

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**

Fifth meeting
Geneva, 11-13 November 2002

Working paper*
MP.WAT/AC.3/2002/WP.17
CP.TEIA/AC.1/2002/WP.17
ENGLISH ONLY

1 November 2002

PROPOSAL FOR AN AMENDMENT OF ARTICLE 2 PARAGRAPH 2 (b) (iii)

Working Paper submitted by Austria

Introductory remarks

When deciding which damage should be restored under the Protocol, special consideration should be given to the following two aspects:

(a) Whatever the policy choice as to the extent of liability may be, a clear definition of the damage, which has to be restored, is of paramount importance. The industries concerned have to be sure to what extent they are liable. Also insurability depends on whether liability is clearly demarcated.

(b) The Protocol is intended to insure a minimum standard of civil liability whenever – within its framework – a transnational damage occurs. The Working Group

* This document has not been formally edited.

seems to be prepared to decide for relatively low maximum liability amounts, which may not be high enough to allow for the restoration of all damage incurred after an accident, in order to ensure insurability and a broad acceptance of the Protocol. For the same reasons, the Working Group decided to keep the scope of application relatively narrow. These efforts may be jeopardized, if on the other hand the definition of damage is overly broad, including categories of damage many legislations are not familiar with. It may be wiser not to be too ambitious and try to set up a reasonable minimum standard acceptable for many States.

In our opinion, article 2, para. 2 (b) (iii), does not meet either of these two considerations. It allows for restoration of “loss of income directly deriving from an economic interest in any use of the transboundary waters, incurred as a result of impairment of the transboundary waters”. This definition seems, on the one hand, unclear by using the relatively spongy notion of economic interest without referring to the infringement of any right of the victim. On the other hand, it seems overly broad, allowing for the restoration of so-called pure economic loss, i.e. a damage a person suffers without being violated in any right, which is legally protected against impairments by third parties. The restoration of pure economic loss is foreign to most jurisdictions. It is not by coincidence that the Lugano Convention, although it has been criticized for being exceedingly broad, in its definition of damage in article 2, para. 7, does not go as far and does not even provide for the restoration of any loss of profit.

We think that the provision should be reformulated in order to express the following ideas: Damage should be restored if:

- (a) The victim has a right to use the water for economic purposes;
- (b) The water has been impaired; and
- (c) Loss of income derives directly from this impairment because the victim is not able to use the water for the said purposes any more.

Proposal for a new wording for article 2, para 2 (b) (iii)

Austria suggests the following wording:

“Loss of income by a person entitled to make use of the transboundary waters for economic purposes, directly deriving from a reduced usability of the transboundary waters for such purposes due to the impairment, taking into account savings and costs;”.