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OVERVIEW OF THE LEGISLATIVE STEPS TAKEN TO FOSTER A MORE EFFECTIVE NUCLEAR LIABILITY REGIME*

6. A Possible 'Model Regulation' on the Inter-state Level? – The 1997 Convention on Supplementary Compensation for Nuclear Damage and its high-ranking expectations

The Convention on Supplementary Compensation for Nuclear Damage (CSC) had been adopted in 1997 (not yet entered into force) under the auspices of the IAEA, simultaneously with the Protocol to Amend the Vienna Convention. Albeit, the CSC is freestanding in its very nature with respect to other liability conventions, according to its Paragraph 1 of Article XVIII[1]; *firstly* an instrument of ratification, acceptance or approval *shall be accepted only from* a State which is a Party to either the Vienna Convention or the Paris Convention, or *secondly*, from a State which declares that its national law complies with the provisions of the Annex to this Convention on the issues of jurisdiction, operator's absolute liability compensation, liability amounts and definition of nuclear damage.

The CSC oversteps the generally accepted priority relating to the exclusive, strict and absolute liability of the operator by means of providing for additional compensation out of international public funds in excess of the operator's liability limit amount (Articles III-IV of CSC and Articles 3-4 of the attached Annex). Signing and implementing the CSC, a State shall enact laws for guaranteeing the availability of compensation amounts as a result of transboundary damages caused by States to be a Contracting Party to the CSC and in the case of the Installation State is willing to establish international public funds for the aim of providing compensation amount in a pool (with about SDR 600 Million of which SDR 150 Million shall be reserved exclusively for transboundary damages). The CSC enacts, similarly to the Brussels Supplementary Convention, the tier-based system by means of the principle of gradation, with the difference on the second (member countries contribution, not fixed by CSC, depending upon the nuclear power capacity of the States) tier of compensation which has been explicitly established by the CSC (Article III), while the text of the CSC does not allude the distribution of the third tier. As for the first tier, the rules of the CSC are in accordance with the rules of the Brussels Supplementary Convention[2]; only by taking into account of the most relevant factor, the amount shall not exceed SDR 300 Million (available from the sources of private insurance companies).

Recognizing the fact, if an injurious nuclear accident or a radiological emergency occurred in the territory of a CSC-member State, and the amount of damage exceeds the limit amount of the absolute responsible operator, the claims for damages shall have been compensated from international public funds provided by the CSC-member State. In this manner, the liability of the Installation State shall be subsidiary as a consequence of the absolute liability of the operator irrespective of the fault or negligence having been attributable to the State. In this case, the State's duty for compensation is absolute but neither exclusive and nor full-scale (for the reason that the fund provides for amounts to compensate damages exceeding the maximum liability amount and the limited time period of the operator's liability) liability for providing compensation for the damage and loss incurred.

As for a noticeable clause of CSC under Article XV named 'Public international law', "*this Convention shall not affect the rights and obligations of a Contracting Party under the general rules of public international law.*" This inter-temporal phrase literally means that both the updated and subsequent general rules and mechanisms can prevail in contempt of the CSC rules, as long as a paradigmatic shift would transpose the provisions and rules of civil liability to the provisions and rules of (non-existing) State liability. This potential but inconceivable alteration would basically convert the liability conception, but this prospect will definitely fall through the wishful resistance of States, irrespective of the acquiescence and doctrinal theories being evolved in the level concerned and competent fora of international community in the elapsed time.

As for the revisions to the Vienna regime, coupled with the CSC of no effect, these steps would produce a common scheme for loss distribution among the victims, focusing liability on the operator of a nuclear installation, based on the principle of absolute or strict liability; but the CSC does not specify how a State ought to ensure the availability of the amounts owing the first tier[3].

Moreover, the CSC does not contain and govern the distribution of the third tier; in comparison with the Paris/Brussels regime it seems to be the most vulnerable point to be denominated in accordance with the effects of the CSC. After 13 years of its status being opened for signature and accession to a State which is a Party to either the Vienna Convention or the Paris Convention, or a State which declares that its national law complies with the provisions of the Annex to this Convention[4], the CSC cannot yet be considered as a prospective liability regime in the level of the actors of States, as the case stands with the four ratifications[5] (in addition, CSC has only 9 signatures[6], as well) from States of relatively low level of nuclear industry (except for, of course, the United States).

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Conclusion

After the Chernobyl accident, when the international community recognised that there was no effective (State) liability regime, constrained attempts have been made mainly within the scope of the competent body (e.g. by the IAEA). Nuclear accidents and radiological emergencies with transboundary effects causing increasingly serious damages reassessed the almost exclusively civil liability regime of that time. In the post-Chernobyl period, it became unambiguous that a civil liability system founded upon the primary liability of the operator could not be maintained in itself by reason of the high amount of compensation to be paid for the victims of an accident or emergency involving transboundary effects[7]. The Vienna Convention imposes the obligation on the Installation State of providing compensation for victims that suffered nuclear damages due to nuclear accidents "*which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit*" (Paras. 1-2 of Article 9). It is likely to remain an unpredictable option for any State seeking redress, and there is no doubt that in most cases reliance on the revised civil liability and compensation scheme provided by the 1997 Protocol to the Vienna Convention will be preferable[8].

The subsequent regulation purposed to eliminate these problems by means of establishing public funds, extending limitation periods, clarifying the main rules concerning issues of jurisdiction, etc. These objectives have been manifested in initiatives with the aim of amending the system of the Vienna Convention, which as wilful goals have been realised and are presently available as legal instruments in force or as drafts. The remaining questions deal with the evergreen problems of *(i)* how can the civil liability-based regime compensate the damage and/or loss, when the victim, the injured individual has no chance to bring the action due to the problems arising from the scope of damage, jurisdiction, time-limitation; or *(ii)* damage that could not be entirely compensated or repaired due to the two limitation mechanisms on time and amount. Further amendments attached to the existing liability regimes or new liability-based treaty shall be regarded as the ways for the promotion and solution of these gaps and problems. The extension of the notion of damage, the yielding provisions on applicable law, on allocation of loss or on jurisdiction-related issues ought to be mentioned as exemplar and future prospects of the anomalies within the scope of nuclear law.

The second and third element of the tier-based system concerning the financial contribution of States beyond and up to the operator's limit of amount shall be minutely elaborated and prepared for the requirements of codification techniques. The expected and anticipated prospective entry into force of CSC in accord with the experiences of the tier-based system of the binding Brussels Supplementary Convention have to be able to serve as a basis for establishing regimes to which the funds for compensation would be provided by States without their exclusive, strict or absolute liability being adopted in the regime concerned.

As *Currie* stated, an effective international liability regime should cover property damage, economic damage, damage to biodiversity, preventive measures, the cost of reinstatement and reinstatement or remediation of an impaired environment[9]. This manifestation is in accord with the purpose of analogous fields of international, as the domain of international environmental law, for the sake of extending the "convention-limited" narrow scope of damage by broadening its rage through anticipatory and follow-up measures, as well; in respect of whether the measures have been born, beyond any reasonable doubt, in direct and causal consequence with the virtual damages occurred.

The subsequent re-consideration of the international nuclear liability and compensation regimes[10] should evidently focus on the aim of establishing higher liability amounts via broadening the range of compensable nuclear damage, whilst leaving much of the original 1960s liability and compensation structure unchanged[11]. *Carroll* properly points out that a potential efficient regime may achieve its purposes by the participation of all of the relevant actors of the sectors of operators, electricity industry, insurers and governments[12]. By the way, the weakness of the regimes could be attached to this concept, while all of the relevant actors were pondering their own financial interests and relieves during the process of negotiations and legislation-oriented debates. Thereto, another critical issue for the international liability regimes is the limited membership and low-level participation mechanism of the conventions[13].

As for the ILC's codification work, the non-binding draft principles or articles auspiciously reflect the modern development of civil liability treaties and in subsidiary way, the evolution of the nuclear liability treaties, as well. The scope of application and the functioning of these civil liability-based instruments will not be endangered by the perspective State liability "dethronement" in spite of the uncertain efforts pleaded by the ILC in the framework of codification objectives associated with the concepts of State liability and State responsibility. Hence, it does not seem to be inconceivable that the States would pledge themselves in the immediate future for stipulating an international treaty-regime in order to impose and obligate State liability rules on the grounds of the ILC's drafts and principles[14].

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[1] Having regard to the fact, that those nuclear power generating countries that do not belong to the Paris Convention or the Vienna Convention account for more than half of worldwide installed capacity and they are willing to accept the basic principles of nuclear liability law within the framework of the CSC. See, McRae, Ben: The Compensation Convention: Path to a Global Regime for Dealing with Legal Liability and Compensation for Nuclear Damage. In: International Nuclear Law in the Post-Chernobyl Period. OECD-NEA, Paris, 2006. 188.

[2] On the further similarities and original linking points between the CSC and the Brussels Supplementary Convention, cf. McRae: op. cit. 190.

[3] Thus, the State would have the flexibility to select the funding mechanism from options, such as private insurance, an operator pool or a regional agreement. See further, McRae: ibid. 179.

[4] See, Point 1. of the Article XVIII.

[5] Yet, Argentina, Morocco, Romania and the United States are the Participating States of the CSC. These states have 108 nuclear reactors (including the 104 reactors of the United States), so, excluding the United States, the coverage of the CSC in the number of nuclear installations is very limited and poor due to the participation therein. See the country briefings at http://www.world-nuclear.org/info.

[6] Australia, the Czech Republic, Indonesia, Italy, Lebanon, Lithuania, Peru, the Philippines and Ukraine signed but not yet ratified the CSC.

[7] In 2003, the Director-General of the IAEA, with a view intending to foster a multilateral (global) and effective nuclear liability regime, reported that the International Expert Group on Nuclear Liability (INLEX) had been established. Dealing with the due professional expectations manifested by the Group, the General Conference stressed "the importance of having effective liability mechanisms in place to insure against harm to human health and the environment as well as actual economic loss due to an accident or incident during the maritime transport of radioactive materials". See, Resolution GC(47)RES/7.C, Chapter C, Point 4. The General Conference, as the plenary body of the IAEA acknowledged that "the preparation of explanatory text for the various nuclear liability instruments would assist in developing a common understanding of the complex issues and thereby promote adherence to these instruments", and consequently welcomed "the decision of the Director General to appoint a group of experts to explore and advise on issues related to nuclear liability". See, ibid.

[8] See, Birnie-Boyle: op. cit. 475.

[9] Compare, Currie: op. cit. 98.

[10] On the gaps and problems of the new liability conventions adopted in the year of 1997 should be classified in 4 groups. On these issues, cf. Carroll: op. cit. 79-85.

[11] Cf. Carroll: ibid. 75.

[12] See, Carroll: ibid. 97.

[13] See at http://www.world-nuclear.org/info/default.aspx?id=406&terms=440+reactors. However, Currie adds that many nuclear countries (Canada, China, India and Japan) are not parties to any of the liability conventions, while the nuclear power generation in the forthcoming decades is expected to increase significantly in these countries. There are currently approx. 436 commercial nuclear power installations operating in approx. 30 countries. It is calculated at a rough guess that the Vienna Convention covers 17,2% of the reactors, the Paris Convention covers 34,4% of the reactors worldwide, while the remaining percentage (48,4%) of the number of the reactors are outside of these liability-based conventions. Cf. Currie: op. cit. 100-101.

[14] Pursuant to Birnie and Boyle, the ILC's Articles on the issue of international liability attracted some attention as a possible model for new provisions based on the strict liability of the State where the nuclear installation is located, and proposals were made by a number of States, while the revised Vienna Convention does not address the question of the liability of States in international law. See, Birnie-Boyle: op. cit. 475.

Резюме

Правові теорії державної відповідальності та державної/цивільної відповідальності за неправомірні дії та дії, заборонені міжнародним законодавством, тривалий час були предметом дискусії в міжнародному публічному праві. Національне законодавство, а саме національні закони регулюють системи цивільної відповідальності у полі приватних законів громадян держави. Як протилежне до визначення поняття цивільної відповідальності національним законодавством має бути встановлене універсальне поняття на міждержавному рівні, що забезпечить захист та попередження єдиної системи державної відповідальності у державі. Проблема державної відповідальності за вчинення ядерної шкоди порушує питання, які бути визначені в рамках загальних міжнародних правил, що стосуються питань відповідальності. Окрім того, зменшення фінансових наслідків від ядерної шкоди шляхом встановлення певної компенсації через базу відповідальності за вчинені дії, встановлює важливий компонент режиму для безпечного використання ядерної енергії.

Ключові слова: державна відповідальність, державна і громадська відповідальність, МПК проекти статей, Паризький режим, Віденський режим.

Резюме

Правовые теории государственной ответственности или государственной/гражданской ответственности за неправомерные действия и действия, запрещенные международным законодательством, долгое время были предметом дискуссии в международном публичном праве. Национальное законодательство регулирует системы гражданской ответственности в поле частных законов граждан государства. Как противоположное определению понятие гражданской ответственности, национальным законодательством должно быть определено универсальное понятие на межгосударственном уровне, что обеспечит защиту и предупреждение единственной системы государственной ответственности в государстве. Проблема государственной ответственности за нанесение ядерного вреда ставит вопросы, которые должны быть определены в рамках общих международных правил, которые касаются вопросов ответственности. Кроме того, уменьшения финансовых последствий от ядерного вреда путем установления определенной компенсации через базу ответственности за совершённые действия, устанавливает важный компонент режима для безопасного использования ядерной энергии.

Ключевые слова: государственная ответственность, государственная и гражданская ответственность, МПК проекты статей, Парижский режим, Венский режим.

Summary

The legal theories of State responsibility and State/civil liability for injurious and internationally prohibited acts have been in the focus of public international law for a long while. By means of domestic legislation, domestic laws govern the systems of civil liability within the area of private laws of individual States. As opposed to the framework of civil liability determined by diverse domestic rules, exclusively a standard regulation framed at an interstate level shall secure and preserve the uniform system of State liability. Obviously, the issue of State responsibility for nuclear damages raises specific questions to be examined in the framework of general international regulations related to the spheres of responsibility and liability. Furthermore, the mitigation of the financial consequences of a nuclear accident through prompt and adequate compensation via liability-based issues shall compose an important component of the regime for the safe utilization of nuclear energy.

Key words: State responsibility, State and civil liability, ILC's Draft Articles, Paris regime, Vienna regime.

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MODEL OF EXECUTIVE POWER IN POLAND

Executive power in Poland consists of two bodies – the head of state – the president (a single–person institution) and the government (a collegial body). Mutual relations between them do not emulate any of the known models formed in democratic countries, being a cross–over of the chancellor and the presidential systems. The main contribution of the former consists in the so–called constructive vote of no confidence concerning the prime minister, which denotes that the parliament may recall him only when it simultaneously proposes a new candidate for the post of the head of the government and when recalling the prime minister and the government it is able to elect a new prime minister and a new government. The latter contributed a solution according to which some presidential decrees require the counter–signature of the prime minister and the appropriate minister who is liable for them before the parliament, while some acts may be passed without the counter–signature (the so–called prerogatives). Detailed discussion of the president's competences on the one hand and the competences of the Council of Ministers, its president and individual ministers on the other does not seem necessary for the purpose of this study. These issues are well discussed by the science of constitutional law and their repetition or summary does not seem necessary.

Adoption of the elements of two different models results in the eclecticism of legal regulations and their inconsistence. It is impossible to advocate a strong president and a strong prime minister at the same time, which may lead to serious dispute over competences, especially in the situation of the so–called co–habitation.

The model of executive power is now also affected by the modifications of the system of the division of the three powers resulting from the on–going processes of European integration and the development of supranational institutions. Their competences frequently overlap with the traditional competences of internal bodies, including the government, which results in the fact that some of their authority is exercised by supranational bodies. Consequently, this leads to strengthening the supervision of state's internal bodies by independent supranational bodies. This issue constitutes a separate subject of research.

1/ President's competences in relation with the government

Due to a great number of the president's competencies, it is necessary to focus on constitutional regulations and consider only the competences which are most important from the point of view of this paper.

The Constitution of the Republic of Poland empowers both the president and the government with the right of legislative initiative, which is a very unusual provision in democratic states. The practice so far does not seem to justify the reservations that "the instance of such a 'double' empowering of the right of legislative initiative to the executive authority involves the risk of destabilising the government's policy or creating competing executive centres". [12] When the government has a majority in the parliament, this fact should prevent such a danger. However, the contrary may occur in the case of a minority government and the president backed by the parliamentary majority could insist on promulgating laws opposed by the government. A minority government faces such a danger even without such an instance, but the support of the head of the state for a draft of a statute might turn out decisive, even if only from the psychological point of view.

Such a situation could be remedied by adopting the solution introducing the necessity of the government's acceptance for the drafts of statutes involving financial burden. However, a change of the constitution in this area should be considered and the president should be deprived of this competence, especially that he will not bear political liability for implementing the law which he has proposed.

As concerns the so–called prerogative resulting from the enumeration in art. 144(3) of the Constitution of the Republic of Poland of the president's official acts which do not require a countersignature, it is evident that their