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ECE LIABILITY REGIME: RELATIONSHIP WITH OTHER LEGAL REGIMES

Working paper submitted by the Delegation of Germany

Introduction

We feel that there was consensus at the Joint Special Session firstly that the liability regime to be developed should fill gaps between existing liability regimes and other relevant laws and should not create overlaps which could lead to confusion or even conflicts with existing legislation; secondly the ECE liability regime aims at a high degree of precision. Both conflicts of laws and lack of precision cause substantial implementation and application problems and should be avoided. This paper endeavors to raise some possible consequences of this approach for the drafting of the

[1] This working paper is reproduced in the form as received by the secretariat. Due to late submission, the document is issued as a working paper. It is being distributed to the focal points under both Conventions prior to the meeting, and to the participants at the meeting on 21-23 November 2001.

ECE liability regime. Due to the early stage of the discussion, especially due to the unclear scope of application, some remarks are meant more as questions than as answers.

Further we would like to draw attention to the fact that as a Member of the European Community we are especially aware of the relationship between the ECE liability regime and the planned EC directive on liability (as well as possibly other EC legislation). This relationship will need further consideration later on.

1. Relationship with the Convention on the Protection and Use of Transboundary Water Courses and International Lakes (Water Convention) and with the Convention on the Transboundary Effects of Industrial Accidents (TEIA)

The simultaneous links of the protocol to the two different conventions implies special drafting challenges.

Protocols usually contain provisions such as: "The definitions of terms contained in the Convention apply to the Protocol, unless …" and "…, the provisions of the Convention relating to its Protocols shall apply to the Protocol" (see Article 2 para. 1, and Article 22 of the Basel Protocol). But the definitions and other general provisions of the two Conventions are, in parts, different. For example:

- One of the key concepts of the Water Convention is that of a transboundary impact, meaning an adverse effect (Article 1, para. 2). The parallel but not identical provision in the TEIA deals with transboundary effects meaning adverse consequences (Article 1 lit. c and d). There is a close link between the concepts of effect/impact and damage. But how should it be worded? Should it be "effect" or "impact"? And would "effect" be within the meaning of TEIA or within the meaning of the Water Convention?

- Another examples of a different terminology is the term "environment" (Article 3 para. 1 sentence 1 of the Accident Convention: human beings <u>and</u> the environment; Article 1 para. 2 of the Water Convention: environment <u>include</u> … human health); in the first case environmental damage would exclude damage to human health as in most liability regimes, in the second case damage to human health would be part of the concept of environmental damage.

- Thirdly "hazardous substances" within the meaning of Annex I of TEIA are not identical with "hazardous substances" within the meaning of the more general provision in Article 1 para. 6 of the Water Convention. As an activity involving hazardous substances will (probably) trigger the liability, it is especially crucial to have clarity as regards this term.

- Furthermore, the provisions on dispute settlement might be different as declarations by some states under Article 22 para. 2 of the Water Convention might differ from those under Article 21 para. 2 of the TEIA.

This list is by no means exhaustive. Thus, before deciding on what definitions and other provisions should be taken from which Convention, we need a more complete understanding of the differences and parallels between the Conventions.

2. Relationship with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

The victim suffering damage because of an industrial accident might need information to prove his case and some of this information might be kept by the authority in charge of monitoring the industrial facility concerned, or by the authority monitoring the damage (impacts/effects). The victim will have few legal problems to get this information if the state of the authority is a Party to the Aarhus Convention. Should that not be the case, the victim might encounter difficulties in obtaining the information.

Thus an article along the following lines should be included in the ECE liability regime:

> *Access to Information and Access to Justice according to*
>
> Article 4, and Article 9 para. 1 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus on 25 June 1998, shall be applied mutatis mutandis.

3. Rules Concerning Conflicts between International Liability Agreements

As it was understood that the ECE Liability Protocol should only fill gaps, and as the rules on conflict of international law are not always very clear, it might be useful to have an explicit provision, similar to Article 11 of the Basel Protocol, such as

> *Rules Concerning Conflicts between International Liability Agreements*
>
> Whenever the provisions of the Protocol and the provision of a bilateral, multilateral or regional agreement apply to liability and compensation for damage caused by an accident and by the transboundary pollution of a watercourse or lake, the Protocol shall not apply provided the other agreement is in force for the Parties concerned and has been opened for signature when the Protocol was opened for signature, even if the agreement was amended afterwards.

4. Relationship with Existing Provisions on State Responsibility

State responsibility is primarily ruled by customary international law. The International Law Commission drafted a codification of these rules that we agree with. Thus, further provisions in this Protocol are not necessary (apart from the fact that we are mandated to draft an instrument on civil liability). However, for the sake of clarity a provision such as Article 16 of the Basel Protocol might be considered:

> *State Responsibility*
>
> The Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.

5. Relationship with Domestic Liability Regimes

Having inter alia an Environmental Liability Act, an unofficial translation of which is attached for information, Germany is rather sensitive about possibly conflicting provisions. Therefore we

feel it might be very useful to have an explicit provision on conflicts with domestic legislation as well, for example one which reads similar to Article 3 para. 7 (a) of the Basel Protocol:

Conflicts with national liability and compensation legislation

This Protocol shall not apply if there is a national liability and compensation regime, which is in force and is applicable to the damage, provided
(a) it fully meets, or exceeds the objectives of the Protocol by providing a high level of protection to persons who have suffered damage, and
(b) the Party has previously notified the Depositary of the non-application of the Protocol.

6. Agreements Relating to Transboundary Procedure and Law Enforcement

It is the aim of the Protocol not to give the victim merely a claim, but actual money for preventive measures and measures of reinstatement. Therefore it is not sufficient to provide for the claim. As not all defendants pay voluntarily, it is of almost equal importance to ensure law enforcement which in transboundary cases is especially difficult. Subject to special provisions the courts are not compelled under international law to serve a writ or obtain evidence abroad or enforce the judgment of a foreign court.

There are quite a number of international agreements on transboundary civil procedure and enforcement in force (or at least under negotiation) to this effect, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague on the 15th November 1965, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, done at the Hague on the 18th March 1970, or the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988. Therefore before drafting any new provisions in the present liability regime it should be evaluated whether the existing/already planned treaties on

- jurisdiction
- service of official documents
- obtaining evidence abroad
- mutual recognition and enforcement of judgments

will apply to the claims established under the future ECE protocol.
Depending on how the compensation for environmental damage is drafted, a problem might arise as some cases might be administrative cases, rather than civil cases in the strict sense. Parallel considerations on administrative agreements might then be reasonable.

If/insofar as the claims established under the Protocol were covered by existing/planned law enforcement agreements the next step would be to check whether their provisions are adequate for liability cases under consideration now, i.e. whether the claims under the Protocol could be reasonably well enforced through the general provisions or whether special rules might be more necessary.

In any event, we would very much welcome the comments of the Hague Conference on Private International Law, not least as it has already also done some work on environmental liability.