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

Tenth session
Geneva, 30 August-3 September 1999

REPORT

I. INTRODUCTION

1. The tenth 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 30 August to 3 September 1999 in accordance with Decision IV/19 of the
fourth meeting of the Conference of the Parties to the Basel Convention.

2. The meeting was opened at 10.00hrs. on Monday, 30 August 1999 by its
Chairperson, Mrs. Flor de Maria Perla de Alfaro from El Salvador. The Chairperson
thanked Norway and Denmark for their financial contribution which enabled delegations
from developing countries and countries with economies in transition to participate in this
session.

3. With reference to the significant progress made during the last session and the spirit
of cooperation shown in reaching a consensus, the Chairperson expressed the hope that the
meeting will be able to finalize the draft Protocol. If finalized the Protocol will be formally
adopted and signed during the fifth meeting of the Conference of the Parties in December
1999.

4. The Chairperson stressed that there are only a few interrelated issues which still have
to be solved: The Scope of the Protocol; Strict Liability; Financial limits; Insurance and other
financial guarantees; Relationship with other Bilateral, Multilateral and Regional
Agreements; and Financial Mechanism.

II. ORGANIZATIONAL MATTERS
A. Opening of the Session

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

   UNEP/CHW.1/WG.1/10/1 Provisional agenda

   UNEP/CHW.1/WG.1/9/2 Report of the ninth 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

B. Attendance

6. The delegates of the following Parties to the Basel Convention participated in the session: Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Bangladesh, Belgium, Benin, Brazil, Burundi, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, European Community, Finland, France, Gambia, Georgia, Germany, Guatemala, Guinea, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kuwait, Kyrgyzstan, Lebanon, Malawi, Malaysia, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Seychelles, Singapore, South Africa, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Turkey, United Kingdom of Great Britain and Northern Ireland, Uruguay and Venezuela.

7. The following countries attended the meeting in their capacity as observers: Democratic People’s Republic of Korea, Dominican Republic, Libyan Arab Jamahiriya, Rwanda and the United States of America.

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

9. The following non-governmental organizations and industry also attended the meeting: Basel Action Network (BAN), Basel Liability Coalition, European Chemical Industry Council (CEFIC) Institute of Scrap Recycling Industries (ISRI) and the West Coast Environmental Law Association (WCELA).
C. Bureau

10. The following are members of the Bureau:

   Chairperson: Ms. Flor de Maria Perla de Alfaro (El Salvador)

   Vice-Chairpersons: Mr. Jawed Ali Khan (Pakistan)
                      Mr. Ephraim Buti Mathebula (South Africa)
                      Mr. Thomas Graner (Germany)

   Rapporteur: Mrs. N. Karpova (Russian Federation)

D. Adoption of the agenda

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

   1. Opening of the meeting
   2. Organization of the meeting
   3. Adoption of the Agenda
   4. Finalization of consideration of Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal and recommendations to the fifth meeting of the Conference of the Parties to the Basel Convention
   5. Other matters
   6. Closure of the meeting

E. Organization of the work

12. The Chairperson advised that the Bureau had held a meeting where the organization of the work of this last session was discussed.

13. In the deliberation of the organization of the work of the session, it was decided to convene:

   (a) An informal Group under the chairmanship of Sweden and subsequently under the chairmanship of the United Kingdom on the draft Articles relating to financial limits (Article 13) and insurance and financial guarantees (Article 15).

   (b) An Open-Ended Group entrusted with negotiation of the remaining Articles with a view to ensuring a better flow of information of informal negotiations under the co-chairmanship of Switzerland and Malaysia.

   (c) An Informal Legal Group under the Chairmanship of France and subsequently
under the chairmanship of Canada for providing a legal review of adopted articles, taken into account the recommendations from the Treaty Section of the United Nations.

Further, it was decided that:

(d) Meetings of Regional Groups would be held frequently in order to ensure daily briefing or mandate reviewing and

(e) The Plenary would be convened every day at 10:00 hrs. and at 16:30 hours respectively, or, if necessary, at any other time, to consider the Articles agreed upon by the Open-ended Group. The meeting agreed with the organization of the work.

F. Consideration of the draft Articles

14. The co-chair of Open-ended Group, Ms. Katharina Kummer from Switzerland gave a report to Plenary on the work done by the Group. She presented the proposals of the Group which were based on proposal by small groups. She explained that the Group had not in general included square brackets around the Articles but have taken note of the reservations and concerns expressed by delegates in particular relating to Article 3, paragraph 5(b) and paragraph 8, Article 12 and Article 23. Only Article 3 and the Annex to the Article 15 and Article 16 contain square brackets. The co-Chairperson of the Open-ended Group concluded the report by thanking all delegates for the tremendous efforts in reaching consensus on all remaining Articles.

15. The following Articles were adopted by the Plenary and are attached to this Report as its Annex:

Article 13 (Financial Limits) without its Annex and Article 23 (Relation between the Protocol and the Law of the Competent Court)

16. Article 10 (Basis of Claims) was deleted from the draft Protocol.

17. However, the meeting was unable to finalize the following Articles of the draft Protocol:

Article 3 (Scope of application), Article 4 (Strict liability), Article 15 (Insurance and other financial guarantees), Article 16 (Compensation Mechanism)

18. Colombia speaking on behalf of the Like Minded Group of Developing Countries made the following statement:

"I would like to thank you for the way in which you have led this Group and the efforts you have made in order for this Group to get to a consensus. However, Madam, bearing in mind the fact that this instrument will be an integral part of our national legislations, the Like Minded Group is not ready to adopt a Protocol on Liability and Compensation today, but we are certain that during COP V the crucial issues will be resolved, without which the Protocol is meaningless. Our Group, has participated in good faith, negotiated with an open spirit and is
willing to continue to look for formulas that help build a balance among the developing and developed world. For the Like Minded Group, many concerns are still on the table: mainly, articles 3.5(b), 3.6 (ii), article 12, article 15, article 31, and of course, article 16, and thereby reserve its position regarding the above mentioned articles.

Madam, I must assure you that our countries struggle everyday to be better, have better set of laws with the aims of protecting the environment. If what we need is regulations for movements among developing countries, then maybe this is not the right forum to do so. If the aim is to set international rules regarding liability and compensation for damage resulting from the transboundary movements of hazardous wastes and their disposal to which all will have abide by, then we feel encouraged to go forward.

When negotiations resume, we would like to start form the conclusions of the tenth session and with the understanding of one common agenda. In three words, "No more surprises". We hope that the intentions of all groups have been disclosed.

The political level needed for the creation of a compensation mechanism can only be achieved at COP V, where our Ministers are hopefully going to be present. In Basel enough time should be allocated to negotiate further. Time should not be a limitant in Basel."

19. Further to some discussion, the Plenary decided to go through the outstanding issues Article by Article.

**Article 3**

20. As far as Article 3 is concerned Norway proposed a different wording to the draft Article 3, paragraph 2(c) which is incorporated in Annex to this Report.

21. The following countries expressed their concerns and reservations on Article 3:

(a) Australia and Japan expressed their reservation concerning Article 3(1). They would prefer the end point of liability to be different for final disposal and recycling.

(b) Argentina reserved its position as regards the second and third sentence of Article 3, paragraph 1.

(c) Japan expressed reservations on Article 3, paragraphs 1, 2(c), 2(d) and 5(b).

(d) Iran felt that Article 3, paragraph 2(d) should cover all non-OECD transit States which are not Party to the Protocol and expressed its reservation to the current draft of Article 3, paragraph 2(d).

(e) Denmark expressed their preference for the deletion of Article 3, paragraph 5(b).
(f) Austria, Australia, Brazil, Germany, China and India made reservations concerning Article 3, paragraph 5(b).

(g) The delegation of Turkey stated that, (1) sub-paragraph (d) of paragraph 2 of Article 3, should cover all transit States which are not Parties to the Protocol, and (2) wastes falling under Article 1, paragraph 1(b) of the Convention should be included in the Protocol. Therefore they have reservations regarding Article 3, paragraphs 2(d) and 5(b).

22. Australia and Canada requested insertion of square brackets in Article 3 para 5(b).

23. A few countries made a reference to their proposal concerning Article 3 as discussed by the Open-ended Group and asked for the proposals to be reflected in the report.

24. A Proposal was presented by India and supported by Korea on Article 3, paragraph 5(b) - To damage due to waste falling under Article 1, paragraph 1(b) of the Convention, unless these wastes have been notified in accordance with Article 3 of the Convention; deletion of "and have been exported .... mutatis mutandis".

25. A Proposal was presented by Colombia on Article 3, paragraph 6 (ii) - there exists a liability and compensation regime, which is in force and is applicable to the damage resulting from movements mentioned above, and which provides victims compensation rights and remedies which meet or exceed those in Articles 4, 5, 13, 14, 15 and 25 of the Protocol.

**Article 4**

26. Article 4 was discussed by the plenary. Australia, Austria, Germany, Japan, Republic of Korea, New Zealand expressed their strong preference for channeling the liability to the person in operational control as this would be more consistent with the polluter pays principle.

27. Austria, Korea addressed the Article 4 paragraph 4 (c), pointing out that the reference to the "State where the damage occurred" would be inadequate, and a reference to the "State where the incident occurred" would be preferable.

**Article 13**

28. The meeting considered and adopted the Article 13 of the draft Protocol. Japan reserved its position on paragraph 2 of Article 13. Australia reserved its position in relation to Article 13 paragraph 2 and expressed its preference that a limit be placed on liability found in relation to negligence.

29. Australia had difficulties with the reference to tonnage in paragraph 1(a) of the Annex to Article 13 as the risk involved in any shipment may not necessarily correspond to the tonnage of the shipment but is dependant on the hazardousness of the material. Australia also
has difficulties with the inclusion of the words "plus any additional amount required by the disposer’s national law " in paragraph 1 (b) as this is redundant in light of Article 23.2.

30. The meeting requested the Secretariat of the Basel Convention to contact the relevant experts, including from the insurance companies and based on the information received, prepared a detailed document for the fifth meeting of the Conference of the Parties to be used in establishing the financial limits of liability as envisaged under Article 13 of the draft Protocol.

Article 15

31. In so far as Article 15 is concerned Belgium and Micronesia reserved their position on the present wording of Article 15, paragraph 4 because it remains convinced that direct action against the insurer should be foreseen as a rule, in accordance with several existing liability conventions.

Article 16

32. With regard to Article 16, Japan reserved its position on paragraph 2. In addition to the general reservation expressed by the "like-minded-group", Cuba and Micronesia reserved their position on paragraph 4 of the present draft and requested that non-Party small islands and developing States is being included in the paragraph.

33. Canada requested insertion of square brackets in Article 16 para 2. And proposed an alternative wording to Article 16 para 2, namely to replace "with the following objectives" with "taking into account".

Article 23

34. Article 23 was adopted by the meeting. Japan and the Republic of Korea reserved its position with regard to the paragraph 2 of Article 23.

35. A few delegates presented written statements to be included in the Report:

36. The Federated States of Micronesia expressed the wish to convey the special needs and concerns of a small Pacific island, a transit state "par excellence". The delegate made the following statement:

"A small island state is above all small, both in size and population, but nonetheless it should be taken into account that a small island state controls a very large expanse of water: its Exclusive Economic Zone (EEZ). For most, if not all island states, EEZ is its principal source of national revenues. The EEZ is particularly vulnerable to incidents, involving hazardous wastes. It is quite likely that the demand for fish from this state’s EEZ will collapse should there be any waste incident. Any response in terms of manpower and technical know-how would also be completely inadequate. Small island states should be protected under this Protocol to the extent that they should be able, both technically and financially, to respond to any environmental crisis."
37. Conscious of their particular situation, the Pacific Island countries have concluded the Waigani Convention under Article 11 of the Basel Convention. Although not yet in force, this regional convention will provide a regulatory regime similar to the Basel Convention although, for reasons, mainly of distance and money, the region may not be able to adhere to the Basel Convention or this Protocol. Those countries that are part of the Waigani Convention should be covered by this Protocol even though they may not be parties.

38. The representative from the International Maritime Organization (IMO) stated the following:

"A resolution adopted at the 1996 International Conference on Hazardous and Noxious Substances and Limitation of Liability states that the relationship between the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the "HNS Convention") and any future liability protocol established under article 12 of the Basel Convention should be determined in accordance with the principles of uniformity, legal certainty, avoidance of overlaps and equity.

At the present stage of the negotiations leading to the adoption of the prospective Basel Liability Protocol, IMO considers convenient to restate its views that these principles are best achieved bearing in mind that the HNS Convention regulates a specific subject matter, namely the liability of the shipowner and the cargo interests in connection with the carriage by sea of HNS. Within this scope, the application of other treaties should be excluded. This exclusion means that in connection with the carriage by sea of HNS no other treaty can attach additional liability to those made liable under the HNS Convention, namely, the ship owner and the cargo interests contributing to the HNS Fund.

The exclusive operation of the HNS treaty in the field of liability in connection with the carriage of HNS by sea is explained in accordance to basic principles of International Law. Maritime Law is recognized as a distinctive corpus juris in respect of which unification of international rules is a subject within the global mandate of IMO.

Bearing in mind these features, IMO considers that options in article 4 of the draft Basel Protocol proposing the channeling of liability to persons such as the generator, notifier, exporter, etc. are the best way of avoiding overlaps with the HNS Convention. The exclusive operation of the HNS treaty should, in the view of IMO, also be preserved vis à vis article 5 of the draft Basel Protocol which establishes the fault based liability of any person due to his lack of compliance with the provisions of the Basel Convention or his wrongful intentional reckless or negligent acts or omissions.

Finally, IMO wishes to state its view that the exclusive IMO’s global mandate in the field of international maritime law should be acknowledged bearing in mind not only the HNS Convention but also any future elaboration of liability and compensation rules which may be undertaken by IMO in the field of carriage by sea of hazardous and noxious substances."
39. The West Coast Environmental Law Association, representing Canadian environmental interests, made submissions that:

$ the exemption of Article 3 para.5(f) (later Article 3 para 6 (ii)) lacks justification and would remove any incentive by OECD countries to ratify the Protocol.

$ domestic legislation in many jurisdictions provides victim remedies which exceeds those found in the Protocol.

$ Article 23.2 should be removed, given its effects of rendering inoperative domestic legislation which provides victims with remedies greater than those in the Protocol; and

$ Given the Protocol’s weak victim remedies, it should at most serve as a floor, and not a ceiling, of liability.

40. Basel Action Network stated that the current draft Protocol was seriously deficient. Firstly, he noted that generators of hazardous wastes, those that created the problem in the first place were exempt from liability claims. Secondly, the failure to cover long-term damage from disposal operations, excluded the most serious forms of possible damage from those operations. Without solving these flaws, environmental NGOs consequently will be left with little choice but to condemn the Protocol.

41. The same NGO further stated in addition that it was felt that Article 11 exclusions from the Protocol were inappropriate and represented a further weakening of the Protocol. It was pointed out that those countries that claim they need such exclusions to retain higher national standards can more appropriately assert this right by allowing higher national standards under Article 23.

42. The Legal Working Group, initially chaired by France and subsequently by Canada, considered the following Articles:

Article 1 (Objective), Article 2 (Definitions), Article 5 (Fault-based liability), Article 6 (Preventive Measures), Article 7 (Combined Cause of the Damage), Article 8 (Right of Recourse), Article 9 (Contributory Fault), Article 11 (Implementation), Article 14 (Time Limit of Liability), Article 17 (State Responsibility), Article 18 (Competent Courts), Article 20 (Related Actions), Article 21 (Applicable Law), Article 25 (Mutual Recognition and Enforcement of Judgements), Article 26 (Relationship of this Protocol with the Basel Convention), Article 27 (Signature), Article 28 (Ratification, Acceptance, Formal Confirmation or Approval), Article 29 (Accession), Article 30 (Entry into Force), Article 31 (Reservations and Declarations), Article 32 (Withdrawal), Article 33 (Depositary), Article 34 (Authentic texts)

43. Canada gave a report to the Plenary on the work done by the Legal Drafting Group. The Articles which were dealt with by the Legal Drafting Group were approved by the Plenary with the exemption of Article 31, paragraph 1 which was amended to be as it was adopted by the previous session.
44. South Africa explained that because its delegation was composed of only one person and that person was busy with the Contact Group it was not in a position to compare the old text with new one. For this reason South Africa reserved its position on these Articles.

45. All Articles of the Draft Protocol, including Articles adopted by this session (Article 13 and Article 23) are contained in the Annex attached to this Report.

**G. Recommendation of the meeting for the fifth meeting of the Conference of the Parties**

46. The meeting considered that the remaining Articles can be solved during the fifth meeting of the Conference of the Parties and the Protocol can be adopted by the fifth meeting of the Conference of the Parties.

47. The meeting adopted this Report with its Annexes on 3 September 1999 at 20.55hrs.

**H. Closure of the meeting**

48. After the usual exchange of courtesies, the Chairperson declared the meeting closed at 20.55hrs. on 3 September 1999.
ANNEX

Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal

(Note: The square brackets and the text in square brackets introduced during the Plenary are marked in bold and italics.)

Article 1
Objective
(Considered by the Legal Drafting Group and adopted by the Plenary)

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 other wastes and their disposal including illegal traffic in those wastes.

Article 2
Definitions
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. The definitions of terms contained in the Convention apply to this Protocol, unless expressly provided otherwise in this Protocol.

2. For the purposes of this Protocol:

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

   (b) "Hazardous wastes and other wastes" means hazardous wastes and other wastes within the meaning of Article 1 of the Convention.

   (c) "Damage" means:

   i. loss of life or personal injury;

   ii. loss of or damage to property other than property held by the person liable in accordance with the present Protocol;

   iii. loss of income directly deriving from an economic interest in any use of the environment, incurred as result of impairment of the environment, taking into account savings and costs;

   iv. the costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken; and

   v. the costs of preventive measures, including any loss or damage caused by such measures,

   to the extent that the damage arises out of or results from hazardous properties of the 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. Domestic law may indicate who will be entitled to take such measures;

(e) "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;

(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 that causes damage or creates a grave and imminent threat of causing damage;

(i) "Regional economic integration organization" means an organization constituted by sovereign States to which its member States have transferred competence in respect of matters governed by this Protocol and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve, formally confirm or accede to it.

Article 3
Scope of application
(Pending)

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 are loaded on the means of transport within the national jurisdiction of a State of export. Any Contracting Party may by way of notification to the Depository exclude the application of this Protocol, in respect of all transboundary movements for which it is the state of export, for such incidents which occur within its area of national jurisdiction, as regards damage in its area of national jurisdiction. The Secretariat shall inform all Contracting Parties of notifications received in accordance with this Article.

The Protocol shall apply:

(a) in relation to movements destined for one of the operations specified in Annex IV to the Convention other than R12, R13, D13, D14 or D15, until the time at which the notification of completion of disposal pursuant to Article 6(9) of the Convention has occurred, or, where such notification has not been made, completion of disposal has occurred, and

(b) in relation to movements destined for the operations specified in D13, D14, D15, R12 or R13 of Annex IV to the Convention, until completion of the subsequent disposal operation specified in D1 to D12 and R1 to R11 of Annex IV to the Convention.
2. (a) This Protocol shall apply only to damages suffered in an area under the national jurisdiction of a contracting party arising from an incident as referred to in paragraph 1.

(b) When the State of Import, but not the State of Export, is a Contracting Party, this Protocol shall apply only with respect to damages arising from an incident as referred to in paragraph 1 which takes place after the moment at which the disposer has taken possession of the hazardous wastes or other wastes. When the State of Export, but not the State of Import, is a Contracting Party, this Protocol shall apply only with respect to damages arising from an incident as referred to in paragraph 1 which takes place prior to the moment at which the disposer takes possession of the hazardous wastes or other wastes. When neither the State of Export nor the State of Import is a Contracting Party, this Protocol shall not apply.

(c) Notwithstanding subparagraph (a), this protocol shall also apply to the damages specified in (i), (ii) and (v) of Article 2, paragraph 2 (c) of this Protocol occurring in areas beyond any national jurisdiction.

(d) Notwithstanding subparagraph (a), this Protocol shall, in relation to rights under this protocol, also apply to damages suffered in an area under the national jurisdiction of a Transit State which is not a Contracting Party provided that such State appears in Annex (Y) and has acceded to a multilateral or regional agreement concerning transboundary movements of hazardous waste which is in force. Subparagraph (b) will apply mutatis mutandis.

Note: Annex Y will contain a list of the small island developing states. (A.O.S.I.S)

3. Notwithstanding paragraph 1, in case of re-importation under Article 8, Article 6(9) or Article 9, paragraph 2(a) of the Convention, the provisions of this Protocol shall apply until the hazardous wastes and other wastes reaches the State of original Export.

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

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

(a) 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;

(b) to damage due to wastes falling under Article 1, paragraph 1(b) of the Convention unless these wastes have been notified in accordance with article 3 of the
Convention and have been exported illegally and the damage arising from the transboundary movement was suffered in the territory of the Party which has notified these wastes as hazardous; Art. 6 paragraph 5 of the Convention shall apply mutatis mutandis;]

6. The Protocol shall not apply to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes or their disposal pursuant to a bilateral, multilateral or regional agreement or arrangement concluded in accordance with Article 11 of the Convention provided that:

(i) the damage occurred within the national jurisdiction of any of the Parties to the agreement or arrangement;

[(ii) there exists a liability and compensation regime, which is in force and is applicable to the damage resulting from movements mentioned above [and is no less protective than this Protocol, and meets its objective], that meets the aims of this Protocol, in particular taking into account the interests of developing countries;

alternative 2 [there exists a liability and compensation regime, which is in force and is applicable to the damage resulting from movements mentioned above, and which provides victims compensation rights and remedies which meet or exceed those in Articles 4, 5, 13, 14, 15 and 25 of the Protocol]

(iii) the movement is not illegal traffic as defined in Article 9 of the Convention; and

(iv) the Parties to the abovementioned Article 11 agreement have not declared that the Protocol shall be applicable.

In order to promote transparency, a Party or Parties to an Article 11 agreement or arrangement shall notify the Secretariat of the non-application of this Protocol and of the applicable liability and compensation regimes referred to in paragraph (ii) above,[including a demonstration of compliance with the conditions of paragraph (ii (alternative 2)) The Secretariat shall submit to the Conference of the Parties to the Convention, on a regular basis, summary reports on the notifications received.

7. The exclusion set out in paragraph 6 of this Article shall neither affect any of the rights or obligations under this Protocol of a Contracting Party which is not party to the agreement or arrangement mentioned above, nor shall it affect rights of transit states which are not Contracting Parties.

8. Article 3 para 2 shall not affect the application of Article 16 to all Contracting Parties.

Note: The square brackets and the text in square brackets introduced during the Plenary are marked in bold and italics.

Article 4
Strict Liability
(Pending)

1. The person who notifies in accordance with Article 6 of the Convention, shall be liable for damage until the disposer has taken possession of the hazardous wastes or other wastes. 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 disposer has taken possession of the hazardous wastes or other wastes. With respect to Article 3 paragraph 5 letter b of this Protocol, Article 6 paragraph 5 of the Convention shall apply mutatis mutandis. Thereafter the disposer shall be liable for damage.

2. Should the hazardous wastes and other wastes be re-imported in accordance with Article 8 of the Convention, the person who notified shall be liable for damage from the time the hazardous wastes leaves the disposal site, until the wastes are taken into possession by the alternate disposer.

3. Should the hazardous wastes and other wastes be re-imported under article 9.2(a) or article 9.4 of the Convention, subject to Article 3, the person who re-imports shall be held liable for damage until the waste is taken into possession by the exporter if applicable, or by the alternative disposal site.

4. No liability in accordance with this Article shall attach to the person referred to in paragraph 1 of this Article, if that person proves that the damage was:

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

   (b) the result of a natural phenomenon of exceptional, inevitable unforeseeable and irresistible character;

   (c) wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred; or

   (d) wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.

5. 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 liable.

Article 5
Fault-based liability
(Considered by the Legal Drafting Group and adopted by the Plenary)

Without prejudice to Article 4, any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions. This Article shall not affect the domestic law of the Contracting Parties governing liability of servants and agents.
**Article 6**
Preventive Measures  
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. Subject to any requirement of domestic law any person in operational control of hazardous wastes and other wastes at the time of an incident shall take all reasonable measures to mitigate damage arising therefrom.

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 domestic law regarding preventive measures, is not thereby subject to liability under this Protocol.

**Article 7**
Combined Cause of the Damage  
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. Where damage is caused by 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 wastes covered by this Protocol to the damage.

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

3. In respect of damage where it is not possible to distinguish between the contribution made by wastes covered by this Protocol and wastes not covered by this Protocol, all damage shall be considered to be covered by the Protocol.
Article 8
Right of recourse
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. Any person liable under this Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court:
   (a) against any other person also liable under this Protocol; and
   (b) as expressly provided for in contractual arrangements.

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

Article 9
Contributory Fault
(Considered by the Legal Drafting Group and adopted by the Plenary)

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

Article 10
Basis of Claims
(deleted)

Article 11
Implementation
(Considered by the Legal Drafting Group and adopted by the Plenary)

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

2. The provisions of this Protocol shall be applied without discrimination based on nationality, domicile or residence.

Article 12
Conflicts with other Liability and Compensation Agreements
(Pending)

1. Whenever the provisions of this Protocol and the provisions of a bilateral, multilateral or regional agreement apply to liability and compensation for damage caused by an incident arising during the same portion of a transboundary movement, this Protocol shall not apply provided the other agreement is in force between the Parties concerned and had been opened...
for signature when this Protocol was opened for signature, even if the agreement was amended afterwards.

2. Contracting Parties may not enter into bilateral agreements on liability and compensation for transboundary movements incompatible with the objectives of this Protocol.

Article 13
Financial Limits
(Adopted by the Plenary
Has not yet been considered by the Legal Drafting Group)

1. Financial limits for the liability under Article 4 of this Protocol, are specified in Annex X to the Protocol. Such limits shall not include any interest or costs awarded by the competent court.

2. There shall be no financial limit on liability under Article 5.

[ANNEX TO ARTICLE 13 [PENDING]]

1. The liability under Article 4 of this Protocol shall for any one incident be limited to:

   (a) in relation to liability of the notifier or exporter, [ ] for shipments up to [ ] tonnes, [plus an additional] [ ] SDR for each [additional tonne up to a maximum of] [ ]; and

   (b) in relation to the liability of the disposer [ ] [plus any additional amount required by the disposer’s national law.]

2. The amounts referred to in paragraph 1 shall be reviewed by the Contracting Parties on a regular basis taking into account, inter alia, the potential risks posed to the environment by the movement of hazardous wastes or other wastes and their disposal and the nature, quantity and hazardous properties of the wastes.

Article 14
Time Limit of Liability
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from the date of the incident.

2. Claims for compensation under this Protocol shall not be admissible unless they are brought within five years from the date the claimant knew or ought reasonably to have known of the damage provided that the time limits established pursuant to paragraph 1 of this Article are not exceeded.
3. Where the incident consists of a series of occurrences having the same origin, time limits established pursuant to this Article shall run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

Article 15
Insurance and other financial guarantees
(Pending)

1. Liability under Article 4 of this Protocol shall be covered, to the limits specified in Annex X, by insurance, bonds or other financial guarantees or, in the case of states, by declarations of self-insurance, valid throughout the period of the time limit of liability. Nothing in this paragraph shall prevent the use of deductibles or co-payments as between the insurer and the insured, but the insured’s failure to pay any deductible or co-payment shall not be a defence against the person who has suffered damage.

2. Insurance, bonds or other financial guarantees referred to in paragraph 1 of this Article shall only be drawn upon in order to provide compensation for damage covered by Article 2 of this Protocol.

3. With respect to the liability of the notifier or exporter under Article 4 of this Protocol, proof that the liability is covered by the insurance, bonds or other financial guarantees shall accompany the notification referred to in Article 6 of the Convention. With respect to liability of the disposer under Article 4 of this Protocol, proof that the liability is covered by the insurance, bonds or other financial guarantees shall be delivered to the competent authorities of the State of import.

4. A Contracting Party shall, by notice to the Depositary at the time of signature, ratification, or approval of, or accession to, this Protocol, or by adoption of legislation or regulation, indicate whether or not it provides a right to bring an action directly against persons who provide insurance, bonds, or other financial guarantees pursuant to this Article within that Contracting Party’s jurisdiction. In the case of such right of direct action, the insurer or the person providing the financial guarantee shall have the right to require the person liable under Article 4 to be joined in the proceedings. The Secretariat shall maintain a record of the Contracting Parties who have made declarations or given notice of their legislation or regulation pursuant to this paragraph. Insurers and persons providing financial guarantees may invoke the defences which the person liable under Article 4 would be entitled to invoke.
Article 16
Compensation Mechanism
(Pending)

1. The Parties recognize the need that all damages due to transboundary movement of hazardous wastes and other wastes or their disposal are adequately and promptly compensated and that the system of liability and compensation that is set out in this Protocol should be sufficient to meet this need. For this purpose the Parties agree that [additional] [compensation] measures [may] [shall] be taken, including the [possible] establishment of a fund, technical assistance [and/or modification of the Protocol]. To this end, the Parties shall evaluate the information made available by the Secretariat on:

(a) the number of incidents arising from transboundary movements of hazardous wastes and other wastes and their disposal which involve damage, as that term is defined in the Protocol,

(b) with regard to each incident, the nature of the damage, the costs of preventive measures and measures of reinstatement;

(c) With regard to each incident, the extent to which damage was not compensated.

2. This evaluation shall take place no later than one year after entry into force of this Protocol in order to [decide on the need for] [implement] [additional] [compensation] measures and their nature and scope [with the following objectives:] [taking into account:] [taking into account:

(a) [to provide for the] costs of preventive measures and measures of reinstatement for damage from accidents arising from transboundary movements of hazardous wastes and other waste under the Convention or during the disposal of the wastes; and

(b) [to provide for] compensation when the person liable is or remains unknown, disappears or cannot be found, or is or may become financially incapable of meeting his or her obligation, or the liable person is exempted from liability in conformity with Article 4, paragraph 2, and with regards to illegal traffic.

[3. Until the Fund is established under Article 16 paragraph 1, Contracting Parties are encouraged to make voluntary contributions to the Technical Cooperation Fund that shall be specifically earmarked not only for the objectives set out in Article 16, paragraph 1, but also preventive measures in cases of transboundary movements of hazardous and other wastes that present immediate threats to human health or the environment and measures of reinstatement for specific cases identified by the Secretariat of the Basel Convention.]

[4. This mechanism shall be available for [Contracting Parties] Transit States even if the State of Export or the State of Import or both are not Party to this Protocol.]

Note: The square brackets and the text in square brackets introduced during the Plenary are marked in bold and italics.
Article 17
State Responsibility
(Considered by the Legal Drafting Group and adopted by the Plenary)

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
(Considered by the Legal Drafting Group and adopted by the Plenary)

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 20
Related Actions
(Considered by the Legal Drafting Group and adopted by the Plenary)

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

2. A court may, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and another court 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
(Considered by the Legal Drafting Group and adopted by the Plenary)

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 including any rules of such law relating to conflict of laws.

Article 22
Non Discrimination
(deleted)

Article 23
Relation between the Protocol and the Law of the Competent Court
(Adopted by the Plenary but has not yet been considered by the Legal Drafting Group)

1. Subject to paragraph 2, nothing in this Protocol shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.

2. No claims for compensation for damage based on the strict liability of the notifier or the exporter liable under Article 4 shall be made otherwise than in accordance with this Protocol.

Article 24
Expertise
(deleted)

Article 25
Mutual Recognition and Enforcement of Judgements
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. Any judgement of a court having jurisdiction in accordance with Article [18] of this Protocol, which is enforceable in the State of origin and is no longer subject to ordinary forms of review, shall be recognized in any Contracting Party as soon as the formalities required in that Party have been completed, 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 case;

(c) where the judgement is irreconcilable with an earlier judgement validly pronounced in another Contracting Party with regard to the same cause of action and the same parties; or

(d) where the judgement is contrary to the public policy of the Contracting Party in which its recognition is sought.
2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Contracting Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.

3. The provisions of paragraph 1 and 2 of this Article shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable.

Article 26
Relationship of this Protocol with the Basel Convention
(Considered by the Legal Drafting Group and adopted by the Plenary)

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

FINAL CLAUSES

Article 27
Signature
(Considered by the Legal Drafting Group and adopted by the Plenary)

This Protocol shall be open for signature by States and by regional economic integration organizations Parties to the Basel Convention, in Basel on the 10th of December 1999, at the Federal Department of Foreign Affairs of Switzerland in Bern from the 11th day of December 1999 to the 31st day of March 2000 and at the United Nations Headquarters in New York from 1st of April 2000 to the 10th of December 2000.

...
Article 28
Ratification, Acceptance, Formal Confirmation or Approval
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. This Protocol shall be subject to ratification, acceptance or approval by States and to formal confirmation or approval by regional 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 of this Article which becomes a Contracting Party without any of its member States being a Contracting 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 Contracting Party, 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 of this Article 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 Contracting Parties, of any substantial modification in the extent of their competence.

Article 29
Accession
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. This Protocol shall be open for accession by any States and by any regional economic integration organization Party to the Basel Convention which has not signed the Protocol. The instruments of accession shall be deposited with the Depositary.

2. In their instruments of accession, the organizations referred to in paragraph 1 of this Article 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 28 paragraph 2, shall apply to regional economic integration organizations which accede to this Protocol.
Article 30
Entry into Force
(Considered by the Legal Drafting Group and adopted by the Plenary)

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval or accession.

2. For each State or regional economic integration organization which ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the date of the deposit of the 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 regional economic integration organization of its instrument of ratification, acceptance, approval, formal confirmation or accession.

3. For the purpose of paragraphs 1 and 2 of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Article 31
Reservations and Declarations
(Considered by the Legal Drafting Group and adopted by the Plenary)

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

2. Paragraph 1 of this Article does not preclude a State or regional 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 of the provisions of the Protocol in their application to that State or that organization.

Article 32
Withdrawal
(Considered by the Legal Drafting Group and adopted by the Plenary)

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

2. Withdrawal shall be effective one year from receipt of notification by the Depositary, 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 Depositary of the Protocol.

Article 34
Authentic texts
(Considered by the Legal Drafting Group and adopted by the Plenary)

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