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**CHALLENGES AND OPPORTUNITIES OF TRANSBOUNDARY
ACCIDENTAL WATER POLLUTION, LIABILITY AND
COMPENSATION – PROGRESS TOWARDS RATIFICATION OF THE
CIVIL LIABILITY PROTOCOL**

submitted by

the Bureaux of the UNECE Industrial Accidents Convention and
the Water Convention

through the Ad Hoc Working Group of Senior Officials

BACKGROUND DOCUMENT



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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
Transboundary Effects
of Industrial Accidents

ASSESSMENT AND IMPLEMENTATION

**IMPLEMENTATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS AND
FINDINGS OF UNECE ENVIRONMENTAL PERFORMANCE REVIEWS**

**CHALLENGES AND OPPORTUNITIES OF TRANSBOUNDARY ACCIDENTAL
WATER POLLUTION, LIABILITY AND COMPENSATION – PROGRESS TOWARDS
RATIFICATION OF THE CIVIL LIABILITY PROTOCOL***

The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Civil Liability Protocol) was adopted by the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) and the Parties to the Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) in 2003. Progress with its ratification has proved more difficult than expected.

This document summarizes the key findings of a workshop organized under both Conventions to explore the challenges related to liability and compensation in cases of transboundary accidental water pollution, the obstacles to ratification of the Protocol, and the way forward.

* This document was submitted on the above date to allow consultation between the Bureaux of the Water and Industrial Accidents Conventions.

I. BACKGROUND

1. The Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) and the Parties to the Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) adopted the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Civil Liability Protocol) at their second joint special session, held in Kiev on 21 May 2003.
2. The Conference of the Parties to the Industrial Accidents Convention and the Meeting of the Parties to the Water Convention agreed at their respective last meetings (Rome, 15–17 November 2006, and Bonn, Germany, 20–22 November 2006) to undertake activities to explore the current ratification status of the Civil Liability Protocol.
3. With this aim, the Bureaux of both Conventions agreed to organize a workshop on “Transboundary Accidental Water Pollution, Liability and Compensation: Challenges and Opportunities” and to present the findings to the Sixth Ministerial Conference “Environment for Europe”.
4. The workshop, organized by Hungary in cooperation with Greece and Switzerland, was held in Budapest on 21 and 22 May 2007. It allowed for a fruitful exchange of national practice, bilateral and multilateral cooperation experience, and specialized knowledge on the subject matters related to the Protocol.

II. THE ISSUE

5. Adverse transboundary impacts from various human activities, and especially from industrial accidents, have happened in the past and may happen in the future, with far-reaching transboundary impacts, even with small amounts of dangerous substances involved.
6. Their prevention and mitigation can be effectively managed only in the framework of international cooperation based on a clear understanding that protecting the environment is a common responsibility of the international community. The damage to ecosystems and to societies is a problem of all States, since environmental security is an important pillar of human security.
7. There is a need for strengthening cooperation in the field of transboundary accident prevention, control and mitigation. The existing frameworks of the Industrial Accidents Convention and Water Convention are very valuable.
8. However, the issues of civil liability and compensation for damage in case of accidental transboundary water pollution are not fully regulated in international law. Experience with industrial accidents causing damage to transboundary waters has shown how difficult it is to receive compensation in these situations. Civil claims very rarely succeed. If there is a settlement, it is usually made out of court. The compensation paid by the operator, if any, is

usually much less than the amount of the damage, and the actual compensation paid to victims comes to less than 10 per cent of their claims. Clean-up costs are mostly borne by the State or municipality, and only partially by the operator causing the damage, and the restoration of the environment remains incomplete.

9. One of the main causes for such situations is the lack of a suitable legal framework. The Protocol is unique in that it is specifically targeted to the transboundary impact of industrial accidents on transboundary watercourses. It therefore fills one of the major gaps in international environmental legislation by solving the problem of uncompensated damage in neighbouring countries.

10. This was one of the main arguments at the basis of the adoption and signature of the Protocol in 2003. However, progress with its ratification since that time has proved more difficult than expected. To date, 24 countries have signed the Protocol, but only one country has ratified it.

11. There have been developments in the UNECE region relevant to civil liability, however. Shortly after the adoption of the Protocol in April 2004, the Directive on environmental liability with regard to the prevention and remedying of environmental damage¹ was enacted. This Directive was further amended in 2006 by the Directive on the management of waste from extractive industries.²

12. Other important developments relate to private international law and include the entry into force of Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as the development in the European Union (EU) of a regulation on the law applicable to non-contractual relations. In particular, relations between provisions of the Protocol and the private international law regime were the subject of discussion during the workshop.

13. There are some areas of convergence between the EU liability regime and the Protocol. To this end, close cooperation amongst all stakeholders is beneficial to establishing a coherent liability regime for the whole UNECE region, with a view to ensuring a high degree of environmental protection.

14. This is particularly important considering that EU law does not apply to two broad categories of transboundary waters, namely (a) transboundary waters shared by non-EU countries, mostly by those in Eastern Europe, Caucasus and Central Asia and in South-Eastern Europe; and (b) waters shared by EU and non-EU countries; where there would not be adequate legislation on the subject if the Protocol were not be ratified and did not enter into force.

¹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

² Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries.

III. MAIN FINDINGS, CONCERNS AND RECOMMENDATIONS

15. The ratification, acceptance, approval and accession of UNECE member States, including the European Community together with its Member States, to the Protocol depends principally on policy considerations.

16. In the four years since the Fifth Ministerial Conference “Environment for Europe” (Kiev, 2003), the lack of appropriate legal mechanisms that triggered the elaboration of the Protocol is still there, and should a transboundary accident occur, there would be no suitable pan-European legal regime in place to cope with civil liability and compensation issues. In this regard, a much more active approach by UNECE member States is needed to create an efficient legal framework to address these issues.

17. In this context, the value of the Protocol in terms of its objectives, substance and regional scope - addressing transboundary environmental liability issues in the whole pan-European region - should be recognized, and its entry into force facilitated, as one of the instruments to deal with those issues.

18. From the point of view of European Community law, action towards its ratification should be jointly envisaged by the European Community and its Member States. In this context, the relation between the provisions of the Protocol and the relevant European Community laws was considered during the workshop, and the discussion cleared up certain doubts about the alleged incompatibility of the Protocol with European Community and international legislation. However, the needed analysis of compatibility between the Protocol and the EU laws has not yet been finalized at the Community level. Such analysis should be completed without further delay to clear any possible legal obstacle to ratification of the Protocol.

19. For its proper implementation, the Protocol requires cooperation between several different actors, in particular the private sector and the insurance and re-insurance sectors. Countries would therefore benefit from establishing a national dialogue with all stakeholders concerned by the implementation of the Protocol, which should be seen as part of the solution.

20. The insurance sector plays an important role in risk assessment and creates effective economic tools for increasing safety standards and preventing accidents. The workshop illustrated developments in the insurance sector, which has proven to be responsive to the market requests and capable of adapting to emerging needs related to environmental liability. In order to address the matter of financial guarantees required by the Protocol, countries should involve their national and regional insurance and financial sectors to assess what the existing possibilities and limits - and future options - are to cover the risks addressed by the Protocol.

21. There is a need to increase capacity-building activities to assist authorities and administrative bodies in various countries, in particular in countries with economies in transition, to develop good administrative and legislative practice and encourage them to take the necessary steps to introduce appropriate liability regimes, including the ratification of the Protocol.
