

**Stockholm Convention “liability” workshop**

**Vienna, 19-21 September 2002-10-14**

**Protocol on Liability and Compensation for Damage Resulting from  
Transboundary Movements of Hazardous Wastes and Their Disposal**

**Pavel Suian  
Senior Legal Officer**

**Secretariat of the Basel Convention**

[Paper introduced *in absentia* and circulated  
for the information of workshop participants]

# Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal

## Short Historical Introduction

The Basel Convention in Article 12 provides that “The Parties shall co-operate with a view to adopting as soon as practicable a Protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from transboundary movement and disposal of hazardous wastes and other wastes”.

The Conference of the Plenipotentiaries which was held in 1999 to conclude the Basel Convention adopted Resolution 3 entitled “Liability”. In that resolution, the Conference requested the Executive Director of the United Nations Environment Programme (UNEP) to establish an ad hoc working group of legal and technical experts to develop elements which might be included in a protocol on liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.

Subsequently the General Assembly of the United Nations adopted Resolution 44/226 of 22 December 1989<sup>1</sup>. Part III of the Declaration is related to the problem of liability and compensation. The first two paragraphs of Part III of this Resolution read:

“The General Assembly .....

1. Recognizes the necessity of developing rules of international law, as early as practicable, on liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes;
2. Requests the Executive Director of the United Nations Environment Programme, in accordance with the resolution adopted at the Basel Convention to establish, on the basis of equitable geographic representation and in consultation with Governments, an ad hoc working group of legal and technical experts to develop, as early as practicable, elements which might be included in a protocol on liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and to report to the Preparatory Committee of the United Nations Conference on Environment and Development and to the Governing Council of the United Nations Environment Programme, in accordance with its mandate in this regard .....

Based on the provision of the Convention and on the two Resolutions, the Executive Director of UNEP convened in 1990, an Ad Hoc Working Group of Legal and Technical Experts to develop elements which might be included in a Protocol on Liability and Compensation.

This working group produced a document which contained the basic elements of the present Protocol.

---

<sup>1</sup> Entitled “Traffic in and disposal, control and transboundary movements of toxic and dangerous products and wastes”.

The first meeting of the Conference of the Parties to the Basel Convention by its Resolution I/5 decided to establish an Ad Hoc Working Group of Legal and Technical Experts to consider and develop a draft Protocol on Liability and Compensation.

This Ad Hoc Working Group started negotiations of the Protocol by using the elements agreed upon by the Working Group established by the Executive Director of UNEP.

The Ad Hoc Working Group held 10 sessions of negotiations between 1990 and 1999. The negotiations of the Protocol were finalized in 1999 and the Protocol was adopted by the fifth meeting of the Conference of the Parties.

#### Some general remarks on liability and insurance and difficulties encountered during negotiations

Insurance is primarily a contract for the allocation of risk. In the case of transportation or disposal of hazardous wastes, the risk is that of damage arising from an incident involving those wastes. Carriage of dangerous goods carries risk of damage, to property and to life as well as to the environment. Responsible carriers of hazardous wastes will generally insure carriage of goods of any nature to cover the potential cost of its loss and any resulting damage, and are generally required to do so by law. Pollution damage and clean-up costs are not necessarily covered however, in traditional insurance coverage.

In the case of hazardous goods, two parties, the producer and receiver have a property interest in ensuring the commodity's safe transit as the goods have an economic value. This property interest in the safe completion of the transit process is much weaker for hazardous wastes in which case an important interest tends to be that of society, in ensuring safe transport and disposal.

The public interest in safe transport and safe disposal of hazardous goods has results in the conclusion of a number of international conventions and arrangements dealing with the transport of dangerous materials and wastes as well as considerable domestic legislation. Often included in this regulation is a requirement for compulsory insurance or a financial guarantee<sup>2</sup>.

However, the insurance market, although subject to regulation, is largely market driven. It establishes the cost of insurance in response to market conditions. Even though insurance may be required under legislation, an insurer may not wish to offer a policy unless a sufficiently high premium can be charged to make the coverage commercially attractive.

The challenge of imposing insurance requirements in the context of the Protocol was to set requirements that will provide adequate compensation for damage under the vast majority of incidents while remaining commercially viable.

The main difficulties, which we have to overcome were:

---

<sup>2</sup> Convention on Civil Liability for Damage caused during carriage of dangerous goods by road, rail and inland navigation vessels (1972). Vienna Convention on Civil Liability for Nuclear Damage (1962). Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage (1997). Convention on Supplementary Compensation for Nuclear Damage (1997). International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea

- (a) To create a precedent ;
- (b) To agree on the scope;
- (c) To agree about limits or no limits of the Protocol;
- (d) Definition of damage;
- (e) Exclusions or not of the bilateral or multilateral agreements;
- (f) Compensation mechanism.

In the end, due to the political will of the Parties, compromise had been found for all these problems.

The Protocol is not a perfect one, but so far, is the most wide in its scope and advance in the liability field and will, after entering into force, create a precedent.

#### Basic provisions of the Protocol

The Objective of the Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic in those wastes.

The Protocol defined damage in its largest sense. The notion of damage includes:

- (a) Loss of life or personal injury;
- (b) Loss of or damage to property other than property held by the person liable in accordance with the present Protocol;
- (c) Loss of income deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;
- (d) The costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken; and
- (e) The costs of preventive measures, including any loss or damage caused by such measures, to the extent that the damage arises out of or results from hazardous properties of the wastes involved in the transboundary movement and disposal of hazardous wastes and other wastes subject to the Convention.

The Scope of application of the Protocol is also extensive. The Protocol will apply to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic, from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export until the completion of disposal in the State of import.

There are some exceptions from this general scope which I will not mention here.

The Protocol applied even to transit states. These transit states are developing small island states which are not Parties to the Protocol. There are 40 such small island states enumerated in Annex A of the Protocol.

However, the Protocol shall not apply to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal pursuant to a bilateral, multilateral or regional agreement or arrangement concluded and notified in accordance with Article 11 of the Convention if some of the conditions expressly mentioned in the Protocol are met. This provision was again hotly debated and was resolved in the last hours.

The Protocol established a strict liability. That means that the person who notified in accordance with Article 6 of the Convention, shall be liable for damage until the disposer has taken possession of the hazardous wastes and 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 and other wastes.

The Protocol clearly enumerates 4 exceptions. If the person proves that the damage was:

- (a) The result of an act of armed conflict, hostilities, civil war or insurrection;
- (b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;
- (c) Wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred; or
- (d) Wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.

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

### **Combined cause of the damage**

Where damage is caused by wastes covered by the Protocol and wastes not covered by the Protocol, a person otherwise liable shall only be liable according to the Protocol in proportion to the contribution made by the wastes covered by the Protocol to the damage.

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

In respect of damage where it is not possible to distinguish between the contribution made by wastes covered by the Protocol and wastes not covered by the Protocol, all damage shall considered to be covered by the Protocol.

### Financial Limits

The Protocol established financial limits for the liability. These limits are:

- (a) For the notifier, exporter or importer, for any one incident, be not less than:
- (a) 1 million units of account<sup>3</sup> for shipments up to and including 5 tonnes;
  - (b) 2 million units of account for shipments exceeding 5 tonnes, up to and including 25 tonnes;
  - (c) 4 million units of account for shipments exceeding 25 tonnes, up to and including 50 tonnes;
  - (d) 6 million units of account for shipments exceeding 50 tonnes, up to and including 1,000 tonnes;
  - (e) 10 million units of account for shipments exceeding 1,000 tonnes, up to and including 10,000 tonnes;
  - (f) Plus an additional 1,000 units of account for each additional tonne up to a maximum of 30 million units of account.
- (b) For the disposer, for any one incident, be not less than 2 million units of account for any one incident.

These limits are supposed to be reviewed by the Contracting Parties on a regular basis taking into account, *inter alia*, the potential risks posed to the environment by the movement of hazardous wastes and other wastes and their disposal, recycling, and the nature, quantity and hazardous properties of the waste.

### Time Limits

The Protocol established the following time limits for liability:

1. 10 years from the date of incident. The text is very clear: claims for compensation under the Protocol shall not be admissible unless they are brought within ten years from the date of the incident.
2. Not later than 5 years after the claimant knew about the damage. The text is again clear: claims for compensation under the Protocol shall not be admissible unless they are brought within five years from the date the claimant knew or ought reasonably to have known of the damage provided

that the time limits established pursuant to paragraph 1 of this Article are not exceeded.

3. Where the incident consists of a series of occurrences having the same origin, time limits established pursuant to this Article shall run from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

#### Insurance and other financial guarantees

The persons liable under Article 4 is bound to establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under the Protocol for amounts not less than the minimum limits specified in the Protocol. States may fulfil their obligation under this paragraph by a declaration of self-insurance.

#### Compensation mechanisms

Where compensation under the Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms. There are already some of the mechanisms which have been identified as possible actions.

The Protocol provides that the Meeting of the Parties shall keep under review the need for and possibility of improving existing mechanisms or establishing a new mechanism.

As an interim arrangement at the time of the adoption of the Protocol, the Conference of the Parties adopted a special Decision for the Enlargement of the Scope of the existing Technical Cooperation Trust Fund for addressing emergency cases, compensation and capacity building for developing countries and countries with economy in transition. The Secretariat prepared the interim guidelines for putting this mechanism into motion. The interim guidelines had been approved by the Expanded Bureau and will be submitted for formal adoption at the sixth meeting of the Conference of the Parties.

The request of developing countries for the creation of an International Fund was not incorporated into the Protocol, but the idea is not excluded. If this interim arrangement does not satisfy all needs and proves that such a Fund is needed, the Protocol provides the possibility of establishing this Fund.

#### State responsibility

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

#### Signature

The Protocol was open for signature by States and by regional economic integration organizations Parties to the Basel Convention in Bern at the Federal Department of Foreign Affairs of Switzerland from 6 to 17 march 2000 and at the United Nations Headquarters in New York from 1 April to 10 April 2000.

To date, the Protocol has been signed by the following 13 Parties to the Basel Convention by the closing date for signature:

Chile; Colombia; Costa Rica; Denmark; Finland; France; Hungary; Luxembourg; Monaco; Sweden; Switzerland; The former Yugoslav Republic of Macedonia; United Kingdom of Great Britain and Northern Ireland.

#### **Ratification, acceptance, formal confirmation or approval**

The Protocol is subject to ratification, acceptance or approval by States and to formal confirmation or approval by regional economic integration organizations. Instruments of ratification, acceptance, formal confirmation or approval shall be deposited with the Depositary.

So far no Parties to the Basel Convention have deposited their instruments of ratification, accession, approval or acceptance of the Protocol.

#### **Entry into force**

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

#### **Reservations and declarations**

No reservation or exception may be made to the Protocol.

#### **Meeting of the Parties**

The Protocol establishes the mechanism to oversee the implementation of and compliance with its provisions through a meeting of the Parties.

#### **Secretariat**

The Protocol will not have a separate Secretariat.

The Protocol provides that the Secretariat's functions shall be carried out by the Secretariat of the Basel Convention.