

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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**Comments to article 11 of the draft legally binding instrument on civil liability
(Working paper submitted by Swiss Re)**

I. General remarks

The analysis of the insurance situation in the member states of both conventions shows that, even in the well developed insurance markets, there are no insurance products available which provide coverage of the whole extent of the envisaged liability regime. This is especially true in respect of the remediation/restoration of environmental impairment ('cost for reinstatement of the environment', 'ecological damage', 'biodiversity damage') as well as in respect of pure economic losses. In some countries, however, insurance coverage for the liability for bodily injuries and property damages as a result of a sudden and accidental environmental impairment is available.

* This document has not been formally edited.

In respect of the general situation we have to realize that there is no established insurance market in 54% of the member states of both conventions.

In more than 60% of the member states there is no mature liability insurance market and in 63% of the member states the insurance industry only provides an insurance coverage for liability claims for bodily injuries and property damages as a result of a sudden and accidental environmental impairment (e.g. industrial accident).

Moreover, even in the insurance markets world-wide there are no insurance products available on a standard basis and in a standard format providing explicit coverage for the remediation/ restoration of environmental impairments (e.g. watercourses), for ecological or biodiversity damages.

Today there is no market for liability insurance for ecological or biodiversity damages.

II. Reasons

The insurability of risks is only given if the following necessary criteria are fulfilled:

- **Accessibility**
The probability and severity of losses must be quantifiable
- **Randomness**
The time at which the insured event occurs must be unpredictable and the occurrence itself must be independent of the will of the insured
- **Mutuality**
Numerous persons exposed to a given hazard must join together to form a risk community in which the risk is shared and diversified
- **Economic feasibility**
Private insurers must be able to charge a premium which is commensurate with the risk.

Clearly, ecological damage risk does not readily meet all of these criteria. Available data from past events reveals little about the future risk. The tremendous loss potential hampers diversification. And finally, with the apparent uncertainties regarding the risk quantification, the economic feasibility of the business is extremely doubtful.

Insurability is the result of a complex decision-taking process by the insurers that involves several individual considerations. The essential precondition for any risk to be insurable is that the insurers must be able to make realistic reliable estimation of the claim amount to be paid out over a specific period. Any injury, damage or loss to be compensated must be quantifiable in terms of money in line with a priori established and known criteria. The insurer has to be able to estimate the probability of any loss and also the severity of the loss. This process results in the willingness of many, few or no insurers to provide coverage.

Even in the well developed liability insurance markets the insurers have difficulties in estimating the probability and severity of the liability for bodily injuries and property damages as a result of environmental impairments.

The probability of industrial accidents regarding **known** industrial activities, types of installations, processes and substances could be estimated due to the experience of the insurers as well as the consequences of the established situation regarding awareness of the claimants or the liability regime. The estimation of changes e.g. new industrial activities, new processes, new substances or changes in respect of the awareness of the public iro environmental matters, changes of the liability legal system or changes in the decisions of courts is quite problematic.

The estimation of the severity of the **known consequences** of substances to the human health or established soil remediation processes for known substances/pollutants is also possible due to past experience. Nevertheless problems arise in respect of the estimation of the severity of unknown consequences of substances to human health e.g. the effects of genetic modified organisms on human health, new scientific results as well as new soil remediation processes due to new scientific results, new substances/pollutants, changes in the remediation and waste legislation and the like. We have to bear in mind the fact, that we still know relatively little about the possible impact many materials and substances have on the environment. Many which today are still considered harmless may soon turn out to be harmful (risk of change).

Due to the fact that insurers currently do not have sufficient experience (as well as of the industry, legislator and science) in respect of the remediation/restoration of the environment as such (e.g. watercourses, biodiversity), the insurance industry is not in a position to offer any coverage for this class of damages.

In addition to the above mentioned factors for insurability there is another important point to mention. Insurers being forced to offer insurance for which they have little experience could come into conflict with regulators because supervisory authorities generally require that insurers are able to calculate the adequate premiums for a risk. This is not the case in respect of remediation/restoration of environmental impairments.

The implementation of a compulsory insurance regime, however, does not solve the above mentioned problems regarding quantification of the probability and severity of an environmental damages.

III. Consequences

The insurance industry is generally willing to develop insurance products as far as the prerequisites for insurability are fulfilled. Today in respect of the envisaged regime the above mentioned prerequisites are only given for liability for loss of life or personal injury respectively for loss of or damage to property as a result of an industrial accident.

Pure ecological damages (e.g. restoration of the environment, biodiversity damages) as well as pure economic/financial losses are not insurable because the relevant statistical data is not available or the risk of change is too vague.