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Environmental Protection in Disputes with a Foreign Element

TEAM MONTENEGRO

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"The law must be stable,

But it must not stand still!"

(Nathan Roscoe Pound)[1]

1. Introduction

The 21st century humans are faced with an increasing number of environmental challenges and are compelled to reconsider their actions. Is the world they created essentially better than that inherited from ancestors? How much did we progress, how much did we regress? What kind of world are we going to leave to the future generations in our constant endeavour to outsmart the nature? In such considerations, let us remember the words of one of the greatest minds Albert Einstein who said that more perfection can be found in only one drop of water than in any man-made machine. Jean Jacques Rousseau shares the same view claiming that nature never deceives us, it is we who deceive ourselves.

We can say there has emerged the need for a new perspective of the world – ecocentrism, which places ecosystem at the basis of all there is and by which humans are equalised with other forms of nature, the only thing which makes it distinctive is responsibility towards nature. Environmental picture of the world means a change to the values cherished by humans nowadays. It is necessary to make a shift from quantity to quality, from competition to cooperation, from ruling to partnership, because that is the only way for humans to redirect their movement from the uncontrolled «progress» towards sustainable development.[2] Starting from the fact that rights restrict behaviour of others and that future generations are entitled to a healthy life, healthy environment and conditions that today' people have, it becomes clear that our obligations have arisen out of the rights of future generations.

From the moment of acceptance of the sustainable development concept until this very day, the responsibility has been a part of and has been emphasised in almost all the definitions and explanations of the sustainable development model. In that regard, Brundtland' s definition reads as follows: "Sustainable development is the development which meets the needs of the present, without compromising the ability of future generations to meet their own needs."

Sustainable development may not be restricted only to the national level, instead it implies decisions of different stakeholders and different spatial levels with as many participants as possible. One of the goals of the sustainable development programme is consideration of environment protection at a very early stage of decision-making, prior to adoption of the plans and commencement of their implementation. In

[1] Nathan Roscoe Pound (1870.-1964.), American sociologist of law.

[2] Sonja Veljić Vlahović, "*Ethics and Culture as the Basis for Sustainable Living", Seminar Paper,* Podgorica, December 2008, p.5.

order for the sustainable development concept to be transformed into reality, all the relevant ruling and population groups should see sustainable development as a common goal.[3]

Therefore, environmental policy clearly carries an international dimension since in a large number of areas (for instance, protection of the world cultural and natural heritage, interventions in the open sea due to oil pollution, prevention of water pollution, protection of ozone layer etc.) states are not capable of addressing environmental issues on their own. Having in mind this fact, let us first and foremost focus on international regulations addressing environmental protection.

2. Outline of Fundamental Principles of Environmental Law through International Documents

The following important international acts were adopted at the **United Nations Conference on Environment and Development** held in Rio di Janeiro back in 1992: Declaration on Environment and Development – more frequently referred to as Rio Declaration; Convention on Climate Change; Convention on Biological Diversity; Principle of Management, Conservation and Sustainable Development of All Types of Forests; Program of Action for Sustainable Development for the 21st Century known as Agenda 21. The most important product of the Conference is most certainly the principle 10[4] of the **Declaration on Environment and Development**. The principle authorises "every person" to be holder of the right to access information and to participate in the decision-making process.

The Aarhus Convention[5] elaborates principle 10 of the Declaration on Environment and Development. It proclaims two fundamental rights to access information: citizens' rights to access environmental information held by state authorities and citizens' rights to participate in the preparation of plans, programmes, policy and legislation which might have impact on the environment, while it also proclaims the right to protection: citizens' rights to file complaint if their rights related to access to information and public participation have been violated. The Aarhus Convention does not necessarily require establishment of *actio popularis*, but it does set out the right of public (where they meet the criteria laid down in the national law) to bring actions in order to protect the environment pursuant to Article 9 paragraph 3[6], while it also elaborates the principle of the right to access information. One may say that

[3] Dr Janko Radulović et alii, *"Sustainable Development Concept",* Belgrade, 1997., p.165.

[4] "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. "

[5] Convention of the United Nations Economic Commission for Europe (UNECE) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in the Danish city Århus at the Fourth Ministerial Conference "Environment for Europe". It entered into force on 30 October 2001.

[6] "In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to

this convention constitutes a line of communication between state administration and citizens, serving as a means to improve democracy and exercise human rights and freedoms. It aims to enable access to environmental information, create condition for active participation of public in the decision-making process and ensure legal protection in environmental matters. The Aarhus Convention proclaims the right to be informed.

The Convention on Civil Liability for Damages resulting from Activities Dangerous to the Environment (Lugano 1993), adopted by the Council of Europe, aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment, while dangerous activity means the production, handling, storage of one or more dangerous substances, genetically modified organisms, microorganisms and waste. Therefore, polluter conducts these activities professionally and the Convention recognises it as the "operator" defining it as the person who exercises the control of a dangerous activity. The system of operator' s liability is deemed quite a 'complex' one, while mandatory financial arrangement is considered 'unique'.[7] Objective liability is nowadays a dominant form of liability for environmental damages, however the dilemma between subjective and objective liability has been extensively debated.[8] This Convention supports the concept of objective liability and does not require evidence of operator' s culpability, in order to make him disciplined to take all preventive measures to prevent damage. The system of operator' s liability is reduced to the "polluter pays" principle, based on objective liability, and that same principle is also proclaimed in Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 which will be elaborated below. By the way, the „polluter pays" principle dates back from the Roman law, and subsequently from civil law, however its more complete content specification is credited to international instruments[9].

The main goal set out by **the Kyoto Protocol**[10] is to reduce emissions of carbon monoxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and hexafluoride – greenhouse gasses. Energy efficiency is one of the fundamental postulates of this Protocol, and that is so because of air decarbonisation. This agreement reached between global science and politics is just a confirmation of what was agreed upon and signed by 189 states in Rio de Janeiro in 1992.[11] Regardless of whether a country has ratified this Protocol or not, on 16 February 2005 this Protocol became applicable to all the Member States of the United Nations. The condition for it to enter into force was its ratification by

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administrative or judicial proceedings to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

[7] Bernasconi Christophe, *"Civil liability resulting from transfrontier environmental damage: a case for Hague Conference?"*, Hague Yearbook of International Law, 1999, p.229.

[8] Richardson Benjamin, *"Environmental Regulation through Financial Organizations"*, Hague, 2002., p.168.

[9] Dr Predrag Stojanović, Dr Ilija Zindović, *„Legal Liability for Development and Environment Protection",* Annals of the Faculty of Law of the University in Belgrade, vol. 63, no. 1(2015), Belgrade, 2015, p. 44.

[10] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11.12.1997, Kyoto.

[11] Željko Dominis*, „Environmental Protection: Consequences of Entry into Force of the Kyoto Protocol ",* Our Sea 53(3-4)/2006, Dubrovnik 2006, p. 132.

Russia.[12] The Kyoto Protocol was also supplemented with amendment to Annex B to the Kyoto Protocol (2006) and Doha Protocol (2012).

The Kyoto Protocol was set to be valid until 2020, which is imminent. In order for the future of our planet not to be uncertain in the post-2020 period, the **Paris Agreement** [13] was concluded. This Agreement is important from the perspective of regulating emissions of harmful gasses since it set reduction of carbon emissions at zero in the second half of the 21st century, and by 2050 at the latest. Unlike the Kyoto Protocol, Paris Agreement is not "limited" by an expiry date. It will not be possible to maintain the same level nor to increase the level of pollution emissions, and in this way world leaders ensured continuation of this process in the coming decades.[14] In fact, fundamental principles of this agreement aim to "reinforce implementation of the Framework Convention and global response to the threats posed by climate change in the context of sustainable development and efforts to eradicate poverty."[15]

Directive of the European Parliament and of the Council 2004/35/EC of 21 April 2004[16] is, as far as EU legislation is concerned, the basic source of law in the area of liability for environmental damage. The fundamental principle of this Directive is "polluter pays", and such principle is set out in Article 174 paragraph 2 of the European Community Treaty (*EC Treaty)*, while defining the visible damage[17] is limited by sustainable development principle. Likewise, Directive regulates prevention of damage and elimination of its consequences. At the same time, it imposes administrative system of liability which Member States are obligated to incorporate into their legislation.[18] Paragraph 28 of the Preamble sets out cooperation with a view to ensuring and taking effective measures to prevent or remedy environmental damage, and costs associated with it, and this will be further elaborated in the sections on Brussels I and Rome II regulations. Directive does not address civil liability for damage since this is regulated under the Lugano Convention mentioned above. Therefore, as set out in paragraph 2 of the Preamble, the fundamental principle of the Directive is financial liability of the operator for harmful activity and development of the prevention of this type of damage.

[12] Ibid, p. 133.
[13] Paris Agreement (Official Journal of the European Union no. L 282/4 of 19 October 2016).
[14] Dragoljub Todić, *„Paris Agreement on climate in light of goals and principles of contemporary politics and environmental law",* Megatrend Review Vol. 13, № 3 2016, Belgrade, 2016, p. 53.
[15] Dragoljub Todić, *„Paris Agreement on climate in light of the goals and principles of contemporary policy and environmental law",* Megatrend Review Vol. 13, № 3 2016, Belgrade, 2016, p. 53.
[16] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 (Official Journal of the European Union L143/56 of 30 April 2004).
[17] Paragraph 2 of the Preamble to Directive 2004/15/EC. „"Damage is defined as a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly".
[18] Dragana Radojević, *„New Directive of the European Union on liability in the field of environmental protection* ", Vol. LVII, no. 1-2, p. 185.

One of the guiding ideas hidden behind the Directive which is worth emphasising is promotion of the rights of non-governmental organisations and other citizens' associations, including general public, in the decision-making process related to the application of environmental law.[19] However, that right is not unlimited in terms of the right to bring *actio popularis*.

The "polluter pays" principle was for the first time introduced in contemporary European environmental law through the Environment Action Programme 1973-1976 and later on it was confirmed by Recommendation 75/436 of 03 March 1975, which the European courts still invoke in environmental cases. The principle led to conflicting opinions among experts, with some seeing it as objective liability of the polluter i.e. "operator", which is the purpose of this Directive, while others have different opinions. According to one of these, application of the "polluter pays" principle is not an obligation since European Union should not oppose if a Member State wishes to finance elimination of harmful consequences and compensation for damage with financial resources generated from taxes or from special purpose funds, while the European Union should not be indifferent towards the source of financing the damage, leaving to the Member States to establish principles on their own." [20]

3.1. Importance of Case-law of the European Court of Human Rights in Strasbourg for Environmental Protection

Due to dynamics of modern life and modernisation itself, the 21st century humans may not be expected to life in "ivory tower" without being affected by the effects of environmental pollution. Evidently, what the European Court of Human Rights finds crucial is intensity of the harmful effect which applicants are exposed to and whether the impact of such intensity at the same time constitutes violation of the Convention. This is the most complex question which the Court needs to answer.

Case-law of the European Court of Human Rights is an inspiration for jurisprudence of the European Union, while human dignity as the central right, the one other rights gravitate around, has been identified as the shared value. In the case *BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. Ireland*[21] the Court accepted the principle of equal protection afforded by the EU legal system based on which as long as the EU grants protection identical to that provided by the European Court of Human Rights it may be assumed that the state did not depart from the obligations laid down by the Convention.

[19] Leading case: CJCE C-293/97, Standley et al, Decision of 29 April 1999 and Opinion of Attorney General Leger of 19.08.1998.
[20] Bergkamp Lucas, *"The Proposed Environmental Liability Directive"*, European Environmental Law Review, November 2002, p. 297.
[21] BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. Ireland (Application No. 45036/98; Grand Chamber Judgment of 30 June 2005).

Case-law of the European Court of Human Rights has shown that the Court certainly stands in defence of environmental protection through evolutionary interpretation of the Convention, whereas there is a broad range of violations of the Convention which may be committed in "environmental matters". In such "environmental matters", the Court found violations of Articles 2, 6, 10, 11, 13 and Article 1 of the Protocol 1. Case-law evolves due to the fact that the case-law of the Court is a "semi-precedent", given that there is no ideal similarity between cases and, besides that, in the "competition of the law" it is all circumstances of the case that are considered.

Scope and evolution in interpretation of the Convention are bound by active legitimation, and unlike Montenegrin legislation which recognises it in Article 150 of the Law on Obligations, the Court does not afford protection for *actio popularis.* It expressed its position on this matter in the case *Dudgeon v. The United Kingdom*[22], in which case the notion of victim, i.e. person that can be an applicant, was established. In the case *Cordella et al. v. Italy*[23] the Court found that 19 applicants out of 180 did not have status of a victim since they did not live in any of the cities which were qualified as highly threatened by effects of toxic emissions from the steel plant in Taranto, thus clearly indicating inadmissibility of *actio popularis*. However, in the case *L'Erablière ASBL v. Belgium*[24] the applicant was a non-profit association which conducted environmental protection campaign and filed complaint to the State Council (*Conseil d'État*) by which it contested granting of the permit to expand a waste collection site. The complaint was rejected as inadmissible since it failed to include reasoning behind the facts which explained background of the dispute. The association – applicant indicated in the application that the decision to reject the complaint constituted violation of the right to access court. In light of Article 6, the Court considered this disputable relation and established that the complaint, and later on the application filed by the applicant, may not constitute *actio popularis*, but that this concerned interest of the members of the society in a healthy environment, due to which Article 6 of the Convention was applicable and violation of Article 6 paragraph 1 was established. This judgment is it constituted the "Judgment of Solomon" where the Court was not absolutely rigid in non-deliberation on *actio popularis*, and indirectly, by protecting rights of the association members to a healthy environment, it somehow got closer to it.

Environmental pollution may have extensive consequences for human rights, as in the case *Öneryıldız v. Turkey*[25], while violations of the Convention articles may be multiple. In this case, violation of Article 2 (both, substantive and procedural parts) was found and such violation was reflected in a death case and omission of the Government to take prevention measures in order to avoid the event. Besides, violation of Article 1 paragraph 1 of the Convention was also found in this case since methane explosion at the waste-

[22] Dudgeon v. The United Kingdom (Application No. 7525/76; Judgment of 22 October 1981).
[23] Cordella et al. v. Italy (Application No. 54414/13 and 54264/15; Judgment of 24 January 2019).
[24] L'Erablière ASBL v. Belgium (Application No. 49230/07; Judgment of 24 February 2009).
[25] Öneryıldız v. Turkey (Application no. 48939/99; Grand Chamber Judgment of 30 November 2004).

disposal site led to destruction of the housing facilities located directly next to the waste-disposal site and these facilities represented economic interest for their owners, particularly due to the fact that the authorities allowed their existence over a long period. Violation of Article 13 of the Convention was also found since omission to prevent the critical event, i.e. lack of prevention of the critical event and failure to take measures to eliminate threat, despite decisions which had to be acted upon, lead to ineffectiveness of the used legal remedies. That is so because according to the case law of the Court, which is uniform in many cases, in order for the legal remedy to be effective it must be able to remediate harmful consequences, whichever "avenue" the applicant chooses to follow – administrative, civil or criminal.

In respect of Article 8 of the Convention, the principle that the Court follows in deciding on whether interference with this right is justified is the following: it must be prescribed by the law, necessary in a democratic society and done for the sake of some of the legitimate goals listed in paragraph 2 of this Article. In order for the requirement of necessity in a democratic society to be met, interference must be the consequence of very important needs of the society. The Court most frequently noted violations which resulted from the failure of state authorities to implement valid national environmental legislation, due to which applicants suffered restrictions of their right to private and family life. In doing so the Court, amongst other things, exerts pressure on the states to indeed "take seriously" their own environmental legislation, which they often neglect in favour of their economic interests.[26] One might say that the majority of "environmental cases" is actually connected with this Article and the famous one is *Fadeyeva v. Russia.*[27] The applicant lives with her family in a building located at a 450 meter distance from the Severstal steel plant – a factory which is a large polluter of the environment and generates pollution which, according to the expert findings, exceeded all the permitted limit values set out in relevant laws, even by 50 times. She lived in the zone from which she was entitled to resettle at the cost of local authorities. The Court examined whether the actual harm was caused to the applicant' s health and concluded that a very strong combination of direct evidence and assumptions led to the conclusion that the applicant' s health condition deteriorated as a result of a long-lasting exposure to the industrial emissions into atmosphere and the Court held that such pollution undoubtedly had a negative impact on the quality of her life in her own home. For these reasons, the Court accepted the thesis that the actual harm was caused to the applicant' s health and to her well-being, thus reaching the level which was sufficient for the case to come within the scope of Article 8. The Court established that refusal of the applicant's resettlement in order to save limited resources for the construction of the new housing for social purposes was a legitimate goal of the state since such resettlement would breach rights of others. However, despite a broad discretionary right which was allowed to the defendant state party for the

[26] Miloš Stopić, Jovana Zorić, *"Right to a Healthy Environment in Case Law of the European Court of Human Rights",* Belgrade Centre for Human Rights, Belgrade 2009, p. 10.
[27] Fadeyeva v. Russia (Application no. 55723/00; Judgment of 09 June 2005).

purpose of achieving that goal, the state still failed to establish a fair balance between community interests and effective enjoyment of the applicant' s right to respect for private and family life.

Environmental protection is addressed by the Court also in accordance with Article 10 of the Convention, through the protection of freedom of expression regarding matters of general interest, given that healthy environment certainly is such a matter. In the case *Vides Aizsardzības Klubs v. Letonia*[28] the applicant was a non-governmental organisation which sought to protect the environment. In November 1997, the applicant adopted resolution which was forwarded to the competent authorities in which it expressed concern over conservation of the coastal dunes in the Gulf of Riga and such resolution, amongst other things, also included claims that the mayor enabled illegal works to be executed in that area. The mayor filed claim for the compensation for damage against the applicant asserting that allegations in the resolution were defamatory, and therefore Latvian court upheld the claim filed by the mayor since the applicant did not prove that its allegations were true. In this case, the Court found that Article 10 of the Convention had been violated, noting that the main goal of the contested resolution was to draw attention of local authorities to a sensitive issue of general interest – shortcomings in an important sector managed by local authorities. As for the non-governmental organisation specialised in this area, its participation was extremely important in a democratic society. Case-law of the Court in this matter is consistent also in the case *Šabanović v. Montenegro*[29] in which director of a municipal water supply enterprise from Herceg Novi reacted in the press conference to the news article which published allegation of water pollution (the article was based on the report issued by the Institute of Public Health and prepared by the order of the Chief State Water Inspector). In that reaction, the director said that the Chief State Water Inspector made such allegations with an intention of promoting the interests of the two private companies engaged in water supply and that the water supplied by the municipal enterprise was filtered and compliant with the prescribed quality criteria. In the criminal proceedings (since at the time Montenegro did not decriminalise defamation), the applicant was convicted and handed down a suspended sentence. In considering the case files, the European Court of Human rights held that the applicant' s remarks, even if it is accepted that they were a statement of fact rather than a value judgment, were not a gratuitous attack on the Chief Inspector but rather, from the applicant' s perspective, a robust clarification of a matter under discussion which was of great public interest.

The scope of protection of the right to a healthy environment in case-law of the Court extends to Article 11 of the Convention and in the case *Costel Popa v. Romania*[30] the applicant, founder of the environmental protection association, filed application because Romanian courts refused to enter his association into the register. The Court found violation of Article 11 of the Convention since such a

[28] Vides Aizsardzības Klubs v. Latvia (Application no. 57829; Judgment of 27 May 2004).
[29] Šabanović v. Montenegro (Application no. 5995/06; Judgment of 31 May 2011).
[30] Costel Popa v. Romania (Application No. 47558/10; Judgment of 26 April 2016).

severe measure, as a refusal of the request for registration, taken even before the association started operating, appeared disproportionate to the aim pursued.

We have seen from what has been mentioned above that the case-law of the European Court of Human Rights related to the protection of human rights guaranteed under the Convention is extremely important.

However, once environmental pollution issues develop cross-border nature and become a shared problem of several EU Member States and of its citizens, it is crucial to know what instruments of judicial cooperation are at disposal and how the Court of Justice addresses problems that might occur in such situations.

4.When Can Environmental Damage Be Subject of Disputes with a Foreign Element?

Damages connected with environmental pollution often occur in developing countries, but due to underdeveloped legal systems of these countries, particularly due to the lack of laws regulating this area and insufficient information among citizens about the possibilities offered by the existing laws, judicial proceedings in these countries are rare. Damaged parties more often set their demands before the courts in the countries with developed and abundant legal systems which regulate in detail the right to a healthy environment and this might be so due to better regulations, but also due to better informing of citizens about rights, processes and procedures in the exercise of their rights.

Free competition and emergence of foreign companies which operate in territories of other states, or which have direct contact with damages occurring in other states, raised the issue of the jurisdiction of courts. In fact, occurrence of damage in the environment very often represents civil law torts in which the place of committing harmful act (*locus actus*) and the place in which a harmful consequence occurred (*locus damni*) and the place of occurrence of indirect damage are located in different countries. Numerous interstate disputes arose out of environmental issues, with their number expected to increase in the future.

Raising awareness about the importance of sustainable development and right to life in a healthy environment entail a tendency to overcome legal gaps in numerous legal systems, and particularly in legal systems of developing countries. In that regard, legal system of the European Union developed a special system of its norms by which it seeks to avoid gaps in individual legal systems and increase the level of environmental protection, put the principles of environmental rights on a pedestal and ensure uniformity in the European Union Member States and in the countries involved in disputes with the EU Member States.

The mere fact that Europe recognised a certain level of standards to be achieved in environmental field and that it attached importance to certain issues which they certainly merit (and this standard needs to be

maintained and perfected) is not sufficient for the preservation of Europe, let alone for the preservation of Earth, and we believe it is necessary to go one step further and put in place a uniform legal system in which instruments for the exercise of environmental rights will be effective and procedures will be facilitated.

International treaties and numerous acts of the European Union regulate this area, but the areas not covered by treaties and acts of the Union remain within the scope of national regulations which still have the most important role to play in the cases when private law entities, natural and legal persons seek in judicial proceedings the compensation for damages they sustained as a consequence of operators' activities. Therefore, for instance, the "polluter pays" Directive mentioned above refers to the rights and duties of competent authorities of states to act towards prevention and elimination of damage, while it does not regulate damage that might occur as a result of environmental pollution, or which occurred to the detriment of private law entities.[31]

Differences in national laws of the European countries create room for the conflict of interest, while their resolution required adoption of Regulations in the EU, primarily Brussels I and Rome II, which set out specific solutions for these types of proceedings in respect of competences and applicable law in environmental protection proceedings. In that regard, case-law of the European Court of Justice is important, though not so copious in this field.

5. Solution in EU Legislation regarding Delegation of Competences in the event of International Disputes resulting from Polluted Environment

The solution offered by the European Union law, in its historic development, in the proceedings with international elements in civil and commercial cases in the European Union dates from 1968 at which point the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as: Brussels Convention) was adopted.[32] The Convention entered into force in 1973 and has been extremely important since for the first time it regulated international civil procedure law at the global level. International jurisdiction in non-contractual obligations, in matters relating to tort, delict or quasi-delict or inadmissible proceedings was primarily regulated under Article 5 paragraph 3 of the Convention.[33] Council Regulation (EC) No. 44/2001 of 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as: Brussels I

[31] See Dr Petar Đundić, *"Applicable law for the damage caused by violating environment in the European international private law",* Compendium of Papers of the Law Faculty, Novi Sad 2013, vol. 47, no. 4, p. 319.

[32] See more details on the Brussels Convention and its signatories: Viktorija Lovrić, *„Some issues of international jurisdiction for civil and commercial matters „* 2007, p. 9, https://www.vtsrh.hr/uploads/Dokumenti/Savjetovanja/europsko_pravo-medunarodna_sudska_nadleznost.doc

[33] Article 5 paragraph 3 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) which prescribes the following: A person domiciled in a Contracting State may, in another Contracting State, be sued: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred''.

Regulation) entered into force in 2002 fully substituting the Brussels Convention. This Regulation was amended and nowadays it is the Regulation Brussels I which is in force (Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

6. Practical Relevance of Article 7 of the Regulation Brussels I (Recast) Presented through the Case-Law of the Court of Justice of the European Union

A provision of the Brussels Regulation (Recast) which we elaborate separately concerns Article 7 paragraph 2 (i.e. Article 5 paragraph 3 of the Brussels Convention and Regulation Brussels I) which prescribes jurisdiction in *locus delicti* in the matters relating to torts or quasi-torts before the court of the place where harmful event occurred or might occur, and which includes damages arising out of environmental pollution. The first problem concerns translation of the Regulation text from English in terms of how to properly translate "harmful event", which is why one may encounter different forms of translation such as "harmful acts" instead of "harmful event" which may considerably change context in which this concept it to be understood. However, the provision mentioned above also created ambiguities in its original form "harmful event" as a result of which the EU Court of Justice gave interpretation of this provision in many of its decisions.[34] Starting with the case "Bier en Reinwater v. Mines de Potasse d' Alsace"[35] in which jurisdiction was established in line with the 1968 Brussels Convention, an issue was raised in respect of jurisdiction of courts in conducting proceedings arising out of environmental damage. Specifically, the facts of this case are well-known and mainly concern a private enterprise from France which discharged, in the territory of France, a salty waste into the Rhine river, as a consequence of which the river was polluted and nurseries of the plaintiff "Bier" in the Netherlands sustained damage which is why the plaintiff was forced to make costly interventions to remedy such damage. "Bier" brought action as a plaintiff before the Rotterdam court, stating that the damage occurred due to a too high share of salt in the Rhine river which resulted from introduction of huge quantities of wastewater from Mines de Potasse d'Alsace. The first-instance court in Rotterdam stated it had no jurisdiction invoking Article 7 paragraph 2 of the Brussels Regulation I (Recast) (Article 5 paragraph 3 of the Convention) and claiming that the French court had jurisdiction since the harmful event occurred over there. Bier and Reinwater appealed that decision before the *Gerechtshof Den Haag* which referred a question to the EU Court in respect of Article 7 paragraph 2 of the Brussels I (Recast) and Article 5 paragraph 3 of the Brussels Convention and sought its interpretation of the "place where harmful event occurred". The question referred to the EU Court was about whether the expression "place where harmful event occurred" referred to in Article 7 paragraph 2 of the Brussels I (Recast) should therefore be read as meaning "the

[34] The expression "the place where harmful event occurred" should be understood in a way that it includes the place where the damage occurred and the place where the event that caused the damage occurred, whereby the wrongdoer may be sued, depending on the plaintiff' s choice, before the courts of any of these places."

[35] Judgment of the Court of Justice of the EU, Case C-21/76 "Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA" of 30 November 1976

place where the damage occurred" (place where the damage emerged or happened) or to "the place where the event giving rise to the damage occurred" (place where the act was committed or omitted). The question of whether such an expression refers to the place where the event giving rise to the damage occurred, i.e. the place where wastewater was discharged into the Rhine river, or to the place where harmful event occurred, in which the damage itself occurred, i.e. the place with damaged nurseries in the Netherlands, was resolved in these proceedings and was later reiterated in other court decisions.

According to the EU Court, if the place where the damage was done (*locus delicti commissi*) is not the same as the place where harmful consequences occurred (*locus damni; locus laesioni*), the expression "the place where the harmful event occurred" includes both places, therefore the defendant may be sued, depending on the plaintiff' s choice, in any of these two places. In the reasoning of the judgment, the EU Court established that the wording "the place where the harmful event occurred" is not sufficiently clear in terms of what place that might be, i.e. whether that is the place where the damage occurred or the place where the act was committed, while the plaintiff should be able to choose the court before which it wishes to bring an action, which is why the court ultimately found that decision of the court to reject jurisdiction is not founded since the court may not choose to hand over the case to the courts of the place where the damage occurred (*locus damni*) or to the courts of the place where the event that caused the damage occurred, be that in the cases in the EU or outside of the EU. The possibility of assigning jurisdiction to several courts may serve community interests, particularly when it comes to environmental protection issues. Since it strives towards uniformity, the EU Court was flexible in interpretation of the provision and stated that this kind of interpretation was favourable since it did not annul solutions which existed in different national legal orders.[36] It also stated that the Convention text, i.e. the terminology used, was taken over from the German legal system, in which assigning jurisdiction to several courts is not inacceptable, ultimately observing the spirit of the Convention from the perspective of the German legal system.

Rules for special jurisdiction referred to in Article 5 paragraph 3 of the Brussels Convention (i.e. Article 7 paragraph 2 of the Brussels I Regulation (Recast)), as concluded by the Court in other decisions, are based on the existence of a specially close factor of connection between the dispute and the courts of the place where the harmful event occurred, which justifies assignment of jurisdiction to these courts for the reasons related to good administration of justice and effective conduct of proceedings.[37]. These considerations are equally relevant irrespective of whether the dispute concerns compensation for damage

[36] Judgment of the Court of Justice of the European Union Case C-21/76 "Handelskwekerij G. J. Bier BV v Mines de Potasse d'Alsace SA" of 30 November 1976.

[37] See in that regard the already mentioned judgments in the cases Mines de Potasse d'Alsace, Dumez France and Tracoba, Shevill et al. and Marinari.

which has already occurred or it concerns an action seeking to prevent the occurrence of damage.[38] Therefore, we may conclude that the wording "place where the harmful event occurred" is not explicitly indicated in Article 7 paragraph 2 of the Brussels I (Recast). The EU Court established in numerous decisions that such place may be understood in two ways, as the place where the event giving rise to the damage occurred, i.e. the place of causal event, and as the place where the damage occurred. Both these places are deemed equal in terms of jurisdiction and the plaintiff is to choose between the two. The principle of ubiquity enables and gives advantage to the plaintiff to choose the court that has jurisdiction by associating the court either with the place of activity of polluter or to the place of damage occurrence.

6.1. Applicable Law – Advantage for the Damaged Party and the Issue with the Adopted Solution set out in Regulation Rome II

Regulation No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter referred to as: Rome II Regulation)[39] lays down uniform rules for determination of the law applicable to non-contractual obligations in the European Union. In fact, Article 4 lays down general rules for determination of the applicable law, while Articles 6, 7, 8 and 9 set out rules for the conflict of laws in special types of non-contractual obligations (product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights and damages caused by industrial action). The solution regarding the court that has jurisdiction for environmental damage, that was established in the Brussels I Regulation, and in the case-law mentioned above, is reflected in the solution for the applicable law referred to in Article 7 of the Rome II Regulation.[40] Each court of the EU Member States will apply the law specified under the Regulation Rome II, irrespective of whether or not it is the law of the Member State (Article 3).

Prior to adoption of the Regulation mentioned above, it was quite rare for a national legislation regulating international private law to include rules for the conflict of laws for environmental damages (with the exception of Bulgaria, Belgium, to some extent Switzerland and Germany), while the law of the place where the tort was committed (*lex loci delicti*) was predominantly applied and application or interpretation of the law of the place where the consequence occurred were rare. According to the law on the resolution of the conflict of laws in Montenegro, which had been in force prior to harmonisation with the Rome II Regulation (and this law was used by Croatia, Bosnia and Herzegovina, Serbia and Montenegro), the applicable law is determined on the basis of the place where the act was committed, or the place where the harmful consequence occurred, depending on which of these two laws are more favourable for the injured party. This ultimately meant that the court determined *ex officio* which law was

[38] Judgment of the Court of Justice of the European Union in the case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel of 01 October 2002, paragraph 48.

[39] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, Official Journal of the European Union L 199/40.

[40] Regulation entered into force in 2009.

more favourable for the injured party. Similar solutions existed in Italy, Germany, Estonia and Slovenia, where the injured party was to choose the applicable law. [41]

The Rome II Regulation sets out that according to the general rule, the law applicable to the civil law torts with a foreign element is the law of the country in which the damage occurred, irrespective of where the harmful event occurred and where indirect harmful consequences occurred (Article 4 paragraph 1). Therefore, applicable law is the law of the country in which direct damage (*lex loci damni*) occurred. The rule for the conflict of laws for non-contractual obligations arising out of environmental damage is set out in Article 7 of the Rome II Regulation. Provisions of Article 7 make a reference to the application of the general conflict of laws rule referred to in Article 4 paragraph 1 (*lex loci damni*), whereby plaintiff may decide to base his claim for the compensation for damage on the law of the state in which harmful action was taken, i.e. in which the event that caused the damage occurred. Obviously, the plaintiff may exercise his right to make a choice only in the cases of torts committed against the environment from a distance, in which the place of action and place of consequence are located in different states. This kind of solution offered by the Rome II Regulation corresponds to Article 7 paragraph 2 of the Brussels I Regulation (Recast) which determines the court that has jurisdiction and also corresponds to the standpoint the European Court of Justice which first established in its decisions that the formulation "harmful event" covered a harmful act and harmful consequence as well. [42] Interpretation of the notions such as "the place of occurrence of damage" and "the place of event giving rise to the occurrence of damage" is identical to the standpoints taken towards the subject article of the Brussels Convention.

However, this legislator' s solution raises plenty of debatable issues. In fact, the question is which court should have jurisdiction if the state would demand from polluters the compensation of the costs of proceedings which it incurred as a result of preventive measures taken to remediate damage, in line with the "polluter pays" Directive[43], and whether regulations Brussels and Rome II may be applied in such proceedings. In that regard, the question is also whether lawsuits against polluters for indemnity under the right of recourse constitute "civil matter" within the meaning of Article 1 of these regulations.[44] Content of the provisions[45] clearly shows intention for the actions of public authorities which they take in the

[41] See Dr P. Đundić, p. 319

[42] See judgment of the European Court of 19 June 1995, Case C-364/93., ECR I-2719, in the case Lloyds Bank. ESP C-364/93 Antonio Marinari v. Lloyds Bank plcECR 1995 I-02719, in which the Court said that "the place where the damage occurred" may not be interpreted so broadly to include any place in which consequences of the event that already caused damage in another place may be present.

[43] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 (Official Journal of European Union L143/56 of 30 April 2004), which authorises competent authority of the member state which identifies in its territory the damage originating from another state to seek compensation of costs incurred as a result of taken preventive measures or measures for remediation of damage.

[44] Which regulate the scope of application identically.

[45] Article 1 of the Brussels I Regulation sets out that the regulation applies to non-contractual obligations in civil and commercial matters, however it does not extend to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

exercise of their powers to be excluded from the field of the compensation for damage for non-contractual obligations in civil and commercial matters. In line with this, the Court of Justice of the European Union held that the concept of "civil and commercial matters" must be interpreted autonomously and when a public authority acts in the exercise of its powers such an act is a civil matter[46], which is in a way reiterated in the Ruffer case[47] in which it was deemed that claim for the compensation for damage incurred in removal of the wreck from the river did not fall within the scope of application of the Brussels Convention because the state performed obligations arising out of public law in relation with waterways. However, taking into consideration the recent case-law of the Court of Justice of the EU one may notice that an increasingly broader interpretation of the "civil matter" prevails within the meaning of the Regulation and it seems that the answer might be affirmative to the question as to whether it is justified for Article 1 of the Regulation to be interpreted more broadly, in the event of actions taken by public authorities in line with Directive 2004/35/EC which concerns environmental liability for the prevention and remediation of environmental damage. This is particularly so if one bears in mind that the Court of Justice of the EU gave broader interpretation of the concept of civil matter in the case Baten[48] stating that this concept also covers the right of recourse of the authority exercising public power, but subject to the restriction that this is only the case when such authority requests recourse from persons in the situations which are regulated under private law. In the specific case, the Court of Justice concluded that the concept of "civil matter" included action under right of recourse under which a public body seeks recovery from a private person of sums paid by it by way of social assistance to the divorced spouse and the child of that person.[49] It is worth noting that some theoreticians believe that actions brought by state bodies against polluters for indemnity under a right of recourse, in line with the "polluter pays" Directive, do not exclude application of the regulations Brussels I and Rome II, which is compliant with the Directive mentioned above. If one takes the opposite view, one might raise an issue of ineffectiveness of the means offered by the Directive mentioned above when it comes to international disputes.[50]

Furthermore, there might be a problem with identifying the "event that led to the occurrence of damage", for instance in the cases of production, packaging **(**if the damage results from inadequate packaging**)** or transport of hazardous substances. "In such circumstances, there might be a controversial issue as to whether the event that is relevant for determination of the applicable law is production of hazardous

[46]Judgment of the Court of Justice of the European Union, C 29/76 „ZTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol", of 14 October 1976

[47] Court of Justice of the European Union, C 814/79 "Netherlands State v Reinhold Rüffer", of 16 December 1980

[48] Court of Justice of the European Union in the case C 271/00, "Baten" of 14 November 2002

[49] *Mutatis mutandis* application of the principle set out in the judgment ESP C 271/00 "Baten", and contrary to the standpoint taken in the judgment ESP 814/79 "Ruffer", in which the standpoint was taken that the state which is responsible in performance of an international obligation is conferred the status of public authority in regard to the private persons on the basis of provisions of national law and such state which makes a request for the recovery of that type of expenses, according to the ECJ, changes nature of the measure taken and this cannot be qualified as a civil matter.

[50] See more details in T. K. Graziano, "The Law Applicable to Cross-border Damage to the Environment (A Commentary on Article 7 of the Rome II Regulation)", Yearbook of Private International Law, Volume 9(2007) pp71-86.

substances, their packaging and transport or the relevant event is contact of a hazardous substance with the environment."[51]Acceptable standpoint in theory is the place where a threat, that had by then been only a possibility, materialised as a result of insufficient control.

Furthermore, there are problems with connection to the public law provisions in respect of this type of damage, where actions of a potential wrongdoer depend on security rules prescribed in that country, which may raise an issue before the court when assessing the fact that the wrongdoer complied with the rules of that state. The Rome II Regulation makes an attempt to overcome this obstacle by prescribing in Article 17 that in assessing the conduct of the person claimed to be liable, account is taken of the rules of conduct and security which were in force at the place and time of the event giving rise to the liability. This ultimately means that polluter may not be relieved from liability only on the basis of the fact that he holds the licence and that he complied with security rules of another state [52], but the fact mentioned above will still be considered. Moreover, mandatory rules of the court which conducts proceedings may never be excluded[53], whereas application of legal rules of another state may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the state whose court has jurisdiction.[54] The result of the solution mentioned above in the event of conflicted norms, when a rule of another state contradicts fundamental principles of the court seised, or when its application leads to the results that are contradictory to such principles, the court is allowed to change a certain rule and to replace it by a *lex fori* rule instead of that one. In assessing whether and in what way the polluter complied with the rules of another state, i.e. in assessing how the fact mentioned above should be evaluated, one should observe a broader context of international legal norms, such as interpretation given by the courts of Austria and the Netherlands.[55] In fact, one should bear in mind whether such conduct is compliant with the fundamental rules of international public law, whether the rules for obtaining foreign licence are similar to those laid down by the domestic court seised, while account should be taken of the fact that the licence should not have been granted without the rights guaranteed under the Arhus Convention.[56] In the judgment rendered by the European Court of Human Rights[57] the Court noted that

[51] See Dr P. Đundić, p. 327

[52] In the case "G.J. Bier BV v. Mines de Potasse d'Alsace", already mentioned in the paper, the court in Rotterdam held, when examining acts done by the defendant, that the fact that they had obtained licences from French administrative authorities was not irrelevant.

[53] Article 16 of the Rome II Regulation

[54] Article 26 of the Rome II Regulation

[55] See more details in T. K. Graziano, "*The Law Applicable to Cross-border Damage to the Environment (A Commentary on Article 7 of the Rome II Regulation)*", Yearbook of Private International Law, Volume 9(2007) pp. 71-86.

[56] Right of citizens to access information on the environment; enabling public participation in making decisions that are relevant for the environment, rights of citizens to participate in the development of plans, programmes, policy and legislation that might have impact on the environment, as well as the possibilities of lodging legal remedies in the event that their rights in connection with access to information of public participation have been violated.

[57] Case C-240/09, Lesoochranárske zoskupenie VLK v Ministry for Environmental Protection of the Republic of Slovenia, brought upon preliminary ruling by the highest court in Slovenia.

even though Article 9 (3) of the Arhus Convention[58] did not have direct effect in the European Union law, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9 (3) of that Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

This solution set out in the Regulation II may cause problems related to the application of a large number of different substantive norms to the same event, and the Regulation does not offer any solution in that regard. In fact, difficulties might arise in the cases in which there are several events that led to damage with each of them occurring in a different country. Principally, the wording of the Regulation might lead to application of the laws of each country in which events that caused damage occurred, thus resulting in consequential legal fragmentation of the wrongdoer' s liability. The situation gets even more complicated if there is a large number of injured parties, whereby each one of them might choose a different law for the event that caused damage and this might lead to different assessment of polluter' s liability and determination of different amounts of compensations for the damage sustained.[59] Having in mind specificities of the damages that occurred as a result of environmental pollution, it is clear that courts of the EU Member States will have to find solutions for each individual case.

Moreover, even though Rome II sets out that court of the EU Member State may apply a foreign law, there is no clear rule as to how to proceed, which rules should be complied with when conducting proceedings, how a foreign law is to be interpreted, what happens in the event of misinterpretation of a foreign law, in what way it is evaluated whether substantive law is properly applied in appeal proceedings and whether parties would have at their disposal all the procedural options which they would also have at their disposal before the courts of these states. The issue of up to when the plaintiff may invoke application of the law of another state is partly resolved in item 25 of the introduction to the Regulation[60] which invokes the law of the state in which the court is seised[61]. However, for the time being Member States have not incorporated solution to the debated issue into their legislation, which is why this issue might be raised before the Court of Justice of the EU in the near future.

[58] Convention of the United Nations Economic Commission for Europe (UNECE) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as Aarhus Convention.

[59] See more details in Carmen Otero Garcia-Castrillon, *"International litigation trends in environmental liability: A European Union-United States comparative perspective",* Journal of Private International Law, Vol. 7, No. 3 pp. 551-581.

[60] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), (25)

[61] See more details in T. K. Graziano, p. 76.

The right to make the choice which is conferred on the party in this manner, in terms of choosing the law and court before which he will pursue its interest, without the possibility for the defendant to influence the choice of the plaintiff, is justified by Article 174 of the Treaty Establishing the European Community which sets out, in respect of environmental damage, a higher level of protection which is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.[62] Criticism according to which this kind of solution in the regulation does not fulfil a "preventive", but rather a compensatory function may not be accepted given the fact that ultimately adoption of these requirements must lead to a greater level of the wrongdoers' precaution and to refraining from polluting the environment, particularly if they are threatened with huge amounts of fines. The answer to the question whether we may deem that application of a foreign law from the wrongdoer' s perspective is completely accidental and unexpected and whether legal certainty is compromised in that manner may be found in the Roman law "Ignorantia iuris nocet " – Not knowing the law is harmful. This saying should be understood from a broader perspective because the lack of knowledge about legal obligation of any country in respect of environment cannot serve as a justification for us. Not only that it cannot serve as a justification for us, but on the contrary it causes us harm, and not only because our liability will be established in the proceedings, but also because we as humans are obligated to preserve the planet. There is no financial interest nor human goal that might prevail this, there is no justification. This is not about expert level knowledge, but rather about life in harmony with nature. Social intelligence is stronger than that, the urge to maintain human kind must not exclude the conscience of what kind of planet we leave to the future generations. This knowledge of life is called wisdom. Nowadays, in the era of different specialisations, the importance of general education declines, whereas the "art" of living as a formula for personal happiness is observed through the prism of a life cycle of one human. And we are much more than just that.

[62] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52003PC0427

7. Conclusion

We are witnessing extensive environmental pollution and the impact such pollution has on human lives and health. The situation gets worse from one year to another and the pollution mentioned above evidently must be reduced, otherwise we will leave to the future generations the planet on which life will not be possible, at least the life that most of us have experienced.

Indeed, solution in Article 7 of the Rome II Regulation and Article 7 paragraph 2 of the Brussels I Regulation leads to prevention policy, indirectly binding operators established in the countries with the low level of protection to comply with higher level of protection, while they should be aware that in the event of violation of such provisions they may be imposed sanctions envisaged in such states, including the amount of the damage they would have to pay. Likewise, polluters in the countries with a high level of protection will have to be cautious when discharging harmful substances in border areas or through rivers because the levels of toxic substances, which might be allowed in these countries, could lead to damage and injured parties might invoke the law of the polluter' s country.[63]

It remains to be seen whether in the practice it will become possible for the actions brought by state authorities for indemnity under the right of recourse, in line with the "polluter pays" Directive, to be covered by the options set out in the regulations Brussels I and Rome II.

The rule for environmental damage is a new step in the European and international legal framework which is completely aligned with the "polluter pays" principle and the trend of improving cross-border tightening of environmental standards, while this solution opens up new perspectives for the plaintiff faced with environmental damage.

The only thing we are genuinely awaiting is development of the case-law in order to see in practice how an unexpected potential for environmental justice set out by these regulations looks like.

[63] See more details in Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52003PC0427