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Topical Issues Concerning Environmental Liability and its Insurance*

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1. Introduction

It is an honour and a pleasure for me to be invited to the Association de Genève here in Vienna today and to address you on a number of topical issues concerning environmental liability and its insurance.

Our world is becoming increasingly aware of dangers to the environment. Measures for its protection are being discussed with growing intensity and are gaining ever-growing political weight. However we may judge its outcome, this year's World Environmental Conference in Rio de Janeiro, which was attended by heads of state from a great many countries, was an impressive demonstration of this fact.

Against this background, it is hardly surprising that the problem of liability for environmental risks – brought to the fore by increasingly pro-consumer court rulings and legislation – is becoming an ever more explosive issue and that protection for potential victims, though justified, is being exaggerated and is becoming an unacceptable burden on the private sector. In my address, I shall confine my remarks to the problems that lie at the heart of the matter, and will focus on recent developments in Europe and the resulting issues for third-party liability insurers.

Before discussing individual countries in detail, allow me to mention the following fundamental aspects with which, I'm sure, you are all familiar:

2. Liability

Liability is influenced

— by growing consumer protection in the political sphere, as promoted by consumer lobbies,
— by an increasing claims consciousness,
— by consumer-friendly jurisdiction and legislation,

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— by increasingly sophisticated methods for detecting and measuring pollution.

The result of this is a larger number of law-suits by an increasing number of claimants. Quite apart from the effects of American "class-action", mass claims are becoming more and more probable. Situations can thus arise that are likely to endanger the very existence of individual private companies, especially small- and medium-sized ones.

3. Insurance

Insurers and reinsurers are wondering to what extent the constant broadening of liability, with its great long-tail potential, is at all calculable and hence insurable. If too broad a concept of liability extending to the officially approved operations of an individual company can threaten the latter's very existence, then there is a strong possibility that the payment of an incalculable number of liability claims for environmental pollution could mean the ruin of an insurance company. So where are the borderlines to be drawn?

International insurance and reinsurance markets are increasingly trying to exclude gradual pollution and thus to render and maintain environmental liability risks insurable via the limitation in time and through the appropriate definition of an insured event (key concepts: 'claims made' and 'manifestation'). However, problems arise when courts rule that such policy clauses are illegal, as we are currently witnessing in the judgements of the Cour de Cassation (Supreme Court of Appeal) on claims made in France. Here the limits of insurability are becoming all too clear, at least in the more traditional forms of insurance.

Having made these basic observations I shall now turn to the current position in a number of European countries. Apart from reviewing the situation in my own country and in Austria, I shall touch briefly upon developments in France, Italy, Holland, Scandinavia and the United Kingdom.

4. Germany

I am told that you are particularly interested in the latest developments in Germany – as regards both legislation and the response from the insurance industry – with an eye to the situation in your own country, to which I shall of course turn in more detail later on. So let me begin with Germany.

The Umwelthaftpflichtgesetz (UHG) – Environmental Liability Law (ELL) – entered into force in Germany on 1st January 1991. This law originated from a Federal Government initiative triggered by the great public outcry following the fire in Schweizerhalle, Basel, in 1986, which polluted the Rhine.

The intention of the law is twofold: *firstly*, it aims to prevent pollution by making liability more stringent, introducing strict liability with assumption of causation up to 160 million marks for bodily injury and an additional 160 million marks for property damage. It would apply to 96 specified types of facilities frequently found in many commercial operations and almost all industrial companies which are capable of affecting the environment. Schedule 1 of the law specifically lists the types of facilities concerned.

Under strict liability, plant operators are liable for any damage caused by pollution from normal operations, whether or not the damage is the result of an unforeseen accident or of emissions that are as a rule expressly authorized by the public authorities. Liability also affects the development risk – also known in environmental circles as "latent risk" – which may be the result, for example, of presently unforeseeable future scientific discoveries

about the health risk of certain pollutants. The broadly construed liability of the plant operator in respect of pollution also extends to damage such as that caused by an explosion or a spreading fire, which has always been considered classical third-party damage. To take an extreme example: the shock wave from an exploding tank injures or kills people and damages buildings on adjacent properties. The intended effect of the law results from Article 3 which states that any effects caused by the installations listed in Schedule 1 via soil, water and air on third-party interests protected by the law are considered damage caused by environmental impact and hence subject to the far-reaching liability of the ELL.

However, the law does not provide liability for cumulative or long-distance pollution such as "Waldsterben" or other effects of acid rain.

Joint and several liability as intended by the legislator, although not clearly regulated by the wording of the law, can constitute an increase in liability which, in particular as regards small- and medium-sized firms, can rapidly become a threat to their very existence. An injured party will sue whichever of the various possible polluters is most obviously responsible for the damage or has "the deepest pocket". The latter will then have to pay all the damage caused and bear, via the internal compensation system, the insolvency risk of the other partly responsible parties.

The law's *second objective* combines the desire to improve protection for victims with the wish to balance existing government enforcement deficits in monitoring the environmental safety of industrial companies. This is reflected in Article 6 of the law which – for the very first time in German liability law – introduces the *assumption of causation* with regard to companies which, because of the nature of their operations and other local conditions, could have caused the damage alleged by the claimant. The claimant therefore no longer has the often difficult or even impossible task of establishing direct evidence of cause.

On the other hand the same article enables the party rejecting the claim to refute the assumption of causation by proving that it had been complying with all the official requirements and other stipulations regarding the operation of its plant at the time. Since such evidence in respect of latent damage must be produced for periods of up to 10 years, plant operators are obliged to keep complete records of the lawful operation of their factories in order to parry possible future claims for damage. It is hoped that this will have a preventive effect, making the need for costly official inspections superfluous, at least in those areas of technology devoid of any real risk of a catastrophe.

Protection for victims is also provided by those provisions of the law which give plaintiffs a broad right to information, both from the party opposing the claim and from the authorities. This right to information does not apply in justified cases of secrecy, e. g. with regard to specific production processes and know-how. Weighing the right to information against the concern for secrecy will pose real problems for the courts.

Public interest is protected further by Article 16 of the law which provides for the restoration of the natural landscape as part of the loss of property settlement. This will no longer be thwarted because its cost exceeds the value of the damaged property – usually land.

As a further improvement of the protection for victims, the ELL provides for compulsory cover, i. e. in practice compulsory insurance for particularly dangerous installations. More about this later.

The Environmental Liability Law comprises special provisions for pollution caused by the installations listed in Schedule 1. In addition, the existing legal bases for making claims for environmental damage without any limitation of liability in terms of amount apply fully as before. Of particular importance here are the strict liability provisions of the Wasserhaushaltsgesetz (WHG) – Water Resources Law (WRL) – and the general liability for offences under Articles 823 ff. of the Civil Code.

In addition to the right to compensation for bodily injury and property damage under the ELL, the Water Resources Law also grants a right to claim compensation for economic loss caused by water pollution, e.g. fishing rights or the rights of use of waterworks.

Besides a right to compensation for bodily injury, property damage and certain economic losses, Article 823 of the Civil Code grants a right to compensation for pain or suffering.

Concerning the liability from these laws we see a danger caused by future court decisions with respect to the ELL. With its assumption of causation and right to information, the ELL offers claimants a legal short-cut for establishing the liability of the party defending the claim. There is concern that this short-cut could also lead, indirectly, to broader unlimited liability under the Water Resources Law and unlimited financial liability under the Civil Code. Though it is true that more stringent rules of evidence apply to these broader claims regarding causation, we still wonder how far the courts will allow these requirements to be "softened" in favour of an injured party when the assumption of causation cannot be disproved under the ELL.

Thus there may well be grounds for thinking that the ELL will do more than tighten liability for pollution caused by installations governed by the new law. The mere existence of the law might indirectly lead to more severe court rulings within the framework of the already existing environmental liability laws. It is hard to imagine, for instance, that a court would not use facts obtained through the right to information under the ELL simply because it discovered that the pollution was not caused by the *installation subject to the ELL,* as was at first suspected, but by the *installation subject only to the WRL* next door to it and run by the same operator.

Industry and liability insurers alike have been following with some apprehension the work on the compulsory cover regulation envisaged by the ELL for installations listed in Schedule II. The mere fact that the ordinance has not yet been finalized indicates the complexity of the problems!

While the views expressed by the Federal Ministry of Justice, which is responsible for this matter, show some understanding for the capacity limits of liability insurers, they also reflect the considerable political pressure in favour of improved protection for the victim.

The need for regulation is extraordinarily complex as can be seen from the types of installations taken into consideration. These are essentially plant and equipment of the chemicals industry for manufacturing, processing, storing and transshipping substances that are particularly hazardous for water. The different types, sizes and applications of these facilities produce a vast range of potential hazards which in turn can involve very varied requirements for the mandatory sum insured. The responsible ministry official has proposed a formula based on the criteria of installation or storage type, substance and quantity. The formula results in a linearly increasing cover up to a maximum of 160 million marks, but this is ruled out by the market's capacity limits. Even amounts of, say, 10 or

20 million marks can cause a very serious capacity problem due to the accumulation risk in the case of normal operational damage and gradual pollution. If this cover were to be compulsory per installation rather than per insured, the problem would be insoluble.

The date when the regulation for the compulsory insurance will be issued is yet unknown.

And this brings us to insurance:

German liability insurers will insure the new liability resulting from the environmental law through their own coverage model designed specifically for environmental risks. The new environmental liability insurance conditions, which have now been finalized, are based on experience with insurance cover concepts used up till now and go back to the considerations of a working party of the Haftpflicht-Unfall-Automobil-Versicherungsverband (HUK) – Association of Liability, Accident and Motor Insurers (ALM) – in 1986. Owing to the increase in the number and cost of water pollution claims with respect to trade and industry, the conclusion arrived at was that existing conditions for insuring water damage also provided cover for types of damage which nobody had imagined when the conditions were drawn up in 1961. These cases chiefly involved the careless handling of substances – especially CFCs – that were hazardous for water in the course of manufacturing processes, filling and transfer.

Prompted by these findings and urged on by the enactment of the Environmental Liability Law, liability insurers developed a new coverage model for all damage caused by pollution. This model was thoroughly discussed by a committee of the ALM and groups representing the interests of trade and industry. The latter vehemently demanded as congruent a cover as possible for this very far-reaching liability. For their part, liability insurers would not and could not agree to such far-reaching coverage, especially with regard to liability for normal, authorized operations. Agreement was further complicated by the high priority insurers gave to reforming the definition of the insured event, in order to limit incalculable long-tail losses, because the system of the insured occurrence had hitherto rendered the processing of claims – especially for water pollution – very complicated and hence very unsatisfactory.

Even though trade and industry groups eventually did not recommend the new terms to their members, there are signs that these terms are tolerated, not least because of the awareness that they constitute an extremely broad cover by international comparison. Insurers for their part have clearly demonstrated the limits of what is feasible.

Work on the conditions is now complete. The ALM has filed them with the Federal Supervisory Office for Insurance and submitted a net tariff proposal to the Federal Cartel Office. In the meantime, the coverage model and the relevant rating recommendations have been presented to the members at three regional conferences.

The Environmental Liability Model is characterized by the following main features:

It is an all-inclusive model to insure against damage caused by environmental pollution and is offered in addition to normal public liability insurance. Such damage is excluded from public liability policies by a complete exclusion clause in the Allgemeine Versicherungsbedingungen für Haftpflichtversicherung (AHB) – General Insurance Conditions of Third Party Liability Insurance (GIC). Environmental pollution caused by products continues to be covered within the framework of public liability insurance, however,

provided the products manufactured are not environmentally hazardous facilities or recognizable accessories for such facilities.

The environmental policy covers bodily injury, property damage and certain types of economic loss, especially rights of appropriation and rights concerning established commercial activities as well as water rights.

Cover is designed primarily for facilities that can have an impact on the environment. There are five different types of installations, viz. facilities according to the Water Resources Law (WRL), facilities according to Schedule 1 of the ELL, other facilities requiring official approval or registration, sewage installations and ELL facilities subject to compulsory insurance. These groups can also be found in the structure of the proposed net tariff.

A further section covers the construction and maintenance of installations and the supply of accessories that are hazardous to the environment. This insurance covers essentially claims for redress by plant operators.

In addition, the so-called residual risk that results neither from the installations referred to nor from the manufacturing, maintenance or the supply of accessories for such facilities is included in the ELL policy as basic cover. An example of this is when a builder's crane collapses and tears open a chemical tank located on a neighbour's property.

Designing insurance to cover the above-mentioned risks, in particular the facilities, requires a substantial departure from the principle of blanket insurance for several installations that was customary in the past. That principle made it almost impossible to gain an insight into the risks actually insured, particularly in the case of large corporations. Insurance cover will now only be available for specifically listed facilities without automatic additional cover for increase and extension of risks, not to mention changes in quantity. More than hitherto this will make it essential to fix rates that are commensurate with the risk and to apply technical risk assessment.

Insured events are now defined completely differently. It is no longer the loss occurring but the first demonstrable manifestation of bodily injury, property damage or economic loss. In this way, liability insurers will be able to lessen the problem of long-tail losses, albeit not to the same extent as would be possible on a claims-made basis. For market policy reasons, it proved impossible to implement such a basis in Germany. The policyholder has the benefit of more up-to-date cover, since the insured event is brought much closer to the time the loss is reported (see chart at the end of the text).

To a certain extent expenditure before the insured event occurs is also covered, although – and this is important – compensation for damaged property of the policyholder is not covered. The insurer will only assume expenditure for damage to uncontaminated property of the insured if this is necessary to prevent or lessen an otherwise unavoidable liability loss.

There is also the so-called "spillage clause" that excludes pollution from continual spillage, leakage, evaporation, etc. of water-polluting substances, i.e. the negligent handling of such materials in the course of production, storage and distribution. Here we see a direct application of relevant experience with losses and an important narrowing of the "gradual damage" risk.

The exclusion of pollution resulting from continual emissions in the course of normal operations appears at first sight to be favourable for insurers. One serious drawback,

however, is the exemption from this exclusion that had to be conceded by insurers to industry as a compromise, i. e. in return for the acceptance of the manifestation principle. If the policyholder is able to show that damage caused by continual emissions was not foreseeable given the state of the art at the time of those emissions, then such risks are covered by a "writeback clause". It will be quite easy to prove that damage was unforeseeable if the policyholder's emissions complied with official limits and the inadequacy of the limits had not yet been scientifically established. This inclusion of the development risk has enormous loss accumulation potential in conjunction with possible demands resulting from compulsory cover. More on this later.

Since it is no longer the loss occurrence itself but the moment when the damage is established for the first time which now constitutes the insured event, it has become necessary to exclude from the new conditions pre-existing damage covered under previous occurrence-based policies. This ensures a smooth transition from the previous to the new type of cover. It was not possible to exclude losses that are already building up on the property of the policyholder or his neighbour, without any demonstrable damage having occurred before the new policy enters into force. Depending on the type of risk, this will induce liability insurers to carry out thorough risk analysis before accepting new business or to exclude not only pre-existing damage but also environmental *impact* prior to policy inception or increase in the limit of indemnity.

The remaining items in the list of exclusions are the same as those contained in previous policy wordings.

The new coverage model contains a series clause which combines all loss events during the term of the policy which are caused by the same environmental impact or by several such impacts directly resulting from the same or similar causes into a single insured event. That event is then considered to have occurred when the first damage of the insured series manifested itself. The definition of "series" complies with the requirements of German jurisdiction on this matter, as shown in professional liability insurance for architects. Conceivable here is a series of bodily injuries and cases of property damage caused by a cloud of toxic gas given off by a fire or caused by the repeated failure of an exhaust filter.

Since the representatives of industry were concerned that liability insurers might, in the light of newly ascertained loss potentials, opt out of existing policies, they insisted on an extended period of coverage. This is why the new model provides for a three-year extended period of coverage, albeit with a proviso that it only covers claims for loss events that occur during the term of the policy. One further important limitation is that only the unused insured amount of the last year of the expired policy is available for these claims.

The new situation regarding liability and conditions of insurance also calls for a new basis for premium calculations, and the ALM has, together with the new conditions, produced a new rating model. The difficulties are obvious: the risk arising out of the new liability situation is almost impossible to calculate. Just think of the development risk arising out of future scientific findings about the toxicity of substances that are still unknown today. The same applies to the risk of change resulting from the ELL and future court rulings. It was therefore essential to develop a clear, logical and systematically structured rating model.

No statistical bases were available for the new risk situation. Cover is, like liability, primarily oriented towards the operation of specific installations. The ALM therefore decided, on the basis of experience gained with the Water Resources Law, to structure the recommended rates according to the installations to be insured, subdivided into a number of groups differentiated in terms of liability, technical features and size.

The *first* section of the tariff covers plants that are subject to neither the WRL nor the ELL, e. g. small scrap-processing plants.

The *second* section concerns installations as defined by the WRL, with the fuel oil tank being the most frequent type of risk (strict liability).

The *third* section deals with facilities governed by the ELL, and distinguishes between storage and production installations (i. e. facilities for the manufacture, processing and use of environmentally hazardous substances) as well as different sizes within these categories (strict liability with assumption of causation).

The *fourth* section concerns installations subject to compulsory insurance cover, and also differentiates between storage and production facilities (strict liability with assumption of causation and compulsory cover).

As already mentioned, liability insurance also covers certain damage caused by normal operations, and this raises the issue of accumulation of harmful substances from many different facilities – which in the case of the combination of specific events constitutes an extreme loss accumulation potential for the liability insurer. It is quite conceivable that one and the same chemical is used in hundreds of plants and may prove one day to be harmful. For reinsurers the problem can multiply through reinsurance accumulation from accumulations of direct insurance claims. One very likely scenario here is the so-called political accumulation, e. g. where a certain pollutant is knowingly or unknowingly emitted for years by many different companies covered by many different liability insurers. New scientific findings about the harmful effects of the substances will lead to the introduction of limits for its concentration in soil, buildings and foods. Because of the new limits, many buildings and properties now have to be decontaminated and foodstuffs destroyed. Large tracts of land are no longer suitable for certain uses. The danger of the situation may only come to light as a result of a number of illnesses, i. e. cases of bodily injury. Since we are talking about the local accumulations of damage, we can foresee that interest groups and specialist lawyers will appear on the scene and that the local and national media will produce more or less factual accounts of the event.

The policyholders' limits of indemnity now start to accumulate with reinsurers via a large number of direct insurers. The limits of excess of loss reinsurance treaties may be exhausted several times, something that might recur in successive years. One can easily imagine that a single reinsurer might be faced with amounts attaining several hundred million marks, possibly a billion marks, even though the initial limits of indemnity were relatively modest, say, 10 or 20 million marks.

There are also grounds for concern that the maximum liability limits set out in the law will have a powerful effect on policyholders' demands with regard to limits of indemnity. Even if we succeed in limiting the maximum amount of compulsory insurance cover to a realistic figure, it is quite possible that industry will ask for that figure at the very least, if not for the maximum liability amount under the ELL. Capacity for high limits of indemnity

can, however, only be available for so-called sudden and accidental pollution and not for damage resulting from normal operations.

More stringent liability in Germany and the chance to insure against unforeseeable pollution from continual emissions have unfortunately caused international reinsurers and retrocessionaires not only to insist on the exclusion of gradual pollution but also to refuse cover for liability under the ELL altogether. I am thinking here particularly of the London insurance market, where this development led to a substantial loss of capacity during the renewal negotiations at the end of 1991. It is to be expected that German liability insurers and their German reinsurers will have to cope with their own means. Together with possible reductions in capacity the treaty reinsurers will introduce agreements that will allow them to render portfolios containing environmental risks more transparent.

The need for an early adaptation of existing portfolios to the coverage model is unanimously approved by the market. A shortage of reinsurance capacity can also be expected as a result of lower annual maximum liability limits. Original limit of indemnity clauses will shift part of the business to facultative reinsurance.

The latter will, to a higher degree than hitherto, link the scope of the cover more closely to the limit of indemnity. The principle will be: the higher the limit of indemnity, the narrower the scope of cover.

German liability insurers are now faced with the huge task of introducing the new coverage model for environmental pollution into the market. This will be relatively simple with new business or when limits of indemnity are increased. Another similarly favourable situation is when an existing policy is amended to take account of increases and extensions of risks because the policyholder's wishes can then be taken as grounds for changing the policy to the new coverage model.

Careful risk analysis is an area that is taking on increased importance, if only as regards rating. However, risk analysis will be particularly important given the danger of covering pre-existing pollution. Since the conditions do not provide for effective exclusion, underwriting will require great caution, in particular when increasing limits of indemnity or insuring risks that have been uninsured until now (e. g. in East Germany). Site inspection by qualified experts will frequently be imperative. The rules that have applied for fire insurance for so long should also apply to public liability insurance. This has already prompted all the major German liability insurers, and many small- and medium-sized ones too, to recruit suitable in-house personnel. Others have signed service contracts with outside consultant engineers. Munich Re has set up – jointly with the Bavarian TÜV (Technical Inspection Agency) – its own subsidiary called Münchener Ecoconsult specifically for risk analysis and risk management in the environmental field.

While these experts may be sufficient in number to handle all the *new* business, they will certainly not suffice to tackle the far greater task of converting existing policies. For that reason we can expect this process to take quite some time.

Reinsurers will fully support direct insurers in our common objective of introducing the new conditions for existing portfolios.

5. Austria

An environment liability draft law is now before the Austrian Parliament. It is similar to the German law in many respects, and this is hardly surprising given the similarity

of the two legal systems. Of particular interest as regards future legal practice are those areas where the Austrian draft law elegantly avoids problems which will doubtless arise in future from the application of the German legislation. I am thinking here of the different provisions that are proposed for enforcing the right to information, for instance.

However, we cannot overlook the fact that the draft law contains, inter alia, much more stringent liability.

The first thing to note is that the Austrian draft law is much broader in scope: strict liability applies not only to operators of listed types of installations but also to anyone operating an installation that is potentially dangerous for the environment or anyone acting in a way that is potentially dangerous for the environment. When dealing with a case of pollution, the courts will always assume that the cause was potentially dangerous for the environment.

Strict liability for bodily injury and property damage is provided for in both countries. In Germany, damage to the natural landscape is only covered as part of *property damage.* Making a claim is a matter for the injured party to decide. In Austria, liability is to be introduced for environmental damage *in general* when the polluter has acted unlawfully. The draft law even provides for class actions to enforce this type of claim (Article 11 of the draft law). This provision is likely to increase both the number and the average size of claims quite substantially.

Environmental cleanups of large areas take a long time and are very expensive. Realistically speaking, for any litigious environmental protection group the prospect of class-actions is a new tool that they will not be able to resist putting into practice as soon as possible. Since a number of recent product liability cases have shown the Austrian courts to be just as consumer friendly as courts in the surrounding countries of Europe, class-actions are a threat that will have to be taken very seriously.

On the positive side we might note the exclusion of liability for cases in which damage occurred though the polluter complied with official requirements and implemented every reasonable precaution. Here the Austrian draft law avoids the situation that is so hard for us to accept and understand under the German law, i.e. that even full compliance with emissions standards can still incur liability.

We also welcome that the Austrian draft law does not call for a maximum liability limit, thereby avoiding prejudging requirements for compulsory insurance. The need for cover will thus not unleash a demand for very high limits of indemnity. The principle of joint and several liability that will presumably be established in Germany is dealt with by the Austrian draft law in such a way that when partial responsibility for causing damage can be proven, only partial liability will apply.

Although the easier enforcement of the right to information in Austria may spare the courts some uncomfortable decisions (the difficult task of weighing the claimant's right to information against the alleged polluter's right to secrecy), it also creates a very high litigation risk for a party deciding to keep its manufacturing process secret. This shifts the conflict between the right to information and right to secrecy from the courts to the relationship between the policyholder and the insurer. It could be vital for the party alleged to have caused the damage to refuse to disclose its production process, but this may be diametrically opposed to the interest of the liability insurer to have this information disclosed

in order to defend the claim. The legislature's elegant solution of relieving the courts of having to choose between conflicting interests may lead to a truly classical conflict between policyholder and liability insurer.

The definition of claimants that can bring a class-action, as mentioned above, is very problematic. If the Austrian law is enacted in its present form, we can expect environmental protection agencies and environmental lobby groups to search immediately for suitable cases for class-action. Who knows, they may even be doing this right now.

The proposed provision for compulsory cover, i. e. the insurance usual in normal business, may at first sight appear rather vague, but for policyholders and liability insurers this has the definite advantage of allowing them to arrange cover in a way that is financially reasonable for the policyholder and that can be responsibly provided by his insurers in terms of scope of cover and capacity.

The normal Austrian cover for environmental claims under Article 6 of the General Conditions of Liability Insurance (AHVB) and information that I have received regarding the proposed reform of the AHVB seem to indicate that cover for damage from environmental factors will only be given for sudden and accidental losses, although this limitation will not apply to bodily injury. This situation will, I am sure, be welcomed by liability insurers – if only for capacity reasons. It also should not present an unacceptable cover limitation for Austrian policyholders, since liability for emissions from approved normal operations is greatly restricted in the Austrian law as compared with the German law, viz. in cases where the pollution occurs despite compliance with statutory regulations or official directives. The architects of the Austrian law, and liability insurers too, have shown a clear understanding of what is reasonable in terms of liability and what is technically feasible for insurance purposes.

The definition of the insured event for environmental *property* damage is to be changed towards the idea of 'manifestation', as in Germany, while for bodily injury it will continue to be the loss occurrence. This could lead to problems in the processing of claims when claims for bodily injury and property damage from environmental influences are triggered by different definitions of the insured event.

When making provisions for the possible extensions of the period of cover under existing policies, care should be taken to avoid double insurance.

As in Germany, the problem of how to effectively avoid risks from prior contamination is one that has to be faced in all environmental liability insurance for industrial companies. For Austrian insurers too, there will be no alternative but to carry out a detailed risk analysis, at least for new business, so as to avoid having to pay for cleaning up previously contaminated industrial land when settling claims for future losses.

If the German experience is anything to go by, policyholders will react to demands for risk analysis with initial scepticism, but they should soon realize that this test of insurability and hence of the safety of their operations is in their own interest as well, and represents a valuable service on the part of the insurer.

6. Other countries

I shall now turn to developments in some other European countries.

To begin with a word concerning liability law.

Preparations for the EC directive on liability for waste have now entered the phase of discussion on fundamental issues. This is desirable given the fact that the directive, with its broad concepts of "waste" and "polluter", will overlap with existing product and environmental liabilities to a large degree. The EC Commission is currently working on a green paper containing fundamental regulations for harmonizing environmental liability legislation within the Community.

In the meantime, the development of environmental law in individual countries has not stood still. At the same time as the German ELL, the *British* Environment Protection Act 1990 introduced absolute liability for pollution resulting form illegal waste storage. By 1993 the Act should have introduced mandatory payments for potential polluters (the "polluter-pays principle") in the form of registration and licence fees and payment for cleanups, and will make it compulsory for plant operators to use the best available techniques of pollution prevention. Violations will be punishable by fines and compulsory compensation.

A new environmental liability law is being drafted in *Denmark*. The interesting *Italian* environmental protection law of 1986, which entitles public authorities to sue polluters for damages under the Civil Code, is still being enforced comparatively rarely by the rather conservative courts. The *French* legislature has so far refrained from establishing specific instances of environmental liabilities, preferring instead to rely on the adaptability of the general clauses of the Code Civil. However, the "loi sur la pollution de l'eau" (law on water pollution), which came into force at the beginning of this year, contains new, far-reaching requirements.

Apart from the laws whose primary objective is, like that of the ELL, to provide compensation for parties that have suffered losses caused by environmental pollution, there is also legislation based on civil liability aimed at the rapid cleanup of land, similar to the American concept of Superfund liability. In addition to a Danish law of 1983, the *Dutch Interim Soil Cleanup Law* of the same year is of growing practical interest in this field: Article 21 of this law enables the Dutch government to recover cleanup costs from the polluters. Like Superfund liability, Article 21 is retroactive but unlike the Superfund it presupposes culpability. The Dutch courts have developed the concept of corporate obligations to investigate the soil-polluting effects of production processes, and Dutch subsidiaries are deemed to have the same level of knowledge as their foreign parent companies. Since the State is the plaintiff, Dutch tort law also demands – similar to the German theory of "protective purpose" – that the company's negligence also exists vis-à-vis the State. Around 150 such actions for damages with a total value in excess of 1 billion Dutch guilders are currently before courts.

Regarding insurance:

We are witnessing conflicting trends in the two core issues of environmental liability insurance, i.e. the exclusion of gradual pollution and the exclusion of own damage.

While market-wide realignment campaigns in Britain and Switzerland are limiting environmental cover to the classical "accident" field, the opposite is happening in *Sweden*. The traditional exclusion of gradual pollution has been dropped in the mass insurance business that covers approx. 400,000 commercial risks, but not for around 2,000 specifically defined exposed risks, for which a specific policy is offered (with little take-up so far, I might add). As well as in Italy, France and Holland, special policies for gradual damage

are now being offered in Denmark by national insurer pools, although European cartel law prohibits any monopoly by these pools. As we have seen, the Germans have established an insurers' association model for the individual cover of environmental risks. Whether a pool will ever be discussed in Germany – because of the accumulation and capacity problems associated with covering normal operation risks or the demands of compulsory insurance – is a matter for conjecture. In Britain a number of companies are offering extended covers and major American specialist insurers are looking at the U.K. as their springboard to Europe. These covers are offered on a claims-made basis, are selectively underwritten and are governed by the strict requirements of a technical risk inspection.

7. Conclusion

This brings me to the end of my review of current issues of environmental liability and insurance, but before I close I should like to return to a basic problem and consider the issue of the limits of insurability.

I have said several times that with the ever-widening scope of legal liability created by court decisions and legislation we have reached the limits of what is possible in liability insurance. But have we yet reached a universal definition of the insurability of environmental liability? I fear we have not.

On the contrary, it is apparent that, quite apart from any other principles of insurance that continue to be valid, recent developments in environmental liability risks have shown how far the issue of the limits of insurability is influenced by the personal judgment of individual insurers or entire markets.

Take the question "Can waste disposal sites be insured?"

Some say, "No, never."

Others develop models for specific industries.

Yet others say, "It depends on an assessment of the risk in each individual case."

Or take the issue of gradual pollution.

Some say, "Not insurable" (e.g. large sections of the US and London markets).

Others say, "Yes,"

a) "with a clear time limit on the long-tail risk and careful technical control of the risk with limited capacity" (as in Germany).

b) "if it is due to an identifiable accident, e.g. leakage" (as in Austria with property damage).

Yet others say, "Only by pool solutions preferably supported by the whole market" (as preponderantly in France, but also in Italy, the Netherlands, Denmark).

Wherever the individual may draw the line, the following points are generally valid:

1. When gradual pollution is the result of officially authorized normal commercial operations (if there must be liability for it at all), it must be regarded as belonging to the entrepreneurial sphere, i.e. as an entrepreneurial risk, outside the so-called development or latent risk, even as non-accidental and foreseeable – it is, therefore, a typically non-insurable risk.
2. It is virtually impossible to control the risk of loss accumulation from one harmful substance by means of normal insurance techniques; it can place the very survival of an insurance company in jeopardy.

Anyone wishing to take on these risks must therefore act on the basis of sound, expert knowledge and a very judicious assessment of the individual risks and equally close accumulation control. Both insurers and reinsurers must together start a dialogue and critically look at the issues arising out of coverage of environmental liability risks, and one of my concerns today has been to heighten an awareness of this need. Making myself and my company available for a dialogue on acceptable solutions was another of my concerns. Last but not least I must thank the Geneva Association for offering the forum for today's lecture. It is the special role of the Association de Genève to examine and develop fundamental issues of insurance science and practice, and I hope that my presentation has to some extent contributed to this endeavour.