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OPEN-ENDED AD HOC WORKING GROUP OF
LEGAL AND TECHNICAL EXPERTS ON
LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY
First Meeting
Montreal, 25-27 May 2005

STATUS OF THIRD-PARTY LIABILITY TREATIES AND ANALYSIS OF DIFFICULTIES FACING THEIR ENTRY INTO FORCE

Note by the Executive Secretary

INTRODUCTION

1. The Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP), in its decision BS-I/7, established an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress (Ad Hoc Group on Liability and Redress) to elaborate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs). In order to undertake preparatory work for the first meeting of the Ad Hoc Group on Liability and Redress, a Technical Group of Experts on Liability and Redress was held in Montreal from 18 to 20 October 2004.

2. The Technical Group of Experts on Liability and Redress identified several areas where additional information relating to liability and redress for damage resulting from the transboundary movement of living modified organisms is needed. One of such areas is related to the information on the status of treaties that provide for third-party liability and analysis of reasons why several those treaties have not entered into force. The Technical Group noted that the information on the reasons why the following liability treaties have yet to enter into force is available, namely, the Basel Protocol on Liability and Compensation for damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, the Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment and the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD). The Technical Group therefore suggested that the Secretariat approach the relevant bodies with a view to obtaining such information.

3. Accordingly, the Executive Secretary obtained the information from the secretariats of the Basel Convention and the Economic Commission for Europe. On the basis of the information received, the

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present note was prepared to summarize the reasons why these three treaties have yet to enter into force. The information gathered with respect to the status of third-party of liability treaties is contained in annex I to the note and the responses from the organizations are included in annex II.

I. THE BASEL PROTOCOL ON LIABILITY AND COMPENSATION

4. The Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Protocol on Liability and Compensation") was adopted on 10 December 1999. The negotiation of the Protocol began in 1993 in response to the concerns of developing countries about their lack of funds and technologies for coping with illegal dumping or accidental spills. As of 1 March 2005, there are 13 signatories and five Parties to the Protocol. Twenty Parties are needed for the Protocol to enter into force.

5. The objective of the Protocol is to provide for a comprehensive regime for liability as well as adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes, including incidents occurring because of illegal traffic in those wastes.

6. Liability under the Protocol covers loss of life or personal injury; loss or damage to property; loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment; the costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually undertaken or to be undertaken; and the costs of preventive measures. The Protocol defines what constitutes "measures of reinstatement" of an impaired environment. These are any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment. 1/

7. The Protocol imposes strict liability on a series of persons regarding damage resulting from the transboundary movement of hazardous wastes, reflecting the complex nature of the relationships arising from such movement and the specificities of the provisions of the Basel Convention. 2/ Thus, liability is imposed respectively on the notifier, disposer, exporter, importer and re-importer. The notifier of a transboundary movement is liable for damage until the disposer takes possession of the wastes; thereafter the disposer is liable. The exporter is liable where either the State of export is the notifier or no notification has taken place in terms of the provisions of the Convention. The importer is liable with respect to wastes under article 1, paragraph 1 (b) of the Convention that have been notified as hazardous by the State of import in accordance with article 3 of the Convention but not by the State of export. A number of exemptions apply with respect to the liability imposed under article 4. These are where the damage is a result of an act of armed conflict, hostilities, civil war or insurrection; a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; compliance with a compulsory measure of a public authority of the State where the damage occurred; or the wrongful intentional conduct of a third party. As regards fault-based liability, article 5 contains an omnibus provision imposing liability on "any person…for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions".

1/ See Article 2, paragraph 2 (d).

2/ See Article 4.

8. In the case of strict liability, the liability of the notifier, exporter, importer and disposer for any one incident is limited in accordance with the tonnage of the shipment. 3/ The persons liable under the strict-liability regime are required to establish and maintain, during the time-limit of the period of liability, insurance, bonds or other financial guarantees covering such liability. There are no financial limits with respect to fault-based liability. The Protocol provides that where available compensation is not sufficient to cover the damage, "additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms" (article 15). It would seem that where compensation under the Protocol is inadequate resort may be had to the financial mechanisms established under article 14 of the Basel Convention. The possibility of the Meeting of the Parties to the Protocol improving such existing mechanisms or establishing new ones to better serve its objectives is expressly contemplated. Liability is also limited in time. Actions for compensation must be instituted within five years from the date the claimant knew or ought reasonably to have known of the damage; but in any case no action shall be instituted after ten years from the date of the incident causing damage. Jurisdiction over actions for compensation lies with the courts of the contracting party where the damage was suffered; or the incident occurred; or the defendant has his habitual residence or principal place of business. In identical terms to the other instruments examined, the Protocol provides for mutual recognition and enforcement of judgments in the territories of all contracting parties. 4/

9. The jurisdictional application of the Protocol is circumscribed in a number of respects. As a general rule, the Protocol applies to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic, from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export 5/. The application of the Protocol is regulated in accordance with the various operations specified in annex IV to the Convention. Nevertheless, the Protocol applies, with two notable exceptions, only to damage suffered in an area under the national jurisdiction of a contracting party. These exceptions are: (a) as regards damage to person or property or the costs of preventive measures, the Protocol's application is extended to areas beyond any national jurisdiction; 6/ and (b) the Protocol applies to all categories of damage suffered in an area under the jurisdiction of a State of transit which is not a party provided that such State appears in annex A (largely composed of small island developing States) and has acceded to a multilateral or regional agreement concerning transboundary movements of hazardous wastes.

Reasons why the Protocol has not entered into force

10. The Secretariat of the Basel Convention, mandated by the Conference of the Parties to the Basel Convention, conducted a survey and organized a series of workshops to identify difficulties and obstacles for countries to ratify the Basel Protocol on Liability and Redress. The main issues raised can be summarized as follows:

(a) Lack of insurance policies, bonds or financial guarantees to cover the risks associated with transboundary movements of hazardous waste. The Basel Protocl on Liability and Compensation requires notifiers and disposers to maintain insurance, bonds or other financial guarantees to cover their strict liability under the Protocol. Many countries indicated that there is no appropriate domestic mechanism to address the financial guarantee/insurance requirements;

(b) Inability of small and medium-sized enterprises to pay high financial guarantee;

3/ Article 12 and annex B.

4/ Article 21.

5/ Article 3(1).

6/ Article 3 (3) (a).

(c) Inadequate national legislation to fulfil obligations under the Protocol or possible conflict between the Protocol provisions and existing domestic law;

(d) Limited human and financial resources for implementation;

(e) Poor cooperation between government agencies with responsibilities for hazardous-waste management; and

(f) Lack of awareness among decision makers and other stakeholders as to the benefits of the Protocol.

II. LUGANO CONVENTION ON CIVIL LIABILITY FOR DAMAGE RESULTING FROM ACTIVITIES DANGEROUS FOR THE ENVIRONMENT

11. The the Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment (the Lugano Convention) was adopted on 21 June 1993 under the auspices of the Council of Europe. It is open for signature by the member States of the Council of Europe, then non-member States which have participated in its elaboration and by the European Community. As of 1 March 2005, there are nine signatories, and no countries have ratified the Convention. The required number of Parties for entry into force is three which must include at least two States of the Council of Europe. 7/

12. The Lugano Convention is so far the most elaborate treaty dealing with liability and redress for environmental damage. This Convention deals with environmental damage regardless of whether it has a transboundary dimension. However, the Convention leaves considerable flexibility to national legal systems with respect to its implementation and also allows them to establish provisions, which go much further than those of the Convention in terms of environmental protection and the protection of victims of environmental damage.

13. The stated objective of the Convention is to ensure adequate compensation for damage resulting from activities dangerous to the environment and also to provide for means of prevention and reinstatement. It is worth noting that the definition of "dangerous activity" includes the production, storage, use, disposal or release of genetically modified organisms; the operation of an installation for the disposal and treatment of wastes as specified in an annex to the Convention; and the production, use or discharge of dangerous substances. An activity is deemed dangerous if it poses "a significant risk for man, the environment or property" (article 2). "Damage" includes damage to person or property; loss or damage by impairment of the environment; and the costs of preventive measures and any loss or damage caused by preventive measures. However, compensation for impairment of the environment, other than loss from such impairment, is limited to the costs of measures of reinstatement actually undertaken or to be undertaken. The definition of the term "environment" is broad, encompassing "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape" (article 2).

14. Liability under the Convention is strict and is imposed on the "operator" of the activity causing damage. This is the person who has the operational control of the dangerous activity. Most of the exemptions from liability are similar to those in other international liability instruments. 8/ However, there are three important departures: the operator is not liable if he proves that the damage resulted necessarily from compliance with a specific order or compulsory measure of a public authority; was

7 Article 32.

8/ Article 8.

caused by pollution at tolerable levels under relevant local circumstances; or was caused by a dangerous activity taken lawfully in the interests of the person who suffered damage.

15. The Convention does not apply to damage arising from carriage or damage caused by a nuclear substance. This is precisely because these issues are already regulated by specific international treaties.

16. As regards jurisdictional scope, the Convention shall apply when the incident occurs in the territory of a contracting party or when the incident occurs outside the territory of a party but the conflict of law rules lead to the application of the law in force in a contracting party.

17. Each party is enjoined to ensure that operators in its territory are required to participate in a financial security scheme or to maintain a financial guarantee up to a certain limit under terms specified by national legislation to cover their liability under the Convention.

18. Actions for compensation have to be brought within three years from the date the claimant ought to have known of the damage and the identity of the operator. In any case, however, no action can be brought after 10 years from the date of the incident causing damage. Such actions may be brought within a party at the court of the place where: (a) the damage was suffered; (b) the dangerous activity was conducted; or (c) the defendant has his habitual residence. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different parties, any court other than the court first seized shall stay its proceedings until such time as the jurisdiction of the court first seized is established. Once such jurisdiction is established any other court shall decline jurisdiction on the issue. The Convention provides for mutual recognition and enforcement of judgments in the territories of all parties.

Reasons why the Convention has not entered into force

19. In preparing for the negotiation of the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters under the auspices of the Economic Commission for Europe, the Working Group on Legal and Administrative Aspects had conducted *prima facie* analysis of the reasons why countries have difficulties signing or ratifying the Lugano Convention. The main reasons are the following: 9/

(a) The Convention is not limited to transboundary damage. It also covers damage caused within the national territory of a member State;

(b) Comparing the regime of the Convention with the environmental liability regimes of member States of the Council of Europe, the general impression is that Convention goes further than most member States in some respects (namely in that it explicitly covers environmental damage as such);

(c) Its open scope of dangerous activities also goes further than several member States, which have regimes with a closed and more limited scope;

(d) These member States, and most of industry, feel that the scope of the Convention is too wide and gives too little legal certainty and that its definitions, especially in the field of environmental damage, are too vague.

9/ Annex III of document MP.WAT/2001/1-CP.TEIA/2001/1.

III. UNECE CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED DURING CARRIAGE OF DANGEROUS GOODS BY ROAD, RAIL AND INLAND NAVIGATION VESSELS

20. The UNECE Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) was adopted on 10 October 1989. As of 1 March 2005, there are two signatories and no country has yet ratified the Convention. The required number of Parties for entry into force is five.

21. The CRTD imposes strict liability on the "carrier" of dangerous goods for damage occasioned during the transport of such goods. Damage is defined to include: (a) loss of life or personal injury; (b) loss of or damage to property; (c) loss or damage by contamination of the environment; and (d) the costs of preventive measures. Compensation for the impairment of the environment is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. The Convention does not apply to damage caused by a nuclear substance if the operator of a nuclear installation is liable for such damage under either the Paris Convention on the Liability of Operators of Nuclear Ships or the Vienna Convention on Civil Liability for Nuclear Damage. The application of the Convention is also limited to damage sustained in the territory of a contracting party and to preventive measures wherever taken. The carrier is exempted from liability where the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; the damage is wholly caused by an act or omission of a third party; or the consignor of the goods or any other person failed to meet his obligation to inform the carrier of the dangerous nature of the goods. Where no liability attaches to the carrier in the latter instance the consignor or the other person shall be deemed to be the carrier for the purposes of the Convention.

22. The liability of the road or rail carrier is limited to 18 million special drawing rights (SDRs) with respect to claims for loss of life or personal injury and to 12 million SDRs for any other claim. The liability of a carrier by inland navigation vessel is limited to 8 million and 7 million SDRs respectively. The carrier is required to maintain insurance or other financial security to cover his liability under the Convention.

23. Actions for compensation are to be instituted within three years from the date at which the victim knew or ought reasonably to have known of the incident causing damage, but in any case no action can be brought after 10 years. Jurisdiction over claims lie with the courts of a State Party where either the damage was sustained, the incident occurred, preventive measures were taken, or the carrier has his habitual residence. The Convention provides for mutual recognition and enforcement of judgments in the territories of all Contracting States.

Reasons why the Convention has not entered into force [10]/

24. The resasons why the Convention has not yet entered into force include:

(a) The small number of accidents involving the carriage of dangerous goods and the fact that the consequences of such accidents could for the time being be covered by general insurance systems;

(b) The difficulty of identifying the beneficiaries of a convention of this type since the potential victims do not comprise an identifiable group;

(c) The lack of inclination of carriers to make large contributions to compensation funds for the indeterminate consequences of accidents of doubtful probability;

10/ The response from the Secretariat of the Economic Commission for Europe – Transport Division is contained in section C of annex II of this document.

(d) The difficulty of dealing with three transport modes in the same convention;

(e) The fact that the Convention had consequences - which might be positive or negative depending on the case - for States that were not contracting parties;

(f) The problem with approval procedure (article 14) – which could be simplified and brought more into line with the current situation;

(g) The difficulty of obtaining reliable statistical data concerning the average level of damage;

(h) The attribution of liability to the carrier;

(i) The insurability; limits of financial liability are too high;

(j) The limits are not fair for rail carriage since they limit liability to the carrier alone and do not take account of the new system of liberalization in the railway sector. As a result, they would discourage new private companies and give the advantage to State companies, since only the latter would be able to sustain financial costs of that nature;

(k) It is necessary to take account of the fact that the special liability for which the CRTD provides is in competition with the general liability for damage caused during carriage. The more liability is fragmented, the more difficult it is to evaluate and insure risks. That means that if liability in the context of the transport of dangerous goods was not adequate, it is the entire third party liability resulting from transport operations that has to be regulated and not just a single aspect.

Annex I

STATUS OF INTERNATIONAL ENVIRONMENT-RELATED LIABILITY INSTRUMENTS AS OF MARCH 2005 IN CHRONOLOGICAL ORDER OF ADOPTION

INSTRUMENTS	Date of Adoption	Number of signatures	Ratification/Acceptance /Approval/Accession	Date of Entry into force
ICAO Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface	7 October 1952	25	47	4 February 1958
• Amending Protocol	23 September 1978	14	9	25 July 2002
OECD Paris Convention on Third party Liability in the Field of Nuclear Energy	29 July 1960	18	15	1 April 1968
• Amending protocol	28 January 1964	16	14	1 April 1968
• Amending protocol	16 November 1982	14	11	1 August 1991
• Amending protocol	12 February 2004	16	None	Not in force
Supplementary Convention	31 January 1963	16	12	4 December 1974
• Amending protocol	28 January 1964	13	12	4 December 1974
• Amending protocol	16 November 1982	14	11	7 October 1988
• Amending protocol	12 February 2004	13	None	Not in force
Convention on the Liability of Operators of Nuclear Ships	25 May 1962	16	6	Not in force
IAEA Vienna Convention on Civil Liability for Nuclear Damage	21 May 1963	14	33	12 November 1977
• Amending protocol	12 September 1997	15	5	4 October 2003
Supplementary Convention	12 September 1997	13	3	Not in force
Convention on International Liability for Damage Caused by Space Objects	29 November 1971	73	82	1 September 1972
Convention on Civil Liability for Oil Pollution Damage resulting from the Exploration for and Exploration of Seabed Mineral Resources	1 May 1977	6	None	Not in force
UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous goods by Road, Rail and Inland Navigation Vessels	10 October 1989	2	None	Not in force

INSTRUMENTS	Date of Adoption	Number of signatures	Ratification/Acceptance /Approval/Accession	Date of Entry into force
IMO International Convention on Civil Liability for Oil Pollution Damage (replaced 1969 Convention)	27 November 1992	10	107	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
Supplementary Convention (replaced 1971 Convention)	27 November 1992	10	94	30 May 1996
• Amendment	18 October 2000	N/A	N/A	1 November 2003
• Protocol	16 May 2003	N/A	3	Not in force
Council of Europe Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment	21 June 1993	9	None	Not in force
IMO International Convention on Liability and Compensation in Connection with Carriage of Hazardous and Noxious Substances by Sea	3 May 1996	8	5	Not in force
Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal	10 December 1999	13	5	Not in force
IMO International Convention on Civil Liability for Bunker Oil Pollution Damage	23 March 2001	3	6	Not in force
UNECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters	21 May 2003	24	1	Not in force

Annex II

RESPONSES FROM ORGANIZATIONS*

A. Response received from the Secretariat of the Basel Convention

Activities of the Basel Convention in the field of promoting ratification of the Basel Protocol

The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (herein referred to as "the Basel Protocol") was adopted at the Fifth Conference of the Parties to the Basel Convention on 10 December 1999. The Protocol will enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval or accession. As of 13 January 2005, there are 13 signatories to the Basel Protocol and four parties.

The Secretariat has been mandated by the Sixth Meeting of the Conference of the Parties to the Basel Convention ("COP6"), which took place from 9 to 13 December 2002, to undertake certain activities relating to the Basel Protocol. The Seventh Meeting of the Conference of the Parties to the Basel Convention ("COP7"), which was convened from 25 to 29 October 2004, extended the mandate of the Secretariat to undertake activities concerning liability and redress, as set forth below.

Workshops on the Basel Protocol

By decision VI/15, the sixth Meeting of the Conference of the Parties to the Basel Convention requested the Secretariat to organize workshops for addressing various aspects and obstacles to the process of ratification of or accession to the Basel Protocol. Accordingly, the Secretariat, with the Basel Convention Regional Centres, organized Regional Workshops Aimed at Promoting Ratification of the Basel Protocol in the summer 2004 in Argentina, El Salvador and Ethiopia. While generally welcoming the Protocol and the protection that will be afforded thereby, the participants also identified difficulties and obstacles they faced in ratifying the Protocol. The reports of these workshops, which were presented to the seventh Meeting of the Conference of the Parties to the Basel Convention, can be found on our website (http://www.basel.int/legalmatters/index.html).

The seventh Meeting of the Conference of the Parties to the Basel Convention, by decision VII/28, requested the Secretariat to continue organizing such workshops in other regions. The Secretariat is planning, subject to availability of funding, to conduct workshops for Asia, Central and Eastern Europe, French-speaking Africa, the Caribbean, and for Arabic-speaking countries.

Instruction manual for the implementation of the Basel Protocol

By decision VI/15, the sixth Meeting of the Conference of the Parties to the Basel Convention requested the Secretariat to prepare, in consultation with Parties and other stakeholders, a detailed instruction manual for the implementation of the Basel Protocol. Pursuant to the decision, the Secretariat, with the Government of Switzerland, prepared a draft of the instruction manual.

This draft instruction manual seeks to highlight the actions that a Party needs to take (for example, in implementing legislation) to give effect to the provisions of the Protocol.

The seventh Meeting of the Conference of the Parties to the Basel Convention, by decision VII/28, requested the Secretariat to continue its work on the instruction manual and to present it to the

* The responses are reproduced in the form and language in which they were received by the Secretariat of the Convention on Biological Diversity.

Open-ended Working Group for consideration and approval. The decision also invited Parties, upon its approval by the Open-ended Working Group, to use the instruction manual, to report to the Secretariat on their experience in the use of the instruction manual and to submit to the Secretariat domestic laws and regulations implementing the Basel Protocol and case studies on the application of the Protocol.

Insurance, bonds or other financial guarantees and the financial limits

The Protocol requires notifiers and disposers to maintain insurance, bonds of other financial guarantees to cover their strict liability under the Protocol, for the duration of that liability. Many Parties to the Base Convention at the said workshops identified the lack of insurance policies, bonds or financial guarantees to cover the risks associated with transboundary movements of hazardous waste as the major obstacles in ratifying the Basel Protocol. Accordingly, the seventh Meeting of the Conference of the Parties to the Basel Convention, by decision VII/28, requested the Secretariat to consult with relevant institutions and to report thereon to the Open-ended Working Group regarding the options that may be available with respect to the requirement of insurance, bonds or other financial guarantees and the financial limits established under the Protocol. The Secretariat has initiated such consultations.

Legal and technical assistance

In its decision VII/28, the seventh Meeting of the Conference of the Parties to the Basel Convention requested the Secretariat to provide legal and technical assistance to Parties who require such assistance for the implementation of the Basel Protocol. The Secretariat will provide such assistance upon request.

B. Response received from the Secretariat of the Economic Commission for Europe-Environment Human Settlements Division, with respect to Lugano Convention

The discussion and subsequent decision by the Parties to the Convention on the Transboundary Effects of Industrial Accidents and to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes to undertake negotiations of a new legally binding instrument for transboundary damage caused by hazardous activities was based, among others, on the report on responsibility and liability in relation to accidental water pollution (MP.WAT/2001/1 – CP.TEIA/2001/1).

Furthermore, a document compiling the responses of countries of the Council of Europe to a questionnaire concerning the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) was prepared (MP.WAT/2001/2 – CP.TEIA/2001/2).

Both documents are available on the Internet web pages of both Conventions at the following address (http://www.unece.org/env/civil-liability/joint-special-session.html#1) .

C Response received from the Secretariat of the Economic Commission for Europe-Transport Division, with respect to CRTD

Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD, 1989)

The CRTD was adopted by the Inland Transport Committee (ITC) in 1989, and signed by Germany and Morocco, but not ratified by these countries nor acceded to by any other country.

Detailed background information, including history, explanations and justification may be found in an explanatory report published by the UNECE (ECE/TRANS/184)

At its 2002 session, the ITC decided to establish an Ad Hoc Group of Experts that would meet twice it 2002 and 2003 to identify and remedy the main obstacles for the entry into force of the CRTD, with the following mandate:

> "(a) To consult experts in all the sectors concerned by the CRTD (for example, liability specialists, insurers, shippers and carriers) in order to determine how to eliminate obstacles, such as those relating to limits of liability and compulsory insurance, to the entry into force of the CRTD;
>
> (b) To propose, on the basis of these consultations and government proposals, amendments to the existing articles of the CRTD so as to facilitate their application to the various transport modes;
>
> (c) To report to the Inland Transport Committee at its 2003 session on the progress made and the difficulties encountered;
>
> (d) To submit to the Inland Transport Committee a revised text of the CRTD containing the aforementioned amendments with a view to the possible adoption of a new Convention at the 2004 session."

The Ad Hoc Meeting reviewed the results of a questionnaire circulated by the secretariat to the UNECE member countries (TRANS/WP.15/2001/17, and -/Add.1 to -/Add.8, TRANS/WP.15/167, annex 5) (http://www.unece.org/trans/main/dgdb/wp15/).

This Meeting concluded that the most important obstacle was the limits of financial liability, which were considered to be too high. It drafted, consequently, a text for a new Convention with reduced limits of liability. Also, some amendments to the original text were made by introducing, in particular a better definition of the notion of "carrier" and the possibility of a temporary dispensation of the obligation of the carrier to cover his liability by insurance.

At its 2003 session, the ITC noted the very low participation at the sessions of the Ad Hoc Meeting of Experts. The Committee also noted that the group had worked on the revision of the limits of liability of the CRTD, but several delegations considered that all obstacles to the entry into force, and the various solutions to remedy the situation, should be comprehensively considered.

The Ad Hoc Meeting of Experts has completed its work and adopted a draft new CRTD (see TRANS/AC.8/8 and TRANS/AC.8/8/Add.1), but only six States participated in this work;

During sessions of the Ad Hoc Meeting of Experts, two States (Netherlands and Germany) expressed support for the new CRTD; two non-governmental (International Road Transport Union (IRU) and International Rail Transport Committee (CIT)) and one intergovernmental (Intergovernmental Organization for International Carriage by Rail (OTIF)) organizations have expressed opposition to the revision of the CRTD; and the Central Commission for the Navigation of the Rhine (CCNR) was continuing its work developing a parallel convention applicable to transport by inland waterway.

Main obstacles to the entry into force of the CRTD (see also Appendix)

The following reasons which might prevent States from acceding to the CRTD Convention have been evoked:

(a) Small number of accidents involving the carriage of dangerous goods and the fact that the consequences of such accidents could for the time being be covered by general assurance systems (Ref: TRANS/WP.15/165, §79);

(b) Difficulty of identifying the beneficiaries of a convention of this type, since the potential victims does not comprise an identifiable group (Ref: TRANS/WP.15/165, §79);

(c) Lack of inclination of carriers to make large contributions to compensation funds for the indeterminate consequences of accidents of doubtful probability (Ref: TRANS/WP.15/165, §79);

(d) Difficulty of dealing with three transport modes in the same convention (Ref: TRANS/WP.15/165, §79);

(e) Fact that the Convention had consequences - which might be positive or negative depending on the case - for States which were not Contracting Parties (Ref: TRANS/WP.15/165, §79);

(f) Approval procedure (article 14) could be simplified and brought more into line with the current situation (Ref: TRANS/WP.15/167, Annex 5, §12);

(g) The difficulty of obtaining reliable statistical data concerning the average level of damage (Ref: TRANS/AC.8/2, §24);

(h) Attribution of liability to the carrier (Ref: TRANS/AC.8/6, §40);

(i) Insurability (Ref: TRANS/AC.8/6, §26, TRANS/AC.8/8, §25);

(j) Limits not fair for rail carriage since they limit liability to the carrier alone and do not take account of the new system of liberalization in the railway sector. As a result, they would discourage new private companies and give the advantage to State companies, since only the latter would be able to sustain financial costs of that nature (Ref: TRANS/AC.8/2, §36);

(k) Necessary to take account of the fact that the special liability for which the CRTD provides is in competition with the general liability for damage caused during carriage. The more liability is fragmented, the more difficult it is to evaluate and insure risks. That means that if liability in the context of the transport of dangerous goods was not adequate, it is the entire third party liability resulting from transport operations that has to be regulated and not just a single aspect (Ref: TRANS/AC.8/2, §39).

At its 2003 session, the ITC considered that it would be premature to adopt the revised text of the CRTD, and that it was not necessary to reconduct the mandate of the Ad hoc Meeting of Experts for further work since there were still uncertainties as to the willingness of member States to ratify a new CRTD. The ITC invited member States to study carefully this new text and to conduct informal consultations, notably with those who had expressed a great interest for the CRTD. It could then be decided at a later stage, if need be, whether a revised new CRTD should be adopted (ECE/TRANS/156, §115).

All documents referred to are available on the UNECE website http://www.unece.org/trans/main/dgdb/ac8/ or http://www.unece.org/trans/main/dgdb/wp15/ and on the UN optical disk (except for ECE/TRANS/184, paper only).

The details of the deliberations of the Ad Hoc Meeting may be found in the following reports:

TRANS/AC.8/2, TRANS/AC.8/4, TRANS/AC.8/6 et TRANS/AC.8/8.

The text of the draft revised CRTD may be found in document: TRANS/AC.8/8/Add.1.

Appendix

EXTRACT FROM REPORTS

Various reasons which might prevent States from acceding to the CRTD

TRANS/WP.15/165, §79

79. The representative of Austria listed the various reasons which might prevent States from acceding to the CRTD Convention, including the small number of accidents involving the carriage of dangerous goods and the fact that the consequences of such accidents could for the time being be covered by general assurance systems; the difficulty of identifying the beneficiaries of a convention of this type, since the potential victims did not comprise an identifiable group; the lack of inclination of carriers to make large contributions to compensation funds for the indeterminate consequences of accidents of doubtful probability; the difficulty of dealing with three transport modes in the same convention; and the fact that the Convention had consequences - which might be positive or negative depending on the case - for States which were not Contracting Parties. He said that all of these could easily be deduced from ECE's explanatory report on the CRTD Convention, issued under the symbol ECE/TRANS/84.

79. Le représentant de l'Autriche a exposé les diverses raisons qui pouvaient empêcher les États d'adhérer à la CRTD, entre autres le peu d'accidents en cas de transport des marchandises dangereuses et le fait que les conséquences de ces accidents peuvent pour l'instant être couvertes par les régimes d'assurance généraux ; la difficulté d'identifier les bénéficiaires d'une telle convention, puisque les victimes potentielles ne forment pas un groupe identifiable ; le peu d'enclin des transporteurs à contribuer chèrement à des fonds d'indemnisation pour des conséquences mal déterminées d'accidents de probabilité incertaine ; la difficulté de traiter dans la même convention de trois modes de transport différents ; le fait que la Convention a des conséquences, positives ou négatives suivant les cas, pour des États qui n'y sont pas Parties contractantes. Il a dit que ces explications peuvent être facilement déduites du rapport explicatif de la CEE sur la CRTD publié sous la cote ECE/TRANS/84.

Approval procedure

TRANS/WP.15/167, Annex 5, §12

12. The representative of Austria said that, contrary to the unlimited liability rule, the compromise contained in the CRTD was to establish a certain limit which could subsequently be combined with a compulsory insurance so as to ensure that any liability set out in the terms of the Convention could be applied. This limit could subsequently be lowered for the compulsory insurance, but at the risk of the victim being up against a carrier who was insolvent when it came to paying the difference. He also pointed out that the level of liability could be differentiated by transport modes, but also according to the type of goods carried by referring to ADR. He also alluded to article 14 of the Convention and how the approval procedure could be simplified and brought more into line with the current situation.

12. Le représentant de l'Autriche a indiqué que, contrairement à la règle de la responsabilité illimitée, le compromis établi dans la CRTD était de fixer une certaine limite pouvant par la suite être assortie d'une assurance obligatoire afin de garantir que toute responsabilité énoncée aux termes de la Convention puisse être appliquée. Cette limite pourrait ultérieurement être abaissée pour l'assurance obligatoire, mais au risque de mettre la victime en présence d'un transporteur non solvable pour la différence. Il a en outre fait remarquer que le niveau de responsabilité pourrait être différencié selon les modes de transport, mais aussi selon la nature des marchandises transportées en se reportant à l'ADR. Il a par ailleurs fait allusion à l'article 14 de la Convention et à la façon dont la procédure d'homologation pourrait être simplifiée et rendue plus conforme à la situation actuelle.

Difficulty of obtaining reliable statistical data

TRANS/AC.8/2, §24

24. The difficulty was stressed of obtaining reliable statistical data concerning the average level of damage. It emerged from the replies to the questionnaire, however, that recorded accidents allegedly caused 4 million SDRs worth of damage in the railway sector, while in inland navigation the highest claim for compensation amounted to 125,000 SDRs. In road transport, on the contrary, the highest claim for compensation amounted to 6.25 million SDRs.

24. Il a été souligné la difficulté d'obtenir des données statistiques fiables sur le niveau moyen des dommages. Cependant, il ressort des réponses au questionnaire que les accidents enregistrés auraient causé pour 4 millions de DTS dans le secteur ferroviaire, alors qu'en navigation intérieure la demande d'indemnisation la plus élevée a atteint 125 000 DTS. Dans le transport par route, en revanche, la demande d'indemnisation la plus élevée a atteint 6,25 millions de DTS.

Attribution of liability to the carrier

TRANS/AC.8/6, §40

40. It was recalled that the authors of the CRTD had strongly recommended a system for the attribution of liability to the carrier as the person controlling the movement of the goods, the person who could most easily be identified by the victims and the person who could take out an annual insurance. It was maintained that this devolution of liability would be the simplest way of ensuring third party compensation, while the carrier for his part would have the right to bring a recourse claim against any other person who could be held liable for the damage under the national law applicable (ECE/TRANS/84, para. 14).

40. Il a été rappelé que les auteurs de la CRTD "préconisèrent vivement un système d'attribution de la responsabilité au transporteur parce qu'il était la personne contrôlant le déplacement des marchandises, la personne que les victimes pourraient le plus aisément identifier et qui pourrait souscrire une assurance annuelle. Il fut soutenu qu'une telle canalisation serait le moyen le plus simple pour assurer l'indemnisation des tiers, tandis que le transporteur serait pour sa part en droit d'intenter une action récursoire contre toute autre personne qui pourrait être tenue pour responsable pour les dommages en vertu de la loi nationale applicable." (ECE/TRANS/84, paragraphe 14)

Insurability

TRANS/AC.8/6, §26

26. The Meeting had already been informed that a sum of 10 million SDRs could easily be insured by the International Group of P&I Clubs; the premiums asked by the P&I Clubs for a Rhine navigation vessel carrying dangerous goods would range from 13,000 to 15,000 DM, with an increase of 30 to 50% in the event of the coverage of civil liability and compensation for damage related to the carriage of dangerous goods.

26. La Réunion a déjà été informée qu'un montant de 10 millions de DTS pourrait facilement être assuré par l'International Group of P&I Clubs; les primes exigées par les P&I Clubs pour un bateau de navigation du Rhin transportant des marchandises dangereuses se situeraient entre 13 000 et 15 000 DM, avec une augmentation de 30 à 50 % en cas de couverture de la responsabilité civile et de l'indemnisation des dommages liés au transport de marchandises dangereuses.

TRANS/AC.8/8, §25

25. The Meeting was informed that it was currently possible to obtain insurance coverage in certain jurisdictions at levels negotiated more than 10 years ago of 6.5 million SDRs. Bearing in mind current general trends such as inflation indexing and the generally increased level of consumer protection in the context of other third party liability instruments, an increase to at least 12 million SDRs was deemed reasonable and therefore acceptable.

25. La Réunion a été informée qu'actuellement il est possible d'obtenir une couverture d'assurance dans certaines juridictions à des niveaux qui avaient été négociés il y a plus de 10 ans à 6,5 millions de DTS. Compte tenu des tendances générales actuelles telles que l'indexation sur l'inflation et le degré généralement accru de protection des consommateurs dans le cadre d'autres instruments relatifs à la responsabilité civile, un accroissement jusqu'à un montant d'au moins 12 millions de DTS était jugé raisonnable et donc acceptable.

Limits for rail

TRANS/AC.8/2, §36

36. The representative of CIT said that the limits were not fair since they limited liability to the carrier alone and did not take account of the new system of liberalization in the railway sector. As a result, they would discourage new private companies and give the advantage to State companies, since only the latter would be able to sustain financial costs of that nature.

36. La représentante du CIT a dit que ces limites n'étaient pas justes car limitant la responsabilité au seul transporteur et elles ne tenaient pas compte de la nouvelle situation de libéralisation dans le domaine ferroviaire. Elles auraient pour conséquence de décourager les nouvelles sociétés privées au profit des sociétés d'Etat, seules capables de supporter de telles charges financières.

Competition with general liability

TRANS/AC.8/2, §39

39. According to the representative of IRU, it would be necessary to take account of the fact that the special liability for which the CRTD provided was in competition with the general liability for damage caused during carriage. The more liability was fragmented, the more difficult it was to evaluate and insure risks. That meant that if liability in the context of the transport of dangerous goods was not adequate, it was the entire third party liability resulting from transport operations that had to be regulated and not just a single aspect.

39. Il faudrait, selon le représentant de l'IRU, tenir compte du fait que la responsabilité spéciale prévue par la CRTD entre en concurrence avec la responsabilité générale pour dommages causés en cours de transport. Plus on fragmente la responsabilité plus il est difficile d'évaluer et d'assurer les risques. Par conséquent, si la responsabilité dans le cadre du transport des marchandises dangereuses n'est pas suffisante, c'est toute la responsabilité civile résultant des transports qu'il faut régler et pas un des aspects seulement.

Revised CRTD

ECE/TRANS/156, §115

115 Since there were still uncertainties as to the willingness of member States to ratify a new CRTD, the Committee **considered** that it would be premature to adopt the revised text, and that it was not necessary to reconduct the mandate of the Ad hoc Meeting of Experts for further work. The Committee **invited** member States to study carefully this new text and to conduct informal consultations, notably with those who had expressed a great interest for the CRTD. It could then be decided at a later stage, if need be, whether a revised new CRTD should be adopted.

115. Comme il restait des incertitudes quant à la volonté des États membres de ratifier une nouvelle CRTD, le Comité **a estimé** qu'il serait prématuré d'adopter le texte révisé et qu'il n'était pas nécessaire de reconduire le mandat de la Réunion pour qu'elle poursuive ses travaux. Il **a invité** les États membres à étudier avec soin ce nouveau texte et à tenir des consultations informelles, notamment avec ceux qui avaient manifesté un vif intérêt pour la CRTD. On pourrait alors décider ultérieurement, le cas échéant, s'il fallait adopter une nouvelle CRTD révisée.
