ECONOMIC COMMISSION FOR EUROPE

MEETING OF THE PARTIES TO THE
CONVENTION ON THE PROTECTION
AND USE OF TRANSBOUNDARY
WATERCOURSES AND
INTERNATIONAL LAKES

CONFERENCE OF THE PARTIES TO
THE CONVENTION ON THE
TRANSBOUNDARY EFFECTS OF
INDUSTRIAL ACCIDENTS

Intergovernmental Working Group on Civil Liability

Second meeting
Geneva, 4-6 February 2002

Working paper [1]
MP.WAT/AC.3/2002/WP.1
CP.TEIA/AC.1/2002/WP.1

ENGLISH ONLY

14 January 2002

THE RELATIONSHIP BETWEEN ARTICLE 9 (3) OF THE CONVENTION ON INDUSTRIAL ACCIDENTS AND THE FORTHCOMING PROTOCOL ON LIABILITY

Working paper submitted by the delegation of Norway

The issues raised in this working paper are in a nut shell:

(a) To what extent does Art. 9 (3) of the Convention on Transboundary Effects of Industrial Accidents (TEIA) constitute a transboundary liability regime?

(b) The similarities between TEIA Art. 9 (3) and the Nordic Environmental Protection Convention.

[1] Apart from some editorial changes, this working paper is reproduced in the form as received by the secretariat.

(c) How should the Protocol secure the victims' ability to proceed both according to TEIA Art. 9 (3) and according to the Protocol?

(d) Could a Protocol restricted to transboundary impact make border areas less competitive?

Introduction

1. In this working paper, we would like to make some comments on the relationship between article 9, paragraph 3, of the UNECE Convention on the Transboundary Effects of Industrial Accidents (TEIA) and the Protocol on environmental liability, currently under negotiation in the Intergovernmental Working Group.

2. We apologise for not bringing this subject to the attention of the Working Group at an earlier stage, but due to some uncertainty regarding whether our reading of Art. 9 (3) was correct or not, we hesitated to present our views before we had undertaken a closer examination of the question.

3. The main purpose of this submission is to focus on a drafting problem. We are not at present in a position to propose a well-balanced solution, but we hope our contribution will prove a step in the right direction.

4. In chapter V we have some comments on the possible effects on border areas as locations for new hazardous activities if the Protocol are limited to transboundary impacts from an industrial accident. We do not assess whether these possible effects are good or bad. We merely point to the problems.

I. THE INTERPRETATION OF TEIA ART. 9 (3)

5. Art. 9 (3) reads:

> "3. The Parties shall, in accordance with their legal systems and, if desired, on a reciprocal basis provide natural or legal persons who are being or are capable of being adversely affected by the transboundary effects of an industrial accident in the territory of a Party, with access to, and treatment in the relevant administrative and judicial proceedings, including the possibilities of starting a legal action and appealing a decision affecting their rights, equivalent to those available to persons within their own jurisdiction."

6. Our reading of this provision is that it guarantees natural and legal persons who are being victims of transboundary effects of an industrial accident ("foreign victims"), the right to initiate legal action in the State where the accident happened ("the Accident State"), on the same basis as any victim within this State. The provision covers both procedural and substantial law. Art. 9 (3) is thus a transboundary liability provision.

7. This means in our understanding that our future liability Protocol would be of minor importance if the Accident State have a domestic liability regime that exceeds the protection

provided by the Protocol. (A precondition for this is of course that the option provided for in Art. 9 (3) is a practical one for the victim, having regard to language barriers, the possibility of getting skilled legal assistance, etc.)

II. NORDIC ENVIRONMENTAL PROTECTION CONVENTION

8. For some UNECE member countries, the content of Art. 9 (3) will be in line with established domestic law. For other member countries, namely Finland, Sweden, Denmark and Norway, the content of this provision will also be known from article 3 of the Nordic Environmental Protection Convention of 19 February 1974. It reads (translation provided to the UN Treaty Service by the Government of Sweden):

> "*Article 3.* Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.
>
> The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured Party than the rules of compensation of the State in which the activities are being carried out."

9. In a Protocol to the Nordic Convention, signed on the same date, the Contracting States agreed on the following understanding of article 3:

> "The right established in article 3 for anyone who suffers injury as a result of environmentally harmful activities in a neighbouring State to institute proceedings for compensation before a court or administrative authority of that State shall, in principle, be regarded as including the right to demand the purchase of his real property."

10. As far as we know, the Convention has been applied in only one court case in Norway.[2] We have no knowledge relating to the situation in the other Parties to the Convention.

[2] In 1990, a Norwegian and a Swedish environmental organisation made a joint application before the District Courts in Halden and Sarpsborg (close to the Swedish border), claiming damages from two major industrial companies in the region based on the presumption that the companies had polluted the coastal area both in south-eastern Norway and western Sweden for decades. Neither the companies nor the courts disagreed that the Swedish NGO had standing according to the Nordic Convention or that the Norwegian courts were competent to rule also regarding the damages on Swedish territory.

III. THE DIFFERENCE BETWEEN TEIA ART. 9 (3) AND THE LIABILITY PROTOCOL

11. The major difference between TEIA Art. 9 (3) and the Nordic Convention's article 3 on the one hand and the Protocol being drafted by the Working Group on the other, is of course that the two existing provisions only establish the principle of non-discrimination. The provisions do not oblige the member countries to enact specific liability regulations or to harmonise their domestic liability regimes.

12. The efficiency of TEIA Art. 9 (3) and the Nordic Convention's article 3 are thus wholly dependent on the quality of the existing liability regime in the Accident State. It seems likely that the Nordic Convention was concluded under the presumption that all the Nordic States were likely to have – or to get – domestic legislation based upon more or less the same liability principles. Each Contracting State trusted the other Parties to provide for a comprehensive coverage of their own citizens in the case of an environmental accident, which again would give the same, sufficient coverage for victims in the neighbouring States.

13. The liability Protocol, on the other hand, will oblige the Parties to enact domestic regulations not only guaranteeing foreign victims standing before national courts, but also to provide for substantial liability regulations.

IV. THE VICTIMS' CHOICE

14. TEIA Art. 9 (3) is already in force, and might be used in future cases regardless of whether the work in the Working Group succeeds or not. From the day, our liability Protocol enters into force, the victims of a transboundary industrial accident will be able to choose whether to proceed according to the Protocol or according to Art. 9 (3).

15. The present wording (see document MP.WAT/AC.3/2002/2-CP.TEIA/AC.1/2002/2) of Art. 16 (2) does not – as we see it – jeopardise the victims' ability to choose. Paragraph 2 only states that if any claim is raised according to article 4, the whole procedure must follow the provisions in the Protocol. It does not exclude claims according to domestic regimes imposing strict liability on the defendant. If such exclusion was intended, the wording of paragraph 2 ought to have been "no claims for compensation for damage based on strict liability shall be made otherwise than in accordance with the Protocol".

16. Being in a position to choose – either domestic legislation of the Accident State before the courts in the Accident State, or claims according to the Protocol – it will be of significant importance to the victim to be able to examine the probable outcome of the two alternatives. It will also be of importance to know whether a victim can initiate proceedings in accordance with the other alternative after an unsuccessful attempt to get sufficient coverage according to the first alternative. If not, the transaction costs related to a pre-trial examination of which alternative are likely to give the best coverage, could be extensive. The Working Group should take this issue into consideration.

17. The scope of the Protocol is of importance regarding the victims' choice. At the present stage, we recognise that many delegations prefer the "interface approach", meaning that the Protocol should only cover:

- personal injury, damage to property and environment, which is
  - due to an industrial accident, which
    - occur in a hazardous activity,
      - which is capable of causing transboundary effects (according to a pre-accident assessment),
        - on transboundary waters.

18. Many industrial accidents might have effects that are both inside and outside the present scope of the Protocol. If the domestic liability regime in the Accident State is regarded as sufficient, the victims would tend to claim compensation according to TEIA Art. 9 (3). Otherwise they would have to initiate two proceedings – one in accordance with the Protocol in so far as the losses are covered, and one in accordance with TEIA Art. 9 regarding any other losses.

19. Because of the possible broader scope of sufficient domestic liability regimes, it is very important that the Protocol does not limit the victims' choice.

IV. THE POSSIBLE EFFECTS OF A PROTOCOL RESTRICTED TO TRANSBOUNDARY IMPACT

20. If the Protocol only applies to transboundary effects, compulsory insurance etc. will only be an obligation for industry that according to a pre-accident assessment is capable of causing transboundary damage. Other industries will not meet this obligation – unless such an obligation is part of domestic law.

21. This seems to implicate that competing industries inside the same State will have to operate under different financial conditions, depending on whether the industry facility is assessed as constituting a transboundary risk or not. An important factor in this assessment would be whether the facility is situated close to an international border or not. To put it bluntly, industrialists will in the future regard areas close to international borders as less interesting for new facilities, because of the more burdensome insurance regime in this areas.

22. If the scope of the liability Protocol is limited to transboundary impacts, we could also experience that victims inside and outside the Accident State get unequal treatment. Only victims outside the State will be compensated according to the Protocol. If the domestic liability regime of the Accident State is insufficient, victims along the same border will be subject to unequal compensation.

23. This is of course discrimination based upon domicile and/or nationality. But the main non-discrimination principles in international law do not – as far as we know – cover this situation. These principles mainly prohibit less favourable treatment of foreign citizens, not the opposite: less favourable treatment of persons within the State's own jurisdiction. Such a

situation is therefore not a legal problem according to principles of international law, but might be at domestic political problem.