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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

Ninth session
Geneva, 19-23 April 1999

REPORT

I. INTRODUCTION

1. 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 was held in Geneva from 19 - 23 April 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 by its chairperson, Mrs. Flor de Maria Perla de Alfaro from El Salvador who emphasized that this meeting is expected to be the last one before the fifth meeting of the Conference of the Parties and therefore there is a hope that this meeting will agree on the draft Protocol to present it for signature at the fifth meeting of the Conference of the Parties which is to take place in December 1999 in Basel. The Executive Secretary in her short statement also referred to the expectations to finalize the Protocol to allow its adoption at the 10th anniversary of the Basel Convention which is going to be celebrated during the fifth meeting of the Conference of the Parties in Basel. She introduced the documentation of the meeting.

II. ORGANIZATIONAL MATTERS

A. Opening of the session

3. The Chairperson of the Working Group, Mrs. Perla de Alfaro in close cooperation with the Vice-chairperson Mr. Jawed Ali Khan (Pakistan) proposed the following organization of the meeting:

(a) There would be meetings of the regional groups to allow the groups to come up with a common position on the articles.

(b) There would be Contact Group meetings at which two representatives from each region would be represented as decided by the regional groups; this Contact

Group would be co-coordinated by Egypt and the United Kingdom.

(c) There would be a Coordinating Meeting under the chairmanship of the Chairperson of the meeting, Mrs. Perla de Alfaro and Vice-chairperson of the meeting, Mr. Khan composed of the Friends of the Chair identified by the chairperson which would receive progress reports on work from the contact group meetings and would advise the chairperson on the proceedings to be followed by the Plenary.

(d) There would be sub-working group meetings to work on specific articles when there was a need for a smaller group to work on the wording of the specific articles as identified by the Plenary. These groups would report to the Plenary on the progress of work.

(e) There would be a sub-working group on legal matters working under the chairmanship of France to consider and as far as possible agree on the text of specific articles mainly from the legal point of view. This group started its work with the following Articles: 5, 10, 23 and 25. This sub-working group would report to Plenary.

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

UNEP/CHW.1/WG.1/9/1

Provisional agenda

UNEP/CHW.1/WG.1/8/5

Report of the Eighth 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

UNEP/CHW.1/WG.1/8/5/Corr.1

Corrigendum to the Report

B. Attendance

5. The delegates of the following Parties to the Basel Convention participated in the session: Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Barbados, Belgium, Benin, Brazil, Bulgaria, Burundi, Canada, Chile, China, Colombia, Comoros, Croatia, Cuba, Czech Republic, Denmark, Egypt, El Salvador, European Community, Finland, France, Gambia, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Korea (Republic of), Kuwait, Malawi, Mauritania, Mexico, Moldova, Mongolia, Morocco, Mozambique, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Papua New Guinea, Peru, Philippines, Qatar, Romania, Russian Federation, Saint Lucia, Saudi Arabia, Senegal, Singapore, South Africa, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The Former Yugoslav Republic of Macedonia, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Venezuela and Vietnam.

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

7. The following United Nations specialized agency participated in the meeting as observer: United Nations Institute for Training and Research (UNITAR).

8. The following Non-Governmental Organizations also attended the meeting: Basel Action Network (BAN), European Association of Metals (EUROMETAUX), Capital Environmental, Greenpeace International, International Chamber of Commerce, International Groups of P & I Clubs, Institute of Scrap Recycling Industries (ISRI) and the West Coast Environmental Law Association.

C. Bureau

9. 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)
Ms Kate-Helen Cook (United Kingdom)

Rapporteur: Mrs. N. Karpova (Russian Federation)

D. Adoption of the agenda

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

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

E. Consideration of the draft Articles

11. The following Articles were adopted by the Plenary and are attached to this Report as its Annex 1:

| | | |
|------------|---|-----------------------------------------------------------|
| Article 1 | - | Objective |
| Article 2 | - | Definitions |
| Article 5 | - | Fault-based Liability |
| Article 6 | - | Preventive Measures |
| Article 7 | - | Combined Caused 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 19 | - | Lis Pendens (deleted) |
| Article 20 | - | Related Actions |
| Article 21 | - | Applicable Law |
| Article 22 | - | Non Discrimination (deleted) |
| Article 24 | - | Expertise (deleted) |
| 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 | - | Depository |
| Article 34 | - | Authentic texts |

12. At the time of the adoption of Article 25 - Mutual Recognition and Enforcement of Judgements, the delegation of the Republic of Korea made a statement that in accordance with the general understanding of the participants, the public policy clause also covers non-compensatory damages. At the time of the adoption of Article 30 - Entry into Force, one delegation maintained its position that there should be 40 (forty) ratifications needed for entry into force of this protocol.

13. All experts emphasized the good spirit of cooperation and the great achievement of the meeting in coming up with the draft Protocol. Unfortunately, due to the lack of time the following Articles while being considered by the Contact Group and to some extent by the Plenary have not yet been finalized and they would have to be further considered by the next meeting of this Group:

| | | |
|------------|---|-------------------------------------------------------------------------|
| Article 3 | - | Scope of the Convention |
| Article 4 | - | Strict liability |
| Article 10 | - | Basis of claims |
| Article 12 | - | Relationship with other Bilateral, Multilateral and Regional Agreements |
| Article 13 | - | Financial limits |
| Article 15 | - | Insurance and other Financial Guarantees |

| | | |
|------------|---|------------------------------------------------------------------|
| Article 16 | - | Compensation mechanism |
| Article 23 | - | Relation between the Protocol and the Law of the Competent Court |

14. All above Articles are included in Annex 2 to this Report for further consideration.

Article 3 - Scope of application

15. At the consideration of Article 3, several delegations noted that Article 3 had not yet been adopted and therefore is still open for discussion at a later stage, including all unbracketed text.

16. In relation to Article 3(1), while most delegations expressed a preference for Alternative 1, some delegations continue to express a preference for Alternative 2 in the draft text annexed to the report of the 8th session (UNEP/CHW.1/WG.1/8/5), and noted that it could still be looked at as an option at a later stage.

17. The majority of Asian group and Turkey stated that inclusion of wastes as defined in Article 1, paragraph 1(b) of the Convention in the Protocol is for them the most important. Their position on Article 3, paragraph 5(d) is to open the brackets and retain the wording. Therefore during the next meeting, they are ready to discuss Article 3, paragraph 5(f) in Article 3, paragraph 5(d) is in line with their basic position.

18. Some Parties informed that they will provide with additional paper related to Article 3 which will be distributed to the Parties at a later stage.

19. One delegation requested brackets to be introduced around Article 3, paragraph 5(d) in particular starting from the wording "unless the wastes are notified ... until the end of the sentence.

20. With a view to creating a package compromise with elements mentioned below (Articles 3, 4 and 16) and bearing in mind the complexity and interlinkage of the elements of such a possible package, several compromises were reached on different elements on Article 3.

Articles 3, 4 and 16

21. European Community countries proposed a package on Articles 3, 4 and 16 which is as follows:

I. Article 3: 3.1 - preference for alternative 1 as drafted in the text annexed to the report of the 8th session (UNEP/CHW.1/WG.1/8/5); Article 3, 5(d) - exclude Convention Article 1, 1(b) wastes from the scope of the Protocol; Article 3, 5(e) - deletion; Article 3, 5(f) - support retention.

II. Article 4: support alternative 1 of the draft text annexed to the report of the 8th session (UNEP/CHW.1/WG.1/8/5) - i.e. notifier/disposer option.

III. The following part of the proposed package on Consideration of Emergency Response and Compensation Mechanism was developed in cooperation with all regional groups.

A. Further discussions on Article 14 of the Convention (COP5)

1. In accordance with Article 14(2) of the Convention the Technical Working Group with the Consultative Sub-group of Legal and Technical Experts will provide COP5 with a progress report on their study of issues related to emergency situations.

2. Consideration of this issue should take into account the Caribbean proposal at Annex 5 of document UNEP/CHW/WG.4/LSG/2/7 dated 16 April 1999. Parties to the Convention are encouraged to consider the proposal and the possible need for the development of emergency response capabilities on a national or regional basis.

3. In the light of the above, Parties to the Convention shall provide responses to the questionnaire from the Secretariat on this issue and shall study the existing compensation mechanisms currently in force under international law such as CLC Convention (1969), FUND Convention (1971).

B. COP5 Decision on data collection to evaluate compensation mechanism

1. The Ad Hoc Working Group of Legal and Technical Experts proposes the following draft decision to COP5 for consideration:

The Parties to the Convention shall communicate each year to the Secretariat under Articles 13 and 16 of the Convention the data specified below:

(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.

2. The Parties to the Convention may, by a decision of COP5, adopt a common format for the communication of this data.

3. The Secretariat shall prepare an annual report to the Parties to the Convention and/or the Contracting Parties to the Liability Protocol once it is in force on the basis of the information received.

4. Until the decision on the need for a compensation mechanism according to Article 16 of the Liability Protocol, the Parties to the Convention are encouraged to make voluntary contributions to the Technical Cooperation Trust Fund that are specifically earmarked for:

(a) preventive measures in cases of transboundary movements of hazardous wastes and other wastes and their disposal that present immediate threats to human health or the environment, when no liable Party is available who is willing and able to pay for such measures, and no other means of paying for such measures is available locally, or

- (b) preventive measures and/or measures of reinstatement for specific cases identified by the contributing Party.

Article 16 - Compensation mechanism

1. With a view to establishing a technical and financial compensation mechanism, inter alia establishing a compensation fund, the Contracting 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;
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 a compensation mechanism and its possible nature and scope with the following objectives:
 - (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. If the Contracting Parties decide on the need for a compensation mechanism, they shall cooperate in order to adopt such a mechanism.

22. Asian and African position paper for Article 16 is as follows:

1. The Contracting Parties agree to consider the establishment of a Compensation Fund hereinafter "the Fund" with the following objectives:
 - (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, disappears or cannot be found or is or may become financially incapable of meeting his or her obligation;
 - (c) to provide for compensation when the liable person is exempted from liability in conformity with Article 4, paragraph 2.
2. In order to achieve the objectives in Article 16, paragraph 1, the Contracting Parties agree to 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 these 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. 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 Basel Secretariat.

Article 12 - Relationship with other Bilateral, Multilateral and Regional Agreements

23. One delegation consider that a specific reference to the HNS Convention should be included in this Article, paragraph 1 particularly in the light of the Resolution of the 1996 HNS Conference calling on the Parties negotiating the Basel Protocol to clarify the relationship between the two instruments.

F. Recommendations of the meeting

24. Taking into account the significant progress which has been made during the 9th session, the Working Group recognized the need to call for another meeting of this Group before the fifth meeting of the Conference of the Parties, to build up on spirit of cooperation and emerging consensus on the draft Protocol which would lead to its presentation for consideration and adoption by the COP5. The following are therefore recommendations of the meeting:

(a) The meeting requires the Secretariat to call for a next meeting of this Working Group at the latest in September 1999 to allow enough time for the finalization of a Protocol and to allow enough time for its translation into all U.N. languages. This meeting should be of duration of 5 working days. The Group requires that a small meeting of lawyers be called by Chair during this meeting to allow it to make a consideration and corrections in the text from purely legal point of view.

(b) The meeting requests the Expanded Bureau of the Conference of the Parties to search for additional funding to allow not only organization of the above meetings but to allow large participation of the experts from developing countries and from the countries which require this assistance to participate at the meeting through first of all additional generous contributions from the developed countries.

25. The meeting adopted this Report with Annexes on 23 April 1999 at 19.55hrs.

G. Closure of the meeting

26. After usual exchange of courtesies, the Chairman declared the meeting closed at 20hrs. on 23 April 1999.

ANNEX 1

Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal as adopted by the ninth session of the Working Group

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 or 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 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 of 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 5 **Fault-based liability**

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 laws of the Contracting Parties governing liability of servants and agents.

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 accordance with the rules of procedure of the competent court:
 - (a) against any other person also liable under this Protocol;
 - (b) against any person whose lack of compliance with the provisions implementing the Convention has caused or contributed to the damage;
 - (c) against any person whose wrongful 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 the damage having regard to all circumstances.

Article 11 Implementation

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 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 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 first 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 24 (deleted)
Expertise

Article 25
Mutual Recognition and Enforcement of Judgements

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 or her case;
- c) 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; 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 to the Protocol 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

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 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 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.

ANNEX 2

Articles worked out by the Contact Group for the further consideration by the next meeting of the Working Group

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 are loaded on the means of transport within the territory of a State of export. Any Party to the Protocol may by way of notification to the [Secretariat] [Depository] exclude the application of this Protocol for such incidents which occur within its territory or in relation to maritime shipments, the territorial sea, as regards damage in its territory including its territorial sea. 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. This Protocol shall also apply to damage within a Contracting Party other than the State of Export arising from an incident specified in paragraph 1 of this Article within the State of Export.
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 in their respective 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 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 provided that such States have acceded to multilateral, regional or bilateral agreements or arrangements concerning transboundary movements of hazardous wastes;

- (b) to damage specified in (iii) and (iv) of Article 2, paragraph 2(c) 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) Notwithstanding any provisions of this Protocol, this Protocol shall not apply to damage arising from an incident involving the transboundary movement of hazardous wastes and other wastes that are exported from or imported into a State which is not a Party to the Protocol.]
- [(f) This Protocol shall not apply to damage arising from the transboundary movement of hazardous wastes or other wastes pursuant to a bilateral, multilateral or regional agreement or arrangement concluded in accordance with Article 11 of the Convention, whether entered into before or after this Protocol has entered into force, provided there exists a liability and compensation regime applicable to damage resulting from such movements that meets the aims of this Protocol, to the extent that the damage occurred within the territory and the territorial sea of any of the Parties to the Article 11 agreement, unless the Parties to the agreement or the arrangement declare that the Protocol shall be applicable. In order to promote transparency, a Party or Parties shall notify the Secretariat of such liability and compensation regimes.]

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 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, as regards that person only, 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 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 12 Relationship with other Bilateral, Multilateral and Regional Agreements

1. Whenever the provisions of this Protocol and the provisions on liability and compensation in a bilateral, multilateral or regional agreement or arrangement, in force or open for signature, ratification or accession at the date on which the Protocol is open for signature, are applicable to the same case, the provisions of this Protocol shall apply, except for those portions of a transboundary movement of hazardous wastes or other wastes to which such an agreement or arrangement on liability and compensation with regard to inland, air or maritime transport applies.
- [2. Whenever the provisions of this Protocol and the provisions on liability and compensation in an subsequent bilateral, multilateral or regional agreements or arrangements are applicable to the same case, the provisions of this Protocol shall apply, except in the cases where the subsequent agreement or arrangement provide higher compensation.]

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 15

[Insurance and other financial guarantees

1. Liability under Article 4 of this Protocol shall be covered by insurance, bonds or other financial guarantees or, in the case of states [acting as exporter, importer, carrier, generator or disposer], by declarations of self-insurance, valid throughout the period of the time limit of liability.

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. Proof that the liability under Article 4 is covered by the insurance, bonds or other financial guarantees shall accompany the notification referred to in Article 6(1) of the Convention.

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

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

6. If the person who has suffered damage is unable to obtain full compensation because the person liable under Article 4 is bankrupt or has been wound up, the person who has suffered damage may bring an action directly against the insurer or the person providing the financial guarantee. In such a case, the insurer or the person providing the financial guarantee may invoke the defences, which the person liable under Article 4

would have been entitled to invoke. Furthermore, the insurer or the person providing the financial guarantee may invoke the defence that the damage resulted from the wrongful intentional act of the person liable under article 4, but the insurer or person providing the financial guarantee shall not invoke any other defence which the person liable under article 4 might have been able to invoke in proceedings brought by the person liable under Article 4 against the insurer or person providing the financial guarantee. 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.]

Article 16 **[Compensation mechanism]**

1. With a view to establishing a technical and financial compensation mechanism, inter alia establishing a compensation fund, the Contracting 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;
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 a compensation mechanism and its possible nature and scope with the following objectives:
 - (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. If the Contracting Parties decide on the need for a compensation mechanism, they shall cooperate in order to adopt such a mechanism.]

Article 23 **[Relation between the Protocol and the Law of the Competent Court]**

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 shall be made against [the notifier or the exporter] [the person in operational control] liable under Article 4 otherwise than in accordance with the Protocol.

