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

Seventh session
Geneva, 7-9 October 1998

REPORT

I. INTRODUCTION

1. The seventh 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 7-9 October 1998 in accordance with Decision IV/19 of the fourth meeting of the
Conference of the Parties to the Basel Convention.

The Executive Secretary informed the meeting that Professor Berguño sent a letter
advising that he would not be able to complete his term as the Chairman of the Working
Group due to other commitments. In relation to this, Argentina on behalf of the Group of
Latin American and the Caribbean countries (GRULAC), informed the meeting that on 2
October 1998, GRULAC was notified by the Secretariat of the prevailing situation
concerning the Presidency of the Ad Hoc Working Group of Legal and Technical Experts.
With the view to maintaining the Presidency GRULAC’s delegations entered into
consultations with their national authorities in order to find a qualified official to fulfill this
post, which requires technical knowledge, fluent English, and experience in Basel
Convention. This situation made apparent to GRULAC, once again, the importance of
having interpretation and translation of documents for the meeting of experts.

After subsequent consultations with regional coordinators, GRULAC nominated as
interim Chairman for this meeting, Ms Flor de Maria Perla de Alfaro (El Salvador).
II. ORGANIZATIONAL MATTERS

A. Opening of the session

The meeting agreed to deliberate on the basis of the Chairman’s Paper (UNEP/CHW/WG.1/7/Inf.2) (hereafter referred to as Chairman’s Paper) with the understanding that delegations would have the option of returning to the text contained in Annex I of the Report of the Sixth Session of the Ad Hoc Working Group (UNEP/CHW/WG.1/6/2) (hereafter referred to as Report 6). The meeting agreed not to introduce any footnotes to the text of Articles prepared at this session. If delegates wish to present their separate view(s), these are to be reflected in the report and accordingly, the appropriate part of the text of Articles will be bracketed if not agreed to by the meeting.

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

- UNEP/CHW/WG.1/7/1 Provisional Agenda
- UNEP/CHW/WG.1/7/Inf.1 List of Participants
- UNEP/CHW/WG.1/7/Inf.2 Chairman’s Paper
- UNEP/CHW.1/WG.1/6/2 Report of 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

The meeting agreed that after consideration at Plenary, the draft Articles would be further reviewed and revised by two Contact Groups; one established under the vice-chairman for Pakistan and the representative of Sweden; the second established under the vice-chairman for the United Kingdom.

B. Attendance

3. The delegates of the following Parties to the Basel Convention participated in the session: Argentina, Australia, Austria, Bahamas, Benin, Brazil, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Ecuador, Egypt, El Salvador, Finland, France, Germany, Guatemala, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Jordan, Lebanon, Malawi, Malaysia, Mauritius, Mexico, Mongolia, Mozambique, Morocco, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Republic of Korea, Romania, Russian Federation, Senegal, Singapore, South Africa, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, United Republic of Tanzania, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, Vietnam, and Zambia.

4. The following countries attended the meeting in their capacity as observers: Algeria, Democratic People’s Republic of Korea, Dominican Republic and the United States of America.

5. The following United Nations specialized agency participated in the meeting as observer: International Maritime Organization (IMO), the Economic Commission for Europe and the World Trade Organization.
6. The following Non-governmental organizations also attended the meeting: International Chamber of Commerce and International Group of P&I Clubs.

C. Bureau

7. The following are the members of the Bureau:

Chairperson: Ms. Flor de Maria Perla de Alfaro

Vice-Chairpersons: Mr. P.K.M. Retief (South Africa)
Ms. Katherine Helen Cook (United Kingdom)
Mr. Asif Shuja Khan (Pakistan)

Rapporteur: Mrs. N. Karpova (Russian Federation)

D. Adoption of the Agenda

8. The meeting adopted the following agenda, as contained in document UNEP/CHW/WG.1/7/1:

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. Consideration of the draft Articles

Article 1: Objective

The meeting agreed that the version of Article 1 contained in the Report 6, with the addition of the phrase “including illegal traffic of those wastes” was the preferred version. One delegation requested that brackets be retained for that phrase at this time. One expert requested that brackets be put around the term “comprehensive” as it was not yet debated in the plenary. Article 1 as it stands is to be included into the Annex I of this Report.
Article 2: Definitions

GRULAC underlined the importance of the definitions in this Protocol being consistent with the definitions established in the Basel Convention including those in Article 2 such as transboundary movement, disposal, management, area under the national jurisdiction of a State, generator, disposal, notifier and other related Articles that include definitions.

Concerns were raised with respect to the proposed definitions in Article 2 of the Chairman’s Paper. A number of delegations preferred the term “income” proposed in Article 2.2 (b) iii of the Chairman’s Paper to “profit” in Article 2.2 (b) (iii) of Report 6. Others were concerned that the substitution of the term “income” for “profit” under Article 2.(b) (iii) could permit victims of damage to claim compensation of the basis of a loss of income without deducting expenses that would have to be incurred to earn that income. It was noted that income was generally viewed as a broader concept than profit. A suggestion that the term “personal injury” be replaced by “physical injury” was discussed. Several delegates proposed dropping the references to “rehabilitation” in the Chairman’s Paper. On the definition of “incident” one delegation voiced its concern that damage from preventive measures should not be included in that term.

On Article 2.3, despite some reservations, most delegations favoured deletion of the term “reasonable”. As well, proposals were made to delete the last sentence in Article 2.3. These and other concerns regarding the definitions were referred to a contact group chaired by Sweden and Pakistan.

Article 3: Scope of application

Many experts were of the view that the term “under the Convention” was rather general in application and merited additional consideration. It was agreed to add the term “including damage from illegal traffic” but in brackets. One delegation noted that the Ad Hoc Working Group had received a mandate at COP4 to consider the implications of the Ban Amendment for the draft Protocol and that this might be achieved through bilateral and regional agreements.

Delegations varied in views regarding the commencement of a transboundary movement. A number supported the commencement of a transboundary movement at the time when the wastes leave the territory or the territorial sea. Others preferred to retain Alternative 1 of Article 3.1bis of Report 6, providing that a transboundary movement is to commence when the carrier takes charge of the wastes. The question of whether it is necessary or desirable to attach liability by defining a transboundary movement, which is already defined in the Convention was raised. The possibility of using negative scoping, to permit Parties to exclude the application of the Protocol in their territory in the case of exports, was raised.

Experts agreed to include the language in the Chairman’s Paper regarding the Law of the Sea. It was noted that the language was included only for the purposes of clarifying that the Protocol would not alter any rights established under Law of the Sea.

A limited number of different views regarding the termination of liability were expressed. The issue of what to do in cases of no notification under Article 6.9 of the
Convention was raised. As well, one delegation suggested that the term "environmentally sound manner" should be defined.

There was some discussion of the exclusion clauses contained in Article 3 of the Chairman’s Paper. Some delegates expressed concern regarding the exclusion of Article 1 para.1(b) wastes of the Convention from the scope of the Protocol. One delegate expressed concern about excluding Non-Parties. As well, a few delegations suggested that Article 3(f) in Report 6 limiting the application of the Protocol to Parties be reinstated. Several delegations advocated the insertion of text dealing with the exclusion of bilateral and multilateral agreements under Article 11 of the Convention. It was noted that the issue of exclusion of bilateral and multilateral agreements under Article 11 of the Convention is a different concept than the relationship of the Protocol to other international agreements dealing with liability.

This Article was referred to the Contact Group chaired by Sweden and Pakistan for further review.

Article 4: Strict Liability

Many delegations supported Article 4 of the Chairman’s Paper. However, a number continued to note their support for Alternative three of Report 6, assigning liability to persons in operational control. A number of delegates raised concerns regarding the phrase “duly completed”, especially in situations where notification does not take place. It was suggested that those in control for the sole purpose of taking preventive measures should not be liable. Some views were expressed regarding exclusion clauses.

This Article was referred to a Contact Group chaired by Sweden and Pakistan for further review.

Article 5: Fault based Liability

The representative of IMO expressed his concern on the inclusion of this Article. He noted that its inclusion could lead to legal uncertainty and to conflicts between the prospective protocol and other international treaties.

It was observed that the meaning of the introductory phrase of this Article was unclear. The reference to adequate and full compensation could be taken to suggest a requirement that proceedings for compensation first be made under Article 4 dealing with strict liability. A number of experts questioned the appropriateness of fault based liability in a strict liability regime, arguing that it diluted channeling. Several delegations supported fault based liability as a right of recourse for those found liable under Article 4. While some delegates maintained that victims should have a variety of options, most appeared to support fault based liability as a fall back if adequate compensation could not be obtained under Article 4.

This Article was referred to the Contact Group chaired by Sweden and Pakistan for further review.
Article 6: Joint and Several Liability

Discussions on Article 6 revealed ambiguities as to whether joint and several liability was intended to apply to strict liability or fault based liability or both. The possibility of having several persons liable was explored. One delegation maintained its reservation on this provision.

This Article was referred to the Contact Group chaired by Sweden and Pakistan for further review.

Article 7: Combined Cause of the Damage

The meeting agreed to revert to the wording in Article 4, alternative 3.4 of the Report.

This Article was referred to the Contact Group chaired by Sweden and Pakistan for further review.

Article 8: Right of Recourse

A number of delegations had concerns with the drafting of this Article. One delegation voiced concern that the term “any person involved in the transboundary movement” was too broad. The intent and effect of the introductory phrase, “without prejudice to Articles 4 and 5” was questioned. It was noted that text as drafted established entitlement to compensation rather than the right to seek compensation and that this approach might be too prescriptive. Brackets were requested for 8.1(b) and all of 8.2. One delegation reserved its position to the inclusion of illegal traffic or references to contraventions of the Convention until such time as it concludes its domestic review of the technical and practical difficulties of implementing liability and compensation for illegal traffic.

This Article was referred to a Contact Group chaired by the United Kingdom for further review.

Article 9: Contributory Fault

A change of title from “exoneration” to “contributory fault” was agreed to by the meeting. A difference of views emerged as to whether this Article should be retained. Those arguing in favor noted that it reflected standard practice regarding contributory negligence. Those against did not want to limit compensation. One delegation argued that this might be addressed through permitting longer time limits (as in Article 13 para.1 (a)).

This Article was referred to a Contact Group chaired by Sweden and Pakistan for further review.

Article 10: Basis of Claims

It was pointed out that this provision, based on Article 4.5 of Report 6, contradicted Article 20, based on 12 (bis) of Report 6. Delegations must reach agreement on whether claims should be limited to those provided for in the Protocol (Article 10) or whether additional remedies arising outside the Protocol should also be permitted (Article 20).
Article 11: Relationship with other Agreements.

Most delegations preferred to return to the text in Report 6. Those delegations expressing preferences for certain alternatives generally supported alternative four or alternative two. The representative of the IMO stated a preference for options which clearly excluded the possibility of overlaps or conflicts between the prospective Protocol and other treaties.

This Article was referred to the Contact Group chaired by Sweden and Pakistan for further review.

Article 12: Financial Limits

The representative of the P and I Clubs stressed that without a financial limit insurance would be difficult to obtain. He also advocated deletion of the reference to negligence, which could be used to override the financial limitation. The delegations which spoke in favour of establishing limits of liability stressed the need to establish a practical and workable regime. Many delegations continued to support no limits on liability. The link between limits on liability and the existence of a Fund was noted by several delegates. One delegate suggested that the text in the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996(HNS) might be used as a model to improve drafting of this Article.

This Article was referred to the Contact Group chaired by the United Kingdom for further review.

Article 13: Time Limit of Liability

A clear divergence of views emerged from discussions concerning the length of time limits. Those supporting longer time periods noted the long term nature of environmental damage. Others stressed the need for practical and insurable regimes with shorter time periods. Brackets were requested for thirty years in Article 13.1 (a) and for ten years in Article 13.1(b). Some support was expressed for different time periods based on the nature of the damage, that is, whether it was a personal injury or not. The view was expressed that the Protocol should refer to “notification” instead of “illegal traffic”. As a compromise one delegation suggested that, in cases of illegal traffic or no notification the time limit should be the same as that which applies to claims with respect to loss of life or personal injury.

This Article was referred to the Contact Group chaired by the United Kingdom for further review.

Article 14: Insurance and Other Financial Guarantees

No delegation opposed compulsory insurance and other financial guarantees but concerns were raised regarding several elements of the text. The necessity of Article 14.2, dealing with how the sums provided as insurance could be used, was questioned by one delegation. The term “adequately” in Article 14.1 received some support but raised ambiguities regarding the requirement for a minimum amount of insurance. Several delegations raised the issue of whether different levels of risk for various wastes would result in different levels of compulsory insurance. The need for language to accommodate
self insurance by governments of state vessels was raised. The inclusion of obligations on states of transit regarding compulsory insurance was questioned.

A report on insurance premiums and different levels of risk is being prepared by the Secretariat and should be ready by the end of the year. The meeting requested that this report be finalized and distributed before the next session.

This Article was referred to the Contact Group chaired by the United Kingdom for further review.

Article 15: International Fund

Delegates noted that the Basel regime contemplates two different types of funds: an emergency fund and a compensation fund and that an emergency fund was being discussed in the Consultative Sub Group. A few delegates indicated that the case for an emergency fund may at this stage be more compelling. However, another delegate noted that it was unlikely that government would support two funds for the Basel regime. One expert stated that a Fund would be required to deal with compensation in cases of illegal traffic.

Those in favor of establishment of a compensation fund noted the link to limitation of liability and stressed the need for full compensation. Others indicated that full compensation should be sought through appropriate limits and insurance coverage. Most delegates agreed that before a decision was taken on the establishment of a compensation fund many issues related to the Fund needed to be developed and elaborated, including who would pay, who would administer the Fund, and how money would be collected. Some experts suggested that a system of taxation or levies be explored. Many delegations noted that governments would be reluctant to provide financing. Several delegations stressed that more information establishing the need for a compensation fund be sought.

The Secretariat was asked to prepare a paper for the next session of this Group based on possible modalities for establishment of a fund under the Protocol based on existing examples and requirements including under the HNS.

Article 16: State Responsibility

The meeting agreed to strike out the new language in this Article.

Articles 17 to 22:

As there was not sufficient time available to the Group to review the Procedural Articles (Articles 17 to 22 in the Chairman’s paper), the meeting agreed to include these in brackets in a consolidated text to be prepared by the Secretariat.

Delegations made suggestions for various other Articles to be included with the procedural Articles and elsewhere in the text.

Final Clauses:

The meeting agreed to include as final clauses in brackets the final clauses in Report 6.
G. Other business

The meeting agreed to attach information contained in the footnotes to Article 12 of Report 6 as an annex to the Report on the Seventh Session. India suggested that it would be useful to have the consolidated text developed at this session made available on the Internet.

The meeting acknowledged the valuable contribution of Professor Berguño in providing the group with the Chairman's paper, which was the basis for discussions.

The Executive Secretary informed the meeting that the next session of this Group is scheduled for 18-22 January 1999 with an extra day being made available on the 23rd for a legal group to review the text.

Prior to the close of the session GRULAC informed the meeting that El Salvador would continue with the Presidency of these negotiations.

H. Closure of the Meeting

After the adoption of the report and the usual exchange of courtesies, the Chairman declared the meeting closed at 17:00 hrs. on 9 October 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 for damage resulting from the transboundary movement of hazardous wastes and their disposal [including illegal traffic of those wastes].

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 purpose of this Protocol:

(a) "The Convention" means the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal;
(b) "Hazardous wastes and other wastes" means wastes subject to the Article 1 of the Convention.
(c) "Damage" means:

i. loss of life or personal injury;
ii. loss or damage to property other than property held by the person liable for damage in accordance with the present Protocol;
iii. loss of profit, including loss of [net income] due to impairment of the environment;
iv. the costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken;
v. the costs of preventive measures, including any loss of damage caused by such measures;


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

d) "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment. Internal law may indicate who will be entitled to take such measures;

e) "Preventive measures" means any reasonable measure taken by any person in response to an incident, to prevent, minimize, or mitigate loss or damage, or to effect environmental clean-up;
f) "Contracting Party" means a Party to this Protocol;
g) "Protocol" means the present Protocol;
h) "incident" means any occurrence or series of occurrences having the same origin arising from the transboundary movement and disposal of hazardous wastes and other wastes 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 due to an incident occurring during a transboundary movement of hazardous wastes and other wastes or their disposal, [including illegal traffic] [from the point where the wastes leave the territory, and in relation to maritime shipments, the territorial sea, of [the State of export] [State Concerned], and until completion of any of the operations specified in D1–D12 [D13] and R1–R11 of Annex IV of the Convention]; or

[until receipt of the notification of completion of disposal expected to be provided by the disposer pursuant to Article 6, paragraph 9 of the Convention or, provided that the disposer has undertaken in good faith efforts to commence disposal activities, one hundred and eighty (180) days after the wastes have been accepted by the importing party, whichever occurs first]; or

[until in relation to operations mentioned in Annex IV B of the Convention, when the wastes have been taken into custody by a person for the purpose of such an operation.]

1bis. Where an operation is D 13–D15 or R11 and R12 of Annex IV of the Convention the "completion of operation" referred to in paragraph 1 of this Article shall occur upon completion of the subsequent operation specified in D1–D12 [D13] and R1–R11 of Annex IV of the Convention.

2. Nothing in this Protocol shall affect in any way the sovereignty of States over their territorial seas and their jurisdiction in their respective economic zones and continental shelves in accordance with international law.

3. Notwithstanding paragraph 1 of this Article, this Protocol shall not apply:

(a) to damage suffered in an area under the national jurisdiction of a State which is not Party to this Protocol, [except that this exclusion shall not apply to transit States not Parties to this Protocol in regard to rights under the Protocol], [for a grace period of four years after the entry into force of this Protocol];

(b) to damage specified in (iii) and (iv) of Article 2, paragraph 2 of this Protocol suffered in areas beyond any national jurisdiction;

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

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

[(e) to damage arising from an incident involving the transboundary movement of hazardous wastes and other wastes that are exported from a State which is not Party to the Protocol;]

[(f) 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 has entered 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.]

[4. This Protocol shall also apply to damage within a State Party other than the State of export arising from an incident specified in paragraph 1 of this Article within the State of export.]

**Article 4**

**Strict Liability**

1. **Alternative 1:**

   [The "notifier", as referred to in Article 6 paragraph 1 of the Convention, shall be liable for damage until the movement document has been signed by the disposer. Thereafter the disposer shall be liable for damage. If the State of export is the notifier or if no notification has taken place, the exporter shall be liable for damage until the movement document has been signed by the disposer. Thereafter the disposer shall be liable for damage. [This provision shall apply mutatis mutandis to the special situations contemplated in Articles 8 and 9.] or]

2. **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.]

2. 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 exceptional, inevitable and irresistible character;
   c) compliance with a compulsory measure of a public authority; or
   d) the wrongful intentional conduct of a third Party.

3. If two or more persons are liable according to this Article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons.

**Article 5**

**Fault-based Liability**

[Without prejudice to Article 4 and for the sole purpose of providing full compensation, if such compensation cannot be obtained according to Article 4, para.1,] any person involved in the transboundary movement of the wastes shall be liable for
damages resulting from his or her negligence, recklessness or wrongful intentional acts or omissions, [including acts or omissions in contravention of the Convention].

Article 6
Preventive Measures

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

2. 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 according with any national law regarding preventive measures, is not thereby subject to liability under this Protocol.

Article 7
Combined Cause of the Damage

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

2. The proportion of the contribution of a waste referred to above shall be determined with regard to the volume and properties of wastes involved, and the type of damage occurring.

3. 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.

Article 8
Right of Recourse

1. Any person liable under this Protocol shall be entitled to a right of recourse [in a separate action]:

   (a) against any other person also liable under this Protocol;

   (b) against any person whose lack of compliance with the provisions of the Convention has caused or contributed to the damage;

   (c) against any person whose intentional, reckless or negligent acts or omissions have caused or contributed to the damage in whole or in part;

   (d) which is expressly provided for in contractual arrangements;

2. 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 9
Contributory Fault

Compensation may be reduced or disallowed if the person who suffered the damage
or a person for whom he or she is responsible under the national law, by his or her own fault, has caused or contributed to cause the damage having regard to all circumstances.

[Article 10
Basis of Claims

[No claim for compensation for damage covered by this Protocol shall be made otherwise than under the conditions for liability set out in this Protocol.]

[Article 11
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 12
Relationship with other Bilateral, Multilateral and Regional Agreements

Alternative 1:

In case of a conflict between the provisions of this Protocol and the provisions on liability and compensation in another international agreement or arrangement, the provisions of this Protocol shall take precedence, 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 2:

[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 [on the Law of Treaties (1969)], such as, special law has priority with respect to general law and subsequent law has priority with respect to previous law; and also the principles contained in Article 11 of the Basel Convention which Article 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 interests 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's right to sue before courts for additional and full compensation under other applicable liability regimes for those situations not covered by the Convention and this Protocol.]

Alternative 3:

[1. The provisions of this Protocol shall not apply to those portions of transboundary movements of hazardous wastes or other wastes subject to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS), 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.

Article 13
Financial Limits

Alternative 1:

[1. Liability for the person liable for damage in accordance with [Article 4 of] this Protocol shall be limited to . . . . . . for any one incident. Such limit shall not include any interest or costs awarded by the competent court.

2. The person liable [under Article 4] [or Article 5 of this Protocol] shall not be entitled to limit its liability under this Protocol if it is proved that the damage resulted from his personal act or omission, committed with [negligence,] [recklessness or wrongful intent].]

Alternative 2:

[There shall be no fixed financial limit on liability.]

Article 14
Time Limit of Liability

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

(a) [ten][thirty] years from the date of the incident which caused the damage, with respect to loss of life and personal injury; or

(b) [ten][thirty] years from the date of the incident which caused the damage, with respect to any other damage contemplated in Article 2.

2. Claims for compensation under this Protocol shall not be admissible unless they are brought within [three] [five] years from the date the claimant knew or ought reasonably to have known of the damage [, its sources and the person or persons liable for it], provided that the time limits established pursuant to sub-paragraphs (a) and (b) of paragraph 1 of this Article are not exceeded.

3. Where the incident which caused the damage consists of a series of occurrences having the same origin, time limits shall run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, the time limits shall run from the end of that continuous occurrence.
4. [No time limit shall apply in the case of [illegal traffic][no notification].] [In cases of [illegal traffic][no notification], the time limit shall be the same as that which applies to claims with respect to loss of life or personal injury].

Article 15
Insurance and other financial guarantees

[1. Contracting Parties shall ensure, with respect to persons under their respective jurisdictions, that liability under [Article 4 of] this Protocol shall be covered by insurance, bonds or other financial guarantees valid throughout the period of the time limit of liability.]

2. Contracting Parties shall ensure that the insurance, bonds or other financial guarantees referred to in paragraph 1 of this Article are only drawn upon in order to provide compensation for damage covered by Article 2 of this Protocol.

3. Proof of [the availability of] the minimum amount of insurance, bonds or other financial guarantees shall accompany the notification referred to in Article 6(1) of the Convention.

4. The minimum amount of the insurance, bonds or other financial guarantees referred to in paragraph 1 of this Article shall be fixed at ……

5. The amount referred to in paragraph 4 of this Article shall be reviewed by the Contracting Parties on a regular basis, taking into account, inter alia, the nature, quantity and hazardous properties of the waste, and the potential risks posed to the environment by the waste.

Article 16
International Fund

[1. The Parties to this Protocol commit themselves to the establishment of an international Fund, hereinafter “the Fund”, as a means to ensure that compensation will be available at all events and entrust the Fund to be created with the following functions:

(a) to minimize damage from accidents arising from transboundary movement of hazardous wastes and other wastes under the Convention or during the disposal of the wastes;

(b) to provide for compensation when the person liable is or remains unknown, or is or may become financially incapable of meeting his or her obligations;

(c) to provide for compensation when the liable person is exempted from liability in conformity with Article 4 paragraph 3.

2. The Parties to this Protocol shall endeavour to adopt, as soon as possible, the legal instrument required for the establishment of the Fund. To that end, the Parties shall cooperate in order to gather sufficient information on the nature and the volume of the transboundary movement, the occurrence and pattern of incidents as well as the amounts and kinds of wastes involved in those incidents, and any other data considered relevant for the assessment of contributions and the fulfilment of the interim and subsidiary functions indicated in paragraph 1 of this Article.]
3. In order to comply, as soon as possible, with the obligations contained in Article 14 (2) of the Convention and paragraph 1 (a) of this Protocol, the Parties shall cooperate to provide assistance in the event of emergencies and consider the potential sources of supplementary funding for the interim role of the Fund in addressing major contingencies and emergencies.]

Article 17
State Responsibility

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

PROCEDURES

[Article 18
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.]

[Article 19
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 20
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 21
Applicable Law

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in this Protocol shall be governed by the law of that court.]

[Article 22
Non Discrimination

The law of the competent court shall be applied without discrimination based on nationality, domicile or residence.]

[[Article 23
Relation between the 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 persons who have suffered damage or as limiting the provisions concerning the protection, reinstatement of the environment which may be provided under the law of the competent court.]

[Article 24
Expertise

The Parties shall establish and instruct the Secretariat to maintain a list of experts in the field of assessment and remediation of environmental damage that may be drawn upon by Parties whose courts may require assistance in the assessment of damage to the environment, the costs of preventive measures and the costs of measures of reinstatement or rehabilitation, including aspects related to harmonization of procedures concerning other costs such as interest rates on the sums allocated during the legal procedures.]

[Article 25
Mutual recognition and enforcement of Judgements

1. Any judgement of a competent court pursuant to this Protocol, if it is enforceable in the State of origin and is no longer subject to ordinary forms of review, shall be recognized in any Contracting Party, except

(a) where the judgement was obtained by fraud;
(b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case;
(c) where the decision is irreconcilable with an earlier judgement validly pronounced in another State with regard to the same cause of action and the
same Parties.

2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Contracting Party without review of the merits of the case.

FINAL CLAUSES

[Article 26
Signature

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

[Article 27
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.

[Article 28
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 Depositary of any substantial modification in the extent of their competence.

3. The provisions of Article 27 paragraph 2, shall apply to political and/or economic
integration organizations which accede to this Protocol.]

[Article 29
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 30
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 31
Reservations and Declarations

1. No reservation or exception may be made to this Protocol.

2. Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, when signing, ratifying, accepting, approving, formally confirming or acceding to this Protocol, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Protocol, provided that such declarations or statements do not purport to exclude or to modify the legal effects or the provisions of the Protocol in their application to that State or that organization.]

[Article 32
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 33
Depositary
The Secretary-General of the United Nations shall be the Depository of the Protocol.

(Article 34
Authentic texts

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

The following Articles, included as a footnote in the previous text, were retained as an annex 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 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 reopened.

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

"1. A final judgement entered by the 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."