Environmental policies for environmental injury: legal protection of the environment

Agustín Viguri Perea

Private Law Department, Jaume I University, Castellón, Spain.

Abstract

Sustainability is a valid term to define a new model of development. It starts in the seventies. Our aim is mainly planned to focus on legal matters concerning different aspects involving environmental protection. In order to effectively protect public health and the environment, governments must first implement legal requirements (including administrative, civil, and penal provisions) at national and international levels. These procedures should be followed by better participation, information and judiciary control measures, culminating in effective enforcement.

United States environmental law has served as an international standard for the emerging regime of international environmental law. International environmental law usually asks how higher United States or European standards can be applied to an international community that lacks a binding enforcement mechanism and consists of a continuum of developed and developing countries with radically different fiscal and institutional capacities to protect environmental quality.

So-called mass torts cases have become an increasingly important aspect of modern litigation. Starting in the late 1980's, the federal diversity class action has begun to be an important way of dealing with mass torts questions. Therefore, it is worth exploring in some detail how federal courts have handled some of the problems in using federal class action procedures to cope with these kinds of cases, and the trend towards more expansive use of the claims device for environmental and toxic tort claims.

1 Introduction

We are firmly convinced of the fact that international environmental law consists basically of sweeping affirmative aspirational principles – such as environmentally sustainable development – tempered by the recognition that they will be applied in
different way by national-states. As far as we are concerned, the general analysis regarding the use of class actions in mass tort litigation will reshape the debate in relation with the use of class actions for environmental and toxic tort disputes (asbestos litigation is one of the most prominent examples). However, the waves of asbestos litigation were soon joined by other mass torts involving a variety of other products.

Recently, major class actions lawsuits have been brought against manufacturers of breast implants, tobacco, asbestos, intrauterine devices, pacemakers, and many other products. Injuries arising from oil spills, airplane crashes, water contamination, and air pollution have developed organized classes of plaintiffs, demanding compensation for their common injuries. Environmental litigation deriving from exposure to toxic substances obviously is related to, and can be manifested as mass tort litigation.

2 A comparative analysis

2.1 European Union environmental policy: The case of Spain

To tell the truth, only with Spain’s entry into the European Community has the government begun to get serious about environmental law. First of all, from our point of view, Spain’s legislation on environmental protection is insufficient and incoherent. In order to have a whole idea of the subjects in question we are dealing with, we must start stating that the Spanish Constitution of 1978 splits jurisdiction over environment. We have multiple levels of jurisdiction (European, national and regional “Autonomous Communities”).

On the other side, our country joined the European Community only in 1986, so has had to adopt a plethora of European law during this same period of national transition. The problems of implementing European environmental policy in Spain are not overriden. Our country’s environmental standards and infrastructure are among the weakest in the EU (along with Greece and Portugal). That is, both Spanish laws and the mechanisms for their enforcement still leave much to be desired.

....Under the original language of the Treaty of Rome (the 1957 constitutional document of the European Economic Community “EEC”) no specific competence was assigned to the Community in the field of environmental regulation. In the early seventies, until the promulgation of the Single European Act in 1986, the EC justified its environmental rules jurisdictionally on Article 100 or catch-all Article 235. The Maastricht Treaty (Treaty on European Union of 1992 – “TEU”) further strengthened EU competence in environment policy. The amended EC Treaty, with its SEA and Maastricht additions now reads in some of the most relevant paragraphs concerning our work as follows:

.....Article 130r.2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that “preventive action” should be taken, that environmental damage should as a priority be rectified at source and that “the polluter should pay”. Environmental protection requirements must be integrated into the definition and implementation of other Community policies.
The recent ecological catastrophe in Doñana (south of Spain) is almost paralleled by the devastating economic impact. The Doñana wildlife area is environmentally unique, presenting an intriguing portrait of fragmented multilevel governance. European regional and environmental policies interact with national, regional and local interests of politicians, business people, farmers, scientists, labor unions, administrators, and environmentalists. By late 1990, the European Community (EC) opened an official investigation against the Spanish government for violation of environmental norms (Community Environmental Directives) in regard to Doñana. Doñana signifies various overlapping spaces—the Spanish National Park, the Andalucian regional “pre-park” or nature park, the historic wildlife preserve (“Coto Doñana”), the UNESCO Biosphere Reserve, the “Entorno” (or “comarca”) surrounding the core, and the general space that includes all of these. The environmental powers within the European Commission have a very strong interest in promoting nature protection in this place as a wildlife refuge, as well as sustainable development in the area in question. That is why Doñana got compensation through the Structural Funds allocation programme. Needless to say, the most recent European Union five-year plan (1995-2000) on the environment put such a great emphasis on sustainable development. The Commission realized Doñana was the perfect showcase project to promote it in a field of environmental importance and delicacy.

Today, without any shadow of doubt, the recent disaster (1998) is opened to great debate about political, legal, and economic responsibilities and cleanup tasks regarding the park. To make matters worse, a judge exonerated Boliden Limited (the multinational Swedish-Canadian company responsible for it) from liability last December. It is amazing to see how pollution and payment still continue to make good friends. After receiving huge sums of money from the local government (“Junta de Andalucía”) as well as from the State in order to subsidize mining, the company has just decided not to follow with this kind of business. This is a crystal clear example of the fact that sustainable development is a sort of illusion in Spain nowadays.

2.2 United States standards for legal protection of the environment. Model Rules and case law

Towards the early 1960’s, in the United States, both the general public and legislators became aware of the subtle dangers posed by environmental toxins. The end of the seventies witnessed the appearance of tort litigation based on “environmental injury” (so to speak, injury caused by exposure to something in the outside environment, as opposed to exposure to a consumer product or to a substance in a confined workplace). The main story of environmental law in the 1970’s and 1980’s was the rather slow, though in certain fields steady pace at which the Environmental Protection Agency (E.P.A) and other federal agencies moved to address the hazards of toxics. Tort litigation could play an important role in both deterrence and compensation of such injuries. Unfortunately, even when they are based on good scientific evidence, environmental tort claims sometimes are difficult to win because of the proof of causation (“causal evidence”).
The federal initiative in the environment field takes two forms: One is a real effort to ensure that agencies of the federal government would give suitable consideration to environmental issues. The other is connected with the promulgation of specific standards to control the pollution of major media, especially water and the atmosphere.

The states have adopted various and sundry statutes which emulate the federal legislation. These laws are usually more general in nature and less powerful in terms of enforcement. Most states have probably come to depend upon federal control over the abuse of the environment. Whatever the cause, the center for imposition and enforcement of standards has largely resided in the federal courts and with EPA.

On the other hand, given the complicated scientific issues involved, the possibility that plaintiffs employing fringe scientists may obtain compensation for groundless claims cannot be dismissed either. Fortunately, methods are available for improving the reliability and predictability of environmental tort litigation. While epidemiological proof now plays a major role in environmental regulation, environmental toxins rarely cause attributable fractions of disease that are greater than 50 percent. The simple “more-probable than not” standard will inevitably preclude most claims.

There are two different kinds of situations covered by the term “mass torts”: a) Mass accident suits: In a mass accident, a large number of persons are injured as the result of a single accident. Although the Federal Rules as originally drafted counseled against the use of class actions for “mass accidents”, the utility of class actions to resolve mass tort claims is now well recognized. Examples of such accidents include an airplane crash, the collapse of a building, or the explosion of a factory accompanied by the release of toxic substances (for instance, Bhopal); b) mass product liability cases: They arise out of the sale of a defective product to thousands of buyers, who are thereby injured. Whereas even a very large mass accident case tends to involve a few thousand claims, a mass product liability case can involve hundreds of thousands of people (e.g., asbestos, prescription drugs such as Bendectin and so on).

As we can see, the traditional worldwide model (an individual litigant represented by a lawyer for whom that claim presents a unique set of facts, and with the client’s approval on such matters as pleading, discovery and trial tactics, settling, conducted as if no other case has presented closely-similar issues, builds a case from scratch), works very poorly in the mass tort situation. Clearly, a way of litigating these issues once or a few times, rather than thousands of times, seems sensible both economically, and in terms of expediting compensation to those who have been injured in a way that deserves redress. From our point of view, the federal class action is a potentially good way of handling these problems.

Historically, the United States judicial system has addressed the need for procedures to facilitate multi-party actions. Originally, class actions in the United States were limited to courts of equity. In 1938, the newly promulgated Federal Rules of Civil Procedure outlined Rule 23, permitting class actions suits at law. This Rule amended in 1966 resolved much of the prior uncertainty concerning the binding effect of the judgments by broadening the applicability of the device and generally improved the procedural management for these actions. The class action mechanism now advances a variety of claims, including consumer, securities, antitrust,
employment, civil rights, institutional-reform litigation, and increasingly in mass-accident, product liability and toxic tort litigation.

The class action is available in both the federal courts and in most state courts. We project to focus our work mainly on federal practice. One of the reasons is that Federal Rule 23 governing class actions has become the model for many state provisions. The majority of the class actions will be composed of plaintiffs. Notwithstanding, defendant class suits, in which the class is designated by the plaintiff, have been brought.

As far as the general prerequisites are concerned, the present Federal Rule of Civil Procedure 23(a) lists four requirements that must be satisfied for certification of a class action:

a) **Size**: The class is so numerous that joinder of all members is impracticable. The number need not be large. For example, classes of 25 have been upheld in cases where the court finds that because of geographical dispersion or other factors, joinder of all would be difficult, and one of 350 held not large enough.

b) **Common questions of law or fact**: This does not mean that all issues must be common to all members, but the common issues must make up a vital component of the lawsuit. It has little practical effect.

c) **Typicality**: The claims or defenses of the representative parties must be typical of the claims or defenses of the class. Again, this requisite has given no difficulty, because in most cases the named parties' interests are typical of the class.

d) **Fair and adequate representation**: The representative parties must fairly and adequately protect the interests of the class. Obviously, the interests of the representative (named) parties cannot conflict with those whom they represent. Furthermore, the interests of all class members must be sufficiently coextensive and result in common goals so that any issues regarding only members not present will not be overlooked or ignored. The number of parties or the size of their interests is not important as long as quality representation of the interests of the entire class is ensured. It has often been seized upon by the defendant in a plaintiff class action to show why the class action should not be allowed.

e) **The action meets any of the requirements of Rule 23(b)**: In addition to the prerequisites of Rule 23(a), a class action will still not be allowed unless the action fits into one of the three categories of Rule 23(b). The first of these categories Rule 23(b)(1) specifies that individual actions by or against members of the class would create a risk of either: inconsistent decisions forcing an opponent of the class to observe incompatible standards of conduct—Rule 23(b)(1)(A)—; or the impairment of the interests of members of the class who are not actually a party to the individual actions—Rule 23(b)(1)(B). As for the Rule 23(b)(1), we must say that it has begun to be used for the joint litigation of mass tort claims, on the theory that if there is no class certification, individual plaintiffs whose cases are not among the first tried may find their interests impaired, especially with respect to the recovery of damages from a defendant with limited financial resources.

In mass tort class actions, which are often brought under b(1), courts have typically required mail notice to all identifiable class members (see, *In re Joint Eastern and Southern District Asbestos Litigation*, discussed more extensively *infra*, where the court held that because class members would not be permitted to opt out, and because members' practical ability to recover money damages was being affected, the stringent notice requirements of *Eisen*—including mail notice to all
claimants identifiable with reasonable effort—must be followed even though the case was brought under b(1)).

In respect of the amount in controversy, the Zahn decision has proven not to be a problem. Where plaintiffs have tried to get class certification for a mass tort case, in which each member of the class has suffered physical injury, courts have held that it cannot be said that, to a legal certainty, individual class members have failed to suffer the requisite $50,000 in damages. Therefore, courts have typically allowed such actions to proceed. Although Zahn was a Rule (b)(3) suit, most lower courts have held that it applies to b(1) and b(2) class actions as well. However, in many b(1) actions, as we know, plaintiffs will be suing on a joint right, and they will be entitled to aggregate their claims.

With regard to Rule 23(b)(2) actions, it allows the use of a class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. This rule does not apply where money damages are the primary relief (injunctive or declaratory relief must be the chief goal of the suit). Its main utility has been for civil right cases, where discrimination against a whole class is alleged, and an injunction prohibiting further discrimination is sought.

The final type of class action, and the most common, because the requirements imposed by it are less restrictive than those laid by b(1) and b(2), is Rule 23 (b)(3). The early attempts to certify toxic tort and environmental class action focused on class certification under this rule. At present, most tort settlement classes are certified under Rule 23 (b)(3), and as a result, the plaintiffs have an opportunity to opt-out of the settlement. It allows a class action if the court makes two findings: a) Common questions: The questions of law or fact common to members of the class predominate over any questions affecting only individual members; b) superior method: The class action is superior to other available methods to the fair and efficient adjudication of the controversy.

Initial attempts to certify mass tort classes under the newly revised Rule 23 were rejected based on the concerns expressed in the Advisory Committee Notes. But, in the late 1980’s, mass tort cases overwhelmed the federal judiciary system, with more district courts certifying class actions, and more courts of appeal agreeing. Particularly, asbestos litigation matured during this time. Several hundred thousand individual asbestos personal injury claims or lawsuits were filed in the course of this decade, and several hundred thousand more are projected to occur between now and the middle of the next century. Professor Coffee cites various statistics that estimate future claims against the Manville Trust. These estimates range from as low as 125,000 to as high as 600,000. Following this concern, we focus our attention on the main points of this especially noteworthy decision allowing class action to proceed, the Weinstein asbestos ruling.

a) Facts: Beginning in the mid-1970’s, thousands of claimants sued Johns-Manville Corp., the world’s largest manufacturer of asbestos. Proceeding in the form of individual actions, these claimants achieved a series of jury verdicts and judgments against the defendant, on the theory that: a’) Manville sold a defective and dangerous product (incurring a “breach of duty”); b’) Manville knew at the time of the sale that the product was defective (vitiating its “state of the art” defense); c’) the plaintiff had through their exposure to the asbestos acquired asbestosis (toxic tort and
environmental claims almost always include allegations that plaintiffs and/or plaintiff's property have been exposed and damaged by hazardous substances). A decade later, by 1982, the corporation was so swamped by the thousands of pending suits that it filed a Chapter 11 bankruptcy petition.

b) Creation of a Trust: In 1988, Manville finally emerged from bankruptcy as a reorganized entity named Manville Corp, and continued operating non-asbestos businesses the corporation owned. A Trust was set up to receive its net economic value (all remaining insurance money, two bonds payable by the corporation, a claim on certain of Manville's future profits, and up to 80% of its common stock), in order to pay all asbestos victims. In return, the bankruptcy court enjoined all claimants nationally from asserting any asbestos claim against Manville Corp.

c) Insolvency of the Trust: The Trust began settling older claims for sizable sums. Within a couple of years, the Trust no longer had enough money even to pay for claims it had already agreed to settle, let alone existing or future claimants. By 1990, it was estimated that there were close to 300,000 claims pending or to be expected, and that the Trust's liabilities exceeded its assets by about four billion dollars.

d) Settlement and class action proposed: Lawyers representing plaintiffs proposed the certification of a b(1) mandatory or non-opt-out class action consisting of all claimants (all over the country), either present or future against the Trust. They also put forward for consideration a settlement of the class action as follows: a') Due to the fact the Trust had little money, -just bond payments and payments from selling off its Manville stock for the next 20 years-, each claimant would receive only 45% of the value of his claim initially, with the balance to be set aside for a later distribution if all of them had first received their initial 45% installment; b') as cash came into the Trust, a large part of it would be carefully segregated in a separate bank account, on behalf of future claimants; c') although the right to a jury trial would not be formally taken from any claimant, any judgment in excess of what the Trust administratively decided was the maximum settlement value would not be paid even in part, until all other present and future claimants had been paid; d') more seriously-injured claimants would get their initial payments sooner than less-seriously injured claimants; e') the entire procedure would be mandatory because no claimant could opt out, try his case in some other state or federal court.

e) Settlement approved: Judge Weinstein approved the certification of the class, and the settlement itself, and made significant rulings: a') Suitability of the b(1) mandatory class action to allocate a limited fund; b') extreme need to avoid repetition of the same factual determinations (whether asbestos was a defective product, whether the manufacturer knew of the danger at the time it was made...); a non-opt-out class action would let the court encourage settlement by binding absent claimants; the court could control attorney fees (a cap of 25% of the amount recovered by any claimant); c') the statutory requirements were easily satisfied (numerosity commonality, typicality, adequacy of representation); d') the requirements for b(1) class were also fulfilled (Judge Weinstein decided that the applicable test should be whether there was a substantial probability that the fund would be insufficient -less than a preponderance but more than a mere possibility-); e') accordingly, class was certified and settlement approved.

....Finally, it is necessary to state that judgment in a valid class action has the following effects: a) Res judicata: The action binds each member of the class and the opposing party regarding the same cause of action involved in the class suit. The
court's decision on the merits is binding only on those parties actually represented, and has no res judicata effect for or against any persons eliminated from the class; b) collateral estoppel: The action is likewise determinative of any issues actually litigated and necessarily decided in the action for purposes of any future action between a member of the class and the same opposing party.

When it comes to facing new developments in toxic tort and environmental litigation class actions, a question crops up: Has the tide shifted against certification of toxic tort claims?. Our starting point could be a $150 million settlement paid by General Chemical Company and its insurers to a class of persons allegedly injured by a release of sulfuric acid from the company's Richmond, California chemical plant. Defendants settled, in spite of the fact that some author characterizes the sulfuric acid release as a false disaster, sharply criticizing many of the plaintiff's claims as bogus. Counsel for defendants' reasoning was as follows: "It is not at all that outlandish to think that if we had taken this to the jury, plaintiffs would each get $15,000 plus lawyers' fees". Multiply that by tens of thousands of claimants, and "the mere math" suggests that settling was the sensible thing to do". Similarly, insurers' defense counsel noted that there appeared to be a lot of questionable claims, but litigating the case would have been staggeringly expensive and carried large risks for the company.

There is no question that class certification dramatically increases the settlement value of the plaintiffs' case in toxic tort litigation. Furthermore, because Rule 23 is clearly designed to enable small claims litigation, the Advisory Committee's intent presumably was that class certification would increase the value of plaintiffs' case in these situations. Nowadays, the Advisory Committee is considering changes to Rule 23 that would add a new subparagraph to Rule 23 (b)(3). It would allow courts to consider whether the probable relief to individual class members justifies the costs and burdens of class litigation. In summary, the final target is that of explicitly creating a relaxed certification standard for settlement class actions.

Summing up, to a certain extent, it seems to me that environmental activism leading to sustainable development has taken a back seat in the 1980's and 1990's to concerns over government spending and foreign affairs. This is true for a variety of reasons, that have served well the aims of businesses and industrial establishments engaged in pollution causing activities. In this way, the great movement for a clean environment is substantially blunted through cutting funds and toning down the goals of EPA. Notwithstanding, the environmental movement is probably only in remission. By any manner of means, it is necessary to be optimistic to think that a new trend is likely to occur in the new millennium.

2.3 Environmental treaties

The international community has discussed on several occasions, in a global forum, questions encompassing both the environment and development. In 1972, there was the United Nations Conference on the Human Environment (Stockholm Declaration). Twenty years later, the international community convened the United Nations Conference on Environment and Development (UNCED). This second Conference culminated in The Rio Earth Summit (Rio Conference).

Since the Stockholm Conference, a "new breed" of environmental treaties have emerged, which integrates both environmental and developmental issues into a
single instrument. They are strongly influenced by **sustainable development** (that is to say, development that meets the needs of the present without compromising the ability of future generations to meet their own needs), a concept which gained impetus during the UNCED process. Additionally, the treaties focus on issues not previously addressed in environmental treaties. Many of these instruments deal with "second generation" environmental problems.

This is the case of Framework Convention on Climate Change (FCCC), an example of the "new breed" of instruments concluded during the above-mentioned Rio Conference. Notably, it calls for sustainable development and requires its signatories to take climate considerations into account in the development of their social, economic and environmental policies and actions. Among the issues addressed in this instrument are the transfer of environmentally sound technologies and financial resources, duties of international cooperation, exchange of information, participation of the public and non-governmental organizations in dealing with the issue of climate change.

Finally, from our standpoint, we must conclude this section by saying that maybe the most interesting concepts cropping up as a result of these treaties are those specially related with inter-generational equity, common but differentiated responsibility, trade and the environment, sovereignty and the environment, the role of non-governmental organizations and local communities in the negotiation and implementation of environmental treaties, caution against allowing a lack of scientific evidence to serve as a pretext for inaction, and above all the famous "polluter-pays-principle".

### 3 Conclusion of the work

Environmental law and regulations have become very pervasive over the past quarter-century all over the world. In civil law actions related to problems arising out of the lack of balance between progress and pollution, sustainable development has become also the real target for the near future.

From a legal point of view, first of all, as we could see, civil procedure refers to the rules of litigation for civil actions. We believe that **tort litigation**, following the path of **class actions**, should play an important role in both deterrence and compensation of such injuries. As a civil law professor, I am of the opinion that the kind of regulation exposed may be an effective enforcement measure, enabling for instance an agency to prohibit plant operators from continuing illegal activities that could endanger the environment, or to seek reimbursement of costs incurred for cleanup.

In addition, in the second place, we think that **strict liability** standard ("liability without fault", in other words, by the mere fact of becoming involved in dangerous activities an industry might be considered responsible for pollution) may also encourage voluntary compliance. Following this pattern, it seems clear that any regulation incapable of providing law-abiding and that cannot be enforced, no doubt, reduces the credibility of the instrument’s goals. This applies at both the national and international levels.

Last but no the least, both agents of environmental protection and agents of economic development cite **sustainable development** as justification for their
plans, but the phrase's real meaning still remains too elusive from our standpoint. It has become a kind of vague principle of transnational, European and also Spanish environmental regulation. Doñana serves as the best example to support our judgment.

References