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

### **LIABILITY FOR NUCLEAR DAMAGE**

1. Attached to this document is a note prepared by the Secretariat on negotiations in the Standing Committee on Liability for Nuclear Damage since the thirty-eighth regular session of the General Conference.
2. On 13 September 1995, the Board of Governors decided that this note should be transmitted, together with the summary records of its discussion on "Liability for nuclear damage", to the General Conference for its information.
3. The summary records of the Board's discussion will be issued as an Addendum to the present document.



## NEGOTIATIONS IN THE STANDING COMMITTEE ON LIABILITY FOR NUCLEAR DAMAGE

1. Over the past few years, the question of liability for nuclear damage has been under consideration both in the Board and in the General Conference, which has adopted a number of resolutions regarding it, in which the two policy-making organs underlined the need for establishing a comprehensive international liability regime.
2. In February 1990, the Board established the Standing Committee on Liability for Nuclear Damage with a mandate - in particular - to:
  - (i) consider international liability for nuclear damage, including international civil liability, international State liability, and the relationship between international civil and State liability;
  - (ii) keep under review problems relating to the Vienna Convention on Civil Liability for Nuclear Damage and advise States party to the Convention on any such problems; and
  - (iii) make the necessary substantive preparations and administrative arrangements for a revision conference to be convened in accordance with Article XXVI of the Convention on Civil Liability for Nuclear Damage.

The Standing Committee reports to the Board periodically on the progress of its work.

3. Since the thirty-eighth (1994) regular session of the General Conference, the Standing Committee has held three sessions - the tenth (31 October - 4 November 1994), eleventh (20 - 24 March 1995) and twelfth (26 - 30 June 1995)<sup>1/</sup> - during which efforts were intensified with a view to expediting the preparatory work for the diplomatic conference. In the context of the integrated approach in dealing with all issues of its agenda, the Committee alternated between the examination of the revision of the Vienna Convention and the new texts on supplementary funding. It was recognized that agreement on fundamental issues of supplementary funding was crucial at the present stage for further progress in negotiations.

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Appendices 1 and 2 to this note contain the reports of the Standing Committee on its eleventh and twelfth sessions. Other documents of those sessions as well as the report on the Standing Committee's tenth session are available from the Legal Division on request.

4. Further progress was made by resolving a number of outstanding issues in the proposed draft amendments to the Vienna Convention. In dealing with this item, the Standing Committee has moved closer to the conclusion of its task. Several questions of principle still remain to be settled, in particular, actual figures for the limits of compensation, geographic scope, the definition of nuclear damage, and the final clauses.

5. With respect to supplementary funding, the Standing Committee has considered two basic approaches under consideration on this issue. One is set out in the "collective State contributions" draft that is intended to operate on the basis of the legal framework of the Vienna and Paris Conventions and covers both transboundary and domestic nuclear damage. The other approach is set out in the "umbrella" draft which is a free-standing instrument that may be adhered to irrespective of participation in the Vienna or the Paris Convention and is devoted exclusively to transboundary nuclear damage.

6. The Standing Committee, at its eleventh session, held detailed discussions of the fundamental issues involved in the above-mentioned draft conventions and of their relationship. The Standing Committee expressed strong preference for elaboration of a single draft instrument on supplementary funding by merging the "collective State contributions" draft and the "umbrella" draft. Only if this should not prove feasible, the Committee would submit to a diplomatic conference two mutually complementary and compatible drafts. At the same time, a number of delegations urged the Standing Committee to prepare only one draft instrument on supplementary funding for submission to the diplomatic conference.

7. Accordingly, the Standing Committee considered, at its twelfth session, the "merged" draft combining the "collective State contributions" and "umbrella" approaches, which was prepared at its request by an informal drafting meeting. The "merged" draft is intended to be a freestanding instrument compatible with the Vienna and Paris Conventions; it contains a so-called "grandfather clause" which also allows participation by a State that does not implement certain provisions of the convention, if it has legislation in force on 1 January 1995 providing for strict liability for substantial offsite nuclear damage and for economic channelling. The draft provides for two types of supplementary funding based on the "collective State contributions" and "umbrella" approaches respectively.

Also, the Standing Committee discussed a proposal by Denmark and Sweden for a single supplementary fund which would be split initially into two equal parts reserved for domestic and transboundary damage respectively. A time limit may be imposed for preferential treatment of claims for both types of damage, beyond which unused money reserved for one part of the fund would be used in its other part.. In several respects this proposal is similar to the "merged" draft, e.g. freestanding character, grandfather clause.

8. No consensus with respect to supplementary funding was reached on the basis of either the "merged" text or the Danish-Swedish proposal. It was generally held that the two texts needed further consideration and elaboration with a view to enabling the thirteenth session to work out the text of a draft convention on the subject. The Secretariat was requested to convene an open-ended informal drafting meeting on 26 to 29 September to prepare, if feasible, a supplementary funding text or texts with a view to assisting the thirteenth session of the Standing Committee in the elaboration of a generally acceptable draft convention. The text or texts coming out as a result of this meeting should be distributed in all the working languages to the Member States.

9. It was recognized during the twelfth session of the Standing Committee that intensified preparations and further political guidance should be sought in order to achieve agreement. The Committee's next session will be held from 30 October to 3 November 1995.

10. On the timing and preparation for the diplomatic conference, the Standing Committee, at its eleventh session in March 1995, agreed to recommend, with reservations by some delegations, that the diplomatic conference may be convened in Spring 1996 and that the administrative and organizational arrangements should be made commensurate with its programme. In this connection, the Standing Committee foresees that the diplomatic conference may be devoted to the revision of the Vienna Convention and supplementary funding.

11. The Standing Committee will report to the Board when the preparatory work has been completed so that a decision concerning the holding of the diplomatic conference, its duration and date may then be taken. The draft budget estimates for 1996 have so far envisaged funds for a conference of one week duration.



**STANDING COMMITTEE ON  
LIABILITY FOR NUCLEAR DAMAGE**

SCNL/11/INF.5  
24 April 1995

Eleventh Session  
Vienna, 20-24 March 1995

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**REPORT OF THE STANDING COMMITTEE ON LIABILITY FOR NUCLEAR DAMAGE**

1. The Standing Committee held its eleventh session at the Agency's Headquarters in Vienna from 20 to 24 March 1995, under the Chairmanship of H.E. Mr. Curt Lidgard of Sweden. H.E. Mr. Taher Shash of Egypt and Professor Jan Łopuski of Poland served as Vice-Chairmen. Mr. Gustavo Zlauvinen of Argentina served as Rapporteur. One position of Vice-Chairman remained vacant.

2. The representatives of the following 52 Member States participated in the session: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Holy See, Hungary, India, Indonesia, Iraq, Ireland, Israel, Italy, Japan, Republic of Korea, Lebanon, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Poland, Romania, Russian Federation, Saudi Arabia, Spain, Sweden, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay.

3. Three intergovernmental organizations, namely Asian-African Legal Consultative Committee, the European Union represented by the Commission and OECD/Nuclear Energy Agency and three non-governmental organizations, namely British/European Insurance Committee, Greenpeace International and UNIPEDE were represented by observers, it being recognized that attendance of NGO's was on the basis of the understanding reached at previous sessions of the Committee.

4. The Standing Committee held 6 plenary meetings on 20-24 March 1995.

5. At its first plenary meeting the Committee adopted the following agenda:
1. Organization of work
  2. Proposals for the revision of the Vienna Convention on Civil Liability for Nuclear Damage
  3. Supplementary funding for compensation of nuclear damage
  4. International State liability and its relationship to the international civil liability regime
  5. Future programme of work
  6. Adoption of the report
6. At the same meeting, the Committee considered item 1 of its agenda "organization of work". As it was recognized that agreement on supplementary funding was essential for future progress in negotiations, it was decided to take up at this session the fundamental problems involved in the relationship between the "collective State contributions" and "umbrella" draft conventions, in particular ascertaining the extent to which both drafts were complementary or mutually exclusive.

To facilitate deliberations, the Committee used as illustrative guides the calculations for the "collective State contributions" draft prepared by the Secretariat and the delegation of Sweden, as well as those prepared by the delegation of the United States for the "umbrella" draft. Pursuant to the decision of the tenth session, it was also agreed to take positions, within the mandate of the Standing Committee, on the alternative formulations in Articles 3, 4 and 5 of the "collective State contributions" draft. In this connection, account was taken of the relevant provisions of the "umbrella" draft. As those issues involved matters of principle, they were dealt with in plenary.

As regards outstanding issues on the revision of the Vienna Convention, it was agreed that, if time permitted, their discussion would be continued in the Drafting Committee.

The Standing Committee decided to consider the schedule for completion of the preparatory work as well as the timing of the diplomatic conference and preparation for it.



In order to expedite general agreement, consultations on fundamental issues were undertaken in informal groups. The Committee held two additional sessions with interpretation.

7. Further, at the first and second plenary meetings, the Standing Committee took up fundamental issues involved in the "collective State contributions" and "umbrella" drafts and their relationship. Attention was focussed on the following questions: (a) whether the two drafts were complementary or mutually exclusive; (b) the freestanding character of the "umbrella" draft and dependence of the "collective State contributions" draft on the system of the Vienna and Paris Conventions; (c) restriction of the "umbrella" draft to transboundary damage.

8. The delegation of Belgium, speaking on behalf of 11 States party to the Brussels Convention, made a statement (SCNL/11/2), regarding their intention concerning the future of that Convention in the light of the negotiations of a wider supplementary funding scheme. The parties also considered that the future work of the Standing Committee on supplementary funding should be concentrated primarily on the "collective State contributions" draft. It was further explained that this position did not prejudge the possibility of continuing examination of other proposals, in particular the "umbrella" draft.

The delegation of France said that while it had approved the statement referred to above in the concern not to slow down the negotiations, it did not consider it perfect. In its view, any financial sharing could only be implemented on the basis of equivalent safety levels of nuclear installations. Regardless of the "collective State contributions" draft, account should be taken of the "umbrella" draft to the extent that it tends to achieve universality and provides for balanced distribution of costs. The delegation remains strongly committed to the main principles of the Paris and Vienna Conventions, particularly the principle of legal channelling.

9. The prevailing opinion was that the "collective State contributions" and "umbrella" drafts were not mutually exclusive but were complementary in their

objectives. It was agreed that the issue requiring close examination was whether and to what extent the main principles of the two drafts were compatible. It was pointed out that such examination should take into account compatibility with regional supplementary arrangements such as the one contemplated in Latin America. In this connection, it was explained that the "umbrella" draft would be built on national law, basic conventions and regional systems.

10. In this context, a number of Latin American delegations reiterated that their governments are analyzing the principles for the establishment of a mechanism for the compensation of nuclear damage in their region. This regional system is considered as being perfectly compatible with an eventual broad agreement on the matter in view of its predictable flexibility to harmonize itself with the regional mechanism. In this regard, they expressed their commitment to continue their regional studies as well as participate in the discussions on such global supplementary funding arrangement.

11. The delegation of Poland presented its proposal (SCNL/11/3) for a combination of the private law regime and an international fund for transboundary damage at State-to-State level and a fixed fund for transboundary damage instead of the phasing out concept which is in the "umbrella" draft. The Standing Committee established an informal group coordinated by Mr. Gioia of Italy to prepare a legal text of the Polish proposal in the context of the "Umbrella" draft. The Committee took note of the report (SCNL/11/7).

12. The Standing Committee established an informal group coordinated by the Chairman of the Drafting Committee, Mr. Melchior. It was requested to consider, in light of the discussion, fundamental issues involved in the relationship of the "collective State contributions" and "umbrella" drafts with a view to approximating their principles. At its third plenary meeting, the Committee took note of the oral report of the working group.

13. Further, at its third meeting, the Standing Committee held a preliminary discussion of alternative formulations in Articles 3, 4 and 5 of the "collective State contributions" draft.

14. The Standing Committee reconvened the Drafting Committee under the Chairmanship of Mr. Melchior. It was requested to give priority to the discussion of the

"collective State contributions" and the "umbrella" drafts, and if time permitted, to proceed with consideration of the outstanding issues relating to the revision of the Vienna Convention. The Standing Committee, at its meeting on 24 March 1995 took note of the report of the Drafting Committee.

15. The Plenary considered the amounts inserted in Article 5 of the revised Vienna Convention of the limits for liability for nuclear damage. In order to achieve a proper balance between broad adherence and adequate compensation, it was felt that the overall amounts for liability in the Vienna Convention could not be as high as 500 million SDRs, but rather between 200 to 300 million SDRs. As to the operator's amount, 150 million SDRs seemed to be within the range of a possible agreement. However, the figures in the text should remain for the time being. Attention was drawn to the fact that, in accordance with the revised Vienna Convention, the new figures would obviously be the minimum amounts and not ceilings. However, future consideration of these figures should take into account the amounts which may be agreed upon in the context of supplementary funding.

16. The Standing Committee considered the timing and the preparation for the diplomatic conference. At the suggestion of the Chairman of the Committee, although there were some reservations, it was agreed to recommend to the IAEA Board of Governors that the diplomatic conference be convened in spring 1996 and that the necessary arrangements be made commensurate with the programme of the conference. In this connection, it was agreed that the diplomatic conference should be devoted to the revision of the Vienna Convention and supplementary funding.

As regards the supplementary funding, the Committee expressed strong preference for elaboration of one draft instrument by merging the "collective State contributions" draft and the "umbrella" draft and emphasized that all efforts, including informal meetings and consultations, should be made to achieve that goal. Only should the merging not prove feasible, the Committee would submit to the diplomatic conference two mutually complementary and compatible draft instruments on supplementary funding. A number of delegations expressed their reservations and appealed to the Standing Committee to prepare one draft on supplementary funding only for the diplomatic conference.

Accordingly, the conference should be presented with draft amendments for the revision of the Vienna Convention and one draft instrument or two draft instruments on supplementary funding.

17. The Committee decided to delete the "levy" and "pool" draft texts from its documentation.

18. The Secretariat was requested to convene an open-ended informal drafting meeting to prepare, if feasible, a text or texts with a view to assisting the twelfth session of the Standing Committee in the elaboration of one instrument on supplementary funding.

19. On 24 March the Standing Committee adopted its report. The Committee decided to hold its next session from 26 to 30 June 1995. The Committee also noted that arrangements have been made by the Secretariat for holding the thirteenth session from 30 October to 3 November 1995.

Report of the Drafting Committee

General

1. The Drafting Committee held 5 sessions from 21-23 March 1995.
2. Priority was given to the consideration of supplementary funding, in particular the "collective State contributions" draft and "umbrella" draft. The Committee also discussed the outstanding issues in the Basic Texts for the revision of the Vienna Convention.

"Collective State contributions" draft

3. The Drafting Committee first considered the "collective State contributions" draft (the Preamble and Articles 1 to 17) with a view towards removing square brackets where appropriate, as well as considering proposed amendments.
4. In the Preamble, it was agreed to leave the text of paragraph 3 intact with square brackets, and to delete the square brackets around paragraph 4.
5. On Article 3, the UK proposal (SCNL/10/4) to refer in that Article to the list of nuclear installations in Article 8 did not receive sufficient support as it was felt that coverage by the convention should not depend on whether the installation would appear on the list.

It was agreed to delete the words in square brackets "or owned by a national of a Contracting Party" in Alternative 1 of Article 3.

In order to adjust Alternative 2 to Alternative 1, it was agreed to insert, after the word "operator", the following words: "of a nuclear installation used for peaceful purposes situated in the territory of a Contracting Party to the Convention (hereafter referred to as "Contracting Party")."

6. The Committee next considered the Spanish proposal (SCNL/8/9) to add to paragraph 1(a) of Article 3 the words "including the territorial sea and the airspace above it". It was explained that as a State's territory includes the territorial sea, airspace and subsoil, the suggested phrase was unnecessary. It was agreed to retain the text in Article 3 as it was and, for the purposes of consistency, to delete the corresponding phrase in the Article on Geographic Scope in the basic text (page 16, SCNL/10/INF.4). The proposal to include the words "in the contiguous zone of a Contracting Party" in paragraph 1 of Article 3 was not supported since that zone was considered as not being part of the territory but of the high sea. Therefore, the proposal was withdrawn.

7. The Committee considered the Israeli proposal that Article 5 , Alternative 1 , paragraph 1.(a)(i) be restricted to nuclear reactors only. After discussion, the Israeli delegation decided to withdraw that proposal as well as the proposal relating to paragraph 4 on the understanding that the question of contribution for storage facilities would be considered in connection with the formula in paragraph 3.

8. With regard to Article 7, it was questioned whether paragraph 2 was necessary. However, it was agreed to retain the text and to remove the square brackets. Also the square brackets were removed around paragraph 3 and the accompanying footnote 10 was deleted.

9. The Committee took note of the oral report by Ambassador Shash of Egypt, co-ordinator of the informal group on the treatment of States with no nuclear power plants or only with small, including research, reactors, with respect to contributions under Article 5 of the "collective State contributions" draft. The group was assisted by an expert from the Division of Nuclear Safety. While research reactors present a lower risk, some risk nevertheless exists even with small research reactors which are often located in populated areas. The group did not consider it feasible to establish technical criteria for definition of a small reactor in connection with the risk of nuclear damage. The group will continue its work at the next session.

10. Some delegations suggested the deletion of paragraph 2 of Article 9, but according to the prevailing view, this provision should be kept, and clarified by replacing the words "such legislation" by the words "the legislation of the Contracting Party in whose territory the nuclear installation of the operator liable is situated". The suggestion that "fault" should be qualified, e.g. "grievous fault", did not find sufficient support because such notion was not used in the legal systems of many countries.

11. The Committee considered a proposal by Austria (IWG/4/7) to Article 10 and a related proposal by Israel (IWG/4/9). The Committee adopted both proposals with minor amendments. Consequently, the following provision was inserted at the end of paragraph 1 of Article 10:

"Concerning the criteria of apportionment established in this context, there shall be, subject to the provisions of Article 3, no discrimination based on nationality, domicile or residence of the person suffering damage."

12. Since paragraph 2 of Article 11 might be redundant in light of draft amendments to the Vienna Convention it was agreed to put paragraph 2 in square brackets with a footnote, as follows: "This provision should be considered in light of the provision in the Basic Texts on geographical scope and exonerations."

13. It was agreed to maintain unchanged in square brackets Chapter VI containing Articles 13, 14 and 15 on the understanding that the issues involved would be considered in substance at a later date.

14. It was agreed to remove square brackets around the reference to the Convention on Nuclear Safety in paragraph 1 of Article 17. The delegation of Germany withdrew its proposal SCNL/10/3 regarding declarations on specified installations. Consequently, the Bulgarian proposal in SCNL/IWG4/8 was no longer of relevance.

15. The Committee did not address specifically Articles 18 to 23 as they were either standard or were related to matters that had not yet been decided in plenary. Article 24 was not discussed due to lack of time.

"Umbrella" draft

16. The Drafting Committee considered the text of the "Umbrella" draft.
17. A suggestion to delete the words "fair" in the first paragraph of the Preamble did not receive support.
18. In order to ensure that the text covers storage, it was agreed to insert in square brackets in Article I the words "and storage incidental to such transportation" after the word "transportation" in the first line of paragraph 1(a).
19. In Article 1(d) it was agreed to replace the words "MAW of" by the word "maximum".
20. It was decided to put paragraph (g) in square brackets since it needed further consideration.
21. Under the discussion of paragraph (h) it was indicated that the phrase "to the extent national law provides" seems to qualify the preceding words and therefore virtually leaves all issues to national law. It was however pointed out that a flexible definition was needed. Furthermore, on the question as which national law was applicable, there was general agreement that the reference was to the lex fori. Consequently, it was decided that the words "national law" should be put in square brackets, and, as an alternative, another bracket should contain the words "the law of the jurisdiction State". In view of the various problems raised about this text, it was agreed to put the first part of paragraph (h), up to the words "which arises" in square brackets.
22. With regard to paragraph (i), it was observed that a difference exists between the basic text for the revision of the Vienna Convention and the "Umbrella" draft: the "Umbrella" draft in this respect was seen to be narrower. It was explained that this



was intentional as the text follows the existing Vienna Convention. It was decided to replace the parentheses with commas.

23. On paragraph (j), a proposal to replace the words "nuclear power plants" with the words "civil nuclear reactors" did not find support. It was agreed to insert the Vienna Convention definition of nuclear installation in square brackets as an alternative text.

24. With regard to paragraph (k), it was observed that the text does not follow the Vienna and Paris Conventions, and may create a problem as it covers natural and depleted uranium. In response to the question whether the text was intended to include nuclear fusion, it was noted that such coverage may be desirable as fusion also creates radioactive by-products. In order to take care of the problem, it was decided to insert in square brackets, as a variant, paragraphs (g) and (h) of Article I of the Vienna Convention.

25. As agreement had not been reached on the figures in Article II, it was agreed to insert square brackets around the number "200" in paragraph 1 and around the words "1 billion" in paragraph 2, and wherever else these words appeared in the text.

26. In the consideration of Article III, it was agreed that the wording contained in the Vienna Convention on legal channelling could be inserted in the "Umbrella" draft along with a grandfather clause which would allow the U.S. to continue with economic channelling. Such clause could be worded as follows:

"The national law of a Contracting Party is deemed to implement ..... of this Article if it contains provisions in effect on ..... that require the operator to indemnify any other person liable for nuclear damage to the extent that that person provides compensation ..."

The same approach could apply to the question of strict liability.

"The national law of a Contracting Party is deemed to implement ..... of this Article if it contains provisions in effect on ..... that provide for strict liability in the event of a nuclear incident which causes substantial nuclear damage off the site of the nuclear installation of the operator liable."

27. In Article IV, it was agreed to delete paragraph 2.(b). It was furthermore agreed that paragraph 2(c) should be replaced by the provision on strict liability mentioned above.

28. In respect of paragraph (d), some delegations felt that the first part up to the words "one nuclear incident" should be deleted although it was pointed out that a similar text exists in the "basic text" for revision of the Vienna Convention; the Committee agreed to delete the text.

29. The Drafting Committee established an informal group coordinated by Mr. McRae of the United States to consider the compatibility of the "Umbrella" draft with other proposed or existing liability regimes. The Committee took note of the report of the group (SCNL/11/6), and it was indicated that the suggested new definition of the national compensation amount might necessitate a priority rule.

#### Deliberations on Basic Texts for the revision of the Vienna Convention

30. On the concept of nuclear damage, consideration was given to Article I.1.(k).(iii) which has two alternative texts in square brackets. The Committee discussed the question of choosing between "unless insignificant" and "unless at tolerable levels". One delegation, which had originally proposed the second option, indicated that the absence of such a provision could lead to disputes as to whether any increase, however minor, in basic radioactivity would amount to environmental damage, even though such increase may be permitted by the local regulatory authority. It favoured the second option, which was inspired by a provision in a Council of Europe Convention on civil liability for damage resulting from activities dangerous to the environment. In response, it was pointed out that it would be for the court to determine what is insignificant or intolerable, and that therefore, there was little difference between the two alternatives. Several delegations recalled their general reservation to any text regarding damage to the environment. Since the prevailing view was in favour of the first option, it was decided to delete the second option and remove the square brackets around the first.

31. In connection with the footnote attached to the definition of damage in the Basic Texts, it was suggested that in light of the expanded definition of damage proposed for revision of the Vienna Convention, paragraph 6 of Article II of that convention would be redundant and should be deleted. However, some delegations indicated that paragraph

6 of Article II was related to paragraph 5 of that article. Therefore, while accepting the need for textual adjustments, they wanted to examine further how the idea of the provision in paragraph 6 would fit with the new definition of damage. It was agreed to amend paragraph 6 of Article II by replacing the words "sub-paragraph k(ii)" with the words "the terms" and to put the paragraph in square brackets.

32. Some delegations regarded the definition of nuclear incident in the Basic Texts as being too broad and specifically objected to the inclusion in it of the notion of "grave and imminent threat of causing damage". They preferred the definitions in the Vienna Convention. Objections were also raised with respect to the definition of preventive measures to the effect that it includes measures undertaken by any person. The observer from the British/European Insurance Committee pointed out that while the concept of preventive measures is not new, the drafting of the definition in question could cause a number of problems for insurance, e.g. causality, and the term "reasonable". A suggestion was made that the definition should be amended to state that preventive measures should be covered only if they were authorized by the competent authorities. In this connection the criteria of insurability was regarded by some delegations as decisive for their position on the definitions in question.

On the other hand, there was support for maintaining the definitions of nuclear incident and preventive measures agreed during previous sessions. It was argued that similar definitions appeared in recent liability conventions relating to the protection of the environment. It would be for the court to decide whether preventive measures were reasonable. It was decided, at least for the time being, to maintain the definitions in the basic text.



STANDING COMMITTEE ON LIABILITY  
FOR NUCLEAR DAMAGE

SCNL/12/INF.6  
25 July 1995

Twelfth Session  
26-30 June 1995

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## REPORT OF THE STANDING COMMITTEE ON LIABILITY FOR NUCLEAR DAMAGE

1. The Standing Committee held its twelfth session at the Agency's Headquarters in Vienna from 26 to 30 June 1995, under the Chairmanship of H.E. Mr. Curt Lidgard of Sweden. H.E. Mr. Taher Shash of Egypt and Professor Jan Łopuski of Poland served as Vice-Chairmen. Mr. Gustavo Zlauvinen of Argentina served as Rapporteur. One position of Vice-Chairman remained vacant.
2. The representatives of the following 57 Member States participated in the session: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Denmark, Egypt, France, Germany, Greece, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Republic of Korea, Lebanon, Lithuania, Luxembourg, Malaysia, Mali, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Philippines, Poland, Romania, Russian Federation, Saudi Arabia, Slovak Republic, Spain, Sudan, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uzbekistan.
3. Three intergovernmental organizations, namely the European Union represented by the Commission, OECD/Nuclear Energy Agency and World Health Organization and three non-governmental organizations, namely British/European Insurance Committee, Greenpeace International and UNIPEDE were represented by observers, it being recognized that attendance of NGO's was on the basis of the understanding reached at previous sessions of the Committee.
4. The Standing Committee held 7 plenary meetings on 26-30 June 1995.
5. At the first plenary meeting, the Chairman brought to the attention of the Standing Committee the discussion on its work that had taken place at the June session of the Board of Governors. The summary record contained in document SCNL/12/INF.2 had been transmitted by the Secretariat to the Committee at the request of the Board. The Chairman pointed out that the discussion in the Board revealed

continued interest in the successful completion of the Committee's work. It also demonstrated serious concern that the progress made so far was not yet sufficient for an early convening of a diplomatic conference. In this connection he noted that given the treaty-making practice of the Agency, the policy-making organs could not be expected to convene the diplomatic conference before its working documents had received broad support in the Standing Committee.

6. Further, at the first plenary meeting the Committee adopted the following agenda:

1. Organization of work
2. Proposals for the revision of the Vienna Convention on Civil Liability for Nuclear Damage
3. Supplementary funding for compensation of nuclear damage
4. International State liability and its relationship to the international civil liability regime
5. Future programme of work
6. Adoption of the report

7. At the same meeting, the Committee considered item 1 of the agenda "organization of work".

It was recognized that, in the context of the integrated approach, agreement on fundamental issues of supplementary funding was crucial at this stage for further progress in the negotiations. It was therefore decided to address in plenary alternative proposals of a system of supplemental funding with a view to making a conclusive choice of a system that would be taken as the basis for negotiations. As approaches set out in the "collective State contributions" and "umbrella" drafts had already been thoroughly discussed, attention should be concentrated on the new draft merging those approaches ("merged" draft) which was prepared by the informal drafting meeting in May (SCNL/12/WP.2), as well as the Danish suggestion contained in Annex 3 to the above-mentioned document (a freestanding convention with a 50:50 fund for transboundary and domestic damage respectively and under which unused transboundary funds are transferred to the domestic fund and vice versa). Some delegations expressed the view that a preference had to be given to completing the examination of revision of the Vienna Convention and that the texts referred to above had only been made available in English.

The Committee decided to alternate between the examination of the new texts on supplementary funding and the examination of the revision of the Vienna Convention.

8. At its first to fourth plenary meetings on 26-28 June 1995, the Standing Committee discussed fundamental issues of supplementary funding involved in the "merged" draft and the "50:50 fund" approach.

(a) In presenting the "merged" draft instrument, Mr. Sturms, Legal Adviser, who had chaired the informal drafting meeting, underlined the following main features: it is a freestanding instrument open for adherence by any State regardless of participation in the Vienna or Paris Convention; its provisions are compatible with the two Conventions; according to the so-called "grandfather clause", ratification would be possible for a State whose legislation provides on or before 1 January 1995 for strict liability for substantial offsite damage and for economic channelling.

The "merged" draft provides for two types of supplementary funding. The fund in Article VIII, which is based on the "collective State contributions" approach, is intended for supplementary compensation of both domestic and transboundary damage. The draft provides for three alternatives as to the participation in the fund: (i) voluntary for all Contracting Parties, (ii) mandatory for Parties to the Vienna and Paris Conventions and voluntary for other Contracting Parties, and (iii) mandatory for all Contracting Parties.

The fund in Article IX, which is based on the "umbrella" draft, is dedicated only to supplementary compensation of transboundary damage. Participation in it is mandatory; the Installation State is required to provide a fixed amount to the fund.

Mr. Sturms pointed out that the draft did not set a link between the two funds, and that therefore the question of their relationship needed consideration.

(b) In explaining the "50:50 fund" approach, the delegate of Denmark underlined that the proposal should be seen as a compromise between the different positions. A number of its features were incorporated in the "merged" draft, e.g. freestanding

character, and a "grandfather clause". It would however cover all peaceful nuclear installations, not only nuclear power plants, both for the purposes of liability and contribution to supplementary funding.

The key element of the suggested approach is the establishment of a single supplementary fund which would be split initially into two equal parts (i.e. 50:50 proportion) reserved for domestic and transboundary damage respectively. A time limit of e.g. 10 years may be imposed for preferential treatment of claims for both types of damage. Beyond that time limit, unused money reserved for one part of the fund would be used in the other part of the fund.

The proposal was intended as a compromise, as, on one hand, it provides for funds reserved for transboundary damage and, on the other, alleviates differential treatment of victims. The position of the non-nuclear States should be accommodated in the formula for contributions. As in a number of respects it is similar to the "merged" draft, the "50:50 fund" approach could be implemented within its framework, in particular by some adjustments in its Article VIII and deletion of Article IX.

9. In discussing the work of the Committee, many delegations expressed a preference for focusing on the "merged" draft. It was emphasized that this draft, intended to be a compromise text, was prepared in response to the decision of the eleventh session of the Standing Committee which had expressed strong preference for the elaboration of a single draft instrument combining the two approaches, and therefore it should be given detailed examination in the Drafting Committee. Some of those delegations have supported the freestanding nature and the idea of a supplemental fund dedicated to transboundary damage, incorporated in the "merged" draft. It was also noted in the context of the integrated approach that final agreement on important issues of the revision of the Vienna Convention depended on the results that were achieved in supplementary funding.

10. Some delegations objected to giving priority to consideration of the "merged" draft. In their opinion, it did not provide a basis for a compromise as it combined irreconcilable concepts and discriminated in favour of transboundary damage. Its freestanding nature left loopholes for deviation from recognized basic liability rules established in conventions in force. This could discourage other States from joining these conventions.



11. An offer was repeated by a delegation supporting the "merged" draft to seek to eliminate such loopholes if they can be specifically identified.

12. The Standing Committee discussed the "50:50 fund" approach at length. While it, in the opinion of some delegations, had the potential to provide a basis for compromise, comments were made by other delegations on its specific elements. In particular, some delegations did not support the idea of a freestanding instrument. Objections were raised to 50:50 split of the supplemental fund. On the one hand, it was argued that it resulted in differential treatment among victims. On the other, such split was regarded as unacceptable because it reserved funds to compensate damage in the incident State. Some delegations indicated that the proposal should guarantee the same amount of compensation for transboundary damage as the "merged" draft.

13. The prevailing feeling in the Committee was to base the discussion at this juncture on the "merged" draft first. A number of delegations indicated that they would be prepared to consider whether the "50:50 fund" approach might provide the basis for a compromise solution if such solution could not be found on the basis of the "merged" draft and if other States as well would indicate their support for that approach.

14. The Standing Committee reconvened the Drafting Committee under the chairmanship of Mr. Melchior. It was requested to consider the outstanding issues in the Basic Text for the revision of the Vienna Convention and the "merged" draft on supplementary funding, in particular its Articles I to VII. The Committee took note of the Report of the Drafting Committee, which is contained in the Annex to this Report.

15. The delegations of Denmark and Sweden introduced a joint proposal for a text (SCNL/12/3) concerning the "50:50 fund" approach. The text also provided an alternative formulation for the liability provisions by way of a reference to the Vienna and Paris Conventions as well as to national legislation in conformity with those Conventions. It was explained by the drafters that the two parts of the proposal should be regarded as independent of each other and not a package.

While the preliminary text concerning the "50:50 fund" approach was generally welcomed as a constructive effort to facilitate a compromise, delegations were not prepared to take a definite position on the proposal before it was carefully studied.

As an initial reaction many delegations pointed out that the proposal needed provisions on geographical scope and would require non-nuclear States to enact elaborate nuclear legislation; the "grandfather clause" placed a requirement regarding strict liability for substantial offsite nuclear damage and economic channelling but did not provide for financial security of operator's liability. Some delegations found that the 50:50 split of a single fund for domestic and transboundary damage was difficult to accept because of differential treatment of victims. In the view of a number of non-nuclear countries, such split was not attractive as it guaranteed half of the fund for damage in the Installation State. Certain delegations regretted that this proposal did not contain the definition of nuclear damage in the Basic Text for the revision of the Vienna Convention. Several of these delegations pointed out that they might however consider the proposal seriously if certain nuclear States indicated their readiness to consider it as a compromise, and were prepared to accept a system of contribution which recognized the special position of non-nuclear power generating States. A number of nuclear States, although reserving their positions, indicated that their first reaction was positive.

16. The Standing Committee continued examination of the "merged" draft, in particular its Articles VIII and IX. A number of delegations welcomed the draft and in particular Article IX on mandatory participation in a transboundary fund. Some delegations maintained their reservations in principle to such a dedicated transboundary fund, especially if the disposition of Articles VIII and IX are not both mandatory or voluntary.

Some delegations pointed out that the system of funds in the "merged" text was very complicated for interpretation and application, in particular by the lack of a specific provision on the relationship between the funds in Articles VIII and IX as well as with other existing instruments, in particular as regards the order in which they are implemented. It was possible to identify multiple categories of victims according to participation in different conventions and funds.

Some delegations expressed the opinion that these complications resulted primarily from the multiple options in the current draft and would disappear with the adoption of a single option.

17. At its fifth plenary meeting, the Standing Committee discussed the basic texts for the revision of the Vienna Convention. The plenary discussed the figures inserted in Article V of the revised Vienna Convention on the limits of liability for nuclear damage. As 150 million SDRs as a limit for operator liability continues to represent a compromise figure, the plenary reaffirmed its conclusion contained in paragraph 15 of the report of its eleventh session.

18. The plenary next discussed paragraph 4 of the provision on a simplified procedure for updating of liability limit. It was recalled that the Drafting Committee had removed the square brackets around the time limits of "6" months and "12" months, but had retained those around "one third". There was general agreement that Governments would need a longer period than 6 months in order to indicate acceptance to any amendment to the liability limit. It was therefore agreed to substitute 18 months for 6 months.

19. Many delegations were of the opinion that a tacit acceptance procedure in the draft may conflict with constitutional requirements in some countries. Some delegations found it difficult to understand why a minority should be able to object to a decision taken by a majority especially since such a decision would not be binding on them if they lodged an objection. It was agreed to refer this paragraph to the Drafting Committee to provide for an explicit approval procedure and make it clearer that an amendment will not be binding on a State which has not approved it.

20. Some delegations expressed their objection to the text on priorities in settlement of claims in Article VIII. It was argued that priorities should not be given to loss of life or personal injury which should not be distinguished from other types of damage. Also, the application of priorities makes it difficult to administer claims, particularly by insurers. Moreover, it involves delays, which is not in the interest of victims. A number of delegations, including States Parties to the Vienna Convention, supported the present text since they consider the compensation of personal injury to be more important than compensation of property damage. Moreover, a priority rule was more necessary because of the inclusion of environmental damage and the cost of preventive

measures in the concept of damage. It was therefore decided to retain the present provision. Should such a provision not be inserted in a revised Paris Convention, it was indicated that such difference would not affect the operation of the Joint Protocol.

21. In connection with the discussion on priorities of claims, the Committee examined the Polish proposal for unlimited liability for loss of life and personal injury contained in SCNL/8/5. The Polish delegation explained that any claims for loss of life or personal injury to the extent not fully compensated from the appropriated part of the financial security of the operator in the Installation State should be guaranteed by that State.

22. The proposal was supported by a number of delegations, but concern was expressed by a number of other delegations about the financial and budgeting problems in the implementation of the proposal. It was indicated that a consequence of this proposal might be to remove loss of life and personal injury from the coverage of supplementary funding. Although strong sympathy was expressed for the principles and motivations underlying the Polish proposal, the delegations did not give sufficient support for the proposal to be referred to the Drafting Committee. It was however decided to incorporate any text to be prepared reflecting the Polish proposal in the documentation for future meetings.

23. Many delegations felt that the provisions on the establishment of a claims commission in Article XI.A were unnecessary since they were of a voluntary nature. They might complicate claims and cause delays. It was therefore decided to delete the provisions.

24. In dealing with the item on the revision of the Vienna Convention, the Standing Committee moved closer to the conclusion of its task. At the end of this session several questions of principle still remain to be settled, in particular, actual figures for the limits of compensation, geographic scope, the definition of nuclear damage, and the final clauses.

25. No consensus with respect to supplementary funding was reached on the basis of either the "merged" text or the Danish-Swedish proposal. It was generally held that

the two texts needed further consideration and elaboration with a view to enabling the thirteenth session to work out the text of a draft convention on the subject. A number of delegations indicated that if that could not be achieved the thirteenth session at least should determine a common approach to the issue of supplementary funding. Some delegations, however, expressed the view that the thirteenth session may instead come to the conclusion that it will only be possible to present an agreed text on the revision of the Vienna Convention to a revision conference convened in accordance with Article 26 of that Convention.

26. It was recognized that intensified preparations and further political guidance should be sought in order to achieve agreement.

27. The Secretariat was requested to convene an open-ended informal drafting meeting on 26 to 29 September to prepare, if feasible, a supplementary funding text or texts with a view to assisting the thirteenth session of the Standing Committee in the elaboration of a generally acceptable draft convention. The text or texts coming out as a result of this meeting should be distributed in all the working languages to the Member States.

28. The Committee decided to hold its next session from 30 October to 3 November 1995.



## Report of the Drafting Committee

### General

1. The Drafting Committee held 6 sessions from 26 - 29 June 1995.
2. The Committee continued discussion of the outstanding issues in the Basic Text for the revision of the Vienna Convention and made several modifications to the Basic Text.

It also undertook an article-by-article examination of the "merged" draft, Articles I - VII. However, due to lack of time only some key provisions of the draft were addressed.

### Deliberations on Basic Text for the Revision of the Vienna Convention

3. On the concept of nuclear damage, it was agreed to delete paragraph 6 of Article II.
4. Some delegations expressed the view that the language of Article I.1(m) on the definition of preventive measures was not clear. It was suggested that preventive measures in order to be compensated ought to be taken by a public authority or on the recommendation of such authority. It was also suggested by one delegation that the definition also should cover measures taken before the incident had occurred. Other delegations expressed reservations on the second part of the definition of nuclear incident in the Basic Text. However, it was decided to keep the provision unamended on the understanding that it might be considered whether there will be a need to qualify the word "reasonable" for instance by stating expressly that the court when deciding whether a measure is reasonable should take into consideration recommendations by the authorities.

5. The consideration of the proposal by Israel on the definition of nuclear incident (SCNL/12/2) was postponed due to lack of time. The observer from OECD/Nuclear Energy Agency made available a paper on the definition of nuclear incident (NEA/LEG/DOC(94)3).

6. It was agreed to remove the square brackets in Article V.3 as a consequence of the amendment to paragraph 2 of Article XIII and to delete footnote 2.

7. The Drafting Committee agreed to the words "in the circumstances referred to in paragraph 1" in Article VC be replaced by "If the courts having jurisdiction are those of a Contracting Party other than the Installation State". Consequently footnote 4 should be deleted.

8. In respect of the new article in respect of updating of the liability limit, it was decided in paragraph 4 to remove the square brackets around the periods 6 and 12 months. As to the brackets around "one third" the question was referred to the plenary. In paragraph 6 it was agreed to remove the square bracket around 6 months.

9. Footnote 7 to draft Article VIII.2 was deleted.

Deliberations on the Draft Convention on Compensation for Nuclear Damage ("Merged" Text)

10. It was agreed to consider the insertion of a reference to the Vienna Convention and the Paris Convention either in the preamble or the operative part of the Convention.

11. It was stated that the text of sub-paragraph (a) was not a definition of Contracting Party, but a provision determining the geographical scope. It was decided for the time being to keep the provision and not to replace it with the provision on geographical scope in the Basic Text for the revision of the Vienna Convention.



12. It was agreed to replace the definition of "Installation State" in Article I.1 (b) with that in the Vienna Convention, Article I.1(d).

13. With respect to the definition of installed nuclear capacity in sub-paragraph (c), and of the national compensation amount in sub-paragraph (f), it was agreed to return to that question when considering the supplementary funding provisions.

14. The Drafting Committee decided to delete the definition of Jurisdiction State in Article I.1(d) as unnecessary. As a consequence, all references in the draft to Jurisdiction State should be replaced with the phrase "States having jurisdiction".

15. On sub-paragraph (e), the question was raised as to the relationship between the phase-in dates and the date of entry into force. It was decided that this definition should be considered in connection with the provisions on supplementary funding. In that connection the relation to the entry into force should be considered.

16. With regard to the definition of nuclear damage in Article I.1(g), the prevailing opinion was in favour of applying the definition in the Basic Text for the revision of the Vienna Convention. Consequently, that definition, as well as the definition of measures of reinstatement, preventive measures and nuclear incident as contained in Article I.1(k-n) of the Basic Text was inserted as an alternative in square brackets. Since there was also some support for the definition in the "merged" text, that definition was kept as an alternative, also in square brackets.

17. (a) A detailed discussion took place on the formulation of the "grandfather clause" contained in Article III.10 in order to clarify its meaning and legal consequences. It was agreed that the formulation should be specifically drafted to take account of the United States Price Anderson Act. While a number of queries and comments were made in the discussion, no objections were raised against its inclusion in the draft. The United States delegation explained how the formulation of the "grandfather clause" reflected the content of its liability legislation. It was agreed that consideration should be given to expanding the formulation of the "grandfather clause"

to include a requirement regarding financial security to cover the operator's liability. It was also agreed that some adjustment might be needed to deal with the question of indemnification in the case of transport where a foreign person other than operator, e.g. supplier, manufacturer, would be held legally liable by the United States court. The delegations of Germany, Poland and the United States would prepare specific proposals to that effect, if necessary.

(b) The suggestions to delete or place in square brackets the date mentioned in the opening phrase of sub-paragraph (a) and to refer to absolute liability in sub-paragraph (a)(i) instead of strict liability were not supported.

(c) With respect to sub-paragraph (b), the words "upon the entry into force of the Convention for such Party" were inserted after the word "Depositary".

18. Concerning the question of prescription, the Committee considered a proposal by Belgium and Germany on periods of extinction and prescription in Articles V, VIII and IX. The Committee agreed to place that proposal and the existing text of Article V in square brackets as alternatives. A similar decision was taken with respect to the proposals relating to Articles VIII and IX.