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STJ AND CAUSAL NEXUS IN ENVIRONMENTAL CIVIL LIABILITY

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ABSTRACT

The present article analyses the legal consequences of the oil spill that occurred in the port of Paranaguá - PR, Brazil, due to an explosion in a ship occurred in 2004. There was pollution of spaces neighboring the port, causing the temporary ban on fishing. The ship carried oil and methanol. There was no delivery of methanol to the purchasing companies. The article deals with the causal nexus in environmental civil liability. Many fishermen have appealed against the judicial decisions, taking place what is called "repetitive appeals". The judgment of the Superior Court of Justice (STJ) occurred in 2017. As objectives of this article, two main theses of law are examined: since there was no tradition of methanol for purchasers, they are not responsible; the other thesis argues that all companies are responsible, simply taking into account the risk of the activity developed. It was used the comparative methodology of jurisprudence, legislation and doctrine. As conclusion, it is highlighted that the STJ judged that the application of objective environmental liability implies the observance of the theory of integral risk, requiring the causal nexus between the action and the damage coming. The companies buying methanol were considered not responsible for the damages that occurred.

Keywords: Pollution; causal nexus; objective environmental liability.

STJ E NEXO CAUSAL NA RESPONSABILIDADE CIVIL AMBIENTAL

RESUMO

As consequências jurídicas do derramamento de óleo ocorrido no porto de Paranaguá - PR, Brasil, decorrente de uma explosão em um navio ocorrida em 2004, são analisadas neste artigo. Houve poluição de espaços vizinhos ao porto, ocasionando a interdição temporária da pesca. O navio carregava óleo e metanol. Não houve a entrega do metanol às empresas compradoras. O trabalho versa sobre o nexo causal na responsabilidade civil ambiental. Muitos pescadores recorreram das decisões judiciais, ocorrendo o que se chama de "recursos repetitivos". O julgamento pelo Superior Tribunal de Justiça ocorreu em 2017. Como objetivos do artigo examinam-se duas teses de direito: não tendo havido tradição do metanol para as empresas compradoras, as mesmas não são responsáveis; a outra tese defende que todas as empresas são responsáveis, bastando o simples risco da atividade desenvolvida. Utilizou-se a metodologia comparativa da jurisprudência, legislação e doutrina. Como conclusão aponta-se ter o STJ julgado que a aplicação da responsabilidade objetiva ambiental implica na observância da teoria do risco integral, exigindo-se o nexo de causalidade entre a ação e o dano advindo. As empresas compradoras do metanol foram consideradas não responsáveis pelos danos ocorridos.

Palavras-chave: *Poluição; nexo causal; responsabilidade objetiva ambiental.*

INTRODUCTION

I shall deal in this article with the causal link in environmental civil liability as it was appraised and judged, in Special Appeal No. 1,596,081 - PR (2016/0108822-1), on October 25, 2017, by the Second Section of the Superior Court of Justice - STJ[1].

1 HISTORY OF CASE AND PROCESS
1. 1 CASE HISTORY

Minister Ricardo Villas Bôas Cueva (Rapporteur), in his vote, points out, in item no. 1, a brief summary of the factual-procedural demand scenario:

> It is a notorious and incontrovertible fact that on the night of November 15, 2004, around 7:45 pm, during the unloading operation, at the private terminal of CATTALINI TERMINAIS MARÍTIMOS, located in Paranaguá/PR, the tanker VICUÑA, owned by SOCIEDAD NAVIERA ULTRAGAZ, exploded, causing - in addition to the death of four (4) of its crew, damage to the dock, terminal facilities and small vessels nearby - environmental contamination by the fuel oil of the vessel (oil bunker , diesel oil, and lubricating oils) and from their cargo (methanol).
>
> The ship arrived at the Port of Paranaguá carrying 11,226,521 tons of methanol, a product that had the three companies now appealed as addressees in the following proportion: 5,546,521 tons destined to BORDEN QUÍMICA INDÚSTRIA E COMÉRCIO LTDA. (currently named MOMENTIVE QUIMICA DO BRASIL LTDA.), 3,670 tons destined to DYNEA BRASIL SA (currently incorporated by ARAUCO DO BRASIL SA) and 2,010 tons destined to SYNTEKO PRODUCTOS QUÍMICOS SA (currently named GPC QUÍMICA SA).
>
> At the exact moment of the explosion, 7147. 288 tonnes of methanol had already been discharged into the port terminal, leaving on board the vessel 4,079,233 tonnes of the product which, in its entirety, was burned, volatilized or even diluted in sea water in the first few hours, or in the first days after the accident (e-STJ fl. 5. 2). [2]

1. 2 PROCESS HISTORY

> This is a special appeal brought by LILIAN CARVALHO, with a focus in art. 105, item III, items “a” and “c”, of the Federal Constitution, against a judgment of the

1 DJe: 11/22/2017.

2 Documento: 1638872 - Inteiro Teor do Acórdão - Site certificado - DJe: 22/11/2017.

> Court of Justice of the State of Paraná. The parties are informed that the applicant has filed an indemnification suit against BORDEN QUÍMICA INDÚSTRIA E COMÉRCIO LTDA. (currently named MOMENTIVE QUIMICA DO BRASIL LTDA.), DYNEA BRASIL SA (currently incorporated by ARAUCO DO BRASIL SA) and SYNTEKO PRODUTOS QUÍMICOS SA (currently named GPC QUÍMICA SA), aiming to be compensated for moral damages that it would have incurred for having been temporarily impeded of exercising her profession as a fisherwoman because of the environmental accident related to the explosion of the Chilean flag VICUÑA, on November 15, 2004, in the Port of Paranaguá.
>
> In its application, the applicant argued that the companies requested would be the addressees (owners) of the cargo transported by VICUÑA at the time of its explosion and would therefore also be jointly and severally liable for the damage resulting from that accident resulting in environmental contamination (by oil and methanol) and, consequently, the prohibition of fishing, in the Bays of Paranaguá, Antonina and Guaraqueçaba, on the coast of Paraná[3].
>
> The first degree judgment dismissed the author's application on the ground that (i) the moral damages in the present case would not have been proven and (ii) there would be no causal link between the conduct of the grounds and the alleged moral damages supported by the plaintiff.

1. 3 Two theses on the causal link in objective environmental responsibility

One of the theses, which was unsuccessful in the STJ's judgment, was embraced by the 8th Civil Chamber of the State of Paraná, is as follows:

> [. . .] the EJV Civil Chamber of the TJ/PR, which, in support of the appeal filed by the author, concluded that the hypothesis would be strictly responsible for adopting the theory of integral risk and that, a convicting magistrate, the causal nexus would have been configured, since this would consist of the "risk activity indirectly assumed by the owners of the pollutant load transported (e-STJ fl. 1. 838).

The other thesis, which won the STJ, was the one proposed by the 9th Civil Chamber of the State of Paraná:

> […] the Ninth Civil Chamber of the same Court, in the same situation, concluded

3 Document: 1638872 - Full Length of Judgment - Certified website - DJe: 11/22/2017. Report of the Minister Ricardo Villas Bôas Cueva (Rapporteur).

that the addition of the theory of integral risk does not remove the need to prove the existence of the causal link, as a necessary presupposition to characterize civil liability. In the present case, 'it is not possible to establish a causal link between the mere fact that the cargo carried by the ship was purchased by the shipowners and the damage claimed in the initial', and concluded that 'it is not reasonable to attribute responsibility for the damage caused by the ship's explosion, since the damaging event occurred before'.

2 ON THE APPLICATION OF THE INTEGRAL RISK THEORY

[…] the responsibility for environmental damage is objective, informed by the theory of integral risk, the causal link being the binding factor that allows the risk to be integrated into the unit of the act, and the invocation by the company responsible for the environmental damage, excluding (REsp nº 1,374,284/MG, Rel. Minister LUIS FELIPE SOLOMÃO, SECOND SECTION, adjudicated on 08/27/2014, DJe of 9/5/2014 and REsp nº 1. 354. 536/SE, Rel. Minister LUIS FELIPE SOLOMÃO, SECOND SECTION, judged on 3/26/2014, DJe of 05/5/2014).

PREQUEST. INCIDENCE OF STUMPS N. 282 AND 356 OF STF. PROBATIONARY NEXT. INVERSION. PREVIOUS. DISCUSSION OF THE EMPLOYED PROOF AND NEED FOR PRODUCTION OF SUPPLEMENTARY PROOF. ANALYZE. SUMULA N. 7/STJ. DECISION MAINTAINED. 1. The mere indication of the legal provisions found to have been infringed, without the subject-matter being challenged by the judgment under appeal, precludes the knowledge of the special appeal, because of lack of pre-questioning, 282 and 356 of the STF. 2. In the case of an indemnification action for environmental damage, liability for damages caused is objective, since it is based on integral risk theory. Thus, inversion of the burden of proof is possible. Precedent. 3. The special appeal does not include the examination of questions that imply a reversal of the factual and evidential context of the file, according to what Súmula n. 7 of the STJ. 4. Regimental aggravation to which provision was denied. "(AgRg in AREsp nº 533. 786/RJ, Rel. Minister ANTONIO CARLOS FERREIRA, QUARTA TURMA, judged on 9/22/2015, DJe of 9/29/2015 - it was emphasized).

"SPECIAL REMEDY CIVIL LIABILITY PRIVATE ENVIRONMENTAL DAMAGE INDUSTRIAL WASTE BURNS IN ADOLESCENT REPAIR OF MATERIAL AND MORAL DAMAGES 1 - Claim for compensation brought by a young man who suffered severe burns to his legs when he was in contact with industrial waste deposited in a rural area. **2 - Civil liability for environmental damages, whether due to damage to the environment itself (public environmental damage) or to an**

> **infringement of individual rights (private environmental damage), is objective, based on the theory of integral risk,** in Art. 14, paragraph 10, of Law no. 6. 938/81. 3 - The placing of warning signs in the place indicating the presence of organic material is not enough to exclude civil liability. 4 - Irrelevant of any exclusive or concurrent fault of the victim. 5 - Quantum indemnity reasonably arbitrated by the instances of origin. Summary 07/STJ. 6 - Change in the initial term of the monetary correction (Summary 362/STJ). 7 - SPECIAL APPEAL PARTIALLY PROVIDED. "(REsp nº 1. 373. 788/SP, Rel. Minister PAULO DE TARSO SANSEVERINO, THIRD COURT, judged on 5/6/2014, DJe of 5/20/2014 - it was emphasized).

The jurisprudence of the STJ, mentioned in the three judgments, clearly shows that the application of the theory of integral risk in objective environmental responsibility requires proof of the causal link between authorship and environmental damage.

3 THE NON-TRADITION OF THE SOLD PRODUCT

The companies buying methanol affirm their non-participation in any event causing civil liability with regard to the explosions and fire on the Vicuña ship and consequent pollution of the sea and marine species and the suspension of fishing because they do not own the product methanol, existing on that vessel.

The mentioned companies point out that the product bought was not delivered to them. With support in art. 492 of the Brazilian Civil Code state that the responsibility lies with the seller.

Art. 492 of the Brazilian Civil Code: "Until the moment of tradition, the risks of the thing run on behalf of the seller, and those of the price on behalf of the buyer."

> The basic consequences of the contract of sale consist, on the one hand, on the obligation of the seller to transfer ownership of the *res* and on the other, on the responsibility of the buyer to make the payment. It is up to those who sell to carry on the tradition, in order for the buyer to gain mastery over the moving thing. (NADER, 2013, p. 165)

The product purchased by the mentioned companies, which was not delivered to them, prevented them from exercising the right of ownership

- to use, enjoy and dispose of the thing (art. 1. 228 CCB). Wisely the Civil Law seeks to encourage the seller to be careful about the thing being sold and, in this way, makes the risks of the thing run on their own until the time of tradition.

> Thus, in the interval between the contracting of tradition - making the thing available to the buyer - the legal transaction operates purely mandatory effects and the risks of the thing will be imputed to the alienator. (ROSEVALD, 2011, p. 549).

The Minister Luis Felipe Solomon stated in his vote:

> […] The CFR code implies that the seller is responsible for packaging, identifying the merchandise, clearing the goods at the customs of his country, hiring and paying the freight and disembarking the merchandise at the port of destination. The code *incoterm* is harmonious with the provisions of art. 234 of the Civil Code, because it allows contractors, in an obligation to give, to establish different rules as to the distribution of risks - which are limited to the loss of the thing (FARIAS, Cristiano Chaves de; ROSENVALD, Nelson. Course of civil law: obligations. 11 ed. Salvador: Juspodivm, 2017, p. 180-183). In fact, the Civil Code of 2002 promoted contractual unification, regulating internal and international contracts. *Mutatis mutandis* , art. 502 of the CC clarifies that the seller, unless otherwise agreed, accounts for all debts that record the thing until the time of tradition. On the one hand, art. 237 that even tradition belongs to the borrower of the thing. And the art. 1. 226 establishes that the real rights over movable things, when constituted, or transmitted by acts between the living, are only acquired with tradition"[4].

4 LEGISLATION ON MARITIME TRANSPORT SECURITY

Law no. 7. 003, 03/07/1984:

> Art. 3 - When the vessel, thing or property in danger represents a risk of damage to third parties or the environment, the owner or owner, as the case may be, will be responsible for the necessary measures to nullify or minimize this risk and, if the damage is made, by its consequences on third parties or on the environment, without prejudice to the regressive right that may correspond to it.

The shipowner or owner of the ship, when the vessel, things or property represents a risk of harm to third parties or the environment, shall

4 Document: 1638873 - Full Judgment - Certified website - DJe: 11/22/2017, p. 32

be responsible for the necessary measures to mitigate the risk. If the damage occurs, the owner will be responsible for third parties or the environment, without prejudice to the corresponding regressive law.

It is worth recalling the legal system on liability adopted by *the International Convention on Civil Liability for Oil Pollution Damage* (Legislative Decree No. 74, of 09/30/74). The cargo carried by the Vicuña vessel contained oil and also methanol. Timely pointing out the content of art. 3 of the International Convention:

> […] *the shipowner* at the time of the incident or if the incident consists of succession of facts at the time of the first fact *shall be liable for any pollution damage* caused by oil that has been spilled unloaded from his ship as outcome of the incident ".

The International Convention commented clearly and emphatically that the owner of the vessel is liable for pollution damage - in this case - from the oil. The owner is exempt from liability if he proves that the damage resulted from war, which was the result of the action of third parties or the victim himself.

Accordingly, it is not appropriate to claim the direct or indirect responsibility of the methanol purchasers for the measures taken or not taken within the vessel, since these measures were entirely the responsibility of the shipowner or the owner of the Vicuña vessel.

5 THE NATIONAL POLICY LAW OF THE ENVIRONMENT/1981 AND OBJECTIVE CIVIL LIABILITY

> Law no. 6. 938/81 is, at least according to the general assessment, the "watershed", having determined the beginning of the stage that we here call the systematic-value phase, only after its edition and the consequent recognition of the normative autonomy ecological values and environmental legal good, is that one can speak of a Brazilian Environmental Law with real expression and normative support. "(SARLET; MACHADO; FENSTERSEIFER, 2015, p. 24).

5. 1 Environmental objective civil liability: authorship and damage

> The obligation to indemnify without fault is up to the ministry of law, in certain cases, for two reasons: 1) consideration that certain activities of man create a special

> risk for others; 2) the consideration that the exercise of certain rights must imply the obligation to compensate the damages that originates (GOMES, 2011, p 113).

I bring the text of Law no. 6,938/1981 - art. 14, which deals with matter:

> Paragraph 1 - Without prejudice to the application of the penalties provided for in this article, it is the polluter who is obliged, regardless of the existence of fault, to indemnify or repair the damages caused to the environment and to third parties, affected by their activity. The Public Prosecutor's Office of the Union and of the States shall have the right to file civil and criminal liability for damages caused to the environment.
>
> Objective environmental liability means that whoever damages the environment has a legal duty to repair it. Therefore, the binomial damage/repair. One does not ask the reason for the degradation so that there is a duty to indemnify and/or repair. The liability without fault has an impact on compensation or reparation for "damage to the environment and third parties affected by their activities" (art. 14, § 1, of Law 6,938/1981). No matter what kind of work or activity to be exercised by that degrades because there is no need for her to present risk that is dangerous. It is sought who was reached and, if it is the environment and the man, the logical-juridical process of the environmental objective civil imputation begins. Only then will one enter the stage of establishing the causal link between the action or omission and the damage. (MACHADO, 2017, p. 416).

The wording of § 1 of art. 14 of Law 6,938 regulates the criterion of the repair of damages caused to the environment and to third parties. It cannot be denied that compensation for environmental damage is important, but it is also important to prevent damage. The guilt-free responsibility aims to "force the potential polluter of the environment to adapt the level of activity itself according to the probability of causing environmental damage (POZZO, 1996, pp. 278-279).

It deserves to be pointed out the difference in the genesis of models of responsibility without guilt - the one contained in the National Environmental Policy Law of 1981 and the Brazilian Civil Code of 2002. They are 21 years that distance one law from the other. In Law no. 6,938/1981 it was thought to "meet also the needs of the victim, who, in case of guilt-based liability, would be facing the difficult task of having to

prove negligence of the agent. " (POZZO, 1996, pp. 278-279). With the greatest respect, my interpretation is that of those who had the historical responsibility to write the mentioned § 1 of art. 14 of Law 6. 938, as memorized the then Special Secretary of the Environment, Prof. Dr. Paulo Nogueira Neto (2010, p. 225).

The 1981 Law did not take into account what is included in the Civil Code of 2002: "[…] or when the activity normally carried out by the perpetrator of the damage implies, by its nature, a risk to the rights of others" (art. 927, single paragraph). That is why I stated above, saying that in objective environmental responsibility "one does not ask the reason for the degradation so that there is a duty to indemnify and/or repair." "Civil liability rests on the conduct of the agent (subjective liability) or on the fact of the thing or on the risk of the activity (objective liability)." (NERY JR and NERY, 2008, p. 735). The control of environmental risk was only more welcomed in 1988, in art. 225 of the Constitution and in the Rio de Janeiro Declaration/1992, with the precautionary principle and then in the Civil Code itself.

5. 2 Environmental civil liability and the causal link

"The requirement of a necessity relationship between the triggering event and the harm will naturally lead the courts to remove the causal link every time the event in question does not appear as a *sine qua non* of harm" (VINEY and JOURDAIN, 2013, p. 255).

The event portrayed in the proceeding shows that the fire and explosions that occurred on the Vicuña ship only point to the authorship of the damage to the owner of the ship *Sociedad Naviera Ultragas Ltda* and to the company *Catalini Terminais Marítimos* , where the ship was moored, in unloading operation. The companies that bought the cargo and did not receive the product on board, just because they are buyers of this product, can not be charged as co-responsible for the environmental damages that occurred.

I emphasize the doctrine that understands damage as the necessary effect of a given cause: "the theory of adequate causality will only consider as causation of the damage the condition alone capable of producing it."(GONÇALVES, 2017, p. 362)

In the case under examination, the necessary condition for the

occurrence of the explosions and the fire on the Vicuña vessel was due to the action and omission the owner of the ship *Sociedad Naviera Ultragas Ltda* and the company *Catalini Terminais Marítimos* , where the ship was moored, in discharge operation.

5. 3 No causal link in the case of the Vicuña vessel with reference to methanol purchasers

> 4. Although liability for environmental damage is objective (and backed by the theory of integral risk), **it is essential, for the configuration of the obligation to indemnify, the demonstration of the existence of a causal link capable of linking the injured result effectively verified to the behavior** (commissive or omissive) **of the person who is considered to be the causal agent**. 5. 4. In this case, there is no causal link between the environmental damages (and related moral damages) resulting from the explosion of the Vicuña vessel and the conduct of the companies acquiring the cargo transported by said vessel"[5].

The methanol-acquiring companies had no authority over the ship carrying the methanol.

These companies were not responsible for the maintenance of the vessel, thus not being able to prevent the damaging event (since the technical report in the case records the absence of maintenance of the ship as the cause of its explosion).

> It is not reasonable to assert also that the applicants' liability would be the logical consequence of any omissive conduct on their part, since the latter, as is well known, only occurs in cases where the agent (allegedly a polluter), having a duty to prevent degradation , nevertheless fails to do so, benefiting, albeit indirectly, from the behavior of third parties directly responsible for the damage caused to the environment.[6]

It cannot be said that the risks inherent in maritime transport were related to the activities of the companies purchasing methanol. Said the Minister Ricardo Villas Bôas Cueva:

5 Document: 1638873 - Full Content of the Judgment - Certified website - DJe: 11/22/2017, p. 1

6 Document: 1638873 - Full Length of Judgment - Certified website - DJe: 11/22/2017, p. 18. Superior Justice Tribunal. Vote of the Minister Ricardo Villas Bôas Cueva.

> These risks - justifying the application to the case of integral risk theory - were characteristic of the economic activities of SOCIEDAD NAVIERA ULTRAGAZ (the owner of the vessel involved in the incident being dealt with) and the company CATTALINI TERMINAIS MARÍTIMOS (responsible for the exploration of the port terminal where if the damaging event occurred). At the very least, it would be reasonable to extend the responsibility for the assumption of this risk to the METHANEX CHILE LIMITED, given that it was in the nature of the contractor of the transport service[7].

The Minister Luis Felipe Solomon, in his view, expressed himself saying:

> Obviously, to regularly acquire merchandise to serve as an input for industrial production is not sanctioned or even discouraged by law, and there is no way of considering, in my opinion, any legal disadvantage as regards the conduct of the applicants, nor any indemnifying damage resulting from this isolated act of linking compulsorily for the acquisition of raw material[8].

The fact of buying a commodity to serve as an industrial input is not sanctioned or even discouraged by law. And in the present case, it did not influence the occurrence of the explosion and the fire that occurred on the Vicuña ship.

5. 4 Inapplicability of the liability theory linked to the risk of the production process

This theory was not accepted in the case of the Vicuña ship, and the Second Section, which welcomed the understandings set forth by Minister Ricardo Villas Bôas Cueva and Luís Felipe Salomão. The latter emphasized in his vote:

> The fundamental idea of doctrine is that there is only a proper causal relationship between fact and injury when the act practiced by the agent is such as to cause the victim to suffer harm in the normal course of things and the ordinary experience of life[9].

The wisdom of the judges does not contradict popular wisdom,

7 Document: 1638873 - Full Judgment - Certified website - DJe: 11/22/2017 Page 18-19 Superior Court of Justice

8 Document: 1638873 - Full Judgment - Certified website - DJe: 11/22/2017 Page 39.

9 Document: 1638873 - Full Length of Judgment - Certified website - DJe: 11/22/2017 Page 39.

so it is very appropriate for the magistrate of the third instance to invoke the "common experience of life. " The mere fact of buying a product does not make the buyer responsible for the initial pollution, perhaps existing in the production line of the product. This would be an extreme application of the polluter-pays principle, which runs counter to "the normal course of things". "The idea of normality is linked to the idea of probability: it seems normal that which occurs frequently, so that which has a high probability of occurrence." (POUILLAUDE, 2011, p. 76)

Some might welcome the so-called "shared responsibility" in the National Policy on Solid Waste. From the outset, it is emphasized that shared responsibility does not spread indefinitely, but it has its limits in the Law itself and in the voluntary agreements.

> It should be stressed that the first objective of shared responsibility is to reconcile interests between economic and social agents, in business and marketing management, with the interests of environmental management, using sustainable strategies (according to art. 30, Only paragraph, I of Law 12,305/2010) (MACHADO, 2017, p. 686).
>
> Objective environmental liability is the great umbrella that covers all fields of environmental law: waters, atmosphere, soil, fauna, forests and also solid waste. Beneath this broad umbrella of objective environmental civil liability lies the shared responsibility. Shared responsibility does not replace objective civil responsibility, neither weakens nor increases it. It personalizes the relationship of these two responsibilities in an "individualized and linked" juridical relationship of special economic, environmental and social context: that of generation and waste management, previously nominated by law or by sectoral agreements and terms of commitment (MACHADO, 2017, p. 687).

Civil liability regardless of fault, "when the activity normally developed by the perpetrator of the damage implies, by its nature, risk to the rights of others" (art. 927, Sole Paragraph, of the Civil Code) presupposes at least two elements. First, there is the clear characterization of the perpetrator of the damage, otherwise it would be an arbitrary and untrue imputation. The second element is the concrete identification of risk, which cannot fall on the ground of conjecture or mere assumption. "An administrative decision invoking the precautionary principle should avoid arbitrariness falling; and for this, it will have to present the elements

of uncertainty or doubt, supporting the administrative act, among other reasons, in legality, reasonableness and proportionality." (MACHADO, 2017, p. 113).

In favor of the thesis of strict liability linked to the risk of the production process, the following point is made: "All risks covered by the activity must be internalized in the production process and, if the damage occurs, there will be a presumption of causality between such risks and damage." (STEIGLEDER, 2004, p 204).

5. 5 Indirect pollutant, objective environmental liability and the case of the process

The National Environmental Policy Law establishes in article 3 that pollution is the environmental degradation resulting from activities committed directly or indirectly (item III) and that defines polluter as "the natural or legal person, directly or indirectly responsible, by activity causing environmental degradation "(section IV).

Direct pollutant is the one who practices pollution decisively and principally. Indirect pollutant is that helps in the practice of pollution. Both the direct agent and the indirect agent to be civilly responsible as a "polluter" must act in a way to cause direct pollution or indirect pollution.

In order to be an indirect polluter (article 3, IV and III, Law 6. 938/1981) - natural person or legal entity - it must be proved that it has caused, through its action or omission, degradation of environmental quality, resulting:

> a) prejudice to the health, safety and well-being of the population;
> b) adverse conditions to social and economic activities;
> c) unfavorable offense to biota:
> d) offense to the aesthetic or sanitary conditions of the environment;
> e) release of materials or energy in disagreement with established environmental standards.

I bring to the court of the Supreme Court that refers to various forms of direct and indirect pollution.

> For the purpose of determining the causal link in environmental damage, who does,

> who does not, when should do, who lets do, who does not care who do, who funds to do, who says when he had the duty to report, and who benefits when others do (Relator Minister Herman Benjamin, Special Appeal n. 1. 186. 130 -RJ,)

There are seven hypotheses and, on each one, I will try to analyze the conduct of the companies buying methanol.

5. 5. 1 Who does

The companies buying methanol had done nothing to involve them in the action that took place on the Vicuña ship, on the day and hour when the explosions and fire occurred on said ship. Because they purchased products that were not delivered to them, they did not practice direct or indirect pollution.

5. 5. 2 Who does not, when should

The companies buying methanol had no chance to prevent environmental damage. They did not intervene in the fight against the fire occurred, because for this the Fire Department was present. They had no power to interfere with the clearance procedures on both the ship and the maritime terminal.

> *The polluter-must-pay* is what actually creates and controls the conditions under which pollution is produced, which in this case is the producer. Its action was a *sine qua non* condition of pollution, and only it had the means to prevent it. It is true that the consumer is also an indirect polluter, who benefits from a product whose production has been harmful to society, but he does not have at his disposal reasonable means to avoid the occurrence of damage because he does not control the conditions under which pollution occurs. Demanding a complete cessation of indirectly polluting activity (consumption) as a means of controlling pollution is manifestly unreasonable where there are other less costly means of avoiding pollution. (ARAGÃO, 1997, pp. 140-141).

5. 5. 3 Who lets it

The companies buying methanol had no omission, leaving

something to be done against environmental legislation. The product purchased was regularly accepted for shipping. Nothing was being done on the sly or in violation of safety and environmental legislation.

5. 5. 4 Who does not care that it's done

The companies buying methanol give importance to the legality of their conduct. They do not despise the environment and value the work of fishermen. It was an unfortunate accident, and nothing contributed to its occurrence. Yes, it is up to legislators to provide for stricter maritime transport safety standards. In making the purchase of the transported product the companies were acting legitimately and giving employment to people and families that make possible the sustainable development of Brazil.

5. 5. 5 Who finances to do so

The companies buying methanol did not finance direct or indirect pollution. They also suffered economically because they were not given the goods they needed to carry out the economic activity they perform.

5. 5. 6 Who does not report when it's a duty

The companies buying methanol did not shut up, but did not act clandestinely. They did not have to denounce the company that owns the ship or the company responsible for the maritime terminal, because the Port Authority, the Environmental Institute of Paraná and IBAMA promptly took the steps due to them, by the Maritime Court.

5. 5. 7 Who benefits when others also do

The companies buying methanol had no benefit from the explosions and fires on the Vicuña ship, and also had no benefit from the suspension of fishing. Contrary to the normal logic of the facts, or what commonly happens in everyday life, that companies derive any benefit from the action or omission of the shipowner and the maritime terminal. These companies are the sole responsible for pollution and reimbursement of damages.

It has been widely argued that there is no basis for invoking solidarity in order to hold methanol buyers accountable.

> The obligation *in solidum* must, as we think, remain a subsidiary solution giving way to individual responsibility, provided that a light can be made on causality. Consequently, if one of the accused can establish among themselves who is at the origin of the damage, all others must be released in full. And if he can prove his non-participation, he must be released from any responsibility. (VINEY and JOURDAIN, 2013, p. 307).

6 THE THESIS ACHIEVED BY THE STF HARMONIZES WITH SUSTAINABLE DEVELOPMENT

6. 1 Sustainable development in the Stockholm Declaration/1972

The *Stockholm Declaration on the Environment*/1972 contains seven points in its preamble. The first point says:

> Man is sometimes creature and creator of his environment, which ensures his physical sustenance and offers him the possibility of intellectual, moral, social and spiritual development. In the long and laborious evolution of the human race on Earth, the moment has come, where, thanks to the ever faster progress of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. The two elements of his environment, the natural element and that which he himself creates, are indispensable to his well-being and to the full enjoyment of his fundamental rights, including the right to life[10].

It should be noted that in the Stockholm Declaration of 1972, 1 that the human being "has a solemn duty to protect and improve the environment for present and future generations. " In this statement is the international seed of the principle of sustainability, which will have a more defined and expanded configuration in the next international documents.

10 United Nations Conference on the Environment, meeting in Stockholm from 5 to 16 June 1972. *Recueil Francophone des Traitès Internationaux en Droit de L'Environnement.* Bruxelles: Brylant. P. 27, 1998. (my translation).

6. 2 Sustainable development in the Declaration of January/1992

> In the twenty-seven principles of the Rio de Janeiro Declaration/92 we find, in at least eleven, the use of the concept of sustainable development (MACHADO, 1993, p. 217).

> The idea of development durability corresponds to the sense of a permanent, transmitted, uninterrupted development in a generation. It is appropriate to talk about environmental patrimony. Environmental patrimony is not just a notion of the present, since it presupposes the right to receive it from the past and to give it to the future (MACHADO, 1993, p. 218).

> The environmental dimension of sustainability" deals with the "environmental dimension, in the sense that there is dignity of the environment, as well as recognizing the right of present generations, without prejudice to future generations, to the clean environment in all aspects. In this way, as environmental degradation can make human life unfeasible (and has already made civilizations unfeasible), its skillful and timely coping is unavoidable. (FREITAS; JUAREZ, 2011, p. 60-61).

6. 3 Sustainable development in the Decision of the Permanent Court of Arbitration in Haya.

The Permanent Court of Arbitration in Haya is a "sui generis" court, as it is composed of three judges of the International Court of Justice - a body which is a member of the United Nations - and two jurists, who do not make up the ICJ. I bring the case - "Iron Rhine" (Ijzeren Rijn), which depicts a disagreement between Belgium and the Netherlands on an economic activity, which had a direct impact on the environment. In short, a railway was built around 1879, which left Belgium, crossed part of the Netherlands and ended up in Germany, aiming mainly at the circulation of goods. After the first world war the use of the railway was decreasing. The Netherlands took measures to establish natural reserves in the areas occupied by the railway, but Belgium wished to reuse this space, and the *différend was* presented to the aforementioned Court of Arbitration. The Court issued its decision on September 20, 2005.

It is worth mentioning a part of the decision that deals with the principles to be observed in the conflicts between environment and development.

> After the 1972 Stockholm Conference on the Environment, international law on environmental protection has made a notable breakthrough. Currently, international law and Community law require the integration of appropriate measures of environmental protection in the design and implementation of the economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992, which reflects this trend, states that "environmental protection must be an integral part of the development process and cannot be considered in isolation. " The important point is that these emerging principles already integrate protection in the development process. Environmental law and the right to development exist not as alternatives but as mutually reinforcing, integrating concepts, requiring that where development may cause significant damage to the environment, there is a duty to prevent or at least reduce injury. This duty, in the Court's opinion, has now become a principle of general international law. This principle applies not only in autonomous activities, but also in activities carried out in the implementation of specific treaties between the parties. The Court reiterates the observation of the International Court of Justice in Gabcikovo-Magymaros, according to which "the concept of sustainable development translates well this need to reconcile economic development and protection of the environment" (Gabcikovo/ Nagymaros, Hungary/Slovakia), Judged. Recueil CIJ, 1997, p. 7-p. 78, § 140).

CONCLUSION

The unanimous decision of the Second Section of the Superior Court of Justice exempted companies that bought methanol from civil liability, but did not receive the product. An indirect polluting action was not recognized in the product purchase operation. The Court, thus understanding, did not want to weaken the protection of the environment, since there were other agents directly related to the explosion and fire of the Vicuña ship. There was no specific court ruling on the other agents - the company selling the product, the company owning the vessel and the maritime terminal - on the grounds that they did not join the proceedings as defendants. There was no abusive predominance of the economy in the decision of the STJ, but the itinerary of sustainable economic development was observed, which provides legal certainty and integration of the right to the environment with the right to development.

I am convinced of the correctness of the decision of the above-

mentioned Haya Permanent Court of Arbitration, which states that "where development may cause significant damage to the environment, there is a duty to prevent or at least reduce that damage", with which harmonizes the decision of the Second Panel of the Superior Court of Justice, in the case of the Vicuña ship. Environmental protection should be done within the rule of law. It will not be an unreasonable extension of objective responsibility, without concrete proof of the risk of economic activity, that an ecologically just society will be built. The prevention of maritime accidents that cause environmental pollution - in ships such as marine terminals - has been strongly demanded, but little effected. Prevention, without a doubt, is the indispensable legal pillar of the constitutional right of all to the ecologically balanced environment.

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