

Protecting the Aquatic Environment in Community Law and International Law: A French Perspective

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In the early 90's, the French Ministry of the Environment still considered that Community Law was part of international law rather than a separate, autonomous, legal order applicable to and mandatory for its institutions. This was despite the fact that the Treaty itself, supported by a constant case law from the European Court of Justice (ECJ) and lately from the French *Conseil d'Etat* clearly asserted such an autonomy. In 1989, the European Commission therefore had to notify France that it had to report on the implementation of the first set of water directives which the Commission had issued in the 70's. These directives, known as the "Aquatic Ecosystem – Water Uses Directives" internalized crude waters designed to be transformed into drinking water (75/440 EEC, 15 July 1975) but also bathing waters (76/160 EEC, 8 Dec. 1975), fishing waters (78/659 EEC, 18 July 1978) as well as shellfish waters (79/923 EEC 30 Oct. 1979) . Once the Member States have transposed the provisions of the Community Law (directives) into their national legal system, they are bound to establish, within two years, a pollution reduction program according to the modalities they find most appropriate to fulfill the mandatory provisions of each directive.

The Commission considered the answer given by the French authorities as insufficient which resulted in a reasoned opinion against France in 1990. France's answer included on-going pollution reduction programs supposed to fulfill the aims of the directives. Such programs were based upon a framework of territorial maps with quality objectives for each area, approved by prefectural orders, water management plans established by administrative circulars and multiannual intervention programs set up by the river authorities (*Agences financières de Bassin*, replaced by *Agences de l'Eau*). They could be revised at all times, including downward.

To say the least, the Commission was not satisfied by the low level of coercion and authority exercised through these administrative tools. Moreover, numerous parameters had not been transposed into these orders, plans and programs. The pollution reduction programs had not been communicated to the Commission.

In order to avoid an action for non-compliance before the European Court of Justice (ECJ), which would have been harmful to the reputation of France - it had just accessed

to the EU Presidency -, the French Authorities committed themselves to implement the directive in a more appropriate way, i.e. via a ministerial decree rather than a prefectural order. They also promised to add the missing parameters and, in particular, to establish a legally binding planning scheme.

As for international law, taking for example of the adhesion to the Convention on the Law of Non-Navigational Uses of International Watercourses adopted by the United Nations General Assembly on May 21st, 1997, France was not among the first countries to be keen on joining the convention, especially because of the ongoing dispute.

I. Significant adjustments to the French legal system and to water management practices have been made necessary to adjust and conform to Community Law. The inadequacies which have remained have caused conflicts and litigations, forcing the Community judicial system and the French one to interact.

Like any other Member of the Union, France had to transpose the EU Directives into its national law. Such transposition resulted in the overhaul of a rather obsolete and incomplete system. A few problems remain.

A. Community Law as a key factor in the overhaul of the legal and institutional framework for water management in France

In all likelihood the absolute necessity to implement the EU directives and the need to give a legal response to three consecutive years of drought were key elements in triggering the overhaul of the water policy and management of France.

Moreover, in addition to the directives mentioned above, one had to consider Directive 80/67 of 17th December 1979 on the Protection of Groundwater against pollution caused by dangerous substances as well as the two directives adopted in 1991 namely, the Urban Waste Water Treatment Directive 91/271 EEC of 21st May 1991 and the Nitrates Directive 96/676 EEC of 12th December 1991.

The work is to be completed by the transposition into French law of the Water Framework Directive 2000/60 EC of 23rd October 2000.

1. The planning framework and the enforcement measures established by the Water Act of 3 January 1992 were made necessary for the transposition into national law of the directives adopted between 1975 and 1991

Since 1983 not fewer than four studies conducted under successive Environment Ministers from various political horizons, either by members of the Parliament or by scholars, had failed to lead to a satisfactory reform. France had to commit itself to adopt a new law which would complete its efforts of transposition of the EU Directives into the

national system.

This was the purpose of the Water Act of 3 January 1992. It had two key elements:

- First, the establishment of a legally binding planning framework with precise pollution reduction schedules, while the police power of the State's representative was applied at the appropriate territorial level, as required in the Drinking Water Directive (75/440 EEC, 15 July 1975), the Bathing Waters directive, the Fishing Waters Directive (78/659 EEC, 18 July 1978) , the Shellfish Waters Directive (79/923 EEC 30 Oct. 1979) and the Groundwater Directive (80/68 EEC, 17 Dec. 1979).
- Secondly, the strengthening of the monitoring and enforcement measures, particularly for private watercourses and ground waters which, under the Civil Code, are subject to user's rights by the owners who are riparian of the watercourse or who own the land above the ground waters. The regulation of these private rights was inadequate.

The planning became effective thanks to the establishment on the one hand of Water Management Master Plans ("SDAGE") for large watersheds, and on the other hand of Water Management Simple Plans ("SAGE") for smaller watersheds and aquifers.

The previous planning frameworks only had an indicative value. The new ones ensure that all programs and decisions are conform (compatible) to the established objectives. Thus, requests for water use authorizations can be approved as such, or subject to modifications, or refused, depending on their degree of conformity with the local planning objectives which fully reflect the objectives set by the Directives.

The transposition requirements of the Water Framework Directive were indeed a step forward.

2. For the first time a water legislation has had for only purpose to ensure the transposition of a Directive

A specific law, the Water Act n°2004-338 of 21 April 2004 imported into national law the Water Framework Directive, in particular by introducing the definition of quantity and quality objectives in the national planning scheme and by adopting the timeframe to reach such objectives. Moreover, it reinforced the framework itself to make it conform to the one called for by the directive, as well as the powers of the competent authority (i.e the Basin Prefect Coordinator) at the district watershed level.

However, this brand-new framework did not prevent litigations.

B. The multiplication of cases against France due to the interaction between the Community judge and the national judge

Without going back to all the preliminary litigations and more recent ones between France and the European Union, one will focus on the Brittany litigation involving the protection of crude waters to be transformed into drinking waters.

1. The Drinking Water litigation

This dispute is exemplary on all aspects.

Indeed, in this case a customer asked to the drinking water distribution service for the refunding of the mineral water he had to purchase for the period during which tap water had been undrinkable. His claim was based on the requirement of the Directive 75/440 EEC, 15 July 1975 transformed into national law and according to which suitable drinking water for humans should not exceed 50 mg of nitrates per liter. The customer was successful before the judge who relied on the contractual liability of the drinking water distribution firm acting on a public service delegation by the Municipality.

The drinking water supplier, condemned in civil law for not providing the appropriate service, immediately started a recourse against the State before the administrative judge and claimed that its lack of power regarding the police of classified facilities for the protection of the environment would make impossible the transformation treatment of crude water into drinking water at economically acceptable costs.

At the same time, a litigation started by the ECJ against France ended in March 2011 condemning France due to the absence of appropriate measures being taken for the quality of superficial waters, intended to be used for the production of drinking waters, to meet the standards of the Directive 75/440 EEC of the 16th June 1975.

While the action started by the farming firm against the French state was pending since 1995, the administrative judge gave a ruling just after the ECJ and in May 2011, condemned France to indemnify the farming firm for not using its police powers regarding classified facilities in a sufficient way.

2. The “Green Algae” litigation

There are some similarities with the “*Green Algae*” (*Ulves Armoricanæ*) litigation. Numerous Brittany associations brought actions before the administrative judge to get compensation from the French Government for the damage suffered because of the proliferation of green algae, due to the presence of nitrates in waters, in the Saint-Brieuc Bay.

The 2007 judgment of the Administrative Tribunal of Rennes relied on the 2003 reasoned opinion of the Commission regarding France, concerning the failure to transpose in Brittany the Directive on crude waters to be transformed into drinking waters (75/440 EEC, 15 July 1975). The tribunal held that France was liable on two

aspects:

- First, because of the poor implementation of the classified facilities police (poor impact assessment studies, abusive regularizations of existing piggeries and authorizations for new ones in already saturated areas, etc.)
- Second, for its late transposition of the “Nitrates Directive” 96/676 EEC of 12th December 1991 .

The liability of France was widely upheld in appeal by the Nantes Administrative Court of Appeal on 1st December 2009 which noted failures from the French Government resulting on the one hand from the lack in the implementation of community measures (late transposition of the Nitrates Directive especially as for establishing action plans and respecting the nitrogen quota per hectare of nitrogen spreads) and on the other hand on the implementation of the classified facilities rules to agricultural livestock holdings.

A causal link between the French Government failures and the damage suffered by the claiming association was found as the proliferation of green algae could only be linked to the over-concentration of nitrates in waters.

Once again, the national judge did not hesitate to use the synergy with community law to hold France liable, and to push the French authorities into action. However, this was not without risk of a backlash.

The dispute between France and several authorities The Netherlands partly explains France’s late adhesion to the Convention on the Law of Non-Navigational Uses of International Watercourses.

II. The French adhesion to the Convention on the Law of Non-Navigational Uses of International Watercourses, which had long been delayed because of an ongoing litigation involving The Netherlands, has now become possible. Such adhesion could boost adhesions to the Convention by other Member States, thereby ensuring better water governance at the international level

After the adhesion of France to the New York Convention has long been delayed, the new developments could lead to new adhesions and to better water governance at the international level.

A. A delayed adhesion despite the low coercive level of the provisions of the Convention

Numerous international agreements govern water management regarding rivers (the Rhine river, the Mosel or the Scheldt river, etc.) or aquifers (e.g. the shared aquifer between France and Geneva) and the stakes concerning the French adhesion to the New York Convention do not seem to cause problem, except for the recurrent litigation between France and the Netherlands or at least some of its authorities.

1. The litigation opposing Dutch authorities (public and private) to the French government: “the Thirty Year War” (1967-2000)

During three decades, numerous Dutch public or private authorities like municipalities, Waterschappen, horticulturists, water distribution firms or associations for the protection of the environment, using all existing legal remedies and before every possible French jurisdiction, attempted to obtain compensation from the French government or from the State Alsatian Mining Company (MDPA) for the alleged damage resulting from the release of chlorides in the Rhine due to the potash exploitation.

In 2000, the Strasbourg Administrative Tribunal was the first jurisdiction to implicitly acknowledge the existence of a causal link between chlorides releases and the alleged damage and to condemn the French Government to pay 24 million Francs (3,65 million Euros) to a drinking water supplying company and to the City of Amsterdam in order to replace the corroded drinking water network and to compensate the costs incurred in the reduction of water salinity.

However, in 2005, on appeal, and after a very thorough technical analysis, the Nancy Administrative Court of Appeal quashed the 2000's decision taken by the Strasbourg Administrative Tribunal. The Dutch claimant failed to assess how the saline releases from the MDPA were precisely the cause of the corrosion of the water distribution network. The French *Conseil d'Etat*, relying on the same experts' report, upheld this decision in 2007 and decided that the causal link between the fraudulent releases and the alleged damages was not proved for the period under consideration. It was the end of a thirty year-long litigation.

The MDPA closed down in December 2008.

Thus, what had appeared to stand in the way of France voting for the New York Convention had finally disappeared, and France could adhere to the Convention.

2. The Low Coercive Level of the Provisions of the Convention

The 1997 Convention sets up, for its signatories, a rather loose general framework for the management of trans-boundary waters. It encourages negotiations between riparian States. It only defines two main principles governing actions of States in the management of international watercourses, namely “the equitable and reasonable utilization and participation” (Article 5) and “the obligation not to cause significant harm” (Article 7) to the other riparian States of the watercourse.

The Convention requires States to comply with the consultation procedures, negotiations and exchanges of information before they take any measure which could impact on other States (Article 11), to protect and preserve the ecosystems of watercourses

(Article 20), to take all necessary measures to prevent or reduce the impact of potential harms to watercourses (Article 27), to initiate consultations in order to create joint monitoring mechanisms (Articles 27 and 28) et to solve disputes by peaceful means (Article 33).

One can already notice that France abides by all these obligations under the international agreements it had previously ratified on the subject.

3. The absence of contradiction between the provisions of the New York Convention and the other international agreements ratified by France, and the mere requirement of minimal compliance

Prima facie, the New York Convention does not have much effect on the domestic legal order, as France already abides by those principles, especially those regarding community requirements.

In the same way, France ratified other agreements and is a member to diverse commissions applying the same principles. The following agreements can be taken as examples: the International Agreement on the River Scheldt, signed in Gand on 3 December 2002 updates the Agreement of Charleville-Mezieres of 26 April 1994 by adding the obligation of multilateral coordination as required by the Framework Directive. Moreover, the International Agreement on the River Meuse was signed at the same time than the latter agreement and had the same purpose; the Agreement of 20 December 1961, establishing the International Commission for the Protection of the River Mosel against Pollution, was completed by a Protocol signed in Brussels on 22 March 1990 which set up a Joint Secretariat; the Convention for the Protection of the River Rhine, signed in Bern on 12 April 1999, superseding the Bern Agreement of 29 April 1963, which aimed at reinforcing cooperation on this watercourse to protect its river bank vegetation and its alluvial sheet; the Convention of 16 November 1962 for the Protection of the Waters of Lake Lemman against Pollution which established the International Commission for the Protection of Lake Lemman (CIPEL).

These texts are usually more coercive than the New York Convention.

The New York Convention would in fact have a meaning for France, only in the case of its Outer sea Department of Guyana, provided that the neighboring countries, Brazil and Surinam, would decide to ratify the Convention. In the case of Brazil, this would have an impact on the Oyapock River; in the case of Surinam, on the Maroni River. Thus, and in conformity with Article 3.5 of the Water Framework Directive which requires cooperation between a Member State of the Union and non-EU countries sharing a trans-boundary watercourse, a trans-boundary provision should be added to the Water Management Master Plan ("SDAGE") of French Guyana.

Finally, it seems that no contradiction with the 1992 Helsinki Convention on Trans-

boundary Waters can be found. It was ratified by France in 1999 and its provisions also appear to be more coercive than those of the New York Convention.

To sum up, it seems that there are only advantages for France to adhere to the New York Convention. In this evolving diplomatic and legal context, the 1998 European Union Guidelines for the Cooperation in the Development of Water Resources expressly refers to the UN Convention which is considered as a key instrument for the integrated management of trans-boundary watercourses.

The bill authorizing the adhesion of France to the Convention was registered at the presidency of the National Assembly on 6 April 2010. It was hastily adopted and transferred to the Senate, registered on 8 April and adopted on 18 May 2010.

For the first time since its adoption in 1997, the international context seems to be favorable to a revival of the adhesion and ratification process.

B. The prospects of a fresh start in the adhesion and ratification process of the Convention. Towards a better water governance at the international level

The perspectives following the French adhesion could be positive, triggering other adhesions which could lead to better water governance.

1. A boost in the adhesions

While 35 States ratified the 1992 Helsinki Convention, only 24 adhesions to the New York Convention were registered. France was the 22nd UN Member Nation to adhere.

During the Fifth World Water Forum, in Istanbul in March 2009, the representatives of about ten States expressed their willingness to adhere but the 35 adhesion quota is still not reached.

There is no chance that Turkey will adhere while the dam program on the Euphrates and Tigris rivers which is included in the south eastern Anatolian development project (GAP) is not over; this being quite detrimental to downstream riparian countries such as Syria and Iraq.

One can just hope that, during the next World Water Forum to be held in Marseille in 2012, a synergy effect between the French adhesion and other participating countries would trigger a wave of new adhesions.

2. Towards better water governance?

Four months after the adoption of the Convention, principles of sound water management vested in it served as benchmarks for the International Court of Justice in the case opposing Hungary to Slovakia (27 September 1997).

In the same way, the principles contained in the Convention had an influence on the negotiations of other treaties regarding international watercourses such as the Revised Protocol on Shared Watercourses of the Southern African Development Community, (S.A.D.C.) of 7 August 2000.

However, one can wonder if new adhesions will come among European Union Member States as numerous countries consider it useless to ratify a text which is in fact less coercive than the 1992 UN-EEC one and even less than the Water Framework Directive. Yet, the New York Convention is a genuine step forward regarding cooperation, a promising step in solving interstate tensions in scarce water areas.