

## Compensation and Liability Protocol Adopted

On the tenth anniversary of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,\* the Conference of the Parties to the Convention adopted a Protocol on *Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and Their Disposal*. Officials from the 125 governments present in Basel also considered, together with the Protocol, other issues regarding hazardous wastes.

The objective of the Protocol is to provide for a comprehensive regime for liability as well as adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes, including incidents occurring because of illegal traffic in those wastes.

During the meeting from 6–10 December 1999, delegates also adopted a decision for an interim arrangement to cover emergency situations until the Protocol enters into force.

The Protocol talks began in 1993 in response to the concerns of developing countries about their lack of funds and technologies for coping with illegal dumping or accidental spills. Negotiations were mandated under Article 12 of the Basel Convention, which called on parties to “cooperate with a view to adopting, as soon as practica-

ble, a protocol setting out appropriate rules and procedures in the field of liability and compensation.”

The Protocol addresses the person financially responsible in the event of an incident: The generator of the wastes or the exporter. Each phase of a transboundary movement, from the generation of wastes to their export, international transit, import, and final disposal, is considered.

Delegates also finalised the operation and funding of a Multilateral Fund (to pay for clean-up operations until the liable party is identified) and an Emergency Fund (for urgent action immediately after an incident).

### *Liability Provisions*

Two key provisions under the Protocol are Articles 4 and 5, setting out strict liability and fault-based liability for waste shipments.

Under the strict liability provisions, persons who notify waste shipments in accordance with Article 6 of the Basel Convention (which requires contracting States or their waste generators/exporters to inform concerned governments about proposed cross-border hazardous waste shipments) will be held liable for damage resulting from an incident until the disposer has taken possession of the waste, at which point the disposer will be held liable.

If the exporting state is notifier or if no notification has taken place, the exporter – but not the generator – will be held liable for damage until the disposer has taken possession of the waste.

The fault-based liability provisions state that any person who causes or contributes to an accident by ignoring Basel Convention requirements or through wrongful intentional, reckless, or negligent acts will be held liable for damages resulting from the spill.

The Protocol does not set out any financial limits for fault-based liability, but it does set out minimum levels of

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\* The Basel Convention entered into force in 1992. One hundred and thirty-two countries and the European Union are Parties to the Convention, which is concerned with the annual worldwide production of hundreds of millions of tonnes of hazardous wastes. These wastes are considered hazardous to people or the environment if they are toxic, poisonous, explosive, corrosive, flammable, eco-toxic, or infectious.

The Convention regulates the movement of these wastes and obliges its members to ensure that such wastes are managed and disposed of in an environmentally sound manner. Governments are expected to minimize the quantities that are transported, to treat and dispose of wastes as close as possible to where they were generated, and to minimize the generation of hazardous waste at source.

compensation for strict liability. Although financial limits for strict liability are to be determined by national law, liability for notifiers or exporters for any one incident must be no less than 1 million SDR (Special Drawing Rights, equivalent to US\$1.38 million) for shipments up to 5 tons of hazardous waste; 2 million SDR for shipments up to 25 tons; 4 million SDR for shipments up to 50 tons; 6 million SDR for shipments up to 1,000 tons; and 10 million SDR for shipments up to 10,000 tons.

Beyond these amounts, an additional minimum of 1,000 SDR will be fixed for each additional ton of waste up to a maximum of 30 million SDR (US\$41.4 million) for any one incident.

For disposers of waste, the minimum limit of liability will be fixed at 2 million SDR for any one incident. These figures are to be reviewed on a regular basis, taking into account potential risks to the environment posed by waste movements and the nature, quantity, and hazardous properties of the wastes.

#### *Global Fund*

The demand from the developing countries that a global fund be set up to provide compensation for cleanup of waste spills where the liable party is unknown or is financially unable to cover the costs, was one of the issues which held up final agreement on the Protocol.

In the end, agreement was reached on wording for the creation of a "financing mechanism" under which parties may consider "additional and supplementary measures aimed at ensuring adequate and prompt compensation... using existing mechanisms."

African countries argued until the final day of COP-5 for stronger wording that would make participation in the financing mechanism obligatory for wealthier countries, but in the end they capitulated on the promise that their demand would be reconsidered in the near future and that assistance would be provided to African countries to help them put in place accident prevention measures.

#### *Criticism of Protocol*

Although negotiators congratulated themselves on the agreement, critics, especially those from the NGO sector closely following the negotiations, charged that the Protocol will do little to stem the flow of cross-border waste shipments and may even encourage the international waste trade. They claimed that the Protocol "is a dangerous precedent and is unlikely... ever to provide adequate relief for victims of toxic waste or serve as an incentive to avoid hazardous waste trafficking."

Critics also noted that the exclusion of waste generators from the strict liability provisions will act as an incentive to waste exports by encouraging firms to hand over their waste to export brokers or other "notifiers" who would assume liability for the shipments but perhaps lack the financial means to pay out any claims for damage. The exclusion could eventually undermine US Superfund legislation, it was claimed. Under Superfund provisions, a waste generator in the United States who disposes of his waste in a landfill, which is not run properly, is jointly liable for any damage. This encourages a firm to ensure

that the waste is being handled correctly. However, it is claimed that all this is being undercut by the option to terminate liability under the Protocol, which acts as a significant and real incentive to export.

Criticism has also been focused on the exemptions. Under Article 3, paragraph 6, the Protocol will not apply to damage resulting from a spill involving cross-border movements of waste pursuant to a bilateral, multilateral, or regional agreement covered under Article 11 of the Basel Convention. Such agreement must have its own liability and compensation regime that "fully meets or exceeds" the aims of the Protocol, and the damage must take place within the national jurisdiction of parties to the agreement.

Critics charged that this provision had been pushed by advanced industrialised countries mainly with the goal of excluding their own arrangements such as the OECD's "red-amber-green" waste shipment accord. One NGO observer noted that "the vast majority of hazardous waste shipments now taking place occur within the OECD, so most waste shipments will not be covered under the Protocol."

The Protocol will also not apply to other bilateral, multilateral, or regional agreements covering liability and compensation, if the agreements were in force or were opened for signature at the time of the Protocol's completion, even if the agreements are amended afterwards. This exemption is specifically designed for the International Maritime Organisation's International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances, which was opened for signature in May 1996.

#### *Conference Declaration*

During the Conference's high-level segment, government ministers adopted a Declaration on the Environmentally Sound Management of Hazardous Wastes.

In their official Declaration, the ministers emphasised the universality of the Basel Convention by calling for a broadening of access to every sector of society to the means of managing hazardous wastes in an environmentally sound way. They emphasised the urgent need to minimize generation of such wastes as well as the need to strengthen the capacity worldwide to handle these wastes properly.

"The adoption of the Declaration is an historic event that represents a major shift towards cleaner production, capacity building in developing countries and a desire to move away from the throw-away philosophy that is all too common, especially in the developing world," said Klaus Töpfer, Executive Director of the United Nations Environment Programme (UNEP).

The Declaration, which will guide the activities of the Convention, outlines the main areas of focus during the next decade:

- 1) The prevention, minimization, recycling, recovery and disposal of hazardous and other wastes subject to the Basel Convention
- 2) Active promotion and use of cleaner technologies and production
- 3) Further reduction of transboundary movements of hazardous and other wastes

- 4) Prevention and monitoring of illegal traffic
- 5) Improvement of institutional and technical capacity-building, as well as the development and transfer of environmentally sound technologies, especially for developing countries and countries with economies in transition
- 6) Further development of regional and subregional centres for training and technology transfer
- 7) Enhanced information exchange, education and public awareness in all sectors of society
- 8) Greater cooperation at all levels between countries, public authorities, international organisations, industry, NGOs and academia
- 9) The development of mechanisms for assuring implementation of the Convention (and amendments) and monitoring compliance.

#### *The US Position*

Although the United States has signed the Basel Convention, the Treaty has yet to be ratified by Congress. However, US officials have been participating in the Protocol negotiations as observers.

Mostafa Tolba, former Executive Director of the United Nations Environment Programme, speaking at ceremonies marking the 10<sup>th</sup> anniversary of the Basel Convention, lambasted the United States and other signatory States for their failure to ratify the Convention.

“Nearly one-third of the state members of the international community are still not party to the Basel Conven-

tion, including the biggest power in the world which produces and exports large amounts of hazardous waste,” Tolba said.

“I fail to find an explanation for this when the United States delegation over 19 months of negotiations regularly pressed for assurances that the Convention provisions are not inconsistent with US national laws and regulations,” he said.

A US government official called these comments “unfair” and “wrong.” Daniel Fantozzi, Director of the US State Department’s Office of Environmental Policy, said

that the US had indeed participated in Basel Convention negotiations insisting that the agreement be consistent with domestic law, but that this objective had not been achieved. Ratification of the Convention thus would require the US to adopt implementing legislation, a long and difficult process, he stated. In addition, he added, there are problems related to the Convention’s definition of hazardous waste that have an impact on treatment of recyclable waste.... “Ratification is still a priority of the US government, but there are complex technical and legal issues.”

Another concern voiced by US officials was that the current minimum limits are a problem for the United States because of the potential impact on trade in non-dangerous recyclable wastes which “can be in bulk shipments with very low hazardous components, but because of those components they would be caught by the agreement.” □



*Courtesy: Ministry of the Environment (NL)*