

Interpretation of the provisions of the Protocol on Water and Health related to transboundary waters

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Background and introduction

The United Nations Economic Commission for Europe (UNECE) – World Health Organization Regional Office for Europe Protocol on Water and Health to the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) was negotiated in 1999 with the objective of protecting human health and well-being through better water management, including the protection of water ecosystems, and of preventing, controlling and reducing water-related diseases.

Since the Protocol is the first international agreement of its kind providing tools at national level to attain an adequate supply of safe drinking water and adequate sanitation for everyone and effectively protect water used as a source of drinking water, the negotiating parties were conscious of the need of promoting intersectoral and interstate cooperation. Accordingly, the Preamble to the Protocol text states that “the prevention, control and reduction of water-related disease are important and urgent tasks which can only be satisfactorily discharged by enhanced cooperation at all levels and among all sectors, both within countries and between States”. When negotiating the legal text of the Protocol, Parties also derived inspiration from the relevant provisions of the Water Convention and emphasized the need both to encourage more widespread application of those provisions and to complement that Convention with further measures to strengthen the protection of public health.¹

However, the transboundary dimension of the Protocol has in general not been in the focus of its implementation, neither at the national level nor at the level of the Meeting of the Parties and its subsidiary bodies, possibly because those aspects are dealt in detail under the mother Water Convention. However, in the recent years, the secretariat became aware of possible difficulties in interpretation of the provisions of the Protocol related to transboundary waters by some Parties and other States in Eastern Europe, the Caucasus and Central Asia, and communicated this matter to the Compliance Committee of the Protocol.

In this relation, the Committee itself also found that information about transboundary issues provided in the national summary reports was rather scarce and casual. The Committee is entrusted with providing advice or assistance to Parties in order to facilitate, promote and aim to

¹ See <http://www.unece.org/fileadmin/DAM/env/documents/2000/wat/mp.wat.2000.1.e.pdf>.

secure compliance with the obligations under the Protocol, with a view to preventing disputes. In light of the above and according to its competence to examine compliance issues and make recommendations or take measures if and as appropriate,² the Committee therefore decided to provide its legal interpretation of the above provisions.

The present analysis quotes the provisions of the Protocol with transboundary implications, namely those contained in articles 1, 2, 4, 5 and 11–14, as relevant, and provides interpretation of their contents.

To a large extent, transboundary waters are governed by customary international law which is binding upon all States, i.e. binding without any specific consent to be bound. The analysis therefore focuses on the obligations of the Protocol and to what extent these constitute additional obligations compared to the obligations potential Parties already have under customary international law, and/or under other relevant treaties to which they are Parties. Relevant in the last sense is mostly the Water Convention. The 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (Watercourses Convention) is also relevant. However, it has so far been ratified only by one Central Asian State while most of the countries in Eastern Europe, Caucasus and Central Asia are Parties to the Water Convention.

Articles 1 and 2

Article 1 defines the objective of the Protocol and article 2 provides definitions of the most important terms used in the legal text of the Protocol. Whereas the objective and definitions do not constitute obligations per se, they are very important for defining more precisely the scope of the obligations under the Protocol and specifying how they should be implemented.

Article 1. Objective

“The objective of this Protocol is to promote at all appropriate levels, nationally as well as in transboundary and international contexts, the protection of human health and well-being, both individual and collective, within a framework of sustainable development, through improving water management, including the protection of water ecosystems, and through preventing, controlling and reducing water-related disease.”

Article 1 of the Protocol defines very broadly the territorial scope for its objective. It requires Parties to promote the protection of human health and well-being “at all appropriate levels, nationally as well as in transboundary and international contexts”.

Article 2. Definitions [only definitions with transboundary implications are considered for the purpose of this analysis]

For the purposes of this Protocol, [...]

² See http://www.unece.org/fileadmin/DAM/env/documents/2007/wat/wh/ece.mp.wh.2_add_3.e.pdf

5. *“Transboundary waters” means any surface or ground waters which mark, cross or are located on boundaries between two or more States; wherever transboundary waters flow directly into the sea, these transboundary waters end at a straight line across their respective mouths between points on the low-water line of their banks;*

6. *“Transboundary effects of water-related disease” means any significant adverse effects on human health, such as death, disability, illness or disorders, in an area under the jurisdiction of one Party, caused directly or indirectly by the condition, or changes in the quantity or quality, of waters in an area under the jurisdiction of another Party, whether or not such effects constitute a transboundary impact;*

7. *“Transboundary impact” means any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of a Party to the Convention, within an area under the jurisdiction of another Party to the Convention. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape, and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors;*

The definitions of two terms (“transboundary impact” and “transboundary waters”) having explicit transboundary implications are transposed to the Protocol from the Water Convention. They are identical in the texts of both instruments and thus are not additional for potential Parties to the Protocol which are already Parties to the Water Convention.

Among the specific terms defined by the Protocol, the one with explicit transboundary implications is the expression “transboundary effect of water-related disease”. No other international water agreements refer to this term as the Protocol is the first international legal instrument specifically dealing with prevention, control and reduction of water-related disease.

But while neither the Water Convention and the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses (Watercourses Convention) include provisions referring explicitly to water-related disease, both instruments deal with prevention of transboundary effect of water-related disease implicitly as they both aim to protect human health. Article 1, para 2, of the Water Convention recognizes “effects to human health” as an example of “significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of a Party, within an area under the jurisdiction of another Party”. The Watercourses Convention uses the term “human health” in Article 21, para. 2, and recognizes it as an object for the protection from possible significant harm to other watercourse States’ or to the Party’s environment that shall be prevented, controlled and reduced.

Article 4. General Provisions

Article 4, para 9.

The provisions of this Protocol shall not affect the rights and obligations of any Party to this Protocol deriving from the Convention or any other existing international agreement, except where the requirements under this Protocol are more stringent than the corresponding requirements under the Convention or that other existing international agreement.

Article 4, para 9 of the Protocol regulates the relationship between the rights and obligations of a Party to the Protocol against those deriving from the UNECE Water Convention or any other existing international agreement.

Article 4, para 9 should be read in the light of the so-called “more favourable provision principle”, according to which, in case of two or more provisions applicable to the same subject matter, the one giving the maximum protection should apply. Read in conjunction with the so-called practice of “gold-plating”, enshrined in article 4, para 8 of the Protocol (“*The provisions of this Protocol shall not affect the rights of Parties to maintain, adopt or implement more stringent measures than those set down in this Protocol*”), the provision in point is called upon to facilitate the establishment of the most effective framework for the achievement of the objectives of the Protocol.

Article 5. Principles and Approaches

Article 5 of the Protocol provides a non-exhaustive list of principles and approaches by which the Parties shall be guided in taking measures to implement the Protocol. The present analysis focuses on whether the principles and approaches embedded in sub-paras (b), (c) and (g) of article 5 entail additional obligations in a transboundary context for potential Parties to the Protocol as compared to the obligations they already have under the Water Convention or customary international law.

(b) The polluter-pays principle, by virtue of which costs of pollution prevention, control and reduction shall be borne by the polluter;

The formulation of the polluter pays principle in the Protocol is in its substance identical to that of article 2, para 5 (b) of the Water Convention and therefore is to be interpreted in the same manner. The *Guide to Implementing the Water Convention*³ is explicit enough as to the nature and substance of the polluter pays principle, as well as approaches to its possible transboundary application.

Extract from the Guide to Implementing the Water Convention, para. 133 (d)

Domestic nature: the PPP has a primarily domestic nature, i.e. it regulates relationships within the territory of a Party rather than between Parties. Accordingly, the PPP does not provide legal grounds to claims for compensation for water pollution between Parties

³ See <http://www.unece.org/index.php?id=33657>.

(A full analysis of the PPP can be found in paras 122 to 135 of the Guide to Implementing the Water Convention)

Hence, the polluter-pays principle under the Protocol does not entail any obligation with transboundary dimension as its nature is primarily domestic.

(c) States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction;

The formulation of article 5 (c) appears to be a combination of the principle of permanent sovereignty over natural resources and the “no-harm rule”. Both principles have achieved a firm status in customary international law and are considered either separately as self-standing provisions or as interrelated elements. In the latter case they are viewed to be mutually linked as a corresponding right and a duty. The same articulation of the provision in point is embodied in Principle 21 of the 1972 Stockholm Declaration and in Principle 2 of the 1992 Rio Declaration. Hence, the provision of article 5 (c) of the Protocol does not entail any additional obligation for potential Parties thereto as compared to the obligations all countries have under customary international law or to the obligations arising from the Water Convention.

It can be noted that the *Guide to Implementing the Water Convention* in its paras. 91 to 98 elaborates on the due diligence nature of the no-harm rule and the minimum requirements to comply with it.

(g) Water has social, economic and environmental values and should therefore be managed so as to realize the most acceptable and sustainable combination of those values;

The formulation of article 5 (g) is yet another way of emphasizing the principles of equitable and reasonable utilisation and sustainability. The principle of equitable and reasonable utilisation is well recognized as part of customary international law. Hence, similarly as above, article 5 (g) does not entail any additional obligation for potential Parties to the Protocol as compared to the obligations all countries have under customary international law or to the obligations arising from the Water Convention.

It can be noted that the *Guide to Implementing the Water Convention* in its paras. 99 to 110 explains and clarifies the nature and substance of the reasonable and equitable utilisation principle and its interrelation with the principle of sustainability.

Articles 11 – 14

Articles 11–14 are all dealing with international and transboundary cooperation, and they are as such included in the tasks of the meetings of the Parties. According to article 16, para 3 (a) of the Protocol, the Meeting of the Parties shall, as one of the tasks under its mandate, with the purpose to continuously review the implementation of the Protocol, “strengthen transboundary and international cooperation in accordance with articles 11, 12, 13 and 14”. This wording seems to

indicate, on the one hand, that such cooperation may also take place outside the institutional framework (“strengthen”), but, on the other hand, at the same time also that the cooperation outlined in articles 11–14 is assumed to be carried out only within the institutional framework (“in accordance with”). The wording of article 13, however, suggests that the role of the Meeting of the Parties in respect of transboundary cooperation should be perceived rather as a supplement to a direct cooperation between concerned States, i.e. States bordering the same waters.

Article 11. International cooperation

The Parties shall cooperate and, as appropriate, assist each other:

(a) In international actions in support of the objectives of this Protocol;

(b) On request, in implementing national and local plans in pursuance of this Protocol.

Article 11 concerns Parties' cooperation and assistance to each other in “international actions in support of the objectives of this Protocol” (article 11 (a)), and, “on request, in implementing national and local plans in pursuance of this Protocol” (article 11 (b)).

Although the term “international actions” is rather broad, its scope is limited to those actions “in support of the objectives of the Protocol”. To some extent international actions in that regard are assumed to be undertaken within the institutional framework of the Protocol, i.e. by the Meeting of the Parties which also has the task to liaise with other governmental and non-governmental bodies (article 16, para. 3 (f)). Hence, the obligation “to cooperate and, as appropriate, assist each other” in international actions may be fulfilled to a certain extent by cooperating in good faith within the framework of the Meeting of the Parties. This conclusion is confirmed by the wording of article 16, para 3 (a) addressed above and the wording of article 12 considered below.

The scope of article 11 (b) quoted above is rather wide. Literally speaking, the provision embodies an obligation of each Party to assist, on request, as appropriate, any other Party in implementing its national and local plans in pursuance of the objectives of the Protocol. The reference to “as appropriate”, is, however, considerably limiting the scope of this obligation, because it is for a State being requested to assist to decide, in good faith, whether such assistance is appropriate, taking into account not only economic and technical but also e.g. political considerations.

Article 12 Joint and coordinated international action

In pursuance of article 11, subparagraph (a), the Parties shall promote cooperation in international action relating to:

(a) The development of commonly agreed targets for matters referred to in article 6, paragraph 2;

(b) The development of indicators for the purposes of article 7, paragraph 1 (b), to show how far action on water-related disease has been successful in preventing, controlling and reducing such disease;

(c) The establishment of joint or coordinated systems for surveillance and early-warning systems, contingency plans and response capacities as part of, or to complement, the national systems maintained in accordance with article 8 for the purpose of responding to outbreaks and

incidents of water-related disease and significant threats of such outbreaks and incidents, especially from water-pollution incidents or extreme weather events;

(d) Mutual assistance in responding to outbreaks and incidents of water-related disease and significant threats of such outbreaks and incidents, especially from water-pollution incidents or extreme weather events;

(e) The development of integrated information systems and databases, exchange of information and sharing of technical and legal knowledge and experience;

(f) The prompt and clear notification by the competent authorities of one Party to the corresponding authorities of other Parties which may be affected of:

(i) Outbreaks and incidents of water-related disease, and

(ii) Significant threats of such outbreaks and incidents which have been identified;

(g) The exchange of information on effective means of disseminating to the public information about water-related disease.

The obligation of article 12 is to *promote* cooperation rather than an obligation to cooperate. Article 12 may be considered as a detailed, but probably non-exhaustive, description of relevant international actions in support of the objectives of the Protocol in context of article 11 (a), as explicitly referred in article 12. Therefore, to a certain extent, international actions are expected to be accomplished via cooperation of Parties within the institutional framework of the Protocol.

Admittedly, subpara (f) of article 12 might be interpreted to impose a specific obligation on individual Parties. The provision is dealing with the prompt and clear notification of other Parties which may be affected by outbreaks and incidents of water-related disease (or significant threats of such outbreaks). An individual obligation to notify other Parties in such circumstances would, however, not exceed what all States are obliged to do under customary international law.

As a conclusion, Parties may, generally speaking, fulfil their obligations under article 12 by cooperating in good faith within the institutional framework of the Protocol. Furthermore, to the extent article 12 may be interpreted to include individual obligation to notify other Parties in specific circumstances, it does not impose other obligations than those derived from customary international law.

Article 13. Cooperation in relation to transboundary waters

1. Where any Parties border the same transboundary waters, as a complement to their other obligations under articles 11 and 12, they shall cooperate and, as appropriate, assist each other to prevent, control and reduce transboundary effects of water-related disease. In particular, they shall:

(a) Exchange information and share knowledge about the transboundary waters and the problems and risks which they present with the other Parties bordering the same waters;

(b) Endeavour to establish with the other Parties bordering the same transboundary waters joint or coordinated water-management plans in accordance with article 6, paragraph 5 (b), and surveillance and early-warning systems and contingency plans in accordance with article 8, paragraph 1, for the purpose of responding to outbreaks and incidents of water-related disease and significant threats of such outbreaks and incidents, especially from water-pollution incidents or extreme weather events;

(c) On the basis of equality and reciprocity, adapt their agreements and other arrangements regarding their transboundary waters in order to eliminate any contradictions with the basic principles of this Protocol and to define their mutual relations and conduct regarding the aims of this Protocol;

(d) Consult each other, at the request of any one of them, on the significance of any adverse effect on human health which may constitute a water-related disease.

2. Where the Parties concerned are Parties to the Convention, the cooperation and assistance in respect of any transboundary effects of water-related disease which are transboundary impacts shall take place in accordance with the provisions of the Convention.

Cooperation in relation to transboundary waters differs considerably from cooperation in international actions since such cooperation by its very nature has to focus on specific waters, thus involving individual Parties in another manner than cooperation in international action generally does. This is reflected in the way in which the provisions of article 13 are drafted, being more specific and detailed than those contained in articles 11–12 and 14. In this manner, article 13 underscores the observation in section 2 above on the nature of the institutional cooperation foreseen by the wording of article 16, para 3 (a).

Article 13 is divided into two parts, one concerning Parties that are also Parties to the Water Convention and the other one presumably concerning only Parties that are not Parties to the Convention.

Article 13, para 2 prescribes that when the Parties concerned are Parties to the Convention “the cooperation and assistance in respect of any transboundary effects of water-related disease which are transboundary impacts shall take place in accordance with the provisions of the Convention”.

A pragmatic reading of article 13, para 2 leads to the conclusion that its objective is to make clear that the Protocol does not impose further procedural obligations of transboundary nature on countries that are also Parties to the Water Convention other than those included in the Convention. This is confirmed by the fact that the subject matters dealt with by subparas (a)–(d) of article 13, para 1 are all addressed by the Water Convention.

The objective of the Convention is to prevent, control and reduce transboundary impact. To this end, Parties shall *inter alia* according to article 6 provide for the widest exchange of information on issues covered by the Convention, corresponding more or less to subpara (a) of article 13, para. 1. They shall also, pursuant to article 9, paras 1 and 2 and article 11 of the Convention, enter into bilateral or multilateral arrangements (or adapt existing ones), establish joint bodies and establish and implement joint monitoring programmes with a view of addressing a number of issues the scope of which by far is exceeding what is envisaged by article 13, para 1 (b) and

(c) of the Protocol. Finally, article 10 of the Convention defines a specific obligation to hold consultations between riparian Parties on the request of any such Party corresponding to the requirements of article 13, para 1 (d) of the Protocol, even if the focus of the latter is much more narrow.

Parties to the Protocol that are not Parties to the Water Convention are bound by article 13, para 1. The question is, however to what extent the obligations pursuant to subparas (a) – (d) exceed obligations in that may exist for States not being Parties to the Protocol or to the Water Convention, leaving aside, however, that such states may be Parties to treaties or arrangements regulating specific transboundary waters.

According to customary international law, States are under an obligation to use all the means at their disposal in order to avoid activities which take place in their territories and are causing significant damage to the environment of other States. Customary international law also establishes a duty of cooperation, consultation and information in respect of transboundary waters. Equally, States are obliged under customary international law to apply elementary considerations of humanity, e.g. to warn other States if something happens in their territories that may pose an imminent threat to human life or health in other States.

Seen in the light of the above obligations, article 13, para. 1 (a) on exchange of information and sharing knowledge about transboundary waters and the problems and risks which they present does not add much to existing obligations under customary international law. In fact, it may be argued that the duty of cooperation under customary law in respect of shared water resources includes as a minimum an obligation to inform each other on problems and risks. The same is true regarding the obligation to consult laid down in article 13, para 1 (d), the scope of which is limited to any adverse effect on human health which may constitute a water-related disease.

Article 13, para 1 (b) defines an obligation to establish with other Parties bordering the same transboundary waters joint or coordinated water management plans as well as surveillance and early warning systems and contingency plans. The obligation has a rather narrow scope, since it is only related to outbreaks and incidents of water-related disease and significant threats of such outbreaks and incidents. Furthermore, the obligation is limited to only to *endeavour to establish such plans and systems*. Hence, it is rather an obligation of conduct.

Article 13, para 1 (c) on agreements or arrangements containing contradictions with the basic principles of the Protocol, includes, although it is based on equality and reciprocity, obligations that exceed customary international law. On the other hand, the scope of the provision in point is simultaneously rather limited because it is only addressing “contradictions”, i.e. what is in conflict with the Protocol and only what is in conflict with its “basic principles”, i.e. presumably primarily the principles enumerated in article 5. Furthermore, insofar agreements and other arrangements are involving States that are not Parties to the Protocol, the obligation is not absolute since its fulfilment requires cooperation of those States.

Article 14. International support for national action

When cooperating and assisting each other in the implementation of national and local plans in

pursuance of article 11, subparagraph (b), the Parties shall, in particular, consider how they can best help to promote:

(a) Preparation of water-management plans in transboundary, national and/or local contexts and of schemes for improving water supply and sanitation;

(b) Improved formulation of projects, especially infrastructure projects, in pursuance of such plans and schemes, in order to facilitate access to sources of finance;

(c) Effective execution of such projects;

(d) Establishment of systems for surveillance and early-warning systems, contingency plans and response capacities in relation to water-related disease;

(e) Preparation of legislation needed to support the implementation of this Protocol;

(f) Education and training of key professional and technical staff;

(g) Research into, and development of, cost-effective means and techniques for preventing, controlling and reducing water-related disease;

(h) Operation of effective networks to monitor and assess the provision and quality of water-related services, and development of integrated information systems and databases;

(i) Achievement of quality assurance for monitoring activities, including inter-laboratory comparability.

The obligation under article 14 amounts to only *to consider how Parties best can help*. Article 14 is particularly important in relation to the scope and interpretation of article 11 (b) to which it explicitly refers. Article 14 contains a non-exhaustive list of the kind of activities that Parties shall consider in order to provide assistance to each other. Generally speaking, the nature of these activities requires concerted action by the Parties, i.e. may be carried out by or under the auspices of the Meeting of the Parties which however does not exclude action by individual Parties. This point of view may be substantiated by the reference to *inter alia* articles 11 and 14 in article 16, para 3 (a) as explained in section 2 above.

In conclusion, Parties are not under a strict and unconditional obligation to assist each other, and their obligations in that respect are, in some ways but not exclusively, limited to cooperation in good faith with other Parties within the institutional framework provided by the Protocol.

Conclusions

Articles 1 and 2 of the Protocol on Water and Health are not setting obligations but rather serve to interpret the scope and content of obligations established under the Protocol.

The relevant provisions of articles 4 and 5 that have transboundary implications do not entail additional obligations for potential Parties to the Protocol as compared to the obligations they already have under customary international law, or under the Water Convention, for those countries which are already Parties to the Convention.

Most of the obligations contained in articles 11 to 14 are likely to be fulfilled in good faith through cooperation carried out within the institutional framework provided by the Protocol.

When these obligations are not fulfilled by means of the Protocol's institutional mechanism, the Protocol does not add further obligations of international or transboundary nature to such obligations imposed on Parties that are also Parties to the Water Convention.

For those States that are not Parties to the Convention, the obligations with transboundary dimension correspond to the obligations that those States already have under customary international law. Article 13, para 1 (c), however, imposes an additional obligation, even if, as explained above, this obligation has a limited extent.