[6] Energy Charter Secretariat: www.encharter.org

[7] *Хорбах Н. Л.* Ядерный протокол к Европейской Энергетической Хартии. Московский журнал международного права. – № 2. – 1996. – С. 128–153; № 6. – 1996. – С. 141–146.

[8] Organization of the Petroleum exporting countries. General information. Wien: OPEC: Secretariat. 2002, – P. 7; *Barnett M. N.* Finnemore M. The Politics, Power and Pathologies of International Organizations / International Organization, 1999 – No 53. – P. 699.

[9] Energy Policies of IEA Countries. – Paris: IEA / OECD, 2003. – P. 62–68.

Резюме

У статті розглядаються міжнародно-правові форми співпраці по окремих видах енергетичних ресурсів. Розкриваються особливості регулювання глобальної енергетичної співпраці в рамках ГАТТ/СОТ. У порівняльному контексті вивчається співвідношення норм ДЕХ і ГАТТ. Не дивлячись на прогресивні тенденції ДЕХ, у забезпеченні енергетичної безпеки він потребує оновлення.

Ключові слова: ГАТТ/СОТ, енергетична криза, енергетична безпека, Договір до Енергетичної Хартії, міжнародна торгівля.

Резюме

В статье рассматриваются международно-правовые формы сотрудничества по отдельным видам энергетических ресурсов. Раскрываются особенности регулирования глобального энергетического сотрудничества в рамках ГАТТ/ВТО. В сравнительном контексте изучается соотношеней норм ДЭХ и ГАТТ. Несмотря на прогрессивные тенденции ДЭХ, в обеспечении энергетической безопасности он нуждается в обновлении.

Ключевые слова: ГАТТ/ВТО, энергетический кризис, энергетическая безопасность, Договор к Энергетической Хартии, международная торговля.

Summary

Provision characters are explained in global energy collaboration GATT system. From the point of energy resources exchange as well as trade, first the crucial overview comes to ECT as general supported normative act for energy security and its foothold GATT. The importance in international trade of energy resources and its mutual comparison with GATT is widely researched. ECT regime, as well as notion of investor and investment and other cases raises its legal importance. A serious necessity forwarded for renewal even attaining multilateral agreement approach peculiarities toward a universal law order of informational trade regime of energy resources between transit and import countries exported ECT energy resources.

Key words: GATT/WTO, energetic crisis, energy security, Energy Charter Treaty.

Отримано 22.12.2011

VANDA LAMM

Professor Vanda Lamm, *Cor. Member of the Hungarian Academy of Sciences; Director, Institute for Ledal Studies, Hungarian Academy of Sciences*

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

5.1. 'Paris regime' – Legal Instruments Based Upon the *Convention on Third Party Liability in the Field of Nuclear Energy*

5.1.1. The 1960 Paris Convention

The 1960 Paris Convention (entered into force in 1 April 1968) was the first cornerstone international treaty dealing with nuclear (third party) liability under the auspices of the OECD. It is, with a general notion of treaty law, an open convention to any member States of the OECD and to any non-member States with the consent of the Contracting Parties; however, this mitigated option has not eventuated a worldwide adherence to this regime, it has not yet increased the willingness of States toward the access process, so a genuine limited participation of States has prevailed thereupon.

In the event of a nuclear accident supervenes in the territory of a State Party to the Paris Convention and subsequent damage or loss has been unanimously emerged in another State, which is also a Party to the Paris Convention, the provisions of the Paris Convention incumbent upon only the victim State will be applicable.

As illustrated by Articles 3-5, the Paris Convention establishes the maximum liability of the operator irrespective of the commission of an error, the liability for compensation[1] shall be covered by insurance or other financial

* Second part of the article published in № 4'2010.

security, while "*no other person shall be liable for damage caused by a nuclear incident*" – as Article 6 exemplifies it[2]. Subsequently, the term 'State liability' has been excluded from its ambit, by reason of establishing the operator's exclusive liability in the general scope of the present convention (entirely civil liability regime, explicitly exclusive and strict liability being evolved). As to proof of this characterization, liability under the Paris Convention is *channelled to the operator* of the specific nuclear installation, with no regard to whether causality obtains between the cause as the operator's fault and the caused damage. Henceforth, these strict (irrespective of fault and negligence of the operator) and financially effective rules pertaining to the operator's liability are counterbalanced, the focal and substantial provisions of the liability regime stipulate time limitation for the submission of claims and limitation of the amount of liability, which resulted in narrowing the scope of the operator's strict liability without imposing serious and virtual restrictions.

As for the amount of compensation, Article 7 declares that „*the aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established*" in accordance with the provisions of the convention[3].

Concerning the lapse of the action before the courts, the limitation in time is rather problematic, because e.g., beyond the domain of financial losses and damages, personal and bodily injury caused by radioactive contamination may not become manifest for years after the accident (while, proving the causal relation between the accident and the injury having incubated for years is rather ponderous). Before the national courts, the right of compensation under the Paris Convention "*shall be extinguished if an action is not brought within ten years from the date of the nuclear incident*"[4]. Nevertheless, a subsidiary rule concedes that national legislation may, however, "*establish a period longer than ten years if measures have been taken by the Contracting Party in whose territory the nuclear installation of the operator liable is situated to cover the liability of that operator in respect of any actions for compensation begun after the expiry of the period of ten years*"[5].

Within the purview of the Paris Convention, the rudimentary purpose was to ensure that adequate compensation should be made available for victims in the Installation State as well as in affected States. By no means, this mechanism demonstrated the tangible duty or obligation incumbent upon the States; however, States had engaged themselves to establish an efficient legal regime by means of the stipulation of compensation provisions for victims residing within and outside the territory of the Installation State.

As of May 2010, only 16 States were contracting parties to the Paris Convention, so thus its efficiency is dubious by its participation and in the time being when the prospects of the 1950s evolved by the most-developed Western States does not seem to meet the requirements of the altered world order and the new and emphatic role of the nuclear industry[6]. Accordingly, the efforts of the revision relating to the Paris regime concentrate on these aforementioned, detailed issues[7], which are yet proceeding and resulted with adopted conventions as the 2004 Protocol or the attempt of 1988 Joint Protocol with its fiasco caused by the inherent gaps and pitfalls[8].

5.1.2. The 1963 Brussels Supplementary Convention

The Paris Convention had been amended three times[9], but the Contracting Parties, prior to the first amending Protocol, had convincingly realized that the system of civil liability neither can be preserved and nor can be rectified through only a superficial and mere revision of the existing nuclear liability law (due to its fundamental principle concerning the operator's exclusive and strict liability)[10].

As a result of the efforts for the sake of making the amounts of compensation for liability of operators proportionate to the scale of the consequences of nuclear incidents, many of the Parties to the Paris Convention adopted the Brussels Supplementary Convention[11], an international instrument functioning in full compliance with the Paris Convention by means of securing public funds for the compensation of victims. Thus, State liability has been implicitly and additionally incorporated into the liability regime governed by the Paris Convention, because the Signatories of the Brussels Supplementary Convention admitted that the liability of the operator limited in time (10 years) and the amount of compensation (SDR 5 to 15 Million) under the Paris Convention would not be adequate for reimbursing the damage caused. Thus, for providing the remaining amount (in an extended time-limit, as well), the State concerned shall enter into the process with the aim of reconsidering the obstacles of the existing regime in success. Hereby, similarly to the amendments to Paris Convention, in 2004, the Protocol to Amend the Brussels Supplementary Convention has been adopted.

The pivotal novelty of this modified instrument was the tier-based funding mechanism, which supplemented the operator's absolute legal liability with financial means based on external resources entailing the liability of the State(s) in addition to guaranteeing the availability of these resources (in sum, SDR 300 Million equivalent with approx. € 360 Million, provided by three tiers, after the Protocol of 2004 not in force: € 1.5 Billion). This system has been built up as follows:

The *first tier* determines the operator's maximum financial liability (at least SDR 5 Million, equivalent with approx. € 6 Million, after the Protocol of 2004: at least € 700 Million). Thus, claims are covered by private-based insurance or other (private-based) financial security according to the operator's limited compensation amount.

The *second tier* requires the Installation State, in the territory of which the operator of the given nuclear power plant is situated, to make public funds available under national law. Thus, at the level of the second tier under an unlimited legal liability regime, the amount of compensation supplied by the operator will be supplemented by public funds secured by the Contracting Party (the difference between SDR 175 Million and the amount required under the first tier, equivalent with approx. € 210 Million, after the Protocol of 2004: € 500 Million).

The *third tier* draws on international public funds made available by the States pursuant to Point b) of Article 3 and Article 12 of the Brussels Supplementary Convention (SDR 125 Million, equivalent with approx. € 150 Million, after the Protocol of 2004: € 300 Million).

The three-tier mechanism imposes absolute legal liability on the operator, meaning that no demonstration of fault or negligence shall be proved, therefore, no instrument concerns the exclusive liability of States in the scope of nuclear law, but exclusive jurisdiction is granted to the courts of the Installation State.

In itself, this noteworthy mechanism (ensuring compensation from the resources of States, *in re* the residual amount without having been embodied by the operator's limited amount) ought not to entail the recognition and implementation of State liability, the three-layered system shall only be considered as the possibility of *de facto* residual obligation:

to compensate and to ensure that adequate reparation shall be obtained for any damage or loss incurred;

as a first step taken in the direction of the process with the aim of restricting the operator's strict liability in theory, and

to increase the implicit, additional, residual and rudimentary role of State (financial, fund-providing) liability.

Viz., in the framework of international legislation, liability of States could not be recognized without explicit obligations concerning the recorded liability rules based upon binding treaties incumbent upon States. It shall be traced back to the feature of international law, as States are simultaneously the legislators, recipients, entitled and obligors of rights and duties being included the adopted international instruments reflecting their interests and purposes throughout the membership status. It was, not only in 1968, inconceivable that all the participating States were going to join and apply efficiently such a legislation being established in the third tier, thereupon its outlook was not primarily alluring; leastways, as they are manifested as such the expectations and aims of the provisions enumerated in the convention. The existing but so far dubious joint revision process in accordance with the 1960 Paris Convention highlighted that kind of weakness.

5.2. 'Vienna Regime' – Legal Instruments Based Upon the *Convention on Civil Liability for Nuclear Damage*

5.2.1. The 1963 Vienna Convention

In 1963, in parallel with the efforts taken by the OECD-member States, under the aegis of the IAEA, the Vienna Convention had been adopted as a new multilateral *civil liability-based* convention (entered into force in 12 November 1977), but this intention has not been achieved successfully because of the limited participation (as of May 2010, 36 countries were contracting parties of the Convention), while, in principle, its declared pursuit has been the creation of the first universal nuclear third liability convention. The basic principles and objectives of the two liability-model treaties had been concluded in close interrelationship, the Paris and Vienna Convention are identical on the issues of exclusive and strict liability of the operator (Article IV of Vienna Convention); on limitation of liability in amount and in time (Articles V and VI of Vienna Convention); on mandatory financial coverage of the operator's liability (Article VII of the Vienna Convention) and ultimately on the jurisdiction of the competent courts of the State of the nuclear installation (Articles XI-XII of Vienna Convention).

Contrary to the provisions of the Paris regime, the Vienna-based regime did not fix an upper ceiling or maximum amount of liability, as it is set forth in Article V of the Convention: "*the liability of the operator may be limited by the Installation State to not less than USD 5 Million for any one nuclear incident.*" In contempt of the previous advantage, the inadequacy of the present regime (correspondingly to the Paris regime) emerged as the result of the Chernobyl accident[12], considering the quarter centennial or nearly 30-year period of experiences of implementation, besides, it has to be mentioned that variable political and economic conditions entered into the international stage after the adoption of the liability-based conventions in question[13]. Several attempts and measures had been put forward to transform the Vienna regime into a more efficient and modernized regime by means of imposing amendments to the Vienna Convention in the framework of the IAEA. The attempts were, at least, three-sided.

5.2.2. The First Attempt – The 1988 Joint Protocol Relating to the Application of the Vienna and Paris Conventions on Liability for Nuclear Damage

In view of the problems ensuing from the immense tragedy at Chernobyl, the gaps and obstacles of the existent legal environment and regulation system had been clearly manifested[14]. For the next years, States' attentions and legislative intentions were focused upon the elaboration of the 1988 Joint Protocol (entered into force 27 April 1992) having demonstrated the joint or mutual co-operation and efforts taken by the IAEA and the OECD within a system of considerable scope of subtlety, while bearing in mind the fact that "the Vienna Convention and the Paris Convention are similar in substance and that no State is at present a Party to both Conventions"[15]. Parties either to the Paris or to the Vienna Convention had pledged themselves that an urgent revision of the instruments of nuclear liability should have been crucially established[16]. High number of States submitted proposals for framing a new convention on State liability for nuclear damage but the clarification of the relationship between State and civil liability was thwarted by some States that refused to assume responsibility for transboundary harm caused by nuclear facilities under their jurisdiction or control. The realization of linkage between the two civil liability-based conventions prognosticated the two-folded civil liability regime, as opposed to the contingent and initially despairing constitution of State liability through joint mechanisms. The original purpose of the Joint Protocol was an appraised

desire to induce the number of the participating States in the contemplated field of unification and to form a bridge between the, at least, two-folded regime by means of establishing „a link between the Vienna Convention and the Paris Convention by mutually extending the benefit of the special regime of civil liability for nuclear damage set forth under each Convention and to eliminate conflicts arising from the simultaneous applications of both Conventions to a nuclear incident"[17].

Thus, the Joint Protocol had the intention to point out and form a 'bridge' between the Vienna Convention and Paris Convention for the purpose of ensuring the benefits in accordance with the fact of either convention had been extended to the Parties to the other convention[18]. Thus, if a nuclear accident occurs at a site of a nuclear installation situated in the territory of a Party to the Paris Convention (and *vice versa*, to the Vienna Convention) and causes damage and losses to persons or property in the territory of a Party to the Vienna Convention (and *vice versa*, to the Paris Convention), but one convention will be exclusively applicable to the accident; the operator of the concerned installation will be held liable for such damage or loss incurred. The operator's liability is determined in accordance with that Convention (irrespective of which one, either Paris or Vienna), i.e. the operator is always liable under the applicable Convention shall be that to which the operator's State is a Party within whose territory the installation is situated, and the amount of liability is determined by the legislation of that State (in addition to the provisions of the Convention through the financial means of the municipal law of the State).

Furthermore, the aspects of State participations and involvements comprehended in the two conventions, with relatively broad adherence, are disproportionate, because Paris Convention had been signed by a group of States of the OECD, whereas the Vienna Convention had been intended to regulate the related issues on a worldwide scale. Contrary to the general acceptance of the operator's absolute liability, States shall be committed for pooling public funds upon; this mechanism could be considered without constrained inclusion to be a special and financial form of the implicit appearance of the term 'State liability'. The Paris- and Vienna-based conventions had been designed for enhancing and combining an expanded liability regime determined by a *de lege ferenda* instrument, which uniformly formulated the legal regime of nuclear liability; however, upon the actual adoption of the Joint Protocol the doctrine of *de lege lata* was applied.

Accordingly, the possible anomaly arising from the simultaneous applications of the conventions in question implied, in principle, no longer a problem, as Articles II-III of the Joint Protocol point out. As it is illustrated by Article II, "*the operator of a nuclear installation situated in the territory of a Party to the Vienna Convention shall be liable in accordance with that Convention for nuclear damage suffered in the territory of a Party to both the Paris Convention and this Protocol*", and *vice versa*. Consequently, reminding the fact once more, that in principle, the Parties to the Paris/Vienna Convention and to the Joint Protocol are no longer regarded as non-member States within the purview of the Vienna/Paris Convention; furthermore, they are mutually regarded as Contracting Parties, whenever the operative provisions of either Convention are applicable and both Parties may claim compensation, if the States affected by the incident are Parties to the Joint Protocol. Therefore, the primarily initiatives of the Joint Protocol provided the legal basis for eliminating the difficulties and impediments emerging from the two distinct legal regimes and contradictions.

After the certain time has passed, only 26 States were parties to a Protocol that was going to form a bridge between a universal convention with genuinely achievable postulates and a regional convention based upon the compliance of the highly inter-connected, developed Western States with analogous economic, political and nuclear issues. The leading role was going to be attributed to the industrialized nuclear power generating Western region participating in the Paris Convention, while this method was going to be complemented by the opportunity of the universal-type of the Vienna Convention. Primarily, this kind of mixture was holding forth the success of the Protocol by compounding of the benefits of the two regimes while eliminating the inconveniences through the application of the provisions being akin to within the other regime. Without doubting the appropriate purposes and recognition of the Protocol, as the time being, after the waves of revisions and re-codification, sometimes by means of reconsideration in the 1990s, the disappointing complications of the multi-fragmented regime shall be emphasized, wherein this Protocol could not successfully act its added part in the practice.

The solution of fragmentation within the nuclear liability regime may no more be envisaged in the framework of the Protocol, that is thence and solidly under critics on its precipitate character after the pressure and urge of action after the Chernobyl tragedy without due and basic consideration of the entire system (excluding the possibility of conjoining two single regimes). Its fiasco brought the light of the problems arising out of the inherent discrepancies and fundamental uncertainties, by way of duplicating the deficiencies, whether they had already been in force within the rules of either the Paris or the Vienna Convention, of the efficient redress issues. In sum, a more efficient instrument had to ensure that in the case of a nuclear accident, much greater financial compensation would be made available to a much larger number of victims in respect of a much broader scope of nuclear damage than ever before[19], while, as Schwartz had correctly admitted, the Joint Protocol, in principle, "could only target the second of these goals, enabling compensation to be made available to a larger number of victims, and it could only do so to the extent that Paris and Vienna Convention states were prepared to adhere to it"[20].

5.2.3. The Second and Third Attempts (Dual Steps) – The 1997 Protocol to Amend the Vienna Convention and the 2003 Protocol amending the Vienna Convention

The Vienna regime, scilicet, the Vienna Convention entered into force 14 years after its adoption, which entailed prospective anomalies by reason of the long interval between its codification and taking of effect afterwards (albeit, only five instrument of ratifications were required, as it is set forth in Article XXIII).

Until 1997, two main instruments had governed the liability regulation operating under the auspices of the IAEA (Vienna Convention) and OECD (Paris Convention), involving the complexity of liability rules with the problem of the separate (Paris- and Vienna-based) mechanisms incorporated into the conventions dealing with the similar questions in a possible form of a nature of interrelationship. In 1997, nine States signed the *Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage*,[21] although its membership is considerably and originally restricted (currently, there are only 5 Parties to the Protocol that had further received 15 signatures, as well). There was a so-called two-stage process, as firstly the chief aim was to amend the certain provisions of the Vienna Convention being considered to be inefficient of the time had passed, while secondly, the question was seriously raised of establishing a new supplementary convention by which additional funds were to be provided by the international community of States[22].

International initiatives after preparation arisen from prolonged observations were designated to supplement and revise the Vienna Convention in a broader scope aiming to attain three main objectives, as:

the requirement of *adequate compensation for damage and more financial means to compensate victims* (Article 2 and Articles 7-9), presumptively being composed of contributions from the nuclear power generating States and contributions of States being proportionally to the rate of assessment provided to the budget of the United Nations);

extending the notion of damage (Article 2), which was one of the most desired novelties; the re-definition of nuclear damage reflected the intention to secure full compensation for victims[23];

the demand to authorize *more individuals/persons* being entitled to compensation due to the revised concept of nuclear damage, more entities from an extended geographical scope of participation, e.g. jurisdiction of coastal States can claim compensation for the injuries and damages caused by nuclear incidents (Articles 7-8 and Articles 12-13)[24].

The other milestone revision settled by the Protocol has been to set the possible limit of the operator's liability at not less than SDR 300 Million (Paragraph 1 of Article 7) at the lowest limit in principle. The limit of the liability shall not be less than SDR 150 Million, but the amount, up to the amount of SDR 300 Million, shall be made available by the State in addition to compensating nuclear damage by means of public funds (unambiguously, the exceeding of the traditional approach of strict civil liability represented by e.g. the Vienna Convention, without the explicit recognition of State liability).

Similarly, the Protocol revised the provisions of the Vienna Convention on the time limit for submission of claims for nuclear damage, in excerpt it was 30 years from the date of the nuclear incident for compensation for loss of life and personal injury (Article 8), while the time limit concerning the other types of damages remained unamended (10 years from the date of the incident).

Since the Vienna regime was substantially revised afterwards, in 1997, the inconveniences no longer influenced the behaviour of States concerning the intentional non-attendance and unconcern within the confines of this regime. Thus, the presumptive future prospects on the ground of the newly formulated Vienna regime as amended by the Protocol held out the promise for settling and simplifying the discrepancies and controversial issues. Since then, the experience and observations of State practice have been contradicting these expectations of high account, which unequivocally proves the inefficiencies and deficiencies of the outlook drafting in 1997, for what reason the international community has taken exception to States' assistance to the attitude raising the fiasco of the revisions and re-codification. The relatively low number of participating States, the broadened definition of damage, the type of limited liability in amount and in time and the extension of the geographical scope of the Vienna Convention[25] can refuse to believe in the success of the Protocol. As for proving this fact, in comparison with the 36 Participating States of the, more or less, obsolete 1963 Vienna Convention, meanwhile, with the revised and updated substance in favour of increasing the possibility for obtaining more compensation in extended redress issues[26], the 1997 Protocol as one of the most relevant and symbolic legislation attempts of the post-Chernobyl period has only 5 ratifications. In the last decades of the 20th century, the accelerated process of legislation negotiations and emerged new liability models entailed the symbiosis of the various liability conventions, having been different upon their participation status, liability issues (time and amount). In this regard, e.g. the 1963 Vienna Convention and the 1997 Protocol is in force and having operated on the basis of diverse mechanisms of high significance, as well[27].

(to be continued)

---

[1] According to the Article 11 of the convention, national law shall govern the nature, form and extent of the compensation, within the limits of the convention.

[2] In addition, Article 10 guarantees that in order to cover the liability under this Convention, "the operator shall be required to have and maintain insurance or other financial security of the amount established pursuant to its relevant articles and of such type and terms as the competent public authority shall specify."

[3] Point b) of Article 7 states „that the maximum liability of the operator in respect of damage caused by a nuclear incident shall be 15 Million SDRs as defined by the International Monetary Fund". However, any Contracting Party, taking into account the possibilities for the operator of obtaining the insurance or other financial security required pursuant to Article 10, may establish by legislation a greater or lesser amount. Hence, this paragraph permits that any Contracting Party may establish a lower amount, provided that in no event shall any amounts so established be less than 5 Million SDRs, an amount being equivalent with a financial mean as regarded to be worth considerably low amount. However, Article 15 enacts a subsidiary provision by ensuring that „any Contracting Party may take such measures as it deems necessary to provide for an increase in the amount of compensation" specified in the Convention.

[4] See, Article 8.

[5] See, Article 8. As for its limitation mechanism, see, point c) of Article 8.

[6] Compare, Tetley, Mark: Revised Paris and Vienna Nuclear Liability Conventions – Challenges for Nuclear Insurers. Nuclear Law Bulletin, No. 77 (2006) 27 – 28.

[7] As for proving their potential prospective efforts, the amended Paris Convention also will officially recognise, for the first time, that a state with an unlimited liability regime may participate in the scheme established by the convention. Compare, Carroll, Simon: Perspective on the Pros and Cons of a Pooling-type Approach to Nuclear Third Party Liability. *Nuclear* Law Bulletin, No. 81 (2007) 79.

[8] On the reform process, see in details, Dussart-Desart, Roland: The Reform of the Paris Convention on Third Party Liability in the Field of Nuclear Energy, and of the Brussels Supplementary Convention: an Overview of the Main Features of the Modernisation of the Two Conventions. In: International Nuclear Law in the Post-Chernobyl Period, OECD-NEA, Paris, 2006. 218 – 238.

[9] The revision of the Paris-based regime concerning the liability issues and compensation mechanisms purported to be a three-pointed modification, firstly to extend the geographical scope of coverage and application of the basically limited regime; secondly, to increase the amount of compensation available to the victims of the nuclear accident (not less then € 700 Million); and thirdly, to enlarge and extend the definition of nuclear damage and loss.

[10] De la Fayette emphasized it as a presumed pitfall of the regime in question. Cf. De la Fayette: op. cit. 7.

[11] It is worth observing in advance, that no State may become or remain a party to the 1963 Brussels Supplementary Convention unless it is a party to the 1960 Paris Convention.

[12] The system of liability and compensation established by the Vienna and Paris/Brussels regimes has their inherent and „statutory" weaknesses, and it was especially criticised in the aftermath of the Chernobyl accident. By way of comparison, the extent of damage had emerged after the Chernobyl accident, the amounts of compensation for the losses and damages were woefully low.

[13] On the historical overview relating to the issues of the lessons learned after Chernobyl, see, Pelzer, Norbert: Learning the Hard Way: Did the Lessons Taught by the Chernobyl Nuclear Accident Contribute to Improving Nuclear Law. In: International Nuclear Law in the Post-Chernobyl Period, OECD-NEA, Paris, 2006. 100 – 115.

[14] See in details, Schwartz, Julia: International Nuclear Third Party Liability Law: The Response to Chernobyl. In: International Nuclear Law in the Post-Chernobyl Period, OECD-NEA, Paris, 2006. 37 – 72.

[15] See, Preamble of the Joint Protocol.

[16] These steps were not novel in itself, nevertheless, during the 1970s and 1980s several attempts were made to find a means of connecting the two conventions, particularly in light of the continuing growth in international trade of nuclear materials, which, in turn, led to continuing concerns with both improving protections for victims and serving the interests of nuclear operators and their suppliers. See, Schwartz: op. cit. 44.

[17] As the substantive cause of the Protocol is set forth in the Preamble.

[18] On the basic ideas and purposes of the Joint Protocol, cf. von Busekist, Otto: A Bridge Between Two Conventions on Civil Liability for Nuclear Damage: the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. In: International Nuclear Law in the Post-Chernobyl Period, OECD-NEA, Paris, 2006. 134-136.

[19] Compare, Carroll: op. cit. 77.

[20] Cf. Schwartz: op. cit. 45.

[21] Entered into force on 4 October 2003, despite the undoubtedly low number of 5 required States for ratifying the Protocol.

[22] Compare with, Lamm: op. cit. 171.

[23] Even the broadened definition of damages within the 1997 Protocol does not include damage to the marine environment and damages to tourism and the fishing industry that may occur because of perceptions of risks regardless of actual damage caused. So thus, damages or losses should be defined broadly to include all actual economic losses of all sorts and all losses to the marine environment, as well as actual health damages and measurable property losses. See, Currie, Duncan: The Problems and Gaps in the Nuclear Liability Conventions and an Analysis of How an Actual Claim Would be Brought under the Current Existing Treaty Regime in the Event of a Nuclear Accident. Denver Journal of International Law and Policy, Vol. 35 (2006) No. 1, 98.

[24] Lamm properly referred to the inevitable fact, that the increasing of the material scope of nuclear damage may entail the extension of the number of the victims and, implicitly, the amount of compensation. The inclusion of certain forms of environmental damage or indirect damage in the concept of nuclear damage is bound to enlarge the number of victims, direct or indirect, of a given nuclear incident. See, Lamm: op. cit. 173.

[25] See more, Lamm: op. cit. 172 – 173.

[26] On this fundamental purpose, see the first formula of the Preamble of the Protocol.

[27] Cf. as it is set forth in the Article 19 of the Protocol, that reads as follows:

„1. A State which is a Party to this Protocol but not a Party to the 1963 Vienna Convention shall be bound by the provisions of that Convention as amended by this Protocol in relation to other States Parties hereto, and failing an expression of a different intention by that State at the time of deposit of an instrument referred to in Article 20 shall be bound by the provisions of the 1963 Vienna Convention in relation to States which are only Parties thereto.

2. Nothing in this Protocol shall affect the obligations of a State which is a Party both to the 1963 Vienna Convention and to this Protocol with respect to a State which is a Party to the 1963 Vienna Convention but not a Party to this Protocol."

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 регулює системи цивільної відповідальності у полі приватних законів громадян держави. Як протилежне визначенню 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 мають бути визначені у 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 финансових 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.

Отримано 25.11.2010

М. Ю. БЕЗДЄНЄЖНА

Марія Юріївна Бездєнєжна, *аспірант Інституту міжнародних відносин Київського національного університету імені Тараса Шевченка*

РОБОТА КОМІСІЇ МІЖНАРОДНОГО ПРАВА З РЕГУЛЮВАННЯ ТРАНСКОРДОННИХ ВОДОНОСНИХ ГОРИЗОНТІВ

Важливість води в житті кожної людини важко переоцінити. Цінність запасів ґрунтових вод для життєдіяльності усього людства усвідомлено нещодавно, тому Комісія міжнародного права ООН (далі – КМП) розпочала роботу над даною темою, завершивши цим кодифікацію міжнародного права у сфері регулювання прісноводних ресурсів.

Мета статті – аналіз роботи КМП, а саме проекту статей з транскордонних водоносних горизонтів. Відповідно до мети дослідження основними завданнями є аналіз чотирьох принципів, покладених в основу проекту статей – суверенітету над частиною водоносного горизонту; справедливого та розумного використання; незаподіяння значної шкоди та співробітництва – у контексті регулювання використання ґрунтових вод. Автор також пропонує альтернативне закріплення режиму для даного природного ресурсу – протокол до Конвенції ООН про право несудноплавних видів використання міжнародних водотоків 1997 р. (далі – Конвенція ООН). Ця тема була предметом дослідження таких науковців як Стівен МакКаффрі, Габріель Екштайн, Кристина Мехлім, Флавія Лурес і Джозеф Делапенна, а оскільки обов'язковий режим ще не розроблено, тема викликає дедалі більший інтерес серед фахівців міжнародного права.

Проект статей про транскордонні водоносні горизонти (далі – проект статей) складається з преамбули та 19 статей, які згруповані у чотири частини: (I) Вступ; (II) Загальні принципи; (III) Захист, збереження та управління; (IV) Інші положення.