Territorial considerations in the legal situation and how they apply to ecological damage

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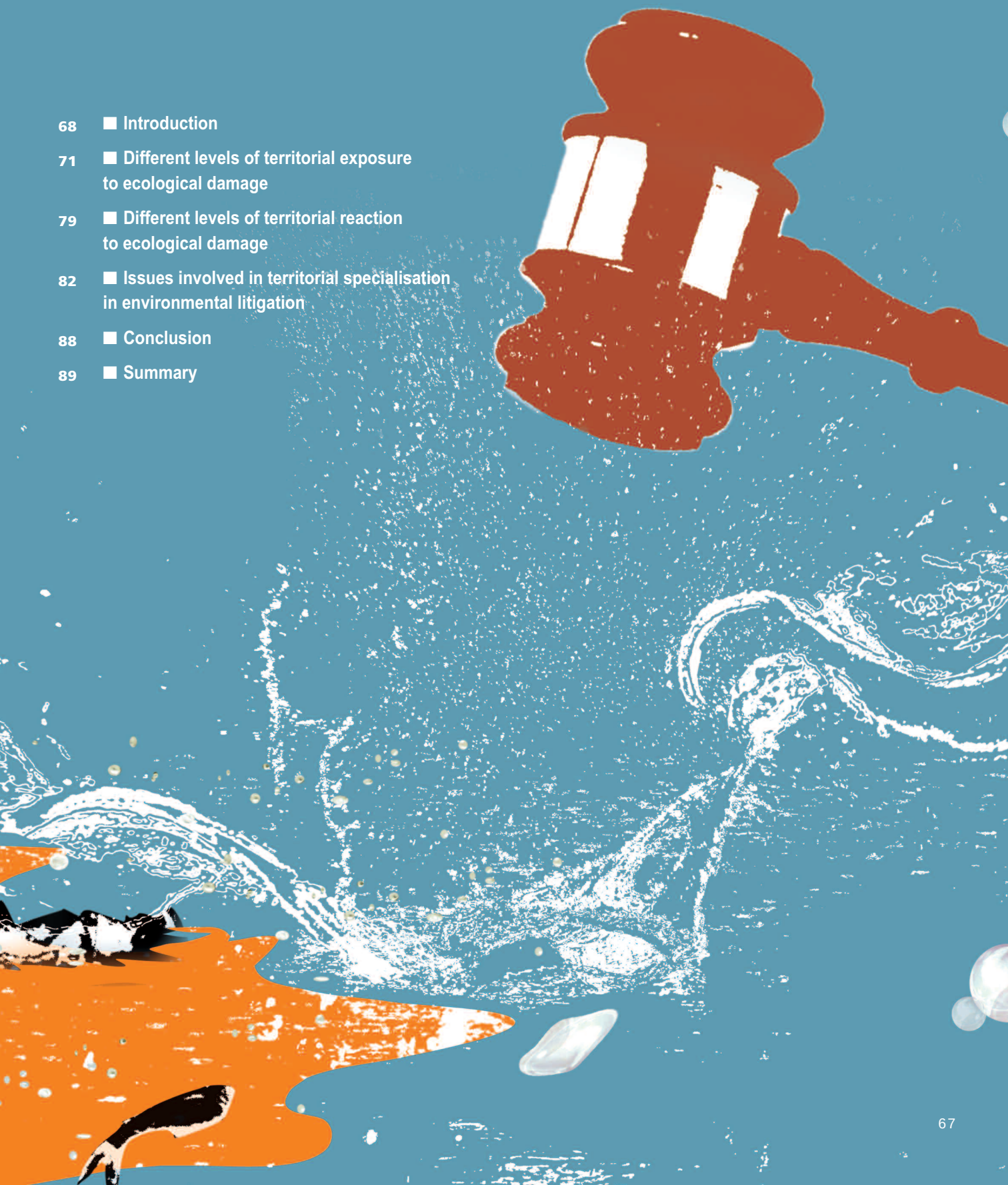


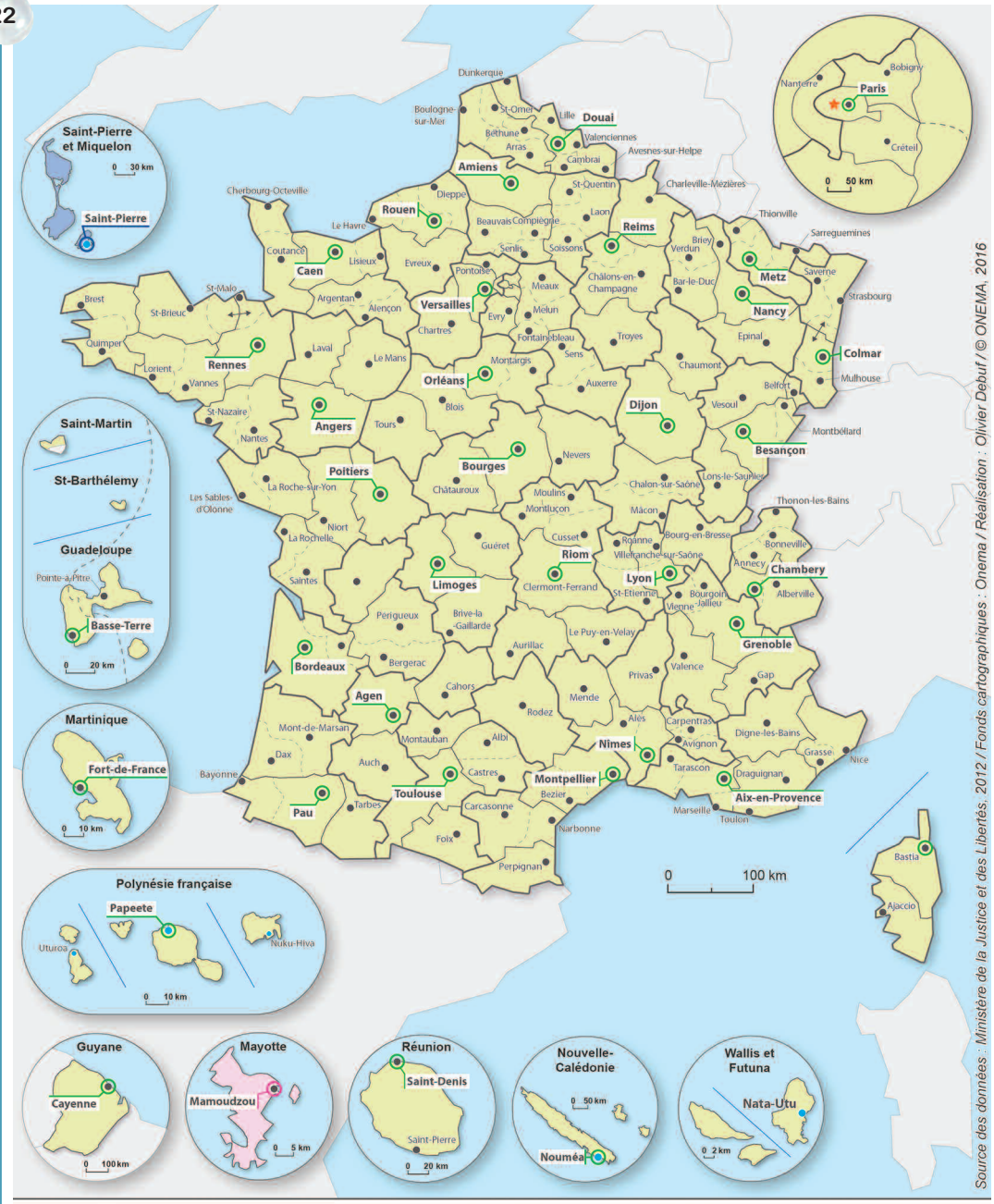
Introduction

The concepts of law and territory are closely intertwined. The **legal territory,** understood here to mean the national territory in which the law applies, determines de limits within which a legal, political and administrative organisation functions. The territory, as a defined and defining area, is one of the necessary conditions for the existence and the implementation of the law. From this point of view, implementation of the law also depends on setting the limits for the activities of each jurisdiction (administrative and judicial). The term "judicial map" (see Figure 22) corresponds to another aspect of the links between law and territory, namely the geographic distribution of the jurisdictions over the national territory. This means that if ecological damage occurs, the cognizant jurisdiction is, unless special provisions apply, notably concerning certain specialised jurisdictions, that in which the defendant has his domicile. This principle of **territorial law**, i.e. the geographic distribution of jurisdictions, an element in the prescriptive organisation of the territory, concerns the areas and districts in which the law applies, but not the primary elements in the production of the law (Morand Deviller, 2006). However, the territories are also areas in which occasionally different methods of applying the law are implemented (Commaille, 2000; Kirat, Lefranc, 2004). This is due to the fact that there is not one, but several territories (Moine, 2006) in that the term "territory" is a multi-faceted concept covering several territorial dimensions, all making up a given territory, namely a material dimension corresponding to the **geographic territory** (the physical space), an organisational dimension corresponding to the **structural territory** (political, administrative, economic, etc.) and an identity dimension corresponding to the **perceived territory experienced** by the people living there (see Figure 23).

It is necessary to keep in mind that when ecological damage occurs, it is in fact all of these territorial dimensions that are impacted and will determine how the damage is (or is not) taken into account. This phenomenon corresponds to what is called the **territorialisation of law**, i.e. the influence that these various aspects of territories have on the application of the law in a given area (Faure, 2004; Auby, 2006; Woehrling, 2013). Consequently, though the law is said to apply uniformly over the national territory (principle of territorial law), its actual application is nonetheless influenced by the characteristics of the various territories (concept of territorialisation). It should be noted in particular that water law organises the country according to the major river basins and sub-basins whose borders often do not correspond to administrative limits and judicial jurisdictions.

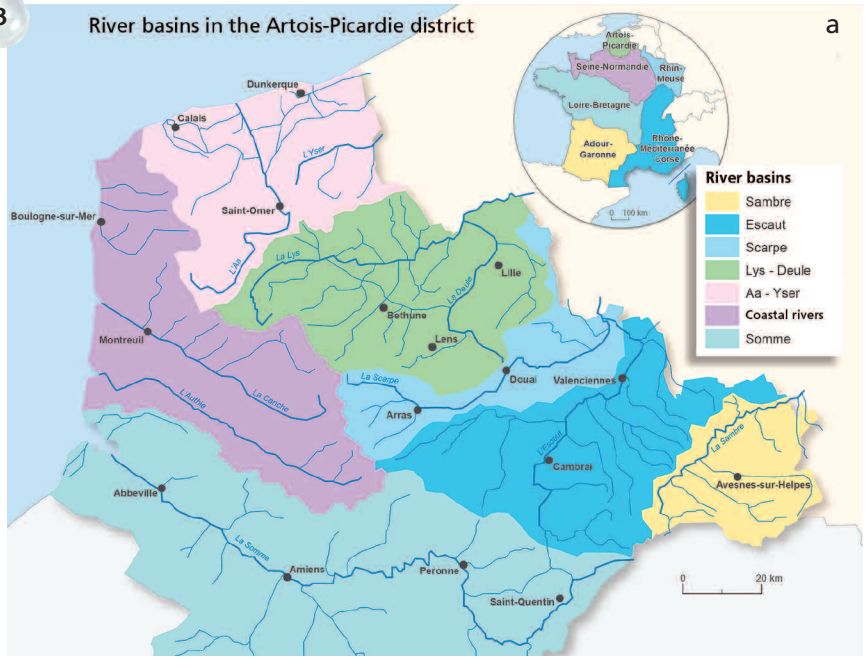
The concept of territorialisation for ecological damage raises two important points. First of all, different territories are exposed to different levels of risk (factors of risk and vulnerability) for ecological damage. Secondly, not only are territories more or less exposed, but their capacity to react to damage differs in terms of the availability of information (access, processing, expertise) and of the awareness and dynamism of the stakeholders in a given territory concerning the legal processing of the problem (sentiment of belonging to the territory, presence of non-profits, etc.).

Figure 22



Distribution of Trial and District Courts in France.

Figure 23



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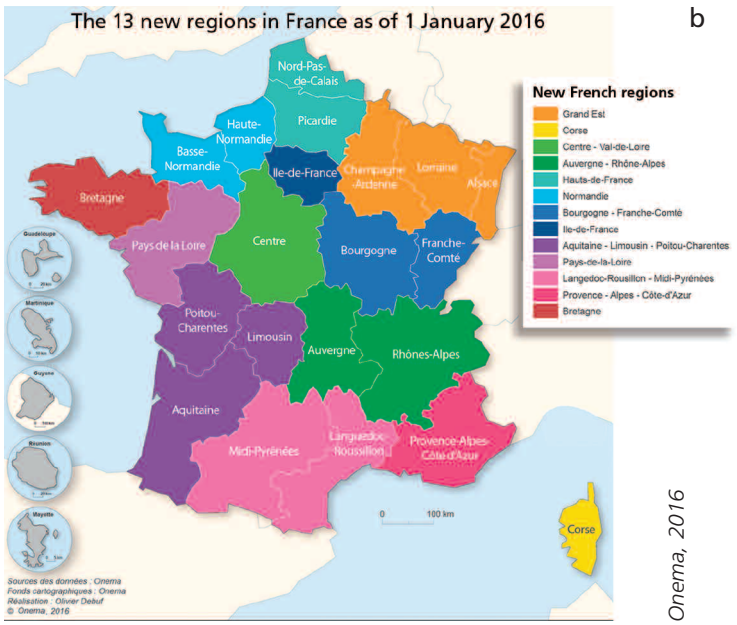

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Three different dimensions of territories concerned by ecological damage:
a) the geographic territory;
b) the structural territory;
c) the perceived territory.

Different levels of territorial exposure to ecological damage

It is a simple fact that different territories are exposed to different levels of risk (Melot, 2008).

A risk may be defined as a danger, as a "possibility, probability of a status, of an event seen as negative or as a form of damage" (Defossez, 2011).

An attempt to measure the exposure of a territory to a risk of ecological damage must therefore take into account two, non-exclusive factors:

- territorial exposure to factors of risk created by humans;
- the vulnerability of the population and structures in a territory (their capacity to adapt, their resilience).

The **factors of risk** consist of the type of event, the probability of its occurrence and its frequency, its intensity and duration.

The **vulnerabilities** correspond to the tendency of a person, object or territory to suffer from or to resist damage in the course of an event (EauFrance).

In the case at hand, it is the combination of the factors of risk created by humans (presence of industries, farms, highly urbanised areas, etc.) and the sensitivity of environments that determines whether a territory is more or less exposed to a **risk of ecological damage** (Leone, Vinet, 2006) that is more or less severe (MEDDE, 2008).

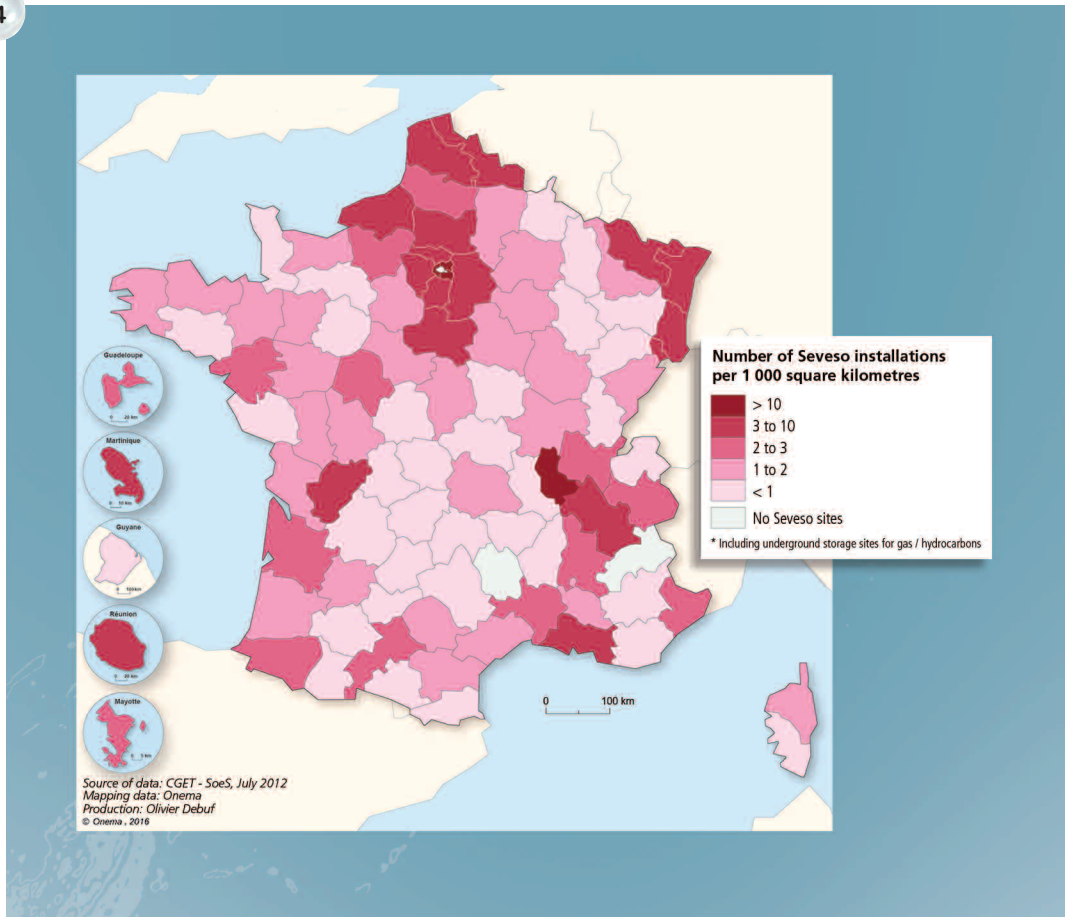
Levels of territorial exposure to factors of risk

Differences in the human and natural situations can increase or decrease the factors of risk confronting territories (see Figures 24 and 25). The physical (i.e. material) characteristics of the territories making up the country (mountains, etc.), as well as the distribution of water, the concentration of industrial and farming activities, the susceptibility of areas to drought all constitute factors that modify the exposure of different territories to ecological damage.

These differences can be made particularly clear when presented on a map. The maps below present simplified, yet illustrative images of what is understood as the degree of territorial exposure to differences in the factors of risk created by humans (see Figure 24).

This type of image makes clear the differences in the exposure of administrative territories (the French departments) to each type of risk factor, but can also be used to combine other layers of data.

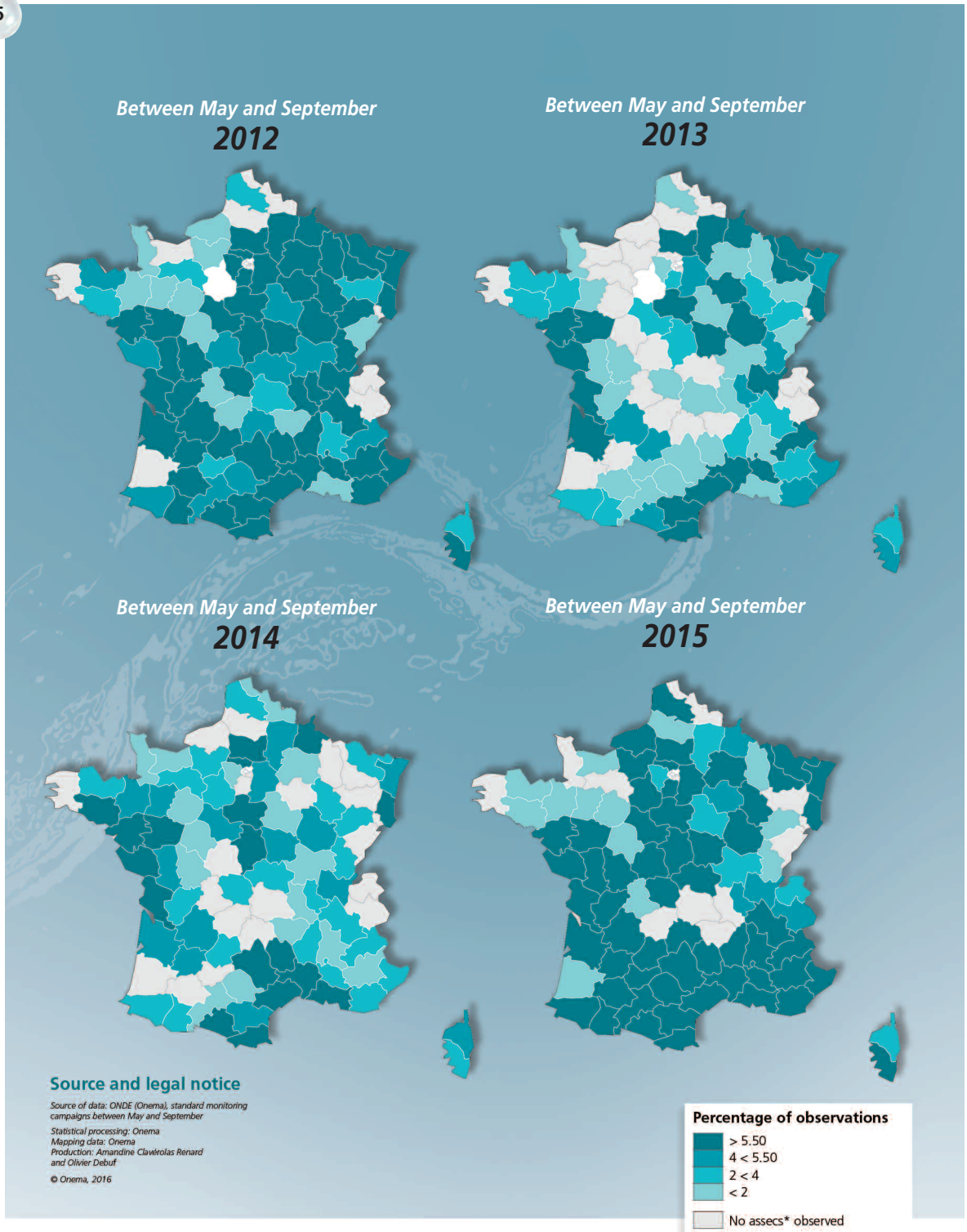
Figure 24



Different levels of exposure to factors of risk created by humans, for example the number of regulated Seveso installations in each French department in 2012.

Seveso installations are the industrial sites likely, in the event of an accident, to produce the greatest damage. A total of 1 097 Seveso installations have been inventoried in France. The map shows that they are unevenly distributed throughout France and that a majority are located in departments with high population densities. The map also makes clear that over 50% of the high-risk installations may be found in only one quarter of the departments. Three departments in the Île-de-France region around Paris have the highest densities of Seveso installations.

Figure 25



Differences in the more or less long-term exposure of territories to natural factors of risk, the example of river "assecs", i.e. rivers running dry, from 2012 to 2015.*

The four maps below illustrate the degree of exposure to assecs. They show over a period of four years that though some areas are exposed to an assec from time to time, others are confronted regularly with the problem. That is the case in the Pyrénées-Orientales, Hérault, Haut-Rhin and Maine-et-Loire departments, among others. The repetition of events over more or less long periods of time is a factor in the degree of exposure of each territory.

** An "assec" is the result of human activities that increase the pressures weighing on the available water resources (groundwater and surface waters) and that can reinforce hydrological regimes (e.g. Mediterranean rivers with severe low-flow levels in the summer) or the hydrogeological functioning of the environment (infiltrations in karstic areas, the slowing or halt of outflows). An "assec" is not a natural situation caused exclusively by the normal, cyclical functioning of the hydrographic system.*

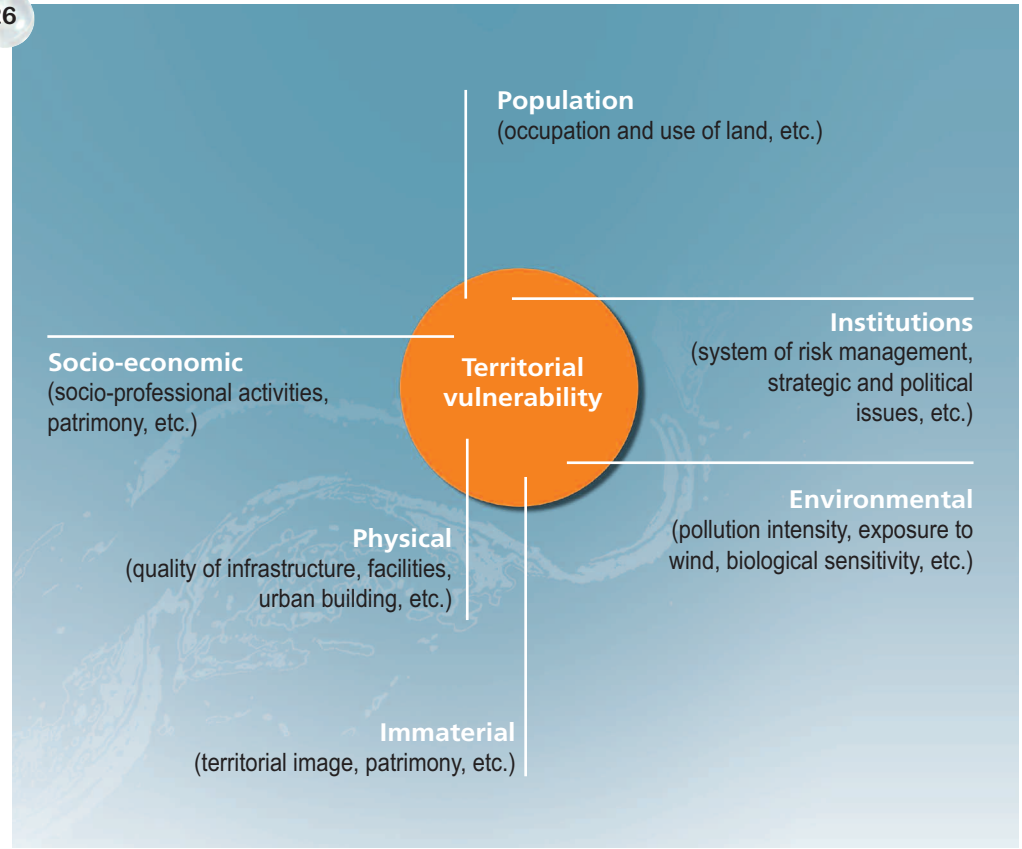
Levels of territorial vulnerability to ecological damage

The vulnerability of a territory is measured by the potential for damage or malfunctions of various elements (goods, activities, functions, systems) making up a given territory and society (Leone & Vinet, 2005). In other words and generally speaking, the factors of risk determine the degree and severity of damage and the vulnerability is the propensity of the territory to suffer from the damage. This aspect more directly concerns the organisational characteristics of the territory because its structure and organisation will necessarily influence its **capacity to resist, to adapt and to prove resilient**.

Societies organise or fail to organise, depending on their desires and possibilities, in order to reduce their vulnerabilities. This is what is called the capacity of society to prepare for adverse events (Hewitt, 1983). The vulnerability of a given territory is measured using various factors that all express thresholds of fragility.

There are many factors of vulnerability (see Figure 26).

Figure 26



Exposure to a risk of ecological damage.

The factors of vulnerability are the following:

- **physical factors:** the quality and concentration of infrastructure (all communication channels), facilities and urban building given the materials used, the construction techniques and the resulting habitat. This includes public buildings, as well as industrial constructions, SMEs and the technical networks (Kelman & Spence, 2002), etc.;
- **immaterial factors:** the image of a city or region for tourism, the patrimonial or sentimental value of objects listed as part of the world cultural and natural heritage, etc.;
- **environmental factors:** the distribution of resources, their availability over time, exposure to waves and currents, the biological sensitivity of the territory (diversity, biomass, abundance, resilience), etc.;
- **institutional factors:** the risk-management system, the degree and fields of competence of organisations, the quality of communication on the national, regional and local levels in informing on malfunctions (Thouret and d'Ercole, 1994).

This category also includes the technico-administrative factors and the strategic and political issues likely to hinder the rational management of risks (lack of prevention programmes, of preparation and studies of risks during urban planning, preventive projects blocked by social pressures, etc.) (Gilbert, 1999; Gilbert & Bourdeaux, 1999);

- **socio-economic factors**: the distribution of activities over the territory and its economic dynamism, the proximity with active urban centres, economic links between different sectors of activity, the quality of threat perception, the gradual loss and deformation of memories over time (Garry and Veyret), awareness of the means of protection, the dissemination of information between stakeholders (Velasquez *et al.*). In addition, threats are not simply perceived and experienced in terms of their effects, they must also compete with other economic and social constraints and thus find themselves "put into perspective";
- **population factors**: the manner in which the land is occupied and used may contribute to risks.

Different territories have different capabilities in terms of limiting risks. For example, the Economic, social and environmental council (2014) noted that the least affluent socio-professional categories had the most difficulty in resisting events affecting directly or indirectly their patrimony, living conditions and social networks. The lack of savings means they are less capable of compensating their losses and some small companies or individual entrepreneurs may suffer. The Social affairs, Health and Ecology ministries acknowledged in January 2014 that the links between the social situation, the territory, environment, life style and health are crucial, and that a great deal remained to be done to align the approaches, make use of the existing tools in characterising inequalities and progress toward environmental justice, in all territories throughout the country (see Figure 27). It should be noted that land prices and insurance premiums are excellent indicators not only of human vulnerability, but also of the capacity of populations to resist (see Box 18).

Figure 27

Environmental inequalities are a topic of intense study by national institutions.
a) An analysis of environmental and social inequalities in the regional territories (by the Social affairs and Ecology ministries, 2014), b) An analysis of environmental and social inequalities on the national level (Economic, social and environmental council, 2014).

Land prices, an indicator of population exposure to ecological damages

Land prices are lower in areas exposed to high environmental pressures and as a result less affluent families are overly exposed to environmental disturbances. Sensitive urban zones (ZUS) are an example clearly showing how environmental inequalities are linked to social conditions. Studies by the Interministerial city directorate (DIV) indicate that ZUSs are much more exposed to environmental risks due to industrial activities than other territories. Their residents represent two-thirds of the total French population that is exposed to industrial risks (CEDD, 2013).

In addition, given that there is a high correlation between incomes and land prices, this indicator provides information on the adaptive capacity of low-income populations (raising of houses, purchase of bottled water, etc.) in as much as it constitutes one of the decisive factors in **environmental inequalities**, which are in turn important factors in **territorial inequalities**.

Numerous factors, including energy insecurity, pollution and effluents, industrial risks (Seveso sites), poor-quality homes and noise, segment territories into exposed and protected populations and are synergistically reinforcing (land prices are lower in areas exposed to risks, acoustic and thermal insulation are expensive).

On the other hand, the socio-economic segmentation is less clear in terms of soil, water and air quality, which can adversely affect more affluent areas. Major ecological issues affect all territorial levels. For example climate change, access to water, loss of biodiversity worldwide, whereas on local levels, the issues concern energy insecurity and unhealthy housing.

Under these conditions, the intervention of the public authorities is essential (urban planning, transport, housing, etc.) and environmental inequalities play an increasingly central role in public policies. That is why it is important to integrate territorial considerations in the objectives and policies of the Grenelle environmental agreements. The objectives and policies must take into account the environmental issues, local-development issues and social issues in order to reduce inequalities because the poorest segment of the population most likely does not have means to adapt to coming changes. Energy inequality is a crucial issue and represents a major challenge.

Some statistics

- In Fulton County (Georgia, United States), two comparable office buildings were located 2 miles and 0.5 miles from a contaminated site (determined by the toxicity and quantity of the pollutant). The building farther from the polluted site sold for a price 36% higher than the nearer building.
- In Douai (France), the average price of houses drops 7.5% in each successive street farther from the Scarpe River. A view of the river increases the average price of a house by 21.5% compared to neighbouring houses.

(Source: Regional environmental directorate in Alsace)

Vulnerability therefore includes the exposure of the population to risks, the effectiveness of measures to prevent, avoid and reduce the risks of damage, and the resilience of a society, i.e. its capacity to recover functional conditions following damage (Thouret & Leone, 2003). It is therefore important for threatened individuals and groups to create large and reliable networks of acquaintances, to acquire a minimum level of education, to remain mobile, to maintain access to available resources, etc. The social response to vulnerabilities depends on the type of society. In modern societies, the response to a crisis is generally organised and brings into play an effective technical and technological system (measurement, detection, transmission devices) as well as excellent emergency logistics, however these systems are very expensive.

Territorial inequalities in the risk management of ecological damage

As noted above, the risk of ecological damage, similar to all other risks, results from the combination of exposure to factors of risk and the capacity of society to manage the situation. However, ecological damage is different in that, contrary to other types of damage, it cannot always be situated.

■ Different reactions to effects in the directly affected territory and trans-territorial impacts

Damage always affects the immediate territory first. It is the **site of the damage**. However, most of the time, an ecological tort is essentially **collective and trans-territorial** in nature.

The **tort is collective** in that it affects not only the directly impacted territory, i.e. the damaged territory, but it is often perceived to harm the interests of society as a whole, as both a drop in its current well-being and a loss to its shared patrimony. This is because the very existence of humans, an animal species, is conditioned by the status of their environment and requires a minimal level of biological quality in the surrounding ecosystems. It is with this in mind that the law on environmental liability (1 August 2008) made it possible for local governments and their groupings, when their territory has been impacted by environmental damage, to sue as plaintiffs if they have suffered a direct or indirect tort. A new article L. 142-4 was inserted in the Environmental code: “Local governments and their groupings may exercise the rights granted to plaintiffs concerning events constituting a direct or indirect tort in their territories and an offence against the legislative provisions concerning the protection of nature and the environment, and/or the provisions in the corresponding enacting texts.”

In some cases, the **tort is trans-territorial** given that environmental problems often comprise a significant spatial element. It is possible to identify the cases where pollutants released to the environment or the removal of resources from one spot will have adverse consequences on other places. For example, that is the case of water running off fields that causes flooding in a town downstream or the pumping of water from a body of groundwater that results in a river several kilometres distant running dry.

Nonpoint-source pollution in continental waters is another good example. It can arrive from the entire surface area of a territory and the pollutants are transmitted indirectly to the aquatic environments via the soil. Control over this type of pollution is particularly difficult due to the fact that it does not have a single source, but has a number of causes involving an array of stakeholders. It may be possible to manage a highly local (point source) emission of a pollutant before the aquatic environments are contaminated, but it is not possible to block the pollutant or to process it when the source is spread over the entire territory. Nonpoint-source pollution disturbs the ecosystem and the quality of human life, biologically due to eutrophication and a loss of biodiversity, and in socio-economic terms due to the cost of treating water (increase in its price, etc.) and the negative effects on tourism (green algae, etc.).

In the case of pollutants transported by water, it is essential to determine the physical area that must be treated to control the environmental problems, but that is not always easy. It is relatively easy to identify the catchment basin supplying a surface river, however it can be very difficult to determine the surface area supplying a deep body of groundwater. Once the physical area has been identified, it is necessary to determine the applicable territorial borders. The source of problems is often the farm land made up of the fields farmed by a given farmer. The areas often suffering most of the disturbances and damage are public (towns and departments) or private (residential) land. These different areas (source and sink) are often managed separately, with the exception of a few rules imposed by the public authorities (zoning laws, abstraction protection perimeters, etc.), and in general there is not a single manager for the areas in question. Consequently integrated policies are not common, but would be required to solve the problems at hand (Martin, 2000).

When ecological damage occurs, the long-term effects (see Chapter 5) and the impacts beyond the directly affected area are rarely taken into account. However, the consequences of an event can rapidly spread well beyond the initial point of impact in a "domino effect". That is why a number of scientists prefer the notion of a "zone" or of a scale/echelon of impact rather than administrative territories when discussing the spatial dimensions of damage (Beucher *et al.*, 2008). The causal links cannot all be taken into account within the limited framework of the spatial units envisioned here. "We must look farther, from a higher vantage point, and we must also look closer " (Lacoste, 2001).

■ Management of one vulnerability can cause other, occasionally distant, vulnerabilities

Protection against the risks of damage, including ecological damage, can in some cases generate other (possibly ecological) damages.

In order to reduce physical damage and the loss of human life, it has been deemed necessary to continuously improve risk-management techniques and make them more effective. This is notably due to urban development in zones of high risk, creating increasing needs for protection, called the "escalation effect" (Parker, 1995). This term is used to describe a situation where protective systems in the form of large structures are created in high-risk areas, which then undergo further urban development precisely because of the protective structures. In a circular "domino effect", the feeling of safety leads to further urban development.

In another example, flood-control systems have a positive effect on the flow of flood waters, however they also have clearly negative effects on the hydro-geomorphological functioning of rivers and on aquatic ecosystems (Bravard *et al.*, 1993; Peiry *et al.*, 2000) and on the dynamics of coastlines (Provansal *et al.*, 2003; Maillet, 2005). Resizing and rectification of rivers and the maintenance and reworking of river banks are all measures that aim to increase the discharge of the river during flooding and to lower the water level. During resizing or rectification, the river bed is widened or deepened. Meanders are cut, i.e. the overall length of the riverbed is shortened. This work increases the hydraulic gradient, which in turn increases the flow velocity. However, these measures can also have highly adverse effects. The deepening of the bed may produce favourable effects over the short term in the reaches where the work took place, but it can also simply result in the flood waters travelling faster downstream and worsening flood conditions in lower sections of the river (Bravard & Petts, 1993). Other negative effects have been observed, such as the undermining of bridge pilings or of dike foundations (Gout, 1993, quoted in Pottier, 1998).

The complex functioning of rivers requires that they be studied as a whole. Limited action on a single reach of a river, for example in a single town, often simply transfers the problem downstream or from one bank to the other. Unfortunately, work on an entire river is not possible due to the number of land owners along the river and the cost. This situation is also the result of social changes.

Different levels of territorial reaction to ecological damage

Environmental conflicts (Torre, 2010) are signals informing on contemporary dynamics in territories. They influence and are the result of both the territorial organisation (how the territory is structured) and the perceived territory, i.e. the notion of identity and the feeling of belonging.

Adapting the legal system in favour of the environment

If we limit the discussion strictly to the legal domain, the study of the territorialisation of law deals, within the boundaries set by the unitary form of our political system, with the capacity of a territory to influence the nature and even the content of the law. This desire to produce a spatially differentiated system is the result more of an enhanced acknowledgement of territories by the law over a number of years than a political position envisioning a breakdown of the national unity (Gallo, 2013). However, territorialisation of the law is not a one-way street where each territory configures and adapts the law to its needs. On the contrary, it is the result of a two-way movement. In one sense, the legal system creates new legal spaces and, in the other, new legal tools arise in the new territories, that the legal system must subsequently qualify, formalise, organise and assign effective legal status. The law concerning water and aquatic environments is a forerunner in this field in that the organisation along river basin and sub-basin lines is in itself a form of territorialisation of the law suited to the local ecosystems and their issues.

Remediation of ecological torts implies acknowledging the existence of legal pluralism above and beyond the pluralism of social modes of organisation. This supposes that the purpose of the legal system is to serve the environment and not simply humans (Lafargue, 2007). To that end, the following two points are required.

- It is necessary to accept more diverse types of damage by expanding the right to initiate procedures and the categories of persons (legal and natural) having that right. Efforts to increase pressures on those destroying the environment imply augmenting the possibility to take action, opening the doors to courts more widely and adapting the basic rules by allowing the law to become more diverse through territorialisation. That would be a means to go beyond the current “all or nothing” situation because beneficiaries of the right to initiate procedures would become the guardians of their territory for themselves and for society as a whole. Nature would be protected, even though it is a “common” good, due to the protective feeling that the inhabitants of a territory have with respect to their environment. To illustrate this point, during environmental catastrophes,

whether natural (e.g. Katrina devastating New Orleans in 2005) or industrial in origin (e.g. Seveso in 1976), the normal feelings of closeness on the part of people with their environment suddenly collapse. That is a very specific type of damage caused by the catastrophe and it requires a new understanding of what has been "damaged".

Sociological analysis contributes to this new understanding and would indicate that the need for acknowledgement of the specificity of this damage and the demand that it be repaired may confront us with the limits inherent in a simple rationale of compensation, even if it is ecological. This is notably the case of sociological work highlighting the importance of **environmental care**, i.e. the efforts, in a protective approach, to take care of an environment that would seem to be the only way to restore a feeling of connectedness with a severely damaged environment.

■ The second point concerns the need to reconcile what are sometimes seen as environmental constraints with the socio-cultural identities in a given territory. An identity is above all "an image of self (...), produced by an individual and their subjectivity" (Staszak, 2004). For Pierre Tap, it is "all the perceptions and feelings that a person develops concerning him or her self" (Tap, 1986). A personal identity is what makes it possible, over time, to remain the same person, to live as one's self, in a given society and culture, in a relationship with others. A personal identity is therefore the result of a constant and voluntary effort to manage continuity in one's life and maintain consistency in an ever changing person (Beaurain, 2008). At the same time, though individuality implies a difference with others, it also proclaims its belonging to categories, to groups, as well as to places. This observation clearly raises the question of locally reconciling the many uses of environmental resources in conjunction with the socio-cultural habits of a territory and the shared representations of nature in view of protecting the environment.

Territorialisation of environmental law is therefore an issue lying at the heart of efforts to improve prescriptive procedures and the effectiveness of the law, and is a central factor in perceptions of social justice. Its implementation targets a double objective, namely to ensure the effectiveness of public policy and territorial equity. It is becoming increasingly clear that the territorialisation of law has become the prime legal instrument in implementing policies targeting social cohesion and the reduction of territorial inequalities (Hommage, 2002). However, in the environmental field, there remain two problems, namely access to data and their effective use, on the one hand, and access to procedural equity, on the other.

Differences in terms of access to information and of the potential of territorial stakeholders to take action

The sharing of information and data among territorial stakeholders contributes to a form of territorial intelligence that is useful in avoiding and reacting to ecological damage in the territory. When the information and data are shared beyond the territorial borders, they constitute significant feedback for others. In addition, certain territories have less potential for launching litigation due to differences in terms of their "local legal cultures" (Church, 1985).

■ Territorial differences in terms of access to data

Environmental issues involve an array of factors that, to be understood, require access to diverse data. But the diversity of organisations that collect statistical data and the lack of a single organisation to gather and clarify the data mean that the information is very difficult to use in an integrated manner by the stakeholders of a territory. On the socio-economic level, the National statistics institute (INSEE) plays an important role in centralising information.

Environmental data, on the other hand, are scattered between the Environment and energy-management agency (ADEME), the Regional environmental directorates (DIREN), the Departmental territorial directorates (DDT), each town, etc. (Roussel, Schmitt, 2009). There is no single source for a given time span and territorial level. The data, which often lack a common temporal and spatial basis, are not suitable for comparison purposes in geographic information systems (GIS), on relevant scales, without taking significant precautionary measures

(Jerrett, 2009; Carrega, 2005). This heterogeneity reflects an approach to the environment often based on sectoral and administrative parameters.

In spite of the Arrhus convention and the Inspire directive, the required data are difficult to collect not because people retain the information, but because it is scattered among many organisations. The lack of information can also be a factor in causing and worsening environmental conflicts. In Brittany, in the "affairs" concerning the coast, aquaculture projects met with opposition from the non-profit *Environnement et Patrimoine* in Ploubazlanec and from the *Comité de défense des sites* in Moëlan sur Mer.

Insufficient sharing of data and information within an administrative territory is an obstacle to understanding the issues involved in a case of damage and the same is true between territories. As noted above, certain types of damage to the environment produce trans-territorial effects that can require the sharing of information in order to fully grasp the issues. The sharing of information can also serve for comparisons and feedback of use to people confronted with situations similar to other events in the past.

■ Territorial differences in terms of the potential of territorial stakeholders to take action

Environmental litigation is initiated not only by the traditional actors in representative democracies (elected officials, civil servants), but also by a second category, namely the non-profit groups active in environmental protection, in which citizens participate voluntarily. Whether in attempts to prevent damage to the environment or to remediate ecological damage, the courts are often called on by non-profits, that now take action to ensure the enforcement of the law (Charbonneau, 2004). Increasing press coverage of ecological damage has had an effect on the results of litigation initiated by non-profits against decision-makers and the persons responsible for the damage. The development of the information and communication technologies (ICT) has become an indispensable factor in the suits brought by non-profits. A case highlighted by the press exists in the social sphere, meaning the procedure will go beyond the purely technical and professional aspects. That being said, not all territories are equal in that they do not have the same level of experience in these issues. This territorial experience (or lack thereof) will necessarily impact the manner in which ecological damage is managed in the territory for two reasons.

■ The organisational means in different territories are not the same. For example, some territories do not have any environmental-protection groups. However, close contacts with jurists or with those familiar with the legal sector are also a positive factor in the reactivity of stakeholders in a territory. This phenomenon is what Bruno Latour called "the experience of the law" (Latour, 2002). This experience makes it possible to establish the links between a particular case and previous cases, as well as with the body of law involved. It is clear that this process requires the capacity to reformulate, redefine and translate a particular situation, which in turn requires mastery of the legal jargon, techniques and practices.

■ The role of the courts is to propose a single, legitimate interpretation or qualification of a situation, thus breaking the continuity between the legal interpretations and the other interpretations that existed before the case was submitted (Azuela, 2008). The experience with the law transforms its role in the understanding of stakeholders and in a territory. By entering into contact with jurists, the mobilised groups learn the importance of legal procedures which would often seem to outweigh the arguments in terms of social justice that they attempt to put forward, but occasionally fail to see acknowledged precisely because of the procedures. Numerous studies have shown that there are clear differences between territories in terms of the suits filed before the judicial and administrative jurisdictions. These differences exist and have been measured between the various departments (Kirat, Lefranc, 2004). It is possible to analyse these differences in a number of ways that are not exclusive of each other. First of all, it is possible to measure the number of judgements in a territory that confirm the existence of ecological damage and take steps to remediate the consequences. It is also possible to study the types of damage that result in litigation in a territory. Similarly, one can assess the sensitivities of each jurisdiction in a given territory. Finally, studies can look at the type of stakeholders and the types of action undertaken that define the active forces in a territory and determine their capacity to take action against ecological damage.

Issues involved in territorial specialisation in environmental litigation

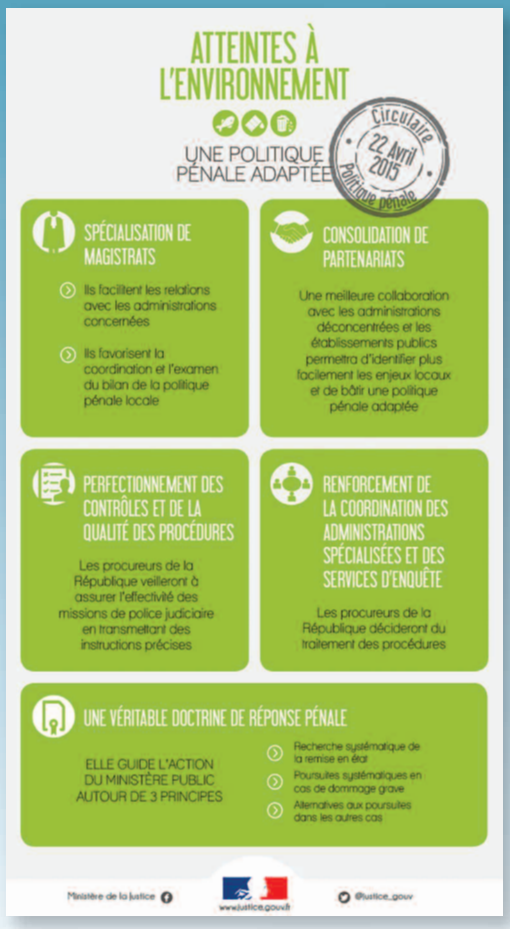
The issue of judicial specialisation in environmental litigation is directly related to that concerning the **links between ecological damage and the territory**. It can be analysed on three levels, 1) the **specialisation of prosecutors**, 2) the specialisation of "judgement groups", also called judgement chambers, and 3) the **specialisation of the jurisdictions themselves**. Only the first and third situations will be discussed here in light of the recent direction taken by the French legal system following the ministerial circular in 2015. They represent two types of specialisation that can be useful in judging complex cases requiring specialised legal knowledge, however they do not necessarily produce the same effects.

In the first situation, it is the role of the specialised prosecutor, appointed to deal specifically with environmental cases, to facilitate the relations with and between the local stakeholders and to clarify the local (i.e. territorialised) issues in view of establishing a suitable criminal policy. In the third situation, the objective would be to have a few specialised courts, spread evenly around the country, capable of completely and competently handling technical issues (Jégouzo report, 2013). In addition, this form of territorial specialisation could facilitate, where necessary, the geographic transfer of cases that, as is occasionally the situation with ecological issues, involve local, political aspects that justify the transfer to a distant jurisdiction. By offering the possibility of geographic transfers, specialisation would have the advantage of avoiding the risk of local disturbances likely to hinder procedures.

Specialisation of prosecutors to promote criminal policy adapted to local issues

As noted in the ministerial circular from 2015 (see Figure 28), the adaptation of criminal policy to environmental issues requires close collaboration between the Prosecutor generals and prosecutors. **The circular reiterates that the appointment of specialised prosecutors is recommended in each office.**

Figure 28



The main points in the circular from the Justice ministry, dated 22 April 2015.

The objective is to facilitate the relations and coordination with the concerned administrations and agencies, and encourage the study of the policy results on the local level. The specialised prosecutor in the Prosecutor general's office must organise regular meetings with the specialised prosecutors in the local offices (see Box 19) in order to coordinate their work and draw up reports on the results. Training courses, addressing local litigation issues, can also be set up by the specialised prosecutor in the Prosecutor general's office. Among his other missions, he must see that a single contact person is appointed in each of the specialised agencies.

The circular also recommends reinforced collaboration between the legal system and the local State services and the agencies in charge of the environmental police. The objective is to identify the main, local (territorial) issues and to structure the criminal policy accordingly. To that end, it is essential that the prosecutors participate in the inter-agency water and nature groups that set up the environmental inspection programmes. The signing of agreements with the prefects and the concerned public agencies is also encouraged in order to better coordinate criminal and administrative policies. The prosecutors should also identify the non-profits certified for environmental protection in their territory and establish contacts for discussions and to gain knowledge on local issues and any damage affecting the environment (see Box 20).

Interview of Jean-Philippe Rivaud, deputy Prosecutor general at the Prosecutor general's office, Court of Appeals in Amiens, in charge of environmental and public-health issues

Since 2007, you have made active efforts in the Picardie region to raise the awareness of prosecutors concerning environmental law and its effective enforcement.

In each office, an "environmental" prosecutor in charge of this specialised sector has been appointed. Each year, we organise a regional conference for public action on an environmental topic. In 2012, the meeting was devoted to the protection of aquatic environments. The idea is to bring together the prosecutors from the seven offices with Onema and the State services (regional environmental directorate, departmental territorial directorates) in charge of the water police, in order to facilitate discussions and better understand the issues at hand through specific examples from the region, as well as the national and global issues concerning the protection of water resources. These meetings serve to create closer ties between the prosecutors and the members of the administrative police. We also set up special sessions at the Court of Appeals for environmental cases to ensure that decisions are rendered within three months following the judgements of the lower courts. These sessions mobilise the efforts of the prosecutors and facilitate the participation of the environmental police agents who provide technical clarifications and information on how the damage can be remediated. Finally, we have established a solid partnership with the regional environmental directorate and with the Onema regional office.

What are the results of this policy?

We note a real increase in the awareness of the prosecutors in the Picardie region, their knowledge of environmental protection has improved. Over the past year, the number of judgements in new cases of environmental damage has increased significantly. Legal efforts have increased, heavier sentences have been handed down and the decisions are published. Momentum has been created, prosecutors have polished their techniques (though a great deal remains to be done), judges are more receptive and administrative services have encouraged police forces to launch criminal procedures, which has significantly motivated the people who report the offences.

Enforcement of environmental criminal law remains difficult.

The situation varies greatly from one region to another, but on the whole, few regions have set up organised and coordinated policies. Environmental issues are not central concerns for judges and prosecutors, contrary to physical violence which represents a large number of cases, or driving offences. In addition, they lack any basic training on environmental offences. Their ignorance of the main legal principles in environmental law is due to the fact that the legal texts are scattered among some 15 legal codes and to the exceptional technicalities involved. As a result, work on a water-pollution case is much more complex than, for instance, a case of child abuse.

What is required to make further progress?

Given the complexity and technicalities of water law, it is essential that Onema personnel provide more contextual information on the offence, highlight the links with regional environmental issues and clearly present the consequences when preparing their reports for legal proceedings. More generally, it is essential that the concept of ecological torts be included in the Civil code and that a chapter on environmental offences and crimes be included in the Penal code. Another option would be to create specialised prosecutors as is the case in Spain and Sweden, or to expand the number of specialised hearings for environmental litigation. Finally, it is important that we encourage cooperation between judges and prosecutors on the European level to handle international environmental cases. The European network of prosecutors for the environment was recently launched. It is chaired by a British colleague and I am a founding member.

(Interview carried out by Onema in January 2013)

200 prosecutors specialised in the environment met in Paris in December 2015

For the first time, almost 200 prosecutors specialised in environmental litigation were invited by the Minister of Justice to meet on 2 December 2015 in Paris (see Figure 29) in order to discuss the major guidelines for judicial procedures in the environmental field.

The objective of the meeting was to bring together the main components of the judicial police and the environmental prosecutors in order to encourage implementation of the ministerial circular (21 April 2015) on criminal policy in the environmental field.

The Prosecutor general for the Court of Appeals in Paris, Catherine Champrenault, opened the meeting with remarks concerning the highly collaborative nature of environmental litigation. She complimented all the public services in charge of inspections for their work and noted the high degree of complexity in environmental cases and the increase in European requirements.

She also suggested putting more thought into preventive measures and strengthening the partnerships with the public services in charge of inspections, with specific mention of the policy of judicial warnings set up by the prosecutor's office in Evry, in conjunction with Onema.

The director of criminal affairs and pardons, Robert Gelli, insisted on the need to coordinate the various participants in the field and to share information on results and on the current situation. He stressed the importance of developing "operational groups", each led by the local prosecutor and comprising all the local stakeholders in environmental affairs and the representatives of the police and *Gendarmerie*, in order notably to analyse the environmental issues in a given area or department, and subsequently establish territorial strategies.

Figure 29

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200 prosecutors met in Paris to discuss damage to the natural environment.

Specialisation of jurisdictions by creating "zones of attribution"

In the environmental field, this type of specialised unit currently exists exclusively for marine pollution by ships. However, following the law (4 March 2002) that enabled the creation of specialised health and environmental units by the Paris and Marseille District Courts, it is clear that this approach could be expanded to include other forms of damage. It has been presented as a means of solving certain problems observed during actual procedures.

First of all, the specialisation of jurisdictions could serve to clear out the backlog of cases and thus contribute to reinforcing the effectiveness of environmental law in general and water law in particular (Jegouzo report, 2013). In theory, cases are sent rapidly to the courts, but the actual lead times are very long (6 to 18 months between the initial citation and a judgement) due to the congestion of the legal system that must process many different types of cases. The average time required to prepare a hearing is half a day, occasionally less. Prosecutors may be tempted to simply close the least serious cases.

Secondly, specialisation is presented as a means to solve the problems concerning the complexity and technicality of water law (see Chapter 2, page 34). In this case, the specialisation of jurisdictions could be interpreted as the specialisation of judges (a topic not addressed by the circular in 2015), i.e. an increase in expertise in technical sectors due to more regular processing of such cases. The study of environmental cases takes time that jurists do not have, as well as a major intellectual effort to gain knowledge in a field in which they cannot be certain that they will be assigned cases.

The two immediate, positive effects of the specialisation of jurisdictions would therefore be more rapid and effective execution of legal procedures, with as a consequence considerable savings of time and money for the parties involved and for the legal system itself.

In addition, as noted above, press coverage of cases is clearly a positive factor for the non-profits and stakeholders whose mission is to defend nature. However, press coverage can also elicit the expression of strong feelings in a territory and lead to conflictual situations that put a territory under pressure. Territorial specialisation can facilitate, where necessary, the **geographic transfer of environmental cases** that, as is occasionally the situation with ecological issues, similar to other fields, involve local, political aspects that justify the transfer to a distant jurisdiction. By offering the possibility of geographic transfers, specialisation would have the advantage of avoiding the risk of local disturbances likely to hinder procedures.

However, it is clear that water law and environmental law as a whole permeate virtually all legal fields (public health, real estate, etc.) (see Box 21). This cross-cutting feature means that a comprehensive and consistent approach is required. But the specialisation of jurisdictions could lead to a partitioning of environmental issues, which could in turn raise other problems.

That is why, though the issue of the specialisation of jurisdictions is still debated, for the time being the French legal system has come down in favour of the specialisation of individual jurists within the normal jurisdictions.

An overview of water law

The main function of water law is to facilitate the management and governance of a vital resource that is subject to multiple uses and potential sources of conflict. It reflects the evolution of our societies in that the law acts to both regulate and protect.

Knowledge of and proficiency in water law are therefore critical issues for all the stakeholders in charge of implementing water policies. In that water law is based on a comprehensive and consistent approach, it is also an important issue for all those working in fields impacted by water law.

That being said, water law is a complex topic that is difficult for both professionals and laypersons in the water field, a factor that adversely affects its effectiveness. That is why Onema put together for the concerned stakeholders an informative document (see Figure 30) designed as an "operational tool" that explains in clear and accessible terms the objectives, means and issues involved in the main European and national texts targeting the restoration of good water status.

Figure 30

European and national legislation in the WFD context (Onema, 2015).

Conclusion

Law is the product of a political process within a given territory. It is also what enables the political and administrative authorities in that territory to wield their authority.

Territories are also areas in which the procedures of applying the law are implemented.

Depending on the local characteristics, the territory applies the law through the prism of its material, structural and identity traits that protect it more or less from the disparities likely to be observed in the implementation of the law. The fundamental cause of the disparities is often, on the one hand, the absence of “distributive equity” because environmental risks are not evenly spread and, on the other, the absence of “procedural equity” because the stakeholders in territories do not all have the same opportunities to influence decisions impacting their immediate environment (CGDD, 2013).

In a country based on the rule of law such as France, respect for the law by one and all must be reaffirmed as a fundamental principle and it is precisely the capability of the public authorities to see that the law is respected and, if necessary, sanctioned that ensures the effective rule of law.

The specialisation of prosecutors, which already existed in some territories prior to the 2015 circular, but was strongly recommended by it, is certainly one means to solve some of the problems at hand.

SUMMARY of chapter 4

Territorial considerations in the legal situation and how they apply to ecological damage

Key concept

The territorialisation of the law is the impact that the characteristics of a given territory have on the application of the law in that territory. One consequence of this phenomenon is that the manner in which ecological damage is approached in territories can differ.

Key points in understanding the subject

The issue of judicial specialisation in environmental litigation is directly related to that concerning the links between ecological damage and the territory. Two aspects of judicial specialisation are discussed. The first concerns the manner in which local issues can be taken into account through specialisation of the prosecutors. The second concerns the creation of "zones of attribution" which, in addition to potentially relieving the congestion of the legal system, could be a partial solution for the problem concerning the complexity and the technicality of the law.

Key points to remember

The concept of territorialisation for ecological damage raises two important points.

First of all, different territories are exposed to different levels of risk (factors of risk and vulnerability) for ecological damage.
Secondly, not only are territories more or less exposed, but their capacity to react to damage differs in terms of the availability of information and of the awareness and dynamism of the stakeholders in a given territory concerning the legal processing of the problem.

spécialisation judiciaire
territorialisation
réaction
complexité et technicité
enjeux locaux
zones de compétences
risque