

**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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**DEFINING ‘MEASURES OF REINSTATEMENT’  
IN INTERNATIONAL LIABILITY CONVENTIONS**

(Paper submitted by the delegation of the Netherlands)

1. In international liability conventions, reference has been made to ‘measures of reinstatement’ in the definition of ‘damage’ since the 1984 amendment of the 1969 International Convention on Civil Liability for Oil Pollution Damage. This amendment defines ‘damage’, *inter alia*, as “loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from

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\* This document has not been formally edited.

such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken”.<sup>1</sup> Other conventions follow the formulation of the ‘draft legally binding instrument on civil liability for transboundary damage caused by hazardous activities, within the scope of both conventions’ which provides that ‘damage’ means, *inter alia*, “the cost of measures of reinstatement of the impaired transboundary waters, limited to the costs of measures actually undertaken or to be undertaken”.<sup>2</sup> These differences in formulations do not reflect differences in substance.

2. The incorporation of the costs of measures of reinstatement in the definition of ‘damage’ has not always been accompanied by a definition of ‘measures of reinstatement’.<sup>3</sup> Such definition has been introduced for the first time in the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. It defines ‘measures of reinstatement’ as “any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. Internal law may indicate who will be entitled to take such measures”.<sup>4</sup> In contrast, the 1999 Basel Protocol on Liability and Compensation defines ‘measures of reinstatement’ as “any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment”. The definition of the Basel Protocol on Liability and Compensations is different in substance as it only covers ‘primary restoration’; it does not also cover ‘compensatory restoration’, i.e. the costs of reinstatement measures on different locations than where the environment has impaired and/or the costs of alternative measures on the location where the environment has been impaired. The proposal for a directive of the European Parliament and of the Council on the prevention and restoration of significant environmental damage also refers to “interim losses of natural resources and/or services that occur from the date of damage occurring until the return of damaged natural resources and/or services to baseline conditions” as a form of compensatory restoration.
3. The coverage of costs of measures of reinstatement is normally limited to ‘reasonable measures’. A definition of the term ‘reasonable’ has for the first time been included in the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage. It defines ‘reasonable measures’ as “measures which are found under the law of the competent court to be appropriate and proportionate, having regard to all the circumstances, for example: (i) the nature and extent of the damage incurred or, in the case of preventive measures, the nature and extent of the risk of such damage; (ii) the extent to which, at the time they are taken, such measures are likely to be effective; and (iii) relevant scientific and

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<sup>1</sup> For similar references, see 1989 Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD); 1992 amendment of the 1969 International Convention on Civil Liability for Oil Pollution Damage; 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage.

<sup>2</sup> For similar references, see 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage; 1999 Basel Protocol on Liability and Compensation; Draft Protocol to Amend the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29<sup>th</sup> July 1960.

<sup>3</sup> For similar references, see 1989 Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD); 1992 amendment of the 1969 International Convention on Civil Liability for Oil Pollution Damage; 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage.

<sup>4</sup> For similar definitions, see 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage; Draft Protocol to Amend the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29<sup>th</sup> July 1960; proposal for a directive of the European Parliament and of the Council on the prevention and restoration of significant environmental damage.

technical expertise”.<sup>5</sup> The Chairman’s Draft Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty defines ‘reasonable’ as “an assessment of the measures against objective criteria such as the risk to the environment and dependent and associated ecosystems, the rate of its natural recovery, any risk to human life and safety associated with such measures, technological and economic feasibility, practicality and proportionality”. However, the current draft only covers “reasonable measures to prevent, minimise or contain the impact of an environmental emergency, including determining the extent of that emergency”, and not ‘measures of reinstatement’.

4. The definition of ‘restoration’ in the proposal for a directive of the European Parliament and of the Council on the prevention and restoration of significant environmental damage refers to ‘baseline conditions’ as a standard for the adoption of such measures. This term is defined as “the condition of the natural resources and services that would have existed had the damage not occurred. Baseline conditions may be estimated using historical data, reference data, control data, or data on incremental changes (e.g. number of dead animals), alone or in combination, as appropriate”.
5. In its consideration of a definition of ‘measures of reinstatement’, the Intergovernmental Working Group could consider to include:
  - a reference to ‘compensatory restoration’ in addition to ‘primary restoration’;
  - a reference to and/or a definition of ‘reasonable measures’; and
  - a reference to and/or a definition of ‘baseline conditions’.

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<sup>5</sup> For a similar definition, see Draft Protocol to Amend the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29<sup>th</sup> July 1960.