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THE ENVIRONMENTAL DAMAGE

Introduction

In the last few years environmental law had such widespread development in Italy to provide by now for numerous sets of rules determining duties and liabilities for undertakings. However, the new laws caused serious uncertainty with respect to the various accomplishments to be borne by the same.

In the legislative scene, as regards the discipline of activities considered as (environmentally) potentially dangerous for the environment, there are together with a series of rules providing for modalities and conditions for the carrying out of some activities (granting of authorisations, certificates, respect of certain specific standards in the production, use of certain "clean" methodologies etc.) special provisions in matter of civil liability.

From a first point of view, these duties arise from that part of "public" environmental law which is aimed at subordinating the exercise of the productive activity to authorisations or to the implementation of certain conducts. The non fulfilment mainly involves administrative liability.

From a second profile, the new rules discipline liabilities connected with damages that may be caused by undertakings in the carrying out of their activities, regardless their compliance with the above mentioned administrative rules, and with a subsequent obligation for them to compensate the damage.

1. Environmental Damage in Law No 349 of 8 July 1986

The notion of "environmental damage" was introduced into the Italian law with Law 8 July 1986 No. 349 *Establishment of the Ministry of Environment and provisions in matter of environmental damage*.

Article 18 of L. 349 of 1986 provides for the compensation of environmental damage in favour of the State, disregarding the breach of subjective rights of third persons: *Any malicious or*

negligent act in breach of provisions of law or measures adopted on the base of law, which compromises the environment, causing damages to it or altering it, deteriorating or destroying it partially or in total, makes the author of the fact to compensate the damage to the State.

The provision states that:

1) The judgement on environmental damage falls within the competence of the ordinary judge and therefore does not fall within the competence of the Court of Auditors, despite the fact that the responsible persons are directors or civil servants;

2) The State or the other territorial authorities whose goods suffered from the harmful act, are responsible to raise an action of environmental damage and for the institution of a civil action in criminal proceeding as well.

3) Environmental associations, identified on the basis of specific proceedings indicated by Article 13 of the Law, may, on one hand, report the acts prejudicial to environmental goods in order to entreat for an action by the legitimated subjects; and, on the other hand, intervene in trials for environmental damages, and appeal before the administrative court for the unlawful acts to be annulled.

4) The judge shall provide for the *restitutio in integrum* of the state of places;

5) As regards the determination of compensation, if the calculation of the environmental damage can not be determined, the judge shall decide according to equity on the basis of three concurrent criteria: gravity of individual negligence, costs necessary for the *restitutio integrum*, profits achieved by the transgressor following to his harmful conduct;

6) In case of joint fortfeasors in the same harmful event, each person shall be liable within the limits of its own individual liability.

The real bearing of the provision contained in Article 18 of L. 349/86 nowadays could not be correctly understood without a constant and precise reference to case law, which quite often gave rise to interpretations contrasting with the law.

It is enough to consider that, the above mentioned provision was reinterpreted by case law as involving an absolute liability or at least a joint liability. (See Cass civ. 1.9.1995, n. 9211, Sez.I, with a critical note by FEOLA *Discarica abusiva e danno ambientale: applicazione retroattiva dell'art. 18 L. 349/86 e responsabilità (solidale) dei produttori di rifiuti e del proprietario locatore della discarica*, in *Resp.civ.prev.*, 1996, 112).

The substantive non application of the law by the oscillating judgements on various subjects has generated uncertainty in the sector and has given rise to the need for reforming the discipline of liability in the branch at issue.

2. Environment between the Legislative Gap and Interpretations in Case Law and based on the Doctrine

The 1986 law does not specify the meaning of environment. The only sure fact is that with Article 18 of Law 349 the legislator wanted to extend the preservation of the environment to those goods which traditionally were not protected goods, such as health and property. It is left to the intepreter to specify the contents and limits of such safeguard.

Even before Law 349/86, the Italian doctrine had already debated for a long time on the notion of environment (see, in: GIANNINI, *Ambiente: saggio sui diversi suoi aspetti giuridici,* in *Riv.trim.dir.pubbl.,* 1973, 15; ANASTASI, *Premesse ad uno studio per la qualificazione dell'ambiente naturale come bene giuridico,* in *Scritti in onore di Salvatore Pugliatti*, Milano, 1978, vol.I, t.1, 3; POSTIGLIONE, *Ambiente: suo significato giuridico unitario,* in *Riv.trim.dir.pubbl*., 1985, 32), the notion had already been used in all its different accepted meanings by the Italian legislator (see. CARAVITA, *Diritto pubblico dell'ambiente,* Bologna, 1990, 43).

Case law had to engage in the matter several times.

The Constitutional Court intervened in the debate, and configured environment as: *A fundamental right of the person and fundamental interest of the community* adopting *a unitary concept of the environment including all natural and cultural resources* which comprises *the preservation, the rational management and the improvement of natural conditions,(air, water, soil and territory with all its components) the existence and preservation of the genetic complement of earth and sea, of all animal and plant species living in it at their natural state and the human being, in all its exspressions*. (see: Constitutional Court. 22.5. 1987, n. 210, in *Riv.giur.amb*., 1987, 334, with a note by BORGONOVO RE).

In a judgement adopted subsequently and which was to become very famous, the Constitutional Court considered the environment as "*a good protected by law, since it is recognised and protected by provisions*", " *a unitary immaterial good, although made of various components; that can each, also isolated and separate, constitute the object of care and protection, but all together can lead again to a unitarian issue*", and surely in no case can be the "possible object of a subjective situation of the appropriating type" (see. Constitutional Court. 30 .12. 1987, n. 641, in *Foro it*., 1988, I, 694 with a note by GIAMPIETRO).

Later, also the Court of Cassation defined environment as an *immaterial good, recognised and protected by law in its unity,* which however *can be divided and according to a current meaning given by doctrine regards the environment as territory planning; environment as richness of natural resources; environment as landscape, with its authentic and cultural value; environment as a condition of healthy life* (See: Court of Cassation 25.1.1989, n. 440, in *Giust.civ*., 1989, I, 560, with a note by POSTIGLIONE. See also

Cass. 9 .4. 1992 n. 4362, in *Mass. Giust.Civ*. 1992, 588).

3.Environmental Damage and Probatory Problems

Under the terms of Article 18 of Law 349/86 environmental damage is deemed to occur each time an "*injury*" to the environment occurs. The harm eventually may derives from a simple alteration, deterioration, or total or partial destruction (for an intepretation in the sense that not all damages, but only those of particular gravity can be considered as harm to the environment; see : CAPPONI, *L'illecito ambientale nella formulazione di cui all'art. 18, comma 1, l. 8 luglio 1986, n. 349: dal danno alla compromissione,* in *Dir. dell'impresa,* 1990, 489).

In Law 349/86 the environmental damage was generally defined as a collective damage, not necessarily of property related nature (CASTRONOVO, *Il danno all'ambiente nel sistema di responsabilità civile*, in *Riv.crit.dir.priv*., 1987, 511). It adds to other hypothesis of damage caused by pollution, which can be raised under the Italian general law.

On the concept of environmental damage the civil sections of the Court of Cassation elaborated a construction which goes beyond the mere breach of the rule and necessarily requires for a harmful event to happen: "*The concept of environmental damage ... accepts the notion of environmental harm consisting in the partial or total alteration, deterioration or destruction of the environment. This means that a merely formal violation of the provision in matter of pollution is not enough, and that the environmental harm has to be inferred by the State or the territorial entities*" (see Cass 1.9.1995, n. 9211, *cit*.).

Since the peculiarities typical of that sector, another difficult problem concerns the proof of cause and effect in matter of environment.

It shall be considered that the damage in itself or its consequences can come to the light even many years after the harmful action happened, with the subsequent difficulties in demonstrating the relation between the conduct and the harmful event. In this context, quite frequently the damage is not the consequence of one single act: in case of so called cumulative immissions it is quite difficult to determine the percentage of liability of each polluter. With respect to the polluting activity, some legal systems solved that problem by means of specific presumptions established by law (see POZZO, *Danno ambientale ed imputazione della responsabilità, Esperienze giuridiche a confronto*, Milano, 1996 , 315 ss.).

The question arises whether, in the absence of the law, the use of presumptions is admissible all the same, provided the latter are heavy, specified and concordant, as established by the Court of Cassation in matter of water pollution, under application of the corresponding anti-pollution provisions.

4. Environmental Damage and Joint Moral Injury: The Seveso Case and the Judgement issued by the Court of Cassation (20.6.1997 No.5530).

In case of difficulties in proving the relation of cause and effect of an actual and certain event, and a future and uncertain injury, the case law of merits followed by several authors made the attempt to classify that typology of damage in the frame of the moral injury caused by the environmental damage (RIGHI e VERARDI, note to Corte d'Appello di Milano 15 .4.1994, n. 667, in Corr. Giur. *1994, 1002;. Moreover, with respect to the reconstruction of compensation of moral injury in case of danger generating offences, see PETRELLI,* Il danno non patrimoniale, *Padova, 1997, 191 s.).*

This was the solution found by the Milanese courts in the famous case regarding the emission of dioxin in the Seveso area, with respect to those persons who had to undergo specific sanitary procedures, which became necessary as a consequence of objectively alarming symptoms, that however could not prove the existence any damage. (App. Milano, 15 .4. 1994, n. 667, in *Riv.giur.amb.* 1995, 327, with a note by DE FOCATIIS).

Lastly, with judgement of 20 .6. 1997, No 5530 which will soon be published in *Danno e responsabilità*, No. 6, 1997, the Court of Cassation, quashing the judgement issued by the Court of Appeals of Milan in the same case, excluded the possibility for subjective moral injury to be compensated in the cases in which the damage occurred concurrently to the even severe injury of the healthiness of environment following to a negligent disaster, unless this is the consequence of psychic and physical impairment or of other types of event causing a property related damage. The Court of Cassation, referring to the famous judgements by the Constitutional Court in matter of moral injury, underlined that it is quite different if the suffering *per se* only determines *alterations of the person's mind; in such case the situation can be regarded in terms of biological damage.*

5. Definition of IIlicit Conduct under theTerms of Article 18 of Law 349/86 and theFfunction of Civil Liability in Matter of Environment.The Interpretation in Case Law

Article 18 of Law 349/86 requires for the agent's conduct to be configurated as "*a malicious or negligent act violating provisions of law or provisions adopted on the base of law*". This is a case of typical liability which according to the Italian case law can fit into the scheme of tort (responsabilità aquiliana). Both the Constitutional Court (with judgment No. 641 of 30.12.1987 cit., in which the Court admitted that the liability ex Article 18 correctly fits into the context and scheme of tort) and the Court of Cassation (lastly with judgement of 1.9.1995 No 9211, cit, in which the judges confirmed that "*the environmental damage has to be seen in strict connection with Article 18, since the particularity contained in it...which, though being part of it. distinguishes it from the genus aquiliano*".

It was denied by several Courts of merit that this liability can be deemed similar to the so called “punitive damages” of the US law (e.g. Pret. Milano-Rho, 29 .6. 1989, in *Foro it.* 1990, II, 526 in which the judge specified that the compensation was not to be intended as punitive damage, but rather as a practical application of the compensation criteria provided for by Article 18 of law No 349/86.). And this issue was conversely recognized by the Italian Court of Cassation (Cass. 1.9.1995,No 9211, cit: “*In the discipline of environmental damage, considered in a unitarian sense, the law not only took into consideration the compensatory profile, but also the sanctioning one*.).

The doctrine was more sceptical in considering such hypothesis as a tort, pointing out its detachment from private law schemes and the perspective of a protection, essentially of public law nature (the debate was quite ample; for all and further bibliographic referrals see: COGGI, *Sul problematico inserimento del danno ambientale nel nostro sistema di responsabilità civile e sulla categoria del danno futuro*, in *Resp.civ.prev.,* 1991, 302).

It shall be reminded that the provision punishes the injurious conducts which are not only characterised by a coefficient of guilt, but also by the presence of “*iniuria*”, i.e a violation of law or of measures adopted on the base of law. Any interpretation seen form the perspective of absolute liability should therefore be precluded.

In other words, the Italian legislator, did not want to adopt the choices made by other law systems, nor did he accept the suggestions coming from the Italian doctrine, which was more in favour of the introduction of absolute liability in that respect. (TRIMARCHI, *Responsabilità civile per danno all’ambiente: prime riflessioni*, in *Amministrare,* 1987, 189). Furthermore, he did not want to select any particularly dangerous activities and provide for a hypothesis of more severe liability, and generally spoke of : “*Whoever damages the environment*”.

For reasons pertaining to the genesis of the provision, the Italian choice appears to be traced upon the path of criminal law models. The quoted provision recalls –at least in terms of assonance – Article 42 of the Criminal law code which defines the negligent act as the one due to non observance of laws regulations, orders or disciplines cfr. BAJNO, *Profili penalistici nella legge istitutiva del Ministero dell’Ambiente*, in: *Studi parlamentari e di politica costituzionale*, 1986, 81).

A confirmation of this assumption can be drawn from the criteria applied by the judge to determine the entity of compensation under the terms of Article 18, No 6, among which the gravity of individual negligence can be found, with an evident reference to Article 133 Criminal Code and furthermore, to the fact that the subjective feature is designated as the instrument by means of which to attribute the obligation of *restitutio in integrum* between the guilty persons who acted jointly (Article. 18, No. 7), derogating the rule of solidarity of Article 2555 Civil Code (on this matter see FRANZONI,

Il danno all'ambiente, in *Contratto e Impresa,* 1992, 1015).

The wording of the provision, although defended with authority, can appear as unsatisfactory from certain points of view.

Furthermore, it was remarked that the Italian solution of 1986, which diverges from the trend followed by most western legislation, is the cause for relevant incoherence at a domestic level TRIMARCHI, *op.ult.cit.*). In particular, it shall be reminded that Italy is a signatory of the 1961 Brussels Convention on civil liability for damages deriving from hydrocarbons, and that the Convention introduces a principle of absolute liability for damages caused to the waters and the marine environment. (Convention of 29 November 1961, which became executive in Italy with Law 6.4.1977 No 185). Furthermore, the law on the discipline of seawaters of 1982 (Law *979 of 1982) is based on the principle of objective liability imputation. Article 21 sets forth that, "with respect to the damages caused by the violation of provisions provided for by the present title, taking into account the provision of Article 185 Italian Criminal Code, the captain, the owner or the ship-owner are jointly liable for the compensation to the State for the costs incurred both for the cleaning of waters and sandy shores, and for the damages caused to the marine resources*". That joint obligation also exists in cases where prohibited substances had to be discharged into the sea for the safety of one's own ship or that of third parties. The same also applies if prohibited substances are discharged into the sea waters as a consequence of an average or of an inevitable leak and all reasonable precautions were adopted after such average or subsequent to the discovery of the leak, in order to prevent or reduce the spilling of the said substances into the sea.

It derives that, in the Italian law, there are two different criteria of liability attribution in matter of water pollution: there is a regime of liability for malice or negligence for landlocked waters, while a principle of absolute liabiltiy applies to sea waters. It shall be reminded, once more, that also Law 31 December 1962 No 1860 on the peaceful application of nuclear energy, and Law 25.1.1983 No 23, for damages caused by space objects, introduces, in a special way, an absolute liability without any possibility of discharging proof.

Article 18 of Law 349/86 provides moreover for an exception to joint liability in matter of environmental damage with respect to what is provided for by Article 2055 Civil Code.

Some authors underlined how joint liability is in contrast with the deterring aims of civil liability in matter of environmental damage, since solidarity would only find a justification in those cases in which the liable ones can affect each others' activities and can somehow have influence on them. This won't apply to environmental matters, where pollution by an undertaking cannot be considered as connected to the pollution caused by another undertaking. In this sense joint liability may give rise to situations which are in clear contrast with the function of civil liability. Such joint obligation upon

undertakings adopting expensive technologies to avoid environmental pollution, will have negative and disencouraging effects. In fact, this undertaking will risk to be escussed before the party which omits to fulfil the obligation imposed by law, maybe, because it is in a precarious financial situation. (see: TRIMARCHI, Per una riforma della responsabilità civile per danno ambientale, *in* Per una riforma della responsabilità civile per danno all'ambiente, *Milano*, *1994, 244*).

Also, with respect to the criteria of imputation of liability the Court of Cassation assumed the "corrective" role of the legislative provision. In the judgement of 1 September 1995, No 9211 (cit.) the Court of Cassation had the opportunity to affirm that, with respect to the offence performed by the undertakings, that are responsible for the production, circulation and spilling of special industrial waste without adopting adequate measures, Articles 2043 and 2055 apply all the same, thus providing for a rule of absolute and joint liability for the same.

6. The Quantifying Criteria in Matter of Environmental Damage

It was already remarked that the Italian Law No 348 of 1986, according to its current interpretation, identifies the environment as the object of a direct protection, independently from the violation of any other subjective right, but it leaves it for the interpreter to give precise definition and contents: subsequently the Italian interpreter will have to face the difficult question of evaluating the injured good.

Nonetheless, at legislative level there is a lack of provisions guiding the operation of determining the quantum (this is different from what happens in other legal systems: see POZZO, La determinazione del "quantum" del danno ambientale nell'esperienza giuridica degli Stati Uniti, in Quadr., 1990, 324) since the Italian legislator referred this delicate task to the judge, establishing that in absence of any precise assessment of the damage, the judge shall give an evaluation on the basis of equity. Paragraph 18 of the same law specifies that "in the ruling, if possible, the judge orders the restoration of the state of places at the liable person's costs, omitting the exception provided for by Article 2058 Civil Code; "therefore the judge can provide for the compensation to be performed in an equivalent way if the restoration in the specific form turns out to be too onerous for the debtor".

Notwithstanding the formal position of restitutio in integrum in a paragraph following the one providing for money compensation and despite the fact that the restitutio shall be provided independently from an specific request made by the party involved and with the only limit of admissibility connected with the verification of the material non feasability, the doctrine agrees with the opinion according to which restoration shall have priority over any equivalent conviction. The Court of Cassation also confirmed that the restoring of places has a dominant position among the forms of protection provided for by Law 349/86 (Hereto see Cass, 25.1.1989, No 440 cit.). The choice in favour of the compensation criteria in the specific form should avoid the difficult task of

determining the compensation by equivalent whenever the restoration is in any case possible, independently from its excessive onerousness.

The judge will only quantify according to equity, if the restoration of places is not feasable and provided that no exact quantification of the damage is possible either.

For cases where neither the restoration nor a precise quantification are possible, the judge shall determine the amount according to equity, in any case applying the already mentioned criteria provided for in paragraph six of Article 18, i.e. the gravity of individual negligence, the cost necessary for the restoration and the profit achieved by the transgressor as a consequence of his harmful behaviour with respect to the environmental goods.

These are, however, heterogeneous parameters, absolutely non exhaustive of the problem regarding the quatification of damage, which raised the doubt whether this was a private sanction rather than a true compensation (DE CUPIS, La riparazione del danno all'ambiente: risarcimento o pena, in Riv. dir. civ.,1988, II, 401).

The criterion of the gravity of negligence was introduced into the legislative text just by chance, on one hand, because of the influence of criminal law models and, on the other, because of the traces of the primitive wording of Article 18 that can still be found in the final text. The maxim drawn from the case law of the Court of Auditors is in fact a degraded version of the primitive wording. In any case, the legislator's choice is in line with part of the modern doctrine of civil liability, which rejected the old dogma of indifference between the various grades of neglicence and the equivalence between negligence and malice and suggested that it is sistematically coherent to allow the judge to increase the entity of the compensating obligation depending on the severeness of the reprovable conduct held by the damaging person (CENDON, Il profilo della sanzione nella responsabilità civile, in Contratto e Impresa, 1989, 886).

In consideration of the above, nonetheless the choice gives rise to some problems. In fact, since the judge can only evaluate the negligence if neither the restoration of the state of places nor the exact quantification of the damage are possible, in order to reach a solution eliminating this disparity of remedies, the doctrine suggests for the judge to take the gravity of individual negligence into account with the limitation that, in any case, compensation shall not exceed the environmental damage assumable (even if not exactly quantifiable) in the specific case.

The second criterion is the cost necessary for the restoration. This criterion is of no help for the purpose of quantification, since the judge has first of all to order the restoration of the state of places, while he shall only quantify the damage if the restitutio in integrum is not possible. The contradictory character of that criterion appears to be obvious, if the cost necessary for the restoration cannot be determined because restoration is no longer technically feasable.

Finally, the last criterion stated by the law takes into account the profit achieved by the transgressor. This criterion has a mere auxiliary function: it can be useful to close a loophole in order to prevent situation in which the profit gained by the polluter exceeds the amount of compensation, but it is useless when it comes to define the problem.

It was remarked that for the entrepreneur the cost of compensation calculated on the basis of traditional rules can be lower than the actual damage caused. It was also shown that by means of the latter parameter the judge has a ductile instrument to transform compensation into an adequate incentive for the entrepreneur to avoid to cause similar damages in future. Several references were made to the US experience of exemplary and punitive damages (PATTI, La valutazione del danno ambientale, in Riv.dir.civ.,1992, II, 463).

In general terms, the question was raised whether - on the base of those criteria - a form of compensation could be identified, or whether one should more correctly consider this a true sanction imposed to the polluter by the legislator (DE CUPIS, La riparazione del danno all'ambiente: risarcimento o pena, op. loc. cit.). In this respect, some authors spoke of a possible "fraud of labels", since the provision of Article 18 only apparently follows the civil model based on compensation, since it is deemed to actually be a rule following the path of the criminal offence (BAJNO, Profili penalistici nelle legge istitutiva del Ministero dell'Ambiente, cit.).

In fact, these criteria deeply diverge from those normally used with respect to the general civil law , in which in case of violation of the principle of neminem laedere of Article 2043, the quantum respondeatur is adjusted to the objective entity of the damage whilst it does neither consider negligence nor the profit gained by the damaging person (BIGLIAZZI GERI, L'art. 18 della Legge n. 349 del 1986 in relazione agli art. 2043 segg. c.c., in Riv.trim. appalti, 1987, 1153).

7. Continued: Application of the Abovementioned Criteria in the Case Law of Merit

From 1986 to date, in case law it is known one sentence only in which the judge came to a quantification of environmental damage on the basis of the criteria established by Law 349/86.

It's the well known judgment by the Judge of the Lower Court of Rho (Pret. Milano-Rho, 29.6.1989, in *Foro it.* 1990, II, 526, with a note by DE MARZO) with respect to an issue of malicious pollution of a watercourse. In the above judgment the parameters of Article 18 are taken into consideration with the aim of quantifying the compensation of damages. In the judgement the maximum gravity of negligence was applied, since the provision established by the legislator had been bypassed and all efforts made by the state and by local authorities to repress the phenomenon of pollution in a densely populated area had been frustrated by a single event.

The second parameter, i.e. *the cost necessary for the restoration*, was

evaluated with respect to a particular existing project for the reclamation of the body of water which includes the said stream.

Finally, the profit gained by the transgressor was considered in the case at issue as very high in consideration of the extremely scarse market offer of waste treatment services compared with the regular treatment of toxic and harmful waste and the relevant quantity of waste to be treated.

However, as admitted by the Judge of the Lower Court, the recourse to those parameters did not allow to determine a precise amount and it is therefore difficult to understand which were the logical steps by the judge to come to the compensation amount of 500 million. In fact, the criteria of Article 18 do not give any indication with respect to the items of damage which can be taken into account in the quantification of compensation and do not help to understand what are the consequential damages and the loss of profit in matter of environment ex Article 1223 Civil Code.

Neither the law nor the case law seem to yield adequate answers in this respect.

In fact, not even the information on the proportionate relationship between the compensation and the value of use of the environment coming from the Court of Cassation seems to be of great help (Cass. 1.9.1995, No 9211 asserting that since the environment is not on the market, and therefore not susceptible of a monetary evaluation according to market prices, it has to be evaluated on the base of its value of use).

According to a classic reconstruction in the economic doctrine (BRESSO, *Per un'economia ecologica,* Roma, 1983, 304), the benefits citizens can draw from the environmental resources are not only derived from *the value of use* of the resources directly pertaining to the use of the environmental resource itself, like fish from the river, for the fisher or mushrooms for those collecting them, but also from *the value of non- use* i.e. the value which the subject attributes to nature, when he is in front of a beautiful landscape or goes for a walk in the fields; furthermore by the so called *option values* that individuals attribute to certain environmental goods independently from their direct or indirect use, and which derive from the awareness of their wish to keep a property intact for a possible future use.

8. The Problem of the Evaluation of Environmental damages and the Choices made by the Council of Europe of 1993 in the Lugano Convention

The fact that the problem of the estimates in the field of environment still remains substantially unsolved at a worldwide level is not only demonstrated by the US failure in this matter (see POZZO, *La determinazione del "quantum" del danno ambientale nell'esperienza giuridica degli Stati Uniti*, *op.cit.*, 324), but also by the recent elaborations at a supranational level. The Council of Europe Convention on civil liability for damage resulting from activities dangerous to the environment ratified in Lugano on 21-22 June 1993

(on which see GIAMPIETRO, *Responsabilità per danno all'ambiente: la Convenzione di Lugano, il Libro verde della Commissione CEE e le novità italiane, Riv.giur.amb.,* 1994, 23) attempts to supply a legal definition of environment which should not only include abiotic natural resources (such as water, air, soil), and biotic (flora and fauna), but also the interaction among them. "Environment" includes: 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 (Article 2.10 of the Convention).

One of the major innovative aspects of the text appears to be the one related to the notion of *damage to the environment* which, in the definition given by the Convention, consists in the impairment of the environment in so far as it is not considered to be damage to goods or people, provided that the impairment of the environment, causes a loss of profit (Article 2.7. of the Convention).

The *direct damage* to the environment consists in the cost of preventive measures and in reinstatement measures aiming at reinstating or restoring damaged or destroyed components of the environment, that existed before the accident occurred. If the *restitutio in integrum* is technically impossible, the person which caused the impairment can be forced to introduce, where reasonable, the *equivalent* of the destroyed resources into the environment.

If the *restitutio in integrum* is no longer possible because the impairment caused an animal or plant species to definitely disappear, there won't be any financial compensation.

In this respect the Explanatory Report to the Convention (Council of Europe Document No 1 of 26 January 1993) states that the damage direct to the environment, i.e the environment in itself, is not susceptible of a financial evaluation: *"such damage cannot be evaluated financially"*.

9. Legitimation of the State and of the Territorial Authorities affected by the Goods Object of the Harmful Action to Act in the Trial for Environmental Damages

A further problem consists in the determination of the active subject legitimated to act for compensation of the environmental damage.

The third paragraph of Article 18 of Law 349/86 states that the claim for compensation of the environmental damage is promoted by the State even if it is raised before a criminal court, and by the territorial authorities affected by the goods hit the harmful act.

The raising of the action shall be considered as compulsory and the Ministry of Environment is competent for it.

At this regard, there are numerous justifications offered by the doctrine concerning the subject who is entitled to act for the environmental damage in favour of the State and of the other

public Authorities, (for a reconstruction see GRASSO, *Una tutela giurisdizionale per l'ambiente,* in *Riv.dir.proc*., 1987, 508).

The Constitutional Court intervened in different occasions to convalidate the constitutionality of the provisions in matter of entitlement to the compensation of the environmental damage. It first asserted the clear groundlessness of the issue of constitutional lawfulness of Article 18, first, second and third paragraph of Law 8 July 1986 No 349 establishing the provisions for the compensation of environmental damages (Corte cost. 29 .12. 1988, No 1162, in *Riv.giur.amb*., 1990, 267, with a note by GIANNUZZI). With a subsequent ordinance it then specified that the Regione too is entitled to raise an action for the environmental damage concerning the goods located in its territory, as well as to institute a civil action in a criminal case against the authors of the act causing the environmental damage to the goods located in the regional territory in order to raise in that place the corresponding action for compensation (Corte Cost. 12 .4. 1990 n. 195, in *Riv.giur.ed*., 1990, I, 483).

The Court of Cassation confirmed in the already quoted judgement 440/1989 that "*the State, as the highest authority representing the nation, is entitled to the reclamation of the environmental damage*".

In the case law of merit various positions are represented.

In a judgment slightly subsequent to the entry into force of the law, the judges of the Tribunal of Vallo di Lucania complied with the configuration of territorial authorities as State susbstitutes in court (Judgement of 13.11.1986, *Giur.it*., 1987, II, 184 states that in order to coordinate No 1 and No3 of the said Article 18, since only the State is entitled to the compensation for the environmental damage, it shall be considered that the territorial authorities as of No 3 only constitute State substitutes in court in matter of environmental damage).

In a subsequent judgment the Lower Court of Lendinara (Judgment of 26 .4. 1988, in *Foro it*., 1989, II, 193) recognised the concurrence of two actions: one ex Article 18 of Law 349/86 for the compensation of environmental damage to the State and the other based on the tort for which the Commune is entitled to compensation.

There are other courts of merit which acknowledged the entitlement *iure proprio* for the territorial authorities to act for compensation ex Article 18 Law 349/86 (e.g. Pret. Rovigo, 4.12.1989, in *Foro, it.*, 1990, II, 517). Moreover, that position is also shared by the Court of Cassation (Cass. 24.1.1989, in *Cass. pen*., 1989, 2050).

The Civil sections of the Court of Cassation also shared the same point of view (Cass. 12.2.1988 n. 1491, in *Giust.civ*. 1988, 818; and Cass. 17.1.1991 n. 400, in *Giust.civ.* 1991, 1190) and, beyond stating the substantial point raised by the territorial Authority in terms of subjective right (both cases involved a Commune), also acknowledged the ordinary judge's

jurisdiction to deal with the request put forward by a Commune, which acts with the purpose of obtaining a precautionary and urgent measure denouncing a danger to the healthiness of the environment and the health of the citizens.

It is worth highlighting that for territorial authorities other than the State, the Courts recognised the possibility of obtaining compensation for damages other than environmental ones, consisting in costs incurred to limit discomfort and dangerous consequences of criminal behaviour (In this sense see: Pret. Rovigo, 4 .12.1989, *cit.;* and also see Trib. Vallo della Lucania, cit.; Cass. pen. 21.7.1988, in *Riv. pen.*, 1989, 521).

Contributions to this issue
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