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

Third Session

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

I. INTRODUCTION

1. The third 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 20 to 24 February 1995 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 third session was opened by the Chairman of the Ad Hoc Working Group, Dr. Johan G. Lammers, who welcomed the delegates and referred to the agreement reached by the second session of the Working Group (October 1994) that the present session would start with the consideration of Article 7 of the Draft Protocol. He also referred to the requests made by the October 1994 meeting that only part of the present session should be held with interpretation while the other part should allow more time for informal negotiations and drafting group meetings. Accordingly the letter of invitation to this meeting pointed out that the first day (20 February 1995) was to be devoted to a plenary meeting which would continue the debate starting with draft Article 7. The following days (21 and 22 February 1995) would be devoted to informal negotiating and meetings of the drafting groups. On 23 and 24 February 1995 the plenary would continue. The Chairman proposed to postpone the consideration of draft Articles 8 and 9 on "International Fund" and "State Liability" for the
next plenary sessions on 23 and 24 February 1995. The meeting agreed with the proposals of the Chairman. The session was not in a position to examine the French version of the Protocol because the informal meetings were held exclusively in English. One delegation distributed a note containing the translation of a number of points in relation to the French version which have no effect on the English version.

3. The Coordinator of the Secretariat of the Basel Convention, Dr. I. Rummel-Bulska, welcomed the wide participation in this session of the Working Group and pointed out the increasing number of Parties to the Basel Convention, which are at present 81 States Parties, and the Commission of European Community. She reminded the Working Group of its mandate stipulated in Decision II/1 of the second meeting of the Conference of the Parties to the Basel Convention and quoted paragraph 5 of this Decision which "requests the Ad Hoc Working Group to make all efforts 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 to the Basel Convention". She further informed the meeting about the new documentation submitted to it, namely:

- **UNEP/CHW.1/WG.1/3/Inf.2** containing the position of the Netherlands in relation to the relationship between the Liability Protocol and the Basel Convention;

- **UNEP/CHW.1/WG.1/3/Inf.3** on possible definition of "the Point when the Transboundary Movement of Hazardous Wastes and other Wastes has commenced" for the purpose of the draft Articles of a Protocol on Liability and Compensation;

- **Comments presented by the "Comité Européen des Assurances"** on the main provisions of the draft Protocol on Liability and Compensation.

**B. Attendance**

4. The delegates of the following Parties to the Basel Convention participated in the session: Argentina; Australia; Austria; Bahamas; Bangladesh; Brazil; Canada; Chile; China; Commission of European Community; Croatia; Czech Republic; Ecuador; El Salvador; Estonia; Finland; France; Greece; Hungary; India; Indonesia; Iran; Japan; Kuwait; Latvia; Malawi; Malaysia; Mexico; Netherlands; New Zealand; Nigeria; Norway; Peru; Republic of Korea; Russian Federation; Senegal; South Africa; Sri Lanka; Sweden; Switzerland; Syrian Arab Republic; United Kingdom; Uruguay.

5. The following countries not Party to the Basel Convention sent observers to the session: Algeria; Colombia; Germany; Malta; Morocco; Qatar; Thailand; United States of America.

6. The following organizations participated in the meeting as observers: Coordinating Unit for the Mediterranean Plan (UNEP); Economic Commission for Europe (ECE); Hague Conference on Private International Law; International Maritime Organisation (IMO); Organisation for African Unity (OAU), Organisation for Economic Co-operation and
Development (OECD), United Nations Industrial Development Organization (UNIDO), and the World Trade Organization.

7. The European Insurance Committee; Chemical Manufacturers Association (CEFIC); Greenpeace International; International Chamber of Commerce (ICC), and Mining Association of Canada also attended the meeting in their quality as observers.

C. Election of officers

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

   Chairperson          Mr. Johan G. Lammers (Netherlands)
   Vice-Chairpersons     Ms Fatima Dia-Touré (Senegal)
                        Mr. Wang Weimin (China)
                        Mr. Guido Fernando Silva Soares (Brazil)

   Rapporteur           Mr. Thomas Michael Baier (Austria)

D. Adoption of the agenda

9. The meeting adopted the following agenda:

   1. Opening of the meeting.
   2. Organization of the session.
   3. Adoption of the agenda.
   5. Consideration of the establishment of a compensation fund for damage resulting from transboundary movements of hazardous wastes and their disposal.
   6. Consideration of the establishment of an emergency fund.
   7. Other business.
   8. Closure of the meeting.

E. Organization of work

10. As proposed by the Chairman when opening the session of the Working Group, the following work programme was adopted:
the first day (20 February 1995) would be devoted for a plenary meeting to continue the debate on draft Article 7 and the following draft Articles of the proposed Protocol (except Articles 8 and 9);

the following days (21 and 22 February 1995) would be devoted to negotiating and drafting group meetings;

on 23 and 24 February 1995, the plenary would consider the outcome of the work of the informal negotiating and drafting groups as well as Articles 8 and 9 of the draft Protocol.

11. At its meeting on 20 February 1995, the plenary considered draft Articles 7 and 10 and held a general exchange of view on the necessity of Articles 11 and 12.

12. In regard to draft Article 7, a number of delegations stressed the need to combine paragraphs 1 and 2 of this Article as well as the need to consider the inclusion of a maximum ceiling for insurance in order to be able to get access to the insurance market.

13. One delegation proposed to have a list of thresholds based on the degree of hazard of the waste subject to insurance. This proposal was supported by a number of delegations. Other delegations pointed out that such a concept of different thresholds depending on the nature of hazardous wastes would be impracticable and complicated. Several delegations stressed the importance of consultation with the insurance and banking industries in the consideration of this draft Article 7.

14. It was pointed out that the obligation to verify the existence of insurance or other financial guarantees should be the obligation of only one Party in order to ensure that such verification would take place. In this connection, reference was made to the need of having a clear definition in Article 4 related to the liable person and of taking into account Articles 8 and 9 related to the International Fund and State Liability.

15. One delegation drew the attention of the meeting to the link which should exist between this draft Article and Article 6, paragraph 11, of the Basel Convention which states that "any transboundary movement of hazardous wastes or other wastes shall be covered by insurance, bond or other guarantee as may be required by the State of import or any State of transit which is a Party".

16. This draft Article was referred to the drafting group in order to negotiate an acceptable text which takes into consideration the various comments made during the plenary.

17. A general discussion was held in relation to the need of inclusion of Articles 10 to 12 in relation to "Competent Courts", "Applicable Law" and "Mutual Recognition and Enforcement of Judgements" in the draft Protocol, or to leave such matters to the general rules of private international law.

18. It was generally felt that there is a need to keep Article 10 related to the Competent Courts in order to facilitate the task of the victim. As for the importance to keep or delete Articles 11 and 12, a number of delegations supported their deletion and others pointed out the merits of keeping them. One delegation suggested that for these Articles a reservation clause be provided.
19. The meeting agreed to redraft paragraphs 1 and 2 of Article 10 to read as follows:

"1. Claims for compensation may be brought in the courts of a Contracting Party only where either
a) the damage was suffered; or
b) the incident occurred; or
c) the defendant has his habitual residence, or has his principal place of business.

2. Each Contracting Party shall ensure that its court possesses the necessary competence to entertain such claims for compensation."

20. It was agreed to include as a footnote to paragraph 2 that three delegations reserved their position.

21. One delegation proposed to add a sub-paragraph (d) to paragraph 1 which should read "the waste has its origin".

22. Regarding sub-paragraph 3, although several delegations requested its deletion in order not to delimit the freedom of the national court, a view was expressed by a number of delegates that the recourse to an advisory body should be optional if assistance is needed in the field of assessment of damage to the environment, preventive measures as well as measures of reinstatement.

23. The plenary agreed to refer the pending proposals to a drafting group to negotiate an acceptable text.

24. As decided in the Organization of Work, the drafting groups met for two days (21 and 22 February 1995) during which two informal meetings of the plenary were also held. The mandate allocated to the drafting groups were divided between two drafting groups.

25. The drafting groups were able to consider Articles 3, 4, 7 and a new paragraph (d) of Article 10. The informal plenary considered new Articles related to "Lis pendens" and "Related actions" based on the present text of the "Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment" (Lugano Convention) and a new Article 10bis on "Technical assistance" based on the original text of Article 10, paragraph 3. In addition, it considered a Chairman's paper related to the scope of application (Article 3) comprising "Cases of transboundary movement to where the Protocol may possibly apply" and "the further condition to be met if the Protocol is to apply".

26. In regard to Article 3 "Scope of Application", drafting group I was able to present a non-bracketed text except for the notions of "Aftercare of disposal sites" and "The point where the transboundary movement commences". The text is as follows:

"1. This protocol shall apply to damage from the transboundary movement of hazardous wastes and other wastes due to incidents occurring during the time from which the transboundary movement has commenced until completion of the disposal of the wastes [including aftercare of disposal sites].

\[1_{(a)}\] For the purposes of this Protocol, a transboundary movement commences:
Alternative (1):
Within the State of export at one of the points mentioned in document UNEP/CHW.1/WG.1/3/Inf.3.

Alternative (2):
At the point where the wastes leave the land territory of the State of export.

Alternative (3):
At the point where the wastes leave the land territory or the territorial sea of the State of export.

2. Notwithstanding paragraph 1, the Protocol shall not apply:
   
   (a) to damage suffered in an area under the national jurisdiction of a State which is not a Party to this Protocol, with the exception of transit States under Article 7 of the Convention;
   
   (b) to damage suffered in the State of export caused by an incident which takes place in the area under the national jurisdiction of that State of export;
   
   (c) to damage that has arisen from a transboundary movement of hazardous wastes and other wastes that has commenced before the entry into force of this Protocol for the Party concerned.

27. In this regard, it should be noted that a small sub-drafting group submitted the following proposal for the definition of the term "Completion of disposal":

"Paragraph 1. Delete [including the aftercare of disposal sites].

Add new paragraph:

1. For the purposes of this Protocol, "completion of disposal" means the notification of completion of disposal provided by the disposer pursuant to Article 6 (9), except that:

   (a) in the case of residues resulting from a recovery operation, completion of disposal extends to the disposal of the residues;
   
   (b) in the case of temporary storage, completion of disposal means the completion of the disposal operation taking place after the storage; and
   
   (c) in the case of permanent storage, landfill or geological disposal, completion of disposal means the completion of the process of loading the wastes into the facility."

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1 One delegation wished to substitute "exclusive economic zone" for "territorial sea".

2 Two delegations reserved their positions with respect to transit States.
28. Also the following proposal was elaborated by a sub-drafting group in relation to the "point of commencement of the transboundary movement", but was not considered by the drafting group:

"I (a) For the purposes of this Protocol, a transboundary movement commences at the point where the wastes leave the land territory of the State of export, [except that a maritime transboundary movement is deemed to commence at a point 12 [200] nautical miles seaward from the point where the wastes left the land territory.]

(b) Sub-paragraph (a) does not prejudice the exercise of any existing rights as may be available under relevant domestic or international law relating to transboundary damage."

29. The same drafting group was able to consider Article 4 except its paragraph 1 related to the liable person which was left to the plenary meeting. It succeeded to produce a non-bracketed text except for sub-paragraph 3(c) related to the liability in cases where it is not possible to distinguish between wastes covered by this Protocol and wastes not covered by this Protocol. As for the cases of exemption from liability enumerated in paragraph 4, the drafting group was not in a position to consider sub-paragraphs (d) and (e) due to the lack of time. The following was the text submitted by the drafting group on Article 4:

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

Alternative 1:
- the generator³,
- the exporter⁴, and
- any person, including the disposer⁵, who at the time of the incident is in [possession and/or] control⁶ 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.

³ 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.

⁴ As defined in Article 2(15) of the Convention, but [under the jurisdiction of the State of export] bracketed. One delegation expressed its reservation to include the exporter in this alternative.

⁵ As defined in Article 2(19) of the Convention.

⁶ Terminology used in the definition of the generator, Article 2(18) of the Convention.
Alternative 3: any person who at the time of the incident has operational control of the wastes, shall be liable for damage.

Note: This paragraph was not discussed.

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

1 (bn) 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, provided that this person acted reasonably and in accordance with any national law, 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.  

3. (a) 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.  

(b) 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 damage occurring.  

(c) 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.)

Note: Some delegations wished liability to be placed upon the person who mixed the wastes. Other delegations wished this sub-paragraph to be deleted. One delegation wished all of paragraph 3 to be deleted. Discussion was suspended pending the submission of a new proposal on contributions.

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

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7 One delegation wished to add the following sub-paragraph:

"This is without prejudice to liability under national law."

8 One delegate called attention to the fact that, in the case of alternative 3, the provisions for joint and several liability are 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.

* Two delegations supported a proposal to make the burden of proof more explicit.
a) a result of armed conflict, hostilities, civil war or insurrection which was not reasonable foreseeable.\textsuperscript{10}

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.\textsuperscript{11}

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.\textsuperscript{12}

Note: The following provisions were not discussed due to lack of time.

d) a result of compliance with a compulsory measure of a public authority;

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

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."

30. Drafting group II was able to present a non-bracketed text on Article 7 "Insurance and other financial guarantees", except for the point related to the criteria on which should be based the reviewing of the maximum amount of the insurance, bonds or other financial guarantees. This whole text which is pending the outcome of decisions on the nature and scope of the final liability regime, including time and financial limits, as well as taking into account representations by the financial and insurance industries, reads as follows:

"1. Contracting Parties which are State of export, State of transit or State of import shall make sure, with respect to the persons under their respective jurisdictions, that liability under this Protocol shall be covered by insurance, bonds or other financial guarantees valid throughout the period of the time limit of liability.

2. The maximum amount of the insurance, bonds or other financial guarantees mentioned in paragraph 1 is ... [SDR] [Units of account].\textsuperscript{14} and shall be reviewed by the Contracting Parties on a regular basis [taking into account inter alia the nature, quantity and hazards of the waste, and the risks of potential damage to the environment]."

\textsuperscript{10} Two delegations considered that it was unclear whether "foreseeable" referred to the act or the result.

\textsuperscript{11} Two delegations wished to delete the word "all".

\textsuperscript{12} Two delegations wished to delete the word "all".

\textsuperscript{13} This provision should be reviewed in light of the consideration of Article 9 of this Protocol on State Liability.

\textsuperscript{14} Should be established in consultation with the insurance industries.
31. The same drafting group agreed not to include the new proposed sub-paragraph 1(d) of Article 10 referred to in paragraph 11 of this report, and was satisfied to reflect the position of one delegation in a footnote to this Article. The drafting group also agreed to delete the original footnotes 29 and 30 as reflected in document UNEP/CHW.1/WG.1/2/4.

32. The informal plenary meetings were unable to achieve an agreement in relation to both "Lis pendens" and "Related actions" and decided to put both between brackets.

33. Some delegations opposed the text on "Lis pendens" because the jurisdiction of a national court is a matter of public order which cannot be changed by provisions of convention or protocols.

34. Several delegations were in favour of including the text of the Lugano Convention on "Related actions" in the draft Protocol because this text is not mandatory. One delegation presented an alternative proposal that "the court in the area where damage has been sustained has priority to take action". This delegation believed that under "the first court priority" the victims will have no choice but to follow the victim who has his case to be heard first by a court. Since the victims will be most likely in the area where damage has been sustained, to give priority to the court in the area where damage has been sustained will be the best solution for the convenience of victims. Another delegation mentioned that the alternative proposal also deserves merit for reducing or avoiding possibilities of different verdicts/decisions at the courts as are foreseen by the Lugano Convention. This view was supported by some other delegations. In the opinion of several other delegations such a wording would destroy the already accepted logic of Article 10 and did not give freedom to the victim to choose the court.

35. The informal plenary also considered a proposal for a new Article 10bis on "Technical assistance" which reads:

"1. The Secretariat shall establish and maintain a list of experts in the field of environmental damage that may be drawn upon by Parties whose courts require assistance in the assessment of damage to the environment, the costs of preventive measures and the costs of measures of reinstatement.

2. The advice provided by any such expert shall be published and circulated to the Parties."

36. The informal plenary decided to delete paragraph 2 related to publication and circulation of the advice provided by the expert to the Parties, but did not reach a final agreement on the remaining part of the proposed Article.

37. In order to facilitate the discussions on Article 3 related to the scope of the Convention, the Chairman presented the following proposal:

"One of the questions still to be solved is to what cases of transboundary movement the Protocol will apply. In addition the question arises what further conditions will have to be met if the Protocol is to apply.

CASES OF TRANSBOUNDARY MOVEMENT TO WHICH THE PROTOCOL MAY POSSIBLY APPLY:
Situation A

Article 6 Basel C.

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Article 7 Basel C.

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Situation B.1

Article 4(5) + 11 Basel C.

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Situation B.2

Article 4(5) + 11 Basel C.

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Situation C

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Note: Situation not at all covered by Basel Convention
Situation D

Non Basel CP
exp. state

Non Basel CP
transit state

Non Basel CP
imp. state

Basel CP Prot. CP
damaged state

Note: Situation not at all covered by Basel Convention

FURTHER CONDITIONS WHICH WILL HAVE TO BE MET IF THE PROTOCOL IS TO APPLY:

Option 1
Incident state must always be a Protocol Party.
Problems: (a) what if there is no incident state?
(b) what if there is an incident state which is not a Protocol Party?

Option 2
Protocol will apply if there is at least one competent court under Article 10(1).

Option 3
Any other/further conditions?

38. The meeting discussed the various situations of transboundary movements to which the Protocol may possibly apply, i.e. the situation of transboundary movement between a Basel Convention exporting State and a Basel Convention importing State (situation A), the situation where hazardous wastes would be exported from a Basel Convention exporting State to a non-Basel Convention importing State (situation B1), the situation where such wastes would be exported from a non-Basel Convention exporting State to a Basel Convention importing State (situation B2), the situation where only a transit State would be a Basel Convention State and Protocol Party, and, finally, the situation whereby none of the States directly involved in the movements would be a Basel Convention Party but another State which would be a Basel Convention State and a Protocol State would be detrimentally affected by the movement of wastes. While the last two situations were not covered at all by the Basel Convention, the first three were dealt with in Articles 6, 7, 4(5) and 11 of the Convention. One delegation raised the question of the case that a transit country would be Party to the Basel Convention and not to the Protocol in which case Article 7 of the Convention could not be applied.

39. It was decided that delegations needed more time to consider the various options before being able to give their final view. In addition, the meeting also discussed various options with regard to further conditions which might have to be fulfilled to be able to file claims under the Protocol. It was generally recognized that there had to be at least one Protocol State which would appoint a competent court.

40. In accordance with Article 10(1), in order to entertain a claim under the Protocol, it was further generally recognized that a State could only be a Party to the Protocol if it would also be a Party to the Basel Convention. Several delegations stressed that as a further condition for application of the Protocol damage had to be suffered by a Contracting Party to the Protocol. Some delegations further noted that in their view the defendant should have his
habitual residence or principal place of business in a Protocol State. Other delegations thought that the Protocol should not address this issue.

41. One delegation presented a new proposal, to be added to Article 4, which was not considered by the informal plenary meeting due to the lack of time. The proposal is as follows:

"This could be inserted after 4(2) as new 4(2) bis and 4(2) ter. It could take the place of 4(2) and of the third paragraph in 4(3):

4(2) (bis) It was proposed to insert in the Protocol that the right of recourse against other potential defendants under 4(1) must exist in the legal systems of Parties to the Protocol for any defendant liable under 4(1). We suggest language such as the following that would create the right of any liable defendant to seek contribution from any other liable defendant in the legal regimes of the Parties:

Each Contracting Party shall ensure that any person who shall be liable in accordance with Article 4(1) and, as a result, is defending a claim for compensation in its courts, shall have the ability in the same action to seek contribution from any other person who shall be liable thereunder.

4(2) (ter) It is further proposed to include a number of permissive factors that may be considered by the competent courts of the Parties in resolving contribution claims as follows:

a) In resolving claims for contribution among those who are liable pursuant to Article 4(1), above, the competent court of a contracting Party may allocate damages among such liable Parties using such equitable factors as the court determines are appropriate. Such factors may include:

(i) the amount of hazardous wastes and other wastes contributed by each liable Party;
(ii) the degree of toxicity of hazardous wastes and other wastes contributed by each liable Party;
(iii) the degree of fault borne by each liable Party for the inability to determine (i) and (ii) above;
(iv) the mobility of hazardous wastes and other wastes contributed by each liable Party;
(v) the degree of involvement of each liable Party in the generation, transportation, treatment, storage, or disposal of the hazardous wastes and other wastes;
(vi) the degree of care exercised by each liable Party with respect to the hazardous wastes and other wastes taking into account the characteristics of the hazardous wastes and other wastes;
(vii) the cooperation of each liable Party in providing complete and timely information during the allocation process; and
(viii) the degree of fault borne by each liable Party with respect to the incident giving rise to the damage."

42. The plenary meetings which took place on 23 and 24 February 1995 were able to consider the result of the drafting groups on Articles 3, 4, 7 and paragraph 1(d) of Article 10 as well as Articles 11, 12 and 12bis as reflected in document UNEP/CHW.1/WG.1/2/4.
43. The plenary decided to add a definition to hazardous wastes in Article 2 of the draft Protocol as it is now reflected in the annex to this report.

44. Concerning Article 3, several delegations welcomed a new proposal to define the "completion of disposal" as reflected in the proposal of the sub-working group referred to in paragraph 6 of this report. In this regard, a few delegations expressed reservation regarding sub-paragraph (a) which extends the completion of disposal to the disposal of residues because residues are considered to be new wastes. This proposal included the deletion of the reference to aftercare due to the practical difficulty of including aftercare within the scope of the Protocol.

45. Another delegation raised the question of the distinction between temporary and permanent storage, and a third delegation requested that equal consideration to temporary storage should be given to operations D8, D9, D13, D14, D15, R12 and R13 in Annex IV of the Basel Convention because these operations similarly to the temporary storage are considered preconditions for disposal.

46. Other delegations did not object to the inclusion of the definition of the term "completion of disposal" as a new paragraph 1(ter) to this Article, but insisted that the scope of application shall apply to damage due to incidents occurring during the period of aftercare of disposal sites, because the Protocol is not dealing exclusively with the simple transportation of hazardous wastes but with transboundary movements of real sources of pollution which stay in the territory of the State. In this regard, it was suggested to replace the term "aftercare of disposal sites" by "management" which, as defined in the Basel Convention, covers the aftercare of disposal sites. Some delegations expressed their support for the term "management", and one delegation objected to it because Article 12 of the Basel Convention dealing with the liability issue, does not refer to management but only to transboundary movements and disposal. One delegation indicated that any post-disposal liability regime should be fault-based.

47. The plenary agreed to keep the term "including aftercare of disposal sites" between brackets with a footnote that some delegations were of the opinion that the Protocol should apply for a particular period after the completion of disposal in order to include States obligations related to disposal management. It also decided to include a new paragraph 1(ter) defining the "completion of disposal" with the text related to residues between brackets and two footnotes related to the storage as reflected in the annex to this report.

48. As for the point of commencement of the transboundary movement and as a compromise solution to the different alternatives discussed in the drafting group and reflected in paragraph 10 of this report, the Chairman proposed:

"For the purposes of this Protocol, a transboundary movement commences at the point where the wastes leave the territory, including the territorial sea, of the State of export".

This proposal was supported by a number of delegates because it is in their view compatible with the aim of the Convention which is to protect other countries than the country of export.

49. One delegation stated that the issue of whether the Protocol should cover transboundary damage from a transboundary movement of hazardous wastes while the incident takes place in the territory of the exporting State should also be discussed again. In its opinion, such
damage and the damage resulting from an incident which takes place after the hazardous wastes have left the State of export were both stemming from the same course of movement, and there was no justified reason to exclude one or the other. Such an exclusion would make the definition of the "transboundary movement" in the Protocol inconsistent with that in the Basel Convention.

50. The same delegation referred to document UNEP/CHW.1/WG.1/3/Inf.3, which contained an excellent legal study on the issue. The choice of the point of commencement should therefore only be based on this study. This opinion was supported by several other delegations, particularly that what is needed is a definition of the "point of commencement" and not "the transboundary movement" which is already defined in the Basel Convention.

51. It was also noted that the issue of the moment the insurance takes effect, is relevant to the definition of "commencement of transboundary movement", but no clear opinion was given in this effect.

52. In light of the above-mentioned discussion, one delegation referred to alternative (b), contained in information paper UNEP/CHW.1/WG.1/3/Inf.3, which states that transboundary movement commences when "the hazardous wastes have been taken in charge by the person who has been contracted to undertake the transport (the carrier)". This delegation suggested that the commencement of the movement could be the moment when the carrier signed the movement document in accordance with Article 6, paragraph 9, of the Basel Convention.

53. In the opinion of this delegation, this proposal could constitute a compromise and replace alternative I presented by the drafting group.

54. This opinion was supported by several delegations because it is linked to the movement document which should be signed by the exporter in accordance with the Basel Convention.

55. In this regard, the plenary decided to retain only two alternatives in paragraph 1bis related to the point of commencement of transboundary movement. The first alternative is based on the UNEP/CHW.1/WG.1/3/Inf.3 with an amendment to take into consideration the movement document of the Basel Convention and the second amendment is as proposed by the Chairman in paragraph 19 of this report. Such an agreement is in paragraph 1bis of Article 3 as reflected in the annex to this report.

56. As for the exclusion clauses from the scope of the Convention, the plenary decided to keep the cases of exclusion as drafted by the drafting group and reflected in paragraph 29 of this report with minor changes as reflected in the annex to the report.

57. The discussion of Article 4 entitled "Liability" focussed on paragraph 1 dealing with three alternatives related to the liable person.

58. In this regard, one delegation expressed its concern with respect to the approach and direction of the working group. It expressed concern over treatment of defendants from non-Protocol countries. This delegation proposed a modification to Alternative 1 which should read:

"the generator,"
the exporter, the broker, the importer and the disposer, provided that person is habitually resident in, or has its principal place of business in a Party to this Protocol, and any person, who at the time of the incident is in possession and/or control of the hazardous wastes or other wastes,

shall be liable for damage."

59. One delegation urged that the working group gives consideration to the development of fault-based alternatives to, and to fault-based elements which might be compatible with, Article 4, paragraph 1. This was supported by at least two other delegations. One delegation which was in favour of Article 4, paragraph 1, alternative 3 concerning strict, joint and several liability, expressed the opinion that this could be supplemented by a fault-based liability system which could apply also to other persons involved in the transboundary movement of hazardous wastes. These views were supported by several delegations. Another delegation expressed the view that this subject should be considered with the question of a possible ceiling of liability, insurability and State liability. Several delegations opposed this approach, for the following reasons: the aim of the Protocol is to make a special law with objective and not subjective liability, the difficulty to examine fault liability case by case, the precedent in other legal regimes which were only focussing on defining the liable person and exemptions to his liability which constitute the main elements of a strict liability system, as well as the clear understanding of this working group since it was established that the base of its work is a strict liability regime which is confirmed in the objective of the draft Protocol as reflected in its Article 1. These same delegations were in favour of alternative 1.

60. Taking into consideration the divergence of opinions in the working group between supporting either alternative 1 or 3, the Chairman proposed to delete alternative 2. Taking into consideration that some delegations preferred not to delete alternative 2 for the moment, the plenary decided to include their concern in a footnote as reflected in the annex to this report.

61. It was also decided to keep the remaining paragraphs of this Article as presented by the drafting group with minor changes and comments stated in the footnotes as reflected in the annex to this report.

62. During the discussion of sub-paragraph 3(c) referring to wastes covered and not covered by this Protocol, one delegation presented its proposal related to the right of recourse which has been submitted to the informal plenary as reflected in paragraph 41 of this report, but not discussed due to the lack of time. A number of delegations believed that this proposal should be dealt with in relation to Article 10. Several delegations supported the inclusion of such a provision in Article 4 while expressing reservation related to the term "shall have the ability in the same action". In this regard, one delegation proposed the replacement of this term by "is entitled to seek contribution".

63. The meeting decided to include the text of this proposal between brackets with the proposed changes as reflected in the annex of this report.

64. When discussing draft Article 7 as presented by the drafting group, several delegations reserved their position regarding the deletion of a reference to the minimum threshold and its replacement by the concept of "maximum amount", one delegation reserved its position in regard to the fixed minimum until a decision is taken in relation to Article 9. One delegation reserved its position on the principle of compulsory insurance.
65. In order to overcome the problem of "maximum amount", one delegation proposed to add at the end of paragraph 1 the terms "to the extend of ... amount of SDR".

66. Another delegation suggested that the minimum and maximum amounts should be subject to modification by bilateral, multilateral or regional agreements. This proposal was opposed by a delegation which pointed out that its understanding of the terms "Contracting Parties" in paragraph 2 of this Article refers to the Conference of the Parties.

67. Due to the lack of agreement, the meeting decided to reflect the above-mentioned observations by adding some phrases and footnotes as reflected in the annex to this report.

68. The plenary endorsed the position of the drafting group in relation to the addition of a footnote to paragraph 1 of Article 10 reflecting the opinion of one delegation which insisted on the inclusion of an additional sub-paragraph (d) as reflected in the annex of this report.

69. In relation to Article 11, some delegations were in favour of its deletion because it does not make any addition to what is stated in Article 10 that the claims will only be brought before a court of a Party to the Protocol, therefore, the choice of a court would imply the choice of the applicable law. Others were of the opinion that this Article is essential because it prescribes the applicable law, for the competent courts.

70. In regard to the detailed comments on paragraph 1 of this Article, one delegation favoured its deletion, because it limits the choice of the courts of applicable law. Most others were in favour of retaining it because it establishes the primacy of the Protocol and guarantees its application.

71. One delegation was of the opinion that the issue in paragraph 1 related to the scope of the Protocol. This opinion was not shared by other delegations which view it as a separate issue, because the scope of the Protocol is dealing with the geographic scope and not with the applicable law. Two delegations reserved their position on paragraph 1 of this Article.

72. Few delegations were of the opinion that the issue raised in paragraph 2 should be inserted in a separate paragraph, because it relates to more than one Article.

73. In light of the deletion of paragraph 3 of Article 10 related to the international commission, the working group decided to delete paragraph 3 of this Article 11 which deals with the applicable law by the international commission.

74. Article 11 in the annex of this report reflects the new formulation by the working group.

75. In respect to Article 12 on "Mutual Recognition and Enforcement of Judgements", many delegations emphasized the importance of including such an Article. Two delegations, however, expressed their doubts concerning the inclusion of this Article in the Protocol. Several concerns were expressed about its present formulation. In this regard, references were made to Article 23 of the "Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) as well as other Conventions; the need to elaborate some exceptions to this rule, the respect of the national public order, the reviewing of the merits of the judgement by the foreign court as well as that the judgement should be final, etc.
76. One of the two delegations which were not in favour of this Article pointed out that such a provision cannot be in the Protocol but only in bilateral agreements, because it is impossible to know all legal systems of the Parties to the Protocol. This delegation added that such a provision could be accepted on an optional basis. The other delegation pointed out that its country has only agreed bilaterally to the recognition of foreign judgements, although national courts have enforced foreign judgements the absence of any agreement.

77. The meeting decided to keep the present Article between brackets and to add a number of Articles from other Conventions for information, as reflected in the Annex to this report, in order to facilitate the task of the working group at its next session.

78. In relation to Article 12bis on "the relation between the Protocol and the law of the competent court", several delegations expressed their concerns either because in its current drafting it can be interpreted to give freedom to the plaintiff to choose application of national law in preference to the Protocol, or because of the possibility of conflicting limitation periods between the national law and the period provided for in the Protocol as reflected in Article 6. An additional argument was based on the uncertainty which will be caused to the operator of hazardous wastes as a result of the present draft.

79. The relation between this Article and Article 11 was raised.

80. Other delegates pointed out that it is clear for them that this Article gives priority to the Protocol and also stated that there is no conflict between the national law and the Protocol because the Protocol should be part of the national law for its Parties.

81. One delegation proposed to insert "or who are alleged to have caused damage" between the word "damage" and "or" in the second line.

82. It was also added by another delegation that this Article is important because it relates to the general rules of interpretation of the Protocol in face of the lex fori. Furthermore it protects the rights of the victims and renders possible the application of the most favourable law to them.

83. The meeting decided to keep this Article bracketed as reflected in the Annex to this report.

84. Article 10bis was reviewed by the plenary which agreed on the present formulation and footnotes as reflected in the Annex to this report.

85. The representative of International Maritime Organization (IMO) informed the meeting that IMO intended to convene a Diplomatic Conference in early 1996 to adopt a Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS). This Convention would regulate the strict liability of the shipowner and would also establish the limits of this liability, together with the obligation for the shipowner to contract compulsory insurance. A second tier would regulate the contribution of HNS cargo interest to an international scheme or fund which would provide either for compensation when: the shipowner was not liable; or he and his insurers were unable to meet their obligations; or when the damage exceeded the limits of the shipowners liability. He made reference to a note prepared by the IMO Secretariat and distributed at the meeting which contained detailed information on the HNS draft Convention.
86. In particular, he pointed out cases of carriage of wastes in respect of which the HNS Convention would be providing compensation for damage. He also stated that in accordance with Article 10 of the London Convention 1972, liability and compensation for damage caused by dumping operations at sea should be covered under a protocol to the London Convention, 1972.

87. The representative of IMO restated IMO's commitment to cooperate with the Ad-Hoc Group and the Secretariat of the Basel Convention to avoid any overlapping between existing and prospective IMO Treaties and the prospective draft Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and their Disposal.

88. The delegation of France indicated that the countries of the European Community are presently studying the relationships between the draft Protocol and the EEC Treaty, and particularly the implications of the draft Protocol provisions on community law regarding wastes. The delegation of France may wish to come back to this question when the relevant Article of the Protocol, namely Article 13, is discussed.

89. Due to the lack of time, the working group was not in a position to consider the remaining Articles of the draft Protocol as well as items 5 and 6 of the agenda related to the consideration of establishment of a compensation fund and an Emergency Fund.

F. Other Business

90. The representative of Senegal informed the meeting about the organization of the workshop in Dakar from 15 to 17 March 1995 on the implementation of Decision II/12 of the second meeting of the Conference of the Parties to the Basel Convention and distributed the programme of work.

G. Adoption of the report

91. The meeting adopted the report.

H. Closure of the meeting

92. After the usual exchange of courtesies, the Chairman declared the meeting closed at 16h50 on 24 February 1995.
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) "Hazardous wastes and other wastes" means wastes subject to the Convention;\(^\text{15}\)
   (b) "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;\(^\text{16}\)
      (iii) loss of profit from impairment of the environment;\(^\text{17}\)\(^\text{18}\)
      (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;

\(^{15}\) Two delegations reserved their positions with regard to the inclusion of wastes which are defined as hazardous pursuant to Article 1, paragraph 1(b), of the Convention.

\(^{16}\) One delegate reserved his position on this point.

\(^{17}\) This should be limited to direct loss to be defined subsequently.

\(^{18}\) Two delegations reserved their positions on inclusion of impact of the environment and loss of profit not falling under sub-paragraphs i and ii.
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;

(c) "Measures of reinstatement" means any reasonable measures aiming to rehabilitate or restore damaged or destroyed elements of the environment;

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

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

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

(g) "Protocol" means the present Protocol;

(h) "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 resulting from the transboundary movement and disposal of hazardous wastes and other wastes due to incidents occurring during the time from which the transboundary movement has commenced until completion of the disposal of the wastes [including aftercare of disposal sites].

For the purpose of this Protocol, a transboundary movement commences:

Alternative 1
within the State of export at the moment when the carrier has signed the movement document referred to in Article 6, paragraph 9, of the Convention, or has otherwise contracted to take charge of the wastes;

Alternative 2
at the point where the wastes leave the territory, including the territorial sea, of the State of export.

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19 Some delegations were of the opinion that the Protocol should apply for a particular period after the completion of wastes in order to include States obligations related to disposal management.

20 One delegation reserved its position with regard to both alternatives 1 and 2 and expressed preference for any of the alternative wordings contained in document UNEP/CHW.1/WG.1/3/Li4/F.3.

21 One delegation reserved its position.

22 One delegation would define territory to include EEZ.
UNEPC/CHW.1/WG.1/3/2
page 22

1. (a) For the purpose of this Protocol, "completion of disposal" means the notification of completion of disposal provided by the disposer pursuant to Article 6, paragraph 9, of the Convention following actual completion, except that:

[(a) in the case of residues resulting from a recovery operation, completion of disposal extends to the disposal of the residues;] 23

(b) in the case of temporary storage, completion of disposal means the completion of the disposal operation taking place after the storage; and

(c) in the case of permanent storage, landfill or geological disposal, completion of disposal means the completion of the process of loading the wastes into the facility. 25

2. Notwithstanding paragraph 1, this Protocol shall not apply:

(a) to damage suffered in an area under the national jurisdiction of a State which is not a Party to this Protocol, with the exception of transit States not Party to this Protocol;

(b) to damage suffered in the State of export caused by an incident which takes place in the area under the national jurisdiction of that State of export;

(c) to damage that has arisen from a transboundary movement of hazardous wastes and other wastes that has commenced before the entry into force of this Protocol for the Party concerned. 26

ARTICLE 4
 Liability

1. Except as provided for in paragraph 4 of this Article 27,

Alternative 1:

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23 Two delegations were of the opinion that paragraph 1ter should only be included if the reference to aftercare of disposal site is deleted.

24 One delegation requested equal consideration to be given to D8, D9, D13, D14, D15, R12 and R13 in the annex of the Basel Convention.

25 One delegation requested that the distinction between temporary and permanent storage should be considered.

26 This paragraph needs further discussion in relation to its drafting.

27 One delegation requested the retention of the following alternative:

- 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.
the generator\textsuperscript{28},
the exporter\textsuperscript{29}, and
any person, including the disposer\textsuperscript{30}, who at the time of the incident is in
[possession and/or] control\textsuperscript{31} of the hazardous wastes or other wastes
shall be liable for damage.

\textbf{Alternative 2:}
any person who at the time of the incident has operational control of the wastes,
shall be liable for damage

1\textsuperscript{(a)} Nothing in this Protocol shall prejudice any right of recourse to which the person liable
might be entitled.

1\textsuperscript{(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, provided that this person acted reasonably and in accordance with any national law
regarding preventive measures, 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.\textsuperscript{32}

2\textsuperscript{(a)} [Each Contracting Party shall ensure that any person who shall be liable in accordance
with Article 4, paragraph 1, and is defending a claim for compensation in its courts, is entitled
to seek contribution from any other person who shall be liable thereunder.]

2\textsuperscript{(b)} [In resolving claims for contribution among those who are liable pursuant to Article
4, paragraph 1, above, the competent court of a Contracting Party may allocate damages
among such liable Parties using such equitable factors as the court determines are appropriate.
Such factors may include:

(i) the amount of hazardous wastes and other wastes contributed by each liable person;
(ii) the degree of hazards of hazardous wastes and other wastes contributed by each liable
person;
(iii) the degree of fault borne by each liable person for the inability to determine (i) and (ii)
above;

\textsuperscript{28} 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.

\textsuperscript{29} 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.

\textsuperscript{30} As defined in Article 2(19) of the Convention.

\textsuperscript{31} Terminology used in the definition of the generator, Article 2(18) of the Convention.

\textsuperscript{32} One delegate called attention to the fact that, in case of alternative 3, the provisions 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.
(iv) the mobility of hazardous wastes and other wastes contributed by each person

(v) the degree and nature of involvement of each liable person in the generation, transportation, treatment, storage, or disposal of the hazardous wastes and other wastes;

(vi) the degree of care exercised by each liable person with respect to the hazardous wastes and other wastes taking into account the characteristics of the hazardous wastes and other wastes;

(vii) the cooperation of each liable person in providing complete and timely information during the allocation process; and

(viii) the relative degree of fault borne by each liable person with respect to the incident giving rise to the damage.

3. (a) 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.\(^{33}\)

(b) 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 damage occurring.

(c) 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 persons 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.]\(^{34}\)

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

a) a result of an act of armed conflict, hostilities, civil war or insurrection, which was not reasonably foreseeable.\(^{35}\)

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.\(^{36}\)

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\(^{33}\) Two delegations supported a proposal to make the burden of proof and defendant more explicit.

\(^{34}\) Some delegations wished liability to be placed upon the person who mixed the wastes. Other delegations wished this sub-paragraph to be deleted. One delegation wished all of paragraph 3 to be deleted. And one delegation proposed the following alternative to sub-paragraph c which should read: "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, then all wastes and resultant damage shall be considered to be covered by the Protocol."

\(^{35}\) Two delegations considered that it was unclear whether "foreseeable" referred to the act or the result.

\(^{36}\) Two delegations wished to delete the word "all".
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.\(^{32}\)

d) a result of compliance with a compulsory measure of a public authority\(^{33} \)\(^{35}\);

[(e) a result of a negligent or other wrongful act of any government or other authority].\(^{40}\)

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.

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 exonerations 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\(^{41}\)

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)\(^{42} \)\(^{43}\),

(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

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\(^{32}\) Two delegations wished to delete the word "all".

\(^{33}\) The deletion of this sub-paragraph was suggested by some delegations.

\(^{35}\) This provision should be reviewed in light of the consideration of Article 9 of this Protocol on State Liability.

\(^{40}\) This provision should be reviewed in light of the consideration of Article 9 of this Protocol on State Liability.

\(^{41}\) This Article has to be further developed with regard to remedies not included in compensation.

\(^{42}\) The mechanisms for assessing compensation under Article 2(b) will need to be discussed in the context of Article 10(3).

\(^{43}\) Some delegations expressed concern about the feasibility and/or the desirability of compensation of damage to the environment per se.
(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;]

(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;[46]

(d) [national law] [shall][may] determine who is entitled to take the measures of reinstatement and receive the compensation in (a), (b) and (c).[47]

ARTICLE 5

Financial Limit of Liability

1. There shall not be a fixed financial limit of liability.[48][49]

ARTICLE 6

Time Limit of Liability

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within five years[48] from the date at which the claimant knew or ought reasonably to have known of the damage, its sources and the person[s] responsible[49] therefore.

[46] Some delegates expressed the view that further consideration should be given to this paragraph.

[47] The discussion and placement of this provision is subject to a discussion on a possible article on the right to claim.

[48] Some delegates reserved their position in so far as strict liability is concerned.

[49] 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.

[48] Some delegates proposed that the period should be three years.

[49] 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.
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 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. Contracting Parties which are State of export, State of transit or State of import shall make sure, with respect to the persons under their respective jurisdictions, that liability under this Protocol shall be covered by insurance, bonds or other financial guarantees valid throughout the period of the time limit of liability.

2. The [minimum] [maximum] amount of the insurance, bonds or other financial guarantees mentioned in paragraph 1 is ... [SDR] [Units of account] and shall be reviewed by the Contracting Parties on a regular basis [taking into account inter alia the nature, quantity and hazards of the waste, and the risks of potential damage to the environment].

[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.

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50 To be considered in connection with the definition of incident.

51 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.

52 Several delegates reserved their position on this sub-paragraph.

53 The final version of this article is pending the outcome of decisions on the nature and scope of the final liability regime, including time and financial limits, as well as taking into account representations by the financial and insurance industries.

54 One delegation suggested that these minimum and maximum figures should be subject to modification in particular cases by agreement between all interested States.

55 Should be established in consultation with the insurance industries.

56 One delegation considers “Contracting Parties” as a diplomatic Conference between all Contracting Parties and not any bilateral or multilateral meetings or agreements between certain Contracting Parties.

57 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.
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.]

**PROCEDURES**

**ARTICLE 10**
Competent Courts

1. Claims for compensation under this Protocol may be brought in the courts of a Contracting Party only where either 58:

   (a) the damage was suffered; or

   (b) the incident occurred; or

   (c) the defendant has his habitual residence, 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 59.

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58 One delegation insisted on the inclusion of an additional sub-paragraph (d) which would read "the waste was generated".

59 Three delegation reserved their position.
ARTICLE 10bis
Expertise

The Secretariat shall establish and maintain a list of experts in the field of assessment and remediation of environmental damage that may be drawn upon by Parties whose courts require assistance in the assessment of damage to the environment, the costs of preventive measures and the costs of measures of reinstatement.\textsuperscript{60, 61}

[ARTICLE 10ter
Lis Pendens

1. 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 seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.]

[ARTICLE 10quater
Related Actions

1. Where related actions are brought in the courts of different Parties, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

2. A court other than the court first seised may also, on the application of one of the Parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

3. For the purpose of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.]

ARTICLE 11
Applicable Law

1. The competent court shall apply the provisions of the Protocol in regard to claims before it.\textsuperscript{62} All matters of substance or procedure regarding such claims 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.\textsuperscript{63, 64}

\textsuperscript{60} One delegation reserves its position for narrowing the scope for providing expertise.

\textsuperscript{61} Two delegations reserved their positions on the question of funding the Secretariat’s role under this provision.

\textsuperscript{62} One delegation reserved its position on the terminology of “the provisions of the Protocol”.

\textsuperscript{63} Pending discussion of Article 3.

\textsuperscript{64} Two delegations reserved their position on this paragraph.
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\textsuperscript{65}.

\textbf{ARTICLE 12}

\textbf{Mutual Recognition and Enforcement of Judgments}\textsuperscript{66, 67}

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.]

The following Articles were added at the request of the meeting for information purposes:

- Article 23 of Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment;

1. Any decision given by a court with jurisdiction in accordance with Article 19 above where it is no longer subject to ordinary forms of review, shall be recognized in any Party, unless:

(a) such recognition is contrary to public policy in the Party in which recognition is sought;

(b) it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

(c) the decision is irreconcilable with the decision given in a dispute between the same parties in the Party in which recognition is sought; or

(d) the decision is irreconcilable with an earlier decision given in another State involving the same cause of action an between the same parties, provided that this latter decision fulfills the conditions necessary for its recognition in the Party addressed.

2. A decision recognized under paragraph 1 above which is enforceable in the Party of origin shall be enforceable in each Party as soon as the formalities required by that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.”

\textsuperscript{65} One delegation suggested placing this paragraph into some other Article of the Protocol, since this paragraph does not deal with the choice of applicable law.

\textsuperscript{66} Possible grounds for exceptions to the obligation of mutual recognition and enforcement of judgments should be considered.

\textsuperscript{67} 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.
- Article 10 of the International Convention on Civil Liability for Oil Pollution Damage, 1969;

"1. Any judgement given by a Court with jurisdiction in accordance with Article 19 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except,

(a) where the judgement was obtained by fraud; or
(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

- Article 20 of the 1989 ECE Convention on the Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels;

"1. Any judgement given by a court with jurisdiction in accordance with article 19 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except;

(a) where the judgement was obtained by fraud; or
(b) where the defendant was not given reasonable notice and a fair opportunity to present his case; or
(c) where the judgement is irreconcilable with an earlier judgement given in the State where the recognition is sought, or given in another State Party with jurisdiction in accordance with article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties.

2. A judgement recognized under paragraph 1 of this article shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

- Article 12 of the Vienna Convention on Civil Liability for Nuclear Damage;

"1. A final judgement entered by court having jurisdiction under Article XI shall be recognized within the territory of any other Contracting Party except -

(a) where the judgement was obtained by fraud;
(b) where the party against whom the judgement was pronounced was not given fair opportunity to present his case;
(c) where the judgement is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

2. A final judgement which is recognized shall, upon being presented for enforcement in accordance with the formalities required by the law of
Contracting Party, where enforcement is sought, be enforceable as if it were a judgement of a court of that Contracting Party.

3. The merits of a claim on which the judgement has been given shall not be subject to further proceedings."


"1. Any judgement given by a court with jurisdiction in accordance with article 30 where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

(a) where the judgement was obtained by fraud; or
(b) where the defendant was not given reasonable notice and fair opportunity to present his case.

2. A judgement recognized under paragraph 1 which is enforceable in the State of origin shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

3. Subject to any decision concerning the distribution referred to in article 12, paragraph 6, any judgement given against the Scheme by a court having jurisdiction in accordance with article 31, paragraphs 1 and 3 shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each State Party."

[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.]64

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].

64 One delegation noted that this provision raised important issues of balance between the interests of claimants and traders.
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.

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.
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 18bis\textsuperscript{70}
Relationship of this Protocol with the Basel Convention

Except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol.

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, \textit{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
Depository

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]