The French Approach to Corporate Liability for Damage to the Environment

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I. INTRODUCTION

In France, as in most industrialized countries, environmental law has become a distinct and independent field of law. Through incremental developments, the right to a safe environment has joined the category of constitutionally protected individual rights.[1] The status reached by this legal discipline results without a doubt from the fact that the protection of the environment is a subject of high concern for the community at large.

This does not mean, however, that protection of the environment by legal means is a new phenomenon. As early as the middle ages authorities in France were concerned about the pollution in cities and organized the transfer of hazardous activities to the outskirts.[2] The first significant attempt to legislate environmental matters at a national level can be traced back to the imperial Decree of October 15, 1810, which regulated the activities of incommodious, unsanitary and dangerous factories and workshops.[3]

The modern approach to environmental protection began in the early '70s with a flood of legislation and regulations. On January 7, 1971, a Ministry of the Environment was created in France for the first time,[4] a symbolic step toward the creation of environmental law as a self-sufficient legal discipline. Another important step was the regrouping of all major environmental laws and regulations in a single unified code, referred to as the Environmental Code, which now takes its place on the shelves of French law libraries near other codes such as the Civil Code or the Commercial Code.[5] The importance of environmental law was stressed recently again when Mr. Jospin, new French Prime Minister

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1. Jean Thévenot, *Environnement et préjudice moral: observations sur les contentieux en réparation*, Recueil Dalloz Sirey, Chronique, 225 (1994).

2. JÉRÔME FROMAGEAU & PHILIPPE GUTTINGER, DROIT DE L'ENVIRONNEMENT 26 (1993).

3. See Jean-Pierre Boivin, Droit des installations classées, 16 (1994) and his bibliography on historical aspects of environmental law refering, among others, to P. Lunel, P. Braun, P. Flandin-Bletty, P. Texier, *Pour une histoire du droit de l'environnement*, REVUE JURIDIQUE DE L'ENVIRONNEMENT, issue n°1 (1986). For additional background on the history of environmental law in France, see also J. Fromageau, *La police de la pollution à Paris de 1666 à 1789*, (doctoral thesis, University of Paris II, 1989) and B. Thibaut, *Le droit des nuisances au XIXème siècle*, (doctoral thesis, University of Paris II, 1975), cited by Jérôme Fromageau & Philippe Guttinger, *supra* note 2, at 26.

4. This Ministry was created by the Decree of January 7, 1971, published in the Official Journal of January 8, 1971.

5. The Environmental Code is published by Dalloz, one of the major legal publishing corporations in France. This Code is not updated on a yearly basis, like the Civil Code or the Commercial Code, but on a so-called "periodical basis." The current edition is the 1994 edition.

following the parliamentary elections of May/June 1997,[6] chose the leader of the Green Party as new Minister of the Environment.[7]

Industrial corporations, due to the potential danger of their activities to the environment, are one of the main targets of the most significant regulations adopted to protect the environment. Because of the diversity of these regulations, and also as a result of judge-made law, the liability of industrial corporations for damage to the environment has drastically increased. At the same time, the plethora of laws and regulations has made it more difficult for industrial corporations to assess their exposure to environmental liability.[8]

This article aims at guiding foreign industrial corporations in assessing environmental risk for their activities in France**.** To aid understanding, the different types of liability to which such corporations may be exposed in France will be grouped into four main categories. For the purpose of this article, industrial corporations will be defined as those corporations whose activities present a potential danger to the environment. Corporations owning paper mills, chemical plants or painting operations would be typical examples.

II. DAMAGE TO THE ENVIRONMENT AND NONJUDICIAL LIABILITY

Industrial corporations operating in France must comply with an extensive set of environmental laws and regulations. Noncompliance may lead to nonjudicial liability, i.e., liability towards the Administration in charge of enforcing such laws and regulations.[9] This section gives an overview of the major laws and regulations that form basic French environmental law. It also describes the powers at the disposal of the French Administration to enforce compliance with such laws and regulations.

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6. The parliamentary elections took place on May 25 and June 1. Mr. Jospin was appointed Prime Minister by the Decree of June 2, 1997, published in the Official Journal of June 3, 1997.

7. Ms. Voynet was appointed Minister of the Environment by the Decree of June 4, 1997, published in the Official Journal of June 5, 1997.

8. According to Mr. Barnier, former French Minister of the Environment, environmental regulations have reached such a level of proliferation and complexity that it has become difficult to enforce them correctly (see his forword to the book written by Olivier Frémau, *Industrie et environnement, les données du contentieux*, (1994)).

9. The expression "non-judicial liability" is to be preferred to the expression "administrative liability." This latter expression would be misleading here since, under French administrative law, "administrative liability" refers to the liability of the Administration for its actions or inactions and not to the liability of industrial corporations toward the Administration.

A. Major Environmental Laws and Regulations Applicable to Industrial Corporations

The basis of French environmental law is found in four major statutes. In accordance with the constitutional distinction between the legislative domain and the regulatory domain,[10] these laws have been supplemented by a whole range of decrees, ministerial orders and other kinds of administrative regulations.

The most important law, because it has general application, is the law n°76-663 of July 19, 1976,[11] as amended, concerning "classified installations" (hereinafter Law on Classified Installations). Several provisions of this law have been amended by subsequent laws, most importantly law n°92-646 of July 13, 1992, which increased both administrative and criminal sanctions for violation of its provisions.[12]

The Law on Classified Installations requires a classification of industrial activities depending on the level of hazard they represent to the environment. More hazardous activities may not be carried out until they have been expressly authorized by the competent administrative authority, i.e., the *Préfet.*[13] Less hazardous activities are only subject to the declaration procedure, according to which a declaration of the activities concerned is to be made to the *Préfet* who will in turn issue an acknowledgment of such declaration, provided the declaration file is complete.[14] Under the authorization/declaration distinction established by the Law on Classified Installations, a chemical plant, for example, would clearly fall within the authorization category whereas a dry cleaning store would normally fall within the declaration category.[15] When granting the authorization or issuing the acknowledgment of declaration, the *Préfet* will indicate the conditions under which the activities concerned may be carried out.

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10. The legislative domain, which is vested in the Parliament, is defined in article 34 of the French Constitution. The regulatory domain, which is vested in the Prime Minister and, more generally, the Government, is defined in article 37. For a recent and specific study of the distinction between these two domains, see Nguyen Van Tuong, *La délimitation des domaines respectifs de la loi et du règlement*, LES PETITES AFFICHES, issue n°152 of December 18, 1996, at 23.

11. Official Journal of July 20, 1976.

12. For an overview of the main modifications brought by this law of 1992, see Christian Huglo & A.T.G. Mafoua-Badinga, *La loi 92-646 du 13 juillet 1992 relative à l'élimination des déchets ainsi qu'aux installations classées pour la protection de l'environnement: une loi ambitieuse et/ou efficace?*, LES PETITES AFFICHES, issue n°131 of October 1992, at 11.

13. The "*Préfet*" is the representative of the Government at the local level.

14. On the distinction between the authorization procedure and the declaration procedure, see more specifically the Code Permanent Environnement et Nuisances, Volume 2, section "installations classées," chapter II.

15. Dry cleaning stores are usually subject to the Law on Classified Installations because of some toxic substances stored for use in the dry cleaning process.

When such activities are ended, the site of the Classified Installation to be shut down must be left in such a state that it does not present any danger to the environment.[16] This clean-up requirement results from article 34-1 of the Decree n°77-1133 of September 21, 1997, which was adopted to supplement the Law on Classified Installations.[17] The *Préfet* may at any time, on the basis of article 34-1, issue an administrative order imposing on an industrial corporation the obligation to satisfy the clean-up requirement. Failure to comply with this administrative order exposes the industrial corporation to criminal liability.[18]

As a result of the Law on Classified Installations, industrial activities which are potentially dangerous to the environment are closely supervised by the French Administration, especially the *Préfet*, as well as specialized administrative agencies or authorities.[19]

The three other major laws are:

- the law n°75-633 of July 15, 1975, as amended, relating to waste treatment and disposal.[20] This law, like the Law on Classified Installations, was heavily amended by the Law n°92-646 of July 13, 1992.[21]
- the law n°92-3 of January 3, 1992, relating to water treatment and pollution.[22] This recent law has raised a great deal of interest among French environmental law scholars as it was the first major law enacted since the mid-seventies.[23] This law, which refers to 27 European Directives, is also an excellent example of the influence of European law on national environmental policies.[24]

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16. François Bavoillot, *La réparation des dommages causés à l'environnement: l'exemple français de la réhabilitation des sites pollués*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 10.

17. This Decree was published in the Official Journal of October 8, 1977.

18. See article 43 of the Decree that provides for criminal fines.

19. In this regard, the most important administrative authorities besides the *Préfet* are the "*Directions Régionales de l'Industrie, de la Recherche et de l'Environnement*" (generally referred to as "DRIRE"). The DRIRE are regional agencies staffed with highly qualified engineers and which, under the authority of the *Préfet*, are in charge of the control of classified installations.

20. Official Journal of July 16, 1975.

21. See *supra* note 12.

22. Official Journal of January 4, 1992.

23. See in particular Jean-François Auby, *Les principes du droit de l'eau*, LES PETITES AFFICHES, issue n°126 of October 19, 1992, at 3; Christian Huglo, *Les grandes orientations de la loi 92.3 du 3 janvier 1992 sur l'eau*, LES PETITES AFFICHES, issue n°126 of October 19, 1992, at 12; Jean-Louis Gazzaniga, *La genèse de la loi sur l'eau*, LES PETITES AFFICHES, issue n°126 of October 19, 1992, at 9.

24. Valérie Gaillot-Mercier, *La réglementation de l'environnement industriel*, GAZETTE DU PALAIS, issue of April 4 and 5, 1997, at 45.

- the law n°96-1236 of December 30, 1996, relating to air pollution and the rational use of energy.[25] This new law is meant to replace the former law n°61-842 of August 2, 1961, relating to air pollution. However, in order to ensure a smooth transition between the old and the new law, the 1961 law will still be in force until all the decrees necessary to supplement the new law have been issued.[26]

These laws aim at regulating activities that create specific environmental problems (waste, water and air pollution) and can be considered as a supplement to the Law on Classified Installations. This means that the same activity may be (and generally will be) subject to the Law on Classified Installations and to the other more specific laws at the same time. This renders the relation between the Law on Classified Installations and the other laws quite complex in some instances.[27]

It should be noted that, under the influence of European law, the above described laws must, from time to time, be modified in order to conform with the directives issued regularly by the European Council.[28] In this regard, it is expected that the Law on Classified Installations will soon be amended to comply with the recent Directive n°96/61 of September 24, 1996, on Integrated Pollution Prevention and Control. [29]

B. The Powers of the Administration in the Event of Violation of Environmental Laws and Regulations

The current trend in France is toward an increase in the powers of the Administration to impose sanctions on polluters.[30] This tendency results primarily from the 1992 modifications to the Law on Classified Installations.[31]

When confronted with a violation of environmental regulations, which is most often found following investigations initiated at the request

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25. Official Journal of January 1, 1997.

26. On this matter and for more general comments on this new law, see the Code Permanent Environnement et Nuisances, actualization bulletin n°228 of January 2, 1997.

27. This problem has been specifically addressed by Jean-Pierre Boivin, *supra* note 3, chapter 3.

28. For a general study on the interaction between national laws and European Law in the field of environmental protection, see Christian Huglo, *Les contraintes du droit europeen de l'environnement sur le droit interne de l'environnement*, LES PETITES AFFICHES, issue n°2 of January 3, 1992, at 10.

29. See Yvan Razafindratandra, *Les apports au droit français de la Directive dite "IPPC,"* DROIT DE L'ENVIRONNEMENT, issue n°44 of December 1996, at 19.

30. On this subject, see Corinne Lepage Jessua, *Les pouvoirs du préfet au regard des installations classées et les droits de l'exploitant après la loi du 13 juillet 1992*, LES PETITES AFFICHES, issue n°16 of February 5, 1993, at 10.

31. Concerning the 1992 modifications, see *supra* note 12.

of complaining neighbors, the French Administration will send a notice to the non-compliant corporation requesting it to put an end to the violation. If, at the expiration of the deadline set in the notice, the corporation has not remedied the situation, the French Administration may:

- compel the polluter to deposit in a government account a sum of money corresponding to the work necessary to remedy the non-compliant situation;[32]
- carry out, at the costs of the polluter, the work necessary to remedy the non-compliant situation;[33]
- suspend the activities of the non-complying industrial facility;[34]
- order the shut-down of the non-complying industrial facility.[35]

The powers of the Administration are considerably reinforced by the fact that the above sanctions are cumulative.[36] The *Conseil Constitutionnel*, i.e., the French Supreme Court, has on several occasions upheld the compatibility of administrative sanctions with the French Constitution.[37]

Although such administrative sanctions can be challenged before the administrative courts, the administrative judge has the power to impose sanctions beyond those the Administration imposed. Challenging an administrative sanction therefore runs the risk that not only will the initial sanction be upheld but also that additional sanctions will be imposed.[38] However, this risk should not be overestimated as administrative judges rarely add sanctions to those imposed by the Administration.[39]

A recent example of the use by the French Administration of its powers to protect the environment is provided by the decision rendered on June 10, 1997, by the Administrative Court of Appeal of the city of

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32. Article 23 a) of the Law on Classified Installations.

33. Article 23 b) of the Law on Classified Installations.

34. Article 23 c) of the Law on Classified Installations. The Administration must consult with the competent local commission before having recourse to such sanction. During the suspension of the activities of an industrial facility, the corporation owning such facility is required to continue payment of salaries to the employees working for such facility (article 25 of the Law on Classified Installations).

35. Article 24 of the Law on Classified Installations. This sanction is of course the heaviest one and is therefore limited to situations in which the industrial facility is functioning illegally, meaning that it did not go through the declaration or authorization procedure required before any classified installation may start its activities.

36. Jean-Pierre Boivin, *supra* note 3, at 353.

37. See, among others, the decision of July 28, 1989, cited and commented by Michel Dobkine, *L'ordre répressif administratif*, RECUEIL DALLOZ SIREY, 1993, chronique, at 157.

38. Corinne Lepage Jessua, *supra* note 30, at 14.

39. Anne Cammilleri, *Le pouvoir d'injonction du juge administratif: une révolution avortée?*, LA SEMAINE JURIDIQUE (JCP), Edition Générale, issue n°3, 1997, at 31.

Lyon.[40] The owner of a piece of land on which a tannery existed had been enjoined by the *Préfet* to clean up the site and to deposit FF 300,000 in a government account, this sum of money representing the amount of the clean-up costs. The owner challenged the *Préfet*'s decision before the Administrative Tribunal of the city of Nice, arguing that he had acquired the piece of land after the tannery had been closed. He was therefore not responsible for the pollution. In the meantime, the corporation that owned the tannery had gone bankrupt. The Administrative Tribunal ruled in favor of the *Préfet* and the Administrative Court of Appeal confirmed this decision, stating that the provisions of the Law on Classified Installations may be applied to the owner of a classified installation even if the owner did not operate such installation.

This description of the means by which the French Administration may ensure compliance with environmental laws and regulations clearly shows that France has adopted a "command and control" approach. However, there is a trend in France, as in other major European countries, toward taking an economic approach to the protection of the environment by introducing specific environmental taxes or awarding financial incentives to reduce pollution.[41] France is therefore evolving toward a system which combines both regulatory and economic approaches.[42]

Compliance with French environmental laws and regulations is important not only to avoid the above described administrative sanctions but also to benefit from insurance coverage. The insurance market in France finds it difficult to respond to the high demand for coverage of environmental risks.[43] In order to cover risks, insurers want to be able to quantify and measure those risks. This is not easy with environmental risks because of the lack of reliability of statistics on environmental

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40. Cour Administrative d'Appel de Lyon, June 10, 1997, decision reproduced in the Code Permanent Environnement et Nuisances, actualization bulletin n°237 of June 15, 1997, at 6815.

41. When awarding subsidies or developing incentive schemes, member states of the European Union must be cautious in order not to violate European competition laws. The award of subsidies or the development of incentive schemes that benefit potential polluters are also, to some extent, in conflict with the famous "Polluter Pays" principle embodied in the Treaty on the European Union ("Maastricht Treaty"). In conclusion, subsidies and incentives must respect a certain number of criteria in order to be valid. *See* Caroline London, *Les aides financières en faveur de la protection de l'environnement*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 282-317 (1994).

42. *See* Jean-Philippe Barde, *Les instruments économiques pour la protection de l'environnement: l'expérience des pays de l'OCDE*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 41-67 (1994) (comparing the "command and control" approach versus the economic one).

43. Johan Bulteel, *Les assurances peuvent-elles résoudre les problèmes dans le domaine de la pollution?,* REVUE DE DROIT DES AFFAIRES INTERNATIONALES 497 (1993).

claims.[44] The specificity of certain types of pollution, such as creeping pollution, adds to the difficulty. Because of the inability of traditional insurance policies to adequately cover environmental risks, a pool of insurers called GARPOL was created in France in 1977 to offer a specific environmental insurance coverage. The GARPOL, which became ASSURPOL in 1989, presents the only real answer to the need for specific environmental insurance coverage in France.[45] The general conditions of the insurance policy offered by ASSURPOL exclude from coverage damages to the environment resulting from noncompliance with environmental laws, regulations and measures adopted by competent authorities.[46] Thus, compliance with environmental laws and regulations is a prerequisite to obtaining appropriate insurance coverage for environmental risks.

III. DAMAGE TO THE ENVIRONMENT AND CIVIL LIABILITY

This section gives an overview of the different legal grounds on which French tort law holds industrial corporations liable for damages to the environment. Possible changes in current French tort law resulting from evolving international and European law will also be addressed.

A. The Legal Basis for Civil Liability in the Event of Damage to the Environment

With the exception of nuclear liability,[47] France has not adopted a specific system of tort liability for damage to the environment, as has Germany for example[48]. As a result, the basis for such liability must be found in traditional tort law principles, i.e., in article 1382 *et seq.* of the Civil Code.[49]

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44. Claude Delpoux, *Responsabilité civile du fait des atteintes à l'environnement: les réponses actuelles de l'assurance*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 21.

45. Jean Leygonie & Xavier Matharan, *L'assurance du risque environnement*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 259 (1994).

46. Karel Moustie, *Assurance de responsabilité en cas d'atteinte à l'environnement: garanties octroyées dans quelques pays européens*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 515 (1993).

47. This liability results from the law n°68-943 of October 30, 1968, relating to civil liability in the field of nuclear energy, which was enacted following the adoption of the Paris Convention of July 20, 1960, on nuclear liability.

48. Germany's specific civil liability rules for damage to the environment result from the law of December 10, 1990, relating to civil liability in the field of environment (*Umwelthaftungsgesetz*). For a description of this law, see Joseph Sievers, *Le droit allemand et la responsabilité civile en matière d'environnement: la loi du 10 décembre 1990*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 35.

49. For a detailed study on these articles and, more generally, on French law of tort, see Jurisclasseur Civil, Editions du Jurisclasseur, 1996, articles 1382 to 1386, Volume 1 to 3.

It should be noted that, under French law, liability toward third parties for environmental damage may be found even when an industrial corporation has fully complied with all relevant administrative regulations. Compliance with administrative regulations enables an industrial corporation to avoid liability toward the Administration, but it is not a defense to a claim from a third party for environmental damage. This principle results from article 8 of the Law on Classified Installations which states that "authorizations are granted subject to the rights of third parties."[50]

1. Fault Liability

According to article 1382, a person causing damage to another person through fault is obliged to compensate that other person for the damage suffered. Under this article, three elements must be proven: damage, fault and a causal link between the two.[51]

The fault of an industrial corporation may be reasonably easy to prove when the corporation did not comply with specific technical or environmental regulations applying to the industrial facility which caused the damage. However, there are instances in which a pollution may occur although an industrial facility complied with all administrative regulations. Such would be the case if an industrial facility discharges waste in a river in amounts sufficient to cause a pollution but within the limits set by the applicable waste discharge authorization.[52] In such events, proving fault is difficult. This burden of proof problem is exacerbated when the pollution is caused by several polluters. Each tries to demonstrate that the pollution was caused by the other. Therefore, article 1382 is not necessarily well suited to compensation for damages resulting from pollution.

2. Custody Liability

Under appropriate circumstances, victims of pollution may prefer recourse to article 1384 § 1 of the Civil Code, which deals with damage caused by objects which a person has under her custody. Since most damages to the environment are caused by an object (dust, chemical product, etc.), use of article 1384 § 1 is usually possible. The advantage of this article is that victims do not have to prove the negligence of the

50. This principle is also contained in article 10-VI of the law n°92-3 of January 3, 1992, relating to water treatment and pollution.

51. See comments under article 1382 in the Code Civil, Dalloz edition, 1996-97.

52. In such instances, the liability of the Administration may be engaged (for a general study on the liability of the Administration for damage to the environment, see Jurisclasseur Droit de l'Environnement, volume 3, fascicule 1090).

guardian of the object in question. In addition, in the case of damages caused by a moving object (e.g. a car) or a dangerous object (e.g., a gas bottle), the causal link between the intervention of the object and the damage suffered is presumed until proven otherwise.[53] On the basis of article 1384 § 1, industrial corporations have been found liable in instances of damages caused by toxic gases,[54] explosives[55] or sewage.[56] Article 1384 § 1 is therefore used more often than article 1382.

3. Nuisance Liability

The most common legal basis under French law of tort for claims for damage to the environment is the theory of abnormal vicinity nuisance (*trouble anormal du voisinage*).[57] This theory is a creation of judge-made law and derives from the more general theory of abuse of rights (*abus de droit*).[58]

Proof of fault is not necessary to benefit from the theory of vicinity nuisance since the victim must only establish the existence of damage resulting from a disturbance of particular intensity that exceeds the normal inconveniences of the neighborhood. Whether or not an abnormal threshold of inconvenience has been reached will depend on a subjective analysis carried out by the judge, taking into account all features and circumstances of the specific situation.[59]

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53. BORIS STARCK, HENRI ROLAND & LAURENT BOYER, OBLIGATIONS, RESPONSABILITÉ DÉLICTUELLE 231 (1996).

54. Cour de Cassation (highest civil court), 2nd Civil Chamber, December 17, 1969, cited in the Code Permanent Environnement et Nuisances, volume 2, section "installations classées", n°191.

55. Cour de Cassation (highest civil court), 2nd Civil Chamber, November 26, 1959, cited in the Code Permanent Environnement et Nuisances, volume 2, section "installations classées," n°191.

56. Cour de Cassation (highest civil court), 2nd Civil Chamber, June 15, 1972, cited in the Code Permanent Environnement et Nuisances, volume 2, section "installations classées", n°191.

57. See Geneviève Viney, *Les principaux aspects de la responsabilité civile des entreprises pour atteinte à l'environnement en droit français*, LA SEMAINE JURIDIQUE (JCP), Edition Générale, Doctrine, 39 (1996), who states that the theory of abnormal vicinity nuisance is "the most traditional and the most used legal basis (. . .) in instances of industrial or agricultural pollution (. . .)."

58. The theory of abuse of rights relies on the idea that there is a limit to the use a person can make of individual rights. This theory finds its traditional application in cases of damage caused to neighbors by a land owner who uses property rights in an abusive way (see Boris Starck, Droit Civil, Obligations, Responsabilité délictuelle 155 (1985)).

59. Jurisclasseur Civil, éditions du Jurisclasseurs, 1996, article 1382, fascicule 131-1, n°38, fascicule 365-1, n°47 through 50, fascicule 265, n°1 through 67.

French case law relies heavily on application of the theory of abnormal vicinity nuisance in instances of damage to the environment.[60] For example, liability was found in cases involving noise caused by an industrial dry cleaner,[61] smell and noise produced by a painting operation,[62] smoke and dust emitted by an aluminum plant[63] and waste discharged into a river by a paper mill.[64]

Since neither article 1384 § 1 nor the theory of abnormal vicinity nuisance require proof of fault, the frequent recourse to these legal grounds in civil litigation involving damage to the environment shows an evolution of French law toward a system of strict liability. However, the efforts of French judge-made law to adapt the provisions of the Civil Code to environmental liability have been imperfect. Addressing the nuances of pollution damage with a 193-year old legal instrument is problematic. Plurality of polluters, impracticability of traditional methods for assessment of damages, and the refusal of the French legal system to allow class actions are all examples of the difficulties attending legal action in France in the field of environmental nuisance.[65] The time may therefore have come to enact modern and specific legislation to deal with environmental tort.

B. Possible Changes to French Rules of Civil Liability for Environmental Damage to Comply with International and European Law

The question of the need for harmonization of the rules of civil liability for damage to the environment has been debated over many years at the European and international level. The legal instruments that have resulted show a strong preference toward a system of strict liability of polluters.

For example, the Convention of the Council of Europe on civil liability for damage resulting from activities dangerous to the

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60. An impressive and extensive collection of court decisions applying the theory of abnormal vicinity nuisance is contained in the fascicule 265 of the Jurisclasseur Civil (*supra* note 59). The examples given below (infra notes 61 through 64) are cited from this fascicule.

61. Cour de Cassation (highest civil court), 2nd Civil Chamber, February 3, 1993, Bull. civ. II, n°44.

62. Cour d'Appel de Versailles (Court of Appeal), October 1, 1993, Juris-Data n°044455.

63. Cour d'Appel de Paris (Court of Appeal), 23rd chamber A, June 1, 1994, Juris-Data n°021813.

64. Cour de Cassation (highest civil court), 2nd Civil Chamber, March 11, 1976, Bull. Civ. II, n°98.

65. See Martine Rémond-Gouilloud, *L'action en justice en matière d'environnement: variations sur l'incertitude*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 198-210 (1994) (listing the major obstacles in France to sucessful environmental claims).

environment provides for strict liability.[66] The Convention was offered for signature on June 24 and 25, 1994, in Lugano but was not signed by France because of strong opposition from industrial corporations.[67] An explanatory report was issued in connection with this Convention stating that the system of strict liability was chosen in order to ensure adequate compensation for damage to the environment.[68] Paragraph 7 of this report states that such system of strict liability is justified by the specific risk created by dangerous activities pursued as part of a modern industrial activity.

Other examples of strict liability can be found in European law. The proposed European Directive concerning civil liability for damages caused by waste, for example, provides in article 3 that waste producers can be liable for damages and destruction of the environment caused by their waste regardless of any wrongdoing.[69]

In fact, this Directive will very likely never be adopted since the European trend now seems to be evolving toward a comprehensive environmental program which would not be limited to damages caused by waste. A discussion on such a comprehensive program was initiated by the European Commission following the adoption, on March 17, 1993, of a Green Paper on remedying environmental damage.[70] By publishing a Green Paper, the European executive power took the initiative to launch a far-reaching debate between the Commission, the member states and all public, professional and private institutions concerned with European environmental issues.[71]

In article 4.2, the Green Paper envisions a global approach to civil liability for damage to the environment. It proposes a system that utilizes

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66. For an analysis of this Convention, see Christian Larroumet & Charles Fabry, *Le projet de Convention du Conseil de l'Europe sur la responsabilité civile des dommages résultant de l'exercice d'activités dangereuses pour l'environnement*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 17.

67. Code Permanent Environnement et Nuisances, Volume 2, section "installations classées," n°196b.

68. The text of the explanatory report as well as the text of the Convention can be obtained from the Directorate of Information, Council of Europe, F-67075 Strasbourg cedex (France).

69. The initial proposal of this Directive was published in the Official Journal of the European Communities n°C 251 of October 10, 1989. A subsequent proposal was presented to the European Commission on June 28, 1991 and published in the Official Journal of the European Communities n°C 192/6 of July 23, 1991.

70. Information on the Green Paper can be obtained in France from the Documentation Center of the European Commission, Socle de l'Arche, Source d'Europe, Cedex 61, 92054 Paris La Défense.

71. Michel de Guillenchmidt, *Le livre vert de la Commission: état de la procédure*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 4.

both strict liability for polluters and the establishment of a compensation fund for instances when polluters can not be found.

Should a new European Directive following the Green Paper guidelines be adopted, this could result in changes to the French Rules of civil liability described above. Such changes would not be drastic ones since, as indicated above, France is evolving toward strict liability which is the principle retained in the Green Paper. However, the adoption of a Directive would mean that articles 1382 *et. seq.* of the French Civil Code would no longer apply to tort liability resulting from environmental claims. A specific law, reproducing the principles set in the Directive, would have to be enacted to treat such type of liability. The main changes compared to the current French system would probably concern technicalities such as causal link presumptions or maximum caps for award of financial compensation.

It appears however that the establishment of a unified European environmental civil liability is not likely to happen in the immediate future. The Green Paper has raised strong objections from French scholars. According to C. Rubin, who complains that the Green Paper has avoided the real questions, there are doubts as to whether a real need for European harmonization in the field of civil liability for damage to the environment actually exists.[72] P. Thieffry also criticizes the Green Paper stating that it is surprising that the European Commission did not draw useful lessons from the gravity and unanimity of the criticisms addressed to the American system of compensation for damage to the environment.[73] Actually, the opposition to the Green Paper was not limited to France. The UK Government, in its formal response to the Green Paper submitted on October 11, 1993, rejected the proposal of European action in the field of civil liability for damage to the environment.[74]

Although these criticisms must be taken seriously, they should not be a reason for blocking the process of European unified rules of civil liability for damage to the environment. It is well-known that differences

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72. Chantal Rubin, *A propos du Livre Vert . . . Des vertiges de la méthode à l'expérience française*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 6.

73. Patrick Thieffry, *L'opportunité d'une responsabilité communautaire du pollueur—Les distorsions entre les états-membres et les enseignements de l'expérience américaine*, REVUE INTERNATIONALE DE DROIT COMPARÉ, 104 (1994). Patrick Thieffry, in connection with criticisms addressed to the American system, refers to Raymond B. Ludwiszewski, *Superfund Liability at Issue, The EPA Resists a Complete Overhaul*, National Law Journal, June 14, 1993, at 29 and to Peter B. Prestley, *The Future of Superfund*, ABA JOURNAL, Aug. 1993, at 62-65.

74. Andrew Bryce & Julian Boswall, *Civil Liability for Environmental Damage and the UK Government's Response to the Green Paper*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 31.

in national environmental liability rules may cause distortion of international competition.[75] A harmonization of national legislation in Europe therefore appears necessary to avoid such distortion.[76] Otherwise, differences in legislation may lead industrial corporations to locate in states with the most lenient rules (so-called "pollution haven"), thereby creating a race to the bottom problem.[77] These differences may also exacerbate conflict of laws issues in the event of a cross-border pollution within the European Union. For instance, should pollution occur in France and then expand to Germany, French judges will apply French law to the French victims and German law to the German victims.[78] This is because France applies the *lex loci delicti* to international torts, thereby giving the preference to the law where the victim suffered the damage.[79] As a result, victims would be treated differently although they suffered from the same tort. This could be avoided with European unification. Five years after the signature of the Treaty on the European Union (Maastricht Treaty) and just two years before the introduction of the European currency ("Euro"), a chauvinistic approach to environmental civil liability appears somewhat old-fashioned. It is therefore to be hoped that the European Council will soon definitively take the lead in introducing legislation effecting a uniform system of civil liability for environmental damage.[80]

IV. DAMAGE TO THE ENVIRONMENT AND CONTRACTUAL LIABILITY

In the course of their business activities, industrial corporations may be confronted with contractual liability as a result of transactions such as the sale of a contaminated piece of land or the purchase of an industrial plant that does not conform to environmental regulations.

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75. Patrick Thieffry, *La protection de l'environnement, la liberté du commerce et la concurrence*, LA SEMAINE JURIDIQUE (JCP), Edition Entreprises, issue n° 26 of June 30, 1994, at 18. On the subject of environment and competition, see also Patrick Thieffry & Valérie Delorge, *La politique communautaire de l'environnement et le commerce international: le dilemne de la compétitivité industrielle*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 68-82 (1994).

76. Marc Bellis & Xavier Declève, *Services bancaires et environnement*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 394 (1993).

77. Henri Smets, *Les exceptions admises au principe du pollueur payeur*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 226 (1994).

78. It is assumed here that both French and German victims have initiated legal action in France.

79. *See* PIERRE MAYER, DROIT INTERNATIONAL PRIVÉ 414 (1987); YVON LOUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ 629 (1988).

80. On this issue, see Jeffrey J. Fahs, Cambridge Water Co. v. Eastern Countries Leather Plc*: The End of Common Law Strict Liability or the Beginning of Unified EC Strict Liability for Toxic Chemical Pollution*, N.Y. INT'L L. REV. 84-100 (1995), who clearly pleads in favor of the need for EC legislation to expand strict liability.

This section examines how issues of contractual liability are addressed under French contract law. In this regard, liability resulting from statutory provisions will be distinguished from liability resulting from a warranty clause agreed between the contracting parties.

A. Contractual Liability Resulting from Statutory Provisions

Statutory provisions triggering contractual liability are found in the general principles of French contract law embodied in article 1101 *et. seq.* of the Civil Code, as well as in relevant court decisions.[81] Examination of these principles in the context of environmental damage can be best achieved by considering the common instance of the sale of a contaminated piece of land. Typically in this circumstance, the disappointed buyer will try to obtain rescission of the sale. This can be achieved through several means.

On the basis of article 1110 of the Civil Code, which deals with mistake (*erreur*), a buyer may try to obtain rescission of the sale by proving that the property purchased does not have the substantial qualities for which it was bought.[82] The burden of proof however makes it difficult for the buyer to win. For example, the *Cour de Cassation*, France's highest civil court, rejected the rescission of the sale of a piece of land because the most important quality sought by the buyer, namely the suitability of the land for building, had not been expressly indicated in the sales contract.[83] Therefore, article 1110 may be of little help to obtain the rescission of the sale of a contaminated piece of land.

Claims of misrepresentation (*dol*), as provided in article 1116 of the Civil Code, can be another option. Here, the deceived buyer has to prove that the seller intentionally provided false information concerning the property to be sold.[84] Article 1116 also can be used in the event of *reticence dolosive*, i.e., when the seller, as a result of silence, led the buyer to believe that the property contemplated by the sale had certain qualities it did not in fact have.[85]

Some scholars conclude that the non-disclosure to a buyer that the piece of land subject to sale is polluted may constitute

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81. For a detailed analysis of French contract law, see in particular Jurisclasseur Civil, Editions du Jurisclasseur, 1996, article 1101 *et. seq.*

82. ALAIN BENABENT, DROIT CIVIL, LES OBLIGATIONS 51 (1995).

83. Cour de Cassation (highest civil court), Commercial Chamber, July 4, 1973, Recueil Dalloz, Jurisprudence, 538 (1974), cited by Joanna Schmidt-Szalewski, Jurisprudence Française, Droit des Contrats 48 (1989).

84. Joanna Schmidt-Szalewski, *supra* note 83, at 51.

85. FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL, LES OBLIGATIONS 186 (1996).

misrepresentation.[86] Such conclusion is in line with a decision rendered by the *Cour de Cassation* that non-disclosure of a potential risk of pollution qualifies as a misrepresentation.[87]

On the issue of misrepresentation, judge-made law has developed over the past forty years the concept that a specific obligation of information and advice rests with the seller who may be assumed to know better than anyone the qualities of the property to be sold. There is little doubt that serious contamination of a piece of land is essential information which must be brought to the attention of the buyer.[88] Noncompliance by the seller with the obligation to provide information and advice should enable the buyer to obtain the rescission of the sale and, under certain circumstances, the award of damages.[89]

Of considerable importance here is a specific text in French environmental law which addresses the obligation of advice and information in the event of the sale of a piece of land. According to the new article 8-1 of the Law on Classified Installations, introduced by the law n°92-646 of July 13, 1992,[90] the seller of a piece of land on which a classified installation previously existed must inform the buyer in writing of this fact. In addition, the seller must also inform the buyer to the best of her or his knowledge, of dangers or significant inconveniences resulting from this previous use. Article 8-1 further provides that in the event the obligation imposed on the seller by article 8-1 is not respected, the buyer may ask either for i) a rescission of the sale or ii) a reduction of the sale price or iii) a clean-up of the site at the seller's cost. However, the clean-up option is possible only if the costs of such clean-up are not excessive compared to the sale price of the piece of land.[91] Although article 8-1 only refers stricto sensu to the sale of a piece of land, it is expected that application of this article will expand to other forms of transactions, such as sales of shares, mergers or commercial leases, when

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86. Corinne Lepage Jessua, *La garantie de passif en cas de cessions de terrains contaminés*, LES PETITES AFFICHES, issue n°21 of February 17, 1993, at 18; Jean-Nicholas Clément, *La cession d'un site industriel ou d'un terrain pollué: les obligations et responsabilités de l'acheteur et du vendeur*, GAZETTE DU PALAIS, issue of May 28 and 29, 1997, at 2-7.

87. Cour de Cassation (highest civil court), January 15, 1971, cited by Jean-Nicholas Clément, *supra* note 86, at 6.

88. Geneviève Viney, *supra* note 57, at 42.

89. FRANÇOIS COLLART DUTILLEUL & PHILIPPE DELEBECQUE, CONTRATS CIVILS ET COMMERCIAUX 164 (1991).

90. See *supra* note 12 for comments on such law.

91. For more comments on article 8-1, see the guide released by the *Conseil National du Patronat Français* (National Association of French Employers) under the title *Ventes de terrains pollués, fusions et cessions d'actifs: mode d'emploi juridique pour les entreprises*, Direction des Affaires Juridiques, C.N.P.F., December 1995.

such transactions involve in one way or another a piece of land on which a classified installation previously existed.[92]

Finally, the buyer may try to contest the sale by suing the seller on the basis of hidden defects (*vices cachés*).[93] Such an action has a reasonable chance of success if the buyer can prove that i) the contamination does not allow normal use of the land, ii) the buyer did not know of the pollution at the time of the sale and iii) the buyer had no way of detecting such situation at the time of the sale.[94] Legal action on the basis of hidden defects must be initiated promptly after the discovery of the defect.[95] Because of all these requirements, this action is sometimes quite difficult to undertake.[96]

B. Contractual Liability Resulting from the Provisions of a Warranty Clause

In recent years, there has been wide national and international attention to environmental problems and to the frequent discovery, in industrialized countries, of cases of severely contaminated pieces of land.[97] As a result, legal practitioners advising industrial corporations in acquisition deals have developed detailed and specific warranty clauses dealing with contractual liability for environmental damage. The development of these warranty clauses in France is partly due to the fact that legal warranties are not as protective of the interests of a buyer as a detailed contractual warranty.[98]

Warranty clauses are usually meant to benefit the buyer by specifying the rules under which the seller will remain liable to the buyer for a certain period of time after the sale. The validity of warranty clauses

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92. Eliane Frémeaux, *La pollution des sols et la responsabilité contractuelle*, GAZETTE DU PALAIS, issue of May 4 and 5, 1994, at 28.

93. Legal provisions dealing with hidden defects are to be found in article 1641 *et. seq.* of the Civil Code.

94. Geneviève Viney, *supra* note 57, n°17 at 42.

95. Article 1648 of the Civil Code, by using the wording "bref delai" (short delay), is unprecise as to the exact period of time granted to the buyer to intiate legal action on the basis of hidden defect. Whether or not an action is initated "promptly" is therefore to be decided by judges on a case by case basis.

96. Jean-Pierre Bertrel*, Les recours offerts par la loi à un cessionnaire déçu,* DROIT ET PATRIMOINE, April 1993, at 53.

97. See Martine Rémond-Gouilloud, *Terrains à vendre: poison compris*, RECUEIL DALLOZ, Chronique, 137 (1992), giving examples of the discovery of contaminated pieces of land in several industrialized countries.

98. Jean-Jacque Caussain & Alain Viandier, *Garantie légale ou garantie contractuelle: garantie de passif ou garantie de valeur?,* DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 43 (1992).

that would only serve to exclude or drastically limit the seller's liability is questionable under French law.[99]

Environmental warranty clauses are traditionally drafted in two sections.[100] The first section lists the representations made and warranties given by the seller. In the sale of an industrial facility, the seller should, for example, represent and warrant that the facility has complied with applicable waste discharge authorizations or that there has been no illegal storage of toxic substances on the premises. The second section will address the indemnification procedure in the event of breach of the first section. The buyer and the seller will generally specify the maximum amount of liability in the event of a breach of warranty and also the duration of the warranty provisions. This last point is delicate because of the risk of latent or creeping pollution, which usually leads the buyer to insist on a long period of validity for the warranties given by the Seller.

Negotiations between buyers and sellers on the wording of the environmental warranty will be facilitated if they are both fully aware of the potential risks.[101] This is why the practice has developed in France, as in other countries, of carrying out pre-acquisition audits.[102] The main purpose of the audit is for the buyer to identify the risks linked with the contemplated purchase. Environmental audits will likely become more frequent in years to come in view of the increased liability of corporations operating classified installations.[103] The extent of the audit will depend on such factors as the size of the targeted corporation, the activities it carried out and, of course, the specific checks the buyer may insist on.[104] If the audit does not reveal any major problems, the buyer should be reassured and be more reasonable in requesting warranties. If the audit reveals a major non-compliance with environmental laws and regulations, such discovery will be taken into consideration in the negotiation of the price

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99. See Jean-Nicholas Clément, *supra* note 86, at 7, who states that such clauses may be deemed null and void since they would put aside the most elementary obligations of the seller.

100. For a detailed model of environmental warranty clause, see Bernard Monassier, *Comment rédiger une garantie d'actif et de passif*, DROIT ET PATRIMOINE, June 1993, at 79.

101. Corinne Lepage Jessua, *La garantie de passif en cas de cessions de terrains contaminés*, *supra* note 86, at 21.

102. It should be noted that voluntary internal audit procedures have now been put into place by the largest industrial groups in France following the European Regulation n°1836/93 of June 29, 1993, promoting the voluntary participation of industrial corporations to a European system of environmental audit and management (Official Journal of the European Community, July 10, 1993).

103. Dominique Basdevant & Jean-Marc Le Bolzer, *Audit juridique et conventions de garantie dans les acquisitions d'entreprises*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 20 (1992).

104. Eric Depré, *Audit d'environnement*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 491 (1993).

of the acquisition.[105] The potential buyer may even decide at this stage not to proceed with the transaction.

When acquisitions are subject to French law, contractual warranty provisions are drafted with the specific intent of supplementing applicable statutory provisions.[106] This interaction between contractual provisions and legal provisions, with which common law practitioners may not be extremely familiar, is typical of a Civil Code legal system.[107]

The way in which environmental warranty clauses interact with statutory provisions can be illustrated by two examples. In a case where, in a land purchase contract, the environmental warranty clause expressly discloses the existence of a contaminated area, the buyer will not be in a position to have recourse to statutory provisions dealing with hidden defects to obtain cancellation of the sale, since the buyer knew of the defect (i.e., the pollution) at the time of the transaction.

Another example of the use of warranty clauses occurs when, as part of the due diligence exercise preceding the acquisition, the seller furnishes to the buyer certain documents containing environmental information on the industrial facility and the site on which it is located. If, in the environmental warranty clause, the parties expressly acknowledge that the seller has provided such documents to the buyer and that, by doing so, the seller has fulfilled her information obligations for the purpose of article 8-1 of the Law on Classified Installations, it will be quite difficult for the buyer to ask later for rescission of the sale on the basis of this article.

In summary, it is important to consider French statutory provisions when drafting and negotiating environmental warranty clauses in agreements governed by French law. Failure to do so may increase the risk of contractual liability for environmental damage.

V. DAMAGE TO THE ENVIRONMENT AND CRIMINAL LIABILITY

Criminal liability for environmental damage is a major risk for industrial corporations. This risk has increased in the recent years in France due to a new trend in criminal litigation. Recognition of the rights of associations to initiate criminal proceedings against corporate entities

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105. For an extensive analysis of environmental audits, see CORINNE LEPAGE JESSUA, L'AUDIT D'ENVIRONNEMENT 1992.

106. See Jean-Pierre Bertrel, *Quel type de garantie de passif choisir?,* DROIT ET PATRIMOINE, May 1993, at 50, who indicates that one of the main purposes of a warranty clause is to supplement the statutory recourses to which a disappointed buyer is entitled.

107. Dolf Weber & Rolf Giebeler, contributors to Warranties in Cross-border Acquisitions, Editor M. Rubino-Sammartano, 45 (1993).

has grown considerably.[108] As a result, associations which have as their main goal the protection of the environment are now fully authorized to join, as civil parties, criminal litigation involving industrial corporations.[109]

This section examines the conditions under which criminal liability of industrial corporations for damage to the environment may be triggered under the New Criminal Code ("NCC").

A. The New Principle of Criminal Liability of Legal Entities

France has reformed some aspects of its criminal system with the adoption of the NCC, effective March 1, 1994.[110] The introduction in the French legal system of criminal liability for legal entities was by far the most original innovation of the NCC.[111] Before the NCC, legal entities could not be faced with criminal liability, since according to traditional criminal case law, it was not conceivable that a legal entity could have the requisite intent to commit a criminal offense. Nor was it possible to impose upon corporations criminal sanctions such as imprisonment.[112]

The new principle of criminal liability of legal entities is contained in article 121-2 of the NCC, which provides that *"legal entities, to the exclusion of the State, can be faced with criminal liability (. . .) in the cases provided for by laws or regulations and for offenses committed on their behalf by their officers."*

Although the NCC sets up the principle of criminal liability for legal entities, this does not mean that corporate executives will now escape criminal liability, as article 121-2 further provides that "*the criminal liability of legal entities does not exclude that of the individuals who are the perpetrators or accomplices of the same acts.*"[113]

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108. A law n°85-601 of July 3, 1985, has added an article 22-2 to the Law on Classified Installations to address specifically the rights of associations protecting the environment to undertake legal action against polluters. Those rights were reinforced by a recent law n°95-101 of February 2, 1995, relating to the reinforcement of the protection of the environment, also referred to as the "loi Barnier" (for more information on this law, see J. Morand-Devillier, *Renforcement de la protection de l'environnement*, ACTUALITÉ JURIDIQUE-DROIT ADMINISTRATIF 443 (1995).

109. OLIVIER FRÉMAU, INDUSTRIE ET ENVIRONNEMENT, LES DONNÉES DU CONTENTIEUX 80 (1994).

110. The New Criminal Code results from the adoption of four laws of July 22, 1992, numbered 92-683 to 92-686 and published in the Official Journal of July 23, 1992.

111. Gabriel Roujou de Boubée, *La mise en oeuvre du Code Pénal de 1992*, RECUEIL DALLOZ, Chronique, 373 (1996).

112. MAURICE COZIAN & ALAIN VIANDIER, DROIT DES SOCIÉTÉS 124 (1996).

113. Barthélémy Mercadal, *La responsabilité pénale des personnes morales*, rapport introductif, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 545 (1995).

The leading principles of this new criminal liability are relatively well defined and may be summarized as follows:

- all types of legal entities are covered by the new legislation (except the State), including partnerships, corporations, workers' committees, unions, foundations, etc.;[114]
- only offenses committed after March 1, 1994 and specifically provided for by a law or a decree may lead to prosecution;[115]
- for a legal entity to be liable, the offense must be committed by a person acting "*on its behalf*." This expression is construed as implying that the offense must have procured some kind of benefit to the legal entity;[116]
- the NCC itself contains a detailed list of offenses that may lead to prosecution of legal entities, but several offenses are also contained in subsequent legislation. Among the areas covered are violations of economic legislation (e.g., antitrust regulations), violations of labor laws (e.g., noncompliance with health and safety regulations), etc.;[117]
- as legal entities cannot be imprisoned, specific criminal sanctions have been provided. These include statutory dissolution of the legal entity, shut-down of a factory, exclusion from public procurements, withdrawal of the right to write checks, publication of the judicial decision condemning the legal entity in the press.[118] Among the choice of sanctions, the fine is likely to become the typical criminal sanction against legal entities;[119]
- a specific register containing the criminal record of legal entities is established.[120]

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114. Maurice Cozian & Alain Viandier, *supra* note 112, at 124.

115. JURSICLASSEUR DROIT DE L'ENVIRONNEMENT, volume 3, fascicule 1020, n°252 bis.

116. Barthélémy Mercadal, *supra* note 113, at 552.

117. See the detailed study issued by the Economic Commission of the *Conseil National du Patronat Français* (National Association of French Employers) under the title "*La responsabilité pénale des personnes morales: ce qui va changer pour les entreprises à compter du 1er mars 1994*," publication of the CNPF, February 1994, chapter II, at 21.

118. Most of the criminal sanctions are listed in article 131-39 of the NCC.

119. Claude Ducouloux-Favard, *Demain les personnes morales responsables pénalement*, LES PETITES AFFICHES, issue n°42 of April 7, 1993, at 10.

120. This register is called "*casier judiciaire*." For general information on this subject, see the study released by ANSA (French association of large corporations) under the title "*Le casier judiciaire des personnes morales*," ANSA publications, March/April 1994, at 2678.

The criminal liability of foreign corporations may be recognized if a criminal offense has been committed on French territory and if such foreign entity can be considered, under French law, as a legal entity.[121]

Several questions relating to the criminal liability of legal entities are still unanswered. For example, will a delegation of powers to an employee lead to an exclusion of the liability of the legal entity for the acts carried out by the employee on the basis of such delegation of powers?[122] Will the liability of corporate executives be automatically recognized at the same time as the liability of the legal entity or will the new criminal liability of legal entities become the rule and that of the corporate executives the exception?[123]

Since criminal liability of legal entities is so recent, it would be premature to give definitive answers to these questions.[124] Evolving case law will shed light on these issues which the NCC does not address.

B. Analysis of the Main Criminal Offenses in the Event of Damage to the Environment

Article 121-2 of the NCC mentioned above establishes the general principle of criminal liability of legal entities. The specific acts which, in the event of damage to the environment, may lead to criminal liability of the legal entity are described in other provisions of the NCC or in subsequent laws.

It is not possible within the framework of this study to give an exhaustive list of all the acts that could lead to criminal liability but a brief overview is provided.

The NCC itself contains provisions which could apply in the event of damage to the environment. Article 221-7 provides that legal entities may be criminally liable for causing the death of a person if they have been negligent with respect to an obligation of safety imposed by the law.[125] Article 422-5 deals with so-called environmental terrorism.[126]

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121. MEMENTO PRATIQUE FRANCIS LEFEBVRE, SOCIÉTÉS COMMERCIALES 177 (1996).

122. For a tentative answer, see Jean Guigue, *La responsabilité pénale en matière d'hygiène et de sécurité*, GAZETTE DU PALAIS, issue of June 14 and 15, 1996, at 19.

123. For a tentative answer, see Barthélémy Mercadal, *La responsabilité pénale des personnes morales et celles des personnes physiques auteurs ou complices des mêmes faits*, RJDA, issue n°5, 1994, at 375. Actually, a criminal tribunal has recently opted for the second option by refusing, under the given circumstances, to cumulate liability of the legal entity with that of the corporate executives. However, this decision is currently subject to an appeal (Tribunal Correctionel de Bethune, November 12, 1996, cited and commented in the Bulletin Rapide de Droit des Affaires, issue n°97-7, 1997, at 3).

124. See Gabriel Roujou de Boubée, *supra* note 111, indicating that only four decisions have been published on matters involving criminal liability of legal entities as of the end of 1996.

125. CNPF study, *supra* note 117, at 23.

126. On this criminal act, see Jean-Pierre Boivin, *supra* note 3, at 440.

According to this article, legal entities may be held criminally liable for introducing into the air, the soil, the underground or the water a substance that may endanger the health of people, the fauna or the flora. The penalty for such crime is FF 7,500,000.00 or FF 25,000,000.00 if loss of life resulted.[127]

However, compliance with environmental regulations is a defense to a criminal action.[128] Under article 122-4 a legal entity may not be declared criminally liable for an act performed in compliance with laws or administrative regulations. It may be debated whether the word "regulations" in article 122-4 should be understood as referring only to governmental decrees and ministerial orders, i.e., regulations applicable to a large category of individuals and adopted by high-level administrative authorities.[129] This would mean that article 122-4 could not serve as a defense in the case of administrative decisions, such as a waste discharge authorization granted by a *Préfet,* which apply to only one individual and are taken by lower level authorities. The majority view among French scholars is in favor of a wide construction of article 122-4 enabling it to apply to all categories of administrative regulations.[130] This view is consistent with article 22 of the law n°92-3 of January 3, 1992, relating to water treatment and pollution, which expressly provides that compliance with a waste discharge authorization is a defense to criminal liability in the event of water pollution.[131]

In fact, most of the provisions for criminal liability of legal entities for damage to the environment are not found in the NCC but in the major environmental laws. Most of these laws were modified after the adoption of the NCC by a law n°92-1336 of December 10, 1992, which introduced specific offenses and penalties for environmental damage.[132] As a result of this law, a new article 22-3 has been added to the Law on Classified Installations to provide that legal entities may be liable for the offenses set

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127. CNPF study, *supra* note 117, at 41.

128. This principle is to be compared with the principle according to which, in environmental tort litigation, respect of environmental regulations is not a defense to an action from a third party claiming compensation for environmental nuisance (see section II.A above).

129. See Corinne Lepage & Christian Huglo, *La responsabilité personnelle civile et pénale des dirigeants d'entreprises en raison des dommages causés à l'environnement*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 19 (1994).

130. Such is the opinion of Jean Pradel, a criminal law professor, cited by Corinne Lepage & Christian Huglo, *supra* note 129, at 19. See also Dominique Guihal, comments under the decision rendered on August 17, 1995, by the Tribunal Correctionnel de Mende (criminal tribunal), Droit de l'Environnement, issue n°34 of December 1995 and January 1996, at 129.

131. On the issue of article 22 as a defense to criminal liability in the event of water pollution, see Dominique Guihal, *Nouveau code pénal et protection de l'environnement*, GAZETTE DU PALAIS, issue of April 16 and 20, 1995, at 5.

132. Corinne Lepage Jessua, *La responsabilité des personnes morales en matière d'environnement*, LES PETITES AFFICHES, issue n°153 of December 22, 1993, at 4.

forth under articles 18 and 20 of that law. The new article 28-1 of the law n°92-3 of January 3, 1992, relating to water treatment and pollution, provides that legal entities may be held criminally liable for noncompliance with its provisions.

In point of fact, any pollution, explosion or incident affecting the environment and human kind are likely to lead to criminal liability.[133] In addition to criminal fines or other penalties such as the shut-down of the factory that caused the pollution, a criminal judge may impose the clean-up of the polluted site as a criminal sanction.[134] Although French criminal environmental law is still considered to be in a developing stage, it nevertheless already provides criminal judges with a wide choice of sanctions to impose on polluters.[135] Criminal liability may therefore turn out to be extremely costly for industrial corporations damaging the environment.

VI. CONCLUSION

France has adopted a sophisticated set of regulations that address all aspects of liability for damage to the environment. These rules are rapidly evolving as a result of pressure from environmental lobbies and international and European law, among other factors. Industrial corporations carrying out activities in France should make sure that they become familiar with French environmental rules and their changing context to more accurately assess their risk of doing business.

133. Corinne Lepage & Christian Huglo, *supra* note 129, at 9.

134. See, for example, article 18 of the Law on Classified Installations.

135. Dominique Guihal, *Répression et réparation des atteintes à l'environnement*, GAZETTE DU PALAIS, issue of February 7 and 9, 1993, at 4.