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

Sixth session
Geneva, 24-26 June 1998

REPORT

I. INTRODUCTION

1. The sixth 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 24-26 June 1998 in accordance with Decision IV/19 of the fourth meeting of the
Conference of the Parties to the Basel Convention.

II. ORGANIZATIONAL MATTERS

A. Opening of the session

2. The sixth session was opened by the Chairman of the Ad Hoc Working Group,
Professor Jorge Berguño, who welcomed the delegates and referred to Decision IV/19 of
the fourth meeting of the Conference of the Parties and to the request of the fourth
Conference of the Parties to the Working Group to finalize its work on the protocol to allow
its adoption by the fifth meeting of the Conference of the Parties which is to take place in
December 1999. Professor Berguño summarized the progress which has been made until
now in the development of a protocol and presented the way in which he would like to lead
the group during this session.

3. The meeting had in front of it the following documentation:

   UNEP/CHW/WG.1/6/1   Provisional Agenda
B. Attendance

4. The delegates of the following Parties to the Basel Convention participated in the session: Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Benin, Botswana, Brazil, Bulgaria, Burundi, Canada, Chile, China, Colombia, Côte d’Ivoire, Cuba, Czech Republic, Democratic Republic of the Congo, Egypt, El Salvador, Estonia, European Community, Finland, France, Gambia, Germany, Greece, Guatemala, Guinea, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kuwait, Lebanon, Malawi, Malaysia, Mauritius, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Perú, Philippines, Qatar, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Uruguay, Uzbekistan, Venezuela and Yemen.

5. The following countries attended the meeting in their capacity as observers: Algeria, Dominican Republic and the United States of America.

6. The following United Nations specialized agency participated in the meeting as observer: International Maritime Organization (IMO).

7. The following Non-governmental organizations also attended the meeting: Comité Européen des Assurances (CEA), European Chemical Industry Council (CEFIC), Institute of Scrap Recycling Industry (ISRI), International Group of P&I Clubs and the Mining Association of Canada.

C. Bureau

8. The following are the members of the Bureau:

Chairperson: Professor Jorge Berguño (Chile)

Vice-Chairpersons: Mr. Jack Christofides (South Africa)
                  Ms. Katherine Helen Cook (United Kingdom)
                  Mr. Asif Shuja Khan (Pakistan)

Rapporteur: Mr. Dimitre Vergiev (Bulgaria)
D. Adoption of the Agenda

9. The meeting adopted the following agenda, as contained in document UNEP/CHW/WG.1/6/1:

1. Opening of the meeting
2. Organization of the session
3. Adoption of the Agenda
4. Finalization of consideration of Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and their Disposal and recommendations to the fifth meeting of the Conference of the Parties to the Basel Convention
5. Consideration of the establishment of a compensation fund for damage resulting from transboundary movement of hazardous wastes and their disposal
6. Other business
7. Closure of the meeting

E. Organization of work

GENERAL COMMENTS

10. The Chairman referred to the documentation prepared by the Secretariat to the meeting and emphasized the document UNEP/CHW/WG.1/6/Inf.2 (Comments on draft Articles of a Protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal) which contains some suggestions for the development of the Articles of the draft Protocol of the Convention. The Chairman emphasized the need for speed up consideration of the draft articles taking into account that it is important from both the legal and the political point of view to conclude consideration of a draft for adoption by the fifth meeting of the Conference of the Parties. He stressed that the adoption of a protocol pursuant to Article 12 of the Basel Convention continued to be of primary importance both for the Contracting Parties and for those States considering the possibility of ratifying the Convention. He mentioned, with regard to the scope of application, that any envisaged solution should safeguard the maritime rights guaranteed by Article 4(12) and, at the same time, encompass the totality of the transboundary movement. He referred to the concepts of “operator” and “notifier” and indicated that precedents accepted in other legally binding instruments did not always accommodate the specific situations and problems originated by the transboundary movement. With regard to the desirable features of the regime, strict liability clearly seemed the only means of overcoming the difficulties of proof but fault related liability should supplement the primary approach so that immunity was not granted to those who had behaved negligently. The Chairman proposed to first concentrate on consideration of draft Articles 4, 4bis, 4ter, 5, 6 and 7. He finally mentioned the need to ensure that compensation will be available at all events and the purpose of reviewing the issue of the fund in the light and in the context of a residual liability for ecological damages, including those which could not be foreseen at the time they were caused.
11. The meeting established a contact group to re-draft the Articles of a draft protocol included in the Annex of document UNEP/CHW.1/WG.1/6/2 in the light of the discussion at the Plenary. The contact group reviewed Articles 4, 4bis, 4ter as well as related to other Articles of a draft protocol namely Articles 1, 2 and 3 as well as agreed on inclusion and drafted text of the Preamble. The text of the contact group which was considered to be a package was subject to some consideration by the Plenary. The draft Articles as prepared by the contact group are attached to this report as its Annex 2 for consideration at the next meeting of the Ad Hoc Working Group.

F. Consideration of draft Articles

Article 3: Scope of application

12. There was a reconsideration by the meeting of two alternatives of this Article and a split of views over preference of one or the other alternatives still persisted. The representative of the International Maritime Organization (IMO) explained that in order to avoid overlaps the prospective Basel protocol should exclude subject matters already regulated in IMO treaties on liability and compensation. This exclusion means that in connection with the carriage by sea of hazardous and noxious substances the protocol should not 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 by the fact that maritime law is recognized as a distinct corpus-juris in respect of which unification of international rules is a subject within the global mandate of IMO.

13. Some delegations expressed the view that there is a need for further clarification of understanding of “completion of disposal”. The suggestion was made that the definition as on a draft Protocol should be as close as possible to the definition in the Basel Convention and be considered in relation of Article 6 of this draft Protocol.

14. Regarding issue of illegal traffic, some delegations proposed that a time limit of 90 days from the moment in which importing state can require the reimporting of shipment, should be considered.

15. One delegation reiterated its opinion that this Protocol should not apply to maritime shipments. Reacting to this statement some island states responded that if it was so then it would be difficult to have a Protocol applied in their countries.

Article 3ter: Preventive measures

16. One delegation expressed the view that this provision was not appropriate but if it was to be included in the Protocol, the language would require modification, in particular to make the obligation more qualified.

Article 4: Liability

17. The meeting re-considered draft Article 4 and its three alternatives. Experts were divided in the way of approaching the channeling of liability. It was emphasized that in this context understanding of Article 6, paragraph 1 of the Basel Convention would need to be further clarified. There was some discussion on how to define the “notifier” in Alternatives 1 and 2. Some experts referred to the polluter-payer principle which has been well established in international environmental law. Experts supporting Alternative 3 underlined
a need for further clarification of the expression "operational control". Several experts opted for Alternatives 1 or 2. P&I Clubs explanation assisted some of the experts for channeling liability for one body rather than for joint liability. In relation to this, some experts referred to the need of maintaining the right of recourse (Article 4ter). The representative of IMO brought the attention of the meeting that in relation to Alternative 3, reference should be made to the need not to overlap with the existing rules on liability of ship owners covered by other international treaties.

Article 4bis: Liability for illegal traffic

18. Most experts agreed that the issue of liability for illegal traffic should be covered by a protocol. Insurance policies would not respond in cases of serious illegality, such as where there is wilful misconduct of the assured. One delegation stated that there should be no exoneration in case of illegal traffic. However, a few experts were of the opinion that the liability for illegal traffic could be covered by the protocol even without a specific article to establish such coverage. A contact group was established to undertake further work on this approach. The meeting agreed for the present Article 4bis to be re-drafted. A contact group presented a new drafting, covering - in particular - the case of illegal traffic when no notification has been sent, by inserting it in Article 4, paragraph 1bis. Article 4bis was drafted in a way intended to provide a cause of action for plaintiffs, in addition to the strict liability provided for in Article 4(1). Some delegations noted that there was a need to further define the relationship between these provisions. In the context of this Article the reference to the compensation fund which is supposed to be created under the protocol was referred to.

Article 4ter: Rights of Recourse

19. Most experts felt that it is for national legislation to undertake the more procedural aspects of the system of recourse as well as right of recourse. Importance of maintaining this Article in a draft protocol was underlined taking into account that it could allow claimant to seek contribution from the one liable for damage by reason of fault or negligence as well to those who may be liable because of strict liability being established under a protocol because they felt that it should be left to their national legislation. Some experts expressed the view that the specific reference to "separate action" should be deleted, while the others were of the opinion that "separate action" should be maintained. With reference in paragraph 6 (c) namely to "the wrongful intentional conduct of a third person" a proposal was made to include this sort of wording in Article 4ter. The Chairman agreed to provide the meeting with a new draft of Article 4ter, taking into account various other drafting suggestions.

Article 5: Financial Limit of Liability

20. The view was expressed that while paragraph 1 should remain, paragraph 2 should be deleted from this article. A number of delegations supported redrafting paragraph 2 using language from the HNS Convention with a view to replacing the concept of negligence with the concept of recklessness. One delegation explained that there are the countries in which there are no limits for liability for hazardous wastes generated in the country while if the paragraph 2 would be maintained in Article 5 there would be limits for liability in relation to the hazardous waste imported into the countries which would create complicated legal regime or requested special clause which could waive the application of paragraph 2 by the country accordingly to their legal regime. Some delegates agreed that there is no reason for fixing a financial limit of liability. Some other delegates argued for
the necessity of such financial limits. The P&I Clubs’ representative also supported the establishment of limits on liability so that insurance could be provided. The view was also expressed that the gaps which exist between insurance and the damage suffered should be covered by the notifier with the rest, if so necessary, to be covered from the compensation fund.

Article 6: Time Limit of Liability

21. There was an agreement that the paragraph referring to no time limit in the case of illegal traffic should at least be bracketed pending the further agreement on Article dealing exclusively with illegal traffic.

22. The P&I Clubs’ representative referred to the words relating to the period of liability in Article 7 and indicated that insurance would find it difficult to provide cover for the full period if this were fixed at 30 years under Article 6, paragraph 2.

23. There were some suggestions for a need to re-draft paragraph 1 of Article 6 regarding the time limit of liability in case of illegal traffic. As well as some suggestions regarding preferences for replacing 3 years by 5 years in paragraph 1 of Article 7 and for opting for 30 years in paragraph 2.

Article 7: Insurances and other financial guarantees

24. The view was expressed for strong support for inclusion of minimal amount of insurance.

25. The P&I Clubs representative drew attention to the fact that there are different insurance markets for different potentially liable persons. Progress in discussions of insurance was to some extent therefore dependent on the outcome of discussions about Article 4.

26. The representative also expressed the view that Article 7 might require amendment to limit its scope to the insurance of strict liability if fault based liability were to be introduced elsewhere in the Protocol.

27. In view of a finalization of the draft protocol, some experts suggested that a mandate be given to the Secretariat, in cooperation with other competent bodies (like representatives of insurance companies) to make proposals on figures for paragraph 2. Experience could be drawn for this purpose from existing conventions on comparable matters, from inquiries and questionnaires conducted recently by the Secretariat on incidents and damage experienced by Parties, and from present practice on insurance of operators in hazardous wastes. One expert called also for a simplified amendment procedure of these figures, and not merely a review of them.

28. Some delegations proposed the establishment of minimum amounts of insurance based on such criteria, as tonnage.

29. The view was expressed that a simplified procedure should be used for changing (amending), when necessary, this figure.

30. The view was also expressed that competent authorities should have the right to establish higher level in certain cases.
31. Some delegations expressed opinion that different rates could also be used for different types of hazardous wastes.

32. One delegation proposed that the text of paragraph one of Article 7 should be amended in the sense that liability in the Protocol shall be covered by insurance to the extent possible, or to the maximum possible.

Article 8: International Fund

33. During the limited discussion on this draft article delegations reiterated mainly their positions as at the previous meeting.

34. Some delegations proposed concentrating, at an initial stage, on practical aspects i.e.: how the Fund would receive its revenue, types of contribution, functions of the Fund, etc.

35. Attention was drawn to the possible use, as a model, of similar conventions i.e.: HNS Convention.

G. Other business

36. Annex I to this report contains draft articles of a protocol on liability and compensation for damage resulting from the transboundary movements of hazardous wastes and their disposal, as in the previous report of the fifth session of the ad hoc working group with only two changes in footnotes 6 and 16 (Canada and Pakistan proposals).

37. The text of the Articles reviewed by this session is attached to this report as Annex II (Swedish package).

38. The meeting agreed on its work plan which is attached to this report as Annex 3.

39. The experts requested the Chairman to prepare a compromise text of the draft Protocol to be considered by the Ad Hoc Working Group at the next meeting. It was agreed that such a document would be considered as an informal contribution to the process.

40. The French delegation reminded that the report of the session should be available in all six UN languages as soon as possible after the session which is in accordance with decisions of COP4. Absence of these documents well in advance of the next session could, in its view, disturb necessary consultation in countries as well as the conclusions of negotiations.

H. Closure of the Meeting

41. After the adoption of the report and the usual exchange of courtesies, the Chairman declared the meeting closed at 18:26 hrs. on 26 June 1998.
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

(b) "Damage" means¹:

(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 environment²;

(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;

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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".
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:\(^5\)\(^6\):

(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]\(^7\);

(b) to damage suffered within the territory, including the territorial sea of the State of export, caused by an incident within that State;\(^8\)

(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\(^9\);

(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]\(^10\);

[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.]\(^11\)

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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 before or after this Protocol comes into force, unless the Parties to the agreement declare that the Protocol shall be applicable at the time of the entry into force of the Protocol, or for subsequent agreements, at the time of the entry into force of that agreement.]

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.
[Article 3bis
Implementation

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

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.

\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).
Alternative 3:  
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.

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

3. 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:

(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;

16 One delegation suggested the insertion of the following: "Provided that the hazardous wastes or other wastes - if it is established by the competent court - are not in conformity on a material way with the documents, the liability in that case will revert to the notifier within a period of ...... years from the date of receipt by the disposer."

17 Some delegations suggested the insertion of a separate paragraph which would define "person liable" as not including employees, brokers, etc.

18 One delegation for reasons related to domestic law, proposed to the word "strict" to be inserted before "liability".

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

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.

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.
(d) compliance with a compulsory measure of a public authority;
(e) a negligent or other wrongful act of any government or other authority.

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\(^{23}\) from the date at which the claimant knew or ought reasonably to have known of the damage, its sources and the person[s] responsible\(^{24}\) 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\(^{25}\) 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\(^{26}\).

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

ARTICLE 7
Insurance and other financial guarantees\(^{28}\)

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\(^{29}\) amount of the insurance, bonds or other financial guarantees mentioned in paragraph 1 is ... [SDR] [Units of account]\(^{30}\) and shall be reviewed by the Contracting Parties\(^{31}\) 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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\(^{23}\) Some delegates proposed that the period should be three years.

\(^{24}\) 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.

\(^{25}\) To be considered in connection with the definition of incident.

\(^{26}\) 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.

\(^{27}\) 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.

\(^{28}\) 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.

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

\(^{30}\) Should be established in consultation with the insurance industries.

\(^{31}\) 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.
[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
   (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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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 subparagraph (d) which would read “the waste was exported” should be inserted.

36 Three delegation reserved their position.
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.]

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.

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

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

\(^{39}\) Two delegations reserved their positions on the question of funding the Secretariat’s role under this provision.
[ARTICLE 12
Mutual Recognition and Enforcement
of Judgments\textsuperscript{40} \textsuperscript{41}

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.]\textsuperscript{42}

\textsuperscript{40} Possible grounds for exceptions to the obligation of mutual recognition and enforcement of judgments should be considered.

\textsuperscript{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.

\textsuperscript{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 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
[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."

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."

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

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.]

44 "Parties concerned" would be defined as the States of export, import, and, where applicable, the States(s) of transit, that are Parties.
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
Signature

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 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 Depositary, who will inform the Parties of any substantial modification in the extent of their competence.

45 The meeting agreed that small groups of lawyers will need to review this chapter as well as Article 12.
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 Protocol46.

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

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46 Excluding when unless otherwise decided in particular issues ie with regard to the commencement of transboundary movement and limitation of liability.
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... ]
ANNEX II

Draft Articles of the Protocol considered during the Sixth Session by the contact group (Sweden package)
(New text in bold letters)

PREAMBLE

... that illegal traffic in hazardous wastes, as defined in Article 9 of the Convention, is a serious threat to the global environment. All available measures should be taken to prevent illegal traffic and to discourage involvement in such activities. One of the means of prevention can - in addition to criminal punishment and other administrative measures - be to impose a swift and effective liability regime that covers illegal traffic.

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, including illegal traffic, 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 1:

      (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 2;

      (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;

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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".
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, 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.

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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 On 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 before or after this Protocol comes into force, unless the Parties to the agreement declare that the Protocol shall be applicable at the time of the entry into force of the Protocol, or for subsequent agreements, at the time of the entry into force of that agreement.]"

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.
[Article 3bis
Implementation

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

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 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
Strict Liability

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

Alternative 2:
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.

1bis If the State of export is the notifier or if no notification under Article 6, paragraph 1 of the Convention has taken place, the exporter shall be liable.

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.

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

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.”

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.

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

16 One delegation suggested the insertion of the following: “Provided that the hazardous wastes or other wastes - if it is established by the competent court - are not in conformity on a material way with the documents, the liability in that case will revert to the notifier within a period of ...... years from the date of receipt by the disposer.”

17 One delegation reserved its position on this provision in so far as it introduces joint and several liability.
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:

(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;

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

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

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**

Fault-based Liability

Without prejudice to Article 4, any other person than the person liable according to Article 4 shall also be liable for damages resulting from his negligent, reckless, or wrongful intentional acts or omissions including acts or omissions in contravention of the Convention.

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18 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.

19 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.
Article 4ter
Rights of Recourse

Without prejudice to liability as established in accordance with Article 4, the liable person shall be entitled to a right of recourse:

a) against any person involved in the transboundary movement or disposal of the wastes, whose wrongful conduct or lack of compliance with the provisions of the Convention have primarily or substantively caused or contributed to the damage;

b) against any other person who is also liable under Article 4;

c) against any other person whose involvement in the transboundary movement has resulted in damage which might be attributed, in whole or in part, to lack of care or negligent omissions or any misconduct by such other persons;

c) bis against any other person involved in the transboundary movements or disposal of the wastes who does not take all reasonable measures to prevent, minimize or mitigate the damages;

d) which is expressly contemplated in contractual arrangements;

e) when the law of the competent court envisages any other right of recourse.
ANNEX III

Meetings 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

Workplan

Seventh session of the Group  Geneva  early October 1998
Eighth session of the Group  Geneva  January/February 1999

In accordance with paragraph 5 of Decision IV/19 adopted in Kuching, the Ad Hoc Working Group is requested to make all efforts possible to finalize the draft Articles of Protocol, making use of informal meetings where possible in order to present it for consideration and adoption for the 5th meeting of the Conference of the Parties (December 1999, Basel, Switzerland)