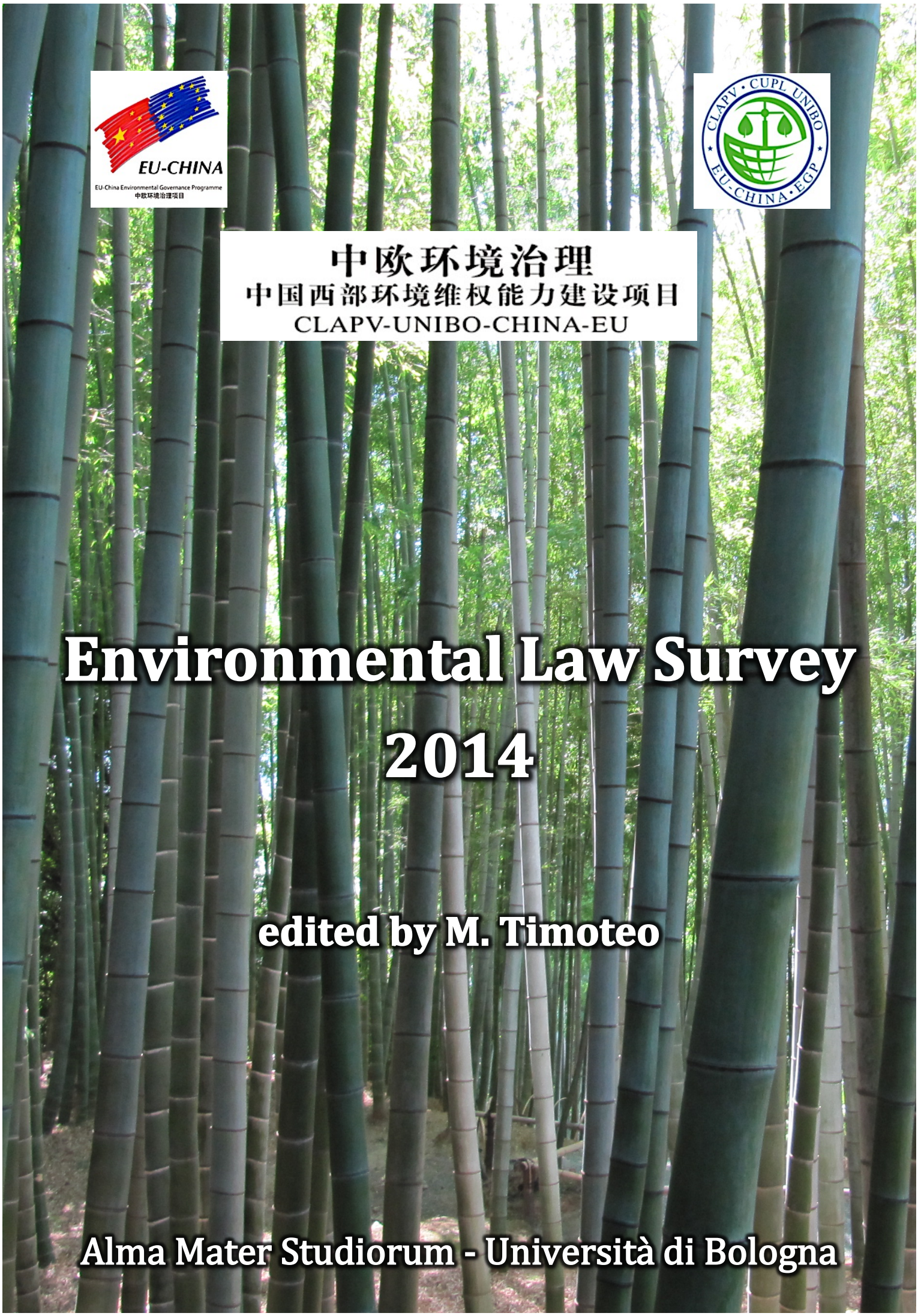

Environmental Law Survey 2014

edited by M. Timoteo

Alma Mater Studiorum - Università di Bologna

EU-China Environmental Governance Programme
中欧环境治理项目

中欧环境治理
中国西部环境维权能力建设项目
CLAPV-UNIBO-CHINA-EU

This publication was realized within the Project "The Capacity Building of Environmental Justice and Guarding Environmental Rights in Western China" financed by the EU – China Environmental Governance Programme (EGP) (Grant Contract External Actions of the European Union n. DCI-ASIE/2012/305-959)

ISBN 9788898010226

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COULD THE NON-LIABLE OWNER OF A POLLUTED LAND TO REMEDY BE OBLIGED TO ADOPT ANY USEFUL MEASURE TO PREVENT AN INCREASING CONTAMINATION?

Gabriele Torelli

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1. The Judicial Controversy.

The Italian Environmental Department had previously forced some companies, owners of contaminated areas, to adopt all the necessary measures to prevent further risks and damages for the surroundings. No other options were taken into consideration because of the impossibility to identify a real responsible for the site pollution. For this reason the Department decided that the most appropriate and rapid solution would be to impose to land owners the urgent implementation of safety standards and soil remediation. The administrative decision was based on art. 240, d.lgs. No. 152 of 3 April 2006 (Italian Environmental Code), which lists all the permitted interventions on a polluted land. In particular, art. 240 pt. 1 includes, on one side, in let. m) securing procedures to be applied immediately after the contamination detection in order to deal with the emergency; on the other in let. p) actions to eliminate the polluting sources and dangerous substances from soil.

The administrative measure that ordered the rehabilitation of the area was clearly necessary, and the parts of the trial are not discussing about this specific profile of the issue, indeed. Much more uncertain is the question if the same imposition could legitimately be required to non-liable companies, owners of polluted lands. As a matter of fact art. 242 of the Italian

Environmental Code introduces the principle of liability, establishing that the adoption of all necessary measures to prevent further risks and damages can be demanded to the person who has caused the contamination or, eventually, to the land owner, in case of *intentional* or negligent behaviour. As a consequence, the owner of the contaminated area cannot be obliged to adopt remedies only because he/she has the assets property.

The three private companies involved in the trial, which should have to adopt the recovery measures, contested the decision of the Environmental Department, underlining the statement of the previous rule. The Court of First Instance[1] recognized its unlawfulness, establishing that public bodies cannot impose upon non-liable owners any emergency measure. For this reason, the Environmental Department appealed the sentence to the Consiglio di Stato, questioning several points of the judgement. First of all, the judicial decision obliges the Public Administration to eliminate the contamination effects and to restore the territories on its own, bearing all the costs of the operations and therefore committing a huge amount of public finances. Moreover, the Department asserted that the "polluter pays" principle is supposed to allow the imposition of any necessary urgent remedy for environmental safeguard due to the relation between the polluted site and the owner, regardless if the event has been caused by intentional or negligent behaviour. In particular, this kind of interpretation of the principle would be in line with the aspects of prevention and protection that are typical of the urgent securing procedures listed in art. 240 pt. 1, let. m) of the Italian Environmental Code. Lastly, the Department contested the sentence underlining that the precautionary principle, that requires to the public bodies to realise preventive actions in order to reduce any predictable risk and damage, permits to impose such an administrative measure to the non-liable owner, so that the land contamination is limited as much as possible.

[1] T.A.R. Toscana, sec. II, No. 1659 of 19 October 2012.

2. The Two Contrasting Case Laws.

The Consiglio di Stato is aware that the whole issue is still uncertain: several judgements of Italian Administrative Courts show contrasting opinions. Specifically, sometimes judges have established that the non-liable owner is obliged to adopt any useful measure to prevent an increasing contamination[2]; but most of the times they rejected this idea, asserting that there is no reason to tolerate this imposition on anyone but the real responsible of contamination[3]. The former is certainly the minority opinion, while the latter is undoubtedly the main one, also because it is supported by one of the most important Italian experts in the subject[4]. Moreover, the same disposition could be assumed considering the previous legal regime of the issue (now totally repealed by the Environmental Code) and comparing it with the actual: art. 17, d.lgs. No. 22/1997, which allowed the Public Administration to establish any decision to limit contamination. Therefore, according to this rule, public bodies could provide important measures to prevent further risks and damages. As a consequence, it was reasonably believed that they could enforce anyone (even the non-liable owners) to adopt securing procedures. For this reason it was widely thought that art. 17 introduced a kind of objective responsibility, that could oblige the owner of a polluted land to be responsible also for unlawful actions committed by third parties. On the contrary, the Italian Environmental Code does not establish similar rules: this aspect is very important, because it is supposed that the lack of the same previsions included in art. 17 indicates the

[2] It is possible to list some of these judgments of the Consiglio di Stato and T.A.R. (Administrative Regional Tribunal, *i.e.* the Court of First Instance, set in every Italian Region): Cons. St., sec. V, No. 6055 of 5 December 2008; Cons. St., sec. V, No. 6406 of 16 November 2005; T.A.R. Lazio, sec. I, No. 2263 of 14 March 2011; T.A.R. Lazio, sec. II-*bis*, No. 4214 of 16 May 2011; T.A.R. Lazio, sec. II-*bis* No. 6251 of 10 July 2012.

[3] Cons. St., sec. VI, No. 2736 of 18 April 2011; Cons. St., sec. VI, No. 56 of 9 January 2013; Cons. St., sec. II, No. 2038 of 23 November 2012; Cons. St., sec. V, No. 1612 of 19 March 2009; T.A.R. Lombardia, Milano, sec. IV, No. 791 of 2 April 2008; T.A.R. Lombardia, Milano, sec. IV, No. 5782 of 7 September 2007.

[4] P. DELL'ANNO, *Diritto dell'ambiente*, Padova, 2014, 296.

wish of Italian legislator to refuse objective liability in contamination issues, and connect it to a negligent or intentional behaviour.

Beyond any consideration about the comparison between the previous and the current legal regime, the Consiglio di Stato analyses the main points of both opposite national case laws.

The first case law strongly affirms that the non-liable owner of a polluted land can be obliged to adopt emergency measures, because the "polluter pays" principle demands that this imposition must be released from any kind of negligence and must be simply based on the property of the land. In other words, in a cost-benefit analysis, the owner is supposed to be granted for gains, but at the same time he/she should tolerate economic dangers and damages: this is a clear example of objective liability, similar to the previous one suggested by the repealed art. 17, d.lgs. No. 22/1997. Moreover, following this first opinion analysed by the Court, the owner should be considered responsible also according to art. 245 pt. 1 of the Italian Environmental Code: this rule allows his/her voluntary intervention in order to adopt both the urgent secure procedures and definitive remedies. Consequently, art. 245 could also suggest that the owner should be involved to prevent an increasing soil contamination as much as possible, no matter of his/her effective liability.

On the contrary, the second case law considered by Consiglio di Stato firmly refuses the obligation for the non-liable owner to adopt the necessary measures to prevent further risks and damages, because of the lack of rules imposing this specific action. The opinion is strengthened with further considerations. First of all, it is reiterated that the "polluter pays" principle should implement a personal liability and at the same time exclude the objective one. Secondly, art. 244 pt. 3 of the Italian Environmental Code establishes that the administrative order to adopt emergency measures (listed in art. 240) must be notified not only to the responsible for pollution (if the person is known), but also to the owner of the polluted area. Nevertheless this order is communicated not to impose the adoption of the measures to the latter, but just to inform that, according to art. 253, the costs bore by the Public Administration to prevent contamination constitute a burden on the

land. This means the charges paid by the public body to restore the area must be registered in the intended-use-certificate of the field, so that they could represent a secured preferential claim for the creditor (*i.e.* Public Administration). Eventually, according to art. 253 pt. 3, the Public Administration is able to enforce in a second moment the original claim on the non-liable owner, under condition that the competent authority adopts a further administrative measure which declares the impossibility to identify the real responsible for pollution, or the unsuccessful attempts to bring an action for damages against him/her. Therefore, the Consiglio di Stato explains that, following this line, art. 244 pt. 3 in conjunction with art. 253 would not allow to impose with priority to the non-liable owner any adoption of emergency measures to prevent an increasing contamination.

Finally, this case law motivates its position also focusing on art. 245 of the Italian Environmental Code, which lists the obligations for not liable people in case of contamination. Beyond the voluntary intervention allowed in art. 245 pt. 1 discussed above, art. 245 pt. 2 establishes that the non-liable owner must communicate to the competent authorities (the Region, the Province and the Municipality) the detected contamination and adopt the necessary prevention measures, listed in art. 304 of the Italian Environmental Code. These are different from those listed in art. 240: as a matter of fact, the prevention measures (art. 304) have to be adopted within 24 hours after the detection of a contamination risk, and the economic effort for the land owner is much less hard than the one requested for the adoption of emergency and restore remedies established in art. 240 let. m) and p). Consequently, by the law (*i.e.* Italian Environmental Code) the non-liable owner is requested to adopt the less hard obligations listed in art. 304, instead of those imposed by art. 240.

3. The Judicial Order.

After the brief summary of the main points of these contrasting case laws, the Consiglio di Stato affirms that the Public Administration, according to the current legal national regime established in the Environmental Code,

cannot impose onto the non-liable owner of a polluted land to adopt the securing procedures listed in art. 240 let. m) and p) after the discovery of contamination, in order to prevent further pollution risks and damages. The reason is that there are no specific rules which expressly justify this order. Therefore, the only requirements for the non-liable owner are the adoption of the preventive measures listed in art. 304 and the obligation to communicate the detected contamination to the competent authorities, in accordance with art. 245 pt. 2. Consequently, the adoption of secure procedures to deal with the emergency (established in art. 240 let. m) and of remedies to eliminate pollution sources (established in art. 240 let. p) could be ordered only to the effective contamination responsible. This thesis is confirmed by art. 250 of the Italian Environmental Code: if the responsible is not identified or does not execute the order or simply cannot, the Municipality has to fulfil these obligations.

This means that the non-liable owner could be obliged to bear the costs for the area restore only after the primary intervention of Public Administration, under condition that this adopts the administrative measures in accordance with art. 253 pt. 3, as explained before.

The Consiglio di Stato believes that this represents the fairest solution, also because the claim of objective liability is not relevant. As a matter of fact if the non-liable owner were directly obliged to adopt any useful measure to prevent an increasing contamination, he/she would be responsible not for an objective liability but for a "position liability", that is a liability depending on his/her position as owner. In other words, while the objective liability does not require a negligent or intentional behaviour and depends only on the cause and effect relationship, the "position liability" cannot be related neither to the subjective nor to the objective aspect, because the contamination is completely independent from any owners' activity.

Although the Consiglio di Stato expresses its own opinion on this matter, uncertainty still remains. For this reason the highest Italian Administrative Court decides to raise a question of preliminary ruling to the European Court of Justice (ECJ) about the compatibility of artt. 244, 245, 253

of the Italian Environmental Code with EU law. Specifically, the Court wishes to know if the European principles on the question – in particular the "polluter pays" principle, the precautionary principle, the preventive action principle and the priority rectification of damages at source principle (listed in art. 191, par. 2, Treaty on the Functioning of European Union) – hinder the application of the previous Italian rules, which do not permit the Public Administration to order the non-liable owner the urgent adoption of measures to prevent an increasing contamination. In other words, the Consiglio di Stato needs this preliminary question to be solved, in order to be able to pronounce the final judgement: the ECJ is of course the only appropriate institutional body to establish the exact interpretation and meaning of European environmental principles and their relationship with Italian environmental rules. Obviously the Consiglio di Stato also explains its main reasons to raise the question to the ECJ.

First of all, in relation to the "polluter pays" principle the uncertainty regards the opportunity of internalising the costs to bear to restore the polluted area. Internalising means to avoid that the community bears the remedy costs: it is preferable to request payments to the land owner, even if he/she is not responsible at all. In this way the "polluter pays" principle would allow to demand him/her the damage restoration: not only to save public funds, but also because the owner is considered the best subject to control the risks. Following this line, the owner should accept advantages and disadvantages deriving from the land property, especially if there is a business activity. Therefore the owner cannot be obliged to adopt emergency measures only under condition that he/she furnishes the proof that pollution has been caused by third parties[5].

Secondly, the precautionary principle and the preventive action principle legitimate an anticipatory environmental safeguard. The former permits the adoption of pre-emptive strategies even though contamination is not effective and there is no any certainty that it will be: risks are partly unknown. The latter intends to prevent damages deriving from risks already

[5] In accordance with art. 8 par. 3 let. a, Directive No. 2004/35/EU.

known and scientifically proven. The sense of both principles clearly permits the intervention of public bodies also in case of doubtful scientific situations: as a matter of fact a preventive protection is necessary to avoid risks of irreversible damages. For this reason the Consiglio di Stato admits that the same sense is referred not only if the damage is uncertain, but also if the responsible of an effective pollution is still unknown. Consequently both the precautionary principle and the preventive action principle would allow to order the non-liable owner to urgently adopt any necessary remedy listed in art. 240 of the Italian Environmental Code, in order to prevent the increasing contamination just because he/she is in the best position for doing it.

Finally, there are some doubts related to the priority rectification of damages at source principle, which demands that damages must be limited after the pollution as quickly as possible. In case it is impossible to identify the real responsible, the owner could be reasonably supposed to be the closest person to pollution sources and consequently the only one who can restore the area immediately.

Although the Consiglio di Stato underlines the reasons of its uncertainty on the question, it asserts once more that the non-liable owner could not be obliged neither to adopt any necessary measure to prevent increasing contamination nor to restore the area, and that the European environmental principles do not hinder the application of Italian rules. This opinion is supported by a similar previous case law: ECJ, Grand Chamber, 9 March 2010, C-378/08. In this circumstance the European Court affirmed that the "polluter pays" principle excludes that the owner must bear the remedy costs for a polluted area if he/she has not any kind of responsibility for the contamination. In other words he/she must respond only in case of contribution to the damage: therefore the cause and effect relationship is an essential element to establish him/her liability[6]. Moreover this relationship should be demonstrated by the competent public body, which must investigate to prove it. Therefore it is not acceptable that the non-liable owner is claimed with priority to restore the area only because of his/her land property.

[6] A similar pronounce is ECJ, 24 of June 2008, C-188/07.

Anyway, the Consiglio di Stato does not mean to absolutely prohibit the forced adoption of necessary measures to subjects who are not effective responsible, because it would contrast with the final goal of ensuring a high level of environmental safeguard. The "polluter pays" principle is not supposed to limit protection, but it seems to prevent that liability is always independent from the cause and effect relationship. For this reason a correct balance between environmental safeguard and personal economic interests is necessary: the non-liable owner could be involved in the remedy works only as a last resort. Considering this point of view, in its final analysis the Consiglio di Stato believes that the European environmental principles do not definitely exclude a liability totally separated from the cause and effect relationship; but at the same time they do not impose it. For this reason the Italian legislator is legitimately free to establish if the non-liable land owner could be obliged or not to adopt emergency and/or remedy measures.

In conclusion, although the Consiglio di Stato has expressed its own opinion on the issue, it raises a question of preliminary ruling, in order to have a definite answer on the matter from the ECJ. For this reason the Italian judges require on one hand the exact interpretation of European environmental principles listed in art. 191 par. 2 TFEU and in art. 1 Directive No. 2004/35/EU; on the other, if these principles hinder the application of art. 244, 245, 253 of the Italian Environmental Code, which do not permit to impose the non-liable owner of a polluted land neither to urgently adopt any necessary measure to prevent an increasing contamination, nor to restore the area as soon as possible.

At this time, the ECJ has not pronounced the final judgement yet[7].

[7] It is still possible to monitor the evolution of the judicial issue, because the action was registered as case ECJ, C-534/2013.