The Social-Environmental Function of Property and the EU 'Polluter Pays' Principle: The Compatibility between Italian and European Law

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Abstract

This article analyses the legal scholarship and Italian jurisprudential debate over the obligations imposed on an owner who is not the polluter of a contaminated site, a debate which culminated in a landmark decision by the European Court of Justice on 4 March 2015. The 'social-environmental' function of property provides the most appropriate balance between the interests and the rights at stake. Civil liability rules, even after the amendments introduced by legge 6 August 2013 no 97 (the so called *legge europea* 2013) which reintroduce references to the polluter in accordance with Directive 2004/35/EC, and its regime of strict liability, do not always lead to the identification of the person responsible for the damage. Where the polluter cannot be identified or is insolvent, it is not possible to oblige the owner, who is not the polluter, to reimburse the competent authority for the measures it took to rehabilitate the polluted site (Art 253 Environmental Code) beyond the limits of the market value of the land. This is in accordance with the constitutional principle of the social function of property (Art 42, para 2, Constitution). This interpretation is also in line with the EU law principle that the 'polluter pays'.

I. Background

The plenary assembly of the *Consiglio di Stato* referred the question of whether Arts 244, 245 and 253 of the decreto legislativo 3 April 2006 no 152 (hereinafter Environmental Code) were compatible with Directive 2004/35/EC on environmental liability to the European Court of Justice (hereinafter ECJ) for a preliminary ruling. This Italian legislation provided that, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures

> 'the administrative authority (may not) require the owner (who is not responsible for the pollution) to implement emergency safety and rehabilitation measures, (but may merely attribute) to that person

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financial liability limited to the value of the site once the rehabilitation measures have been carried out'.[1]

The Luxembourg Court upheld, in its judgment of 4 March 2015,[2] the compatibility of the Italian legislation. It specifically held that the Italian law limiting the obligations of an owner who is not responsible for the pollution to the value of the estimated encumbrances was in line with the European environmental principles set out in Art 191, para 2, Treaty on the Functioning of the European Union (hereinafter TFEU). These environmental principles were primarily the 'polluter pays' principle (implemented by Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage),[3] the precautionary principle, the principles that preventive action should be taken, and that environmental damage should, as a matter of priority, be rectified at the source.

The encumbrance, along with the special security interest, is a form of collateral security (Art 253 Environmental Code),[4] albeit within the limits of the market value of the land, aimed at ensuring recovery of the costs related to the measures adopted by the competent authority. The encumbrance is determined after the implementation of those measures. These two private law instruments (the encumbrance and the special security interest) guarantee reimbursement of the costs that the public administration incurs when rehabilitating polluted sites. The special security interest is a guarantee in its

[1] Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 and Consiglio di Stato-Adunanza Plenaria ordinanza 25 September 2013 no 21, para 50, available at www.giustizia-amministrativa.it. See the comment of P.M. Vipiana Perpetua, 'La figura del proprietario di un sito inquinato non responsabile dell'inquinamento: la parola definitiva dell'Adunanza plenaria sull'interpretazione della normativa italiana' *Giurisprudenza italiana*, 947-955 (2014). The two ordinances have the same text. In the text that follows, the more recent is cited, but the reference will regard both, because they are the same.

[2] Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare and other* v *Fipa Group s.r.l., Tws Automation s.r.l. and Ivan s.r.l.* (European Court of Justice 4 March 2015) available at www.eur-lex.europa.eu. See the comments of P.M. Vipiana Perpetua, 'La soluzione "all'italiana" della posizione del proprietario di un sito inquinato non responsabile dell'inquinamento: il suggello della ECJ' and C. Vivani, 'Chi non inquina non paga? La ECJ ancora sulla responsabilità ambientale' *Giurisprudenza italiana*, 1480-1492 (2015); V. Fogleman, 'Landowners' Liability for Remediating Contaminated Land in the EU: EU or National Law? Part I: EU Law' available at http://www.lawtext.com/pdfs/sampleArticles/EL23-2FOGLEMANpt1.pdf (last visited 6 December 2016), in Part I of the paper, 'examines the effect on the ELD (Environmental Liability Directive) of the WFD (Waste Framework Directive), which provides, amongst other things, that a 'waste holder' (which includes the owner of land on which there are waste contaminants) is responsible for the proper disposal of the contaminants'.

[3] F. Giampietro, *La responsabilità per danno all'ambiente. L'attuazione della direttiva 2004/35/CE* (Milano: Giuffrè, 2006); B. Pozzo, *La responsabilità ambientale. La nuova Direttiva sulla responsabilità ambientale in materia di prevenzione e di riparazione del danno ambientale* (Milano: Giuffrè, 2005).

[4] V. Corriero, 'Garanzie reali e personali in funzione di tutela ambientale' *Rassegna diritto civile*, 43-75 (2012).

very nature: the credit which the government provides increases the value of the site by decontaminating it.

The preliminary ruling was, however, susceptible to varying interpretations. This susceptibility led to further references to the Italian courts so that determinations could be made in regards to the correct application of European environmental principles to the nature and the limits of obligations placed on owners of polluted sites.

The VI Chamber of the *Consiglio di Stato*[5] referred the question of whether the competent authority may impose emergency safety measures on owners of polluted land who are not responsible for the pollution to the plenary assembly of the same Court.[6]

An absolute minority of Italian administrative courts place a liability 'by position'[7] on the owner of the polluted site: in such cases neither the subjective criteria of liability (fault and negligence), nor an objective test (causation) are taken into consideration. The differences under the law between the positions of the owner who is not responsible for the contamination and the original polluter would derive from the lack of both these subjective and objective conditions in a judgment of liability, so that the non-polluting owner would only be obliged to bear the costs of decontamination embodied in the encumbrance (Art 253 Environmental Code).

The plenary assembly of the *Consiglio di Stato*, while referring the

[5] Consiglio di Stato-Sezione VI ordinanza 21 May 2013 no 2740, *Foro Amministrativo Consiglio di Stato*, 1420-1428 (2013).

[6] Such emergency safety measures should be imposed in accordance with Art 240, para 1, lett *m* of the Environmental Code.

[7] Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263, *Ambiente sviluppo*, 543-551 (2011), with critical comment by F. Giampietro, 'Ordine di bonifica, in via provvisoria, a carico del proprietario incolpevole?'; Tribunale amministrativo regionale Piemonte-Torino 11 February 2011 no 136, *Rivista Giuridica dell'Ambiente*, 660 (2011), with comment by F. Vanetti, 'Bonifica da parte del proprietario incolpevole: è un obbligo o una facoltà?'. See also, after the Consiglio di Stato Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, Tribunale amministrativo regionale Lazio-Roma 12 February 2015 no 2509, available at www.giustizia-amministrativa.it, which justifies the possibility of requiring the non-polluting owner, who is not responsible for the contamination, to implement emergency safety measures without incurring any sanction and/or compensatory obligation, in light of the precautionary principle. For P.M. Vipiana Perpetua, 'La figura del proprietario di un sito inquinato non responsabile dell'inquinamento' n 1 above, 950, some judgments 'have, in fact, also extended the obligation of rehabilitation to the non-polluting owner who is not responsible for the pollution, restoring, in fact, his burden to an obligation *propter rem*'. In this sense, see the opinion, given in an extraordinary appeal by the Consiglio di Stato-Sezione II 30 April 2012 no 2038, *Foro amministrativo-Consiglio di Stato*, 979 (2012). For Tribunale Amministrativo Regionale Lombardia-Milano 30 May 2014 no 1373, available at www.giustizia-amministrativa.it, 'while in the obligations *propter rem* the person identified on the basis of the property of the *res* as obligated remains liable, in encumbrance the same situation arises, considering the fact that, as explained in Art 253, the person subject to the encumbrance is liable within the limits of the market value of the *res*'.

matter for a preliminary ruling to the ECJ, opted for a literal interpretation of the law and affirmed the majority judgment:[8] the non-polluting owner, while at liberty to intervene on a voluntary basis, is neither obliged to rehabilitate polluted sites, nor to implement emergency safety measures.[9]

The curial passage of the plenary assembly's decision,[10] which held that the encumbrance does not necessarily entail a rehabilitation, which Art 245 Environmental Code qualified as a mere faculty, is particularly significant. In implementing the 'polluter pays' principle, the obligation of rehabilitating the site is imposed upon the person responsible for the contamination (Arts 242, 244, 253 and 257 Environmental Code); such a person may be different from the owner or the administrator of the land.

The encumbrance arises where rehabilitation measures are implemented by the competent authority on its own initiative (that is, by the municipality that is territorially competent or – where that municipality does not adopt those measures – by the region, in accordance with Art 250 Environmental Code). This occurs if the polluter does not provide for the rehabilitation or if the polluter is not identifiable and is not replaced by site owners or other persons not responsible for contamination. In accordance with Art 245 of the Environmental Code, the 'other persons' are defined as 'interested parties' who have the right at any time to voluntarily intervene for the purpose of rehabilitation.

Although in no way connected with the pollution, the owner is obliged, by virtue of the encumbrance, to reimburse, within the limits of the market value of the land, the public administration for the costs related to the rehabilitation of the contaminated land. These costs are determined after the implementation of those measures (Art 253 Environmental Code).

Sites of national interest (hereinafter SNI) fall within the competence of the Environment Ministry, and not of the local authorities (municipalities and regions).[11]

[8] *Ex multis* Consiglio di Stato 5 September 2005 no 4525, *Ambiente sviluppo*, 281 (2007), with comment by F. Giampietro, 'Bonifica di siti contaminati: obblighi e diritti del proprietario incolpevole nel T.U.A.'; Consiglio di Stato 16 July 2015 no 3544, available at www.giustizia-amministrativa.it, which addressed the same issue and, by endorsing the majority view of Italian courts, recalled a view in a decisive Judgment 4 March 2015, C-534/13 of the ECJ, which is reported herein, and one which was already expressed in Judgment 9 March 2010, C-378/08, affirming that the 'polluter pays' principle was compatible with imposing the personal financial liability on the owner since such liability was limited to the encumbrance and special security interest on the land.

[9] Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 24.

[10] Ibid para 17.

[11] Title V of Part IV of the Environmental Code makes reference to SNIs and regulates contaminated sites in general. It is followed by Part VI dealing with environmental damage. On competence framework see S. Grassi, 'La bonifica dei siti contaminati', in R. Ferrara and M.A. Sandulli eds, *Trattato di Diritto dell'Ambiente* (Milano: Giuffrè, 2014), II, 687, 694-698.

The owner, although not responsible for the pollution, may, in order to avoid the imposition of an encumbrance on the site and the creation of an associated special security interest, carry out the rehabilitation work that would be required of the person responsible.

In the present case referred to the ECJ, three private companies, between 2006 and 2011, had become the owners of land falling within the SNI of Massa Carrara. The companies carried out health and environmental activities that did not pose any risk to health.[12] Nonetheless, the companies were notified by the Ministry of the Environment that they were required to carry out three emergency safety actions. The measures in question, adopted by the Ministry, in accordance with the usual remediation procedure relating to SNIs, involved the construction of a hydraulic capture barrier to protect a groundwater table and the submission of an amendment to a project, dating back to 1995, for the rehabilitation of the land. The grounds for issuing the order were that the companies had, on acquiring the land, incurred a sort of 'custodial liability', regardless of the fact that they were not in any way factually responsible for the historical contamination of the Massa Carrara SNI (Case C-534/13, para 28).

The Ministry of the Environment had declared the lands in question an SNI in 1998 in order to provide for the land's environmental rehabilitation. Further environmental remedial measures were required since the land, which had been contaminated in the 1960s and 1980s by various chemical substances (including dichloroethane and ammonia) used for the manufacture of insecticides and herbicides, had not been fully decontaminated by the polluter companies.

The ECJ, before considering the merits of the question, reiterated the demarcation lines between European law and national law, which had been drawn in previous judgments.[13] The ECJ assigned a programmatic nature[14]

[12] These activities included the sale of electronic devices, real estate and the construction and repair of boats.

[13] Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010), with comment of P. Bertolini, 'Il Principio "chi inquina paga" e la responsabilità per danno ambientale nella sentenza della ECJ 9 marzo 2010' *Rivista italiana di diritto pubblico comunitario*, 1607-1632 (2010) and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* (European Court of Justice 9 March 2010) available at www.eur-lex.europa.eu. See also the notes relating to the decisions D.T. Würtenberger, 'Beweismaß bei der Umwelthaftung: Die Konkretisierung des Verursacherprinzips liegt bei den Mitgliedstaaten, die durch die Richtlinie 2004/35/EG nicht gehindert sind, auch strengere Maßnahmen vorzusehen – "Augusta-Priolo" ' *Europäisches Wirtschafts- & Steuerrecht*, 282-284 (2010); C. Brüls, 'Responsabilité environnementale des entreprises: Application du principe du pollueur-payeur en cas d'une pollution diffuse' *Revue pratique des sociétés*, 84-103 (2010).

[14] A regulation having a programmatic nature is considered unenforceable: it is only binding for the legislator.

to the 'polluter pays' principle (Art 191, para 2, TFUE), which concerns the action of the Community, rather than individuals, and cannot be invoked to exclude the application of national law.

In contrast, the *Consiglio di Stato*[15] considers the 'polluter pays' principle to be a prescriptive rule[16] underlying the system of environmental liability. The conformation of national legislation to the 'polluter pays' EU principle is justified by the Italian constitutional principle (Art 42, para 2) of the social function of property. In accordance with this principle,[17] national legislation, by virtue of a decontamination carried out by a public authority, prevents an unjustified enrichment of the owner at the expense of the collectivity. At the same time, the congruence of European and national principles on this issue has produced a situation where, through excessive exploitation of the mechanism of encumbrance, a polluter, who cannot be identified or who is insolvent, is absolved of all responsibility; this breaches the 'polluter pays' principle.

An hermeneutical error is attributable to the VI Chamber of the *Consiglio di Stato*, which referred the question of law to the plenary assembly, providing an upstream statutory interpretation that was not in accordance with the Italian Constitution.[18] The possibility that the Administration would compel non-polluting owners to take emergency safety measures in accordance with Art 240, para 1, lett *m* of the Environmental Code, indicates the competent authorities' improper application of Art 191, para 2, TFEU. The authorities effectively impose such measures in the absence of any national legal basis (paras 41, 39-42 and more extensively 39-42 judgment C-534/2014), as emphasised on a number of occasions by the Luxembourg Court.[19]

[15] Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 24, paras 31-36.

[16] In this sense, see M. Pennasilico, 'Sviluppo sostenibile, legalità costituzionale e analisi "ecologica" del contratto' *Persona e Mercato*, 37-50 (2015); Id, 'Fonti e principi del "diritto civile dell'ambiente" ', in M. Pennasilico ed, *Manuale di diritto civile dell'ambiente* (Napoli: Edizioni Scientifiche Italiane, 2014), 26-28, who argues that 'to allow environmental principles to effectively accommodate the intent of the legislator, the application of the law and the relationships between stakeholders, it is appropriate to place the same principles at the apex of the legislative system, that is in the Constitution)'.

[17] On the 're-reading of the civil code and statutes in the light of the Republican Constitution' see P. Perlingieri, 'Constitutional Norms and Civil Law Relations' *The Italian Law Journal*, 17-49 (2015) and ibid further bibliographical references, among others, P. Rescigno, 'Per una rilettura del Codice civile' *Giurisprudenza italiana*, IV, 224 (1968); P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare' *Rivista di diritto commerciale*, I, 475 (1969); M. Pennasilico, 'Legalità costituzionale e diritto civile' *Rassegna di diritto civile*, 840-876 (2011).

[18] Consiglio di Stato-Sezione VI ordinanza 21 May 2013 no 2740 n 5 above.

[19] See also the precedents Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010), n 13 above, paras 45-46 and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and*

The ECJ has also expressed doubt as to the temporal applicability *ratione temporis* of Directive 2004/35/EC to historic environmental damages, which took place before 30 April 2007, such as in the case in point. This reasoning provides another argument in support of the groundlessness of the order to take the emergency safety measures in accordance with Art 240, para 1, lett *m* of the Environmental Code.

The ECJ confers the function of assessing the temporal applicability *ratione temporis* of Directive 2004/35/EC, which necessarily includes an ascertainment of the permanence of any environmental damage, on the national court, even if the damage took place before 30 April 2007.[20] In the event that the Directive is deemed not applicable, the issue is then resolved in light of national legislation with due observance of the rules of the Treaty. If, however, the national court decides that the Directive should be applied in the context of a particular fact, the national court must then follow the reasoning of the Luxembourg Court.

II. The Groundlessness of 'Custodial Liability' of the Owner Who Is Not Responsible for Contamination and the Social-Environmental Function of Property in Italian-European Law

The systematic interpretation of the rules on the rehabilitation of contaminated sites does not allow for the qualification of the responsibility – either subjective or objective – of the owner who is not the polluter of the contaminated site due to the lack of a causal link, which is an indispensable element in a judgment of civil liability.

The ECJ came to the same interpretive results and qualified the interpretation given by the referring court as a literal interpretation of the Environmental Code and of the principles of civil liability, which require a causal link between the act and the damage in order for environmental liability to be triggered (para 36).

In reality, the interpretation of the referring court – as it acknowledged

other (European Court of Justice 9 March 2010) n 13 above, para 39; Joined Cases C-478/08 and C-479/08 *Buzzi Unicem S.p.A. and other* v *Ministero dello Sviluppo Economico and other* (European Court of Justice 9 March 2010) available at www.eur-lex.europa.eu, paras 35-36. L. Bergkamp, 'Comment on Case C-378/08, 9 March 2010; Joined Cases C-379/08 and 380/08, 9 March 2010; Joined Cases C-478/08 and C-479/08, 9 March 2010' 7.3 *Journal for European Environmental & Planning Law*, 355-361 (2010).

[20] In this sense, see para 44 of Case C-534/13. See, to that effect, Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010) n 13 above, paras 40-41; *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* (European Court of Justice 9 March 2010) n 13 above, para 34; Joined Cases C-478/08 and C-479/08 *Buzzi Unicem S.p.A. and other* v *Ministero dello Sviluppo Economico and other* (European Court of Justice 9 March 2010) n 19 above, paras 32 and 38.

(para 36) – was founded on a systematic and axiological interpretation[21] of Italian-European law, in line with previous judgments of the Luxembourg Court.[22]

The burdens imposed on a non-polluting owner arise from the quality of the land which is the object of his property right.

The real nature of these burdens is confirmed by the different categories of prohibitions on abandonment and unchecked deposit of waste on land and subsoil (Art 192 Environmental Code).

The Environmental Code establishes that anyone who violates this prohibition 'must proceed with the removal, recycle or the disposal of the waste, and a restoration of the (original) state of the (affected) areas jointly and severally with the owner and with those who hold real or personal rights to enjoy the area' – and, in accordance with the Cassazione Sezioni Unite no 4472/2009, the holders of the lands –,[23] on the basis of the conditions specified under Art 192, para 3, Environmental Code.[24]

The legislator has adopted two different attitudes towards an owner.[25] The subjective liability of the owner in the abandonment of waste stems from supervisory duties which are imposed on the owner, the possessor and also the qualified holder of the estate by virtue of a lease or service. The nature of the joint liability of a site owner and of one who is guilty of abandonment

[21] On the scope of the major branches of private law, such as property, contract, enterprise and liability, which see the human person as having a fundamental value, at the top of the axiological hierarchy provided by the Constitution, see P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 74. For M. Costantino, 'Il diritto di proprietà', in P. Rescigno ed, *Trattato di diritto privato* (Torino: Utet, 2th ed, 2005), 7, I, 253, the social function of property must be taken into account so as to protect the legitimate interests of non-owners who interact with the owner. With particular reference to the autonomy of a legal transaction see, for example, M. Pennasilico, *Metodo e valori nell'interpretazione dei contratti. Per un'ermeneutica contrattuale rinnovata* (Napoli: Edizioni Scientifiche Italiane, 2011), 135-185, 392-406. In Latin-American law, on the systematic and axiological interpretation in a '*perspectiva civil-constitucional*' (civil-constitutional perspective) del *código civil* see G. Tepedino, H.H. Barboza and M.C. Bodin de Moraes, *Código Civil Interpretado conforme a Constituição da República* (Rio de Janeiro: Renovar, 2014 and 2012), I and II. See also C.I. Salvadores De Arzuaga, 'Protección constitutional y legal del medio ambiente y la interpretación sudicia en la República Argentina', in A.M. Citrigno and G. Moschella eds, *Tutela dell'ambiente e principio "chi inquina paga"* (Milano: Giuffrè, 2014), 397-414.

[22] Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* (European Court of Justice 9 March 2010) n 13 above.

[23] A. Jannarelli, 'L'articolazione delle responsabilità nell'«abbandono dei rifiuti»: a proposito della disciplina giuridica dei rifiuti come non-beni sia in concreto sia in chiave prospettica (nota a Cass., S.U., 4472/09)' *Rivista di diritto agrario*, 128-153 (2009).

[24] Consiglio di Stato 26 June 2013 no 3515, available at www.giustizia-amministrativa.it.

[25] In this sense see, Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 23.

and waste deposit often masks the attempt of public administrators to allocate the costs of disposal, cleaning and collection of abandoned waste to the person who is easy to identify and target in practice: the owner (who is not guilty of abandonment and waste deposit). In doing this, administrators are transforming subjective liability under Art 192, para 3, Environmental Code into objective liability, because they do not demonstrate the owner's negligence (*culpa in vigilando*).[26]

The regulation of the rehabilitation of contaminated sites should implement the constitutional principle of the social function of property.[27] The difference between the provisions of Arts 253 and 192, para 3, Environmental Code is justified because rehabilitation returns commercial value to the contaminated estate, and is more expensive than the removal of waste and the restoration of places where only abandoned waste has been placed on other people's land. The abandonment of waste on soil does not necessarily involve a contamination of environmental matrices.

Providing liability because of goods 'in custody' as part of the regulation of the rehabilitation of contaminated sites would not only be contrary to the EU 'polluter pays' principle,[28] transposed into the Art 3-*ter*, para 2, Environmental Code, but would also be contrary to the principle of the social function of property, enunciated in Art 42, para 2, Constitution.

This contrast is unavoidable whether the owner of the polluted site's 'liability by position' is cast as a subjective responsibility,[29] when the owner's

[26] A. Jannarelli, n 23 above, 150.

[27] S. Pugliatti, 'La proprietà e le proprietà (con riguardo particolare alla proprietà terriera)', in Id, *La proprietà nel nuovo diritto* (Milano: Giuffrè, 1964), 145-309, proponent of the theory of properties, on the presupposition of the impossibility of remaining anchored to a unitary model of property, being in reality a plurality of its own statutes. For a comparative study on the right to property see S. Rodotà, 'La logica proprietaria tra schemi ricostruttivi e interessi reali', in Id, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: Il Mulino, 3th ed, 2013), 47-72. For a reading of the right to property in the light of constitutional legality, see P. Perlingieri, *Introduzione alla problematica della proprietà* (Camerino-Napoli: Jovene, 1971); A. Iannelli, *La proprietà costituzionale* (Camerino-Napoli: Edizioni Scientifiche Italiane,1980), passim; E. Caterini, 'Proprietà', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2005), 85-136; U. Mattei, 'Una primavera di movimento per la «funzione sociale della proprietà»' *Rivista critica del diritto privato*, 531-568 (2013). For a historical framing of the property see P. Grossi, 'La proprietà e le proprietà nell'officina dello storico' *Quaderni fiorentini*, 17, 1988, 359-422.

[28] In terms of criminal law, in the absence of direct participation in the offense or in the absence of a material or moral contribution to the illicit waste management a 'liability by position' may not be imposed on the owner of the land, see Corte di Cassazione-Sezione penale 1 October 2014 no 40528, *Ambiente & sviluppo*, 247-248 (2015), (addressing the absence of direct participation in the offense or in a material or moral contribution in the illicit waste management.)

[29] In this sense, see Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263 n 7 above. For a contrary view, see Corte di Cassazione-Sezione penale 1 October 2014 no 40528 n 28 above, which excludes the existence of *culpa in vigilando* against third

culpa in vigilando is accentuated,[30] or as an objective liability, when the traditional interpretation of the Art 2051 Civil Code is followed.[31]

The rules of property in Italian law, inspired by the traditional social function of property and reinterpreted in light of European values, might not justify a 'custodial liability' of the owner[32] as part of the regime of environmental liability.

The only obligation on the owner who is not responsible – besides the previously mentioned obligation to communicate an actual or apprehended contamination of a site to territorial authorities – is to carry out preventive measures (Art 245, para 2, Environmental Code), ie initiatives aimed at countering an event that constitutes an imminent threat to the environment. Art 245, para 2, Environmental Code contains this innovation, absent from the previous legislation; it provides that the owner or the administrator who are not responsible – even if willing to intervene in the proceedings – are now obliged to do so, thereby facilitating the province's carrying out of investigations to identify the person responsible (Art 244, para 2, Environmental Code), and to apply the obligation of rehabilitation to him.

The *Consiglio di Stato* explained that a liability 'by position' cannot be traced back to Art 253 Environmental Code, as the encumbrance only represents collateral limited to the value of the property. This encumbrance is only meant to cover a reimbursement of the costs of the environmental rehabilitation undertaken by the public administration to substitute for the punishment of those responsible for the contamination.[33] Contradictorily,

parties, as the obligations of correct management and disposal are placed exclusively on the producers and holders of waste, or, in the case of abandonment or uncontrolled storage of waste by the employees of a business corporation, on the owner of the company.

[30] On the contrasting views in case law, see Tribunale amministrativo regionale Friuli-Venezia Giulia-Trieste 9 April 2013 no 229, which considers Art 2051 Civil Code inapplicable to specialty disciplines contained in the Enviromental Code. For a trend that is developing with respect to the liability ex Art 2051 Civil Code of the owner who is not responsible for the pollution as the guardian of the contaminated site see Tribunale di Ferrara 17 January 2013 no 65, Tribunale amministrativo regionale Veneto-Venezia 8 February 2013 no 196, Tribunale amministrativo regionale Veneto-Venezia 8 February 2013 no 197, available at www.giustizia-amministrativa.it.

[31] C.M. Bianca, *Diritto civile, V, La responsabilità* (Milano: Giuffrè, 2th, 2012), 717-727.

[32] G. Atzori, 'Chi (non) inquina, paga? La giurisprudenza più recente sugli obblighi del proprietario incolpevole' *Ambiente & sviluppo*, 557-563 (2015), points out the contrast between the imposition of rehabilitation costs on non-polluting owners not responsible and Art 17 of the European Charter of Fundamental Rights and Art 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. See also M. Jaeger, 'Il diritto di proprietà quale diritto fondamentale nella giurisprudenza della Corte di Giustizia' *Europa e diritto privato*, 348-364 (2011); M. Comporti, 'La proprietà europea e la proprietà italiana' *Rivista di diritto civile*, I, 189, 192-199 (2008), on the conflict between the European concept of property and the 'criterion of social function'; C. Tenella Sillani, 'I diversi profili del diritto di proprietà nel XXI secolo: brevi spunti di riflessione' *Rassegna di diritto civile*, 1058-1076 (2013).

[33] Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above,

however, the *Consiglio di Stato*, raising interpretative doubts, also recalled another Italian case tackled by the ECJ, although judged differently, which was predicated on the assumption that demonstrating a causal link in any type of pollution, including diffuse pollution,[34] is necessary.

Environmental liability is cast as a special liability system derived from general tort (Arts 2043 ff Civil Code) and is viewed in such a way by the majority of administrative justice. This precludes the extension of Civil Code Art 2050 (relating to liability for operation of dangerous activities) and Art 2051 Civil Code (relating to damages to things in custody) to environmental damage or to issues of rehabilitation.[35]

On the other hand the Court of Venice,[36] while admitting that the 'provision of Art 2051 Civil Code was unusual for cases of environmental damage', did not exclude the potential applicability of the provision to such cases and, in the context of the episode in question, acknowledged that the owner and alleged tortfeasor would bear substantial liability.

Moreover, even if the Court wanted to, by analogy, apply Art 2051 Civil Code, this kind of liability could not be mapped onto this type of environmental harm due to the fact that a corporeal possession of the estates upon pollution is lacking.

Art 253, para 4, Environmental Code, in fact, points to the general criteria to be applied to future rehabilitated sites in cases of diffuse pollution; in the alternative, such sites may also be the object of specific provisions contained in special plans approved by Regions. At the same time, however, the ECJ highlights the limits of the civil liability system, paying particular attention to cases of diffuse pollution[37] (which may also include cases of historical pollution),[38] given the difficulty of both establishing the requisite causal link and applying the 'polluter pays' principle.

Art 4, para 5, of Directive 2004/35/EC, affirming the importance of the principle of causation, limits the application of the directive to cases of diffuse pollution in which it is possible to establish a causal link between the

para 44.

[34] Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* (European Court of Justice Grande Chambre 9 March 2010) n 13 above, paras 44-45.

[35] Tribunale di Milano 16 September 2010 no 10655, *Ambiente & sviluppo*, 432-439 (2011), with comment of L. Prati, 'La responsabilità soggettiva per inquinamento e bonifica in danno della procedura fallimentare'.

[36] Tribunale di Venezia 4 February 2010 no 304, *Ambiente & sviluppo*, 631-640 (2010), with comment of F. Giampietro e F. Lalli, 'Sito inquinato e responsabilità da custodia: il giudice italiano e comunitario a confronto'.

[37] C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare and other* v *Fipa Group s.r.l., Tws Automation s.r.l. and Ivan s.r.l.* (European Court of Justice 4 March 2015) n 2 above, para 13.

[38] The term 'historical pollution' is used to refer to a case of pollution that has historically occurred.

damage and the activities of individual operators.

The owner of the contaminated site who has not contributed to the contamination in any way cannot be held accountable under an objective liability test. The regulation must necessarily hold the polluter responsible for all the costs related to an area's rehabilitation; therefore, in such circumstances the non-polluting owner of the property cannot be held liable.

Any exercise of discretion by a Member State that would impose liability beyond the limits of the value of the site on an owner of the site who is in no way connected with the pollution, in the sense envisaged by the plenary assembly of the *Consiglio di Stato*, would not be in accordance with either the 'polluter pays' principle,[39] or with EU environmental principles.

Moreover, it would not be possible to impose greater liability on a non-polluting owner by relying on Art 16 of the Directive 2004/35/EC. This Directive, in accordance with Art 193 TFUE, allows Member States to maintain or to introduce more stringent protective measures, including that additional activities may be subject to obligations of prevention and remediation and that additional responsible parties may be identified.[40]

First of all, extending the limits of liability in this way would not lead to 'more stringent provisions' as envisaged by Directive 2004/35/EC. It would also subvert the EU 'polluter pays' principle: such an approach is not cognizant of 'who is the polluter' but rather 'who is the owner' and imputes liability to a person who is not responsible for the contamination.

The *Consiglio di Stato* plenary assembly's decision, pending a preliminary ruling from the ECJ, to interpret a person's liability in such a way that would include not only persons who engage in polluting activities, those who enter or deposit pollutants on the territory, but also the owner who – by omission or negligence – does not perform an act to eliminate or reduce the area's pollution, is not only at odds with judicial consensus but is also, frankly, open to criticism.[41]

The understanding that property has a social function finds its rationale in pragmatic considerations (Art 832 Civil Code)[42] such as the need to

[39] Consiglio di Stato Adunanza-Plenaria ordinanza 13 November 2013 no 25 n 1 above, paras 45-48, recalls the opinion of Advocate General Juliane Kokott delivered on 22 October 2009 in C-378/08, para 98, according to which 'Liability irrespective of any causal contribution would neither follow the policy of the Environmental Liability Directive nor be compatible with it if it diminished the liability of the person who is responsible for the environmental damage under the directive. The directive creates an incentive specifically for the responsible operator to prevent environmental damage and provides that he is to bear the costs of remedying damage which nevertheless occurs'.

[40] In this sense, see previously, F. Goisis, 'Caratteri e rilevanza del principio comunitario «chi inquina paga» nell'ordinamento nazionale' *Foro amministrativo Consiglio di Stato*, 2711, 2724-2725 (2009).

[41] Consiglio di Stato-Adunanza Plenaria ordinanza 25 September 2013 no 21, available at www.giustizia-amministrativa.it.

[42] In this sense, see P. Rescigno, 'Proprietà (diritto privato)' *Enciclopedia del diritto*

safeguard values of constitutional relevance, including health and the environment (Arts 9, 32 and 117, para 2, lett s, Constitution).

Recourse to the outdated private law concept of the encumbrance (Art 253 Environmental Code), as re-interpreted in light of Art 42, para 2, Constitution[43] assigning a social function to property, circumvents the limits of subjective liability favoured by the Italian legislature, although that preference is in violation of the 'polluter pays' EU principle[44] (Art 191, para 2, TFEU), that is, before the amendment by legge 6 August 2013 no 97 (hereinafter *legge europea* 2013, came into force on 4 September 2013). The elements of subjective liability were inadequate compared to the actual requirements for imposing liability: the causal link between the active or omissive conduct and the damage; the criteria for imputation of fault and negligence; and, identification of the person responsible.

The non-polluting owner, although not obliged to undertake rehabilitation, is in an unfortunate position, due to the authority's inability to hold the person actually responsible for the contamination accountable (Art 257 Environmental Code). The non-polluting owner must – at least, if he wishes to remain the owner of the property and not be subject to expropriation – necessarily undertake the burden of rehabilitation.

The administrative courts, in accordance with Art 244, para 3, Environmental Code, held that the notice issued to the person responsible for contamination must also be sent to the non-polluting owner, in order to apprise him of both the encumbrance and the special security interest and to allow him to exercise his right to initiate the rehabilitation. This notice cannot, however, require an implementation of rehabilitation measures without an adequate assessment of the parties' respective liabilities for the pollution of the site.[45]

By the combined provisions of Arts 244, 250 and 253 Environmental Code, the non-polluting owner, although not responsible for the pollution, has the burden – not the obligation – to ascertain both the level of

(Milano: Giuffrè, 1988), XXXVII, 254, 275-276.

43 U. Salanitro, 'La bonifica dei siti contaminati nel sistema della responsabilità ambientale' *Giornale di diritto amministrativo*, 1270 (2009), doubts that the encumbrance as a mechanism is constitutional 'because it would require the owner to incur the cost of public interventions whose purpose is guaranteeing the property's suitability, in terms of health protection, for the urban planning discipline's required appropriation use'.

44 On the infringement procedure no 2007/4679 by the EU Commission against Italy, see below para III and following footnotes. See also S. Cassotta and C. Verdure, 'Recent Developments Regarding EU Environmental Liability for Enterprises: Lessons Learned Italian's Implementation with "Raffinerie Mediterranee" Cases' 2 *Environment and Internal Market*, 1, 6-16 (2012).

45 Consiglio di Stato 5 September 2005 no 4525 n 8 above; Tribunale amministrativo regionale Friuli-Venezia Giulia 5 May 2014 no 183, available at www.giustizia-amministrativa.it; Tribunale amministrativo regionale Friuli-Venezia Giulia-Trieste 9 April 2013 no 227, *Foro amministrativo TAR*, 1133-1135 (2013).

contamination and the amount of possible rehabilitation if he is to avoid encumbrances on the land. The collateral system provided for in Art 253 Environmental Code induces the non-polluting owner – frequently in cases of inaction, or of failure to identify the responsible person, or of non-fulfilment of executive action – to bear the costs of environmental restoration.

The public administration creditor may legitimately initiate an action for recovery of costs against a non-polluting owner, but only after officials have carried out a diligent investigation to establish the identity of the person actually responsible.[46] This obligation of the competent Administration (specifically, the province) to take steps to identify the person responsible for the contamination acts as a guarantee of the public interest that informs the 'polluter pays' EU principle and as a way to protect the owner. Indeed, a voluntary rehabilitation of the land by the non-polluting owner does not negate this administrative responsibility. The action is predicated upon a public administration's reasoned decision which attests that it is impossible to identify the person responsible or that the recovery action against that person, if identified (Art 253, para 3, Environmental Code),[47] has failed.

Only by virtue of a reasoned decision and the provisions of legge 7 August 1990 no 241, the maximum reimbursement the non-polluting owner can be required to pay is the market value of the land, which must be determined after the implementation of measures to be taken by the competent authority (Art 253, para 4, Environmental Code). With respect to the non-polluting owner who has rehabilitated the polluted site voluntarily, that person

> 'shall be entitled to bring an action for damages against the person responsible for the pollution in respect for costs incurred and any additional damage suffered' (Art 253, para 4, Environmental Code).

The wording of the provision appears to preclude recovery in cases of rehabilitation by the public administration where the public administration has been reimbursed by the non-polluting owner through an encumbrance. The restriction on the right to recovery is justified because, in light of Art 253, para 1 Environmental Code, the encumbrance should not exist where the competent authority does not intervene, as, for example, in the case a non-polluting owner's spontaneous performance. An action for compensation for further damage is determined by the general rules of civil liability.

[46] Tribunale amministrativo regionale Lombardia-Milano 15 April 2015 no 940, available at www.giustizia-amministrativa.it.

[47] On the 'ejecución forzosa y recuperción de costes por parte de la Administración' in Spain see A.J. Quesada Sánchez, 'Principi europei e regole di responsabilità ambientale in Spagna: quale ruolo per il diritto civile?', in A. D'Adda, I.A. Nicotra and U. Salanitro eds, *Principi europei e illecito ambientale* (Torino: Giappichelli, 2013), 160-195.

III. The Correct Implementation of the 'Polluter Pays' Principle in Italian-European Law and the Legislative Hypertrophy of the Italian Environmental Liability System

Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage,[48] implemented the EU 'polluter pays' principle. Recital 2 of the Directive specifies that:

> 'an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced'.

The principle – which is compensatory rather than punitive in nature – is premised on the notion that environmental justice requires the prevention of environmental damage, especially with regard to professional activities which pose a risk to health or the environment.

The Environmental Code separates matters that have many common features into two distinct parts: the rehabilitation of contaminated sites; (Title V, Part IV) and compensatory protection against environmental damages (Part VI).[49]

However, defects with respect to coordination and the risk of unnecessary procedural duplications remain, resulting in a slowness that could have been obviated by a national unitary framework, in line with the European Directive on environmental liability.

A responsible person, faced with an event that could potentially contaminate a site, may choose to initiate the rehabilitation procedure pursuant to Art 242 Environmental Code or, alternatively, to activate the procedure for the adoption of the necessary measures for prevention and emergency safety pursuant to Art 304 Environmental Code.

The substantial connection between the scope of the two provisions indirectly derives from their identical notification procedures: Art 242, para

[48] M. Meli, *Il principio comunitario "chi inquina paga"* n 16 above, 269-275; S. Grassi, *Problemi di diritto costituzionale dell'ambiente* (Milano: Giuffrè, 2012), 300-313; L. Krämer, *EU Environmental Law* (London: Sweet & Maxwell, 7th ed, 2012), 27; M. Meli, 'Il principio chi inquina paga e il costo delle bonifiche' and V. Fogleman, 'The Polluter Pays Principle for Accidental Environmental Damage; Its Implementation in the Environmental Liability Directive', in A. D'Adda, I.A. Nicotra and U. Salanitro eds, n 47 above, 59-80 and 116-161. See also V. Corriero, 'Il principio "chi inquina paga" ' n 16 above, 269-275.

[49] M. Gorgoni, 'Ripristino, bonifica, risarcimento in forma specifica: dei vari volti della «riparazione» del danno all'ambiente', in G. Ponzanelli ed, *Liber amicorum per Francesco D. Busnelli. Il diritto civile tra principi e regole* (Milano: Giuffrè, 2008), I, 319-338; F. de Leonardis, 'La bonifica ambientale', in P. Dell'Anno and E. Picozza eds, *Trattato di diritto ambientale*, II, *Discipline ambientali di settore* (Padova: Cedam, 2013), 273-374.

1, Environmental Code refers back to Art 304, para 2, Environmental Code. According to both procedures, the responsible party has an obligation to communicate the potential contamination to the municipality, the province, the region and the prefect of the province, who, in turn, inform the Environment Ministry.

The obligation of rehabilitation, according to the repealed Art 17, para 2, of the decreto legislativo 5 February 1997 no 22, was imposed on anyone who had either caused environmental contamination 'in an accidental way', or who had exceeded – or were genuinely at risk of exceeding – the limits of acceptability of environmental contamination. The expression 'in an accidental way' had influenced part of the legal scholarship[50] and courts[51] causing the expression, in line with the 'polluter pays' EU principle, to reformulate the responsibility of the polluter in terms of strict liability: excluding the subjective criteria of fault or negligence, liability became exclusively based on the causal link between the act or omission of the polluter and the contamination.

The fact that the Environmental Code was silent as to the criteria needed to allocate liability for sites to be rehabilitated, combined with the suppression of the expression 'in an accidental way', led the courts – prior to amendments made in 2013 –[52] to reformulate the responsibility of the polluter in subjective terms, in accordance with the general clause of Art 2043 Civil Code and general legislation on environmental damage (in Part VI of the Environmental Code).[53] The legislation on rehabilitation itself, contained in the Environmental Code, retained the subjective nature of liability of the polluter, and integrated encumbrance into it to combat inefficiency.

Following the conversion of decreto legge 25 September 135 no 2009,

[50] L. Prati, 'Il danno da inquinamento e la disciplina delle bonifiche: l'aspetto della responsabilità civile', in B. Pozzo ed, *La nuova responsabilità civile per danno all'ambiente. Le problematiche italiane alla luce delle iniziative dell'Unione europea* (Milano: Giuffrè, 2002), 147 and see also B. Pozzo, 'La giurisprudenza in tema di bonifiche dopo il D.Lgs. 152/2006' *Rivista giuridica dell'ambiente*, 838-843 (2007).

[51] For the Tribunale Amministrativo Regionale Liguria 21 November 2005 no 1494, available at www.giustizia-amministrativa.it, responsibility of an objective nature would derive from the enterprise risk associated with the operation of an activity which is potentially damaging to the environment. A recent confirmation is by Consiglio di Stato 26 September 2013 no 4784, available at www.giustizia-amministrativa.it.

[52] In contrast with the 'polluter pays' principle and with Directive 2004/35/EC, the rehabilitation discipline, before the 2013 amendments, required environmental damage and attributed a form of subjective liability to the polluter, founded on the general clause of Art 2043 Civil Code and on the subjective imputation criteria of fault and negligence. In this sense, see L. Prati, 'I criteri di imputazione delle responsabilità per la bonifica dei siti contaminati dopo il D.Lgs. n. 152/2006' *Ambiente & sviluppo*, 635, 636 (2006).

[53] Tribunale Amministrativo Regionale della Sicilia-Catania 20 July 2007 no 1254, available at www.giustizia-amministrativa.it.

with amendments, into legge 20 November 2009 no 166, the legislature added Art 5-*bis*, '*Attuazione della direttiva 2004/35/CE – Procedura di infrazione n. 2007/4679, ex articolo 226 Trattato CE*' which, in response to community censures, had passed through a number of amendments (Arts 303, 311, 317 Environmental Code, 2 decreto legge 30 December 2008 no 208, converted in legge 27 February 2009 no 13), which, however, only affected the assessment criteria for environmental damage.

In line with the original provisions of the Environmental Code, the legislative amendments did not affect the subjective nature of the liability of the polluter, nor did they eliminate the consequences for a violation of the Directive. In this way, in frequent cases of failure to identify the person responsible or in cases of that person's insolvency, the social cost of rehabilitation, fell upon the owner – not the polluter – through the imposition of an encumbrance.[54]

The Italian legislature's inadequate enforcement of the 'polluter pays' principle is due to its frequent recourse to the rules of property, and, in particular, to its application of forms of collateral to contaminated sites such as the encumbrance and the special security interest (Art 253 Environmental Code), intended to allow an effective environmental restoration. Despite the proliferation of tort cases in environmental liability, there is a marked retreat from the use of responsibility rules, as the function of property is used as a tool of restoration (Art 42, para 2, Constitution). The understanding that property has a social function is intended as an effective environmental protection when contaminated sites are to be rehabilitated. The rules of liability, supported by subjective parameters, did not – until the amendments made in 2013 – ensure identification of the person actually responsible for the contamination and, in fact, while inspired by a policy preference for objective imputational criteria, actually defeated their intended purpose.

The *legge europea* 2013[55] reformulated certain rules on environmental damage in response to the objections of the European Commission (infringement procedure 4679/07). The *legge europea* 2013 marked a confused return to a form of strict liability, poorly coordinated with the rules contained in the Environmental Code (Arts 298-*bis* and 311, para 2).

The current legal regime on environmental damage has finally – despite persistent contradictions – brought the Italian system into line with EU legislation, allowing for the application of strict liability to dangerous activities listed in Annex V (as well as to energy industry, refineries, coke ovens, chemical activity, mining, production and processing of metals and waste

[54] V. Corriero, 'La «responsabilità» del proprietario del sito inquinato' *Responsabilità civile e previdenza*, 2440-2460 (2011).

[55] F. Giampietro, 'Danno ambientale e bonifica dopo la legge europea n. 97/2013' *Ambiente & sviluppo*, 973-979 (2013); U. Salanitro, 'La novella sulla responsabilità ambientale nella «legge europea» del 2013' *Le nuove leggi civili commentate*, 1309-1330 (2013).

management), which includes contaminated sites. In both Art 311 and the new Art 298-*bis*[56] of the Environmental Code, there is a reference to strict liability for damage caused by any activity listed in Annex 5 to Part VI of the Environmental Code.

In both the original formulation of Art 311 of the Environmental Code, before its 2013 amendments,[57] and in that currently in force, a subjective test determines liability for damage to protected species and natural habitats. This subjective test may allow damage to be attributable to 'anyone' and not only – as required by Directive 2004/35/EC – to operators of professional activities not included in Annex III. The inherent vagueness of the term 'anyone' coupled with the reference to the imputation criteria of fault and negligence could facilitate a self-serving construction of the liability criteria by a putative polluter intent on side-stepping liability under the 'polluter pays' principle. These elements combine to obfuscate the application of the framework of environmental liability.

The major review of Part VI of the Code, although incomplete and unsystematic, implemented some fundamental changes:

a) the introduction of strict liability to Art 298-*bis* of the Environmental Code ('*Principi generali*') distinguishes damage and imminent threat of damage caused by any of the occupational activities listed in Annex 5 to part VI of the Code – for which a form of strict liability is imposed – from damage and any imminent threat of such damage from occupational activities other than those listed in Annex III – for which liability arises whenever the operator has been at fault or negligent;

b) the repeal of lett *i*) of Art 303, para 1, Environmental Code, in accordance with Art 4 of the Directive 2004/35/EC, which effectively widened the scope of the regulation on compensation for environmental damage to situations of pollution for which rehabilitation procedures have been activated or realised;

c) any references to pecuniary compensation as the only form of compensation for environmental damage (Art 311, para 3, Environmental Code) were deleted, as well as references to monetary valuation criteria designed only to determine the extent of damage for remedial actions.

[56] The new Art 298-*bis* of the Environmental Code could be renumbered as Art 298-*ter* (in this sense see Data bank online De Jure), following the unintentional insertion by the legislature which was 'distracted' by another Art 298-*bis* in the same Environmental Code and by the Art 25, para 1, decreto legislativo 4 March 2014 no 46, in the Part Quinta-*bis* addressing installations and establishments producing titanium dioxide industry.

[57] E. Leccese, *Danno all'ambiente e danno alla persona* (Milano: Franco Angeli, 2011), 120, advocates the solution adopted by the Italian legislature in the earlier version of Art 311 of the Environmental Code 'in an area of "mediation" between the old and the new', with the inevitable consequence of 'betraying the aspiration of objectivity' and, in violation of the 'polluter pays' principle, incorrectly transposing the European directive on environmental liability.

However, the amended part VI still incorrectly implements European principles because it suffers from a lack of coordination with the provisions on the rehabilitation of contaminated sites. The text of Art 311 sets forth elusive and contradictory formulations of European law: the heading, although modified by the deletion of the words 'pecuniary equivalent', still retains a reference to that very form of compensation in the first paragraph, thanks to legislator oversight.

Administrative justice provides for the imputation of damage 'to those who control the conditions of risk',[58] rather than allowing the principle of 'modeling liability in relation to litigious fact scenarios by reference to the subjective element of fault or negligence' to guide it. In this way, society imputes the cost of the damage to the person who has the possibility of performing a 'cost-benefit analysis' before the damage actually occurs, and imposes responsibility on such a person for his failure to carry out this function. The aim of this approach is to foster the internalisation of negative externalities – ie the costs of environmental alteration – into enterprise budgetary planning as part of corporate social responsibility.[59]

After integrating the encumbrance into the social function of property, the legislature avoids imposing the burden of the costs of rehabilitation on the collectivity through the public administration. It does this in order to avoid that the owner could derive an unwarranted benefit from the rehabilitation of the polluted site,[60] according to the principle provided for by Art 2041 Civil Code.[61]

The recoupment action exercised by the public administration is based on the principle of unjust enrichment. Such a principle is predicated on a proportionality of values, which has its roots in the constitutional principle of economic and social solidarity (Art 2 Constitution); unjust enrichment exceeds individualistic concerns and makes itself known as the 'parameter of active and passive situations under both public law and private law'.[62]

In practice, unjust enrichment is implemented by placing an encumbrance on sites to be rehabilitated.

[58] Tribunale Amministrativo Regionale del Lazio-Roma 16 March 2015 no 1680, available at www.giustizia-amministrativa.it, imputing damage to the polluter; Consiglio di Stato 30 April 2012 no 2038 n 7 above, imputing damage to the owner.

[59] A. Addante, *Autonomia privata e responsabilità sociale dell'impresa* (Napoli: Edizioni Scientifiche Italiane, 2012), passim; G. Mastrodonato, 'Gli strumenti privatistici nella tutela amministrativa dell'ambiente' *Rivista giuridica dell'ambiente*, 707, 722-723 (2010).

[60] In the same sense see F. Goisis, n 40 above, 2711.

[61] F. Giampietro, n 7 above, 284, states that the Art 253, para 4, Environmental Code derives from the unjustified enrichment principle ex Art 2041 Civil Code (in case law see Tribunale Amministrativo Regionale of Sicilia-Catania 20 July 2007 no 1254 no 53 above) and, therefore, it is open to criticism, as it imposes on the Public Administration heavy and unnecessary burdens of proof (referred to in para 3) given the residual nature of the unjustified enrichment action.

[62] L. Barbiera, *L'ingiustificato arricchimento* (Napoli: Jovene, 1964), 210.

As other commentators have noted,[63] in circumstances where the rehabilitation costs exceed the market value of the site, the owner may find it cheaper to bypass the dual system of collateral imposed on the site to be rehabilitated by abandoning the land to the public administration.

The European 'polluter pays' principle, as implemented into Italian law, was considered in the context of scholarly discussion on the doctrine of unjust enrichment, to be a 'stylistic clause',[64] inappropriately implemented by the legislator and incorrectly applied by the courts.[65] The Italian legislation on environmental damage, not based on strict liability criteria and therefore in violation of Directive 2004/35/EC,[66] is grounded in constitutional solidarity (Art 2 Constitution), which is connected with the social function of property (Art 42, para 2, Constitution)[67] and with the protection of relevant constitutional interests, such as health and the environment (Arts 2, 32 and 117, para 2, lett *s* Constitution).

The actual Italian environmental liability regime is in large part based on objective criteria and is fully in line with the 'polluter pays' principle as it relates to dangerous activities. Its regulation of dangerous activities is also congruent with the principle of the social function of property and corresponds to European law as interpreted by the ECJ. These contaminated properties are destined for environmental rehabilitation, in the personal, social and environmental interest.[68]

However, in the process of 'civilization in the environmental interest', which is based on European environmental principles, as enshrined in Art 192, para 2, TFEU and now transposed into Italian law by Art 3-*ter* Environmental Code, the 'who pays' principle cannot be uncoupled from the 'polluter' principle and transferred to the owner for the sole reason of direct possession of the land at the time the competent authority issues notice to

[63] P. Carpentieri, 'Bonifica e ripristino ambientale dei siti inquinati: obblighi del proprietario (I) (II)' *Ambiente*, 631, 845-846 (2002); A. Nervi, 'Tutela ambientale e bonifica dei siti contaminati' *Rivista diritto civile*, II, 693-709 (2004).

[64] F. Giampietro, 'Ordine di bonifica', in his comment on Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263 n 7 above, 547, fn 16, criticizes the extensive and arbitrary interpretation of TAR Lazio, which derives the intention to exclude the collectivity's responsibility for the rehabilitation costs and an attribution of such responsibility to the culpable person from the 'polluter pays' principle by applying objective imputation criteria, regardless of any subjective element (fault or negligence).

[65] Consiglio di Stato 15 luglio 2010 no 4561, available at www.giustizia-amministrativa.it.

[66] F. Giampietro, 'Codice dell'ambiente: l'(incoerente) attuazione dei principi ambientali in materia di bonifica e danno ambientale' *Ambiente & Sviluppo*, 333, 337 (2009); B. Pozzo, 'La direttiva 2004/35/CE e il suo recepimento in Italia' *Rivista giuridica dell'ambiente*, 1-80 (2010). See also, V. Corriero, 'Il principio "chi inquina paga" ' n 48 above, 271-275.

[67] See on this point P. Dell'Anno, 'La tutela dell'ambiente come «materia» e come valore costituzionale di solidarietà e di elevata protezione' *Ambiente & sviluppo*, 585, 590 (2009).

[68] V. Corriero, *Autonomia negoziale e vincoli negli atti di destinazione patrimoniale* (Napoli: Edizioni Scientifiche Italiane, 2015), 178-189 and below para III.

adopt specific emergency safety measures.

The private law instruments used – the rules of strict liability, with respect to activities damaging to health and environment (Annex III to Directive 2004/35/EC), the principle of the social function of property (Art 42, para 2, Constitution) and the doctrine of unjust enrichment *ex* Art 2041 Civil Code – dovetail perfectly with the *ratio* which has grown out of the ECJ's construction of the 'polluter pays' principle, supporting the notion of a unitary legal system.[69]

The alternative interpretation proposed by the plenary assembly of the *Consiglio di Stato* is a further attempt to shift the rehabilitation costs exclusively to the owner of the site. In its referral orders to the ECJ for a preliminary ruling,[70] the *Consiglio* indirectly intended to allow the public administration to require the reimbursement of rehabilitation costs which amounted to more than the value of the site. In this regard, the dissenting judgments, demurring to the correctness of the majority view, do not justify the decision of the *Consiglio* to refer this point of disagreement to the ECJ, only seeing some possible justification for it in the desire to devise a method to hold the polluter responsible.

Part of administrative case law, while denying that the burdens falling on the non-culpable owner for the contamination constitute a form of liability, are nonetheless aware of EU case law which, in its interpretation of the EU 'polluter pays' principle, precludes the transfer of the costs resulting from the restoration of polluted sites to the collectivity. Administrative case law resolves the problem by attaching these costs to the property by virtue of the constitutional principle of the social function of property (Art 42, para 2, Constitution).[71]

The plenary assembly of the *Consiglio di Stato*, instead of justifying such an interpretation in light of Art 42, para 2, Constitution, however, framed its reasoning by referring to 'limits that meet this operation of 'internalisation' of the environmental cost (so-called externalities or social costs unconnected with the ordinary operations of the accounts).' These limits recognize that the 'who' of the EU principle 'polluter pays' might include the owner of the contaminated site, in the event that the culpable person is not identified or

[69] In particular, see P. Perlingieri, *Leale collaborazione tra Corte Costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 54-64; Id, 'Diritto comunitario e identità nazionali' *Rassegna di diritto civile*, 530-545 (2011); A. Tartaglia Polcini, 'Integrazione sistematica e assiologica dirimente nel dialogo tra Corte costituzionale e Corte di giustizia', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 421-478.

[70] Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25, n 1 above.

[71] In this sense, see the opinion, given in an extraordinary appeal, of the Consiglio di Stato 30 April 2012 no 2038 (unreported); Tribunale amministrativo regionale Lazio-Roma 14 March 2011 no 2263 n 7 above.

insolvent.[72]

The costs of decontamination, generally borne by the community or single guiltless subjects, must be imputed to the polluters.[73] Such application of the 'polluter pays' principle is based on recital 18 of Directive 2004/35/EC, according to which

> 'an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator.'

From this viewpoint, administrative law constrains the boundaries of the 'polluter pays' principle by subjecting its application to a proportionality test, referenced in the same Directive 2004/35/EC (recital 3), so that the legislature and the administrative organs may 'distribute any costs of protection proportionally to the negative incidence that each person causes on overall environment'.[74]

Likewise, the principle of proportionality must be harmonised with the precautionary principle – which provides that, when preventive action is intended, the burden of proof necessarily shifts to the proponent of harm in the absence of scientific proof that harm actually exists.

The logic of the 'polluter pays' principle derives primarily from its preventive function and secondly from its compensatory role *ex post factum*. With respect to prevention, enterprises must internalise the potential costs of environmental alteration by incorporating such costs into commodity prices. It therefore appears unlikely that these costs, included in the costs of production, would lead to a decrease in the price of goods; they would, rather, lead to an increase. The different opinion of the *Consiglio di Stato*[75] contradicts the principles of the Consumer Code (decreto legislativo 6 September 2005 no 206), as it necessarily imposes the burden of decontamination costs on the consumer. In fact, the social costs borne by the collectivity, both *ex ante* and *ex post*, would decrease if all enterprises were – in accordance with the prevention and precautionary principles – required

[72] Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 32.

[73] Tribunale Amministrativo Regionale Piemonte-Torino 11 February 2011 no 136, available at www.giustizia-amministrativa.it.

[74] Tribunale Amministrativo Regionale Puglia-Lecce 13 April 2011 no 664, available at www.giustizia-amministrativa.it.

[75] Consiglio di Stato-Sezione V 16 June 2009 no 3885, available at www.giustizia-amministrativa.it.

to adopt appropriate measures to avoid the damage (Art 2050 Civil Code).[76] From the perspective of sustainable development,[77] the 'polluter pays' principle provides the final straw with respect to the principles of prevention and precaution.

IV. The Encumbrance on the Contaminated Site as a Burden Imposed in the Personal, Social and Environmental Interest

Placing encumbrance under the rubric of contaminated sites confirms the need to reinterpret it in a historical-comparative perspective.[78] The encumbrance is characterised by its innate ability to satisfy common interests, such as environmental protection, as a result of its typicality,[79] which works well with the provisions of Art 42, para 2, Constitution, which requires law to ensure the social function of property.[80]

[76] On the implementation of Directive 2004/35/EC in a comparative perspective, see B. Pozzo, 'Il recepimento della direttiva 2004/35/CE sulla responsabilità ambientale in Germania, Spagna, Francia e Regno Unito' *Rivista giuridica dell'ambiente*, 207, 210 (2010), which highlights how the German Civil Code (Bürgerliches Gesetzbuch, BGB) provides no strict liability provision for the exercise of dangerous activities comparable to the content of Art 2050 Civil Code.

[77] M. Pennasilico, 'Sviluppo sostenibile e solidarietà ambientale', in M. Pennasilico ed, n 16 above, 49-53.

[78] The third book of the BGB, entitled *Sachenrecht* (Right of the things), dedicates the sixth section on encumbrances (*Reallasten*), establishing at §1105 that '*ein Grundstück kann in der Weise belastet werden, dass an denjenigen, zu dessen Gunsten die Belastung erfolgt, wiederkehrende Leistungen aus dem Grundstück zu entrichten sind (Reallast)*' ('A plot of land may be encumbered in such a way that recurring acts of performance are to be made from the plot of land to the person in whose favour the encumbrance is created (charge on land'), English translation available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4244 (last visited 6 December 2016)). See, also, A. Fusaro, '«Affectation», «destination» e vincoli di destinazione', in P. Cendon ed, *Scritti in onore di Rodolfo Sacco. La comparazione* (Milano: Giuffrè, 1994), II, 455-480.

[79] The typicality of the encumbrance exemplifies a legal technique envisaged by Art 42, para 2, Constitution, according to which the legislator realizes the balance between the individual interest of the owner and the social interest. The overcoming of the inviolable concept of ownership as established by the Constitution, which defines the prevalence of the social interest in terms of balancing the interest of the owner, is analyzed by S. Rodotà, 'Art. 42', in Id and F. Galgano eds, *Rapporti economici*, II, *Arts 41-44*, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro italiano, 1982), 110. With particular reference to the properties of polluted sites, see P. Carpentieri, n 63 above, 851 and *contra* Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 21.

[80] P. Carpentieri, n 63 above, 635, 846, 850-851, allows the framing of the encumbrance in the context of the rehabilitation of contaminated sites from the viewpoint of the social function of property, where a foundation of reasonableness is found and proportionality in the legislative choice of private property involvement in the pursuit of health objectives and of environmental protection of decontamination. In the same sense, see also A. Nervi, n 63 above, 708; V. Corriero, 'La «responsabilità» del proprietario' n 54 above, 333-345; Id, 'Garanzie reali e personali in funzione di tutela ambientale' n 4 above, 49-52, 60, 69; Id, *Autonomia negoziale e vincoli negli atti di destinazione patrimoniale* n 68 above, 178-189; A.

The plenary assembly of the *Consiglio di Stato* is, however, of a different opinion. In the two orders referring the question of the application of EU principles (Art 191, para 2, TFUE) concerning sites to be rehabilitated[81] to the ECJ, the plenary assembly denied that the clauses contained a legal provision that could justify the imposition of an encumbrance within the social function of private property (Art 42 Constitution) –[82] as also requested by the European Court of Human Rights case law (hereinafter ECHR).[83]

The *ratio* of legislation on sites to be rehabilitated lies between the rules of property and those of liability.[84] The provisions seek to represent a judicious balance between multiple constitutional values: the right to private property (Art 42 Constitution), freedom of economic initiative (Art 41 Constitution), safeguarding of human health (Art 32 Constitution) and environmental protection (Art 117, para 2, lett *s*, Constitution). The balance finds its equilibrium in respect for the centrality of the person (Art 2 Constitution),[85] which time and again has been identified as the prevalent interest.

Art 253, para 1, Environmental Code constitutes a typical model of how to destine certain goods (Art 2645-*ter* Civil Code) for the purpose of health and environmental protection. It reconciles a number of interests: the interest in the repair of polluted environmental matrices (soil, landfills, subsoil and groundwater); the social interest in the protection of public health; the community interest in not being exposed to rehabilitation costs and the personal interest of the owner in good health and in owning a rehabilitated site (even if he is not responsible for the contamination).[86]

This view is not in accord with the body of administrative case law that,

Tommasini, 'Proprietà privata, sicurezza agroalimentare e tutela ambientale (a proposito della gestione dei siti contaminati)' *Rivista di diritto alimentare* (2015), 64, 74.

[81] Consiglio di Stato-Adunanza Plenaria ordinanza 13 November 2013 no 25 n 1 above, para 21.

[82] For P. Rescigno, 'Proprietà (diritto privato)' n 42 above, 254, 271-272, the rereading of property rights within a social perspective is influenced by Catholic thinking, which is sensitive to the rights of non-owners.

[83] On the relations between the two European Courts (Strasbourg and Luxembourg) for environmental protection, see A. Randazzo, 'Ambiente e tutela sovranazionale: il contributo della Corte di Strasburgo', in A.M. Citrigno and G. Moschella eds, n 21 above, 320-324. See, also, P. Carballo Armas, 'Il diritto all'ambiente nella giurisprudenza del Tribunale europeo dei diritti umani ed il suo recepimento nella dottrina del Tribunale costituzionale spagnolo', ibid 381-395.

[84] G. Calabresi and D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089, 1115-1124 (1972), on the pollution control rules.

[85] P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188, 199-207 (2005); Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 159-215.

[86] V. Corriero, *Autonomia negoziale* n 68 above, 178-189.

due to the fact that the encumbrance is inserted into para 2 and not para 3, Art 42 Constitution, characterises Art 253 as 'more similar to expropriation than to compensation for environmental damage'.[87] Such expropriation would derive from a breach of the encumbrance and the consequential forced execution of the special security interest (Arts 253 Environmental Code and 2910 Civil Code). There is a parallel between this provision and the expropriation of real estate ex Art 42, para 3, Constitution, although these rehabilitation measures constitute public utility works (Arts 17, para 7, decreto legislativo 5 February 1997 no 22, now in 242, para 7, Environmental Code).

The fact that the provision exposes the non-polluter owner to the same measure of liability as the polluter[88] raised doubts as to the provision's constitutionality. The encumbrance has been likened to expropriation, which necessarily gives rise to a possible indemnity from the administration. Without such an indemnity the non-polluting owner would necessarily incur the social cost of rehabilitation.

This approach is not acceptable, however, because the provision, while not within the scope of Art 42, para 3, Constitution, is unequivocally within the scope of Art 42, para 2. The encumbrance places a legal limit on property, in order to ensure that it achieves a social function – the safeguarding of constitutionally guaranteed values, such as human health and environmental protection (Arts 2, 9, 32 e 117, para 2, lett *s*, Constitution). An encumbrance does not merely serve an egoistic-individual function, nor does it serve as an assurance of the owner's exclusive economic enjoyment in his real estate.

The revised Art 252-*bis*, para 7, Environmental Code, introduced by decreto '*Destinazione Italia*' (Art 4 decreto legislativo 23 December 2013 no 145, converted with modifications into legge 21 February 2014 no 9) has

[87] Tribunale Amministrativo Regionale Piemonte-Torino 21 November 2008 no 2928, available at www.giustizia-amministrativa.it. *Contra* P. Carpentieri, n 63 above, 846-847, who qualifies the *iter* procedural designed by the decreto Ronchi – which tracks that provided by the Environmental Code – as 'alternative to, and incompatible with, expropriation'.

[88] D. Röttgen, 'Siti inquinati: responsabilità del proprietario non autore dell'inquinamento' *Ambiente*, 1088, 1089 (2001) and S. D'Angiulli, 'Privilegi e bonifiche: diritto italiano e tedesco a confronto' *Ambiente*, 1092-1095, reflect on the constitutionality of the Art 17, paras 10 and 11, decreto legislativo 5 February 1997 no 22, in light of the judgment of 16 February 2000 of the German Federal Constitutional Court (*Bundesverfassungsgericht*), which declared the law for the protection from harmful changes of soil and for rehabilitation of contaminated sites (*Gesetz zum Schutz vor schädlichen Bodenveränderungen und zur Sanierung von Altlasten, Bundes-Bodenschutzgesetz-BBodSchG*) illegitimate on the grounds that it exposed the owner of the site to unlimited personal financial liability, regardless of the valuation of the subjective conditions of the owner, then the state of good or bad faith in relation to the presence of contamination on the site in question, for breach of the constitutional norm for the protection of property (Art 14 *Grundgesetz*) and for conflicts with the principle of reasonableness (*Verhältnismässigkeitsprinzip*). For a more detailed comparison between Italian and German law, see M. Mazzoleni, 'Tecniche di tutela del suolo: disciplina tedesca ed italiana a confronto', in F. Giampietro ed, *La bonifica dei siti contaminati. I nodi interpretativi giuridici e tecnici* (Milano: Giuffrè, 2001), 363-379.

eliminated the subsidiary liability of the owner (already provided for by Art 252-*bis*, para 2, Environmental Code, as formulated by decreto legislativo 16 January 2008 no 4) where national interest sites in the process of industrial reorganization are contaminated. The constitutionality of an owner's subsidiary liability was in doubt due to a misuse of power by the legislator and due to the violation of the 'polluter pays' principle,[89] albeit in relation to a special possession. The subsidiary liability was arguably justified on the grounds that it represented a balance between the public interests relating to the polluted site – or the decontamination and re-industrialisation thereof – and the private interest in the economic exploitation of the real estate, in accordance with the sustainable development principle (Art 3-*quater*, para 1, Environmental Code).

Among the most important and discussed novelties of the new law, are the concepts of 'encumbrance revocation' and 'conditional revocation'. 'Encumbrance revocation relates to all acts committed prior to the program agreement designed to promote the realisation of the rehabilitation of sites of national interest', whereas conditional revocation concerns a case where 'the person responsible for the contamination has been certified as having undertaken rehabilitation of, and implemented safety measures on, the polluted sites' (Art 252-*bis*, para 6, Environmental Code). This latter provision was introduced at the urging of environmental associations, in order to mitigate the violation of the 'polluter pays' principle, given the anticipated 'tomb amnesty' for environmental disasters which displayed an unjustified bias in *favor* of big companies responsible for the pollution of SNIs.[90]

The norm confirms the centrality of the encumbrance and of the special security interest. The special security interest also assists *ex officio* interventions by the public administration with regard to sites of national interest,[91] while, at the same time, evading the *ratio* of the encumbrance, which is effectively a residual environmental protection. All other obligations of rehabilitation and environmental remedying governed by the Environmental Code can be excluded and/or 'evaded' by a legal agreement between the persons responsible

[89] L. Butti and F. Peres, 'Articolo 252-*bis*', in V. Italia ed, *Codice dell'ambiente. Commento al D.lgs. 3 aprile 2006, n. 152, aggiornato alla Legge 6 giugno 2008, n. 101* (Milano: Giuffrè, 2008), 2041-2042; F. Goisis, n 40 above, 2724.

[90] V. Corriero, 'Responsabilità e riparazione ambientale nella bonifica dei siti contaminati', in M. Pennasilico ed, n 16 above, 359, 364-365.

[91] According to Tribunale Udine 9 May 2011 no 1840, available at *Data bank online De Jure*, the logical and systematic interpretation of Art 253, whatever the application of the principle of Art 3 Constitution, leads to a solution in which all office actions (Arts 250 and 252, para 5) carried out by the competent local authorities for sites of regional relevance, or by the Ministry for the sites of national interest, are assisted by a special security interest. This use of the special security interest is subject to the rule in art. 2748, para 2, Civil Code and to the registrability of the connected encumbrance on the real estate which is the object of the special security interest.

for the contamination and the public administration (Art 252-*bis*, para 6, Environmental Code) covering 'all acts committed prior to that agreement.' These legal agreements do seem, however, to prioritize the interests of re-industrialisation over the protection of health and the environment.

The same provision – this time in line with the 'polluter pays' principle – establishes that public contributions and other economic and financial support measures (Art 252-*bis*, para 2, lett *e*, Environmental Code), which are imposed upon those responsible for the contamination, may concern 'only the buying of inconsumable things to industrial reorganisation and economic development of the area' (Art 252-*bis*, para 6, Environmental Code), but not the safety measures, rehabilitation and remedying of environmental damage, which are part of the polluter's competence.

A notable provision is Art 306-*bis* which has been introduced by the so called 'environmental connected' provision in the Environmental Code,[92] and which deals with damages and the environmental restoration of sites of national interest in the context of reinforcing 'environmental negotiation.' For the first time this article incorporates a provision on environmental transactions (new Art 306-*bis* on transactions aimed at environmental restoration of SNIs) into the Environmental Code, a provision previously introduced into the law by Art 2 decreto legge 30 December 2008 no 208, and converted into the (now repealed) legge 27 February 2009 no 13. The 'global transaction' is an alternative dispute resolution mechanism, with the purpose of diminishing the need for legal cases. The norm establishes the possibility of a form of pecuniary compensation which is not in accord with the specific form of compensation indicated by Directive 2004/35/EC.[93]

V. The Essential Requirement of a Causal Link for Environmental Liability

One of the most significant aspects of the judgment of the Luxembourg Court is the necessity for proof of causation.[94] The Luxembourg Court

[92] Art 31, para 1, legge 28 December 2015 no 221 '*Disposizioni in materia ambientale per promuovere misure di green economy e per il contenimento dell'uso eccessivo di risorse naturali*'. For more details, see M. Meli, 'La nuova disciplina delle transazioni nelle procedure di bonifica e di riparazione del danno ambientale concernenti i siti di interesse nazionale' *Le nuove leggi civili commentate*, 456, 470 (2016).

[93] V. Corriero, 'La "transazione globale" per il ripristino dei siti inquinati di interesse nazionale (SIN)', in M. Pennasilico ed, n 16 above, 367-370.

[94] On the problem of strict liability, on the consequential insurability of environmental damage, and on the relevance of the causal link in strict liability in environmental responsibility, see L. Villani, 'Il danno ambientale e le recenti modifiche del Codice dell'Ambiente (D.Lgs. n. 152 del 3 aprile 2006) nel sistema della responsabilità civile' *Responsabilità civile e previdenza*, 2173, 2179 (2008) and there for further bibliography (fn 31). On the causal relationship in the unitary and complex legal system, see M. Pennasilico, 'Dalla causalità alle

requires proof of causation in the context of strict liability for damages caused by any of the occupational activities listed in Annex 3 of the Directive 2004/35/EC, and by the corresponding activities in Annex 5 to part VI of the Environmental Code.[95] The court also requires proof for damages caused to species and natural protected habitats[96] and ascertained under subjective liability where the operator is at fault or has been negligent and where the operator's activity is different from those listed in the abovementioned annexes (Art 3, para 1, lett *a* and *b* Directive 2004/35/EC correspondent to Art 298-*bis* Environmental Code).

The position adopted by the Luxembourg Court on the question of the obligations imposed on a non-polluting owner confirms the previous reasoning of Luxembourg judges, recalled and applied to the peculiarities of the present case.[97]

The difficulty of demonstrating a causal link in relation to environmental pollutions, especially those of historic origin and diffuse character, may be particularly evident when several dangerous substances posing a threat to health and the environmental activities are alternately used on a site. Such difficulty has led the ECJ to consider whether national legislation which, in the transposition of the Directive, allows the competent authority *to presume* and *not to exclude* the existence of a causal link between the exercise of activities, which fall within the types referred to Annex III of the Directive, and contamination of environmental matrices,[98] is compatible with European

causalità: il problema del nesso eziologico tra diritto civile e diritto penale' *Rassegna di diritto civile*, 1295-1315 (2013).

[95] Tribunale Amministrativo Regionale della Lombardia-Milano 19 April 2007 no 1913, *Rivista giuridica dell'ambiente*, 830 (2007), according to which, when the party responsible no longer exists, a subject entirely foreign to pollution cannot be held responsible, not even in strict liability, which presupposes the conduct, despite the absence of subjective imputation criteria of fault or negligence. This *dicta* is published in the same review with other decisions, with comments of A.L. De Cesaris, 'L'Amministrazione fa male all'ambiente e all'impresa'; L. Prati, 'La giurisprudenza in tema di bonifiche dopo il D.Lgs. 152/2006'; M. Panni, 'Inquinamento storico e obblighi attuali di bonifica', in which the Italian administrative case law denies the liability of the owner and of the administrator of the area, who carry out occupational activities, on the grounds that they are not the authors of the pollutions on the national interest sites in question. The Ministero dell'Ambiente nevertheless, however, imposes the obligation to establish an emergency safety system of the groundwater table, through the construction of a hydraulic capture barrier in order to protect the groundwater table, regardless of technician ascertainment of the actual contamination *status*.

[96] V. Corriero, *La funzione sociale della proprietà nelle aree protette* (Napoli: Edizioni Scientifiche Italiane, 2005), 40-47, 148-154.

[97] Joined Cases C-478/08 and C-479/08 *Buzzi Unicem S.p.A. and other* v *Ministero dello Sviluppo Economico and other* (European Court of Justice 9 March 2010) n 19 above, para 38.

[98] Cases C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* n 13 above.

law. As provided in Art 11, para 2, of Directive 2004/35/EC, the causal link must be demonstrated by the competent authority. This evidence may, if necessary, be plausible evidence, which corresponds to the presumptions – serious, precise and consistent – set out in Art 2729, para 1, Civil Code.

The evidence of the causal link between the act or omission of the polluter and the contamination of environmental matrices can, according to Italian administrative case law, also be demonstrated indirectly, in accordance with the ECJ guidelines, through simple presumptions (Art 2729, para 1, Civil Code), or 'elements of fact from which serious, precise and consistent evidence can be drawn, which raises the probability that pollution has occurred and that it is attributable to certain authors'.[99] Evidence that could support such a conclusion would be the existence of an industrial plant in proximity to the polluted site or a similarity between chemicals used in industrial activities and pollutants found in the environmental matrices.[100]

In fact, according to the 'polluter pays' principle, the obligation to remedy environmental damage falls neither on the non-polluting owner nor on the collectivity (ie the public administration). Rather, it falls on the polluters in proportion to their contribution to the damage that has occurred.

To impose custodial liability on an owner who is not the polluter would transform that owner into a sort of State designated 'licensee'. From the moment the owner would entrust the management of the property to third parties, he would be obliged to examine, under pain of liability, the reliability of the third parties in terms of sustainable approaches to industrial activities which would be carried out *in situ*. The result would be aberrant, illogical and would openly violate the Italian constitutional principles (reflecting European environmental values). It would involve excessive responsibility on the part of the owner and would result in a real lack of accountability for the polluter. Contrary to the fundamental principles of national law, the limitation of real estate circulation would also follow as another indirect effect.

[99] Consiglio di Stato-Sezione V 16 June 2009 no 3885, Tribunale Amministrativo Regionale della Toscana-Firenze 17 September 2009 no 1448, Tribunale Amministrativo Regionale della Toscana-Firenze 24 August 2009 no 1398, *Rivista giuridica dell'ambiente*, 152 (2010). For a contrary view, see Consiglio di Stato-Sezione VI 9 January 2013 no 56, available at www.giustizia-amministrativa.it, which considers 'the rigorous assessment of the causal link between the act of 'responsibility' and the phenomenon of pollution' necessary and provides that 'such a determination must be based on adequate reasoning, on suitable instructors elements' and 'on evidence and not on mere presumptions.'

[100] In this sense, see Tribunale Amministrativo Regionale della Sicilia-Catania 11 September 2012 no 2117, *Rivista giuridica dell'ambiente*, 114 (2013), with comment of L. Prati in accordance with Case C-378/08 *Raffinerie Mediterranee (ERG) s.p.a. and other* v *Ministero dello Sviluppo economico and other* n 13 above, cited in para 57 of motivation of the judgment. See, by analogy, Case C-188/07 *Commune de Mesquer* v *Total France SA e Total International Ltd* (European Court of Justice Grande Chambre 24 June 2008), available at www.eur-lex.europa.eu, para 77.