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**MEASURES TO STRENGTHEN INTERNATIONAL  
CO-OPERATION IN NUCLEAR SAFETY,  
RADIOLOGICAL PROTECTION AND  
RADIOACTIVE WASTE MANAGEMENT**

**LIABILITY FOR NUCLEAR DAMAGE**

The summary records of the discussions in the Board of Governors on 12 and 13 September 1995 (GOV/OR.879 and 880) under the agenda item "Liability for nuclear damage" are reproduced in the Attachment.



EXCERPT FROM THE RECORD OF THE BOARD'S 879th MEETING

LIABILITY FOR NUCLEAR DAMAGE (GOV/2819)

The CHAIRMAN said that the Standing Committee on Liability for Nuclear Damage had held three sessions since the previous year's General Conference session. Document GOV/2819 and its two appendices contained the reports of the Standing Committee on its eleventh and twelfth sessions, under cover of the draft of a report which the Board could submit to the General Conference.

Mr. BAER (Switzerland) said that the Standing Committee on Liability for Nuclear Damage was taking a very long time indeed over the task entrusted it. His delegation recognized that the issues were highly complex and specialized. However, the process still had to be completed. Some agreement, even if imperfect, had to be reached. His delegation was impatient to see further progress and was aware of no good reason why the Board should wait forever and a day for an agreement among experts.

His delegation had hoped that the Standing Committee would complete its work soon enough for a diplomatic conference to be convened at about the time of the tenth anniversary of the Chernobyl accident. In view of the slow progress made, a more pragmatic approach was now required. No date could be set for the diplomatic conference until there was a final draft from the Standing Committee. While not wishing to interfere with the micromanagement of that Committee, he could only consider as final a document containing a single version rather than a choice of versions. He regretted that he could not be more positive or at least optimistic, but the risk of a failed diplomatic conference was too great. There were already enough difficulties, and so the conference should only be planned when its success was reasonably assured.

It would seem logical to deal with revision of the Vienna Convention and supplementary funding at the same conference, as they were aspects of the same problem. However, if that was not possible, the second-best option would be for the Standing Committee to concentrate first on updating the Vienna Convention, and then to try and reach

agreement on supplementary funding. That would not be a perfect solution, but preferable to no solution at all.

In summary, the Board should impress upon the Standing Committee that time was of the essence and that it must speed up its work. No date could be set for a diplomatic conference until a final draft had been submitted. If necessary, his delegation would favour a two-step approach, giving priority to the Vienna Convention, over endless further discussions in the Standing Committee. Finally, his delegation recommended transmitting document GOV/2819 to the General Conference as suggested in paragraph 4 of the document.

Mr. de YTURRIAGA (Spain) recalled that his delegation had expressed doubts at the Board meetings in June concerning the Director General's over-optimism with regard to the possibility of convening a diplomatic conference in early 1996 to amend the Vienna Convention and adopt a further convention on supplementary financing. As there had been no meeting of the Standing Committee since that time, his delegation could only maintain its sceptical attitude. Still, it was true that some progress had been made in amending the Vienna Convention and that if some remaining issues could be resolved, a draft set of amendments could be produced which might attract considerable support and could serve as the basis for a diplomatic conference.

If the Standing Committee were to concentrate on the preparation of a supplementary convention based on the excellent draft presented by the Secretariat, there should be no major difficulties about having the two texts required for a diplomatic conference. Unfortunately, however, the Committee had not faithfully followed its mandate and had been disgracefully wasting time in examining a series of irrelevant proposals while forgetting its real goal. Some of the texts considered were quite contrary to that goal and some were aimed at adopting a supplementary convention which would be entirely outside the scope of the Vienna Convention. If the Committee continued in that way, there might still be no agreement in seven years' time - indeed the discussions could continue indefinitely!

The Board and possibly the General Conference would have to take a serious decision on what they really wished the Standing Committee to do. Had it been given the correct

mandate or was there some other, separate agenda? The Standing Committee should be reminded of its mandate to amend the Vienna Convention. It should then be relatively easy to reach a solution, including a supplementary convention. Otherwise the proposal made by the Governor from Switzerland could be adopted, with the Committee focusing on the main topic and leaving supplementary financing to be dealt with later. That would not be satisfactory, but still better than the present lamentable waste of time. He also agreed that a single text would be preferable to several texts, which would preordain the failure of the conference.

Mr. BORCHARD (Germany) said his delegation attached great importance to the revision of the Vienna Convention and the establishment of a system of supplementary funding. It welcomed the progress made by the Standing Committee with regard to the proposed draft amendments of the Convention and urged the Committee to conclude its work.

His Government concurred with the majority opinion expressed at the Standing Committee's most recent session that work on a supplementary funding mechanism was unlikely to be completed before the end of 1995. That being so, his delegation viewed with some scepticism the proposal to hold a diplomatic conference in spring 1996.

The Standing Committee seemed to have reached an impasse on the issue of supplementary funding. It hardly needed emphasizing that an international liability regime required the participation of a majority of States, including specifically the major nuclear power generating States. His Government therefore proposed to give first priority to the revision of the Vienna Convention, the more so as an increasing number of States worldwide, and in particular from Eastern Europe and the former Soviet Union, were acceding to it. Furthermore, the work on revising the Vienna Convention seemed close to completion, and so might need to be uncoupled from the ongoing work on supplementary funding.

Mr. PESCI BOUREL (Argentina) commended the Secretariat on the report contained in document GOV/2819.

Having participated in a co-operative spirit in the work of the Standing Committee since its inception, Argentina was now satisfied with the progress that had been made on the

revision of the Vienna Convention, while also recognizing that a number of important issues remained to be resolved.

On the other hand, it regretted that similar progress had not been achieved on drafting a convention on supplementary funding. Such a convention would enable a truly universal legal framework to be put in place that would facilitate significant progress towards the consolidation of a worldwide safety culture. His delegation therefore hoped that the delegations directly involved in the forthcoming informal meeting would achieve tangible progress towards a supplementary funding convention.

At all events, the text which was eventually approved would need to take into account and be compatible with regional compensation mechanisms such as those now being negotiated among a number of Latin American countries.

In conclusion, he said Argentina was convinced that it would be possible to proceed to the diplomatic conference in 1996 provided that the necessary political will existed.

Mr. WALKER (Australia) said his country wished to see a comprehensive liability regime established which would embrace both the "polluter pays" principle and the principle that a State should be liable for transboundary damage originating on its territory. Australia supported the Standing Committee's decision to proceed simultaneously with the revision of the Vienna Convention and the elaboration of a convention on transboundary damage and supplementary funding, and considered the two instruments to be interdependent.

Australia remained committed to the work of the Standing Committee and to the early conclusion of a credible and effective nuclear liability regime capable of providing proper compensation for transboundary damage caused by nuclear accidents. However, it was concerned that, with the tenth anniversary of the Chernobyl accident in sight, the Committee did not seem to be approaching that task with the required sense of urgency.

In that regard, it seemed to his delegation that the factors preventing an agreement being reached were not technical or legal in nature. Indeed, it would be possible to conclude the Standing Committee's work very quickly once it had been agreed on the political level that the supplementary funding convention should be free-standing, i.e. independent of but

consistent with the existing Vienna and Paris Conventions, and that it should contain a mandatory supplementary funding scheme covering only the victims of transboundary accidents. Both those elements were essential if a truly global solution to the liability problem was to be achieved.

Australia still considered that the diplomatic conference could be held as planned in spring 1996 and urged all the members of the Standing Committee to work towards that goal. While it would be preferable if agreement could be reached on a single convention on transboundary damage and supplementary funding, his country would support the submission of two mutually complementary and compatible draft instruments on supplementary funding to the diplomatic conference, as agreed at the Standing Committee's eleventh session in March.

However, if the Standing Committee's discussions arrived at a point where it seemed that no conclusion would be reached during a diplomatic conference in spring 1996, his country would have to question seriously whether the negotiations should go on. While discontinuing them would be regrettable after so many States had invested so much effort, it would be difficult to justify any further commitment of a substantial portion of the Agency's scarce resources to an undertaking in which consensus had proved so hard to achieve.

With those comments, his delegation could support the transmission of document GOV/2819 to the General Conference for information purposes.

Mr. NIEWODNICZANSKI (Poland) commended the Secretariat on preparing document GOV/2819 and agreed that it should be transmitted in its entirety to the forthcoming session of the General Conference.

The General Conference would be considering the report some seven years after it had first indicated its awareness, in the light of the consequences of the Chernobyl accident, that the civil liability regime established under the existing Paris and Vienna Conventions and the Joint Protocol did not cover all the liability issues that might arise in the event of a nuclear accident. Furthermore, the report was being considered by the Board five and a half

years after it had established the Standing Committee on Liability for Nuclear Damage and given it the mandate to examine international liability for nuclear damage, including international civil liability, international State liability and the relationship between them, and to keep under review problems relating to the Vienna Convention and advise the States party accordingly.

By including the concept of State liability within the civil liability system the Board had highlighted the need for a global nuclear liability system capable of offering meaningful compensation to transboundary victims. The Standing Committee had subsequently devoted considerable attention to devising a supplementary funding scheme capable of providing such meaningful compensation. However, the issue had proved a complex and controversial one in view of its financial dimension, and so far no consensus on it had been reached.

In that context, the fact that considerable sums would have to be paid as compensation after a serious nuclear accident was a reflection simply of the potential environmental consequences of such an accident, rather than the result of any legal liability or policy scheme so far developed. With nuclear power plants accounting for 17% of world and 30% of European electricity generation, it was now too late to argue whether the financial consequences of a transboundary nuclear accident were excessive from the point of view of the States which operated nuclear power plants.

Given the Standing Committee's acknowledgement, in the report on its twelfth session held in Vienna in June, that it required further political guidance in order to achieve agreement, he appealed to the Board to respond accordingly. The Standing Committee would meet again in September and October, and funds had already been secured for convening a diplomatic conference in early 1996. His delegation considered that the Agency had an obligation to the nuclear community to reach agreement on such an important issue in the year marking the tenth anniversary of the Chernobyl accident. The Agency could hardly be accused of dealing with the issue hastily.

His delegation shared the Standing Committee's opinion that preference should be given to the elaboration of a single draft instrument on supplementary funding, and it agreed



with many other delegations that such an instrument should contain a mandatory supplementary funding scheme dedicated exclusively to transboundary victims.

Turning to the revision of the Vienna Convention, he noted that Poland was one of several countries which had tabled a proposal related to unlimited liability for loss of life and personal injury. He trusted that the Committee would give the proposal due consideration, taking into account the motivation behind it and the support it had attracted from a number of delegations.

Mr. PRETTRE (France), referring to paragraph 24 of the Standing Committee's report in its twelfth session, said that if indeed several questions of principle still remained to be settled with regard to the revision of the Vienna Convention, in particular actual figures for the limits of compensation, geographic scope, the definition of nuclear damage and the final clauses, then it seemed to his delegation that the Standing Committee's work on the Convention was still far from complete since those were fundamental issues. Moreover, although the Committee had already been engaged in discussions for some time and the holding of a diplomatic conference ten years after the Chernobyl accident would no doubt have great symbolic significance, France believed that a realistic approach should be taken and that a solution should be found before the diplomatic conference was convened. In addition, further clarification and discussion was required with regard to the right of States not party to the Vienna Convention to vote on its revision at the diplomatic conference.

Turning to the issue of supplementary funding, he said his delegation noted from document GOV/2819 that no consensus had been attained in respect of either a "merged" draft or the "50:50 fund" approach advocated by Denmark and Sweden. The two texts required further consideration and development, and the forthcoming informal drafting meeting would be attempting to prepare one or several texts to enable the Standing Committee to produce an acceptable draft at its next session.

However, although the Secretariat's Note in the Attachment to document GOV/2819 seemed to suggest that agreement could be reached if delegations received additional instructions from their governments, his delegation feared that as long as the experts were still considering drafts which had not been translated, questions of principle that had not been

settled, and various alternative wordings, it would be difficult for the competent authorities to provide their delegations with clear and detailed instructions. Consequently, it seemed very unlikely that the Standing Committee would arrive at a consensus during its next session.

Mr. MEADWAY (United Kingdom) said he agreed with the Governor from France that the Standing Committee still needed to accomplish a great deal of work before the revised Vienna Convention could be considered by a diplomatic conference. Furthermore, the Attachment to document GOV/2819 referred to at least four different draft conventions on supplementary funding, which reflected a lack of agreement on points of principle. His delegation felt that the diplomatic conference should not have to consider more than one text on supplementary funding, and that the choice should be made in the Standing Committee before such a conference was convened.

Since the Standing Committee had not made sufficient progress at its June session to enable preparations for an early diplomatic conference to proceed, it would need to consider the situation seriously at its October session, bearing in mind that what was required, both for a successful diplomatic conference and for the viability of a new instrument, was a fully developed and broadly supported text. The Board, meanwhile, rather than considering some of the more drastic solutions proposed with respect to the diplomatic conference, should wait with a decision on a date for the conference until the Standing Committee had reported the successful conclusion of its preparatory work. For the moment, all the Board could do was thus to agree to transmit document GOV/2819 to the General Conference for information.

Mr. RICHARDSON (United States of America) said that his delegation had been prepared to support strongly a decision by the present Board meeting to hold the diplomatic conference as recommended by the Standing Committee's eleventh session, feeling that early confirmation of a spring 1996 date for the conference would provide a political impetus that would encourage the participants in the Standing Committee's autumn meetings to make the final compromises needed to achieve a consensus in time for the conference.

It would be particularly appropriate to hold such a conference on the occasion of the tenth anniversary of the Chernobyl accident since the Standing Committee's mandate had

been established in the aftermath of Chernobyl, which had exposed weaknesses in the system of domestic laws and international conventions relating to compensation for civil nuclear damage.

Also, it would not go unnoticed if the Agency proved incapable of producing broadly acceptable improvements in the international liability structure after six years of trying, in particular with regard to an international system of compensation for transboundary victims.

His delegation had been somewhat encouraged by the - albeit limited - progress reflected in the Standing Committee's report on its twelfth session and was confident that, given the requisite political will reinforced by the prospect of an imminent conference, the Standing Committee could reach agreement in the coming autumn.

Should no consensus emerge on the present occasion in favour of holding a diplomatic conference in early 1996, his delegation would request the Board to issue a strong statement urging the Standing Committee to reach agreement at its October session on a single document that would also cover supplementary funding dedicated to transboundary damage, and to report to the Board at its December meetings. That would be the Agency's last opportunity to convene a conference for spring 1996, and his delegation's position at that time would depend on whether the Standing Committee had made sufficient progress in the autumn to justify confidence that a spring conference could succeed.

In the absence of such progress, the Board would have to seriously consider abandoning the whole undertaking and reallocating the increasingly scarce resources now absorbed by the Standing Committee.

His delegation did not favour the options either of continuing the Standing Committee's work indefinitely or of allowing it to suspend its negotiations. A failure to reach agreement after 13 sessions would indicate that the Standing Committee was unlikely ever to succeed and that other ways of resolving the issue of liability for nuclear damage would have to be explored.

In conclusion, his delegation could support the transmission of document GOV/2819 to the General Conference for information.

Mr. BENMOUSSA (Morocco) said that his Government was likely to ratify the Convention on the Physical Protection of Nuclear Material and the Vienna Convention within the next few weeks. The information received from document GOV/2819 and during the present discussions therefore placed his delegation in a somewhat difficult position, and he wished to know whether the revised Vienna Convention and the convention on supplementary funding, though interlinked, would be two different conventions requiring States to undertake two separate ratification procedures, and therefore to suspend any ongoing ratification procedures.

Mr. STURMS (Director, Legal Division), responding first to the question raised by the Spanish delegation as to the nature of the Standing Committee's mandate, said that although the issue of supplementary funding, might seem to be a new one, it had in fact been covered by the Committee's mandate since its inception in 1990.

Faced with the question whether the minimum provisions under the Vienna Convention would always be sufficient to provide reasonable compensation in the event of a major accident, the Standing Committee had decided to take supplementary funding out of the context of the Vienna Convention and create a separate convention to deal with it. The main consideration behind that decision had been concern that some States party to the Vienna Convention might not accept the need for supplementary funding, and would therefore not ratify the revised Vienna Convention if such funding were included. The preference for two conventions instead of one was therefore a matter of political convenience rather than a reflection of changes in the Standing Committee's mandate.

Turning to the question raised by the Governor from Morocco, he noted that many States still regarded adherence to the existing Vienna Convention as desirable. Largely as a result of the negotiations of the Standing Committee, the existing Vienna Convention now had 26 members and the Joint Protocol 20 adherents.

The current efforts to achieve a revised Vienna Convention did not in any way impinge upon adherence to the old version. The revisions under discussion did not aim to change the Convention's basic principles, but only to improve its effectiveness.

Some States had already used the greater latitude given to national legal systems under the terms of the existing Vienna Convention to introduce revisions that were still being discussed by the Standing Committee. In that sense, it could be seen that harmonization of national laws was a principal objective of the revision of the Vienna Convention.

Mr. AJURIA GARZA (Mexico) said that in view of the lack of progress reflected in document GOV/2819 with regard to agreement on a single supplementary funding instrument and on amendments to the Vienna Convention, his delegation felt it might be desirable for the Standing Committee to hold two additional sessions before the proposed diplomatic conference in order to resolve the outstanding issues.

He joined other delegations in approving of the transmission of document GOV/2819 to the forthcoming session of the General Conference for information.

EXCERPT FROM THE RECORD OF THE BOARD'S 880th MEETING

LIABILITY FOR NUCLEAR DAMAGE (GOV/2819) (continued)

Mr. PROČKA (Slovakia) said that his delegation's position on the present item remained unchanged. It was satisfied with the comprehensive reports in document GOV/2819 and appreciated the work of the Standing Committee on Liability for Nuclear Damage at its most recent session. In view of the importance of the subject he argued that the document should be submitted to the thirty-ninth session of the General Conference for its information.

Liability for nuclear damage was a very sensitive issue for all countries, particularly those in Central and Eastern Europe, owing to its close interrelation with technical assistance and supplies from Western companies.

Slovakia had acceded to the Vienna Convention and the Joint Protocol in March 1995. It supported the endeavours of the Standing Committee and was interested in participating in its continued work and in the preparations for the diplomatic conference. However, it expected that agreement on supplementary funding would be difficult to attain given the financial problems and the lack of a well-established mechanism for assuring the necessary funding.

Mr. ESTEUES DOS SANTOS (Brazil) congratulated the Standing Committee for its efforts to produce a generally acceptable draft convention on supplementary funding and for extending the time devoted to discussions on the revision of the Vienna Convention.

Priority should undoubtedly be given to that revision. The Board had given the Standing Committee a mandate to propose issues for a revision of the Convention as long ago as 1990, but despite the time which had elapsed since then, questions of principle such as figures for compensation limits still remained to be settled.

As to the draft instrument on supplementary funding, Brazil intended to participate in the discussion on that subject at the forthcoming meetings of the Standing Committee with a view to achieving a consensus.

Should it be decided to convene a diplomatic conference to discuss both the revision of the Vienna Convention and the draft instrument on supplementary funding, the Brazilian delegation would still be in favour of holding a conference at an appropriate decision-making level, lasting longer than just one week, as already stated during the Board meeting in June 1995<sup>1</sup>.

Mr. FITZGERALD (Ireland) said that his country did not subscribe to any existing conventions in view of their disabilities. It had, however, participated in all sessions of the Standing Committee because it was important for the credibility of the nuclear industry that there should be an acceptable international convention backed up by adequate funding to deal with the question of transboundary risks.

While the Board was naturally anxious to see the Standing Committee complete its work, it would not be fair to berate that Committee without also taking into account that the delegations to it were acting under instructions from their capitals, and that unless the degree of flexibility necessary to make progress was forthcoming from that quarter, the Standing Committee would get nowhere.

The Standing Committee had worked very hard for many years and the fact that it had not been successful to date was due to its attempting to overcome certain insurmountable obstacles, which was where the real problem lay.

His delegation believed it would be premature at the present stage for the Board to take a decision not to hold a diplomatic conference in 1996 unless it was clear that the Standing Committee was in a totally impossible situation. The Board should therefore proceed on the basis that a diplomatic conference would be held in 1996 to mark the tenth anniversary of Chernobyl, and all delegations to the Agency should take steps to ensure that their representatives at that conference were authorized to make the necessary progress.

Amending the Vienna Convention on its own would not be sufficient, and would merely be a device for pretending that a compensation regime existed, when in fact the

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<sup>1</sup> See GOV/OR.873, para. 16.

financial resources to make that meaningful were missing. It was therefore essential also to make progress on supplementary funding, in whatever form it might take. On that issue, his delegation had an open mind and would support any measures which might lead to success.

Mr. COOK (New Zealand)\* said that he shared the concerns expressed by previous speakers about the need for progress in the Standing Committee and in particular endorsed the views of the Governor from Ireland. New Zealand was concerned that the Committee might be losing sight of the expectations of the international community that action would be taken after the Chernobyl disaster to establish a credible and effective regime to compensate for damage suffered as a result of a nuclear accident. New Zealand believed that all countries, including non-nuclear countries which might suffer transboundary damage, were entitled to reassurance that if an accident occurred there would be prompt, reliable and adequate compensation.

The obstacles in the way of concluding a convention were neither legal nor technical. His country's delegation had supported the decision taken by the Committee to hold a diplomatic conference in 1996 in the belief that, with sufficient political commitment, the thirteenth session of the Standing Committee could arrive at an agreement that could be taken to a diplomatic conference in 1996. If there was no agreement at that session, his delegation would have to question whether those negotiations would ever produce results. He therefore hoped that all participants would recognize the urgency of bringing the Committee's work to a conclusion which could command broad international support.

Mr. LI (China) noted that the twelfth session of the Standing Committee had made some progress on revision of the Vienna Convention. However, discussion among the various parties on the "merged" draft on supplementary funding remained in the preliminary stages, and there were still a number of matters of principle awaiting consensus. His delegation felt that the Standing Committee should continue to hold meetings in order to prepare for a diplomatic conference, a necessary precondition for which would be general support for the draft legal instrument.

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\* Member States not members of the Board of Governors are indicated by an asterisk.



Mr. de YTURRIAGA (Spain) said that the Standing Committee should be allowed to continue its consideration of the revision of the Vienna Convention and to make substantive preparations and administrative arrangements for the convening of a diplomatic conference, whether or not progress was made on supplementary funding. It was not part of the Standing Committee's mandate to concentrate on the question of supplementary funding.

Mr. FITZGERALD (Ireland) responded that the mandate of the Standing Committee, as defined in paragraph 2 of document GOV/2819, was to consider all aspects of international liability, which in his view included such matters as funding and compensation. The work currently being done by the Committee clearly fell within its mandate, and he saw no need for that mandate to be changed.

The CHAIRMAN, summing up the discussion, said that the Board had expressed concern about the lack of progress in the efforts of the Standing Committee on Liability for Nuclear Damage to formulate a framework for a comprehensive liability regime, and had urged that the Committee intensify its efforts with a view to the early convening of a diplomatic conference. Member States had been urged to provide political impetus in order to facilitate achievement of the compromises essential to the success of the Committee and the diplomatic conference.

It had been generally felt that, as things now stood, it was not opportune to fix a date for the envisaged diplomatic conference. Some members had been hopeful, however, that sufficient progress would still be made to permit the diplomatic conference to be held in 1996.

He took it that the Board wished to transmit the material contained in document GOV/2819, together with the summary records of the Board's discussion, to the General Conference for its information.

It was so decided.

