



**Towards a Typology of the Remediable Environmental
Damage**

**QUESTIONNAIRE INTENDED
TO STAKEHOLDERS**

Working group led by:

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I. An overview of the scientific project

➤ WHAT THE “TYPOLOGY” IS THERE FOR :

A « typology of the remediable environmental damage » : why ?

French law has nowadays widened the possibilities to take into account the consequences of environmental damage. Not solely classical personal injuries caused *via* the environment (environment-related damage) but also damage to the environment itself are from now on taken into account, as illustrate it on the one hand the recent judgment passed by the Parisian tribunal de grande instance (Court of first instance) on the 16th of January 2008 relative to the Erika case and on the other hand the law n° 2008-757 of the 1st of August 2008 relative to environmental liability, which implements the directive 2004/35/CE of the 21st of April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. And yet, this evolution hasn't been accompanied neither by the drawing up of a typology, nor by the working out of a clear definition of the remediable damage, with the result that we are facing a remediation that varies according to circumstances, to jurisdictions and to concerned institutions. The outcome is an inequality of treatment of both those whose liability is alleged and of the environmental cause. Such an inequality is furthermore increased by the difficulties linked to the description and the assessment of an adverse effect on the environment's impacts.

This situation is comparable to the inequality of compensation and the following judicial insecurity that have prevailed during a long time regarding the remediation of bodily harms' consequences. In order to put an end to this inequality, a working group presided by M. Dintilhac, then president of the Cour de cassation's (Final Court of appeal) second Civil Chamber, has submitted a report to the Minister of Justice on the 28th of October 2005 which suggested a “Typology of the damage linked to bodily harms”. This typology is nowadays accepted unanimously among stakeholders involved in the compensation of bodily harms. And a ministerial circular urges all court's presidents to implement it. If such a result has been possible regarding adverse effects on human life, so can it be achieved as regards adverse effects on non-human life.

The group's members underline that the typology should consist of an open and non exhaustive list of those of the damage which may be taken into account. Such a list should cover both the damage included in the field of application of the directive of the 21st April 2004 on environmental liability and those which are excluded from it and are regulated by traditional tort law.

➤ PARTIES INTERESTED IN A « TYPOLOGY »:

A « typology of the remediable environmental damage » : for whom ?

By establishing a unique typology of the remediable environmental damage, we could provide both the protagonists of environmental action (lawyers, magistrates, operators of polluting activities, insurers, environmental experts, environmental defenders...) and the relevant public authorities with a guidebook of which would outcome more transparency, coherence, judicial security and equality. Such a typology could also contribute to the settlement of environmental disasters, permitting a saving of time and money, notably in the cases in which a compromise is agreed upon by the parties. Above all, a typology of the remediable environmental damage guarantees the respect of the classical principal of integral compensation. Last but not least, such a project may prompt the working out of a typology of European dimension.

➤ **WORKING METHOD OF THE GROUP HOSTED BY THE REGULATION'S CHAIR OF SCIENCES PO :**

A « typology of the remediable environmental damage » : how ?

The drawing up of this typology presupposes a collective and multidisciplinary work within the framework of a group gathering qualified people in the field of adverse effects on the environment, whether jurists, economists or ecologists.

Since March 2009, this group has been hosted by the Regulation's Chair of Sciences-Po presided by the professor Marie-Anne FRISON-ROCHE.

The group gathers following people:

- **Frédérique AGOSTINI**, Jurist, Judge at the Cour de cassation's Social Chamber
- **Philippe BRUN**, Jurist, Professor at the University of Savoy
- **Mathilde BOUTONNET**, Jurist, Lecturer at the University of Rennes I
- **Isabelle DOUSSAN**, Jurist, Research worker at INRA-CREDECO
- **Gilles J. MARTIN**, Jurist, Professor at the University of Nice, Lawyer, Scientific adviser at the Regulation's chair of Sciences-Po
- **Laurent NEYRET**, Jurist, Lecturer at the University of Versailles Saint-Quentin, Member of the Regulation's chair of Sciences-Po
- **Françoise NESI**, Jurist, Judge at the Cour de cassation's third Civil Chamber
- **Béatrice PARANCE**, Jurist, Lecturer at the University of Maine, Member of the Regulation's chair of Sciences-Po
- **Régis LAFARGUE**, Jurist, Judge at the Cour de cassation's first Civil Chamber
- **Harold LEVREL**, Economist, Research scientist at IFREMER (French Research Institute for Exploitation of the Sea)
- **Xavier LE ROUX**, Ecologist, Director of the French Foundation for Research on Biodiversity (Fondation pour la recherche sur la biodiversité)
- **Guillaume SAINTENY**, Economist, former Director of the Ministry of the Environment's Department for Economic Studies and Environmental Assessment
- **Jacques WEBER**, Economist, Director of Research at the International Centre for Agricultural Research for Development (CIRAD)

With collaboration of **Aude SOLVEIG EPSTEIN**, *Doctoral student in Law*

We have to focus our attention on the typology's fundamental structure. In this respect, the following distinctions one can discern whether in common law, in the directive 2004/35 or in comparative law attract our attention:

- a distinction between **subjective and objective damage** : the distinction criterion relies here on the existence or on the absence of repercussions on the possessor of a right. Subjective damage encompass the adverse effects caused to man *via* the environment (personal, patrimonial and non-patrimonial injuries), whereas objective damage include those damage which affect the environment *per se*, provided they exceed a sufficient gravity threshold,
- a distinction between **direct and indirect damage** : the distinction criterion is here related to the existence or the absence of a sufficient geographical and/or chronological

proximity between the source of the damage and its effects. Indirect damage could encompass diffuse pollutions and adverse effects on the interests of future generations,

- a distinction between **temporary and permanent damage** : the distinction criterion corresponds here to the existence or the absence of a stabilization of the environmental state. The concept of stabilization could be compared to the idea of “consolidation” which prevails regarding bodily harms, which means the moment when the lesions stabilize and become to such an extent permanent that a treatment is no longer necessary and that it becomes possible to assess the damage definitely. Before the environmental state has stabilized it would be a matter of temporary damage, whereas after such a stabilization it would be a matter of permanent damage.

- **ESTIMATED CALENDAR :**
 - June-December 2009 : Stakeholders’ consultation
 - December-March 2010 : Drafting of the final typology’s proposition
 - September 2010 : Publication of a book related to the typology
 - October 2010 : Seminar of presentation of the typology and discussion with the stakeholders

II. Questionnaire

The following questionnaire aims to collect the feedbacks, the standpoints, and the ideas of the different stakeholders concerning the project of a typology of the remediable environmental damage.

The questionnaire’s addressees are among others : the five committees formed on the occasion of the « Grenelle de l’environnement » (the State, the elect, the trade-unions, the federations, the NGOs), the EU Forum of judges for the environment, the Association of the Final Courts of appeal from French-speaking countries (AHJUCAF), the French Foundation for Research on Biodiversity, insurers, lawyers, environmental experts, operators...

The respondents are pleased to write a report gathering their answers to all the questions raised. A synthesis of all the stakeholders’ reports will be attached to the final report which will be published :

- 1°) **From your point of view, what is the interest of drafting a typology of the remediable environmental damage: in general and more specifically considering your missions in the environmental field ?**
- 2°) **which qualities do you expect and which drawbacks should we avoid when working out the typology of the remediable environmental damage?**
- 3°) **In your opinion, how should the fundamental structure of such a typology be designed? What should the structural distinctions be?**
- 4°) **More precisely, could you suggest a typology of the damage resulting from an adverse effect on the environment which are susceptible of being taken into account?**
- 5°) **A *contrario*, do you think that some consequences of an adverse effect on the environment should be excluded from the typology? If you do so, which ones and why?**
- 6°) **According to you, which judicial status (purely voluntary instrument, circular, decree...) should be conferred to the typology and why?**

III. Annex : Illustration of a typology of the remediable environmental damage

Typology of the remediable environmental damage suggested by L. Neyret, in “Naufrage de l’Erika : vers un droit commun de la réparation des atteintes à l’environnement”, *Recueil Dalloz* 2008, chron., p. 2681

Subjective damage :
indirect damage caused *via* the environment

Patrimonial damage

Temporary patrimonial damage

- Present expenses for measures taken in order to safeguard and to clean up
- Present expenses for measures taken to safeguard wild animal life
- Present damage to property
- Present loss of earnings
- Communication and promotion expenses
- Present financial supports
- Sundry expenses

Permanent patrimonial damage

- Future damage to property
- Future loss of earnings
- Future expenses for environmental monitoring

Extra-patrimonial damage

Temporary extra-patrimonial damage:

- Loss of recreational opportunities resulting from temporary disturbances
- Temporary adverse impact on public image and reputation
- Direct or indirect damage caused to the collective interest the body corporate aims to defend
- Temporary adverse effect on the landscape’s aesthetic qualities

Permanent extra-patrimonial damage:

- Loss of recreational opportunities resulting from permanent disturbances
- Permanent adverse effect on the landscape’s aesthetic qualities

Evolutionary extra-patrimonial damage:

- Damage linked to evolutionary adverse effects on the environment

Objective damage :
damage caused directly to the environment itself

Temporary objective damage

- Present adverse effects on natural resources:

Damage impairing the air

Land damage

Water damage

Damage caused to natural species and habitats

- Present adverse effects on public services and uses stemming from the existence of natural resources

Permanent objective damage

- Future adverse effects on natural resources

- Future adverse effects on public services and uses stemming from the existence of natural resources

Translation by Aude-Sovleig Epstein