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Shifts in Compensation for Environmental Damage

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Contents

List of Abbreviations

AA	*Ars Aequi*
Admin. LJ	*Administrative Law Journal*
ALI-ABA	*American Law Institute – American Bar Association*
ART	Alternative Risk Transfer
ATSDR	Agency on Toxic Substances and Disease Registry
AVB	*Aansprakelijkheidsverzekering Bedrijven*
AV&S	*Aansprakelijkheid Verzekering & Schade*
AVV	*Abfallentsorgungs- und Altlastensanierungsverband Nordrheinwestfalen*
Baylor LR	*Baylor Law Review*
BGB	*Bürgerliches Gesetzbuch*
Bofas	*Bodemsaneringsfonds voor tankstations*
BR	*Bouwrecht*
BVerfG	*Bundesverfassungsgericht*
BW	*Burgerlijk Wetboek*
CC	Civil Code
CEA	Comité Européen des Assurances
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CLC	International Convention on Civil Liability for Oil Pollution Damage 1969
CMI	Comité Maritime International

COFIZE	Stichting Collectief Financieel Zekerheidsfonds
CRISTAL	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
CWA	Clean Water Act 1977
D	*Recueil Dalloz Sirey*
Duke Evtl. L & Pol'y F.	*Duke Environmental Law and Policy Forum*
EELR	*European Environmental Law Review*
ELD	Environmental Liability Directive
Env. L. Rev.	*Environmental Law Review*
EPA	Environmental Protection Agency
FC	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971
GASTULR	*Georgia State University Law Review*
GG	*Grundgesetz*
HLJ	*Hastings Law Journal*
HR	*Hoge Raad*
IAEA	International Atomic Energy Agency
IBC	*Interregionale Bodemsaneringscommissie*
Ibs	*Interimwet bodemsanering*
IMCO	Inter-governmental Maritime Consultive Organization
IMO	International Maritime Organization
IOPC	International Oil Pollution Compensation Fund
J Envtl. For.	*Journal of Environmental Forensics*
M&R	*Milieu en Recht*
MSV	*Milieuschadeverzekering*
NCP	National Contingency Plan
NEA	Nuclear Energy Agency
NGO	Non Governmental Organisation
NJ	*Nederlandse Jurisprudentie*
NJB	*Nederlands Juristenblad*

NJW	*Neue Juristische Wochenschrift*
OPA	Oil Pollution Act 1990
OSIR	Oil Spill Intelligence Report
OSLTF	Oil Spill Liability Trust Fund
OVAM	*Afvalstoffenmaatschappij voor het Vlaamse Gewest*
P&I Clubs	Protection & Indemnity Clubs
PLI/Real	Practising Law Institute Real Estate Law and and Practice Course Handbook Series
PRL	Police and Regulatory Law
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
Real Est. LJ	*Real Estate Law Journal*
RECIEL	*Review of European Community and International Environmental Law*
RvdW	*Rechtspraak van de Week*
RW	*Rechtskundig Weekblad*
SARA	Superfund Amendments and Reauthorization Act
SDD	Soil Decontamination Decree
SDR	Special Drawing Rights
SF	Supplementary Fund 2003
SPA	Soil Protection Act
Stb.	*Staatsblad*
STOPIA	Small Tanker Oil Pollution Indemnification Agreement
SUBAT	Stichting Uitvoering Bodemsanering Amovering Tankstations
TBO	*Tijdschrift voor Bouwrecht en Onroerend Goed*
TK	Tweede Kamer, House of Representatives in The Netherlands
TM	*Tijdschrift voor Milieurecht* (Belgium)
TMA	*Tijdschrift voor Milieuaansprakelijkheid* (The Netherlands)
TOPIA	Tanker Oil Pollution Indemnification Agreement

TOVALOP	Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution
TPR	*Tijdschrift voor Privaatrecht*
Tul. Envtl. LJ	*Tulane Environmental Law Journal*
USC	United States Code
USCA	United States Code Annotated
VLAREBO	*Vlaams reglement betreffende de bodemsanering*
WA	Waste Act
Wbb	*Wet bodembescherming*
WMA	Water Management Act
Wayne LR	*Wayne Law Review*
WQIA	Federal Water Quality Improvement Act 1970

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I. Introduction

Michael Faure and Albert Verheij

A. Problem definition

In recent years, one can notice a shift in paradigm with regard to the compensation of damage across the borderline between civil law and public funding. This trend can be discovered in several areas, but more particularly also with respect to environmental damage. It seems that during the *first* years when environmental pollution was "discovered" as a legal problem, compensation was originally considered as a problem of the public at large. As a consequence, the attitude seemed to be to consider pollution a "sin of the past", largely caused by a previous generation. The present generation should therefore effectively pay for this collective debt of the past. The result of this attitude was that when in the beginning so-called black points (heavily polluted soils) were discovered, largely governments or governmental agencies intervened to take care of the clean-up of these polluted soils (if at all). The way to remedy these first pollution problems which occurred was therefore basically public in nature. However, in a second wave, a shift took place whereby it was held that it should no longer be the general taxpayer who should bear the costs of environmental pollution, but that an allocation of these costs should be borne by the polluters who caused the damage. The so-called polluter-pays principle became an important tool to justify this shift. In many countries, one could notice evolutions in case law, legislation and legal doctrine towards increasingly laying duties on polluters to compensate the costs caused by their pollution. The form these actions took, however, differed greatly between the legal systems. In some cases, legislation or administrative authorities forced polluters to undertake their clean-up activities themselves, thereby using regulatory solutions under public law. In other cases, environmental agencies undertook clean-up activities themselves but subsequently attempted to recover the clean-up costs from polluters, thereby largely using private legal mechanisms. One can thus argue that in a *second* stage, a shift took place towards an increasing financing of environmental damage by polluters, largely backed up by the polluter-pays principle. However, it seems that in many legal systems, after that, a *third* shift took place which resulted

1

from a discovery of the limits of applying private law solutions to environmental damage. These limits have various causes. On the one hand, insurers have argued that an expanding environmental liability may become uninsurable. This is related to the fact that often polluters today are held liable for wrongdoings in the past on the basis of the knowledge of today. Effectively, this can amount to a retrospective environmental liability. Also the consequences of causal uncertainty are sometimes shifted to polluters. Hence, polluters may in some cases be held liable for damage they have not (entirely) caused themselves. These and other trends may potentially substantially enlarge the exposure to liability of polluters and therefore the uncertainty for their insurers. In some cases, this uncertainty became so high that insurers argued that environmental damage became an uninsurable risk. On the other hand, private law solutions were not always applicable to environmental damage, more particularly in those cases where an individual polluter cannot be held liable. This can for instance be the case after long-lasting pollution, whereby responsible parties can no longer be identified, but also in cases where the environmental damage is that widespread that it cannot be attributed to one particular source or polluter. In all of those cases, private law mechanisms like liability law do not offer a remedy. Therefore, in a third phase, one could notice a shift towards alternative compensation mechanisms for environmental damage. In some cases, these took the form of public fund solutions. However, this shift has certainly not come to an end yet since the question what legal instruments should be used when private law remedies fail to provide an adequate answer leads to much dispute. Some will argue that a shift towards more public governance is the optimal solution and will therefore argue in favour of a general environmental fund. Others would on the other hand claim that solutions can be found by improving the working of the private law. They argue that similar problems as with liability will also occur when public fund solutions are introduced. In sum, the compensation of environmental damage has undergone various crucial shifts whereby the evolution does not seem to have come to an end yet.

B. Reasons for this book

2 From the above, it is clear that in many legal systems, but also at the European and international level, various shifts in the compensation of environmental damage have taken place. Indeed, the evolutions sketched above cannot only be discovered at the national level in case law, legal doctrine or legislation. Also at the European level, spectacular shifts have taken place. In that respect, we can for instance refer to the creation of Directive 2004/35 on Environmental Liability (Official Journal L143/56 of 30 April 2004). Similar shifts have equally taken place at the international level, more particularly within the international conventions with respect to the compensation for damage caused by oil pollution and in the conventions with respect to nuclear accidents. Legal literature has of course paid attention to all of these various shifts, mainly by describing the shifts and their consequences. However, it seems equally important to address these

shifts in the compensation for environmental damage from a more fundamental perspective.

Thereby, several questions arise: 3

1. What is the precise nature of the shifts? Are the shifts always a shift from private law to public funding or sometimes vice versa? Do the shifts occur in the same direction in the various legal systems, in Europe and at the international level or are there contradicting trends?

2. What are the precise reasons for the shifts? Obviously, politicians may often provide formal reasons, such as the need to come to a better compensation for victims of environmental damage. However, political theory will predict that in some cases, the importance of various interest groups in the legislative process may probably also explain why certain shifts take place at a particular moment and may equally provide an explanation for the nature of the shifts.

3. What are the effects of the shifts? In many cases, shifts take place because the legislator expects a certain effect of such a shift. For instance, a shift in the international regime with respect to the nuclear liability of the licensee of a power plant or with respect to the liability of the tanker owner for oil pollution may have as formal goal to increase the compensation available to victims. A question that of course arises is whether that shift is indeed able to realize the desired effects of the shifts. Moreover, the question also arises whether a shift in the compensation regime may have other effects, for instance with respect to the prevention of environmental damage. In some cases, a shift towards an increased liability of the polluter is also motivated by the belief that this increased exposure to liability will provide incentives to the responsible party to avoid pollution in the future. For instance in the White Paper on environmental liability, this incentive effect of a potential liability is explicitly stressed. The question then equally arises (and would be interesting to examine) whether that preventive effect could actually be discovered. In other words: did environmental pollution cases decrease e.g. after a shift to strict environmental liability for polluters? Equally, the question merits attention whether a shift to a particular compensation regime may also have (positive or negative) effects on the prevention. If for instance a shift away from private law (and thus away from individual responsibility of polluters) towards public funding took place, one could fear that this may negatively affect the polluter's incentives to prevent the pollution. Such a shift could thus in theory lead to more pollution. But is that actually the case?

4. Finally, a closer look at the shifts in compensation for environmental damage is equally interesting since, at the normative level, the question could also be asked how environmental damage should ideally be compensated.

In that respect, one could use a normative framework indicating under what kind of circumstances private or public legal instruments might be optimal. However, this is an extremely dangerous exercise since the "optimality" of particular compensation regimes is of course strongly linked to an existing legal cultural framework. This means that a particular solution may well work within the setting of a particular legal framework, but not necessarily in others.

4 It may be clear that many of the interesting questions mentioned above may be a good reason for writing a book on the shifts in compensation in environmental damage. However, it may be equally clear that these questions are that complex and complicated to answer that even within one book, one can only attempt to address a few of them. Most of the contributions in this book therefore limit themselves to the first or the second question. One contribution also attempts to identify some of the effects of particular shifts (the third question) but most contributors have expressly refrained from normative statements on what the optimal compensation mechanism would be (the fourth question). Of course in some contributions a few policy recommendations are formulated with respect to specific areas, but no attempt is made to indicate whether general environmental damage should primarily be compensated via public funding rather than through private or vice versa. The reason is obvious: within a book like this, the complicated questions with respect to the shifts in compensation for environmental damage can only be touched upon from some angles and with respect to a few legal systems. In order to provide strong normative and policy recommendations, far more (also empirical) research would be needed which fell largely outside the scope of this book.

C. Methodology

5 However, as we just described, we do not attempt at all to address, let alone answer, the various complicated questions with respect to the shifts in environmental damage. The contributors to this book have attempted to use a variety of mechanisms and techniques to provide a broad picture of the shifts in compensation for environmental damage.

6 First of all, shifts will be addressed in a variety of national legal systems. For instance with respect to soil pollution, a comparison will be made between Belgium, Germany, the Netherlands and the United States. In addition, as far as compensation for oil pollution damage and for nuclear damage is concerned, shifts at the international level (more particularly in the relevant international conventions) will be addressed. Thus a comparative approach can be adopted which seems particularly useful for the simple reason that the shifts in compensation for environmental damage can of course be discovered in many legal systems. However, the legal instruments chosen, for instance to compensate for historical soil pollution, still seem quite different today. Hence, the shifts in this domain of environmental damage have not all led to the same result. A

comparative legal approach addressing some of these different evolutions in various countries can thus prove to be quite valuable and may contribute to explaining why different shifts took place in various countries.

Second, the shifts will obviously be analysed using environmental legal doctrine as well. Traditional environmental legal doctrine has for instance indicated potential benefits of the public law approach for remedying environmental damage and has paid a lot of attention, for example, to the foundations for the polluter-pays principle. Thus the contributors to this book will use some of this environmental legal doctrine in order to describe (question one) and explain (question two) the shifts. 7

Third, some contributions equally use the economic analysis of environmental law. Economic analysis of law has extensively analysed the comparative benefits and shortcomings of environmental liability versus other solutions (such as collective mechanisms like funds) to provide compensation for environmental damage. Especially when it comes to answering the third question (effects of the shifts) a mere legal approach will probably not suffice to provide an answer. Economists have paid much attention to desired and undesired effects of changes in legislation with respect to both compensation and prevention. Even though measuring effects will always remain difficult given the dependency upon available data, the tools of economists can be quite useful to at least provide some indications of a few effects of particular shifts. Using the economic approach to analyse the effects of a few shifts (more particularly with respect to compensation for marine oil pollution) will thus enable us to address the compensation for environmental damage within a multi-disciplinary framework. 8

D. Framework of the project

This book fits into a larger research project, called "Shifts in Governance", supervised by Prof. Dr. Willem H. van Boom (Erasmus University Rotterdam) and Prof. Dr. Michael G. Faure LL.M. (Maastricht University). This broader project "Compensation for Damage: the Shift from Civil Law to Public Funding and vice versa" consists of a cooperation between scholars from the Erasmus University Rotterdam, Tilburg University and Maastricht University and is executed with financial support of the Netherlands Organisation for Scientific Research, NWO. The goal of this broader project is to conduct research on the shifts in paradigm with respect to compensation for damage across the borderline between civil law and public funding. Whereas in this particular book attention is paid to shifts in environmental damage, other books address shifts in compensation for occupational health hazards and shifts in compensation for adverse medical events. Another book addresses the shifts in compensation generally, indicating the shifts from private law to alternative arrangements. The project also received the support from the European Centre of Tort and Insurance Law (ECTIL) in Vienna and from the Research Unit for European Tort Law (ETL) of the Austrian Academy of Sciences. For this particular project, a 9

cooperation was also sought with the Institute of Environmental and Energy Law of the Law Faculty of the Catholic University of Leuven, which is supervised by Prof. Dr. Kurt Deketelaere. Two collaborators from this institute provided contributions to this book.

E. Collaborators in the project

10 The academic responsibility and coordination for this part of the project dealing with shifts in environmental damage lies with Prof. Dr. Michael G. Faure LL.M. (Maastricht) and Dr. Albert J. Verheij (Tilburg). The other contributions are drafted by Dr. Ruud Hendrickx (Faculty of Economics, Tilburg University) and by Hui Wang and Dr. Tom Vanden Borre (Institute for Environmental and Energy Law, Catholic University of Leuven, Belgium). Kristel De Smedt also contributed to the book as well (University of Hasselt, Belgium).

F. Structure of this book

11 After this introduction (I), first Albert Verheij will pay attention to shifts in governance in the compensation for historical soil pollution in Belgium, Germany, the Netherlands and the United States. In that contribution shifts are addressed in a few national legal systems and these shifts are not only identified, but an attempt to provide reasons for the shifts in this important domain is provided by Verheij as well in Chapter II. Next Michael Faure indicates a few shifts towards using alternative compensation mechanisms to deal with environmental damage (III). In this respect attention is more particularly paid to a few compensation mechanisms used in the Netherlands and in Belgium, more particularly voluntary compensation agreements and environmental damage insurance. The shift in this paper is not only identified and explained (questions 1 and 2), but to some extent also normatively evaluated (question 4) using the economic analysis of law.

12 Next the papers address shifts taking place at the European level. This is more particularly the question addressed by Kristel De Smedt, being why, in the area of environmental damage, there has been a shift from the Member States to the European level (IV). Subsequently shifts at an even higher level (international treaties) will be addressed. Albert Verheij addresses the shifts within the international treaties, but also in the voluntary arrangements and in the United States (V). The reasons for the shifts in the compensation in this international oil pollution regime are sketched by Hui Wang (VI). Whereas Albert Verheij thus mostly focuses on the identification of the shift (question 1) Hui Wang pays more attention to the reasons for the particular shift (question 2). Next, Ruud Hendrickx addresses the effects and consequences of the various shifts in the oil pollution regime from an economic perspective (VII). Chapter VIII, by Tom Vanden Borre, deals with the shifts in governance in the compensation for nuclear damage. This particular chapter indicates how compensation for this important damage category has shifted since the early international conventions

until today and equally explains some of the reasons behind these shifts. Finally a few concluding observations are provided by the editors of this book, Michael Faure and Albert Verheij (IX).

All sections in the book are numbered. The index at the end of the book refers to these marginal numbers.

G. Words of thanks

We are grateful to all of the contributors to this book for their willingness to 13
cooperate in examining the shifts in environmental damage on the basis of the pattern and questions provided. We are equally grateful to Prof. Willem van Boom (Erasmus University Rotterdam), one of the general coordinators of the Shifts in Governance project for his enthusiastic support for this research in the domain of environmental damage. More particularly we owe gratitude to the two collaborators of the International Institute for Environmental and Energy Law (Hui Wang and Tom Vanden Borre) for their willingness to participate in this book, even without formally being involved in the project.

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Michael Faure
Albert Verheij
Maastricht-Tilburg
June 2006

II. Shifts in Governance: Soil Pollution

Albert Verheij

A. Soil pollution in the United States

1. Introduction

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) also referred to as the Superfund program in response to serious soil pollution discovered in the city of Love Canal. It should be kept in mind however that CERCLA does not regard the problem of soil pollution alone. An idea of the scope of CERCLA is provided by its subtitle: "An Act to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." In the context of this report the focus will be on soil pollution. 15

CERCLA has been controversial from the beginning. It was signed by President Carter on 11 December 1980 and therefore can be listed as one of the last deeds of the Carter administration. CERCLA did not fare well under the Reagan administration and many expected that the Act would not be renewed after expiration date of 1 October 1985.[1] CERCLA however has stubbornly resisted most attempts to be obliterated although its taxing authority expired on 31 December 1995 and the Trust (also known as the Superfund) created by the Act ran out of money on 30 September 2003.[2] 16

The enactment of CERCLA can be regarded as a shift in itself. In the course of years a number of changes were made. Most notably in this respect was the 17

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1 M.E. Cartwright, Superfund: it's no longer super and it isn't much of a fund. CERCLA at 25: a retrospective, and prospective look at the Comprehensive Environmental Response, Compensation, and Liability Act on its 25th anniversary, [2005] *Tulane Environmental Law Journal* (Tul. Envtl. LJ) 18, 310.

2 M.E. Cartwright, [2005] Tul. Envtl. LJ 18, 300-301.