ECONOMIC COMMISSION FOR EUROPE

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

Intergovernmental Working Group on Civil Liability

Second meeting
Geneva, 4-6 February 2002

Working paper*
MP.WAT/AC.3/2002/WP.4
CP.TEIA/AC.1/2002/WP.4

ENGLISH ONLY
31 January 2002

COMMENTS ON THE DRAFT LEGALLY BINDING INSTRUMENT ON CIVIL LIABILITY FOR TRANSBOUNDARY DAMAGE CAUSED BY HAZARDOUS ACTIVITIES, WITHIN THE SCOPE OF BOTH CONVENTIONS (MP.WAT/2002/2 - CP.TEIA/2002/2)

Submitted by Swiss Re

I. General remarks

1. From the reinsurance point of view, we welcome the idea of a uniform regime on civil liability for damage resulting from transboundary effects of industrial accidents on transboundary watercourses and international lakes within the member states of the Economic Commission for Europe. We support the results of the first meeting and we agree, in general, with the solution formulated in the above document. There are, however, some concerns about the consequences for the insurance industry and we have to express our reservations on some specific provisions.

---

* Apart from minor editorial changes, this working paper is reproduced in the form as received by the secretariat.

2. The insurance landscape within the member states of the Economic Commission for Europe is not standardized but rather heterogeneous. This is true for civil liability insurance for enterprises in general and particularly for civil liability insurance for damage as a result of environmental impairments. There is a well developed insurance penetration in industrial countries (e.g. Germany, France, Switzerland). On the other hand in some countries, which do not fulfill the development of industrial countries in technical, social and legal areas, a civil liability insurance system is not in place or is only partially developed. In some countries there are no civil liability insurance solutions available because the prerequisites for insurability (e.g. up-to-date technical standards regarding the installations, processes and use of hazardous substances) are not given and it would appear that these requirements will not be fulfilled in the near future. This could lead to differences in the economic competition within the member States.

3. Liability insurance companies are private organized enterprises. Contrary to public or non-profit institutions and organizations, the insurance companies as well as other financial institutes and the industry in general, target economic goals. Insurance solutions have to achieve a certain yield. Therefore, only risks fulfill the minimum insurance requirements (e.g. big number of uniform risks, calculation of frequency and severity) are insurable. This is true in respect of known damage (e.g. bodily or personal injuries, third party property damage). It is extremely difficult to estimate the consequences of new damage, for example ‘ecological damage’ or too broad formulated liability conditions, and thereby provide an insurance solution.

4. We strongly support the introduction of uniform legal regulations within the member States in respect of the construction and use of technical installations, use of hazardous substances, permission for business and the like, which help to avoid the occurrence of environmental impairments. These preventative measures have a large impact on the position of the insurance industry regarding the civil liability regime and the subsequent insurance solutions.

II. Remarks on art 2 ‘definitions b) damage’

5. The insurance industry has developed instruments which allow the calculation of specific types of liability and, therefore, the insurability of these is given. This is true for bodily or personal injuries (‘loss of life or personal injury’) and third party property damage (‘loss of, or damage to, property other than held by the person liable in accordance with this protocol’). In respect of pure economic damage (‘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’) insurance protection is not in place or is only partially available. The costs for the prevention of resulting damage (bodily or personal injuries and/or third party property damage) after the occurrence of an environmental impairment are also partially insurable (‘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’). In general, pure ecological damage (‘ecological damage’, the cost of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken’) are not insurable. The use of traditional insurance instruments is not possible. There is no experience available which allows the calculation of frequency and severity of ecological damage.

III. Remarks on art. 4 ‘strict liability’

6. The liability limitation should also be available for the operator of the industrial facility. Therefore, subparagraph 2 should be changed as follows ‘...shall attach to the owner/**operator** of the industrial facility...’.

7. The implementation of a joint and several liability regime may inhibit the development of insurance products. We strongly support a liability regime where the owner/operator of the industrial facility would only be liable proportionally for the damage they cause. Therefore subparagraph 3 should be cancelled.

IV. Remarks on art. 10 ‘time limit of liability’

8. The absolute period of limitation of 10 years is in accordance with most national liability regimes. The introduction of a relative period of limitation of 5 years is, however, new. Usually the relative period of limitation is between 1 and 3 years (e.g. product liability regimes). Experience shows that there is normally no problem for the plaintiff to claim compensation within 1 year from the date the claimant knew or ought reasonably to have known of the damage and of the person liable. There is no need to implement a special relative period of limitation of 5 years. On the contrary this could lead to the danger that the subject of the liability no longer exists. The unnecessary blocking and reserving of capital for damage for more than 1 year prevents investments and, therefore, economic development. Therefore subparagraph 2 should be changed as follows ‘...brought within **one** year form the date the claimant knew or ought reasonably to have known...’.

V. Remarks on art. 11 ‘insurance and other financial guarantees’

9. In principle civil liability insurance is a suitable instrument for providing financial guarantees for the insured for damage as a result of environmental impairment, which fulfil the prerequisites of insurability. On condition that the insurance companies have the right to decline insurance for risks, which do not fulfill the technical standards and the insurance prerequisites (e.g. ecological damage), liability insurance could provide financial guarantees.
As mentioned above art. 11 should be changed as follows ‘‘...guarantees covering their liability under article 4 **for damage mentioned in article 2 Ziff.2a lit. (i) and (ii)** for amounts not less than ...’

10. The implementation of the right to claim directly from the insurance company is problematic. This instrument is useful in cases where the subject of the liability could be lost by the accident, for example in motor liability insurance, and where claiming for liability could be more difficult or impossible. But this is not the case in respect of damage as a result of environmental impairment. The polluter’s identity would be known and a claim could be made against it. The task of liability insurance is the financial protection of the insured (not the plaintiff) for the negative consequences of a liability claim. Such a right to claim leads to a change of the intention of liability insurance. The liability insurer or any person providing financial guarantee should take over the role of the polluter and is suddenly subject of a claim. That is a new situation

for the insurer and changes the function of insurance. We strongly recommend not to implement such a right to claim. Such a right to claim is not necessary and therefore we recommend to cancel subparagraph 2.