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**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

Second meeting
Geneva, 4-6 February 2002 (6 February a.m. only)
Item 5 of the provisional agenda

**DRAFT LEGALLY BINDING INSTRUMENT ON CIVIL LIABILITY FOR
TRANSBOUNDARY DAMAGE CAUSED BY HAZARDOUS ACTIVITIES, WITHIN THE
SCOPE OF BOTH CONVENTIONS**

Prepared by the Rapporteur, Mr. Jürg Bally, Switzerland,
with the assistance of the secretariat and in consultation with the Chairperson */

*/ This document has not been formally edited.

EXPLANATORY NOTES

1. The following text has been prepared on the basis of document MP.WAT/2001/3 - CP.TEIA/2001/3 and the outcome of the first meeting of the Working Group (MP.WAT/AC.3/2001/2 - CP.TEIA/AC.1/2001/2).
2. For easy reference, amendments and additions to the annex to document MP.WAT/2001/3 - CP.TEIA/2001/3 are marked as follows:
 - (a) *Underlined italics* is used for new text passages drafted by the Rapporteur on the basis of the outcome of the first meeting;
 - (b) The ~~striketrough~~ mode is used for text passages that were proposed, at the first meeting or – thereafter - by the Rapporteur, for deletion;
 - (c) [Square brackets] are used for text passages, the wording of which was not agreed in principle at the first meeting.

In certain cases, these text markers are used in combination.
3. It should be noted that some delegations expressed at the first meeting their readiness to provide text passages for additional articles as soon as possible. These additional text proposals will be published in working papers, and will be considered together with the present document.
4. The texts of annexes I and II will be drawn up at a later stage once agreement has been reached on the scope of application (see article 3).
5. Annex III on arbitration will also be drawn up at a later stage. The Working Group may wish to note that the Secretary-General of the Permanent Court of Arbitration, Mr. Tjaco van den Hout, has kindly agreed to brief delegations on this issue in the course of the second meeting.

DRAFT PROTOCOL
ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM THE
TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS [ON TRANSBOUNDARY
WATERCOURSES AND INTERNATIONAL LAKES]

The Parties to the Protocol,

Having taken into account the relevant provisions of principle 13 of the Rio Declaration on Environment and Development, according to which States shall develop international and national legal instruments regarding liability and compensation for the victims of pollution and other environmental damage,

Having also taken into account the relevant provisions of principle 16 of the Rio Declaration on Environment and Development, according to which national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking in account the approach that the polluter should in principle bear the cost of pollution,

Basing themselves upon the conclusions of the World Summit on Sustainable Development (Johannesburg, 2002), in particular the [. . .],

Mindful of the obligations under the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and under the Convention on the Transboundary Effects of Industrial Accidents,

Taking note of the 1990 UNECE Code of Conduct on Accidental Water Pollution of Transboundary Inland Waters,

Aware of the risk of damage to human health, property and the environment caused by the transboundary effects of industrial accidents,

Recognizing article 7 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and article 13 of the Convention on the Transboundary Effects of Industrial Accidents,

Convinced of the need to provide for third-party liability and environmental liability in order to ensure that adequate and prompt compensation is available,

Further taking note of [. . .],

[. . .],

Acknowledging the desirability to review the Protocol at a later stage in order to broaden it as appropriate,

Have agreed as follows:

Article 1

Objective

The objective of this Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary effects of industrial accidents *[on transboundary watercourses and international lakes]*

Article 2

Definitions

1. The definitions of terms contained in the Conventions apply to this Protocol, unless expressly provided otherwise in this Protocol.
2. For the purposes of the Protocol:
 - (a) “The Conventions” means the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Transboundary Effects of Industrial Accidents;
 - (b) “Damage” means:
 - (i) Loss of life or personal injury;
 - (ii) Loss of, or damage to, property other than property held by the person liable in accordance with this Protocol;
 - (iii) Loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;
 - (iv) The cost of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken; and
 - (v) The cost of *[preventive/mitigation]* measures, including any loss or damage caused by such measures, to the extent that the damage results from the transboundary effects of an industrial accident on *[transboundary watercourses and international lakes]*;

(b)bis "Hazardous activity" means any activity in which one or more hazardous substances are present or may be present in quantities at or in excess of the threshold quantities

listed in Annex I hereto, and which is capable of causing transboundary effects on transboundary watercourses and international lakes and their water uses.

(c) “Measures of reinstatement” means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment. Domestic law may indicate who will be entitled to take such measures;

(d) [*“Preventive/mitigation”*] measures” means any reasonable measures taken by any person in response to an industrial accident, to prevent, minimize or mitigate possible loss or damage due to the industrial accident, or to arrange for environmental clean-up;

(e) “Party” means a Contracting Party to this Protocol;

(f) “Protocol” means this Protocol;

~~(g) “Regional economic integration organization” means an organization constituted by sovereign States to which its member States have transferred competence in respect of matters governed by the Protocol and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve, formally confirm or accede to the Protocol;~~

(g) “Unit of account” means the Special Drawing Right as defined by the International Monetary Fund.

(h) “*Operator/owner*” means [. . .];

(i) “*Industrial accident*” means [. . .];

(j) [. . .]

Article 3

Scope of application

1. The Protocol shall apply to damage due to an industrial accident occurring in a hazardous activity *that has caused* transboundary effects on [*transboundary watercourses and international lakes as well as on their water uses*].

~~2. The Protocol shall apply to hazardous activities in which one or more hazardous substances are present or may be present in quantities at or in excess of the thresholds specified in annex I to the Protocol.~~

2. The Protocol shall apply only to damage as referred to in paragraph 1 suffered in an area under the national jurisdiction of a Party and arising from an industrial accident occurring under the national jurisdiction of another Party.

Article 4

Strict liability

1. The *[owner / operator]* of the industrial facility which caused the damage shall be liable for the damage.
2. No liability in accordance with this article shall attach to the owner of the industrial facility, if he or she proves that the damage was:
 - (a) The result of an act of armed conflict, hostilities, civil war or insurrection;
 - (b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;
 - (c) [Wholly the result of compliance with a compulsory measure of a public authority of the State where the industrial accident occurred;] or
 - (d) Wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.
3. [If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable.]

Article 5

Fault-based liability

Without prejudice to article 4, *[any person / the owner / the operator]* shall be liable for damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions. [This article shall not affect the domestic law of the Parties governing liability of servants and agents.]

Article 6

[Preventive/mitigation measures]

1. Subject to any requirement of domestic law, any person in operational control of the industrial facility at the time of an industrial accident shall take all reasonable measures to mitigate damage arising therefrom.
2. Notwithstanding any other provision in the Protocol, any person in operational control of the industrial facility for the sole purpose of taking *[preventive/ mitigation]* measures, provided that this person acted reasonably and in accordance with any domestic law regarding *[preventive / mitigation]* measures, is not thereby subject to liability under the Protocol].

Article 7¹

Right of recourse

1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court:
 - (a) Against any other person also liable under the Protocol; and
 - (b) As expressly provided for in contractual arrangements.
2. Nothing in the Protocol shall prejudice any rights of recourse to which the person liable might be entitled pursuant to the law of the competent court.

Article 8

Implementation

1. The Parties shall adopt the legislative, regulatory and administrative measures necessary to implement the Protocol.
2. In order to promote transparency, the Parties shall inform the secretariat of the measures taken to implement the Protocol ~~including any limits of liability established.~~
3. The provisions of the Protocol *and measures adopted under paragraph 1* shall be applied without discrimination based on nationality, domicile or residence.

Article 9

Financial limits

1. Financial limits for the liability under article 4 are specified in annex II. Such limits shall not include any interests or costs awarded by the competent court.
2. There shall be no financial limit on liability under article 5.

Article 10

Time limit of liability

1. Claims for compensation under the Protocol shall not be admissible unless they are brought within [ten] years from the date of the industrial accident.

¹ At a later stage, this article may be moved to the procedural part of the Protocol.

2. Claims for compensation under the Protocol shall not be admissible unless they are brought within five years from the date the claimant knew or ought reasonably to have known of the damage [*and of the person liable*], provided that the time limits established pursuant to paragraph 1 of this article are not exceeded.

3. Where the industrial accident consists of a series of occurrences having the same origin, time limits established pursuant to this article shall run from the date of the last of such occurrences. Where the industrial accident consists of a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

Article 11

Insurance and other financial guarantees

1. The persons liable under article 4 shall establish, and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under article 4 for amounts not less than the limits specified in paragraph 3 of annex II. States may fulfil their obligation under this paragraph by a declaration of self-insurance. Nothing in this paragraph shall prevent the use of deductibles or co-payments as between the insurer and the insured, but the failure of the insured to pay any deductible or co-payment shall not be a defence against the person who has suffered the damage.

2. Any claim under the Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under article 4 to be joined in the proceedings. Insurers and persons providing financial guarantees may invoke the defences which the person liable under article 4 would be entitled to invoke.

Article 12

State responsibility

The Protocol shall not affect the rights and obligations of the Parties under the rules of general international law with respect to State responsibility.

PROCEDURES

Article 13

Competent courts

1. Claims for compensation under the Protocol may be brought in the courts of a Party only where either:
 - (a) The damage was suffered; or
 - (b) The industrial accident occurred; or
 - (c) The defendant has his or her habitual residence or principal place of business.
2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

Article 13bis

Arbitration

Parties shall establish optional arrangements of arbitration where claimants and defendants can agree to have recourse to such a procedure.

Article 14

Related actions

1. Where related actions are brought in the courts of different Parties, any court other than the court first seized may, while the actions are pending at first instance, stay its proceedings.
2. A court may, on the application of one of the Parties, decline jurisdiction if the law of that court permits the consolidation of related actions and another court has jurisdiction over both actions.
3. For the purpose of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

Article 15

Applicable law

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Protocol shall be governed by the law of that court, including any rules of such law relating to conflict of laws.

Article 16

Relation between the Protocol and the law of the competent court

1. Subject to paragraph 2, nothing in the Protocol shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.
2. [No claims for compensation for damage based on the strict liability under article 4 shall be made otherwise than in accordance with the Protocol.]

Article 17

Mutual recognition and enforcement of judgements

1. Any judgement of a court having jurisdiction in accordance with article 13 of the protocol which is enforceable in the State of origin and is no longer subject to ordinary forms of review shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:
 - (a) Where the judgement was obtained by fraud;
 - (b) Where the defendant was not given reasonable notice and a fair opportunity to present his or her case;
 - (c) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or
 - (d) Where the judgement is contrary to the public policy of the Party in which its recognition is sought.
2. A judgement recognized under paragraph 1 of this article shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be reopened.
3. The provisions of paragraphs 1 and 2 of this article shall not apply between Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable.

FINAL CLAUSES

Article 18

Meeting of the Parties

Alternative 1:

[1. A Meeting of the Parties is hereby established. The secretariat shall convene the first meeting of the Parties in conjunction with the first meeting of the governing body of one of the Conventions after entry into force of the Protocol.

2. Subsequent ordinary meetings of the Parties shall be held in conjunction with meetings of the governing bodies of the Conventions unless the Meeting of the Parties decides otherwise. Extraordinary meetings of the Parties shall be held at such other times as may be deemed necessary by the Meeting of the Parties, or at the written request of any Party, provided that, within six months of such a request being communicated to them by the secretariat, it is supported by at least one third of the Parties.]

Alternative 2:

1. The first meeting of the Parties shall be convened no later than [one year/ eighteen months] after the date of the entry into force of this Protocol. Thereafter, ordinary meetings shall be held at regular intervals to be determined by the Parties, but at least every [two / three] years, except in so far as other arrangements are necessary to achieve the aims of paragraph 2 of this article. The Parties shall hold an extraordinary meeting if they so decide in the course of an ordinary meeting or at the written request of any Party, or at the written request of any Party, provided that, within six months of it being communicated to all Parties, the said request is supported by at least one third of the Parties.

2. Where possible, ordinary meetings of the Parties shall be held in conjunction with the meetings of the governing body of one of the Conventions.

3. The Parties, at their first meeting, shall adopt by consensus rules of procedure for their meetings as well as financial rules.

4. The functions of the Meeting of the Parties shall be:

(a) To review the implementation of and the compliance with the Protocol;

(b) To provide for reporting and establish guidelines and procedures for such reporting where necessary;

(c) To consider and adopt, where necessary, proposals for amendment of the Protocol or any annexes and for any new annexes; and

(d) To consider and undertake any additional action that may be required for the purposes of the Protocol.

Article 19

Secretariat

1. The Executive Secretary of the Economic Commission for Europe ~~or his or her representative~~ shall carry out the following secretariat functions for this Protocol:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Protocol;

(c) The performance of such other functions as may be determined by the Meeting of the Parties on the basis of available resources.

Article 20

Amendments to the Protocol

1. Any Party may propose amendments to this Protocol.

2. The text of any proposed amendment to this Protocol shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall circulate it to all Parties. The Conference of the Parties shall discuss proposed amendments at its next annual meeting, provided that such proposals have been circulated to the Parties by the Executive Secretary of the Economic Commission for Europe at least ninety days in advance:

3. For amendments to this Protocol- other than those to annex I, for which the procedure is described in paragraph 4 of this Article:

(a) Amendments shall be adopted by consensus of the Parties present at the meeting, and shall be submitted by the Depository to all Parties for ratification, acceptance or approval;

(b) Instruments of ratification, acceptance or approval of amendments shall be deposited with the Depository . Amendments adopted in accordance with this Article shall enter

into force for Parties that have accepted them on the ninetieth day following the day of receipt by the Depositary of the sixteenth instrument of ratification, acceptance or approval;

(c) Thereafter, amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instruments of ratification, acceptance or approval of the amendments.

4. For amendments to Annex I:

(a) The Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted and no agreement reached, the amendments shall, as a last resort, be adopted by a nine-tenths majority vote of the Parties present and voting at the meeting. If adopted by the Conference of the Parties, the amendments shall be communicated to the Parties and recommended for approval;

(b) On the expiry of twelve months from the date of their communication by the Executive Secretary of the Economic Commission for Europe, the amendments to Annex I shall become effective for those Parties to this Protocol which have not submitted a notification in accordance with the provisions of paragraph 4c of this article, provided that at least sixteen Parties have submitted such a notification;

(c) Any Party that is unable to approve an amendment to Annex I of this Protocol shall so notify the Executive Secretary of the Economic Commission for Europe in writing within twelve months from the date of the communication of the adoption. The Executive Secretary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and the amendment to Annex I shall thereupon enter into force for that Party.

(d) For the purpose of this paragraph “Parties present and voting” means Parties present and casting an affirmative or negative vote.

Article 21

Right to vote

1. Except as provided for in paragraph 2 of this article, each Party shall have one vote.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States

which are Parties. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 22

Settlement of disputes

[1. If a dispute arises between two or more Parties about the interpretation or application of this Protocol, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Protocol, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 of this article, it accepts one of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) ~~Where the Parties are Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and/or the Convention on the Transboundary Effects of Industrial Accidents, and have accepted as compulsory in relation to each other one or both of the means of dispute settlement provided in the Conventions, the settlement of the dispute in accordance with the provisions of the Conventions for the settlement of disputes arising in connection with the Conventions;~~

(b) ~~In any other case, the submission of the dispute to the International Court of Justice, unless the Parties agree to arbitration or some other form of dispute resolution.~~

(a) *Submission of the dispute to the International Court of Justice;*

(b) *Arbitration in accordance with the procedure set out in Annex III hereto.*

3. *If the Parties to the dispute have accepted both means of dispute settlements referred to in paragraph 2 of this article, the dispute may be submitted only to the International Court of Justice, unless the Parties to the dispute agree otherwise.]*

Article 23

Signature

The Protocol shall be open for signature in [] from [] to [] and thereafter at United Nations Headquarters in New York until [] by States members of the Economic Commission for Europe, as well as States having consultative status with the Economic Commission for Europe pursuant to paragraph 8 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the

Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Protocol, including the competence to enter into treaties in respect of these matters.

Article 24

Ratification, acceptance, approval and accession

1. The Protocol shall be subject to ratification, acceptance or approval by the signatory States and regional economic integration organizations referred to in article 23.
2. This Protocol shall be open for accession by the States and organizations referred to in article 23.

2bis. Any other State, not referred to in paragraph 2 above, that is Member of the United Nations may accede to the Protocol upon approval by the Meeting of the Parties.

3. Any organization referred to in article 23 which becomes Party to this Protocol without any of its member States being a Party shall be bound by all the obligations under this Protocol. In the case of such organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under this Protocol concurrently.
4. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 23 shall declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

Article 25

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.
2. For the purposes of paragraph 1 of this article, any instrument deposited by an organization referred to in article 23 shall not be counted as additional to those deposited by States members of such an organization.
3. For each State or organization referred to in article 23 which ratifies, accepts or approves this Protocol or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, this Protocol shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

Article 26

Withdrawal

1. At any time after three years from the date on which the Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect one year from the date of its receipt by the Depositary, or on such later date as may be specified in the notification.

Article 27

Depositary

The Secretary-General of the United Nations shall act as the Depositary of the Protocol.

Article 28

Authentic texts

The original of this Protocol, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Protocol.

DONE in [], this [].