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.2
CP.TEIA/AC.1/2002/WP.2

ENGLISH ONLY

14 January 2002

PROPOSALS RELATING TO THE RESPONSIBILITY OF STATES AND THE JURISDICTION OVER THE DISPUTES ORIGINATING FROM WATER-RELATED INCIDENTS CAUSED BY INDUSTRIAL ACCIDENTS

Working paper submitted by the delegation of Hungary

Introduction

1. Having proved that the delegation of Hungary welcomes the idea of a regime on civil liability for damage resulting from transboundary effects of industrial accidents and it agrees *grosso modo* with the essence, the structure and the main solutions of the draft formulated by the delegation of Switzerland (see MP.WAT/2001/3-CP.TEIA/2001/3), this paper concentrates only on two issues to be considered. The first issue is the question of the responsibility of States in the context of transboundary damage resulting from water-related incidents caused by industrial accidents. The second issue concerns the possible extension of

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

the list of competent courts by an arbitral tribunal concerning claims for liability and compensation under the present Protocol.

I. THE RESPONSIBILITY OF STATES CONNECTED WITH THE TRANSBOUNDARY DAMAGE RESULTING FROM WATER-RELATED INCIDENTS CAUSED BY INDUSTRIAL ACCIDENTS

2. During the preceding meetings, the delegation of Hungary always stressed the importance of the responsibility of States under both the Convention on Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, owing to the network of legal obligations established by these instruments. Therefore, the delegation of Hungary expressed its desire that an instrument should be worked out on the **implementation** of the general principles of international law relating to the responsibility of States in the context of both Conventions. We also mentioned the continuation of the preceding works established under the auspices of UNECE.

3. Despite the limited mandate of the Intergovernmental Working Group on Civil Liability, it would be very advantageous to formulate such a text, which lays more emphasis on the importance of the responsibility of States, instead of the usual „without prejudice clause" of article 12 (see MP.WAT/AC.3/2002/2-CP.TEIA/AC.1/2002/2).

4. The text of the proposal is as follows:

> ***The provisions of the present Protocol do not in any way modify the responsibility or obligations imposed by the principles and rules of international law on States as regards transboundary injury or damage caused by water-related incidents resulting from industrial accidents.***

III. PROPOSAL RELATING TO THE JURISDICTION OF AN INTERNATIONAL ARBITRAL TRIBUNAL OVER THE DISPUTES CONNECTED WITH CIVIL LIABILITY AND COMPENSATION FOR THE TRANSBOUNDARY DAMAGE, ORIGINATING FROM WATER-RELATED INCIDENTS CAUSED BY INDUSTRIAL ACCIDENTS

5. In order to resolve the disputes connected with civil liability and compensation for transboundary damage originating from water-related incidents caused by industrial accidents, article 13 of the draft Protocol formulated by the delegation of Switzerland determines three competent courts (see document MP.WAT/2001/3-CP.TEIA/2001/3 considered at the first meeting). It would be desirable to extend these offered options to the probable Parties of future civil actions. The proposal of the delegation of Hungary is that the above-mentioned claims could be submitted before an international arbitral tribunal. The principal lacunae in environmental dispute resolution was filled by the Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to National Resources and/or the Environment adopted on 19 June 2001 by the ninety-four Member States of the Permanent Court of Arbitration. These Rules can be used in arbitration disputes arising under treaties or other agreements or relationships between parties one or more of which is not a State.

6. The **benefits** of the use of this new dispute resolution mechanism can be as follows:

(a) The international character of the litigation can be reflected under the present Protocol;

(b) The very elaborated Optional Arbitration Rules can assure due procedural garanties, relative rapidity of the legal proceeding and the participation of environmental science experts;

(c) The Optional Arbitration Rules concern only civil actions under the present Protocol between States and private persons. Therefore, the fact must be taken into consideration that in some cases the territorial State can probably be affected, either in the status of a claimant or in that of a defendant. Owing to this mechanism, the waiver of any right of sovereign immunity from jurisdiction is irrelevant, on the one hand, moreover, the claimant-State can more equilibrate the disadvantages in the field of evidence, on the other;

(d) Evidently, the State has not an international legal personality in the proceeding to be initiated. Therefore the rules on the settlement of disputes as contained in article 22 of the annex to document MP.WAT/2001/3-CP.TEIA/2001/3 considered at the first meeting of the Working Group are not modified by this proposal.

7. The key-problem of all proceedings before arbitral tribunals is that they are subordinated to the consent of Parties. But a previous consent, i.e. a compulsory arbitral clause is inimaginable, owing to the lack of contract between the future Parties in a dispute relating to liability and compensation in the case of transfrontier damage resulting from water-related incidents caused by industrial accidents. In the case of an extracontractual relationship, the condition of a consent has to be accomplished after the occurence of such transfrontier damage. Owing to the above-mentioned benefits and in accordance with the possibility of option among the relevant courts, the private persons can also be motivated to agree that the dispute shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, wherever the legal conditions exist. The establishment of these conditions is subordinated to the municipal law of the Contracting Parties.

8. According to the obligation of result, implied consequence of their consents connected with the above-mentioned proceeding, the Contracting Parties to the present Protocol shall have the responsibility to ensure that the natural or juridical persons that posses the nationality of a State or are effectively controlled by them must be endowed with *locus standi*.

9. The text of our proposal relating to art 13/*bis* or art. 13, paragraph 3, is as follows:

> ***If any dispute under the present Protocol arises between the parties one or more of which is not a State, either party may submit the dispute to final and binding arbitration, in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. Where not already provided for by existing legislative or other measures, each State Party to the present Protocol undertakes to take the necessary steps, in accordance with its constitutional processes, to adopt such legislative or other measures as may be necessary for the purpose that the natural or juridical persons which posses its nationality or are effectively controlled by them must be endowed with locus standi.***