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Key Differences between the ELD, the UNEP Guidelines and the Lugano Convention

Environmental Liability 2011

Legal Analysis

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What are the key differences between the EU Environmental Liability Directive, the 1993 Lugano Convention on Liability and the draft UNEP Guidelines on the same matter?

Introduction

This paper compares three legal regimes that aim to regulate environmental liability. Only one of them is of legal value. Whereas the Environmental Liability Directive (ELD, 2004/35/EC) is in force since 2007, the 1993 Lugano Convention never entered into force due to the lack of signatories. The draft 2009 UNEP guidelines on environmental liability propose legal paragraphs but would be of non binding nature even if they would be adopted.

The idea for this comparison grew from the fact that the ELD seems not very effective until now. One of the reasons could be that it lacks clear and/or crucial provisions. This small research should aims to identify major differences between the ELD and the other two regimes. Based on this conclusions could be drawn for improvements of the ELD.

A comprehensive table with the full text of all three legal orders can be found under: http://www.justiceandenvironment.org/publications/eld

Scope / Damage covered:

The Directive covers **environmental damage** caused by occupational activities listed in Annex III[1], as well as **damage to protected species and natural habitats** caused by occupational activities other than listed in Annex III, but when the operator has been at fault or negligent (Arts. 1, 3, Annex III). Two elements narrow the scope significantly. First, only damage caused by **occupational activities** (which needs to be of economic character, or a business or an undertaking, Art. 2(7)) is covered by the Directive. Second, only three elements of the environment are covered: **protected species and habitats, water and land** (Art. 2(1) and (12)). For damage to have occurred, a **measurable adverse change** in a natural resources or **measurable impairment** of a natural resource service must have occurred (Art. 2(2)). In addition, specific criteria for each resource have to be fulfilled (Art. 2(1)). Moreover, Art. 4 lists explicit **exceptions** (for one, damage caused by a certain event or reason[2]; for

[1] For example: IPPC; waste management operations and transport; discharge of substances or pollutants into inland surface water as well as groundwater; water abstraction and impoundment; manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances; transport of dangerous or polluting goods; contained use, including transport, involving GMOs; deliberate release into the environment, transport and placing on the market of GMOs.

[2] Art. 4: 1. (a) an act of armed conflict, hostilities, civil war or insurrection; (b) a natural phenomenon of exceptional, inevitable and irresistible character. 6. This Directive shall not apply to activities the main purpose

another, where other international civil liability conventions (oil pollution damage, carriage of hazardous substances or dangerous goods, and nuclear energy) are applicable[3]. However, the manner in which this exception is formulated is problematic, as damages fall outside the scope of the Directive merely by resulting from such activities. Whether or not they have actually been compensated or restored is therefore irrelevant. Finally, only such environmental damage shall be covered, where it possible to establish a **causal link** between the damage and the activities of the operator.

In comparison, the Lugano Convention contains **wide definitions** of dangerous activities as well as environment. Hence, **dangerous activities** (that are professionally performed) encompass *i.a.* the production, handling, storage, use and discharge or similar operations (*e.g.* culturing with regard to GMOs) of **dangerous substances** (see also Art. 2(b)), certain GMOs (as far as not excluded by Art. 2(c)), micro-organisms, and in particular waste-related activities (Art. 2(1)). Art. 2(7) defines **environment** as: **natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property** which forms part of the c**ultural heritage**; and the characteristic aspects of the **landscape**. Consequent to the wide definition of environment, **damage** covers the following instances arising from the hazardous properties of the dangerous substances, genetically modified organisms or micro-organisms or arises or results from waste: **loss of life or personal injury**; loss of or damage to **property;** loss or **damage by impairment of the environment** (provided that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to the costs of measures of reinstatement); and the costs of preventive measures and any loss or damage caused by preventive measures. Arts. 4 and 8 contain **exceptions**: in particular, the Convention therefore does not apply to damage arising from carriage, **except for carriage by pipeline** or internal carriage inside an installation or site, or damage caused by a nuclear substance[4]; further, where damage was caused by an act of war, natural phenomenon etc.

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of which is to serve national defence or international security nor to activities the sole purpose of which is to protect from natural disasters.

[3] Art. 4: 3. This Directive shall be without prejudice to the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, including any future amendment to the Convention, or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988, including any future amendment to the Convention.; As listed in **Annex IV** (1992 International Convention on Civil Liability for Oil Pollution Damage; 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage; 1996 International Convention of on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels), and **Annex V** (1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and the 1963 Brussels Supplementary Convention; 1963 Vienna Convention on Civil Liability for Nuclear Damage; 1997 Convention on Supplementary Compensation for Nuclear Damage; 1988 Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention; 1971 Brussels Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material)

[4] o. This Convention shall not apply to damage caused by a nuclear substance: (a) arising from a nuclear incident the liability of which is regulated either by the Paris Convention of 29 July 1960 on third party liability in the field of nuclear energy, and its Additional Protocol of 28 January 1964, or the Vienna Convention of 21 May 1963 on civil liability for nuclear damage; or (b) if liability for such damage is regulated by a specific internal law, provided that such law is as favourable, with regard to compensation for damage, as any of the instruments referred to under sub-paragraph a above.

The UNEP Guidelines apply a **wide definition of damage** as well, covering: loss of life or personal injury arising from environmental damage; loss of or damage to property arising from environmental damage; pure economic loss; costs of reinstatement measures, limited to the costs of measures actually taken or to be undertaken; costs of preventive measures, including any loss or damage caused by such measures; and environmental damage. **Environmental damage**, as will be discussed below, means an **adverse or negative effect** on the environment that is **measurable and significant**.

Extent of damage required:

As mentioned above, the Directive foresees that for damage to have occurred, a **measurable adverse change** in a natural resources or **measurable impairment** of a natural resource service must have occurred (Art. 2(2)). In addition, damage is further qualified with specific criteria regarding each resource (Art. 2(1)). Thus, for damage to have occurred, **significant adverse effects** on the relevant existing protection standards of the concerned Directives (Habitats Directive, Wild Birds Directive, Water Framework Directive) is required. Damage to land is limited to damage which poses a **significant risk** to human health. In addition, Annex I to the Directive contains criteria which are to be taken into account when determining the significance of any damage, as well as scenarios which are excluded from the classification of constituting significant damage.

The Lugano Convention covers damage caused by dangerous activities or dangerous substances which pose a **significant risk for man, the environment or property**. Certain **substances**, for example **explosive, toxic,** flammable etc. should be presumed to possess such risk (Art. 2). Annex I of the Convention also makes reference to Community legislation*, i.a.* Directive 67/548/EEC (dangerous substances).

The UNEP Guidelines cover **adverse or negative effects** on the environment that is **measurable and significant**. Here the Guidelines list several criteria to be taken into account such as long-term or permanent change; extent of the qualitative or quantitative changes; reduction or loss of the ability of the environment to provide goods and services (temporary or permanent); extent of any adverse or negative effect of impact on human health; and aesthetic, scientific and recreational value of parks, wilderness areas and other lands (Guideline 3).

Preventive Action / Response Action:

In instances where environmental damage has not yet occurred, but there is an imminent threat thereof, the Directive obliges the **operator** to take necessary preventive measures. The competent authorities **may** require him to take such measures, give him instructions on how, or, subsidiarily, take such measures itself (Art. 5). If environmental damage has occurred, then the operator shall take immediate remedial action, and, as with regard to preventive measures, the competent authorities **may** require him to take such measures, give him instructions on how, or, subsidiarily, take such measures itself (Art. 6). Art. 7 and Annex II of the Directive provide **detailed guidance** on which measures to be taken and how to approach the situation.

In comparison, the UNEP Guidelines (Guideline 3(6)) as well as the Lugano Convention (Art. 2(i)) state that such preventive measures can be taken by **any person**. Moreover, the UNEP Guidelines state that if the operator fails to fulfill his obligation, the competent public authority **may** take such action itself, **or authorize third parties** to take such action and **recover the costs from the operator**. Response action, according to the UNEP Guidelines, shall be taken by the **operator** (Guideline 4), while the Lugano Convention leaves it to domestic law to decide on who shall be entitled to take such measures (Art. 2(h)). Neither contain any reference or guidance on which restoration measures to take. Hence, the Directive is more precise in this aspect.

Liability Regime / Costs:

In implementation of the **polluter pays principle** (Art. 1), Art. 8 of the Directive stipulates that the **operator** shall bear the **costs** (Art. 2(16) contains a wide definition of costs) for the preventive/remedial actions taken. If the operator takes action himself, then he bears the costs directly, if the competent authorities take action on their part, then the operator bear the costs indirectly, as the authority is authorized to recover costs from the operator. A number of **exceptions** are listed in the Directive. First, as states are not obliged to take such action themselves (see above "may"), if the competent authority does not take action, then the operator will not have to pay any costs. Moreover, operators will also not be required to take costs when they can prove that the threat of/damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or resulted from compliance with a compulsory order or instruction emanating from a public authority. In addition, member states **may allow** operators **to not bear the costs** for remedial actions taken when the operator demonstrates that he **was not at fault or negligent** and that the environmental damage was caused by an emission/event **expressly authorized** by and enacted in compliance with the national laws implementing the instruments of Annex III of the Liability Directive (*permit defense*), or the emission or activity was not considered likely to cause environmental damage (*state of the art defense*). This means the ELD applies a fault based liability regime. This is in contrast to the very concept of environmental liability that normally provides for strict liability. Further requirement are listed in Art. 4, as also mentioned above, in particular that only such environmental damage shall be covered, where it is possible to establish a **causal link** between the damage and the activities of the operator.

According to the UNEP Guidelines **operators** shall be **strictly liable** (Guideline 5(1)). Annex I and II to the Guidelines serve as samples of which substances and activities should be considered an "activity dangerous to the environment". Guideline 10 clarifies that this liability may be limited pursuant to criteria established under any applicable domestic classification scheme for activities dangerous to the environment.[5] However, with regard to damage caused or contributed to by not complying with applicable statutory or regulatory requirements or through wrongful, intentional, reckless or negligent acts or omissions (Guideline 5(2)), no such financial limits shall be introduced. Guideline 6 contains the provision that in addition to **additional exonerations provided for in domestic law**, the operator shall escape liability if he proves that the damage was caused by an act of

[5] To ensure sufficient the closure of potential compensation gaps, special funds or collective compensation mechanism might be introduced as well.

God/*force majeure*, by an armed conflict etc., by an act or omission by a third party, as a result of compliance with compulsory measures imposed by a competent authority. In addition, the *permit defense* as well as *state of the art defense*, as also contained in the Directive, are included in the Guidelines as well. It has to be noted that the both defenses were introduced to the draft Guidelines due to the pressure of the EU at the very end of the drafting process. Until the EU directive was in force it was totally unacceptable to have such defenses since it questions the whole concept of liability for dangerous activities (such as in product liability). But the EU aims to export this unjustified and unsuccessful tool to the rest of the world. One of the reasons that the guidelines were not adopted could be that countries outside the EU do not share the idea of the defenses.

In contrast the Lugano Convention follows as a consistent strict liability approach. Moreover, if the incident causing the damage consists of a continuous occurrence, all operators successively exercising control of the dangerous activity shall be **jointly and severally** liable (Art. 6). Art. 7 contains a separate provision regarding the liability in respect of sites for the permanent deposit of waste. Also, if a person who suffered the damage (or a person for whom that person is responsible for under internal law) has by his own fault contributed to the damage, the compensation may be reduced or disallowed (Art. 9). In comparison to the Directive, the Lugano Convention, regarding the **causality** principle, formulates that the court shall take due account of the increased danger of causing such damage inherent in the dangerous activity (Art. 10). This seems to imply a lesser standard or proof required where the damage is typical of such an installation. In addition, the exceptions listed above (fn 5) apply.

Access to Information:

Only the Lugano Convention contains provisions on **access to information** (Arts. 13-16). Arts. 14 and 15 state that **any person** shall have **access to information** relating to the environment **held by public authorities, or by bodies with public responsibilities** for the environment and under the control of a public authority. For the EU, this is also covered by the implementation of the Aarhus Convention (Art. 4). However, in addition the Lugano Convention also contains in Art. 16 the provision that any person who suffered the damage may request the court to order an **operator** to provide him with specific information, insofar as this is necessary to establish the existence of a claim for compensation. Such a provision is not contained in neither the UNEP Guidelines nor the Directive.

Claims for compensation and access to justice:

Unlike the UNEP Guidelines (Guideline 8) as well as the Lugano Convention (*i.a.* Art. 1), which contain wide definitions of damage (see above), the Directive does not give private parties a right of compensation (Art. 3). The ELD only provides for access to justice for certain members of the public (including NGOs) regarding the administrative procedure, whereas UNEP Guidelines (Guideline 9) as well as the Lugano Convention (Art. 18) give direct court access to a wider group of the public.

Financial security:

All three instruments contain provisions regarding the establishment of **financial security** schemes. The Directive states, in a rather weak formulation, merely obliges the member states to take measures to **encourage the development** of financial security instruments (Art. 14).

Thus, it does not establish the obligation of operators to cover potential environmental damage by insurance. The UNEP Guidelines state that the operator should be **encouraged or required** to cover liability (Guideline 11). The Lugano Convention contains the strongest obligation, by stipulating that parties **shall ensure** that where appropriate operators be required to participate in a financial security scheme (Art. 12).

Time limits for presentation of claims:

The Directive states that the competent authorities shall be entitled to initiate cost recovery proceedings within **five years** from the date on which those measures have been completed or the liable operator or third party has been identified, whichever is the later. The UNEP Guidelines, in comparison, leave the determination of the time limits to the **discretion of the states** concerned (Guideline 12 "Domestic law should establish"). Under the Lugano Convention actions for compensation shall be subject to a limitation period of **three years** from the date on which the claimant knew or ought reasonably to have known, however, in no case after **thirty years** (Art. 17).

Concluding remarks

Narrow scope

The ELD has a rather narrow scope compared to the Lugano Convention and the draft UNEP guidelines. This starts with the limiting number of dangerous activities in the Annex – Lugano is far more open here. In addition the ELD excludes damages from oil pollution, hazardous substances or nuclear matters, whereas Lugano explicitly includes, among others, GMO damages.

Narrow damage definition

The next limitation in the ELD follows in the damage definition. Whereas Lugano and UNEP have a wide damage definition covering biotic and abiotic natural resources, air, soil, flora, fauna, cultural heritage, landscape, loss of life and property, preventive measures or pure economic loss ELD only refers to water, soil and nature, with relatively high thresholds. Again Lugano has far lower thresholds and sees for example certain substances to possess a significant risk for people, the environment and property by definition. The damage definition seems to be more concise both in the Lugano Convention and the UNEP guidelines.

Request for action, access to justice and information

Whereas both Lugano and UNEP enable any person to take preventive measures the ELD does not provide for this. The same counts for compensation claims. Access to justice provisions in ELD are far weaker compared to the other regimes. The same counts for access to information.

Fault based versus strict liability

One of the worst shortcomings of ELD is for sure the fault based liability approach. Even though the ELD currently faces other problems such as a low number of cases, when it comes to cases liability could be easily turned down by using the defenses that are a systemic breach of a liability system for dangerous activities such environmental or product liability. Only a strict liability regime is expected to have effective preventive effect. It goes without saying the Lugano Convention follows a pure strict liability approach. The Lugano Convention and UNEP guidelines are also stricter regarding compulsory financial security, prove of evidence and joint and several liability.

Scope of ELD should be extended

To conclude, the ELD is subject to major shortcomings compared to the other (proposed) liability regimes. It can be argued that many aspects of the Lugano Convention might exist in most national European legal systems. However, Justice and Environment is convinced that there should be a comprehensive European approach for environmental damages that is far closer to the Lugano Convention than to the current ELD. This would raise the level of environmental protection in the EU and would avoid a “race to the bottom” regarding environmental legislation. Investors should not be able to choose locations in the EU with the low liability standards.

- although the licensing of mining waste deposits has been the competence of the Mine Supervision since 2008, the competent District Mining Inspectorate did not check the structure of the disposal site for technological compliance, and **failed to enforce use of the best available technology** with regard to disposal (conversion to dry technology);
- none of the authorities substantially considered the **risk of a dam break.** When the privatization contract was concluded, IPPC and BAT requirements were not taken into consideration. Neither was compliance with these requirements subsequently enforced in an exhaustive manner by either the environmental or the construction authorities.”

Beside the failures of authorities, the **implementation of EU legislation** is imperfect as well. The company’s **liability insurance** did not extend to the damages caused to third parties and it was clearly declared that the insurance company would not pay for the aggrieved parties based on the contract bound with the MAL Co. Ltd.

According to Article 14 sub (1) of the ELD, Member States shall take measures to encourage the development of **financial security** instruments and markets to cover ELD-related liabilities.

The provisions of the ELD were **formally taken over** by Hungarian environmental legislation, when it called for providing proof of the deposit in regulations governing activities in the scope of environmental use defined in the Directive (waste management, activities based on the of hazardous materials and goods and mining activities linked to an integrated environmental permit) and some formal provisions also had been transposed in to the national mining law.

However, in Hungary the **mandatory financial security** scheme in regulation regarding to treatment of mine waste had not been introduced efficiently before the Kolontar accident.

Directive No. **2006/21/EC on the management of waste** from extractive industries and amending Directive 2004/35/EC was adopted on the 15th March of 2006. Article 14 lays down the base of financial guarantee. According to the regulation the competent authority shall, prior to the commencement of any operations involving the accumulation or deposit of extractive waste in a waste facility, require a financial guarantee (e.g. in the form of a **financial deposit**, including industry-sponsored mutual guarantee funds) or equivalent, in accordance with procedures to be decided by the Member States.

The calculation of the guarantee shall be made on the basis of **the likely environmental impact** of the waste facility, taking into account in particular the category of the waste facility, the characteristics of the waste and the future use of the rehabilitated land; the assumption that independent and suitably qualified third parties will assess and perform any rehabilitation work needed.

Hungary implemented Directive No. 2006/21/EC with amendments of the Act XLVIII of 1993 on mining activities and the Decree No. 14/2008 of the Ministry of Economy on treatment of mine waste. The latter regulation has been **meaningfully and significantly amended** – inter alia in addition to providing financial guarantees – after the accident in Kolontár.

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