

Hannes DESCAMPS
Legal Counsel
Department on Environment, Nature & Energy
Belgium

**Natural Resource Damage
Assessment**
under the
**EC Directive on Environmental
Liability.**
Comparative Legal Point of View

International Workshop on Environmental Damage
caused by Black Seas
University of Brest
Paris, 18-19 May 2006



Outline

-  Environmental Liability Directive
-  Relationship International Conventions
-  Damage
-  Natural Resources
-  Assessment



1. Environmental Liability Directive

- Article 249 Treaty on the European Community)

" A directive shall be binding, as to the result to be achieved, upon each Member State to which is addressed, but shall leave national authorities the choice of form and methods"

≠ International Convention

1. Environmental Liability Directive

- Addressed to 25 MS (soon 27)



1. European Liability Directive



Purpose:

To **prevent** and **remedy** environmental damage by establishing a framework on environmental liability based on the « polluter pays principle »

≠ adequate compensation to persons who suffer damage caused by pollution

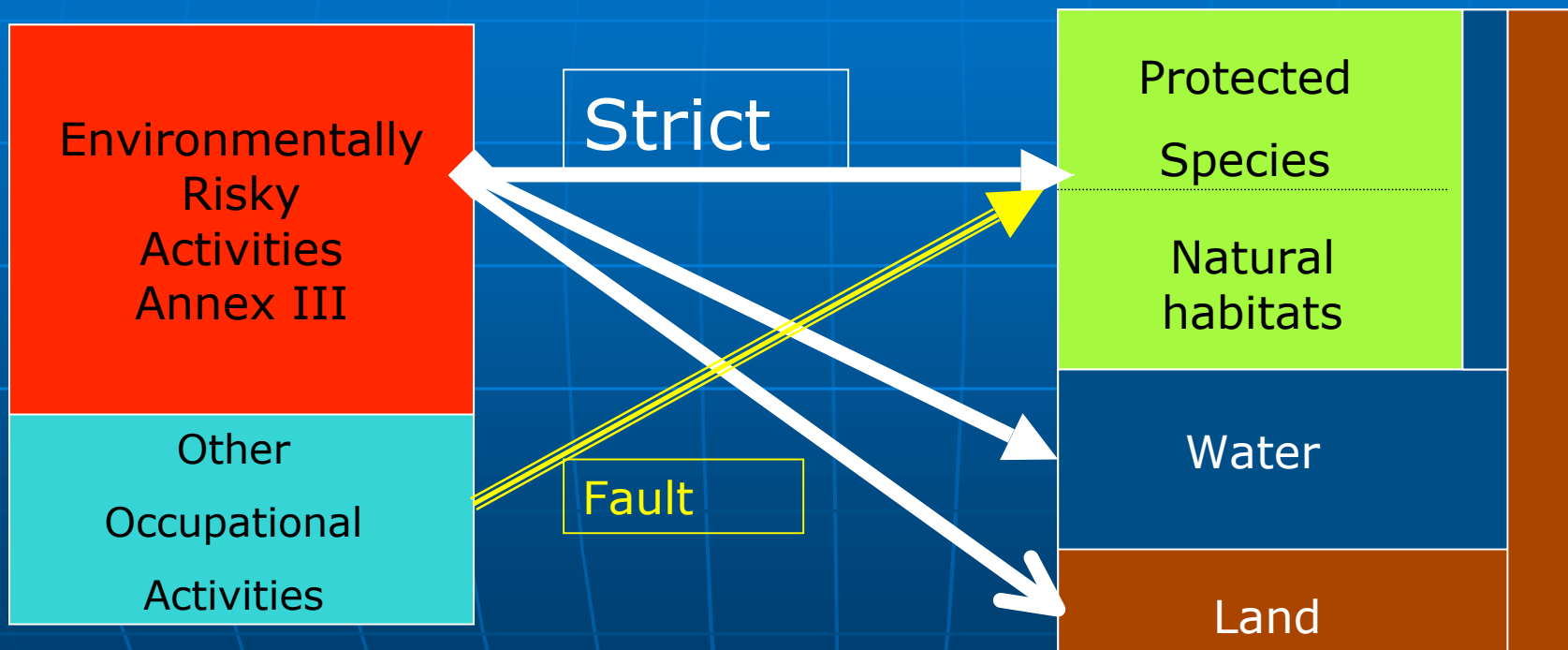


1. ELD : Scope

Activities

Liabilities

Environmental
Damage (or
Imminent Threat)





1. ELD : Exceptions

- Act of War
- Act of God
- Nuclear risk
- Activities main purpose national defence / international security / natural disaster protection
- Historic pollution = before 30/04/07
- Diffuse pollution unless causal link
- Some International Conventions (Infra)



1. ELD : Person liable

- Operator :
 - Any natural or legal, private or public person
 - who **operates** or **controls**
 - the **occupational activity**
 - or (poss.) decisive economic power technical functioning delegated
 - Holder permit / authorization
 - Registered
 - Notifier
- ≠(registred) **ship owner** [+ oil receivers]

1. ELD : Preventive Action (1)



- Preventive measures :
“any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage”
- Imminent threat :
“a sufficient likelihood that environmental damage will occur in the near future”



1. ELD : Preventive Action





1. ELD : Preventive Action

- Operator shall take, without delay, the necessary preventive measures.
- The Competent Authority shall require that the preventive measures are taken by the operator.
- The Competent may :
 - Require information
 - Give instructions
 - Take preventive measures themselves

1. ELD : Remedial Action (2)



Where environmental damage has occurred the operator shall, without delay, :

- inform the competent authority of all relevant aspects of the situation,
- Take all 'practicable steps'
- Take the necessary remedial measures

- The Competent Authority shall require that the preventive measures are taken by the operator.
- The Competent may :
 - Require information
 - Give instructions
 - Take preventive measures themselves



1. ELD : Remedial Action

- Practical steps

"... immediately control, contain or otherwise manage the relevant contaminants and/or to limit or to prevent further environmental damage and adverse effects on human health..."

- Remedial measures

"...actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative as foreseen in Annex II" (Infra)

1. ELD : Costs of Prevention and Remediation (3)



The Operator shall bear the costs for the preventive and remedial measures.

The Competent Authority shall recover those costs it has incurred.

Costs: justified to ensure implementation
Including assessment, enforcement, data collection, monitoring...

≠ limited (see Art. 4, par. 3 ELD)



1. ELD : Defences

1. Third Party (despite appropriate safety measures) (e.g. terrorist attack)
2. Compliance compulsory order (e.g. salvage operations)

(Possibly and subject to conditions)

3. PERMIT

4. STATE OF THE ART



1. ELD : Other Features

No choice between joint and several liability / apportionment

≠

The 'public concerned' can submit observations and request competent authority for action

No mandatory financial security

≠ System of P&I and Oil Pollution Fund

2. Relationship International Conventions





2. Relationship International Conventions

« The Directive shall not apply to environmental damage arising from an incident of which liability and compensation falls within the scope of any of the International Conventions listed in Annex IV (1992 CLC, 1992 IOPF, 1996 HNS, 2003 Bunker Oil, 1989 CTRD), including any future amendments thereof, which is in force in the Member State concerned » (Article 4, par. 2 ELD)



3. Damage

"a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly"



3. Damage

"... compensation for impairment of the environment, other than loss of profit from such impairment shall be limited to the costs of reinstatement actually undertaken or to be undertaken"

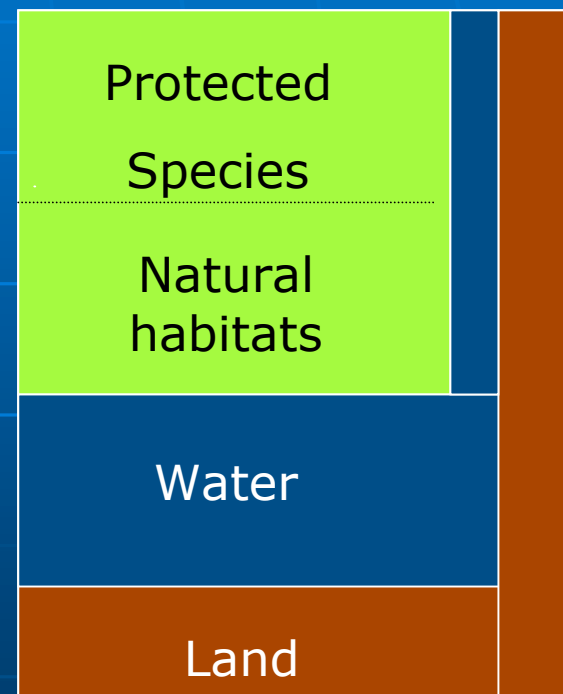
+ costs of preventive measures

4. Natural Resources



+ the functions performed by a natural resource for the benefit of another natural resource or the public =

Natural Resource Services



4. Natural Resources Damages





4. Natural Resource Damages

- Damage to **protected species and natural habitats**:
 - 1992 Habitats Directive & 1979 Wild Birds Directive
 - *“significant adverse effect on reaching or maintaining favourable conservation status”*
 - Criteria in Annex I



4. Natural Resource Damages

- **Water damage :**
 - 2000 Water Framework Directive
 - *"... damage that significantly adverse affects the ecological, chemical and/or quantitative status and/or ecological potential..."*
 - + Proposal for a Directive Marine Strategy and other measures



4. Natural Resource Damages

- **Land damage :**

"... significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under the land, of substances, preparation, organisms or micro-organisms"



5. NRD Assessment

Determination of remedial measures in accordance with Article 7 and Annex II ELD:

- Operator proposes
- Competent authority disposes and can establish priorities
- Consultation of the persons on whose land remedial measures are taken + 'public concerned'



5. NRD Assessment

Objective : Recovery

bring 'Biodiversity' and Water back to
Baseline condition

"the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available"

- It includes "natural recovery"
- If primary remediation not sufficient
Complementary remediation (alternative site)
Compensatory remediation (**interim losses**)



5. NRD Assessment

Identification (“scaling”)

1. Resource-to-resource and service-to-service **equivalence approaches**
(same type, quality & quantity)
2. Alternative approaches, e.g. monetary evaluation techniques

Should reflect the time preferences



5. NRD Assessment

Choice of remedial options (Selection)

- using the best available technologies, evaluated on set of criteria (cost, likelihood success, effect public health...)
- no more measures when costs are disproportionate to the environmental benefits to be obtained



6. Conclusion

- ELD sets out a framework that still has to implemented ⇔ experience within IMO
- ELD focuses on the prevention and restoration damage to the environment ⇔ compensation of oil pollution victims
- ELD is some respects broader / less precise than CLC+IOPF
 - no channeling
 - no caps
 - no financial security



6. Conclusion

- • Relationship between International Agreements and European Directive is not entirely clear
- More natural resource damages are covered under the ELD (also irreversible damage)
- Guidance on how to restore the environment

Thank you !

For further information see :

www.europa.eu.int/comm/environment/liability

www.milieuaansprakelijkheid.be

hannes.descamps@lin.vlaanderen.be