



Liability of Greenhouse Gas Emitters for Damage to European Nature

a tricky exercise

Marjan Peeters

(marjan.peeters@maastrichtuniversity.nl)

Two perspectives:

- Environmental liability directive:
the legal framework and its interpretation by the ECJ
- Science & the causal link:
uncertainties and "tricks"



The (disappointing) overall EU legal framework:

- Current EU framework only aims at minus 20% in 2020
- This does not prevent (significant) climate damage



IPCC projection & EU policy statements: there should be 25 to 40 % reduction in 2020

EU often refers to this IPCC-recommendation but has adopted a less ambitious target (20%)

The EU has proposed that developed countries, as a group, should reduce their emissions by an amount consistent with the 2° objective. The 4th Assessment report by the Intergovernmental Panel on Climate Change (IPCC) indicates that this would require emission reductions for developed countries in the range of 25-40% by 2020 and 80-95% by 2050. Developed countries should be able to achieve their reduction targets in part through domestic action and in part by using credits resulting from emission reductions in developing countries, as illustrated in Figure 1.

Climate damage might occur -> Environmental liability directive (ELD)

BUT:

- **Much contested, disappointment**
- **Limited scope, high threshold**
- **Moreover, general opinion :
ELD not fit for greenhouse gas emitters**



CLOSER LOOK

Art. 3: Scope

1. This Directive shall apply to:

- (a) environmental damage caused by any of the occupational activities listed in **Annex III**, and to any imminent threat of such damage occurring by reason of any of those activities;
- (b) damage to protected species and natural habitats caused by any occupational activities other than those listed in **Annex III**, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent





Art. 3(1)a -> strict liability -> Annex III

- EU ETS installations not included
- However, IPPC installations are
- IPPC has a broad aim (protection of the environment as a whole)
- EU ETS – IPPC relationship does as such not prevent liability claim (?)

Conclusion:

it is not excluded that IPPC installations emitting greenhouse gases are covered by the strict liability regime



Art. 3 (1)(b) -> fault / negligence **Any occupational activity other than Annex III**

damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the **operator has been at fault or negligent**

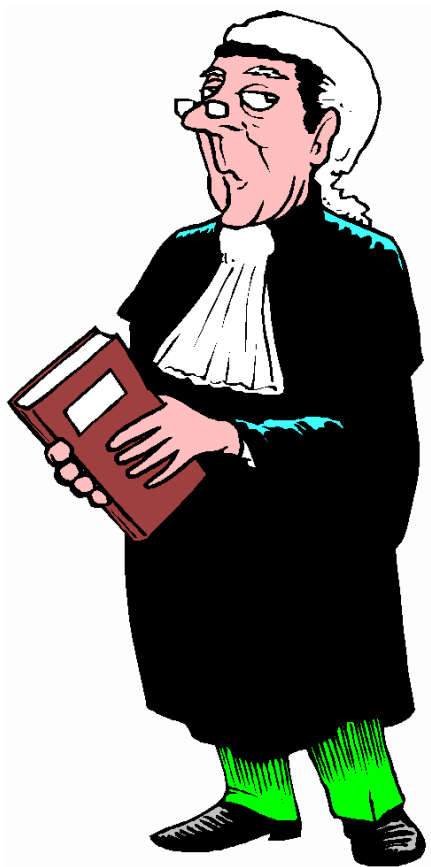
Diffuse pollution : a barrier?

Art. 4(5) ELD

This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.



Case C-378/08 (and C-379/08) [9 March 2010]:



Soil pollution Sicily



Authority may operate on the **presumption**,

also in cases involving **diffuse pollution**,

that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area.

However, in accordance with the 'polluter pays' principle, in order for such a causal link thus to be presumed, that authority must have **plausible evidence** capable of justifying its presumption, such as the fact that the operator's installation is **located close** to the pollution found and that there is **a correlation between the pollutants identified and the substances used by the operator in connection with his activities**.

A causal link between greenhouse gas emissions and damage caused by climate damage?

- **If science indicates that:**
- Greenhouse gas emissions contribute to climate change
- And that hence damage as covered by the ELD might “very likely” occur
- Isn’t that enough for presuming a causal link?
- And hence starting a preventative liability claim?



science

IAC review of the IPCC organisation:

Report of 31 August 2010



Uncertainty

- IAC: “authors reported high confidence in some statements for which there is little evidence”.
- In particular comments re WG II 2007 (on: impacts, adaptation and vulnerability)
- Which is crucial for determining damage (to nature)



- It's not surprising that the InterAcademy Council and the U.N. still stand behind the IPCC's global warming pseudo science, without which billions in funding for climate research and other items on the big-government agenda would dry up.

Washington Times, editorial 30 August 2010.



Marjolein van Asselt (Dutch scholar, expert on uncertainty, opinion in Dutch newspaper:)

- IPCC should have distanced itself from Al Gore (especially when winning both the Nobel Peace Prize)
- Especially the word "truth" in the documentary is misleading
- Uncertainty is the buzz word, politicians should decide



And the courts?

- ... liability law should find a way how to deal with uncertainty
- including the role of the precautionary principle ...



- **While the IPCC should be cautious with using “tricks” in order to cover uncertainty**
- **Liability law is in need of it, in order to create liability in cases of far reaching indications of possible damage**

Concluding observations

- Greenhouse gas emitters are covered by the ELD
- A causal link might be established, not impossible if an abstract approach will be taken
- But this highly depends on whether it can be conveniently stated that emissions indeed contribute to climate change and that the possible damage plausibly will be caused by such emissions
- Preventative action towards the most careless emitters of greenhouse gases would be an interesting test case



“If the IPCC has developed a bias, it has been towards suggesting that scientists know more than they really do about how climate change will play out. It could be as guilty of underplaying risks as of over-egging them”.

(New Scientist, 1-9-2010: Why it's time for a change at the IPCC)

Problems:

- Permit defence (art. 8 only refers to annex III; the occupational activities other than annex III are only liable in case of fault or negligence)
- Can the EU ETS serve as a defence?
- Third Party causation (art. 8 (3))