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

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Note from Belgium with respect to the draft civil liability protocol

The Belgian delegation wishes to submit the following additional comments and welcomes your reactions. For easy reference, the comments submitted by Belgium on February 21 are reprinted below.

I. Article 2, 2, h.

This subsection reads: "Industrial accident" means an event resulting from an uncontrolled development during the course of any activity involving hazardous substances either: …"

We suggest that, in this provision, the words "any activity involving hazardous substances" be replaced by "an hazardous activity". "Hazardous activity" is a term defined in
art. 2, 2 (b)(bis) which refers to quantities of hazardous substances defined in annex I. The language "any activity involving hazardous substances" to the contrary, does not imply a reference to annex I, but leads to the definitions of hazardous substances in art. 6 of the Convention on the protection and use of transboundary watercourses and international lakes. Art. 3, 1 confirms the need to refer to "hazardous activity" in art. 2,2, h.

II. Art. 3, 2.

1. Belgium suggests that the parties be given an option to expand the application of the protocol to damages as referred to in paragraph 1 arising from an industrial accident in an area under their own jurisdiction and occurring in an area under their jurisdiction.
This would allow providing their domestic victims with the same additional rights as foreign victims without having to enact separate domestic legislation.

2. The words “in an area” should be added after “occurring” at the second line of 3, 2.

III. Art. 8.3. Equal treatment of domestic and foreign victims.

Belgium suggests that art. 8, 3 be limited to its present first sentence. This should be sufficient to ensure an equal treatment of the different categories of victims.

IV. Art. 11, 1.

The present text imposes an obligation on the operator to “… establish and maintain financial security to cover liability under article 4 for amounts not less than …by financial security such as insurance bonds or other financial guarantees, or by a financial mechanism providing compensation in the event of insolvency.”

The last part of the sentence was included in order to open the possibility that public or industry based, sectoral or general, guarantee funds or other loss sharing arrangements are used as financial guarantees.

The present drafting of art. 11, 1, however, raises a problem in so far as the burden “to establish and maintain a financial mechanism … providing compensation in the event of insolvency”, is imposed on the operator. It is clear that an operator will generally *not* be in a position to *establish* a guarantee fund or similar mechanism. He nevertheless should also be able to avail himself of the cover of financial mechanisms set up by trade organisations or by public authorities. To do this, he generally will have to pay a contribution or a tax. He may even, in certain cases, be covered by law by a public fund.

In order to clarify that alternative financial mechanisms can be used as a financial guarantee also if others than the operator himself have established them, the following solution can be adopted:

If the Working Group would deem it necessary to phrase the article as an obligation imposed on the operator, the following language could be used: *“The operator shall ensure that liability under article 4 … is and shall remain covered by financial security such as insurance, bonds or other financial guarantees, or by a financial mechanism providing compensation in the event of insolvency”*.

In any event, in the text of art. 11, 1, line 3, there should be a “,” between insurance and bonds.