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.

Second Session
Geneva, 10 - 14 October 1994

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

I. INTRODUCTION

1. The second 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 10 to 14 October 1994 in accordance with decision II/1 of the second meeting of the Conference of the Parties to the Basel Convention.

II. ORGANIZATIONAL MATTERS

A. Opening of the session

2. The second session was opened by the Chairman of the Ad Hoc Working Group, Dr. J. Lammers, who welcomed the delegates to Geneva, referred to the mandate of the Working Group given to it by the second meeting of the Conference of the Parties to the Basel Convention and expressed its hope that this meeting would be fruitful and would allow adoption of the Protocol at the next meeting of the Conference of the Parties. The Chairman commended the Secretariat for the preparation of the excellent documentation for the meeting and in particular commended the Secretariat's initiative in preparing the document containing comprehensive information on liability and compensation provisions in existing or draft international environmental legal instruments (UNEP/CHW.1/WG.1/2/Inf.2).
3. The Coordinator of the Secretariat of the Basel Convention, Dr. I. Runumel-Bulska, thanked the Bureau of the Working Group for agreeing to continue its mandate. She further introduced the documentation for the meeting, namely:

- **Provisional Agenda**;
- **Factual Basis**, as received from States Parties and Non-Parties to the Basel Convention, concerning the subject of liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal, *Report by the Secretariat*;
- **Assessment of existing capacities in the field of emergency assistance**, *Report of the Secretariat*;
- **State liability as a possible element of a comprehensive regime of liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal**, *Note of the Secretariat*;
- **Implementation of Decision I/14, entitled "Emergency Fund," Report of the Secretariat**;
- **Report of the Ad Hoc Working Group on the work of its first session**;
- **Note of the Executive Director on the establishment of an international fund for compensation for damage resulting from transboundary movements of hazardous wastes and their disposal**;
- **Implementation of Decision I/5 of the first meeting of the Conference of the Parties on "Liability and Compensation," Note by the Secretariat**;
- **Information by the Secretariat on liability and compensation provisions in existing or draft international environmental legal instruments**;
- **Additional information on the factual basis concerning the subject of liability and compensation, as received from States Parties and non-Parties to the Basel Convention**;
- **Information by the Secretariat on the experience of insurance companies in dealing with incidents resulting**
from the transboundary movements of hazardous wastes and their disposal.

4. She reiterated the Chairman's expectations that the Working Group would be able to finalize the proposed draft Articles of the Protocol in order to present it for consideration and possible adoption by the third meeting of the Conference of the Parties in September 1995.

B. Attendance

5. The delegates of the following Parties to the Basel Convention participated in the session: Antigua and Barbuda; Argentina; Australia; Austria; Bahamas; Bangladesh; Belgium; Brazil; Canada; Chile; China; Commission of the European Communities; Croatia; Cuba; Czech Republic; Ecuador; Egypt; Estonia; Finland; France; Greece; Hungary; India; Italy; Japan; Latvia; Malawi; Malaysia; Maldives; Mexico; Netherlands; Nigeria; Norway; Philippines; Poland; Republic of Korea; Senegal; Slovak Republic; South Africa; Spain; Sri Lanka; Sweden; Switzerland; United Kingdom; Uruguay.

6. The following countries not Party to the Basel Convention sent observers to the session: Colombia; Gambia; Germany; Guinea; Honduras; Morocco; New Zealand; Sultanate of Oman; Singapore; Thailand; United States of America.

7. The following organizations participated in the meeting as observers: Conférence de la Haye de Droit International Privé; League of Arab States, and Organisation for Economic Co-operation and Development (OECD).

8. In addition the European Insurance Committee; European Chemical Industry Council (CEFIC); Greenpeace International; International Group of P & I Clubs; Mining Association of Canada and Zürich Insurance Co. participated in their quality as observers.

C. Election of officers

9. The following continued their mandate as members of the Bureau of the Working Group:

Chairperson
Mr. J.G. Lammers (Netherlands)

Vice-Chairpersons
Ms Katarzyna Mochowska (Poland)
Ms Reine Marie Coly (Senegal)
Mr. Hermann Aschentrupp (Mexico)
Mr. Wang Weimin (China)

Rapporteur
Mr. Hugo M. Schally (Austria)
D. Adoption of the agenda

10. The meeting adopted the following agenda:

1. Opening of the meeting.
2. Organization of the session.
3. Adoption of the agenda.
4. Presentation of the report submitted by the Secretariat on the factual basis, as received from States Parties and non-Parties to the Basel Convention, concerning the subject of liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal (UNEP/CHW.1/WG.1/2/2 and UNEP/CHW.1/WG.1/2/Inf.3).
6. Presentation of the report of the Secretariat on the assessment of existing capacities in the field of emergency assistance (UNEP/CHW.1/WG.1/2/3 and UNEP/CHW.1/WG.1/2/Inf.2) and consideration of the establishment of an emergency fund.
7. Consideration of the establishment of a compensation fund for damage resulting from transboundary movements of hazardous wastes and their disposal.
8. Other business.
9. Closure of the meeting.

E. Organization of work

11. Since there were no comments by the delegates on the document on "Factual basis, as received from States Parties and Non-Parties to the Basel Convention, concerning the subject of liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal," the Chairman proceeded with the second reading of the Articles of a Protocol as contained in the Annex to the Report of the Working Group at its Meeting in September 1993 (UNEP/CHW.1/WG.1/1/5).

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

13. The Working Group redrafted the definitions included in Article 2 as reflected in the Annex of this report.

14. Regarding Article 3 "Scope of Application" the opinion was expressed by several delegates that the after-care of disposal sites should be included in the scope of the Protocol. Several other delegates objected to this inclusion.
15. Some delegates maintained their position that the Protocol should also apply to transboundary pollution when the hazardous wastes subject to transboundary movements were still within the territory of the country of export. Many others considered that such a case should not be covered by the Protocol. A few delegates expressed the opinion that radioactive wastes not covered by other legally binding instruments should also be included in the scope of the Protocol.

16. A comprehensive discussion was held in relation to Article 4. A majority of delegates expressed their support for alternative 1 of paragraph 1 of Article 4, mainly on the grounds that it ensures the application of the Basel Convention which through the generator aims to minimize the generation of wastes and subsequently the transboundary movement of those wastes. In this context, the polluter pays principle was mentioned. Other delegation's expressed their view that the purpose of the Protocol is the compensation of victims and the promotion of sound management of waste, not the minimization of the generation of waste. Some delegates disagreed with this. Some delegates felt that the liability of the exporter should also be included in alternative 1. Certain delegates supported the view that the text should provide that the generator, the exporter, the carrier, the importer and the disposer should be liable.

17. Other delegates expressed their preference for alternative 3, as far as strict liability is concerned, stating that, from the point of view of the victim, the person in control of the waste is the "easiest person to identify" and is in the best position to prevent the occurrence of an incident. As far as fault liability is concerned, some of these other delegates were open to consider that persons other than those in operational control of waste may be held liable, whilst others stated that placing liability on the person in control of the waste would give an incentive to each person in successive control to manage the waste in an environmentally sound manner. Some delegates expressed their reservations as to what the definition of the person in control of the waste should include and, particularly, as to the notion of possession of the wastes as an element of this definition, notably when it leads to holding liable a person in possession of the wastes but not in actual control of them. Some referred to the fact that in their national legislation, possession has a certain defined meaning.

18. One delegate was in support of alternative 2.

19. Some delegates emphasized the need to have a provision on the right of recourse of the person liable against other persons. One delegate suggested that the provision should clearly state who these other persons should be.

20. Delegates, representing insurers, pointed out that the more the liability is channelled to one person the better the capacity of the insurance market to cover damage. For this reason, one supported alternative 3. The other insurance delegate, while agreeing with his colleague, nevertheless supported alternative 1 from the purely environmental protection point of view.

21. Further discussions led to the elaboration of three new alternatives which are substantially different from those contained in UNEP/CHW.1/WG.1/1/5. These new alternatives are included in the draft Articles of a Protocol which constitutes the Annex of this report.
22. The Working Group was only able to consider in detail the provisions of the draft Protocol up to and including Article 6.

23. Regarding Article 7, entitled "Insurance and other financial guarantees", the Working Group was only able to hear declarations of the representatives of the International Group of P&I Clubs and of the Zürich Insurance Co.

24. The representative of the International Group of P&I Clubs advised that the Group had not yet given consideration to the insurability of the liabilities contemplated in the draft Protocol, but the International Group would in general be opposed to the imposition of unlimited, strict liabilities on maritime carriers. The representative agreed, however, to make a statement solely in his personal capacity as a delegate (and not on behalf of the International Group) to enable the Working Group to appreciate some potential insurance problems.

25. In his personal statement, the delegate drew attention to the finite size of the marine insurance markets and its relation to the channelling of risks. The delegate suggested that it was necessary to study the relation between this Protocol and other liability conventions, and commented on the different effects of a limit on liability and a limit on insurance coverage requirements. The delegate also drew attention to certain difficulties in insuring liability for damage computed by abstract, theoretical methods, punitive liability, and long tail liability.

26. The representative of Zürich Insurance pointed out that insurance coverage required in Article 7 might cause problems to all involved Parties due to the in calculable and uncontrollable nature of the risks. For an insurance company to be able to calculate appropriate premiums, the risk must be calculable and in order to keep the losses to a minimum, risks must be controlled. He raised the problem of an already contaminated soil before the waste had been released and how this case should be dealt with in relation to the decision on the rate of contamination already existing and which portion of the clean-up costs should be paid by insurance. He referred to the lack of definitions necessary for coverage such as temporal limita tions, local limitations and coverage modulations (sudden and accidental, gradual or both).

27. The speaker further referred to the involvement of very broad insurance branches such as transport insurance, marine insurance, casualty insurance, property insurance, business interruption (loss of profits) etc. He also pointed out other problems, particularly the definition of the physical state of the waste, the "preventive measures" in conjunction with "any person" who may cause unnecessary expenses, and the responsible person for defining "how clean is clean", "how safe is safe" and the after clean-up operations. Finally, he stated that for uninsurable, or difficult to ensure risks, a self-financing solution could be an alternative to the traditional insurance programmes. This product was concerned with the spreading of risks between insurers and insured. In this case, however, the risk had to be calculable and also controllable.

28. Due to lack of time, the Working Group was not in a position to make comments on this statement and one delegate expressed the view that with regard to paragraphs 23 to 27, other observers, in particular Greenpeace Organization, should be accorded a similar opportunity to have their statement summarized and subsequently entered into the report of the meeting in question, pursuant to a request by a State Party to the Convention.
29. Due to time constraints the Working Group was not able to give further consideration to the remaining Articles of the draft Protocol which are now reproduced in Annex to this report and was also not able to consider agenda items 6 and 7.

F. Future work

30. The Meeting decided to have its next session in Geneva from 3 to 7 April 1995 subject to the availability of conference facilities.

31. It was decided that the Working Group will work for five half days with simultaneous interpretation (English, French, Spanish) while spending the remaining half days for meetings of negotiating and drafting groups.

G. Other business

32. The Working Group further agreed that the next meeting will start with the consideration of Article 7 of the draft Protocol and only negotiating and drafting group meetings will continue the drafting of the Articles already considered by the second session of the Working Group, namely entities 1 to 6 in order to submit to the plenary an agreed text.

G. Adoption of the report

33. No other business was recorded under this agenda item.

H. Closure of the meeting

34. Some delegates expressed their appreciation for the participation and contributions of observers in the meeting and to the work of the Working Group.

35. After the usual exchange of courtesies the Chairman declared the meeting closed at 16.50 on 14 October 1994.
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 liability and 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 Convention apply to this Protocol, unless expressly provided otherwise.

2. For the purposes of this Protocol:

(a) "Damage" means:

(i) loss of life or personal injury;

(ii) loss or damage to property other than property held by the person liable for the damage in accordance with the present Protocol;¹

(iii) loss of profit from impairment of the environment;²

(iv) impairment of the environment, in so far as this is not considered to be damage within the meaning of sub-paragraphs (i), (ii) or (iii) above;

(v) the costs of preventive measures;

(vi) any loss or damage caused by preventive measures;

...to the extent that the damage arises out of or results from the transboundary movement and disposal of hazardous wastes and other wastes under the Convention;

¹ One delegate reserved his position on this point.

² This should be limited to direct loss to be defined subsequently.

³ Two delegations reserved their positions on inclusion of impact of the environment and loss of profit not falling under subparagraphs i and ii.
(b) "Measures of reinstatement" means any reasonable measures aiming to rehabilitate or restore damaged or destroyed elements of the environment;

(c) "Preventive measures" means any reasonable measures taken by any person in response to an incident, to prevent or mitigate loss or damage;

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

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

(f) "Protocol" means the present Protocol;

(g) "Incident" means any occurrence or series of occurrences having the same origin in relation to the transboundary movement and disposal of hazardous wastes and other wastes under the Convention, that causes damage or creates a grave and imminent threat of causing damage.

ARTICLE 3
Scope of Application

1. This Protocol shall apply to damage arising from transboundary movement of hazardous wastes and other wastes subject to the Convention due to incidents occurring during the time from which the transboundary movement has commenced4 within the scope of the Protocol until completion of the disposal of the wastes [including aftercare of disposal sites].

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 in the State of export caused by an incident which takes place in the area under the national jurisdiction of that State of export [unless there is no equivalent applicable law];

   (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.]

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4 The Secretariat is requested to elaborate on the possible definition of the point when the transboundary movement has commenced for the purpose of this Protocol.
ARTICLE 4
Liability

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

Alternative 1:
- the generator,5
- the exporter, and
- any person, including the disposer, who at the time of the incident is in
  [possession and/or] control8 of the hazardous wastes or other wastes
  shall be liable for damage.

Alternative 2:
- the generator,
- the exporter, and
- any person, including the broker, importer and disposer, involved in the
  transboundary movement or disposal of the hazardous wastes or other wastes
  shall be liable for damage.

Alternative 3:
any person who at the time of the incident has operational control of the wastes,
shall be liable for damage.

1.(b) Nothing in this Protocol shall prejudice any right of recourse to which the person
liable might be entitled.

1.(c) [Notwithstanding any other provision in this Protocol, any person in [possession
and/or] control of hazardous wastes or other wastes for the sole purpose of taking
preventive measures to minimize or prevent loss or damage arising from an incident, is not
thereby subject to liability under this Protocol.]

2. If two or more persons are liable pursuant to paragraph 1, the claimant shall have
the right to seek full compensation for the damage from any or all liable persons.9

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5 As defined in Article 2(18) of the Convention. One delegation suggested that the generator be defined to mean any person
whose activity produces hazardous wastes or other wastes.

6 As defined in Article 2(15) of the Convention, but [under the jurisdiction of the State of export] bracketed. One delegate
expressed its reservation to include the exporter in this alternative.

7 As defined in Article 2(19) of the Convention.

8 Terminology used in the definition of the generator, Article 2(18) of the Convention.

9 One delegate 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.
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2(ba) [Where an incident consists of a continuous occurrence or a series of occurrences,
all persons successively exercising control over the wastes may be subject to an action as
under paragraph 2. However, if any person liable proves that the occurrence during the
period when he was exercising control caused only a part of the damage, he shall be liable
for that part of the damage only.]

3. [Where an incident involves wastes covered by this Protocol, and wastes not
covered by this Protocol, a person otherwise liable under paragraph 1 shall only be liable
in proportion to the contribution made by the waste covered by this Protocol to the damage
occurring.

In determining the proportion of the contribution of a waste referred to above,
regard shall be had to the volume and properties of wastes involved, and the type of the
damage occurring.

In respect of an incident where it is not possible to distinguish between wastes
covered by this Protocol and wastes not covered by this Protocol, any person referred to in
paragraph 1 [who is responsible for the inability to make this distinction shall be fully
liable. [If there is no such person, any person referred to in paragraph 1] shall be liable as
if the damage occurred solely in respect of the wastes covered by this Protocol.]

4. There shall be no liability if the damage is exclusively\(^{10}\):

(a) a result of an act of armed conflict, hostilities, civil war or insurrection
which was not reasonably foreseeable;

(b) a result of a natural phenomenon of an exceptional, inevitable and irresistible
character [provided that all reasonable safety measures have been taken to prevent the
damage];

(c) a result of the wrongful intentional conduct of a third person provided that
all reasonable safety measures have been taken, to prevent the consequences of such
conduct;

(d) a result of compliance with a compulsory measure of a public authority,\(^{11}\)\(^{12}\)

[(e) a result of a negligent or other wrongful act of any government or other
authority].\(^{13}\)

5. Compensation 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.

\(^{10}\) One delegate suggested to replace "exclusively" by "to the extent that".

\(^{11}\) The deletion of this sub-paragraph was suggested by some delegations.

\(^{12}\) This provision should be review in light of the consideration of Article 9 of this Protocol on State Liability.

\(^{13}\) This provision should be reviewed in light of the consideration of Article 9 of this Protocol on State Liability.
ARTICLE 4bis
Liability for Illegal Traffic

[In the case of damage as a result of illegal traffic, all persons involved [in] [who knew or ought to have known of] the illegality shall be held liable. No exoneration shall be permitted.

The implementation of this Article shall be without prejudice to any liability arising under Article 4.]

ARTICLE 4ter
Forms or Modalities of Compensation

1. With respect to compensation for loss or damage referred to in Article 2 (2)(a)(i), (ii) and (iii) the claimant may invoke the forms or modalities of compensation provided for by the applicable law.

2. With respect to compensation for the impairment of the environment in Article 2 (2)(a)(iv),

(a) if the environment can be reinstated, compensation shall be limited to:

(i) the costs of measures of reinstatement actually undertaken or to be undertaken; or

(ii) the costs of returning the environment to a comparable state, where reasonable;

(b) if the environment cannot be reinstated,

Alternative 1
compensation shall be limited to an amount calculated as if the environment could be reinstated or returned to a comparable state.

Alternative 2
compensation shall be calculated only taking into account the following; intrinsic value of the ecological systems involved including their aesthetic and cultural values and in particular the potential loss of value entailed in the destruction of a species or subspecies of flora or fauna. [Punitive damages shall not form part of the calculation under this subparagraph;]

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14 This Article has to be further developed with regard to remedies not included in compensation.

15 The mechanisms for assessing compensation under Article 2(b) will need to be discussed in the context of Article 10(3).

16 Some delegations expressed concern about the feasibility and/or the desirability of compensation of damage to the environment per se.
(c) where compensation is received for damage to the environment that cannot be reinstated, it shall be used for purpose of environmental reinstatement which may include the creation of a comparable environment in another area\(^{17}\);

(d) [national law] [shall][may] determine who is entitled to take the measures of reinstatement and receive the compensation in (a), (b) and (c).\(^{18}\)

**ARTICLE 5**

Financial Limit of Liability

There shall not be a fixed financial limit of liability\(^{19}\)\(^{20}\).

**ARTICLE 6**

Time Limit of Liability

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within five years\(^{21}\) from the date at which the claimant knew or ought reasonably to have known of the damage, its sources and the person[s] responsible\(^{22}\) 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\(^{23}\) having the same origin the [thirty years] shall run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence the [thirty years] period shall run from the end of that occurrence\(^{24}\).

3. No time limit shall apply in the case of illegal traffic\(^{25}\).

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\(^{17}\) Some delegates expressed the view that further consideration should be given to this paragraph.

\(^{18}\) The discussion and placement of this provision is subject to a discussion on a possible article on the right to claim.

\(^{19}\) Some delegates reserved their position in so far as strict liability is concerned.

\(^{20}\) Two delegates reserved their positions as far as the questions of subsidiary liability, including State liability, as well as of insurance and other financial guarantees are concerned.

\(^{21}\) Some delegates proposed that the period should be three years.

\(^{22}\) Some delegates wanted it to be emphasized that knowledge of the three elements mentioned should not constitute a prerequisite for the presentation of a claim.

\(^{23}\) To be considered in connection with the definition of incident.

\(^{24}\) 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.

\(^{25}\) Several delegates reserved their position on this sub-paragraph.
Note: The following Articles were not considered at the second session of the Working Group (10 to 14 October 1994).

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\textsuperscript{26} 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\textsuperscript{27} 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\textsuperscript{28}]

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.

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.]

\textsuperscript{26} One delegate reserved its position on the inclusion of State of transit.

\textsuperscript{27} One delegate reserved its position on the inclusion of State of transit.

\textsuperscript{28} General debate was held in regard to these articles which is reflected in the report. The delegates agreed to come back to these articles at the next session.
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.

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].

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

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

31 This draft article has not been discussed.

32 This paragraph was not discussed.
ARTICLE 12
Mutual Recognition and Enforcement
of Judgments

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 12bis
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.

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31 Possible grounds for exceptions to the obligation of mutual recognition and enforcement of judgements should be considered.

34 One delegate suggested that the exceptions could include:
   - where one judgment was obtained by fraud;
   - where the person alleged to be liable was not given a reasonable notice and fair opportunity to present a defense;
   - where the judgment is irreconcilable with an earlier judgment given in another State involving the same cause of action and between the same Parties.
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.

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 Depositary.

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.

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35 The articles 14 - 22 were not discussed and were included to the text the square brackets for easy reference of the delegates at their next meeting.
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 Depository 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]