second session, Geneva, UN Doc. A/CN.4/L.600 of 21 August 2000.

<sup>2</sup> Draft Articles on State Responsibility provisionally adopted by the International Law Commission on first reading, Yearbook of the International Law Commission 1996 Vol II, Part Two, pp. 58–66, UN Doc. A/CN.4/SER.A./1996/Add. 1 (Part 2).

<sup>3</sup> Case-387/97, *Commission of the European Communities v. The Hellenic Republic* [2000] ECR.

<sup>4</sup> Commission Communication on the Question of Penalties under Article 171 of the EC Treaty, OJEC C 242 of 21 August 1996; Commission Communication on the Method of Calculating the Penalty Payments Provided for pursuant to Article 171 of the EC Treaty, OJEC C 63 of 28 February 1997.

<sup>5</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy*, [1991] ECR I-5357.

<sup>6</sup> Commission of the European Communities, White Paper on Environmental Liability, EC Doc. COM (2000) 66 final.