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Item 13 (c) of the provisional agenda

Prevention of accidental water pollution: activities related to the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters

Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes

Sixth session

Rome, 28–30 November 2012

Item 4 (i) of the provisional agenda

Review of past activities and discussion of future activities in the different areas of work: water and industrial accidents

Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters

Note by the Bureaux

Summary

This document describes actions taken to implement a three-step approach to help countries, particularly those with economies in transition, to ratify the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention).

The Conference of the Parties to the Industrial Accidents Convention requested its Bureau to report on the implementation of these actions at its seventh meeting (ECE/CP.TEIA/22, para. 66). The Meeting of the Parties to the Water Convention, in its workplan for 2010–2012 (ECE/MP.WAT/29/Add.1, item 6.1), foresaw activities aiming to promote ratification and implementation of the Protocol. Further to that objective, the Working Group on Integrated Water Resources Management under the Water Convention requested the Convention's Bureau to report on the progress achieved in implementation of the three-step approach to the Meeting of the Parties of the Convention at its sixth session (see ECE/MP.WAT/WG.1/2012/2–ECE/MP.WAT/WG.2/2012/2, forthcoming).

The Conference of the Parties and the Meeting of the Parties to the two Conventions are invited to reconfirm their commitment to implement the three-step approach, to consider the results of the first step, to decide when and how to implement the second and third steps and to commit the necessary funds.

Introduction

1. The present document describes actions taken to implement a three-step approach to help countries, particularly those with economies in transition, to ratify the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Protocol on Civil Liability). The approach was agreed by the Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) at its sixth meeting (ECE/CP.TEIA/22, para. 65), and by the Bureau of the Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) at its thirteenth meeting, as noted by the Water Convention's Working Group on Integrated Water Resources Management at its sixth meeting (ECE/MP.WAT/WG.1/2011/2, para 57). The approach comprises:

(a) *Step 1*, to strive to better understand what national legislation is required to implement the Protocol in light of differences between the Protocol and other civil liability instruments;

(b) *Step 2*, to carry out case studies based on realistic potential accidents to understand the implications including the benefits of implementing the Protocol and/or other instruments;

(c) *Step 3*, to identify and recommend actions which would enable the Republic of Moldova and Ukraine to implement the Protocol.

2. The remainder of this document is structured according to the agreed three steps.

3. In addition, the Bureaux of the two Conventions wish to draw attention to the upcoming review of European Union (EU) Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, according to its article 18. Awareness of this pending review may influence the decisions taken by governing bodies of the two Conventions with regard to the implementation of the three-step approach.

Step 1

4. In agreement with the Convention Bureaux, the secretariat contracted a consultant, Mr. M. Pallemmaerts of the Institute for European Environmental Policy, to identify national legislation needed to implement the Protocol, with the following objectives:

(a) To prepare an inventory of international instruments on civil liability for damage caused by industrial accidents;

(b) To assess what requirements would have to be fulfilled and what national legislation would need to be put in place to implement these instruments;

(c) To identify the conditions and benefits guaranteed by each of these instruments.

5. The full report by the consultant is available on the websites of the Conventions.¹ The consultant's executive summary of the report is provided in annex to this document.

Step 2

6. It is the understanding of the Bureaux that the case studies to be carried out in step 2 will address four hypothetical situations of transboundary effects on the aquatic environment caused by an industrial accident:

- (a) A situation with transboundary effects involving two non-member States of the EU;
- (b) A situation with transboundary effects involving two EU member States;
- (c) A situation with transboundary effects in a non-member State of the EU in which the accident occurred in an EU member State;
- (d) A situation with transboundary effects in an EU member State in which the accident occurred in a non-member State of the EU.

7. The implementation of this step should provide valuable information to all Signatories to the Protocol. The Bureaux requested the secretariat to provide terms of reference for the carrying out of the case studies, to facilitate the identification of a lead country or donor willing to support this step. They also recognized that valuable information for this undertaking was already included in the report carried out under step 1. To date, no funds have been identified to implement this step.

Step 3

8. It is expected that step 3 will only begin upon completion of step 2 and following (a) the definition of the terms of reference and (b) the identification of sufficient funds and possibly a lead country. Confirmation of the continuing interest of the concerned countries in the implementation of step 3 should also be sought.

¹ The full study is available from
http://www.unece.org/fileadmin/DAM/env/documents/2012/wat/WG/Joint_meeting_july/background_docs/IEEP_UNECE_final_report.pdf.

Annex

Study on national legislation needed to implement the Protocol on Civil Liability

Executive Summary

1. This study seeks to facilitate a better understanding of legal issues relating to the ratification and entry into force of the Protocol on Civil Liability, adopted in Kyiv in May 2003 by the Contracting Parties to the ECE Industrial Accidents Convention and the ECE Water Convention. Though signed by 24 States, the Protocol, to date, has only been ratified by a single signatory, while it would require 16 ratifications to enter into force. As member States of ECE seem reluctant to proceed with ratification, the Protocol's provisions have been examined against the background of other international instruments and provisions of EU law relating to civil liability for damage caused by industrial accidents, in order, in particular, to assess what national legislation would need to be put in place to implement the Protocol and to identify the advantages and disadvantages of ratification in a variety of legal and factual situations that may be faced by States in the ECE region.

2. The Protocol establishes a comprehensive regime for civil liability and for adequate and prompt compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters, building on the regulatory regimes established, respectively, by the 1992 Industrial Accidents and Water Conventions. The basic principle on which the Protocol is based is the strict liability of the operators of hazardous activities for the damage caused by an industrial accident having transboundary effects. Operators also have the obligation to take all reasonable response measures, and to bear the cost of such response measures, as well as of necessary measures of reinstatement of the impaired transboundary waters. This liability under the Protocol is subject to a financial limit, and operators who may be liable have an obligation to ensure that their potential liability is covered by adequate financial security up to certain limits. Parties must adopt all necessary legislative, regulatory and administrative measures for the implementation of the Protocol, including rules on the competence of their courts, applicable law, financial security, time and financial limits of liability, response measures and rights of recourse.

3. While legal circumstances and requirements vary from country to country, depending on national legal systems and legislative policies concerning the incorporation of provisions of international treaties into the domestic legal order, an analysis of the provisions of the Protocol suggests that a range of legislative and/or regulatory measures would be required for its implementation. These measures are detailed in the study, which identifies a number of potential legal and other difficulties that may be encountered by Parties in adopting such rules or measures. It appears that, although the required implementing measures cover a wide range of issues, many of them are closely interrelated and would normally be the subject of one and the same legislative and/or regulatory act. The study also shows that any legal difficulties that may arise can be overcome through proper drafting of national implementing legislation and regulatory measures.

4. Within the scope of application of the Protocol, a number of legislative instruments of the EU are currently in force in EU member States, most importantly Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive). Since the scope of the Environmental Liability

Directive partly overlaps with that of the Protocol, the relationship between its provisions and those of the Protocol has been extensively examined in the study. The analysis of benefits and possible drawbacks that would arise from the entry into force of the Protocol has focused primarily on a comparison of the Protocol's regime with the Environmental Liability Directive regime (for EU member States) and with the lack of any international legal framework covering liability and compensation for damage to transboundary waters caused by industrial accidents (for non-member States of the EU).

5. The stated purpose of the Environmental Liability Directive is to establish a framework of what it calls "environmental liability", designed to prevent and remedy environmental damage. The notion of "environmental damage" as defined in the Directive is not the same as the notion of "damage" defined in the Protocol. Damage to persons or property, including loss of income resulting from environmental damage, does not give rise to liability under the Environmental Liability Directive. In EU member States such damage, and compensation for it, remain exclusively regulated by relevant national legislation and is therefore not subject to any harmonized rules at the EU level.

6. The scope of application of the Environmental Liability Directive's liability regime is determined not only by the definition of "environmental damage", but also by the definition of the activities which may give rise to "environmental liability" within the meaning of the Directive. Most, if not all, hazardous activities as defined in the Protocol are also activities within the scope of the environmental liability regime of the Directive.

7. Contrary to the Protocol's regime, the Directive's regime was not designed specifically for either accidental or transboundary pollution. It applies to actual environmental damage, or the imminent threat of such damage, whether accidental in origin or not. It even applies to damage caused by pollution of a diffuse character whenever it is possible to establish a causal link between the damage and the activities of individual operators. However, environmental damage originating in a non-member State of the EU, and environmental damage caused outside the territory of the EU by activities taking place within the territory of a Member State, fall outside the scope of the Environmental Liability Directive. Transboundary environmental damage occurring within the EU falls within the scope of the Directive, but the relevant provisions are not very specific as to how precisely competent authorities of EU member States are to cooperate in order to ensure that adequate preventive or remedial measures are implemented at the operator's expense. Under the Directive, it is the responsibility of the competent authority designated by each EU member State to define the response measures to be implemented by the operator. Where the operator fails to act or to follow the competent authority's instructions, the latter has the power take the necessary remedial measures itself and to recover the costs it has incurred in doing so from the operator. However, competent national authorities have some discretion in exercising these powers.

8. In comparing the benefits and drawbacks of the Directive's liability regime with that of the Protocol, it has to be recalled that the scope of both liability regimes only overlaps in the event of transboundary environmental damage to transboundary waters between EU member States. The main advantage of the Protocol regime from the perspective of public authorities in the affected member State in such situations is that the Protocol provides clear procedures and more legal and financial certainty in terms of the ability of public authorities to recover the costs of response measures and measures of reinstatement from the operator. Indeed, under the Protocol the procedures for asserting such claims are clearly defined and the public authority concerned has the certainty that the operator's liability is covered by financial security up to a certain limit. The disadvantage of the Protocol regime is that the liability of the operator is strictly limited in accordance with the financial limits calculated pursuant to an annex to the Protocol, whereas no similar limitation of liability applies under the Environmental Liability Directive. Another disadvantage of the Protocol

regime is that the time limit for bringing claims for compensation against the liable operator are shorter than under the Directive.

9. Since the Environmental Liability Directive does not lay down any rules concerning liability for damage to persons or property, the advantages of the Protocol regime for any persons suffering such damage as a consequence of an industrial accident are obvious: the Protocol ensures that any injured person, whether a natural or legal person under private or public law, can claim compensation from the operator for loss of life or personal injury, loss of or damage to property, and loss of income directly attributable to impairment of transboundary waters.

10. From the perspective of operators of hazardous activities the Protocol regime presents both drawbacks and advantages compared to the Directive regime. The main advantage from an economic perspective is that, under the Environmental Liability Directive, strict liability exists only for the costs of prevention and remediation measures taken by public authorities in accordance with the applicable rules laid down in the Directive. There is no liability under the Directive for any other damage that would be covered by the Protocol. Moreover, the Directive does not impose any direct obligation on operators to cover their potential liability by insurance or any other form of financial security, whereas the Protocol has such an obligation, which would have cost implications for operators.

11. Nevertheless, a strict liability regime such as that instituted by the Protocol also has certain advantages for operators. The main benefit would be increased legal certainty and predictability of the economic consequences of any industrial accident. The lack of any rules in the Environmental Liability Directive governing liability for damage caused to injured parties other than public authorities taking response measures does not mean that the operator is not potentially exposed to such liability, in addition to his liability towards the competent authority under the Directive. Though the Directive itself does not give private parties any right of compensation, its provisions are without prejudice to any such rights that may exist under the national law of the EU member States. Under the Protocol, however, while the strict liability of the operator would be more extensive, since it would also extend to private claims, it would at the same time be limited financially and therefore more predictable and manageable economically.

12. The relevant EU regulations concerning the jurisdiction of courts and the recognition and enforcement of judgments are fully compatible with those laid down in the Protocol. Both the rules on jurisdiction and the rules on applicable law under the Protocol as well as under EU law are designed to allow injured parties to choose the forum and the law which they deem most favourable to their interests.

13. The study shows that there is no substantive incompatibility between the liability rules laid down in the Environmental Liability Directive and those set out in the Protocol. The respective liability regimes are complementary rather than contradictory. Two potential inconsistencies of the rules of both instruments with respect to the financial and time limits of liability can be avoided by applying a specific article of the Protocol which provides that its provisions are without prejudice to any existing rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under the applicable domestic law of the Parties. Though the EU itself presently has no intention of ratifying the Protocol, there is nothing in either EU law or international law that would prevent individual EU member States from doing so.

14. The study concludes that the liability regime established by the Protocol entails significant advantages for private persons and, to a lesser extent, public authorities which suffer damage as a result of an industrial accident with transboundary effects on international watercourses. It summarizes the benefits of bringing the Protocol into force

and implementing its provisions in four hypothetical situations of transboundary effects on the aquatic environment caused by an industrial accident: (a) a situation with transboundary effects involving two non-member States of the EU; (b) a situation with transboundary effects involving two EU member States; (c) a situation with transboundary effects in a non-member State of the EU in which the accident occurred in an EU member State; and (d) a situation with transboundary effects in an EU member State in which the accident occurred in a non-member State of the EU.
