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Item 3 of the Board's provisional agenda  
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Item 13 of the Conference's provisional agenda  
(GC(48)/1)

## Civil Liability for Nuclear Damage

### International Expert Group on Nuclear Liability (INLEX)

1. At the International Conference on the Safety of Transport of Radioactive Material (the International Conference), which was held in Vienna, Austria, from 7 to 11 July 2003, the Conference President in his Summary and Findings noted that “there remains considerable uncertainty and debate related to the implementation of a comprehensive regime to deal with the legal liability resulting from an accident during the transport of radioactive material. There are a number of liability-related conventions, to which many States are parties but many others are not.” Further, he noted that “the provisions of the liability conventions, and the relationships between them, are not simple to understand” and concluded that “the preparation of an explanatory text for these instruments would assist in developing a common understanding of what are complex legal issues, and thereby promote adherence to these instruments. The Agency Secretariat should prepare such an explanatory text, with the assistance of an independent group of legal experts appointed by the Director General.”
2. The Director General, in the light of the aforementioned findings and with a view to fostering a global and effective nuclear liability regime, announced on 8 September 2003 to the Board of Governors and on 15 September 2003 to the General Conference the establishment of an International Expert Group on Nuclear Liability (INLEX).
3. On 19 September 2003, the General Conference, in resolution GC(47)/RES/7.C, stressed “the importance of having effective liability mechanisms in place to insure against harm to human health and the environment as well as actual economic loss due to an accident or incident during the maritime transport of radioactive materials”, acknowledged the International Conference President’s conclusion that “the preparation of explanatory text for the various nuclear liability instruments would assist in developing a common understanding of the complex issues and thereby promote adherence to these instruments”, and welcomed “the decision of the Director General to appoint a group of experts to explore and advise on issues related to nuclear liability”.
4. Following the adoption of resolution GC(47)/RES/7.C, INLEX which consists of 20 expert members held three meetings, all at the Agency’s Headquarters. The first meeting was held on 16 and 17 October 2003, the second from 22 to 26 March 2004 and the third from 13 to 16 July 2004.
5. In the course of these three meetings, INLEX finalized the discussion and review of explanatory texts (including an overview of the modernized IAEA nuclear liability regime) on the nuclear liability

instruments adopted under Agency auspices. It recommended the circulation of the explanatory texts to Member States as constituting a comprehensive study of the Agency's nuclear liability regime in order to aid the understanding and authoritative interpretation of that regime.

6. The overview is contained in the Annex to this document. The explanatory texts are available on the Agency website:

<http://www.iaea.org/About/Policy/GC/GC48/Documents/gc48inf-5explanatorytexts.pdf>

# Overview of the Modernized IAEA Nuclear Liability Regime

1. The adoption in 1997 of the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage<sup>1</sup> (1997 Protocol) and the Convention on Supplementary Compensation for Nuclear Damage<sup>2</sup> (CSC) marked a major milestone in the development of the international nuclear liability regime. The 1997 Protocol and the CSC contain important improvements in the amount of compensation available, the scope of damage covered and the allocation of jurisdiction. Furthermore, the CSC provides the framework for establishing a global regime with widespread adherence by nuclear and non-nuclear countries.

2. The existing international nuclear liability regime is based on the Convention on Third Party Liability in the Field of Nuclear Energy of 29<sup>th</sup> July 1960, as amended by the Additional Protocol of 28<sup>th</sup> January 1964 and by the Protocol of 16<sup>th</sup> November 1982 (Paris Convention) and the 1963 Vienna Convention on Civil Liability for Nuclear Damage (Vienna Convention), which set forth the basic principles of nuclear liability law<sup>3</sup>. These principles include the following:

- **The operator of a nuclear installation is exclusively liable for nuclear damage.** All liability is channelled onto one person, namely the operator of the nuclear installation where the nuclear incident occurs, or in the case of an accident during the shipment of material, of the installation from which the shipment originated. Under the Conventions, the operator — and only the operator — is liable for nuclear incidents, to the exclusion of any other person. Two primary factors have motivated this exclusive liability of the operator, as distinct from the position under the ordinary law of torts. Firstly, it is desirable to avoid difficult and lengthy questions of complicated legal cross-actions to establish in individual cases who is legally liable. Secondly, such exclusive liability obviates the necessity for all those who might be associated with the construction or operation of a nuclear installation other than the operator himself, to also take out insurance, and thus allows a concentration of the insurance capacity available.
- **Strict (no-fault) liability is imposed on the operator<sup>4</sup>.** There is a long-established tradition of legislative action or judicial interpretation that a presumption of liability for hazards created arises when a person engages in a dangerous activity. Because of the special dangers involved in the activities within the scope of the Conventions and the difficulty of establishing negligence in particular cases, this presumption has been adopted for nuclear liability. Strict liability is therefore the rule; liability results from the risk, irrespective of fault.
- **Exclusive jurisdiction is granted to the courts of one country, to the exclusion of the courts in other countries.** The general rule is that a court of the Contracting Party in whose territory the nuclear incident occurs has jurisdiction. If suits arising out of the same incident were to be tried and judgements rendered in the courts of several different countries, the problem of assuring equitable distribution of compensation might be insoluble. Within the country, one single competent forum should deal with all actions — including direct actions against insurers

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<sup>1</sup> Reproduced in document INFCIRC/566.

<sup>2</sup> Reproduced in document INFCIRC/567.

<sup>3</sup> These Conventions were linked in 1988 by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention.

<sup>4</sup> Referred to in the Conventions as “absolute liability”.

or other guarantors and actions to establish rights to claim compensation — against the operator arising out of the same nuclear incident.

- **Liability is limited in amount and in time.** In the absence of a limitation of liability, the risks could in the worst possible circumstances involve financial liabilities greater than any hitherto encountered and it would be very difficult for operators to find the necessary insurance or financial security to meet the risks. As to the limitation in time, bodily injury caused by radioactive contamination may not become manifest for some time after the exposure to radiation has actually occurred. The legal period during which an action may be brought is therefore a matter of great importance. Operators and their insurers or financial guarantors will naturally be concerned if they have to maintain, over long periods of time, reserves against outstanding or expired policies for possibly large but unascertainable amounts of liability. On the other hand, it is unreasonable for victims whose damage manifests itself late to find no provision has been made for compensation to them. A further complication is the difficulty of proof involved in establishing or denying that delayed damage was, in fact, caused by the nuclear incident. A compromise has necessarily been arrived at between the interests of those suffering damage and the interests of operators.

3. The 1997 Protocol and the CSC built on these principles but enhanced them in three significant ways: higher compensation; broader definition of nuclear damage; and updated jurisdiction rules. In addition, the 1997 Protocol mandates access to compensation by residents of non-Contracting Parties.

4. The 1997 Protocol and the CSC establish 300 million special drawing rights (SDRs)<sup>5</sup> as the minimum amount that a country must make available under its national law to compensate nuclear damage. This represents a major increase in the minimum amounts required by the 1960 Paris Convention and the 1963 Vienna Convention. Furthermore, the CSC provides for an international fund to supplement the amount of compensation available under national law. Assuming widespread adherence, the international fund could provide approximately 300 million SDRs more to compensate nuclear damage, meaning a total compensation amount of approximately 600 million SDRs. Contributions to the international fund are based on a formula under which more than ninety percent of the contributions come from nuclear power generating countries on the basis of their installed nuclear capacity, while the remaining portion comes from all member countries on the basis of their United Nations rate of assessment. Since nuclear power generating countries generally have high United Nations rates of assessment, this formula should result in a very high percentage of the contributions coming from nuclear power generating countries. The CSC provides that half of the international fund must be exclusively allocated to cover any transboundary damage. This recognizes the importance that the international community attaches to compensating transboundary damage.

5. The 1997 Protocol and the CSC enhance the definition of “nuclear damage” by explicitly identifying the types of damage that must be compensated. In addition to personal injury and property damage, which are included in the existing definition, the enhanced definition includes five categories of damage relating to impairment of the environment, preventive measures, and economic loss. The definition makes it clear that these additional categories are covered to the extent determined by the law of the competent court. The enhanced definition thus provides certainty that the concept of nuclear damage includes costs of reinstatement of impaired environment, preventive measures, and certain economic loss, while recognizing that the forms and content of compensation is best left to the national law of the country whose courts have jurisdiction over a particular nuclear incident.

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<sup>5</sup> As at July 2004 this amounted to \$443 million, or €358 million.

6. The 1997 Protocol and the CSC also revise the definition of “nuclear incident” to make it clear that, in the absence of an actual release of radiation, preventive measures may be taken in response to a grave and imminent threat of a release of radiation that could cause other types of nuclear damage. The use of the phrase "grave and imminent" makes it clear that preventive measures can be taken if there is a credible basis for believing that a release of radiation with severe consequences may occur in the future. The 1997 Protocol and the CSC are explicit that preventive measures (as well as measures of reinstatement relating to impairment of the environment) must be reasonable. The importance of reasonableness is confirmed by the inclusion of a definition of reasonable measures. This definition makes it clear that the competent court is responsible for determining whether a measure is reasonable under its national law, taking into account all relevant factors

7. The 1997 Protocol and the CSC reaffirm the basic principle of nuclear liability law that exclusive jurisdiction over a nuclear incident lies with the courts of the member country where the incident occurs, or with the courts of the Installation State if the incident occurs outside any member country. They also recognize recent developments in the law of the sea in respect of the exclusive economic zone (EEZ) and the concerns of some coastal States over compensation for possible accidents in the course of maritime shipments of nuclear material. Specifically, the 1997 Protocol and the CSC provide that the courts of a member country will have exclusive jurisdiction over claims for nuclear damage resulting from a nuclear incident in its EEZ. EEZ jurisdiction is only for the purposes of adjudicating claims for nuclear damage and does not create or modify any rights or obligations concerning actual shipments.

8. In addition to enhancing the existing international nuclear liability regime, the CSC provides the framework for establishing a global regime. The CSC is a free-standing instrument open to all States. As a free-standing instrument, it offers a country the means to become part of the global regime without also having to become a member of the Paris Convention or the Vienna Convention. The CSC requires members to accept the higher compensation amounts, including participation in the international fund, the broader definition of nuclear damage and the updated jurisdiction rules. The provisions of the CSC on these matters take precedence over any similar provisions in other nuclear liability instruments to which a country might adhere.

9. To the maximum extent practicable, the CSC has been developed to be compatible with the Paris Convention and the Vienna Convention. A State party to the Paris or Vienna Conventions would have to change its national law only to the extent necessary to reflect the provisions in the CSC that apply to all member countries. These provisions include: ensuring the availability under its national law of at least 300 million SDRs to compensate nuclear damage; participating in the international fund; implementing the enhanced definition of “nuclear damage”; and extending coverage to include all member countries. Other countries would have to take similar actions, as well as ensure their national laws were consistent with the basic principles of nuclear liability law set forth in the Annex to the CSC, which is based on the provisions of the Paris and Vienna Conventions. The CSC also contains a provision to accommodate the unique legal regime in the United States of America, and thereby permit the United States of America to become part of a global regime.