



Insurance and the environment

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I think that there can be no doubt that in the last twenty years of this century which is now drawing to an end the environment has taken a very important role in a society which is increasingly aware of the necessity of protecting a world which has already become degraded and which will, if nothing is done about it, become a very poor legacy for future generations.

At the same time a new field of law has been developed which until now has been carried out in a unequal form: **Environmental Law**, this includes matters which, although in existence for many years, have now taken on a completely different perspective.

The impact of this social and legal perception on the world of insurance has been, and continues to be, extremely relevant, to the point where never in the history of the insurance institution has so much literature been generated on this subject; so many and varied working parties been set up to study this matter, and have such a large number of international forums been organised in which the experts in this field can give the results of their experience and research.

The argument concerning the insurability of environmental risks is far from being resolved, and would seem to have no solution in the short-term, given the upcoming legislative changes and the mounting uncertainties concerning insurance - especially in the context of environmental third party liability. The pace of change is rapid and the drafts for legal texts and official documents which are continually being issued on a domestic and international level or on a community level, where their effects are most immediate and direct, constantly remind us of certain questions which have still not been resolved.

Since the publication of the now familiar GREEN PAPER¹ which aimed to open a debate on the repair of ecological damage, the assignment of responsibility and their tendencies towards strict liability, the solutions based on joint compensation funds and the advisability of setting up a harmonised legal body for the European Union have given rise to various documents which give a magnificent vision of this controversial subject, particularly with respect to insurance matters:

– The responses to the Green Paper on the part of national governments, public bodies, associations, corporations, legal institutions, academies, scientists and personal opinions².

– The «Avis» of the Economic and Social Committee³.

– The recommendations of the Commission on Insurance of the International Chamber of Commerce⁴.

– The work of the European Insurance Committee on the prerequisites for the insurability of environmental liability⁵.

– The so called McKenna Report which includes:

- «Study on third party liability systems to remedy environmental damage»⁶.

- «Economic aspects of third party liability and joint compensation systems to remedy environmental damage»⁷.

¹ Comunicación de la Comisión al Consejo y al Parlamento Europeo y al Comité Económico y Social: **Libro verde** sobre la reparación del daño ecológico.

COM. (93) 47 final. Bruselas. 14 de mayo de 1993.

² Summaries of the Responses to the Commission's Green Paper on Civil Liability and Remedying Environmental Damage. Study Contract B4-3040/94/ 000088/MAR/H1 - Final Report Brussels 20 may 1994. Fabio Cherubini.

³ Avis sur la Communication de la Commission au Conseil, au Parlement Européen et au Comité Economique et Social: **Livre vert** sur la réparation des dommages causés à l'environnement.

COM. (97) 47 final. Bruxelles, 4523-24 fevrier 1994.

⁴ International Chamber of Commerce. Commission on Insurance.

Draft Position Paper on Environmental Liability and Financial responsibility. Doc. 121/137 Bis.

⁵ Comité Européen des Assurances.

Prerequisites for the insurability of environmental liability.

Annex 1 au doc RC008 (01/96).

Annex au doc RC 009 (01/96).

⁶ Contract B4-3040/94/000665/ MAR/H1.

McKenna & Co. Environmental Law Group.

⁷ European Commission DG-XI . Main Report.

Ref. 3066. March 1996.



As a summary of the content of these documents, of special note is that the «conflictive» aspects with regard to third party liability fall into the following categories:

- **Retroactivity:** the assignment of responsibility to occurrences which happened in the past.

- **Strict Regime:** in the assignment of responsibility without allowing the possibility of recourse to the classical instruments of exoneration: acts of God, fault of the affected party, intervention of a third party, burden of proof, compliance with regulations...

- **Joint and Several:** one entity should take responsibility for the total repair costs of the damage produced by many.

- **Third party claimants,** especially of interest groups.

- **Limitation period** of the compensation action.

- **Ecological damage** of as yet undefined characteristics, this is associated with the notion of the environment itself.

- **Reparation** of the damage caused: this should be realistic and viable.

- **Financial guarantees** through insurance or other instruments, especially if these are compulsory.

The insurance sector's stance is relatively reticent on how to respond to the necessity of covering environmental risks due to the pernicious consequences of the «black hole» of American industry⁸. At the same time it argues a lack of experience in the treatment of these covers, the fact that the technology related to underwriting, risk assessment and damage repair is still in the process of development, and, above all, a tremendous legal and social uncertainty as to the future development of environmental laws.

If one examines the list of prerequisites for the insurability of environmental liability established by the European Insurance Committee the following conditions can be observed:

- **For the insurable event,** it is inexcusable that:

- The insured event should be of a fortuitous nature.

- The events are subject to the lack of intention, or that they are not the consequence of non-fulfillments or that they are the result of the normal processes of an activity.

- **Concerning the damage to be covered,** it should be:

- The result of the insured activity.

- Attributable to the insured.

- Quantifiable in economic terms.

- Reparable.

- Sustained by identifiable parties.

- Not pre-existent to the inception date of the insurance.

- **Concerning cover limitations,** it is necessary to consider:

- An insured sum set by event and by year.

- The imposition of specific time limits to the period of validity, as otherwise liability could extend for an almost infinite period.

The requirement of **compulsory insurance** concludes this study, this is not a miraculous solution if other measures concerning legislative policy and compliance with regulations by the industrial sector, often affected by costs and competition, are not taken. Compulsory insurance is therefore not always operative, as in the majority of cases:

- It is non-viable, as the aims of the legislator frequently conflict with insurance principles.

- It adversely affects the development of the market.

- It is inefficient if not supervised.

- And, if this is the case, problems arise for its control and monitoring.

- It should be focused on concrete activities, homogenous risks and subject to a technical evaluation, this is not always possible.

- The insurer becomes a «policeman» and takes on functions which

do not correspond to him; making judgements about insurability or non-insurability.

Finally, it should be mentioned that the objective liability systems linked to compulsory insurance are generally accompanied by a **specific fund** which comes into play when there is no entity responsible, or none can be identified.

In reality, this very praiseworthy social component of Third Party Liability insurance should only be invoked with certain reservations and limitations as, if the economic resources of governments to solve the environmental outrage of the past have not been sufficient, then neither will the much more limited resources of the insurance companies⁹.

⁸ JOHN H. SNYDER and W. DOLSON SMIT: «Environmental / Asbestos : The Industry's Black hole», BEST'S REVIEW. May 1994.

⁹ Standard & Poor'S. Environmental Liability and the Insurance Industry. November 1995.