

International Aspects of Pollution

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Abstract

The transboundary effects of industrial accidents must be analyzed in the context of Romania's position as European Union member. During the Baia Mare accident in 2000, Romania was not member of European Union. Key principles of international environment law are included in multilateral conventions and other international legal instruments. The issue of transboundary effects of industrial accidents is an important problem in North America too, mainly in United States of America. Finally, the liability regime is very important in order to cover the damages produced by such dangerous activities.

Keywords: pollution, international law, environment law, Romania, European Union.

JEL Classification: K21, K33

1. Introduction

A very important issue in the field of European (community) law is the environment law. In this context, the location of environmentally hazardous industrial activity becomes a problem of neighboring states too, when the environmental consequences of this activity have transboundary effects. The European Union is considering very seriously this type of negative transboundary effect. Romania had serious problems in the past with the Baia Mare cyanide spill. Such problems can occur again, due to the Roşia Montană gold mining project. After the cyanide spill from the gold mining operation in Baia Mare, Romania was a warning to the international community that legal and institutional regimes that should prevent and respond to such accidents are not complete. The international legal regimes for industrial accident prevention and liability must be considered as a whole in order to identify gaps and weaknesses in the system, in the effort to protect human health and the environment from such accidents.

2. Principles of law

International legal principles relating to the Baia Mare accident can be divided in five categories (general principles of environmental law, principles relating to prevention and response to industrial accidents, principles of managing and using international watercourses, principles of liability for environmental harm, and principles for environmentally responsible investment).²

Key principles of international law are reflected in multilateral conventions and other international legal instruments.³

The Declaration of Principles of the United Nations Conference on Environment and Development (1992 Rio Summit, or Earth Summit) put into evidence the key principle relating to resource development and its relation to international responsibilities. The principle against causing transboundary environmental harm is also a rule of customary international law. The strict nature of this principle lets it serve as an ideal towards which international environmental legal regimes should strive as well as a tool with which to counter national policies that flagrantly and knowingly flout it. The first principle of accident prevention in international environmental law is that states have an obligation to take appropriate steps to reduce risks, including working with operators.⁴

The key principles of international law for accident prevention can be divided in three categories (policy development, including the integration of environmental concerns in design and

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² Regional Environmental Center for Central and Eastern Europe, *International Law and the Baia Mare, cyanide spill*, <https://eecentre.org/wp-content/uploads/2019/06/Baia-Mare-cyanide.pdf>, p. 16.

³ Ibid, p. 16.

⁴ Ibid, p. 17.

management of facilities, stakeholder collaboration, and promoting the use of best available technology). The second principle under the appropriate measures principle stipulates that states must require operators to provide information on their activities in order to demonstrate safe operation. A more comprehensive principle on accident prevention is specified in the International Labour Organisation Prevention of Major Industrial Accidents Convention of 1993, establishing the principle that accident prevention requires a coherent national-level policy developed according to collaborative and inclusive criteria.⁵

The principles related to accident prevention and response and those associated with notifying affected states Principles to respond to industrial accidents with transboundary effects are divided in three areas, emergency preparedness, notification, and information dissemination. These principles are reflected in many international conventions relevant to the Baia Mare accident, including the Convention on the Transboundary Effects of Industrial Accidents, the International Labour Organisation Prevention of Major Industrial Accidents Convention, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and the Convention on the Co-operation for the Protection and Sustainable Use of the Danube River.

The principles related to accident prevention and response and those associated with notifying affected states have been most successfully translated into specific international legal provisions and policy at the national level across the Danube River Basin.⁶

The notification system in the Danube watershed is a part of the Transnational Monitoring Network in the Danube River Basin.⁷

Principles for the use and management of transboundary waters are contained in four general categories (equity, reasonable use, conservation and co-operation). The operationalisation of the principle of notification has been further elaborated in the Danube River Convention, where states are obligated to create a regional water quality monitoring and emergency warning system for the Danube River. The Accident Emergency Warning System operating across Danube region functioned reasonably well to alert downstream countries of the Baia Mare accident, is a primary example of the institutional network required under the principle of notification.⁸

If a significant damage is occurring, then the state in which the damage originated must eliminate, mitigate, and/or compensate for the harm.⁹

The obligation of states to ensure that facilities within their jurisdictions meet technological and safety standards agreed to with their neighbours would be a solid step in the direction of accident prevention and meaningful collaborative management of transboundary watercourses by watercourse states.¹⁰

The principles and norms regarding transboundary pollution are well-established and compatible under international and domestic law. Transboundary pollution is defined as “pollution whose physical origin is situated wholly or in part within the area under the jurisdiction of one [state] and which has adverse effects, other than effects of a global nature, in the area under the jurisdiction of [another state],” and is one of the oldest and most persistent problems in environmental law. Transboundary pollution problems can be found along political borders at any level of government. International transboundary pollution has proved particularly difficult to address.

The challenge in creating and enforcing a transnational pollution control regime lies in harmonizing international and domestic law.¹¹

For example, the first step in the evolution of transboundary pollution principles in North America was in the late nineteenth century, when american farmers and ranchers in Colorado and

⁵ Ibid, p. 18.

⁶ Ibid, p. 19.

⁷ Ibid, p. 20.

⁸ Ibid, p. 20.

⁹ Ibid, p. 20.

¹⁰ Ibid, p. 21.

¹¹ Noah D. Hall, *Transboundary pollution: Harmonizing international and domestic law*, „University of Michigan Journal of Law Reform”, 40, 2007, p. 682.

New Mexico began diverting water from the Rio Grande for irrigation.¹²

The mechanisms for effectuating transnational pollution principles through international and domestic law are very different. Analyzing transnational pollution is requiring international and domestic law.

Mexico claimed that these diversions reduced the downstream supply of Rio Grande water for the Mexican city of Ciudad Juarez. Mexico formally complained to the United States Secretary of State. The Secretary of State requested a legal opinion from the United States Attorney General. Attorney General (US Minister of Just) Judson Harmon's 1895 opinion claimed that the United States was under no international legal obligation to hinder its development to protect the environment of its downstream neighbor: The Harmon Doctrine is the leading statement of the concept of absolute territorial sovereignty.

The doctrine was never actually applied by the United States in the Rio Grande water dispute with Mexico or any other international transboundary environmental dispute.¹³

The International Waterways Commission recommended that the United States and Canada adopt legal principles to govern uses of their shared waters and form an international body to advance protection of boundary waters. In 1907, the International Waterways Commission drafted a proposed treaty which was modified through negotiations and eventually led to the Boundary Waters Treaty of 1909.¹⁴

The Boundary Waters Treaty of 1909 has provided both a substantive and procedural foundation for addressing transboundary pollution between the United States and Canada for nearly a century.

There are two major causes of past failures to build working regimes that enhance the role of tort in environmental governance. Of the fourteen major civil liability treaties signed in the environmental field since 1960, however, only six have ever entered into force, and only one treaty, governing oil pollution from ships, has resulted in actual claims for compensation. The failure of civil liability treaties has serious effects for deterrence, corporate accountability, compensation of victims, and the global environment. Without specific treaties setting ground rules for transnational tort suits, individuals harmed by transboundary pollution have few viable ways for remedies. Theorists of the role of liability in international law have largely overlooked the lack of ratifications of civil liability treaties and have instead engaged in micro-level analysis of individual treaties, examining design issues such as the choice between strict and fault-based liability, the types of environmental harm that should trigger liability, channeling of liability to certain operators, and the consequences of governmental permits for private liability.¹⁵

The first cause is conflicts between states that are exporters of pollution (mainly developed states) and states that are importers of pollution (mainly developing states). Numerous liability negotiations have been ended by disputes between these states, and a rational state that is a net-exporter of pollution has little incentive, absent some inducement or side-payment, to cooperate on a liability treaty that could lower liability walls and expose its firms to tort suits.¹⁶

The second major cause of regime failure is that the content of the treaties, as they have emerged from negotiations, has become too onerous to attract widespread adherence. With stringent provisions mandating cost internalization, mandatory insurance, high liability limits, and other provisions that require substantial changes in domestic liability law, the treaties have become unacceptable to both developed and developing countries.¹⁷

In 2002, the UN General Assembly called on the International Law Commission (ILC) to resume work on codifying principles of liability for transboundary damage, and the ILC issued draft

¹² Ibid, p. 692.

¹³ Ibid, p. 693.

¹⁴ Ibid, p. 694.

¹⁵ Noah Sachs, *Strengthening tort remedies in International Environmental Law*, University of Richmond School of Law, Robert R. Merhige Jr. Center for Environmental Studies, 2007, https://law.stanford.edu/wp-content/uploads/sites/default/files/event/266730/media/slspublic/Sachs_Strengthening_Tort_Remedies_3.pdf, p. 6.

¹⁶ Ibid, p. 6.

¹⁷ Ibid, p. 6.

principles in 2004.¹⁸

In public international law, the principal of *sic utere tuo* has played an important role in treaty making and diplomatic negotiations. The Latin maxim “*sic utere tuo ut alienum non laedas*” means use your property so as not to injure the property of another.¹⁹

There are at least three major benefits that a “thick” tort system of clearly established rights and responsibilities would bring to international environmental law.²⁰

Finally, tort law could act as a regulatory device by filling in “gaps” in the major public-law environmental treaties. Existing treaties governing shipments of hazardous waste, safety of nuclear reactors and industrial facilities, use of watercourses or regional seas, and other areas of environmental cooperation might fail to prevent environmental damage for numerous reasons. The damage may have been of a type unforeseen by the treaty negotiators, the treaty might contain weak initial commitments, there might be widespread non-compliance, or states may lack regulatory power, or fail to use their power, to control transboundary pollution originating in their borders. Treaties as a whole may be underenforced in an anarchic international system that lacks an authoritative judicial organ. Tort liability, in theory, could remedy these weaknesses by First, tort damages could provide pollution victims with compensation after major transboundary environmental accidents or pollution flows, such as oil spills on the high seas, chemical contamination of rivers or lakes, or industrial accidents that release toxins into the air. While governments may take criminal or regulatory action against culpable parties, only tort provides a monetary remedy that can directly assist the victims of the pollution, and particularly victims who reside outside the jurisdiction where the harm originated. Tort could be a plaintiff’s only resort against a polluting firm where state regulation of the firm’s activities is weak or has been corrupted because of bribery or political influence. Second, more robust cross-border tort remedies could have a deterrent effect by forcing firms to internalize both the cost of any transboundary environmental damage and the cost of preventative measures. Tort remedies are a form of accountability mechanism, ensuring a check on corporate conduct, providing incentives for precautionary measures, and avoiding “unjust enrichment” by companies that benefit from global economic activity while externalizing environmental consequences beyond national borders. Interest in enhancing private tort remedies for environmental damage developed in tandem with the growing international acceptance of the “polluter pays” principle in the 1970s and 1980s. Indeed, establishing viable tort remedies against culpable parties that cause environmental damage through transboundary pollution gives concrete legal meaning to the “polluter pays” principle. providing private-law avenues for compensation and redress. “In this way, private litigators contribute to a larger regulatory system, thereby producing a public good while pursuing their private aims.”

Fourteen major civil liability treaties have been signed since 1960. They are usually sectoral, targeting specific industrial activities (such as transport of hazardous substances by road or rail, transport of hazardous wastes by ship, or industrial accidents on transboundary watercourses) rather than addressing environmental damage regardless of cause. The sectoral nature of the treaties often leaves gaps in coverage for certain types of environmental damage.

Civil liability treaties have three main functions.²¹

Two main treaties apply to transboundary harms. We are speaking here about The Convention of the United Nations Economic Commission for Europe on the Protection and Use of Transboundary Watercourses and International Lakes, and the Convention on the Transboundary Effects of Industrial Accidents and The Convention of the United Nations Economic Commission for Europe on the Transboundary Effects of Industrial Accidents. Each of these treaties, like the Environmental Liability Directive, calls for states to promote communication, notification and cooperation on transboundary issues, but does not impose liability or compensation. First, they ensure non-

¹⁸ Ibid, p. 10.

¹⁹ Ibid, p. 12.

²⁰ Ibid, p. 19.

²¹ Henry van Egteren, R. Todd-Smith, Andrew Eckert, *Environmental liability and harmonization in the presence of transboundary effects and hidden assets*, „University of Alberta Economics Working Paper” No. 2005-01-17, available at SSRN: <https://ssrn.com/abstract=658383> or <http://dx.doi.org/10.2139/ssrn.658383>, p. 3.

discriminatory treatment of foreign plaintiffs and equal access to national procedures and remedies for resolving tort disputes. Second, they handle problems of jurisdiction, choice of law and enforcement of judgments. This is done by setting-up internationally-agreed standards for where suits can be brought, which state's law will apply, and how judgments can be enforced through attachment of assets or mutual recognition of judicial decrees. Third, the treaties harmonize the substance of liability law for suits arising out of activity covered by the treaty. All treaties are including provisions regarding the standard of liability, limitations on damages, defenses, and channeling of liability (the important issue of whom can be sued). When it is established the strict liability of industrial operators or setting a monetary limit on claims, for example, a civil liability treaty may require parties to change their domestic liability law to reflect the harmonized rules of the treaty. The harmonization of national tort law, with respect to certain defined categories of environmental damage, reduces the prevalence of forum-shopping and the risk that litigation outcomes will depend on accidents of geography.

The international community has not shown any significant interest in procedural treaties that would address liability solely through jurisdictional rules.²²

In the problem of harmonization there are two main legal issues to consider.²³

The first is the choice of law and the second is the choice of forum.

There are two jurisdictions, a domestic jurisdiction in which the firm responsible for the environmental harm is located and a foreign jurisdiction where the transboundary damages occur.

Choice of law focuses on which law, domestic or foreign, will determine liability for the firm. Choice of forum determines which jurisdiction will handle the case, not the law to be applied in a given jurisdiction as is the case with choice of law decisions. When a jurisdiction is not appropriate, then it can declare itself an inconvenient forum or forum non conveniens. While the legal test used in forum cases does not explicitly state that forum choice is about access to assets, in practical terms, forum choice determines if foreign claimants can recover damages against transboundary harms.

The European Court of Justice provides protection in the form of civil liability. It ensures uniformity in interpretation of European Union legislation. The Protocol ensures that judgments of European Union states are respected.²⁴

Although there are over 200 international agreements dealing with environmental matters, only a few deal specifically with transboundary pollution.²⁵

The customary international law of transboundary pollution has as base a very small number of inconclusive adjudications and a mountain of official declarations and unofficial commentary seeking to make something out of them.²⁶

Some authors argue that a right to advance notification and consultation is all that can be demanded. There is a high level of consensus under both international customary law and U.S. statutory law about the answers to three questions (a source state is legally responsible for all transboundary pollution emanating from sources within its jurisdiction, a source state is liable only when such pollution is clearly proven to cause significant harm in the affected state and once the threshold of significant harm is crossed, a source state is strictly liable for such harm).

The appropriate remedy under international law is a matter of some disagreement. Some authors insist that international law provides for awards of monetary damages for proven transboundary pollution.²⁷

There are two conventions relevant to the Baia Mare and Baia Borsa accidents, the Convention of the United Nations Economic Commission for Europe on the Protection and Use of Transboundary Watercourses and International Lakes (signed in Helsinki on 17 March 1992 and entered into force on 6 October 1996) and the Convention of the United Nations Economic Commission for Europe on

²² Ibid, p. 3.

²³ Thomas Merill, *Golden Rules for transboundary pollution*, 46 „Duke Law Journal” 931-1019 (1997), available at: <https://scholarship.law.duke.edu/dlj/vol46/iss5/1>, p. 933.

²⁴ Ibid, p. 938.

²⁵ Cedric Lucas, *The Baia Mare and Baia Borsa accidents. Cases of severe transboundary water pollution*, „Environmental Policy and Law”, vol. 31, no. 2, 2001, p. 107.

²⁶ Ibid, p. 108.

²⁷ Ibid, p. 109.

the Transboundary Effects of Industrial Accidents (also signed in Helsinki on 18 March 1992).

These two conventions emphasize the need for prevention, warning alarm systems and notification, mutual assistance, and the exchange of information, as well as public access to information. Such provisions are also included in the Convention on Co-operation for the Protection and Sustainable Use of the River Danube adopted on 29 June 1994 in Sofia, Bulgaria. The main benefits of these conventions are their provisions for notification and co-operation.²⁸

The Water Framework Directive, adopted by the Council and the European Parliament, sets-up for measures at watershed level including “measures required to prevent significant leakage of pollutants from technical installations, and reduce the impact of accidental pollution incidents”, and “systems to detect or give warning of such events”.²⁹

The European Union has decided to adopt an environmental liability regime, the absence of which is one of the main weaknesses of the present international conventions.³⁰

The Convention establishes a system of objective liability chargeable to the operator (Art. 6).

Here are relevant the provisions of the Helsinki Convention regarding the trans-boundary impact caused by industrial accidents (Convention on the Trans-boundary Effects of Industrial Accidents-CTEIA) because they both are industrial objectives which develop operations where one or several hazardous substances may be present in quantities equal or higher than the standard quantities included in Annex I to the Convention, or are located within the river systems of some trans- boundary water courses, thus have the potential to generate trans- boundary effects.³¹

The convention is not sufficiently clear in its scope and definitions to provide the kind of legal certainty deemed requisite by industry and many member states. The victim has not the obligation to bring any proof of fault, nor to establish the cause or the origin of the occurrence.

3. International legal instruments

The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, completed at Lugano in 1993 (The Lugano Convention) has established a general framework for liability. The most important reasons that states have not signed or ratified the convention include concerns around the fact that the convention does not limit the scope of liability to transboundary harms but also to harms occurring within the jurisdiction of a single state. The convention exceeds the liability regimes existing in member states at the moment by including environmental damage as such. Its definition of dangerous activities exceeds that existing in some member states.³²

The Convention is based on objective liability in the context of the polluter pays principle. Specific provisions are included for causation, joint liability, and a compulsory financial security system for liability. The Convention also provides for public access to information. While the convention is not likely to come into force, it has provided a jumping board for current efforts to draft a liability instrument that has broader support in the international community.³³

A new liability regime could be drafted using the provisions of the Lugano Convention.³⁴

Even though the convention is not likely to come into force, its provisions would be useful as a guide for new legislation. The object of the Lugano Convention is to ensure adequate compensation for the damage resulting from activities dangerous to the environment. The convention is useful in determining who ought to compensate the victims of the Tisa River cyanide spill for loss of the use of river water, loss of wildlife, long-term health effects of the spill, loss of income and restoration costs. The operator of dangerous activity is to be liable for damage “[c]aused by the activity as a result

²⁸ Ibid, p. 110.

²⁹ Cristine Bernasconi, *Civil liability resulting from environmental damage: a case for the Hague Conference*, „Hague Yearbook of International Law/Annuaire de La Haye de Droit International”, Vol. 12, 1999, p. 13.

³⁰ Ibid, p. 22.

³¹ Ibid, p. 30.

³² Ibid, p. 36.

³³ Ibid, p. 36.

³⁴ Ibid, p. 37.

of incidents at the time or during the period when he was exercising the control of that activity.”

The operator will be excused from liability if he can prove that the accident was caused by a natural phenomenon of an exceptional, inevitable, or irresistible character.³⁵

A proposed comprehensive environmental liability instrument would resolve these ambiguities and provide certainty as to the types of damage covered, the types of activity covered, the standard of liability applied to each activity, specific rules for transboundary harm, and a complete system of financial guarantees. There are other instruments applicable not to the Tisa spill specifically, but to water-related incidents in general. These include the ECE Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements, the Convention on Liability and Compensation in connection with Carriage of Hazardous and Noxious Substances by Sea and the Vienna Protocols on Civil Liability for Nuclear Damage.³⁶ Although it has been shown that many legal instruments are not applicable to the current situation simply because they are not in force, a closer look reveals problems with the implementation of those instruments that would be applicable to the current situation. In some cases, additional steps need to be taken in order to make full use of those legal instruments already in force.³⁷

At the time of the Baia Mare accident, Romania was party to several international conventions and protocols, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the Convention on the Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Convention), the Convention on Environmental Impact Assessment in a Transboundary Context, and the Hungary-Romania Treaty on Understanding, Cooperation and Good Neighbourliness.³⁸

The convention is requiring the parties to establish monitoring, research and development, bilateral and multilateral cooperation, consultation, joint monitoring and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes has as goal to strengthen international measures to prevent, control, and reduce pollution of waters causing or likely to cause transboundary impacts. The CPUTW obligates parties to manage all actual or potential sources of pollution through appropriate legal, administrative, economic, and technical means, including the use of best environmental practices, appropriate licensing, best available technology, and minimising the risk of accidents.

The parties have the obligation to support the development of an international liability regime for pollution of transboundary waters. The CPUTW specifically provides the polluter pays principle and obligates parties to ensure the restoration of damaged ecosystems.³⁹

Romania did meet its obligations under the convention to exchange information as early as possible and had also established an accident emergency warning system in compliance with requirements under this and other international conventions.⁴⁰

The Bucharest Declaration of 1985 represented the first step taken by Danube River Basin countries to collectively address water quality and management issues in the basin. The declaration set the stage for the creation in 1992 of the Environmental Programme for the Danube River Basin, an intergovernmental co-ordinating body. One of the principal achievements of the EPDRB is the establishment of a task for that drafted the Strategic Action Plan for the Danube River Basin, which in turn was the basis for the creation of the Transnational Monitoring Network in the Danube River Basin. All of these activities have been in support of the Danube River Convention. The Danube River Convention is the main of international environmental law directly and specifically applicable to the Danube River. It is in relation to other institutions and instruments designed to address the environmental quality of the Danube River Basin, including the Bucharest Declaration of 1985, the

³⁵ Ibid, p. 43.

³⁶ Ibid, p. 24.

³⁷ Ibid, p. 25.

³⁸ Ibid, p. 25.

³⁹ Ibid, p. 25.

⁴⁰ Ibid, p. 26.

Environmental Programme for the Danube River Basin, and the Strategic Action Plan for the Danube River Basin.⁴¹

Romania has failed to fully implement the provision obligating it to minimise the risks of accidental pollution through preventive measures. The Danube River Convention is repeating reiterates many of the obligations of parties under the CPUTW. Romania, as party to the convention, has taken essential steps to implement the DRC, including establishing its part of the Accident Emergency Warning System under the Transnational Monitoring Network and exchanging information relating to accidents.⁴²

The Hungary-Romania Treaty is the general framework for security co-operation between the two nations. Article 10 obliges the parties to the treaty to cooperate to prevent, reduce, and eliminate transboundary pollution and to inform each other without delay of accidents that threaten to result in ecological catastrophes and on measures taken in response to such accidents. Even some delay took place in informing Hungary of the Baia Mare spill, as discussed above, Romania fulfilled its obligations under the treaty to the extent possible at the time through channels established under the Accident Emergency Warning System and subsequent cooperation.⁴³

The CTEIA is the main international legal instrument for industrial accident prevention to which European countries are party. Hungary is Party to this Convention and Romania is not. The convention seeks to reduce the risks and effects of industrial accidents through prevention, emergency preparedness, consultation and cooperation, legal and administrative reform, public participation, research and development, and exchange of information and technology. The parties to the CTEIA are obliged to support international efforts to establish a liability regime for industrial accidents.⁴⁴

The convention requires that parties take "appropriate measures" to reduce risks with the help and co-operation of operators. Operators have also the obligation to demonstrate safe operating procedures by providing information about their plants to governments. The convention covers such obligations between states as notification, sharing information, providing mutual assistance, and exchanging technology.⁴⁵

The CTEIA convention remains the centrepiece multilateral agreement for industrial accidents, and therefore provides the most relevant framework for action. The ILO convention's superiority in the area of prevention lies in large part with the provisions calling for the use of best available technology, risk assessment of operations, training of personnel, and analysis of accidents for the purpose of adaptive learning and future accident prevention. Similar provisions and provisions for a comprehensive safety management system approach to accident prevention and response, such as contained in the Seveso II Directive of the European Union, could be included in a protocol for accident prevention under the TEIA convention in the future. The UNECE Convention on the Transboundary Effects of Industrial Accidents is less comprehensive in its approach to accident prevention than the ILO Prevention of Major Industrial Accidents Convention.

The convention obligates parties to take measures to prevent accidents and to notify and cooperate with other affected states in the case of emergency situations. In regard to accident prevention and management, the convention does not go beyond previously discussed conventions. The broad nature of the convention as a whole lays the framework for structuring particular watercourse conventions such as the Danube River Basin Convention. Convention on the Law of the Non-Navigational Uses of International Watercourse is a treaty on the use and management of watercourses that obligates parties to cooperate closely with each other to ensure the sustainable and equitable development of transboundary water systems.⁴⁶

The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes is focusing on measures for the prevention of

⁴¹ Ibid, p. 26.

⁴² Ibid, p. 27.

⁴³ Ibid, p. 27.

⁴⁴ Ibid, p. 35.

⁴⁵ Ibid, p. 30.

⁴⁶ Ibid, p. 30.

waterborne diseases. The protocol is concerned with mitigating the effects of transboundary pollution on human health. Both the Convention on Co-operation for the Protection and Sustainable Use of the Danube River and the Convention on the Law of the Non-Navigational Uses of International Watercourses outline steps that parties are required to take in order to protect, preserve, and manage international watercourses. Each convention specifies measures that are necessary to prevent and control transboundary impacts.⁴⁷

One of the most important directives emphasizing the preventive approach is Council Directive 85/337/EEC amended by Council Directive 97/11/EC, the so-called EIA III.

The EIA Directive requires an assessment of the likely environmental effects of a large number of economic activities, including mining, before authorisation is given. Such an assessment should be reflected in an environmental report that has to be taken into account by the competent authority that grants permission. Romania has signed the UN/ECE Convention on Transboundary Environmental Impact Assessment. Therefore, preparing to join the EU and adopting the EIA Directive would help the country to implement the requirements of the UN/ECE Convention.⁴⁸

At the time of the accident, Romania had signed but not ratified the Aarhus Convention. The Aarhus Convention is a international legal instrument intended to link environmental and human rights by guaranteeing the public access to information, participation, and justice in environmental matters. The convention should serve as a valuable tool in the future in guaranteeing the transparency of siting, design, risk, and other aspects of decisions that have environmental implications.⁴⁹ The main EU accident prevention directive is the Seveso II directive (Council Directive 96/82/EC), replacing Convention on the Transboundary Effects of Environmental Accidents.⁵⁰

The Seveso II Directive is demanding the development of safety management systems by operators of industrial facilities. Such assessments include detailed risk assessments, the obligation to take appropriate steps to reduce risks, emergency planning, monitoring, and audit and review. The Seveso II Directive has as goal to be comprehensive and detailed in its components and sets a solid framework for all major aspects of industrial accident prevention. Seveso II is providing a comprehensive accident prevention scheme, but the directive explicitly excludes mining operations from the list of operations covered by the directive.⁵¹

Council Directive 76/464/EEC has as object of activity pollution caused by certain dangerous substances discharged into the aquatic environment of the Community.⁵²

The EU directive on integrated pollution prevention and control (Council Directive 96/61/EC) focuses on prevention by requiring installations in Member States to obtain an operating permit from the competent authorities, with emission limit values based on the use of best available techniques. Permits must include provisions to deal with conditions other than normal operating conditions where there may be environmental risks. The directive does require member states to establish national emission reduction programmes, which must include legally binding water quality objectives. The national programmes would also require deadlines for the implementation of emission reduction targets. This would be a valuable tool to reduce point-source emissions in the countries of Eastern Europe, including emissions from mining activities.⁵³

Waste management within the EU is governed by Directives 75/442/EEC, 91/156/EEC and 99/31/EC.

Directive 75/442/EEC specifies that states shall ensure that waste is recovered and disposed of without endangering human health and without using processes which could harm the environment. Directive 75/442/EEC was amended in 1991 to exclude extraction, treatment and storage of mineral resources from its scope (Directive 91/156/EEC) in areas where these activities are covered by other Community legislation. Directive 75/442/EEC⁴¹ on waste as amended by Directive 91/156/EEC⁴²

⁴⁷ Ibid, p. 34.

⁴⁸ Ibid, p. 29.

⁴⁹ Ibid, p. 31.

⁵⁰ Ibid, p. 32.

⁵¹ Ibid, p. 32.

⁵² Ibid, p. 33.

⁵³ Ibid, p. 33.

applies to waste from extractive industries, such as mining. This Directive establishes that Member States must take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods that could harm the environment. The deposit of waste in a pond is a waste disposal operation covered by Directive 99/31/EC on waste landfills.

Directive 75/442/EEC continues to apply to waste from extractive industries, including gold mining.⁵⁴

Directive 99/31/EC is excluding inert wastes from the scope of the Directive, however, since wastewater containing cyanide far from being inert waste, 99/31/EC applies to the Baia Mare case. The directive requires that landfill siting take account of the distance to groundwater and the risk of flooding and other potentially disruptive natural events; requires that appropriate measures to be taken in order to prevent water from precipitation to enter the landfill. It also requires that waste placement be done to ensure stability; and requires monitoring and reporting of the site. The immediate causes of the Tisa spill were the instability of the dams and the overflowing of the tailings pond from excess precipitation. Transposition of the new directive in national legislation would provide additional legal safeguards against future mining accidents.⁵⁵

4. Special aspects of international law

There is also a lack of existing international law dealing with the long-term effects of hazardous accidents. Mining and regulatory documents often state that cyanide in water rapidly breaks down in the presence of sunlight into largely harmless substances such as carbon dioxide and nitrate. Cyanide does react with many other substances to form about a hundred different compounds, many of which are known to be toxic to aquatic organisms. Some of these compounds have been found to persist in the environment for longer periods of time and to accumulate in plant tissues. Regulatory agencies do not require monitoring for these compounds, so they remain undetected, and it is assumed that they do not exist. In order to fully incorporate health standards into contingency plans, international law must be developed in order to address wildlife and ecosystem health as well as the chronic effects of hazardous pollution. Existing legal instruments also fail to consider the effects of activities that in themselves are not classified as dangerous. On the one hand, such measures can aggravate the consequences of natural disasters (floods or drought). On the other hand, these nondangerous activities can negatively affect the surrounding ecosystem without causing actual water pollution. In order to protect the environment from the effects of industrial accidents, legal instruments need to take into account the health of the whole ecosystem surrounding a body of water. Current legal instruments are limited to the human health aspects of industrial accidents or to water pollution. On the other hand, he or she must prove that there is a causative link between the occurrence and the damage suffered. The Convention does not provide any presumption of causation in this respect. It simply sets it out that when considering evidence of the causal link between the incident and the damage, the court shall take due account of the increased danger of causing such damage inherent in the dangerous activity (Art. 10).

It goes without saying that this provision is less favorable to the victim than a presumption of causation.⁵⁶

The geographical aspect of the Convention is defined in Article 3, meaning the territory of a State Party, “regardless of where the damage is suffered”. The Convention applies whether or not there is reciprocity. An injured person residing in a non-Contracting State may bring, before the courts of a Contracting State, an action for damages against the operator of a dangerous activity, while in the reverse situation, an injured person who resides in the Contracting State can not invoke the Convention before the courts of the nonContracting State. Overall, The Convention seeks to establish a scope of application which is as broad as possible. This solution undoubtedly reflects greater and

⁵⁴ Ibid, p. 34.

⁵⁵ Noah Sachs, *op. cit.*, p. 13.

⁵⁶ Ibid, p. 14.

greater awareness of the issues of environmental damage.⁵⁷

The White Paper on Environmental Liability explores the various features that community action might include to ensure restoration of damage to the environment. It should be pointed out here that on 9 February 2000, the European Commission adopted a White Paper on Environmental Liability. This document explores how a Community regime on environmental liability can best be shaped; it examines in particular how the polluter pays principle can best be applied to serve the aims of Community environmental policy.⁵⁸

First, a Community directive would not be retroactive. The directive is covering damage that becomes known after the entry into force of the directive, unless the act or omission that resulted in damage had taken place before the entry into force of the directive. Second, the scope of a Community directive would expand on existing liability regimes within member States. The White Paper on Environmental Liability sets out both the type of damage to be covered and the activities to be covered. A Community directive should cover environmental damage as such. Environmental damage includes damage to biodiversity and damage in the form of contamination sites. The biodiversity damage would expand the scope of most EU Member States' environmental liability regimes. Such damage could take the form of damage to habitats, wildlife or species of plants, as defined in the annexes to the habitats and wild birds directives. The proposed directive is also covering traditional damage to health or property that is caused by dangerous activity.

The scope of a Community directive is to ensure restoration of the environment where this is possible and to provide an incentive for compliance with national laws that implement Community environmental legislation. The polluter would be under obligation to restore damage or pay compensation for the lost value of the injured asset.⁵⁹

This is the situation for Spain and for France, where Civil Code continues to play an essential role even in environmental matters. The French Civil Code originally provided only for exceptional cases of liability for damage caused by things and liability for damage caused by animals or by buildings. The liability regime is covering both traditional damage (harm to health and property) and environmental damage (site contamination and damage to biodiversity). In environmental matters, the general rules for civil liability have different roles. The general rules of civil liability may be enforced where the environmental liability is not dealt with in a specific law.⁶⁰

The Italian Civil Code has a similar rule. Contrary to the French Civil Code, it also provides a particular basis of liability for anyone engaging in a dangerous activity. If in the context of such a dangerous activity some damage is caused, the entrepreneur is held responsible, unless he or she proves that he took all the measures that would be adequate to prevent the damage.

5. Conclusions

The development of environmental law at the national, regional, and international levels must incorporate the ecosystems perspective.

Environmental law is burdened with the aim of protecting our natural environment from the human activities.

EU accession is not an universal solution for the environmental problems. In the same time, the world's legal systems have failed in their efforts to find a solution to transboundary pollution. The most successful strategy for achieving limits on transboundary pollution is contractual. We must take into consideration the fact that a small number of states are involved in a transboundary pollution dispute.

The states act as representatives of all individuals who are affected by negative effects. As a consequence, a bilateral or multilateral agreement is possible.

Harmonizing accepted international environmental law principles with respected and

⁵⁷ Regional Environmental Center for Central and Eastern Europe, *op. cit.*, p. 38.

⁵⁸ *Ibid*, p. 38.

⁵⁹ Cristine Bernasconi, *op. cit.*, p. 13.

⁶⁰ *Ibid*, p. 13.

independent domestic legal mechanisms could create a system that prevents and resolves transboundary environmental disputes, respecting at the same time the state sovereignty.

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