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

**CONFERENCE OF THE PARTIES TO THE
CONVENTION ON THE TRANSBOUNDARY
EFFECTS OF INDUSTRIAL ACCIDENTS**

Joint special session
Geneva, 2-3 July 2001

**RESPONSIBILITY AND LIABILITY
IN RELATION TO ACCIDENTAL WATER POLLUTION**

Submitted by the Chairperson of the Working Group on Legal and Administrative Aspects,
established by the Meeting of the Parties to the Convention on the Protection and Use of
Transboundary Watercourses and International Lakes

Introduction

1. This document contains the results of the work of the expert group on liability, established as an open-ended ad hoc expert group by the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) at their second meeting. It was prepared with the assistance of the secretariat and finalized by the Working Group on Legal and Administrative Aspects at its first meeting on 29-30 January 2001.

2. Following the decisions of the Parties to the Water Convention at their second meeting, a preliminary version of this report (CP.TEIA/2000/14/Add.1) was submitted to the Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents (Brussels, 22-24 November 2000) for consideration. The outcome of the relevant discussions and decisions of the Conference is included in this document. This document was also submitted to the Bureau of the Meeting of the Parties to the Water Convention and the Bureau of the Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) for consideration at their joint meeting in Geneva on 19-20 February 2001.

I. MANDATE OF THE EXPERT GROUP

3. The Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, worried about the serious consequences of recent water-related accidents and aware of the discussions that they had triggered also in other international forums on how to prevent such accidents in the future and better control their consequences, entrusted at their second meeting an open-ended group of experts under the auspices of the Working Group on Legal and Administrative Aspects (ECE/MP.WAT/5, paras. 31-34; annex I; and annex II, programme element 1.4) with:

(a) Assessing the relevant rules on liability, and relevant UN/ECE and other international instruments and proposals;

(b) Identifying gaps in rules on liability which action within the framework of the Water Convention could help to bridge;

(c) Drawing up options for developing possible tools, including options for non-binding or legally binding instruments, taking into account developments in other forums, particularly within the framework of the United Nations Environment Programme (UNEP);

(d) Submitting a draft report to the Conference of the Parties to the Convention on the Transboundary Effects of Industrial Accidents for consideration at its first meeting (Brussels, 22-24 November 2000);

(e) Including as appropriate the outcome of the discussion at this meeting in the final version of the report.

4. The Meeting of the Parties to the Water Convention also:

(a) Accepted with appreciation the offer of the Chairman of the Meeting of the Signatories to the Convention on the Transboundary Effects of Industrial Accidents as well as UNEP and the Regional Office for Europe of the World Health Organization (WHO/EURO) to assist in this activity;

(b) Invited delegations, international organizations and NGOs to nominate experts for the open-ended group.

5. Furthermore, the Meeting of the Parties to the Water Convention decided that the report of the open-ended expert group, finalized by the Working Group on Legal and Administrative Aspects, should be submitted to its Bureau at its meeting in 2001 for consideration so that a decision could be prepared on possible ways and means of following up the activities proposed by the Working Group on Legal and Administrative Aspects. The Bureau of the Meeting of the Parties to the Water Convention should further proceed on the subject as part of the preparations for the Ministerial Conference "Environment for Europe" (now scheduled to be held in Kiev on 21-23 May 2003), and develop a procedure which ensured the involvement of all the Parties to the Convention in taking decisions.

II. PARTICIPATION IN, MANDATE AND ACTIVITIES OF THE EXPERT GROUP ON LIABILITY AND INPUT OF THE CONFERENCE OF THE PARTIES TO THE INDUSTRIAL ACCIDENTS CONVENTION

6. The following countries and organizations designated participants for the open-ended expert group: Austria, Belgium, Estonia, Finland, Germany, Greece, Hungary, Italy, Netherlands, Poland, Russian Federation, Sweden, Switzerland, European Commission, UNEP, WHO/EURO, and Regional Environmental Center for Central and Eastern Europe.

7. The expert group, led by the Chairperson of the Working Group on Legal and Administrative Aspects, Mrs. Phani DASCALOPOULOU-LIVADA (Greece), held two meetings, on 19 May and on 10-11 August 2000. Most of the experts attended these meetings.

8. Within its mandate, the expert group decided to focus on civil liability as a priority, recognizing that some aspects of the responsibility of States could be considered at a later stage.

9. At its two meetings, the expert group:

- (a) Made a preliminary assessment of relevant rules on civil liability regarding accidental water pollution as well as an analysis of their gaps and shortcomings (chap. III);
- (b) Considered possible tools to address civil liability for damage resulting from transboundary impact caused by water-related accidents (chap. IV);
- (c) Compiled examples of solutions found in legally binding international instruments on a number of issues relevant to this subject (annex I). For technical reasons, annex I is issued as document MP.WAT/2001/1/Add.1 – CP.TEIA/2001/1/Add.1;
- (d) Took note of the study by the Centre for Transboundary Damage and Compensations on “International Legal Instruments on Civil Liability Applicable to Water-related Incidents: Coverage and Possible Gaps”, commissioned by the expert group (annex II). For technical reasons, annex II is issued as document MP.WAT/2001/1/Add.2 – CP.TEIA/2001/1/Add.2;
- (e) Considered the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (annex III);
- (f) Raised some questions related to future action (annex IV).

10. Decision 2000/6 of the Conference of the Parties to the Industrial Accidents Convention on responsibility and liability, which forms part of this report according to the mandate, is also annexed (annex V).

III. PRELIMINARY ASSESSMENT OF RELEVANT RULES ON LIABILITY AND IDENTIFICATION OF GAPS

A. Agreements under consideration by the expert group

11. There are at least 30 worldwide or regional agreements on civil liability of relevance to fresh water, on civil liability covering human impact on the marine environment, on civil liability covering nuclear safety, and on civil liability covering space objects.

12. Following the mandate of the expert group, agreements and proposals on civil liability regarding water-related accidents caused by “mining and quarrying” and/or “manufacturing” (see the United Nations International Standard Industrial Classification of all Economic Activities 1/), which were at the origin of the recent accidents, were analysed in particular. 2/

13. Water-related accidents may, however, also arise from other economic activities listed in the United Nations Classification 1/, for example, activities belonging to “agriculture”, “electricity, gas and water supply”, “construction”, “transport, storage and communications (e.g. land transport, transport via pipelines, water transport)”, “sewage and refuse disposal, sanitation and similar activities”, “research and development” and “human health activities (e.g. hospital activities)”. Therefore, an assessment of the existing agreements and proposals was also made regarding the coverage of water-related accidents caused by these activities.

14. Moreover, the analysis was not limited to water pollution. It also covered adverse transboundary effects on the environment 3/ that may be caused by dam failures 4/ or the inappropriate operation of other water-construction works, leading, for example, to flooding of downstream areas.

B. Conclusions of the expert group

15. In connection with the identification of gaps in the existing international civil-liability conventions, the expert group drew up a table indicating its views on the matter.

Table. Damage caused by transboundary pollution

ISSUES	INTERNATIONAL INSTRUMENTS ON LIABILITY				
	Lugano [a]	CRTD [b]	CLC [c]	HNS [d]	PIL [e]
Transboundary pollution in general	yes	yes	partly [f]	yes	yes
Transboundary pollution caused by accidents	yes	yes	partly [f]	yes	yes
Transboundary pollution caused by other events	yes	yes	partly [f]	yes	yes
Transboundary pollution caused by normal operation	no	no	no	no	partly [i]
Water-related aspects in general [g]	yes	yes	partly [f]	yes	yes
Water-related aspects due to industrial activities [h]	yes	yes	partly [f]	yes	yes
Water-related aspects due to other activities	partly	yes	no	no	partly [j]

Notes to the table:

- [a] Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment. Done at Lugano on 21 June 1993. Not yet in force.
- [b] Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD). Done at Geneva on 10 October 1989. Not yet in force.
- [c] 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC). In force since 1975, amended by the Protocols of 1976 and 1992 (in force).
- [d] 1996 International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea (HNS). Not yet in force.
- [e] Private international law.
- [f] Applicable to oil pollution only.
- [g] One expert was of the opinion that air-related and soil-related aspects should also be dealt with in the identification of gaps and shortcomings.
- [h] In this prima facie identification, industrial activities include all kinds of carriage of goods by road, rail and inland navigation vessels. It does not include the transport of hazardous and other substances via pipelines.
- [i] Reference is made to conventions regulating private international law, especially the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. They cover the problem under consideration “partly” in so far as they address only issues of jurisdiction, recognition and enforcement of foreign judgements, while leaving open the issues of the substantive applicable law.
- [j] Depending on the substantive regulations of the applicable national law.

1. Industrial accidents from mining and manufacturing

16. In connection with water-related accidents from “mining and quarrying” and “manufacturing”, the expert group found that the existing instruments did not specifically cover accidental pollution of transboundary inland waters which may be caused by these economic activities.

17. Although the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, done at Lugano on 21 June 1993 (hereinafter referred to as the Lugano Convention), could in principle be considered to cover liability in the event of transboundary water pollution from the above activities, the expert group was of the opinion that its scope was too general and that it did not provide sufficient legal certainty. It was also pointed out that its definitions were too vague, especially in the field of environmental damage (see annex III).

2. Transport (except transport via pipelines) and storage of hazardous substances

18. Civil liability regarding water-related accidents caused by activities under the category “transport, storage and communications” is addressed, either fully or in part, in a number of agreements.

19. The expert group considered the following:

- (a) The Lugano Convention. Not yet in force;
- (b) The Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD). Done at Geneva on 10 October 1989. Not yet in force;
- (c) The 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC). In force since 1975, amended by the Protocols of 1976 and 1992 (in force);
- (d) The 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS). Not yet in force.

3. Transport via pipelines

20. Transport via pipelines does not seem to be specifically covered, apart from the general provisions in the Lugano Convention.

4. Other activities

21. Other economic activities of relevance to water-related accidents were not considered.

IV. POSSIBLE TOOLS TO ADDRESS CIVIL LIABILITY FOR DAMAGE RESULTING FROM TRANSBOUNDARY IMPACT CAUSED BY WATER-RELATED ACCIDENTS

A. Options to address civil liability

22. In order to commence with the expert group's task of drawing up options for developing possible tools, including options for non-binding or legally binding instruments, taking into account developments in other forums, particularly within the framework of UNEP and the EU, the following five options were proposed on a preliminary basis:

Option one: Use international legal instruments in force which are of relevance to civil liability for damage resulting from transboundary impact caused by water-related accidents.

Option two: Evaluate the relevant agreements already in force and consider whether they should be amended to address questions of civil liability for damage resulting from transboundary impact caused by water-related accidents.

Option three: Promote the entry into force of existing international agreements containing provisions which, inter alia, cover civil liability for damage resulting from transboundary impact caused by water-related accidents, and identify the reasons why they have not yet entered into force. In this regard, the possibility of amendments or adjustments to these agreements might be considered.

Option four: Develop a new international agreement (treaty/protocol) providing for civil liability, inter alia, for damage resulting from transboundary impact caused by water-related accidents.

Option five: Develop a code of conduct, guidelines or recommendations concerning liability, inter alia, for damage resulting from transboundary impact caused by water-related accidents.

23. An example of option 1 is the application, by EU member States, of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

24. As concerns option 2, the study commissioned by the expert group has shed more light on this option.

25. An example of option 3 is the promotion of the entry into force of the Lugano Convention (see annex III).

26. Option 4 includes the proposals made by the delegation of Switzerland at the second meeting of the Parties to the Water Convention and at the first meeting of the Parties to the Industrial Accidents Convention to draw up a protocol on these issues. It also includes ideas brought forward in the discussion at the meeting of the Parties to the Water Convention to consider the drawing-up of a new ECE convention or the drawing-up of amendments to the Water and/or Industrial Accidents Conventions.

27. As concerns option 5, the advantages and disadvantages of developing non-binding as opposed to binding instruments have been evaluated within a different context - the prevention, control and reduction of water-related disease in the ECE region (see MP.WAT/AC.1/1998/4 - EHCO 020102 F). This document may provide useful ideas when addressing the development of a non-binding instrument on civil liability.

B. Related suggestions of the expert group

28. Assuming that the drawing-up of a binding or non-binding instrument (see options four and five above) would add value, the expert group was of the opinion that such an instrument should at least include provisions on the following:

- Scope of application;
- Definitions;
- Attribution of liability and exemptions;
- Enforcement of liability;
- Insurance and financial guarantees;
- Compensation fund.

V. PRELIMINARY CONCLUSION OF THE WORKING GROUP

29. In the light of the considerations set out above, the Working Group recognized that the existing international civil liability regimes presented certain shortcomings, which were due in particular to their lack of specificity in certain cases and to the fact that they had not yet entered into force. The Working Group, taking into account decision 2000/6 on responsibility and liability adopted by the Conference of the Parties to the Industrial Accidents Convention (annex V), also stressed the need for an appropriate regime, including a legally binding instrument, on civil liability for damage caused by hazardous activities within the scope of both Conventions.

Notes

1/ Listed in the United Nations International Standard Industrial Classification of all Economic Activities (ST/ESA/STAT/SER.M/4/Rev.3) as categories, divisions or classes.

2/ Hazardous activities falling under these categories are further specified in annex I to the Industrial Accidents Convention, and in the indicative lists of industrial sectors and industries that may lead to accidental water pollution contained in the Recommendations to ECE Governments on the prevention of water pollution from hazardous substances (ECE/CEP/10).

3/ According to the definitions in existing ECE Conventions, the term “environment” includes human health and safety.

4/ See, for example, the recommendations to ECE Governments on dam safety with particular emphasis on small dams (ECE/CEP/10).

Annex I

MATTERS UNDER CONSIDERATION BY THE EXPERT GROUP

For technical reasons, annex I is issued as document MP.WAT/2001/1/Add.1 –
CP.TEIA/2001/1/Add.1;

Annex II

**EXISTING INTERNATIONAL LEGAL INSTRUMENTS ON CIVIL LIABILITY
APPLICABLE TO WATER-RELATED INCIDENTS:
COVERAGE AND POSSIBLE GAPS**

For technical reasons, annex II is issued as document MP.WAT/2001/1/Add.2 –
CP.TEIA/2001/1/Add.2;

Annex III

PRIMA FACIE ANALYSIS OF THE LUGANO CONVENTION

1. The Council of Europe's Convention on Civil Liability for Damage resulting from Activities Dangerous for the Environment was established in 1993. The Convention contains a regime for environmental liability that covers all types of damage (both traditional damage such as personal injury and property damage, and impairment of the environment as such) when caused by a dangerous activity. Dangerous activities related to dangerous substances, biotechnology and waste are further defined. The scope is open in the sense that other activities than the ones explicitly referred to may be classified as dangerous.
2. Nine member States of the Council of Europe have signed the Convention (Finland, Greece, Italy, Luxembourg, Netherlands, Portugal, Cyprus, Iceland and Liechtenstein). Several member States have already prepared legislation to implement the Convention, or are in the process of preparing ratification (Austria, Finland, Greece, Netherlands, Portugal). However, some other member States do not intend to sign or ratify it.
3. The main reasons why countries have difficulties signing or ratifying the Convention are possibly the following:
 - (a) The Convention is not limited to transboundary damage. It also covers damage caused within the national territory of a member State;
 - (b) Comparing the regime of the Convention with the environmental liability regimes of member States of the Council of Europe, the general impression is that the Convention goes further than most member States in some respects (namely in that it explicitly covers environmental damage as such);
 - (c) Its open scope of dangerous activities also goes further than several member States, which have regimes with a closed and more limited scope;
 - (d) These member States, and most of industry, feel that the scope of the Convention is too wide and gives too little legal certainty and that its definitions, especially in the field of environmental damage, are too vague.

Annex IV

**SOME OPEN QUESTIONS AS TO THE SCOPE AND FORM
OF THE INSTRUMENT**

In order to further proceed with the identification of gaps with regard to existing rules on liability, where action within the framework of the Water Convention or the Industrial Accidents Convention could add value, the Parties to these Conventions are invited to address the following issues at their joint special session:

- (a) Should the instrument specifically focus on water-related accidents (as was the expert group's original mandate) or should other accidents also be considered?
- (b) Should the scope of the instrument be limited to hazardous activities in the mining and manufacturing industries and to transport via pipelines?
- (c) Should the scope of the instrument cover the dangerous activities (with a potential to cause water-related accidents) listed in annex I to the Industrial Accidents Convention, or should the potential adverse impact from the accidental release of bacteria, viruses and genetically modified organisms also be considered?
- (d) Should the concept of best available technologies (BAT) be part of the instrument?
- (e) To what extent should environmental damage be covered?
- (f) If the legal form to be adopted for the instrument under consideration were to be a protocol, should it be one to the Water Convention alone or to both the Water and the Industrial Accidents Conventions?
- (g) Should such a protocol deal only with transboundary pollution and other adverse effects on transboundary waters, or should it also deal with civil liability in the event of water pollution or other adverse effects confined within a single State?
- (h) Should the instruments consider the responsibility of States?

Annex V

**DECISION 2000/6 ON RESPONSIBILITY AND LIABILITY, ADOPTED BY THE
CONFERENCE OF THE PARTIES ON THE INDUSTRIAL ACCIDENTS
CONVENTION (22-24 November 2000)**

The Conference of the Parties,

Recalling article 13 of the Convention,

1. Welcomes the initiative by Switzerland on responsibility and liability as contained in document CP.TEIA/2000/14;
2. Takes note of the decisions taken on the subject of responsibility and liability by the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) at their second meeting in The Hague, Netherlands, in March 2000 (ECE/MP.WAT/5);
3. Also takes note of the support in this respect expressed by delegations at the seventh session of the UN/ECE Committee on Environmental Policy (ECE/CEP/74);
4. Recognizes, on the basis of the preliminary report by the Chairperson of the expert group on liability and industrial accidents established by the Parties to the Water Convention (CP.TEIA/2000/14/Add.1) and the background study "International Legal Instruments on Civil Liability Applicable to Water-related Incidents: Coverage and Possible Gaps", commissioned by this expert group, the shortcomings of existing international civil liability instruments, in particular due to their lack of specificity in certain cases and to the fact that they have not entered into force;
5. Stresses the need for an appropriate regime, including a legally binding instrument, in the UN/ECE region on civil liability for damage caused by hazardous activities within the scope of both Conventions;
6. Mandates its Bureau to work closely with the Bureau of the Meeting of the Parties to the Water Convention to prepare a joint special session of the governing bodies of both Conventions in 2001 with a view to considering entering into an intergovernmental negotiation process;
7. Requests its Bureau, to that end, to prepare, in conjunction with the Bureau of the Meeting of the Parties to the Water Convention, elements for defining the scope of a regime on civil liability, taking into account the issues raised during its first meeting (see ECE/CP.TEIA/2, para. 37).