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

Eighth session
Geneva, 11 - 15 January 1999

REPORT

I. INTRODUCTION

1. The Eighth session of the Ad Hoc Working Group of Legal and Technical Experts to consider and draft Protocol on liability and compensation for damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal was held in Geneva from 11-15 January 1999 in accordance with Decision IV/fourth meeting of the Conference of the Parties to the Basel Convention.

2. The session was opened by Dr. I. Rummel-Bulska, the Executive Secretary of the Basel Convention Secretariat. In her opening remarks, Dr. Rummel-Bulska welcomed the delegates to their eighth meeting to them the importance of showing flexibility and reaching consensus. The Executive Secretary expressed that the meeting will be a successful one and that the 5th Conference of the Contracting Parties will be the Protocol to sign. She informed the meeting that the Chairperson, Ms Flor de Maria Perla de Alfar (El Salvador), was unable to arrive in time for the opening of the meeting but, she would be joining the group on the third day.

3. The Vice-chairperson, Mr. Asif Shuja Khan (Pakistan), stepped in as interim chair. Mr. Khan made reference to the results and achievements of the seventh session held in October 1998 and expressed his hope that the meeting would achieve a successful outcome on the remaining crucial areas. He reminded the group that last meeting and as such the group had before it tremendous task of agreeing on a final text to be presented to the Conference of the Parties for adoption at its next meeting. As such, he called on delegates to continue with the momentum they had built over the last seven years and to exhibit the same attitude of cooperation they had shown in previous meetings. To this end, would be a need to make sacrifices and show flexibility in previous positions.
4. On the third day of the session, Ms Flor de Maria Perla de Alfaro (El Salvador) resumed the chair the meeting, by thanking and congratulating Mr. Asif Shuja Khan (Pakistan), for the progress he and the made over the last two days. She reiterated the importance of reaching a consensus text by the end of the requested the group to continue with the commitment and enthusiasm that had got them thus far.

5. The delegation of Brazil, speaking on behalf of GRULAC, expressed its concern about the lack of simultaneous interpretation and documents translation into Spanish during the session. While recognizing of the insufficiency of funds, the delegation mentioned that interpretation and translation would allow the participation of Spanish-speaking representatives in the Basel Convention meetings.

II. ORGANIZATIONAL MATTERS

A. Opening of the session

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

- UNEP/CHW.1/WG.1/8/1 Provisional agenda
- UNEP/CHW.1/WG.1/8/2 Information paper regarding insurance aspects of the Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and their Disposal
- UNEP/CHW.1/WG.1/8/3 Information Paper on Liability, Compensation and Emergency Issues in Existing International Agreements (Parts I and II)
- UNEP/CHW.1/WG.1/7/2 Report of 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

B. Attendance

7. The delegates of the following Parties to the Basel Convention participated in the session: Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Belgium, Benin, Brazil, Burundi, Canada, Chile, China, Colombia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Finland, France, Gambia, Germany, Guatemala, Guinea, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Korea (Republic of), Kyrgyz Republic, Kuwait, Lebanon, Macedonia, Malaysia, Mexico, Moldova, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Russian Federation, Senegal, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, Vietnam, Yemen and Zambia.

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

10. The following Non-Governmental Organizations also attended the meeting: Capital Environmental, European Chemical Industry Council (CEFIC), International Chamber of Commerce, the International Council on metals and the Environment (ICME), Comité Europeen des Assurances (CEA), International Group of P & I Clubs, Institute of Scrap Recycling Industries (ISRI).

C. Bureau

11. The following are members of the Bureau:

   Chairperson: Ms. Flor de Maria Perla de Alfaro
   Vice-Chairpersons: Mr. Asif Shuja Khan (Pakistan)
                    Mr Xolisa Mabhongo (South Africa)
   Rapporteur: Mrs. N. Karpova (Russian Federation)

D. Adoption of the agenda

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

   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 Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal; 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 movements of hazardous wastes and their disposal
   6. Other business
   7. Closure of the Meeting
E. Consideration of the draft Articles

13. **Article 1: Objective**

   The representative of IMO noted that the formulation of the scope of the prospective protocol should be considered bearing in mind the need to avoid overlapping with the mandate conferred by the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (“The London Convention, article 10”) and its 1996 Protocol (Article 15) in connection with the transport of wastes for their disposal at sea, in this regard, the expression “other wastes” should be read together with articles 2 (Definition of “hazardous wastes”), 3 (scope of application) and 12 (Relationship with other bilateral, multilateral and regional agreements).

   It was decided to delete the brackets around the word "comprehensive". Some delegates noted for the record that the draft Protocol as it now stands, is not a "comprehensive" regime as that term is usually understood.

   The article was adopted without any square brackets.

14. **Article 2: Definitions**

   Many delegations insisted on Article 1, para 1 (b) to be an integral part of the definition.

   Some delegations stated that the Protocol should cover all the wastes covered by the Basel Convention in its Article 1. This will imply revisiting Article 3 para 3 of the Protocol on clauses for exclusion, since the Protocol should also cover those wastes defined as or considered to be hazardous by domestic legislation of a Contracting Party duly notified in accordance with the Basel Convention.

   Several delegations expressed reservations on including Basel Convention 1 (b) wastes in the Protocol but agreed to take this issue up during future discussions on Article 3.3 (d) of the Protocol.

   One delegation proposed an amendment for better defining "damage" by replacing the term "loss of profit" in Article 2.2 (c) (iii) with "loss of income". After discussion, this amendment was adopted but two words remained in square brackets.

15. **Article 3: Scope of application**

   During discussion of this Article, the views of experts continued to vary regarding the scope of the Protocol and when liability terminates.

   The issue of commencement of a transboundary movement was not discussed at this session. A sub-working group under the chairmanship of Australia was formed to consider further the issue of end-point and presented to the plenary two alternatives. In both the sub-working group and plenary, most delegates supported Alternative 2 while a few delegates supported Alternative 1. A new paragraph on cases of reimportation was introduced. Para 3 was not discussed.

   The Working Group did not have the opportunity during this 8th session, to discuss neither the issue of commencement of the transboundary movement in paragraph 1, nor the entire paragraph 3 of article 3 on the clauses of exclusion of application of this Protocol.

   The paragraph 4 of this Article was not discussed at this session.

16. **Article 4: Strict Liability**

   There was a general discussion of the Article 4: Strict Liability and the views of experts remained divided. The
Article 4 was referred to a sub-working group chaired by Norway to improve the wording of the two alternatives for the first paragraph. This sub-working group presented and agreed text to the plenary and the wordings for the two alternatives were approved by the plenary. The plenary discussed the choice between these two alternatives, but could not reach a compromise. However, the first option was preferred by the majority of delegates. The two alternatives remained bracketed in the text of the article.

The second paragraph of the Article 4 was approved by the plenary with two small amendments presented by one delegation and supported by another delegation. These two amendments remained in square bracket as no agreement could be reached. One delegation made a general reservations on this paragraph depending upon the outcome of the discussions on article 23. Another delegation requested to put square brackets around the word “wholly” in the paragraph 2, small c and d.

When considering Alternative 1 for paragraph 1 of Article 4, one delegation reserved its right to come back on the issue of the moment for shifting the liability to the disposer (since now it is just the factual possession), being especially interested in studying the possible effects on cases of illegal traffic (namely an eventual incitement to illegal traffic and analyse an unjust solution if no proper help is provided through an International Fund for example, when the liable person is unknown).

17. **Article 5: Fault based Liability**

After a general discussion on this article in the plenary, it appeared clear that the experts were not ready to accept a compromise text because this article is related to other articles not yet agreed, dealing with the scope of the Protocol and the provisions of the strict liability.

A few experts questioned the necessity of this article. Others proposed to postpone the discussion thereof as it is related to other articles not yet agreed. The discussion in the plenary did not lead to a consensus. The Chairperson therefore constituted a sub-working group under the chairmanship of Belgium. A first proposal made by this sub-working group was not agreed upon. After a second meeting, the sub-working group under the chairmanship of Belgium submitted a new proposal with two alternatives. A majority in the sub-working group and of the plenary were in favour of the first option. A few delegations expressed preference for the second option which was maintained in the text.

18. **Article 6: Preventive measures**

The views of the experts were different in relation to the title - namely preventive or response measure, in defining the term operational control and in understanding which national law should be taken into consideration where a person being in possession or control of hazardous wastes or other wastes acted reasonably in taking preventive measures.

In order to reach a compromise, the Chairperson of the meeting constituted a sub-working group chaired by Gambia, who, later on presented to the plenary a text with three alternatives.
After debating this proposal, the plenary decided to take one of the alternatives of the proposal of the sub-group chaired by Gambia to replace the first paragraph of article 6 of the previous text of the Draft Protocol.

One delegation asked that this new text of the first paragraph be put into the square brackets.

19. **Article 7: Combined Cause of the Damage**

This article was adopted by the plenary.

20. **Article 8: Right of Recourse**

The text of this article remains, as in the previous draft, with one addition and square brackets around the first paragraph.

21. **Article 9: Contributory Fault**

The article was considered and at the request of one delegation square brackets were introduced around "caused or".

22. **Article 10: Basis of Claims**

This article was revised from the proposal of the sub-group chaired by France. The article remained in square brackets. The experts were of the opinion that the approaches of article 23 (protocol as a minimum international standard) and this one (exclusive approach) are incompatible and only one should be kept depending on the final version of the protocol.

23. **Article 11: Implementation**

In relation to the deletion of article 22 of the draft Protocol, paragraph 2 of article 11 has been redrafted and remains in brackets.

24. **Article 12: Relationship with other Bilateral, Multilateral and Regional Agreements**

After consideration of this article, there was no agreement in the plenary. As a consequence, the article remains unchanged from the previous draft, with the three alternatives.

During the discussion one delegation, while expressing the support for alternative 3, also expressed the opinion that nuclear liability protocol should be enclosed in this text.

The representative of IMO noted that alternative 1 seemed to be the most appropriate one to exclude the possibility of overlaps or conflicts with other treaties. In connection with alternative 3, he questioned the inclusion of the provision according to which the prospective protocol should not apply to cases covered by other treaties provided the Parties concerned were also Parties to these other treaties. This provision could undermine efforts undertaken by States to become Parties to all treaties they have adopted, not only the prospective Basel Protocol.
25. **Article 13: Financial limits**

   This article was considered by the Plenary; the chairperson established a sub-group chaired by Sw which came up with a text that replaced the previous version of this article.

26. **Article 14: Time Limit of Liability**

   A compromise text was proposed by India with three paragraphs. This was adopted without the brackets in para 2.

   Few delegates felt that there should be no time limits for illegal traffic.

27. **Article 15: Insurance and Other Financial Guarantees**

   After discussion at the Plenary the chairperson established a sub-group chaired by Sweden and the new text of this article replaced the previous draft.

   One delegation expressed its reservation about the non-establishment of time limits for liability related to illegal traffic cases.

28. **Article 16: International Fund**

   The delegates could not agree about the establishment of an international fund. Those delegates questioned the establishment of this fund stressed the fact that there was not yet enough information to decide the need for such a fund. Several delegates said that they were not in a position to make a commitment to the establishment of an international fund and that further work would be required on how such a fund would work while others reaffirmed that this fund should be part of the protocol.

   Compromise text was agreed by the sub-group chaired by India.

   Several delegations reserved their right to consider alternatives other than those developed at this stage based on a proposal by India which is entirely bracketed and will require further discussions.

   The delegation of Brazil, speaking on behalf of GRULAC, mentioned that the Regional Group attach importance to the subject of the international fund. It further stated that the issue must be kept in the draft protocol and additional work is necessary in order for consensus to be reached.

   One delegation stressed its concern related to payment of contributions by Governments while it was preferable to get the contributions from industries.

29. **Article 17 State Responsibility**

   This article was adopted without any square brackets and the text is identical as in the Annex of the document UNEP/CHW.1/WG.1/7/2.
PROCEDURES

30. The meeting noted that Articles 18 - 34 of UNEP/CHW.1/WG.1/7/2 have not yet been discussed and agreed to commence their deliberations with those Articles.

The representative of the Hague Conference on Private International Law made several reservations as to the consistency and adequacy of Articles 18-25.

The meeting had a general discussion on these articles on the first day of the meeting and agreed, that these clauses are customary included in international agreements, but because these articles were not discussed in the previous sessions it was decided to discuss them in a sub-working group chaired by France.

The meeting deleted the following articles: Articles 19, 22 and 24

Article 24: The meeting agreed to delete this article because the Basel Convention itself contains identical to the provisions in this article. Article 16 of the Basel Convention, paragraph 1, small (h), req the Secretariat of the Basel Convention to provide Parties with information on consultants or consulting firm necessary competence in the field.

It was therefore decided to recommend COP5 to adopt a decision requesting the Secretariat to enl of experts with experts in the field of assessment and remediation of environmental damage.

One delegation raised its concern regarding to expertise issues in the field of assessment of damă environmental and specific methods which could be used by courts.

It was observed that harmonized methods should be used for base of assessment of damage result transboundary movements of hazardous wastes and their disposal.

31. Article 18 Competent Courts

This article was adopted.

32. Article 19 (Lis Pendens)

This article was deleted.

33. Article 20 Related Actions

This article was adopted.

34. Article 21 Applicable law

This article was adopted as was presented in the text negotiated by the sub-working group chaired by France.

35. Article 22 Non discrimination:

This article was deleted.

36. Article 23 Relation between the Protocol and the Law of the Competent court

No agreement was reached on the text and therefore it remains in square brackets. This article is to be revised in relation to Article 10.
37. **Article 24  Expertise**

   This article was deleted because of the reasons mentioned in para 30 above of this Report.

38. **Article 25  Mutual recognition and enforcement of judgements**

   This article was presented in the text negotiated by the sub-group chaired by France with some minor amendments. Part of the text is in square brackets.

   **FINAL CLAUSES**

39. **Article 26  Signature**

   This article was adopted with minor changes.

40. **Article 27  Ratification, Acceptance, Formal Confirmation or Approval**

   This article was adopted.

41. **Article 28  Accession**

   This article was adopted, with the addition in the second line, after "organization" of the words: "the Basel Convention".

42. **Article 29  Entry into Force**

   This article was considered. Most delegations supported 20 instruments of ratification necessary into force. Some suggested more ratifications to be necessary for entry into force.

43. **Article 30  Relationship of this Protocol with the Basel Convention**

   This article was adopted and placed before article 26.

44. **Article 31  Reservations and Declarations**

   This article was adopted. One observer recorded option for having reservation included.

45. **Article 32  Withdrawal**

   This article was adopted.

   It was agreed by the plenary that it was unnecessary to add a paragraph which would preserve the rights of the victim prior to withdrawal as this situation is already addressed by Article 70 of the Vienna Convention on the Law of Treaties.

46. **Article 33  Depository**

   This article was adopted.

47. **Article 34  Authentic texts**

   This article was adopted.
ANNEX

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

Article 1
Objective

The objective of this Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other 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 of damage to property other than property held by the person liable for damage 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 [significant] 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;
      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 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 seas, of [the State of export] [State Concerned]] until

Alternative 1

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 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, completion of the subsequent operation specified in D1 to D12 and R1 to R11 of Annex IV to the Convention.

Alternative 2

a) in relation to movements destined for one of the operations specified in Annex IVB of the Convention, the time at which the wastes have been taken into possession by the disposer at the site where the operation shall take place, and

b) in relation to movements destined for one of the operations specified in Annex IVA of the Convention, 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, until completion of disposal has occurred.

Paragraph 2bis

Notwithstanding paragraph 1, the Protocol shall, in case of re-importation under Article 8 or Article 9 paragraph 2 (a) of the Convention, apply until the hazardous wastes and other wastes have been returned to… [the point at which commencement occurs under paragraph 1]

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:**

   [1. The person who notifies in accordance with Article 6 paragraph 1 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. Thereafter the disposer shall be liable for damage.]

**Alternative 2:**

[1. 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. A person who has formally accepted and is in possession of the movement document referred to in Article 4 paragraph 7 (c) of the Convention shall be considered [shall be presumed] to be in operational control of the wastes.]

2. No liability 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; or
   d) [wholly] the result of the wrongful intentional conduct of a third party [or of the person who suffered the damage].

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 liable.

[Article 5
Fault-based Liability

Option 1: Without prejudice to Article 4, any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions of the Convention or by his intentional, reckless or negligent acts or omissions.

Option 2: Without prejudice to Article 4, any person potentially liable under Art. 4 shall also be liable for damages caused or contributed to by his lack of compliance with the provisions of the Convention or by his intentional, reckless or negligent acts or omissions.]

Article 6
Preventive Measures

1. [Subject to any requirement of national 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 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 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**

1. No claim for compensation for damage shall be made against the liable person under article 4 otherwise than in accordance with the protocol.

2. Nothing in this protocol shall prejudice the right of contracting Parties to maintain or introduce in their national law provisions more favourable to the victim of damage with regard to:
   a) limitation of liability
   b) minimum of compulsory insurance or financial guarantees
   c) time limits

   .....]

**Article 11**
**Implementation**

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

1. The liability of the person liable for damage in accordance with Article 4 of this Protocol shall be limited to . . . SDRs per tonne of wastes, [but in no case more than . . . million SDRs] for any one incident. Such limit shall not include any interest or costs awarded by the competent court.

Alternative 1
2. The person liable under Article 4 or [Article 5] of this Protocol shall not be entitled to limit his 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

2. The person liable under Article 4 shall not be entitled to limit his liability under this Protocol unless he proves that he has taken all reasonable measures to avoid the damage.

[3. There shall be no financial limit on liability under article 5.]

4. The amount referred to in paragraph 1 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 14

Time Limit of Liability

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from the date of the incident which caused the damage as defined in Article 2.

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 paragraphs 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.

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, [including declarations of self insurance by States,] 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 .....
by the waste.

[6. Any claim for compensation for damage be brought directly against the insurer or person providing financial guarantee.]

[7. Any sum provided by insurance or by other financial security maintained in accordance with paragraph 1 shall be available exclusively for the satisfaction of claim under this protocol.]

**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 commit themselves to ensure that resources will be available for all incidents occurring during transboundary movements of hazardous wastes and other wastes resulting in damages. To this end, with a view to cover damages under Article 2 paragraph 2 (iv) and (v) agree to setting up appropriate rules and procedures for a financial mechanism, in addition to the limited compulsory insurance provided for under Article 15. The financial mechanism may be based initially on voluntary contributions. The following functions are envisaged of the financial mechanism:

(a) to minimize damage from accidents;

(b) to provide adequate help to the State Party concerned when the person liable under Article 4 remains unknown, or is or may become financially incapable of meeting his or her obligations;

(c) to provide adequate help to the State Party concerned when the liable person is exempted from liability in conformity with Article 4 paragraph 2.]

2. The Parties shall [endeavour to establish a fund][consider the establishment of a further instrument for compensation] and cooperate in order to gather sufficient data and information on the nature and the volume of the transboundary movement, the occurrence, impact and pattern of incidents as well as the amounts and kinds of wastes involved in those incidents, the extent to which claims for damages related to such incidents are being satisfied, and any other data and information considered relevant for the [assessment] of contributions, the sources of such contributions [and the fulfilment of the functions of the instrument.]

[3. When exercising the [considerations][endeavouring] mentioned in paragraph 2 of this Article, the Parties shall bear in mind the relationship between Article 14 paragraph 2 of the Convention and paragraph 1 of this Article [with the possibility of a combined mechanism.]]
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 (deleted)
Lis Pendens

[Article 20
Related Actions

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

2. A court other than the court first seized 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 seized 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 including any rules of such law relating to conflict of laws.

Article 22 (deleted)
Non Discrimination

[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 (deleted)
Expertise

[Article 25
Mutual recognition and enforcement of Judgements

1. Any [judgement] [recognition] of a court pursuant to this protocol having jurisdiction in accordance with article 18 of 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, as soon as the formalities required by that Party have been completed, except:

   a) [where [judgment] [recognition] is contrary to the public policy of the Contracting Party in which recognition is sought;]

   b) where the judgement was obtained by fraud;

   c) where the defendant was not given reasonable notice and a fair opportunity to present his or her case;

   d) where the decision is irreconcilable with an earlier judgement validly pronounced in another Contracting Party with regard to the same cause of action and the same Parties.

2. A judgement recognized under paragraph 1 of this article, which is enforceable in the Party of origin and is no longer subject to ordinary forms of review, 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 reopened [nor delay the implementation of the Court judgment.]

Article 26
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.

FINAL CLAUSES

Article 27
Signature

This Protocol shall be open for signature by States and by political and/or 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

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 Depository.

2. Any organization referred to in paragraph 1 above which becomes a Party to this Protocol without any of its member States being a Party shall be bound by all the obligations under the Protocol. In the case of such organizations, one or more of whose member States is a Party to the Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under the Protocol concurrently.

3. In their instruments of formal confirmation or approval, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Protocol. These organizations shall also inform the Depository, who will inform the Parties, of any substantial modification in the extent of their competence.

Article 29
Accession

1. This Protocol shall be open for accession by States and by political and/or economic integration organizations that are Parties to the Basel Convention from the day after the date on which the Protocol is closed for signature. The instruments of accession shall be deposited with the Depository.

2. In their instruments of accession, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Protocol. These organizations shall also inform the Depository of any substantial modification in the extent of their competence.

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

Article 30
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 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
Depository

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.