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Liability in Terms of an International Environmental Disaster

A comparison between the United States of America and the European Union

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JKU Europe Working Papers:

Im Rahmen der unregelmäßig erscheinenden *JKU Europe Working Papers* werden Forschungsergebnisse des Instituts für Europarecht der Johannes Kepler Universität Linz der interessierten Öffentlichkeit zugänglich gemacht. Zudem soll damit exzellenten Diplomarbeiten eine Publikationsplattform geboten werden.

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1 Introduction

"[E]*nvironmental problems tend to be interconnected and multidimensional; they are, in a word, complex. Complexity refers to the number and variety of elements and interactions in the environment of a decision system. When human decision systems confront environmental problems, they are confronted with two orders of complexity. Ecosystems are complex, and our knowledge of them is limited, as the biological scientists who study them are the first to admit. Human social systems are complex too, which is why there is so much work for the ever-growing number of social scientists who study them. Environmental problems by definition are found at the intersection of ecosystems and human social systems, and thus are doubly complex.*

The more complex a situation, the larger is the number of plausible perspectives upon it because the harder it is to prove any one of them wrong in simple terms. Thus the proliferation of perspectives on environmental problems that has accompanied the development and diversification of environmental concern since the 1960s should come as no surprise."[1]

The nature of justice is a moral and political perspective, often explained with the word fair,[2] affecting all aspects of life, including the environment. It is not rare to see that environmental crimes are based on the motto "the dose makes the poison". In fact, industrial activities cause harm to the environment and yet that is accepted under certain circumstances simply because we do not want to or cannot renounce the benefits we receive from those activities. The question is, however where to draw the line in order to find a balance between economic interests every country has and environmental protection.

This paper analyses the environmental law situation in the United States of America and the European Union, both highly industrialized and advanced but differentiating in the way they were founded: The United States of America is a country based on a constitution while the European Union is an International Organization established by treaties.

Starting with a case for each legal system should demonstrate that the environmental law aspects covered in this paper do matter in real life. The following chapters deal with the evolution of environmentalism, the criminalization of conducts harming the environment and the enforcement of environmental laws including the penalties offenders face in case of violations. The last chapter is dedicated to Environmental Standing, a particular important and controversial issue, especially for NGOs.

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[1] John S. Dryzek, The Politics of the Earth (2nd ed. 2005) at 8-9.

[2] Western Theories of Justice http://www.iep.utm.edu/justwest/ Retrieved August 26, 2014.

1.1 United States of America Case: Deepwater Horizon Oil Spill

On April 20, 2010 about 50 miles southeast of the Mississippi River delta, one of the worst environmental disasters in history occurred. The Deepwater Horizon, a mobile offshore drilling vessel, sank after an explosion on the Macondo well, killing eleven workers and causing the largest oil spill in U.S. history. For 87 days, oil gushed into the Gulf of Mexico, devastating the ecology in and around the ocean.[3] Even after several years, the long-term environmental harm on marine and wildlife habitats remains inassessable. While environmental disasters like earthquakes and hurricanes involve the force of nature, this one was merely caused by human activities, inevitably leading to the question of responsibility.

The Deepwater Horizon Oil Spill was not simply an "accident" that happened without any previous disruption. BP had chosen to put profits before environmental compliance and worker safety by deliberately deviating from industry standards. BP's decision to use a long string instead of a liner in a deep high-pressure well made it more difficult to obtain a reliable primary cement job in several respects. Consequently primary cement failure was a direct cause of the blowout.[4] BP's failure to communicate important information to its contractors and to its own personnel on the rig presumably contributed to the explosion as well. Even though Halliburton recommended using 21 cement spacers, BP chose to install only six, and instead of telling Halliburton, they found out by overhearing a discussion on the rig. On the other hand, Halliburton's previous foam testing revealed that the foam cement slurry would be unstable. Yet, this information has never gotten reported to BP. Rather Halliburton's personnel modified the test result, so the cement was being used regardless.[5]

Decisions were made based on time and cost efficiency without considering comprehensive and systematic risk analysis, and, thereby, negligently increasing the risk of the Macondo well blowout.

On December 15, 2010, the U.S Department of Justice announced a civil lawsuit against nine defendants for violating the Clean Water Act. Among them were BP Exploration and Production, Inc. as the lessee and principal developer of the Macondo well in which the rig was operating and where the explosion occurred and Transocean Ltd. as the owner of the Deepwater Horizon, and contractor Halliburton, which had recently completed cementing in the well.[6]

On August 13, 2012 BP urged U.S. District Judge Carl Barbier, who was and still is in charge of this case, to approve an estimated $ 7.8 billion settlement reached with individuals and businesses affected by the spill, claiming its actions "did not constitute gross negligence or

[3] http://www.eoearth.org/view/article/161185/ Retrieved June 26, 2014.

[4] National Commission Report on the BP Deepwater Horizon Oil Spill, at 115.

[5] National Commission Report, supra note 2, at 117.

[6] http://www.justice.gov/opa/pr/2010/December/10-ag-1442.html, Retrieved June 27, 2014.

willful misconduct". Under the Oil Pollution Act of 1990 Section 1004(a)(3) the total liability of a responsible party is limited to $ 75 million for economic damages, provided that the incident was not caused by "gross negligence or willful misconduct".[7]

On August 31, 2012 the U.S. Department of Justice (DOJ) filed papers in federal court in New Orleans, accusing BP and Transoceans of gross negligence in the Gulf Oil Spill based on evidence found during investigation.[8] Civil charges are still subject to legal proceedings, but should the court agree with the DOJ, the penalties imposed under the Clean Water Act could reach nearly $ 18 billion.

On November 14, 2012, BP and DOJ reached a settlement after BP had agreed to plead guilty to felony manslaughter, environmental crimes and Obstruction of Congress Surrounding Deepwater Horizon incident as well as to pay $ 4.5 billion in criminal fines and penalties - the largest retribution ever imposed for environmental crimes in the United States. The U.S. District Court in the Eastern District of Louisiana charged BP with 11 counts of felony manslaughter, one count of felony Obstruction of Congress, and violations of the Clean Water and Migratory Bird Treaty.[9] In addition, three of the highest ranked BP employees face criminal charges as well. Two of them for manslaughter and violating the Clean Water Act, and one for Obstruction of Congress and making false statements to law enforcement officials. If convicted, the defendants could face a prison sentence up to several years.[10]

1.2 European Union Case: C-378/08 and Joined Cases C-379/08 and C-380/08

1.2.1 The dispute in the main proceedings and the question referred for a preliminary ruling

The Augusta roadstead, situated in the Priolo Gargallo Region (Sicily), is affected by environmental pollution phenomena which, in all likelihood, originated in the 1960s when the Augusta-Priolo-Melili site was established as a hub for the petroleum industry. In particular, the sea-bed in this area is heavily contaminated by pollutants. Since that time, numerous undertakings operating in the hydrocarbon and petrochemical sectors have been set up and succeeded one another in this region. According to the referring court, this may

[7] Oil Pollution Act § 1004(c)(A).

[8] In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20,2010 http://www.stuarthsmith.com/wp-content/uploads/2012/09/7229-2.pdf, Retrieved July 13, 2014.

[9] http://www.justice.gov/opa/pr/2010/December/10-ag-1442.html, Retrieved July 13, 2014.

[10] http://www.drinkerbiddle.com/resources/publications/2013/Key-Deepwater-Horizon-Criminal-Charges-Dismissed-Against-Two-BP-Officials, Retrieved July 13, 2014.

mean that a specific assessment of individual liability of various undertakings for the pollution is impossible.[11]

By various successive decisions, the Italian Administrative authorities required the undertakings bordering the Augusta roadstead to remedy the existing pollution, without differentiating between previous and current pollution or assessing the extent to which each individual undertaking is responsible for the pollution. Further, if those undertakings failed to comply, the remediation work would be carried out by the authorities themselves and expenses to be borne by those undertakings.[12]

Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA, Syndial SpA and ENI SpA brought actions against those administrative decisions before the Italian Courts, claiming that such a task is impracticable and would expose them to disproportionate costs and that the measures chosen by the authorities do not primarily help the environment to recover. Thereupon the Tribunale Amministrativo Regionale della Sicilia initiated a Preliminary Ruling Proceeding by referring the following question to the Court of Justice.[13]

The referring court asked whether the Polluter-Pays Principle, laid down in Article 191 TFEU (ex Article 174 EC) and the provisions of the Directive 2004/35, precludes national legislation which allows the competent authority to impose measures on operators to remedy environmental damage on the account that their installations are located close to a polluted area, without first carrying out an investigation into the occurrence of the contamination or establishing a causal link between the conduct and the pollution found and without assessing the requirement of intent or negligence.[14]

1.2.2 The Court's reply

Concerning the applicability ratione temporis of Directive 2004/35, Article 7 clearly states that the Directive does not apply to damage caused by an emission, event or incident that took place before 30 April 2007 or to damage caused after that date which derives from a specific activity that was carried out and finished before that date. Accordingly, Directive 2004/35 only applies to damages caused either from activities carried out after 30 April 2007 or activities carried out but had not finished before that date. It is, however, within the national court's responsibility to assess whether Directive 2004/35 applies to the facts submitted in this case, based on the Court of Justice's interpretation.[15]

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[11] Case C-378/08 *Raffinerie Mediterranee (ERG) SpA* [2010] ECR I-1919, para. 19.

[12] Para. 21.

[13] Paras. 22, 25.

[14] Paragraph 34 summarizes the first three questions; Question number four is dealing with public tendering procedure and therefore, due to irrelevance not mentioned in this paper.

[15] Paras. 40 et seqs.

Should the national court find that Directive 2004/35 is not applicable to this case authorities may keep enforcing national law by complying with the rules of the Treaty. In case the national court finds Directive 2004/35 applicable, the questions referred should be addressed as follows.[16]

Due to Article 4(5) of Directive 2004/35 the competent authority has to prove a causal link between the damage and the activities of individual operators in order to impose remedial measures. However, the Directive does not specify how such a causal link has to look like. Considering that the European Union and Member States share their competences in terms of environmental matters, the definition of a causal link may depend upon national legislation. Thus a competent authority can operate on the presumption that there is a causal link between the pollution found and the operators due to the fact that their installations are located close to that pollution. However, the Polluter-Pays principle requires the competent authority to have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his/her activities. The absence of a causal link means that this situation does not fall within the scope *ratione materiæ*, and leads, therefore, to the application of national law.[17]

For environmental damages caused by activities mentioned in Annex III to Directive 2004/35, the competent authorities may impose environmental clean-up costs without having to prove intent or negligence, making the actors strictly liable for their actions. Before being able to take legal actions though, the authority has to investigate the origin of the pollution found and, based on national burden of proof requirements, provide a causal link between the activities of the operators and the environmental damage.[18]

[16] Para. 44.
[17] Paras. 53 et seqs.
[18] Paras. 64, 65.

2 The Evolution of Environmental Crimes

2.1 United States of America: Environmental Crimes Program

2.1.1 The National Environmental Policy Act

The consequences of a rapid industrialization have resulted in the contamination of soil, water and air, threating the ecological balance. With the emergence of the idea that the biosphere was a fragile system vulnerable to human-induced impairment in the 1960s, legal protection of air, water, soil and ecosystem, such as wetlands and forests, was being more and more requested.

As one of the first major environmental laws, the National Environmental Policy Act (NEPA, 42 U.S.C. §§ 4321-4347) was signed into law on January 1, 1970, declaring national environmental policy and goals for the protection of the environment and dedicating its existence to the following:

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Henceforth, federal agencies, whose activities were often seen as significant sources for pollution, were required to assess the environmental impacts of their actions (such as highway and transit projects[19]) before proceeding with it and, if necessary to prepare an Environmental Impact Statement (EIS) to reflect environmental consequences and evaluate alternatives.[20] Section 101(b) of the Act states "*it is the continuing responsibility of the federal government to use all practicable means, consistent with other essential considerations of national policy to improve and coordinate Federal plans, functions, programs,* […]" in order to attain widest range of beneficial uses of the environment without any undesirable consequences.[21] That includes as well the agency's duty to inform the public about environmental concerns being considered in their decision-making-process.

Since the Act failed to include specific regulations on how exactly to implement environmental protection, some agencies struggled complying with the NEPA. Given that no agency had an enforcement authority with regard to NEPA's environmental policy goals, other agencies entirely ignored to adhere to any of NEPA's provisions. In fact the courts

[19] Cf. the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) guidance for applying NEPA to highway and transit projects.

[20] 42 U.S.C. § 4332(2)(c)(i).

[21] National Environmental Policy Act of 1969.

finally decided how to interpret and enforce the NEPA's requirements. According to the U.S. Supreme Court, *"the NEPA itself does not mandate particular results, but simply prescribes the necessary process. Other statutes may impose substantive environmental obligations on federal agencies but NEPA merely prohibits uniformed-rather than unwise-agency action."*[22]

2.1.2 Environmental Protection Agency

Shortly after the commitment to environmental protection through the NEPA, U.S. President Richard Nixon proposed the Environmental Protection Agency (EPA), a federal agency to protect human health and the environment by enforcing compliance with environmental laws passed by Congress, state legislatures and tribal governments. After being cleared through hearings in the Senate and House of Representatives, the EPA came into being on December 2, 1970.[23] In order to assist the regulated community (business, industry and government) to interpret and understand the laws passed by Congress, EPA drafts regulations to better delineate federal legislation. One of the best ways to assure compliance with environmental regulations is through effective monitoring. In case of a violation, EPA has several options to respond:

- **Informal response:** requesting compliance but no further legal actions.
- **Formal administrative enforcement:** option to (1) issue an administrative order for compliance, and (2) impose a fine for past infractions.
- **Formal civil/judicial enforcement:** EPA can initiate a civil lawsuit against the violator in the federal district courts.
- **Criminal enforcement:** constitutes the most powerful enforcement tool and addresses the most significant violations. Criminal penalties can include the imprisonment of responsible individuals, substantial fines, and restitution to victims.
- **Cleanup enforcement:** the responsible parties may be obligated to do the cleanup or to bear the costs of a cleanup.[24]

By evaluating severity and duration of the violation, risk to human health and environment, and the past compliance history of the violator, EPA chooses either informal or formal response. Most cases, however, are settled before trial or hearing. The penalty amount depends on the economic benefit violators may have gained from noncompliance and the environmental harm.

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[22] *Robertson v. Methow Valley Citizens Council,* 490 U.S.332 (1989) at 351.

[23] The Guardian: Origins of the EPA, http://www2.epa.gov/aboutepa/guardian-origins-epa Retrieved on June 27, 2014.

[24] United States Environmental Protection Agency, Pacific Southwest, Region 9, Introduction: Environmental Enforcement and Compliance.

After 40 years of work, the EPA has cleaned 67% of contaminated Superfund sites nationwide, reduced 60% of the dangerous air pollutants and tremendously improved U.S. waterways as well as the quality of drinking water.[25]

2.1.3 Criminalization of Environmental Violations

With the enactment of the federal Clean Air Act, the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Resource Conservation and Recovery Act (RCRA) during the 1970s and 1980s, the storage or disposal of hazardous waste without a permit or the discharge of pollutants into waters of the United States without a permit, was considered a felony under the federal law for the first time.[26] Forthwith, both, prosecutor and offender were exposed to a situation of criminalizing conducts that had been legal before. Thereupon, companies were restricted in their way of doing business, such as waste management practices and safety instructions.

Environmental statutes generally include both civil and criminal enforcement. Prior to 1981, the U.S. government's approach was to almost exclusively seek civil judicial enforcement, based on two reasons. First, while in a criminal trial the prosecutor has to prove the defendant's guilt "beyond a reasonable doubt"[27], the standard of proof in a civil context is lowered to "preponderance of the evidence"[28] standard. Since negligence is easier to prove the chance of conviction is higher making it simpler to interpret the meaning of new regulations, especially during the first few years. Second, considering the seriousness of criminal punishment and, therefore potential fairness issues, enforcers wanted to give the community some time to adapt to the new crimes.

2.2 European Union: Environmental Approach

2.2.1 The Beginning of the EU's Environmental Policy

Initially the European Union was founded as an economic union creating a "common market"- a fully integrated single market within the boundaries of the Member States - to ensure the free movement of goods, services, capital and persons. The environment as such was not mentioned in the founding treaties establishing the European Economic Union (EEC). In fact, the beginning of environmental protection happened as a byproduct when the

[25] 40 Years of Achievement, 1970-2010, EPA.

[26] David Uhlmann, Environmental Crime of Age, Utah Law Review (2009) at 1224.

[27] Black's Law Dictionary (9th ed. 2009): The doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty.

[28] Black's Law Dictionary (9th ed. 2009): superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

first environmental regulations were enacted to guarantee fair competition among the Member States[29] and to avoid "raise to the bottom" pressure. In the past 40 years, however the EU has been formulating and adopting substantial and diverse environmental measures aimed at improving the quality of the environment for European citizens and providing them with a high quality of life.[30]

Like in the United States, Europe started to realize the impact that economic growth had on the environment in the early 1970s. In October 1972, when the heads of state or government of EEC member countries met in Paris, the environment was, for the first time, expressed as a significant political issue, requesting the Commission to take actions.[31] Subsequently, the Commission submitted the first Environment Action Programme, a political statement to define future environmental goals by introducing today's main environmental principles.[32]

The Action Programme did not give the EU any additional power to adopt legislation, so in order to pass environmental laws the European Union was limited to the competences provided by the treaties. Before the Single European Act 1986 (SEA), environmental policy was not exclusively part of the treaties so to pass environmental laws Articles 100 and 235 of the Treaty Establishing the European Economic Community (EEC Treaty)[33] were being used as legal basis before 1986.[34] The fact that both, Article 100 and 235 constituted the legal foundation to establish the common market and were not meant to start off instituting environmental policy, the question came up weather this is in accordance with the "principle of conferral".[35]

In 1985, the European Court of Justice (ECJ) confirmed the Commission's competence to propose environmental legislation based on Article 235, making it possible to continue implementing environmental policy even without any explicit reference to the environment in the treaties. In Case *Procureur de la République v. Association de Défense des Brûleurs D'huiles Usagées*[36] the national court asked whether the system of permits, set out in Article 5 and 6 of the Directive 75/439/EEC is compatible with the principles of free trade, free

[29] Sonja Eisenberg, Kompetenzausübung und Subsidiaritätskontrolle im europäischen Umweltrecht (2006) at 24; Directive 67/548/EEC for packaging and labelling dangerous substances was primarily adopted to achieve the Common Market.

[30] European Commission http://ec.europa.eu/environment/legal/implementation_en.htm Retrieved July 6 2014.

[31] Stuart Bell/Donald McGillivray/Ole W. Pedersen, Environmental Law (8th ed. 2013), at 190.

[32] Official Journal of the European Communities (OJ), 1973 C 112/1 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1973:112:FULL&from=EN.

[33] Today's Article 115 and 352 Treaty of the Functioning of the European Union (TFEU).

[34] Supra note 20, at 191.

[35] Cf. Article 5(1)-(2) TEU.

[36] C-240/83 [1985] ECR 531.

movement of goods and freedom of competition considering that free movement of goods and freedom of competition, together with freedom of trade are general principles of the Community.[37]

The ECJ found the restrictions justified by saying that *"*[…] *the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community.*[…] *The directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives."*[38]

2.2.2 The Signing of the Single European Act

The SEA, signed in Luxembourg on 17 February 1986, constituted the first major amendment of the Treaties of Rome. By introducing a new title relating to the protection of the environment, the basis for the enhancement and integration of environmental policy was provided. In particular, Articles 130(r)-(t) EEC Treaty, now 191-193 TFEU, eventually equipped the EU with the necessary legal basis to deal with environmental issues effectively. The objectives of the EU's environmental policy were, finally legally binding declared in Article 130(r)(1)[39], which defined them as:

- To preserve, protect and improve the quality of the environment.
- To contribute towards protecting human health.
- To ensure a prudent and rational utilization of natural resources.

By introducing the environmental principles in Article 130(r)(2), the backbone of the EU's environmental legislation was created, aimed to guide environmental policy-making. The fact that today's Article 191(2) TFEU basically mentions the exact same principles proves the continuity of the EU's policy drivers. Apart from their guiding function, the principles may also contribute to clarify the sharing out of powers between the EU and the Member States by determining when it is essential to pass EU environmental regulations based on Article 192 TFEU.[40]

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[37] Para. 9.

[38] Paras. 12, 23.

[39] Cf. Treaty Establishing the European Economic Community http://www.eurotreaties.com/singleuropeanact.pdf.

[40] Cf. Klaus Meßerschmidt, Europäisches Umweltrecht (2010) at 285.

2.2.3 Guiding Environmental Principles

2.2.3.1 Principles of Precaution and Prevention

The commitment to environmental precaution was recorded for the first time in the Rio Declaration 1992, where Principle 15 states:

"*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage.*"[41]

According to that it is necessary to evaluate "risks" threatening the environment or human health and undertake actions to avoid damage. In Case *Pfizer v. Council of European Union*[42] the Court of First Instance interpreted the meaning of the precautionary principle and under which circumstances it is applicable. It proclaimed that "[…] *the principle also applies where the Community institutions take, in the framework of the common agricultural policy, measures to protect human health.* [...] *Where there is scientific uncertainty as to the existence or extent of risks to human health, the Community institutions may, by reason of the precautionary principle, take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.* [...] *However, it is also clear that a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified.*" Concluding that by saying "[...] *a preventive measure may be taken only if the risk, although the reality and extent thereof have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken.*"[43]

As an example for enforcing the precautionary principle serves Regulation (EC) No. 258/97 of the European Parliament and the Council concerning Novel food and Novel food ingredients.[44] It requires companies to provide a risk assessment report and present scientific information to the competent authority before being able to market novel foods or a novel food ingredients.[45]

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[41] Rio Declaration 1992 http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[42] Case T-13/*99 Pfizer Animal Health SA* [2002] ECR II-3318.

[43] Paras. 114, 139 et seqs.

[44] Defined in Article 1(2) as foods and food ingredients which have not hitherto been used for human consumption to a significant degree within the Community. http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R0258:20090120:EN:PDF.

[45] http://ec.europa.eu/food/food/biotechnology/novelfood/index_en.htm, Retrieved July 19, 2014.

2.2.3.2 Polluter-Pays Principle

According to the OECD's interpretation "[...] *polluter should bear the expenses of carrying out pollution prevention and control measures* [...] *to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption."*[46]

Basically that means that producers of goods or other items shall bear the costs of preventing pollution as well as providing remediation in case of damage caused by their products.[47] The fact that the Polluter-Pays Principle does not only cover clean-up costs but also the costs to actually avoid pollution leads straight to the precautionary principle. Considering that the third principle mentioned in Article 191 TFEU, the principle to rectify damage at source, strongly relates to the Polluter-Pays Principle as well shows that all principles interact, ensuring a comprehensive environmental policy.

The Commission described the internalization of costs as a translation of the Polluter-Pays Principle, expressing that especially businesses need to consider pollution as a major cost factor.[48] However, saying that producers may pollute the environment as long as they pay for it would lead to a complete misunderstanding. Rather, it creates an economic incentive for businesses to avoid environmental harm, rewarded with a competitive advantage on the market.[49]

In theory the Polluter-Pays Principle sounds reasonable and, even more important fair. Those who pollute the environment should be responsible for that, instead of making the government spending tax money.[50] In practice, however identifying the polluter very often turns out to be frustrating. Both, the Deepwater Horizon Oil Spill Case and the polluted Augusta roadstead area Case face problems finding out who had really caused the pollution. Yet, the fact that the purpose of the Directive 2004/35/EC is to establish a framework of environmental liability based on the Polluter-Pays Principle[51], the identification of the polluter is required in order to legally impose clean-up obligations.

2.2.3.3 Principle to rectify damage at source

Especially waste flows and life-cycle management strongly rely on the objective of this principle. This new "cradle-to-grave" approach considers the impact products have beginning with the extraction of natural resources, followed by manufacturing and

[46] OECD (1972) Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies, and (1974) The Implementation of the Polluter-Pays Principle; Supra note 26, at 58.
[47] Supra note 26, at 231.
[48] Commission Decision on State Aid, Official Journal 2006 L 268/37 (96).
[49] Supra note 35, at 309.
[50] Burden-sharing principle.
[51] Cf. Article 1 of Directive 2004/35/EC.

transportation, eventually ending up on the scrapheap. The idea is to implement recycling. Technology and environmental understanding facilitate to turn products at the end of their useful life into new products, instead of throwing them away.[52] That does not only affect waste management, it also contributes to avoid resource depletion.

Today's waste production does not only pollute the environment, but became a significant threat to human health as well. Storing waste on landfill sites may pollute the groundwater and soil, while incineration produces toxins and heavy metals. Transporting waste to other parts of the world happens quite frequently, even though it is in many cases illegal. The fact that waste does not just disappear, or at least not without leaving its mark has still not found its way into people's minds.

In *Commission v. Kingdom of Belgium*[53] the Commission opened an infringement proceeding against Belgium for violating EU law by prohibiting the storage, tipping and dumping of hazardous waste from a foreign state in one of its regions.[54] The Belgium government justified the prohibition with the imperative requirement of environmental protection. By assessing whether or not the barrier in question is discriminatory, the court found, by using the principle of rectification at source, that the local authority is authorized to take the steps necessary to make sure that its own waste is collected, treated and disposed of. That needs to be done close to the place where it is produced to avoid, if possible the transport of waste. The contested measures were therefore not seen as discriminatory and the application was dismissed.[55]

2.2.4 Environmental Legislation Today

Today, the number of environmental regulations is characterized by the coexisting of EU and domestic environmental laws as a result of the different categories of the EU's competences, defined in the treaties. The exclusive competence (Article 3 TFEU) gives the EU the responsibility to legislate and adapt legally binding acts without any Member State's participation. Shared competence (Article 4 TFEU) means that the Union and the Member States both may legislate and adapt legally binding acts, the latter in case the former has not exercised its competence. Given that the environment is a matter of shared competences[56], the Member States may legislate where the Union decided to cease its competence.

Article 11 TFEU requires the mainstreaming of environmental protection in all policies and activities of the EU, particularly promoting sustainable development. The aim is to ensure

[52] Supra note 35, at 307; ACP-EU Cooperation Programme in Higher Education (EDULINK): Introduction to solid waste management, at 22.
[53] Case C-2/90 [1992] ECR I-04431.
[54] Paras. 1, 4.
[55] Paras. 33, 34.
[56] Article 4(2)(e) TFEU.

that environmental protection and conservation are integrated and considered in every single decision the EU makes, irrespective of what policy area is concerned.[57] Particularly important to mention here is Article 114(3) TFEU. By adopting new measures to establish the internal market based on Article 114 TFEU, the Commission has to take as a base a high level of environmental protection, considering in particular all new developments.

The most specific competences for harmonizing environmental protection provide Article 191-193 TFEU. The focus is on the advancement of environmental standards rather than the realization of the internal market.[58] Thus, measures adopted under Article 192 TFEU serve purely the improvement of environmental protection, completely separated from any economic interests.

Considering that the incorrect choice of legal basis can lead to the annulment of the law by the court, the question whether to use Article 114 or Article 192 TFEU to legislate environmental aspects is of significant importance. In *Commission v. Council*[59] the court found an error in the provided legal basis and annulled Directive 89/428/EEC dealing with the harmonizing of the reduction and elimination of pollution caused by waste from the titanium dioxide industry. The Council wrongly based the Directive on Article 130s EEC[60], while the court determined Article 100a EEC[61] as the right legal basis for Directive 89/428/EEC.

The court recognized that *"*[…] *It is apparent from the very terms of Article 130r(2) of the Treaty that a Community measure cannot be covered by Article 130s merely because it pursues, among others, objectives of environmental protection. […] The choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review."*[62] Since the action intended here is to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition, the objective of the Directive serves the attainment of the internal market and thus falls within the scope of Article 100a.[63]

[57] Supra note 39, at 67-69.
[58] Supra note 30, at 194.
[59] Case C-300/89 [1991] ECR I-02867.
[60] Today's Article 192 TFEU.
[61] Today's Article 114 TFEU.
[62] Summary of the court's decision, para. 1, 3.
[63] Para. 23.

3 Environmental Enforcement Actions

3.1 United States of America

3.1.1 Civil v. Criminal Liability

3.1.1.1 Mental State Requirement for Environmental Crimes

Considering the serious punishment like incarceration and the deterrent message set out thereby, the purpose of criminal prosecution clearly is to address the most reckless, the most polluting environmental crimes. Given that the focus on criminal law is on the defendant's culpable conduct and state of mind, the question remains whether ordinary negligence or strict liability should generally ever result in criminal liability.[64]

Due to the Latin maxim "actus not facit reum nisi mens sit rea" (an act does not make one guilty unless his mind is guilty) criminal prosecution requires besides actus reus (guilty act) mens rea (guilty mind).[65]According to that view, BP or any other company involved in the Deepwater Horizon Oil Spill would not face any criminal sanctions since none of them deliberately discharged oil into the ocean.

Congress included criminal provisions in each of the major environmental laws when they were enacted during the 1970s distinguishing between misdemeanors[66] and felonies[67]. The Clean Water Act prohibits any unpermitted discharge of pollutants into the water of the United States under 33 U.S.C. § 1319(c)(1). If a prohibited discharge happens knowingly, a felony occurs. If a prohibited discharge results from the defendant's negligence, the conduct is recognized as a misdemeanor. A defendant acts "knowingly" if s/he had knowledge of what was being discharged, regardless of whether s/he knew the discharge was unlawful.[68] For example, a defendant who discharged gasoline into a sewer system but thought it was water does not act "knowingly".[69] Accordingly, "knowingly" means knowledge of the facts, not knowledge of the law. To prove "negligently" the prosecutor has to show that the discharge occurred because the defendant failed to exercise reasonable care.[70] Both,

[64] David Uhlmann, After the Spill is Gone, Michigan Law Review (2011) at 4.

[65] Timothy Lynch, Polluting Our Principles: Environmental Prosecution and the Bill of Rights, Cato Policy Analysis No. 223 (1995) http://www.cato.org/pubs/pas/pa-223.html, Retrieved June 27, 2014.

[66] Black's Law Dictionary (9th ed. 2009): A crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement.

[67] Black's Law Dictionary (9th ed. 2009): A serious crime usu. punishable by imprisonment for more than one year or by death. Examples include burglary, arson, rape, and murder.

[68] *United States v. Cooper*, 482 F.3d 658, 665-68 (4th Cir. 2007); *United States v. Ahmad*, 101 F.3d 386, 390-91 (5th Cir. 1996).

[69] Supra note 52, at 1238.

[70] *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005); *United States v. Hanousek*,176 F.3d 1116, 1121 (9th Cir.).

negligently and knowingly discharging pollutants are considered criminal conducts, potentially punished with imprisonment.

Title 33 U.S. Code § 1319(a)–(c) shows how thin the line is between administrative, civil, and criminal enforcement for violations of the Clean Water Act. Depending on the mental state, the investigating agency or prosecuting office decides what path to follow. Prosecutorial discretion remains controversial as it leaves the question what makes an environmental case criminal unanswered. Considering the impact a criminal prosecution has on a corporation or on an individual person, it does make a difference whether to bring a criminal lawsuit or not. For example Title 33 U.S. Code § 1368(a) prohibits federal agencies from entering into any contract with any person, who has been convicted of any criminal violation under the Clean Water Act until the Environmental Protection Agency (EPA) Administrator certifies that the condition giving rise to the violation has been corrected.[71] Besides the potential economic consequences, a criminal prosecution could also lead to a considerable damage to the company's public image. The fact that corporate officials[72] face multiyear jail time in case they had enough supervisory responsibility and personal involvement certainly acts as the greatest deterrent.

3.1.1.2 What makes an Environmental Case Criminal?

Federal criminal indictments for environmental laws have increased in the 1990s, making the consequence of violations potentially more severe and emphasizing the seriousness of environmental offenses.[73] Upgrading misdemeanor crimes to felony status in the late 1980s improved enforceability, certainly encouraging the DOJ to prosecute these cases.[74] Due to broad prosecutorial discretion, procedures were developed to help deciding which cases of noncompliance should be handled criminally as opposed to civilly or administratively.

Usually the mental state requirement provides the main distinction between civil and criminal liability. Yet, in case the defendant acted knowingly, the investigating agency can still elect between criminal, civil and administrative remedies.[75] Any discharge caused by negligence can result in criminal liability under the Clean Water Act, even without substantial harm to the environment. On the other hand, prosecution based on harm alone

[71] Supra note 24, at 1226.

[72] The Clean Air Act and Clean Water Act include "responsible corporate officers" in the definition of a "person", 33 U.S.C. § 1319(c)(6); 42 U.S.C. § 7413(c)(6).

[73] Donald Carr, Environmental Criminal Liability (1995) at 12.

[74] Id. at 19; Felony provisions were included in the 1987 reauthorization of the CWA and the 1986 reauthorization of RCRA.

[75] 33 U.S. Code § 1319 (a)–(c).

without culpable conduct would erase the distinction between criminal and civil violations- and between crimes and torts.[76]

Congress used broad statutory language when passing environmental laws, delegating much authority to the investigating body to decide which environmental violations are criminal. However, EPA has passed a guidance setting out specific factors under which circumstances criminal investigation is appropriate.[77]

3.1.1.2.1 Cases Involving Significant Harm or Risk of Harm

The destructive environmental harm the Deepwater Horizon Oil Spill caused was certainly the main reason why DOJ found it appropriate to prosecute BP, comparable with the Exxon Valdez Oil Spill 1989. In this case, the United States prosecuted Exxon Shipping Company based on negligent conduct that caused substantial environmental harm.[78]

Environmental Disasters like the BP or the Exxon Valdez Oil Spill capture public awareness and generate frustration and anger, pressurizing the government to impose criminal penalties even for negligent conduct.

Both, the actual harm and the threat of significant harm to the environment or human health deserve consideration. While actually neither harm nor risk of harm is an element the government must prove, criminal prosecution should be limited to violations that caused significant harm and to defendants who knew or should have known about the risk involved. In this way, the government limits discretion and will avoid litigation solely based on the desire for retribution.[79]

3.1.1.2.2 Cases Involving Deceptive or Misleading Conduct

Midnight dumping, hidden discharge pipes, tampering with required samples, and falsification of required reports are typical examples for violating RCRA, the Clean Water Act, and the Clean Air Act.

Lying about facts can change a civil case to a criminal one. If a company reports the violation of the permit (e.g. a permit for discharging waste) as statutory required, the company might be receiving a fine for infracting regulations, but most likely, provided that there has not been any prior violations, EPA will not take any other legal actions. Should the company decide to falsify the monthly reports mandatory under the Clean Water Act, the company or

[76] Supra note 18, at 22 et seq.

[77] Memorandum from Earl E. Devaney, U.S. Environmental Protection Agency: The Exercise of Investigative Discretion, Jan. 12, 1994.

[78] Robert W. Adler/Charles Lord, Environmental Crimes: Raising the Stakes, Wash. L. Review (1991) at 782 et seqs.

[79] Supra note 24, at 1247-1248.

individuals working for the company face indictment for violating criminal provisions under Titel 18 of the United States Code.[80]

Concerning the Deepwater Horizon Oil Spill, David Rainey, a former BP exploration vice president, was charged with obstruction of congressional inquiry and investigation[81] and with making false statements to law enforcement.[82] He was being accused of failing to disclose important information to the House of Representatives Subcommittee on Energy and Environment by claiming that only 5,000 barrels of oil a day were being released, when his own estimates suggested a much higher flow rate.

In May 2013, U.S. District Judge Kurt Engelhardt ruled in favor of the defendant by claiming "*Considering that after consulting the text, context, and legislative history the Court cannot 'say with certainty' that Congress intended section 1505 to reach subcommittee inquiries"*. Due to the rule of lenity[83], the Court dismissed the indictment, charging obstruction of a congressional inquiry in violation.[84]

The 5th Circuit decision overturned that ruling and said Rainey can be charged with obstruction of law because the language of the law is "plain" and it does include subcommittees.[85]

3.1.1.2.3 Cases Involving Facilities That Operate Outside the Regulatory System

The major environmental laws like the Clean Water Act, the Clean Air Act and RCRA include permitting requirements, which means that any company/individual that treats, stores, or disposes hazardous waste must first obtain a permit. Not every failure to participate in the regulatory system should trigger criminal enforcement. The fact that a company reports and confesses to its violation of a permit can draw the line between civil and criminal punishment.

Needless to say, the risk of harm to the environment and public health as well as the competitive advantage the violator gained are worth being considered just as well.

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[80] 18 U.S.C. § 371 (conspiracy); Id. § 1001 (false statement); Id. § 1341 (fraud); Id. §§ 1501-1520 (obstruction).

[81] 18 U.S.C. § 1505.

[82] 18 U.S.C. § 1001(a)(2).

[83] Black's Law Dictionary (9th ed. 2009): The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.

[84] *United States v. Rainey*, 946 F.Supp.2d 518 (Unites States District Court 2013).

[85] http://www.reuters.com/article/2014/06/29/us-bp-spill-rainey-idUSKBN0F40VS20140629, *Unites States v. Rainey*, No. 13-30770 (5th Cir. 2014).

3.1.1.2.4 Cases Involving Repetitive Violations

While the first violations are very often addressed with administrative or civil enforcement actions, repeatedly violating environmental laws generally warrants criminal prosecution. The idea behind is obvious. A facility that deliberately keeps violating the law does not deserve more protection than a company that does not obtain a permit or lies about its permit compliance. In fact, a company that for example keeps violating its permit by discharging pollutants acts knowingly after having received information from EPA that the discharge is unlawful. Consequently, this means that a former negligently committed misdemeanor turns into a knowingly committed felony.

3.1.2 Corporate and Individual Offenders

3.1.2.1 Corporate Criminal Liability

In *New York Central & Hudson River Railroad v. United States*[86] the court confirmed that a corporation can be held liable for actions of its employees and agents, taking away a corporation's immunity from criminal accountability. The court found that there is no reason why corporations should not be held responsible for and charged with the knowledge and purposes of their agents as long as employees are acting within the scope of their employment[87] and their conduct benefits the corporation. This is true even when no single employee had full knowledge of every single fact contributing to the criminal offense.[88]

3.1.2.2 Criminal Liability of Corporate Officers

Given that an entity itself cannot conduct any (unlawful) action like discharging pollutants without a permit, it is worth considering calling the person to account that was actually committing the crime. However, those are very often lower-level employees, merely following orders from their supervisors, inadequately educated and, therefore unaware of their action's consequences. The focus should be on the mid- to upper-level managers and supervisors, typically salaried employees, enough involved and educated to know the risks

[86] 212 U.S. 481 (1909); The defendant, a railroad company, and its assistant traffic manager were convicted for violating the Elkins Act by paying rebates upon shipments from the City of New York to the City of Detroit. The corporation was held liable form criminal acts committed by corporate directors acting on behalf of the corporation.

[87] "Scope of employment" means if the employee has actual or apparent authority to engage in the act in question. See *Meyers v. Bennett Law Offices, 238 F.3d 1068, 1073 (9th Cir. 2001)*.

[88] See *United States v. Penagaricano-Soler*, 911 F.2d 833, 843 (1st Cir. 1990) (imputing to corporation various employees' collective knowledge obtained within scope of their employment); *United States v. Bank of New England*, N.A., 821 F.2d 844, 856 (1st Cir. 1987).

and yet choosing economic benefits over environmental compliance, for the firm, and, indirectly for themselves.[89]

The reason why the U.S. government has increasingly chosen to prosecute corporate officers is because threating a company's employees with criminal sanctions became the most effective deterrent in communicating to the corporate world that pollution is a crime to be avoided. Community service and fines are seen by businesses as the cost of doing business and do not serve as effective deterrents.[90]

3.1.2.2.1 Types of Conduct that may create Criminal Liability

As already mentioned earlier the distinction between criminal and civil conduct is not clearly determined, usually depending on different various parameters such as culpability standard, environmental harm and the overall requirements of the violated statute.[91]

The following types of violation include recklessness and intention, thus illustrate the most serious delinquencies that could be treated as criminal, after all leaving it up to the prosecutor's discretion.

- "Midnight dumping" of hazardous waste.
- Knowingly transporting hazardous waste to unpermitted facility.
- Deliberately making false statements to or filing false information with the government.
- Failing to report spills of hazardous substances.
- Knowing destruction, alteration, or concealment of required records.
- Tempering with monitoring devices.[92]

3.1.2.2.2 Responsible Corporate Officer Doctrine

In *Donsco, Inc. v. Casper Corp.* the Third Circuit Court Appeals ruled that "*A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort. The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the*

[89] Kevin Cassidy, The Role of Motive in White Collar Environmental Crimes, 23 Nat. Resources & Env't 37 (2009) at 37.

[90] Supra note 61, at 112.

[91] For example, the Comprehensive Environmental Response, Compensation and Liability Act provides for criminal fines and imprisonment for any person who knowingly destroys records required to be maintained under the statute, 42 U.S.C. § 6603(d)(2), whereas the same conduct is made subject to civil penalties under 42 U.S.C. §§ 6909(a)(1)(B), (b)(2).

[92] Supra note 71, at 114.

doctrine of respondeat superior; it does not however relieve the individual of his responsibility."[93]

Generally, a person cannot be held liable by virtue of his or her positon in the corporation. Rather the court focuses on individuals that are either participating in the wrongdoing themselves or are somehow else substantially involved in the violations. In case the statute involved is designed to protect the public welfare and does, therefore not require any culpability standard, the government must prove only that the individual had the responsibility and authority to prevent or to correct the violation, and yet failed to do so.[94]

In *Liparota v. Unites States*[95] the court defined public welfare as "[…] *a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."*[96]Accordingly, if a person commits a crime threating the public welfare, the government can prosecute without having to prove a specific guilty mind.

In *United States v. Dotterweich*[97] the president of a company convicted of public welfare offense was held liable, even though there was no proof that he knew about or participated in the illegal conduct. The court supported the conviction by saying "*The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct - awareness of some wrongdoing. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."*[98]

Nonetheless, the court clarified in *United States v. Park* that the doctrine does have limits. According to the court, a person that was "*'powerless' to prevent or correct the violation"*[99] cannot be held liable for the corporation's actions.

While public health and welfare offenses display the exemption to the rule, most environmental laws demand a specific mens rea standard. Courts consider the requirements

[93] 587 F.2d 602 (3d Cir. 1978).

[94] Supra note 71, at 129. See *United States v. Park*, 421 U.S. 658 (1975*); United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971*); United States v. Dotterweich*, 320 U.S. 277 (1943).

[95] 471 U.S. 419 (1985).

[96] Id. at 433.

[97]320 U.S. 277 (1943); Dotterweich was the president and general manager of a pharmaceutical company, which purchased drugs, repacked them under its own label, and shipped them in interstate commerce. He was convicted of a criminal misdemeanor by violating the Food, Drug and Cosmetic Act (FDCA).

[98] Id.at 280- 281, 285.

[99] 421 U.S. 658 (1975), at 673.

set out by the statutes and impose punishment accordingly.[100] Overall, managers or any other employees with substantial responsibility increase the risk of prosecution in case they (1) are willfully ignorant of, (2) condone, or (3) participate in criminal conduct.[101]

3.1.3 Strict Liability under CERCLA

Strict liability is generally defined as liability imposed on a defendant in the absence of fault, knowledge, intent, negligence, breach of contract, or any other duty to exercise reasonable care.[102] In short, the proof of the defendant's care or lack of fault does not matter. The major U.S. environmental statute dealing with strict liability is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as "Superfund", addressing any threatened or actual release of any hazardous substance that may pose an imminent and substantial public health threat.

Under CERCLA, any individual or corporation found "responsible" for a release or threatened release of a hazardous substance from a facility that results in the incurrence of response costs is strictly, jointly, and severally liable for reimbursing those costs.[103] Also it authorizes EPA to force the responsible parties to take actions, and in case they fail to comply, the parties may be liable to the United States for punitive damages as a result of such failure to take proper action.[104]

Joint and several liability means that where the harm is not divisible, a person that had contributed to the pollution could be held liable for all clean-up costs. Only in case the defendant proves that the harm is divisible and liability allocable, each is held liable only for the portion of the harm s/he caused.[105]

Applying strict liability for abnormal dangerous activities was the way Congress chose to antagonize the growing hazardous waste problem in the United States. While critics claim strict liability will not give any incentive to act with care, the argument for holding defendants strictly liable clearly is the internalization of costs. The risk of injuries should be borne as costs and thus be financially considered by entities engaged in hazardous

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[100] Supra note 71, at 131. E.g., CERCLA , 42 U.S.C. § 9603(b)(3) (knowing) ; TSCA, 15 U.S.C. § 2615(b) knowing or willful); 33 U.S.C. § 1319(c) (negligence).

[101] Annie Geraghty, Corporate Criminal Liability, American Criminal Law Review (2002) at 346.

[102] Alexandra B. Klass, From Reservoirs to Remediation: The Impact of CERCLA on Common Law strict liability environmental claims, Wake Forest Law Review (2004) at 907.

[103] Id. at 921-922.

[104] 42 U.S.C. § 9607(c)(3).

[105] *United States v. Hunter*, 70 F.Supp.2d 1100, C.D. Cal. 1999.

activities.[106] The idea of strict liability is not to find scapegoats, but to achieve economic efficiency and the working of a free market economy.[107]

3.2 European Union

3.2.1 Criminal Law Regulations under the principle of conferral

The question whether the EU even has the authority to obligate Member States to establish a harmonized criminal sanction mechanism for environmental crimes resulted in a dispute between the Commission and the Member States. The Council, joined by several Member States argued that considering the significance of criminal law for the sovereignty of the Member States, the EU does not have the power to require Member States to impose criminal penalties.[108]

In Case *Commission v. Council*[109] the ECJ disagreed with the Council's argument and ruled in favor of the Commission. *"As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence.* […] *However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective"*[110], so the reasoning of the court.

In 2007 the court reaffirmed its view on criminal penalties in a similar decision. However, it emphasized again that *"*[…] *The determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence."*[111]

Summarized this means that the EU is competent to obligate Member States to implement certain environmental crimes into their national legislature and to punish offenders with appropriate criminal sanctions, but the EU is not authorized to specify the quantum of these penalties.[112]

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[106] Lynda J. Oswald, Strict liability of individuals under CERCLA: A normative analysis, B.C. Envtl. Aff. L. Rev. (1993) at 594-595.

[107] Andrea Jarolímková, Enforcement of Environmental Protection through Criminal Law, Common Law Review (Czech Republic) (2011/12) at 35.

[108] Case C-176/03 *Commission v. Council* [2005] ECR I-07879, paras. 26, 27.

[109] Id.

[110] Paras. 47, 48.

[111] Case C-440/05 *Commission v. Council* [2007] ECR I-09097, para. 70.

[112] Armelle Gouritin/Paul De Hert, Directive 2008/99/EC: A new start for criminal law in the European Community, Environmental Law Network International No.1 (2009) at 22.

The court's jurisprudence led to the adoption of Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law. It requires Member States to adopt at least a minimum set of environmental crimes into their national legal system. Member States are free though to introduce measures stricter than those laid down in this Directive.

Article 3 of the Directive lists the offenses Member States have to prosecute. It is important to consider that the Directive only covers environmental crimes that were committed intentionally or with at least serious negligence. As far as simple negligence is concerned Member States have discretion to decide whether or not to prosecute and what sanctions to impose. Serious negligence was defined by the ECJ as the following: *"An unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation."*[113]

Given that the EU does not have the competence to mandate the level and size of punishment to be imposed, penalties mentioned in the Directive are relatively weak determined, leaving plenty of room for interpretation. Article 7 merely requires them to be "effective, proportionate and dissuasive". What exactly that means depends on every single Member State's interpretation. In its proposal for the Directive in 2007 the Commission actually set maximum and minimum penalties, including several years of imprisonment.[114] Due to the court's case-law, the Commission's suggestion became not part of the Directive's Article 7.

Since all too often environmental crimes are committed by corporations, Article 6 clarifies that the Directive applies to both, natural and legal persons. To hold a legal person liable, it must have received or will receive benefits from a criminal conduct, defined in Article 3 or 4 of the Directive. Besides that, the natural person acting must have a "leading position" within the legal person. The term "leading position" is not entirely clear, but rather depends on the power of representation and the authority to take decision and exercise control on behalf of or within the legal person. Also, pursuant to Article 6(3) the liability of legal persons does not exclude criminal proceedings against natural persons.

The attempt to harmonize criminal provision has only been half as successful as desired. Due to the vague wording particularly concerning the required penalties for environmental crimes, the differences in environmental criminal law between Member States continue to exist. It still remains uncertain whether or not Member States that have not adopted

[113] Case C-308/06 *Intertanko v. Secretary of State for Transport* [2008] I-04057, para. 77.

[114] COM(2007), Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, at 15.

criminal liability of legal persons in their domestic laws yet are obliged to change their national system.[115]

3.2.2 Liability with regard to the prevention and remedying of environmental damage

In April 2004, the European Parliament and the Council adopted Directive 2004/35/EC. Based on the Polluter-Pays Principle, the Directive's main objective is to prevent and remedy environmental damages, such as contaminated sites within the EU.

3.2.2.1 Scope of Directive 2004/34/EC

Article 3(1) of the Directive distinguishes between occupational activities listed in Annex III and any occupational activities other than those listed in Annex III. While activities mentioned in Annex III do not require any degree of fault, making the operator strictly liable to any occurring significant environmental damage, activities not listed in Annex III require (1) the operator to be either at fault or negligent and (2) a damage done to protected species or natural habitats. The reason for applying strict liability in the first case but not in the second is that activities listed in Annex III present by nature a potential danger to the environment such as waste management, discharging substances into surface or ground water or working with hazardous materials.[116] In the contaminated Augusta roadstead Case the Court confirmed that the competent authority does not have to prove intent or negligence in case environmental damages were caused by activities categorized in Annex III.

What is more, the Directive does not apply to all environmental damages. Article 2 provides a very restrictive definition of "environmental damages". Included are:

- Damage to protected species and natural habitats.
- Water damage (includes damage caused by airborne elements).
- Land damage (includes damage caused by airborne elements).

The word damage is defined as *"a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly."*[117] Consequently, only damages done to protected species and natural habitants as well as water and land are covered by Directive 2004/35/EC.

When viewed as a whole, the Directive turns out to be quite restrictive in its application. First, damages caused by activities that are not mentioned in Annex III requests biodiversity to be affected. Second, the definition of "environmental damages" is particularly restrictive,

[115] Id. at 8; Supra note 38, at 434.

[116] Supra note 38, at 642.

[117] Article 2(2) of Directive 2004/35/EC.

excluding severe environmental damages like nuclear risks. Third, damages without significant adverse effects to the environment were not considered at all. And finally, only damages caused by business activities are remediable under the Directive.

Damage of private property, economic loss or any other civil law claims are explicitly not subject to this Directive. Member States signed International agreements dealing with civil liability that make it possible for individuals to assert their rights across borders.

3.2.2.2 Temporal application

Directive 2008/35/EC does not apply retroactively. Thus, damages that were caused by an emission, event or incident that took place before 30 April 2007 are not covered by the Directive. However, the Directive does apply to damages that resulted from activities carried out but had not finished before 30 April 2007. Especially when similar activities were carried out at different times (before and after the reference date) it appears difficult to find out which one caused the damage.

3.2.2.3 Causal link requirement

Article 4(5) clearly states that *"This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual."* Since the Directive does not provide any more details, Member States may legislate when the causal link requirement is met.[118] It is necessary though to prove a causal link between the damage and the identified polluter(s).[119] In the contaminated Augusta roadstead case the court decided that a competent authority can operate on the presumption that there is a causal link between the pollution found and the operators as long as the authority provides a plausible evidence to justify its presumption.[120] It remains unclear whether the Directive addresses cumulative impacts as well. Environmental harm is very often not caused by one single individual, but rather by a group of people. Combined, incremental effects of human activities might lead to environmental damage while, when considered separately the same activity only done by one person does not cause any harm. The question is if this person can still be held responsible due to the cumulative impact his/her activity had.[121]

Directive 2004/35/EC can be classified as administrative law. Instead of private parties, the competent authority, assigned by the Member States, takes legal actions in case of violations. Recital 2 states that operators whose activities caused environmental damage should be held financially liable. According to Article 7 the competent authority shall decide

[118] Supra note 38, at 648.

[119] Recital 13 of Directive 2004/35/EC.

[120] Supra note 9, paras. 53 et seqs.

[121] Supra note 38, at 648.

which remedial measures shall be implemented. There are two approaches available: Preventive actions and costs before harm was caused or remediation costs afterwards. Besides that, Article 16 allows Member States to maintain or adopt more stringent provisions in relation to the prevention and remedying of environmental damage.

4 The right to bring a lawsuit: Environmental Standing

4.1 Access to Court in the United States of America

In order to seek redress, a person must prove a relationship between himself and the activity s/he seeks to condemn.[122] Since the plaintiff invokes the court's jurisdiction, the respondent bears the burden to prove the existence of such a relationship.

The law of standing authorizes whether a litigant is entitled to have the court decide a particular case or controversy.[123] Article III of the U.S. Constitution limits federal court's jurisdiction to hear only "Cases" or "Controversies". In case the plaintiff does not have a real and personal stake in the outcome of the litigation, in short lacks the standing requirement, the federal lawsuit will be immediately dismissed.[124]

§ 702 of the federal Administrative Procedure Act (APA) states that "*A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.*"[125] While in many kinds of legal issues like contracts and torts disputes, standing is not a problem, environmental lawsuits very often refer to the "public interest", lacking the required personal involvement of the plaintiff.

4.1.1 The Three-Part Federal Standing Test

In *Lujan v. Defenders of Wildlife*[126], the court defined the three mandatory elements required to bring a lawsuit. First, the court declared by relying in part on *Sierra Club v.*

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[122] David D. Gregory, Standing to Sue in Environmental Litigation in the United States of America (1973) Preface.

[123] Richard L. Revesz, Environmental Law and Policy (2007) at 1088.

[124] Robin K. Craig, Principles of Constitutional Environmental Law: Standing and Environmental Law (2009) at 196.

[125] 5 U.S.C. § 702 Right to Review, Administrative Procedure Act.

[126] 504 U.S. 555, 560 (1992); Environmental groups brought action challenging regulation of the Secretary of the Interior which required other agencies to confer with him under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas. The court concluded that respondents lack standing to seek judicial review of the rule because they failed to show "actual or imminent" injury.

Morton[127] *"the parties have to show that they have suffered injury in fact, a concrete and particularized, actual or imminent invasion of a legally protected interest."* Claiming purely speculative, nonconcrete injuries is not sufficient. Second, "*There must be a causal connection between the injury and the conduct complained of - the injury has to be 'fairly ... trace*[able]' *to the challenged action of the defendant, and not ... th*[e] *result* [of] *the independent action of some third party not before the court."* And third, "*it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"*[128] This test has become the standard for assessing standing in environmental cases.[129]

In case the plaintiff is an organization that sues as the representative of its members, it must show that at least one member meets the requirements under the three-part test, that the lawsuit relates to the organization's purpose and that participation of individual members of the organization is not necessary.[130]

4.1.1.1 The injury requirement

In several decisions the court concretized the injury requirement. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* (*Laidlaw*)[131] Justice Ginsburg, delivering the court's opinion announced that "*The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.*"[132] Due to FOE members' testimony asserting that Laidlaw's permit violation caused reasonable concerns, which directly affected their recreational, aesthetic, and economic interests, the court, supporting the injury-in-fact, was upholding the standing.

In *Summers v. Earth Island Institute*[133] the court's focus was again on the injury-in-fact element. The U.S. Forest Service implemented in its regulations that certain projects are excluded from NEPA's Environmental Impact Statement requirement. As a consequence, fire rehabilitation activities on less than 4200 acres and salvage timber sales of 250 acres or less were excluded from the notice, comment, and appeal process. Environmental organizations challenged these regulations in the Bund Ridge Project, which was a salvage sale of timber

[127] 405 U.S. 727, 730, 734-35 (1972).

[128] Id. at 556, 560.

[129] Supra note 78, at 3.

[130] *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); Supra note 78, at 4.

[131] 528 U.S. 167, 176 (2000); Laidlaw violated its discharge permission by repeatedly exceeding the limits set by the permit. Ultimately, **Environmental** groups brought action pursuant to citizen suit provision of Clean Water Act (CWA) against Laidlaw, alleging, inter alia, violation of mercury discharge limits, and seeking declaratory and injunctive relief, civil penalties, costs, and attorney fees.

[132] Id. at 181.

[133] 555 U.S. 488 (1990).

on 238 acres in the Sequoia National Forest that had been damaged by a forest fire during summer 2002. After all parties admitted that the plaintiff had established standing to challenge this specific project through one of its members claiming to use the relevant area for recreation, the parties settled their dispute as to Burn Ridge.[134]

Although concluding that the sale was no longer at issue, the plaintiffs continued challenging the regulations by asserting that those regulations would be used by the Forest Service for more significant land management decisions. Jim Bensman, an organization member claimed that he had suffered injury in the past form the development on the Forest Service land. Further he stated that he has visited many National Forests and plans to visit several unnamed National Forests in the future. The court denied standing and concluded that his past injury failed to relate to any particular future timber sale and that the vague desire to return is insufficient to satisfy the requirement of imminent injury. *"Such 'some day' intentions - without any description of concrete plans, or indeed any specification of* when *the some day will be - do not support a finding of the 'actual or imminent' injury that our cases require*", so Justice Scalia in delivering the opinion of the court.[135]

4.1.1.2 The causation requirement

Following the "fairly traceable standard",[136] causation used to be relatively easy to prove. Nevertheless, the emerging climate change debate in the 1990s demanded to consider the consequences of global warming. The question whether there is a correlation between global warming and natural disasters such as Hurricane Katrina in 2005 remains controversial as no one can neither confirm nor negate any risk associated with global warming. The fact that everybody contributes somehow to the greenhouse effect makes proving causation more difficult.[137]

Causation demands *"a genuine nexus between a plaintiff's injury and a defendant's alleged illegal conduct. But traceability does not mean that plaintiffs must show to a scientific certainty that defendant's effluent ... caused the precise harm suffered by the plaintiffs."*[138]

In *Gaston Copper,* the Fourth Circuit noted that "*where a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable' requirement can be said to be fairly met."*[139] The cumulative nature of climate change makes tracing emissions to injuries complicated,

[134] Id. at 1146; Supra note 94, at 6.

[135] Referring to *Defenders of Wildlife,* 504 U.S. at 564, 112 S.Ct. 2130; Supra note 103, at 495-496.

[136] *Defeneders of Wildlife*, at 590.

[137] Blake R. Bertagna, "Standing" up for the Environment: The ability of plaintiffs to establish legal standing to redress injuries caused by global warming, Brigham Young University Law Review (2006) at 427-429.

[138] *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000).

[139] *Gaston Copper,* 204 F.3d at 161-162.

derailing the plaintiffs' claims. Consequently, the fact that cumulative emissions cause climate change frequently prevents courts from finding causation.[140]

One of the major Environmental Standing breakthroughs happened in *Massachusetts v. EPA*. In this case a group of private organizations brought suit against the Environmental Protection Agency (EPA) to force that federal agency to regulate carbon dioxide and other greenhouse gases (GHGs) as pollutants. EPA argued that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the relief petitioners seek would not mitigate global climate change and remedy their injuries.[141] The court dismissed EPA's argument and clarified that *"Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop."* Further it stated, "*reducing domestic automobile emissions is hardly a tentative step,"* because, *"*[c]*onsidering just emissions from the transportation sector, which represents less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the thirdlargest emitter of carbon dioxide in the world, outpaced only by the European Union and China.* The court was finally concluding that "*U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming. We therefore hold that petitioners have standing to challenge EPA's denial of their rulemaking petition."*[142]

4.1.1.3 The redressability requirement

In *Steel Co v. Citizens for a Better Environment* the court defined redressability as *"a likelihood that the requested relief will redress the alleged injury."*[143] The court decided that referring to past environmental violations does not satisfy the redressability requirement. "*The civil penalties authorized by the statute* […] *might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties - the only damages authorized by EPCRA - are payable to the United States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An 'interest in attorney's fees is ... insufficient to create*

[140] Erica D. Kassman, How local courts address global problems: The case of Climate Change, 24 Duke Journal of Comparative & International Law (2013) at 225-227.

[141] 549 U.S. 497(2007), at 523-524.

[142] Id. at 525-526.

[143] 523 U.S. 83, 103 (1998). Citizens For A Better Environment, an environmental protection organization filed an enforcement action accusing Chicago Steel And Pickling Company of violating the Emergency Planning And Community Right-To-Know Act (EPCRA) by failing to file timely toxic- and hazardous-chemical storage and emission reports since 1988. The defendant came into compliance with the act after the citizen gave notice of their suit but before they actually filed the suit.

an Article III case or controversy where none exists on the merits of the underlying claim'", so the court in its conclusion.[144]

Two years later, the court reversed its view on civil penalties. In *Friends of the Earth, Inc. (FOE) v. Laidlaw Environmental Services, Inc.*[145] Environmental groups brought action against holder of National Pollutant Discharge Elimination System (NPDES) permit, alleging violation of mercury discharge permit, and seeking declaratory and injunctive relief, civil penalties, costs, and attorney fees. This time the court decided that a claim for civil penalties need not be dismissed as moot when the defendant, after commencement of the litigation, has come into compliance with its NPDES permit. Obviously the court distinguished between wholly post and continuing violations by stating that *"*[…] *it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties*." The court reaffirmed that civil penalties do have a deterrent effect and that *"Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations."*[146]

It looks like it matters whether the defendant comes into compliance before or after the citizen files suit. Generally speaking, violations that merely occurred in the past are likely to be dismissed. Only if the plaintiff can prove that s/he will be suffering injury in the future, the court considers supporting standing.

The three-part standing test analyses are a product of constitutional common law and depend on every single case's unique circumstances. Indeed, the court defined standing requirements in *Lujan v. Defenders of Wildlife*, and yet left a lot of room for interpretation.[147]

4.2 Access to Court in the European Union

4.2.1 Locus Standi before the Aarhus Convention

Pursuant to Article 263(4) TFEU *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."* In short, any non-privileged applicants (that is, applicants other than EU institutions and other Member

[144] Id. at 106-109.
[145] 528 U.S. 167.
[146] Id. at 185.
[147] Supra note 99, at 198.

States) must prove that they are both directly and individually concerned by the challenged act.[148]

The problematic ambiguity of the term "individual concern" required clarification by the ECJ. In Case *Plaumann v. Commission*[149] the court interpreted "individual concern" very restrictively by providing that *"Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed."* By applying this principle, it became obvious that public interest groups like NGOs could never meet the "individual concern" requirement, thus never have standing.

One of the leading cases dealing with environmental standing for NGOs was *Stiching Greenpeace Council and others v. Commission*[150]. In this case the Commission granted the Kingdom of Spain financial assistance from the European Regional Development Fund (the ERDF) for the construction of two coal-fired power plants. The plaintiffs brought an action against the decision of the Commission seeking annulment of the approved subsidies for the Spanish government.[151] The Court of First Instance found by taking into account the "Plaumann doctrine" that *"*[…] *They* [the plaintiffs] *do not, therefore, rely on any attribute substantially distinct from those of all the people who live or pursue an activity in the areas concerned and so for them the contested decision,* [...] *, is a measure whose effects are likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned."*[152] Particularly addressing NGOs the court decided further that "*It has consistently been held that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned* […] *by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually."*[153] The Court of Justice confirmed on appeal the ruling of the Court of First Instance.[154]

[148] Elizabeth Fisher/Bettina Lange/Eloise Scotford, Environmental Law: Text, Cases, and Materials (2013) at 372.
[149] Case 25/62 [1963] ECR 95.
[150] Case T-585/93 [1995] ECR II-2205.
[151] Paras. 1, 13.
[152] Para. 54.
[153] Para. 59.
[154] Case C-321/95 P [1998] I-01651.

In several rulings the ECJ reaffirmed that organizations dedicated to protect the environment do not automatically meet the "individual concern" requirement.[155]

4.2.2 The Aarhus Convention[156]

4.2.2.1 Implementing Aarhus and Case Law Review

The Aarhus Convention is an International Treaty designed to equip the public with rights with regards to the environment. The Treaty contains three main pillars:

- Access to environmental information.
- Public participation in environmental decision-making.
- Access to justice.[157]

The EU joined the Convention in May 2005, and was henceforth obligated to comply with its provisions. Article 15 of the Convention has set up a Compliance Review Mechanism in order to comment on a party's noncompliance, but without the power to make binding decisions.

In April 2011 the Compliance Committee (ACCC) released its "findings and recommendations concerning compliance by the EU".[158] The focus was particularly on Article 9 of the Convention, dealing with "access to justice".

"1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. […]

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative

procedural law of a Party requires this as a precondition,

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[155] Joined Cases T-236/04 and T-241/04 *European Environmental Bureau and Stichting Natuur en Milieu v Commission* [2005] ECR II-4945, para. 56; Case C-355/08 P *WWF-UK Ltd. v. Council* [2008] ECR II-8, para. 38;

[156] http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

[157] http://ec.europa.eu/environment/aarhus/ Retrieved August 25, 2014.

[158] Report of the Compliance Committee, Addendum, Findings and recommendations with regard to communication ACCC/C/2008/32 concerning compliance by the European Union, April 2011, http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf Retrieved August 25, 2014.

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."[159]

The Compliance Committee concluded that the ECJ's restrictive interpretation of "individual concern" is too strict and does not fulfill the objective of the Convention. Article 9 guarantees the public a wide access to justice. In case the jurisprudence of the EU Courts was to continue in this way, the EU would violate Article 9, particularly paragraphs 3 and 4 of the Convention.

[159] Article 9 of the Aarhus Convention.

Contracting Parties are obligated to transpose the Convention's provisions into national legislation. The Convention leaves it to the individual signatory states to define "sufficient interest" as long as it is in accordance with the objective of giving the public concerned wide access to justice. The EU implemented Article 9(2) by the Directive 2003/35/EC on public participation. Article 10a of the Directive sounds almost identical to the existing Article 9(2) of the Convention, requiring the Member States to determine the definition of "sufficient interest".

In Case *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*[160] the Court interpreted Sweden's national law concerning access to justice for NGOs. The referring court asked whether with Article 10a of Directive 85/337/EC[161] precludes national law that allows small, locally established environmental protection associations to participate in the decision-making procedure but does not grant the right to challenge the decision.

The Court ruled that "*While it is true that Article 10a of Directive 85/337*, […], *leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies."* While it is conceivable to demand a certain amount of members to make sure that it in fact does exist and is active, "*the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337. Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with*",[162] so the Court in its conclusion.

A key decision concerning the "impairment of a right" criterion was *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e. V. v. Bezirksregierung Arnsberg*[163]. The question was if Article 10a of Directive 85/337 precludes national legislation which does not permit non-governmental organizations to promote environmental protection because the alleged infringement of a rule protects only the interests of the general public and not the interests of individuals.[164]

The Court clarified that even though national legislature is entitled to confine the access to court by requiring the violation of individual public-law rights, such a limitation applied to

[160] Case C-263/08 [2009] ECR I-9967.
[161] Amended by Directive 2003/35/EC.
[162] Supra note 134, paras. 43-49.
[163] Case C-115/09 [2011] ECR I-03673.
[164] Para. 35.

environmental protection organizations disregards the objectives of the last sentence of the third paragraph of Article 10a of Directive 85/337.[165] *"*[…] *The concept of 'impairment of a right' cannot depend on conditions which only other physical or legal persons can fulfil, 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"*[166], so the court completing its decision.

Considering the long-lasting restrictive interpretation with regard to environmental standing for NGOs, the last decision constitutes important progress and great prospect of major change in the near future. However, the EU still lacks a harmonized legislation, resulting in 28 different accessibilities to courts for environmental matters.

4.2.2.2 Proposal for a Directive on access to justice

The Directive was aimed at implementing Article 9(3) of the Aarhus Convention with the intention to provide a broader access to justice in environmental proceedings for members of the public.[167] Because of substantial convincing issues with some Member States, the proposal has never been implemented.[168] As a consequence, the third pillar of the Aarhus Convention, more precisely Article 9(3), is still not completely part of EU law, raising the question of its applicability.

In Case *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (Slovak Brown Bear Case)[169] the referring court asked whether Article 9 (3) of the Aarhus Convention has a self-executing affect due to the fact that the European Union acceded to the international treaty but has not adopted legislation in order to transpose the treaty concerned into EU law.[170]

The Court negated the direct effect in EU law and explained "*It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise*

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[165] Para. 45.

[166] Para. 47.

[167] Article 1 of the proposal. COM (2003), Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters, at 11 http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2003/0624/COM_COM(2003)0624_EN.pdf Retrieved on August 25, 2014.

[168] European Commission, Possible Initiatives on access to justice in environmental matters and their socio-economic implications, Final Report (2013) at 6. http://ec.europa.eu/environment/aarhus/pdf/access%20to%20justice%20-%20economic%20implications%20-%20study%202013.pdf Retrieved on August 25, 2014.

[169] C-240/09 [2011] ECR I-01255.

[170] Para. 23.

the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure."[171] At last the court emphasized that national courts must consider the objectives of Article 9(3) and interpret their national law accordingly.

In his speech "The fish cannot go to Court"[172] in November 2012 Janez Potočnik reminded the audience that the lack of implementing existing legislature creates ecological and health debt that we cannot afford to have. He pointed out that in some Member States standing rules are still too restrictive or that litigation is too costly and inefficient. In his opinion better compliance with EU environmental law is essential to receive the benefits environmental legislation is offering for improving human health. The environment is a public good with no chance to protect itself. Those who want to represent it must be able to do so.[173]

5 Conclusion

The fact that the European Union is only authorized to act where the Member States have expressly conferred upon it the power to do so effects the efficiency of legislation. Especially criminal law is still considered as too significant to a country's sovereignty, making it more difficult to adopt substantive environmental laws on the EU level. Directive 2008/99/EC on the protection of environment through criminal law serves as a good example. The penalties for environmental crimes required by the Directive are so vaguely worded by the terms "effective, proportionate and dissuasive", that Member States have broad discretion when implementing them, inevitable leading to differing interpretation and, therefore counterproductive for harmonization.

The accession of ten new members from Central and Eastern Europe between 2004 and 2007 pulled back the EU's dynamic environmental policy setting. The new Member States needed and still need support to catch up with the high environmental standard the EU is stipulating. The infrastructure for environmental protection is expensive and demands know-how. It will take them a while to adopt the Western-dominated environmental standards.[174] Consequently, planned environmental-related projects might fail to be realized or will at least suffer start-up delays.

Environmental pollution is not like "murder" or "rape" by definition a crime. Rather it depends on several circumstances. A discharge of certain substances can be absolutely legal as long as a permit was obtained. Mental state requirements and the type of sanctions

[171] Para. 45.

[172] Advocate General Sharpston used this expression in the Trianel-Case.

[173] Janez Potočnik, "The fish cannot go to Court" – The environment is a public good that must be supported by a public voice, European Commission Speech/12/856 on 23 November 2012.

[174] Supra note 39, at 514.

imposed for environmental crimes particularly matter for corporations. As long as their employees are not at risk to face serious punishment like incarceration, to them violating environmental laws is perceived as a cost of doing business. Due to limited resources, prosecutors focus on conducts committed with intent or gross negligence, while the majority of violators get off fairly lightly.

The biggest challenge the contemporary world is facing is the global climate change. Given that the consequences of aggregated emissions are not confined within national frontiers, global cooperation is required to tackle the problem effectively. Even though finding a global approach is still constantly being postponed, the fact that U.S. courts granted standing in *Massachusetts v. EPA*[175] represents a step in the right direction.

The access to court for NGOs within the EU is still lagging somewhat behind. Indeed, the developments of the latest jurisprudence of the EU courts can certainly be considered as progressive. However, most of the Member States still do not guarantee "wide access to justice" under their national law systems. Resources for judicial control exercised by the ECJ are limited, resulting in time-consuming proceedings. Meanwhile, the environment and in particular people continue to suffer from the consequences of air, water and soil pollution.

[175] Cf. supra note 130.

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