

**THE KIEV PROTOCOL ON CIVIL LIABILITY AND COMPENSATION FOR DAMAGE
CAUSED BY THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS ON
TRANSBOUNDARY WATERS –
ACHIEVEMENTS AND PROSPECTS**

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Civil liability in connection with pollution problems having a transboundary impact is a relatively new concept which has, as of late, been adopted in an increasing number of international instruments. This is, however, not in any way signifying that it provides an easy solution to such problems. In fact, it would be rare to see any other case where the well-known rift between upstream and downstream countries is more obvious or more acute than in this particular one.

Notwithstanding the difficulties, however, civil liability could not be ignored as a solution to the problems I just referred, as it constitutes a straightforward application of the already universally recognized "the polluter pays" principle.

It goes without saying that this recent flourishing of the civil liability solution in no way affects the responsibility of states in such matters. The latter has been recently codified in a Draft produced by the International Law Commission, which however, does not deal with the specific question of liability on environmental matters which still remains on the agenda of the ILC.

On a regional level, the most recent instrument which adopts civil liability as a legal response to environmental pollution is the Lugano Convention of 1994, elaborated in the context of the Council of Europe and still not in force due to the fact that the minimum number of ratifications has not been reached. This Convention is wide in scope as it covers any kind of pollution from whatever source which has a transboundary effect. Other recent instruments on environmental liability are the Basel Protocol of 1999 on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal and also the EU Directive 2004/35 of 21.04.2004, on environmental liability with regard to the prevention and remedying of environmental damage.

The Economic Commission for Europe began thinking about civil liability arising out of pollution due to industrial accidents after the painful Baia Mare incident in the Danube in January 2000. The final decision, which was taken by the Joint Meeting of the Parties of the two relevant ECE

Conventions, i.e. the 1992 Convention on the protection and use of transboundary waters and international lakes and the Convention on Industrial Accidents of the same year, was not an easy one. This was mainly due to the fact that there were several States which thought that there was no real need for a civil liability instrument from the moment that there already existed an extremely satisfactory one on the European level, namely the 1994 Lugano Convention. That Convention was not, however, as I already mentioned, yet in force, and, even more, would not likely enter into force in the future or at all. A research conducted by the ECE showed that the main reason for the reluctance of States to ratify the Lugano Convention lay in the fact that it was too general in nature, covering all sorts of damage and, more particularly, environmental damage in general. It was therefore clear that any new instrument should, if the unfortunate precedent of the Lugano Convention were to be avoided, be as specific and focused as possible.

This was indeed the solution that found wide support in the Joint Meeting of the Parties to the two Conventions and was finally adopted by States on a consensual basis after almost one and a half year of intense negotiations in the context of a special working group set up for this purpose. The Protocol therefore, which is connected to both the Conventions I mentioned a while ago, refers specifically and restrictively to civil liability which arises from the adverse effects which industrial accidents may have on transboundary waters.

Let us now give you an outline of the content of the Protocol and the basic questions it is dealing with.

A) Facts giving rise to liability

The first of these questions refers to the facts which give rise to liability. The Protocol provides for the strict liability of the operator. Article 4 of the Protocol establishes the liability of the operator for damage caused by an industrial accident in the course of a hazardous activity, which means that damage due to chronic pollution is not covered by the Protocol. The Protocol contains definitions of the terms "industrial accident" and "hazardous activity". In respect of this last definition, Annex I to the Protocol lists the threshold quantities of hazardous substances, the presence or excess of which is required for an activity to be considered hazardous.

Once the fact which gives rise to liability occurs, no fault is required to be proven for the liability to be given rise to, which qualifies it as strict liability. The operator is indeed liable even if he proves that he has shown due diligence on the matter. He can be exonerated only in cases of force majeure which are specifically defined, such as armed conflict, a natural phenomenon of inescapable consequences, or if the specific conduct was the result of compliance with a compulsory measure of a

public authority. Similarly, the liability of the operator is excluded if the damage was due wholly to the wrongful and intentional conduct of a third party. If, on the other hand, the injured person has by his or her own fault contributed to the damage, the compensation may be reduced.

The fact that the Protocol deals exclusively with the establishment of strict liability for the operator does not mean that liability based on fault is excluded --the Protocol makes that clear in article 5. It is, however, left to the domestic legislation of each State party to the Protocol.

B) Damage

Article 2 para. 2 gives a definition of "damage." It includes the classical cases of loss of life or personal injury as well as loss or damage to property. It also includes environmental damage in the sense of costs of measures of reinstatement of the impaired transboundary waters and the cost of response measures. The former are the measures which aim to reinstate or restore damaged or destroyed components of transboundary waters to their original condition or --and this is a relevant novelty--to introduce, where appropriate, the equivalent of these components into the transboundary waters. Response measures, on the other hand, are those which aim at preventing, minimizing or mitigating possible loss or damage or arranging for environmental clean-up.

Damage also includes loss of income. A prolonged discussion took place in connection with the latitude of such loss which could potentially extend to an unjustified measure. A balance between opposing views was finally struck by the introduction of the notion of "legally protected interest" in any economic use of the impaired transboundary waters. The notion remains, however, largely undefined, and it will be necessary to investigate into the domestic legislation of States to identify such an interest which could consist, for example, in an administrative license or concession or other similar facility.

C) Limits of liability

The strict liability of the operator is limited to certain amounts which are specified in Annex II of the Protocol. No such limits exist in respect of fault-based liability. Claims for compensation must be brought within 3 years from the date that the claimant knew or ought reasonably to have known of the damage and of the person liable. In any case, claims cannot be brought after 15 years from the date of the industrial accident (art. 10).

Of paramount importance is article 11 of the Protocol which secures the effective application of the Protocol in case the operator is unable to cover his strict liability obligations deriving from the

Protocol. Indeed, the operator is obliged to be insured for amounts not less than the minimum limits for financial securities which are specified in Annex II.

D)Procedural rules

Claims for compensation according to the Protocol may be brought before the courts of a Party where the accident occurred, or the damage was suffered or the defendant has his or her habitual residence or, if the defendant is a company or other legal person, where it has its principal place of business, its statutory seat or central administration (art. 13 para. 1). Parties to a dispute may, however, agree to submit such dispute to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for arbitration of disputes relating to natural resources and/or the environment. It is worth noting that it is the first time that these Rules which provide access for private persons to the PCA are mentioned in a conventional text.

Mention should also be made of the fact that the Protocol contains a disconnection clause in favor of the rules of the European Community. Parties to the Community will therefore apply, in their mutual relations, the rules of the Community rather than the Protocol as far as jurisdiction, recognition and enforcement of judgments are concerned.

As regards settlement of disputes between States Parties to the Protocol, they range from negotiations to any other means that the Parties may agree on. At the time of signature or ratification, accession etc. a Party may declare that it accepts as against any other Party accepting the same obligation, to submit any such dispute to either the International Court of Justice or to arbitration in accordance with a procedure set out in Annex II of the Protocol.

?) ? he Protocol and the European Union environmental liability directive

The directive 2004/35 of the European Parliament and the Council on environmental liability with regard to the prevention and remedying of environmental damage, has been adopted recently, after the conclusion of the Protocol. Their respective scope of application *rationae materiae* is not the same, although they partially overlap. They both cover environmental damage, either in a generic way as the Directive or under the heading of response measures and measures of reinstatement as in the case of the Protocol. The Directive does not address only transboundary damage resulting from an industrial accident as the Protocol does, and provides not only for the compensation of damage, but also for its prevention. In this sense, the scope of the Directive is broader than the relevant scope of the Protocol in the field of environmental damage.

As far as other types of damage are concerned, the Directive, contrary to the Protocol, simply does not cover them. In paragraph 14 of its Preamble it is clearly stated that the Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damage. So, as far as “traditional” damage is concerned, only the Protocol can be of help to persons and entities who might want to seek compensation.

Both the Directive and the Protocol implement the “polluter pays principle”, by holding the operator financially liable for the damage occurred. The Directive however, establishes a novel system of public liability, whereby the operator has to adopt the necessary remedial measures, while the public authorities can recover from him the cost of the remedial measures they might have taken by themselves. Thus, the operator is not liable towards persons who have suffered damage as in the case of civil liability regimes and, article 3 par. 3 of the Directive makes it clear that this text does not give private parties a right of recourse against the operator.

In our personal view, the mechanisms of the Protocol and of the Directive respectively could coexist, as they regulate different kinds of claims against the operator, the first one being a classic civil liability regime and the second establishing a public law relationship between the authorities and the operator. Paragraph 12 of the Preamble to the Directive clearly states that Member States should be able to remain Parties to international agreements dealing with civil liability and also that other Member States should not lose their freedom to become parties to these agreements. Therefore, we think EU Member States should seriously consider, jointly with the EU Commission as it is a mixed competence agreement, to become Parties to the Protocol as soon as possible. Each one of these States as well as the European Union and the wider community of the States of the region have only to gain from such a move.

Conclusion

It is our firm belief that this Protocol marks an important milestone in the field of civil liability for the pollution of international waters from industrial accidents. Hopefully, not only will it serve as an important instrument in the hands of the weaker party, i.e., the victims of such pollution which, as we all very well know and have seen, can take catastrophic proportions, but also, and perhaps more importantly, as a powerful deterrent for the avoidance of such disasters. The fact that, despite its significant novelties and the «progressive» solutions that it adopts, its negotiation process, although complex and difficult, has been concluded in record time (hardly one and a half year) proves, in my

view, that the time was ripe to take such a step. The Protocol has already been signed by 24 States and has already been ratified by one State. I hope that this clear evidence of good will on the part of States will be verified by the promptness of other States also to become Party to it as soon as possible. The Madrid Declaration adopted by the Meeting of the Parties to the Convention on the protection and use of transboundary watercourses and international lakes, welcomed the signature of the Protocol and invited States to consider taking the necessary steps to become Parties to it. I think our Meeting should reiterate this invitation, giving thus a strong signal of our commitment to support the Protocol.

The work plan of the Water Convention for the years 2004-2006 entrusted the Working Group on integrated water resources management to provide the States with further information on the provisions of the Protocol and guidance for its implementation. Thereafter, the WG will assess the progress made towards the ratification of the Protocol and report to a joint special session of the Governing Bodies of the two Conventions to be convened preferably in 2006. It is in two years time from now, a rather short period given the length of ratification procedures. It is not, therefore, too early for us to start considering further steps to promote the entry into force of the Protocol. If so, we will be able to say that the international community is on the right track towards the solution of one of the most pressing problems our industrialized world is faced with.