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

Seminar on Flood Prevention, Protection and Mitigation
(Berlin, 21-22 June 2004)

**POSSIBLE OPTIONS TO FURTHER DEVELOP AND STRENGTHEN
A COMMON FRAMEWORK FOR FLOOD PROTECTION,
PREVENTION AND MITIGATION**

Note by the secretariat

Introduction

1. The Parties to the Convention adopted at their third meeting a new programme of work, which covers the period 2004-2006. One of the programme elements, to be carried out under the auspices of a task force with Germany as lead country, deals with flood protection and prevention (annex). Under this programme element, the task force in charge of the preparations for the Seminar and a number of other tasks, such as the exploration of options, including the possibility of drawing up a legal instrument under the Convention, to further develop and strengthen a common framework for flood protection, prevention and mitigation strategies. After the discussion of such options during the Seminar, the task force will present appropriate proposals to the Convention's Working Group on Integrated Water Resources Management in December 2004 and thereafter to the Meeting of the Parties for discussion and possible adoption.

2. To facilitate the discussion on such options under topic III of the Seminar – Recommendations for future actions – the secretariat had prepared a preliminary version of the current document for consideration by the task force at its second meeting in Budapest on 26-27 April 2004. The outcome of the discussion at this meeting was taken into account when drawing up the present document. Moreover, use was made of Seminar document MP.WAT/SEM.3/2004/4, which provides the experience gained in the implementation of the Guidelines on Sustainable Flood Prevention, based on replies to a questionnaire by Parties and non-Parties to the Convention.

II. MAJOR FINDINGS FROM THE EVALUATION OF THE QUESTIONNAIRE

3. The aim of the programme element on flood protection and prevention is to enhance the level of commitment to prevent, protect and mitigate floods; improve the framework within which it is carried out; and promote regional as well as bilateral and multilateral cooperation in this field.

4. The evaluation of the responses to the questionnaire have led to three major groups of activities, which could be further considered as “options” of a common framework for flood protection, prevention and mitigation. These include: (a) an action programme on capacity building; (b) the further development of soft-law instruments; and (c) the drawing up of legal instruments. The following table gives an overview, based on the evaluation of the responses (see document MP.WAT/SEM.3/2004/4), where action at the local, national, transboundary and/or ECE-wide levels could be envisaged. For further details the above document should be consulted.

Possible action	Capacity building	Further development of soft-law instruments	Drawing up of legal instruments
Local level	Yes	Yes	Not applicable
National level	Yes	Yes	Yes
Transboundary level	Yes	Not necessarily	Yes
ECE-wide	Yes	Not necessarily	Yes

5. Without going into a detailed evaluation of the responses to the questionnaire, capacity building (e.g. through training courses) seems to be needed at all levels.

6. As concerns the further development of soft-law instruments, there also seems to be a need for further guidance on the link between flood protection and physical planning, the role of insurances, and other specific aspects of flood management from the local and national perspectives.

7. Regarding the drawing up of legal instruments, three pieces of information seem to be important:

(a) At the country level, some States have already embarked (or are planning to do so) on the further development of their national law in order to include obligations to coordinate flood plans for transboundary basins with the riparian countries;

(b) At the transboundary level, flood issues are incorporated in a number of agreements. Starting with the new (1999) Rhine agreement and planned work in other river basins, there seems to be a tendency to draw up detailed bilateral and multilateral flood agreements, supported by action plans, as the existing agreements obviously lack specificity and do not yet follow the new paradigm on sustainable flood prevention as put forward in the 2000 UNECE Guidelines on Sustainable Flood Prevention and the Best Practice Document drawn up by the EU Water Directors; 1

(c) At the ECE-wide level no specific legal instrument on flood issues exists yet; such an instrument could also provide for the subsequent development of bilateral and multilateral flood agreements, tailored to the specific needs of the more than 150 river basins in the region.

III. THREE BASIC OPTIONS FOR THE COMMON FRAMEWORK 2/

Option 1: Capacity building

8. Capacity building is part of many activities under the Convention as well as bilateral and multilateral agreements, were the Parties support the process of “mutual learning by doing” among partners through exchange of information and experience, including workshops and training courses. Under the Water Convention, this has, for example, led to the programme “Capacity for Water Cooperation (CWC)”, which became part of the new 2004-2006 work plan to strengthening national capacity to implement the Convention and its protocols, particularly in the countries in Eastern Europe, the Caucasus and Central Asia.

9. However, flood management is not yet part of this programme: it should be undertaken under the Convention, based on existing soft-law instruments, such as the 2000 Guidelines on

1/ See for example the compilation of provisions on flood protection in international law by Slavko Bogdanovic in “International Law of Water Resources”, Kluwer Law International, 2001.

2/ In the further discussion of the basic options for the common framework, only aspects that are of relevance to transboundary and ECE-wide cooperation are being considered. At a later stage and based on the outcome of the Seminar, the task force will also discuss national and local aspects, as appropriate.

Sustainable Flood Prevention and the Best Practice Document, and on training material still to be developed following the guidance to be given by the Seminar.

Options 2 and 3: Soft-law and legally binding agreements

10. In addition to capacity building, the two other basic choices on the options to further develop and strengthen a common framework for flood protection, prevention and mitigation is between a soft-law instrument and a legally binding instrument.

11. A soft-law instrument can take various formats, including:

- A revised version of the existing guidelines, which would need to be updated in the light of the experience with their application since 2000, taking into account the work undertaken under the auspices of the European Commission (Best Practice Document) as well as activities under the auspices of relevant United Nations bodies; or
- An international instrument in the form of a charter or code of conduct.^{3/}

12. Basically, legally binding instruments include:

- An amendment of the Convention;
- A protocol to the Convention.

13. Whatever decision on the options for the common framework on floods will be taken by the Meeting of the Parties, it should be noted that the task force should draw up some proposals for follow-up mechanism so that the framework is fully successful.

14. Any of the options for the common framework on floods cannot be simply statements of rules or commitments. The chosen option must initiate or intensify processes, both at national level and internationally, to bring about improvements in flood prevention, protection and mitigation. Such processes need to be monitored to see whether they are achieving the aims of the common framework, so that corrective action can be taken if achievement falls short of intention.

^{3/} Under UNECE terminology, “charters or codes of conduct” designate instruments that were adopted by the Commission – the highest decision-making body of UNECE – whereas “guidelines” or “recommendations to Governments” were adopted by the Commission’s subsidiary bodies. However, such a difference does not exist for the work under the Convention with the Meeting of the Parties as the highest decision-making body that approves, adopts or endorses products developed under the work plan. To attract more attention, however, one may prefer to call a soft-law instrument to be developed “charter or code of conduct”, rather than “updated and revised guidelines”.

III. RELEVANT FACTORS ^{4/}

15. The following seem to be the relevant factors, which need to be evaluated in reaching a decision on an option, whether non-binding or binding.

A. Ease of negotiation

16. Since Governments will not formally be bound by the wording of a non-binding instrument, its negotiation can be expected to be a less complicated task than for a binding instrument. In particular, since the legal formalities of a binding instrument would not be needed, it might be easier to bring the negotiations to a speedier conclusion than with a binding instrument. This could be important in view of the short time available for negotiation, if the instrument would be submitted to the fourth meeting of the Parties in June 2006. However, many Governments pride themselves on implementing fully any commitments into which they enter, whether these are binding or not. Such Governments can be expected to be just as careful with their choice of wording in a non-binding instrument as in a binding instrument. The saving in time and effort from choosing the non-binding solution is likely to be less than might at first be expected.

B. Flexibility

17. Since a non-binding instrument will not require the same formalities (e.g. ratification) as a binding instrument, it can in principle be amended or up-dated more easily. However, if the main feature of the instrument is initiating or intensifying a process, there is likely to be only a limited need to amend the instrument once the process is under way.

C. Degree of commitment

18. Because a binding instrument has to go through a more elaborate approval process, normally involving tacit or express approval by Parliaments, it represents, and is seen to represent, a greater degree of commitment since it establishes, in fact, a set of obligations under international law. Since one of the aims of the instrument is to develop a higher degree of political commitment to the prevention, protection and mitigation of floods, a binding instrument would thus appear to be more likely to deliver this aim.

D. Uniformity

19. Since a binding instrument will be structured so as to set out a clear, consistent set of legal commitments, it can be expected to promote a greater degree of uniformity in the application of the commitments it creates. However, an instrument in this field is likely to promote uniformity in the approaches applied rather than in the precise results achieved.

^{4/} It should be noted that in drafting this section, use was made of a document prepared by the former drafting group for the 1999 London Protocol on Water and Health (MP.WAT/AC.1/1998/4).

E. Speed of application

20. Since a non-binding instrument does not require ratification or approval, action under it is not subject to a period of uncertainty while the necessary steps are taken. Even for relatively straightforward instruments the time taken for ratification can be a number of years. However, the Signatory of a binding instrument is obliged, pending its ratification, not to defeat by its actions the object and purpose of that instrument. The factual implementation can start before ratification, if the Signatories so chose, especially if the ratification is seen as being non-controversial.

IV. SOFT-LAW OPTIONS FOR THE COMMON FRAMEWORK

21. One part of the questionnaire focused on the needs for updating and or revision of the Guidelines. Indeed, some areas have been suggested (see MP.WAT/SEM.3/2004/4) where further guidance would be needed. However, there was a general feeling that the Convention's bodies should not embark on the revision of the Guidelines.

Replies to the questionnaire

Is there a need for the Guidelines to be supplemented or updated? Which additional recommendations should be added to the Guidelines?

Only a few of the States' responses to the questionnaire suggest points where the Guidelines should be supplemented or updated. Indeed, several countries do not consider any revision to be necessary. In this connection, reference is also made to the EU's Best Practice Document. This document was drawn up on the basis of the Guidelines on Sustainable Flood Prevention. On the one hand, it is suggested that the Guidelines be amended to bring them in line with the Best Practice Document. On the other, another response states that such an amendment would be unnecessary. Other suggestions concerning the revision of the Guidelines relate to the role of insurance companies in flood plains. Further ideas put forward include the suggestion that the issue of climate change should be discussed and possibly included in the Guidelines, and the suggestion that examples of good practice should be added to the Guidelines.

V. LEGALLY BINDING OPTIONS FOR THE COMMON FRAMEWORK

22. If the chosen option would consist in the drawing up of a legally binding instrument on flood prevention, it is essential to avoid duplication of efforts and keep away from unnecessary work for riparian countries that have already established specific legal frameworks for cooperation on floods, such as the Rhine countries. The riparian countries to these rivers may be reluctant to enter into a new UNECE-wide negotiation process.

23. The challenge could be to draw up a framework agreement on floods, which on the one hand would cover the entire region and thus harmonize approaches throughout the region, and which, on the other hand, would entitle Parties to apply the existing flood agreement, provided it would fulfil

some specific provisions. Thus, a possible solution could be similar to the provisions of article 9, paragraph 1, of the Convention. It could read as follows:

“The Riparian Parties shall on the basis of equality and reciprocity enter into bilateral or multilateral agreements or other arrangements, *where these do not yet exist, or adapt existing ones, where necessary to eliminate the contradictions with the basic principles of this [Protocol] [Amendment]*, in order to define their mutual relations and conduct regarding the prevention, protection and mitigation of the transboundary impact of floods.”

A. Amendment to the Convention

24. An amendment to the Convention could be developed along the lines of the 2000 Guidelines, including the necessary updating.

25. Quite a number of articles would need to be amended, including those in part I and part II of the Convention, and a number of new articles would have to be drawn up in order to properly incorporate flood prevention, protection and mitigation issues into the Convention's text. This seems to be less of a problem; when it comes to implementation, however, different versions of the Convention (i.e. the original wording and the amended text) may cause confusion among the Parties that will be bound by the original text of the Convention, and those, which have accepted the amendment.

26. A possible solution to avoid such confusion may be by drawing up an annex to the Convention, as - following article 20 of the Convention – such an annex on flood issues would constitute an integral part of the Convention. Following established practice, however, an annex contains technical issues and not primary and "framework" obligations, such as the obligation to prevent floods, to cooperate with other riparian States and so on.

26. There is also another issue, which one should bear in mind when deciding on whether to draw up an amendment. This is the rather high number of instruments of acceptance of the amendment needed for the entry into force of the amendment 5/, compared to the 16 ratifications needed for a Protocol's entry into force.

5/ Following article 21, paragraph 4, of the Convention, an amendment enters into force on the condition that two thirds of the Parties have accepted the amendment (as of mid-2006, this would mean some 25 Parties). Another, even more stringent condition became part of the amendment to articles 25 and 26 of the Convention, adopted at the third meeting of the Parties – whereby this amendment enters into force if all those that were Parties to the Convention - as of 28 November 2004 - have accepted it.

B. Protocol on floods

29. A draft flood protocol could be developed along the lines of the 2000 Guidelines, including the necessary updating.

30. Compared to the Convention and its two Protocols, the “institutional and final provisions” of a new flood protocol could be rather short, because such issues as “Meeting of the Parties”, “right to vote”, “secretariat”, “amendments”, and “settlements of disputes” are already regulated by the parent convention.

31. In substance there should be no difference between an amendment and a Protocol to the Convention, the latter would, however, attract more political attention.

Annex

**Programme element 2.1 of the work plan for 2004-2006
Flood prevention and protection**

Objectives: The Meeting of the Parties will review the experience in the application of the 2000 Guidelines on sustainable flood prevention and update, if need be, the Guidelines in the light of the practice and lessons learned during the most recent flood events in various parts of the UNECE region.

Moreover, options to strengthen flood protection, prevention and mitigation strategies as well as enhancing their respective implementation, in particular in a transboundary context, will be explored, taking into account the role of joint bodies foreseen in article 9 of the Convention.

Work to be undertaken: An open-ended task force, with Germany as lead country, will prepare a Seminar on Flood Prevention, Protection and Mitigation, hosted by Germany in Berlin on 21-22 June. The need for and possibilities of updating and amending the Guidelines on sustainable flood prevention will be examined. In this context, a survey on provisions concerning transboundary river-basin cooperation in the field of flood protection, prevention and mitigation in national legislation as well as in bilateral and multilateral agreements will be undertaken. Options, including the possibility of drawing up a legal instrument under the Convention, to further develop and strengthen a common framework for flood protection, prevention and mitigation strategies, will be explored, with a view to presenting appropriate proposals to the Meeting of the Parties for discussion and possible adoption. Cooperation with the European Commission will be sought to ensure harmonization with the planned EU integrated strategy on flood prevention and protection and with the Sixth Framework Programme for Research and Technological Development.

Lead Party: Germany.

Participating Parties and non-Parties: Azerbaijan, Finland, France, Georgia, Hungary, Latvia, Netherlands, Poland, Republic of Moldova, Romania, Russian Federation, Slovakia, Switzerland and the European Commission (EC).

Main partners: The Global Water Partnership (GWP) and the Regional Environmental Centre for Central and Eastern Europe (REC). Cooperation will be sought with joint bodies, such as the International Commissions for the Protection of the Rhine, Elbe, Oder, Danube, Meuse and Scheldt, as well as joint bodies established in Eastern Europe, the Caucasus and Central Asia. Cooperation will also be sought with the International Strategy for Disaster Reduction (ISDR), the World Meteorological Organization (WMO) and the Regional Office for Europe of the World Health Organization (WHO/EURO).