ABSTRACT OF THE DOCTORAL THESIS

1. Preliminaries on the research topic

Continuous scientific and economic progress that characterizes society today, but generates significant degradation of the environment, determined states to be interested in adopting a set of specific legal rules, to prevent possible harm to the environment, provide the procedure and conditions granting compensation in case of their fatal occurrence and contain provisions regarding the amicable settlement of disputes which could be born as a result of environmental damage.

The main reason that has led to choosing this topic is the urgent desire and also the need to contribute, perhaps insignificantly, through this scientific approach, to reducing the adverse effects on the environment.

The objective of this paper consists in analyzing this international liability for environmental damage, which is the author's vision an effective international environmental protection mechanism.

This thesis is devoted to an issue which, undoubtedly, enjoys **actuality** through awareness, on a broader scale, the importance of protecting the environment, **the need** to address, in theory, a research topic arising out of the challenges that countries face in pursuing the amicable settlement of the disputes resulted from environmental damage.

To address this theme, I appealed primarily to a rigorous analysis of the evolution of international regulations aimed at international environmental law, and the role of jurisprudence and doctrine in shaping rules regarding liability for environmental damage.

The methodology used in this thesis is based on a mixed strategy of methods that combine gathering and analyzing qualitative and quantitative data, this multi-methodological approach being necessary to analyze the concept of international liability for environmental damage and its fundamentals from different perspectives. To this end, a number of national and international materials have been studied to understand the practice in this area, and to identify and separate the main elements of the theme.

Regarding the **structure of the work**, in the first chapter entitled "General considerations on liability for environmental damage", before moving on to the detailed analysis of international liability for environmental damage, I felt it necessary to make a number of clarifications of the terminology, meaning that we will present the concept of liability, and the concept of environment.

Etymologically, the term "responsibility" derives from the Latin “spondeo" which in Roman law designated the solemn obligation of the borrower against its lender to fulfill the obligation assumed. Regarding the etymology of the word "responsibility", it comes from the French, “responsable" meaning responsible, which in turn comes from the Latin past participle of "respondere", used in the sense of being a guarantor.

The second notion that underlies the paper is environment, which, in a normal context, simply means surroundings[1]. Currently, there is no conclusive definition of what environment means in international law, considering that the notion is defined differently depending on the context and on the legal instrument it is used in.

The relationship between responsibility and environment is very problematic and generally any type of liability will question the existence of a causal link

[1] See Stuart Bell and Donald McGillivray: Environmental Law – The Law and Policy Relating to the Protection of the Environment, 5th edition, New York, 2000, p. 3-4.

between an action and inaction and environmental damage is difficult to prove[2]. Moreover, it is also difficult to determine the threshold of environmental damage[3].

In the context of the second chapter with the title "Sources of international environmental law", I started to analyze the main sources, as well as secondary sources. For the main sources, I took into account international conventions, International custom, and general principles of law. The most important secondary, subsidiary sources treated in this chapter are judicial practice and doctrine. Moreover, there were analyzed, as possible secondary sources, the contribution of NGOs to the creation of rules on cross-border environmental damage.

Of interest and novelty in international environmental law is the notion of soft-law, a term that entered the international vocabulary in the 1970s, thereby denoting everything that is not “hard-law”, i.e. what is not promulgated by a governmental body authorized by it, but, however, is intended to affect or even affects behavior and which in time could turn into “hard-law” or it may affect the development of “hard-law”.[4]

It should be specified from the beginning that there is no consensus on the concept of “soft law”. In literature opinions range from denying the existence of the concept, to those who consider it has an important role in the regulations of international law. There is, however, a group of theorists who adopt more nuanced, middle, compromise opinions.

By soft-law we understand a set of rules that are not binding by themselves, but can play an important role in international environmental law.

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[2] Mark Wilde: Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy Europe and the United States, The Hague/New York 2002, p. 56 ff.

[3] Mourie-Luise Larsson, The Law of Environmental Damage – Liability and Reparation, Cambridge inter alia 1999, p. 123-124.

[4] Andrea K. Bjorklund, Assessing the effectiveness of soft-law instruments in international investment law, International Investment Law and Soft Law, Edward Elgar Publishing Limited, 2012, p. 51.

These rules indicate the likely direction of future binding regulations by informally establishing acceptable behavior rules and by coding and covering rules of customary law.[5]

Under the name of "soft-law" we have recommendations, standards and guidelines developed by international institutions, vague provisions of international treaties, resolutions and statements that are not binding, interpretations offered by the provisions of treaties, or standards, indications and codes of conduct issued by various international bodies.

There were also many definitions of the concept, but much has been written about the functions “soft-law” has, many of which are seen through the antagonist prism with the concept of “hard-law”, especially as it becomes increasingly difficult to determine if a rule may fall into one category or another.

To better delineate the “soft law” instruments from “hard-law” instruments, we must make a distinction between the “substance” of the rule, namely what it imposes or recommends to those it addresses, and the “instrument” of the rule. It should be noted that in terms of “soft-law” phenomenon, instrument and substance are usually in agreement, but there may also be derogatory situations.

The chapter suggestively entitled “**The meaning of certain fundamental principles in community and international environmental law’’** made the analysis of many principles such as: the principle of precaution, prevention, the polluter pays and sustainable development.

In literature there have been numerous attempts to define the meaning of the *principle of precaution*. In a vision it means “the attitude any person should adopt when making a decision regarding an activity that can be assumed, reasonably, that it shows a serious danger to the health of current and future generations or the

[5] See C. M. Chinkin, The challenge of soft law: development and change in international law, 38 and A. Boyle, “Some reflections on the relationship of soft-law an treaties”, 48

environment. These persons, especially public authorities, must give priority to health and safety imperatives of economic freedoms (...) and reduce the risk to an acceptable level for economically bearable cost."[6]

The precautionary principle arises and seems to grow with the polluter pays principle and the principle of prevention.

The principle of prevention, known in environmental law as the principle of preventive action, consists, on the one hand, in foreshadowing a causal model on the sequence of events which would happen and their consequences and, on the other hand, in a certain conduct adopted in order to avoid risk factors.[7]

It can be said that the *polluter pays principle* is an economic principle which envisages allocating costs of pollution and damage brought to the environment incurred by public authorities.[8]

Consecrated legally, specifically at European level, the polluter pays principle tends to acquire universal recognition and consecration.[9]

Although a principle that meets different regulations but converging to the same basic idea, the polluter pays principle was enshrined first in the 70s with a series of recommendations by the Organization for Economic Cooperation and Development (OECD).

The principle of sustainable development was formally recognized at the Earth Summit in Rio de Janeiro, being included in the Declaration of Principles on Environment and Development, Principle 3, according to which "the right to development must be achieved so as to meet development and environmental needs of present and future generations".

[6] P. Kourilski, G Viney, Le principe de précaution, Ed. Odile Jacob, Paris, 2000, p.216.
[7] Simona-Maya Teodoroiu, Dreptul mediului şi dezvoltării durabile, Universul Juridic, Bucureşti, 2009, p. 68.
[8] P.W. Birnie, A.E Boyle, International law and the environment, Second edition, Oxford University Press Inc, 2002, p.92.
[9] Pentru doctrina, a se vedea: M. Prieur, Droit de l'environnement, Ed. Dalloz, Paris, 1991, p. 170-181; P. Girod, La reparation du domage ecologique, LGDJ, Paris, 1974, p. 84-91 şi lucrările citate acolo. În ce priveşte proclamarea principiului în America Latină, a se vedea CIDAA, El principio contaminador pagador, Ed. Fraterna, Argetina, 1983.

The principle of sustainable development works in order to ensure a better quality life, both for current generations, and for those that will succeed. In its implementation, the principle trains long-term aspirations, as well as short-term ones, local and global actions, environmental and economic issues, all inextricably linked.

However, we must not overlook the role of society as a whole, not enough for the survival of sustainable development principle, which must impose certain policies and must produce a change apt to lead to the adoption of certain principles.

This objective seems to be if not realized, at least assumed at EU level, which adopted a Strategy for Sustainable Development, among whose stated objectives is distinguished, in terms of environmental protection, climate change and clean energy, sustainable consumption and production or conservation and management of natural resources.

The right to a healthy and effective protection of the environment cannot be conceived without considering both the needs of the present generation, and those of future generations, what determined the *principle of equity* both within the same generation, as well as between generations.

We are talking about a broad vision over equity when adopting measures relating to the social, cultural, economic and environmental needs of future generations (inter-generational equity) and about a restricted one, when pursuing only the present needs of all individuals in all countries (intra-generational equity).

The principle of public participation can be divided into three parts: access to information, access to justice (appeal) and access to public participation in environmental decision making. The literature talks about the existence and development of a "fourth pillar" of the principle called nondiscrimination, national treatment or equal treatment, which considers the way in which the principle is applied to citizens and how it affects the states' interests, others than those implied in decision-making.[10]

The principle according to which members of the public must be consulted and that the views expressed by them should be considered during the development of projects that are likely to affect their lives and environment, enjoys substantial support in international legal instruments on the environment.

The importance of principles for the institution of liability for environmental damage lays in the fact that, often, when there are no specific legal rules to solve a situation relating to the environment, one applies the principles of law, given their character of being general ideas that guide and lead the domain.

In Chapter IV I approached **"the problem of the international liability of states for illegal acts in regulating Articles Project.''**

Article 2 of the Articles Project stipulates two conditions to engage the international responsibility of a State after committing an internationally illegal act.

The conditions are known as illicit conduct and imputability and are regulated as such:

a) the fact consisting in an action or inaction, it is imputable to the State in accordance with international law and,

b) the fact constitutes a violation of the international obligations of the state.

The two conditions were also mentioned in the *Phosphates in Morocco*, where the Court stated that the liability of States may be engaged under a "fact imputable and described as contrary to the rights arising from the treaties of another state."[11]

The literature stated that the only conduct attributable to the state, at international level, is that of its government bodies or those acting under the

[10] Ved P. Nanda, George (Rock) Pring, International Environmental law and policy for the 21st century, 2nd revised edition, Ed. Martinus Nijhoff, Leiden/Boston. 2013, p. 50.

[11] Phosphates in Morocco, Judgment, 1938, P.C.I.J, Series A/B, No. 74, p. 10, at p. 28. See also S.S. ,,Wimbledon'', 1923, P.C.I.J, Series A, No.1, p.15, at p.30; Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No.9, p. 21; and ibid, Merits, Judgment No. 13, 1928, P.C.I.J, Series A, No. 17, p. 29.

direction, instigation or control of those bodies, such as state agents. Therefore, the doctrinal view moves away from the theory of international law according to which the conduct of all individuals, corporations or collectivities linked to the state by nationality or residence, can be attributed to the state whether there is a connection with the government or not.[12]

The Chapter III preamble[13] of the Articles Project defines the notion of violation of international obligations, stating that we shall face a violation whenever the conduct attributable to a State as a subject of international law reaches a failure of that state to comply with incumbent international obligations. Summarizing, the essence of violating an international obligation is reduced to non-compliance between the conduct imposed by a certain obligation and the one adopted by the State.

The idea of international obligation, but also its violation is fully resumed by the comments relating to Article 12, which is marginally called "existence of a violation of an international obligation".

Chapter V is dedicated to the ***international responsibility of states for illegal acts in regulating the Project and the Project of principles and the Lugano Convention*** where there were analyzed conditions whose cumulative joining is needed in order to engage international liability: hazardous activities not to be prohibited by international law, the activities to involve the risk of causing significant cross-border damage, a causal link to exist between cross-border damage and activities not prohibited by international law and the damage to be caused by the physical consequences of activities.

Essentially, whenever an international obligation on environmental protection is violated, whether it is customary or conventional, or whenever a

[12] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, par.2, p.38.
[13] Idem, par. 1, p. 54.

general principle of environmental law is violated, the international liability of states will be engaged under some conditions.

In Chapter VI, entitled Regulation of international liability for environmental damage in European law through Directive 2004/35/EEC, I started analyzing the Directive by presenting Article 1 which states that it "aims to establish a liability framework for environmental damage founded on the "polluter pays" principle to prevent and remedy environmental damage", but without specifying the legal nature of the liability covered and without defining the notion. Moreover, in this analysis, I highlighted the benefits brought by the Directive to the environmental system, benefits that are undeniable, making the Directive so remarkable, especially in comparison to traditional liability systems. Therefore, the Directive can be seen as a tool that contributes to the development and application of the principle of equity between generations.

2. Conclusions of the doctoral research

In the current socio-economic context, the necessity of states to implement a system of liability for environmental damage, system which, to enjoy efficiency, should benefit from a high degree of homogeneity, is undeniable.

Attracting states' liability for environmental damage, who are responsible for its occurrence, must be seen as a sanction necessary in view of the disastrous effects produced globally amid the excessive industrialization and automation, and also the irrational exploitation of natural resources.

Awareness that all these causes of pollution encountered in a State have the ability to produce harmful effects on the territory of another State, has led to the emergence of the idea at first, and later of the theory of states' liability for environmental damage.

This was the starting point of the research, aiming at emphasizing that pollution is a cross-border phenomenon that concerns the international community as a whole and that the only way to prevent the production of such damage is to establish an effective liability system.

International liability for environmental damage cannot be understood in the absence of deepening the premises from which it arises and the basic principles that govern both public international law, as well as, specifically, international environmental law.