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Task Force on Access to Justice

STUDY ON THE POSSIBILITIES FOR NON-GOVERNMENTAL ORGANISATIONS PROMOTING ENVIRONMENTAL PROTECTION TO CLAIM DAMAGES IN RELATION TO THE ENVIRONMENT IN FOUR SELECTED COUNTRIES

France, Italy, the Netherlands and Portugal

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1. Introduction

In this country study, an overview will be given of the possibilities for environmental non-governmental organizations (ENGOs) to claim for damages on behalf of the environment in the Netherlands. Paragraph 2 of this report concerns a general picture of the laws and administration on the environmental area in the Netherlands. The third paragraph covers a description of the legal situation concerning environmental damages in general. Moreover, this paragraph includes the possibilities for ENGOs to claim damages in more detail. Finally in paragraph 4, we draw some conclusions about the effectiveness of the environmental liability rules.

2. Overview of the administrative and judicial structures regarding environmental law[1]

2.1 Environmental legislation

In the Netherlands, environmental law is embedded in the structures of general administrative law. Although there is an Environmental Management Act with a quite general scope, a totally integral environmental statute is lacking. In spring 2015, the environmental law is enshrined in about ten statutes on environmental law in a narrow sense, an integral act on water (Waterwet), two acts on nature protection (one on the conservation of special areas and one on the conservation of species) and some provisions in physical planning law. In June 2014, the government submitted a proposal for an integral law on nature protection to the parliament.[2] This proposal is now discussed in the Second Chamber (Tweede Kamer) and the government expects that this proposal will come into force at the end of 2015. The government also submitted a proposal for an integral act on environmental law in the broadest sense (Omgevingswet), which will cover almost all environmental law, including water law, physical planning law and nature protection law. At this moment, the government expects the entry into force in 2018, but this is rather uncertain. An important aim of all these law reforms is to simplify environmental law, to reduce the amount of environmental law, permit requirements, administrative procedures and judicial review procedures.

2.2 System for decision-making and administrative objection procedure

Ordinary procedure of decision making

[1] This part of the report is based on the country Report of the Netherlands, regarding The implementation of Article 9.3 of the Aarhus Convention on access to justice in the Netherlands, written by Chris Backes, Maastricht University.

[2] In this proposal, the Nature Protection Act (Natuurbeschermingswet 1998), the Flora and Fauna Act (Flora- en Faunawet) and the Forest Protection Act (Boswet) are integrated.

Decisions are prepared by the competent public authority, whereby it must adhere to certain principles of good governance stipulated in section 3.2 General Administrative Law Act (hereafter: GALA, Algemene wet bestuursrecht), such as thorough preparation. A decision upon request in this "ordinary procedure" has to be taken within eight weeks after the application has been submitted.

Uniform public decision making procedure

However, on most applications for environmental permits, section 3.4 GALA is applicable, the so-called uniform public decision making procedure. This means that a draft decision will be published by the competent public authority and interested parties will be invited to present their views on the draft, either in writing or orally, within six weeks after publication. This decision making process should not last longer than six months.

Administrative objection procedure and judicial review by administrative courts against "decisions"

A violation of environmental law by an act of a public authority can be subject to an administrative objection procedure if it fits the description of an "administrative decision" as stipulated in art. 1:3 GALA. The objection procedure is skipped if the uniform public decision making procedure was applied.

Only written decisions on specific cases having a regulating effect in public law can be qualified as a "decision" as meant by art. 1:3 GALA. Therefore, administrative review and judicial review by administrative courts is not possible with regard to factual action of the administration, regulations or other decisions with a general scope and administrative acting based on private law powers (like contracts). Then the civil law division of the district court is competent. The role and the structure of the civil court will be explained in 2.4.

2.3 Administrative courts

The Netherlands is divided into 11 judicial districts as courts of first instance and three administrative courts of appeal. The district court is competent to decide about administrative decisions. Article 8:1 GALA stipulates that an interested party may bring a claim to the district court. Appeal of district court judgments in environmental cases is handled by the Judicial Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State). This Council also acts as the court of first and only instance for some categories of cases related to environmental law.

A complaint may be filed against decisions (art. 8:1 and 1:2 GALA). A complaint may also be filed against the refusal to take a decision, and against the fact that a decision is not taken in due time (art. 6:2 GALA). Certain decisions are excluded from judicial review by the administrative courts (art. 8:3 and 8:5 GALA). Judicial review is open to all interested parties (art. 8:1 GALA). Since section 3.4 GALA is applicable to the preparation of most environmental decisions, only those interested parties who have submitted a view on the draft decision may lodge a complaint (art. 6:13 GALA). In those cases in which section 3.4 GALA is not applicable, judicial review is open only to those interested parties that have lodged a notice of objection against the decision (art. 7:1 and 6:13 GALA).

2.3.1 Standing

Standing for individuals

The Dutch legal system follows the interest-based model. An individual must show a specific interest in the decision at stake. The concept of the interested party (in Dutch 'belanghebbende') is described in art. 1:2 GALA. It is also required to have a legitimate interest in the proceedings (procesbelang): the interested party must be able to gain or win something by the procedure. The standing requirement of art. 1:2 in conjunction with art. 8:1 GALA contains several sub conditions, developed in case law: the interested party must have 1) direct, 2) own, 3) personal, 4) objective and 5) actual interest. The interest of the person that wants to contest the administrative decision must be directly influenced by that decision. This is one of the most important sub condition in practice. In environmental and planning law cases, some sub-criteria were developed, like a distance and sight criterion, to determine whether a person's personal interest is affected by an environmental decision. Only people living in a certain distance to an industrial installation (mostly a few hundred meters) or people who are able to see a tree which is cut from their apartment, have such a personal interest. In the end, it is the spatial influence that determines at which distance parties can still be considered to have an interest.

Standing for ENGOs

Just as with natural persons, the notion of 'belanghebbende' (interested person) is the starting point. Some of the sub-criteria developed by the courts are applied differently or in a specific manner however for NGOs who represent a general interest. Art. 1:2 (3) GALA stipulates that the general and collective interests that legal persons specifically represent shall be considered to pertain to their interests. If a legal person wants to have standing with regard to any general or collective interest, this interest has to be reflected in the specific statutory objectives and in the actual activities of the interest group.[3] The requirement to be a legal person is easily met and in fact not seriously applied. In Dutch law, groups of persons do not have to register to be able to legally act. It is even sufficient if the legal person was established after the objected decision was taken and published. The most important requirement is that the task and collective or general interest the legal person wants to represent must be specific. Political parties serve an unspecific purpose and do not have standing at the administrative courts. Recently, there have been some tendencies to interpret this requirement more narrowly.[4] The criterion that the interest group has to undertake actual activities which serve the interest it is representing was not seriously applied in the past. The factual activities were more or less used to further interpret the statutory aims of the organisation. Some NGOs did nothing else than objecting to certain types of decisions. Since the 1st of October 2008, the Council of State has narrowed access to justice of (mainly environmental) NGOs by using the factual activities as a separate criterion.[5]

[3] ABRvS (Judicial Devision of the Council of State) 29 January 2014, ECLI:NL:RVS:2014:170 and ABRvS (Judicial Devision of the Council of State) 12 November 2014, ECLI:NL:RVS:2014:4099.

[4] ABRvS ((Judicial Devision of the Council of State) 28 October 2008, ECLI:NL:RVS:2008:BG1844 and ABRvS (Judicial Devision of the Council of State) 26 November 2008, ECLI:NL:RVS:2008:BG5311.

[5] ABRvS (Judicial Devision of the Council of State) 28 May 2008, *AB* 2008, 238 and ABRvS (Judicial Devision of the Council of State) 1 October 2008, *JB* 2008, 239.

2.3.2 Remedies

The only possible judgments that are given in administrative proceedings are: the court is not competent; the complaint is not admissible; the complaint is not justified; the complaint is (partly) justified (art. 8:70 GALA). If the complaint is found to be (partly) justified, the decision is quashed. The competent public authority may be ordered to take a new decision. The court can determine that the judgment replaces the decision. Basically, this is possible if the administrative authority does no longer have discretion how to decide (8:72 (3) (b) GALA). The court may also decide that the legal effects of the decision that has been quashed stay in place (art. 8:72 (3) (a) GALA). The judgment also contains a decision on compensation of court fees. If the court is about to conclude that the objected decision infringes the law, it may abate the proceeding and offer the administrative authority the possibility to correct the faults in the contested decision within a certain time limit (art. 8:51a and 8:51b GALA). If the administration agrees on that, the proceedings before the court continue after the authority has submitted the "repaired" decision.

2.3.3 Costs

Court fees do not relate to the 'value' of the case. In first instance administrative law cases, natural persons have to pay 167, - EUR (except for those that have a very limited income), and legal persons, including NGOs, 331, - EUR. In appeal, the fees are respectively 248, - EUR and 497, - EUR. Each party has to pay its own experts and other costs. In an administrative procedure, representation by an attorney is not required. Parties are free to choose to represent themselves or to receive help from any other person who represents them (article 8:24 (1) GALA). If an applicant is successful, the individual is awarded compensation by the losing public authority to cover the court fees (art. 8:74 GALA). Additionally, in principle the individual must also be compensated for other court costs (e.g. counsel's fee, experts, witnesses, etc.), but deviations are possible. These costs must be reasonable (art. 8:75 GALA). There are standards for these costs. If the actual costs of applicants are above these standards, these costs will not be compensated. If the applicant loses the case, he or she does not have to pay the expenses of the public authority or third parties (one way cost shifting). The only reason for awarding compensation to the winning public authority is, if the individual has abused his rights. Court orders which require compensating the public authority by the loosing applicant are very rare. Hence, the loser pays principle is not common to the Dutch administrative law. It is only the authority which has to pay the applicants costs if the authority looses, but not the other way round.

2.4 Civil courts

Since claiming damages on behalf of the environment is mostly based on a civil law regulation, it is important to mention the structure of the civil court. As said, the Netherlands is divided into 11 judicial districts. There is a civil law division in each district court. District court judgments in civil law cases may be appealed (under certain conditions). The appeal is brought before one of the four Courts of Appeal. In principle, appeal is ensured in each case in which a judgment has been reached in first instance. After appeal, the Supreme Court is accessible for a legal review of the judgment given by the Court of Appeal (*cassatie*, Article 78 Judiciary Act). The Supreme Court will not give a judgment on the facts, only on specific legal issues, as stipulated by Article 80 of the Judiciary Act.

In civil law cases, passiveness *(lijdelijkheid*) is the judge's stance with regard to the facts presented to him by the litigants. This means that the judge will only consider facts that are brought forward by the parties appearing in the case at hand, and will not actively search for other relevant facts.

2.4.1 Standing

In civil procedures, standing rules are different from the rules in administrative procedures. Basically, everyone who argues that an act or omission to act infringes his or her rights has access to the civil court. Access to justice is available to any natural person or legal person (minors and persons in ward only through proper legal representation). Representation by an attorney-at-law is required, except in cases heard by the Cantonal Court (Article 79 Code of Civil Procedure, Wetboek van Burgerlijke Rechtsvordering). At all times (legal) persons initiating a procedure before a civil court need to demonstrate their having a legal interest in the case at hand.

Civil Society Organisations may initiate civil proceedings. However, the law provides for special requirements (Article 3:305a, Civil Code), being:

• The organisation must be a foundation or association with complete legal capacity; this means that the organisation must be formally registered and must have bylaws;
• The claim should aim to protect similar interests of other persons;
• The interests at stake should be promoted according to its bylaws;
• The organisation must have tried sufficiently to negotiate with the respondent in order to settle the claim out of court.

Different from administrative law cases, in civil law cases representation by an attorney-at-law is required.

Procedures may be initiated by serving a writ of summons on the natural or legal person that is held responsible for an environmental violation (Article 111 and 45 Code of Civil Procedure). The writ of summons is drawn up by an attorney-at-law and served to the defendant by a bailiff.

2.4.2 Evidence

At the civil court a party who claims something has to provide full evidence for its claim. In principle, the party who claims that a legal consequence follows from a fact has to prove this fact unless a different burden of proof follows from a specific rule, or from equity (Article 150 Code of Civil Procedure). However, public facts, procedural facts, facts laid down in a contract, and facts - recognised - or not sufficiently disputed – by the other party do not have to be proven (Articles 149, 153 and 154 Code of Civil Procedure). In principle, any type of evidence is allowed in civil proceedings, unless the law provides differently. The judge is responsible for determining the value of the given evidence (Article 152 Code of Civil Procedure).

2.4.3 Costs

At the civil courts, costs and cost risks are significantly higher than in administrative proceedings. In first instance, ENGOs have to pay court fees between 613, - and 3.864, - EUR. In appeal, the fees are between 711, - and 5.160, - EUR. The amount charged depends on the value of the trial. Furthermore, the loser pays principle applies. Hence, the party who loses the case has to pay the costs of the total procedure, including the court fees, costs for experts etc. from the other party.[6] On top of that, applicants must be represented by a lawyer.

3. Legal situation concerning environmental damages[7]

There are two varieties of regulations that concern liability of environmental damage. The first category consists of all kind of public regulation, as we speak about liability towards the government for damage caused to the environment. The most important example of such a regulation is section 17.2 of the Environmental Management Act (hereafter: EMA, Wet milieubeheer) which is the implementation of the Environmental Liability Directive. The second category has a civil law character and will be explained in paragraph 3.2.

3.1 Public law regulations

The implementation of the Environmental Liability Directive in the Netherlands

The Environmental Liability Directive (ELD)[8] aims to ensure that business focuses on the environmental effects of their activities by encouraging operators to avoid causing environmental damage and to proactively remediate such damage rather than gambling on whether regulatory action will be taken once the damage occurs. The Netherlands implemented the ELD on 1 June 2008 by the entry into force of section 17.2 of the EMA. To increase clarity and accessibility, the legislator chose to introduce the ELD in one single regulation that applies to all the activities that are mentioned in annex 3 of the ELD.

The first step that needs to be taken is to stipulate whether a certain case is covered by section 17.2 EMA.

This section covers the following situations:

-There has to be damage to protected species, natural habitats, water or land,
-The damage has significant adverse effects,
-The damage is caused by an occupational activity, depending on the continuity, the nuisance, the surroundings, the scale of the activity etc.,
-The damage is caused

[6] An example: District Court Gelderland 29 April 2015, ECLI:NL:RBGEL:2015:2832.
[7] This part of the report is mainly based on M.G. Faure ea., Milieuaansprakelijkheid goed geregeld?, The Hague: Boom Juridische Uitgevers 2010.
[8] Directive 2004/35/EG of the European Parliament and the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, Pb EU 30.4.2004, L 143, p. 56-75.

- By one of the activities mentioned in annex III of the ELD, like the manufacturing, collection, release and transport of dangerous substances and the introduction of GMOs into the environment (strict liability; no need to proof fault, risicoaansprakelijkheid) or,
- To protected species or natural habitats, provided that the damage is due to negligence (fault-based liability, schuldaansprakelijkheid), according to article 17.7 EMA.

-The damage is not excluded in article 17.8 EMA. This is the case when the damage is the result of war acts, armed conflicts, hostilities, civil war or insurrection. When a natural phenomenon of exceptional, inevitable and irresistible character occurs, the damage is not covered by section 17.2 EMA. When the damage is covered by an international treaty, it is also excluded from this section. According to article 17.8, there is no liability when the damage is caused by acting in accordance with the licence of the Nature Protection Act (Natuurbeschermingswet 1998) or the Flora and Fauna act (Flora- en Faunawet).

Hence, damage to land and water that is caused by an activity that is not mentioned in annex III of the ELD is not covered by section 17.2 EMA. Furthermore, to define the scope of section 17.2, knowledge and understanding of the range of annex III is required, since this annex refers to several other European Directives.

The operator, who operates or controls the occupational activity, is liable for the environmental damage and for the costs for the remedial measures (art. 17.6 EMA). If the competent authority has to take preventive or remedial measures itself, they are able to recover these costs from the operator. Individuals and ENGOs are not able to claim damage from the operator, as only the competent authority has this competence (article17.6 EMA). Affected natural or legal persons and ENGOs have the right to request the competent authority to take remedial action if they deem it necessary (article 17.15 EMA). The Dutch legislator decided to designate multiple administrative authorities as competent authorities. According to article 17.9 EMA, in the case the damage is caused due to the exploitation of an installation, the answer of the question which administrative authority is competent depends on the category of this installation. In case of damage that is caused outside the activities of an installation, the competent authority is determined on the base of other regulations than the EMA. This can create a situation wherein there are more competent authorities for one case. Therefore article 17.9 EMA stipulates that the concerned administrative authorities are obliged to deliberate with each other.

Relevance for ENGOs

For ENGOs, the practical relevance of section 17.2 EMA is very limited. Firstly, ENGOs are not able to claim damage from the operator. The only competence they have is to request the competent authority to take remedial action if they deem it necessary. Secondly, since the scope of section 17.2 EMA is particularly limited, it is imaginable that a lot of cases that cause damage to the environment fall outside the scope of this section. Furthermore, section 17.2 EMA does not provide the possibility to oblige a financial insurance for the operator. There is no case-law available about section 17.2 EMA, which is a (strong) indication that this section is not very useful in practice.

A legal basis for recovering of costs can also be found in other public law regulations, like article 75 Land Protection Act (LPA, Wet bodemscherming). Different from section 17.2 EMA, article 16 LPA provides the possibility to oblige a financial insurance. Such an obligation is missing in section 17.2

of the EMA. According to all these public law provisions, only the administrative authorities are competent to claim for the damage. Hence, there is no opportunity to claim damage for individuals and ENGOs.

Article 8:88 GALA

Different from the public law provisions on state liability in special areas of law discussed above, there is one article in the General Administrative Law Act (GALA) that provides – at least in theory - the opportunity for ENGOs to claim for damages. Article 8:88 GALA stipulates that the district court can order the administrative authority to compensate an applicant for the damage suffered or for the damage that is going to be suffered if the damage occurs due to an unlawful decision or if the damage occurs due to an unlawful actual activity which is connected with an unlawful decision. When the judge has quashed a decision, it is automatically deemed to have been unlawful. The damage occurred has to be a direct consequence of the unlawful decision.

The administrative judge is only competent if the damage to the environment amounts to less than 25.000,- EUR. However, next to the administrative court, the civil court is also competent to hear such a claim. Hence, the claimant may choose where he or she wants to raise the claim. When the damage amounts to more than 25.000,- EUR, only the civil court is competent (article 8:89 GALA).

When an administrative judge has to decide on such a claim it will stay close to the (interpretation of the) civil law articles on (state) liability (as will be discussed in paragraph 3.2). So in the end, there will not be so much difference between the case-law from the civil court and the administrative court. Article 8:88 GALA does not grant ENGOs more substantive rights than private law does.

The possibility for ENGOs to claim environmental damage on the basis of article 8:88 GALA may be rather theoretical as environmental damage will not often occur as a direct consequence of an unlawful decision of an administrative authority. There is no case-law available yet and we do not expect that there will be many cases in the future on this legal basis. Similar to article 3:305a Civil Code we suppose that article 8:88 GALA could – in theory - offer the possibility to claim or to receive financial compensation for environmental damage (see paragraph 3.3).

In conclusion, article 8:88 GALA creates the possibility for an ENGO to lodge a claim at the administrative court to compensate any damage which has occurred due to an unlawful decision if the damage is not more than 25.000,- EUR. In practice however, the relevance of this possibility for ENGOs will be quite limited because of the strict requirement that only damage caused by an unlawful decision can be claimed.

3.2 Liability on the basis of civil law (private law claims)

Civil law liability finds its basis in the Dutch Civil Code (Burgerlijk Wetboek) and can be challenged through tort proceedings. Article 6:162 Civil Code is the general tort clause in the Netherlands.

3.2.1. Article 6:162 Civil Code (fault-based liability)

The general tort proceedings are based on article 6:162 Civil Code. The requirements mentioned in paragraph 1 of this article are:

-there has to be a tortious act (unlawful act)
-which can be attributed to the 'perpetrator'
- damage must have occurred
- a causal link between the tortious act and the damage
- the violated standard of the behaviour (the violated legal norm) has to intend to offer protection against damage as suffered by the injured person (relativiteitsvereiste, article 6:163 Civil Code).

According to paragraph 2 of this article 'an unlawful activity' is:

'As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.'

The first category is 'a violation of someone else's right' and this category could be relevant for violations of environmental law. Examples are an infringement of property when a person's soil is polluted, caused by an adjacent factory or damage to crops due to the pollution of the surface water. For approving such an infringement it is necessary that there must be some form of negligence. The second category contains of 'an act or omission violating of a duty imposed by law'. Of course this is of great importance for environmental law, since the existence of the multiple written environmental rules. Acting against such a legal duty is regarded as unlawful towards the people who are protected by these regulations, like ENGOs and people living in that area.[9] For ENGOs, there is not much case-law available on this topic. The case-law that is available, will be described in paragraph 3.3.

The second category covers also the requirements added to a licence. When these requirements are violated, the perpetrator acts against a legal duty.[10] In some cases, even if the licence regulations are met, the court still judges that there is an unlawful act.[11] The third category concerns violating a rule of unwritten law has to be regarded as proper social conduct. This is the so-called 'standard of care' (zorgvuldigheidsnorm or standard for carefulness). This category is specified by case law and is very casuistic. However, according to case law it is an important category, because there are many examples wherein the acting of individuals and companies is qualified as unlawful on the base of a violating of the standard of care. The court even developed a special standard of care about eliminating polluted land.[12]

It is often hard to determine who caused the damage to the environment. When the area around a chemical factory is polluted with substances which are used during the operation procedure, it is plausible that the operator of the factory is the causer. But it is impossible to be for 100% sure. Therefore case law has developed a system in which a suspected perpetrator has the opportunity to prove that someone else was responsible for the substances which have contaminated the environment. In fact, it regularly appears that environmental damage is caused by several perpetrators.

[9] District Court Rotterdam 15 March 1991, *NJ* 1992/91.
[10] Supreme Court 9 January 1981, *NJ* 1981, 227.
[11] Supreme Court 23 September 1988, *RvdW* 1988, 150.
[12] Supreme Court 14 June 2002, *NJ* 2004, 127.

Think of factories losing polluted water on a river and several companies dumping waste on a dump. In general, the rule is that every single perpetrator is only liable for his share.

One of the requirements of article 6:162 Civil Code is the existence of damage. When there is only ecological damage, it is hard to calculate this damage. The courts found a solution for this problem and have specified that not the damage to nature can be claimed, but that it is possible to claim for the costs that were made to reduce the damage or to recover the polluted area.[13]

Next to the general article 6:162 Civil Code, there are some specific articles which contain a form of strict liability, so when these articles are applicable, it is not necessary that the behaviour that caused the damage can be attributed to the perpetrator. When the damage occurs, they are liable, regardless of whether it is their fault.

3.2.2. Forms of strict liability

Liability for dangerous substances

Article 6:175 Civil Code applies that a person who in the course of his professional practice or business uses a substance or keeps it under control, while it is known that this substance has such characteristics that it causes a special danger of a serious nature for persons or property, is liable when this potential danger is realized. Everyone who works with these substances is liable; the producer, the transporter, the keeper and the user of them. When the damage consists of pollution of the air, the water or the land, then the person who brought them in the environment is liable.

Liability for the dump holder and operator of a borehole

Due to article 6:176 Civil Code, the operator or owner of a waste site is liable for the damage which arises before or after the closing of the waste site, resulting from pollution of air, water or soil with substances that were dumped there before the closing. The people who dumped the materials that caused the damage cannot be held liable, as the legislator chose to transport this liability to the owner or operator of the dumping ground. If, after the moment on which the damage has become known, the waste site is taken over by another operator, then the liability continues to rest on the person who was the operator at the moment on which the damage became known. The same system applies to the operator of a mining work when an effusion of minerals or movements of the soil or underground occurs, according to article 6:177 Civil Code.

Liability for dangerous substances during transportation

There is also a specific regulation about liability for dangerous substances during transportation, according to section 8 of the Civil Code. This section covers the liability for dangerous substances which are on board of a sea ship, a barge, a vehicle or a railway vehicle. Notwithstanding the general system of liability for dangerous substances in article 6:175 Civil Code, section 8 is a closed system of liability. The section is only applicable when the specific substance is enumerated in a delegated regulation (Algemene Maatregel van Bestuur). Section 8 covers a form of strict liability, so the

[13] District Court Rotterdam 15 March 1991, *NJ* 1992/91.

owners of the sea ship or the barge and the operator of the vehicle are liable, regardless whether they are to blame for this damage. When they are obliged to pay damages, this amount will also cover the damage caused to the environment like the sea, the surface water or the land.

To determine which costs have to be compensated, article 6:184 Civil Code stipulates that the 'reasonable costs' include the costs for the measures which have prevented or lowered the more serious consequences.

Exceptions

Article 6:178 Civil Code contains some exceptions from the rules pointed out in article 6:175, 6:176 and 6:177. No liability under Articles 6:175, 6:176 or 6:177 exists if:
a. the damage is caused as a result of an armed conflict, civil war, insurrection, internal riot, rebellion or mutiny;
b. the damage is caused by a force of nature of exceptional, inevitable and compelling characteristics;
c. the damage is caused exclusively due to the observance of a command or mandatory regulation of the government;
d. the damage is caused due to an operation or activity with a substance as meant in Article 6:175 in the interest of the injured person himself, where it was reasonable to expose him to the danger of damage;
e. the damage is caused exclusively by an operation, activity or omission of a third person, performed with the intention to cause damage;
f. it concerns nuisance, pollution or another impact as far as the persons who are held liable for these effects would not have been liable under the previous Section, even if they would have deliberately caused this nuisance, pollution or other impact.

3.3 Possibilities for ENGOs to claim damage

All the options mentioned above can be used by ENGOs when they fulfill the requirements mentioned in article 3:305a Civl Code. In article 3:305a Civil Code it is stipulated that a foundation or an association with full legal capacity, that, according to its articles of association, has the objection to protect specific interests, may bring to court a legal claim that intents to protect similar interest of other persons. The Supreme Court explains this by using the requirement that the interests which are at stake must be suitable for pooling. Hence, it must be possible or expected that the claim of the NGO substitutes a range of claims of private parties. This requirement applies because effective en efficient legal protection must be guaranteed.[14] The legislator had the intention that a collective action prevents potential perpetrators of violating the law, as for collective groups it is less onerous to go to court.[15]

This article covers both actions from groups with collective interests as actions from legal persons who represent a general interest. ENGOs fall under the last mentioned category and are able to litigate on the basis of article 3:305a Civil Code, as they represent environmental interests.[16] It is also possible

[14] Supreme Court 26 February 2010, *NJ* 2011/473.
[15] Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1991/92, 22486, 3, p. 2.
[16] Supreme Court 18 December 1992, *NJ* 1994/139.

for an ENGO to have standing when it represents the interest of preventing climate change.[17] The legislator considers this interest as an interest of a substantial group of citizens.[18] Foreign ENGOs do also have the opportunity to go to the Dutch civil court. Furthermore, it is possible for Dutch ENGOs to claim when the harmful activities took place abroad led by Dutch companies. In order for this, the ENGO must mention in its statutory objectives that it stands up for the environment in the affected area.[19] An important case to illustrate this is mentioned below. In this case, the 'Vereniging Milieudefensie' (a Dutch ENGO) went to court to claim restitution for damages caused by oil leaks in Nigeria, wherefore Shell was held responsible.[20] The Dutch court decided that the ENGO had a collective interest, since the whole environment was polluted by the oil leak, people living in the neighbourhood had less income due to the oil leak and it could be more difficult for each individual to go to court. Interesting fact is that the court requires that the ENGO performs factual activities, while this requirement is not mentioned in article 3:305a Civil Code. Perhaps, the civil court would reach out to the approach and requirements mentioned in article 1:2 (3) GALA. However, the judge determined that campaigning against the pollution of the environment in Nigeria, fulfils the requirement of factual activities.

Paragraph 2 of article 3:305a Civil Code stipulates that a legal person filling a claim is inadmissible if he, in the given circumstances, has made insufficient attempts to reach a settlement over its claim through consultations with the defendant. If a legal person was founded just before the claim was brought to court, it cannot be admissible.[21]

Reading article 3:305a, third paragraph, Civil Code, it does not seem to be possible to claim compensation in money. However, the district court of Rotterdam has determined that ENGOs are able to claim for the costs they made to clean up the environment. This was emphasized in a case filed by the Dutch ENGO for the Protection of Birds. In this case, the ENGO for the Protection of Birds litigated against the ship owner of the ship Borcea, which caused huge oil pollution before the shore of the Netherlands.[22] The ENGO claimed for the costs it had to make because it had to cleanse, take care of and shelter the smudged birds. The court considered:
'Due to the statutory objectives of the ENGO, the general interest (of protection seabirds) has to be regarded as an interest of the ENGO itself and since this interest is affected, it receives compensation for damage it has suffered when acting to limit the consequences of the pollution.'[23]

Hence, when organisations take necessary measures to prevent further damage to the environment or its recovery, it is still possible to receive compensation for this.[24] The court also has the competence to publish the judgment, the so-called 'naming and shaming' (article 3:305a (3) Civil Code). Beside, an ENGO is able to claim for a prohibition or for a commandment on the base of article 3:305a Civil Code. Unfortunately, there is no case-law that provides some examples of this competence of the court. In literature, it is mentioned that the court can oblige a perpetrator to stop the polluting

[17] Supreme Court 8 June 2007, ECLI:NL:HR:2007:BA2075, conclusion.
[18] Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1991/92, 22486, 3, p. 22.
[19] District Court Leeuwarden 25 January 2010, *JM* 2010/80.
[20] District Court The Hague *14 September 2011, LJN* BU 3529 *and LJN* BU3538.
[21] District Court Arnhem 10 October 2007, *LJN* 5975.
[22] District Court Rotterdam 15 March 1991, *NJ* 1992/91.
[23] District Court Rotterdam 15 March 1991, *NJ* 1992/91.
[24] Proceedings of the Second Chamber of States General, *Kamerstukken II,* 1991/92, 22486, nr. 3, p. 21.

activities, or that the court is able to require that the perpetrator adapt their activities so that the consequences for the environment are less.[25]

The options of a declaratory judgement, a prohibition or a commandment are only possible when there is some form of liability on the base of the articles mentioned in paragraph 3.2.

Court fees and other costs

Claiming damages on behalf of the environment is mostly based on a civil law regulation. At the civil courts, the court fees and the cost risks for ENGOs are high, at least if compared with Dutch administrative courts. In first instance, ENGOs have to pay court fees between 613, - and 3.864, - EUR. The amount charged depends on the value of the trial. Since representation by an attorney is required, the total costs can be high. As an example, in the famous and wide-spread Urgenda case, the costs of the attorney were estimated on 12.840,- EUR. Furthermore, in civil procedure, different from administrative law suits, the loser pays principle applies. Hence, the party who loses the case has to pay the costs of the total procedure, including the court fees, costs for experts etc. from the other party. We contacted several (relatively small ENGOs) and they explained that they do not have the money to go to the civil court in case they would like to do so. Their resources are limited so they have to make choices. Usually they decide to use the administrative court procedures to get decisions quashed. However, as the Urgenda case and some famous other cases demonstrate (amongst which cases where restitution of environmental damage was claimed), the big ENGOs, like Stichting Natuur en Milieu and Greenpeace, sometimes file civil court cases if they think that the situation urges to do so. Nevertheless, even for the big ENGOs, it is without doubt that court fees and cost risks prevent to file civil court cases on a regular base.

Compared to that, the court fees in administrative court cases (which are used by ENGOs quite often), are much lower. For example, in first instance administrative law cases ENGOs have to pay 331,- EUR. In appeal the court fee is 497,- EUR for ENGOs. In addition to the lower court fees, the risks are much lower since representation by an attorney is not required and the principle of 'one way cost shifting' is applied. If the authority loses the case, it has to reimburse the costs of the claiming party (at least to a certain extent). If the applicant loses the case, he is not obliged to reimburse the costs of the authority. However, as described in the previous chapters, one has to notice that the possibilities for ENGOs to start proceedings before administrative courts in order to claim costs for cleaning up the environment are very limited.

4. Conclusion

4.1 The public law regime

The effectiveness of section 17.2 EMA

Since section 17.2 EMA is only applicable on damage caused by activities mentioned in annex III of the ELD or on damage caused to protected species or natural habitats, significant adverse effects must be proven and there is no duty for the operators to obtain a financial3, it seems that the incentive to prevent pollution is very limited. Therefore, the effectiveness of this section is rather confined. In literature, it is recommended that operators should be obliged to take out an insurance. Since the

[25] M.G. Faure ea., Milieuaansprakelijkheid goed geregeld?, The Hague: Boom Juridische Uitgevers 2010, p. 134.

threshold of 'significant adverse effects' is high, lots of cases are not covered by section 17.2 EMA. On top of that, it is rather difficult for the competent authorities to determine a) if they are competent and b) whether the harmful activities fall under the scope of annex III of the ELD. ENGOs are not able to claim damage from the operator. The only competence they have is to request the competent authority to take remedial action if they deem it necessary. There is no case-law available about section 17.2 EMA, so this is a strong indication that this regulation does not work in practice.

4.2 The private law regime

Effectiveness of the civil law regime

According to Dutch literature, the civil rules about liability for environmental damage don't provide a real incentive to prevent and recover this damage.[26] There are several reasons for this statement. At first, there are often multiple perpetrators which are not joint and several liable. Another factor in this is the fact that it often takes a very long time for the damage, caused by the pollution, is revealed (the so-called long tail risk). Then it is quite difficult to find out who actually is responsible for the damage. When the damage is not caused to an individual victim but to a collective good, only article 3:305a Civil Code can be helpful.

However, this article does not fulfil the need to claim money for the damage that is caused to the environment. The possibilities which article 3:305a Civil Code reflects are claiming damage for the costs that an ENGO made for stopping or preventing the damage caused to nature. When there is only ecological damage, no individual person is a victim and an ENGO has not spent any money, the only solution they have is to claim for a declaratory judgment, a prohibition or a commandment, according to scholars. This is rather a theoretical option, since no examples in case-law are available yet. I contacted several dutch ENGOs and most of them do not have the knowledge about all this, or do not have enough employees in order to claim damage or ask for a prohibition. They usually focus on preventing the damage before a licence has been granted, or go in appeal against a licence. The main judicial procedure they take advantage of is the administrative procedure, rather than the civil procedure, because there the costs and the risks are higher.

The requirement that the legal person has to have full legal capacity may disadvantage local and regional ENGOs. In order to form a legal person with full legal capacity, it is necessary that the legal person comes to existence by a deed signed by a notary. This will cost, depending on the notary, between the 500,- and 850,- EUR. For many local ENGOs, this is a large amount of money and it can be a serious threshold.

The most important shortcoming in the effectiveness of the civil procedure is the fact that there is no duty to obtain financial insurance for the operators. The recommendations in literature to improve the civil law on this topic are the same as for the public regulations.[27] It should be obliged for operators to take out an insurance to cover the costs if they are made.

[26] M.G. Faure ea., Milieuaansprakelijkheid goed geregeld?, The Hague: Boom Juridische Uitgevers 2010, p. 141.
[27] M.G. Faure ea., Milieuaansprakelijkheid goed geregeld?, The Hague: Boom Juridische Uitgevers 2010.

Another great disadvantage is the costs and especially the risks of costs in these civil procedures. Not only the court fees are higher in civil procedures, when the ENGO loses the case, they have to pay also the costs that are made by the other party, including the costs for experts etc.

Concluding, it seems that claiming damage on behalf of the environment by ENGOs is rather difficult, since the public regulations only provide this competence to administrative authorities and civil law excludes the option to claim damage, unless the ENGO has made investments itself to recover the environment. It is not only rather difficult, it is also quite uncommon that an ENGO takes advantage of article 3:305a Civil Code. There are only a few judgments available (which are mentioned above), so the practical relevance is quite limited. Therefore it cannot be said that the legal system in the Netherlands leads to efficient and effective legal protection.