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**ECONOMIC COMMISSION FOR EUROPE**

**CONVENTION ON THE PROTECTION AND USE  
OF TRANSBOUNDARY WATERCOURSES AND  
INTERNATIONAL LAKES**

**CONVENTION ON THE TRANSBOUNDARY EFFECTS  
OF INDUSTRIAL ACCIDENTS**

**Intergovernmental Working Group on Civil Liability**

**REPORT ON THE FIRST MEETING<sup>\*/</sup>**

Introduction

1. The first meeting of the Working Group was held in Geneva on 21-23 November 2001.
2. Mr. Jürgen WETTIG (European Community), Vice-Chairperson of the Conference of the Parties to the UNECE Convention on the Transboundary Effects of Industrial Accidents, opened the meeting of the Working Group.
3. The following countries and regional economic integration organizations participated: Armenia, Austria, Belgium, Croatia, Czech republic, Denmark, Finland, France, Germany, Greece, Georgia, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Russian Federation, Slovenia, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, and European Community.

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<sup>\*/</sup> This document has not been formally edited.

4. A representative of the United Nations Environment Programme (UNEP) also participated.

5. Representatives from the following organizations and institutions also participated: European Chemical Industry Council (CEFIC), Regional Environmental centre for central and eastern Europe (REC) and Swiss Re-insurance Company (SWISS RE).

## **I. PROCEDURES**

6. The Working Group adopted its agenda as set out in document MP.WAT/AC.3/2001/1 - CP.TEIA/AC.1/2001/1.

7. Following the Rules of Procedure of the Economic Commission for Europe, the Working Group agreed to elect one Chairperson and three Vice-Chairpersons from among the participants, and agreed that one of the Vice-Chairpersons should act as the Rapporteur of the Working Group. It unanimously elected Mrs. Phani DASKALOPOULOU-LIVADA (Greece) Chairperson, and Mr. Jürg BALLY (Switzerland), Mr. Attila TANZI (Italy) and Mr. Jürgen WETTIG (European Community) Vice-Chairpersons. The Working Group designated Mr. BALLY as its Rapporteur.

## **II. PROPOSALS AND WORKING DOCUMENTS ON CIVIL LIABILITY**

8. The Working Group had before it two documents that were already considered at the joint special session of the Parties to both Conventions (Geneva, 2-3 July 2001): examples of solutions found in international instruments on liability (MP.WAT/2001/1/Add.1 - CP.TEIA/2001/1/Add.1) and an example of an instrument on liability and compensation, prepared by the delegation of Switzerland (MP.WAT/2001/3 - CP.TEIA/2001/3).

9. In addition, the delegation of Hungary had submitted one working paper on observations and propositions on liability and compensation for damage resulting from the activities regulated by the Convention on the Transboundary Effects of Industrial Accidents and by the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (MP.WAT/AC.3/2001/WP.1 – CP.TEIA/AC.1/2001/WP.1). The delegation of Germany had submitted two working papers. one on the German Liability Act (MP.WAT/AC.3/2001/WP.2 – CP.TEIA/AC.1/2001/WP.2) and the other on the relationship of an ECE liability regime with other legal regimes (MP.WAT/AC.3/2001/WP.3 – CP.TEIA/AC.1/2001/WP.3).

### **III. PREPARATION OF A LEGALLY BINDING INSTRUMENT ON CIVIL LIABILITY FOR TRANSBOUNDARY DAMAGE CAUSED BY HAZARDOUS ACTIVITIES**

10. The Working Group noted that the annex to document MP.WAT/2001/3 - CP.TEIA/2001/3, entitled “Example of a protocol on liability and compensation for damage resulting from the transboundary effects of industrial accidents on the public and the environment, including transboundary watercourses and international lakes”, covered most of the substantive ground for a future legally binding instrument. It agreed to use this document as the basic document for its first meeting - in addition to the other documents referred to in chapter II above.

11. The representative of the European Community informed the Working Group about progress made in the preparation of a legislative proposal on environmental liability, and provided copies of the Environment Directorate’s working paper on prevention and restoration of significant environmental damage as published on the Internet.

#### **A. General debate on the possible scope of application of the Protocol (article 3 of the annex to document MP.WAT/2001/3 - CP.TEIA/2001/3)**

12. The Working Group recalled the decision of the joint special session regarding the preparation of a legally binding instrument on civil liability for transboundary damage caused by hazardous activities within the scope of both the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) and the UNECE Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention).

13. A debate was held on the two possible ways of interpreting the wording “within the scope of both Conventions” (see ECE/MP.WAT/7 – ECE/CP.TEIA/5, annex): (a) to follow an “additive approach” meaning that all relevant provisions of both Conventions would be taken up in the drafting of a legally binding instrument; or (b) to follow an “interface approach” meaning that only those provisions would be considered that are common to both Conventions.

14. In general, the Working Group favored the “interface approach” that would lead to an instrument that deals with civil liability for water-related accidents in a transboundary context. Such an approach would avoid the shortcomings of existing regimes on civil liability, due, in particular, to the lack of specificity, in certain cases, of the relevant instruments. It would also take into account that the event that has led to the current joint activity of the Parties to both Conventions was related to impact on and impact through transboundary waters.

15. The Working Group agreed to examine this issue further at its second meeting with a view to reaching consensus on the approach to be followed as this would have an effect on the content and structure of the instrument.

**B. Examination of other provisions of the draft Protocol as contained in the annex to document MP.WAT/2001/3 - CP.TEIA/2001/3**

1. Preamble

16. The Working Group agreed to insert, inter alia, references to the polluter-pays principle and principle 16 of the Rio declaration, the outcome of the Rio+10 Conference, the 1998 UNECE Code of Conduct on Accidental Water Pollution, and the phased approach to draw up the Protocol (i.e. first the “interface approach”, and once finalized, a broadened instrument at a later stage).

2. Objective (article 1)

17. The Working Group agreed that the objectives should reflect the approach to be taken by the Protocol as to its scope of application. If the “interphase” approach were adopted, the Protocol should provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from transboundary effects of industrial accidents on transboundary watercourses. For this the term damage would cover, inter alia, loss of life or personal injury and adverse impact on water uses (see the outcome of the discussion on definitions). The Working Group also noted that the term “transboundary watercourse”, as defined in the Water Convention, covers the whole aquatic ecosystem of such a watercourse.

3. Definitions (article 3)

18. The Working Group agreed that work on definitions is a continuous process that would continue in parallel with the drafting of the substantive articles of the instrument. It noted differences in some basic definitions of the Water and Industrial Accidents Conventions, and voiced the need for tailor-made definitions for the purpose of the instrument (e.g. industrial accident, level of damage required for the application of the instrument) and clear-cut definitions of other terms (e.g. reasonable measures). Definitions should be drafted, inter alia, for the terms operator, owner, hazardous activity, country of origin, risks and transboundary effects. Some delegations suggested that in the definition of “damage” the cost of monitoring and mitigation measures should be referred to, while other delegations saw these costs already covered by the current definition. It was also suggested that the instrument should cover damage to water uses.

There was also the need for harmonization of terminology such as the term “preventive measures”, which has different meanings in legal documents on civil liability and on environmental protection. One delegation questioned the need for the given definition of “regional economic integration organizations” as there was a clear reference to these organizations under the final clauses of the Protocol.

4. Strict liability (article 4)

19. The Working Group noted the crucial importance of attributing liability for industrial accidents either to the operator or the owner of the hazardous installation, and agreed to come back to this issue at the second meeting. Several delegations voiced the need to examine whether provisions on joint and several liability should be included in the Protocol.

5. Fault-based liability (article 5)

20. Some delegations expressed the view that the phrase “any person shall be liable” (first sentence of this article) should be replaced by a reference to the owner or operator of the installation. Other delegations questioned whether the second sentence – taken from article 5 of the Basel Convention – could be kept in its present wording.

21. The Working Group requested its Rapporteur to come up with alternative proposals in the revised draft Protocol (see also section D below).

6. Preventive measures (article 6)

22. The Working Group noted the clarifications on the text given by the Swiss delegation, and agreed in principle on the content of such an article. It noted, however, the different meaning of “preventive measures” in legal texts on civil liability and environmental protection (see also the above discussion on definitions), and felt a preference for using the term “mitigation measures”.

7. Right of recourse (article 7)

23. The Working Group noted the explanation of the phrase “contractual arrangements”, and agreed in principle on the content of such an article. It felt, however, that the article should be moved to the procedural part of the Protocol.

8. Implementation (article 8)

24. The Working Group noted that some delegations were of the opinion that this article should be deleted, as the Protocol should be “self executing”, while other delegations wanted to keep such an article as it was the usual practice of other UNECE environmental conventions to include provisions on implementation.

25. Some delegations stated that the establishment of limits of liability (paragraph 2) was a matter of the Protocol and not a national implementation measure. Some delegations suggested that the beginning of paragraph 3 should be re-drafted as follows: “The provision of the Protocol and measures adopted under paragraph 1 should be applied . . . “.

9. Financial limits (article 9)

26. The Working Group noted that the final wording of this article will be considered at a later stage since the establishment of the financial limits would require prior agreement on the text of other articles, in particular articles 4 and 5, and the annexes to the Protocol. Some delegations felt that the limits established under annex II should be lowered, and suggested the insertion of “risk elements” into this annex.

27. Some delegations referred to the need to revise annex I in the light of a final decision on the scope of the Protocol (i.e. whether to use the “interface approach” or the “additive approach”).

28. The Working Group also noted the readiness of the joint ad hoc expert group on water and industrial accidents, established under both Conventions, to assist in the revision of annex I.

10. Time limit of liability (article 10)

29. The Working Group agreed in principle on the content of this article. One delegation stated that the time limit referred to in paragraph 1 should be longer than ten years. It was stated that in order to make a claim, not only the damage but also the person liable has to be known. Therefore, there was a need for re-drafting paragraph 2.

11. Insurance and other guarantees (article 11)

30. The Working Group noted the decisive role of provisions on insurance and other guarantees for the purpose of the Protocol, and agreed in principle with the content of the two paragraphs of this article.

31. It also welcomed the participation of representatives of the insurance industry who may provide further advice on these issues.

12. State responsibility (article 12)

32. The Working Group agreed in principle on the content of this article in the present form. One delegation informed the Working Group that they could make a proposal for an alternative text at the second meeting.

13. Competent courts (article 13)

33. The Working Group noted that the proposal by Hungary to provide for the settlement of disputes by arbitration could add value to the proposed regime which follows existing precedents, provided that it would be optional. The Working Group invited the delegation of Hungary to draft – with the assistance of Germany and Italy – some text for consideration at its second meeting.

14. Related actions (article 14) and applicable law (article 15)

34. The Working Group agreed in principle on the content of these articles in their present form.

15. Relation between the Protocol and the law of the competent court (article 16)

35. The Working Group agreed in principle with paragraph 1 of this article. It noted, however, that two delegations could not yet agree with paragraph 2. Other delegations stated that they agree, provided that the phrase “for damage based on strict liability under article 4” would remain.

16. Mutual recognition and enforcement of judgement (article 17)

36. The Working Group agreed in principle with this article in its present form.

17. Meeting of the Parties (article 18)

37. The Working Group agreed on the revision of paragraphs 1 and 2 in line with similar provisions of existing UNECE environmental conventions and protocols, such as the Protocol on

Water and Health to the Water Convention, particularly regarding the timing of the first and the subsequent meetings, and the convening of such meetings in conjunction with meetings of Parties / Conferences of the Parties to the parent Conventions.

38. The Working Group also noted that paragraph 4 on the functions of the Meeting of the Parties could be broadened at a later stage.

18. Secretariat (article 19)

39. The Working Group agreed to amend the beginning of the article as follows: “The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions”

19. Amendments to the Protocol (article 20)

40. The Working Group discussed three different options for amending the Protocol: (a) the use of the same rules for amending articles of the Protocol and the annexes I and II to the Protocol; (b) the use of different rules for amending articles of the Protocol and its annexes; (c) the use of the same rules for amending articles of the Protocol and annex II, but the use of a “simplified” procedure for amending annex I.

41. There was general agreement that amendments to annex I should follow a procedure that is similar to the procedure for amending annex I to the Industrial Accidents Convention.

20. Right to vote (article 21)

42. The Working Group agreed with this article in its present form.

21. Settlement of disputes (article 22)

43. The Working Group agreed in principle on this article, noting the proposal by one delegation to follow the wording of other UNECE environmental conventions and delete the cross-reference to both the Water and Industrial Accidents Conventions.

22. Signature (article 23)

44. The Working Group noted that the current wording of the articles allows countries that are not Parties to the Water and/or Industrial Accidents Conventions to become Parties to the



Protocol. This was seen as a policy decision, following the same approach under the Protocol on Water and Health to the Water Convention.

45. Referring to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Working Group also discussed whether countries outside the UNECE region, at least those that share waters with UNECE countries, should be given the opportunity to become a Party to the Protocol. The Working Group entrusted the secretariat to communicate, as appropriate, information on the drafting of the Protocol to the secretariats of the other regional commissions and, following rule 4 of the Rules of Procedure of the Economic Commission for Europe, to invite the other regional commissions and other member countries of the United Nations, who are not members of ECE, to participate in a consultative capacity in meetings of the Working Group.

23. Ratification, acceptance, approval and accession (article 24),  
entry into force (article 25), withdrawal (article 26),  
depository (article 27) and authentic texts (article 28)

46. The Working Group agreed on the wording of these articles in their present form. The secretariat, referring to article 27, informed the Working Group that it will forward the Working Group's proposal regarding the Depository to the Legal Service of the United Nations.

**C. Possible additional articles to be drafted**

47. The Working Group examined the proposal by Germany to insert three more articles in the Protocol: (a) on access to information and access to justice, following the Aarhus Convention; (b) on rules concerning conflicts between international liability agreements; and (c) on the relationship with domestic liability regimes (see sections 2, 3 and 5 of working paper on the relationship of an ECE liability regime with other legal regimes (MP.WAT/AC.3/2001/WP.3 – CP.TEIA/AC.1/2001/WP.3), submitted by Germany). Regarding the first proposal, the Working Group noted that the references to the Aarhus Convention, as contained in the Protocol on Water and Health, could be taken into account when re-drafting the German proposal. As to the second and third proposals, the Working Group agreed to reconsider these issues at its second meeting, noting that some delegations expressed reservations, while others supported the proposals.

48. The representative of REC proposed the insertion of two additional articles, one on compliance review, the other on reporting. The Working Group felt that such provisions could only address the duties of the contracting parties, rather than the duties of operators/owners of hazardous installations. It invited REC to submit a written proposal for consideration at the second meeting of the Working Group.

#### **D. Preparation of a revised text of the draft Protocol**

49. The Working Group requested its Rapporteur to prepare with the assistance of the secretariat, and in consultation with the other officers, a revised text of a draft Protocol for consideration at its second meeting.

50. The Working Group also recalled its request to other delegations to prepare their written inputs, and invited them to submit their contributions in good time so that these can also be examined at the second meeting.

51. Furthermore, the Working Group invited other delegations to prepare any other relevant meeting documents and/or working papers for consideration at the second meeting.

#### **IV. DATE AND VENUE OF FUTURE MEETINGS OF THE INTERGOVERNMENTAL WORKING GROUP**

52. The Working Group scheduled its second meeting for 4 February to 6 (a.m. only) February 2002. It also tentatively scheduled its third, fourth and fifth meetings for the periods 6-8 May, 2-4 September and 11-13 November 2002, respectively.

53. The Working Group took note of information given by UNEP on the drawing up of a legal instrument of relevance to civil liability for industrial accidents open to all UN member States. It also noted UNEP's proposal to consider whether the forthcoming UNECE instrument on civil liability should be open for accession by countries outside the UNECE region. It recalled its decision to inform other regional commissions and other UN member countries about the Working Group's activity, and invite them to participate, as appropriate, in a consultative capacity in the future meetings of the Working Group.

#### **V. OTHER BUSINESS**

54. The secretariat informed the Working Group about the forthcoming International Conference on Freshwater (Bonn, Germany, 3-7 December 2001).

#### **VI. CLOSING OF THE MEETING**

55. The Chairperson closed the meeting on 23 November 2001.