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

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

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**RESPONSES TO THE QUESTIONNAIRE ON THE
CONVENTION ON CIVIL LIABILITY FOR DAMAGE RESULTING FROM
ACTIVITIES DANGEROUS TO THE ENVIRONMENT (LUGANO
CONVENTION)**

Compiled by the secretariat */

*/ This document has not been formally edited.

1. In its report on responsibility and liability in relation to accidental water pollution (MP.WAT/ 2001/1 – CP.TEIA/2001/1), the Working Group on Legal and Administrative Aspects, established under the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) evaluated existing instruments on civil liability. The Working Group also proposed options to comply with the decisions of the Parties to both the Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) and the Water Convention regarding 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.
2. One of the annexes to the report contains the Working Group's evaluation of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, done at Lugano on 21 June 1993 (Lugano Convention). In spite of its major innovations in the field of civil liability, this Convention has not yet entered into force.
3. In order to investigate the likelihood of its entering into force within a reasonable period of time, to obtain further clarity about the reasons why there has been some delay in the acceptance of the Convention, and to pinpoint overlaps, if any, with a future liability regime under both the Water Convention and the Industrial Accidents Convention, the Working Group compiled a questionnaire, following the outcome of the first meeting of the Conference of the Parties to the Industrial Accidents Convention held in Brussels on 22-24 November 2000 (see ECE/MP.WAT/6-ECE/CP.TEIA/4, annex II, para. 7). This questionnaire, invited States to give their opinion about five major issues (see chapter I).
4. When preparing for the joint special session, the Bureaux of both Conventions (at their joint meeting on 19-20 February 2001) decided to circulate the Working Group's evaluation and the questionnaire regarding the Lugano Convention to the focal points under both Conventions. At the time of writing this document, replies to the questionnaire had been received from the following Governments: Austria, Azerbaijan (reply to question 1, only), Bosnia and Herzegovina (reply to question 1, only), Croatia, Greece, Norway, Spain, Sweden, Switzerland, Turkey and United Kingdom (chapter I). In addition, Croatia, Sweden, Turkey and United Kingdom submitted brief case studies, which are reproduced in the annex.

I. COMPILATION OF THE RESPONSES TO THE QUESTIONNAIRE

A. Responses to question 1

What are the reasons that your country has not signed/ratified, approved, acceded to or not accepted the Convention yet, are there any obstacles for a possible decision to ratify, approve, accede or accept the Convention and, if so, could you identify them?

1. Austria

5. In 1994, on the request of the Parliament the Austrian Government has prepared the ratification of the Convention and at the same time a law following closely the rules of the Convention. In the course of the discussion on the Convention and the draft, it was felt that the time has not yet come to decide on it. It was agreed to postpone these projects until the ongoing discussion on this issue in the European Union has come to results.

2. Azerbaijan

6. Azerbaijan has not signed the Lugano Convention. Azerbaijan is in the process of examining whether or not to sign/ratify this Convention, and is translating the Convention in the our national language. In principle, Azerbaijan agrees with the articles of this Convention, but some definitions concerning environmental damage are too vague.

7. Azerbaijan certainly will support the idea of developing a liability regime under both the Water Convention and the Industrial Accidents Convention, and will play an active role at the forthcoming joint session in July 2001.

3. Bosnia and Herzegovina

8. The Lugano Convention was not yet officially taken into consideration for a possible ratification due to various reasons, mostly linked to general political and institutional circumstances related to the ratification of the international conventions and agreements as follows:

(a) Bosnia and Herzegovina is in the process of big changes in the political and economic system;

(b) Based on the Dayton Peace Accord, the environmental policy in Bosnia and Herzegovina is not determined at the State level. This policy is strictly in the jurisdiction of two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska;

(c) This resulted in a very complicated procedure of developing legal regulations with still weak and unorganised institutions and insufficient co-operation between the two entities. Under such conditions, environmental issues do not get enough attention as they should deserve.

9. Gaining independence, Bosnia and Herzegovina developed conditions for independent decision making on international cooperation. International cooperation is the key element in the State development policy and must be carried out in coordination between both entities through Ministry of Foreign Affairs.

10. Activities of Bosnia and Herzegovina in the field of international cooperation on environmental issues are intensive and go in several directions:

(a) Notification, adoption and admission of environmental international agreements and conventions;

(b) Active participation of Bosnia and Herzegovina in international environmental programmes;

(c) Preparation and implementation of programmes with financial and technical assistance from the international community.

4. Croatia

11. The objectives of the Lugano Convention have not been sufficiently promoted by the Council of Europe. This is undoubtedly the reason why the Convention has remained rather unknown.

12. Article 13 of the Industrial Accidents Convention and article 7 of the Water Convention stipulate that the Parties shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability for damage. As the Lugano Convention treats this issue, it is the view of Croatia that the Lugano Convention should be supported by the Parties to the Industrial Accidents and Water Conventions. Since the Water Convention also calls for its implementation at the sub-regional level, some activities for the detailed elaboration of this problem and its implementation have already been initiated within the activities under the Convention on Cooperation at the Protection and Sustainable Use of the Danube River (Danube River Protection Convention). With regard to the implementation of this Convention, some measures elaborated in Chapter VII of the National Water Protection Plan (Official Gazette No. 8/99) were undertaken at the national

level. In this Plan, the requirements from the Danube River Protection Convention relating only to the Danube catchments area were extended to the whole territory of Croatia. The penal provisions of the Law on Waters (Official Gazette No. 107/95) govern also the issue of responsibility and liability for damage. The basis principles in the implementation of the framework law, i.e. the Environmental Protection Law (Official Gazette No. 82/94), are the principle of liability for damage and the polluter-pays principle with regard to all costs arising from environmental pollution. At the national level, some other activities are also being implemented that may be connected to the activities under the Lugano Convention.

13. Since the Lugano Convention refers to the issue of liability for damage in the field of water as well as to damage in the field of environment in its entirety, and to damage in the field of cultural heritage and landscape protection, Croatia stresses that also other national authorities have to give their relevant opinion with regards to the accession to the Lugano Convention.

5. Greece

14. Greece is a signatory to the Lugano Convention but has not yet ratified it. Its decision on the matter has, indeed, been postponed pending the adoption of a directive of the European Commission (EC) concerning civil liability for environmental damage. The question will then be reconsidered in its entirety.

6. Norway

15. In 1993, the Government of Norway has sent the Lugano Convention to various institutions and organizations for their comments on whether Norway should sign the Convention. Several important institutions and organizations had objections regarding signing the Convention at that time.

16. Firstly, they recommended that Norway should await the EU process on the Green Paper on remedying environmental damage, done in May 1993. Secondly, the position of the other Member States of the European Council were at that time unclear, which was an additional argument to await the further development. Amongst these were Denmark and Sweden, with whom Norway is normally co-operating closely within the field of international environmental law. Thirdly, according to the representatives of the Norwegian insurance sector, it was difficult to take out an insurance to cover article 12 of the Convention.

17. The follow-up on the Convention was therefore not an issue that was given high priority by the Ministry of Justice. Meanwhile, the question on whether Norway should sign the Lugano Convention has not been raised again.

7. Spain

18. The European Union Member States are currently working on a common/consensus position in relation to the Lugano Convention. Spain will take a decision accordingly.

8. Sweden

19. Nothing in the Convention could be regarded as an *absolute* obstacle for Sweden to sign or ratify the Convention but certain provisions do not fit into the Swedish system.

20. In order to safeguard the right to compensation for an injured party, the Swedish system contains a compulsory environmental damage insurance which covers claims not able to compensate due to statutes of limitation in tort. Sweden is of the opinion that such an insurance solution is better after more than 10 years from the date of the incident compared to having a tort limitation period of 30 years as set out in the Convention. So, one reason why the Convention has not been signed by Sweden is because of the limitation periods.

21. Another reason is that the definition of “damage” goes beyond what has been generally accepted in tort legislation since the Convention includes a right for compensation for impairment of the environment per se. Compensation for impairment of the environment needs further elaboration.

9. Switzerland

22. A number of elements of the Lugano Convention (relating, for example, to the notion of environmental damage, the facilitation of evidence, limitation periods) are not yet implemented in the domestic law of Switzerland. The entire legislation on liability and compensation in Switzerland has recently come under examination and several important amendments are proposed. One of these proposals is covering the question of environmental damage while others are dealing with the facilitation of evidence and the extension of the limitation periods. As soon as these proposals get the approval of the Parliament, the question of signing/ratifying the Lugano Convention could be considered.

10. Turkey

23. Referring to the provisions of the Lugano Convention related to “Access to Environmental Information”, there are some differences in the national legislation. While the Lugano Convention provides the right of access to environmental information for any person, at his/her request and without his/her having to prove an interest, the national legislation provides this right only for the citizens of Turkey. Therefore, there is a need for harmonization between the Convention and national legislation from this point of view. This issue is one of the main obstacles for not being a Party to the Lugano Convention.

11. United Kingdom

24. The United Kingdom strongly supports the principle of environmental liability, and has a number of domestic law regimes which give effect to the principle, including measures in the field of contaminated land, biodiversity damage, pollution of freshwater resources, and major industrial accidents.

25. The United Kingdom actively participated in the Council of Europe negotiations on the 1993 Lugano Convention, but abstained from voting on the final text. Since then the United Kingdom has given considerable thought to the Convention and its implications, particularly when the European Commission contemplated action to accede to the Convention a few years ago. The United Kingdom notes that the Commission's White Paper on Environmental Liability adopted in February 2000 rejected the option of acceding to the Lugano Convention, in favour of preparing a Framework Directive which is expected to be different from the Convention in various respects.

26. The United Kingdom sees a number of problems with the Lugano Convention from the domestic perspective, and particularly about its implications for the existing arrangements. Some of these concerns can be summarised briefly as follows:

(a) The Lugano Convention is not just about damage to the environment, but also about personal injury and damage to property, including cases where the environment is unharmed. It is not clear why this wider scope was needed;

(b) The Lugano Convention has at its heart a vague and potentially very wide definition of environmental damage, including as it does heritage and landscape. It does not exclude insignificant damage;

(c) The definition of "dangerous activities", used to set the scope of control, includes anyone producing/handling/using certain substances including those in EC Directives on packaging & labelling of dangerous substances. This means that the scope is probably much wider than at first appears, since such substances are used in many areas of human activity. It is imprecise on what exactly constitutes a dangerous substance, a dangerous activity, and an "operator";

(d) The Lugano Convention is vague as to the standard of remediation required. No regard is had to cost versus benefit;

(e) There are elements of joint and several liability, which has generally been rejected in the United Kingdom, where a proportionate approach is more usual.

27. Generally, there are many areas of imprecision which may cause difficulties in implementation. It is very important for liability regimes to be clear, if excessive litigation and other costs are to be avoided.

B. Responses to question 2

Does the fact that the Convention is not limited to transboundary damage but also covers damages caused within the national territory of a Member State, constitute an obstacle for your country to ratify?

1. Austria

28. The applicability of the Convention both to national and international cases is not the problem.

2. Croatia

29. Activities in the field of environmental protection, including the protection of waters, are quite developed at the national and transboundary levels. Since the Lugano Convention poses additional requirements on both levels, it is necessary that the requirements and modalities are determined in more detail. It is most probable that during further elaboration, the issue of additional costs related to the implementation of requirements from the Lugano Convention will arise, which will impose new obligations on the economy of Croatia.

3. Greece

30. Damage caused within the national territory is covered by internal legislation, especially Law 1650/1986, which recognizes, like the Lugano Convention, the principle of strict liability. However, there exist some differences between the two systems which should be considered. In particular, Greek legislation does not provide for a general obligation of operators conducting dangerous activities to take financial insurance. Neither do organizations involved in the protection of the environment have such a broad scope of judicial remedies in their disposal, as provided for in article 18 of the Lugano Convention.

4. Norway

31. Norway has not taken any stand regarding this question. See, however, Norway's reply to the first question.

5. Spain

32. Yes, it does constitute an obstacle for Spain to ratify. Please, see also the reply to question 1.

6. Sweden

33. No, the fact that the Convention is not limited to transboundary damages does not constitute an obstacle to ratify.

7. Switzerland

34. The fact that the Convention also aims at the harmonization of domestic regulations on civil liability for damages caused within the national territory is not in principle an obstacle for Switzerland to sign or to ratify. However, it complicates the issue as the ratification requires several significant amendments to the domestic law.

8. Turkey

35. There is no specific definition of "Damage", "Environmental Damage" and "Transboundary Damage" in the national legislation except the Draft Law on Prevention of Sea Pollution and Intervention in Urgent Circumstances.

36. In spite of the lack of the definition on "Damage", the national Environment Law refers to the liability regime for the person who damages the environment. However, the efficient implementation of the related provision needs the accurate definition of "Environmental Damage" in the national legislation.

37. On the other hand, since the national Environment Law defines the environment limited to the national territory, it is not seen possible to implement the national law including the transboundary damages.

9. United Kingdom

38. This factor certainly adds to the potential for disruption to existing approaches in the United Kingdom.

C. Responses to question 3

Are the damage and scope of dangerous activities covered by the Convention too broad in comparison with your internal legislation?

1. Austria

39. In fact it was felt that the scope of the Convention was very broad. Some types of damage are not to be compensated under the actual Austrian law.

2. Croatia

40. No, in the national legislation, the same principles are laid down with regard to water as well as with regard to other parts of environment.

3. Greece

41. With the exception of the subject of genetically modified organisms, Greece does not consider that the damage and dangerous activities covered by the Lugano Convention are much broader than those of the internal legislation.

4. Norway

42. Norway had not taken any stand regarding this question.

5. Spain

43. Yes, they are too broad.

6. Sweden

44. As mentioned above, "damage" also covers compensation for impairment of the environment and that goes further than our internal legislation.

7. Switzerland

45. The scope of dangerous activities covered by the Convention is similar to the one under Swiss law. The definition of damage is – as far as the damage by impairment of the environment is concerned – broader than in Swiss domestic law. law.

8. Turkey

46. Please see the reply to question 2.

9. United Kingdom

47. Yes, the definition of damage is rather broad, by including cases where there is no environmental damage; by not limiting scope to significant cases; and by including landscape and cultural heritage neither of which are defined. At the same time, the scope of human activity covered may be narrower than in the United Kingdom regimes, which generally focus on the damage, and apply to anyone conducting any activity that causes it.

D. Responses to question 4

Should the definition of the environmental damage in the Convention be more accurate?

1. Austria

48. A more accurate definition of the environmental damage probably would help to overcome some reservations by the industry.

2. Croatia

49. The definition of the environmental damage in the Lugano Convention is rather broad. Croatia is of the opinion that it would be useful, in order to achieve the full operationality of this definition, to provide a more detailed explanation in the form an Annex to this Convention.

3. Greece

50. The definition of environmental damage in the Lugano Convention is in general acceptable.

4. Norway

51. Norway has not taken any stand regarding this question.

5. Spain

52. Yes, the definition is very broad. See the reply to question 2.

6. Sweden

53. The definition of environmental damage in the Convention does not constitute an absolute obstacle to ratify. If, however, further elaboration is deemed necessary, consideration should be given to the work that is going on within the Convention on Biological Diversity.

7. Switzerland

54. The definition of the environmental damage is correct. We do not think that a different definition of the environmental damage could solve the problems of the Convention.

8. Turkey

55. The definition of “Environmental Damages” is quite wide and clear in the Convention. Therefore, we do believe that there is no need for making the definition more accurate.

9. United Kingdom

56. Please see answers above.

Responses to question 5

Can you provide information on the damage, if any, resulting from activities dangerous to the environment in your country?

1. Austria

57. Austria cannot provide information on damages resulting from activities dangerous to the environment because it does not have statistics or studies about it.

2. Croatia

58. Some examples from Croatia are given in the annex.

3. Greece

59. Apart from certain isolated events of oil pollution at sea, there have been no major incidents of environmental damage in Greece.

4. Norway

60. Norway is not in a position to provide information on this question. As far as Norway recalls, there has not been any major incidents in this field in the last decades.

5. Spain

61. No, industrial accidents with a transboundary impact have not occurred in Spain in recent times.

6. Sweden

62. Information about one case in Sweden on damage resulting from activities dangerous to the environment is reproduced in the annex.

7. Switzerland

63. Switzerland has a well known example of a damage resulting from activities dangerous to the environment. It is the one that resulted from a fire that occurred in 1986 in a storage facility of the company then called "Sandoz", in Schweizerhalle. Information on this damage is in the public domain.

8. Turkey

64. Some examples from industrial accidents in Turkey are given in the annex.

9. United Kingdom

65. The United Kingdom does not hold information in this form. However, the information presented in the annex may be of interest as a broad indication.

II. CONCLUSIONS

66. As expected, the Government responses to the questionnaire did not contradict the Working Group's evaluation of the Lugano Convention. Indeed, the replies have shed more light on the position of individual countries regarding the obstacles to a possible decision to ratify the Lugano Convention, certain shortcomings of the Convention from a national perspective, and ongoing activities to further develop civil liability regimes both in the national and the international contexts.

67. The replies also provided more insight into the current knowledge about damage that occurred in some countries as a consequence of industrial accidents and action undertaken to clean up the environment. This information is particularly helpful for the further implementation of the work programmes under both the Water Convention and the Industrial Accidents Convention.

Annex

CASE STUDIES

I. INFORMATION BY CROATIA ON DAMAGE RESULTING FROM ACTIVITIES DANGEROUS TO THE ENVIRONMENT

1. In Croatia there are currently two government bodies in charge of environmental pollution. Within its scope of activities, the Ministry of Environmental Protection and Physical Planning is responsible for the protection of soil, air, the sea and natural heritage, while the State Directorate for Water is responsible for pollution of inland waters and pollution of the sea caused by land-based sources. In 2000, the Ministry of Environmental Protection and Physical Planning registered 111 cases of environmental pollution. In 32 cases, pollution was caused by industry, in 27 cases pollution had its origin in transport, in 10 cases in municipal activities, while in 35 cases the polluter was unknown. In 6 cases, the origin of the damage could not be classified in any of the indicated groups.
2. In 2001, one case of environmental pollution was registered as a transboundary accident having its origin in Bosnia and Herzegovina, where discharge of fuel was caused by the overturn of a road tank with fuel. The transboundary accident caused drinking-water contamination and temporary closure of the water-supply system. In 2000, the Water Inspectorate registered 107 cases of pollution at the national level. Among them, 32 cases were registered as emergency pollution and 75 cases as unexpected pollution. The total number is increasing, as compared to previous years. This can partly be explained by the unfavourable hydrological conditions that caused the increased number of emergency pollution. The number of cases of unexpected pollution corresponds approximately to the number in previous years. Of the 75 cases of unexpected pollution, the polluter was registered in 56 cases. While under the Law on Water, the polluter has to come up for the expenses of intervention and rehabilitation, significant problems arise in connection with legal proceedings in these cases and the effective collection of identified expenses.

II. THE HÖGANÄ CASE (Sweden)

3. By accumulation of cases, 91 house-owners claimed compensation for loss of market value of, and loss of income from, their property as well as personal inconvenience from noise and the fact that the localization of the Höganäs company constituted an aesthetic disturbance. The company had run its business of metal powder processes from several sources within the industrial area for several decades, had prior authorization with conditions permitting more emissions than released, and had undertaken an ambitious program of

environmental investment during the 1980s. The claims amounted to SEK 14.5 million for the period from 1983, when the releases increased according to the claimants, to the time of litigation in 1988.

4. An extensive scientific investigation proved causality between the company's releases and handling of iron dust in technical processes, and the dirt and corrosion of buildings, inventories and parked cars. The damage was admitted by the company. The house-owners raised concern whether the releases also harmed agricultural products and human health, but causality could not be proven scientifically. Concerning other metals used in the process, harmful effects could not be proven, although releases took place. Other and additional sources were demonstrated by the company.

5. Since the company had unused permissions, annual green accounting supervision and dialogue with the authorities, negligence could not be proven. The mere localisation could not be regarded as an emission.

6. But the court considered that certain limit values and guidelines concerning noise had been exceeded, and that the damage to buildings exceeded what had to be tolerated in spite of being locally common disturbances. Höganäs was held strictly liable for air pollution and noise. The house-owners received compensation for loss of market value, increased costs of maintenance, loss of garden products, and in some cases for noise disturbances (Malmö Fastighetsdomstol, DT 128, 1989-09-29, the Höganäs Case).

III. INFORMATION BY TURKEY ON DAMAGE RESULTING FROM ACTIVITIES DANGEROUS TO THE ENVIRONMENT

A. The Fire in Tuzla Shipyards (13 February 1997: Tuzla)

7. After the accident, the petroleum spilled into the sea was collected by the barriers of The North Sea Field Commandership and the Shell Company. The petroleum collected in the coasts and shipyards was partially cleaned by the skimmers of the Shell Company and TÜPRAS.

8. A boat trip was made with the participation of relevant experts from the Ministry of Environment and Istanbul Province Environment Directorate in Tuzla Shipyards and the coast line. Very slight petroleum slice and local oil pollution in suspension condition at the sea level were seen. In addition to pollution explained above, oil slice in the sea-coasts was also observed.

9. A Commission on Sea Pollution was established including the representatives from: Istanbul University, Istanbul Technical University and Istanbul Province Environmental Directorate.

B. The Fire in Kirikkale Ammunition Warehouse (3 July 1997)

10. The explosion started in the Production Unit at 9:30 a.m. and the biggest explosion occurred at 15:30 p.m.

11. The Crisis Center which was established by the Governorship of Kirikkale decided to evacuate the people in the Province. A sketch was prepared showing both the quantity and the conditions of the explosive substances in the warehouses.

12. The helicopters of the Ministry of Forestry were used in order to extinguish a fire.

13. The measurement of 150 air pollutants in Kirikkale showed that only CO₂ emissions was higher than the acceptable value, while the other ones were at the acceptable level. On the other hand, the measurements made in the water environment showed that the amounts of oil and grease were lower than the acceptable levels which are determined in the Turkish Water Pollution Control Regulation.

IV. INFORMATION BY THE UNITED KINGDOM ON DAMAGE RESULTING FROM ACTIVITIES DANGEROUS TO THE ENVIRONMENT

14. The Environment Agency estimates that some 300,000 hectares of land in England and Wales are affected by land contamination, covering between 5,000 and 20,000 "problem sites". This is mostly historic contamination, arising from a wide range of activities, not all of which would fall within the Lugano Convention definition of dangerous activity. Local authorities are now under a statutory duty to inspect their areas to identify land meeting the new legal definition of "contaminated land" (as well as to secure its remediation), and it is expected that a more reliable and meaningful estimate can be attempted in a year or two when progress has been made.

15. In terms of formal enforcement action for regulated activities in fields like waste management, water pollution, and integrated pollution control, the Environment Agency issued more than 500 enforcement and prohibition notice of various types in 1999, and 300 cautions. It prosecuted 566 businesses and individuals for criminal offences in that year. Further details are available at the website

<<http://www.environment-agency.gov.uk/envinfo/spotlight/spotrep.pdf>>

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Annex

16. English Nature (EN) regulates for nature conservation, biodiversity and natural features in England, working closely with the Environment Agency. They particularly work to protect over 4000 designated and statutorily protected "Sites of Special Scientific Interest" (SSSI), covering over 1 million hectares, including all sites for designation under the EC Habitats and Wild Birds Directives. According to their annual report, formal enforcement action by EN was taken in 20 cases in 1998 and 1999. Damage occurred on 55 SSSIs, affecting over 3000 hectares. Two sites were irreparably damaged. Damaging activities range from quarrying, overgrazing by sheep, to illegal motorcycle scrambling and waste dumping.