

Environmental Liability – Modern Developments

Ellen Margrethe Basse

1 Environment and Law

Until the 1970s, it was the fundamental assumption of the international, the regional and the national societies that the environment¹ could and should be used as a medium for disposal of every kind of fluid and solid waste. And as assumed, the aquatic, atmospherical and terrestrial environments are capable of performing tremendous scavenging, assimilating and dispersing functions. However, the environment changed drastically as a consequence of growth – especially caused by the rapid development of different kinds of technology – and therefore new political initiatives were taken because scientific evidence showed that the environment is incapable of coping with all residuals and that its neutralizing capacity can be overburdened.

Command-and-control regulations have been the traditional way of dealing with pollution. This traditional regulation style has its merits. Existing enterprises already causing pollution and degradation of the public goods are, however, given permits free of charge. The enterprises are also protected against new more costly (and restrictive) regulation by the law and order principles laid down in the legal traditions (especially the public law principles).²

The burdens of environmental protection generally take two forms: First, there are the economic costs of pollution prevention and control (the economic burden). Second, there are the burdens of environmental risks that are

¹ In ordinary language, the term environment normally designates something that is not under any control whatsoever – something that is given as common goods. Talking about the environment as such therefore usually means aspects of our physical surroundings – the media air, water and soil. The elements of the unmodified environment are wild things – including the “wild” resources such as underground water and wild animals.

² See Francis G. Jacobs, *The Community Legal Order – A Constitutional Order? A perspective from the European Court of Justice*, in Vol. 21 de l’Académie de Droit Européen de Trèves. *Towards a New Constitution for the European Union?* The Intergovernmental Conference 1996, Bundesanzeiger Verlagsges. MbH., Köln (1997) 31.

necessarily redistributed by environmental law. The “burden” dimension of environmental protection has received significantly more attention than the “benefit” side.³ Looking into traditional liability discussions and liability law, the burden dimension is, consequently, normally in focus.

Modern environmental law is based on the concept of sustainability that has been well-known for several years. It expresses legal obligations to incorporate concern for the preservation of environment and natural resources. Liability is as part of this concept triggered if there is an impact on the environment (air, water, soil) coming from an establishment and causing death, bodily injury or damage to property. The duty of the developer to cover the costs of protection and restoration of nature is also part of the development of this concept. From the “benefit” side, the impact on the development of cleaner technologies and new market forces are in focus.

1.1 The Concept of Sustainable Development

In June 1972, the United Nations Stockholm Conference established the international forum for negotiation of international agreements on modern environmental law. At the Conference, new ideas for the simplification of liability rules were presented in order to implement general principles of human rights and obligations towards nature, environment and future generations. In the Declaration from this Conference, titled “The Human Environment”, the traditional emphasis on the right to exploit resources was complemented with a confirmation in the form of an international obligation to use a holistic approach when protecting the environment for present and future generations.⁴

The concept of sustainable development was acknowledged by the United Nations at the passing of the World Charter for Nature in 1982. The acceptance of the concept implied a paradigmatic challenge to the political and juridical discussion of the perspectives of liability, responsibility, and equity.⁵

³ See Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, in *Northwestern University Law Review*, Volume 87, Issues 3, 1993, pp. 787ff.

⁴ See U.N. Doc.A/CONF.48/14 Corr., 1972, reprinted in 11 I.L.M. 1416, 1972; Patricia W. Birnie and Alan Boyle, *International Law and the Environment*, Clarendon Press Oxford, 1992, p. 428; Martin S. Soroos, *From Stockholm to Rio: The Evolution of Global Environmental Governance* in Norman J. Vig and Michael E. Kraft (eds.), *Environmental Policy in the 1990's*, 2nd edition, 1994, p. 299; Anita Rønne, *The Legal Dimension of Sustainable Development with the Emphasis on the Energy Sector* in Henrik Zahle (ed.) *Law and Ecology – Special Issue*, Academic Press, 1994, p. 56 and Harald Hohman, *Precautionary Legal Duties and Principles of Modern International Law. Between Exploitation and Protection*, Graham & Trotman/Martinus Nijhoff, 1994, p. 38.

⁵ See D.H. Meadows et al., *The Limits to Growth. Report for the Club of Rome*, New York: University Books, 1972; Björn Wallgren, *The Principles of Ecocycle Society*, in *The Environmental Advisory Council Report On the General Principles of Environmental Protection*, SOU 1994:69, p. 29; Peter G. Sly, *Sustainable Development: The Scientific Dimensions*, in Sauders (ed.) *The Legal Challenge of Sustainable Development*, Canadian Institute of Resource Law and the Contributors, Ottawa, 1990, p. 36; Edith Brown Weis,

The complicated aspects in relation to the responsibility of the states have been debated ever since. One of the important questions is whether the obligations to conserve and protect the natural resources are relevant only in relation to transboundary and extraterritorial resources, or if purely natural sources are also included.⁶

In 1987, the Report from the United Nations World Commission on Environment and Development “Our Common Future” described the threatening global environmental and resource problems as well as the global challenge, and by doing this, brought the concept “sustainable development” very much into focus. The concept was ascribed a wider meaning, as it included an estimate of sound and economic development and the question of distribution of resources between rich and poor communities. It is stated as an international goal and consequently of greatest importance as a reasoning for

“the establishment of a new era of international cooperation based on the premise that every human being – those here and those who are to come – has the right to life, and to a decent life.”⁷

As an important premise, the Report emphasized that the concerns of environmental and economic development were not two separate challenges. They were regarded as being inextricably linked to each other.

The concept of sustainable development is today an important part of international conference activities and instruments.⁸ Environmental degradation, however, continues in all parts of the world, while economic activity has become increasingly globalised through the medium of international trade. This pattern has motivated the international community to focus on integration of economic, trade, and environmental strategies so that they supplement and strengthen each other. It is the opinion that if environmental and trade policies are to be effectively integrated, policy strategies need to take account of complex interdependencies and interrelationships between production processes, consumption, and the global impact of production and consumption on the environmental media. The concept of partnership and the three elements of international sustainability are now in focus: intergenerational equity in relation to use of natural resources; and integration of environmental protection and development.⁹

Environmental Equity: The Imperative for the Twenty-First Century, in Winfried Lange (ed.) *Sustainable Development and International Law*, Graham & Trotman/Martinus Nijhoff, 1995, pp. 17ff. and Michael Ruse, *Sustainability*, in Gunnar Skirbekk (ed.) *The Notion of Sustainability and its Normative Implications*, Scandinavian University Press, 1994, p. 8ff.

⁶ See Veit Koester, *From Stockholm to Brundtland, Environmental Policy and Law*, Vol. 20, No. 1, 2nd March 1990, p. 17.

⁷ *The World Commission on Environment and Development, Our Common Future*, Oxford University Press, 1987, p. 42.

⁸ See Susan L. Schmith, *Ecological Sustainable Development: Integrating Economics, Ecology, and Law*, in *Willamette Law Review*, Vol. 31, No. 2/1995, pp. 261ff.

⁹ See Phillippe Sands, *Principles of International Law*. Volume I. Frameworks, standards and implementation, Manchester University Press, 1995, pp. 198-208.

1.2 *Sustainability and Liability*

There have been several approaches concerning environmental protection policy in relation to the important questions behind introducing liability rules and concepts based on distribution of burdens and benefits: (1) what is the acceptable level of risk and/or pollution in a long perspective? (2) what kinds of instruments would be best suited for reducing risk and pollution to that level? and (3) how are the benefits and costs of environmental protection to be spread among groups of persons - including the potential for distribution of ecological and economic inequities?¹⁰

The demand for sustainability expresses a need for alternative rethinking when considering the liability concept. The liability concept based on sustainability includes the obligations of present generations to act as trustees for future mankind.¹¹ To function as a legal and financial tool used to make the responsible parties compensate the cost of protection, prevention and remedying of a damaged environment liability has to be based also on new environmental principles and new definitions of responsibility.

One premise in modern environmental law is that the obligation of developers to take care of the common natural resources is added to the traditional concepts of responsibility and liability.¹² In a sustainability context, a broader definition of duties on authorities at all levels, on trade and industry, on organisations and on consumers is required. Therefore, the concept of common heritage of all mankind has been developed. It now embraces the idea of shared natural resources, including all resources and areas beyond national jurisdiction, termed the global commons, i.e. genetic diversity, the ocean, the atmosphere, outer space and the Antarctic. In relation to environmental law, the liability in damage is first and foremost of importance in relation to the long-term perspectives of distribution of benefits of the ecological environment by obligations concerning prevention and restitution of environmental damage caused by pollution and/or by over-utilisation of the common resources. Collective liability systems could be interpreted as an organisational opportunity to deal collectively with ecological issues for the firms that fall within a market.¹³ Such means are

¹⁰ An analysis on these issues is included in the thesis of Hans Chr. Bugge, *Forurensningsansvaret. Det økonomiske ansvar for å forebygge, reparere og erstatte skade ved forurensning* (The environmental liability. The economic responsibility in relation to prevention, restoration and compensation for pollution), Tano Aschehoug, 1999, pp. 176ff.

¹¹ Marie-Louise Larsson: *The Law of Environmental Damage. Liability and Reparation*, Kluwer Law International/Nordsteds Juridik, 1999, p. 45.

¹² See Percival, R.V. Miller, A.S. Schroeder, C.H. Leape, J.P., *Environmental Regulation. Law, Science, and Policy*, supra note 10, pp. 165-66 concerning the theory of Carol Rose (presented in the articles, *Comedy of the Commons*, and *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 Duke L.J.1).

¹³ Teubner, G. *The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability* in: Teubner, G. – Farmer, L. – Murphy, D. (eds.), *Environmental Law and Ecological Responsibility. The Concept and Practice of Ecological Self-Organization*, p. 17 and p. 23.

connected with duties concerning guarantees, impact fees etc. – they will not be covered by this article.

1.3 The Approaches in Environmental Law

International environmental law, regional environmental law (e.g. European Community law) as well as national environmental law are based on framework rules and principles that do not absolutely prohibit the polluting activities or the utilisation of the common resources. In general, it was until recently, concentrated on end-of-pipe controls and did not treat input and final products as part of the environmental problem.

The control and sanctions applicable to each medium were applied and administered independently of each other. The ordinary fragment of environmental law, policy, administration and court judgements fail to provide effective pollution controls.¹⁴ Limitations and regulatory failures in the traditional regulatory styles were the reason for the introduction of new concepts. New (sustainability) demands concerning a holistic approach appeared. The pursuit of sustainable development demands better coordination, strengthened cooperation, and a broader concept of responsibility and management.¹⁵ The polluter has to pay all the costs of protection, prevention and remedying of the damaged environment. The prevention principle is involved in that the potential polluters, who know that they will be liable for the costs of remedying the damage they cause, have a strong incentive to avoid causing such damage.

The clear trend in environmental laws is also to replace traditional notions of state sovereignty and private property rights in natural resources with an intricate scheme of environmental programmes, international agreements, Community law, government-administered entitlements (e.g. detailed land use plans) and permits. The production and exploitation of water, raw materials, fossil fuels etc. in modern environmental law is as a consequence of this not only the subject of traditional norm regulation, but also the object of substantial green taxes, impact fees and modern liability rules transferring the economic wealth of the resources to the general public and coping with the need of precaution, prevention, pollution reduction and restoration of damaged environment.

The legislator is today aware that he is unable to strike a just and fair, and at the same time, precise balance between diverging interests in the external environment and the cost of taking care of such interests. The focus is on procedural instruments: the right of access to information, the right to participate

¹⁴ Laksman Guruswamy, *Integrating Thoughtways: Re-opening of the Environmental Mind?* in *Wisconsin Law Review* 463 (1989) and the same article in Robert L. Fischman, Maxime I. Lipeles and Mark S. Squillace (eds.), *An Environmental Law Anthology*, Andersons Publishing Co., Chincinnati, Ohio, 1996, pp. 100ff.

¹⁵ See Ernst-Ulrich Petersmann, *International and European Trade and Environmental Law after the Uruguay Round*, Kluwer Law, 1995, pp. 11ff.

in decision-making and the right of access to recourse bodies and to courts. The initiatives are changing the traditional guarantee of due process of law that is primarily of benefit to businesses claiming that environmental regulation is taking away their rights. The new procedural approach has a considerable impact on the enforcement of environmental law.¹⁶ At the same time a broad concept of responsibility has been defined in relation to the environment and is used as a means to change behaviour, to establish new rules for the economic calculations of costs and to ensure the enforcement of obligations concerning the taking care of common goods. In order to reach the objective “sustainable development”, environmental law is also shifting from requirements concerning causation based on an activity approach to minimum quality norms on the recipients and is using economic instruments (including strict liability rules) to ensure that market prices send the correct signals.

To ensure sustainable development, regulation and interference with property rights have to be based on a perceived need for general protection of common interests (e.g. environmental protection), and the interference has to be general and necessary. The actual development has however two opposite directions: *Some* of the tendencies are as mentioned above based on the demand for a stronger and better protection of common goods (also in the interests of future generations), *whereas* other tendencies are based on the new constitutionalism (and the stronger and better protection of individual rights). The last mentioned tendencies are e.g. a result of the fact that the administrative decisions concerning environmental prevention and restoration may, under certain conditions, and based on the national constitutions, require that the authorities pay compensation to the owners of the properties or to other persons with specific interests in the use of the relevant properties. The question of how to find the proper mix of old traditional concepts of liability and new concepts of liability is one of the fundamental challenges facing environmental policymakers.¹⁷

2 The International Law Concept

There is a long standing body of international instruments concerning damage caused by nuclear activities, as well as in the field of oil pollution at sea. More recent instruments deal with damage caused by maritime transport of hazardous and noxious substances. Those who draft international agreements have had to design instruments and implementation mechanisms with sufficient flexibility in order to allow parties to adapt to changes in our scientific understanding and

¹⁶ Ludwig Krämer, *The Citizen in the Environment: Access to Justice*, in *Environmental Liability*, Vol. 8, issue 5, 2000, pp. 127ff.

¹⁷ See Percival, R.V. – Miller, A.S.- Schroeder, C. H. – Leape, J. P., *Environmental Regulation, Law, Science, and Policy*, Boston, New York, Toronto and London: Little, Brown and Company, 2nd edition (1996), p. 137.

technological abilities.¹⁸ Sustainable development underlines the precautionary principle and facilitates new concepts of environmental liability. It implies an integrated approach - the pollution prevention and control should be based upon an holistic, rather than a discrete or segmented, view of the environment.

In the 90s, there has been several international initiatives (based on the mentioned new approach) concerning use of strict liability to ensure protection also of the natural resources.

2.1 *The Lugano Convention*

The Council of Europe has, in 1993, drawn up *the Lugano Convention*¹⁹ in which the definition of environment is described as:

“natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors;
property which forms part of the cultural heritage; and
the characteristic aspects of the landscape”

The Convention contains a regime for strict liability that in principle covers all types of damage caused by *dangerous activities*.²⁰ Such activities in the field of dangerous substances, biotechnology and waste are further defined – using a very wide definition of dangerous activities. It is not an exclusive list of activities covered by the liability concept. As far as remedies are concerned, the Convention provides that in case of damage or impairment of the environment, compensation shall be limited to measures of partial restoration. It covers traditional damage as well as ecological damage. So, damage to natural resources by dangerous activities that would affect biological diversity is an environmental liability issue. The Convention deals with such damages, but in a rather unspecified way using the term “reasonable” costs of restoration neither specified in the text of the rules nor in its Explanatory Report. Measures of reinstatement are defined by Article 1(9):

“any reasonable measures aiming to reinstate or restore damaged or destroyed natural resources or, where reasonable, to introduce the equivalent of these resources into the environment.”

¹⁸ Edith Bown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, in 81 *Georgetown University Journal* 675ff. (1993) – the same article in Robert L. Fischman, Maxime I. Lipeles and Mark S. Squillace (eds.), *An Environmental Law Anthology*, Andersons Publishing Co., Chincinnati, Ohio, 1996, pp. 468ff.

¹⁹ *Council of Europe Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment* of 21 June 1993 (ETS No. 150).

²⁰ Liability being “strict” means that the plaintiff does not have to prove legal wrongdoing or fault of the responsible actor. Such a strict liability concept may provide an incentive for taking measures to prevent damage from occurring in the first place.

The Convention has not given any *criteria* for restoration or economic valuation of ecological damage. Measures of restoration are given priority over other means of redress to ensure that the restoration is possible.²¹ By use of a new environmental liability concept, based on the precautionary principle as well as the polluter pays principle, there has to be non-allowance of the development risk defence.²² Such defence is connected to the so-called “pollution exclusion” in relation to insurance. The underlying comprehensive general liability coverage protects a company against liability caused by an “occurrence”, that is, an accident, which can be of continuous duration and which is neither expected nor intended by the insured. The exclusion removes coverage, however, if the occurrence is a discharge, dispersal, release or escape of pollution and is consequently not based on the above mentioned environmental principles.

The European Community and all Member States participated in the negotiations. Nine States signed the Convention – six of which are EU Member States, namely Finland, Greece, Italy, Luxembourg, the Netherlands and Portugal. Other signatory states are Cyprus, Iceland and Liechtenstein. Some states – including Denmark - do not intend to sign or ratify it as they do not accept retroactivity (concerning waste deposits accepted by the Convention) or standing for the environmental organizations. The Convention is also open to accession by Central and Eastern European Countries – even countries which are not members of the Council of Europe. It will enter into force after the third ratification.²³ Most of the industry and some EU Member States feel that the scope of strict liability is too wide covering ecological damage and based on an open scope of dangerous activities. It is the opinion that it gives too little legal certainty and that its definitions, especially the definition of ecological damage, are too vague.

2.2 New Initiatives Concerning Marine Environment

Damage to the marine environment, civil liability and compensation for pollution damage are dealt with by several conventions. The United Nations Environmental Programme (UNEP) has been working on initiatives concerning new instruments on liability and compensation for damage to the Mediterranean Sea – especially introducing definitions of recoverable damage as a key issue

²¹ Bianchi, A. *Harm to the Environment in Italian Practice: The Interaction of International Law and Domestic Law* in: Wetterstein, P. (ed.), *Harm to the Environment. The Right to Compensation and the Assessment of Damages*, *supra* note 9, p. 111. The Convention is however using the word “equal” instead of “identical” restoration, see also Larsson, M.-L., *On the Law of Environmental Damage*, Stockholm University, 1997, pp. 144-146 and pp. 222f.

²² See Sayer, R.N.: *The Mother of all Battles: The Dispute over Insurance Coverage for Environmental Contamination in the United States*, (1993), 1 *Environmental Liability* 1, p. 32.

²³ The ratification has not yet been made, but ratification procedures are under way e.g. in Finland, Greece and the Netherlands.

aiming at the establishment of a new civil liability regime.²⁴ The UNEP Secretariat has stressed the concept that a liability scheme under the Barcelona Convention system should be based on strict liability rather than fault, as proof of fault can be impossible to obtain.²⁵

It is suggested that the right to compensation shall be recognised in the form of measures of reinstatement: restoration and reinstatement or reintroducing of equivalent components into the marine and coastal environment. The working document on this issue suggested that all professional dangerous activities should be covered by the new instruments, and that a wide definition of dangerous activities should be adopted. In this respect, the suggestion includes a reference to the activities listed in the Lugano Convention. In the working paper, the responsible person is described as the developer – the person who is in control of the dangerous activity.

2.3 *Initiatives on Wastes*

In December, a Protocol on Liability and Compensation for damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal were signed by 132 parties – including the European Community and its Member States - as a new instrument connected to the United Nations Basel Convention (from 1989).²⁶ The new Protocol shall apply to damage due to incidents during a transboundary movement of hazardous wastes and other wastes and their disposal. The person who notifies a transport in accordance with the Basel Convention's article 6 shall be liable – based on strict liability - for damage until the disposer has taken possession of the wastes. Thereafter, the disposer shall be liable, see the Protocol article 4. If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable, see article 4(6). Without prejudice to article 4, any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Basel Convention or by his wrongful international, reckless or negligent acts or omissions, see the Protocol article 5. The objective is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous waste transport. The definition of damage is laid down in article 2, litra c:

²⁴ See Lorenzo Schiano di Pepe, *Introducing an International Civil Liability Regime for Damage to the Marine Environment in the Mediterranean Sea Area*, in *Environmental Liability*, 1999, Vol. 7, Issue 1, pp. 8ff. and UNEP (OCA)/MED IG.5/16(ii), paragraph 6.

²⁵ Document UNEP (OCA)/MED WG. 117/3, paragraph III.1.

²⁶ The Convention was incorporated within EC legislation through Regulation 259/93/EEC which introduced a common system of control relating to the transfrontier shipment of wastes. The regulation is directly effective in all Member States.

“(c) “Damage” means:

- (i) Loss of life or personal injury;
- (ii) Loss of or damage to property other than held by the person liable in accordance with the present Protocol;
- (iii) Loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;
- (iv) The costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be taken; and
- (v) The costs of preventive measures, including any loss or damage caused by such measures, to the extent that the damage arises out of or from hazardous properties of the wastes involved in the transboundary movement and disposal of hazardous wastes and other subject to the Convention.”

2.4 *Access to Justice*

The new instruments and initiatives mentioned above include rules on access to justice. Of relevance when determining the scope of persons with standing, before the administration as well as courts, are also the 1974 Nordic Environmental Protection Convention. The Convention has a direct impact on national law, as it gives the supervisory authorities and individuals of the other Nordic countries the right of access to appeal to e.g. Danish national decision-making administrative authorities and courts under the same conditions as, respectively, Danish supervisory authorities and individuals. The primary principle of the Nordic Convention is that of equating the pollution caused to a neighbouring country with pollution within the country of the activity. The Convention covers all kinds of environmental dangerous activities but it does not prescribe which “access to justice system” each State has to adopt.

An important new initiative concerning a broad concept of *access to justice* is the United Nations Economic Commission for Europe’s (ECE’s) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) that has been adopted and signed by most of the European Community and Member States at the Fourth Ministerial Conference.²⁷ Under this Convention, the parties have signed up to a series of commitments regarding improving transparency, access to environmental information and public participation in environmental decision-making. This Convention builds on the ideas of the EC Directive on Freedom of Access to Information on the Environment, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making as well as on the Rio Declaration. The Convention is expected to be ratified by the EC and thus to become part of the Community legislation.

²⁷ The Conference was held in Aarhus, Denmark, 23-25 June 1998.

3 The Community Environmental Liability Concept

The European Community policy and law has to be based on the principle of “balanced and sustainable development” (article 2) as well as on the principle of integration of environmental protection requirements (article 6). The objectives of environmental policy are formulated in the first paragraph of article 174. In article 174(2) the principles of EC environmental policy are:

- the high level of protection principle
- the precautionary principle
- the prevention principle
- the source principle
- the polluter pays principle and
- the safeguard clause allowing Member States to take provisional measures for non-economic reasons subject to a Community inspection procedure²⁸

Most important in relation to liability is the polluter pays principle, see below concerning the White paper. But also the precautionary principle and the source principle are important. The intention behind the Community policy is to facilitate sustainable development by use of means respecting trade as well as environmental policies - including the policies of the international agreements.²⁹ It is the general opinion that the effectiveness of instruments depends largely on their ability to harness market forces in favour of environmental protection and sustainable use of the common resources.

New liability rules can work as a lever for the application of new instruments based on a market approach (such as eco-accounting and environmental contracts), which has the potential to induce methods for coping with new risks. In this regard, the concepts of liability can be *complementary* to other modern environmental instruments, such as emission control measures, environmental impact assessments, environmental auditing and economic instruments.

3.1 Policy Programmes

The 5th Environmental Programme (1992-1999) “Towards Sustainability” emphasizes that more broadly based and active participation of all economic and social actors is a basic requirement to achieve sustainability in trade policy and the consumption of goods.³⁰ In the proposal for the 6th Environmental Action Programme (2001-2010) “Environment 2010: Our future, Our choice” it is stressed that environmental policy must be innovative in its approach and seek

²⁸ See Jan Jans, *European Environmental Law*, European Law Publishing, 2000, pp. 31ff.

²⁹ See the 1978 Council meeting *Environment* Brussels, 9 December 1996, 12434/96.

³⁰ See Margaret Brusasco Mackenzie, *European Community Law and the Environment*, in Alan Boyle, ed., *Environmental Regulation and Economic Growth*, Clarendon Press Oxford, 1994, pp. 86-88; Brian Greenwood, *Looking Ahead: Environmental Regulation - A Future?*, *id.* pp. 102-107.

new ways of working with a wide cross section of society.³¹ Among the priorities is improvement of existing legislation.³² Of specific interest is the ambitions concerning creating a Community environmental liability regime,

“In general, EC environmental legislation has tended to focus on the regulation of certain activities or substances which carry risks to human health and the environment. This body of legislation rarely addresses the question of what should happen if, despite legislation, injury to persons or damage to their property or to the environment should nonetheless occur. The Treaty provides that Community environmental policy should be based upon certain basic principles – among which the polluter pays principle and the principle of preventive action. Thus, one of the important tasks for the Community is to ensure that those who cause injury to human health or cause damage to the environment are held responsible for their actions and that such injury and damage is prevented wherever possible.

In its White Paper on Environmental Liability of February 2000, the Commission proposed a regime which would impose liability on those parties who cause injury to persons or their property, contaminate sites or cause damage to bio-diversity. It is currently preparing a legislation on environmental liability.”³³

3.2 *Green and White Papers*

The Green Paper on Civil Liability and Remedying Environmental Damage from the Commission (of May 1993) was drafted with a close eye to developments in the Council of Europe.³⁴ It was meant to initiate discussion on defining environmental damage, liable parties and determining which activities should be covered by a no-fault liability regime. Details of known joint compensation schemes, their problems and limitations were discussed. The perspective used in the paper had the weakness that focus was *not* directed towards the demand for re-establishment of the environment.

In February 2000, the Commission published the White Paper on Environmental Liability.³⁵ In the Paper it is stressed that a growing number of international conventions and protocols are dealing with environmental liability in several fields on a strict but limited liability basis.³⁶ The intentions behind new liability concepts are to ensure sustainable development based on the interaction between trade law and environmental law. The concept is based on a close scope of application linked with EC environmental legislation.

³¹ COM (2001)31 final of 24 January 2001, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the sixth environmental action programme of the European Community.

³² COM (2001)31 final, p. 14.

³³ COM (2001)31 final, p. 20.

³⁴ COM (93)47 final.

³⁵ COM(2000)66 final of 9 February 2000.

³⁶ COM(2000)66, p. 23.

The White Paper sets out the structure for a future EC environmental liability regime that aims at implementing the environmental principle –

“above all the polluter pays principle. If this principle is not applied to covering the costs of restoration of environmental damage, either the environment remains un-restored or the State, and ultimately the taxpayer, has to pay for it. Therefore, a first objective is to make the polluter liable for the damage he has caused. If polluters need to pay for damage caused, they will cut back pollution up to the point where the marginal cost of abatement exceeds the compensation avoided. Thus, environmental liability results in prevention of damage and in internalisation of environmental costs. Liability may also lead to the application of more precaution, resulting in avoidance of risk and damage, as well as it may encourage investment in R&D for improving knowledge and technologies.”³⁷

The White Paper introduces strict liability for damage caused by inherently dangerous activities. In other cases liability is based on negligence. It is focusing on the operator in control of the activity, which caused the damage. The paper expects liability to be based on criteria (standards) for assessing and dealing with the different types of damage.

The proposed regime should not only cover damage to persons and goods and contamination of sites, but also damage to nature - ecological damage is only covered if it is protected under the Natura 2000 network. Also other main features of the regime are outlined.

It includes the principle of no retroactivity. In this connection, the norms that were in force at the time of the action (or inaction) applied.

The paper introduces an obligation for the plaintiff to spend compensation paid by the polluter on environmental restoration. It is the assessment of the paper that joint and several liability may lead to “forum shopping” and inequity results, if the injured party sues the party with the most financial assets first, instead of the party who caused the most damage. It is therefore not based on joint and several liability. An additional problem in the liability law occurs therefore, in European countries *when* the effects from various polluters cumulate making it almost impossible to link the cause and the effect.

There is growing acknowledgement that the public should feel responsible for the environment, and should under certain circumstances be able to act on its behalf. It is, consequently, stated that

“Member States should be under duty to ensure restoration of biodiversity damage and decontamination in the first place (first tier), by using the compensation or damage paid by the polluter.

Public interest groups promoting environmental protection (and meeting relevant requirements under national law) shall be deemed to have an interest in environmental decision-making. In general, public interest groups should get the right to act on a subsidiary basis, i.e. only if the State does not act at all or does not act properly (second tier). This approach should apply to administrative and judicial review and to claims against the polluter.

³⁷ COM (2000)66 final, pp. 11f.

...

In urgent cases, interest groups should have the right to ask the court for an injunction directly in order to make the (potential) polluter act or abstain from action, to prevent significant damage or avoid further damage to the environment.”³⁸

Article 6 of the EC Treaty is mentioned, and it is assessed that a Community liability regime covering all Community-regulated policies and activities bearing a risk for the environment will bring about a better integration of the environmental considerations in the different sectors concerned through the internalisation of environmental costs.³⁹ It is also the intention to improve the function of the internal market by the proposed Community liability regime. It is the opinion of the Commission that the existence of any problem of competition caused by differences in Member States’ environmental liability approaches in the internal market is currently unclear.

“This may be because national environmental liability systems in the EU are relatively new and have yet to become totally operational.

However, most existing Member States’ environmental liability regimes do not cover damage to biodiversity. The economic impact of the latter could conceivably be significant higher than the impact resulting from existing national liability laws and reach thresholds where concerns about the competitiveness of firms established in one Member State would advise the national authorities to wait for an EU initiative and refrain from imposing unilaterally liability for biodiversity. If so, this would justify EU action on the grounds of ensuring a level playing field in the internal market.

The considerations above suggest that an EU liability regime should also be designed with a view to minimising possible impacts on the EU industry’s external competitiveness....”⁴⁰

The paper concludes that the most appropriate option would be a framework directive providing for strict liability based on the just mentioned features. As other possibilities assessed in the paper are the Community accession to the Lugano Convention, a regime covering only transboundary damage, a Community recommendation to guide Member States action and a regime focusing only on biotechnology. Although the conditions of liability are governed by Community law, the remedy of reparation is a matter for national law subject to the limitations imposed by the European Court of Justice’s jurisprudence. The EC institutions and interested parties were invited to discuss the paper and to submit comments by 1 July 2000.

³⁸ COM (2000)66 final, p. 22.

³⁹ COM (2000)66 final, p. 12.

⁴⁰ COM (2000)66 final, p. 13.

4 The National Liability Concepts

As illustrated by other articles in this volume of *Scandinavian Studies in Law*, the liability concept at the national level is focusing on individual rights and responsibilities. The traditional conditions laid down in the constitutions as well as the protection of the landowner's interests by the principles of public law, neighbour and tort law (as classic features) are important parts of environmental law. At the same time, the modern features mentioned above of regulatory systems as part of a trend using new market-based solutions are instituted at the national level.

New conditions concerning the duty not only to protect but also to restore ecological resources can be difficult to maintain in a traditional legal decision-making system. The focus in the following text will be on the problems connected with the traditional liability concept based on tort law. As an introduction, it has to be stated that the tort law traditions are already modified by statutory rules as well as by the growth of equally important systems of judge-made law.⁴¹

Several states have recently enacted environmental liability systems which provide for strict liability for dangerous activities and installations. New environmental acts in all the Nordic countries on environmental liability stipulate, that the question concerning the economic responsibility for environmental damages caused by a particularly polluting enterprise will be prosecuted on an objective basis, since they introduce the regime of strict liability in respect to environmental damage caused by activities. The Danish Environmental Liability Act is however so narrow that it has never been used. The traditional similarities in the Nordic countries are lacking in environmental liability law.⁴² Some acts – e.g. the Danish - are in this respect limited to real estate-based activities - other acts include liability as to traffic and harbours.⁴³ Several liability laws are based on an evaluation of the ecological damage as well as an evaluation of the disturbance or risk of disturbance versus the benefit of the restoration measures.⁴⁴ Rules on reversal of the burden of proof, presumptions of liability and strict liability are laid down in some special legislation - and such initiatives are changing the traditional civil law concepts of negligence described in general codes.

⁴¹ See concerning the great variety of living legal traditions and especially about the “civil law systems” versus the “common law systems” in Merryman, J.H. – Clark, D.S. – Haley, J. O. (eds.): *The Civil Law Tradition: Europe, Latin America, and East Asia*, Charlottesville, Virginia: The Michie Company, 1994.

⁴² Marie-Louise Larsson: *The Law of Environmental Damage. Liability and Reparation*, Kluwer Law International/Norstedts Juridik 1999, p. 31.

⁴³ Cf. in relation to the Danish Act the Report of the Committee constituted by the Danish Ministry of Justice No. 1237/1992 on *Liability for Environmental Damage*.

⁴⁴ Concerning the Finnish Act see Wetterstein, P., *The Finnish Environmental Damage Compensation Act – and some Comparisons with Norwegian and Swedish Law*, in (1995) 3 *Environmental Liability* 3, pp. 41-48.

The old as well as the new concepts of liability are embracing the following categories:

- constitutional liability for the lawmaker and other public authorities expropriating private properties (compensation for taking of property),
- public liability for public authorities' violation of duties (based on fault analogy),
- liability in relation to tort under the private law,⁴⁵
- liability in relation to neighbour law based on the general level of accepted pollution in the concrete surrounding,
- strict liability system based on the polluter pays principle and the precautionary principle,
- public law obligations to restore and/or compensate the public authorities for the cost to restore environmental damage,
- market-based liability concerning contribution in joint financial funding systems established to secure the protection of the environment and repair of damage nature (e.g. waste treatment fees, impact fees and insurance), and
- punishment as part of criminal law⁴⁶

All sorts of liability concepts can be regarded as tools stimulating a better implementation of existing regulatory instruments. The legal issues in relation to criminal liability or to the practice concerning introduction of warranties and indemnities into the contract of shares or property will not be covered by this article.⁴⁷

4.1 Conditions for Compensation

A standard based upon historically bounded property law reflects the opinion that the state should compensate landowners who, through no fault of their own, lose property rights because of transformations in the content of property rights. The landowners are, based on constitutional principles, the ultimate victims of anticipated, uncontrolled changes by the authorities.

Property rights are traditionally protected also against interference from other private parties by tort law and the neighbour nuisance case law. The nuisance law is based on the fundamental principles of civil law or common law where

⁴⁵ The term "civil liability" is also used as covering private nuisance law and tort law. Civil liability exists under both statute and common law.

⁴⁶ See concerning some of these aspects Deterring, B. Jones, *Compensating, and Remediating Environmental Damage: The Contribution of Tort Liability*, in Wetterstein, P. (ed.), *Harm to the Environment. The Right to Compensation and the Assessment of Damages*, Clarendon Press, Oxford, 1997 p. 12.

⁴⁷ See as articles on such contractual questions Atkinson, N.: *Warranties and Indemnities: A "Cure All" for Environmental Liability in the United Kingdom?*, in (1993) *Environmental Liability* 1, pp. 90-95, Conrad, J.W. *So Sue Me: Common U.S. Contractual Provisions and their Role in Allocating Environmental Liability*, (1993) 1 *Environmental Liability*, 1, pp. 77-82 and Rankin, N. S. *Managing Canadian Environmental Liabilities using Contractual Arrangements*, in (1993), 1 *Environmental Liability*, 1 pp. 83ff.

some degree of fault has to be proved as a condition for compensation when a person causes damage to someone else.⁴⁸ These private law approaches are only relevant in relation to damage caused by “not accepted” activities.

Whether a property owner is liable for pollution depends on which types of nuisance are considered acceptable – and not on ecological needs for restoration of damaged nature. The general conditions are as follows:

- documentation of *culpable actions* (fault) resting on the plaintiff - unless the statutory rules establish a legal basis for a strict liability
- the injured person *has suffered a loss*
- *causal relation* between the culpable action and the occurrence of the loss, and
- the injured party has *not shown own guilt*

The basic principle of tort law is traditionally – as indicated - without a specific statutory rule on strict liability. Negligence exists when the person causing the loss has not exercised the caution required of an individual or an enterprise practising that exact type of activity, etc. (which means use of standards that may be ascribed to a hypothetical reasonable person). The liability of the responsible person to inspect installations, deposits, etc. likely to cause pollution is in the legal traditions dependant on the likelihood of the occurrence of pollution. Of relevance is also the harmfulness of the substances, the sensitivity of the area, and the responsible person’s knowledge of technical and other conditions likely to cause the pollution. In the assessment of whether or not there is a duty of care, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. The principle of non-retroactivity seems to be important in the European liability systems (this is first and foremost based on tort law traditions).

A problem related to the traditional liability law is caused by the fact that environmental torts to nature from polluting activities frequently cause damage not only to persons and individual *owned property*, but very often also have broad consequential economic and ecological damage. Damage, which in itself has no *economic value* – but may have great value in other terms – such as loss of a species or of a picturesque landscape, is not a traditional element of national liability law. Recoverable losses are generally limited to personal injury, damage to property and pure economic loss. In this respect, it is important to realise that damage to the environment cannot always be compensated in terms of economic payment. A landowner may also claim compensation for the reduction in value of land or means of support (damage to livelihood).

Based on modern environmental liability law, fair compensation for the restoration of the environment may be paid - the cost of restoration should, however, not be considered to be out of proportion merely because it exceeds the economic value of the damaged natural resources or the need of restoration. It

⁴⁸ See also Lidsky, J. W. – Lidsky, L. B.: *Torts: The Civil Law of Reparation for Harm done by Wrongful Act Casebook Series*, 2nd ed. New York: Matthew Bender, 1997.

also remains the case that a balancing exercise will be necessary: weighing the cost of restoration against the ecological gains achieved by the restoration.

4.2 *The Causation Problem*

The liability arises where the plaintiff has suffered damage and he can prove that there is a causal link between the relevant activity and the damage. Based on the traditional liability law, the burden of proof lies with the injured party i.e. he loses his case if he cannot prove negligence on the part of the responsible person.

If an incident has caused destruction of flora and fauna in a sensitive area, and the polluter is responsible for that damage, the first question is: what was to be protected for the long time of sustainable development?

A common problem is related to the difficulties of identifying the relation between the individual action, the cause and the damaging effect on the nature. The distance between the affected area and the activity is another determining factor. Yet another is the time-gap between the interference and the materialisation of damage.

Contaminated sites and ecological damages are some of the serious ecological problems. In cases of such types of damages, it is, normally, difficult to attribute degradation to the act or responsibility of a particular party. Often, several actors have a close relation to the environmental consequences of land use and the responsible party is consequently, difficult to identify. Difficulties also arise if the damage does not manifest itself until after a lapse of time.

Also the new laws on strict liability can be very narrow. An example: strict liability in Denmark, based on the Environmental Liability Act, will only fall upon the industrial or public activities included in the list attached to the Act. The strict liability system does not apply to all polluting activities of the listed enterprises, only to the types of activities, which have caused the enterprise to be included in the list. For instance in relation to agricultural holdings, only matters relating to the manure tank can justify strict liability - excluded from the rules are matters relating to the oil tank at the same farm and the use of pesticides or fertilisers.

4.3 *The Responsible Polluters*

How the liability is actually apportioned among the liable parties depends on whether liability is joint or joint and several. Under joint liability, the responsible party must pay compensation only for that amount of damage which can be actually attributed to his particular use of the land or to his polluting activities. In case of aggregate pollution, precise determination may be impossible. In the Danish Act, the operator will always be the only legal person that is liable on an objective basis. In other acts – e.g. the Finnish Act - persons comparable with an operator and persons, who take over the firm on conditions, in situations where they are knowing about the damage, are also potentially

liable on an objective basis. The responsibility of the last-mentioned categories of persons is depending on their influence on the decision-making as to their economic interests in and their economic benefits of the relevant activity. If several persons are responsible, the plaintiff is entitled to choose among the responsible persons, which one he wishes to bring to court.

The effectiveness of the liability regime depends also on the *allowed defences*. It is of crucial importance that the traditional liability regime is modified by: (1) allowing as a defence, the compliance with a permit and (2) accepting the development risk defence. Permits on polluting activities are consequently widening the rights of the property owners or the property users in relation to “dangerous” or damaging activities. Consequently, there is no incentive based on this traditional liability law to minimise the pollution below the term included in a licence or further to include new unforeseeable risks in a precautionary management style.

4.4 Access to Justice

Litigation provides medium for addressing the damaged issues. Traditionally, it has been a requirement for a private person bringing a case to the courts, that s/he has a necessary individual significant (legal) interest in the case. This requirement of *locus standi* also applies in environmental matters. This means that the person who wants to protect the environment by bringing a case to the court system must be one of the individual persons who is protected by the rules according to which the matter has been settled. The person also has to prove, that s/he is significantly affected by the decision as compared to other citizens. An judicial complaint could be filed on behalf of the plaintiff or on behalf of a group of people (e.g. by an non-governmental organisation) for the purpose of preventing the sites of an unwanted polluting activity in the community. The basis of the lawsuit could be the developers’ non-compliance with an applicable law statute or with the terms included in a licence.

The owner of the damaged nature has the right to claim compensation, if he has suffered economic losses. But, he does not have the duty to use the received money on restoration. The character of private law - only giving the owners right to bring cases (not duties) - explains why the employment of sanctions depends on whether the private persons will bring the case to court and submit relevant claims.

More often than not, there is no private appropriation of the water, ground water, wild flora and fauna. This generates difficulties in relation to nature protection by enforcement based on traditional liability law, as ownership is the basis for protection of interests by the courts. As long as there is no legal or natural person, who has the right to sue on behalf of the environment, the costs of restoration cannot always be recovered by use of liability rules. In legal systems accepting the goals on sustainable development, it consequently becomes necessary (by clear acts) to explore more collective ways of sharing the responsibilities for polluting activities and for the costs of restoration.

In this respect, the implementation of the Aarhus Convention is of importance. The Danish Act on Implementation of the Convention (from 2000) does, however, not include rules concerning who has the right to bring a case to the courts. Neither does the Danish Environmental Liability Act (from 1994) contain provisions on standing for organizations. It was, however, a subject to discussions during the preparation of both acts.⁴⁹ The majority of the Committee preparing the Environmental Liability Act did not find any reasons to include a rule on a right of action for environmental organisations. In principle, it was argued that such a right of action would constitute a serious breach of one of the fundamental principles of the Danish tort law, i.e. that only the person who has an actual or possible disposal of the damaged property may institute an action and claim damages. Moreover, the majority supported its conclusion on the view that the rules on the rights of public authorities to interfere and, consequently, to claim refund for the expenses by the wrongdoer, combined with the introduction of strict liability for damage, would adequately prevent damage to the environment. Later, history has shown that this assumption was untenable. It has also been clarified by the reports of the Committee on the Contaminated Soil Act (the Act is from 2000),⁵⁰ that this view was untenable with respect to effective public enforcement. In the view of the majority of the above-mentioned Committee on the Environmental Liability Act, if fiercer rules were necessary for preventive reasons, this should be done by way of extending criminal liability on specific areas, e.g. by means of higher penalties for violation of relevant provisions of environmental legislation, instead of a right of action for environmental organisations. The Danish Parliament followed the recommendation of the majority. Thus today, environmental organisations that (according to legislation) do not have any special rights in relation to the environmentally damaged property (e.g. in the form of a fishing right or ownership), cannot commence court proceedings with a view to claim action for the damage incurred or claim a refund of their costs for the re-establishment.

5 Perspectives Concerning Compatibility of Law

As stressed above, in international law the expansion of liability concepts reflects the general legal reforms based on sustainable development and the environmental principles – especially the principle of precaution, the principle of taking care of the pollution at the sources and the polluter pays principle. One of the important characteristics by international environmental law is the impact of soft law, not least as a vanguard of new approaches and concepts, where one of the most important is the concept of sustainable development. The sustainable

⁴⁹ See Committee on the new Environmental Liability Act, *Report No. 1237/1992 on Liability for Environmental Damage*.

⁵⁰ The Report from the Agency on Environmental Protection No. 1/1995 *Lovgivning og praksis - forurennet jord* (Law and Practice - Polluted Soil) and the Report from the Agency No. 2/1996 *Betænkning om forurennet jord* (Report on polluted soil). Both reports are results of the works of the Committee on recommendation concerning a new Contaminated Soil Act.

concept provides an impulse for the development of new legal rules and more precise principles.

The compatibility of international and national environmental law is bridging the gap between the international and the national field of environmental law.⁵¹ Treaty performance is closely related to the concept of state liability, which concerns the question of states being held accountable against other states under international law for not complying with their obligations. The interaction between international and national law is a consequence of the fact that the international instruments have been negotiated by the ratifying states. The International Court of Justice has in this respect regarded soft law instruments and principles as e.g. sustainable development in motivation of various decisions (based on a dynamic approach). The influence can be found in the case law as the Statutes for the International Court of Justice in Haag article 38 includes general principles of law as a way of complementing custom and treaty law. A recognition of the role of individuals and non-governmental entities in the international context for improving the protection of the environment and the implementation of international law is also an important reason for the compatibility.⁵² The access to justice approach, mentioned above, is therefore, very important.

The European Community law implements several international instruments as part of the EC law – and hereby ensures compatibility. The Community also influences the international law as the EC institutions are taking part in the international negotiations. The horizontal compatibility is also of relevance. When negotiating international environmental agreements, the EC presents a unified position, voiced by the representative of the country holding the Council's Presidency at the time. This contributes to the effectiveness of EC environmental policy, as it facilitates consensus among the Member States.⁵³

The need for a dynamic approach to the connection between inter-state rules and the legal situation of individuals is also acknowledged within the European Community and the jurisprudence of the European Court of Justice (ECJ).⁵⁴ The Court is willing to question the compatibility with Community law (e.g. Community environmental law) of national rules pertaining to procedures and remedies in order to secure the effective protection of Community rights. The Court enunciates three conditions to meet for Community law to confer a right to reparation: breach of rule intended to protect individuals⁵⁵ and sufficiently

⁵¹ See Jonas Ebbesson, *Compatibility of International and National Environmental Law*, §Iustus Förlag, 1996 – see concerning the definition of compatibility pp. 37ff.

⁵² See Ebbesson *Compatibility of International and National Environmental Law*, §Iustus Förlag, 1996, p. 56.

⁵³ See Adrian Fabra, *International Commitments as an Influence over Effectiveness of EC Legislation, Effectiveness of EC Environmental Legislation*, in Report Workshop, London 1998, pp. 35f.

⁵⁴ See Ebbesson *Compatibility of International and National Environmental Law*, §Iustus Förlag, 1996, p. 56.

⁵⁵ Joined Cases C-178/, 179/, 188/, 189/ and 190/94 *Dillenkofer and Others v. Federal Republic of Germany* (1996) ECR I-4845, p. 21.

serious fault as well as direct causal link between the breach and the damage.⁵⁶ The case law established by the ECJ seeks to strike a balance between the need to ensure the effective protection of Community rights (e.g. in relation to substantive environmental quality standards) and respect for the autonomy of the national legal systems. Establishment of state liability in damage by the ECJ is assessed to be the high point in the evolution of the principle of primacy from a general principle of constitutional law to a specific obligation on national courts to provide full and effective remedies for the protection of Community rights.⁵⁷

The ECJ has extracted several law and order principles (protecting e.g. property rights) from the traditions in the Member States. This is the case in relation to the principle of proportionality, the principle of legal certainty and respect for legitimate expectations, and the principle of respect for fundamental individual rights. As part of Community law and policy, the liability concept can be reasoned by the interaction between trade and environment (based on the principles of harmonization and integration), the interest in a more effective enforcement of EC environmental law and the respect of subsidiarity.⁵⁸

The law of tort in the EU Member States is firmly based on the fault principle.⁵⁹ Tort liability is judge made, and originally limited to individual wrongs by public servants. The doctrine is now capable of accumulating also with different public bodies to satisfy the requirements of public negligence and other liability standards.⁶⁰ The national traditions and/or constitutions regulating the allocation of powers in the States have general requirements regarding protection of property rights. Such requirements provide that no-one can be deprived of his private property rights, unless in accordance with the law and statutes and provided that full compensation is being paid. It has been explained by the former president of the ECJ - *Ole Due* - that the ECJ examines the solutions to be found in the national laws of Member States in three kind of situations – all of relevance in relation to environmental liability issues: (1) when a legal concept borrowed from national law has to be given an autonomous content; (2) when the link between a Community rule and the general systems of administrative, procedural or criminal law in the Member States has to be defined; and (3) when general principles of law have to be

⁵⁶ W. Van Gerven *Taking Article 215(2) EC Seriously*, in Jack Beatson and Takis Tridimas (eds.), *European Public Law*, Hart Publishing, 1997, pp. 37.

⁵⁷ Takis Tridimas, *Member State Liability in Damages for Breach of Community Law: An Assessment of the Case Law*, in Jack Beatson and Takis Tridimas (eds.), *European Public Law*, Hart Publishing, 1997, p. 32.

⁵⁸ For the purposes of this article, the term market-based-regulation refers to more recent environmental reforms that attempt to use market forces more extensively than in traditional regulations.

⁵⁹ Jack Beatson and Takis Tridimas (eds.), *European Public Law*, Hart Publishing Oxford, 1998, p. 3.

⁶⁰ Henning Skovgaard, *Offentlige myndigheders erstatningsansvar* (Professional Public Liability), Gad, Copenhagen, 1983, p. 336.

shaped by case-law.⁶¹ Therefore, without new initiatives the tendencies based on new constitutionalism, mentioned above in part 1.3, could be the strongest.

However, the White Paper and the Policy Programmes described above in part 3 indicate a new direction in the Community environmental liability system based on the international developments. The results can be a new Directive and a harmonization of the environmental liability laws in all Member States – and consequently compatibility between international law, Community law and national law.

⁶¹ Ole Due, *Danish Law in a European Context*, in Dahl, Melchior, Rehof and Tamm (eds.) *Danish Law in a European Perspective*, GadJura, 1996, pp. 14ff.