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Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal

First session
Geneva 13-17 September 1993

REPORT OF THE AD HOC WORKING GROUP ON THE WORK OF ITS FIRST SESSION

I. INTRODUCTION

1. The first session of the Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal was held in Geneva from 13-17 September 1993, in accordance with decision 1/5 of the first meeting of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, held at Piriapolis, Uruguay, on 3 and 4 December 1992.

II. ORGANIZATIONAL MATTERS

A. Opening of the session

2. The session was opened by Ms I. Rummel-Bulsk, Coordinator of the Secretariat of the Basel Convention. In her opening statement, she referred to article 12 of the Basel Convention which, she quoted, stated that "the Parties shall cooperate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes."

3. Referring to resolution 3 adopted by the Conference of Plenipotentiaries held at Basel in 1989, she pointed out that a Working Group established under the terms of that resolution had presented to the first meeting of the Conference of the Parties elements which might be included in a protocol on liability and compensation. The Secretariat
had presented to that same meeting a combined text incorporating the elements adopted by the two sessions of the previously established Working Group. That combined text, contained in document UNEP/CHW.1/5 for discussion at the present meeting, reflected those elements in the form of draft articles of a protocol. The first meeting of the Conference of the Parties adopted decision 1/5 establishing the present Working Group for the purpose of drafting a protocol on liability and compensation. That decision also requested the present meeting to consider the adequacy of the factual basis contained in document UNEP/CHW.1/1/2, as provided by the Parties.

4. The Coordinator of the Secretariat also pointed out that the present working group had the mandate to implement decision 1/14 of the first meeting of the Conference of the Parties, entitled "Emergency Fund". That decision had been adopted within the framework of implementation of article 14 of the Basel Convention. The Secretariat had submitted to the present meeting a report on the implementation of decision 1/14, contained in document UNEP/CHW.1/1/4.

B. Attendance

5. The session was attended by representatives of the following Parties to the Basel Convention: Antigua and Barbuda; Argentina; Australia; Austria; Bahamas; Brazil; Canada; China; Czech Republic; Egypt; Estonia; Finland; Hungary; India; Jordan; Maldives; Mexico; Netherlands; Norway; Panama; Poland; Saudi Arabia; Senegal; Sweden; Switzerland; Syrian Arab Republic; Uruguay.

6. The following countries not Parties to the Basel Convention sent observers to the session: Belgium; Cape Verde; Colombia; Cuba; Germany; Guinea; Honduras; Italy; Japan; Kenya; Korea, Republic of; Libyan Arab Jamahiriya; Morocco; Mozambique; Nicaragua; Philippines; Singapore; Thailand; Turkey; United Kingdom; United States; Venezuela; Viet Nam; Zaire.

7. The following organizations participated in the meeting as observers: United Nations Economic Commission for Europe (UNECE); United Nations Centre for Human Settlements (UNCHS/Habitat); United Nations Centre for Urgent Environmental Assistance (UNCUEA); Department for Policy Coordination and Sustainable Development (DPCSD); European Economic Community (EEC); International Chamber of Commerce (ICC); Organisation for Economic Co-operation and Development (OECD); Nuclear Energy Agency (NEA) of the OECD.

European Chemical Industry Council (CEFIC); Greenpeace International; Mining Association of Canada also participated.
C. Election of officers

8. The following officers were unanimously elected by the Working Group to constitute the Bureau of the Meeting:

Chairperson Mr. J.G. Lammers (Netherlands)

Vice-Chairpersons Ms Katarzyna Mochowska (Poland)
Mr. Jean Timothée Maty (Senegal)
Mr. Ulises Canchola (Mexico)
Mr. Wang Weimin (China)

Rapporteur Mr. Hugo M. Schally (Austria)

D. Adoption of the agenda

The following agenda was adopted by consensus:

1. Opening of the meeting.

2. Organization of the session.

3. Adoption of the agenda.

4. Consideration of a draft protocol on liability and compensation for damage resulting from the transboundary movement of hazardous wastes and their disposal:

(a) Report of the first session of the ad hoc group of legal and technical experts to develop elements which might be included in a protocol on liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes (UNEP/CHW/WG.1/3);

(b) Report of the second session of the ad hoc working group of legal and technical experts to develop elements which might be included in a protocol on liability and compensation for damage resulting from the transboundary movements and disposal of hazardous wastes and other wastes (UNEP/CHW/WG.1/2/3);

(c) Note of the Secretariat, submitted to the first meeting of the Conference of the Parties to the Basel Convention, on draft articles of a protocol on liability and compensation of hazardous wastes and their disposal (UNEP/CHW.1/5);
(d) Report submitted by the Secretariat on the factual basis, as received from the Parties to the Basel Convention, concerning the subject of liability and compensation for damage resulting from the transboundary movement of hazardous wastes and their disposal (UNEPICHW.1/WG.1/1/2);

(e) Note of the Secretariat on state liability as a possible element of a comprehensive regime of liability and compensation resulting from the transboundary movement of hazardous wastes and their disposal (UNEPICHW.1/WG.1/1/3);

5. Consideration of the establishment of a Compensation Fund for damage resulting from the transboundary movements of hazardous wastes and their disposal: note of the Executive Director of UNEP, submitted to the first meeting of the Conference of the Parties to the Basel Convention, on the establishment of an international fund for compensation for damage resulting from transboundary movements of hazardous wastes and their disposal (UNEPICHW.1/11).

6. Consideration of the establishment of an emergency fund:

(a) Note of the Executive Director of UNEP, submitted to the first meeting of the Conference of the Parties to the Basel Convention, on the establishment of a revolving fund to assist on an interim basis in case of an emergency situation to minimize damage from accidents arising from transboundary movements of hazardous wastes and other wastes or during the disposal of those wastes (UNEPICHW.1/6);

(b) Report of the Secretariat on the implementation of decision 1/14 of the first meeting of the Conference of the Parties to the Basel Convention, entitled “Emergency Fund” (UNEPICHW.1/WG.1/1/4).

7. Other business.

8. Closure of the meeting.

E. Organization of work

9. During the discussion on the organization of the session, it was agreed that, within the framework of the above agenda, a short preliminary discussion would be held on the paper prepared by the Secretariat on the factual basis, as received from the Parties to the Basel Convention, concerning the subject of liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal (document UNEPICHW.1/WG.1/1/2). It was agreed that consideration of the draft Protocol would be based on documents UNEPICHW/WG.1/1/3 and UNEPICHW/WG.1/2/3 as well as on the combined text presented by the Secretariat (document UNEPICHW.1/5). It was also agreed that during discussion of those
documents the related information pertaining to the factual basis would also be considered.

F. Consideration of the draft Protocol

10. The group discussed the document containing the factual basis, as received from the Parties to the Basel Convention, concerning the subject of liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal (document UNEP/CHW.1/WG.1/1/2). Some experts expressed the view that the factual basis should be supplemented. The group agreed to make a recommendation to the second meeting of the Conference of the Parties that the questionnaire requesting information on the factual basis concerning liability and compensation should also be addressed to States not Parties to the Basel Convention.

11. Based on the above-mentioned documents, the Working Group considered a number of draft articles contained in the annex to the present report.

12. Regarding article 3 "Scope of application" the group agreed that a clarification of the expression "point of export" would be needed. Some experts were of the opinion that the after-care of disposal sites could be understood as being included in the understanding of the term "completion of their disposal" while some others considered that the Protocol would not cover the damages arising during the time of the "after-care of disposal sites".

Some experts expressed the position that the Protocol should also apply to transboundary pollution which was caused even when the hazardous wastes subject to transboundary movements were still within the territory of the country of export, because the transboundary movement should be considered to have started from the point of origin, according to their interpretation of the Basel Convention. Others considered that that case should not be covered by the Protocol. The Chairperson then gave an interpretation that the Protocol should not apply in such cases. Some experts disagreed with that interpretation. It was finally agreed that the matter needed further consideration. The group agreed, however, that the Protocol should cover transboundary pollution from transboundary movements of wastes after the waste had crossed the border of the export, transit or import States.

13. It was also decided that the working group shall, in its next session, include in the draft Article of the Protocol an additional provision on the "Right to Claim."

14. A general debate took place on draft Articles 8 and 9 [document UNEP/CHW.1/5] in relation to the establishment of an emergency fund, a compensation fund, as well as the subject of State liability.

15. One expert noted that while there may be advantages to the establishment of an emergency fund, there where also certain problems which should be addressed before deciding to establish such a fund. He particularly referred to the problems related to the difficulties to collect the funds from numerous generators or exporters, the need
for new bureaucratic arrangements for assessment and payment of claims, undertaking clean-up measures and pursue suits against liable persons. The establishment of an emergency fund, could also discourage claimants from pursuing claims in domestic courts and diminish incentives to avoid incidents of damage.

16. A number of experts voiced similar concerns and suggested that the working group should rather at this moment concentrate on the development of civil liability. The Secretariat was also requested to prepare an assessment of existing capacities in the field of emergency assistance to avoid an overlap in functional and institutional terms in particular in relation to the UN Center for Urgent Environmental Assistance, DHA and the Red Cross. One expert referred to the possibility of developing national funds to which foreign persons could also have access: An expert from the Mining Association of Canada (MIC) drew the attention of the meeting to programmes such as the Transboundary Emergency Assistance Plan (TEAP) established by the Canadian Producer's Association (CPA) and which has been broaden to accept non-members organizations.

17. Some other experts however pointed out the importance of establishing the emergency fund and the need of its availability as soon as possible taking into consideration the inability of the developing countries to cope with the problem of emergency as a result of accidents involving transboundary movements of hazardous wastes and their disposal. They emphasized the need of inclusion of the establishment of a emergency fund into the Protocol and requested that deliberations on the terms of its establishment of such a fund should be pursued taking into consideration that bureaucratic problems, referred to in paragraph 15 above, could easily be solved by establishment of an assessing body on an ad hoc basis when the need appears. The fund should be envisaged as an intermediary body which will get reimbursed from either the Compensation Fund or the liable person when the final case is settled.

18. During the consideration of the issue of the establishment of a Compensation Fund, one expert pointed out that since the Compensation Fund is to be established for the cases when civil liability regime seems to be inadequate it is premature to take a decision on the establishment of the Compensation Fund as of now. In addition, he pointed out the need to have further factual basis to answer some questions regarding the establishment of such a fund. He requested in particular additional information concerning the relationship with questions of insurance. Another expert raised the issue of the possible incompatibility of the compensation fund with the Polluter Payer Principle. Another expert advocated that the establishment of the compensation fund will enhance the Polluter Payer Principle because in most developing countries the measures to enforce the Polluter Payer Principle do not exist. It was generally felt that since there were wide differences of opinion on the matter, there was a need for further and more detailed discussion at the next meeting.

19. In commenting on draft Article 9 related to State liability, experts referred also to the additional note submitted by the Secretariat on points related to State liability [document UNEP/CHW.1/WG.1/1/2]. In this regard, several experts pointed out that the subject of State liability should be kept separate from the issue of breach of the
Convention and non-compliance; these are regulated by the general principles of international law as well as by provisions of Article 20 and Annex VI of the Basel Convention.

20. One expert expressed the view that there were no reasons to establish the liability of the State of export in the cases if the State of import has accepted to receive the wastes. Therefore if issue of State liability is to be addressed it should widen its scope to include also liability of State of import and in some cases in the State of transit. In addition a distinction should be drawn for the cases when the transboundary movement of illegal traffic.

21. Two experts supported the concept of at least residual State liability. This opinion was supported by another expert who was in favour of the inclusion of State liability in the Protocol even if it is of a residual nature. He further stated that State liability is the proper way of encouraging States to ensure that those involved in the transboundary movements of hazardous waste comply with the provisions of the Convention. It was further suggested that the State liability was the right way to ensure that States controlled those involved in the transboundary movements of hazardous wastes and assured that those complied with the provisions of the Basel Convention.

G. Other business

22. The expert from Belgium, speaking on behalf of the European Economic Community, requested that the following statement be reflected in the report of the Working Group:

"I am speaking on behalf of the European Community and its member States.

"As we have already made clear on a number of occasions, the European Community and its member States do not accept that the Federal Republic of Yugoslavia is the automatic continuation of the Socialist Federal Republic of Yugoslavia.

"In this context, we take note of General Assembly Resolution 47/1, adopted on 22 September 1992, in which the Assembly considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations, and decided that the FRY (Serbia and Montenegro) should therefore apply to join the United Nations and shall not participate in the work of the General Assembly.

"The European Community and its member States have also noted the United Nations Legal Counsel's advice on the applicability of the General Assembly Resolution to other United Nations bodies. We regard General Assembly Resolution 47/1 as a model for action in the specialized agencies and other United Nations bodies in due course, as appropriate.

"We do not accept that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) may validly represent Yugoslavia in this meeting. The presence of
the representatives in question - if they turn up - is without prejudice to any future action which the Community and its member States may take."

23. The expert from Austria requested the following to be reflected:

"My Government has on numerous occasions clearly expressed its position that the so called "Federal Republic of Yugoslavia (Serbia and Montenegro)" cannot be regarded as the automatic continuation of the Socialist Federal Republic of Yugoslavia.

We have therefore lent our support to the relevant resolutions of the UN General Assembly and Security Council, which have considered that the so called "Federal Republic of Yugoslavia (Serbia and Montenegro)" cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in United Nations and decided that the FRY (Serbia and Montenegro) should therefore apply to join the UN and shall not participate in the work of the General Assembly and its subsidiary organs. We refer in that context mainly to UN/GA Res. 47/1 of 22 September 1992 and the Resolution adopted by the UN GA on 28 April 1993.

We therefore support the EC position not to accept that representatives of the FRY (Serbia and Montenegro) may represent Yugoslavia at this meeting. The presence of representatives - if any - is without prejudice to the position of Austria.

24. The expert from Australia requested the following to be recorded:

"Australia was among the countries which supported United Nations General Assembly resolution 47/1 adopted on 22 September 1992. In accordance with that resolution, Australia maintains that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically membership of the former Socialist Federal Republic of Yugoslavia in the United Nations, that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it should not participate in the work of the General Assembly.

"Australia has also taken note of the opinion of United Nations Legal Counsel on 29 September 1992 that resolution 47/1 applies to the participation of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the work not only of the General Assembly but also that of its subsidiary organs, conferences and meetings convened by it.

"The presence of representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) at this meeting is accordingly without prejudice to the position of Australia on the participation of Yugoslavia in the United Nations."  

\section{Future work}

25. The meeting decided to recommend to the Bureau of the Conference of the Contracting Parties to the Basel Convention that the next session of the Ad Hoc Working Group be held in January 1994 subject to availability of funds, this would
allow the further development of the Protocol before the second meeting of the Conference of the Parties to the Basel Convention scheduled for March 1994. It also recommended to the Bureau that it was decided, due to the limited financial resources available in the budget that the meeting could be held in one language only - English, subject of the translation of the working document into other languages as well.

J. Adoption of the report

26. The meeting adopted the report.

J. Closure of the meeting

27. After the usual exchange of courtesies the chairperson declared the meeting closed at 16.45 on 17 September 1993.
ANNEX

Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal

Article 1
Objective

The objective of this Protocol is to provide for a comprehensive regime for adequate and prompt compensation, including reinstatement of the environment, for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal.

Article 2
Definitions

1. The definitions of terms contained in Articles 1 and 2 of the Basel Convention apply to this Protocol, unless expressly provided otherwise.

2. For the purpose of this Protocol:

(a) "Damage" means:

(i) loss of life or personal injury;

(ii) loss of or damage to property [other than property [owned by or] held under the control of the generator, carrier, and disposer involved in the transboundary movement of hazardous wastes or other wastes and their disposal];

(iii) loss or damage by impairment of the environment in so far as this is not considered to be damage within the meaning of sub-paragraphs (i) or (ii) above [provided that compensation for impairment of the environment, other than for loss of profit from such impairment [or due compensation for loss or damage by impairment of the environment which cannot be reinstated], shall be limited to the costs of measures of reinstatement actually undertaken or to be undertaken];

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1 The phrasing between brackets should be reviewed in light of the decision related to the "Right to Claim."

2 One expert expressed reservation with regard to this provision.
(iv) the costs of reasonable preventive measures taken in response to a grave and imminent threat of damage, or to prevent or to minimize loss or damage;

(v) any loss or damage caused by the preventive measures referred to in sub-paragraph (iv);

to the extent that the loss or damage referred to in sub-paragraphs (i) to (iv) of this paragraph arises out of or results from the hazardous wastes and other wastes subject to the Convention.

(b) "Measures of reinstatement" means any reasonable measures aiming to rehabilitate or restore damaged or destroyed components of the environment [or to introduce, where reasonable, the equivalent\(^3\) of these components into the environment].\(^4\) \(^5\)

(c) "Contracting Party" means a Party to this Protocol;

(d) "The Convention" means the Bascl Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;

(e) "Protocol" means the present Protocol.

[(f) "Incident" means any occurrence or any series of occurrences having the same origin due to an environmental release of waste substances which causes damage or creates a grave and imminent threat or causing danger.]\(^6\)

**Article 3**

**Scope of Application**

1. This Protocol shall apply to damage arising from the transboundary movements of hazardous wastes and other wastes [and their disposal] [from their point of export\(^7\) to and including the completion of their disposal.]

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\(^3\) The plenary is invited to address the use of the term "equivalent."

\(^4\) The person entitled to take such measures must be decided in light of the discussion related to the applicable law.

\(^5\) The decision on the phrasing between brackets should be taken in light of the agreement reached in relation to paragraph 2 (a) (iii).

\(^6\) Pending a decision whether this definition is needed. The contents of this definition was not discussed.

\(^7\) Point of export needs to be clarified.
2. Notwithstanding paragraph 1, this Protocol shall not apply:

(a) to damage which takes place in an area under the national jurisdiction of a State which is not a Party to this Protocol;

(b) to damage which takes place in an area under the national jurisdiction of the State of export;

(c) to damage that has arisen from transboundary movement of hazardous wastes and other wastes commenced before the entry into force of this Protocol for the Parties in question;

(d) to damage related to wastes which, as a result of being radioactive, are subject to other international control systems, including international instruments, applying specifically to radioactive material; or

(e) to damage related to wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument.

Article 4

Liability

1. Except as provided for in paragraph 4 of this Article,

Alternative 1:
the generator and the disposer duly authorized to receive wastes if he has taken charge of them and any person who [at the time of the incident] has [operational] control of the wastes

Alternative 2:
any person who [at the time of the incident] has [operational] control of the wastes, as well as [on a subsidiary basis,] the generator

Alternative 3:
any person who [at the time of the incident] has [operational] control of the wastes,

shall be liable for damage.

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8 Some experts stressed the importance of the role of brokers. The opinion was also expressed that the notion of "operational control" should be defined.
2. [In case of damage from wastes involving two or more persons liable pursuant to paragraph 1, liability shall be joint and several.]

3. If damage arises from waste subject to a transboundary movement as well as locally produced waste,

   Alternative 1:
   the generator and the disposer duly authorized to receive wastes if he has taken charge of them and any person who [at the time of the incident] has [operational] control of the wastes

   Alternative 2:
   any person who [at the time of the incident] has [operational] control of the wastes, as well as [on a subsidiary basis,] the generator

   Alternative 3:
   any person who [at the time of the incident] has [operational] control of the wastes, shall be liable only in proportion to his contribution to the wastes involved. For the purpose of this provision, a liable person's share shall be defined in terms of volume and relative toxicity of the wastes involved.

4. There shall be no liability if the damage is:

   (a) a result of an unforeseeable act of armed conflict, hostilities, civil war or insurrection;

   (b) a result of an unforeseeable natural phenomenon of an exceptional, inevitable and irresistible character;

   (c) a result of the wrongful intentional conduct of a third party which is the sole cause of damage taking into account that all reasonable safety measures have been taken, to prevent the consequences of such conduct;

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9 One expert called attention to the fact that, in case of Alternative 3, the provision for joint and several liability is only practicable if damage involves more than one transboundary movement of wastes and more than one person who at the time of the incident has operational control of the wastes.

10 One expert expressed concern that the use of volume and toxicity to calculate the share of liability fails to recognize that, in practice, waste streams are often managed together for beneficial reasons which are difficult to quantify.
(d) a result of compliance with a specific order or compulsory measure of a public authority.\textsuperscript{11}

5. Compensation\textsuperscript{12} may be reduced [or disallowed] if the person who suffered damage or a person for whom he is responsible under national law has, by his own fault, contributed to [or is the sole cause of] the damage having regard to all circumstances.

6. In the case of damage as a result of illegal traffic, all persons [responsible] [involved therein] shall be jointly and severally liable and no exonerations shall be permitted\textsuperscript{13}.

**Article 5**  
Financial Limit of Liability

There should be no fixed financial limit of liability\textsuperscript{14}

**Article 6**  
Time Limit of Liability

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within five years\textsuperscript{15} from the date at which the claimant knew or ought reasonably to have known of the damage, its sources and the person[s] responsible\textsuperscript{16} therefore.

2. In no case should a claim be admissible after [thirty years] from the date of the incident which caused the damage. Where the incident consists of a series of occurrences having the same origin the [thirty years] shall run from the date of the last

\textsuperscript{11} During the discussion it was suggested that in view of the generator's potentially open-ended liability exposure, there might be a need for further review of the adequacy of the proposed bases of exonerations. It was further noted that negligence on the part of the public authorities of the importing State as well as the exercise of all due diligence on the part of the generator might be factors to be taken into account.

\textsuperscript{12} One expert thought that the concept of compensation required definition.

\textsuperscript{13} Few delegations expressed concern about the interpretation of Article 9, paragraph 1 (d) of the Basel Convention on the material non-conformity of documentation in relation to paragraph 5 of this Article.

\textsuperscript{14} One expert reserved its position.

\textsuperscript{15} One expert proposed that the period should be three years.

\textsuperscript{16} Some experts wanted it to be emphasized that knowledge of the three elements mentioned should not constitute a prerequisite for the presentation of a claim.
of such occurrences. Where the incident consists of a continuous occurrence the [thirty years] period shall run from the end of that occurrence.  

3. No time limit shall apply in the case of illegal traffic.

**Article 7**

**Insurance and other financial guarantees**

1. Liability under this Protocol shall be covered by insurance, bonds or other financial guarantees for a minimum threshold ... [SDR] [Units of account]. Such threshold shall be reviewed on a regular basis.

2. For this purpose, Contracting Parties which are State of export, State of transit or State of import shall ensure [with respect to the persons under their respective jurisdictions] that liability under this Protocol shall be covered by insurance, bonds or other financial guarantees.

3. Contracting Parties which are State of export, State of transit or State of import shall also ensure [with respect to those persons under their respective jurisdictions] that the insurance, bonds or other financial guarantees are valid throughout the period of the time limit of liability.

**International liability and compensation**

**Article 8**

**International Fund**

1. The Parties to this Protocol shall establish an international fund, hereinafter "the Fund", for immediate response measures in an emergency situation and for compensation to the extent that compensation for damage under the civil liability regime is inadequate or not available.

2. The Parties to this Protocol shall adopt as soon as possible, the legal instrument establishing the Fund.

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27 It was suggested that, especially as regards damage to the environment, the period of thirty years was not sufficient, given that modern science shows that damage may well manifest itself only after this period.

18 One expert reserved its position on this sub-paragraph.

19 One expert reserved its position on the inclusion of State of transit.

20 One expert reserved its position on the inclusion of State of transit.

21 General debate was held in regard to these articles which is reflected in the report. The experts agreed to come back to these articles at the next session.
Article 9
State liability

[The Exporting (importing) State Party to the Protocol shall be held liable and provide for compensation to the extent that compensation for damage under the civil liability regime and/or the Fund regime is inadequate or not available.]

Procedures

Article 10
Competent Courts

1. Claims for compensation may only be brought in the courts of a Contracting Party where either:
   (a) the damage was sustained; or
   (b) the damage has its origin; or
   (c) the person alleged to be liable resides, is domiciled or has his principal place of business.

2. Each Contracting Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

3. [The assessment of costs of clean up and remedial actions, as well as for the evaluation of environmental damage should be done by [domestic courts, assisted by an international technical advisory body to be consulted on an [optional] or [mandatory] basis] [an international commission with exclusive jurisdiction].

Article 11
Applicable Law

1. All matters of substance or procedure regarding claims brought in a competent court which are not specifically regulated in the Protocol shall be governed by the law of that court, including any rules of such law relating to conflicts of law.

2. The provisions of the Protocol, as well as of the law of the competent court shall be applied without discrimination based on nationality, domicile or residence.

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22 One expert noted that it might process these claims wholly or partially in administrative tribunals and that the term "courts" may need revision.

23 The issue of claimants bringing their claims for compensation in different courts should be addressed.

24 This draft article has not been discussed.
3. [The law to be applied by the international commission referred to in paragraph 3 of Article 10 should be determined in the negotiations of the Parties]25.

**Article 12**

**Mutual Recognition and Enforcement of Judgments**26 27

Any judgement of a court competent shall, if it is enforceable in the State of origin, be recognized in any Contracting Party and shall be enforceable without review of the merits of the case.]

**Article 12 bis**

**Relation between this Protocol and the Law of the Competent Court**

Nothing in this Protocol shall be construed as limiting or derogating from any of the rights of the persons who have suffered the damage or as limiting the provisions concerning the protection or reinstatement of the environment which may be provided under the law of the competent courts.]

**Article 13**

**Relationship with other Bilateral, Multilateral and Regional Agreements**

**Alternative 1:**
In case of a conflict between the provisions of this Protocol and the provisions on liability and compensation in another international agreement or arrangement, the provisions of this Protocol shall take precedence to the extent that they are more favourable to the claimant [, in particular taking into account the interests of developing countries].

**Alternative 2:**
In case of a conflict between the provisions of this Protocol and the provisions on liability and compensation in another international agreement or arrangement, except where all Parties concerned are members of a separate international agreement on
liability and compensation with regard to inland, air or maritime transport, the provisions of this Protocol shall take precedence to the extent that they are more favourable to the claimant [in particular taking into account the interests of developing countries.]

**Alternative 3:**
In case of a conflict between the provisions of this Protocol and the provisions on liability and compensation in another international agreement or arrangement, the provisions of this Protocol shall take precedence, unless the damage is related to wastes which are specifically covered by international or regional instruments on liability and compensation with regard to inland, air or maritime transport.

**Alternative 4:**
In case of a conflict between the provisions of this Protocol and the provisions on liability and compensation in another international agreement or arrangement, except where all Parties concerned are members of a separate international agreement on liability and compensation with regard to inland, air or maritime transport, the claimant shall have the right to choose which regime shall apply for compensation.

[**Final Clauses**]

**Article 14**

**Signature**

This Protocol shall be open for signature by States, and by political and/or economic integration organizations, in ... from ... to ...

**Article 15**

**Ratification, Acceptance, Formal Confirmation or Approval**

1. This Protocol shall be subject to ratification, acceptance or approval by States and to formal confirmation or approval by political and/or economic integration organizations. Instruments of ratification, acceptance, formal confirmation, or approval shall be deposited with the Depositary.

2. Any organization referred to in paragraph 1 above which becomes a Party to this Protocol without any of its member States being a Party shall be bound by all the obligations under the Protocol. In the case of such organizations, one or more of whose member States is a Party to the Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under the Protocol concurrently.

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28 The articles 14 - 22 were not discussed and were included to the text the square brackets for easy reference of the experts at their next meeting.
3. In their instruments of formal confirmation or approval, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Protocol. These organizations shall also inform the Depository, who will inform the Parties of any substantial modification in the extent of their competence.

Article 16
Accession

1. This Protocol shall be open for accession by States, and by political and/or economic integration organizations from the day after the date on which the Protocol is closed for signature. The instruments of accession shall be deposited with the Depository.

2. In their instruments of accession, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Protocol. These organizations shall also inform the Depository of any substantial modification in the extent of their competence.

3. The provisions of Article 15 paragraph 2, shall apply to political and/or economic integration organizations which accede to this Protocol.

Article 17
Right to Vote

1. Except as provided for in paragraph 2 below, each Contracting Party to this Protocol shall have one vote.

2. Political and/or economic integration organizations, in matters within their competence, in accordance with Article 15, paragraph 3, and Article 16, paragraph 2, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to the Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 18
Entry into Force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the [tenth] instrument of ratification, acceptance, formal confirmation, approval or accession.

2. For each State or political and/or economic integration organization which ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the date of the deposit of the twentieth [tenth] instrument of ratification, acceptance, approval, formal confirmation or accession, it shall enter into force on the ninetieth day after the date of deposit by such State or political and/or economic integration organization of its instrument of ratification, acceptance, approval, formal confirmation or accession.
3. For the purpose of paragraphs 1 and 2 above, any instrument deposited by a political and/or economic integration organization shall not be counted as additional to those deposited by member States of such organization.

**Article 19**

**Reservations and Declarations**

1. No reservation or exception may be made to this Protocol.

2. Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, when signing, ratifying, accepting, approving, formally confirming or acceding to this Protocol, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Protocol, provided that such declarations or statements do not purport to exclude or to modify the legal effects or the provisions of the Protocol in their application to that State.

**Article 20**

**Withdrawal**

1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depository.

2. Withdrawal shall be effective one year from receipt of notification by the Depository, or on such later date as may be specified in the notification.

**Article 21**

**Depositary**

The Secretary-General of the United Nations shall be the Depositary of the Protocol.

**Article 22**

**Authentic texts**

The original Arabic, Chinese, English, French, Russian and Spanish texts of this Protocol are equally authentic.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Protocol.

Done at............. on the ............. day of ...............1993]