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Private Law Instruments in the System of Environmental Control

The main factor presently influencing the Estonian environmental law is preparation for accession to the European Union. The adoption and implementation of the EC environmental law is a serious challenge for our legal system, economy, and also for our administrative capacity. This article examines some of the problems directly or indirectly related to the harmonisation of Estonian environmental law with European Community law. The paper focuses on the private law instruments of environmental risk control mainly for two reasons. Firstly, the private law regulatory instruments are presently acquiring quite an important role in the system of environmental risk control, and secondly, the private law issues of environmental risk control have been discussed relatively little in literature.

The posing of the problem by relating the implementation of European Community environmental law and private law may seem unjustified. It is known that like environmental law in general, the European Community harmonisation measures are of a public law nature. The doubt should thus be dispelled and the following question should be investigated — what is (or should be) the role of private law in the implementation of EC environmental law? The task is not so onerous. It suffices to bring three examples of private law regulatory mechanisms, or at least mechanisms substantially affected by private law.

- Pollution trading, which has been applied or has been attempted to be applied both in single countries and globally. The best known example is the Kyoto protocol, in which the system is seen as an important means of solving the global warming problem.*[1]
- Environmental agreements, which have been lately increasingly used to define the environmental protection goals, and also to ensure the enforcement of environmental requirements. The environmental agreements are discussed in detail below.
- The environmental (civil) liability scheme, the application of which in regulating environmentally hazardous activities has yielded relatively good results in certain cases. The topics of environmental liability are also further discussed below.

[1] See Foundation for International Environmental Law and Development. FINAL REPORT: "Designing Options for Implementing an Emissions Trading Regime for Greenhouse Gases in the EC". Available at: http://www.field.org.uk/fieldmain/climate.htm.

Naturally, the list is not exhaustive and does not nearly provide a full picture of the role of private law in today's environmental control system.*3

When discussing the role of private law in the implementation of EC environmental law, particular attention should be drawn to two aspects. These pertain to:

- the basic obligations of a Member State in the implementation of EC law and the implementation methods;
- the integration principle laid down in article 6 of the EC Treaty.

So, what are the main obligations of a Member State in ensuring the implementation of the EC environmental harmonisation measures? To clarify the issue, a number of references are provided below to the EC Treaty and also to the positions and declarations of the Court of Justice and of other institutions.

In the given context we should start with article 249 of the EC Treaty, which provides: "/…/A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of **form and methods**"*4 (author's accentuation — H.V.).

This provision is to be read together with article 10 which provides: "Member States shall **take all appropriate measures** to ensure fulfilment of the obligations arising out of this Treaty and facilitate the achievement of the Community's tasks. They shall **abstain from any measure** which could jeopardise the attainment of the objectives of this Treaty" (author's accentuation — H.V.).

The Court of Justice has assumed the position that:

- the freedom of choice of methods as set out in article 249 does not release a Member State from the general obligation to choose "the most suitable forms and methods";
- the transposition requirement does not imply the obligation to establish special provisions copying the wording of a directive;
- a Member State has fulfilled its transposition requirement if the legal order of the state ensures the achievement of the goals provided in a directive and is sufficiently clear and precise for that purpose.*5

Declaration No. 19 on the implementation of Community law was added to the EU Treaty, which stresses:

"/…/ it is central to the coherence and unity of the process of European construction that each Member State should fully and accurately transpose into national law the Community Directives addressed to it within the deadlines laid down therein. Moreover, the Conference, while recognising that it must be for each Member State to determine **how the provisions of Community law can best be enforced in the light of its own particular institutions, legal system and other circumstances**, but in any event in compliance with article 189 of the Treaty establishing the European Community, considers it essential for the proper functioning of the Community that the **measures taken by the different Member States should result in Community law being applied with the same effectiveness and rigour as in the application of their national law**" (author's accentuation — H.V.).

Protocol 30 to the Treaty of Amsterdam, concluded in Maastricht, which deals with the application of the principles of subsidiarity and proportionality, points out: "Regarding the nature and the extent of Community action, Community measures should **leave as much scope for national decision as possible**, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, **care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems**" (author's accentuation — H.V.).

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3 The majority of private law-related pollution control measures belong to the Economic Incentive Systems for Environmental Control. The main components of the system are tradable residuals quota or credit systems, market-based information strategies, liability for environmental damage, transferable development rights, mitigation banking, risk bubbles.

4 The EC environmental harmonisation measures are mainly established in the form of directives; the share of regulations in this area of policy is negligible.

5 J. Jans. European Environmental Law. Groningen: Europa Law Publishing, 2000, pp. 135–137.

6 J. Jans (Note 4), p. 152.

It can be said from the theoretical aspect that transposition of the EC law has been correct and exhaustive, if after the entry into force of the national measures implementing a directive the directive loses its relevance. In such a case, all the goals set out in the harmonisation measures can be achieved through the legal order of the Member State.*[7] A directive has to be addressed only if problems arise in the interpretation of national law. It should be added that until the entry into force of the implementing legislation of a directive, a Member State has to abstain from all measures that may damage the achievement of the goals of the directive in the future. Thus, a Member State has the right and obligation to ensure the implementation of a directive by applying the instruments, terminology and administrative arrangements of its own legal system.

Two main conclusions can be drawn from the above.

- The obligations of a Member State in the implementation of environmental policy are not limited to the formal transposition of directives to its own legal order. As said, the due transposition of a directive does not consist in exact copying of its provisions in a separate act or legal provision, but it suffices to create a general legal context that enables persons to exercise the rights arising to them from the directives and to protect such rights in court. Formal copying of the provisions of a directive can even cause confusion. National legal systems are different and the use of certain wordings can be misleading.*[8]
- A Member State has to ensure not only the implementation of the environmental harmonisation measures established in the form of directives (or regulations), but also the achievement of the general objectives of EC environmental policy*[9] as set out in article 174 (1) of the EC Treaty. The European Commission has stressed that if a country has harmonised its law with the EC environmental *acquis,* the environmental control obligations of the country are by far not completed. The EU environmental *acquis* apparently does not cover more than a half of the legal instruments necessary for adequate environmental protection today.

Considering the central role of private law in the shaping of a country's economic environment, it is obvious that this area of law forms an integral part of the above "general legal context". The freedom of choice of "form and methods" of the implementation of directives as provided in article 249 of the EC Treaty enables Member States to apply the "most suitable means" of achieving the goals of EC law. If the goal of an EC environmental directive is to control certain environmentally hazardous activities, without prescribing the exact implementation methods, a Member State is free to choose whether to apply an environmental permits and pollution charges system, to impose punishment pursuant to criminal procedure, or to apply an environmental civil liability scheme to control such activities and prevent material damage. Relevant examples can be found in the natural habitats directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora), the goal of which is to contribute to ensuring biodiversity, to determine areas of conservation to this end and to establish the necessary protection regime in such areas. Article 6 (1) of the Directive provides:

"For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites".

It is thus up to a Member State to decide what measures to apply in ensuring the implementation of the Directive. As we see, contracts are a part of such measures.

The potential role of private law in environmental risk control should also be regarded in the context of the integration principle laid down in article 6 of the EC Treaty. Article 6 provides: "Environmental protection requirements must be integrated into the definition and implementation of the Community

[7] Transposition is a process whereby the rights given to and obligations imposed on persons pursuant to directives are incorporated into national law. The national law also has to contain measures to protect the rights of persons, if the directive grants to the competent authorities the right to act, but under the specified conditions (or pursuant to certain conditions or restrictions) and if exercise of such a right under such conditions may result in damaging the lawful rights and interests of persons. The above is reasoned by the need to ensure the right of persons to contest, in a court of their country, the activity of public authority as influenced by Community law. The obligation to incorporate the provisions of a directive into national legislation does not merely require repetition of the text of the directive in national law, but rather the obligation to ensure that such transposition leads to the result pursued by the directive ("*effet utile*"). The "result" may, in this context, cover certain aspects of protection, preservation and improvement of the quality of the environment.

[8] J. Jans (Note 4), p. 152.

[9] The main goals of the EC environmental policy are (1) preservation, protection and improvement of the quality of the environment, (2) protection of human health, (3) prudent and rational utilisation of natural resources, and (4) implementation of measures at international level to deal with regional or worldwide environmental problems.

policies and activities referred to in article 3, in particular with a view to promoting sustainable development".

This is a rather unique requirement in the general context of the Treaty. Similar provisions can be found in article 151 of the Treaty: "The Community shall take cultural aspects into account in its action under other provisions of this Treaty", article 152: "A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities" and article 153: "Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities". As one can see, the integration principle is laid down much less clearly and much more "mildly" for other policies. The only policy area comparable to environmental policy in this respect is the protection of public health. But a clear difference exists even here. The integration requirement for environmental policy has a much higher position in the hierarchy of the provisions of the Treaty, as it is included in the first part setting out the main principles. The requirement to ensure the protection of human health is still placed in division XIII concerning public health. It has been thought that the placement of the environmental integration requirement in a position comparable to the other basic principles of EC functioning (subsidiarity, proportionality, *etc.*) is not only a clear political sign that recognises the importance of environmental policy[*10], but also an important legal definition that gives environmental policy "certain added value" when conflicting with other policies.[*11] But it should be stressed that the majority of authors[*12], as well as the Court of Justice practice, do not directly confirm the existence of such added value. The dominant opinion is that no hierarchy can exist in respect of the policies declared in article 3 of the EC Treaty. One has to agree with the opinion that the principle of proportionality has to be taken into account in the implementation of the integration principle, which in this case means that incorporation of environmental concerns into other policies (*e.g.* in imposing certain trade restrictions) does not go further than absolutely essential for the achievement of a particular environmental goal.[*13] Such interpretation is also supported by the Court of Justice in the *ADBHU* case.[*14]

The integration principle is not solely characteristic of the EC Treaty, but belongs to the fundamental bases of contemporary environmental policy and reflects the endeavour to make the applicable law "greener".[*15] The integration principle should not thus be limited to the policy level; environmental concerns should be incorporated into the entire legal system, having again regard to the principle of proportionality. Several countries have taken this path by incorporating environmental concerns into the system of law of property, law of obligations, insurance law and certain other areas of private law.[*16] Such examples can also be found in Estonia. For instance, section 25 of the Environmental Impact Assessment and Environmental Auditing Act[*17] provides for the requirement of environmental audit for certain transactions with immovables.

When addressing the environmental risk control systems affected by private law, one has to bear in mind that the "ability" of private law is unfortunately limited in this context. Already at the beginning of last century the British economist A. C. Pigou formulated a theory[*18], the content of which is briefly the following. In a market economy context, environmental problems arise as the result of market failure. Environmental damage occurs because polluters of the environment do not have to bear the social expenditure (damage) that the pollution created by them causes to other persons.[*19] One of the reasons for such a situation is the fact that it is almost impossible to determine effective and precisely delimited property rights of the common resources (such as ambient air, fish resources, flora, *etc.*). If this were possible, non-owners should agree upon the establishment of restricted real rights or find another similar property law solution in order to enter the sphere of ownership of another

10 G. van Calster, K. Decetelaere. Amsterdam, the Intergovernmental Conference and Greening the EU Treaty. – European Environmental Law Review, 1998, p. 14.

11 See S. Bär, R. Krämer. European Environmental Policy After Amsterdam. – Journal of Environmental Law, 1998, pp. 318–319.

12 See L. Krämer. EC Environmental Law. London: Sweet and Maxwell, 2000, p. 15.

13 See J. Jans (Note 4), pp. 18–19.

14 Case 240/83 *ADBHU* (1985) ECR 531.

15 See V. Kuhlmann. Making the Law More Ecocentric: Responding to Leopold and Conservation Biology. – Duke Environmental Law & Policy Forum, Fall, 1996, pp. 133–165.

16 See German Environmental Law for Practitioners. Ed. H. Schlemminger, H. Wissel. Munich: C. H. Beck, 1996, pp. 176–181, 193–195, 247–251.

17 Keskkonnamõju hindamise ja keskkonnaauditeerimise seadus (Environmental Impact Assessment and Environmental Auditing Act). – Riigi Teataja (The State Gazette) I 2000, 54, 348 (in Estonian).

18 See A. C. Pigou. The Economics of Welfare. – AMS Press, 1978, pp. 172–203.

19 See T. Anderson, J. Grewell. From Local to Global property: Privatising the Global Environment?: Property Rights Solution for the Global Commons: Bottom-up or Top-Down. – Duke Environmental Law & Policy Forum, Fall, 1999, p. 74.

person. In such a situation the polluter would be interested in reducing pollution.*[20] Market failure can therefore be largely attributed to the "failure" of private law. Contemporary private law is concerned with the division of resources rather than their preservation. However, this does not imply that private law should not be placed in the service of environmental protection to a greater extent than it has been done so far. Private law instruments certainly have their role in the general legal context, the goal of which is to ensure sustainable development. Environmental law in its archaic form is known to originate from private law, more specifically from the institute of neighbourhood rights. Regulation concerning pollution control only later took a sudden turn toward public law. Estonian environmental legal regulation is almost entirely of a public law nature. In conclusion, it should again be stressed that the goal is not to exclude or exaggerate different methods, but to combine them in the correct manner.*[21] Environmental protection is and will be primarily an area of public law, but private law should be increasingly employed to prevent environmental damage. Private law instruments (*e.g.* neighbourhood rights or environmental civil liability) work best in a situation where specific sources of pollution can be clearly identified and their impact is relatively local. It is also clear that private law is not an appropriate instrument to handle the pollution problems caused by different sources and damaging the rights of many persons.

The advantage of private law instruments and economic incentives is believed to lie in the fact that they are largely self-regulated and flexible (to choices)*[22] and the final goal — a clean environment — is achieved more quickly and with less public expenditure*[23] than in the case of "command and control measures". This is partly true, but most of the above instruments are not automatic, but take effect in a certain legal framework. An example is the system of pollution trading, where spontaneous market order cannot by far be relied on solely. One of the reasons for imposing regulation and particular market restrictions is the fact that pollution trading could in certain cases (if one company or the state buys up the polluting right) be accompanied by a local increase in pollution load beyond the established maximum levels, although the overall pollution load may reduce.*[24]

The main advantage of alternative instruments to the command and control measures lies in their flexibility. The system of pollution trading directly or indirectly attributes a price to each "pollution unit", but leaves the polluter the opportunity to decide on reducing the quantity of pollution caused by it and also on the methods and time span of reduction. In order to ensure economic viability together with the quality of the environment, companies should be left with as great as possible freedom to decide on the application of flexible, innovative and economically efficient methods to reduce or prevent pollution. The prevalence of centralised command and control inhibits the environmental innovation of companies. Ireland is a good example of how the development of "green industry" has driven the entire country to rapid economic growth.

The following part of the paper focuses on the details of two environmental risk control systems related to private law: environmental agreements and environmental civil liability.

Environmental agreements

Environmental agreements between companies or their associations and the state are gaining popularity. Several factors trigger such agreements — the economic aspects of meeting the increasingly stringent environmental requirements, the sometimes inefficient legal regulation, *etc.* However, the main reason behind the environmental agreements is the above-described need for self-regulation and flexible solutions.*[25]

A variety of different environmental agreements exist. These may:

- be concluded on the local, national or regional (*e.g.* European Union) level;

20 See L. de Alessi. Private Property Rights as the Basis for Free Market Environmentalism. – Who Owns the Environment. Ed. P. Hill, R. Meiners. Lanham: Rowman and Littlefield Publishers Inc, 1998, pp. 1–3.

21 R. V. Percival *et al*. Environmental Regulation. Law, Science and Policy. Boston: Little, Brown and Company, 1996, pp. 131–138.

22 See A. A. Schmid. Environmental Law and Economics. – The Elgar Companion to Law and Economics. Ed. J. G. Backhaus. Northampton: Edward Elgar Publishing, 1999, pp. 203–204.

23 See B. Ackerman, R. Stewart. Reforming Environmental Law. – Stanford Law Review, 1985, Vol. 37, p. 301.

24 See T. Tuetenberg. Tradeable Permits for Pollution Control When Emission Location Matters. What Have We Learned? – Environmental and Resource Economics, 1995, Vol. 5, p. 95.

25 See E. Rehbinder. Environmental Agreements: A New Instrument of Environmental Policy. European University Institute, Jean Monnet Chair Paper, RSC No. 97/45. Available at: http://www.iue.it/PUB/JMChP.html.

- regulate general or specific environmental issues;
- involve or not involve public authorities.

By their legal nature, the environmental agreements can be divided into legally binding (contracts, covenants) and non-binding ("gentlemen's agreements") on the parties. The practice varies by country. According to Rehbinder, non-binding agreements prevail in Germany, Austria, Belgium and France, binding agreements predominate in the Netherlands and Portugal, and both are almost equally used in Sweden and Denmark.*[26]

Entry into the environmental agreements brings about a number of legal issues.

Firstly, the use of the environmental agreements as a means of transposing EC environmental directives. Having regard to the position of the Court of Justice, which requires transposition of EC law through general mandatory provisions*[27], the environmental agreements should not be accepted as means of transposing directives. However, exceptions exist. The environmental agreements of the state and industry can be used for transposition if accompanied by other public law measures. Several Member States apply the principle that if the majority of members in an association of undertakings join an agreement, the state may also enforce the agreement with regard to the remaining members. In some cases the possibility to use the environmental agreements is provided in the directives.

It should also be noted that both the Commission and the Council have lately supported the extended use of the environmental agreements as a means of implementing the environmental policy of Member States and of the Community (Commission Recommendation 96/733*[28]). At the same time, the Commission has provided clear guidelines and defined the formal and substantive requirements with which the agreements used for transposition of directives must comply.

In all cases, the environmental agreements are required to:

- be concluded as written agreements, subject to the enforcement mechanisms of civil or administrative law;
- contain exact quantitative specifications and deadlines for application;
- be published in an official publication;
- provide for clear and exact supervision and publicity mechanisms and mechanisms of regular reporting to competent authorities;
- provide for the procedure for generalisation, assessment and verification of the performance results;
- contain the requirement to provide information to third parties on the same bases and under the same conditions as provided in the directive on access to information on the environment (90/313/EEC);
- provide for the possibility to apply sanctions (fines, compensation for damage, revocation of environmental permit);
- exclude unilateral termination of the agreement by the industry.

If all these conditions are fulfilled, the environmental agreements and the "normal" instruments of legal regulation do not differ significantly. *[29]

One has to agree with the position of J. Jans that the last and most important condition still remains — a directive must allow the use of the environmental agreements. Directives usually provide that Member States effect the legal and administrative provisions required for the compliance with the directive by the specified term. This standard formulation quite apparently refers to generally mandatory legal provisions, and not to privately initiated "agreements".*[30] The answer to the question of whether environmental agreements are an acceptable means of transposing EC law is no rather than yes.

Another problem concerning environmental agreements is related to their compliance with the principles of competition law. The following environmental agreements may be held to be contrary to the prohibition of agreements that distort competition as provided in article 81 (1) of the EC Treaty:

- agreements whose goal is to develop common technical standards or product labelling systems;

26 *Ibid.*, p. 4.

27 Case 361/88 *Commission v. Germany* (1991) ECR I-2567.

28 COM (96) 561 final; Recommendation 96/733/EC, OJ 1996, L 333/59.

29 J. Jans (Note 4), pp. 147–148.

30 *Ibid.*, p. 148.

- agreements whose goal is to develop common less polluting products and technologies;
- agreements in which the energy consumption of products is agreed to be reduced to a certain level;
- agreements in which a common waste collection or recycling system is agreed to be created.

Pursuant to article 81 (2) any prohibited agreements are automatically void. Agreements may be permitted if they contribute to improving the production or distribution of goods or to promoting technical or economic progress in a manner that outweighs the potential distortion of competition. It must be admitted that the Commission, which takes decisions on the acceptability of such agreements, has taken a rather critical view of the environmental agreements from the competition aspect.*[31]

Environmental agreements can result in a dominant position on the market. An example is an agreement on a common system of accepting and recycling used packaging*[32], which constitutes a dominant position if alternative systems do not exist. At the same time, a dominant position is not *per se* incompatible with the Treaty — what is prohibited is the abuse of the dominant position. Unlike article 81, article 82 does not allow for any exceptions. Any cases of abuse of the dominant position are prohibited.

The main problem thus is the proportionality of competition distorting environmental measures. The Commission has been chiefly guided by the following criteria when assessing proportionality:

- an agreement must have a direct environmental goal;
- an agreement must allow the actual (not hypothetical) achievement of such goal;
- the goal could not be attained by other, less distorting measures;
- distortion of competition must be proportionate to the environmental benefit.

Environmental liability

The following part of the paper deals with certain issues related to the private law aspects of environmental liability. But before focusing on the main topic, neighbourhood rights should be addressed that also play an important role in the prevention of environmental damage.

Section 143 of the Law of Property Act provides that the owner of an immovable may not spread gas, smoke, steam, odour and other nuisances to another immovable if this is contrary to the environmental protection requirements or significantly damages the use of other immovables. The significance of damage to the use of another immovable largely depends on the planning or the intended purpose of such immovables. When the immovables are in the same town, one in a mainly industrial and another in a residential area, the level beyond which the nuisance is prohibited is very different. Noise level that is completely ordinary and permitted in an industrial area might be prohibited in a residential area, whose main purpose excludes activities related to the noise level equivalent to that of an industrial area. To prevent arbitrary action and violation of the neighbourhood rights, it has become a tradition lately that many damage preventing procedures are public and everyone whose interests an activity may violate can participate in the decision-making process or at least is entitled to receive relevant information. An example is the public procedure for planning, publication of the applications for and issue of pollution permits, or the dependence of the issue of building permits on the neighbours' consent, if there is reason to believe that the building may cause adverse effects, *etc.* If the nuisance is contrary to the environmental protection provisions, it is clearly unlawful behaviour, in which case the owner of the neighbouring immovable may demand the elimination of the nuisance and claim compensation for the caused damage. The situation is more complicated when the nuisance is not directly contrary to any environmental standards, but the use of the immovable in accordance with its intended purpose is nevertheless materially damaged. In such case the consequences depend on weighing the expenses of eliminating the nuisance and the caused damage. If the damage exceeds the expenses of eliminating the nuisance, the owner of the affected immovable may demand elimination of the nuisance and compensation for the caused damage. However, if the expenses of elimination exceed the damage, the owner of the immovable may only claim compensation. It should be added as a comment that regard has to be paid not only

31 See *e.g.*: Decision 82/731 of 17 December 1981, *Navewa-Anseau*, OJ 1982, L 167/39.

32 See EC XXIIIrd Competition Report, § 240.

to the environmental protection requirements, but also to the provisions regulating the use of the immovable, particularly the requirements arising from planning.

In common law countries the principles similar to the above arise from the *Rylands v. Fletcher* case. The *Rylands v. Fletcher* case brought about application of the strict liability scheme, the essence of which lies in the principle that if the owner of an immovable brings into or maintains in its premises something that does not naturally belong to the plot of land and that can be assumed to cause damage to the neighbours, the owner must compensate for all the related damage. The land owner is thus presumably liable for damage caused by a source of pollution located on his or her land and escaping therefrom, regardless of whether the negligence of the possessor of the source and the causal relationship between the negligence, the escape of the source of pollution and the damage done is proved or not.*[33]

The scheme arising from the above neighbourhood rights and the *Rylands v. Fletcher* case has actually gone beyond the scope of purely private law and has also acquired a place in the contemporary international environmental law as well as in the sustainable development concept.

From the viewpoint of the development of international environmental law, the turning point was the UN Environmental Conference in Stockholm in 1972, in which 113 countries reached a common understanding in the relevant basic principles of environmental protection.*[34] In this context, particular reference should be made to the 21st principle of the Stockholm Declaration, which is worded as follows: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

This principle has been later frequently repeated in various international conventions, resolutions and other sources of international law, including the 1992 Biodiversity Convention and the 1997 Kyoto Protocol of the Convention on Climate Change. The principle essentially originates from the well-known *Trail Smelter* case.*[35] It can thus be said that neighbourhood rights exist not only for neighbouring immovables but also between countries.

But this is not all yet. The principle of sustainable development is also directly related to the neighbourhood rights. Sustainable development has been defined as a method of development that satisfies the needs and endeavours of the present generation without jeopardising the similar rights of future generations. It can thus be said that a certain neighbourhood right exists in time or between generations, which in English terminology is known as intergenerational equity.*[36]

Returning to environmental liability, it must be admitted that rather than targeting compensation for damage the contemporary environmental policy aims at prevention of damage. The following main goals of environmental civil liability (further to compensation for damage) should be pointed out:

- implementation of the polluter pays principle, imposing on the polluter the encumbrance of incurring the expenses of pollution control;
- acting as an anti-stimulus to the polluter for the prevention of further environmental damage.

Environmental considerations (including the risk of environmental proprietary liability) have become an important factor influencing the economic activities of companies, particularly as regards transactions with immovables, bank loans, insurance and commercial lease relationships. The assessment and management of environmental (liability) risks has become a routine procedure for these types of transactions.*[37]

The peculiarities of environmental damage and its causing mechanism render the application of several civil liability principles problematic in some cases. The peculiarities that cause the need to modify the usual liability schemes particularly include:

- the cumulative and binary nature of environmental damage, which makes identification of the tortfeasor difficult;

33 E. T. James. An American Werewolf in London: Applying the Lessons of Superfund to Great Britain. – The Yale Journal of International Law, 1994, Vol. 19, No. 2, pp. 364–366.

34 See A. Kiss, D. Shelton. International Environmental Law. London: Graham & Trotman, 1991, pp. 40–41.

35 Arbitral Award in the *Trail Smelter* Case, (11 March 1941), 3U.N.R.I.A.A. 1911.

36 See S. Tai. Future Generations and International Law (Emmanuel Agius & Salvion Eds., 1998). – Georgetown International Environmental Law Review, Fall, 1998, pp. 232–234.

37 J. T. O'Reily. US Environmental Liability Risks. London: Graham & Trotman, 1995, p. 127.

- difficulties in establishing the causal relationship as the environment is a non-linear system not characterised by the usual cause and effect relationship, but a complex set of causes and effects;
- the time factor, due to which environmental damage (including damage caused to human health) may become apparent only after years or even decades. Problems concerning past environmental damage therefore require solving.

It would be wrong to say that the environmental civil liability scheme is as unique as to always require completely independent regulation. Similar problems arise in other cases of damage, when risks inherent in particularly hazardous items or activities actualise. In such cases, strict liability, *i.e.* liability in which case the person who controls the risk is liable for damage regardless of his or her fault is applied. Strict liability is the most adequate liability scheme for environmentally hazardous activities. Upon environmental damage, a major advantage of the strict liability scheme is the presumption of a causal relationship. Subsection 1162 (2) of the Estonian draft Law of Obligations Act provides: "Where a dangerous facility or thing is, according to the circumstances, capable of causing the damage incurred, the facility or thing is presumed to have caused the damage. This does not apply if the facility or thing has been operated in compliance with requirements and no disturbance has occurred in its operation." Such a presumption makes solving of the causal relationship issue easier for the injured party in the case of environmental damage. Otherwise it would be difficult (if not impossible) for the injured party to prove the "origin" of pollution, if, for instance, ground water or ambient air were polluted.

Strict liability stimulates polluting industries to apply further safety measures and reduce the emissions or the volume of waste. Strict liability does, however, have a number of disadvantages. Such risk can be born and managed only by economically successful companies, while the less successful are forced to leave the market. The problem is particularly acute in the transition countries of Central and East Europe. It has been stated that the application of the strict liability standard may impede foreign investments. On the one hand, such arguments are partly correct and the concern justified, whilst on the other hand, it is quite natural that economically and technologically weak companies should not be allowed to operate in areas involving an increased risk that can be presumed to cause material damage.

Upon environmental pollution or other damage, the environmental damage *per se* or the damage related to the deterioration of the quality of the environment also needs to be compensated for further to the damage caused to other persons and their property. The most important peculiarity of environmental liability is related to this problem. Section 127 of the Estonian draft Law of Obligations Act provides:

> "(1) Upon causing damage by an environmentally hazardous activity, the damage related to the loss or deterioration of the quality of the environment shall be compensated for further to the damage caused to a person or the person's property insofar as compensation for the former is not covered by compensation for the latter. Compensation may be claimed for such damage up to the scope of the cost of measures taken in good faith or provided by law for restoration of the environmental condition, the goal of which is to recover the destroyed or damaged parts of the environment or to replace same with equivalent parts.
>
> (2) Further to the provisions of subsection (1), the cost of measures applied to prevent damage or alleviate the consequences of damage and the damage caused by application of such measures shall also be compensated for".

Similar principles have been provided in the law of many other countries*[38] and in international conventions. However, upon careful examination of such provisions paradoxical conclusions can be reached. The regulation, pursuant to which environmental damage *per se* is to be compensated for within the scope of costs (to be) incurred to restore and replace the environment and to eliminate the consequences, may cause the tortfeasor to fully and finally destroy the environmental object. In such case, the tortfeasor need not pay anything as the environmental object is irrecoverable and irreplaceable.*[39] This rather provocative argument proves that in the case of environmental proprietary liability, private law regulation has to be complemented by public law regulation, which establishes the bases and methods for determination of compensation upon destruction of environmental objects whose recovery and replacement is impossible.

38 M.-L. Larsson. The Law of Environmental Damage. Liability and Reparation. – Kluwer Law International, 1999, pp. 490–492.

39 It is clear that a large part of the environmental objects are irreplaceable. It would mean the same as replacing a Picasso painting with a copy.

To summarise the above, it should be stressed that the strict environmental liability schemes applied in the developed countries since the 1980s have radically changed the behaviour of undertakings and particularly the obligations of land owners. In countries such as the USA, where this aspect of civil liability is developed to perfection, environmental risk analysis has become an integral part of many business transactions. The actual market situation — including pressure from lenders, contract partners and consumers — requires that companies pay more and more attention to the environmental protection considerations even in countries where environmental civil liability schemes are not perfectly effective yet.

It should also be noted that although environmental civil liability is generally regarded as an effective legal instrument of pollution control, one should not believe in it as a panacea that treats all illnesses. Civil liability is not applicable to many types of pollution, such as pollution of ambient air by municipal waste or the exhaust gases of cars. It should also be understood that despite the attempts to achieve effective and applicable environmental civil liability schemes, court matters in this regard are slow and the decisions might not be productive from the aspect of environmental protection.

Several other aspects have to be taken into account when incorporating environmental considerations into other areas of law. The priority of environmental protection in state policy and in the eyes of public opinion is particularly important in this respect. Public opinion is often influenced from the outside. This is also the case in Estonia, where the outlook of accession to the European Union has placed environmental issues among the priorities. Environmental protection is one of the areas, the regulation of which inevitably has to have regard to not only the political, economic and social interests dominating at the particular moment of time, but also to the readiness of the public for such regulation.*[40] Our society, which is undergoing radical economic, social and political reforms, must find a consensus to the question of which efforts to protect and improve the environment are to be regarded as tolerable and which are not. Both aspects have to be taken into account when searching for an effective environmental law method — to ensure the preservation of quality environment, capable of guaranteeing life, and to remain within the scope of environmental protection expenditure acceptable to the society. This formula is also applicable when determining the balance of private law and environmental protection.

[40] Pursuant to the sustainable development principle, the interests and needs of future generations also have to be taken into account in all these respects.