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

Fifth session 
Geneva, 20-23 May 1997

REPORT

I. INTRODUCTION

1. The fifth 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 20-23 May 1997 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 fifth session was opened by the Chairman of the Ad Hoc Working Group, H.E. Professor Jorge Berguño, who welcomed the delegates and referred to Decision III/2 of the third meeting of the Conference of the Parties and to the request of the third Conference of the Parties to the Working Group to finalize its work on the protocol to allow its adoption by the fourth meeting of the Conference of the Parties which is to take place in October 1997. The Chairman appealed that the Working Group should put all effort into achieving substantial progress in its consideration and - at least partial - finalization of the draft articles of the Protocol.

3. The Executive Secretary of the Secretariat of the Basel Convention, Dr. Iwona Rummel-Bulska, welcomed the wide participation in this session of the Working Group. She reiterated the urgent necessity for progress as the fifth session of the Working Group is the last one before the fourth meeting of the Conference of the Parties to which - through the Open-ended Ad Hoc Committee on Implementation - recommendations should be submitted.

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4. The Executive Secretary introduced the documentation for the meeting, namely:

- **UNEP/CHW.1/WG.1/5/1:** Provisional agenda
- **UNEP/CHW.1/WG.1/5/2:** Information note from the Chairman
- **UNEP/CHW.1/WG.1/5/3:** Insurance replies about the draft protocol
- **UNEP/CHW.1/WG.1/5/4:** Relationship of the draft protocol on liability and compensation with the HNS Convention
- **UNEP/CHW.1/WG.1/Inf.2:** Update to the assessment of existing capacities in the field of emergency assistance, and Add.1: Response from France

5. The delegates of the following Parties to the Basel Convention participated in the session: Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Brazil, Canada, Chile, China, Comoros, Croatia, Cuba, Ecuador, Egypt, El Salvador, Estonia, European Community, Finland, France, Germany, Guinea, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kyrgyzstan, Malawi, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Panama, Peru, Philippines, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and Uruguay.

6. The following countries attended the meeting in their capacity as observers: Thailand and the United States of America.

7. The following intergovernmental organizations participated in the meeting as observers: International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD).

8. The following Non-governmental organizations also attended the meeting: Comité Européen des Assurances (CEA), European Chemical Industry Council (CEFIC), Greenpeace International, International Chamber of Commerce (ICC), International Group of P&I Clubs and the Mining Association of Canada.

9. The following persons were members of the Bureau of the Working Group:

- **Chairperson:** H.E. Professor Jorge Berguño (Chile)
- **Vice-Chairpersons:** Mr. Jack Christofides (South Africa)
  Mr. Ahmad Jazri Mohd Johar (Malaysia)
  Ms. Katherine Helen Cook (United Kingdom)
- **Rapporteur:** H.E. Mr. Pavel Suian (Romania)

B. Attendance

C. Election of Officers
D. Adoption of the Agenda

10. The meeting adopted the following agenda, as contained in document UNEP/CHW.1/WG.1/5/1:

1. Opening of the meeting.
2. Organization of the session.
3. Adoption of the agenda.
4. 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.1/4/2 and possible recommendations to the fourth meeting of the Conference of the Parties.
5. Consideration of the establishment of a compensation fund for damage resulting from transboundary movements of hazardous wastes and their disposal.
6. Other business.
7. Closure of the meeting.

E. Organization of work

GENERAL COMMENTS

11. The Chairman presented document UNEP/CHW.1/WG.1/5/2 (Information note from the Chairman) and stressed the - also in the light of Decisions II/12 and III/1 - unchanged need for a protocol on liability and compensation. As major outstanding issue, he identified the question of the channeling of liability. With regard to definitions, he appealed to delegations to resort to already agreed language as much as possible in order to facilitate the deliberations.

12. The aim of the meeting should be to reach consensus on at least some core issues of the draft protocol and to present clear recommendations to the next Conference of the Parties. In this respect, he underlined the necessity to limit down the numerous alternatives in some crucial articles and to avoid lengthy discussions simply repeating earlier deliberations.

13. The Chairman’s note and his additional comments received broad support from delegations, in particular with regard to the main outstanding issues and the way how to proceed. Some delegations reflected on the possible implications of Decision II/12 and III/1 on the future work of this group. Some delegations expressed a preference to start discussions on the scope of the protocol (Article 3) as this would facilitate the discussion of extremely complex issues such as the channeling of liability. Many delegations also stressed the importance of streamlining the text.
F. Consideration of draft Articles

Article 2: Definitions

14. The Chairman drew attention to the existing inconsistency between Article 2, paragraphs 2 (iii) and (iv). His suggestion that given the uniqueness of the Protocol’s provisions on environmental loss among international liability instruments, and inherent problems in applying this concept, delegations agree to delete the provision on pure ecological loss, was generally accepted, with the understanding that the concept of damage would include the costs of reinstatement measures undertaken or to be undertaken.

15. The Chairman presented a new version of Article 2 which was appreciated by delegations and formed the basis for a detailed discussion which lead to the text as reflected in the annex to this report.

Article 3: Scope of Application

16. A majority of delegations expressed a preference for paragraph 1, alternative 1, and for deleting alternative 2. Most delegations, in addition, favoured the deletion of “aftercare of disposal sites” in alternative 1, suggesting instead that the latter be dealt with under national legislation. Other delegations, however, strongly supported the inclusion of “aftercare of disposal sites” in Article 3. The Chairman pointed out that the matter of aftercare could be taken up again after an in depth discussion of the issue of channeling of liability.

17. The issues of the commencement of a transboundary movement (Article 3 paragraph 1 (bis)) and the completion of disposal (paragraph 1 (ter)) were discussed intensively by a contact group chaired by Australia.

18. With regard to paragraph 1 (bis), the Chairman of the contact group reported to the meeting that the contact group had agreed that alternatives 1 and 3 of the draft protocol as contained in document UNEP/CHW.1/WG.1/4/2 should be merged in a new alternative 1 and alternative 3 deleted, whereas alternative 2 should be maintained. The contact group proposed a new wording of Article 3 paragraph 1 (bis) which was generally supported by all delegations and included into the draft text of the Protocol.

19. The Chairman of the contact group presented the following summary of the discussion: Many delegations supported alternative 2 as providing certainty and taking into account both maritime and air transport. Some delegations were concerned that in cases of maritime transport it could be difficult to determine whether an incident had occurred just inside or outside the territorial waters of a State.

20. Some delegations supported the new alternative 1, arguing that this option was more consistent with the structure of the Basel Convention control system; other delegations had expressed concern that this option would involve the Protocol applying to incidents where damage only occurred in the State of export. A proposal was made to take this situation into account by providing in the exclusions set out in Article 3 para. 2 of the current draft that the Protocol shall not apply to damage which occurred only within the territory of the State of export or that the Protocol should give exporting States the discretion to exclude application of the Protocol to damage occurring within their territory, consistent with their national liability
regime. One delegation reserved its position that the Protocol should not apply to maritime shipments.

21. With regard to the "completion of disposal" (Article 3 paragraph 1 (ter) of the draft Protocol), the contact group only had a preliminary discussion of this issue. According to the chairman, two trends emerged in the contact group’s discussions: Either one provision should deal with the end point in relation to movements destined for final disposal with a separate provision for shipments for recycling, or the Protocol should follow the Basel Convention itself by dealing with final disposal and recycling in the same manner. The Chairman of the contact group pointed out that within the contact group it had been suggested that it would be useful to seek guidance from the Technical Working Group; other delegations however had argued that the definition of completion of disposal was ultimately a policy issue involving a range of issues including e.g. insurance.

22. With regard to Article 3, paragraph 2, the discussion revealed concern among delegates about the need, on the one hand, for clarification of the Protocol’s exact scope of application to areas beyond national jurisdiction, in particular the high seas, and, on the other hand, for retaining the “negative scoping” approach of the article. Some delegations referred to the HNS Convention as providing model language that could be adapted for the purposes of the Protocol.

23. A majority of delegations favoured deletion of paragraph 3. In this case, a provision should be included that this Protocol does not apply to wastes falling under Article 1 (1) (b) of the Basel Convention. Some delegations, however, preferred those wastes falling under Article 1 (1) (b) which were notified in accordance with Article 3 of the Basel Convention to be included in the scope of the Protocol.

24. The result of the deliberations was reflected in a Chairman’s proposal for a new Article 3 which was discussed in detail and generally supported. Some delegations, however, noted that the scope of the Protocol, as limited by Article 3 paragraph 2, might need to be further limited depending on the outcome of clarification of the definition of “hazardous wastes” under the Basel Convention, including the new lists. The Working Group should therefore review this at a later date. It was noted that Article 3(f) alternative 2 only apply to Parties.

**Article 4: Liability**

25. The discussion focussed on the issue of channelling of liability. After an exhaustive discussion of the various alternative draft proposals, two major trends emerged: one that favoured a refined version of alternative 4 which incorporates “operational control” as a key concept, and two, strong expressions of interest in a proposal by the representative of the P&I Clubs which calls for channelling liability to the “notifier”/exporter.

26. There was general agreement that the P&I Clubs proposal deserved further exploration. In particular, the term “notifier” should be clarified. Other delegations maintained that channelling based on “operational control” would be workable and was their preferred option for allocating liability. Some delegations expressed the need to further clarify the meaning of “operational control”.
27. On the basis of this discussion, the Chairman presented a streamlined version of Article 4 which was generally welcomed by delegations. On the channelling of liability, two alternatives were proposed:

**Alternative 1:**
the "notifier" shall be liable for damage. If the State of export is the notifier, the exporter shall be liable.

**Alternative 2:**
any person, not including his employees or governmental agencies, who at the time of the incident, has operational control of the wastes, shall be liable for damage.

Alternative 2 was slightly favoured by delegations; some supported the additional inclusion of the generator.

One delegation which had supported channelling of liability to the owner indicated that they will consider withdrawing this proposal at the next session provided that other delegations whose proposals had not received substantial support also withdrew their proposals.

**Article 4 bis: Liability for Illegal Traffic**

28. Several delegations called for a deletion of this article as this issue is referred to in the Convention and should be taken care of in the national legislation. Other delegations saw a need to retain at least the thrust of this article, i.a. because they felt it to be problematic to apply Article 4 to illegal traffic. There were also a number of delegations who wanted to maintain this article.

**Article 4 ter: Forms or Modalities of Compensation**

29. Many delegations favoured the deletion of this article because the issues were mainly dealt with under Articles 2 and 4, and forms and modalities of compensation could be dealt with under national law. Some delegations preferred to retain the article, and be it in a shortened version, because it was felt to provide important guidance to States what to include in their national legislation. There was a discussion of a right of recourse by claimants and defendants against other persons involved in the transboundary movement or disposal of the wastes. This was considered by some delegations to be an important component of any strict liability regime so that such a regime would permit claimants to seek contribution from those who may be liable by reason of fault (intent or negligence), as well as those who may be liable because they may also be liable under Article 4(1).

**Article 8: International Fund**

30. The Chairman suggested that when discussing the possible establishment of a Fund, Article 9 on State liability should be born in mind. There was, however, no significant change in the positions of delegation: Whereas there was a prevailing feeling that if the Fund were established, the private sector would have to finance it, opinions were divided whether such a Fund should be established within the Protocol at this stage. A number of delegations favoured the deletion of the article as too many uncertainties about the structure, management, modalities, operation and financing of the Fund existed. A legal instrument establishing the Fund would have to be negotiated in parallel with the draft Protocol but this was seen as too
complex at this stage. These delegations maintained that data currently available (e.g. UNEP/CHW.1/WG.1/5/Inf.2) did not demonstrate the need for a fund. Some delegations said that rules on first tier liability should first be settled before considering further the issue of a fund.

31. Other delegations strongly supported to retain the article which in their view stated the principle that such a Fund should be established. The establishment or the agreeing on the establishment was seen as crucial for the Protocol because otherwise, the Protocol would not be consistent with the objectives of the Basel Convention.

Article 9: State responsibility

32. The proposal of some delegations that "liability" in the title should be replaced by "responsibility", met no objection. Several delegations did not see a real need to have such an article but did not oppose it in its present formulation. They made, however, clear that state responsibility would not be acceptable as a second or third tier without the first tier - the person(s) liable - being sufficiently precised. Other delegates said they would not accept any state responsibility beyond formulation now existing in the Annex.

Article 13: Relationship with other Bilateral, Multilateral and Regional Agreements

33. There was a certain preference for alternative 2 but both alternatives were seen as not completely satisfactory. Some delegations were of the opinion that, in any case, international agreements on liability and compensation with regard to inland, air or maritime transport should prevail over the Protocol. There was also a trend that those agreements which shall take precedence over the Protocol should be explicitly enumerated. The HNS Convention was seen as one of those agreements.

34. Although there was less support for alternative 1, the point was made that the rights of the claimant to the full recovery of his claims should not be affected by a conflict between the Protocol and other instruments.

35. Due to the insufficient time the proposal by Chile, Canada and by the Chairman were added as additional alternatives 3, 4 and 5 to the body of the Annex with clear understanding that they were not yet discussed.

G. Other provisions, final clauses

36. The meeting further considered the remaining articles of the Draft Protocol including the final clauses. The text of the articles as reviewed by this session of the Working Group is annexed to this report.

H. Other business

The Latin American and Caribbean Group presented a statement acknowledging the importance of the work of this Ad Hoc Working Group for development of a Protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal, and importance which such an instrument has for the Basel Convention and to their region; it also emphasized that every effort should be made to look for extra-budgetary funds to ensure participation of experts designated by all Governments from
Latin America and the Caribbean at the work of this Working Group and to look also for all possible ways to start work of the experts from this region one day before the Plenary with appropriate translation facilities from English to Spanish.

I. Recommendations

37. The Working Group recommends the following actions related to its work for the fourth meeting of the Conference of the Parties to the Basel Convention.

38. The fourth meeting of the Conference of the Parties to the Basel Convention may wish to:

- Acknowledge the substantive progress made by 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 at its fifth session in May 1997;

- Take note of its report presented to the fourth meeting of the Conference of the Parties to the Basel Convention;

- Extend the mandate 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;

- Request the Ad Hoc Working Group to make all efforts possible to finalize the draft Articles of the Protocol, making use of informal meetings where possible, in order to present it for consideration and adoption by the fifth meeting of the Conference of the Parties to the Basel Convention.

39. It was agreed that a small working group of lawyers should be called during the next meeting of the Working Group on Legal and Technical Experts to look through the legal aspects of Article 12 - Mutual Recognition and Enforcement of Judgments - as well as the whole chapter related to final clauses. Particular attention should be given to the recent developments related to the institutional arrangements with other environmental agreements. The view was expressed that it would be advisable not to have two different Conferences of Parties to the Protocol and to the Basel Convention as well as Secretariats.

J. Closure of the Meeting

40. After the adoption of the report and the usual exchange of courtesies, the Chairman declared the meeting closed at 17.30hrs. on 23 May 1997.
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

   (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;

       (iii) loss of profit, including loss of profit from impairment of the environment;

       (iv) the costs of measures of reinstatement of the impaired environment, provided such measures are actually undertaken or to be undertaken;

       (v) the costs of preventive measures, including any loss or damage caused by such measures;

   to the extent that the damage arises out of or results from hazardous properties of wastes

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1. One delegation reserved its position as far as this provision arrives from the parallel provision in the HNS Convention.

2. This section should be revisited; some delegations believed that Article 2 paragraph 2 (b) (iii) should read: "loss of income due to impairment of the environment".
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, reinstate or restore damaged or destroyed elements of the environment. Internal law may indicate who will be entitled to take such measures;

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

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.

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 taken charge of the wastes as required by Article 6, paragraph 9 of the Basel Convention.

Alternative 2:
at the point where the wastes leave the territory, and in relation to maritime shipments, the territorial sea of the State of export.\(^4\)

Chairman’s Note: The contact group was not able to arrive at an agreed upon text proposal on “completion of disposal”.

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3 One delegation stated that “measures of reinstatement” should, in addition, cover “measures aiming to rehabilitate, replace or acquire the equivalents of damaged or destroyed elements of the environment”.

4 One delegation reserved its position that the Protocol should not apply to maritime shipments. Another delegation noted that transboundary movements should only commence once the wastes have left the territorial sea of the exporting Party.
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, [except that this exclusion shall not apply to transit States not Party to this Protocol];

(b) to damage suffered within the territory, including the territorial sea of the State of export, caused by an incident within that State;

(c) to damage suffered in areas beyond any national jurisdiction, unless it involves:
   (i) loss of life, property damage or personal injury; (ii) costs of preventive measures;

(d) 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;

(e) to damage due to wastes falling under Article 1 paragraph 1(b) of the Basel Convention, [unless the wastes are notified in accordance with Article 3 of the Basel Convention];

(f) 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.]

[Article 3bis
Implementation

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

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5 Some delegations noted that the scope of the Protocol, as limited by Article 3.2, might need to be further limited depending on the outcome of clarification of the definition of "hazardous wastes" under the Convention, including the new lists. The Working Group should review this at a later date.

6 One delegation proposed to add a new sub-paragraph (g): "[To damage arising from the transboundary movement of hazardous wastes or other wastes pursuant to a bilateral, multilateral or regional agreement concluded in accordance with Article 11 of the Convention, whether entered into either before or after this Protocol comes into force, unless the Parties to such agreement so decide."

7 One delegation proposed to insert the last phrase without bracket, adding this new text "..., for a period of four years after the entry into force of this Protocol".

8 One delegation reserved its position on this sub-paragraph; this paragraph needs to be reviewed when decision is taken on commencement of transboundary movement.

9 One delegation noted that the Protocol should not apply to areas beyond any national jurisdiction.

10 Some delegations favoured the exclusion of Article 1 paragraph 1(b) wastes from the Protocol entirely.

11 Some delegations noted that it would be necessary to revisit the situation with regard to transit States. One delegation noted the need to consider in particular compensation for transit States party where the exporting country is a Party and the importing country is not.
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.

[Article 3ter
Preventive Measures

[All persons in operational control\textsuperscript{12} of hazardous wastes shall take the response measures necessary to minimize damage arising from an incident.]

Chairman’s Note: Article 3ter has not yet been reviewed.

ARTICLE 4
Liability

1. Except as provided for in paragraph 4 of this Article\textsuperscript{13},

Alternative 1:
the “notifier”, as referred to in Article 6 paragraph 1 of the Basel Convention, shall be liable for damage until the waste in question has been received by the disposer. Thereafter the disposer shall be liable for the damage. Liability shall shift from the notifier to the disposer at the moment when the movement document has been signed by the disposer. If the State of export is the notifier, the exporter shall be liable.

Alternative 2:\textsuperscript{14}
the “notifier”\textsuperscript{15}, as referred to in Article 6 paragraph 1 of the Basel Convention, shall be liable for damage until the waste in question has been received by the disposer. Thereafter the disposer shall be liable for the damage. Liability shall shift from the notifier to the disposer at the moment when the movement document has been signed by the disposer. If the State of export is the notifier, the exporter shall be liable.

Alternative 3:\textsuperscript{16}
any person, not including his employees or governmental agencies\textsuperscript{17}, who at the time of the

\textsuperscript{12} Some delegations required that notion “person in control” should be defined (Article 2).

\textsuperscript{13} One delegation urged retention among following alternatives that should be considered, of the following alternative: “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.”

\textsuperscript{14} Some delegations suggested that any other person involved in the transboundary movement of hazardous wastes shall be if there is a fault on its part.

\textsuperscript{15} Many delegations supported the idea to insert the definition of the term “notifier” in Article 2 (Definitions).

\textsuperscript{16} One delegation referred to the need to define “operational control” by reference to Article 6 paragraph 9 of the Convention.

\textsuperscript{17} Some delegations suggested the insertion of a separate paragraph which would define “person liable” as not including employees, brokers, etc.
incident has operational control of the wastes, shall be liable for damage\textsuperscript{18}.

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{19}.

3. 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.

4. (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, all wastes and resultant damage shall be considered to be covered by the Protocol.

5. No claim for compensation for damage covered by this Protocol shall be made against the person liable otherwise than in accordance with this Protocol.

6. There shall be no liability if the damage is exclusively the result of\textsuperscript{20}:

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

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

(c) the wrongful intentional conduct of a third person\textsuperscript{21};

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

(e) a negligent or other wrongful act of any government or other authority.

\textsuperscript{18} One delegation for reasons related to domestic law, proposed to the word “strict” to be inserted before “liability”.

\textsuperscript{19} One delegation reserved its position on this provision in so far as it introduces joint and several liability.

\textsuperscript{20} One delegation noted that Article 4 paragraph 6 (a), (b) and (c) should be modified by: “provided the defendant has exercised due care with respect to the waste concerned and has taken reasonable precautions against damages that were reasonably foreseeable.” This delegation also stated that Article 4 paragraph 6 (d) and (e) should be deleted.

\textsuperscript{21} One delegation noted that the implications of this exemption of this liability will have to be reviewed again if the Working Group opted for Alternative 2. Other delegations wanted this exemption deleted.
7. 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 exoneration shall be permitted.

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

**Article 4ter (old 4quarter)**

**Rights of Recourse**

**Alternative 1:**
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 contributed, in whole or in part, to the damage with intent or by negligence.

**Alternative 2:**
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 is either liable under 4(1) hereunder or has contributed in whole or in part, to the damaged with intent or by negligence.

1. Nothing in this Protocol shall prejudice any other rights of recourse to which the person liable might be entitled pursuant to the law of the competent court.

**ARTICLE 5**

**Financial Limit of Liability**

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

2. The person liable shall not be entitled to limit liability under this Protocol if it is proved that the damage resulted from his personal act or omission, committed with intent to cause such damage, or negligently.

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22 One delegation noted that Article 4bis could be deleted, if a provision were included stating that any person would be liable that had contributed, in whole or in part, to the damage with intent or by negligence.
ARTICLE 6
Time Limit of Liability

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within five years\textsuperscript{23} 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{24} therefore. In the case of illegal traffic the three years time will count since the illegal traffic has been discovered by the competent authority.

2. In no case should a claim be admissible after [ten years] [thirty years] from the date of the incident which caused the damage. Where the incident consists of a series of occurrences\textsuperscript{25} having the same origin the [ten years] [thirty years] shall run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence the [ten years] [thirty years] period shall run from the end of that occurrence\textsuperscript{26}.

3. No time limit shall apply in the case of illegal traffic\textsuperscript{27}.

ARTICLE 7
Insurance and other financial guarantees\textsuperscript{28}

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\textsuperscript{29} amount of the insurance, bonds or other financial guarantees mentioned in paragraph 1 is ... [SDR] [Units of account],\textsuperscript{30} and shall be reviewed by the

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\textsuperscript{23} Some delegates proposed that the period should be three years.

\textsuperscript{24} 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{25} To be considered in connection with the definition of incident.

\textsuperscript{26} 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{27} Several delegates reserved their position on this sub-paragraph taking into account the linkage of this paragraph with the question to which extent this Protocol is to cover illegal traffic.

\textsuperscript{28} 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{29} One delegation suggested that these minimum and maximum figures should be subject to modification in particular cases by agreement between all interested States.

\textsuperscript{30} Should be established in consultation with the insurance industries.
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.

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

ARTICLE 9

State Responsibility

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

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

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31 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.

32 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.

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

34 Some delegations expressed the opinion that a milder wording should be found for paragraph 1.

35 One delegation suggested that in case that under Article 3 paragraph 2 (a) the bracketed sentence "except that this exclusion shall not apply to transit States not Party to this Protocol" would be retained, for reasons of consistency an additional sub-paragraph (d) which would read "the waste was exported" should be inserted.
(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\textsuperscript{36}.

**ARTICLE 10bis**  
**Expertise**

The Secretariat\textsuperscript{37} 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{38} \textsuperscript{39}.

**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 [may] [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 [may] [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.]

\textsuperscript{36} Three delegation reserved their position.

\textsuperscript{37} One delegation maintained that it was for the Parties to establish and maintain the list of experts.

\textsuperscript{38} One delegation reserves its position for narrowing the scope for providing expertise.

\textsuperscript{39} Two delegations reserved their positions on the question of funding the Secretariat's role under this provision.
ARTICLE 11
Applicable Law

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

[ARTICLE 12
Mutual Recognition and Enforcement of Judgments

Any judgement of a competent court pursuant to this Protocol 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.]

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

41 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.

42 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 defense;
(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 and 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 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

- 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."

- Article 32 of the draft International Convention on Liability and Compensation for Damage in connection with the
Carriage of Hazardous and Noxious Substances at Sea.

"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 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.]

Alternative 3:
[1. In case of a conflict between the provisions of this Protocol and the provisions on liability and compensation in other international agreements raised by any Party before the competent court (Article 10), the tribunal shall determine the applicable rule considering the principles of conflicts of law resolution contained in the Vienna Convention, such as, special law has priority respect general law and subsequent law has priority respect previous law; and also the principles contained in Article 11 of the Basel Convention which stipulates that these agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by the Convention in particular taking into account the interest of developing countries.

2. In any case, the criteria set in paragraph 1 of this article shall not be understood as a limitation of the claimant right to sue before courts additional and full compensation under other applicable liability regimes for those situations not covered by the Convention and this Protocol.]

Alternative 4:
[1. The provisions of this Protocol shall not apply to those portions of transboundary movements of hazardous wastes or other wastes subject to the HNS Convention, or that are covered by multilateral, regional or bilateral instruments on liability and compensation with regard to inland, air or maritime transport, provided that the Parties concerned by the movement are also Parties to the HNS Convention or the other instrument in question.

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

44 "Parties concerned" would be defined as the States of export, import, and, where applicable, the States(s) of transit, that are Parties.
2. Notwithstanding the provisions of this Protocol, the Parties may enter into subsequent bilateral, multilateral or regional agreements for the purpose of addressing liability and compensation, provided that the provisions of such agreements are compatible with this Protocol.

Alternative 5:
In case of 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 the carriage by sea of hazardous and noxious substances covered by the Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances at Sea (HNS) or to nuclear damage covered by the Vienna Convention on Civil Liability, its amendment Protocol or other related instruments.

Conflict between the provisions of this Protocol and the provisions on liability and compensation in another international agreement or arrangement shall in no case affect the rights for adequate and prompt compensation provided for under this Protocol.

Nothing in this Protocol may prevent the future development of liability and compensation standards, in accordance with international law, through other bilateral or regional arrangements or the right of Contracting Parties to impose additional requirements in order to protect human health and the environment.

[FINAL CLAUSES]

ARTICLE 14
Signatures

This Protocol shall be open for signature by States and by political and/or economic integration organizations Parties to the Basel Convention.

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

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45 The meeting agreed that small groups of lawyers will need to review this chapter as well as Article 12.
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
Entry into Force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the [tenth] [twentieth] 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 [tenth] [twentieth] 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 17bis
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 18
Reservations and Declarations

1. No reservation or exception may be made to this Protocol.\footnote{46}

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 or that organization.

ARTICLE 20
Withdrawal

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

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

ARTICLE 21
Depositary

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

ARTICLE 22
Authentic texts

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

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

Done at................. on the ................. day of ......................199... ]