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

Fourth Session
Geneva, 24 - 28 June 1996

REPORT

I. INTRODUCTION

1. The fourth 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 24 to 28 June 1996 in accordance with Decision III/2 of the third meeting of the Conference of the Parties to the Basel Convention.

II. ORGANIZATIONAL MATTERS

A. Opening of the Session

2. The fourth session was opened by the Executive Secretary of the Secretariat of the Basel Convention, Dr. Iwona Rummel-Bulaska, who welcomed the delegates and referred to Decision III/2 of the third meeting of the Conference of the Parties and to the request addressed by the 3rd COP of the Parties to the Working Group to finalize its work on the Protocol to allow its adoption by the 4th COP in September / October 1997.

B. Attendance

3. The delegates of the following Parties to the Basel Convention participated in the session: Antigua and Barbuda, Argentina, Australia, Austria, Brazil, Canada, Chile, China, Commission of the European Communities, Croatia, Cuba, Egypt, El Salvador, Estonia, Finland, France, Germany, Honduras, Iran (Islamic Rep. of), Italy, Japan, Jordan, Korea (Rep. of), Malaysia, Micronesia (Fed. States of), Morocco, Netherlands, New Zealand, Nigeria, Norway, Panama, Peru, Philippines, Poland, Qatar,
4. The following countries not Party to the Basel Convention sent observers to the session: Colombia, Thailand and the United States of America.

5. The following intergovernmental organization participated in the meeting as an observer: International Maritime Organization.

6. Greenpeace International, Eurometrec, the European Chemical Industry Council (CEFIC), Mining Association of Canada, the International Chamber of Commerce (ICC) and the International Group of P&I Clubs also attended the meeting in their capacity as observers.

C. Election of officers

7. Some delegates proposed the election of the new Bureau of the fourth session according to the Rules of Procedure. The meeting agreed to postpone the subject of election to the second day of the meeting in light of the fact that, due to other commitments, the Chairman of the previous sessions, Mr. J.G. Lammers from the Netherlands was not able to attend the first day of the meeting. At the invitation of the Executive Secretary, Vice-Chairman, Mr. Silva Soares from Brazil took the chair of the first day of the meeting.

8. After extensive consultations on the second day of its deliberations, the meeting elected the following Bureau:

Chairperson: Latin America & Caribbean - H.E. Professor Jorge Berguño, Chile

Vice-chairpersons: Africa - Mr. Jack Christofides, South Africa

Asia and Pacific - Mr. Vong Poh Fah, Malaysia

West Europe and Others - Ms. Katherine Helen Cook, United Kingdom

Rapporteur: Central and Eastern Europe - Ms Katarzyna Mochowska, Poland

9. The acting coordinator for the Western Europe and Others (WEO) expressed those countries’ distress that more than a day had been wasted on procedural matters. It was important that the Rules of Procedure should be followed rigorously. The WEO countries suggested that the composition of the bureaux of the subsidiary working groups of the Basel Convention and the associated procedural issues should be discussed by the Extended Bureau at its next meeting.

10. The Asian group coordinator expressed this group’s position in favour of full application of Rule 21 of the Rules of Procedure, which states that a Bureau shall be elected with due regard to the principle of equitable geographical representation, and that the offices of the President and Rapporteur shall normally be subject to rotation among the five UN regional groups.

D. Adoption of the Agenda
11. The meeting adopted the following agenda, as contained in document UNEP/CHW.1/WG.1/4/1:

(I) Opening of the meeting

(ii) Organization of the session

(iii) Adoption of the Agenda

(iv) Finalization of the consideration of Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal annexed to UNEP/CHW.1/WG.1/3.2.

(v) Consideration of the establishment of a compensation fund for damage resulting from transboundary movements of hazardous wastes and their disposal.

(vi) Other business

(vii) Closure of the meeting

E. Organization of work

12. A number of delegations insisted that this session of the Working Group should be held in English, French and Spanish as was the case in the past. The statements of two delegates made in relation to this point are attached to this report as its Annex II. One delegation proposed that future sessions should be held in Spanish, Arabic and French. As a result of the above statements another delegation requested interpretation into Chinese, a further into Russian and Arabic.

13. The Executive Secretary informed the meeting that, as requested by delegates, the subject of the use of languages at the meeting was being followed up by the Secretariat who has been in contact with the United Nations Conference Services regarding the possibilities and availability of providing interpreters for this meeting.

14. The delegations requested that in the letter of invitation for the meetings, the languages to be used at the meetings should be indicated. Several delegations requested the report of the meeting of the Ad Hoc Working Group of Legal and Technical Experts should be translated into other official UN languages.

F. Consideration of draft Articles
   (Agenda items (iv) and (v))

15. The meeting agreed to discuss in the plenary meeting of the first day draft Article 13 entitled "Relationship with other Bilateral, Multilateral and Regional Agreements", Article 8 "International Fund" and Article 9 "State liability" which were not discussed in the last session.

16. In relation to Article 13 on the relationship with other agreements, the representative of the International Maritime Organization (IMO) referred to the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention). He stated that the Hazardous and Noxious Substances (HNS) is a maritime law
treaty which regulates a specific and distinctive scope. In particular he referred to the definition of HNS, damage covered, attachment of liability and tiers of compensation. The specific subject matter regulated by the HNS Convention is the liability of the shipowner and the cargo interests in connection with the carriage by sea of HNS. Within this scope the application of other treaties should be excluded. This exclusion means that in connection with the carriage by sea of HNS no other treaty should attach additional liability to those made liable under the HNS Convention, namely, the shipowner and those cargo interests contributing to the HNS Fund. The exclusive operation of the HNS treaty in the field of liability in connection with the carriage of HNS by sea is explained in accordance with basic principles of International Law. Maritime Law is recognized as a distinctive corpus juris in respect of which unification of international rules is a subject within the global mandate of IMO.

16. Several delegations supported Alternative 3 of Article 13 of the draft Protocol, to avoid overlaps with provisions on liability and compensation contained in other international agreements. In this regard some delegations proposed to add an explicit reference to specific agreements or arrangements, such as the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS-Convention) and the "Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment" (Lugano Convention), into the wording of draft Article 13. One delegation proposed to add in Alternative 3 of draft Article 13, in the third line, between the words "damage" and "is" the following formula: "(as that term is defined in Article 2 (2) (b) of this Protocol) is specifically covered, and".

17. Several other delegations supported Alternative 2 of this draft provision, because the application of the most favorable legal instruments to the claimant reflected the concepts of "equity" and "legal certainty". In addition, the text of Alternative 2 would make a specific reference to the interests of developing countries which should be given special consideration due to their limited capabilities in case of accidents. One delegation proposed to replace the expression "the claimant" with the wording, "the person who suffered the damage". Another delegation preferred to keep the term "claimant", but to define it in Article 2.

18. The meeting decided to delete Alternatives 1 and 4 of draft Article 13 and to keep Alternatives 2 and 3 between square brackets.

19. During the considerations of draft Article 8 related to the International Fund several delegations pointed out that a substantive consideration of this Article would need more detailed information related to cases of accidents and how States are dealing with such cases. One delegation requested the Secretariat to provide the next session with the updated study as required from the Secretariat by the Consultative Sub-group of Legal and Technical Experts, and to consult the insurance industry about its experiences with accidents involving transboundary movements of hazardous wastes and their disposal. Another delegation expressed reservations about a possible International Fund and pointed out that experience with a liability and compensation regime should be gained before its consideration to see what functions of the Fund would be necessary.

20. A number of delegates supported draft Article 8 because one merit of an International Fund would be to provide funds and necessary immediate assistance to developing countries. One delegation pointed out that it supported the creation of an International Fund that should have two functions, but not the establishment of two separate Funds.
21. In this regard, it should be noted that one delegation submitted the following proposal for Article 8 to the meeting: "The Parties to this Protocol shall establish an international Liability and Compensation Fund with two components: an Emergency Fund to support immediate containment and remedial response measures; and a Contingency for Civil Liability Fund to cover compensation for civil liability damages that liable private parties are incapable or unable to cover." This proposal was supported by one delegation.

22. Since no consensus on Article 8 could be reached, the plenary meeting decided to keep it in its original version in square brackets. A footnote was added to this provision, stating that two delegations expressed their opinion that a possible fund should have two components.

23. In relation to Article 9 of the Protocol, several delegations opposed this draft provision, because the effects of a liability of states would be similar to those created by an insurer and would be counterproductive to the Polluter Pays Principle. Other delegations stressed that States should only be responsible if they were directly involved in the damage and at fault. It was pointed out that the rules of general international law would in any case foresee a responsibility under these conditions. Only two delegations supported the original version of draft Article 9.

24. One delegation proposed to change the language of Article 9 to the following wording: "This protocol shall not affect the rights and obligations of Contracting Parties under the rules of general international law with respect to State responsibility and liability for damage." Several delegations supported this proposal. One delegation pointed out that the scope of such a provision would be already covered by Article 12bis of the draft Protocol. Some delegations wanted to see the words "and liability" deleted from the proposal.

25. The meeting decided to replace the original wording of Article 9 with the entire text of the new proposal and to put the term "and liability" between square brackets. It was also decided to keep the original wording in a footnote to Article 9, with a remark added that this version was supported by only two delegations.

26. It should be noted that one delegation proposed to add the following paragraph to the new wording of Article 9: "The Protocol, however, does obligate the Contracting Parties to contribute to the Contingency for Civil Liability Fund of the International Liability and Compensation Fund as provided for in Article 8". Some delegations expressed a reservation to Article 8 (2) and emphasised the importance of considering together Articles 7, 8 and 9.

27. Several delegations presented a number of proposals in relation to Articles 2, 3, 4, 5, 7 and 12.

28. The meeting then decided to hold a general discussion on Article 2 "Definitions", Article 3 "Scope of Application" and Article 4 "Liability" and the related proposals on these articles.

29. The Canadian delegation presented proposals for additions or amendments to Articles 2, 3, 4, 5, 7 and 12 of the draft Protocol. Canada introduced a new article stating that Contracting Parties shall adopt the legislative, regulatory and administrative measures necessary to implement the Protocol, as well as another new article requiring the taking of response measures by the person in operational control of the wastes when an incident occurs. For Article 2, Canada proposed three additions, including a definition of "reasonable", the addition of the words "impairment of health" in 2.2(b)(i) and the addition of a phrase limiting the application of the Protocol to damage caused by
the hazardous properties of the wastes.

30. In relation to Article 2 several delegations supported the proposal to add the term "impairment of health" to the definition of damage in paragraph 2 (b) (i), to increase legal certainty for the victim. Some delegations opposed this proposal, because the term "impairment of health" would already be covered by the formula "loss of life or personal injury". The proposed term could also be interpreted as covering not only human health, but also health of plants or animals which was not the intention of the delegate who presented the proposal.

31. In relation to the proposal to define the word "reasonable", as used in context with "measures of reinstatement" and "preventive measures" within the draft protocol, in Article 2, some delegations expressed doubts about the appropriateness to define "reasonable" only in terms of risk, technological feasibility and costs as proposed.

32. In relation to the wording "loss of profit from impairment of the environment" in the definition of damage in Article 2 paragraph 2 (b), one delegation questioned whether this term included loss because of unemployment. Another delegation expressed its view that this term would be very broad and could include e.g. the loss of wages. Some delegations expressed a wish to narrow down the scope of this definition.

33. One delegation proposed to use the same formulation as contained in Article 1 of the HNS Convention 1996 as follows: "Loss or damage by contamination of the environment caused by the hazardous or noxious substances, provided that compensation for the impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken". Several delegations supported this position.

34. Some delegations suggested exploring the link between loss of profit and impairment of the environment. This should be linked to the direct loss. Another delegation stressed that the loss of profit would already be covered by the concept of loss of use of the environment and proposed to reword this passage in the draft protocol. Several delegations expressed their view that the problem of compensation for irreparable damage to the environment would require further investigation under Article 4 ter (2), particularly on how it could be measured.

35. The representative of a Non-governmental Organization suggested to only include the release of hazardous waste into the environment and the actual damage caused by the release, and to delete the reference to "imminent threat" in the definition of "incident" in Art. 2 para. 2 subpara.(h). Several delegations opposed this position.

36. Some delegations suggested replacing the term "preventive measures" with "response measures". Another delegate clarified that in his countries opinion the definition of preventive measures covered response measures and in this regard a proposal to include response measures in a separate article would be submitted to this meeting. One delegation stated that it would agree to replace "preventive measures" by "response measures" throughout the Protocol.

37. Several delegations proposed to add an explicit provision to the draft protocol, stating that only Parties to the Convention should be able to adhere to the Protocol.

38. For Article 3, Canada proposed a new paragraph 1 which would state that the Protocol covered
damage in the territory of all Contracting Parties, including the territorial sea, as well as preventive and response measures. Canada emphasised that, in the interests of treating all victims equally, it believed that the Protocol should cover all damage caused by an incident and all victims, without discrimination or distinction between Contracting Parties, including the state of export. In the view of Canada, in order to ensure that all victims are treated equally and fairly, liability under the Protocol must commence at the point where the carrier has taken charge of the wastes. Thus, the Protocol would provide compensation for transboundary damage caused by incidents within the state of export. If the protocol did not cover such incidents, victims outside the state of export might not have a remedy. Similarly, the Protocol should cover damage within the state of export, so that all victims would be treated equally and would have access to remedies under the Protocol. As to the termination of liability, Canada proposed to exclude liability for aftercare of disposal sites after they are closed and for residues generated by recycling, as the insurance covering the transboundary movement and disposal would not extend so far and as the situation after the completion of disposal of the wastes could be adequately and more appropriately covered by national law.

39. Germany and Austria presented proposals related to Articles 3 and 4. In relation to Article 3, it was proposed to add a paragraph 3 to Article 3 of the draft Protocol, providing that the Protocol should apply only two wastes as according to Article 1, paragraph 1 (b) of the Basel Convention if they are considered or defined as hazardous by the domestic legislation of the State in which the damage has occurred and by the domestic legislation of the State of which the defendant is a national or in which he has his habitual residence.

40. In his presentation of the proposal, the delegate of Germany referred to Article 1 paragraph 1 letter (b) of the Basel Convention which allows wastes to be defined as "hazardous" by domestic legislation. Pursuant to Article 3 paragraphs 1 and 2 of the Basel Convention, the additional definition shall be communicated to all other Parties through SBC. It could, however, not be ruled out that the various domestic legal systems would reflect different standards and opinions with respect to the hazards posed by given types of waste.

41. With respect to damage resulting from the transboundary movement of wastes defined as hazardous by domestic legislation, as addressed above, any international regime for liability should, in German and Austrian opinion, only cover those wastes which are:

- firstly defined as hazardous by the domestic legislation of the State in which the damage-causing incident has occurred, because it would hardly be comprehensible if an international liability system with high liability standards would apply to damage from an incident involving wastes which are not defined as hazardous by the domestic legislation of the State in which the incident has occurred;

- secondly, not least because of the principle of reciprocity, also the State of which the defendant is a national should classify the waste as hazardous according to its domestic legislation or should at least recognize the classification of the other State.

42. During the considerations in relation to Article 3 "Scope of Application" the proposal of Austria and Germany faced opposition by several delegations who referred to Article 3 of the Convention and added that the German/Austrian proposal would limit the application of this Article which only requests that additional definitions of hazardous wastes be communicated to other Parties through the Secretariat. Some delegations pointed out that, following this proposal, damages
occurring in the importing country or any other country that do not possess national legislation on hazardous wastes or that have not recognized the waste classification of the exporter state would not be covered and the scope of application of the Protocol (Article 3) narrowed.

43. The Canadian proposal that the Protocol should apply to any damage (including preventive/response measures) in the territory of a Contracting Party, including the territorial sea, was supported by several delegations. One delegation proposed to replace the term "territorial sea" by "area under national jurisdiction".

44. The Canadian proposal that, for the purpose of the Protocol, a transboundary movement should commence within the State of export at the moment when the carrier has taken charge of the wastes, was supported by several delegations. They stressed that the Protocol should apply to all victims of an incident, independently of the fact whether it occurred before or after a national boundary. Some delegations opposed this opinion and put forward the view that the transboundary movement should start when the shipment has moved out of the area under national jurisdiction of the exporting State. In their opinion, this solution would be in accordance with the definition of Article 2 para. 3 of the Convention.

45. Some delegations supported one country's compromise proposal to accept the Canadian proposal with the addition of the provision of Article 3 para. 2 (b) of the original draft, excluding damage suffered in the State of export caused by an incident that has taken place in the State of export. Several delegations opposed this view, pointing out that it would be in conflict with the concepts of "justice, equity and uniformity" if some of the victims of one incident would receive compensation according to the Protocol and others not, depending on what side of a border they lived. Some delegations argued that the Protocol, in accordance with Article 1, should only apply to the transboundary movements of hazardous wastes and the incidents occurring prior to leaving the land territory or area under the national jurisdiction of a State where matters which should be dealt with under domestic law and not the Protocol.

46. The proposal of Canada that the term "completion of disposal" should only mean the notification of completion of disposal by the disposer and not the post-disposal period before closure of the facility was supported by some delegations, because a clearly limited period of liability would be easier to insure. Canada also proposed removing the reference to aftercare in Article 3 para. 1.

47. Other delegations supported the inclusion of the aftercare of the disposal site into the scope of the Protocol, because this would guarantee the environmental sound management of hazardous wastes from the "cradle to the grave" and consequently be in accordance with the provisions of the Basel Convention which not only covers the transboundary movement of hazardous wastes but also the management of hazardous wastes until the time after disposal, including "aftercare".

48. One delegation of a Non-governmental Organisation proposed that operations D8, D9, D13, D14, D15, R12 and R13, contained in Annex IV of the Convention, should be included with operations of "temporary storage" in Article 3 para 1 ter (b) of the Protocol, because they were also cases of pre-disposal treatment. One delegation proposed a time-limit for liability, which should end either upon notification or 90 days after the hazardous wastes had been accepted by the importing Party.

49. The delegate of Canada presented a new joint proposal of Canada, Germany and Austria on Article 3, taking into consideration the debate on this provision and trying to combine the different
positions. Some delegations supported this proposal.

50. Several other delegations criticized that this proposal would only cover damage suffered in the territory of a Contracting Party, including the territorial sea, and would not apply to damages suffered in the Exclusive Economic Zone of a Party. The question of the relationship to the HNS Convention was raised by several delegations, who pointed out that this Convention would on the one hand also apply to the territorial sea, on the other hand it might not cover the same substances as the Basel Convention. The proposal would therefore be inconsistent and not avoid overlaps between the Protocol and the HNS-Convention. The representative of IMO noted that the HNS Convention covered damage by contamination of the environment not only in the territorial sea but also in the Exclusive Economic Zone. He reminded however that this territorial scope would in the case of the HNS Convention be considered only in connection with substances transported on board of a ship.

51. Several delegations also opposed the proposal, because it would not provide for liability during aftercare of the disposal site. They pointed out that the obligations for environmentally sound management and liability should extend until the environmental dangers of the waste would have terminated. Some delegations proposed the inclusion of a time limit for liability.

52. Several delegations expressed their views that the discussion should remain based on Article 3 of the original draft report.

53. In relation to the paragraphs of the new combined Canadian/German/Austrian proposal which were not changed from the previous proposal, several delegates repeated the same arguments as already reflected in this report.

54. Taking into consideration the debate, Canada presented a redraft of this proposal, providing that the Protocol should apply to damage suffered in the area under the national jurisdiction of a Contracting Party. The relation between the Protocol and the HNS-Convention should be entirely be clarified within Article 13 of the Protocol. One delegation reiterated that in its opinion the Protocol should only apply to transboundary movements between member States of the Protocol.

55. With respect to Article 4, Canada proposed that the person in operational control of the waste at the time of the incident should be strictly liable for any damage it caused. The victim should be able to sue this person for compensation without proving fault. Making liable the person in operational control would be an application of the polluter pays principle, as it was that person who was in the best position to prevent and minimise the damage. Furthermore, making the person in operational control liable would facilitate recovery for the victim, as in most cases this person would be easily identifiable. In order to provide the victim with a greater range of options, in the Canadian proposal he would also be entitled to sue any other person involved in the transboundary movement on the basis of fault. Fairness to the person liable who might not be at fault would be ensured by providing the person liable with a right of recourse in the Protocol against any other person involved in the transboundary movement and disposal of the wastes who may have caused the damage with intent or by negligence. In order to avoid embroiling the victim in complicated, lengthy and costly litigation, this right of recourse would have to be exercised in a separate legal action. In Canada's opinion the proposal was intended to facilitate the recovery of compensation by the victim, at the same time as ensuring fairness to the person liable.

56. Germany and Austria proposed to channel the strict liability to the person carrier or disposer as defined in the Convention, who at the time of the incident was in operational control of the movement
of hazardous wastes. In presenting this proposal, the representative of Germany summarized the different opinions on this issue and explained that the aim of this proposal is to envisage that strict liability be confined to only a few actors who have operational control over the wastes and are therefore in the position to directly prevent damage caused by the waste. Only this case would justify to impose strict liability. This type of liability would be supplemented by fault-based liability on the part of additional persons potentially liable as defined in the Convention.

57. Australia and Singapore presented a proposal to channel strict liability on the person who at the time of the incident has legal or beneficial ownership of the wastes. In its presentations the Australian delegate stated that in assigning liability the "polluter pays" principle should be applied. The proper application of this principle would attach primary liability to the person who owns the waste at the time of the incident. The point at which ownership of the waste changes hands, should be the point at which the assignment of liability should also change. The delegate considered that with ownership of the waste should flow the risk of liability arising from the hazardous nature of the waste. This approach would provide an incentive for the owner of the waste to ensure that the waste is dealt with by properly qualified individuals.

58. This approach would in the delegate's opinion provide legal certainty. Contractual arrangements surrounding the transboundary movement should identify the person who owns the waste at each stage of the transboundary movement. Furthermore the person who owns the waste would change less frequently than the person in operational control.

59. The Australian delegate added that if strict liability is attached to the person in operational control, there would be a great number of individuals who would be required to obtain insurance. Whereas under the approach of attaching primary liability to the owner of the waste at the time of the incident would enable channelling of insurance capacity.

60. In addition, attaching liability to the person in operational control could lead to inequitable situations where innocent parties could be held primarily liable, stated the Australian delegate.

61. The delegation of the United States of America proposed a variant of Article 4 (1), Alternative 1, which states that a wide range of actors (generator, exporter, broker, importer and disposer) should be liable, as well as any person who, at the time of the incident, is in possession and/or control of the hazardous and other wastes, shall be liable.

62. The delegate stated in his presentation that the aim of this proposal was to apply the regime to the full range of potentially liable actors (not only the generator and exporter as is the case with Alternative 1). The delegate further stated that it might be appropriate to deal with the need for the defendants to have “significant contacts” with the forum when forum courts exercise jurisdiction over such defendants when there is a full discussion of Article 10 (“Competent Courts”).

63. This proposal was presented together with a second proposal to limit the scope of the Protocol by adding a new Article 3(2)(d) which seeks to make clear that the proposed Protocol is to be an agreement among Parties to the Protocol and should not cover damages arising from the transboundary movement of hazardous and other wastes unless such wastes are exported from a Protocol Party and imported into or intended to be imported into a Protocol Party.

64. In considering Article 4, several delegations supported the proposals of Austria, Canada and
Germany that strict liability should be channelled on the person (or just carrier and disposer) having operational control of the wastes in the moment of the incident, because he would be the only one capable to prevent an accident and he would be easily identifiable. This strict liability should be combined with a fault based liability that would target any person (or just persons defined in the Convention) acting unlawfully and at fault.

65. Other delegations supported the Australian/Singapore proposal to designate the "owner" of the wastes as the liable person, because this would be in accordance with the polluter-pays-principle and the owner would be easily identifiable by the movement, shipping and other contractual documents. Several delegations criticized this saying that it would be very difficult to establish the owner at the moment when the incident happened. One delegation suggested the concept of registered ownership of wastes. Another delegation proposed that Article 4 should cover a wide range of liable persons, as the generator, the exporter, the broker etc., provided that this person would be habitually resident in a Party to the Protocol. In this regard the IMO representative referred to his statement on Article 13 which in his view should be related to Article 4. In this regard he stated that in order to avoid overlaps between the HNS Convention and the prospective Protocol, any expression referring to liability of the transporter or carrier should not include the owner of the ship as referred to in Article 1, paragraph 3 of the HNS Convention.

66. Several delegations supported Alternative 1 of Article 4 para. 1 of the original draft, because the generator of the wastes would be the one creating the risk and the one who could avoid it. The generator would also be the one in a position to choose the exporter, the carrier and the disposer. In many cases he would be the economically strongest person in the chain. One delegation proposed to combine Alternative 1 with a subsidiary fault-based responsibility. Another delegation wanted to see liability channelled on the exporter.

67. One delegation clarified that in the report of the third session of the Working group Article 4 para. 4 (e) of the Protocol, relating to exonerations of liability, should be cleared of brackets.

68. One delegation proposed to delete all brackets in Article 4 para. 3, relating to incidents where it is not possible to distinguish between wastes covered by the Protocol and wastes not covered by it. Another delegation opposed this.

69. In relation to Article 4 paragraph 2 one delegation proposed to add a provision, stating that in the case of an incident covered by the Protocol the liable person should also be obligated to perform, at his own cost, every measure of reinstatement prescribed by ordinance by the local competent authority. Some delegations criticized this point of view, because this reinstatement would not be a form of compensation. One delegation stated that the designation of a competent national authority to fulfil international obligations would be an internal affair of every Party.

70. Taking into consideration the discussion on Article 4 of the Protocol, the delegate of Canada presented a new joint proposal of Canada, Germany, Austria and Brazil, combining the elements of the previous proposals leaving square brackets around elements of the text not unanimously agreed by all the sponsors.

71. In the following debate several delegations reiterated their arguments on elements that remained unchanged from the previous proposals, and many delegations supported this proposal.

72. One delegation pointed out that aftercare could be a misleading concept. The group should
rather reflect on a reasonable time after storage because aftercare would be a national matter.

73. As for the reformulated paragraphs of the above-mentioned submission, providing that a liable person should have a right of recourse in a separate action against any other person having acted with intent or by negligence, several delegations expressed their doubts on the right of recourse and its relation to other persons strictly liable. Some delegations pointed out that the right of recourse of the strictly liable should be defined more broadly. One delegation proposed to add a new paragraph, providing for a limitation of liability in the case where the liable person had effected measures of reinstatement of the environment. Other delegations were of the opinion that this concept could be dealt with in a separate article or in the article related to the exonerations. In light of the divergence of opinions related to the term "negligence" one delegation proposed to replace it by "duty of care".

74. Concerning Article 4 para. 4 of the original draft, relating to causes of exonerations from liability, one delegation requested the review of a number of subparagraphs taking into consideration footnotes 35 to 40 of the report of the third session of the Working Group. Due explanation was given by other delegations on the way the present draft has been formulated during the third session of the Working Group.

75. In relation to Article 4 bis of the draft Protocol "Liability for Illegal Traffic" some delegations pointed out that at this stage they would not be able to enter into discussion on it. One delegation proposed to delete this Article and to treat the problem of illegal traffic within the other individual Articles, which refer to the elements of negligence and intention and would therefore replace the concept of illegal traffic. Another delegation pointed out that illegal traffic would be reflected in the criminal law, and to be recognized as illegal a judgement is needed. In general, criminal judgements would not be recognized in another state. The Chairman recalled that this particular article concerned the applicability to the draft Protocol of relevant provisions contained in the Basel Convention.

76. For Articles 5 and 7 on limits of liability and insurance, Canada proposed that there be a limit on the liability of the person liable under Article 4 that would be the same as the minimum amount of insurance provided for in Article 7. This proposal was based on the assumptions that insurance would be available and that there would be a second tier of funding in a Compensation Fund. The limit on insurance would be specified in an annex so that it might be changed quickly and easily without amending the main text of the Protocol. Different levels of insurance could be required for different persons involved in the transboundary movement and disposal depending on the degree of risk entailed by a particular operation. Interest and costs would be payable in addition to compensation and the compensation amount would be transferable into national currency. There would be no limit on liability if the person liable had caused the damage intentionally or recklessly with the knowledge that damage would result.

77. Some delegations stated that consultation with the insurance/banking sectors would be required before the next meeting of the Working Group.

78. The Canadian proposal for Article 12 was an attempt to draft a compromise text incorporating the best elements of the various provisions on recognition and enforcement of judgements found in existing agreements.

79. The meeting agreed that some elements of the proposals submitted and discussed in relation to
Articles 2, 3 and 4 be introduced either as alternatives or bracketed texts in the draft Protocol annexed to the report, and requested a sub-working group to undertake this task in cooperation with the Chairman and the Secretariat.

80. The sub-working group met and, taking into consideration the mandate given to it, presented to the Plenary a revised version of the Protocol which reflects the request made to it. The new version includes also decisions of amendment taken by the Plenary meeting in relation to Articles 8, 9 and 13.

G. Closure of the Meeting

81. The Executive Secretary informed the meeting that Mr. Ahmed Fathalla who has been working within the Secretariat of the Basel Convention not only since its official establishment but also during the interim period and who also took a very active participation in the negotiation of the Basel Convention as the representative of the Government of Egypt has decided to return to the service of the Ministry of Foreign Affairs of Egypt, effective 1 August 1996. She also thanked Mr. Fathalla for his outstanding work within the Secretariat and expressed the hope of the Secretariat to cooperate with him in the future. Mr. Fathalla thanked the Executive Secretary for the kind words and underlined that his decision to resign from the Secretariat was not an easy one but he decided to continue his services for the Government of Egypt. The Group applauded Mr. Fathalla and the Chairman also thanked him for his effective work.

82. After the usual exchange of courtesies, the Chairman declared the meeting closed at 5.45 pm on 28 June 1996.
ANNEX I

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\(^1\);

(b) "Damage" means:

(i) loss of life or personal injury [or impairment of health];

(ii) loss or damage to property other than property held by the person liable for the damage in accordance with the present Protocol\(^2\);

(iii) loss of profit from impairment of the environment\(^3,4\) [loss of use, including but not limited to loss of profit, directly due to impairment of the environment.];

(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;

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

\(^2\) One delegate reserved his position on this point.

\(^3\) This should be limited to direct loss to be defined subsequently.

\(^4\) Two delegations reserved their positions on inclusion of impact of the environment and loss of profit not falling under sub-paragraphs i and ii.
(v) the costs of preventive measures [the costs of reasonable preventive and response measures taken to prevent or minimize loss or damage.];

(vi) any loss or damage caused by preventive measures [any loss or damage caused by reasonable preventive and response measures taken to prevent or minimize loss or damage.];

to the extent that the damage arises out of or results from [hazardous properties of wastes involved in] the transboundary movement and disposal of hazardous wastes and other wastes under the Convention;

(c) "Measures of reinstatement" means any reasonable measures aiming to [assess] 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;

[(d) *Response measures* means any reasonable measures taken in response to an incident to address resulting adverse environmental conditions including measures taken to effect environmental clean-up.]

(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.

[3. "Reasonable" as referred to in the definition of "measures of reinstatement" and "preventive measures" includes notions of risk to the environment, risk to human life and safety, technological feasibility and proportionality in relation to costs.]

**ARTICLE 3**

Scope of Application

**Alternative 1**

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].

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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. Some delegates requested the inclusion of a definition of "aftercare disposal". Some other delegates called for deletion of this term.
**Alternative 2**

1. This protocol shall apply to:
   (a) damage suffered, and
   (b) [preventive and] [response] measures taken,

in the area under the national jurisdiction of a Contracting Party, where the damage results from the transboundary movement and disposal of hazardous wastes and other wastes due to an incident occurring during the time from which the transboundary movement has commenced until completion of the disposal of the wastes.

1(bis) 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;

**Alternative 3**
within the State of export at the moment when the carrier has taken charge of the wastes.

1(ter) 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 [or a point [ninety 90] [..] days after the hazardous waste have been accepted by the importing Party, whichever occurs first], except that:

(a) in the case of temporary storage [and the operations in D13, D14, D15], completion of disposal means the completion of the disposal operation taking place after the storage;

(b) 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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6 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/Inf.3.

7 One delegation reserved its position.

8 One delegation would define territory to include EEZ.

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

10 One delegation requested that the distinction between temporary and permanent storage should be considered and another delegation stated that the term "temporary storage" needs to be defined.
[(c) in the case of a series of continuous events commencing with an incident that occurs prior to completion of disposal, disposal shall be deemed to have been completed upon the discontinuance of the last such event.]

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] [within the territory, including the territorial sea of State of export];

(c) to damage that has arisen from a transboundary movement of hazardous wastes and other wastes [that has] [which movement has] commenced before the entry into force of this Protocol for the Party concerned\(^{11}\).

[(d) unless the damage has arisen from an incident involving the transboundary movement of hazardous wastes and other wastes that are exported from a Party to the Protocol and imported into or intended to be imported into a Party to the Protocol.]

[3. This Protocol shall apply only to damage resulting from the transboundary movement of wastes specified in Article 1, paragraph 1, letter (b) of the Convention if the wastes are notified in accordance with Article 3 of the Convention by the State in which the damage has occurred [and by the State in which the defendant has his habitual residence,] [or if this State recognizes the classification of the other State.]\(^{12}\]

[Article 3\(_{\text{bis}}\), Implementation]

States Parties shall adopt the legislative, regulatory and administrative measures necessary to implement this Protocol.]

[Article 3\(_{\text{ter}}\), Response Measures]

All persons in operational control of hazardous wastes shall take the response measures necessary to minimize damage arising from an incident.]

ARTICLE 4

Liability

\(^{11}\) This paragraph needs further discussion in relation to its drafting.

\(^{12}\) The debate on this subject is reflected in the main body of the report.
1. Except as provided for in paragraph 4 of this Article\(^{13}\).

**Alternative 1:**
- the generator\(^{14}\),
- the exporter\(^{15}\), and
- any person, including the disposer\(^{16}\), who at the time of the incident is in [possession and/or] control\(^{17}\) of the hazardous wastes or other wastes

shall be liable for damage.

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

**Alternative 3:**
[Except as provided for in paragraph 4 of this Article, the generator, the exporter, the broker, the importer, the disposer 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.]

**Alternative 4:**

(i) [Any person] [the carrier or disposer] who at the time of an incident has operational control of the [transboundary movement of hazardous wastes or other wastes or their disposal] wastes shall be strictly liable for [any] damage caused by the transboundary movement or disposal of those wastes.

(ii) [Any other person involved in the transboundary movement or disposal of the wastes] [the generator, the exporter, the importer, the carrier or the disposer], shall be liable if he has caused the damage with intent or by negligence [or] [by infringing provisions of national law implementing the Basel Convention].

(iii) The person liable shall be entitled to a right of recourse in a separate action against any other person involved in the transboundary movement or disposal of the wastes, if the other person has caused the damage with intent or by negligence.

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\(^{13}\) 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.

\(^{14}\) 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.

\(^{15}\) 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.

\(^{16}\) As defined in Article 2(19) of the Convention.

\(^{17}\) Terminology used in the definition of the generator, Article 2(18) of the Convention.
(iv) In actions enforcing a right of recourse under paragraph 3, above, the competent court of a Contracting Party may allocate damages among liable Parties using such equitable factors as the court determines are appropriate. These factors may include (see list in 2(b)).]

**Alternative 5:**

(i) Any person who at the time of the incident has legal or beneficial ownership of the hazardous wastes or other wastes, shall be jointly and severally liable for damage caused by the transboundary movement or disposal of the hazardous wastes or other wastes.

(ii) Nothing contained in paragraph 1 of this Article shall prejudice any right of recourse to which the person liable might be entitled.

(iii) In cases of illegal traffic, the persons with legal and beneficial ownership of the hazardous and other wastes and all other persons involved in the illegal traffic shall be jointly and severally liable.]

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

1 (bii) 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.\(^{18}\)

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

2 (bii) [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 hazard 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;

(iv) the mobility of hazardous wastes and other wastes contributed by each person

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\(^{18}\) 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.
(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.\textsuperscript{10}

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.\textsuperscript{20}

(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.

\[\text{[c] In respect of an incident where it is not possible to distinguish between wastes covered by this Protocol and wastes not covered by this Protocol, any persons referred to in paragraph 1 [who is responsible for the inability to make this distinction] shall be fully liable. [If there is no such person, any person referred to in paragraph 1 shall be liable as if the damage occurred solely in respect of the wastes covered by this Protocol.]}\textsuperscript{21}\]

[3 \textit{bis}. No claim for compensation for damage covered by this Protocol shall be made against the person liable otherwise than in accordance with this Protocol.]

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:\textsuperscript{22}

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{23}

\textsuperscript{10} One delegation called attention to the fact that, in order to promote reinstatement, the measures of reinstatement eventually performed the incident may be positively considered by the court in allocating damages.

\textsuperscript{20} Two delegations supported a proposal to make the burden of proof and defendant more explicit.

\textsuperscript{21} 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.

\textsuperscript{22} Two delegations considered that it was unclear whether "foreseeable" referred to the act or the result.

\textsuperscript{23} Two delegations wished to delete the word "all".
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{24}

d) a result of compliance with a compulsory measure of a public authority\textsuperscript{25} \textsuperscript{26};

[(e) a result of a negligent or other wrongful act of any government or other authority].\textsuperscript{27}

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.\textsuperscript{28}

\textbf{ARTICLE 4bis}

\textbf{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.]

\textbf{ARTICLE 4ter}

\textbf{Forms or Modalities of Compensation}\textsuperscript{29}

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)\textsuperscript{30}

(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;

\textsuperscript{24} Two delegations wished to delete the word “all”.

\textsuperscript{25} The deletion of this sub-paragraph was suggested by some delegations.

\textsuperscript{26} This provision should be reviewed in light of the consideration of Article 9 of this Protocol on State Liability.

\textsuperscript{27} This provision should be reviewed in light of the consideration of Article 9 of this Protocol on State Liability.

\textsuperscript{28} One delegation called attention to the fact that money recovered for compensation should be addressed to measures of reinstatement.

\textsuperscript{29} This Article has to be further developed with regard to remedies not included in compensation.

\textsuperscript{30} The mechanisms for assessing compensation under Article 2(b) will need to be discussed in the context of Article 10(3).
(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 sub-paragraph;]

(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;

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

In case a damage occurs within the provisions of the present Protocol the liable subject shall perform, at his own cost, every measure of reinstatement as it shall be prescribed by ordinance by the local Competent Authority.

Where the liable subject does not conform with the ordinance within the prescribed time, the local authority may perform the measures of reinstatement in conformity with its ordinance.

Then the local authority shall sue the liable subject for the recovering of costs. Damage to the environment not recoverable by measures of reinstatement shall be allocated to the liable subject.

**ARTICLE 5**

**Financial Limit of Liability**

1. There shall not be a fixed financial limit of liability.

**ARTICLE 6**

**Time Limit of Liability**

1. Claims for compensation under this Protocol shall not be admissible unless they are brought

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31 Some delegates expressed the view that further consideration should be given to this paragraph.

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

33 Some delegates reserved their position so far as strict liability is concerned.

34 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.
within five years\textsuperscript{35} from the date at which the claimant knew or ought reasonably to have known of the damage, its sources and the person[s] responsible\textsuperscript{36} 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\textsuperscript{37} 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\textsuperscript{38}.

3. No time limit shall apply in the case of illegal traffic\textsuperscript{39}.

**ARTICLE 7**

**Insurance and other financial guarantees\textsuperscript{40}**

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]\textsuperscript{41} amount of the insurance, bonds or other financial guarantees mentioned in paragraph 1 is ... [SDR] [Units of account],\textsuperscript{42} and shall be reviewed by the Contracting Parties\textsuperscript{43} 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].

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\textsuperscript{35} Some delegates proposed that the period should be three years.

\textsuperscript{36} 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.

\textsuperscript{37} To be considered in connection with the definition of incident.

\textsuperscript{38} 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.

\textsuperscript{39} Several delegates reserved their position on this sub-paragraph.

\textsuperscript{40} 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.

\textsuperscript{41} One delegation suggested that these minimum and maximum figures should be subject to modification in particular cases by agreement between all interested States.

\textsuperscript{42} Should be established in consultation with the insurance industries.

\textsuperscript{43} 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.
[International liability and compensation]

[ARTICLE 8]
International Fund

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

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

ARTICLE 9
State liability

This Protocol shall not affect the rights and obligations of Contracting Parties under the rules of general international law with respect to state responsibility [and liability for damage].

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:

   (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.

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44 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.

45 Two delegations expressed their opinion that a possible fund should have two components.

46 [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.] This version was supported by only two delegations.

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

48 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.\[^{49}\] \[^{50}\]

[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.]

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49 One delegation reserves its position for narrowing the scope for providing expertise.

50 Two delegations reserved their positions on the question of funding the Secretariat's role under this provision.
ARTICLE 11
Applicable Law

1. The competent court shall apply the provisions of the Protocol in regard to claims before it\(^5\). 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\(^5\)\(^2\)\(^3\).

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\(^5\)\(^4\).

[ARTICLE 12
Mutual Recognition and Enforcement of Judgments\(^5\)\(^5\)\(^6\)

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 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;"

\(^5\) One delegation reserved its position on the terminology of "the provisions of the Protocol".

\(^2\) Pending discussion of Article 3.

\(^3\) Two delegations reserved their position on this paragraph.

\(^4\) 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.

\(^5\) Possible grounds for exceptions to the obligation of mutual recognition and enforcement of judgments should be considered.

\(^6\) 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.
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;

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."

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 IX
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.\(^{57}\)

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, 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 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, the provisions of this Protocol shall take precedence, unless the damage [as the term is defined in Article 2 (2)(b) of this Protocol] 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.]

[FINAL CLAUSES\(^{58}\)

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.

\(^{57}\) One delegation noted that this provision raised important issues of balance between the interests of claimants and traders.

\(^{58}\) 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.
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 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

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, 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.

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59 During the third session of the Working Group, the Secretariat was requested to include an additional Article on the "Relationship of this Protocol to the Basel Convention" in line with the already adopted Article 14 of the Montreal Protocol on the substances that deplete the ozone layer.
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]
Annex 2

Statement made by the French delegation:
Statement made by the delegation of Morocco:

M. Chairman, I regret that we couldn’t use official languages during the meeting as it was decided in COP III. We express our deep concerns about this inefficiency which had limited the participation of our delegation.

We are a Party to the Convention and we would like to participate actively in this important issue (elaboration of a legal text about the liability and compensation for damages ...).

As France, we would like to make our reservation on all the report and the views expressed during this meeting until we receive a document translated in the other official languages.