COMITÉ MARITIME INTERNATIONAL

RISQUES ATOMIQUES

CONFÉRENCE DE

RIJEKA

CONFERENCE

NUCLEAR RISKS

INTERNATIONAL MARITIME COMMITTEE

ADMINISTRATION : HENRY VOET-GENICOT, RUE DE LA BOURSE 17 - ANVERS

RISQUES ATOMIQUES -- NUCLEAR RISKS

ABSTRACT FROM "NATO LETTER" (July '59)

EUROPEAN AFFAIRS.

Radiation protection measures agreed by OEEC countries.

The seventeen countries of the Organization for European Economic Co-operation have agreed on common measures towards safe-guarding their populations from the dangers of nuclear radiations. Meeting in Paris today the OEEC Council adopted a Decision requiring Member Countries to ensure adequate health protection for all persons who might be exposed, whether occupationally or otherwise, to ionising radiations. Appropriate safeguard measures to meet emergencies or accidents involving these radiations must also be taken. Finally, all countries are called upon to report to the European Nuclear Energy Agency, by 15th. November 1959, on their legal and administrative measures in this field, so that E.N.E.A. can make a comprehensive survey by the end of the year.....

OEEC Nuclear Liability and Insurance Convention.

The Steering Committee of the OEEC European Nuclear Energy Agency, meeting in Paris on June 18th, agreed upon the ENEA draft Convention on Third Party Liability in the field of Nuclear Energy and decided to submit it to the OEEC Council for approval and signature.

This represents the conclusion of work undertaken within the Agency, by an international expert group, to elaborate a Convention that takes account of technical, economic and financial conditions of the nuclear industry, and provides for compensation in the case of claims which would be expected to result from a nuclear accident.

Substantial agreement on the draft Convention had already been reached between experts from OEEC Member countries some months ago, and the general principles, which are given below, remain unaltered. They have, however, been extended to cover nuclear accidents arising in the course of transport of nuclear fuels for which the same maximum liability and time for bringing actions have been specified.

As soon as approved by the Council, the Convention will be submitted to Member governments for signature.

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convention internationale concernant la Responsabilité Civile découlant des dommages provoqués par l'utilisation pacifique d'Energie Nucléaire."

4.- En ce qui concerne la responsabilité de l'exploitant de réacteur nucléaire vis-à-vis des tiers, l'avant projet susmentionné ainsi que les recommandations du Centre d'Etude partent du principe de la responsabilité objective, c'est-à-dire d'une responsabilité pour laquelle il n'est point besoin de prouver la faute de l'exploitant ou de ceux dont il est garant.

Les seules circonstances exonérantes proposées par les deux groupes d'étude sont les cas de force majeure et de faute de la partie lésée, auxquels l'avant-projet ajoute encore le cas de guerre.

En plus du principe général de la responsabilité objective, le projet de convention précité et les recommandations du Centre d'Etudes comportent des règles sur les sujets suivants :

a) limitation par accident de la responsabilité de l'exploitant incriminé (le projet mentionne "un évènement dommageable ou plusieurs événements dommageables successifs ou simultanés"), de même qu'une

b) limitation par personne de la responsabilité de l'exploitant en ce qui concerne les lésions corporelles;

c) réparation des dommages dits catastrophiques

d) fixation des délais à observer pour signifier un dommage éprouvé ou probable (y compris les lésions corporelles), et pour assigner les responsables, le tout sous peine d'une fin de non-recevoir.

Les mêmes règles visant l'exploitant d'un réacteur nucléaire s'appliquent aussi au détenteur légal de matières fissiles, de résidus radioactifs et de déchets produits par une réaction en chaîne.

5.- Aucune des organisations précitées n'a examiné jusqu'à présent le problème de la responsabilité de l'armateur de vaisseaux atomiques.

Vu la situation spéciales du trafic et commerce maritimes, ce problème mérite pourtant aussi d'être étudié sérieusement, ne serait-ce que pour éviter qu'une législation internationale, destinée à régler la responsabilité de l'exploitant de réacteurs nucléaires et du détenteur des matières susmentionnées, ne puisse affecter de manière défavorable la position des armateurs. Les risques découlant du fonctionnement d'un navire atomique ne diffèrent pas, en principe, de ceux qui entourent un réacteur nucléaire sur terre ferme. Les machines produisant à bord l'énergie atomique constituent en substance un réacteur nucléaire Pour faire tourner ces machines, le navire devra transporter des matière fissiles. Leur utilisation produira par la suite des résidus et déchets qui resteront dans le navire, du moins pendant quelque temps, jusqu'à ce qu'il puisse s'en débarrasser quelque part.

En principe aussi, les dangers d'explosion d'un navire atomique sont pareils à ceux du réacteur nucléaire installé ailleurs. De plus le danger de contamination des êtres humains, des animaux et des marchandises en raison du dégagement de substances radioactives, est peut-être encore plus grand dans le cas d'un navire atomique que dans celui d'un réacteur nucléaire opérant sur terre ferme. Il suffit de penser au

dégagement des résidus et/ou d'un échouement. Si l'accident se produit en mer il peut entraîner une contamination du poisson aux suites vraiment graves. Si le lieu est une rivière ou un canal la possibilité de contamination des personnes, des animaux et de tous objets dans les environs est très réelle. Et la question se pose, enfin, de la responsabilité du transporteur à l'égard des personnes, animaux et marchandises transportés à bord du navire atomique.

6.- L'Association Néerlandaise de Droit Maritime est d'avis qu'il y a lieu d'inscrire le présent sujet à l'agenda du Comité Maritime International.

Pour assurer une étude fructueuse et efficace, il faudrait non seulement recueillir dans les différents pays la documentation afférente au problème, mais prendre contact aussi avec les organisations en Europe et ailleurs entrain de préparer déjà les mesures législatives visant la responsabilité de l'exploitant de réacteurs nucléaires et du détenteur légal des matières mentionnées plus haut.

En vue de faciliter l'enquête et le choix de la documentation nécessaire, l'Association Néerlandaise de Droit Maritime a cru devoir rédiger le questionnaire suivant.

Questionnaire.

1.- Y a-t-il dans votre pays des mesures législatives déjà en vigueur ou proposées à l'endroit des navires actionnés par l'énergie nucléaire, et s'il en est ainsi, lesquelles?

2.- Etes-vous partisan d'une responsabilité objective de l'armateur de navires à propulsion atomique, dont seraient exemptés seulement les cas démontrés de force majeure, de guerre ou de faute de la partie lésée, ou êtes-vous d'avis que la responsabilité ne doit peser sur l'armateur que moyennant preuve de sa faute ou celle de ses préposés, ou bien estimez-vous que l'armateur devra toujours être responsable des dommages causés - sauf dans les trois cas d'exonération précités - à moins qu'il ne prouve l'absence de faute de sa part ou de ses préposés?

3.- Quant aux dommages impliqués, faudrait-il oui ou non hausser la limite de responsabilité prévue par la Convention de Bruxelles d'octobre 1957, et dans l'affirmative, jusqu'à concurrence de quelle somme?

4.- Faut-il prévoir des dispositions spéciales pour les cas de dommages catastrophiques, par exemple dans ce sens que si le total du dommage devait dépasser une somme spécifique, l'Etat du pavillon et/ou l'Etat en territoire duquel s'est produit l'accident prendrait pour son compte l'excédent, en entier ou en partie?

5.- Les nouvelles mesures législatives doivent-elles prescrire les délais à respecter pour faire la déclaration du dommage souffert ou probable, ainsi que pour assigner les responsables, sous peine d'une fin de non-recevoir?

6.- Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard des passagers du navire et leurs parents, ainsi qu'à l'égard des animaux et marchandises à bord?

7.- Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard du capitaine, des officiers et de l'équipage du navire?

8.- Une convention internationale réglant cette matière vous paraît-elle utile et souhaitable? Dans l'affirmative, comment devrait-elle se rapporter avec la Convention de Bruxelles d'octobre 1957 sur la responsabilité de l'armateur?

SWEDISH MARITIME LAW ASSOCIATION

REPLIES TO QUESTIONNAIRE REGARDING SHIPOWNER'S LIABILITY FOR SHIPS PROPELLED BY NUCLEAR ENERGY

The C.M.I. has submitted a questionnaire regarding various problems in respect of shipowner's liability for ships propelled by nuclear energy.

Question 1. Y a-t-il dans votre pays des mesures législatives déjà en vigueur ou proposées à l'endroit des navires actionnés par l'énergie nucléaire, et s'il en est ainsi, lesquelles ?

Answer : At the moment no special laws regarding ships propelled by nuclear energy are in force or under preparation. However, the authorities and the shipping circles have their attention directed on these problems.

Question 2. Etes-vous partisan d'une responsabilité objective de l'armateur de navires à propulsion atomique, dont seraient exemptés seulement les cas démontrés de force majeure, de guerre ou de faute de la partie lésée, ou êtes-vous d'avis que la responsabilité ne doit peser sur l'armateur que moyennant preuve de sa faute ou celle de ses préposés, ou bien estimez-vous que l'armateur devra toujours être responsable des dommages causés - sauf dans les trois cas d'exonération précités - à moins qu'il ne prouve l'absence de faute de sa part ou de ses préposés?

Answer : All nations will presumably stipulate that land-based privately owned atomic reactors cannot be operated within their territory except by special licenses or permits. This is the case as far as Sweden is concerned under the Atomic Energy Act of 1956. In the laws already in force or under preparation in Belgium, England, Germany, Switzerland and U.S.A. a private operator of a land-based atomic reactor is held responsible for third party damage irrespective of his fault or privity. The "draft convention on third party liability in the field of nuclear energy" excludes liability only in case of armed conflict, invasion, civil war, insurrection or grave natural disaster of an exceptional character but not force majeure generally, nor negligence on the part of the injured person.

As a rule land-based reactors will probably be located in sparsely propulated territories in order to minimize the dangers to the public. A propulsion reactor must necessarily occasionally move about in crowded areas (Harbours and territorial waters) and is in addition exposed to the dangers of collisions and other perils on the sea. It is therefore felt that a propulsion reactor represents a potentially greater danger to the public than a land-based reactor of equal power.

If the operator of a land-based reactor is required to possess a special operating license, this will presumably also be the case with the operator of a ship reactor. If the operator of a land-based reactor is held absolutely responsible for third party damage, it is felt that the potentially greater danger inherent in a ship reactor must lead to the conclusion that the operator of such a reactor should also be liable for third party damage irrespective of his fault and privity. This liability should fall on the operator of the reactor, in other words on the person or firm who has received the required government license to operate the reactor.

Question 3. Quant aux dommages impliqués, faudrait-il oui ou non hausser la limite de responsabilité prévue par la Convention de Bruxelles d'octobre 1957, et dans l'affirmative, jusqu'à concurrence de quelle somme?

Answer : The considerations discussed in the answer to question n° 2 would seem to lead to the conclusion that the operator of a ship reactor cannot be granted a lower limit of liability than that which applied for an operator of a land-based reactor.

In the draft convention for third party liability in the field of nuclear energy presently under discussion within the O.E.E.C. the maximum liability figure suggested for the operator of a land-based reactor is $ 15 millions in respect of any single nuclear incident. Under these circumstances it is felt that the limitation figures of the Brussels Convention of 1957 cannot be accepted as representing the maximum liability of the operator of a ship reactor. Substantially higher figures are needed which should conform with the figures of the convention eventually accepted for land-based reactors. If the draft convention be accepted the amounts may var from $ 5.000.000 to $ 15.000.000 (or higher). For international transport it seems essential that one and the same amount should apply in all convention states.

It is only fair to state that some objections have been raised against this view.

It has been submitted that a third party should in the first place be protected by stringent safety regulations apt to prevent catastrophes and to reduce their consequences, that the purpose of the present limitation rules is to support and stimulate the shipping industry in view of the heavy risks involved, that, while the risks which will follow from the use of ships propelled by nuclear energy will be increased, compared with those which follow from the use of ordinary ships, increased risks have up to now not constituted a sufficient motive for increasing the liability of a Shipowner, that if the development and the use of ships propelled by nuclear energy are thought desirable then the limitation figures for such ships should be the same as for other ships, that all technical developments which are regarded as important and desirable usually get the support of the State in their initial stage until they are strong enough to stand on their own legs and that it would be contrary to such a generally accepted view if particular heavy liability figures were fixed for ships propelled by nuclear energy.

Question 4. Faut-il prévoir des dispositions spéciales pour les cas de dommages catastrophiques, par exemple dans ce sens que si le total du dommage devait dépasser une somme spécifique, l'Etat du pavillon et/ou l'Etat en territoire duquel s'est produit l'accident prendrait pour son compte l'excédent, en entier ou en partie?

Answer : A ship propelled by nuclear energy might possibly cause damage which exceeds even the substantial figure of $ 15 millions. Since the total of the losses suffered by the public might exceed the limit of liability eventually agreed upon, a government might therefore take the attitude that it will not expose its citizens to the risk of potential damage for which full liability is not assumed and it might therefore refuse to grant licenses to operate nuclear propelled vessels. It might also prevent such vessels licensed by other governments from entering its ports or territorial waters.

If general considerations lead to the conclusion that it is in the interest of the public that atomic energy is developped and used also for the propulsion of merchant vessels, then a government might consider that an additional cover granted by the state is unavoidable, since the development of nuclear powered vessels might be delayed if such cover is not given.

It would therefore seem necessary to discuss whether special rules should be laid down for catastrophes. Such rules might for instance stipulate that the excess liability should fall on the state which has granted the license to operate the ship reactor causing the catastrophe. Any such rule should conform with the rules eventually agreed upon for land-based reactors. However, the rules for land-based reactors regarding the state's liability will probably vary from country to country. This is hardly an acceptable situation for ships calling on ports in many countries. An international convention for nuclear ships should establish a minimum amount to be guaranteed by every contracting state over and above the guarantee to be taken out by the operator.

Question 5. Les nouvelles mesures législatives doivent-elles prescrire les délais à respecter pour faire la déclaration du dommage souffert ou probable, ainsi que pour assigner les responsables, sous peine d'une fin de non-recevoir?

Answer : Yes, it will be necessary to stipulate the time limits within which a claim for third party damage must be presented. As it can be difficult and even impossible immediately to establish the extent of the damage caused by a nuclear incident it will probably be necessary to make the time limits fairly generous.

They should in principle be the same as those agreed for land-based reactors. It is, however, suggested that in this particular field there should be complete uniformity between various national legislation and that it would be desirable to have a double time limit. This could be so construed as to make a claim for third party damage timebarred if the proper action has not been taken against the operator within two years after the damage became manifest. After the passing of ten years after the nuclear incident all such claims should be timebarred.

Question 6. Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard des passagers du navire et leurs parents, ainsi qu'à l'égard des animaux et marchandises à bord?

Answer : The operator of a ship reactor should be liable towards passengers for nuclear damage in exactly the same way as he is liable for such damage towards other third parties.

As regards liability towards cargo carried on board no clear-cut answer can be given at this early stage. There would seem to be reasons for excluding cargo from the provisions of the convention, since adequate cover against atomic risks might be obtained through customary marine insurance. It is felt that this point requires careful study and it should be pointed out that the general idea in respect of land-based reactors is that there shall be only one source from which indemnity should flow for atomic losses or damages, viz. the operator of the reactor (except as regards life insurance and longterm sickness insurance).

Question 7. Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard du capitaine, des officiers et de l'équipage du navire ?

Answer : The operator's liability towards persons employed by him should preferably be regulated by national law and it is felt that this matter should not be dealt with in the proposed convention, which, however, should leave upon the possibility of including employees by national legislation.

Question 8. Une convention internationale réglant cette matière vous paraît-elle utile et souhaitable? Dans l'affirmative, comment devrait-elle se rapporter avec la Convention de Bruxelles d'octobre 1957 sur la responsabilité de l'armateur?

Answer : An international convention regulating the liability towards third parties of an operator of a nuclear powered vessel is desirable. It would seem to be necessary to draw a clear dividing line between such a convention and existing conventions. The proposed new convention should only regulate the operator's liability towards third parties for nuclear damage. The carrier's liability towards third parties for all other forms of damage should be dealt with by existing law and conventions.

Stockholm, 20th December 1958.

Kaj Pineus Claes Palme

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BRITISH MARITIME LAW ASSOCIATION

REPORT ON THE COMITE MARITIME INTERNATIONAL'S PROPOSED RECOMMENDATIONS TO THE O.E.E.C. COMMITTEE CONSIDERING LIABILITY FOR NUCLEAR INCIDENTS.

The British Maritime Law Association would like to thank the C.M.I. for the Report and to congratulate them upon the speed with which they have produced a comprehensive survey of the many aspects of this problem. However, after deep consideration of the report, the Association feels compelled to state that it is not in agreement with some of the major points nor, indeed, with a number of the minor ones.

We feel that it is not possible, within the framework of an O.E.E.C. Convention, to deal with all incidents which might arise during the carriage by sea of radioactive materials, and that such matters can only properly be dealt with on an international basis embracing all maritime nations.

We in this country have prepared a Bill, the Nuclear Installations (Licensing and Insurance) Bill, which is now before Parliament and which is aimed at producing in this country approximately the same result as the O.E.E.C. Convention aims to do for all O.E.E.C. countries. It places, as does the O.E.E.C. Convention, an absolute liability solely upon the operator - a principle with which the B.M.L.A. is entirely in support - but it omits any reference to international sea carriage.

We are advised that for practical purposes the most dangerous substance that ocean carriers will be required to take will be nuclear waste. We understand that this substance will be carried in many skinned lead and metal containers each weighing about thirteen tons. These will apparently be mounted on skids, carried on deck and so stowed and lashed that the force required to push the container overboard will be less, by a safe margin, than that required to breach the container. Designers of these containers and of the regulations under which they should be carried, do not, of course, contend that it is impossible for radioactivity to escape therefrom, but they point out that even from nuclear waste the dangerous area is small, and to

receive a dangerous dose the substance has to be approached "closely". It is thought that the risks arising from the carriage of these substances are no greater than those arising from the carriage of many "conventional" cargoes.

Dangerous cargoes are carried by ships every day as part of their normal trade. Such carriage is controlled by Government regulations, which, after taking account of all the factors involved, are drawn up so as to minimise the dangers as far as possible. Admittedly there is the rare occasion on which serious damage is caused, for example by explosion. The risk of explosion on board ship, as well as the risks arising from the use of nuclear power, were taken into account when, as recently as October, 1957, in Brussels the representatives of all maritime countries attended a Diplomatic Conference. This Conference agreed a Convention on Limitation of Shipowners' Liability, in which the Limitation of Liability of a Shipowner was fixed at £.74 per ton of the registered tonnage of the ship and the right to limit extended to cover claims for damage done to persons on shore - property already being covered.

The adoption of certain of the C.M.I. proposals will in our view result in imposing upon Shipowners, in certain circumstances, either as Owners of carrying or non-carrying vessels, liabilities far in excess of those at present prescribed by this very recent international maritime convention.

Where the trade is particularly hazardous particular standards of limitation are granted. A ship is subject to sudden loss through the elements. She is particularly liable to be totally lost or seriously damaged by the negligence of those in charge of her navigation and management. She carries cargoes peculiarly liable to explode under conditions of ocean carriage. A ship, moreover, has to navigate in narrow waterways and crowded ports all over the world. She is thus unable to choose the site of her operations with a view to minimising her liability for accidents.

By comparison, the operator of a nuclear installation is not subject to these disadvantages. Nevertheless, to encourage the development of nuclear power and to encourage operators to undertake the hazards thereby involved, this same principle of special limitation is applied, and we feel rightly so. We agree that carriage of nuclear substances may increase the normal hazards of ocean trading, but submit that it is inverted thinking to rely upon this fact as proper grounds for increasing a shipowner's limit of liability.

From what we have said above it follows that we consider it impossible to compare a nuclear operator's right to limit his liability with that of a shipowner's.

The Brussels Limitation is a limit "per accident" and shipowners maintain insurances on that basis. The

suggested O.E.E.C. limit is a limit "per period". Should a liability fall on the shipowner we feel that a limit "per accident", which is internationally recognised as the basis for the limitation of a shipowner's liability, is the only practical one to adopt where ships are concerned. We can see good reason why the operator's limit should be "per period" and we accept the advice of those who have studied that aspect of the problem.

We fail to see why the limit of liability for a shipowner, agreed in Brussels in October, 1957, in the full knowledge that nuclear waste would, in the near future, be carried as cargo, should be disturbed. We fail to see that a case has been made out to show that a legislature would refuse to permit a Shipowner to avail himself of his right to limit when the accident involved nuclear damage.

We agree that it is the duty of the Government which permits the transport of nuclear material to ensure that adequate security is available for the public, but we do not agree that a shipowner should be saddled with a liability vastly extending the limit of liability so recently agreed upon internationally at Brussels.

We concur in thinking that the best protection that can be devised, consistent with the operator's right to limit, is that provided by Article 2 of the O.E.E.C. Convention, viz : the operator (or shipper or consignee) shall be liable for nuclear damage and "no other person shall be liable to pay compensation for such damage". (We are not, however, satisfied that the wording of Article 2 (a) is wide enough to cover consequential liabilities which may fall on other parties, e.g. on the owner of a ship for removal of wreck).

We feel that, so far as is possible, the carrier by sea should be put in no worse a position than a carrier by land, but it should be pointed out to O.E.E.C. that under the proposed convention this will inevitably be the case.

The Jurisdiction Clause (Article 9) of the O.E.E.C. Convention will not prevent a carrier by sea of nuclear substances being sued in a non-convention country. He may, by the law of that country, be entitled to limit his liability, and if the accident is a collision the combined limits liability of the two ships will often exceed the minimum limit and may exceed the maximum limit laid down by the O.E.E.C. Convention. The ships will then have to participate in the O.E.E.C. fund. To do so they will, of course, have to have an indemnity such as that in C.2 of the C.M.I. Clauses, but which is absent from the O.EE.C. Clauses. However, the words in Clause C.2. "Under any existing international convention" are an unnecessary restriction and, we think, should be omitted. There may other claimants against the O.E.E.C. fund who have not availed themselves of their rights in a non-O.E.E.C. jurisdiction, and there will probably be the balance of claimants who did succeed in the non-O.E.E.C. jurisdiction whose claims were reduced by Shipowners availing themselves of their

right to limit. It is suggested that in these circumstances the transport Clauses should ensure that the aggregate recovered by these claimants should be no more than the amount they would have recovered had they claimed in full against the O.E.E.C. fund.

We are apprehensive that, in some jurisdictions, the fact that one ship is carrying radioactive substances, will, of itself, be considered sufficient to deny the Owner the right to limit on the grounds of fault or privity. We should like to see the Convention clearly state that the mere fact of carrying is insufficient to deprive the Owner of his right to limit under any other Convention, statute or common law, even though such a provision in an O.E.E.C. Convention might be inapplicable in the country of jurisdiction.

The second difference between land and sea carriers is that in some jurisdictions proof of insurance by the operator may not be a defence as it will be in O.EE.C. countries.

The carrier who knows that he will be carrying radioactive substances is in a position to take the necessary steps to protect himself and to provide for the public an adequate insurance. But we feel that the position of a non-carrying convention ship has not been fully considered. We do not agree with any of the following passage from the Sub-Committee's Report other than the first sentence.

"We do not consider that it would be either logical or fair that the exoneration from liability of the Owner of the non-carrying ship should depend upon whether the Owner of the carrying ship has or has not complied with these requirements, for that is a matter over which the former has obviously no control. On the other hand, we are convinced that no Legislature would permit the Owner of the non-carrying ship to escape liability unless the victims of the nuclear incident could enforce their claims against some party who was subject to the jurisdiction of the Courts of one of the Contracting States.

"We think, therefore, that the correct solution is that the Convention should provide that the Owner of the non-carrying ship should be exempted from liability if and only if the Operator (or Shipper) or Consignee were subject to the jurisdiction of one of the Contracting States; otherwise we think for the same reasons as those given in paragraph 11, that his liability should not be limited below the amount to which an Operator's liability is limited by the Convention (subject to the qualification in the last sub-paragraph of paragraph I2)."

This conclusion has been implemented by Clause A.4. in the proposed draft Clauses. It seems to us that if a

convention vessel collides with a non-convention vessel carrying nuclear substances, as a result of which there is nuclear damage, then the victimes can come to the convention country and collect £.5 million from the non-carrying vessel. Yet if the non-carrying vessel has to pay £.5 million he has no recourse against any operator shipper or consignee. But the carrying vessel has this right under the proposed O.E.E.C. Rules, as suggested by the C.M.I.

The question of the non-carrying vessel has occupied much of the time of the B.M.L.A. Members in a number of meetings, We are firmly of the opinion that this problem is incapable of satisfactory solution unless this convention has world-wide application.

We regrefully conclude that we are opposed to the solution submitted by the Committee and will consequently propose the deletion of Article A.4. and the passages in the Committee's Report on this subject.

We feel that the Brussels Convention of 1957 was intended to meet this among other problems, and we remain unconvinced that the 1957 Convention is incapable of dealing with it.

We agree with the Committee's statement of principle on page 7 - that a right of recourse against Underwriters in a protection to which victims of a nuclear incident are entitled in the event of the party upon whom the sole and absolute liability is cast becoming insolvent, or, in the case of a Corporation, going into liquidation.

This, of course, entails depriving the Underwriter of his normal defences if he is sued by a victim of the incident. But we do not agree that he should be so depriced of these defences if the assured is solvent. We, therefore, feel that Clause D should be amended to permit recourse to direct action against the Underwriter only in cases of bankruptcy or liquidation.

We agree that a Convention requiring compulsory insurance must set a practical limit. We have discussed this matter with many persons in the Insurance Market and they all agree that the insurances envisaged are practicable. They vary so much in their reasons for so saying and so much in their reasons for so saying and so much in their opinions on how and on what basis these insurances will be done, that we are of the opinion that it is inappropriate and indeed unwise to indicate, as is done in some places in the Committee's Report, how or on what basis these insurances will be effected.

ASSOCIATION YOUGOSLAVE DE DROIT MARITIME

REPONSE AU QUESTIONNAIRE At-1/7-58 CONCERNANT LA RESPONSABILITE DE L' ARMATEUR DE NAVIRES ACTIONNES PAR L' ENERGIE NUCLEAIRE.

Les réponses contenues ci-après ont un caractère provisoire et sont données par l'Association Yougoslave de Droit Maritime sous toute réserve quant à la formulation définitive, vu que les aspects techniques des réacteurs nucléaires, générateurs d'énergie atomique et les mesures de sécutité contre les radiations n'ont pas été, en général, l'objet d'une étude approfondie pour qu'une base solide, visant la réglementation de ce problème, soit proposée.

Aussi l'Association Yougoslave de Droit Maritime recommande à la Commission respective du Comité Maritime International de se vouer à une étude plus sérieuse de tous les facteurs techniques indispensables pour apporter une solution juridique conforme à ce problème.

Les navires à propulsion atomique ou transportant des marchandises atomiques posent de nouveaux problèmes dont certains tenant du domaine du droit public international et d'autres du domaine du droit maritime privé et du droit civil. Parmi problèmes touchant le droit public il y a lieu de mentionner la question de l'accès libre à tous les navires, sans aucune discrimination, de tous les ports ouverts à la navigation maritime internationale, le passage non-dangereux de ces navires dans les eaux territoriales, ainsi que le devoir de prêter toute assistance, y compris le sauvetage, aux navires se trouvant en détresse; et parmi ceux touchant le droit maritime privé et le droit civil, la responsabilité de l'armateur de navires actionnés par l'énergie nucléaire et celle du transport de marchandises atomiques.

Le problème de l'accès libre dont il est question plus haut comporte plusieurs solutions. L'une de ces solutions serait celle d'appliquer pour ce genre de navires les mêmes règlements que ceux valables pour les navires à "propulsion classique". Cette solution nous paraît toutefois difficilement acceptable en raison de la lourde menace que ces navires présentent à la sécurité du port dans lequel ils font escale, ce qui exigerait un contrôle plus efficace de ces navires de la part des pays côtiers. Vu cependant que la majorité des pays ne sont pas à l'heure actuelle en mesure d'effectuer un tel contrôle, il y aurait lieu de leur reconnaître le droit d'interdire à ces navires complètement l'accès de leurs ports, ainsi que le passage non-dangereux dans leurs eaux territoriales.

Au cas où ils auraient cependant la possibilité d'un tel contrôle, ce dont ils seraient les seuls à en décider, ils pourront autoriser soit l'accès d'un ou plusieurs ports déterminés, soit le passage dans certaines zones de leurs eaux territoriales. Toutes ces restrictions seraient évidemment valables sans aucune discrimination. Il ne faudrait pas considérer cependant comme un acte de discrimination, le droit qu'un pays se réserve à l'égard de l'embarquement et/ou le débarquement des matières fissiles auxquelles il aurait un intérêt tout particulier qu'il permettrait dans des cas exceptionnels dans ses ports.

Répondant au questionnaire soumis sous les réserves précitées, l'Association Yougoslave de Droit Maritime s'abstient de traiter davantage la question du droit public.

Question N° 1 : Y A-T-IL DANS VOTRE PAYS DES MESURES LEGISLATIVES DEJA EN VIGUEUR OU PROPOSEES A L'ENDROIT DES NAVIRES ACTIONNES PAR L'ENERGIE NUCLEAIRE ET S'IL EN EST AINSI, LESQUELLES ?

Réponse : Non.

Question N° 2 : ETES-VOUS PARTISAN D'UNE RESPONSABILITE OBJECTIVE DE L'ARMATEUR DE NAVIRES A PROPULSION ATOMIQUE DONT SERAIENT EXEMPTES SEULEMENT LES CAS DE FORCE MAJEURE DE GUERRE OU DE FAUTE DE LA PARTIE LESEE, OU ETES-VOUS D'AVIS QUE LA RESPONSABILITE NE DOIT PESER SUR L'ARMATEUR QUE MOYENNANT PREUVE DE SA FAUTE OU CELLE DE SES PREPOSES, OU BIEN ESTIMEZ-VOUS QUE L'ARMATEUR DEVRA TOUJOURS ETRE RESPONSABLE DES DOMMAGES CAUSES - SAUF DANS LES TROIS CAS D'EXONERATION PRECITES - A MOINS QU'IL NE PROUVE L'ABSENCE DE FAUTE DE SA PART OU DE SES PREPOSES ?

Réponse : Il y a lieu de distinguer deux formes de responsabilité : celle contractée, que nous traiterons dans notre réponse à la question N° 6 et celle non-contractée. En ce qui concerne cette dernière responsabilité de l'armateur à l'égard des tierces personnes, nous sommes d'avis que celle-ci devrait être une responsabilité objective dont seraient exonérés seulement les cas démontrés de force majeure et de faute de la partie lésée et non pas également ceux de faute d'une tierce personne. Comme cas de force majeure ne sauraient être toutefois définis les dangers typiques d'un navire actionné par l'énergie nucléaire, même pas quand leurs effets pernicieux seraient dû à une cause, elle-même de nature à être qualifiée comme cas de force majeure. Une telle responsabilité de l'armateur est pleinement fondée, du fait qu'il a installé des réacteurs nucléaires capables de mettre en danger les biens et l'intégrité personnelle de la personne lésée et aussi pour avoir rendu possible que de tels dangers soient provoqués également par la faute des tiers.

Question N° 3 : QUANT AUX DOMMAGES IMPLIQUES, FAUDRAIT-IL OUI OU NON HAUSSER LA LIMITE DE RESPONSABILITE PREVUE PAR LA CONVENTION DE BRUXELLES D'OCTOBRE 1957, ET DANS L'AFFIRMATIVE JUSQU'A CONCURRENCE DE QUELLE SOMME ?

Réponse : Pour les dommages dont la responsabilité de l'Armateur serait limitée, il faudrait sans autre mais seulement pour les navires atomiques, reviser en faveur d'une hausse les montants prévus par la Convention de Bruxelles d'Octobre 1957, vu que la valeur moyenne de la tonne et le tonnage par rapport à la valeur du navire ne seraient plus les mêmes que dans le cas des navires non-atomiques.

Question N° 4 : FAUT-IL PREVOIR DES DISPOSITIONS SPECIALES POUR LES CAS DE DOMMAGES CATASTROPHIQUES, PAR EXEMPLE DANS CE SENS QUE SI LE TOTAL DU DOMMAGE DEVAIT DEPASSER UNE SOMME SPECIFIQUE, L'ETAT DU PAVILLON ET/OU L'ETAT EN TERRITOIRE DUQUEL S'EST PRODUIT L'ACCIDENT PRENDRAIT POUR SON COMPTE L'EXCEDENT, EN ENTIER OU EN PARTIE ?

Réponse : Cette question comporte au fond deux questions. Une celle de savoir si c'est l'Etat qui assumera la responsabilité envers les personnes lésées pour le dommage subit et sous quelles conditions et l'autre, lequel des Etats en assumera.

Il nous semble que la responsabilité de l'Etat ne peut être envisagée que sous l'angle d'une responsabilité non-contractée. Nous estimons qu'il est tout juste que l'Etat en assume la responsabilité puisque la responsabilité même illimitée de l'armateur ne pourrait couvrir les dommages catastrophiques. C'est aussi pourquoi que nous jugeons qu'il faudrait engager tant la responsabilité illimitée de l'Etat, que celle limitée de l'armateur et prendre comme base la responsabilité causale.

Pour le moment nous ne saurions définir quels seraient tous les dommages dits catastrophiques. Nous sommes néanmoins d'avis que l'Etat devrait prendre pour son compte le montant intégral des dommages impliqués et non seulement le montant qui dépasserait une somme spécifique fixée pour les cas de dommages catastrophiques.

En raison du danger de radiation signalé, nous sommes d'avis qu'il y aurait lieu d'embrasser tous les Etats qui, d'une façon objective, auraient rendu possible ces dommages et notamment l'Etat du pavillon ayant permis l'utilisation de l'énergie nucléaire sur le navire et l'Etat ayant permis à un tel navire l'accès de son port. Ensuite, si le dommage a été occasionné par les matières fissiles, l'Etat du pavillon ayant chargé une telle marchandise, l'Etat dans les ports duquel cette marchandise a été chargée et finalement l'Etat côtier ayant permis l'accès de son port aux navires transportant une telle cargaison.

L'armateur et les Etats précités devraient répondre solidairement, afin que les personnes lésées soient au plus tôt dédommagées.

Question N° 5 : LES NOUVELLES MESURES LEGISLATIVES DOIVENT-ELLES PRESCRIRE LES DELAIS A RESPECTER POUR FAIRE LA DECLARATION DU DOMMAGE SOUFFERT OU PROBABLE, AINSI QUE POUR ASSIGNER LES RESPONSABLES, SOUS PEINE D'UNE FIN DE NON-RECEVOIR ?

Réponse : Oui, lorsqu'il s'agit d'une responsabilité vis-à-vis des tiers. Ce délai devrait toutefois correspondre à une période au dedans de laquelle les conséquences d'une radiation peuvent être découvertes. Aussi, nous pensons qu'un délai de 3 ans à partir de la date où ces dommages se sont manifestés, serait suffisant en y déterminant toutefois une prescription objective qui serait fixée en conformité avec les recherches scientifiques des conséquences de la radiation.

Question N° 6 : LES NOUVELLES MESURES LEGISLATIVES DOIVENT-ELLES REGLER LA RESPONSABILITE DE L'ARMATEUR A L'EGARD DES PASSAGERS DU NAVIRE ET LEURS PARENTS, AINSI QU'A L'EGARD DES ANIMAUX ET MARCHANDISES A BORD ?

Réponse : Pour les passagers s'il y aurait lieu d'accepter le principe selon lequel l'armateur serait présumé être responsable du dommage, ainsi que cela a été prévu dans le Projet de Convention concernant la responsabilité pour le transport de passagers à la X. Conférence diplomat que tenue à Bruxelles pour les 4 cas. Nous pensons qu'il ne faudrait pas peser sur l'armateur une responsabilité plus lourde que celle-ci puisque par son embarquement volontaire sur un navire atomique, le passager aussi a pris sur lui une partie des risques. En ce qui concerne l'étendue de la responsabilité pour le dommage y compris la responsabilité de l'Etat, il y aurait lieu d'accepter les valeurs forfaitaires internationalement reconnues, ainsi qu'elles le sont prévues pour le transport aérien dans la Convention de Varsovie et dans le Protocole de La Haye, ainsi que dans le Projet de Convention concernant le transport de passagers par mer.

Quant à la responsabilité vis-à-vis des marchandises qui sont transportées à bord des navires atomiques, les Règlements de la La Haye pourraient être appliqués en totalité.

Question N° 7 : LES NOUVELLES MESURES LEGISLATIVES DOIVENT-ELLES REGLER LA RESPONSABILITE DE L'ARMATEUR A L'EGARD DU CAPITAINE, DES OFFICIERS ET DE L'EQUIPAGE DU NAVIRE ?

Réponse : La responsabilité de l'armateur à l'égard du capitaine, des officiers et de l'équipage du navire, devrait être réglée sur base du principe causal. Cependant, la question de la faute propre de la personne lésée devrait, à notre avis, être réglée sur les principes suivants : pour "culpa levis " de la personne lésée, l'armateur serait toujours tenu responsable envers elle, alors que cela ne serait pas le cas pour le " dolus " de la personne lésée. Pour " culpa lata ", cependant, l'armateur serait tenu responsable envers la personne lésée seulement au cas qu'il n'aurait pas pris les mesures réglementaires, soit les mesures de sécurité ordinaires. Dans le cas où un membre de l'équipage serait lésé par suite des matières fissiles, l'armateur et les ayants-droit de cette marchandise répondraient, selon ces principes, solidairement. Une telle solution est dictée par les principes sociaux, en raison d'un travail pénible et de l'insécurité sur ces navires.

Question N° 8 : UNE CONVENTION INTERNATIONALE REGLANT CETTE MATIERE VOUS PARAIT-ELLE UTILE ET SOUHAITABLE ? DANS L'AFFIRMATIVE, COMMENT DEVRAIT-ELLE SE RAPPORTER AVEC LA CONVENTION DE BRUXELLES D'OCTOBRE 1957 SUR LA RESPONSABILITE DE L'ARMATEUR ?

Réponse : Nous considérons qu'une telle Convention serait utile et souhaitable. Toutefois, il ne faudrait procéder à son élaboration qu'après avoir soigneusement étudié les aspects économiques et techniques du problème. Cette Convention devrait, bien entendu, englober tous les accidents produits en mer et non seulement ceux découlant du transport. La nouvelle Convention ne devrait pas toucher à la Convention de 1957 sur la limitation de la responsabilité de propriétaire de navires, s'il s'agit là de simples risques et non-atomiques, alors qu'il faudrait expressément stipuler que la Convention de 1957 ne s'applique pas aux risques atomiques.

Rijeka, le 18 février 1959.

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SWEDISH MARITIME LAW ASSOCIATION

REPORT ON THE COMITE MARITIME INTERNATIONAL'S PROPOSED RECOMMENDATIONS TO THE O.E.E.C. COMMITTEE CONSIDERING LIABILITY FOR NUCLEAR INCIDENTS

Text proposed by the C.M.I. working party	Observations of the Swedish Delegation.
A.1.	A.1.
The Operator of a nuclear nstallation shall be liable in ccordance with the provisions of his Convention for damage to any erson or property occurring uring the carriage of and oc- asioned by irradiated nuclear uel coming from such nuclear nstallation.	This Article can be deleted as corresponding provisions are contained in Art. 2(b) of the O.E.E.C. draft convention, as appearing in document nr. SEN(59)7.
A.2.	A.2.
If the nuclear installation s not situated in a Contracting tate, and the irradiated nuclear uel is consigned to the Operator f a nuclear installation which s so situated, that Operator hall be liable in accordance with he provisions of this Convention or damage to any person or pro- erty occurring during the car- iage of and occasioned by such radiated nuclear fuel.	This Article can be deleted if the corresponding provision contained in Art. 2(b) (1) of the O.E.E.C. draft convention are amended to read: "Where nuclear fuel or radioactive products or waste are sent from an installation situated outside the territory of the Contracting Parties to an installation within such territory the operator of the nuclear installation for which they are destined shall be liable; and"

A.3.

In either event no other person shall be liable for such damage; save that in any event no person, who would otherwise be liable as Carrier or as the Owner or Demise Charterer of the ship carrying the irradiated nuclear fuel nor the ship herself shall be exonerated from such liability or be entitled to limit such liability (under any International Convention or other provision of law) below the amount specified in this Convention unless a Certificate in the form and manner laid down in Article... has been issued.

A.4.

If neither nuclear installation is situated in a Contracting State, then neither the Owner of the ship carrying the irradiated nuclear fuel nor the ship herself nor any other person or ship who or which would, apart from this Convention, be liable for damage occasioned by such fuel during the carriage, shall be exonerated from such liability under this Convention or be entitled to limit the same (under any International Convention or other provision of law) below the amount specified in this Convention; but the person so liable shall be entitled to any right of recourse which he may have by contract or otherwise against the Operator of either nuclear installation.

A.3.

We propose that this Article be deleted in its present form. The main principle i.e. that nobody but the operator shall be liable is expressed in Art. 2(f) in the O.E.E.C. draft convention.

We submit that the said Art. 2(f) should be amplified to read:
"No other person shall be liable to pay compensation for such damage and the carriage of nuclear fuel or radioactive products or waste shall not deprive a transporter of his rights or defences under any other Convention, statute or law".

As regards the further provisions of Article A.3 in the C.M.I. draft see below under Article B.

A.4.

We understand this Article to be based on the presumption that the owner of a vessel, whether carrying or non-carrying, might become liable for an accident involving nuclear damage and that for such liability he might not be in a position to limit his liability under any other International Convention or under national law. However, we believe that this conception conflicts with the basic principle of the O.E.E.C. draft Convention i.e. that the operator should be absolutely and solely liable for nuclear damage however arising.

In Art. 4 of the C.M.I. draft an attempt is made to solve the problems arising when there is no operator in a Contracting State. In our opinion

B.

The Certificate referred to
n this Convention shall be a Cer-
ificate issued under the authority
f the Contracting State in which
he nuclear installation is situated,
r in any other case, of the Con-
racting State in which the insu-
ance required under this Conven-
ion was underwritten, and shall
ontain (inter alia) :
(I) the name and address of the
erson liable under this Convention
(II) the name and address of the
eading Underwriter or set of
nderwriters
(III) a statement that the policy
rovides that all the Underwriters
hereon shall follow the settle-
ents made by or final judgments
iven against the Leading Under-
riter or set of Underwriters
(IV) the amount of the sum in-
ured at the date of the issue of
he Certificate
Such Certificate shall be
ountersigned by or on behalf of
he underwriters.

this a situation which can not be dealt with in the Convention. We therefore propose that this Article be deleted.

B.

We suggest that this Article be amended to read as follows : "For transports of nuclear fuel, radioactive products or waste to or from a Contracting State the operator shall provide a certificate issued under the authority of the Contracting State in which the operator, liable under this Convention is domicilied.

This certificate shall contain:
(1) the name and address of the person liable under this Convention
(II) the name and address of the insurer or financial guarantor supplying the security required by Art. 6
(III) the nature and amount of such security
(IV) a statement that the packaging and shielding of such nuclear fuel, radioactive products or waste conform with the international safety regulations in force at the time of issue of such certificate."

Note: This text is wide enough to cover all types of transports, not only carriage by sea. In the circumstances this Article might be inserted in the O.E.E.C. draft convention, either as part of Art. 2 or as a separate Article.

As will be seen from our counterproposals to the C.M.I. text of Article B we have not taken up the idea, put forward under Art. 3, that failure to have a "green ticket" should bring about an extended liability under this Convention for the Carrier; we believe that the penalties for such failure can safely be left to the national legislation.

C.1.

Any person liable under this Convention shall have a right of recourse against the person causing the nuclear damage only if that person caused such damage by his personal act or omission done with intent to cause that damage.

C.2.

Any person other than the person made liable for nuclear damage under this Convention, who incurs liability for such damage under any existing International Convention shall have a right of recourse against the person who is made liable under this Convention.

C.1.

This Article can be deleted as corresponding provisions are contained in Art. 2 (g) of the O.E.E.C. draft convention.

C.2.

We suggest that this Article be amended to read as follows :
"Any person in a Contracting State other than the operator who incurs liability for nuclear damage under any existing International Convention or national law shall have a right of recourse against the operator liable for such damage under this Convention".

Note : This Article applies both to products liability and to the field of transport. We believe that with this suggested amendment this Article will safeguard a Shipowner or other transporter in a Contracting State who may incur liability for nuclear damage in a non-contracting state. If there exists an operator liable under this Convention this Article gives the Shipowner or other transporter full recourse. If no such operator exists this Convention can obviously not give him any right of recourse against an operator in a non-contracting state. In our opinion this Article should be inserted in the O.E.C.E. draft convention between Art. 2 (g) and Art.2(h

D.

In the event of any person becoming liable for nuclear damage under this Convention, in respect of which liability he is covered by insurance as provided herein, the Claimant shall have a direct right of recourse against the Underwriters of such insurance, who shall not be entitled in such an action to rely upon any provision of the policy purporting to restrict or attach conditions to the insurance or to avoid the policy upon the ground that it was obtained by a misrepresentation or by non-disclosure of a material fact.

D.

The principle of direct action has been established in Art. 2(e) of the O.E.E.C. draft convention. We therefore feel that Article D of the C.M.I. draft can be deleted. However, we would suggest that the right to direct action be limited to the cases when the claimant really needs such right i.e. when the operator has become insolvent or gone into liquidation. We consequently propose the following addition to the O.E.E.C. text of Art.2(e) "..... Article 6(b) provided that such operator or operators have become insolvent or gone into liquidation".

E.

Liability for nuclear damage under this Convention shall include the cost of removal of irradiated nuclear fuel or the extra cost of the removal of a wreck due to the presence of such material, sunk in any place from which the owner of the vessel carrying that material can be compelled by law to remove that material or the wreck or to pay the cost of such removal.

E.

We are fully aware that this Article was inserted in the C.M.I. draft at the instigation of the Swedish representatives. It has, however, been pointed out to us from insurance quarters that the liability for wreck removal is not a third party liability in the proper sense and that the set of insurers likely to underwrite the operator's liability strongly objects to the proposed Article A possible solution is of course for the shipowner to insert into his contract with the operator a clause to the effect that the costs of wreck removal should be borne by the operator who can fairly simply cover that liability under a separat insurance in the marine markets. For this reasons we suggest that this Article should be deleted.

F.

If the nuclear damage occurs within the jurisdiction of a Contracting State the action shall be brought at the option of the Claimant in the Court of such Contracting State or in the Court of the Contracting State in which the nuclear installation referred to in Article ... is situated.

If the nuclear damage occurs on the high seas the action shall only be brought in the Court of the Contracting State in which the nuclear installation is situated, or, failing such nuclear installation, in the Court of the Contracting State in which the person made liable for such damage under this Convention has his residence or principal place of business.

Any final judgment given by a Court of a Contracting State in respect of a claim referred to in this Article shall be enforceable in any of the Contracting States upon registration only.

F.

We feel that the stipulations of Article F of the C.M.I. draft largely duplicate the provisions of Art. 9 of the O.E.E.C. draft convention. However, we prefer on the whole the principle laid down in the C.M.I. version and would propose the following new wording of Art. 9 of the O.E.E.C. draft convention.

"(a) Jurisdiction over actions for compensation under this Convention shall, except as otherwise provided in paragraph (b) and (c) of this Article, lie only with the courts of the country where the nuclear installation of the operator liable is situated.

(b) In the case of nuclear incidents occurring in the course of carriage within the jurisdiction of a Contracting State the action shall be brought at the option of the Claimant in the Court of such Contracting State or in the Court of the Contracting State in which the nuclear installation referred to in Article.... is situated.

(c) If the nuclear incident occurs in the course of carriage on the high seas, or if the place where the nuclear fuel or radioactive products or waste involved were at the time of the nuclear incident cannot be determined, jurisdiction shall lie with the courts of the country where the nuclear installation of the operator liable in accordance with Article 2(b) first paragraph and Article 2(b) (1) is situated, or, if Article 2(b)(11) is applicable, with the courts of the country granting the license or authorization referred to therein.

(d) Final judgments of such courts shall be enforceable in the territory of that or any other Contracting Party without the requirement of any proof except the authenticity of such judgments".

Note : As far as the final paragraph of the C.M.I. draft is concerned we prefer the O.E.E.C. text in (d) with the addition of the word "that" as our country amongst others does know of registration of judgment.

Further observations.

1.- Considering the probability that a contracting state may be either an operator or a guarantor under the Convention we question whether it would not be adviseable to insert in the O.E.E.C. text as a new section (d) of Article 10 the following provision :

" The Contracting Parties undertake not to plead immunity if legal action is brought against them in their capacity as operator insurer or guarantor before a court having jurisdiction according to Article 9 of this Convention. "

2.- With regard the figure set out in the O.E.E.C. draft convention Art. 3 (b) we have discussed this with interested parties in our country. We have been informed that uniform limit is desirable for all international transport of nuclear fuel, radioactive products or waste. However, serious objections have been made against fixing this limit at $ 15.000.000.-. It is contended that,

a) the amount of dangerous material shipped in any one shipment will be far smaller than that contained in a reactor.

b) that the material shipped will be less dangerous than those in a reactor because of the cooling off period required before shipment

c) that the safety regulations and conditions of carriage will make the prospects of damage far removed and the possible damage small in comparison with the maximum danger inherent in a reactor.

Without suggesting a text on this point we therefore wish to raise the question whether it should not be possible to reach international agreement on a lower uniform limit of liability for nuclear incident in the course of carriage. A maximum figure of $ 5.000.000 has been suggested.

3.- Further and final note. By proceeding along the lines suggested above it would not be necessary to alter existing International Conventions in the field of maritime and other transport law. It has been pointed out by Swedish legal authorities that to alter those conventions would be wrought with serious risks as it might i.a. give a pretext for certain countries to withdraw from the Conventions.

Gothenburg, 17th February 1959.

N. Kihlbom F. Nordborg C. Palme K. Pineus

ASSOCIATION BRITANNIQUE DE DROIT MARITIME.

RAPPORT SUR LES RECOMMANDATIONS PROPOSEES PAR LE COMITE MARITIME INTERNATIONAL AU COMITE DE L' O.E.C.E. CONCERNANT LA RESPONSABILITE A RAISON D'INCIDENTS NUCLEAIRES (traduction)

L'Association Britannique de Droit Maritime aimerait remercier le C.M.I. pour son Rapport et le féliciter pour la célérité avec laquelle il a élaboré une étude complète des nombreux aspects de ce problème. Toutefois après un examen approfondi du rapport, l'Association ne peut s'empêcher de declarer qu'elle n'est pas d'accord avec certains points d'importance majeure ni non plus, en vérité, avec un certain nombre de points d'importance mineure.

Nous sommes d'avis qu'il n'est pas possible, dans le cadre d'une Convention de l'O.E.C.E., de traiter tous les accidents qui peuvent se produire pendant le transport maritime de matières radioactives et qu'un pareil sujet ne peut être traité convenablement que sur une base internationale englobant toutes les nations maritimes.

Dans notre pays nous avons préparé un projet de loi appelé " Nuclear Installations (Licensing and Insurance) Bill", qui est présentement soumis au Parlement et qui vise à etablir dans notre pays un régime à peu près semblable à celui que la Convention de l'O.E.C.E. cherche à établir dans tous les pays de l'O.E.C.E. Il impose, comme le fait la Convention de l'O.E.C.E., une responsabilité absolue uniquement à l'exploitant - un principe que l' A.B.D.M. adopte pleinement - mais il ne contient aucune référence à un transport maritime international.

Nous avons appris qu'en pratique les matières les plus dangereuses que les transporteurs maritimes seront appelés à transporter, seront les déchèts nucléaires. Nous comprenons que ces déchets seront transportés dans des containers entourés d'une couche de plomb et de métal et que chacun de ces containers pèsera à peu près 13 tonnes. Ils seront apparemment montés sur des patins, transportés en pontée et arrimés et fixés de telle manière que la force nécessaire à les précipiter par dessus bord sera inférieure et encore avec une marge de sécurité à celle qui serait susceptible de les briser. Ceux qui ont fait les projets de ces containers et des réglements sous l'empire

lesquels ils devraient être transportés, ne prétendent évidemment pas qu'il est impossible à la radioactivité de s'en échapper mais ils font observer que l'aire de radiation dangereuse en ce qui concerne les déchets radioactifs est peu étendue et que pour recevoir une dose dangereuse il faut approcher les déchets " de près". On pense que les risques résultant du transport de pareils dechèts ne sont pas plus grands que ceux provenant du transport de nombreuses cargaisons " courantes".

Le transport de cargaisons dangereuses fait partie des activités normales et journalières des navires. Les transports de ce genre sont soumis à des règlements gouvernementaux qui, après avoir tenu compte de tous les facteurs qui entrent en ligne de compte, ont été rédigés de manière à réduire au minimum les dangers qu'ils comportent. Il est reconnu qu'à de rares occasions un sérieux dommage est causé par exemple à la suite d'explosion. On a tenu compte du risque d'explosion à bord des navires ainsi que des risques résultant de l'emploi d'énergie nucléaire pas plus tard qu'en octobre 1957 lorsqu'à Bruxelles les représentants de toutes les nations maritimes ont participé à une Conférence Diplomatique. Cette Conférence a adopté une Convention sur la limitation de la responsabilité des propriétaires de navires, en vertu de laquelle la limite de responsabilité d'un propriétaire de navire a été fixée à £. 74. -. -. par tonne du tonnage enrégistré du navire et le droit à limitation a été étendu jusqu'à couvrir les réclamations pour dommages causés à des personnes se trouvant à terre, ceux causés aux biens ayant déjà été couverts.

L'adoption de certaines des propositions du C.M.I. aura pour conséquence, à notre avis, d'imposer aux propriétaires de navires, dans certaines circonstances, soit comme propriétaires de navires transportant des matières radioactives soit comme propriétaires de navires ne transportant pas pareilles matières, des responsabilités beaucoup plus étendues que celles présentement prévues par cette très récente Convention Maritime Internationale.

Lorsque le commerce est particulièrement aventureux, un régime particulier de limitation est accordé. Un navire peut subitement se perdre sous l'influence des éléments. Il est particulièrement exposé à être totalement perdu ou sérieusement endommagé parsuite de la négligence de ceux qui sont chargés de sa conduite et de son exploitation. Il transporte des marchandises particulièrement sujettes à explosion à l'occasion d'un transport maritime. En outre, un navire est obligé de naviguer dans des voies navigables étroites et dans des ports encombrés partout dans le monde. Il est donc incapable de choisir le lieu de ses activités dans le but de diminuer sa responsabilité en cas d'accident.

Par comparaison l'exploitant d'une installation nucléaire n'est pas exposé à de pareils inconvénients. Néanmoins afin d'encourager le développement de l'énergie nucléaire et de pousser les exploitants à s'exposer aux risques que cette exploitation comporte, ce même principe de limitation particulière est appliqué et nous estimons que c'est à bon droit. Nous sommes d'accord pour dire que le transport de matières radioactives peut accroître les risques normaux du transport maritime mais nous pensons qu'il est faux de se baser sur cette circonstance pour justifier une augmentation de la limitation de la responsabilité d'un propriétaire de navire.

De ce que nous avons dit ci-avant il resulte qu'il est im-ible de comparer le droit à limiter sa responsabilité d'un exploitant nucleai-ivec celui d'un propriétaire de navire.

La limitation prévue par la Convention de Bruxelles est une .tation " par accident " et les propriétaires de navires prennent des assuran- sur cette base. La limitation proposée par l'O.E.C.E. est une limitation " par ode". Si une responsabilité devait être imposée aux propriétaires de navires, estimons que la limitation par accident qui est celle internationalement ue comme étant la base de la limitation de la responsabilité d'un propriétaire avire, est la seule qu'en pratique on pourrait adopter lorsqu'il s'agit de res. Nous pouvons voir de bonnes raisons pour lesquelles la limitation de la respon-lité d'un exploitant soit établie" par période " et nous nous rallions aux de ceux qui ont étudié cet aspect du problème.

Nous ne parvenons pas à voir pourquoi la limitation de la ponsabilité d'un propriétaire de navire, convenue à Bruxelles en octobre 1957 s que l'on avait pleinement conscience du fait que des déchets nucléaires ient à bref délai transportés comme cargaison, devrait être modifiée. Nous ne s pas que la démonstration ait été faite qu'un législateur refuserait d'autori- un propriétaire de navire de se prévaloir de son droit à limitation lors- l'accident entraîne des dommages nucléaires.

Nous sommes d'accord pour dire que c'est le devoir des Gou-ements, qui permettent le transport de matières radioactives de s'assurer que public soit convenablement protégé, mais nous ne pouvons pas admettre qu'un priétaire de navire soit chargé d'une responsabilité dépassant largement la itation de responsabilité qui a été si récemment convenue internationalement ruxelles.

Nous sommes unanimes à penser que la meilleure protection l'on puisse envisager et qui soit compatible avec le droit de l'exploitant à itation est celle prévue par l'article 22 de la Convention de l'O.E.C.E. à sa-que l'exploitant (ou le chargeur ou le destinataire) sera responsable des ages nucléaires et que " personne d'autre ne sera tenu de payer une compensa-n à raison de pareils dommages " (toutefois nous craignons que le texte de rticle 2 a) ne soit pas assez large que pour couvrir les responsabilités en ine qui peuvent incomber à d'autres parties par exemple le propriétaire d'un ire à raison de l'enlèvement d'une épave).

Nous estimons que dans la mesure du possible le transpor- maritime devrait être placé dans une situation qui ne serait pas plus désavan-euse que celle d'un transporteur par terre, mais il faudrait attirer l'atten-n de l'O.E.C.E. sur le fait que sous l'empire de la Convention proposée tel ait inévitablement le cas.

La Clause juridictionnelle (article 9) de la Convention l'O.E.C.E. n'empêchera pas qu'un transporteur maritime de matières radioacti- soit poursuivi dans un pays n'ayant pas adhéré à la Convention. Il se peut en vertu de la loi de ce pays il puisse se prévaloir d'une limitation de sa ponsabilité et, si l'accident est une collision, il arrivera souvent que les

limites de responsabilité combinées des deux navires dépasseront la limite minimum et parfois même la limite maximum qui sont prévues par la Convention de l'O.E.C.E. Les navires auront alors à participer au fonds de l'O.E.C.E. Pour le faire ils devront évidemment disposer d'un droit de recours comparable à celui prévu sous la rubrique C.2. des Clauses du C.M.I. mais qui n'existe pas dans celle de l'O.E.C.E. Toutefois les mots dans la Clause C.2. " sous l'empire d'une Convention Internationale existante" constituent une restriction inutile et nous pensons qu'ils devraient être supprimés. Il peut y avoir d'autres réclamants vis-à-vis du fonds de l'O.E.C.E. qui ne se sont pas prévalus de leurs droits devant les tribunaux d'un pays qui n'est pas membre de l'O.E.C.E. et il y aura probablement le restant des réclamants qui ont obtenu gain de cause auprès des tribunaux d'un pays non-O.E.C.E. dont les réclamations ont été réduites par les propriétaires de navires se prévalant de leurs droits à limitation.

Il est proposé dans ces conditions que les Clauses régissant le transport garantiraient que le total récupéré par ces réclamants ne soit pas plus élevé que le montant qu'ils auraient recupéré s'ils avaient présenté leur réclamation intégralement vis-à-vis du fonds de l'O.E.C.E.

Nous redoutons que dans certaines juridictions le fait qu'un navire transporte des matières radioactives sera considéré de par lui-même suffisant pour refuser au propriétaire de ce navire le droit à limitation sur base du fait ou de la faute (fault or privity). Nous aimerions que la Convention détermine clairement que le seul fait de transporter des matières radioactives ne suffit pas pour priver le propriétaire de son droit à limitation sous l'empire de n'importe quelle autre Convention, loi ou droit commun, même si une stipulation de ce genre dans une Convention de l'O.E.C.E. pouvait s'avérer inapplicable dans le pays de juridiction.

La seconde différence entre les transporteurs maritimes et les transporteurs à terre réside dans le fait que dans certaines juridictions la preuve qu'une assurance a été souscrite par l'exploitant peut ne pas constituer un argument suffisant dans la défense comme ce sera le cas dans les pays de l'O.E.C.E.

Le transporteur qui sait qu'il transportera des matières radioactives est en mesure de prendre les dispositions nécessaires en vue de se protéger lui-même et de souscrire en faveur du public une assurance adéquate. Mais nous estimons que la situation d'un navire non transporteur mais soumis à la Convention n'a pas été complètement examinée. Nous ne sommes pas d'accord avec le passage suivant du rapport de la Commission, la première phrase exceptée :

" Nous n'estimons pas qu'il serait logique ou équitable
" que l'exonération de responsabilité dans le chef du propriétaire du navire
" transportant pas de matières nucléaires doive dépendre du point de savoir si
" le propriétaire du navire qui transporte ces matieres s'est ou ne s'est pas
" conformé à ces exigences précitées parce qu'il s'agit là d'une question sur
" laquelle le premier n'a bien entendu aucun contrôle. D'un autre côté nous sommes convaincus qu'aucun législateur ne permettrait que le propriétaire du navire ne transportant pas de matières nucléaires, échappe à la responsabilité à moins que les victimes de l'accident nucléaire ne soient en mesure de faire valoir leurs droits à indemnisation contre une partie qui serait soumise à la juri-

ction des tribunaux de l'un des Etats contractants.

" Nous pensons dès lors que la bonne solution consiste en que la Convention prévoie que le propriétaire du navire, qui ne transporte s de matières nucléaires, soit exonéré de responsabilité lorsque et seulement rsque l'exploitant (ou le chargeur) ou le destinataire est soumis à la juri- ction d'un des Etats contractants; autrement nous pensons, pour les mêmes mo- fs que ceux avancés au paragraphe 11, que sa responsabilité ne devrait pas re limitée à un montant moins élevé que celui a concurrence duquel la respon- bilité de l'exploitant est limitée par la Convention (compte tenu de la qua- fication dont traite le dernier alinéa du paragraphe 12).

Cette conclusion a été rendue effective par la Clause A.4 le projet de Clauses. Il nous semble que si un navire soumis à la Convention t en collision avec un navire non soumis à la Convention et transportant des ères radioactives, avec la conséquence qu'il se produit un dommage nucléaire, s les victimes peuvent venir dans le pays ayant adhéré à la Convention et re- llir £. 5 millions du navire non-transporteur. Il n'empêche que si le navire transporteur se voit obligé de payer £. 5 millions il n'a pas de recours con- aucun exploitant, chargeur ou destinataire. Mais le navire transporteur possè- e droit sous l'empire du projet des Règles ~~xxxxxxxx~~ de l'O.E.C.E. ainsi que .M.I. le propose.

Les membres de l'A.B.D.M. ont consacré beaucoup de temps à ude de la question du navire non-transporteur et tenu de nombreuses réunions. s avons la ferme conviction qu'à ce problème il ne peut être réservé de solu- satisfaisante si cette Convention n'est pas d'application universelle.

Nous regrettons d'avoir à conclure que nous sommes adver- es de la solution proposée par la Commission et qu'en conséquence nous propo- ns la suppression de l'article A.4 ainsi que des passages du rapport de la ission à ce sujet.

Nous estimons que la Convention de Bruxelles de 1957 visant ésoudre ce problème parmi d'autres et nous demeurons convaincus que la Conven- n de 1957 est capable d'apporter la solution.

Nous sommes d'accord avec la déclaration de principe de la ission à la page 6 - qu'un droit de recours contre les assureurs constitue protection dont peuvent se prévaloir les victimes d'un accident nucléaire s le cas où la partie à qui la responsabilité absolue et unique incombe de- nt insolvable ou , lorsqu'il s'agit d'une Société, si cette dernière entre en uidation.

Ceci entraîne évidemment comme conséquence de priver l'as- eur de moyens de défense normaux lorsqu'il est poursuivi par une victime de ccident. Mais nous ne sommes pas d'accord qu'il soit ainsi privé de ces moyens défense lorsque l'assuré est solvable. Nous estimons dès lors que la clause D. t être modifiée de manière à autoriser le recours directement contre les Assu- rs seulement dans les cas de banqueroute et de liquidation.

Nous admettons qu'une Convention imposant une assuranc obligatoire doive établir une limite pratique. Nous avons discuté ce problème avec de nombreuses personnalités du marché de l'assurance et toutes sont d'ac pour dire que les assurances envisagées sont possibles. Ils émettent toutefoi des avis tellement différents en ce qui concerne les motifs qu'ils ont de par ainsi et concernant le mode et la base de pareilles assurances, que nous esti qu'il est inopportun et même peu sage d'indiquer, ainsi qu'il a été fait à ce tains endroits du rapport de la Commission, comment et sur quelle base ces as rances seront effectuées.

ASSOCIATION ITALIENNE DE DROIT MARITIME

RAPPORT SUR LA RESPONSABILITE DU CHEF DE TRANSPORT DE MATIERES NUCLEAIRES ET SUR LE QUESTIONNAIRE CONCERNANT LA RESPONSABILITE DE L'ARMATEUR POUR LES NAVIRES UTILISANT L'ENERGIE NUCLEAIRE.

Rappelons préliminairement que le C.M.I. avait mis à l'étude un questionnaire d'origine néerlandaise concernant la responsabilité du transporteur utilisant un navire atomique. L'O.E.C.E. ayant ensuite élaboré un projet de Convention qui, à l'origine, s'inspirait de la responsabilité de l'exploitant atomique, souleva la question de savoir si, outre la responsabilité de cet exploitant, il fallait tenir compte de la responsabilité du transporteur des matières nucléaires, donc dans les transports aérien, fluvial, ferroviaire, routier et maritime. En ce qui concerne ce dernier mode de transport, le C.M.I. fut chargé de cette question qui, pour des motifs d'urgence, doit recevoir la priorité.

Etant entièrement différents, ces deux problèmes seront examinés séparément, en donnant le pas au second sur le premier.

Le projet de l'O.E.C.E., dont la forme n'est pas encore définitive, part de la prémise - nous nous limiterons aux lignes générales du système adopté - d'après laquelle l'exploitant doit répondre des dommages causés par les matières nucléaires à concurrence d'une somme déterminée en son maximum, d'après les principes de la responsabilité objective, et avec une prescription décennale.

Au cours des discussions, il s'est manifesté une tendance à tenir également compte d'une responsabilité du transporteur, et par conséquent aussi du transporteur maritime. Ainsi déplaçait-on la base même du système préparé, puisque le transporteur qu'on devait considérer comme couvert par la responsabilité de l'exploitant, et par conséquent comme un éventuel ayant-droit à dommages-intérêts, devait au contraire répondre directement des dommages vérifiés pendant que la matière nucléaire est sous sa garde.

Pour admettre une situation de ce genre, il faut lui donner une base. Mais cette base ne peut être trouvée qu'au seul cas où le transporteur n'aurait pas pris toutes les mesures nécessaires pour éviter le dommage. Un cas de ce genre est cependant dépourvu de toute importance pratique. En effet, il faut bien présumer que le transporteur ne sera autorisé à effectuer le transport que s'il est muni d'une licence spéciale et lui seront évidemment prescrits tous les contrôles et toutes les précautions qui s'imposent, et que s'il a rigoureusement respecté ces prescription personne ne pourra l'accuser d'avoir commis une faute ou d'avoir été négligent à cet égard. Si on veut rechercher une base permettant de justifier une responsabilité objective du transporteur et de mettre, spécifiquement, une telle responsabilité à sa charge, il faudra recourir à une justification purement politique: c'est-à-dire affirmer qu'en assumant le risque du transport qui devrait être considéré non pas comme un transport normal mais comme un transport exceptionnel, le transporteur doit aussi assumer les conséquences du risque qu'il a voulu courir.

Ceci implique que le transporteur ne se charge pas de la responsabilité de l'exploitant atomique et qu'il doit répond d'une responsabilité qui s'ajoute à celle de l'exploitant.

La résultante, en pratique, d'un tel système est qu le transporteur s'assure: et le coût de l'assurance est en rapport avec les responsabilités qu'on assume.

Mais puisqu'en définitive, l'armateur ne prend jama sur lui des charges pareilles et qu'il en transfère l'incidence su le chargeur et sur les passagers, il s'ensuit que le fret afférent au transport des matières atomiques coûtera plus cher et ceci signifie qu'en fin de compte, ce fardeau retombera toujours sur l'exploitant, majoré des frais généraux et des profits dus à l'armement. On ne saurait songer à transférer, en tout ni en partie, le poids en question sur les passagers ou sur les chargeurs. Pour ce faire, en effet, le transporteur devrait procéder à une discrimination entre les frets, en justifiant ceux-ci : mais aucun passager ou chargeur ne se montrera disposé à couvrir les risques superflus découlant pour lui de l'emploi d'un navire à cargaison dangereuse : tous préféreront, bien au contraire, faire appel à un autre bâtiment à bord duquel ils ne courront que des risques normaux : et cela d'autant plus que - o ironie du sort - il leur faudrait encore acquitt un fret plus cher pour le pur plaisir de courir un risque de plus.

Dans le domaine des transports maritimes, où la que tion des dommages aux tiers (qui est importante en droit aérien) e négligeable, il ne reste que les problèmes des dommages contractue (passagers et cargaison), auxquels nous avons déjà fait allusion e qui sont réglés par les deux Conventions de Bruxelles, celle qui es actuellement en vigueur et la nouvelle qui vient d'être adoptée. Pour les raisons exposées ci-dessus, nous croyons que le problème

limite à préciser que la responsabilité de l'exploitant atomique s'étend aux dommages causés aux navires ainsi qu'aux responsabilités encourues par l'armateur. Reste le problème de la collision qui, comme l'abordage, est réglé par l'une des Conventions de Bruxelles, alors que, pour la navigation aérienne, les projets élaborés par le C.I.T.E.J.A. et repris par l'O.A.C.I. n'ont pas encore abouti à une Convention formellement en vigueur. A première vue, on pourrait peut-être penser que sur cette question, il faudrait tenir compte du fait que le dommage peut être même dû à un navire auquel le fait dommageable devrait être imputé. En réalité cependant, ce problème ne doit pas être considéré comme présentant un aspect nouveau, car le navire en faute au cas d'abordage n'est pas tenu de supporter des charges dépassant la normale du fait que la cargaison du navire abordé serait dangereuse. Et le navire qui transporte des matières nucléaires ne doit pas répondre au-delà de la normale, de par le simple fait de sa cargaison dangereuse dont répond l'exploitant atomique et la faute de la collision si est à lui imputable.

Quel que soit l'angle sous lequel on considère cette question, il semble donc qu'il n'y ait aucune raison sérieuse de créer une responsabilité spéciale du transporteur maritime, à moins qu'on n'agisse ainsi pour des raisons purement politiques: mais de telles raisons ne se justifient que sur le plan politique et, par conséquent, peuvent même être illogiques et inconsidérées, puisque nul ne pourra empêcher la réaction des usagers (chargeurs et passagers) qui ne voudront évidemment pas employer des navires effectuant des transports dangereux. Ceci, les armateurs ne peuvent pas l'ignorer, si, à un moment donné, il leur faudra choisir entre la perte de leur clientèle et les profits plus grands qu'ils pourraient retirer du transport de matériel nucléaire.

Les conclusions qu'on doit déduire des considérations précédentes sont :

a) d'abord, et en vue préliminaire, qu'on ne voit la nécessité de conclure une convention sur l'exploitant de l'énergie nucléaire ni pour quelle raison on devrait arriver à l'adopter comme base de la responsabilité celle objective. L'expérience jusqu'ici accomplie ne consent pas de prendre de pareille décision et il ne semble pas opportun de créer un système conventionnel sans une sérieuse expérience.

b) que si une convention doit être quand même adoptée en la matière, on ne voit aucune raison de créer en force de convention, outre celle de l'exploitant, une responsabilité du transporteur. Celui-ci ne puisse être visé expressément (nous nous bornons ici au transporteur maritime, mais le principe peut être appliqué aussi au transporteur par chemin de fer, ou automobile, ou aérien) que pour deux questions :

1° le règlement des conditions techniques du transport en tenant compte que les Etats ont déjà une réglementation pour les transports dangereux et une annexe de la Convention de Berne CIM règle d'une manière internationale les transports dangereux. On pourrait pourtant adopter

soit une règle générale pour les Etats à réglementer expressément matière, s'il y a lieu, ou bien de prévoir que la question sera réglée dans une annexe, dans lequel on pourrait donner des règles d'ordre international (étant donné que le transport est internati nal) tout en laissant aux Etats une marge de liberté pour la réglementation complémentaire, s'il y a lieu.

Il n'est pas inutile de rappeler que le problème de la licence spéciale et des conditions auxquelles on doit soumettre le transport de matière nucléaire, pour garantie des biens (passagers ou marchandises) est à l'étude dans plusieurs Etats et aussi en Italie.

2° L'adoption législative du principe que si le transporteur se charge de la responsabilité pendant le transport au lieu de l'exploitant ou du destinataire, le principe est valable envers les tiers, qui peuvent s'adresser directement au transporteur. Il semble inutile s'occuper expressément de l'exploitant ou du destinataire parce que est vivante la pratique cif ou fob, et l'exploitant peut bien se décharger de toute responsabilité pour la livraison de la marchandise soit à bord du navire ou à l'embarcation de la marchandise, soit à la livraison de la même de l'un moment ou l'autre commence la responsabilité de l'exploitant destinataire.

Quand même si on veut le dire expressément dans la Convention on peut le faire, bien qu'il soit inutile.

L'autre question posée dans le questionnaire du C.M.I. présuppose qu'on problème préliminaire ait été résolu. Il est raisonnable de penser que les Gouvernements autoriseront l'exploitation de la navigation atomique le jour où celle-ci pourra être considérée comme normale, ce qui se réalisera vraisemblablement à brève échéance, grâce aux progrès de la technique (le Savannah, premier navire atomique, devrait entrer en exercice dans le courant du 1960).

Mais il semble évident qu'il est impossible d'échapper au dilemme suivant : ou bien la navigation atomique est une navigation normale - et alors point n'est besoin de la soumettre un régime particulier - ou bien elle est anormale - et en pareil cas, elle présente un risque plus grand, qu'il faut couvrir. La seconde hypothèse qui vient d'être envisagée implique évidemment que le Gouvernement autorise bien qu'anormale, la navigation atomique, si on met à la charge de l'armateur le coût plus élevé de l'assurance contre les risques de la navigation atomique, et, évidemment, on se retrouvera, en pareil cas, face à face avec le phénomène du transfert de cette charge, qui finira par retomber sur le passager et sur le chargeur. On ne reviendrait alors à l'hypothès

prise en considération tout à l'heure, dans laquelle il est absurde de s'attendre à voir jamais passagers ou chargeurs préférer un navire atomique, anormal, où il leur faut payer plus cher, à un navire normal, à meilleur marché. Nous devons donc déduire de ces considérations que le problème du transport par navire atomique ne pourra devenir actuel que le jour où il pourra être considéré comme un transport normal, ce qui implique, par voie de conséquence, qu'il n'y a aucune raison d'édicter des règles conventionnelles spéciales dérogeant aux règles existantes.

Aucune expérience relative aux sous-marins en exercice aux Etats Unis et au navire antiglace de l'U.R.S.S. ne permet d'attribuer aux dits navires le caractère de danger.

Il est un problème particulier auquel fait allusion le questionnaire du C.M.I., problème qui peut se référer aussi bien au navire atomique qu'au navire transportant du matériel atomique : l'hypothèse de la catastrophe. A cet égard, il convient de distinguer le cas de l'individualisation du moyen de transport ayant provoqué la catastrophe du cas du défaut d'individualisation de ce moyen; mais il faut auparavant rappeler l'attention sur le fait que ce problème a un caractère général et qu'il n'est pas spécial à la navigation maritime.

Une catastrophe peut avoir lieu, aujourd'hui, même indépendamment de toute influence ou question atomique. Des réglementations particulières sont déjà en vigueur en ce qui concerne le transport de matières inflammables ou dangereuses; ainsi la Convention de Berne sur les transports par chemins de fer contient-elle une réglementation particulière à cet égard, dans une annexe spéciale. Il suffit de songer à un moyen de transport quelconque, qui serait chargé de dynamite ou de trinitrotoluène. Dans ces différentes hypothèses, le transporteur recourt à l'assurance supplémentaire pour couvrir ces risques plus élevés. Autre situation tout aussi grave: lorsqu'il y a eu catastrophe ou victime et que le moyen de transport responsable est resté inconnu. En ce cas, en effet, même la précaution de la garantie obligatoire s'avère vaine, puisqu'on ignore qui a produit le dommage. Mais puisque cette hypothèse n'a presque rien à faire avec la navigation maritime, nous ne la mentionnons que dans le souci de rendre plus complet le présent exposé. Dans les cas de catastrophe, l'Etat est appelé à intervenir, mais son intervention n'est pas supplémentaire, mais complémentaire.

Il suffira de rappeler à cet effet :

a) que cette situation a été prévue dans la Convention de Rome sur la responsabilité de l'exploitant aérien vis-à-vis des tiers, qui ne prescrit pas seulement l'assurance obligatoire, mais autorise aussi une garantie bancaire ou celle de l'Etat. Et cette seconde forme de

garantie a été mise en avant à un moment où le fardeau de la navigation aérienne, directement ou indirectement, retombait sur l'Etat, car elle semblait être la garantie la plus économique pour lui puisqu'elle épargnait les frais d'assurance ou de banque. Toutefois, cette garantie n'a guère eu d'application;

b) que cette solution se base sur un principe de solidarité, qui se traduit par une charge pour tous les citoyens, puisque l'Etat doit faire face aux dépenses qu'il prend sur lui - comme le fait aux Etats-Unis la loi ou bien encore le projet en Allemagne pour la responsabilité comportant une charge dépassant quinze millions de dollars - en recourant aux moyens budgétaires usuels auxquels l'Etat pourvoit en faisant appel à l'impôt, qui retombe sur tous les contribuables.

On voit donc mal comment on pourrait raisonnablement faire une discrimination en ce qui concerne la seule question des dommages provoqués par des transports atomiques ou par des navires atomiques, alors que le problème a un caractère plus général et que, ratio legis étant une et unique, une telle discrimination devrait trouver sa justification dans un motif purement politique.

En tout cas on ne voit pas l'utilité de fixer une responsabilité supplémentaire de l'Etat d'une manière fixe, parce qu'elle pourrait être en pratique pêcher par excès ou par défaut. Il s'agit de cas exceptionnels dans lesquels l'Etat peut intervenir parce que le problème prend un caractère de deuil national et les mesures peuvent être adoptées en tenant compte de la particularité concrète des situations.

A l'avis de l'Association italienne il s'agit d'un problème qu'on devrait laisser entièrement à la loi nationale, n'étant pas possible d'arriver à une réglementation uniforme.

C'est à ces principes que s'inspirent les réponses préparées, aux questions soulevées par le C.M.I. Avant de passer à l'examen de ces questions, il nous faut toutefois observer qu'en tout cas la prescription décennale de la responsabilité du transporteur constitue une véritable aberration. En matière de transports, en effet, la durée de la prescription est toujours fort brève; la pratique correspondante a tiré son origine de la nécessité qu'il y a à ne pas laisser indéfiniment en suspens les problèmes du contrat de transport ayant une incidence sur l'armement. C'est de ce principe qu'est née la tendance à rendre toujours plus court les délais de prescription. Dès lors, cette proposition serait en antithèse formelle avec une telle tendance, ce qui porterait à des conséquences fort graves, puisqu'elle immobiliserait la gestion de l'armement et des assurances et, en cas de faillite, rendrait impossible l'évaluation du montant des charges privilégiées dont le curateur devrai

tenir compte, ce qui aurait à son tour pour effet d'immobiliser la liquidation elle-même.

Il semble que la disposition du projet envisage un cas de déchéance. Si telle est le sens de la règle, on peut concevoir un délai plus long d'une prescription (p. ex. cinq ans) en laissant aux lois nationales le soin de déterminer un délai de prescription bref, bien que plus long du normal (p. ex. deux ans).

Les questions qui sont soumises aux Associations nationales sont deux et on ne peut pas les confondre.

La première question a été soulevée à l'occasion du projet à l'étude auprès de l'O.E.C.E. sur la responsabilité atomique. Il s'agit d'établir si, en dehors de la responsabilité de l'exploitant atomique fixée en 15 millions de dollars, on ne devrait pas envisager aussi une responsabilité du transporteur maritime.

C'est-à-dire, tandis que selon la première relation du projet, le navire est le premier dommage à indemniser en cas d'accident, est considéré comme responsable pour avoir accepté le transport de matières atomiques, c'est-à-dire pour avoir accepté de courir le risque du transport. Cette justification est très faible et on devrait plutôt admettre que le principe serait adopté pour raisons politiques, qui, néanmoins, échappent à une raisonnable justification, d'autant plus que le transporteur serait exposé à perdre le transport des passagers ou des caricateurs, qui n'ont aucune raison de préférer le transport sur un navire dangereux.

Il semble pourtant qu'il faudrait exclure une deviation de la réglementation normale. On se réfère à tel propos aux suggestions faites dans l'introduction : pour ce qui concerne le questionnaire du C.M.I. on doit d'abord considérer la question générale de la navigation actionnée par l'énergie nucléaire. Si elle doit être considérée comme une navigation exceptionnelle parce que particulièrement dangereuse pour l'équipage, les passagers et les marchandises, on peut comprendre que le transporteur prend à sa charge les risques du choix de l'exploitation de telle système d'énergie. Reste à voir si passagers et expéditeurs ne préfèrent, dans tel cas, des moyens ordinaires de transport, d'autant plus que le transporteur ferait tomber sur les usagers le majeur prix du transport. On doit ajouter qu'on ne voit pas à quel titre il devrait ajouter la responsabilité à celle de l'exploitant de l'énergie.

Si, par contre, on considère que le navire actionné par l'énergie nucléaire avec les perfectionnements qui suivront, peut-être rapidement, est à considérer comme un navire ordinaire, on ne voit pas pour quelle raison on devrait mettre à la charge du transporteur une responsabilité aggravée, en dehors de celle qui résulte des Conventions de Bruxelles. Il n'est pas inutile d'ajouter que si on aggrave la responsabilité du transporteur on ajoute un autre fardeau d'assurance à ceux existants qui, en définitive, est transféré sur le fret.

En tout cas, il semble absurde penser qu'on puisse adopter un délai de prescription de cinq ou de dix ans pour la responsabilité atomique, pour les raisons précédemment indiquées.

Les réponses qui suivent s'inspirent aux susdites questions préliminaires.

1.- En Italie n'existent pas des mesures législatives (ni des projets) concernant les navires actionnés par l'énergie nucléaire.

2.- N. 3, 5, 6, 7 - Pour les raisons indiquées on ne voit la nécessité d'adopter un régime juridique particulier. Tel point de v absorbe les questions posées au N. 3, 5, 6, 7.

3.- La question posée au N. 4 n'est pas nouvelle et n'est pas un problème propre ou dérivé de la navigation à énergie nucléaire. Elle se pose même actuellement dans le cas dans lequel on transporte des matières inflammables ou dangereuses extraordinaires (par ex. le récent incident du navire danois "Hans Hedhoft" investi par un iceberg). Il faut aussi considérer le cas dans lequel on n'a pas individué le moyen qui a produit le dommage, qui rend inutile même la garantie obligatoire des tiers (assurance obligatoire, garantie de banque ou de l'Etat). Il s'agit de créer, pour raison d'humanité, une solidarité entre l'Etat du pavillon ou de l'Etat sur le territoire duquel l'incident s'est produit pour mettre à la charge de l'un des deux toute ou partie de l'excédent de la somme due par le navire. Ce qui veut dire que la somme payée par l'Etat serait à la charge de tous les contribuables étant prélevé des fonds disponibles au budget.

A l'avis de l'Association italienne le problème est de caractère général et ne pourrait être envisagé seulement comme cas d'espèce.

4.- La conclusion qui se dégage des considérations précédentes est qu'une Convention réglante d'une manière particulière la responsabilité du propriétaire ou exploitant d'un navire actionné par l'énergie nucléaire ne semble pas souhaitable. On doit laisser accomplir une expérience suffisamment large pour constater si réellement des problèmes particuliers rendent nécessaire l'adoption de dispositions nouvelles et spéciales.

ASSOCIATION BELGE DE DROIT MARITIME

R A P P O R T
SUR LA RESPONSABILITE DES PROPRIETAIRES DE NAVIRES TRANSPORTANT DES MATIERES RADIOACTIVES

Après avoir pris connaissance du rapport de la Commission restreinte du C.M.I. et de celui de l'Association britannique de Droit Maritime ainsi que de la documentation soumise par l'O.E.C.E., la Commission belge estime devoir émettre les considérations que voici :

I.- Remarques Préliminaires.

1. La Commission belge n'a disposé que d'un temps extrêmement limité. Il résulte de cette circonstance que le présent rapport n'a pu porter que sur les principes soulevés par les rapports de l'O.E.C.E. et de la Commission restreinte du C.M.I. Ainsi, la Commission belge estime qu'il faut s'en tenir rigoureusement au principe de la responsabilité unique et objective des exploitants.

3. La Commission belge estime qu'un problème économique est à la base des questions juridiques qui sont posées, à savoir que l'on ne peut imposer une responsabilité à un transporteur que dans la mesure ou celui-ci peut s'assurer normalement contre les suites de cette responsabilité. Cette considération a même plus d'importance en ce qui concerne le transporteur de matières radioactives qu'en ce qui concerne l'industriel traitant ces mêmes matières. En effet, l'industriel peut choisir un endroit facilement protégeable pour ses installations alors que le transporteur maritime est obligé de fréquenter les routes maritimes et les ports où des capitaux importants sont concentrés et où une population très dense s'est établie; en outre, les opérations de chargement et de déchargement présentent inévitablement des risques considérables.

5. La Commission belge est arrivée à la conclusion que la question qui est actuellement posée au C.M.I. concerne uniquement le problème de la responsabilité des transporteurs maritimes; en conséquence, elle a écarté l'examen des points de vue qui pourraient être défendus par les "victimes terrestres" et même par les propriétaires des marchandises qui se trouvaient à bord du navire et par les propriétaires de la coque du navire (à distinguer de la responsabilité civile que ces mêmes propriétaires encourent à l'égard des tiers).

II.- Responsabilite limitée ou Responsabilité illimitée

A. La Commission Internationale restreinte du C.M.I. n'a pas tranché cette question (page 8 du rapport; document At-9); elle a demandé aux Associations Nationales de choisir entre trois solutions, à savoir :

1) une responsabilité limitée par la Convention Internationale ou par une loi nationale existante.
2) une responsabilité limitée dans le cadre du projet de Convention de l' O.E.C.E. et
3) une responsabilité illimitée.

La Commission belge estime qu'il y a lieu d'opter pour une responsabilité limitée sous l'empire de la Convention Internationale ou d'une loi nationale existante. En effet, l'acceptation d'une exception à la règle traditionnelle de limitation de la responsabilité des transporteurs maritimes pourrait signifier la fin prochaine de toute responsabilité limitée. Or, il est certain que cette technique de la responsabilité limitée a contribué au développement des transports maritimes et a permis de maintenir ceux-ci à un niveau satisfaisant dans l'intérêt du commerce international. En outre, la Commission belge estime que toutes les mesures de protection contre les radiations radioactives sont conçues et réalisées par les industriels et que le rôle des transporteurs se borne à exécuter les recommandations éventuelles de ces industriels.

B. L'Association britannique de Droit Maritime a fait valoir que la Convention de 1957 a tenu compte des risques résultant du transport de matières radioactives.

La Commission belge estime devoir contester cette opinion et devoir faire remarquer que dans l'esprit des auteurs de la Convention de 1957 le problème des risques atomiques n'a pas été tranché. Cette opinion se base sur les témoignages de la délégation belge à la Conférence Diplomatique

III.- Responsabilité objective ou Responsabilité traditionnelle.

L'exposé des motifs du rapport de l'O.E.C.E. adopte le principe de la responsabilité objective. La Commission Internationale restreinte demande aux Associations Nationales d'émettre leur point de vue sur la question de savoir si pareille responsabilité doit être imposée aux transporteurs de matières radioactives. (p. 10 du rapport - doc. At.-9)

La Commission belge estime qu'il faut éviter d'introduire dans le régime quasi-délictuel actuel un régime d'exception pour les transports de matières radioactives et qu'il y a lieu de concentrer ses efforts en vue d'arriver à un système permettant d'insérer tous les accidents survenus pendant le transport dans le champ des responsabilités imposées aux exploitants des industries nucléaire

tte conclusion est dictée par les mêmes considérations que celles
i ont prévalu lors du choix entre la responsabilité limitée et la
sponsabilité illimitée.

En outre, la Commission belge estime que les risques
accidents pouvant survenir pendant le transport maritime, résultent
grande partie d'événements extérieurs inhérents au transport par
r (fortune de mer). Or, ces événements ne justifient pas l'appli-
tion du principe de la responsabilité objective.

. Champ d'application.

La Commission belge estime que le champ d'application
projet de Convention peut être étendu autrement qu'en modifiant
compétence des tribunaux, système préconisé par l'Association
itannique. Elle préconise les suggestions que voici :

La Commission belge suggère d'annexer à la Convention
voeu demandant aux Etats contractants d'exiger que les navires ne
argent ou ne déchargent des matières radioactives dans un de leurs
rts que dans le cas où ils connaissent l'identité de l'exploitant
hargeur ou destinataire) et où ils ont la preuve d'une police d'as-
rance ou d'une garantie établie conformément aux dispositions de
Convention. Cette règle aurait pour effet d'éviter que des navires
ttant le pavillon d'un Etats non-contractant ne fassent une concur-
nce aux navires des Etats contractants. En effet, ces navires
on-contractants) ne seront probablement pas soumis aux mêmes obliga-
ons que les navires contractants.

Limitation:

- Limitation par accident ou par période

La Commission belge estime que seule une limitation
aditionnelle " par accident " est concevable pour les risques du
ansport maritime. Toutefois elle croit pouvoir avancer que les
fficultés résultent du fait que les assureurs des risques terrestr s
ont pas encore pris position avec assez de netteté étant donné qu'ils
disposent pas d'assez d'éléments pour procéder à l'évaluation des
sponsabilités qui leur seront imposées par le projet de convention.
nsi, la Commission estime qu'il faut s'en tenir à la limitation
r accident, tout au moins en ce qui concerne le transport.

- Montant de la Limitation

Le projet actuel prévoit la possibilité de plusieurs
mites de responsabilité oscillant entre 5.000.000 et 15.000.000 de
llars. La Commission belge estime qu'il faut éviter des limites
fférentes qui auront pour seul effet d'augmenter le nombre de con-
lts de loi.

En outre, elle estime qu'en ce qui concerne le montant il s'agit avant tout d'un problème économique tel que cela a été préconisé dans la remarque préliminaire N° 2.

C.- Action directe contre les assureurs ou les garants.

La Commission belge estime que pareille action directe se conçoit très bien dans le cadre des responsabilités imposées aux exploitants des installations nucléaires. Toutefois, elle estime que si le projet de Convention admet des garanties fournies par des mutuelles d'exploitants, il devrait préciser que cette action directe peut également être intentée contre ces mutuelles contre lesquelles les lois actuelles ne permettent aucu action.

VI. Remarque générale.

A plusieurs reprises la Commission belge a dû se rendre compte de la nécessité d'arriver à des règles couvrant un champ d'application plus large que celui des accidents survenus dans un des Etats de l'O.E.C.E. Elle suggère en conséquence d'ins rer dans la Convention une clause permettant à d'autres Etats d'adhérer à la Convention projetée.

ASSOCIATION ARGENTINE DE DROIT MARITIME

L'Association argentine de Droit Maritime, ayant pris connaissance des questionnaires remis par le Comité chargé de la matière, considère que toute réponse à leurs questions serait prématurée et inopérant, puisque la responsabilité de l'armateur - dans le cas des bateaux à propulsion atomique - ou celle du chargeur ou destinataire, s'il s'agit du transport de matière fissible, doit se rapporter forcément aux réglementations qui seront dictées par les Etats en qualité de mesures de sûreté pour la prévention des accidents durant l'exercice de ces activités. Mesures de sûreté qui ne sauraient d'ailleurs tarder à être sanctionnées, comme l'ont été déjà en certains pays ou vont l'être par d'autres en ce qui concerne les installations terrestres pour la production de l'énergie atomique.

Le sujet de la responsabilité, son extension, sa limite quantitative, son caractère d'objective ou subjective, la charge de la preuve, le délai de prescription, etc., ce sont tous des aspects juridiques qui se trouvent nécessairement liés, de façon intime, aux dits systèmes de sûreté; l'on devra donc prévoir par ceux-ci quels seront les bateaux pouvant utiliser la propulsion atomique (p.e., l'interdiction pourrait tomber sur les transports de passagers, ou sur des pétroliers), lesquels pourront transporter des matières fissibles, s'ils doivent être spécialisés, dans le sens qu'ils devront être équipés avec des mécanismes appropriés à de tels transports, la spécialisation du personnel, les systèmes de charge, décharge et dépôt du matériel dans les ports, la responsabilité de l'armateur vis-à-vis de l'équipage la concurrence de l'Etat pour faire face aux dommages, la spécialisation des assurances, etc.

De la méthode selon laquelle seront envisagées par les Etats ces mesures de sûreté - qui devront être, naturellement, plus ou moins uniformes - ainsi que de leur efficacité, on pourra établir ce qui reste du danger résultant de l'emploi de l'énergie nucléaire et du transport de matières fissibles. L'adéquation de la responsabilité à ces conséquences sera un problème ultérieur dont la solution devra être envisagée - cherchant l'uniformité - au cours de la future Convention internationale projetée.

Pour l'Association, ce premier cas est fondamental et se permet d'y insister, suggérant donc que le Comité Maritime International s'adresse à l'Organisation Maritime Consultative Internationale, pour que, par l'intermédiaire du Comité de Sécurité - organisme compétent en tout ce qui concerne la sûreté de la navigation - se voue le plus tôt que possible à l'étude des mesures préventives susmentionnées.

Entretemps, l'Association croit convenable que le Comité réunisse la plupart possible d'antécendents concernant les lois qui se dictent dans les différents pays sur l'emploi de l'énergie nucléaire et qu'il les fasse connaître aux Associations Nationales.

ORGANISATION FOR EUROPEAN
ECONOMIC CO-OPERATION

RESTRICTED

Paris, 23rd June, 1959

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Scale I

Or. Engl.

COUNCIL

REPORT TO THE COUNCIL OF THE STEERING COMMITTEE FOR NUCLEAR ENERGY ON THIRD PARTY LIABILITY IN THE FIELD OF NUCLEAR ENERGY .

I. Following work undertaken by the Insurance Sub-Committee at the request of the Special Committee for Nuclear Energy, the Steering Committee for Nuclear Energy at its Session on 24th January, 1957, set up a Working Party on Third Party Liability to examine and formulate proposals on the harmonization of legislation concerning third party liability in the case of damage caused by the peaceful uses of nuclear energy. This Working Party's report was approved by the Steering Committee at its meeting of 2nd - 3rd July, 1957, when the Steering Committee decided to constitute a restricted Group of Experts to draft common regulations on third party liability in the field of nuclear energy.

2. The Group of Experts, composed of lawyers, specialists in insurance problems, and technicians, met throughout 1958 and submitted a report to the Steering Committee in September. Representatives of the European Atomic Energy Community (Euratom), as well as experts of non-Governmental organisations (U.N.I.P.E.D.E. and the European Insurance Committee), took part in the work of the Group.

The experts unanimously agreed that a Convention was the best method of ensuring the desired uniformity in regulating third party liability in the field of nuclear energy on a European basis. The draft Convention which was elaborated aimed at providing the necessary basic principles for such common regulations whilst leaving States free, where possible, to take national action. This flexibility, however, has not prevented a comprehensive regulation of third party liability from being provided so that, in the absence of national legislation, the Convention as such presents a régime in this field. In the elaboration of the Convention account had to be taken of the complexity of the problems, the diverse social and economic factors involved, and the multiplicity and variety of legal rules and traditions in the Member countries. The Group of Experts also elaborated a draft Exposé des Motifs by way of commentary on the different provisions in the Convention.

3. At its meeting of I6th October, I958, the Steering Committee decided that the draft prepared by the Experts should be discussed and finalized by representatives of the Governments of Member countries. The Group of Government representatives, in which the European Atomic Energy Community (Euratom) took part, and Observers from the International Atomic Energy Agency in Vienna, U.N.I.P.E.D.E., the European Insurance Committee, and international transport organisations, were present, submitted its report to the Steering Committee in March of this year.

4. The proposals of the Group of Government representatives were examined by the Steering Committee for Nuclear Energy at its meetings of I6th - I7th April, I959, and I8th June, I959. In between these two Sessions, the Group of Government representatives discussed the provisions relating to transport in the draft Convention, and a special Drafting Group reviewed the text on 27th - 30th May, I959. At its meeting of I8th June, the Steering Committee approved the present Report and agreed that the draft Convention and Exposé des Motifs set out in Annexes I and II should be forwarded to the Council for approval and signature with the least possible delay.

5. The attention of the Council is drawn to the following points:

(a) Liability in the Case of Transport /Article 4/

The German and Swiss Delegations felt that Contracting Parties should be permitted to impose liability on the carrier in place of the operator liable in respect of a transport of nuclear substances to or from a nuclear installation situated in its territory. In such a case, the carrier would be

required to have the insurance or other financial security required of an operator and would be considered for all purposes as if he were the operator liable in accordance with the Convention.

(b) System of Channelling /Article 6(a)/

The Austrian, German and Swiss Delegations favoured an alternative to the system of channelling all liability on to the operator and wished to make a reservation to the Convention in the following terms:

> "National law may, however, provide that persons other than the operator may continue to be liable in addition to the operator on condition that these persons are fully covered in respect of their liability, including defence against unjustified actions, by insurance or other financial security obtained by the operator."

The other Delegations, with the exception of the Swedish Delegation, agreed that such a reservation would be acceptable. The Swiss Delegation indicated that Switzerland might not wish to make use of the reservation at the time of signature.

(c) Liability of and Recourse Actions by Carriers /Article 6(b) and (c)/

In the event of a nuclear incident occurring in the course of transport of nuclear substances in the territory of Contracting Parties, or on the high seas, the Convention allows victims to bring actions for compensation against the carrier under international agreements in the field of transport or equivalent provisions of national law, (or against carriers who do not reside or have their principal place of business in the territory of a Contracting Party or of a Member or Associate country of the Organisation) Carriers who do reside or have their principal place of business in the territory of a Contracting Party or of a Member or Associate country of the Organisation have a right of recourse against the operator wherever the nuclear incident occurs. The Steering Committee felt that a formula should be found whereby these benefits might be extended to other countries who are in some way associated with the work of the O.E.E.C. but which are not Contracting Parties or Member or Associate countries of the Organisation. It was therefore suggested that the Council might, by Decision, extend these benefits to such contries.

(d) Unit of Account /Article 7(b)/

The United Kingdom Delegation took the view that instead of European Monetary Agreement units of account a gold-basis

currency or a translation into terms of gold itself should be adopted and if necessary the opinion of the Board of Management of the E.M.A. should be sought as to the appropriateness of referring to E.M.A. units of account. The Board of Management is due to meet on 30th June when its opinion will be sought.

(e) Maximum Liability of Operator for Transport Incidents /Article 7(b)/

The Belgian, French and Luxembourg Delegations felt that in the event of a nuclear incident occurring in the course of transport of nuclear substances, the maximum liability of the operator should be that fixed by the Contracting Party of the competent court (i.e. the court of the place where the nuclear incident occurs) for operators of nuclear installations in its territory and not, as in the present draft, that fixed by the Contracting Party in whose territory the nuclear installation of the operator liable is situated.

(f) Implementation of the Convention /Article I8/

The German and Austrian Delegations stated that they wished to declare at the time of signature that they reserve the right to give effect to the Convention by including the provisions thereof in their national legislation in a form appropriate to their legislation. The other Delegations agreed that this declaration should be incorporated in the Minutes of Signature.

(g) Languages

The German Delegation expressed its desire to adopt the same solution in regard to the German language as had been adopted for the Security Control and Eurochemic Conventions. Other Delegations indicated that if the German language was included they might also ask for the inclusion of their languages.

6. The Steering Committee for Nuclear Energy proposes that the Council:

(i) Approves the draft Convention on Third Party Liability in the Field of Nuclear Energy, set out in Annex I to this report, and recommends that it be signed by all Member countries;

(ii) Approves the draft Exposé des Motifs, set out in Annex II to this report, and recommends that it be published together with the Convention as an authoritative commentary on the Convention.

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x This Annex will be circulated separately.

ANNEX I

DRAFT CONVENTION ON THIRD PARTY LIABILITY IN THE FIELD OF NUCLEAR ENERGY

DRAFT CONVENTION ON THIRD PARTY LIABILLITY IN THE FIELD OF NUCLEAR ENERGY

PREAMBLE

THE GOVERNMENTS OF .....
.....

CONSIDERING that the European Nuclear Energy Agency, established within the framework of the Organisation for European Economic Co-operation (hereinafter referred to as the "Organisation"), is charged with encouraging the elaboration and harmonization of legislation relating to nuclear energy in participating countries, in particular with regard to third party liability and insurance against atomic risks;

DESIROUS of ensuring adequate and equitable compensation for persons who suffer damage caused by nuclear incidents whilst taking the necessary steps to ensure that the development of the production and uses of nuclear energy for peaceful purposes is not thereby hindered;

CONVINCED of the need for unifying the basic rules applying in the various countries to the liability incurred for such damage, whilst leaving these countries free to take, on a national basis, any additional measures which they deem appropriate, including the application of the provisions of this Convention to damage caused by nuclear incidents not covered therein;

HAVE AGREED as follows:

(a) For the purposes of this Convention:

(i) "A nuclear incident" means any occurrence or succession of occurrences having the same origin which causes damage, provided that such occurrence or succession of occurrences, or the damage, arises out of or results from the radioactive properties, or a combination of radioactive properties with toxic, explosive, or other hazardous properties of nuclear fuel or radioactive products or waste or with any of them.

(ii) "Nuclear installation" means reactors, other than those comprised in any means of transport; factories for the manufacture or processing of nuclear substances; factories for the separation of isotopes of nuclear fuel; factories for the reprocessing of irradiated nuclear fuel; facilities for the storage of nuclear substances; and such other installations in which there are nuclear fuel or radioactive products or waste as the Steering Committee of the European Nuclear Energy Agency (hereinafter referred to as the "Steering Committee") shall from time to time determine.

(iii) "Nuclear fuel" means fissionable material in the form of uranium metal, alloy, or chemical compound (including natural uranium), plutonium metal, alloy, or chemical compound, and such other fissionable material as the Steering Committee shall from time to time determine.

(iv) "Radioactive products or waste" means any radioactive material produced in or made radioactive by exposure to the radiation incidental to the process of producing or utilizing nuclear fuel, but doed not include (I) nuclear fuel, or (2) radio-isotopes outside a nuclear installation which are used or intended to be used for any industrial, commercial, agricultural, medical or scientific purpose.

(v) "Nuclear substances" mean nuclear fuel (other than natural uranium) and radioactive products or waste.

(vi) "Operator" in relation to a nuclear installation means the person designated or recognised by the competent public authority as the operator of that installation.

(b) The Steering Committee may, if in its view the small extent of the risks involved so warrants, exclude any nuclear installation, nuclear fuel, or nuclear substances from the application of this Convention.

ARTICLE 2

This Convention does not apply to nuclear incidents occurring in the territory of non-Contracting States or to damage suffered in such territory, unless national legislation otherwise provides.

ARTICLE 3

The operator of a nuclear installation shall be liable, in accordance with this Convention, for:

(i) damage to any person; and

(ii) damage to any property, other than property which is held by the operator or in his custody or under his control in connection with, and at the site of, such installation,

upon proof that such damage (hereinafter called "damage") was caused by a nuclear incident involving either nuclear fuel or radioactive products or waste in, or nuclear substances coming from such installation, except in the case otherwise provided for in Article 4.

ARTICLE 4

In the case of carriage of nuclear substances, without prejudice to Article 2:

(a) The operator of a nuclear installation shall be liable, in accordance with this Convention, for damage upon proof that it was caused by a nuclear incident outside that installation and involving nuclear substances in the course of carriage therefrom, only if the incident occurs

(i) before the nuclear substances involved have been taken in charge by another operator of a nuclear installation situated in the territory of a Contracting Party; or

(ii) before the nuclear substances involved have been unloaded from the means of international carriage in the territory of a non-Contracting State, if they

are consigned to a person within the territory of that State.

(b) The operator referred to in paragraph (a)(i) of this Article shall, from his taking charge of the nuclear substances, be the operator liable in accordance with this Convention for damage caused by a nuclear incident occurring thereafter and involving the nuclear substances.

(c) Where nuclear substances are sent from outside the territory of the Contracting Parties to a nuclear installation situated in such territory, with the approval of the operator of that installation, he shall be liable, in accordance with this Convention, for damage caused by a nuclear incident occurring after the nuclear substances involved have been loaded on the means of international carriage in the territory of the non-Contracting State from which they are sent.

(d) The operator liable in accordance with this Convention shall provide the carrier with a certificate issued by or on behalf of the insurer or other financial guarantor furnishing the security required pursuant to Article 10. The certificate shall state the name and address of that operator and the amount, type and duration of the security, and these statements may not be disputed by the person by whom or on whose behalf the certificate was issued. The certificate shall also indicate the nuclear substances and the carriage in respect of which the security applies and shall include a statement by the competent public authority that the person named is an operator within the meaning of this Convention.

ARTICLE 5

(a) If the nuclear fuel or radioactive products or waste involved in a nuclear incident have been in more than one nuclear installation and are in a nuclear installation at the time damage is caused, no operator of any nuclear installation in which they have previously been shall be liable for the damage. If the nuclear fuel or radioactive products or waste involved in a nuclear incident have been in more than one nuclear installation and are not in a nuclear installation at the time damage is caused, no person other than the operator of the last nuclear installation in which they were before the damage was caused or an operator who has subsequently taken them in charge shall be liable for the damage.

(b) If damage gives rise to liability of more than one operator in accordance with this Convention, the liability of

those operators shall be joint and several, but the liability of any one operator shall not exceed the amount established with respect to him pursuant to Article 7.

ARTICLE 6

(a) The right to compensation for damage caused by a nuclear incident may be exercised only against an operator liable for the damage in accordance with this Convention, or, if a direct right of action against the insurer or other financial guarantor furnishing the security required pursuant to Article IO is given by national law, against the insurer or other financial guarantor.

(b) No other person shall be liable for damage caused by a nuclear incident, but this provision shall not (i) prevent actions against carriers who are not ordinarily resident in the territory of a Contracting Party or of a Member or Associate country of the Organisation or do not have their principal place of business there or against the servants or agents of such carriers, or (ii) affect the application of any international agreement in the field of transport in force or opened for signature at the date of this Convention, or the application of equivalent provisions in the legislation of a Contracting Party in that field.

(c) Within the limitation of liability established pursuant to Article 7, any person who is ordinarily resident in the territory of a Contracting Party or of a Member or Associate country of the Organisation or has his principal place of business there or who is the servant or agent of such a person, and who is liable for damage caused by a nuclear incident under any international agreement or legislation referred to in paragraph (b)(ii) of this Article or under any legislation of a non-Contracting State, shall have a right of recourse against the operator liable for the damage in accordance with this Convention or against the operator who, but for the provisions of Article 2, would have been liable for the damage, for any sums which he is liable to pay in respect of the damage.

(d) The operator shall have a right of recourse only:

(i) If damage caused by a nuclear incident results from an act or omission done with intent to cause damage, against the person acting or omitting to act with such intent; or

(ii) If so provided expressly by contract.

(e) Where provisions of national health insurance, social security, workmen's compensation or occupational disease compensation systems include compensation for damage caused by a nuclear incident, rights of beneficiaries of such systems and rights of recourse by virtue of such systems shall be determined by the national law of the Contracting Party having established such systems.

ARTICLE 7

(a) The aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established in accordance with this Article.

(b) The maximum liability of the operator in respect of damage caused by a nuclear incident shall be 15,000,000 European Monetary Agreement units of account as defined at the date of this Convention: provided that any Contracting Party, taking into account the possibilities for the operator of obtaining the insurance or other financial security required pursuant to Article 10, may establish by legislation in respect of operators of nuclear installations in its territory a greater or lesser amount, but in no event less than 5,000,000 such units. The sums mentioned above may be converted into national currency in round figures.

(c) Any interest and costs awarded by a court in actions for compensation under this Convention shall not be considered to be compensation for the purpose of this Convention and shall be payable by the operator in addition to any sum for which he is liable in accordance with this Article.

ARTICLE 8

(a) The right to compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. In the case of damage caused by a nuclear incident involving nuclear fuel or radioactive products or waste which, at the time of the incident have been stolen, lost, or abandoned and have not been recovered, the period for the extinction of the right shall be ten years from the date of the theft, loss, or abandonment. National legislation may, however, establish a period of not less than two years for the extinction of the

right or as a period of limitation either from the date at which the person suffering damage has knowledge or from the date at which he ought reasonably to have known of both the damage and the operator liable: provided that the period of ten yars shall not be exceeded except in accordance with paragraph (b) of this Article.

(b) National legislation may establish a period longer than ten years if it has taken measures to cover the liability of the operator in respect of any actions for compensation begun after the expiry of the period of ten years.

(c) Unless national law provides to the contrary, any person suffering damage caused by a nuclear incident who has brought an action for compensation within the period provided for in this Article may bring supplementary proceedings in respect of any aggravation of the damage after the expiry of such period provided that final judgment has not been entered by the competent court.

ARTICLE 9

Except in so far as national legislation may provide to the contrary, the operator shall not be liable for damage caused by a nuclear incident due to an act of armed conflict, invasion, civil war, insurrection, or a grave natural disaster of an exceptional character.

ARTICLE IO

(a) To cover the liability under this Convention, the operator shall be required to have and maintain insurance or other financial security of the amount established pursuant to Article 7 and of such type and terms as the competent public authority shall specify.

(b) No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided for in paragraph (a) of this Article without giving notice in writing of at least two months to the competent public authority or in so far as such insurance or other financial security relates to the carriage of nuclear substances, during the period of the carriage in question.

(c) The sums provided as insurance, reinsurance, or other financial security may be drawn upon only for compensation for damage caused by a nuclear incident.

ARTICLE II

The nature, form and extent of the compensation, within the limits of this Convention, as well as the equitable distribution thereof, shall be governed by national law.

ARTICLE I2

Compensation payable under this Convention, insurance and reinsurance premiums, sums provided as insurance, reinsurance, or other financial security required pursuant to Article I0, and interest and costs referred to in Article 7(c), shall be freely transferable between the monetary areas of the Contracting Parties.

ARTICLE I3

(a) Jurisdiction over actions under Articles 3, 6(a) and 6(c) of this Convention shall lie only with the courts of the Contracting Party in whose territory the nuclear installation of the operator liable is situated.

(b) In the case of a nuclear incident occurring in the course of carriage, jurisdiction shall, except as otherwise provided in paragraph (c) of this Article, lie with the courts of the Contracting Party in whose territory the nuclear substances involved were at the time of the nuclear incident.

(c) If a nuclear incident occurs outside the territory of the Contracting Parties in the course of carriage by sea or air, or if the place where the nuclear substances involved were at the time of the nuclear incident cannot be determined, jurisdiction shall lie with the courts of the Contracting Party in whose territory the nuclear installation of the operator liable is situated.

(d) Judgments entered by the competent court under this Article after trial, or by default, shall, when they have

become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.

(e) If an action is brought against a Contracting Party as an operator liable under this Convention, such Contracting Party may not invoke any jurisdictional immunities before the court competent in accordance with this Article.

ARTICLE 14

(a) This Convention shall be applied without any discrimination based upon nationality, domicile, or residence.

(b) "National law" and "national legislation" mean the national law of the national legislation of the court having jurisdiction under this Convention over claims arising out of a nuclear incident, and that law or legislation shall apply to all matters both substantive and procedural not specifically governed by this Convention.

(c) That law and legislation shall be applied without any discrimination based upon nationality, domicile, or residence.

ARTICLE 15

(a) Any Contracting Party may take such measures as it considers desirable to provide additional compensation in respect of damage caused by nuclear incidents occurring in its territory.

(b) If any such measures are taken by any Contracting Party, the additional compensation shall be made available without discrimination in respect of damage suffered sithin its territory, expect in so far as such compensation includes benefits deriving from national health insurance, social security, workmen's compensation or occupational disease compensation systems.

(c) The application of such measures in respect of damage suffered within the territory of another Contracting Party to nationals of other Contracting Parties shall be determined by agreement between the Contracting Parties taking such measures and such other Contracting Parties.

ARTICLE I6

Decisions taken by the Steering Committee under Article I(a)(ii), I(a)(iii) and I(b) of this Convention shall be adopted by mutual agreement of the members representing the Contracting Parties.

ARTICLE I7

Any dispute arising between two or more Contracting Parties concerning the interpretation of this Convention shall be examined by the Steering Committee and in the absence of friendly settlement shall, upon the request of a Contracting Party concerned, be submitted to the Tribunal established by the Convention of 20th December, I957, on the Establishment of a Security Control in the Field of Nuclear Energy.

ARTICLE I8

(a) This Convention shall be ratified. Instruments of ratification shall be deposited with the Secretary-General of the Organisation.

(b) This Convention shall come into force upon the deposit of instruments of ratification by not less than five of the Signatories. For each Signatory ratifying thereafter, this Convention shall come into force upon the deposit of its instrument of ratification.

ARTICLE I9

Amendments to this Convention shall be adopted by mutual agreement of all the Contracting Parties. They shall come into force when ratified or confirmed by two-thirds of the Contracting Parties. For each Contracting Party ratifying or confirming thereafter, they shall come into force at the date of such ratification or confirmation.

ARTICLE 20

(a) The Government of any Member or Associate country the Organisation which is not a Signatory to this Convention may accede thereto, by notification addressed to the Secretary-General of the Organisation.

(b) The Government of any other country which is not a Signatory to this Convention may accede thereto by notification addressed to the Secretary-General of the Organisation and with the unanimous assent of the Contracting Parties. Such accession shall take effect from the date of such assent.

ARTICLE 21

Any Contracting Party may terminate the application of this Convention to itself by giving twelve months' notice to that effect to the Secretary-General of the Organisation.

ARTICLE 22

Any Contracting Party may, at the time of signature or ratification of or accession to this Convention, or at any later date, notify the Secretary-General of the Organisation that this Convention shall apply to any territory or territories which are mentioned in the notification and for whose international relations the Contracting Party is responsible. Any such notification may in respect of any territory or territories mentioned therein be withdrawn by giving twelve months' notice to that effect to the Secretary-General of the Organisation.

ARTICLE 23

The Secretary-General of the Organisation shall give notice to all Signatories and acceding Governments of the receipt of any instrument of ratification, accession, notification under Article 22, withdrawal, and decisions of the Steering Committee under Article I(a)(ii), I(a)(iii) and I(b). He shall also notify them of the date on which this Convention and any amendment thereto comes into force.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, duly empowered, have signed this Convention.

DONE in Paris, this ..... day of ..... Nineteen Hundred and Fifty Nine, in the English and French languages, both texts being equally authentic, in a single copy which shall remain deposited with the Secretary-General of the Organisation for European Economic Co-operation by whom certified copies will be communicated to all Signatories.

ORGANISATION FOR EUROPEAN
ECONOMIC CO-OPERATION

RESTRICTED

Paris, 30th. June, 1959

C(59)154 - Annex II

Scale 1

Or.Engl.

COUNCIL

REPORT TO THE COUNCIL OF THE STEERING COMMITTEE FOR NUCLEAR ENERGY ON THIRD PARTY LIABILITY IN THE FIELD OF NUCLEAR ENERGY

ANNEX II

DRAFT EXPOSE DES MOTIFS

DRAFT EXPOSE DES MOTIFS

1. The production and use of atomic energy involves hazards unlike those with which the world has long been familiar. Knowledge of possible accidents and their consequences is limited by the remarkable safety record whi has hitherto governed atomic energy activities. Despite thi excellent safety record, it is only reasonable to expect t as the new source of energy becomes more widely used accid will happen more frequently. Most experts incline to the v that the probability of a catastrophic nuclear incident is extremely low, but however slight the probability, the pos lity remains, and enormous losses could fall upon both the public exposed to injury and also upon the undertakings operating or associated with the operation of a nuclear ins lation.

2. A special régime for third party liability is indis pensable, Firstly, the potential risks, under existing leg rules, would expose operators of nuclear installations to limited liability. It would clearly not be possible to obt unlimited financial protection. It is, secondly, vitally i portant that all those who are associated with the operati of nuclear installations should be likewise protected. Thos who supply services, materials or equipment, in connection with the planning, construction, modification, maintenance, repair or operation of a nuclear installation, should not b exposed to unlimited liability which could result if existi legal principles and practices were to apply. The heavy financial burden which could result from unlimited liabilit could thus seriously endanger the development of the nuclea industry.

3. The elaboration of a special régime for third party liability should as far as possible provide a unif system for all Western European countries. The effects and repercussions of a nuclear incident will not stop at polit or geographical frontiers and it is highly desirable that persons on one side of a frontier should be no less well protected than persons on the other side.

4. Furthermore, the possible magnitude of a nuclear incident requires international collaboration between national insurance pools. Only an effective marshalling of th resources of the European insurance market by co-insurance and reinsurance will enable sufficient financial security t be made available to meet possible compensation claims. The establishment of uniform third party liability regulations throughout Europe is a vital factor if this collabor tion is to be achieved.

5. Such uniform regulations will, moreover, supplement the measures under elaboration in the related and important fiels of public health and safety and the prevention of accidents. All these measures together will provide the legal and social conditions necessary for the rapid and full development of the nuclear industry.

Lastly, an internationally agreed system may facilitate the solution to third party liability problems on a national basis.

6. The core of the third party liability problem is upon whom and in what proportions and conditions should fall the risk of legal liability to persons who may suffer damage caused by nuclear incidents. How much of this risk should be borne by the operator or those associated with the operation in a particular nuclear incident, how much by the individuals who have suffered the damage, and finally to what extent should States make available public funds for compensation. The solution to the problem involves devising means of harmonizing the separate sets of interests.

On the one hand, the public exposed must be ensured of adequate protection in the face of unknown dangers, both for legal and psychological reasons, and on the other hand, the growth of the nuclear industry should not be hindered by a burden of liability, which would be intolerable in the case of an incident assuming catastrophic proportions and which could not be covered by conventional insurance.

A balance of these interests involved is not easy to attain, especially in view of the multiplicity and variety of legal rules and traditions which may have to be modified or laid aside.

Scope of Application of the Convention.

7. The Convention provides an exceptional régime and its scope is limited to risks of an exceptional character for which common law rules and practice are not suitable. Whenever risks, even those associated with nuclear activities, can properly be dealt with through existing legal processes, they are left outside the scope of the Convention.

With one small exception which grants certain carriers a right of recourse against operators even though operators are not liable under the Convention to pay compensation to persons suffering damage (see paragraph 32 below), the Convention does not apply to nuclear incidents occurring in the territory of non-Contracting States or to damage suffered in such territory, unless a Contracting Party, by national legislation, otherwise provides (Article 2). Territory as used in the Convention is understood to include territorial seas.

8. The special régime of the Convention applies only to nuclear incidents occurring in or in connection with certain nuclear installations, or in the course of transpo of certain nuclear substances. States remain free, howeve to apply the provisions of the Convention to damage caused nuclear incidents not covered by the Convention.

A nuclear incident is defined as any occurrence or succession of occurrences having the same origin which cau damage, provided that the occurrence or succession of occu ces, or the damage, are due to radioactivity or a combinat of radioactivity with other hazardous properties of nuclea fuel or radioactive products or waste. Thus, for example, uncontrolled release of radiation extending over a certain period of time is considered to be a nuclear incident if it origin lies in one single phenomenon even though there has been an interruption in the emission of radioactivity.

9. The nuclear installations concerned are defined as reactors, factories for the manufacture of processing of nuclear substances, factories for the separation of isotope of nuclear fuel, factories for the reprocessing of irradia nuclear fuel and facilities for the storage of nuclear sub- stances. Nuclear fuel is defined as fissionable material, i uranium (including natural uranium) in all its forms, and plutonium in all its forms. Nuclear substances are defined nuclear fuel (other than natural uranium) and radioactive products or waste.

Some activities, as for example, mining, milling and the physical concentration of uranium ores, do not involve high levels of radioactivity and such hazard as there is co cerns persons immediately involved in those activities rath than the public at large. Hence, these activities do not fa within the scope of the exceptional régime of the Conventio Factories for the manufacture or processing of natural uranium, facilities for the storage of natural uranium, and the transport of natural uranium, since the level of radio- activity is low and there are no criticality risks, are als excluded.

Installations where small amounts of fissionable mate rials are to be found, such as research laboratories, are likewise outside the Convention. Particle accelerators too are excluded. Finally, where materials, such as uranium salt are used incidentally in the various industrial activities not related to the nuclear industry, such usage does not bring the plant concerned within the scope of the Conventio

10. Similarly, risks which arise in respect of radio-isotopes used for any industrial, commercial, agricultural, medical or scientific purpose are excluded from the scope of the Convention once the radio-isotopes are applied for these purposes. Such risks are not of an exceptional nature and, indeed, have been covered by the insurance industry in the ordinary course of business for some years. Despite the rapidly increasing use of radio-isotopes in many fields, which will require continual and careful observance of health protection precautions, there is little possibility of catastrophe. Hence no special third party liability problems are posed and the matter is left to existing legal régimes.

If, however, an incident occurs involving radio-isotopes which are in a nuclear installation and causing damage arising out of or resulting from the special properties of these materials as defined, the nuclear incident is covered by the Convention. Whilst there may be some borderline cases, this solution indicates in a general way the moment in time when radio-isotopes fall outside the Convention.

11. For different reasons, nuclear propulsion is excluded from the scope of the Convention by limiting its application to reactors other than those comprised in any means of transport. The feasibility of merchant ship propulsion has clearly been brought nearer by the success of the atomic-powered submarines, and it is encouranging to note that it is possible that the marine insurance market will be in a position to offer a satisfactory cover to commercial owners of nuclear propelled ships when they are ready to take the water, but commercial exploitation is still some way off.

The possibility of nuclear propelled aircraft is frequently discussed but commercial development is even less near. In view of the special problems which are posed in this field, it is not felt appropriate at present for nuclear propulsion to be covered by the Convention.

12. The same position is true with regard to nuclear fusion which may be on the threshold of a development which will render it of great economic importance in a few decades. But until the nature of the development is clearer it does not seem possible or necessary to take nuclear fusion into consideration.

13. So as to take account of furture developments as well as new activities which may involve risks of an exceptional kind, it is provided that the Steering Committee for Nuclear Energy, the governing body of O.E.E.C.'s European Nuclear Energy Agency, may extend the scope of the Convention to other nuclear installations (Article 1 (a) (ii)). The Steering Committee may furthermore include new materials in the definition of nuclear fuel (Article 1 (a) (iii).

It may also decide that a nuclear installation or nuclear or nuclear substances at present included may, by reason o small risks involved, cease to be covered by the Conventio (Article 1 (b)). Decisions of the Steering Committee in these matters are taken, in accordance with the Statute of by mutual agreement of the members of the Steering Committ representing Contracting Parties (Article I6).

Nature of Liability.

14. In Western Europe, with but few exceptions, there is long-established tradition of legislative action or dicial interpretation that a presumption of liability for hazards created arises when a person engages in a dangerou activity. Because of the special dangers involved in the a vities within the scope of the Convention and the difficul of establishing negligence in view of the new techniques o atomic energy, this presumption has been adopted for nucle liability. Absolute liability is therefore the rule; liabi results from the risk irrespective of fault (Article 3). T does not, however, mean that merely to engage in a nuclear activity or to transport nuclear substances is to be consi in itself as a presumption of fault; but where an incident occurs liability is absolute.

Person Liable - Installations.

I5. All liability is channelled onto one person, namely operator of the nuclear installation where the nucle incident occurs. Under the Convention, the operator - and the operator - is liable for nuclear incidents at installa and no other person is liable. The Convention deals, of co only with civil liability. The operator is defined as the person designated or recognised as the operator of a nucle installation by the competent public authority (Article 1 (vi)). Where there is a system of licensing or authorizat the operator will be the licensee or person duly authorize In all other cases he will be the person required by the c petent public authority, in accordance with the provisions the Convention, to have the necessary financial protection meet third party liability risks. Thus, during test opera when a reactor, for the initial trial period, is normally operated by the supplier before being handed over to the p son for whom the reactor was supplied, the person liable w be appropriately designated by the competent public author Where an action is brought, the court concerned will be bo to consider the operator as the person designated or recog as the operator by the competent public authority of the country where the operator's installation is situated.

Two primary factors have motivated in favour of this channelling of all liability onto the operator which involves a limitation of the rights of an injured person under the law of torts to sue the person causing the damage. 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, insurance would be needed to cover the liability of all those who might be associated with a nuclear installation as well as the liability of the operator, which would be very expensive and which it is not certain would be available.

I6. No other person is liable for compensation for damage caused by a nuclear incident at a nuclear installation. This rule is not intended to affect thr rules of public international law with regard to any possible responsibility of States towards each other for tortious acts.

I7. It is essential to the notion of channelling liability onto the operator that no actions may lie against any other person and in particular, for example, any person who has supplied any services, materials or equipment in connection with the planning, construction, modification, maintenance, repair or operation of a nuclear installation.

In the ordinary course of law, should an incident arise due to a defect in design or in material supplied a person suffering damage may well have a right of action against the supplier, for example on the basis of the so-called products liability.

I8. Furthermore, the operator might well have a recourse for indemnity for any compensation which he has to pay for damage to third parties. A corellary to the notion of channelling is therefore that possible recourse actions by the operator (or the insurer or other financial guarantor to whom the operator's right of recourse may have been transferred) against suppliers in respect of any sums which the operator has paid as compensation are barred.

I9. There are, however, two exceptions to this rule. Firstly where damage results from an act or omission done with the intention of causing damage, the operator's normal right of recourse against the individual who so acts or omits to act is specifically retained (Article 6 (d) (i)). The right of recourse is limited to a right against the individual physical person who acts or omits to act with intent to cause damage. There is no right of recourse against the employer of such a person and the principle of 'respondeat superior' is thus excluded. Imputation to the employer of acts or omissions of individuals done with intent to cause damage has been barred in order to avoid an incongruous result.

Under the Convention, operators of nuclear installations c never be held to any civil liability beyond the maximum la down pursuant to Article 7 even if the damage was caused b them with intent to cause damage. For this maximum liabilit insurance or other financial security will be available. If undertakings supplying operators were to be held liable for acts or omissions of their employees by way of actions in recourse for an unlimited amount, it would be impossibl for them to obtain the necessary insurance or other financ security. This would involve serious consequences for suppliers and impede the development of the nuclear indust

Secondly, rights of recourse may be exercised where are expressly provided for in contractual arrangements (Ar 6(d) (ii)). These rights of recourse may, of course, be exercised by the insurer or other financial guarantor by w of subrogation.

The provisions of Article 6 (d) relating to the oper right of recourse do not include his rights to recover fro joint tortfeasors in the case where more than one operator liable.

20. Where the damage gives rise to the liability of more than one operator, the liability of the different op tors involved is joint and several, and any of them may the fore be sued for the whole amount of the damage. But the liability of each is limited to the maximum liability established for him in respect of a nuclear incident in accor with Article 7 (Article 5 (b)). The ordinary operation of commun law as regards contributions between persons jointly and severally liable will regulate the recovery of sums pa as compensation to third parties as between the different operators involved.

21. In the event of a nuclear incident involving material which have been stolen, lost or abandoned, liability is imposed on the operator from whose nuclear installation the materials came immediately before such an event (article 3)

Person Liable - Transport.

22. When nuclear incidents occur in the course of trans of nuclear substances, the choice of the person liab must fall either upon the carrier or upon the operator of nuclear installation in connection with which the material are carried. The choice will not affect any contractual ar gements which may be made by the person liable and, in tur such arrangements will not, of course, have any effect upo third persons.

It would seem normal, in the case of transport, for the carrier to be the person liable and this is the present situation at common law. However, in the case of radioactive materials, very special considerations are involved. The carrier will generally not be in a position to verify the precautions in packing and containment taken by the person sending the materials. Moreover, if the carrier is to be liable he will have to obtain the necessary insurance coverage in respect of potentially high liability, and this would result in increased transport charges for the operator. Transport insurance ordinarily covers only the value of the goods transported, i.e. their loss or destruction, and does not extent to damage which such goods may cause to third persons.

23. If liability is to be imposed on the operator, the operator in question must be defined : is it to be the operator who sends nuclear substances or who receives them ? In principle, liability is imposed on the operator sending the materials since he will be responsible for the packing and containment and for ensuring that these comply with the health and safety regulations laid down for transport (Article 4 (a)).

24. The liability of the sending operator ends when the materials have been taken in charge by another operator of a nuclear installation situated in the territory of a Contracting Party (Article 4 (a) (i)). Thus, from the point of view of the person suffering damage, the burden of proof will be on the sending operator to show that some other operator has taken charge of the nuclear substances. The precise moment of the taking over will of course be determined by the competent tribunal in the event of actions. If, during the transport, the materials cross the territory of a non-Contracting State the operator will not be liable under the Convention (Article 2) except for damage suffered in the territory of a Contracting Party. The operator taking the substances in charge then becomes liable (Article 4 (b)).

25. If, however, the materials are consigned to a destination in a non-Contracting State, different rules apply, for the Convention clearly cannot impose liability upon persons not subject to the jurisdiction of the Contracting Parties. The liability of the sending operator comes to an end when the materials have been unloaded from the means of international carriage in the territory of a non-Contracting State (Article 4 (a) (ii)). As in the case of crossing the territory of a non-Contracting State in the course of transport from one nuclear installation to another nuclear installation within the territory of a Contracting Party, the operator will only be liable for damage suffered in the territory of a Contracting Party.

26. In the converse situation, where materials are being carried from a non-Contracting State to a Contracting Party, i.e. where there is no sender in the territory of th Contracting Parties, another rule applies : it is vital for victims that there should always be somebody liable within the territory of the Contracting Parties. Liability in this case is imposed upon the operator for whom the materials ar destined and with whose approval they have been sent (Artic 4 (c)).

27. Here again, it is necessary to define exactly the poi when the liability of the operator in the territory of a Contracting Party for whom the materials are destined and with whose approval they have been sent, begins. This opera tor's liability will begin when the materials have been loa on board the means of international carriage in the territo of the non-Contracting State from which they are sent. In t case also the general principle of Article 2 applies and th operator will not be liable for nuclear incidents occurring or damage suffered in the territory of non-Contracting Stat

28. In order to facilitate the transport of radioactive materials, especially in the event of transit through number of countries, it is provided that in respect of each carriage the operator liable in accordance with the Conventi must provide the carrier with a certificate issued by or on behalf of the insurer or other person providing the financi security required pursuant to Article IO. This certificate must contain the name and address of the operator liable an the details of the financial security. This information may not be subsequently contested by the person by whom or on whose behalf the certificate was issued. The certificate mu also include an indication of the nuclear substances involv and the carriage in respect of which the security applies, a a statement by the competent public authority that the pers named is an operator within the meaning of the Convention (Article 4 (e)).

The possession of such a certificate by a carrier doe however, imply any right to enter the territory of another Contracting Party; each Contracting Party remains free to authorize or forbid the carriage of any nuclear substances destined for, or in transit through, its territory.

29. Where, and this may well be a normal case, the carria involves materials sent by a number of different oper tors, as in the case of one nuclear incident involving more than one nuclear installation, the provisions of Article 5 apply (see paragraph 20 above).

All these rules relating to transport apply to all th different means of transport.

30. It has been thought advisable not to interfere with existing international agreements in the field of transport in force or opened for signature at the date of the Convention, especially since countries outside Europe are parties to them. To avoid the possibility of conflicting provisions, it is laid down that the Convention does not affect such agreements (Article 6 (b) (ii)). Similarly, it has to be remembered that some countries, although not parties to the international agreements, nonetheless apply equivalent provisions in national legislation. Such provisions also remain unaffected by the Convention (Article 6 (b) (ii)). Furthermore, the Convention does not bar actions against carriers not ordinarily resident or having their place of business in the territory of a Contracting Party or a Member or Associate country of the O.E.E.C.

31. Hence, a person suffering damage in the territory of a Contracting Party caused by a nuclear incident occurring in the course of transport, may have two rights of action : one against the operator liable under the Convention and another against the carrier.

32. A carrier liable under international agreements in the fields of transport, or equivalent provisions of national legislation, providing he is ordinarily resident or has his principal place of business in the territory of a Contracting Party or Member or Associate country of the O.E.E.C., has a right of recourse regardless of where the nuclear incident takes place. If the nuclear incident takes place or damage is suffered in the territory of non-Contracting States, the right of recourse may be exercised against the operator who, but for the general rule of Article 2, would have been liable; in other cases the right of recourse will be exercisable against the operator liable under operator in circumstances where he is not liable to third persons, i.e. in non-Contracting States, is the only derogation from the general principle of Article 2.

Actions.

33. Although actions for compensation under the Convention, whether arising out of nuclear incidents occurring in connection with installations or in the course of transport, can in principle only be brought against the operator or carrier, the right to bring actions against the insurer or other person providing the financial security, either as an alternative to the operator or in addition to him, is maintained where the national law of the place where the incident occurs grants a right of direct action in such a case (Article 6 (a)).

Damage giving Right to Compensation.

34. The Convention contains no detailed provisions determi the kind of damage or injury which will be compensated but it is provided merely that damage must be to the person property and related causally to a nuclear incident. What sh be considered as damage to person or property and the extent which compensation will be recoverable, for example, for pur moral damages or by dependants and others who suffer a loss right to support, in view of the very wide divergence of leg principles and jurisprudence in the law of torts in European countries, is left to be decided by the competent court in accordance with the national law applicable.

35. There is, however, no right of compensation under the Convention for damage to on-site property which is hel the operator or in his custody or under his control or by hi employees in the course of their employment in connection wi his installation (Article 3). Where property belongs to the operator hilself, no action for compensation would lie in an event since a person cannot sue himself.

Normally, damage to property in regard to which a pers has a contractual relationship is not covered by third party insurance. It sems likely that an exception may be made whe the property is at the site of a nuclear installation but is not held by the operator in connection with his installation

Where a right to compensation for damage exists by virtue of contractual arrangements, such right remains unaffected by the Convention.

Industrial Accidents and Occupational Diseases.

36. Any person who suffers damage caused by a nuclear inci dent, whether he is a third party inside or outside th installation or an employee of the operator of the installati in question is covered by Article 3. In most countries, employees who suffer damage may also be entitled in respect such damage to compensation under national health insurance, social security, workmen's compensation, or occupational disease compensation systems. In principle it is felt that benefits under such systems should be retained for employees whether of the installation in question or employed in other establishments, but it is left to national legislation to decide this as well as whether employees should also be entitled to compensation under the Convention. National legi lation will also decide whether the bodies responsible for such systems can turn to the operator to recover for payment made, it being understood that in any event the operator cannot be obliged to pay more than the maximum liability lai down (Article 6 (c)).

Limitation of Liability in Amount.

37. In the absence of a limitation of liability the risks could in the worst possible circumstances involve financial liabilities greater than any hitherto encountered. Even with a limitation, it will not always be easy for operators to find the necessary financial security to meet the risks.

The maximum liability in respect of any single nuclear incident whether occurring at a nuclear installation or in the course of carriage of nuclear substances has been fixed at I5 million E.M.A. u/a, unless national legislation provides for a greater or lesser amount, but in no case can maximum liability be fixed at less than 5 million such units. Since the units of account of the European Monetary Agreement of 5th. August, I955, may be altered by the Parties to that Agreement, it is provided that the units of account referred to should be as valued at the date of the Convention (Article 7 (a) and (b)).

If no special rule was envisaged, the maximum liability for nuclear incidents occurring in the course of transport might involve an operator in liability for varying amounts depending on the countries crossed in the course of such transport. To avoid this it is provided that the maximum liability in the case of transport incidents will be determined by the legislation of the operator liable (Article 7 (b)).

38. The possibility of removing the limit in the case of fault on the part of the operator or his employees was considered, but it was feared that in the absence of experience in operating nuclear installations, the notion of fault or gross negligence would be very difficult to define and would tend to be given a wide interpretation. Moreover, unlimited liability would easily lead to the ruin of the operator without affording any substantial contribution to compensate for the damage caused.

39. The amount fixed for the maximum liability in accordance with Article 7 does not include interest and costs awarded by a court in actions for compensation. Such interest and costs are payable by the operator in addition to any sum for which he is liable under Article 7 (Article 7 (c)).

Limitation of Liability in Time.

40. Bodily injury caused by radioactive contamination may become manifest for some time after the exposure to r tion has actually occurred. The legal period during which t an action may be brought is therefore a matter of great imp tance. Operators and their financial guarantors will natura 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 other hand, it is unreasonable for victims whose damage mani itself late to find no provision has been made for compensa to them.

A further complication is the difficulty of proof inv in establishing or denying that delayed damage was, in fact caused by the nuclear incident. A compromise has necessaril been arrived at between the interests of those suffering da ge and the interests of operators.

A period of ten years running from the date of the nu incident is provided after which a right to compensation is extinguished if no action has been brought before the court Where nuclear fuel or substances have been stolen, lost or abandoned - e.g. in the case of the jettisoning of a cargo after a transport accident - it is provided that the period for bringing actions is ten years from the date of the thef loss or abandonment (article 8 (a)).

States may, however, establish a shorter period of no less than two years running from the time when the damage a the operator liable have become known to the victim or ough reasonably to have become known, provided that the ten-year period is not exceeded (Article 8 (a)). This shorter peri may constitute a conventional period of prescription which be suspended or interrupted even, where this is recognised, by a mere extra-judiciary demand, provided always that such suspension or interruption does not have the effect of pro- longing the period beyond ten years from the date of the nu incident. On the other hand, the shorter period may be an absolute period after which no right to compensation exists

Nonethless, proceedings may be brought after the ten- period in two exceptional cases : a State may provide that rights to compensation may continue to exist after the expi of the ten-year period if it undertakes to cover the liabil of the operator over and above the ten-year period (Articl 8 (b)). Secondly, a person who suffers an aggravation of t damage for which he has already brought an action for compe sation within the time limit laid down, may bring supplement proceedings after the expiry of the time limit provided tha no final judgment has yet been entered by the competent cou (Article 8 (c)).

Exonerations.

41. The absolute liability of the operator is not subject to the classic exonerations for tortious acts, force majeure, Acts of God, or intervening acts of third persons, whether or not such acts were reasonably foreseeable and avoidable. In so far as any precautions can be taken, those in charge of a nuclear installation are in a position to take them, whereas potential victims have no way of protecting themselves.

The only exonerations lie in the case of damage caused by a nuclear incident directly due to certain disturbances of an international character such as acts of armed conflict and invasion, of a political nature such as civil war and insurrection or grave natural disasters of an exceptional character, which are catastrophic and completely unforeseeable , on the grounds that all such matters are the responsibility of the nation as a whole. No other exonerations are permitted. It is provided, however, that a State may, by national law, even further restrict the exonerations (Article 9).

Where the incident or damage is caused wholly or partly by the person suffering damage, it will be for the competent court, in accordance with national law, to decide the effect of such negligence upon the claim for compensation.

Security for Liability.

42. To meet liability towards victims, it is provided that the operator shall be required to have and maintain financial security up to the maximum amount established pursuant to Article 7 of the Convention (Article I0 (a)). Financial security may be in the form of conventional financial guarantees, ordinary liquid assets, though more probably, insurance coverage. A combination of insurance, other financial security and State guarantee may be accepted. An operator may change the insurance or other financial security providing that the maximum amount is maintained.

Although the operator will thus be required to have financial security available for each nuclear incident, in practice, insurance coverage may be granted per installation or for a certain period of time rather than in respect of a single incident. There is nothing in the Convention which prevents this, provided that the maximum amount available is not reduced or exhausted as a result of a first incident without appropriate measures being taken to ensure that financial security up to the maximum amount is available for subsequent incidents.

It is for the competent public authority to determine type and terms of the insurance or other financial security which the operator will be required to hold. The type and t envisaged do not imply the establishment of a supervisory authority in the field of insurance in those countries where control by such an authority over insurance activities does at present exist, but only the control necessary to ensure pliance with the Convention. Thus the competent public auth rity must ensure that insurance policies are satisfactory i that they do not contain clauses which might render them in fective, e.g. that the insurer or other financial guarantor cannot put up any defences, such as non-payment or premiums, against persons seeking compensation.

Whatever conditions are laid down by the competent pub authority, something untoward could happen, such as the ban ruptcy of the financial guarantor, or where there is insura per installation or for a fixed period and after a first in dent it is impossible to reinstate the financial security u to the maximum liability of the operator. It was recognised that these circumstances could not set aside the obligation the operator under Article IO or that of the State which is required to ensure that the operator always holds financial security up to his maximum liability. The Contracting Parti may therefore be led to intervene in such a situation to av their international responsabilities from being involved.

The competent public authority has also to decide whe where the operator operates a number of reactors or other n installations within the meaning of the Convention at the s site, it is necessary for him to have and maintain insuranc other financial security for each of the nuclear installati or for the site as a whole.

The guiding principle is that financial security must available in the amount provided for pursuant to Article 7 each nuclear incident, whatever system is adopted by the co tent public authority in regard to licensing and insurance nuclear installations.

Operators of all the nuclear installations defined in Convention are required to hold the financial protection whether the installations are small research reactors of ful fledged nuclear power stations. This may seem to weight hea for example, on a university or research institute. But the premiums for different types of nuclear installations, by taking account of factors such as power, use and location, mean costs to the operator which vary considerably accordin the type of installation. This being so, the fixing of a un amount for the operator's liability should not, in principl involve a heavier burden for educational or research insti than if the security required for them were to be reduced.

43. To ensure as far as possible that there will never be a period in which less than the full amount fixed is available, it has been necessary to provide that the financial security can only be suspended or cancelled, i.e. brought to an end before the expiry of the period provided for in the policy, after a period of at least two months notice has been given to the competent public authority. The competent public authority may of course fix a longer period of notice. Where the financial security is provided in respect of the operator's liability for nuclear incidents occurring in the course of transport, the security is provided for the duration of the liability of the operator in respect of any carriage (Article IO (b)), and, in particular, that it cannot be suspended or cancelled before a transport has been completed.

44. All sums provided as financial security can only be drawn upon to pay compensation for damage caused by a nuclear incident; they need not be segregated but cannot be used to meet any other claims (Article IO (c)).

Nature, Form and Extent of Compensation.

45. Claims for compensation following a nuclear incident may differ greatly in nature, amounts and time, and measures may be necessary to ensure an equitable distribution of the amount of compensation available if this amount is or may be exceeded. It will be for the competent court, in accordance with national law, to decide the nature, form and extent of the compensation, within the limits of the Convention, as well as equitable distribution (Article II). Thus the granting of annuities and their amounts and, as has already been noted, the effect of contributory negligence on the part of a person suffering damage on his claim to compensation, will be decided by national law.

It is for each State to decide whether measures for equitable distrubiton should be taken in advance or at the time when actions are brought. Measures may involve providing a limit per person suffering damage, or limits for damage to persons and damage to property.

Transfer of Compensation.

46. If the system envisaged under the Convention - in particular the recognition of a single competent forum to deal with all actions arising out of the same nuclear incident and the enforceability of its judgments in all Contracting Parties - is to be effective, it is necessary to ensure that there are no impediments, for example, by way of exchange control or other financial regulations. Under the O.E.E.C. Code of Liberalisation, insurance premiums in respect of nuclear risks are only transferable if the risks cannot be covered in the country where they exist.

Reinsurance premiums as well as compensation, costs and interest, are freely transferable. Financial guarantees other than insurance which may be provided to comply with Article IO of the Convention are not covered. In order, therefore, to ensure a comprehensive liberalisation and in addition to facilitate the accession to the Convention of countries which are not parties to the O.E.E.C. Code of Liberalisation, it is laid down that insurance and reinsurance premiums, sums which have to be paid out as insurance or reinsurance, or other financial security, as well as sums due as compensation and interest and costs shall be freely transferable between monetary areas of the Contracting Parties (Article I2). This freedom to transfer in regard to insurance is not intended, however, to affect national regulations governing insurance activities such as, for example, the establishment of technical reserves.

Jurisdiction and the Enforcement of Judgments.

47. There are many factors motivating in favour of a single competent forum to deal with all actions against the operator - including direct actions against insurers or other guarantors and actions to establish rights to claim compensation - arising out of the same nuclear incident. Most important is the need for a single legal mechanism to ensure that the limitation on liability is not exceeded. Moreover, if suits arising out of the same incident were to be tried and judgments rendered in the courts of several different countries, the problem of assuring equitable distribution of compensation might be insoluble.

The choice of the forum falls most obviously upon the competent court of the country in which the installation giving rise to the nuclear incident is situated (Article I3 (a)).

This single forum is intended to deal with all actions which might be brought against an operator, eighter directly by persons suffering damage (under Article 3) or in recourse by other persons who might be liable under transport provisions (Article 6 (c)). The forum for actions in recourse by an operator under Article 6 (d) or actions for contribution by an operator against other operators in the case of joint and several liability is not fixed in the Convention and will be decided by national law.

48. Nuclear incidents occurring in the course of transport entail special arrangements. The competent jurisdiction is that of the place where the nuclear substances were at the time of the incident (Article I3 (b)). If the place of an incident cannot be determined, for example, in the case of an incident due to continuous radioactive contamination in the course of transport, in order to secure uniformity of jurisdiction for

the same incident, the competent court is that of the place where the installation of the operator liable is situated. Where the nuclear incident occurs outside the territory of the Contracting Parties in the course of carriage by sea or air the same rule applies (Article I3 (c)). Whilst there might be some practical disadvantages for the victims in recourse to the jurisdiction of the operator as a result of the distance involved, it has not been possible to find another solution which would enable the victims to refer to their national courts and which would at the same time secure uniformity of jurisdiction.

49. The concept of a single forum carries with it the need to ensure that final judgments rendered in that forum can be enforceable in the other countries without re-examination of the merits. Hence such final judgments will be enforceable in any of the other Contracting Parties as soon as the formalities required have been complied with (Article I3 (d)).

Final judgments enforceable under Article I3 (d) do not include judgments rendred against persons other than the operator liable under Article 6 (b), judgments rendered in actions in recourse by the operator under Article 6 (d), actions in recourse against the operator under Article 6 (e), or actions for contribution between persons jointly and severally liable.

50. Where a Contracting Party is the operator of a nuclear installation under the Convention it is provided that such Party may not invoke any jurisdictional immunities which it might have where it is sued for compensation under the Convention (Article I3 (e)).

Law Applicable.

51. The competent court must apply the provisions of the Convention without any discrimination based upon nationality, domicile or residence (Article I4 (a)) and for all matters, both substantive and procedural, not governed by these provisions, their national law or legislation, including rules of private international law, which are not affected by the Convention except for the case of determining the maximum liability of the operator pursuant to Article 7. This amount is determined by the Contracting Party in whose territory the operator's installation is situated (Article 7 (b)). Such national law or legislation must also be accplied without any discrimination based upon nationality, domicile or residence (article I4 (c)).

Intervention of the State.

52. The establishment of a limited liability necessarily involves a possible reduction in compensation for damage suffered and in the event of a catastrope it may well be that the limited amount of compensation available is inadequate to meet all the claims. For social and psychological reasons it seems difficult to accept this consequence without recognising that the intevention of the State may be necessa

53. It is recognised that a State may take measures to provide additional compensation for damage caused by nucl incidents occurring in its territory (Article I5 (a)). Where such measures are taken, it is provided that this compensati shall be made available in respect of damage suffered within its territory without discrimination (Article I5 (b). But t does not include compensation deriving from national health insurance, social security, workmen's compensation or occupational disease compensation systems since the conditions und which foreigners benefit from such systems are in many cases laid down in special bilateral agreements, which it is not thought appropriate or necessary to alter.

54. The application of such measures to damage suffered by nationals of other Contracting Parties in the territory of another Contracting Party is left to be determined by agreement between the Contracting Parties concerned (Article I5 (

Final Clauses.

55. The final clauses of the Convention contain provisions covering disputes (Article I7), ratification (Article amendments (Article I9), accession (Article 20), withdrawal (Article 21), notification of the application of the Conventi to territories for whose international relations the Contract Party is responsible (Article 22), and notice to the Signato of receipt of the various instruments deposited pursuant to final clauses (Article 23). In the case of disputes as to t interpretation of the Convention, it is provided that these shall be examined by the Steering Committee and in the absen of friendly settlement shall, upon the request of a Contracti Party concerned, be submitted to the Security Control Tribu set up by the Security Control Convention of 20th. December, I957. The Tribunal will act in accordance with the rules governing its organisation and functioning, which are set ou in the Protocol annexed to the Security Control Convention.

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ASSOCIATION NEERLANDAISE DE DROIT MARITIME.

Responsabilité des Propriétaires de Navires à propulsion atomique.

Rapport.

Observations générales.-

I.- Depuis l'époque à laquelle l'Association néerlandaise soumit au Comité Maritime International une Note introductive et un Questionnaire concernant le problème de la responsabilité des propriétaires de navires actionnés par l'énergie nucléaire, l'évolution à laquelle cette note fit allusion, s'est manifestée plus fortement. Non seulement qu'aux Etats-Unis le "Savannah", premier navire marchand à propulsion nucléaire vient d'être lancé, mais dans divers pays européens comme la Grande Bretagne, la France, la Suède, la Norvège et les Pays-Bas, les milieux intéressés ont commencé des études plus ou moins approfondies des possibilités techniques et économiques de l'exploitation de pareils navires. On verra, d'ici quelques années, un petit nombre de navires nucléaires expérimentaux faire escale dans certains ports.

2.- Ce phénomène rendra-t-il nécessaire ou désirable une nouvelle législation tant nationale qu'internationale portant sur la responsabilité des propriétaires des dits navires?

Un navire à propulsion nucléaire est un navire dans lequel aura été construit un réacteur. Ce réacteur "régénerera" de l'énergie au moyen d'une fission nucléaire de certains combustibles, tels que l'uranium enrichi ou autres. Cela implique que ces combustibles (les matières fissiles) se trouveront dans l'intérieur du réacteur. Au fur et à mesure ces combustibles se transformeront en résidus et déchêts radioactifs qui, eux aussi, seront gardés dans l'intérieur du réacteur.

Les combustibles ainsi que les résidus et déchêts ci-dessus mentionnés sont radioactifs et, en conséquence, dangereux. Ils peuvent, lorsqu'ils échappent au réacteur, malgré toutes les précautions envisagées et déjà appliquées- quelque peu vraisemblable puisse être pareil événement - comme, par exemple lors de la construction des sous-marins à propulsion nucléaire et du "Savannah", contaminer les objets et les êtres vivants (animaux et êtres humains) sur des distances plus ou moins grandes. Cette contamination peut être répandue par le courant de l'eau, par le vent et par l'attouchement; elle peut rendre certains objets absolument inutilisables; pour l'homme et pour l'animal elle peut avoir des conséquences mortelles.

Ensuite, les frais à encourir pour décontaminer terrain exposé à une contamination radioactive, seront considérables. Finalement, lors qu'une contamination entrainerait la fermeture d'un port et de ses installations pendant une période plus ou moins longue, les pertes financières pourraient atteindre des sommes astronomiques.

En ce qui concerne les navires actionnés par l'énergie nucléaire, un échappement de matières radioactives pourrait théoriquement être dû à des causes différentes.

D'abord, il y a la possibilité d'une faute de construction du réacteur ou une erreur commise dans le manoeuvrement de celui-ci. Ensuite, il faudra tenir compte des incidents spécifiquement maritimes, comme un abordage à la suite duquel les parois de sécurité entourant le réacteur propre et le réacteur lui-même seraient percés, permettant aux matières radioactives de s'échapper.

Toutefois, le manque d'expérience pratique dans le domaine dont il s'agit, notamment en ce qui concerne l'efficacité des mesures de sécurité, ne permet guère de juger à quel point ces possibilités théoriques représentent des dangers réels en ce sens qu'à l'heure actuelle, il n'est guère prouvé que l'exploitation de navires à propulsion nucléaire pourrait, en pratique, donner lieu à des incidents si graves que l'adoption de nouvelles règles tant nationales qu'internationales représente une nécessité inéluctable.

Ce manque d'expérience et le fait que les savants sont fort divisés sur cette question, amènent l'Association néerlandaise à la conclusion qu'il serait prématuré de vouloir, d'ores et déjà, entamer la préparation d'un projet de convention internationale, aussi longtemps que l'adoption de pareille convention ne serait justifiée ni par l'expérience ni par les résultats des recherches scientifiques.

En effet, s'il devait s'avérer que la possibilité réelle de catastrophes causées par ces navires, ne serait pas plus grande par comparaison aux navires conventionnels il serait indésirable et inopportun de modifier le droit maritime actuellement en existence en ce qui concerne les dispositions réglant la responsabilité des propriétaires de navires ainsi que celles réglant la limitation de cette responsabilité.

Ceci est d'autant plus vrai puisque, d'après les prévisions généralement reconnues comme exactes, les navires à propulsion nucléaire n'atteindront pas un nombre dépassant celui de 10 à 15 d'ici 10 ans.

Dans ces conditions, l'Association néerlandaise exprime l'avis qu'une convention internationale réglant cette matière, ne paraît, à l'heure actuelle, ni utile ni désirable, sous réserve de revenir sur cette question, dès que l'expérience à gagner dans les années prochaines, le justifier

3.- Ce n'est donc que subsidiairement, c.à.d. pour le cas où le Comité Maritime International déciderait de procéder, d'ores et déjà, à la préparation d'un projet de convention internationale, l'association néerlandaise fait remarquer ce qui suit.

4.- Le projet de convention devrait se limiter à l'unification de règles portant sur la responsabilité civile des propriétaires de navires à propulsion nucléaire. Conformément à une sage tradition, il faudrait laisser à d'autres organisations internationales toutes questions de droit public et de droit administratif, telles que l'établissement des conditions de sécurité et autres auxquelles les navires atomiques devront répondre.

5.- Avant d'aborder l'examen de la question de savoir si la responsabilité des propriétaires de navires à propulsion nucléaire devrait être régie par le droit dit commun, c'est-à-dire par les conventions internationales de droit maritime déjà adoptées, telles que la convention sur l'abordage, la convention sur les connaissements et la convention sur la limitation de la responsabilité des propriétaires de navires de 1957, ainsi que par le droit national des différents pays, ou bien si de nouveaux principes et de nouvelles règles s'imposent, il convient de rappeler le projet de convention établi par l'Agence Européenne pour l'énergie nucléaire de l'O.E.C.E., convention qui règle la responsabilité civile des exploitants de réacteurs fixes et qui porte également sur la responsabilité pour dommages nucléaires survenus en cours de transport de matières radioactives.

Les principes généraux qui sont énoncés par ce projet et qui dérogent, dans une mesure considérable au droit commun, sont les suivants :

A. Canalisation de responsabilité pour tous dommages dits nucléaires vers l'exploitant de l'installation nucléaire dans lequel l'incident nucléaire s'est produit ou dont les matières radioactives émanent. Cette canalisation s'applique même lorsque l'incident nucléaire survient au cours d'un transport de matières radioactives expédiées par ou destinées à un exploitant et même lorsque l'incident nucléaire aura été la conséquence d'une faute de construction dont normalement le fournisseur de l'installation nucléaire ou des ses parts ou, le cas échéant, le transporteur (l'armateur) devrait répondre. Le projet énonce donc le principe de la responsabilité unique de l'exploitant de l'installation. Il dit ensuite que, lorsqu'en cas de dommages nucléaires survenus au cours de transport, un tiers quelconque sera condamné du chef de ces dommages en vertu soit d'une convention internationale soit de la législation d'un Etat non-contractant, ce tiers aura un droit de recours contre l'exploitant qui, conformément à la convention, est l'exploitant responsable.

B. Le projet de convention pose le principe de la responsabilité objective ou causale de l'exploitant de l'installation nucléaire. Sa responsabilité est acquise sans preuve de sa faute ou de celle de ses préposés, sans qu'il puisse plaider la faute d'un tiers et sans qu'il puisse exciper d'un cas de force majeure, à l'exception de ceux de guerre, d'hostilités etc. et de cataclysmes naturels de caractère exceptionnel.

C. Finalement, le projet de l'O.E.C.E. limite la responsabilité de l'exploitant à une somme de US.$.15.000.000.- par accident, tout en permettant aux législations nationales des Etats contractants de réduire ce maximum à US.$.5.000.000.- par accident.

6.- L'objet des principes généraux du projet de l'O.E.C.E. est double :
d'une part, ils visent la protection aussi efficace que possible des victimes d'un incident nucléaire- protection aux fins de laquelle le projet impose à l'exploitant le devoir de se procurer une couverture d'assurance ou autre garantie financière à concurrence de la limite de sa responsabilité et donne aux victimes une action directe contre l'assureur ou le garant- ;
d'autre part, le projet établit une limite de la responsabilité de l'exploitant, et cela en vue de l'éventualité de conséquences catastrophiques d'un accident nucléaire et la possiblité pour l'exploitant de s'assurer contre ces conséquences.

7.- Cependant, le projet de convention de l'O.E.C.E. ne constitue pas nécessairement un précédent pour une réforme éventuelle du droit maritime. Contrairement à la règle séculaire du droit maritime qui permet aux propriétaires de navires de mer de limiter leur responsabilité, le droit civil de la presque totalité des Etats, ne permet au propriétaire ou à l'exploitant d'une installation industrielle, sous aucune condition de limiter sa responsabilité quasi-délictueuse pour mort ou lésions corporelles et pour pertes ou dommages à des biens d'autrui. La limitation de responsabilité de l'exploitant de l'installation nucléaire fixe, limitation telle que prévue par le projet de l'O.E.C.E. constitue donc une véritable dérogation au droit commun. Cette dérogation explique, en partie, l'autre dérogation prévue par ce projet, à savoir l'adoption de la responsabilité objective et unique du dit exploitant.

Aussi échoit-il de faire remarquer, d'une part, que la construction de navires à propulsion nucléaire nécessitera, pour le moment, l'investissement de capitaux beaucoup plus grands que celle de navires dits conventionnels et, d'autre part, que, de l'avis unanime, l'augmentation de l'utilisation pacifique de l'énergie nucléaire tend vers un plus grand bien-être et peut-être vers un plus grand bonheur de l'humanité, alors que dans la plupart des cas, la construction de réacteurs fixes a été ou sera financé moyennant d'importa-nts subsides gouvernementaux.

Même dans l'hypothèse où la mise en exploitation de ces navires créerait un véritable danger de catastrophes, l'Association néerlandaise se demande s'il serait nécessaire ou désirable de reprendre en droit maritime le principe de la responsabilité objective et unique, principe établi par le projet de Convention de la O.E.E.C.

8.- D'autre part, la limitation de cette responsabilité pose des problèmes encore plus difficiles à résoudre.

D'après le système de la Convention internationale de Bruxelles de I957, la limite de la responsabilité est de frs. .- or 3.000.- (c.à.d. approx. £.74. -. -.) par tonneau de jauge du navire "responsable". La question se pose si ce système devra être maintenu, lorsqu'il s'agit d'accidents nucléaires, en ce sens que l'étendue et la gravité de la contamination radioactive résultant d'un tel incident, n'auront, probablement, aucun rapport avec le tonnage du navire en question.

Dans ces conditions, on pourrait envisager que le désir sera exprimé d'augmenter le montant de la limite adoptée par la Convention internationale de I957.

Aurait-il lieu de reprendre le système de limitation du projet de convention de l'O.E.E.C., à savoir une même limite pour tous les navires en question, abstraction faite de leur tonnage? De l'avis de l'Association néerlandaise la réponse à cette question doit être négative, compte tenu de ce qu'il paraît non seulement inutile mais même fort dangereux de vouloir déroger aux principes séculaires du droit maritime. Il semble que tout au plus une variation de la disposition de la Convention Internationale I957 pourrait être envisagée, comme par exemple l'adoption d'un minimum de tonneaux de jauge d'un navire atomique, pour déterminer la limite de la responsabilité de son propriétaire. (v. Article 3, par. (5) de la Convention de I957) tout en retenant le montant de frs. - or 3.000.- par tonneau.

L'incertitude actuelle quant à la possibilité d'un incident nucléaire et l'étendue d'une contamination lors d'un tel incident rend fort difficile de proposer une solution définitive pour ce problème.

Aussi faut-il tenir compte du fait que, tout au moins pendant une période encore assez longue, la construction de navires atomiques sera limitée, pour des raisons d'ordre économique, à des navires qui dépassent un certain tonnage.

Or, la limite de responsabilité établie par la Convention de I957 pour un navire de 25.000 t. est déjà d'environ 25.000 x £.74.- = ± £.I.850.000.- ou ± U.S.$.5.I00.000.-, soit supérieure à la limite minimum prévue par le projet de convention de l'O.E.C.E.

9.-Généralement, les dommages résultant d'un accident quelconque, comme par exemple un abordage; un incendie ou une explosion, se manifestent presqu'immédiatement. Il n'en est pas de même, lorsqu'il s'agit des conséquences d'une contamination radioactive, Ces conséquences ne sont presque jamais visibles; il faudra les constater au moyen d'instruments spéciaux, comme le compteur "Geiger". Ensuite, l'expérience a démontré que, parfois, des êtres humains avaient été contaminés à leur insu et que les conséquences de cette contamination n'étaient devenues apparentes qu'après une période plus ou moins longue. De tout ceci il résulte que, lorsqu'il s'agit de dommages ou de lésions corporelles occasionés par un incident nucléaire, l'on ne saurait maintenir

les délais de prescription courts pour les actions civiles en dommages-intérêts, tels que la prescription de deux ans prévue dans la Convention internationale sur l'abordage.

Par contre, compte tenu des exigences de l'assurance ou garantie financière que le propriétaire d'un navire atomique devra se procurer, l'on ne saurait non plus envisager la prescription de 30 ans, qui est la prescription "normale" dans un nombre de pays, comme par exemple les Pays-Bas.

Réponses au Questionnaire.

Comme il a été exposé ci-dessus, la réponse de l'Association néerlandaise à la Question 8 du Questionnaire est, tout au moins pour le moment, négative.

Sous réserve de ce point de vue l'Association Néerlandaise donne ces réponses aux autres question :

1.- Y a-t-il dans votre pays des mesures législatives déjà en vigueur ou proposée à l'endroit des navires actionnés par l'énergie nucléaire, est s'il en est ainsi, lesquelles?

Réponse.
Aux Pays-Bas, aucune mesure législative n'a été jusqu'ici, promulguée ni proposée.

2.- Etes-vous partisan d'une responsabilité objective de l'armateur de navires à propulsion atomique, dont seraient exemptés seulement les cas démontrés de force majeure, de guerre ou de faute de la partie lésée, ou êtes-vous d'avis que la responsabilité ne doit poser sur l'armateur que moyennant preuve de sa faute ou celle de ses préposés, ou bien estimez-vous que l'armateur devra toujours être responsable des dommages causés - sauf dans les trois cas d'exonération précités - à moins qu'il ne prouve l'absence de faute de sa part ou de ses préposés?

Réponse. : Non.

3.- Quant aux dommages impliqués, faudrait-il oui ou non hausser la limite de responsabilité prévue par la Convention de Bruxelles d'octobre 1957, et dans l'affirmative, jusqu'à concurrence de quelle somme?

Réponse : Voir le par.8 ci-dessus.

4.- Faut-il prévoir des dispositions spéciales pour les cas de dommages catastrophiques, par exemple dans ce sens que si le total du dommage devait dépasser une somme déterminée, l'Etat du pavillon et/ou l'Etat en territoire duquel s'est produit l'accident prendrait pour son compte l'excédent, en entier ou en partie?

Réponse :

Une garantie supplémentaire gouvernementale semble souhaitable.

5.- Les nouvelles mesures législatives doivent-elles prescrire les délais à respecter pour faire la déclaration du dommage souffert ou probable, ainsi que pour assigner les responsables, sous peine d'une fin de non-recevoir?

Réponse :

Il faudrait envisager un délai de prescription pas trop long qui commence à courir à partir de la date à laquelle la victime a pris connaissance ou aurait dû prendre connaissance du dommage ou de la lésion corporelle. D'autre part, il faudrait un délai maximum de, disons IO ans, à compter de la date de l'incident.

6.- Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard des passagers du navire et leurs parents, ainsi qu'à l'égard des animaux et marchandises à bord?

Réponse :

Il n'y a pas de raison pour déroger, en ce qui concerne les passagers, les animaux et les marchandises à bord d'un navire à propulsion nucléaire, aux règles existantes, étant entendu que ces passagers et les propriétaires des animaux et des marchandises ont volontairement assumé le risque.

7.- Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard du capitaine, des officiers et de l'équipage du havire?

Réponse :

Ce problème pourrait être renvoyé à la loi nationale applicable.

ASSOCIATION BELGE DE DROIT MARITIME

RESPONSABILITE DU PROPRIETAIRE D'UN NAVIRE A PROPULSION ATOMIQUE.

R A P P O R T

DOCUMENTS.

Si nous écartons les documents relatifs à la Responsabilité du Propriétaire d'un navire conventionnel transportant des Matières Radioactives, nous disposons du questionnaire de l'Association hollandaise et des réponses des Associations suédoise et argentine.

Il nous appartient, à présent, de répondre au questionnaire précité.

PRELIMINAIRES.

1°) Il faut remarquer qu'un élément nouveau est intervenu depuis l'établissement du questionnaires en ce sens qu'un avant-projet de Convention relatif à la Responsabilité des Exploitants des réacteurs nucléaires terrestres a été élaboré par l'O.E.C.E.

Il résulte de cette circonstance que nous devrons tenir compte des dispositions de cet avant-projet de Convention, d'autant plus que le Comité Maritime International a participé à l'élaboration de celui-ci.

2°) Etant donné que seule l'Association suédoise a répondu au questionnaire - l'Association argentine ayant estimé que le temps n'était pas venu d'y répondre - nous ne pouvons procéder à aucune comparaison et nous désirons nous réserver le droit de modifier ultérieurement nos réponses en tenant compte, le cas échéant, des observations qui seraient émises ultérieurement par d'autres Associations.

QUESTIONS.

Question 1 : Y a-t-il dans votre pays des mesures législatives déjà en vigueur ou proposés à l'endroit des navires actionnés par l'énergie nucléaire, et s'il en est ainsi, lesquelles?

Jusqu'à présent le Parlement belge n'a pas été saisi de la question de la responsabilité du propriétaire d'un navire à propulsion nucléaire.

Question 2 : Etes-vous partisan d'une responsabilité objective de l'armateur de navires à propulsion atomique, dont seraient exemptés seulement les cas démontrés de force majeure, de guerre ou de faute de la partie lésée, ou êtes-vous d'avis que la responsabilité ne doit peser sur l'armateur que moyennant preuve de sa faute ou celle de ses préposés, ou bien estimez-vous que l'armateur devra toujours être responsable des dommages causés - sauf dans les trois cas d'exonération précités - à moins qu'il ne prouve l'absence de faute de sa part ou de ses préposés?

En fait, cette question laisse le choix entre trois systèmes, à savoir :

(a) Responsabilité objective absolue sauf preuve de cas de force majeure, de guerre ou de faute de la partie lésée.

(b) Responsabilité en cas de faute personnelle ou de faute des préposés du propriétaire d'un navire atomique.

(c) Responsabilité du propriétaire sauf preuve de l'absence de faute dans son chef ou dans celui de ses préposés et sauf preuve d'un cas de force majeure, de guerre ou de faute de la partie lésée.

En réalité, il y a un quatrième système, celui du projet de l'O.E.C.E. contenu dans les articles que voici :

Article 2 : " (a) The operator of a nuclear installation shall be
" liable in conformity with the provisions of this
" Convention, for :
" (1) loss of life of/or personal injury to any
" person
" (11) loss of or damage to any property other than
" property which is held by the operator or in
" his custody or under his control and which is
" so held in connection with, and at the site
" of, such installation; and
" (111) infringements of any rights, and any other
" loss, damage or liability incurred by the
" claimant (hereinafter together referred to as
" "such damage") upon proof that such damage
" was caused by a nuclear incident involving
" nuclear fuel or radioactive products or waste

" in or originating from such installation which
" have not at the time of the nuclear incident
" been taken in charge by another operator.
"
" (k) The operator shall have a right of recourse only :
" (1) if such damage results from an act or omission
" done with intent to cause damage, against the
" person who so acts or omits to act, unless the
" national law applicable excludes such right of
" recourse; or
" (11) if so provided expressly by contract.

Article 5 : " Except as any contracting party may provide to the
" contrary, the operator shall not be liable for damage
" caused by a nuclear incident due to an act of armed
" conflict, invasion, civil war, insurrection or a grave
" natural disaster of an exceptional character. "

Ainsi l'exploitant aurait une responsabilité objective, atténuée uniquement par la possibilité d'exercer un recours contre celui qui a intentionnellement causé le dommage ou qui s'est engagé contractuellement à prendre le préjudice à sa charge; toutefois l'exploitant pourra, suivant ce système, dégager sa responsabilité en prouvant que l'incident nucléaire est la suite directe d'un conflit armé, d'une invasion, d'une guerre civile, d'une insurrection ou d'un grave désastre de la nature d'un caractère exceptionnel.

En fait, il ne s'agit pas seulement de choisir entre une responsabilité objective - atténuée ou non - et une responsabilité subjective, mais surtout de savoir si le droit commun maritime s'applique. Cette dernière question est dominée par une considération d'ordre politique qui est également à la base du régime spécial qui a été prévu en matière de responsabilité du propriétaire terrestre d'une centrale nucléaire: les peuples exigent une protection spéciale contre les accidents nucléaires, tout comme ils semblent vouloir accepter une responsabilité limitée des exploitants nucléaires alors que ce régime de faveur n'est pas accordé aux autres industriels a l'exception des armateurs. Il paraît évident qu'il faudr s'incliner devant cette exigence de l'opinion publique et abandonner l'application pure et simple du droit commun maritime en matière de responsabilité de l'armateur d'un navire à propulsion atomique.

En outre, aucun argument ne permet, semble-t-il, de réserver aux "exploitants maritimes" d'énergie atomique un régime plus favorable que celui de l'exploitant terrestre ou même différent de celui-ci. En effet, les réacteurs terrestres sont généralement situés dans des endroits où les risques de contamination sont réduits au minimum alors qu'un navire à propulsion atomique sera amené à suivre des routes maritimes très encombrées et à séjourner dans des ports où le mondre accident peut entrainer des pertes incalculables. C'est pourquoi il est suggéré d'appliquer aux exploitants maritimes d'énergie atomique un régime qui s'inspire de celui de la responsabilité d'exploitants terrestres.

Question 3 : Quant aux dommages impliqués, faudrait-il oui ou non hausser la limite de responsabilité prévue par la Convention de Bruxelles d'octobre 1957, et dans l'affirmative, jusqu'à concurrence de quelle somme ?

Le préambule du rapport du C.M.I. adressé à l'O.E.C.E. précise que (1b) la Convention relative à la Responsabilité Civile dans le domaine de l'énergie nucléaire ne devrait pas avoir d'effet sur l'application des conventions existantes et plus particulièrement des Conventions de Bruxelles de 1924 et 1957 sur la Limitation de la Responsabilité des Propriétaires de Navires de mer.

Quoique cette conception ait été adoptée dans un domaine différent de celui de la responsabilité du propriétaire d'un navire à propulsion atomique, il paraît indiqué de l'étendre également à ce dernier cas, les exigences de l'opinion publique étant les mêmes dans les deux hypothèses.

De cette façon rien ne sera changé en principe aux dispositions des conventions envisagées sauf en ce qui concerne le régime spécial qui est déjà proposé pour les accidents nucléaires terrestres.

Il y aura donc lieu d'appliquer aux accidents nucléaires la limite prévue par la Convention de l'O.E.C.E. Cette attitude rejoindrait celle de l'Association suédoise qui a fait valoir que, comme un réacteur maritime est plus dangereux qu'un réacteur terrestre, il ne peut pas être envisagé d'appliquer une limite inférieure à celle de l'O.E.C.E.

Question 4 : Faut-il prévoir des dispositions spéciales pour les cas de dommages catastrophiques, par exemple dans ce sens que si le total du dommage devait dépasser une somme spécifique, l'Etat du pavillon et/ou l'Etat en territoire duquel s'est produit l'accident prendrait pour son compte l'excédent, en entier ou en partie?

Il s'agit d'une question qui regarde avant tout les rapports entre les Etats. Or, ceux-ci ne sont pas représentés au C.M.I. Il convient donc de s'abstenir. En outre, le principe de la limitation étant admis, il n'y a pas de raison de prévoir des exceptions.

Question 5 : Les nouvelles mesures législatives doivent-elles prescrire des délais à respecter pour faire la déclaration du dommage souffert ou probable, ainsi que pour assigner les responsables, sous peine d'une fin de non-recevoir?

Il paraît certain que les délais prévus par le droit commun maritime ne pourront pas être appliqués, les dommages nucléaires pouvant se déclarer, suivant des avis autorisés, très tardivement. Ici aussi il semble indiqué d'adopter le même délai que celui

qui est préconisé par l'O.E.C.E. à l'article 4 de son projet, à savoir 10 ans.

Par ailleurs, la prolongation de ce délai ne semble pas présenter d'inconvénient majeur pour l'armateur puisque c'est à la victime qu'incombe la preuve d'une relation de cause à effet entre l'incident nucléaire et les dommages subis.

Question 6 : Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard des passagers du navire et leurs parents, ainsi qu'à l'égard des animaux et marchandises à bord?

En fait il s'agit de savoir si la liberté contractuelle en matière de contrats de transport doit être maintenue. L'Association belge de droit maritime estime qu'il n'y a pas de motif spécial pour y déroger.

Question 7 : Les nouvelles mesures législatives doivent-elles régler la responsabilité de l'armateur à l'égard du capitaine, des officiers et de l'équipage du navire?

L'Association belge de droit maritime partage entièrement le point de vue suédois qui consiste à soumettre cette question à la loi du pavillon et qui est conforme au droit commun maritime.

Question 8 : Une Convention Internationale réglant cette matière vous paraît-elle utile et souhaitable? Dans l'affirmative comment devrait-elle se rapporter avec la Convention de Bruxelles d'octobre 1957 sur la responsabilité de l'armateur?

Il est certain qu'il est souhaitable de promouvoir l'adoption d'une Convention Internationale réglant la matière, le problème étant international.

CONCLUSIONS.

Nous sommes partisans des principes que voici :

1°) Une Convention éventuelle régissant la responsabilité du propriétaire d'un navire à propulsion atomique ne devrait s'occuper que des suites d'un accident nucléaire qui s'est produit dans les installations propulsives du navire incriminé; elle ne devrait pas avoir d'effet sur l'application des autres conventions internationales.

2°) Cette Convention éventuelle devrait suivre en principe le régime réservé aux exploitants d'un réacteur terrestre; ce n'est que dans la mesure où les règles prévues pour la détermination de la responsabilité de ces exploitants terrestres ne pourraient pas être appliquées aux exploitants maritimes que notre convention devrait innover.

Anvers, le 15 juin 1959.

At.42
8 -59

EUROPEAN ATOMIC
ENERGY COMMUNITY

Brussels, 29 April 1959.

E U R A T O M

C O N F I D E N T I A L

The Commission

Industry and Economy
Division

D R A F T C O N V E N T I O N

ON GOVERNMENTAL THIRD PARTY LIABILITY GUARANTEES IN THE FIELD OF NUCLEAR ENERGY.

The Contracting Parties of the present Convention,

CONSIDERING,

that they have undertaken to contribute to the raising of the standard of living in their territories by the creation of conditions necessary for the speedy establishment and growth of nuclear industries ;

that all necessary steps must be taken to provide compensation for the consequences of any loss of life, injury to health or damage to property arising from the peaceful use of nuclear energy;

that the afore-mentioned aims can only be attained if the State assists in providing protection against nuclear risks and that a joint effort on the part of the Contracting Parties is necessary to achieve this purpose,

have agreed as follows :

Article 1

In the event of a nuclear incident occurring within the territory of any Contracting Party, that Party shall by means of a governmental guarantee exonerate from any legal obligation to make compensation the operator of a nuclear installation who is liable under the O.E.E.C. Convention on Third Party Liability in the Field of Nuclear Energy in so far as the damage incurred exceeds the amount of private insurance cover or if restitution for such damage cannot for any other reason be made from the funds available for this purpose.

Claims for compensation for such damage may only be made against the operator or operators.

Article 2.

If a Contracting Party exonerates the operator of a nuclear installation from his obligations by virtue of Article 1 of this Convention and if the operator of a nuclear installation has a legal right of recourse against the person responsible, this right shall pass to the Contracting Party concerned.

If the operator of a nuclear installation deliberately causes a nuclear incident, the State providing guarantees shall have a right of recourse against him.

Article 3.

The operator of a nuclear installation shall contribute to the cost of the governmental guarantee in accordance with the scale set out in Annex I of this Convention.

Article 4.

The amount of the private insurance cover, over and above which the governmental guarantee becomes operative, shall be established by a Permanent Committee of independent experts.

The decision of the Permanent Committee shall be based on the latest scientific and technological knowledge. The maximum private insurance cover which is established must be reasonably proportionate to the risk inherent in the installation. In its decisions, the Committee shall not establish a figure lower than the maximum insurance cover obtainable at reasonable economic conditions on the international insurance market.

Article 5.

The Contracting Parties shall submit to the Permanent Committee the relevant documents pertaining to any nuclear installation planned within their territory not later than 3 months before the nuclear installation is brought into operation.

To enable the amount of the private insurance cover to be established, the Contracting Parties shall by .....furnish the Permanent Committee with the relevant documents pertaining to any nuclear installations which were already brought into operation before the coming into force of this Convention.

In the case of a nuclear incident involving a nuclear installation for which the Permanent Committee has not establishe

the maximum private insurance cover, the Contracting Parties within whose territory the nuclear incident occurs shall by means of a governmental guarantee exonerate the operator of the nuclear installation from his obligations in accordance with the principles of this Convention.

The Permanent Committee shall be composed and shall function in conformity with Annex II of the present Convention. The operator or the Contracting Party within whose territory the nuclear installation of the operator is situated may appeal against the decisions of the Permanent Committee by referring them to an Arbitration Tribunal, which shall be set up in accordance with Annex III of the present Convention.

Article 6.

In accordance with Articles 6 and 9 of the O.E.E.C. Convention, the liability of the owner of a nuclear installation in respect of any single nuclear incident shall be 100 million European Monetary Agreement units of account, unless a higher amount is established by a Contracting Party.

Article 7.

In so far as an action for damages by the injured party against the operator of a nuclear installation is no longer admissible under the O.E.E.C. Convention as a result of prescription or fore-closure of rights, the governmental guarantee shall no longer be obligatory.

Article 8.

If within the territory of a Contracting Party a nuclear incident occurs involving damage in excess of the amount established for the governmental guarantee, there will be an additional indemnification for the excess amount, granted on the basis of a joint undertaking given by the Contracting Parties.

The form and nature of the Joint Undertaking and the conditions under which recourse can be had to it appear in Annex IV of the present Convention.

Article 9.

If it is anticipated that the damage incurred cannot be covered by the total funds available, the distribution thereof shall be governed by the national legislation of the Contracting Party in whose territory the incident occurrs.

Article IO.

In respect of the liability of the operator and the governmental guarantee, the compensation payable and the conditions governing payment, the provisions of Articles IO to I5 of the O.E.E.C. Convention shall apply.

Article II.

"Governmental guarantee" means the exoneration by one of the Contracting Parties of the operator of a nuclear installation from his legal obligation to pay damages.

"Private insurance cover" means, in conformity with Article 4 of the present Convention, the amount up to which the operator of a nuclear installation shall be required to cover his liabilities.

"Territory" means the European territories of the Contracting Parties as well as the non-European territories under their jurisdiction.

The definitions appearing in Article I of the O.E.E.C. Convention shall also apply to the present Convention. However, the tasks entrusted to the Steering Committee of the European Nuclear Energy Agency under Article 1 b and c of the O.E.E.C. Convention shall be carried out by the Permanent Committee, pursuant to Article 4 of the present Convention, in conjunction with the Steering Committee.

Article I2.

Amendments to the present Convention shall come into force if they are ratified by two thirds of the Contracting Parties in accordance with their constitutional laws and upon the deposit of the instruments of ratification with the Commission of the European Atomic Energy Community.

Article I3.

Any country may accede to the present Convention by notification addressed to the Commission of the European Atomic Energy Community and with the unanimous assent of the Contracting Parties. Such accession shall take effect from the date of such assent.

Any Contracting Party may withdraw form the present Convention by giving twelve months' notice to that effect to the Commission of the European Atomic Energy Community.

Article 14.

Any dispute arising between the Contracting Parties concerning the interpretation of the present Convention shall be submitted to the Arbitration Tribunal set up under Article 5 of the Convention; the decisions of this tribunal shall be binding.

Article 15.

The present Convention shall be ratified by the Signatories in accordance with their constitutional laws. Instruments of ratification shall be deposited with the Commission of the European Atomic Energy Community.

This Convention shall come into force upon the deposit of instruments of ratification by not less than five of the Signatories. For each Signatory ratifying thereafter, this Convention shall come into force upon the deposit of its instrument of ratification;

Article 16.

A country may only become and remain a party to the present Convention, if it has also acceded to the Convention of the O.E.E.C. on Third Party Liability in the Field of Nuclear Energy or if its internal laws are in conformity with the provisions of the O.E.E.C. Convention.

The Contracting Parties of the present Convention shall only agree to amendments to the O.E.E.C. Convention by mutual consent. They shall deposit the instruments of ratification for such amendments at the same time following an indentical procedure.

Article 17.

The Commission of the European Atomic Energy Community shall give notice to all Contracting Parties of the receipt of any instrument of ratification and of any declaration of accession or withdrawal. The Commission shall also notify the Contracting Parties of the date on which this Convention comes into force.

Article 18.

The present Convention is drawn up in the Dutch, French, German and Italian languages, all four texts being equally authentic; it shall be deposited in the archives of the Commission of the European Atomic Energy Community; the latter shall communicate a certified copy to the Government of each Contracting Party.

In WITNESS WHEREOF the undersigned Plenipotentiaries have signed the present Convention.

Annex I

To Doc. EUR/C/71/4/59 e

AMOUNT OF THE CONTRIBUTION TO BE MADE BY OPERATORS OF NUCLEAR INSTALLATIONS TO THE GOVERNMENTAL GUARANTEE AS PRESCRIBED IN ARTICLE 3 OF THE CONVENTION.

For an investment up to 5 million EMA units of account, the annual payment shall be 250 EMA units of account.

For an investment between 5 and 20 million EMA units of account, the annual payment shall be 1,000 EMA units of account.

For an investment above 20 million EMA units of account, the annual payment shall be 2,500 EMA units of account.

The calendar year shall be the basic period for calculating payments. A calendar year which has already commenced shall count as a full year.

Annex II

To Doc.EUR/C/7I/4/59 e

PRINCIPLES UNDERLYING THE COMPOSITION AND FUNCTIONING OF THE PERMANENT COMMITTEE AS PRESCRIBED IN ARTICLE 5 OF THE CONVENTION

The Permanent Committee shall consist of representatives of the Contracting Parties, one for each Party, and a representative of the Commission of the European Atomic Energy Community.

The representatives shall be appointed by the Contracting Parties or the Commission of the European Atomic Energy Community for a period of 4 years. They may not be replaced by a substitute. The representatives shall not be bound by instructions of any kind and shall take decisions at their own discretion. The representatives shall receive from the Contracting Parties or the Commission of the European Atomic Energy Community an annual remuneration of 6,000 EMA units of account as well as daily allowances and the refund of travelling expenses.

The Permanent Committee is a body of experts having power of decision.

The Committee shall elect by a simple majority vote a Chairman and Vice-Chairman, who shall hold office for a period of 4 years. They may be re-elected.

The Committee has the right to consult experts and take opinions. It will decide by a simple majority vote. In the event of the voting being equal, the Chairman shall have a casting vote. The meetings of the Committee shall not be public. Unless otherwise agreed the proceedings shall be conducted in the language of the petitioner.

The Committee shall draw up its rules of procedure. The secretariat shall be provided by the Commission of the European Atomic Energy Community, which shall also bear the costs of the proceedings before the Permanent Committee. The members of the Committee, experts and specialists taking part in the proceedings, and the administrative personnel shall be bound to secrecy.

The decisions of the Committee shall be supported by reasons and shall be communicated to the Contracting Parties, the Commission of the European Atomic Energy Community and the petitioner.

Any appeal against a decision as prescribed in Art. 5. para of the Convention shall be made by the aggrieved party within a period of one month after notification of the decision and grounds for the appeal shall be given within one further month. Such appeal shall be submitted to the Permanent Committee, and, should the Committee not amend its decision in conformity with the appeal within one month, it shall be transmitted to the Arbitration Tribunal, giving reasons.

An appeal against a decision shall not have suspensive effect.

Annex III

To Doc. EUR/C/7I/4/59 e.

PRINCIPLES UNDERLYING THE COMPOSITION AND FUNCTIONING OF THE ARBITRATION TRIBUNAL AS PRESCRIBED IN ARTICLES 5 AND I4 OF THE CONVENTION

The Arbitration Tribunal shall consist of a Chairman and two or more assessors.

The President shall have judiciary capacity within the territory of one of the Contracting Parties. He shall be appointed for a period of four years by the Contracting Parties and the Commission of the European Atomic Energy Community. No substitute may perform the duties of the President unless he declares himself not competent to do so.

When a decision by the Arbitration Tribunal shall be required pursuant to article 5 of the Convention, the aggrieved party, or parties, and the Permanent Committee shall each select an assessor from among a number of persons whose names shall appear in a register. When a decision shall be required pursuant to Article I4 of the Convention, each Contracting Party shall select an assessor from the afore-mentioned register.

Each Contracting Party shall be entitled to propose the names of three persons for inclusion in the register having respectively the necessary legal, economic or technical qualifications to enable the Arbitration Tribunal to take its decisions. The assessor selected by the Permanent Committee may not be of the same nationality as the operator of a nuclear installation appealing to the Arbitration Tribunal.

The members of the Arbitration Tribunal shall not be bound by instructions of any kind and shall take their decisions at their own discretion. They shall receive for their services a remuneration from the Contracting Parties and the Commission of the European Atomic Energy Community.

This shall amount to 2,000 EMA units of account for the President. The remuneration of the assessors shall be fixed equitably by the President according to each case. The members of the Arbitration Tribunal shall receive daily allowances and a refund of travelling expenses.

There shall be no appeal against the decisions of the Arbitration Tribunal.

It shall have the right to consult experts and specialists. It shall take decisions by a simple majority vote.

The meetings of the Arbitration Tribunal shall not be public. Unless agreed otherwise, the proceedings shall be conducted in the language of the petitioner.

The Arbitration Tribunal shall draw up its rules of procedure which shall lay down procedure in detail. The secretariat of the Arbitration Tribunal shall be provided by the Commission of the European Atomic Energy Community.

The judges, experts and specialists taking part in the proceedings an administrative personnel shall be bound to secrecy.

The decisions of the Arbitration Tribunal shall be supported by reasons and be communicated to the Contracting Parties, the Commission of the European Atomic Energy Community and the petitioner. The decisions shall have force of law upon notification.

Annex IV

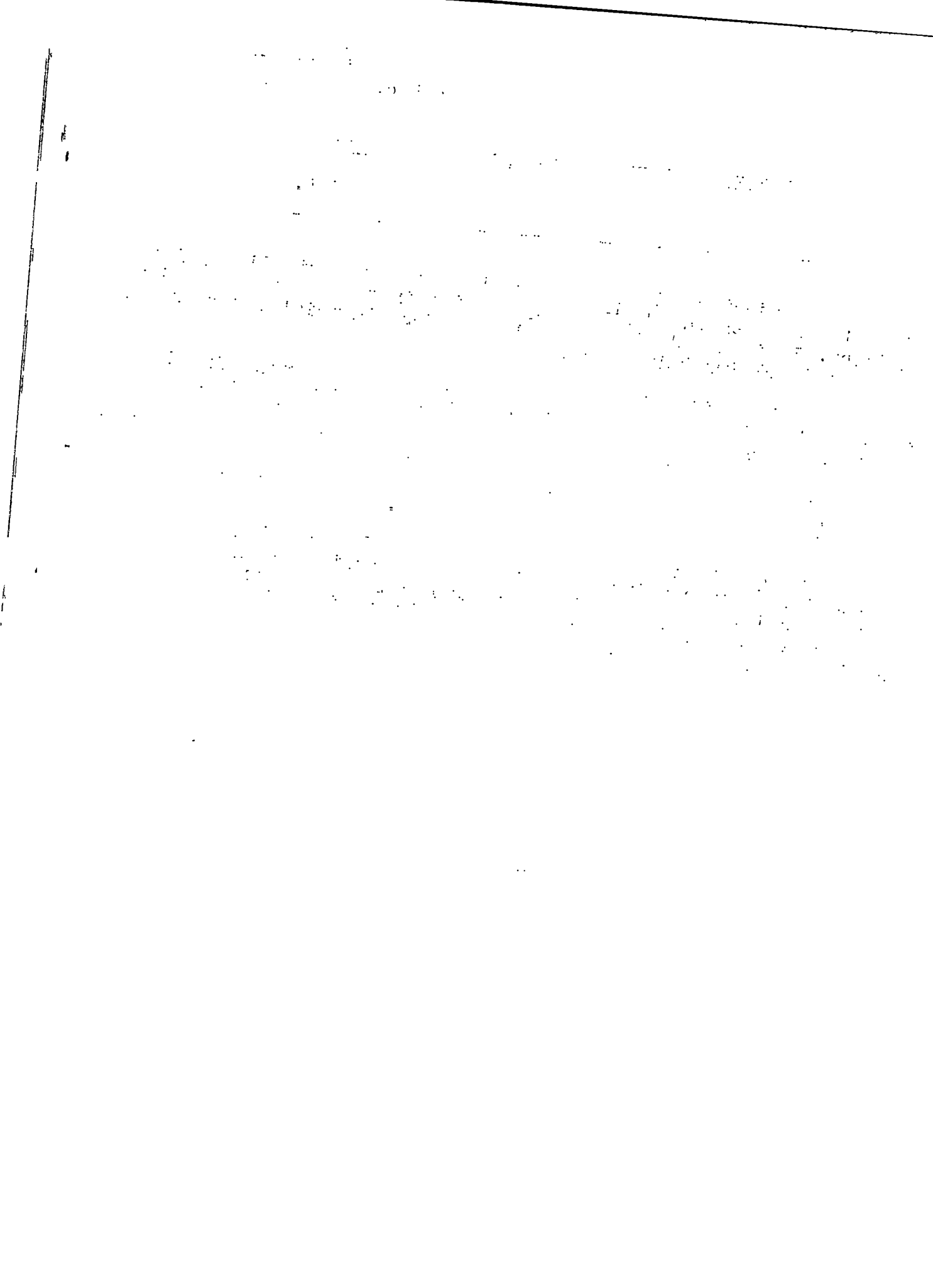
To Doc. EUR/C/71/4/59 e

PRINCIPLES UNDERLYING THE JOINT UNDERTAKING PROVIDED FOR IN ARTICLE 8 OF THE CONVENTION.

The object of the joint undertaking is to establish joint liability between the Contracting Parties in the event of a major incident. It is not designed to provide for financial reserves prior to possible claims being made.

The Convention itself does not define the amounts involved in the Joint Undertaking and the contribution of the Contracting Parties. However, such amounts and the contribution to be made should be fixed from the outset as difficulties might arise if these fundamental problems had to be solved only at the time of the incident. Since the question of joint liability is involved it will be necessary to fix a uniform period of prescription.

The remaining problems arising from the practical application of the joint undertaking resulting from a possible incident should be settled later with the Contracting Parties by means of a conference convened for this purpose by the Commission of the European Atomic Energy Community.



EUROPEAN ATOMIC
ENERGY COMMUNITY

E U R A T O M

The Commission

Industry and Economy
Division

Brussel, 29 April 1959.

C O N F I D E N T I A L

EXPLANATION MEMORANDUM

on the Draft Convention on Governmental Third Party Liability Guarantees in the Field of Nuclear Energy.

The possibility of major incidents occurring as a result of the use of nuclear energy cannot be excluded with absolute certainty. To make the operator alone liable for damage above a certain amount might act as a brake on the nuclear industries in their initial stages and hinder long-term development. Moreover, it seems quite intolerable that the protection of the general public should be made dependant upon the economic resources of the operator.

These points illustrate how essential it is for the State to intervene in providing against damage which might arise in connection with the use of nuclear energy. For this reason, the O.E.E.C. Convention on Third Party Liability in the Field of nuclear energy, which does not deal with the problem of State exoneration of the operator, stands in need of a complementary Convention. The present Convention, which provides for the further application of the O.E.E.C. Convention, is intended to satisfy that need.

It might be asked whether a supplementary convention can be concluded before the O.E.E.C. Convention has come into force. The supplementary Convention, however, in practice presupposes that the O.EE.C. Draft Convention, upon which it is based, will come into force first or that both Conventions will come into force simultaneously.

Since the O.E.E.C. Draft Convention is conceived as an open convention, it can only be linked to the supplementary Convention without difficulty if the latter is also an open convention.

The present Convention is based upon the following principles :

1) The basis of liability is constituted by the private funds made available by the operator in respect of a particular nuclear installation in the form of insurance cover or other financial guarantees.

2) Where the damage exceeds the above-mentioned private insurance cover, the Governmental guarantee will take effect.

3) In the event of this proving insufficient in particular cases, it is intended that joint liability will be assumed by the Contracting Parties.

In the event of a nuclear, the injured party may claim indemnification from the operator. The latter is liable up to the upper limit of the governmental guarantee as provided for in Article 6. In all cases where the private insurance cover is exceeded, the State will exonerate the operator.

These Conventions thus enable victims of nuclear incidents to claim compensation in every case.

The Preamble reflects the principles set out in the introduction of this Explanatory Memorandum. The wording of the first paragraph is based on Article I of the Euratom Treaty. This emphasizes the fact that the Euratom Treaty serves as a common basis and that there is nothing to prevent the accession of third States to the Convention at a subsequent date.

Article 1 constitutes a continuation to the O.E.E.C. Draft Convention with the pupose of providing a complete set of regulations governing third party liability. The governmental guarantee takes effect for any operator who is liable according to Article 6 of the present Convention, at the point where private cover ceases. This is so not only in cases where the private insurance cover is exceeded, but also where, for other reasons, such as reasons connected with the technicalities of insurance, private cover is inadequate.

The whole question of liability in connection with the transport of nuclear fuels, radioactive products or waste is not touched on in the present Convention as the appropriate regulations in the O.E.E.C. Convention are not yet available.

The operator of a nuclear installation has to assume the operating risks himself up to a limit to be fixed in each particular case. He is further liable to indemnify the injured party for any damage incurred over an above that limit and up to the maximum liability as referred to in Art. 5. The governmental guarantee will, however, exonerate him from this latter obligation.

Since, as was mentioned in the general introductory remarks, the present Convention is completed by the O.E.E.C. Convention, no attempt has been made to take over the regulations established therein relating to occupational accidents and diseases and other social provisions; in this field, national legislation in principle is not affected by the O.E.E.C. regulations.

The first paragraph states that the operator of a nuclear installation shall be exonerated from his liability by governmental guarantee, even in cases where "fore any other reasons" compensation cannot be made from funds provided for by the operator for this purpose. It might be asked what "other reasons" are meant here. As with all other insurance policies, a policy to cover nuclear risks excludes certain cases from the cover. In the field of nuclear energy, such cases are wider in scope and more numerous than with policies covering conventional risks. Thus, it is not the amount of compensation which is understood, but those cases in which no liability falls on the insurer.

Just as in the O.E.E.C. Convention, the intention in the present Convention is to "channel" all claims for indemnification onto one person, namely the operator. To put the O.E.E.C. regulations more precisely, the injured party may only make a claim against the operator, not against the insurer, whose obligations are only towards the policy holder, i.e., the operator. The present Convention also excludes any direct action by the injured party against the State. This general approach is in the interest of the injured party since he cannot be expected to decide for himself as to who should intervene on behalf of the operator.

The contractual liability of the supplier towards the operator did not have to be dealt with in the Convention since the latter is only concerned with third party liability. The relations between X them. According to the principle of freedom of contract, such contracts may either provide for the contractual liability of the supplier, which will apply according to the principles of civil law in the event of a fault being committed, or they may exclude such provisions.

The supplier is always responsible for his deliberate acts since it is impossible to exclude liability for deliberate faults in advance by means of a contract. This principle is incorporated expressly in all legal systems in Western Europe.

Article 2 provides that State exoneration in the event of an incident being caused intentionally must be associated with the possibility of having recourse in accordance with the rules of the O.E.E.C. Convention. By virtue of this consideration, the right of the operator to claim indemnification under the governmental guarantee must pass to the State. Furthermore, the State is granted a right of direct recourse against the operator should the latter have caused the incident intentionally.

Article 3 lays down that irrespective of the form of the govern mental guarantee, which is selected by the individual Contracting Parties, operators of nuclear installations shall make a small contribution to the governmental guarantee calculated on the basis of the invested capital. The scale is given in detail in Annex I. This measure brings out the fact clearly that the governmental guarantee is in the nature of an insurance.

Xoperator and supplier are governed by contracts concluded between

Article 4 provides for the creation of a Permanent Committee of independent experts which will assess and lay down the exact amounts of private insurance cover they consider appropriate to each enterprise, taking into account all relevant individual circumstances such as the extent of the risk, site, etc. This would also establish the limits beyond which governmental guarantees could take effect. This clause should not be understood as meaning that the maximum private insurance cover would decrease as the risks involved in a nuclear installation increase.

The advantage of this solution is that the Committee, by functioning in this way, might bring about an extension of the international market for nuclear insurance. This would mean that the insured party could arrange insurance for higher amounts than at the present time if the Permanent Committee should so desire. Such a development of the market would result in a general lowering of premiums.

The O.E.E.C. Draft Convention provides that the maximum liability of the operator of a nuclear installation shall be, in principle, 15 million and the minimum liability 5 million EMA units of account. The various Contracting Parties are free to establish this maximum liability at a figure higher than 15 million EMA units of account by means of legislation. The present Convention has applied this principle in Article 6. According to this system, the maximum liability of the operator will be covered partly by private insurance cover and partly by governmental guarantee.

Article 5 lays down the prior conditions relating to the activities of the Permanent Committee. The composition and functioning of the Committee appear in Annex II to the Draft.

Article 5 is based upon the principle that each Contracting Party shall communicate to the Permanent Committee all the necessary data for fixing the limits of private insurance cover. In order, moreover, to cover cases where such communication has not been made and the Permanent Committee has consequently not been able to take action, it is provided that the State here too shall exonerate the operator from his obligations in the event of an incident.

In view of general constitutional considerations, it would appear necessary to allow appeals against the decisions taken by the Permanent Committee. After exercising the powers of descretion vested in it. Since recourse cannot be had to the Court of the European Atomic Energy Community, this duty has been assigned to the Arbitration Tribunal (see Annex III).

Article 6 fixes the liability of the operator and consequently the upper limit of the governmental guarantee at 100 million EMA units of account. This does not exclude the possibility of more comprehensive liability being fixed if national legislation so provides.

This arrangement is designed to give the Contracting Parties a sufficiently wide margin for their internal legislation and to ensure that the liability is the same for all the Contracting Parties up to a certain sum.

The question of how the victim is to be compensated and the operator exonerated is also left to the legislation of the Contracting Parties.

Article 7 establishes a legal interpendence between the liability of an operator and that of the State. The duration of the liability incumbent on the operator and the State which intervenes for him is fixed in accordance with the provisions of the O.E.E.C. Convention. The Contracting Parties are at liberty to make a payment on account of social considerations even when no claim can be brought against the operator as a result of prescription or foreclosure of rights.

Article 8 provides for joint liability in the event of damage resulting from a major catastrophe, for which the operator can no longer be made liable. This article establishes a system of joint and several liability among the Contracting Parties. Recourse can only be had to it in cases where the funds provided for by a Contracting Party for its governmental guarantee are not sufficient to cover the damage incurred.

The Joint Undertaking ensures the distribution of risks among all the Contracting Parties. Details of the form and nature of the Joint Undertaking and the conditions under which recourse can be had to it are contained in Annex IV to the present Convention.

Article 9 deals with the case where compensation of all parties affected is not assured in spite of the liability of the operator and the Joint Undertaking of the Contracting Parties. In this eventuality, the funds available for meeting legal obligations to pay compensation will be distributed in a manner to be decided by particular national legislation.

Article IO ensures by means of references to specific articles in the O.E.E.C. Convention that the O.E.E.C. and the Euratom Conventions are applied in a consistent manner.

Article II contains fundamental definitions. The definition for "territory", while it is based on Article I98 of the Treaty setting up the European Atomic Energy Community, does not debar countries not belonging to the European Atomic Energy Community from accession to the Convention. The definitions for "nuclear incident", "nuclear installation", "nuclear fuel", "radioactive products or waste" and "operator" appear in Article 1 of the O.E.E.C. Convention. However, the task entrusted to the Steering Committee of the European Nuclear Energy Agency of determining what constitutes a nuclear installation or a nuclear fuel is transferred to the Permanent Committee in accordance with Article 4 of the present Convention. The Permanent Committee will work in conjunction with the Steering Committee.

Articles I2 - I8 contain the final clauses. Articles I3, I5, I7 and I8 assign to the Commission of the European Atomic Energy Community the responsibility normally vested in the depositary of an international agreement. In view of the objectives outlined in the Preamble to the Convention, the Commission as the organ of the European Atomic Energy Community is to be regarded as the primarily competent institution. This arrangement is no way, however, prevents third states from acceding to the Convention.

Whereas under Article I4 of the Euratom Draft Convention, disputes relating to the interpretation of this Convention are settled in the last instance by the Arbitration Tribunal set up pursuant to Article 5, under the O.E.E.C. Convention (Article I8) responsibility for this task rests with the Court, which was constituted by an O.E.E.C. Convention of 20.I2.I958 on the establishment of a system of security control in the field of nuclear energy.

The Arbitration Tribunal provided for in the Euratom Draft Convention is the same as that to be set up under Article 5 to review the decisions of the Permanent Committee. This is a practical solution, since as a result of its competence in accordance with Article 5 this Tribunal has a particularly good insight into the purport, substance and aims of the Convention.

As already set forth in the introduction to this Explanatory Memorandum, the coming into force of the Euratom Convention presupposes the application of the provisions of the O.E.E.C. Convention, since a complete system covering liability is only possible if both Conventions are operative. For this reason, Article I6 stipulates that a State can only become and remain a party to this Convention if it is also a party to the O.E.E.C. Convention. This condition need not be fulfilled if its internal laws are in conformity with the provisions of the O.E.E.C. Convention.

The possibility provided for under Article I9 of the O.E.E.C. Convention of allowing amendments in the Convention to take effect for some of the Contracting Parties only could raise difficulties in the application of the Euratom Convention, which is built up on the basis of the O.E.E.C. Convention. Article I6, Para II, removes this danger.

Annexes

Annex I : As already explained in the explanatory note to Article 3, the governmental guarantee is to be in the nature of an insurance. This is brought out by the scale of contributions in Annex I, which are reminiscent of insurance premiums; the amounts provided for, however, are only provisional. The operator of a nuclear installation will pay this premium to the Contracting Party of which he is a national.

Annex II : gives a few indications on the composition and the functioning of the Permanent Committee. Annex I could be objected to as inexpedient for not allowing instructions to be given to the Permanent Committee. This point leads to the question as to how a possibility of this sort could be provided without being inconsistent with the idea of an open convention. It would hardly be acceptable to set up a special authority responsible for giving instructions to the Permanent Committee.
If, on the other hand, the Council of the European Atomic Energy Community were empowered to give such instructions acting on a proposal of the Euratom Commission, this would practically preclude the accession of third States to the Convention. If this objection were disregarded, the words in Annex II, para 2.

> " The representatives shall not be bound by instructions of any kind and shall take decisions at their own discretion"

would have to be replaced by the following version :

> " Instructions relating to the establishment of the maximum private insurance cover may be given to the Permanent Committee by the Council of the European Atomic Energy Community acting on a proposal of the Commission of the European Atomic Energy Community. The representatives shall take their decisions at their own discretion within the framework of these instructions."

Another possibility would be for every member of the Committee to be bound by the instructions of the Contracting Party by whom he was appointed. This would make the Committee of Experts into a group of representatives of the Member States; this might appear to be inadvisable, but it would be in line with the principle of the open convention.

Annex III deals with some of the question affecting the composition and the functioning of the Arbitration Tribunal. The fundamental principle underlying this Annex, on which the composition of the Arbitration Tribunal is based, is that each of the parties to a dispute (i.e., the operator or operators of nuclear installations and the Permanent Committee) chooses an assessor from a register drawn up following proposals of the Member States. By limiting the number of the eligible assessors to the persons entered in the register it will be possible to prevent persons simply representating particular interests from being chosen and to ensure a degree of stability in the decisions of the Arbitration Tribunal. The Permanent Committee is obliged to appoint an assessor having a different nationality to that of the aggrieved operator in order to preclude any suspicion of preferential treatment being shown to a particular nationality. It should be added that the proposed arrangement does not limit the operator of the nuclear installation in the free choice of his assessor.

Appendix IV deals with the basic principles underlying the "Joint Undertaking", i.e., the immediate liability assumed by the Contracting Parties towards the victims of catastrophes. This is, therefore, not a case of intervention for the operator. The latter in only liable up to the maximum amount as stated in Article 6 of this Convantion.

JAPANESE MARITIME LAW ASSOCIATION.

Replies to Questionaire Regarding Shipowner's Liability for Ships Propelled by Nuclear Energy.

Our answers to the Questionaires (At-1/7-58) submitted by the C.M.I. are as follows :

Answer 1 : At the present there are no laws specially pertaining the vessels propelled by nuclear energy, nor is there any legislation in draft form. However, The Japanese Atomic Industrial Forum Inc. and The Nuclear Powered Ship Research Association of Japan are beginning to study the problem of legislation in this field, and the Government is being urged by the latter organization to draft legislation in this field.

Answer 2 : The probability of accidents caused by nuclear powered vessels would not be less than that of land-based reactors, and furthermore, damages might well be greater. Accordingly, the owners of nuclear powered vessels should bear absolute responsibility for damage to third parties, irrespective of negligence on the owner's part. There is room for controversy, however, as to whether negligence of injured parties should discharge the owners from liability, or whether the latter's liability should be discharged only upon a showing that the accident has been caused by gross negligence on the part of injured parties. The use of the force majeur as a cause for avoiding liability may well be discussed in relation to safety regulations. In other words, the case and scope of discharge from absolute liability must be fully scrutinized.

Answer 3 : It would be unquestionable to apply the limits of liability provided for in the Brussel Convention of 1957 in the cases involving the nuclear powered vessels. This gives rise to two major problems.

1) whether a new formula raising the limits stipulated in Brussel Convention should be established as to damages caused by nuclear powered ships, or whether a new treaty dealing exclusively with nuclear accidents brought about by nuclear powered vessels should be concluded, in the latter case there could be stipulated limits of liability exclusively relating to nuclear accidents to the third parties. New limits thus established would have to be accorded to existing conventions which relates to the liability of shipowners. We are of the opinion that the conclusion of a new convention would be preferable in order to secure international uniformity, particularly because of the possible participation of non-member states of the Brussel Convention.

2) Secondly, as for the amount of compensation, a higher limit should be set than that applies to the case of land-based reactors. Fixing the actual sum is, of course, an exceedingly difficult problem, but, at least, minimum standards must be unified. A criterion which might possibly be used is the power of the reactors or tonnage of the vessels involved.

Answer 4 : Once a limit upon liability has been set, it can be left entirely to domestic legislator to determine whether or not a state should assumed responsibility in the case of damage exceeding the specified limit. Of course, even within the limit specified, a State may decide to shift the responsibility of operators of nuclear powered vessels to the State. These matters are questions for the licensed State, and not for the State in whose territory the catast-rophic accident takes place.

Answer 5 : A short period of prescription of one or two years after the discovery of damage and a long period of prescription of ten to twenty years after the occurrence of incidents should be recognized.

Answer 6 : If the new convention is to deal only with compensation for damages suffered by third party in nuclear incidents, there would be no need for special legislation concerning the passengers and cargo. However, assuming that the convention would be thus limited, a new system of payment of compensation for damages suffered by passengers and cargo, somewhat different from the traditional one, might well be needed because the damages by nuclear incidents might be brought about over a long period of time.

Answer 7 : Liability for damages suffered by employees, i.e. master, seamen etc. need not be dealt with in the Convention.

Answer 8 : It goes without saying that there is urgent necessity for an international convention regarding the liability of operators of nuclear powered ships. The International Atomic Energy Agency should be required to initiate a draft convention so that problems can be solved with as much uniformity as possible.

At 45
8 -59

29 June 1959
PK/hml

SECRETARIAT DRAFT

CONVENTION ON MINIMUM INTERNATIONAL STANDARDS REGARDING CIVIL LIABILITY FOR NUCLEAR HAZARDS

COMMENT

Background and Scope.

1. The peaceful utilization of nuclear energy involves hazards which, because of their potential magnitude and of their peculiar characteristics, are not fully met by the rules of civil law devised for conventional risks or even for non-nuclear industrial activities. Such special hazards arise whenever a large scale emission of ionizing radiation occurs. Emissions of ionizing radiation may originate in a reactor installation, or may occur in connection with the production, re-processing, carriage and disposal as waste of hazardous nuclear fuels or of irradiated materials.

2. Although the problems arising in connection with these unconventional hazards cannot be entirely solved by rules regarding civil liability, it is nevertheless desirable that special civil legislation be devised to provide fullest financial protection for the public without exposing the operating, manufacturing and transportation industry to an unreasonable or indefinite burden of liability and to the risk of harrassing litigation with respect thereto. Such special legislation has been enacted in the United States and is planned in a number of European countries. A regional Convention, proposing to unify the rules of third party liability for nuclear damage in Western Europe, has been perfected by the Organization for European Economic Cooperation.

3. However, national and regional solutions are not sufficient to cope with all aspects of nuclear hazards. Among these special hazards the fact that damage attributable to radioactive fall-out or to contamination of water bodies may occur at a considerable

distance from the place where the original discharge of ionizing radiation has taken place. Also, the present and expected geographical distribution of the operating and manufacturing industry is such that any malfunctioning of a nuclear installation could directly or indirectly involve industries located in a variety of countries. To this must be added the hazards inherent in international transportation of fuels capable of criticality outside an installation, of irradiated fuel elements shipped back to their producer for re-processing, and of other radioactive products and waste. Under existing rules regarding jurisdictional competence and choice of laws a single incident might generate suits in several States, and the courts seized of such suits might apply different laws to different claims arising out of the same incident. Such a multiplicity of judicial proceedings and the ensuing legal uncertainty would make it difficult to provide adequate and equitable financial protection for the public by effective legal norms. Also, it would expose the industry to unforeseeable and therefore uninsurable risks of liability. It appears that to attain adequate insurance coverage for nuclear risks it will in many instances be necessary to draw upon the insurance capacity of more than one insurance market. Any international coinsurance or reinsurance arrangement presupposes a minimum of coordination of the various national rules governing liability and jurisdiction with respect to the risks to be covered.

4. Only an international convention, adopted on a universal basis, can serve as a predicate for effective rules regarding civil liability for nuclear hazards. Such an international convention should bind not only States in which nuclear energy is presently utilized, but also other States on the territory of which nuclear damage might be suffered or in which nuclear industry is expected to develop in the future.

5. The Convention consists essentially of a coordinating formula, designating the State which shall have exclusive legislative and jurisdictional competence over claims arising out of a given nuclear incident. It contains also an enumeration of the minimum international standards which must be adopted with regard to civil liability for large scale nuclear damage before a State can be entrusted with such exclusive legislative and jurisdictional competence.

6. The Convention does not, except with respect to legislative and jurisdictional compentence, purport to create a new and uniform civil law applicable to nuclear hazards. It sets down flexible formulae adaptable to a variety of legal families and to different social and economic concepts.

It is not intended to supplant existing national or regional legislation in the field of nuclear liability, but to enhance its effectiveness by giving it world-wide application.

7. Within the framework of the flexible formulae of this Conventio further national legislation remains desirable in these States which have not yet enacted special nuclear liability laws. However, the minimum norms contained in the Convention are designed to be applicable by themselves so as to fill the gap until such time as more complete national legislation has been devised.

PART ONE : DEFINITIONS

Article I

(1) Nuclear Installation

1. This definition is intended to cover all potential fixed sources of ionizing radiation capable of causing large scale damage. Such sources must be identified in order to serve as predicates for the choice of the State which will have exclusive legislative and jurisdictional competence over claims for nuclear damage. (Art. I (3); Art.VIII; Art.IX); the definition is also necessary in connection with the designation of the person liable for third party nuclear damage (Art. I (4); Art.III) and to compute the aggregate limit of such liability (Art.IV).

2. The hazard of large scale damage due to ionizing radiation is present whenever nuclear fuels undergo a divergent chain reaction; accordingly, the definition includes facilities in which such criticality is attained deliberately (reactors) and in which there exists a danger of unintended criticality (facilities in which critical hazard materials are fabricated, and any place where such critical hazard materials are stored; see below as to the definition of critical hazard material). Large scale damage attributable to ionizing radiation is also possible by direct exposure to radioactive products which present no danger of criticality, or by exposure to substances or organisms which have been contaminated by radioactive products. This definition includes facilities in which sufficient amounts of radioactive products are located to present a risk of large scale damage (facilities in which radioactive products are produced or processed; facilities for the re-processing of irradiated fuels), and any place where radioactive products are stored or where radioactive products or critical hazard materials are abandoned as waste. With respect to the latter provision it is not intended to imply that abandoning of waste material should be considered lawful; if it occurs, however, liability and legislative and jurisdictional compentence should be tied to the place where possession over the waste materials was abandoned. Only that solution permits to attain the essential objectives of unity of law and of jurisdiction. As to the definition of " radioactive products ", see below Article I (9).

3. The Convention does not apply to propulsion reactors, which are accordingly excluded from this definition.

(2) Nuclear Consignment

1. This definition is necessary because under the Convention special rules of liability (Art. III (2)) and of jurisdictional and legislative competence (Articles VIII (2) and IX) apply to consignments which present a hazard of large scale damage through ionizing radiation.

2. The definition treats the consignment as a unit, from the time it leaves the possession of the consigner to the time when it is taken into possession by the consignee. The purpose of this is to permit the development of special practices and legal rules with respect to the specific risks of transportation. Thus under the Convention liability and the corresponding duty to maintain insurance coverage may be assumed by a specialized shipping enterprise. However, the Convention does not make such assumption of liability mandatory. Under Article III (2), liability may also be assumed for a given voyage or for any part thereof, or it may remain with the consigner. Legislative competence over this matter resides with the States designated in Article III (2) (a).

3. Only consignments of critical hazard materials and of radioactive products, including any waste materials which may be covered by either definition, are considered nuclear consignments. Nuclear fuels which do not present a hazard of unintended criticality outside a reactor (e.g., natural uranium, thorium) do not, unless they are irradiated and are thus covered by the definition of radioactive product, present any hazard of large scale damage through ionizing radiation in the course of transportation.

(3) Installation State

1. This definition designates the State that will have exclusive legislative and jurisdictional competence over actions for third party nuclear damage (see above, Art.I (1), Comment N°I) and that, if by its national legislation it should lower the minimum limits of liability in time and in amount as set down in Articles IV and V of the Convention, would be subsidiarily liable pursuant to Article III (5).

2. Since fixed reactors and other nuclear installations may conceivably be operated outside the territory of any State - e.g., on the high seas or in Arctic or Antarctic regions - it is provided that any State which has authorized such installations shall be considered the Installation State. The term "authorized" implies an affirmative act. What consitutes an "authorization" in concrete cases (e.g., an authorization to expert nuclear fuels for use outside the territory of any State) is a matter left to interpretation by the Courts.

(4) Operator

1. This definition identifies the person who will be primarily liable for third party nuclear damage (Art.III). In most instances a person will have been designated and authorized to operate a nuclear installation. If, however, no designation has been made, the person who has the largest degree of control over the installation should be liable. This will generally be its owner, but national law may provide that the possessor of the installation shall be liable.

2. The term person is used in its widest sence. It is intended to include natural or legal persons. It covers States and political subdivisions or international organizations which, under the law of the installation State, have legal personality

(5) Nuclear Damage.

1. The special rules of this Convention are necessary only with respect to damage which, as compared to that resulting from conventional industrial activities, is of an extraordinary nature and cannot be covered by conventional insurance arrangements. Such damage of an extraordinary nature is likely to occur whenever there is an exposure to ionizing radiation. The extraordinary nature of such damage may not only reside in its magnitude, but in the fact that ionizing radiation may produce distant, delayed or indirect effects.

2. This definition includes any damage caused by ionizing radiation. However, in many cases it will be difficult to determine whether and to what extent a given injury or damage has been caused by ionizing radiation, by the toxic properties of nuclear fuels (e.g., plutonium) or radioactive products by an explosion in a nuclear installation or by the heat released in the course of an incident. It is therefore provided, in order to avoid any difficult litigation on that point, that any damage due to toxicity, heat or to an explosion shall be considered "nuclear damage" if it occurred in connection with an event or condition involving also a release of ionizing radiation. It will thus not be necessary that, to obtain the benefit of this Convention, the claimant or the defendant prove that the particular damage for which compensation is claimed was due to ionizing radiation, or to ionizing radiation alone. On the other hand, damage caused by an event occurring in a nulcear installation, but not connected with a release of ionizing radiation, is not covered by the Convention, and compensation therefor must be sought according to ordinary rules of civil law.

3. The Convention governs all rules of civil liability for nuclear damage attributable to a nuclear incident covered by it. No compensation may be had in civil proceedings except in conformity with the standards set down in the Convention. On the other hand, the question of what kinds of nuclear damage entail civil liability, and the related question of who may claim compensation, are left to the national law applicable pursuant to Article IX. It does not appear necessary or indeed feasible to establish uniform international rules in that connection. The scope of civil remedies is intimately tied to the general legal concepts and traditions of each country. It varies with the social function reserved to such remedies. Thus in some legal families no civil compensation or only qualified compensation is allowed for pecuniary or indirect damage (e.g., for loss of profits, or for damage to fisheries), for damage provable only on a statistical basis, for damage attributable also to the victim's negligence, or for the cost of emergency measures. In some legal systems "social" injuries are compensated not through tort remedies, but by social security, insurance or by direct compensation furnished by the State. The scheme of this Convention is designed to leave fullest freedom to national legislation in determining the scope of civil law remedies and on the related question of who is entitled to claim compensation or to acquire such claims by subrogation or assignment (e.g., insurance companies or the State). It should be noted, however, that while national legislation may deny civil recovery for certain types of damage, the responsibility of the State might nevertheless be engaged under general rules of public international law for any foreign damage that remains uncompensated (see Art.XV). The same applies if the competent national law does not permit a State that has furnished compensation with respect to nuclear damage suffered by its nationals or on its territory to acquire their claims by subrogation and to obtain recovery therefor.

4. A distinction has to be made between third party nuclear damage and damage to the operator or owner of the nuclear installation or their property. The Convention establishes minimum norms with respect to liability for both types of nuclear damage, since there exists a close interrelationship between the two (e.g., in the field of insurance). On the other hand, certain rules (e.g., Part Two; Articles VI and VII (2); Article VIII (1) and (2); Article IX) can apply only to third party damage. As to on-site damage, the Convention merely refers to contract law where actions against suppliers are concerned.

5. The definitions of third party damage and of on-site damage cover only typical items. In the proviso, however, full latitude is left to the applicable national law to determine whether or not the rules of liability established for third party damage should apply also to special kinds of damage (Paragraph(5) (i) to (iv)). This flexibility is necessary since the classification depends in large measure on the structure and capabilities of the insurance market and on the extent to which such special types of damage

(e.g., injuries to workmen) are already covered by appropriate legislation. Item (iv) permits the national legislator to avoid some conflicts between the rules of liability applicale under conventions in the field of international transportation or shipping and the terms of this Convention by classifying such damage as "on-site damage".

(6) Nuclear Incident.

This definition serves as a predicate for the provisions concerning the limitation of liability in amount (Art.IV (1)) and in time (Art.IV (2)). A nuclear incident can be a single event ("accident") or a condition (e.g., a leakage) extending over a period of time. The problem of determining when a series of occurrences constitutes a single event or incident is left to judicial interpretation, which in turn may be guided by national legislation.

(7) Nuclear Fuel.

This definition refers to the definition of "nuclear installation", which covers facilities where nuclear fuels are used (reactors) and where they are reprocessed after such use. It includes natural and enriched uranium, thorium, plutonium and materials used in a reactor in which they undergo a process of nuclear fusion.

(8) Critical Hazard Material.

1. This generic formula is intended to cover any nuclear fuels which are capable of experiencing a divergent chain reaction under accidental circumstances in the course of transport, storage or if abandoned as waste. For the purposes of this Convention it is not necessary that the fuels have or approach a critical mass, i.e., the form and amount required to experience a divergent chain reaction. Among the risks inherent in transportation, storage or disposal as waste must be counted the risk that such a critical mass be attained accidentally when several consignments come into contact. If it is true that by proper transportation, storage and waste disposal such accidents can be avoided, the low or non-existent risk factor will be reflected in low or nominal insurance charges.

2. The definition covers all nuclear fuels which can attain criticality when in contact with air or with ordinary water. It thus includes the Uranium isotopes 233 and 235 and the Plutonium isotopes 239 and 241. It includes also enriched Uranium, i.e., Uranium containing either or both the isotopes 233 or 235 in an amount such that the abundance ratio of the sum of these isotopes is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature. It appears that even slightly enriched Uranium (i.e., where the ratio is greater than 0.7 %) is capable of undergoing a critical reaction in air or in ordinary water. This generic formula also includes any alloys or other materials which may attain criticality outside a reactor installation.

(9) Radioactive Products

1. This definition covers any material which has been made radioactive by an artificial process. It includes irradiated fuels and radioactive waste, but does not cover materials which are naturally radioactive.

2. The Convention is not intended to apply to radioisotopes other than nuclear fuels while they are used for medical purposes, for scientific research or in industry, since they do not appear to present any large scale nuclear hazard to the public. On the other hand, factories for the production or processing of such radioisotopes, wast disposal sites and consignments present a risk of outside contamination and are therefore covered by the Convention.

PART TWO : LIABILITY FOR THIRD PARTY NUCLEAR DAMAGE

Article II Principles of Liability

Paragraph (1) Liability without fault

1. This Paragraph establishes the principle of strict (causal, alsolute) liability for third party nuclear damage. The activities covered by the Convention are inherently of a hazardous nature, so that such a principle is morally and practically justified. The requirement that fault or negligence on the part of the defendant be proved would impose a heavy burden upon the claimants without giving the defendant or his financial guarantor any corresponding practical advantage. The factual issues concerning fault or absence of fault might generate intricate litigation and raise questions of a technical nature which courts are ordinarily not equipped to solve. In many legal systems the principle of strict liability has been adopted with respect to industrial activities. In others the burden of proof or of going forward with the evidence has been reversed. The practical result of these various systems is usually the same. In the interest of legal certainty the Convention has adopted a simple and uniform rule to that effect.

2. It remains necessary to establish proof of causation by a given installation, consignment or by materials removed from an installation before recovery can be had under this Convention. Liability without such proof of causation would be outside the realm of civil laws. However, all matters regarding the administration and adequacy of such proof are left to the applicable national law. This means that courts or legislators may, if they consider it necessary in cases where the relationship between cause and effect cannot be established with absolute certainty (e.g., where damage is provable only on a statistical basis), establish reasonable inferences or presumptions to lighten the burden of proof imposed upon the claimant.

Paragraph (2) No Exonerations

1. In view of the hazardous nature of the activities covered by this Convention, it is desirable to impose liability for third party damage even where the damage is caused by a nuclear incident attributable to an outside event which would ordinarily constitute a ground for exoneration from civil liability. Such outside events may be acts of war or cases of force majeure. The principle of liability without exonerations is supported by the same considerations which demand the adoption of a system of liability without fault.

2. The Convention nevertheless permits the State which has legislative compentence over third party suits to provide exonerations where the nuclear incident was due directly to military acts or to grave natural events of an exceptional character. The predicate for such exonerations may be defined or limited further by national legislation. However, such national legislation may not go beyond the limits set in this paragraph : thus exonerations for "force majeure" cannot apply to natural events if the events were foreseeable (e.g., earthquakes in a region where seismic disturbances are frequent) or if they could reasonably be guarded against.

3. The reason for this proviso with respect to acts of war and to natural events is that insurance coverage may not be available with regard thereto, and that the State may undertake social relief measures outside the realm of civil liability (e.g., compensation for war damage; special disaster relief).

Paragraph (3) Geographical Scope of the Convention

1. The Convention is applicable in principle only to nuclear incidents which occur on the territory of a contracting State, regardless of when the damage was suffered (see Article XII). It covers also incidents which occurred outside the territory of any State (e.g., on the high seas). However, where an incident occurs on the territory of a non-contracting State, the Convention does not apply, and any suits would be governed by ordinary jurisdictional and substantive rules.

2. An exception to this principle is established only for nuclear consignments originating in or destined for a contracting State. If a nuclear incident involving such a shipment occurs on the territory of a non-contracting State, suits with respect thereto are governed by the Convention in the following instances :

(a) for consignments originating in a contracting State, if the incident occurred before the consignment was unloaded from any means of international carriage (ship, airplane, railroad car) in which it was transported from the contracting State; or

(b) for consignments destined for a contracting State, if the incident occurred after the consignment was loaded on a means of international carriage in which it was to be transported to a contracting State.

The reason for these two exceptions is to permit the development of rules of liability applicable to every consignment for the entire duration of an international voyage. Suits filed in a non-contracting country would generally not be governed by the Convention. But an adequate forum will be provided in the contracting States in which plaintiffs and defendants can and will be encouraged to claim the benefits of this Convention and of the financial guarantee maintained in compliance therewith. Except in special circumstances (see Article VII (2)) recourse actions against operators and attempts to have judgments entered in non-contracting States enforced in the courts of a contracting State can be barred, thus discouraging any attempt to circumvent the basic norms of the Convention.

3. The term "territory of a State" includes the internal and territorial waters of any State and the air space above it. It is not intended to cover any ship or airplane located outside the territory of the State of its flag.

Article III Persons Liable

Paragraph (1) : Person Liable for Nuclear Installations

The Convention concentrates liability for third party nuclear damage in one person, with respect to each incident, subject to a possiblity of concurrent liability of others where so provided by the applicable law in conformity with Paragraph (4) of this Article. The person to which liability for incidents occurring in a nuclear installation is channeled is the operator (see Art.I (4)). This system has been adopted in order to facilitate the filing and litigation of claims and the purchase of financial coverage for all third party liability.

Paragraph (2) : Person Liable for Materials removed from an Installation

1. The Convention provides that the operator shall be liable also for nuclear incidents attributable to radioactive products or to critical hazard materials removed from his installation. This includes nuclear consignments, waste materials and materials which were lost or stolen.

2. The Convention provides, however, that the operator's liability shall terminate whenever another person assumes liability in his stead for the particular materials. Such other person may be the operator of the installation for which a nuclear consignment is destined; it may be a carrier, a transportation enterprise or the person in charge of a waste disposal facility. As for fixed installations, it is essential that one person should be the one which has the largest degree of actual control over the potential source of nuclear damage, and which for that reason is best placed to obtain insurance coverage. Since the choice depends upon a number of variable factors, which are particularly apparent in connection with international transportation practices, it was not considered feasible or desirable to devise a rigid formula to designate the persona liable. This paragraph leaves wides discretion to national law to determine who may assume liability in conformity also with existing international agreements in the maritime and air transportation field or with future international compacts dealing specifically with liability for the transportation of the hazardous materials covered by this Convention.

3. The term " assumption " implies a voluntary act on the part of the person who assumes liability. However, such an assumption may be required by the competent national law as a condition for any carriage, export, disposal or other handling of radioactive products or of critical hazard materials.

4. The assumption of liability entails certain consequences under the terms of this Convention with respect to financial security, to the subsidiary liability of the State and, in certain instances, with respect also to legislative and jurisdictional competence. It is necessary, therefore, that the assumption of liability be authorized by a contracting State. The term " authorized " implies an affirmative act; however, nothing precludes States from extending a general authorization in specified circumstances. The Convention specifies that only contracting States which have some connection with and some measure of control over the particular materials shall be competent to authorize a person other than the original operator to assume liability (paragraph (2) (a) (i - iii)). Here again it is intended to leave enough flexibility for the development of special transportation practices and of future international rules with respect thereto.

5. Paragraphs (b) and (c) deal with situations where the installation in which nuclear consignments originate is not located in a contracting State. The Convention applies to incidents involving such materials if the incidents occur on the territory of a contracting State, outside the territory of any State or, pursuant to Article II (3), on the territory of a non-contracting State in cases of international transportation to a contracting State.

6. When a nuclear consignment originates in a non-contracting State and is destined for an installation located in a contracting State, the operator of the receiving installation or any person who assumes liability in his stead shall be liable under this Convention. Such liability, however, arises only if the shipment was made with the approval of the consignee. A consignee may condition his approval upon certain conditions as to packaging , selection of the means of transportation, etc; if these conditions are not met he is not liable under sub-paragraph (b).

7. Nuclear consignments may enter the territory of a contracting State and be involved there in a nuclear incident in the course of transit between non-contracting States. Also a shipment originating in a non-contracting State may not be "approved" by a consignee in a contracting State. In such instances the Convention applies, but the choice of the person or persons liable in conformity with the minimum rules is left to the contracting State on the territory of which the nuclear incident occurs. Subject to their obligations under international rules regarding transit and transportation, States may conceivably require that before being granted access to its territory, any means of transport carrying a nuclear consignment produce evidence of satisfactory financial security as provided under this Convention.

Paragraph (3) Joint Liability

1. The Convention provides that wherever third party damage is attributable to several sources of ionizing radiation, the person responsible for each source shall be liabile for the full amount of the damage, up to the limits applicable to the liability of each person. This provision applies also to damage caused jointly or cumulatively with sources of ionizing radiation not covered by this Convention (e.g. installations located in non-contracting States; military activities), although in each instance the competent national law may provide for partial exoneration of the persons liable under this Convention (Article XI (4)).

2. The provisions regarding joint and several liability are a direct consequence of the absolute nature of third party liability for nuclear damage. They are devised in the interest of the public, which should not be compelled to proceed separately against every person liable. On the other hand, any operator who has been held liable for more than the ratio of the damage attributable to his installation may seek contribution from the operator of any other installation which contributed to causing the damage.

3. The Convention imposes joint and several liability also for damage caused cumulatively by several sources of ionizing radiation, even if the radiation released from one source alone would not have caused damage. This provision imposes an absolute duty of care with respect to accidental or to planned releases of ionizing radiation from sources covered by the Convention (e.g. disposal of waste in a body of water).

4. Matters regarding the burden of proving causation are left to the applicable national law (see above, Comment (2) to Article II (1)). However, where causation can be traced to several sources of ionizing radiation, but cannot be led back to any particular one of these sources (e.g. when several installations discharge waste materials in a drainage basin), Sub-Paragraph (6) of the Paragraph provides that the operators of all these installations which might have caused the damage shall be jointly and severally liable unless any one of them could prove that the source of radiation for which he is responsible did not cause or contribute to causing the damage. This rebuttable presumption of causation is necessary to give the claimants, who might have to proceed in separate courts against the several installations, maximum protection against separate findings exonerating each of the defendants on the issue of causation. Also, it appears that the facts concerning causation are generally within the sphere of knowledge of the defendants.

Paragraph (4) Concurrent liability of other persons

In some legal systems the principle of channeling all third party liability through the operator may seem morally objectionable With respect to nuclear consignments it may run counter to existing international agreements in the transportation field. Paragraph (4) accordingly permits the competent national law to impose concurrent liability on persons other than the operator. Such liability must be included under the ceiling of liability established with respect to the operator and must be covered by the financial security maintained under this Convention. Under such a system of "coverage", adopted in the United States Atomic Energy Act, the competent State may impose concurrent liability predicated as proof of fault or governed by other special rules, upon such persons as suppliers or carriers. If strict liability is imposed upon a person other than that primarily liable under Paragraphs (1) and (2) of this Article (e.g. upon a maritime or air carrier), such other person may, pursuant to Article VII (2) and subject to the limits of Article IV, file a recourse action against the person primarily liable.

Paragraph (5) Subsidiary Liability of the State

1. The Convention permits States to lower the minimum norms established with respect to the limit of liability and to the period of prescription (Article IV (1) and (2)). In such cases the State will be liable in lieu of the operator and may be sued in the same courts where ordinary claims can be litigated. When a State has lowered the ceiling of liability, it will be responsible for the difference. If it shortens the period of prescription, it will be held to compensate claimants who file their claims after expiration of the shorter period but before the ten year period of Article IV (2). In such instances compensation will have to correspond to what the claimants would have recovered had their claim been permitted against the operator.

2. The purpose of this provision is to permit States to adopt a flexible system whereby the ceiling of liability for each source of ionizing radiation is determinedin function of its hazard coefficient, of the available insurance coverage and of other economic, social or political factors. Such a system is presently in force in the United States, and might be advantageous in any country in which a central hazards-evaluation authority has been constituted. It will also permit States to comply with the requirements regarding financial security even if the capacity of the insurance market should shrink due to unforeseen economic developments.

3. The assumption of subsidiary liability by the State does not affect any responsibility which that State may incur under general rules of international law, and which is reserved under Article XV of this Convention. Nor does this Paragraph prevent the creation of joint pools among several States to meet their obligation under the Convention. It is also possible for the State subsidiarly liable under the Convention to require another State (e.g. as a condition for importing nuclear equipment manufactured there, or for permitting a nuclear consignement to proceed to such other State) to assume liability in its stead. However, such an assumption of liability by a joint pool or by another State will remain a purely internal matter among the parties to the particular agreement.

Article IV Limitation of Liability in Amount and in Time

Paragraph (1) Limitation in Amount

1. One of the principal postulates of any legislation regarding third party nuclear damage is to keep the aggregate amount of civil liability for nuclear hazards within reasonable limits. The purpose of such a limitation is on the one hand to protect the industry against a risk of liability which would exceed its financial capabilities. On the other hand, it serves as a predicate for the requirement that financial security be maintained for the full amount of such liability, and permits an equitable distribution of compensation in the event that the damage should exceed the assets of, or the ceiling of liability established with respect to the defendant.

2. The Convention establishes minimum standards with respect to the limitation of liability in amount. The sums recommended correspond generally to the insurance coverage available in every country. In some countries the capabilities of the insurance market are greater, but it is not expected that, with proper co-insurance and reinsurance arrangements, the available insurance coverage will become any lower. It must be noted, however, that the aggregate damage caused by catastrophic nuclear incidents may conceivably exceed the limits set in this article. For that reason the Convention is not intended to preclude or discourage the States from taking all measures to provide for additional protection. If, however, some States will find it expedient to do so by raising or even foregoing altogether any limit of liability under this Article, others may consider it more desirable to furnish additional protection and compensation outside the realms of civil law.

3. The Convention establishes two minima which States may not lower without engaging their subsidary liability. The first minimum applies to the aggregate damage caused by each incident. The term incident is defined in Art. I (6) but will, in individual cases, have to be identified further by national legislation or by the courts.

4. A second minimum applies to the aggregate damage caused by an installation during any period of one year to be computed from the time of the first incident or, where nuclear consignments are concerned for the duration of any voyage. The term voyage means the carriage on a particular means of transport. This further limitation is designed to cope with the hazard of successive incidents. It appears that insurance coverage will be difficult to obtain on a pure per-installation basis, i.e. with automatic reinstatement after a first incident. The factor of three by which the per-installation limit is multiplied seems to afford reasonable, if calculable, protection against the hazard of successive incidents, which may

occur even after the shutdown of an installation. Furthermore it gives the operator an apportunity to re-negotiate his full insurance coverage within the one year period before having to shut down his installation.

5. Since the limits indicated in this Paragraph represent only minima which States might exceed, it is possible for them to adopt a pure per-incident limitation by abolishing the per-installation limit altogether. Whether or not such a system is feasible depends largely upon the capacity of the insurance market.

6. Subparagraph (b) is designed to apply where several consignments are involved in one or several nuclear incidents occur simultaneously or successively. If the consignments are located in the same vehicle or in the same place of storage, it will be difficult to determine whether any particular consignment triggered the incident, and whether or to what extent any of the consignments caused damage. Under the general rules of this Convention the persons responsible for each consignment would be jointly and severally liable, and the total amount of compensation could be the sum of the individual limits of liability. This would impose a heavy risk on the insurance market and might discourage specialized transportation practices. For that reason it is provided that such joint or cumulative damage shall be considered due to a single incident where there is unity of location and of time. The persons responsible for each consignment are still jointly and severally liable up to the ceiling of liability applicable to their particular consignment. However, the maximum compensation obtainable will not be the sum of the individual limits, but the highest individual limit of any consignement involved.

7. Sub-Paragraph (c) specifies that only the actual damage suffered by the victims, and not incidental litigation expenses or expenses incurred by the defendant, are covered by this Article. However, nothing precludes the competent law from requiring the reimbursement of litigation expenses outside the limit of liability.

Paragraph (2) Limitation in Time

1. The Convention permits the States whose law is applicable pursuant to Article IX to establish periods of prescription within which actions for nuclear damage must be filed. If, however, such a period is calculated from the time when the nuclear incident occurs, it cannot be of less than ten years. Nuclear injuries frequently produce delayed effects. Not all such latent damage will manifest itself within ten years.

That period represents a reasonable compromise which covers most latent injuries with respect to which causation can be established with some degree of certainty, and which does not expose the operator to uninsurable risks.

2. States are free to establish any reasonable periods of prescription computed from the time when the damage and its cause were ascertained or ascertainable. Any State which adopts exclusively such a period of prescription is not bound by the ten year minimum. The term "reasonable" as used in connection with these periods of prescription means only that they shall be established in such a way that reasonably diligent persons - even if residing in a foreign country - would be given an opportunity to file an action for third party damage.

3. The applicable national law may also establish reasonable periods within which notice of claims must be filed, or it may require that all persons likely to have been exposed to a release of ionizing radiation notify the competent authorities within a reasonable period after they learn about the possibility of exposure (Article XI (5)).

4. With respect to nuclear incidents caused by hazardous materials which were involuntarily removed from the possession of the person liable (loss, theft or jettisoning at sea), the ten year minimum is computed from the time when the loss, theft or jettisoning occurred, and not from the time of the nuclear incident.

Article V

Financial Security

1. The requirement that all liability for nuclear damage be covered by adequate financial security represents one of the principal features of the Convention. It is necessary to protect claimants against the possible insolvency of a defendant. Such financial security may be in the form of insurance, of a bank guarantee or of any pledge of the State or of a private person. It must be adequate and effective, and it must be maintained exclusively for the purpose of covering any and all third party liability which the person to whom the security is granted should incur under this Convention. If a State establishes limits of liability which are higher, or a period of prescription longer that the minima prescribed under this Convention, it is not required to demande financial security for the excess.

2. The duty to obtain financial security is incumbent upon the operator or upon any other person that has assumed liability in his stead in conformity with Article III (2), even though pursuant to Article III (4) national law may provide that the financial security cover also the liability of other persons.

3. The duty to ascertain that adequate and effective financial security be maintained is incumbent upon the State which has the most direct control over the person required to maintain such security. That is generally the Installation State and, in cases where another person has assumed liability instead of the operator, the State which has authorized such assumption of liability. It is accordingly left to that State to determine what type of security shall be furnished and on what terms.

4. Where nuclear installations are directly operated by a State or by a Member State, Canton or other sovereign political unit in a Federal System of Government, the Convention does not require that financial security be furnished. It is considered that the direct responsibility of the State is equivalent to any such security. However, that exoneration does not extent to nuclear installations operated by State-owned enterprises which have a separate legal personality, and the debts of which do not directly engage the responsibility of the State.

PART THREE

ACTIONS FOR CONTRIBUTION, RECOURSE AND ON-SITE DAMAGE.

Article VI

Actions for Contribution

1. The institution of joint and several liability in cases of joint or cumulative causation of nuclear damage (Article III (3)) may lead to harsh and inequitable results with respect to individual defendants. Actions for contribution among persons jointly liable are intended to correct that harshness. While such actions should not reduce or exceed the amount of liability and the financial security which is maintained by every defendant to satisfy direct third party claims, contribution may nevertheless be awarded wherever after satisfaction of all direct third party claims arising out of a given nuclear incident the limit of liability of the defendant from whom contribution is sought has not been attained Such a system will not affect the principle of limited liability. It will merely insure an equitable distrubition of the burden of liability among joint tortfeasors.

2. The substantive and procedural rules that are to govern actions for contribution are left to the applicable national law. Pursuant to Articles VIII (3) and IX(1), that is the law of the State in which actions for third party nuclear damage can be filed against the defendant in contribution. Thus the applicable national law may apportion liability according to the ratio of causation, to the degree of fault or in equal shares. It may combine these various criteria, and deny contribution to a plaintiff who was at fault where the defendant was not at fault, or if the gravity of his fault was of a lesser degree. Also, where the plaintiff and the defendant are subject to the jurisdictional compentence of the same State, such State may permit or require that any potential plaintiff in contribution be joined or impleaded in the suits brought for third party nuclear damage against the defendant. Finally, the competent State may permit the award of contribution, or interim awards of contribution, before the period of limitation for third party claims against the defendant has expired, if it appears that the aggregate of such claims will not exceed the ceiling of liability.

Article VII

Recourse Actions and Actions for On-Site Damage

Paragraph (1) Actions against suppliers and carriers

1. The operator or other person liable under this Convention may have to furnish compensation for damage caused by nuclear incidents which were not attributable to fault or negligence on his part, but which might have been due to the fault of some other person (Article II (1)). In such instances the operator will generally have a recourse claim in tort against that other person. The Convention does not interfere with the remedies available to that effect under national law, except to the extent that their retention might affect the sound development of nuclear industry and the protection of the public.

2. Paragraph (1) is intended to regulate only recourse actions against suppliers and against consigners or carriers of nuclear consignments. An unlimited retention of such recourse actions, which under existing law can generally be based on a tort theory or on the express or implied terms of a contract, is not desirable. It could only generate onerous and perhaps abusive litigation, which in turn would hinder the development of nuclear industry without extending any additional protection to the public. Indeed, if suppliers, sub-suppliers and carriers were all exposed to the risk of recourse litigation, they would justifiably seek to protect themselves by insurance or other financial security. This would result in a pyramiding of insurance coverage and costs with respect to any nuclear installation or consignment, and might considerably reduce the coverage available to protect the victims of nuclear incidents.

3. The effect of Paragraph (1) is to relegate the problem of recourse actions against suppliers and carriers to the realm of express contract bargaining. This eliminates any recourse actions based on a tort theory or on implied contract warranties. It is no longer possible for the operator to turn against suppliers or carriers with whom he is not, or has not been, in a contractual relationship. Sub-suppliers are thus not exposed to the risk of litigation. On the other hand, any operator may request that the person from whom he purchases nuclear material or equipment, or the carrier to whom he entrusts a nuclear consignment for which he is liable, shall assume recourse liability under the specific terms of a contract. Such recourse liability may be unlimited or qualified in its terms or amount. Indeed, the Installation State or

the State responsible for the consignment may make it mandatory before any equipment is imported, or before any nuclear consignment is transported, that the supplier or the carrier assume recourse liability therefor . The same principle applies to the relationship between principal supplier and sub-supplier : the principal supplier who has assumed, or who expects to assume recourse liability under his contract with the operator, may demand that the sub-supplier from whom he has purchased the equiment guarantee him by contract against the recourse liability. The result of such a system is that each participant in a nuclear project or activity will know precisely what his duties and obligations are with respect to the other participants, and that maximum economy can be devised regarding the distribution of insurance coverage. On the other hand, nothing precludes the State from taking criminal sanction against a supplier or carrier who, though he did not assume civil liability with respect thereto, caused damage to third parties by an intentional or grossly negligent act or omission.

4. The reasons which demand a clear definition of recourse liability apply also to actions for on-site damage. Such on-site damage may be damage to the nuclear installation or to the consignment itself. It may consist of personal injury to employees, of damage to other cargo or to the means of transportation in which a consignment is carried, if the applicable law so provides (Article I (5)). In all these instances the Convention abolishes actions on a tort theory or based on implied contract warranties. On the other hand, fullest latitude is left to the contracting parties to expressly stipulate liability for such damage. Here again the result will be greater legal certainty and economy of insurance coverage. Only those suppliers or carriers who have expressly assumed liability will require such insurance coverage. This is a matter of considerable importance, since any saving in insurance capacity otherwise required to cover liability for on-site damage may add to the capacity available to cover third party nuclear risks.

5. This paragraph applies to any recourse actions by the State on the basis of compensation it has furnished pursuant to its subsidiary liability. It applies also to actions by workmen's compensation funds against an operator in the event that worker's claims are considered on-site damage. However, the State may require as a condition for granting a licence to operate any nuclear installation that the operator assume such recourse liability by contract.

Paragraph (2) Recourse Actions against Operators

1. This paragraph excludes any recourse actions, other than claims for third party nuclear damage, against the person who is primarily liable for a nuclear incident. Such recourse actions may be filed by the insurer or a victim or by a State that has furnished compensation without being required to do so under the terms of this Convention (e.g., a life insurance company, or a State that has

furnished emergency assistance). To permit such recourse actions could nullify the effect of the limitations of liability for nuclear damage. However, nothing precludes the State that has legislative competence over actions for third party nuclear damage from providing that the payment of compensation under an insurance contract or by virtue of special legislation should entitle the payer to present a claim for third party nuclear damage (Article I (5)). The theory might be either that the insurer or the State which furnished compensation to the victims sustained a direct and compensable damage, or that it acquired the victim's claim by subrogation.

2. It is conceivable that, especially where nuclear consignments are concerned, a person other than that which would be liable under this Convention (e.g., a carrier) might be sued and held liable in the courts of a non-contracting State. Although in such instances the Convention does not permit the person who has been held liable in a non-contracting State to file a recourse action against the person who would be liable pursuant to Article III, the applicable national law may nevertheless consider that the persons who are held liable in a non-contracting State have a claim for third party nuclear damage under this Convention.

Article VIII Jurisdictional Competence

Paragraph (1) General Principle

1. The Convention concentrates all jurisdictional competence over third party suits arising out of a given nuclear incident with the courts of the one State which has the closest connection with the source of ionizing radiation. Except where nuclear consignments are concerned (Paragraph 2) that choice falls on the defendant's Installation State even for damage sustained in another State. The Convention does not prescribe what particular courts in the Installation State shall be exclusively competent. Article X (1) merely requires the State which has jurisdictional competence to designate one court in which actions for third party nuclear damage may be filed.

2. Article VIII is one of the essential provisions of this Convention. Under existing law the same nuclear incident could generate a variety of civil proceedings in different courts (e.g., the courts of any place where damage was suffered; the courts of the plaintiff's domicile). This would not only multiply litigation expenses ; it would greatly hinder the equitable distribution of compensation in the event that the aggregate third party damage exeeded the limits of liability

established in conformity with Article IV. The scheme of this Convention, which establishes only minimum norms and leaves the largest freedom of action to national legislation, is workable only if it is predicated upon the clear designation of the State that will have exclusive jurisdictional and legislative competence.

Paragraph (2) Jurisdiction over actions for third party damage caused by nuclear consignments.

1. As to nuclear incidents caused by consignments, the interest of the claimants demands that jurisdictional competence be placed with the courts of the Contracting State in which the incident occurred. To require claimants to travel to the courts of the consigner's Installation State, or of any State which allowed another person to assume liability in his stead, would not be a satisfactory solution. It should be noted, however, that Paragraph (2) applies only to incidents involving nuclear shipments, and not to other materials removed from a nuclear installation (e.g., stolen materials or abandoned waste).

2. It is conceivable that a gradual release of ionizing radiation through leakage or otherwise could occur on the territory of more than one Contracting State, so that several States would have jurisdictional competence over actions for third party nuclear damage attributable to such an incident. To avoid the resulting multiplicity of proceedings it is provided in sub-paragraph (a) that claimants shall have an option to file suit in the courts of the State in which the first action was brought, regardless of whether the damage suffered by them was attributable to ionizing radiation emitted while the consignment was in another State. However, where it appears that the aggregate damage will exceed the limit of liability of the particular defendant, any interested party may request that the action be removed to the court in which the first action was brought. Whether or not there is reasonable ground to assume that such excess damage has been caused is left to judicial interpretation. The term " Interested party " is intended to include not only the defendant or any plaintiff, but also persons who, having reason to fear that they have suffered latent injuries, may become plaintiffs at some subsequent time. The right to demand such removal is also given to the court itself with respect to actions pending before it, and may be exercised at any time before final judgment is entered on such claims.

3. Only where a nuclear incident occurs outside the territory of any Contracting State (e.g., on the high seas or in a non-Contracting State), or where the location of the consignment at the time of the nuclear incident cannot be ascertained, does jurisdiction lie with the courts of the consignor's Installation State or of the State which permitted another person to assume liability in his stead (sub-paragraph (b)).

Paragraph (3) Jurisdiction over Actions for Contribution and Recourse

1. Jurisdiction over actions for contribution is placed with the courts which would have been competent to entertain suits for direct third party damage against the defendant from whom contribution is sought. However, it is provided that the defendant may voluntarily submit to the jurisdiction of another court, since in some cases it may be desirable to concentrate all litigation in the plaintiff's courts.

2. As to recourse actions, the matter is left entirely to ordinary jurisdictional rules. Where actions against suppliers are concerned, jurisdictional clauses may be inserted when the supplier assumes liability by contract.

Article IX : Applicable National Law

Paragraph (1) General Principle

The question of what law shall be applied to tort claims where the source of damage is located in one country, but damage is sustained in another country, does not have a uniform answer in all present legal systems. Most courts would tend to apply the law of the place where damage is sustained. In connection with nuclear incidents this would result in different norms being applied to claims arising out of the same incident. It would be impossible for operators or for their insurers to know in advance what these various norms would be. Therefore, and since the wide latitude left to national legislation gives the choice of the applicable law a very great practical importance, it is essential to provide for a single law to be applicable to all claims arising out of the same nuclear incident.

The Convention designates a single national law by providing that courts shall apply the law of the forum in all matters not otherwise regulated by the Convention. "Renvoi" to another law by virtue of the domestic rules on choice of laws is not permitted. To determine what law will govern suits arising out of a given incident it is therefore sufficient to know what State has jurisdictional competence under Article VIII. Damage caused by a nuclear installation is governed by the law of the Installation State; damage caused by nuclear consignments is generally governed by the law of the State on the territory of which the incident has occurred.

Paragraph (2) Exceptions regarding Nuclear Consignments

1. The rule established by Paragraph (1) requires some corrective with respect to nuclear consignments located outside the Installation State. Sub-paragraph (a) provides that where damage is caused in the course of transportation, all claimants, regardless of where the incident occurred, shall have the benefit of any higher limit of liability, or of any longer period of prescription, applicable pursurant to the law of the Installation State to which the responsible operator pertains, or to the law of the State which permitted a person other than the operator to assume liability in his stead. The same provision applies where a single incident has occurred on the territory of more than one contracting State : the highest limit of liability, and the longest period of prescription among those provided for in the laws of these several States shall be applicable to all claimants, regardless of where the actions are filed and of whether or not the proceedings have all been removed to the same court in conformity with Article VIII (6). The purpose of sub-paragraph (b) is to insure equal treatment of all victims of the same nuclear incident.

2. With respect to nuclear consignments it is conceivable that the subsidiary liability of the State will be engaged for incidents occurring outside its territory and governed by the law of another State. Paragraph (b) makes it clear that even if the national law of the State of the incident provided for a higher ceiling of liability than the law of the State whose subsidiary liability would be engaged pursuant to Article III (5), the latter State shall not be subsidiarily liable for the difference, but only for any possible difference between the ceiling of liability provided for under its own law and the minima given in Article IV (1).

P A R T F I V E

DUTIES AND LEGISLATIVE COMPETENCE OF STATES.

Article X : Duties of States.

In addition to the obligation to comply with the minimum standards set down in the Convention, contracting States which have jurisdictional competence pursuant to Article VIII are bound to provide adequate rules of practice with respect to the exercise of their jurisdictional competence. The Convention does not specify how States are to comply with their obligation, since that would constitute an undesirable and unnecessary interference with internal procedural matters. Article X only enumerates the objectives which the States are bound to attain in conformity with their own legal concepts and with the capabilities of their judicial machinery.

Paragraph (1) Designation of a competent court.

Article VIII does not designate the specific court in which actions for nuclear damage are to be filed. The designation of a single court with respect to every nuclear incident is necessary in the interest of plaintiffs and of defendants alike, but it should be made by the State which has jurisdictional competence over the suits growing out of such nuclear incidents. Paragraph (1) permits States to designate a judicial court with respect to every nuclear incident. It may be the territorial court at the site of the nuclear installation; it may be a central court handling all nuclear claims in the State; or it may be a special set of courts (e.g., admiralty courts). The Convention does not generally make it mandatory to provide for ways of recourse or of appeal. The only exception concerns the rulings of administrative bodies (i.e., a scientific board set up to examine claims for nuclear damage) which certain States may wish to set up in view of the difficult factual issues in determining the extent, nature and source of nuclear damage. The rulings of such administrative bodies must be subject to review by a judicial court at least on legal issues.

Paragraph (2) Due Process

The State in which actions are filed must make certain, if necessary by special procedural rules or recourses, that all parties be treated in conformity with basic principles of "due process". Naturally the term "due process" should be understood in a broad sense, implying chiefly ultimate fairness in the handling of litigation. It requires for instance that defendants be given adequate notice and that plaintiffs, even

if located in a foreign country, have a reasonable opportunity to file claims and to institute proceedings; all parties must have the right to be represented by counsel; they must have the right to present evidence, to be informed of any evidence against their claim and to controvert it.

Paragraph (3) Equitable and prompt distribution of Proceeds

The distribution of compensation in the event that the aggregate damage should exceed the limits set pursuant to Article IV (1) is a very difficult task, even where a period of prescription is established, since damage caused by the same source of ionizing ra may manifest itself at different times. The Convention provides that the proceeds available from a given defendant be distributed equitably and promptly. These are relative and general objectives; national law is expected to devise systems by which they can be attained. The principle problem is to avoid that early claimants be required to wait until the period of prescription has expired before receiving compensation, or conversely that they be compensated at once at the possible expense of those who suffered latent injuries. The double objective of equity and promptness can at least be approximated by several devices: courts may grant tentative awards in the form of annuities which can be reviewed before the period of prescription has expired; special - and perhaps tentative - limitations can be established for every claim or for certain classes of claims; orders of preference may be established for certain clases of claims; finally courts may set aside certain portions of the limited liability fund for delayed injuries to be expected from a given release of ionizing radiation. The choice between these possible methods is left to national law; in some States express legislation may be necessary, while in others the matter can be deatl with by court-made rules.

Article XI : Legislative Competence of States.

The Convention leaves full freedom to the State whose law is applicable pursuant to Article IX to legislate on or to apply existing rules to all legal matters concerning civil liability for nuclear damage, provided only that in so doing it does not run counter to the terms of this Convention. Article XI further enumerates the areas in which national action is permissible altough in some instances such action may affect the minimum remedies provided for in other parts of the Convention.

Paragraphs (1), (2) and (3) Distribution of Proceeds.

1. Paragraphs (1), (2) and (3) concern the distribution of compensation for third party nuclear damage. They are intended to permit the courts to devise adequate mechanisme for the prompt and equitable allocation of the available proceeds in cases where the aggregate damage is likely to exceed the ceiling of liability (see Comment on Article X, Paragraph (2)). Per claim limitations may be desirable both for personal injury claims, following the example set in many workmen's compensation laws and wrongful death statutes, or for property damage (e.g., compensation shall not exceed the

market value of the damaged proporty). Such limitations need not be applicable only where the aggregate damage exceeds the ceiling of liability. The only requirement is that they be "reasonable", i.e., that they correspond to general public values and standards of equity. What those values and standards are must be determined chiefly from the viewpoint of the State which has legislative competence; such a limitation does not, of course, affect any international responsibility which might arise if by virtue of these national limitations damage caused in another country or to foreign nationals could not be compensated in conformity with international standards and values.

2. As to the establishment of orders of preference in the distribution of proceeds, such a device corresponds to practices in other fields (e.g., bankruptcy). The orders of preference may apply to given portions of the defendant's liability (e.g., 30 % of the liability fund should be set aside for personal injuries and 30 % for injuries to workmen) and give a preferential position to certain types of damage (e.g., direct property damage shall be compensated before loss of profits; loss of profits shall be compensated before claims of persons with whom the defendant stood in a contractual relationship). The only requirement is that such orders of preference be reasonable (see above, Paragraph (1) of Comment).

3. The power to set aside certain portions of the proceeds for victims of delayed injuries is closely related to per-claim limitations and orders of preference. Thus a court may decide to earmark 30 % of the proceeds to compensate possible claims for leukemia, the peak of which will manifest itself only 5 to 7 years after exposure. This device cannot be used to provide compensation for claims which are not filed within the period of prescription. The setting aside of portions of the proceeds must also be reasonable. (Article X (3)); however, it will generally be difficult for any legislator to set down fixed rules with respect thereto. The apportionment may instead be left to the courts on the basis of expert testimony as to the nature and extent of delayed injuries to be expected from a given nuclear incident.

Paragraph (4) Partial defense when damage was caused jointly cumulatively by a non-Convention source of ionizing radiation

This Paragraph permits national legislation to introduce a partial defence where it is shown that nuclear damage was caused jointly or cumulatively by a nuclear installation or consignment and by another source of ionizing radiation not covered by the Convention. The possibility of such joint damage is very real; the non-Convention source of ionizing radiation may be annatural one (radiation in certain mines; cosmic radiation), an installation in a non-Contracting State, a nuclear weapon, or facilities such as fluoroscopes or therapeutic devices which are not covered by the Convention, but which may have exposed the victim of a nuclear incident to such a dose of ra-

diation that, together with the radiation emanating from the nuclear incident, nuclear damage is produced or aggravated. It may seem unduly harsh in such instances to impose liability for the entire damage upon the operator covered by this Convention. It should be noted that the apportionment permitted under this Paragraph is a deviation from the principle of joint and several liability. Also, the apportionment can only be based on the relative ratio of ionizing radiation omitted from other source, and not on the degree to which each source caused a given damage or injury.

Paragraph (5) Certificate of Exposure.

States may consider it desirable to require all persons who could have been exposed to ionizing radiation attributable to a nuclear incident (e.g., all persons living within 10 miles from the place where the incident occurred, or who consumed fish that had been caught in a given contaminated body of water) to notify the competent public authority, which might be required to certify that fact. Such notification may permit the State to reduce the extent of damage by providing medical examination and treatment, and by prescribing other preventive measures. This may be given some legal relevancy with respect to civil liability. Thus the certified fact of exposure may serve as a predicate for the setting aside of certain portions of the proceeds to compensate late injuries, and States may, within reasonable limits, provide that only persons who submit a certificate of exposure shall receive compensation from the earmarked fund. A certificate of exposure may also justify presumptions or inferences with respect to the burden of proving causation (see Comment on Paragraph 5

Paragraph (6) Proof of Causation

Liability for third party nuclear damage under this Convention is no longer predicated upon proof of fault , but it remains necessary that the causal link between damage and the incident for which the defendant would be liable be proved. Such proof of causation will be difficult to furnish in many instances, especially when delayed injuries are concerned. Nevertheless the principle that causation must be established cannot be abandoned. If it were, claimants would not have a civil remedy, but a special political right to consider the nuclear industry as their insurer. The Convention has, however, relaxed the burden of proving causation in cases of putative joint or cumulative causation (Article III (3) (b)). This Paragraph goes further and gives the competent State full freedom to legislate in matters concerning the administration of the burden of proving causation. In particular, the State or its courts may permit the construction of reasonable inferences or presumptions with respect thereto. Thus in instances when there exists a reasonable likelihood of causation, such as where the claimant can prove the fact of exposure to ionizing radiation (he may be required to furnish a certificate of exposure), courts may reverse the burden of proof and require that the defendant furnish satisfactory evidence that the damage is not attributable to a source of ionizing radiation for which he is responsible. It should be noted, however, that both Article X (2) and this Paragraph require that such presumption shall be

reasonable and thus rebuttable.

Paragraph (7) Direct Actions against Insurers

In some States legislation has developed whereby liability insurers can be sued directly by the persons who have suffered damage for which the insured can be sued directly by the persons who have suffered damage for which the insured would be liable. Since such a system does not affect the interest of the planitiffs or of the defendants, the Convention expressly permits States to retain or to adopt it. However, such direct suits must be permitted under the law that governs the claims for third party damage, and not necessarily under the law of the insurance contract.

Paragraph (8) Workmen's Compensation Claims.

The State that has legislative competence under Article IX may, in conformity with Article I (5) (i), provide that workmen's compensation claims be considered claims for third party nuclear damage. On the other hand, special rules may be applicable or desirable regarding such workmen's compensation claims. It may be possible, for instance, that unlike claims by other persons claims by employees be permitted even where no causal link between the damage and a nuclear incident is shown. Or claims of employees of a third person may lie also against that person, and not only against the operator liable. Finally, additional compensation may be given to workmen even where the limited liability fund is exhausted. In all such instances the workmen or their compensation funds may, if national law so provides, be granted the benefit of the rules and financial security prescribed by this Convention. Paragraph (8) is intended to make it clear that special rules on workmen's compensation and the rules of this Convention regarding civil liability are not mutually exclusive; if the applicable law so provides they may be complementary.

Article XII : Non-discrimination

1. This Article applies to all rights and duties established by the Convention but does not necessarily govern any additional compensation which a State may grant above the minima set down in the Convention.

2. The Convention provides that where nuclear damage is caused by an incident covered by it (Article I (6) and Article II (3)), no discrimination shall be made between plaintiffs or between defendants, regardless of their nationality and of where they suffered the nuclear damage. The result is that even nuclear damage suffered on the territory of a non-contracting State by persons who are not nationals of a Contracting State will be governed by the rules of this Convention. There appears to be moral justification for giving such claimants the benefit of the Convention. Also, this provision will protect defendants

against unlimited liability for damage caused in non-Contracting States, It will not fully eliminate the danger of suits brought in the courts of such non-Contracting States, but it may encourage all foreign claimants to sue in the forum provided for by the Convention, and may bar in any Contracting State suits for the enforcement of judgments entered elsewhere.

3. This Article applies also to the rights of defendants, and to actions for recourse and for contribution.

Article XIII : Waiver of Sovereign Immunity

This Article precludes any person who is liable under this Convention to claim full or partial sovereign immunity as a defence or as an exception to jurisdiction. It applies to foreign States, to the State of the forum or to any political subdivision or governmental body or person that, or with respect to which the State would normally be entitled to claim such immunity. This does not mean that where the State or a Government agency operates an installation or is responsible for a consignment the applicable national law may not prescribe a special court in which suits against it are to be tried.

Article XIV : Transferability and Convertibility of Currency.

This Article imposes upon Contracting States a general obligation to permit the transfer and convertibility into the currency of the State in which damage was sustained, of any compensation awarded for third party nuclear damage. It also covers transferability and convertibility of insurance and reinsurance payments and of the corresponding premiums. However, this obligation arises only where the transfer or conversion are permissible under existing internal currency regulations and under international agreements in that field. This is a minimum solution which does not preclude individual States or groups of States from establishing more comprehensive rules by bilateral or multilateral agreement. Such international arrangements might facilitate the flow of insurance or reinsurance capacity among the participating States (See Special Protocol on Transfer and Convertibility of Compensation, Insurance and Reinsurance).

Article XV : General and International Responsability of States not affected.

Although the Convention is designed to provide relief for as much nuclear damage as seemed feasible on an international level, and although national law may be expected to go even further, it is nevertheless conceivable that in certain cases the damage caused by the peaceful uses of nuclear energy will not be fully compensated. That might occur where the aggregate damage exceeds the applicable limits of liability, or where damage becomes manifest after expiration of the period of prescription. It may also be that the applicable national law does not provide civil liability for certain types of damage. In such instances the individual States may, voluntarily or by virtue of special legislation, furnish direct indemnities in the

form of compensation or of social relief. The Convention does not affect - and its provisions do not apply to - any such measures undertaken by the State or by other on its behalf. Nor does the Convention deal with the problem of possible responsibility of States under general rules of international law for damage which is not fully covered by civil liability or by State indemnity. Article XV specifically provides that nothing in the Convention shall be construed as affecting either the general responsibility of States or their responsibility under international law. Compliance with the minimum international norms of the Convention will eliminate many cases where such State responsibility would otherwise have been engaged. It does not, however, relieve the State of its possible responsibility for damage not otherwise redressed.

Article XVI : Exclusion of military uses of nuclear energy

The Convention is intended to apply only to damage attributable to the peaceful use of nuclear energy. Its provisions concerning the limitation of liability, the waiver of sovereign immunity and the choice of a single forum could not be justified with respect to damage caused by military activities. Article XVI accordingly excludes all nuclear weapons from the scope of the Convention. It excludes also consignments and installations if the competent State declares that they are destined primarily for military uses. This exclusion should not be abused and should not normally cover dual purpose installations- i.e., a civilian power reactor that produces plutonium usable for the manufacture of military weapons. As to damage caused by excluded installations and materials, it will be governed by ordinary rules of liability, and it may entail the responsibility of States under rules of international law.

In the many areas left to national legislation it is desirable to prevent the enactment of any laws which would reduce the rights or add to the burdens of any party to a suit concerning damage caused by a nuclear incident which had already occurred at the time when the law was enacted. It is not intended to prevent such retroactive legislation where it concerns only procedural matters without affecting any substantive rights. As to the latter, however, it is important to avoid any legal uncertainty and possible abuses of the legislative power as they could result from ex-post facto laws.

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SECRETARIAT DRAFT

(Revision A)

CONVENTION ON MINIMUM INTERNATIONAL STANDARDS REGARDING CIVIL LIABILITY FOR NUCLEAR HAZARDS

Note : Provisions in brackets are retained only "pro momoria"

PART ONE

DEFINITIONS

Article I. For the purposes of this Convention :

I. "Nuclear Installation" means
(a) reactors and facilities in which critical hazard material or radioactive products are produced, but not reactors employed to propel any means of transportation;
(b) any facility for the processing of radioactive products or of nuclear fuel after its utilization;
(c) any place where critical hazard materials or radioactive products are stored or abandoned;
provided, however, that nothing in this definition shaff preclude the Installation State from considering several interrelated facilities located on the same site as a single nuclear installation.

2. "Nuclear Consignment" means any consignment of critical hazard material or of radioactive products in the course of carriage by land, air or water or by a combination two a more of these, including any intervening storage, transshipment or diversion from the time the consignment is loaded at the site of the originating nuclear installation to the time when it is discharged at the site of the receiving nuclear installation.

3. "Installation State" means the State on the territory of which a nuclear installation is located, (or which authorizes a nuclear installation to be operated outside the territory of any State.)

4. "Operator" means the person who has been designated as such by the competent authority of the Installation State; in the absence of a designation, the owner or, if so provided by the law of the Installation State, the person who has possession of the nuclear installation shall be considered the operator.

5. "Nuclear Damage" means any death or personal injury, property damage, loss of property or pecuniary damage, including the cost of preventive measures, for which civil liability arises

under the law applicable pursuant to this Convention, and which is attributable to ionizing radiation or to the toxic, thermal or mechanical effects of an event or condition involving also a release of ionizing radiation.

((a) "Third party nuclear damage" means nuclear damage suffered by a person other than the operator or owner of the nuclear installation,
(b) "On sito nuclear damage" means nuclear damage suffered by the operator or owner of the nuclear installation; provided, however, that nothing in the definitions shall prevent the State whose law is applicable to suits for third party nuclear damage pursuant to this Convention from providing that any of the following be considered as third party or as on site nuclear damage :

(i) personal injury suffered by employees, agents or invitees of the operator or owner of the nuclear installation;

(ii) damage to property of persons other than the operator or owner of the nuclear installation if such property was located on the site of the installation;

(iii) damage to property of the operator or owner of the nuclear installation if such property was not located on the site of the installation;

(iv) with respect to nuclear consignments, damage to any ship, airplane or vehicle in which the consignment is carried or which is involved in a collision with such a ship, airplane or vehicle, including damage to its cargo, passengers or crew.)

6. "Nuclear Incident" means any condition or event that is capable of causing nuclear damage and that occurs within a nuclear installation or in connection with any critical hazard materials or radioactive products removed from an installation.

7. ("Nuclear Ruel" means any material that can be used to produce energy by a process of nuclear fission or fusion.)

8. "Critical Hazard Material" means any material that can experience a fission chain reaction outside an appropriate reactor installation.

9. "Radioactive Product" means any nuclear fuel, waste or other material made radiaactive as a result of the production, utilization or reprocessing of nuclear fuel, provided, however, that this Convention shall not apply to any radioactive product, other than a nuclear fuel, used for medical, scientific or industrial purposes, (or to any consignment of such radioactive products.)

IO. ("Waste Material" means any critical hazard material or radioactive product stored or abandoned as waste or removed from a nuclear installation in order to be stored or abandoned as waste.)

PART TWO

LIABILITY FOR THIRD PARTY NUCLEAR DAMAGE

Article II. Principles of liability.

1. Primary liability for third party nuclear damage shall arise without proof of fault.

2. There shall be no exonerations from primary liability for third party nuclear damage, except to the extent that the national law applicable under this Convention should provide such exonerations with respect to nuclear incidents caused directly by acts of armed conflict, invasion, civil war or insurrection, or by unforeseeable natural disasters which could not reasonably be guarded against.

3. This Convention shall not apply to nuclear incidents occurring on the territory of a non-contracting State except where the incident involves a nuclear consignment originating in a contracting State before it is unloaded from a means of international carriage on the territory of a non-contracting State, or a nuclear consignment destined for a contracting State after it has been loaded on a means of international carriage.

Article III. Persons Primarily Liable.

1. Nuclear Installations. The operator shall be primarily liable for any third party nuclear damage caused by a nuclear incident in his installation.

2. Critical hazard materials and radiaactive products.

(a) Where third party damage is caused by a nuclear incident involving critical hazard materials or radiaactive products removed from a nuclear installation, the operator of that installation shall be primarily liable unless at the time of the nuclear incident another person had assumed in his stead liability under the terms of this Convention; provided, however, that such assumption of liability shall have been authorized by any one of the following contracting States :

(i) the State in which the critical hazard materials or radioactive products were then located;

(ii) the Installation State of the originating installation;

(iii) the Installation State of the receiving installation.

(b) With respect to nuclear consignments originating in a non-contracting State but destined for an installation located in a contracting State, the operator of the receiving installation shall be primarily liable if the consignment was made his approval; provided, however, that his liability may be assumed by any other person in conformity with sub-paragraph (a).

(c) With respect to nuclear consignments originating outside the territory of any contracting State but made without the approval of any operator of a receiving installation located in a contracting State, the law of the State in which the nuclear incident occurs shall determine what person will be primarily liable for any third party nuclear damage.

3. Joint Liability.

(a) If any third party nuclear damage was jointly or cumulatively caused by nuclear incidents for which more than one person is primarily liable under paragraphs (I) and (2) of this Article, such persons shall be jointly and severally liable for the entire damage; provided, however, that the liability of any one person shall not exceed the limit of liability applicable to it pursuant to Article IV of that Convention.

(b) If third party nuclear damage is attributable to one or more of several separate installations or nuclear consignments, or to critical hazard materials or radioactive products for which more than one person would be primarily liable under paragraphs (I) or (2) of this Article, but causation cannot be traced with certainty to any one of these installations, consignments or materials, the persons liable for them shall be jointly and severally liable in accordance with sub-paragraph (a) unless they prove that the installation, consignment or materials for which they would have been liable did not cause or contribute to causing the nuclear damage.

4. Other Persons. Persons other than these specified in paragraphs (I), (2) and (3) of this Article shall be liable for third party nuclear damage only if the applicable national law so provides, in any event the aggregate liability of all persons primarily liable shall be included in and shall not exceed the limit of liability and shall be covered by the corresponding financiall security maintened pursuant to Articles IV and V and undor the applicable national law.

5. Subsidiary Liability of the State. If the installation State or any State that authorizes an assumption of liability pursuant to paragraph (2) lowers the minimum limit of liability established under Article IV (I) or provides for a shorter period of prescription than that established under Article IV (2), such State shall be primarily liable for the difference between the lower limit and that establishe under Article IV (2)

Article IV. Limitation of Liability in Amount and in Time.

1. Limitation in amount.

(a) Unless higher limits are set by the State whose law is appliacable under this Convention, the aggregate amount of liability for third party nuclear damage shall not exceed ..... for one nuclear incident, and ..... for any installation or consignment during any period of twelve months or for the duration of any voyage.

(b) Where nuclear damage is caused jointly or cumulatively by nuclear incidents attributable to several nuclear consignments transported in the same ship, airplane or vehicle, or located in the same place of storage, the aggregate liability of the persons jointly and severally liable therefor under Article III (3) shall not exceed the highest individual limit applicable pursuant to paragraph (a) of this Article;

(c) The limit of liability applicable pursuant to paragraph (a) of this Article shall not include the cost of investigating, litigating or settling claims, nor any costs incurred by the operator in protecting persons or property against nuclear damage, or to limit the extent thereof after a nuclear incident.

2. Limitation in time.

(a) Unless the State whose law is applicable under this Convention establishes a lenger period of limitation, any right to compensation for third party nuclear damage under this Convention shall expire if an action therefor is not brought within ten years from the date of the nuclear incident; provided, however, that :

(i) where the nuclear incident is a continuing condition or a series of occurrences, the ten years shall be computed from the date of the victim's last exposure thereto ;

(ii) where the nuclear incident is caused by critical hazard materials or by radioactive products which were stolen, jettisoned or involuntarily lost, the ten years shall be computed from the date of such theft, jettisoning or loss.

(b) The State whose law is applicable under this Convention may in addition to or instead of any period of limitation computed from the date of the nuclear incident establish shorter reasonable periods of limitation for filing claims or bringing actions, to be computed from the date on which the nuclear damage and its cause were ascertained or ascertainable through the exercice of ordinary care.

Article V. Financial Security.

1. The operator of a nuclear installation or any other person who has assumed liability in conformity with Article III (2) shall maintain adequate financial security, of such type and on such terms as the Installation State or the State that has authorized a person other than the operator to assume liability for third party nuclear damage arising under this Convention.

2. Nothing in this Article shall require any State or any member State or similar political unit in a Federal Government to furnish financial security for a nuclear installation operated by it.

PART THREE .

ACTIONS FOR CONTRIBUTION, RECOURSE AND ON SITE DAMAGE

Article VI. Actions for contribution.

Any person who is liable for third party nuclear damage under this Convention, including his financial guarantors or any State subsidiarily liable under Article III (4), may sue for reasonable contribution any other person jointly liable pursuant to Article III (3).

Article VII . Recourse actions and actions for on-site damage.

1. Actions against suppliers.

Recourse actions for third party liability and actions for on-site damage shall lie against any person who has manufactured materials or equipment for, or who has furnished materials, equipment or services in connection with the design, construction, repair or operation of a nuclear installation, or who has transported or stored a nuclear consignment, only if that person had expressly assumed such liability by contract, provided, however, that this paragraph shall not apply if the defendant resides or has his principal place of business in the installation State.

2. Recourse actions against operators.

With respect to third party nuclear damage caused by incidents which are covered by this Convention, no recourse actions shall lie against any person primarily liable; provided, however, that any person who has furnished compensation or who has been held liable in a non-contracting State with respect to nuclear damage for which compensation would be due under this Convention may, if the national law applicable to suits for third party nuclear damage so provides, be considered a claimant for third party nuclear damage.

PART FOUR .

JURISDICTION AND APPLICABLE LAW

Article VIII. Jurisdictional Competence .

I. Except as otherwise provided in paragraph (2) of this Article, jurisdiction over actions for third party nuclear damage shall lie only with the courts of the Installation State.

2. Where third party damage is caused by a nuclear incident involving a nuclear consignment, jurisdiction over actions for such damage shall lie exclusively with the courts of the contracting State inwhich the nuclear incident occurred; provided, however, that ;
(a) where a nuclear incident occurs on the territory of several contracting States, any actions may be brought in the courts of the State where the first action was filed; if it appears that the aggregate nuclear damage will exceed the limit of liability, any interested party may request, and any court before which actions are pending under this Article may order the removal of such actions to the court in which the first action was filed;
(b) where a nuclear incident occurs outside the territory of any contracting State, or if the place where the incident occurred cannot be determined, actions for third party damage resulting therefrom may be brought in the courts of the Installation State.

3. Jurisdiction over actions for contribution, and over recours actions against operators, shall lie only with the courts of the State which pursuant to paragraphs (I) and (2) of this Article has jurisdictional competence over actions for third party damage against the defendant; provided,however, that the defendant may voluntarily submit to the jurisdictio of any other court.

Article IX. Applicable Law.

I. The courts competent under Article VIII shall apply the domestic law of the forum and the provisions of this Convention.

2. Notwithstanding the provisions of paragraph (I) of this Article, the following special rules shall apply to third party damage attributable to nuclear consignments :

((a) If a higher limit of liability or a period of prescription more favorable to the plaintiff is established under the law of the Installation State of any operator liable under Article III (I), or under the law of any State which authorized another person to assume liability in conformity with Article III (I), or under the law of any other contracting State on the territory of which the particular nuclear incident occurred, then the higher limit or the longer period of limitation shall apply;)

(b) No State subsidiarily liable under Article III of this Convention shall be required to pay more than what its liability would have been under its own law.

PART FIVE

DUTIES AND LEGISLATIVE COMPETENCE OF STATES .

Article X. Duties of States.

The State whose courts have jurisdiction under this Convention shall :

I. Designate the competent courts for the presecution of any actions under this Convention, such courts may be administrative bodies if their rulings are subject to judicial review on all legal issues.

2. Establish adequato methods for the filing, processing and prosecution of any claims and actions under this Convention, and insure that all parties shall have a fair and adequato opportunity to defend their interests.

3. Establish adequato methods for the prompt and equitable distribution of the proceeds available in the event that third party nuclear damage should exceed, or should be likely to exceed, the limit of liability pursuant to Article IV.

Article XI. Legislative Competence of States.

The State whose courts have jurisdiction under this Convention shall be free to legislate on any matter not expressly regulated by this Convention. Also, it shall be free to :

I. Reasonably limit recovery per claim or for certain classes of claims;

2. Establish reasonable orders of preference among certain classes of claims ;

3. Authorize the courts in which claims for third party damage are pending to set aside for the duration of the period of prescription reasonable portions of the secured limited liability to provide compensation for victims of delayed injuries.

4. Provide that, where third party nuclear damage has been caused jointly or cumulatively by a nuclear incident covered by this Convention and by a source of ionizing radiation not covered by it, the liability arising under this Convention shall be reduced to the ratio which tho ionizing radiation attributable to sources covered by this Convention is shown to bear to the total amount of ionizing radiation which caused the nuclear damage ;

5. Require that exposure to ionizing radiation be declared and certified within a reasonable period of time ;

6. Establish any reasonable presumption and inferences in connection with the burden of proving causation and damage;

7. Provide that any financial guarantor may be sued directly;

8. Provide strictor rules of liability for workmen's compensation claims.

PART SIX

GENERAL PROVISIONS:

Article XII.

With respect to any rights or duties established by this Convention no person shall be treated loss favorably than the nationals of the Installation State or of any other State; nor shall compensation for nuclear damage which occurred outside the territory of the Installation State be any lower than if damage had occurred in the Installation State.

Article XIII.

Any immunity from legal processes pursuant to rules of national law shall to waived with respect to liability arising from, or to financial security furnished under this Convention.

Article XIV.

The contracting States shall as far as possible facilitate payment in the currency of the State where the damage occurred of any compensation under this Convention, and of any insurance and re-insurance payments in connection therewith.

Article XV.

Nothing in this Convention shall affect any liability which States may incur under rules of international law or by virtue of their domestic logislation.

Article XVI.

This Convention shall not apply to nuclear weapons or to any facilities, nuclear fuels or to radioactive products removed from a nuclear installation if the State in which they are located or in which the consignment originated declares that they are used or destined to be used primarily for military purposes.

Article XVII.

No national legislation applicable pursuant to this Convention shall alter any rights or duties arising in connection with a nuclear incident which had already occurred at the time when such legislation entered into force.

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PANEL ON CIVIL LIABILITY AND
STATE RESPONSIBILITY FOR NUCLEAR HAZARDS

ANNOTATED DRAFT CONVENTION ON CIVIL LIABILITY FOR NUCLEAR HAZARDS

Introductory Note.

This draft has been prepared as a basis for discussion for the second series of meeting of the Panel of Experts. It represents a joint effort of the Experts who expressed their views during and after the first series of Panel Meetings, of the Legal Division of the Agency, and of the Panel Secretary.

Each Article of this draft is followed by an explanatory note. These draft proposals do not necessarily represent the views of the Legal Division and of the Panel Secretary. They are formulated chiefly to identify specific problems to be faced in drafting a convention on civil liability. Once agreement is reached on matters of substance, it will be possible to reformulate, rearrange and shorten most articles.

As stated by the Panel in the course of its first meeting, the objective to be attained is a minimum convention. Mr.Lokur further expressed the wish that the rules of the draft convention be wherever possible limited to truly international situations. This would, of course not prevent States from adopting the same or similar rules for internal use.

In preparing the present draft, we have consequently tried to avoid any undue interference with national legislation, and to devise formulae which, though different, would not conflict with national law, with international conventions and with national or regional legislative projects concerned with the same subject matter.

It was considered desirable to subdivide this first draft convention as follows : Part One : Definitions; Part Two : Liability for Off-site Nuclear Damage; Part Three : Actions for Contribution, Recourse and On-site Damage; Part Four: Liability for Nuclear Damage Caused by Nuclear Shipments; Part Five : General Provisions. As to the Final Clauses of the Convention, it was decided in conformity with the views expressed at the last Panel meeting to deal with them only after agreement had been reached on matters of substance.

PART ONE

DEFINITIONS

ART. 1.

FOR THE PURPOSE OF THIS CONVENTION :

1. "PERSON" MEANS ANY NATURAL OR LEGAL PERSON, INCLUDING ANY STATE OR ADMINISTRATIVE ENTITY THEREOF AND ANY INTERNATIONAL ORGANIZATION.

This definition was considered necessary in order to identify the legal entitites that may be liable or that may be entitled to sue under this Convention. By including States or administrative entities thereof we attempted to avoid any recourse to rules of sovereign immunity or reciprocity which may impede litigation against or by States. International organizations were included principally to allow them to assume responsibility under this Convention; this was considered necessary in view of the trend toward nuclear development undertaken on a basis of international cooperation by appropriate intergovernmental institutions.

2. "NUCLEAR FUEL" MEANS PLUTONIUM; URANIUM 233 OR 235; URANIUM CONTAINING EITHER OR BOTH THE ISOTOPES 233 OR 235 IN AN AMOUNT SUCH THAT THE ABUNDANCE RATIO OF THE SUM OF THESE ISOTOPES TO THE ISOTOPE 238 IS GREATER THAN THE RATIO OF THE ISOTOPE 235 TO THE ISOTOPE 238 OCCURRING IN NATURE; AND ANY OTHER MATERIALS IN SUCH A FORM, AMOUNT OR COMBINATION THAT THEY ARE CAPABLE OF PRODUCING ENERGY BY UNDERGOING A PROCESS OF NUCLEAR TRANSFORMATION;

As had been suggested by Mr. Winkler, we have attempted to enumerate all the materials which should be considered "nuclear fuels" instead of adopting an open-ended formula such as that of Article II of the Statute of the I.A.E.A. The objective was to cover any materials which presented a risk of criticality. We also adopted a formula which would include any fuels developed in the future and any materials which might inadvertently become critical. Materials such as natural uranium, on the other hand, would not be included unless they were in such a quantity, combination or form that a chain reaction would be possible. If irradiated, they would be covered by the definition of "radioactive product". The last sentence of this Paragraph includes also materials which could undergo a process of nuclear fusion. There was some objection to this on the part of our technical and scientific staff, since in their view a fusion process does not present the same danger of contamination as a process of nuclear fission. Keeping in mind that installations for nuclear fusion are included in the U.S. Atomic Energy Act, as amended, but not in the draft convention proposed to the Steering Committee of the OEEC, we decided to include at this

oint fuels capable of producing nuclear fusion, subject to additional larifications to be presented by the technical and scientific staff f the Agency as to the hazard inherent in such fuels.

"RADIOACTIVE PRODUCTS" MEANS ANY MATERIAL OR WASTE MADE RADIOACTIVE AS A RESULT OF THE PRODUCTION OR UTILIZATION OF NUCLEAR FUELS.

This definition is intended to cover any materials, ncluding waste products, which have been made radioactive by an rtificial process; it does not include materials which are naturally adioactive.

A "WASTE MATERIALS" MEANS ANY NUCLEAR FUELS OR RADIOACTIVE MATERIALS, OTHER THAN EXCLUDED MATERIALS, DISPOSED OF AS WASTE OR REMOVED FROM NUCLEAR INSTALLATION FOR DISPOSAL AS WASTE.

This definition has proved necessary in view of the pecial legal rules applying to waste materials (e.g. Paragraph 11(a) f this Article).

"EXCLUDED MATERIALS" MEANS :
a) ANY NUCLEAR FUELS OR RADIOACTIVE PRODUCTS USED, OR REMOVED FROM NUCLEAR INSTALLATION IN ORDER TO BE USED? IN MILITARY WEAPONS;
b) ANY RADIOACTIVE PRODUCTS OTHER THAN IRRADIATED FUELS OR WASTE IF EY ARE TRANSPORTED, STORED OR USED FOR MEDICAL, INDUSTRIAL OR SCIENIFIC PURPOSES IN QUANTITIES SUCH THAT THEIR RADIOACTIVITY DOES NOT XCEED _____ CURIES;
c) ANY NUCLEAR FUEL USED, OR REMOVED FROM A NUCLEAR INSTALLATION IN RDER TO BE USED TO PRODUCE AN UNCONTAINED EXPLOSION FOR ANY PURPOSE;
d) ANY NUCLEAR FUELS OR RADIOACTIVE PRODUCTS AS SHALL FROM TIME TO IME BE EXCLUDED BY THE INTERNATIONAL ATOMIC ENERGY AGENCY ON THE GROUND HAT THEY PRESENT NO HAZARD OF OFF-SITE NUCLEAR DAMAGE; SUCH AN EXCLUSION AY BE GRANTED WITH RESPECT TO NUCLEAR FUELS OR TO RADIOACTIVE PRODUCTS N A PARTICULAR FORM, OR IF HANDLED IN CONFORMITY WITH MINIMUM SAFETY ULES.

It was considered desirable to enumerate in a single rovision all the nuclear fuels or radioactive products which were ot intended to be covered by this Convention (i.e. with respect to hich the limited but absolute liability backed by financial security hould not be applicable) for political reasons or because they clearly resent only a minimum risk of criticality.

<u>ilitary activities.</u>

It was suggested by Mr. Nikolaiev that no State should nefit from this Convention with respect to nuclear weapons; also, by cluding nuclear weapons in this Convention, we might contribute to galizing their use. We have attempted to reflect these views in aragraph 5(a) by excluding any materials used in nuclear weapons

(i.e. also the manufactured weapons) and any materials separated from a nuclear installation in order to be used in such weapons. Since it is conceivable that radioactive products other than nuclear fuels may also be employed as weapons, we have added them in the definition of Paragraph 5(a). On the other hand, it proved difficult to exclude any materials destined for military uses before they are separated from a nuclear installation covered by this Convention (i.e. plutonium obtained as by-product in non-military power reactor) without establishing a universal system of safeguards and inspections.

Radio-isotopes.

It is clearly necessary to exclude from the scope of this Convention certain radioisotopes used for medical, industrial or scientific purposes. The principal difficulty, however, lies in defining them. The term "radioisotopes" as used for instance in the O.E.E.C. draft convention includes irradiated materials or waste which present a considerable hazard of contamination. Some radioisotopes which present only a small risk if properly used for medical industrial or scientific purposes, may present much greater risks in the course of transportation and storage or when abandoned as waste. We have therefore attempted to exclude pursuant to Paragraph 4(b) only radioisotopes used, transported or stored for medical, industrial or scientific purposes if their radioactivity does not exceed a given value in curies. This value could be kept quite low, since additional exclusions may be possible under Paragraph 5(d). Also, we have not included in Paragraph 4(b) any radioactive products abandoned as waste. Some members of the technical and scientific staff of the Agency have expressed doubts about the present formulation of Article 4(b), especially as it concerns transportation and storage and with respect to the arbitrary limit measured in curies. We will ask them to present their views at the next series of meetings.

Nuclear explosions.

Mr. Nikolaiev and Mr. Winkler had asked that nuclear explosions be excluded from this Convention. We have attempted to reflect this in Article 4(c) by excluding any materials used in order to produce an uncontained explosion for any purpose whatsoever. We will ask the technical and scientific staff of the Agency to present their views as to whether the term "uncontained" is necessary or desirable to attain the objective set by Mr. Winkler and Mr. Nikolaiev.

EXEMPTIONS GRANTED BY THE I.A.E.A.

It appears from the statements made by the technical and scientific staff of the Agency that certain fuels and radioactive products may present no appreciable danger of criticality or

f contamination if they are properly handled, transported and stored. t would be desirable, therefore, to exclude them from the scope of his Convention. However, unlike the exclusion of those radioisotopes hich under no circumstances can cause widespread damage, a similar xclusion for materials which, if improperly handled, might cause ontamination of catastrophic proportions should be predicated upon he observance of minimum safety rules. We have therefore proposed hat the I.A.E.A., which has already devised a code of safe handling n connection with radioisotopes, be empowered to grant exclusions for ertain materials subject to compliance with any safety rules it may stablish or with any national or regional safety rules it may approve.

"NUCLEAR INSTALLATION" MEANS :

a) ANY FACILITY FOR THE PRODUCTION OF NUCLEAR FUELS, BUT NOT FACILITIES FOR THE MINING AND PHYSICAL CONCENTRATION OF ORES UNLESS THE ORES OR THE CONCENTRATES ARE INCLUDED IN THE DEFINITION OF "NUCLEAR FUEL".

b) ANY FACILITY FOR THE UTILIZATION OF NUCLEAR FUELS WHICH ARE NOT EXCLUDED MATERIALS, EXCEPT A SHIP, AIRPLANE OR OTHER VEHICLE PROPELLED BY NUCLEAR ENERGY.

c) ANY FACILITY FOR THE PROCESSING OF NUCLEAR FUEL AFTER ITS UTILIZATION.

d) ANY PLACE WHERE NUCLEAR FUELS OR RADIOACTIVE PRODUCTS OTHER THAN EXCLUDED MATERIALS ARE STORED.

e) ANY FACILITY FOR THE DISPOSAL OF WASTE MATERIALS.

THING IN THESE DEFINITIONS SHALL PRECLUDE THE INSTALLATION STATE FROM NSIDERING SEVERAL INTERRELATED FACILITIES LOCATED ON THE SAME SITE AS SINGLE INSTALLATION.

It was thought advisable to enumerate in this Paragraph l stationary facilities for the production, utilization and reprocesng of nuclear fuels, and any facilities for the storage and disposal waste of nuclear fuels or radioactive products other than excluded terials. With respect to facilities for the mining and physical conntration of ores, it is the opinion of some technical experts that risk of criticality and no catastrophic risk of contamination could cur. We nevertheless included such mining and concentration facilities the event that either the ores or the ore concentrated should be in ch a form, amount or combination as to be included in the definition nuclear f el. It should be noted, however, that this is not the case present for any ores or for any facilities for the physicae concentraon of ores. With respect to facilities for the production and reprocesng of nuclear fuels, we did not make any special allowance for cilities dealing with excluded materials, since the origin and ultimate stination of the fuels for military purposes would be difficult to certain. In including places of storage, we did not intend to cover y means of transportation, for which special rules have been proposed der Part Four of the Convention.

In view of the practice existing in certain States, e.g. the United Kingdom, to attach liability to a given "nuclear site" ich may comprise several interrelated nuclear facilities, we specified the last sentence of this Paragraph that nothing in these definitions

should preclude States from adopting such a system, provided that the facilities are interrelated. It should be noted that such a provision might, of course, be abused. However, there seems to be little fundamental difference between a system imposing the same limit upon an individual facility and a cluster of facilities and a system which imposes the same ceiling of liability upon single installations with different safety coefficients.

Unlike the definition of nuclear installation adopted in Article 1(b) of the O.E.E.C. draft convention, the definition of Article I(5) of this draft does not provide for any other installations to be added in the future. We have instead provided for the exclusion of certain materials pursuant to Article I(4)(d), believing that such a system would accomplish the same purpose without causing difficulties of a political order. We have also excluded from this definition any propulsion devices, since that problem will be discussed in more detail at the second series of Panel meetings.

6. "NUCLEAR SHIPMENT" MEANS ANY NUCLEAR FUELS OR RADIOACTIVE PRODUCTS OTHER THAN EXCLUDED MATERIALS, IN THE COURSE OF CARRIAGE BY LAND, AIR OR WATER OR BY A COMBINATION OF THESE, FROM THE TIME THE SHIPMENT LEAVES THE SITE OF THE ORIGINATING NUCLEAR INSTALLATION TO THE TIME WHEN IT IS DISCHARGED AT THE SITE OF THE RECEIVING INSTALLATION; IT SHALL INCLUDE ANY INTERVENING STORAGE, TRANSSHIPMENT OR DIVERSION.

This definition is intended to cover any nuclear fuels or radioactive products in the course of carriage by land, air or water. The principal purpose is to permit the shipment to be considered as a unit from the time the materials transported are removed from the control of the consignor to the time when control is resumed by the consignee. Any storage in the course of transportation, and any transshipment or diversion shall be considered part of that transportation; accordingly, the place where such intervening storage occurs needs not be considered a nuclear installation pursuant to Paragraph 5(d).

7. "INSTALLATION STATE" MEANS THE STATE ON THE TERRITORY OF WHICH THE NUCLEAR INSTALLATION IS LOCATED; PROVIDED, HOWEVER, THAT WHERE A NUCLEAR INSTALLATION IS LOCATED OUTSIDE THE TERRITORY OF ANY STATE, THE INSTALLATION STATE SHALL BE THE STATE WHICH HAS AUTHORIZED THE INSTALLATION TO BE OPERATED; IF NO SUCH AUTHORIZATION HAS BEEN GIVEN, THE STATE OR STATES OF ANY NUCLEAR INSTALLATION FROM WHICH NUCLEAR FUELS OR RADIOACTIVE PRODUCTS WERE TRANSFERRED TO SUCH UNAUTHORIZED INSTALLATION; AND PROVIDED THAT THE TERM "TERRITORY OF A STATE" AS USED IN THIS CONVENTION SHALL INCLUDE ITS TERRITORIAL WATERS, BUT NOT ANY VESSEL OR AIRPLANE PERTAINING TO IT.

This definition is relevant because under the substantive provisions of this Convention, the Installation State has exclusive power to legislate on a number matters, because its courts have jurisdiction over suits for nuclear damage and because in

rtain instances that State may have to assume subsidiary liability
damage not covered by the liability or insurance of the operator.
was considered essential, therefore, that the Installation State
the State which has the greatest amount of physical control over
nuclear installation. That is obviously the State on the territory
which the installation is located. It is conceivable, however, that
installation might be located outside the territory of any State
g. a waste disposal facility on the high seas, or a power reactor
the Antarctic). In such event, the role of Installation State should
assumed by the State which has authorized the operation of that
ility. In the event that no State had authorized it, the rights and
ties of the Installation State should fall to the State from which
lear fuels or radioactice products have been transferred to the
uthorized installation. This will have the effect of encouraging
States to exercise adequate control over the destination and use of
lear fuels and radioactive products leaving their territory.

With respect to transportation, special rules discussed
connection with Article XIII apply to the qualification of "Installa-
n State".

"OPERATOR" MEANS THE PERSON WHO HAS BEEN AUTHORIZED BY THE COMPETENT AUTHORITIES OF THE INSTALLATION STATE TO OPERATE A NUCLEAR INSTALLA-N; IF NO SUCH AUTHORITY HAS BEEN GIVEN, THE OWNER OF THE INSTALLATION LL BE CONSIDERED THE OPERATOR.

This definition is clear with respect to authorized
tallations. It is intended to avoid any litigation on the difficult
tual issue of whether or not a given person has "control" over an
tallation. Where no person has been authorized to operate an instal-
ion, the proprietor thereof shall be considered the operator. Although
s solution may seem arbitrary, it will apply only in very exceptional
cumstances and will have the effect of imposing a specific burden
care upon the owner of any facility susceptible of becoming a nuclear
tallation. In particular, the owner will be led to ascertain that
operation of his facility as a nuclear installation by another
son be properly authorized by the competent public authority.

"SUPPLIER" MEANS ANY PERSON WHO HAS MANUFACTURED EQUIPMENT FOR, OR HAS FURNISHED EQUIPMENT OR SERVICES IN CONNECTION WITH THE DESIGN, STRUCTION REPAIR OR OPERATION OF A NUCLEAR INSTALLATION.

This definition is relevant with respect to the special
visions regulating recourse actions and actions for on-site nuclear
ge. It is intended to be all-inclusive, covering in particular any
suppliers and any other person who has furnished services in connec-
with the nuclear installation.

10. "NUCLEAR DAMAGE" MEANS PROPERTY DAMAGE, LOSS OF PROPERTY, DEATH OR PERSONAL INJURY DUE TO IONIZING RADIATION, OR TO TOXIC, EXPLOSIVE OR OTHER HAZARDOUS PROPERTIES OF NUCLEAR FUELS AND RADIOACTIVE PRODUCTS COMBINED WITH SUCH IONIZING RADIATION.

a) "OFF-SITE NUCLEAR DAMAGE" MEANS NUCLEAR DAMAGE THAT OCCURS OUTSIDE ANY NUCLEAR INSTALLATION WHICH CAUSED OR CONTRIBUTED TO CAUSING IT.

b) "ON-SITE NUCLEAR DAMAGE" MEANS DAMAGE TO ANY NUCLEAR INSTALLATION WHICH CAUSED OR CONTRIBUTED TO CAUSING IT, AND PERSONAL INJURY TO THE EMPLOYEES OF THE OWNER OR OPERATOR OF SUCH AN INSTALLATION WITHIN THE COURSE OF DUTIES CONNECTED WITH THE INSTALLATION.

NOTHING IN THESE DEFINITIONS SHALL PREVENT THE INSTALLATION STATE FROM CONSIDERING THE FOLLOWING AS OFF-SITE OR ON-SITE NUCLEAR DAMAGE :

(i) DAMAGE TO PROPERTY OF THE OPERATOR OR OF THE OWNER OF A NUCLEAR INSTALLATION IF IT IS LOCATED OUTSIDE THE INSTALLATION;

(ii) PERSONAL INJURY SUFFERED ON THE SITE OF THE INSTALLATION BY PERSONS WHO ARE NOT EMPLOYEES OF THE OWNER OR OPERATOR OF AN INSTALLATION AS DEFINED IN SUB-PARAGRAPH (b).

(iii) DAMAGE TO PROPERTY OF PERSONS OTHER THAN THE OWNER OR OPERATOR OF A NUCLEAR INSTALLATION, IF SUCH PROPERTY WAS LOCATED ON THE SITE OF THE INSTALLATION.

The first sentence of this definition describes the type of damage for which compensation may be had under this Convention. We have included any property damage, death or personal injury caused by a nuclear incident. By virtue of Article 8(3)(c), however, the law of the Installation State is further (and exclusively) competent to define what type of damage, death or personal injury entails liability. We have further provided that compensation under this Convention shall in principle be due only for damage attributable to ionizing radiation. It had been suggested by Mr. Carruthers that any damage not due to ionizing radiation should be excluded from the purview of this Convention; however, since we were told by our technical and scientific staff that in some instances the effect of ionizing radiation and the effect of simultaneous toxic or explosive properties of a nuclear installation could not be distinguished, we nevertheless included damage caused by toxic explosive or other hazardous properties if these properties were combined with ionizing radiation. Perhaps this solution is too harsh and should be replaced by a mere presumption that, when damage is suffered as a result of ionizing radiation and of toxic or hazardous properties of nuclear fuels and radioactive products, the damage shall be deemed to be caused by ionizing radiation. We will ask our technical and scientific staff to present additional clarifications on the cumulative or combined effects of nuclear incidents.

We have also introduced a distinction between off-site nuclear damage and on-site nuclear damage, leaving it up to the Installation State to decide whether certain marginal types of damage should be considered off-site or on-site nuclear damage. It was felt that this solution was preferable to any arbitrary classification

h as it appears in Article 2(ii) of the OEEC draft convention with pect to property in the custody or control of an operator. The ques- n of whether or not damage to such property should be considered on- off-site damage is closely related with the general legal status of h property and with the modalities of insurance coverage. Since these vary from country to country, it does not seem possible to establish niform international rule in connection therewith.

"NUCLEAR INCIDENT" MEANS ANY CONDITION OR EVENT THAT IS CAPABLE OF CAUSING NUCLEAR DAMAGE AND THAT OCCURS WITHIN A NUCLEAR INSTAL- ION, IN CONNECTION WITH A NUCLEAR SHIPMENT OR IN CONNECTION WITH NUCLEAR FUELS OR RADIOACTIVE PRODUCTS, OTHER THAN EXCLUDED MATERIALS OVED FROM A NUCLEAR INSTALLATION. PROVIDED, HOWEVER, THAT THE FOLLOWING SUBSEQUENT NUCLEAR INCIDENTS SHALL BE CONSIDERED PART OF THE FIRST INCIDENT

(i) IF THE LAW OF THE INSTALLATION STATE SO PROVIDES, ANY RELATED NUCLEAR INCIDENT WHICH OCCURS AFTER ADEQUATE MEASURES ARE TAKEN TO TERMINATE THE OPERATION OF A NUCLEAR INSTALLATION, BUT BEFORE THE INSTALLATION RESUMES ITS OPERATIONS;

(ii) ANY RELATED NUCLEAR INCIDENT CAUSED BY A NUCLEAR SHIPMENT IN THE COURSE OF THE SAME VOYAGE;

(iii) ANY NUCLEAR INCIDENTS CAUSED BY WASTE MATERIALS, DISPOSED OF BY THE SAME NUCLEAR INSTALLATION; PROVIDED, HOWEVER, THAT THE PROVISIONS OF THIS SUB-PARAGRAPH SHALL NOT APPLY IF THE SUBSEQUENT INCIDENTS COULD HAVE BEEN AVOIDED BY THE EXERCISE OF REASONABLE CARE OR IF THEY WERE CAUSED BY THE VIOLATION OF A RELEVANT SAFETY RULE OF THE INSTALLATION STATE; WITH RESPECT TO DAMAGE THAT OCCURRED OUTSIDE THE INSTALLATION STATE, THIS SUB-PARAGRAPH SHALL NOT APPLY IF THE SUBSEQUENT INCIDENTS WERE CAUSED BY THE VIOLATION OF A RELEVANT SAFETY RULE ESTABLISHED OR APPROVED BY THE I.A.E.A.

WHERE NUCLEAR DAMAGE IS CAUSED JOINTLY OR CUMULATIVELY BY NUCLEAR INCIDENTS ATTRIBUTABLE TO SEVERAL NUCLEAR SHIPMENTS IN THE SAME SHIP, AIRPLANE OR VEHICLE, OR IN THE SAME PLACE OF STORAGE, THEY SHALL BE CONSIDERED A SINGLE NUCLEAR INCIDENT.

UNLESS OTHERWISE PROVIDED BY THE INSTALLATION STATE, THIS CONVENTION SHALL NOT APPLY TO NUCLEAR INCIDENTS WHICH OCCUR ON THE TERRITORY OF A NON-CONTRACTING STATE, EXCEPT

(i) WITH RESPECT TO NUCLEAR SHIPMENTS TRANSPORTED BY SEA, BY INTERNATIONAL WATERWAY OR BY AIR FROM A CONTRACTING STATE, WHERE THE NUCLEAR INCIDENT OCCURS PRIOR TO DISCHARGE ON THE TERRITORY OF A NON-CONTRACTING STATE;

(ii) WHERE THE NUCLEAR INCIDENT IS CAUSED BY WASTE MATERIALS ABANDONED IN A BODY OF WATER BY A NUCLEAR INSTALLATION PERTAINING TO A CONTRACTING STATE, IF THEY HAVE NOT BEEN TAKEN INTO POSSESSION BY ANOTHER PERSON AFTER DISPOSAL.

In this Draft Convention the concept of "nuclear incident" ves as a predicate for the limitation of liability in time and in unt.

The basic definition is intended to include any accident, malfunctioning or condition in an individual nuclear installation or in connection with a nuclear shipment or with waste materials removed from an installation. This formulation seemed necessary in order to include also damage attributable to malfunctioning which extends over a prolonged period of time. Even so, it has proved difficult to find an adequate definition in view of the fact that a single damaging event may well consist of a series of interrelated occurrences. It was suggested in connection with the O.E.E.C. draft that it might be left to the courts to decide whether a series of occurrences constitute a single incident or several incidents. This solution seems undesirable to us, especially as to transportation and waste disposal. Also, in view of the fact that adequate insurance coverage could not be automatically reinstated after a nuclear incident (DG/PL/11, Annex 9), the subsidiary liability of States would generally be engaged with respect to successive incidents. We have therefore provided that, in certain situations where the occurrence of a second incident is generally beyond the control of the operator and of the Installation State such subsequent incidents should be considered part of the first incident. The situations in which this would apply are the following:

a) any installation which has ceased to operate, if the law of the installation State so provides. It was pointed out that successive incidents could not be ruled out during and after shut-down. Nevertheless the suggested solution might encourage States to order the shut-down of any installation in which an incident of a certain magnitude had occurred. It would also permit a limitation of liability per "cover period", as proposed in the United Kingdom draft.
b) subsequent incidents in the course of transportation.
c) subsequent incidents involving waste materials abandoned by the same operator.

A number of qualifications seem desirable with respect to these rules: the subsequent incidents should be related to the first incident with which they are merged (however, this qualification cannot well be applied to abandoned waste); they should not have been avoidable by a reasonably careful operator; and they should not have been caused by the violation of any relevant safety rule or regulation of the Installation State. As to damage occurring outside the territory of the Installation State, we propose that the operator be penalized also if the subsequent incident was caused by the violation of any relevant safety rule or regulation established or approved by the I.A.E.A. We believe that this reintroduction of a qualified system of fault-liability may well contribute to the voluntary compliance with adequate safety measures recommended nationally or internationally with respect to some of the most dangerous aspects of nuclear energy.

Sub-paragraph (c) of the Paragraph seems necessary both for political reasons and because it would be quite ineffective to cover by this Convention events which might occur on the territory of a State which has not ratified it. Suits for damage resulting from

h incidents will not be barred, although they will not be covered this Convention. This means that in many countries the operator will be liable without proof of fault, and that financial security intained by the operator could not be touched by successful claimants. the other hand, the limitations of this Convention will not protect operator who is held liable under common law rules.

It seemed desirable to provide for two exceptions to the nciple of territoriality expressed in Sub-paragraph (c). The first eption concerns nuclear shipments by air or on water where the in- ent occurs prior to discharge on the territory of a contracting State. second exception concerns incidents caused on the territory of a n-Contracting State by nuclear waste abandoned in water by an instal- tion pertaining to a Contracting State. It would cover any container waste which, after being dumped at sea, drifted into a port of a n-Contracting State and broke open there. It would not cover any waste nsferred for disposal to an installation pertaining to a non-Contract- g State, or to any container picked up by somebody on the territory a non-Contracting State. The purpose of these extensions was not so ch to protect the persons injured in a non-Contracting State than to ve defendants (operators or carriers) the benefit of the limitations liability under this Convention. This provision would of course not otect the defendant against suits in non-Contracting States; it would, wever, govern direct suits brought in a Contracting State and limit enforcement in any Contracting State of judgments entered in the urts of non-Contracting States.

P A R T T W O

LIABILITY FOR OFF-SITE NUCLEAR DAMAGE

T. II. PRINCIPLES OF LIABILITY.

THE OPERATOR OF A NUCLEAR INSTALLATION SHALL BE LIABLE FOR ANY OFF-SITE NUCLEAR DAMAGE CAUSED BY A NUCLEAR INCIDENT IN HIS STALLATION.

This Paragraph establishes a system of liability not edicated upon fault. Several reasons have been advanced for aban- ning the requirement that fault be proved. In the first place, fault connection with a nuclear installation would be difficult to prove to disprove; secondly, the mere fact of operating a dangerous strumentality justifies the imposition of an absolute duty of care, d of strict liability for the consequences of any incident, upon e enterprise which derives an immediate economic benefit from ch an instrumentality, Thirdly, strict liability imposed upon the rson who has control over a dangerous instrumentality may well courage the adoption of special precautionary measures and devices.

The principle of strict liability has been accepted in all draft laws, national or regional, concerned with the legal effect of nuclear incidents. Only in the United States was the matter left to the law of the individual States which, though most of them recognize the reversal of the burden of proof in connection with hazardous activities, have not yet accepted a principle of strict liability. Should a similar solution, leaving this matter to national legislation, be adopted in this Convention? We agree with the Panel that it should not. As pointed out above, the predicate of fault has little practical meaning except to leave courts an area in which political pressure may conceivably be brought to bear upon them. Also, proof of fault would be particularly difficult to establish in a factual situation encompassing several countries. Lastly, the legal uncertainty inherent in a system leaving the very predicate of liability to national legislation would encourage litigation and would almost certainly work out to the detriment of the victims of nuclear incidents.

It should be noted that while this Paragraph has abandoned the predicate of fault, it will still be necessary to prove causation. This may mean that damage with respect to which causation can only be shown on a statistical basis (e.g. most of the latent nuclear injuries) may be excluded. We have considered the possibility of wording this Paragraph in such a way as to cover these "statistical" injuries; however, in view of the radical departure from the principles of tort law which such a step would imply, we finally concluded to leave this matter to national legislation. Under Article VIII (3)(c) of this draft the Installation State may regulate such matters as the sufficiency and administration of proof with respect to causation, and it might therefore also permit recovery in instances where a reasonable likelihood of causation has been shown, or where damage can only be proved on a statistical basis. Anything else would have to be compensated by a system of State indemnity.

2. WHERE NUCLEAR FUELS OR RADIOACTIVE PRODUCTS OTHER THAN EXCLUDED MATERIALS HAVE BEEN REMOVED FROM A NUCLEAR INSTALLATION, THE OPERATOR OF THAT INSTALLATION SHALL REMAIN LIABLE FOR ANY OFF-SITE NUCLEAR DAMAGE CAUSED BY SUCH NUCLEAR FUELS OR RADIOACTIVE PRODUCTS, UNLESS AT THE TIME OF THE INCIDENT POSSESSION THEREOF HAD BEEN TRANSFERRED TO ANOTHER NUCLEAR INSTALLATION, OR TO AN AGENT OF ANOTHER NUCLEAR INSTALLATION, IN CONFORMITY WITH THE LAWS AND REGULATIONS OF THE PLACE WHERE SUCH TRANSFER HAD TAKEN PLACE; IF THE TRANSFER OF POSSESSION HAD OCCURRED OUTSIDE THE TERRITORY OF ANY CONTRACTING STATE, IT MUST HAVE BEEN IN CONFORMITY WITH THE LAWS AND REGULATIONS OF THE STATE TO WHICH THE ORIGINATING NUCLEAR INSTALLATION PERTAINS.

The purpose of this Paragraph is to impose upon the operator a similar duty of care and liability with respect to nuclear fuels and radioactive products removed from an installation as that imposed upon him with respect to the installation itself. However,

originating operator must be in a position to terminate his bility by transferring the nuclear fuels or radioactive materials another installation. In order to avoid any conflicts of qualifica- n, we suggest that this be the moment when possession is transferred another operator or to an agent of another operator. Also, the bility of the originating operator will be extinguished only if t transfer occurs in conformity with the laws and regulations of the te where it takes place. If the transfer takes place outside the ritory of any Contracting State (e.g. on the High Seas or on the ritory of a non-member State), it must have been approved by the te to which the originating installation pertains. We believe that s system will encourage both the operator of the originating instal- tion and the State to which the installation pertains to exercise e care in effecting or authorizing transfers of possession to materials ered by this Convention. Where these materials are lost or abandoned .g. as waste), the operator who lost or abandoned them will remain ble just as if he had transferred them in violation of the competent s. This again should lead him to adopt appropriate precautions.

Special rules are proposed in Part Four of this Conven- n with respect to transportation. They are intended to dove-tail h the provisions of this Paragraph, though they permit the assumption liability in lieu of the originating operator by the receiving rator or by any other person (e.g. a carrier) if the transfer is fected pursuant to an authorization of the State of transfer.

EXCEPT AS PROVIDED IN ARTICLE IX, X AND XII OF THIS CONVENTION NO PERSON OTHER THAN THE OPERATOR OF THE NUCLEAR INSTALLATION SHALL BE LIABLE FOR ANY OFF-SITE NUCLEAR DAMAGE CAUSED BY THAT INSTALLATION, OR ANY NUCLEAR FUELS OR RADIOACTIVE PRODUCTS FOR WHICH HE IS LIABLE UNDER THIS ARTICLE, UNLESS THE LAW OF THE INSTALLATION STATE SO PROVIDES; NO EVENT SHALL SUCH LIABILITY ARISE EXCEPT WHERE:
THE LIABILITY OF SUCH OTHER PERSONS IS INCLUDED IN THE CEILING OF LIABILITY ESTABLISHED UNDER ARTICLE IV, AND IS COVERED BY FINANCIAL SECURITY AS REQUIRED BY ARTICLE VI OF THIS CONVENTION; OR
SUCH OTHER PERSONS WILFULLY CAUSED THE DAMAGE: PROVIDED, HOWEVER, THAT THE TERM "WILFULLY" AS EMPLOYED IN THIS PARAGRAPH SHALL NOT INCLUDE ANY WILFULNESS ON THE PART OF A PERSON'S EMPLOYEES OR AGENTS UNLESS THEY WERE ACTING IN THE COURSE OF A SUPERVISORY DUTY ENTRUSTED TO THEM BY SUCH PERSON; AND PROVIDED FURTHER THAT
(i) COMPLIANCE WITH THE RELEVANT SAFETY STANDARDS AND REGULATIONS OF THE INSTALLATION STATE SHALL BE CONCLUSIVE PROOF THAT THE DAMAGE WAS NOT WILFULLY CAUSED; AND
(ii) WHERE THE ALLEGED WILFUL ACT WAS COMMITTED IN A STATE OTHER THAN THE INSTALLATION STATE, THAT COMPLIANCE WITH ANY RELEVANT SAFETY STANDARDS AND REGULATIONS ESTABLISHED OR APPROVED BY THE I.A.E.A. SHALL BE PRIMA FACIE PROOF THAT THE DAMAGE WAS NOT WILFULLY CAUSED.

This Paragraph is intended to channel all third party bility through the operator. From the viewpoint of the public such olution presents many advantages. However, there have been some ections to channeling, mainly for doctrinal reasons, and the system not adopted in the German and Swiss draft laws and in the U.S. mic Energy Act, as amended. We have therefore thought it advisable

to provide two distinct exceptions to channeling, which would become operative only if expressly adopted by the installation State:

a) where the liability of the other persons is included in the ceiling of liability established for the operator, and covered by the financial security furnished therefor; this would allow a system of "coverage" as proposed in the German and Swiss drafts and as presently embodied in the U.S. law.

b) where damage was wilfully caused by another person. Since actions under this sub-paragraph would not be included in the operator's ceiling of liability, abuses (especially against suppliers) would be encouraged and might result in onerous if fruitless litigation. If this exceptional remedy should at all be maintained (and it does not appear in the O.E.E.C. draft), it is thus essential that it be carefully circumscribed. We have consequently suggested that wilfulness on the part of an employee other than one acting in the course of a specific supervisory duty be eliminated as a predicate for such actions; also, that compliance with the appropriate safety standards and regulations of the Installation State be conclusive proof that no "wilfulness" existed. In some instances, however, the act (e.g. the manufacture of defective equipment) may have occurred in another country. In that case, the defendant would not only be exonerated if he observed the safety rules of the Installation State: the fact that he complied with any appropriate safety standards or rules established or approved by the I.A.E.A. would be prima facie proof that no "wilfulness" existed. This defense may be particularly important for sub-suppliers of equipment who may not know where their equipment will ultimately be employed. The I.A.E.A. would not necessarily have to establish safety standards of its own, but could approve in bloc the standards applied in a given country.

It should be noted that this Paragraph does not apply to actions for contribution and to recourse actions, and that special rules apply with respect to transportation under Articles XII and XIII (5) and (6).

4. a) NO LIABILITY SHALL ARISE UNDER PART TWO OF THIS CONVENTION FOR NUCLEAR INCIDENTS DUE TO ACTS OF ARMED CONFLICT, INVASION, CIVIL WAR AND INSURRECTION.

b) NO PERSON DAMAGED BY A NUCLEAR INCIDENT SHALL BE ABLE TO RECOVER FROM THE OPERATOR UNDER PART TWO OF THIS CONVENTION TO THE EXTENT THAT THE NUCLEAR INCIDENT OR THE DAMAGE RESULTED FROM THE NEGLIGENCE OR OTHER WRONGFUL ACT OF SUCH PERSON.

c) THE INSTALLATION STATE MAY FURTHER EXONERATE THE OPERATOR FROM LIABILITY UNDER THIS CHAPTER FOR NUCLEAR INCIDENTS DUE TO UNFORESEEABLE NATURAL DISASTERS WHICH COULD NOT REASONABLY BE GUARDED AGAINST.

This Paragraph concerns exonerations and special defenses available to an operator.

a) As suggested by the Panel, a universal exoneration was introduced for any incidents due to acts of armed conflict - including invasions, civil war and insurrections.

Also, the operator was given a defense on the basis of "contributory negligence" to the extent that such negligence has contributed to the damage or incident. This is a departure from the traditional rule of Anglo-Saxon tort law, by virtue of which any contributory negligence, however slight, is an absolute bar to recovery. As to nuclear incidents attributable to "force majeure" or "Acts of God", the last sub-paragraph reflects the views of the Panel that this matter should be left to national legislation. In order to avoid abuses, however, we have suggested that in any event the incident should have been unforeseeable (e.g. not an earthquake in region where seismic disturbances often occur) and that it could not guarded against by the adoption of reasonable safety precautions.

IF ANY OFF-SITE NUCLEAR DAMAGE HAS BEEN CAUSED JOINTLY OR CUMULATIVELY BY A NUCLEAR INCIDENT AND BY A SOURCE OF IONIZING RADIATION NOT COVERED BY THIS CONVENTION, THE INSTALLATION STATE MAY PROVIDE THAT THE LIABILITY OF THE OPERATOR OF THE NUCLEAR INSTALLATION FOR THE RESULTING NUCLEAR DAMAGE SHALL BE REDUCED TO THE RATIO WHICH THE IONIZING RADIATION ATTRIBUTABLE TO THE NUCLEAR INCIDENT IS SHOWN TO BEAR TO THE TOTAL AMOUNT OF IONIZING RADIATION WHICH CAUSED THE NUCLEAR DAMAGE.

This Paragraph permits national legislation to introduce partial defense where it is shown that nuclear damage was caused jointly or cumulatively by a nuclear installation or shipment and by another source of ionizing radiation covered by this Convention. The possibility of such joint damage is a very real one; the other source of ionizing radiation might be a natural one (cosmic radiation, or radiation in certain mines) an installation in a non-Contracting State, nuclear weapon, or installations such as X-ray machines or therapeutic devices which are not covered by this Convention but which have exposed the victim of a nuclear incident to such a dose of radiation that, together with the radiation emanating from the nuclear incident, nuclear damage is produced or aggravated. It may seem unduly harsh in such instances to impose liability for the entire damage upon the operator covered by this Convention.

This provision, dealing with what we think is one of the most difficult problems with which we are faced, is quite new. We advance it with considerable misgivings even in this optional form, but believe that the underlying problem cannot be passed over in silence.

ART. III. JOINT LIABILITY.

IF ANY OFF-SITE NUCLEAR DAMAGE WAS JOINTLY OR CUMULATIVELY CAUSED BY NUCLEAR INCIDENTS FOR WHICH THE OPERATORS OF MORE THAN ONE NUCLEAR INSTALLATION ARE LIABLE UNDER THIS CONVENTION, AND IF THE INSTALLATIONS ARE NOT ALL PERTAIN TO THE SAME INSTALLATION STATE, THEIR OPERATORS SHALL BE JOINTLY AND SEVERALLY LIABLE FOR SUCH DAMAGE UP TO THE CEILING APPLICABLE TO THEM UNDER ARTICLE IV, AND SUBJECT TO A SUBSEQUENT RIGHT OF CONTRIBUTION PURSUANT TO ARTICLE IX OF THIS CONVENTION.

In keeping with the wish of the Panel that we should not unduly interfere with national legislation, this Paragraph is applicable only where installations located in more than one country are involved. It establishes the principle of liability "in solidum" not only for joint causation, but also in instances where damage was caused by the cumulative effect of incidents in several installations.

The problem of cumulative causation is a very difficult one. It is not dealt with in any of the existing laws or drafts. Since cumulative causation (e.g. in connection with waste disposal in a body of water or in a drainage basin) is likely to occur in connection with nuclear activities, the problem should not be closed over, especially not where it involves installations pertaining to different States, the liability of which cannot adequately be regulated by national legislation. Perhaps the rule suggested in this Article is unduly harsh although any installation liable in accordance therewith still has a right to sue for contribution and in certain instances to recover for all it had to pay. On the other hand, it would also seem unconscionable to give nothing to persons injured by such cumulative emanations.

2. IF OFF-SITE NUCLEAR DAMAGE WAS CAUSED BY ONE OR MORE OF SEVERAL NUCLEAR INSTALLATIONS OR NUCLEAR SHIPMENTS WHICH DO NOT ALL PERTAIN TO THE SAME INSTALLATION STATE, BUT CAUSATION CANNOT BE TRACED WITH CERTAINTY TO ANY PARTICULAR ONE OF THESE SEVERAL INSTALLATIONS OR SHIPMENTS, THE RESPECTIVE OPERATORS SHALL BE JOINTLY AND SEVERALLY LIABLE PURSUANT TO PARAGRAPH 1 OF THIS ARTICLE UNLESS THEY PROVE THAT THE INSTALLATION OR SHIPMENT FOR WHICH THEY WOULD BE LIABLE COULD NOT REASONABLY HAVE CAUSED OR CONTRIBUTED TO CAUSING THE NUCLEAR DAMAGE.

Like the foregoing provision, this Paragraph applies only to international fact situations. It is intended to cover instances of so-called "putative causation", where it can be shown that one or more nuclear installations did cause nuclear damage, but where causation cannot be led back to any specific installation. Such a situation might occur, for instance, if damage had been caused by contamination of a river on which several installations were located. It is suggested that if it is proved that the damage must have been caused by waste materials dumped by one of them, the operators of all those installations should be jointly liable unless they could show that they did not dump any waste, or any uncontained waste, or any waste of the kind to which contamination was attributable, into that particular river, so that they could not reasonably be assumed to have caused the nuclear damage. Leaving all matters of administration and sufficiency of proof to national legislation, this provision seems nevertheless highly desirable where putative causation can be led back to installations pertaining to several States. Indirectly it may encourage the riparian installations mentioned in the above example to keep adequate and credible record of any waste disposal activities in order to escape liability under this Paragraph.

T. IV. CEILING OF LIABILITY.

UNLESS A HIGHER CEILING IS SET BY THE INSTALLATION STATE, THE AGGREGATE AMOUNT OF LIABILITY OF THE OPERATOR SHALL NOT EXCEED ..... UNITS OF ACCOUNT FOR ANY OFF-SITE NUCLEAR DAMAGE CAUSED ONE NUCLEAR INCIDENT;

a) WITH RESPECT TO ANY NUCLEAR INSTALLATION OR TO ANY NUCLEAR SHIPMENT OR WASTE THE I.A.E.A. MAY, AT THE REQUEST OF THE INSTALLATION STATE, LOWER THE CEILING OF LIABILITY OTHERWISE APPLICABLE UNDER PARAGRAPH (1) OF THIS ARTICLE.

b) THE LOWER CEILING DETERMINED PURSUANT TO THIS ARTICLE:
   (i) MAY BE RE-EVALUATED AT REGULAR INTERVALS AND WHENEVER A MAJOR CHANGE OF CIRCUMSTANCES SO REQUIRES;
   (ii) MAY BE CONDITIONED UPON THE OBSERVANCE OF MINIMUM SAFETY RULES ESTABLISHED OR APPROVED BY THE I.A.E.A. FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF THE INSTALLATION OR FOR THE HANDLING OF THE SHIPMENT OR WASTE MATERIALS: THE OPERATOR SHALL BE REQUIRED TO FURNISH ALL THE INFORMATION DEEMED PERTINENT THERETO BY THE I.A.E.A.

THE CEILING OF LIABILITY APPLICABLE PURSUANT TO THIS ARTICLE SHALL NOT INCLUDE THE COSTS OF INVESTIGATING AND SETTLING CLAIMS AND OF FENDING SUITS.

Despite the fact that insurance coverage will probably ly be available on a per-installation basis, we have nevertheless ggested here a per-incident ceiling of liability. This is the system dopted in the U.S. Atomic Energy Act and in all draft legislation xcept the Swiss and United Kingdom bills. Some valid objections were aised against such a system by representatives of the insurance ndustry, although it is also admitted that a pure "per installation" ystem would work hardship on the public in case of successive in- idents. We believe that the formula suggested in this draft is the est compromise, and that it meets both objectives because;

) The State is subsidiarily liable for any damage which, like damage caused by successive incidents, may not be covered by insurance until the policy is reinstated. This does not expose the State to a very great risk: it is quite conceivable that, if the per incident ceiling of liability is set at "X", a State would require double insurance coverage of "X" per incident and "X + Y" per installation, which would always leave "Y" to cover damage caused by another incident prior to reinstatement of the full coverage. This system was proposed by Mr. Batten in a recent statement to the O.E.E.C.

We have defined "nuclear incident" so as to permit the inclusion of related incidents during the shut-down of a reactor and in connection with nuclear shipments or waste material (e.g. allowing a system similar to that proposed in the United Kingdom Bill). If therefore such shut-down were required by the State immediately after an incident of any magnitude, the risk of a second unrelated incident would be very small and should be quite adequately covered by the hypothetical "Y" of the example given above.

In keeping with the views expressed by the Panel, we have proposed a fixed ceiling applicable to all installations and shipments. This ceiling may, of course, be exceeded by the Installation State. The amount of this uniform ceiling would perhaps best be discussed after consultation with a number of governments since it ought to be acceptable to all States.

Upon the suggestion of Mr. Winkler, we have also explored the possibility of devising a compromise formula whereby the uniform ceiling might be lowered still further with respect to specific installations, shipments or materials disposed of as waste. It had been said in connection with the O.E.E.C. draft that such a provision would not be necessary in view of the fact that insurance rates would always adjust themselves to the lowered risk. However, since the Panel Secretary has received conflicting statements on this, we will attempt to seek more specific advice for the next Panel meeting. In the Draft Convention as it now stands, three possibilities of lowering the ceiling of liability are offered :

(i) pursuant to Article I (4) the I.A.E.A. may be asked to exclude from the purview of this Convention any minimum risk material, shipment or installation;

(ii) under Article VII, a State may lower the ceiling of liability if it assumes the responsibility for any excess damage up to the uniform ceiling;

(iii) under Paragraph (2) of this Article, the Installation State may ask the I.A.E.A. to approve a lower ceiling for a given installation or shipment. It is conceivable that, with respect to certain nuclear shipments or waste materials, such a lowered ceiling could be granted on a blanket basis, provided that adequate safety rules were observed.

In conversations with the Panel Secretary some Experts have expressed doubts about the proposal made in Paragraph (2), to the extent that it applies to nuclear installations. It was pointed out that the I.A.E.A. would assume a heavy burden of moral responsibility in lowering the ceiling of liability. This formula is nevertheless advanced for the Panel's consideration. It gives the I.A.E.A. a role in connection with hazards evaluation only at the request of the Installation State. It was pointed out at the first Panel Meeting that such a relative hazards evaluation was possible even with respect to nuclear installations (DG/PL/11, Annex 4). If the Panel feels that in certain instances a fixed and uniform ceiling would work unnecessary hardshup and impede nuclear development, we believe that the formula suggested in Paragraph (2) represents a compromise entailing no actual interference in internal affairs of the States.

ART. V. LIMITATION OF LIABILITY IN TIME.

1. ANY RIGHT TO COMPENSATION FOR OFF-SITE DAMAGE UNDER THIS CONVENTION SHALL EXPIRE IF AN ACTION THEREFOR IS NOT BROUGHT WITHIN FIVE YEARS FROM THE DATE OF THE NUCLEAR INCIDENT, UNLESS THE

STALLATION STATE ESTABLISHES A LONGER PERIOD OF LIMITATION: PROVIDED, EVER, THAT
WHERE THE NUCLEAR INCIDENT IS A CONTINUING CONDITION OR A SERIES OF OCCURRENCES, THE FIVE YEARS SHALL BE COMPUTED FROM THE DATE OF THE VICTIM'S LAST EXPOSURE TO THE CONTINUING CONDITION OF SERIES OF OCCURRENCES.
WHERE THE NUCLEAR INCIDENT IS CAUSED BY NUCLEAR FUELS OR RADIO-ACTIVE PRODUCTS WHICH WERE INVOLUNTARILY LOST OR STOLEN, THE FIVE YEARS SHALL BE COMPUTED FROM THE DATE OF THEIR LOSS OR THEFT; AND
WHERE THE NUCLEAR INCIDENT IS CAUSED BY WASTE MATERIALS THE FIVE YEARS SHALL BE COMPUTED FROM THE DATE ON WHICH SUCH WASTE WAS ABANDONED;
OVIDED FURTHER THAT SUB-PARAGRAPH (b) SHALL NOT APPLY IF THE LOSS, EFT OR INCIDENT WAS ATTRIBUTABLE TO A VIOLATION BY THE PERSON LIABLE DER THIS CONVENTION OR BY ANY AGENT OR EMPLOYEE OF SUCH A PERSON OF RELEVANT SAFETY RULE OF THE INSTALLATION STATE AND IN THE EVENT THAT MAGE OCCURRED ALSO OUTSIDE THE TERRITORY OF THE INSTALLATION STATE, THE VIOLATION OF ANY RELEVANT SAFETY RULE ESTABLISHED OR APPROVED THE I.A.E.A.

ANY INSTALLATION STATE MAY IN ADDITION ESTABLISH SHORTER PERIODS OF PRESCRIPTION FOR BRINGING CLAIMS OR ACTIONS, TO BE COMPUTED FROM E DATE ON WHICH THE NUCLEAR DAMAGE AND ITS CAUSE WERE ASCERTAINED ASCERTAINABLE THROUGH THE EXERCISE OF ORDINARY CARE, PROVIDED THAT E PERIOD OF LIMITATION APPLICABLE UNDER ARTICLE 1 SHALL NOT BE CEEDED.

In this Article we followed the pattern set by the Panel recommending first an absolute period of limitation for actions der this Convention, and leaving it up to national legislation to troduce further periods of prescription (which cannot exceed the riod of limitation) from the time when the damage and its cause are certained or ascertainable by a reasonably prudent victim.

As to the absolute period of limitation, its effect uld be of a substantive nature, cutting off any right to compensation. suggested a period of 5 years - as opposed to 10 years in the O.E.E.C. aft -. Both figures are arbitrary. However, in view of the declarations of Dr. Hug (PL/DG/11, Annex 3), we believe that 5 years is an equate period if one is to expect substantial insurance coverage in l contracting States. National legislation in the Installation State y, however, provide for a longer period of limitation.

In principle the absolute period of limitation is computed om the date of the nuclear incident, and where the incident is a continuing condition, from the date of the victim's last exposure to it. a number of instances, however, a period of limitation computed from e date of the nuclear incident as defined in this Convention might k considerable hardship and expose operators to a risk of liability ich could be insured only at a prohibitive cost. We are thinking in ticular of the loss of a package or of disposal of waste material in appropriate container. The package or container - if properly structed - might not break open for many years. From what moment uld the period of limitation be computed in such a case? Under the sent definition of "nuclear incident" (Article I(ii)), it would occur

not at the time of the loss or when the materials were abandoned as waste, but when the particular containment vessel broke open. In sub-paragraphs b) and c) we therefore suggest that the five years be computed from the date of the theft, involuntary loss or disposal as waste. However, the theft, loss or the nuclear incident itself should not be attributable to the violation of a relevant national or international safety rule. Any other solution might put a premium on the violation of safety rules, especially as to packaging and as to containment of waste products.

ART. VI. FINANCIAL SECURITY.

1. THE OPERATOR OF A NUCLEAR INSTALLATION OR ANY OTHER PERSON DESIGNATED BY THE INSTALLATION STATE SHALL MAINTAIN FINANCIAL SECURITY, OF SUCH TYPE AND ON SUCH TERMS AS THE INSTALLATION STATE SHALL SPECIFY, TO COVER THE OPERATOR'S LIABILITY FOR OFF-SITE NUCLEAR DAMAGE UNDER THIS CONVENTION.

2. THE FINANCIAL SECURITY PROVIDED FOR IN THIS ARTICLE SHALL BE APPLIED ONLY TO COMPENSATION WITH RESPECT TO OFF-SITE DAMAGE CAUSED BY A NUCLEAR INCIDENT IN CONNECTION WITH WHICH THE OPERATOR HAS BEEN FOUND LIABLE UNDER THIS CONVENTION.

3. NOTHING IN THIS ARTICLE SHALL REQUIRE ANY STATE TO FURNISH FINANCIAL SECURITY FOR NUCLEAR INSTALLATIONS OPERATED BY IT OR FOR ANY OF ITS OBLIGATIONS ARISING UNDER ARTICLE VII OF THIS CONVENTION.

This Article establishes the principle of compulsory financial security to cover any third party liability under this Convention. Although generally the appropriate coverage will be taken out by the operator, the Installation State has power to impose this burden upon anyone else. This provision was considered necessary in view of the fact that in certain situations the Installation State may wish to demand that financial security be furnished by suppliers (e.g. for test operations), by carriers or by shipping enterprises. Also, it was thought necessary to leave all matters concerning the type and the terms of the security to the Installation State, and to permit it even to require less than full financial security. In such instances, however, the State will be subsidiarily liable for any deficit.

As suggested by Mr. Lokur, we expressly provided that States should not be required to furnish formal financial security for their liability under this Convention, since with respect to State treasuries the danger of insolvency is very small.

ART. VII. SUBSIDIARY LIABILITY OF THE STATE.

1. NOTHING IN THIS CONVENTION SHALL PRECLUDE THE INSTALLATION STATE FROM SETTING CEILINGS OF LIABILITY WHICH ARE LOWER THAN THAT APPLICABLE UNDER ARTICLE IV, FROM ESTABLISHING A SHORTER PERIOD OF

LIMITATION THAN THAT APPLICABLE UNDER ARTICLE V, OR FROM EXCLUDING PRIVATE LIABILITY WITH RESPECT TO CERTAIN TYPES OF NUCLEAR DAMAGE; PROVIDED, HOWEVER, THAT THE INSTALLATION STATE SHALL BE LIABLE IN LIEU OF THE OPERATOR FOR THE DIFFERENCE BETWEEN THE OPERATOR'S LIABILITY AND THE CEILING ESTABLISHED UNDER ARTICLE IV, OR FOR ANY ACTIONS BROUGHT AFTER EXPIRATION OF THE SHORTER PERIOD OF LIMITATION IT HAS ESTABLISHED, BUT WITHIN THE PERIOD OF LIMITATION APPLICABLE UNDER ARTICLE V, OR FOR ANY NUCLEAR DAMAGE WITH RESPECT TO WHICH PRIVATE LIABILITY IS EXCLUDED.

2. IF FINANCIAL SECURITY AS REQUIRED BY ARTICLE VI IS NOT MAINTAINED, IF IT DOES NOT COVER ALL OF THE OPERATOR'S LIABILITY UNDER THIS CONVENTION, OR IF THE FINANCIAL SECURITY PROVES TO YIELD LESS THAN FULL COVERAGE WITH RESPECT THERETO, THE INSTALLATION STATE SHALL COVER THE DIFFERENCE OR DEFICIT ITSELF.

3. ANY STATE OTHER THAN THE INSTALLATION STATE, ANY GROUP OF STATES AND ANY INTERNATIONAL ORGANIZATION SHALL BE AUTHORIZED TO ASSUME ALL OR PART OF THE LIABILITY OF THE INSTALLATION STATE; PROVIDED, HOWEVER, THAT THE INSTALLATION STATE SHALL REMAIN SECONDARILY LIABLE FOR ANY RESULTING OBLIGATION.

In our opinion this Article represents the only possible and justifiable formula for allowing Installation States to lower the minimum norms established in this Convention. It can, of course, not be determined in advance whether there will ever arise a need for lowering these norms in specific circumstances. That might depend as much on the political and economic necessity of nuclear development in a given country as on the capabilities of the insurance market. We nevertheless though it advisable to provide a mechanism for mitigating the rigidity of this Convention.

It should be noted that while under this Article for Installation State appears as the guarantor of the terms of this Convention, its liability will never be engaged unless for political reasons the State decides to assume it. The States have only to establish liability rules consistent with the minima recommended in this Convention, and to require responsible financial security, in order to escape any obligations under this Article. They may also demand that liability under this Convention be excluded or lowered with the approval of the I.A.E.A. under Article I(4) and IV(2).

In the last Paragraph we suggested that other States or international organizations shall be in a position to assume liability in lieu of the Installation State. However, in order to avoid any abuses the Installation State should remain secondarily liable for any default.

In our opinion this last Paragraph is necessary to counter-act in certain situations the arbitrariness of the definition of "Installation State" under this Convention. It might be resorted to, for instance, where an Installation State should wish to have the State from which equipment is purchased back up any product guarantees by the assumption of part of its liability under this Convention. Such

an assumption of responsibility could also be required by the Installation State before allowing a nuclear shipment for which it if subsidiarily liable to be transported on vessels or airplanes of a given State, or before allowing it to cross its territory. Finally, this Paragraph also permits the handling of State liability by international or regional indemnity pools.

ART. VIII. JURISDICTIONAL COMPETENCE, PROCEDURE AND APPLICABLE LAW.

1. JURISDICTION OVER ACTIONS FOR OFF-SITE NUCLEAR DAMAGE UNDER PART TWO OF THIS CONVENTION SHALL LIE ONLY WITH THE COURTS COMPETENT UNDER THE LAW OF THE INSTALLATION STATE.

This Paragraph provides that jurisdiction for actions under Part Two of the Convention shall lie exclusively with the courts of the Installation State. It does not say which court in the Installation State shall be competent, although under Paragraph 2(a) the Installation State must designate such a court. This is one of the key provisions of the Draft Convention, since it would be practically impossible to administer any limited liability fund without concentrating all the claims in one forum.

2. THE INSTALLATION STATE SHALL
   a) PROVIDE WITH RESPECT TO ANY NUCLEAR INSTALLATION PERTAINING TO IT A COMPETENT COURT FOR THE LITIGATION OF ANY CLAIMS FOR OFF-SITE DAMAGE ARISING UNDER THIS CONVENTION; SUCH COURT MAY BE AN ADMINISTRATIVE BODY, THE RULINGS OF WHICH ARE SUBJECT TO JUDICIAL REVIEW TO THE EXTENT THAT THEY TOUCH UPON LEGAL ISSUE REGULATED BY THIS CONVENTION;
   b) PROVIDE ADEQUATE METHODS FOR THE PROCESSING AND LITIGATION OF ANY CLAIMS FOR OFF-SITE DAMAGE UNDER THIS CONVENTION, INSURING ESPECIALLY THAT ALL PARTIES SHALL HAVE A FAIR AND ADEQUATE OPPORTUNITY TO DEFEND THEIR INTERESTS;
   c) PROVIDE ADEQUATE METHODS FOR THE PROMPT AND EQUITABLE DISTRIBUTION OF THE PROCEEDS AVAILABLE IN THE EVENT THAT NUCLEAR DAMAGE SHOULD EXCEED, OR BE LIKELY TO EXCEED, THE CEILING OF LIABILITY APPLICABLE UNDER ARTICLE IV.

We have enumerated here all the obligations which must be undertaken by Installation States with respect to jurisdiction and procedure. At the first Panel meeting it was recognized that, though adequate procedural mechanisms were of prime importance in the interests of victims and of defendants alike, these matters should be left as much as possible to national legislation. We accordingly included here only obligations which seemed essential.

a) First among these duties is the designation of a competent court to adjudicate claims with respect to any nuclear installation pertaining to the particular Installation State. It had been suggested by Mr. Lokur that instead of a judicial court this might be a scientific or administrative body. In view of the intricacy of the factual background of nuclear claims this may well be a necessity in

any countries. However, as to any legal issues arising under this nvention, the rulings of purely administrative bodies should, in r opinion, be reviewable by a judicial tribunal.

) the Installation State must make certain, if necessary by special procedural rules or recourses, that all parties be treated in conformity with basic principles of "due process". (e.g. adequate notice, ight to be represented by an attorney, right to present and to contravert evidence, etc.) Naturally the term "due process" should be understood in a broad sense, implying chiefly ultimate fairness in the handling of litigation.

) the Installation State must, if necessary, establish adequate rules to permit the competent courts to administer a limited liability und and to insure the equitable and prompt distribution of any proceeds.

3. THE INSTALLATION STATE SHALL BE FREE TO
a) LIMIT RECOVERY PER CLAIM OR FOR CERTAIN CLASSES OF CLAIMS;
b) ESTABLISH ORDERS OF PREFERENCE AMONG CERTAIN CLASSES OF CLAIMS;
c) REGULATE OR LEGISLATE ON ANY MATTERS CONCERNING THE ADMINISTRATION AND ADEQUACY OF PROOF, THE ELEMENTS OF DAMAGE, INCLUDING THE EXTENT TO WHICH RECOVERY MAY BE GRANTED FOR LOSS OF PROFIT AND FOR INDIRECT PECUNIARY DAMAGES, THE PERSONS WHO MAY SUE, AND ANY OTHER MATTERS NOT OTHERWISE DEALT WITH BY THIS CONVENTION.
d) PROVIDE THAT ANY FINANCIAL GUARANTOR MAY BE SUED DIRECTLY.

In this Paragraph we have enumerated the areas in which the Installation State may legislate on its own, or which he may submit to existing rules of law; such a provision seems desirable in order to dispel any doubts on the role left to national legislation. The Paragraph is, we believe, self-explanatory. As to the right to establish special ceilings or liability or order of preference for certain classes of claims, the classification should, of course, be reasonable in order to comply with Paragraph 2(c) of this Article (equitable distribution). Also, it may not be used as a way to discriminate against foreign claimants or against persons who have suffered damage on the territory of another State. Such discrimination would run counter to the provisions of Article XV.

4. THE COURTS COMPETENT UNDER PARAGRAPH (1) OF THIS ARTICLE SHALL APPLY THE PROVISIONS OF THIS CONVENTION AND THE LAW OF THE FORUM, PROVIDED THAT SUCH LAW IS NOT CONTRARY TO THE PROVISIONS OF THIS CONVENTION. THE TERM "LAW" AS USED IN THIS PARAGRAPH DOES NOT INCLUDE ANY RULES ON CONFLICT OF LAWS.

This Paragraph specifically submits all substantive and procedural matters to be local law of the forum, except where that law is in conflict with this Convention. The possibility of "renvoi" is excluded in order to avoid any uncertainty as to what rules and limits of liability should be applicable in areas left to national legislation. In many countries the doctrines of conflict of law with respect to torts

are in a state of flux. Since the Installation State may be subsidiarily liable under Article VII of this Convention, its responsibility should not be predicated upon any norms established by another State.

5. ANY STATE, INCLUDING ANY NON-CONTRACTING STATE, THAT HAS FURNISHED COMPENSATION WITH RESPECT TO NUCLEAR DAMAGE WHICH OCCURRED ON ITS TERRITORY, OR ANY PERSON WHO HAS DONE SO PURSUANT TO THE LAW OF SUCH STATE, MAY ACQUIRE BY SUBROGATION ANY CLAIMS ARISING UNDER THIS CONVENTION, OR ANY PART OF SUCH CLAIMS, TO THE EXTENT THAT THEY WERE COVERED BY THE COMPENSATION HE FURNISHED; IT MAY THEN ADVANCE SUCH CLAIMS ON THE SAME BASIS AND IN THE SAME COURTS AS THE ORIGINAL CLAIMANTS.

The purpose of this Paragraph os to protect any State who has furnished emergency help or who has provided benefits under national social security systems (e.g. pursuant to Article 120 of the Constitution of the U.S.S.R.) to persons who have suffered damage on that particular State's territory. It applies of course only to claims arising under this Convention, i.e. not where damage was caused by an incident which occurred in a non-Contracting State, or before discharge in such a non-Contracting State of a nuclear shipment by water-transport or by air (cf. Article I(ii)). To the extent that such claims have been covered by the compensation furnished by the State or by any person authorized by it (e.g. a social security fund), they may be acquired by subrogation. We believe that such a provision is necessary not only in order to encourage States which undertake immediate emergency measures on their territory, but also because in certain countries such a subrogation would not be automatically recognized. We do not believe that subrogation should be allowed except in favor of the State in which damage has occurred or of a person authorized by it to furnish compensation. To allow subrogation in favor of any other State who has indemnified victims would inevitably lead to conflicts in the event of double indemnification. On the other hand, we have included non-Contracting States and persons other than operators who provided compensation pursuant to the law of the State where damage occurred. It is quite conceivable that in a non-Contracting State a person not liable under this Convention (e.g. a supplier or a carrier having assets in such a non-Contracting State) would be sued and held liable for nuclear damage which occurred there, but which was caused by a nuclear incident covered by this Convention. Such a person, as well as any State who has protected its public, should have some recourse against the person liable under this Convention.

6. ANY STATE, INCLUDING A NON-CONTRACTING STATE, MAY PERMIT OR REQUIRE ITS NATIONALS TO ASSIGN TO IT ANY CLAIMS FOR OFF-SITE DAMAGE ARISING UNDER THIS CONVENTION, IF THE CLAIMS HAVE NOT BEEN ACQUIRED BY SUBROGATION PURSUANT TO PARAGRAPH (5); IT MAY THEN ADVANCE SUCH CLAIMS ON BEHALF OF ITS NATIONALS ON THE SAME BASIS AND IN THE SAME COURTS AS THESE NATIONALS.

We have also retained the possibility that States may require their nationals to assign to them any claims which were not already acquired by another State pursuant to the foregoing Paragraph. The reasons for this provision were discussed in the course of the first Panel meeting (cf DG/PL/11, page 30). Any State who by a system of social security (e.g. again Article 120 of the Constitution of the U.S.S.R.) furnishes or intends to furnish compensation to its injured nationals, should be encouraged and should be able to present the claims of the persons it compensated. While in the preceding Paragraph it was considered desirable to allow subrogation only to the extent that compensation had already been furnished by the subrogee, such a provision does not seem necessary with respect to the victim's own national State.

P A R T T H R E E

ACTIONS FOR CONTRIBUTION, RECOURSE AND ON-SITE DAMAGE

We have considered it necessary to deal in a special Part of this Convention with all actions which are not for primary third party liability. Especially where jurisdiction and procedure are concerned, it is necessary to make it clear that such actions are not governed by the norms set forth in Part Two and motivated chiefly by the convenience of the public.

ART. IX. ACTIONS FOR CONTRIBUTION.

1. ANY PERSON WHO HAS BEEN FOUND LIABLE FOR OFF-SITE NUCLEAR DAMAGE UNDER THIS CONVENTION, INCLUDING ANY PERSON WHO HAS FURNISHED COMPENSATION IN SATISFACTION OF THE OPERATOR'S LIABILITY, MAY SUE FOR CONTRIBUTION ANY OTHER PERSON WHO IS JOINTLY LIABLE PURSUANT TO ARTICLE III, OR ANY PERSON LIABLE IN HIS STEAD, SUBJECT TO THE CEILING OF LIABILITY APPLICABLE TO THE DEFENDANT UNDER ARTICLE IV.

Actions for contribution are necessary to remove some of the arbitrariness from a rule of joint and several liability as proposed in Article III. We do not think that, in the cases covered by that Article (i.e. where installations pertaining to different installation States are involved) the matter could be left to national legislation, which would always tend to protect the defendant-installation pertaining to it. In permitting actions for contribution only where the plaintiff has already been found liable under this Convention (but not necessarily where he has already satisfied any judgment entered against him) we have sought to attain a double objective: in the first place, courts in which suits for contribution are pending should not be entitled to re-examine the merits of any judgment entered under Part Two

against a plaintiff; secondly, the plaintiff should be able to sue only once his own liability has become engaged. Under the term plaintiff we have included also persons who are not operators, e.g. any other person liable under Article II(3)(a), any States under Article VII, or any financial guarantors.

Since actions for contribution are a means to distribute more equitably the burden of liability for off-site damage, they should be subject to the ceiling of liability established with respect to the defendant under Article IV. Any other solution would violate the territorial principles of this Convention and might lead to harassing litigation.

It goes without saying that any persons who have filed claims against the plaintiff-operator, but who have not received full satisfaction because the aggregate damage exceeded the limited liability fund, may turn also, under Part Two of this Convention, against another operator who is jointly liable pursuant to Article III. Such suits, however, are <u>not</u> actions for contribution. The danger of double recovery can be discounted, since any amount of compensation received from the first operator will reduce the actual damage upon which the second claim must be predicated.

2. THE EXTENT OF CONTRIBUTION SHALL BE DETERMINED AS FOLLOWS AMONG OPERATORS OF INSTALLATIONS PERTAINING TO DIFFERENT INSTALLATION STATES:

a) WHERE NUCLEAR DAMAGE WAS NOT CAUSED BY ANY FAULT OR NEGLIGENCE ON THE PART OF THE CLAIMANT, BUT THE OPERATOR FROM WHOM CONTRIBUTION IS DEMANDED CAUSED OR CONTRIBUTED TO CAUSING THE NUCLEAR DAMAGE THROUGH FAULT OR NEGLIGENCE, THE CLAIMANT SHALL RECEIVE CONTRIBUTION FOR THE TOTALITY OF THE COMPENSATION HE FURNISHED UNDER PARTS TWO AND FOUR OF THIS CONVENTION.

b) WHERE THE CLAIMANT CAUSED THE NUCLEAR INCIDENT THROUGH FAULT OR NEGLIGENCE, BUT THE OPERATOR FROM WHOM CONTRIBUTIION IS SOUGHT WAS NEITHER AT FAULT NOR NEGLIGENT, NO CONTRIBUTION SHALL BE DUE TO THE CLAIMANT;

c) IN ALL OTHER INSTANCES THE RESPECTIVE SHARES OF LIABILITY SHALL BE PROPORTIONAL TO THE RATIO IN WHICH EACH NUCLEAR INSTALLATION OR NUCLEAR SHIPMENT CONTRIBUTED TO CAUSING THE NUCLEAR DAMAGE; IF NO SUCH RATIO CAN BE ASCERTAINED, LIABILITY SHALL BE APPORTIONED EQUALLY AMONG THE INSTALLATIONS OR SHIPMENTS.

PROVIDED THAT, AS USED IN THIS PARAGRAPH, THE TERMS "FAULT" OR " NEGLIGENCE" SHALL INCLUDE THE FAULT OR NEGLIGENCE OF THE OPERATOR OR OTHER CLAIMANT AND OF ANY OF THEIR EMPLOYEES OR AGENTS IN THE COURSE OF DUTIES CONNECTED WITH THE NUCLEAR INSTALLATION OR SHIPMENT: AND PROVIDED FURTHER THAT COMPLIANCE WITH ANY RELEVANT SAFETY RULES ESTABLISHED OR APPROVED BY THE I.A.E.A. SHALL BE PRIMA FACIE PROOF THAT THERE WAS NO FAULT OR NEGLIGENCE IN CONNECTION THEREWITH.

These rules of apportionment are specifically limited to international litigation, although by appropriate legislation they can be made applicable also on a domestic level.

We have chosen a simplepredicate, namely presence or absence of fault or negligence, rather than to distinguish further between the relative gravity of the fault or negligence. The latter system would, ideally, be more equitable, and may well be advisable on a national level. In international litigation, however, it would complicate matters by widening the area in which plaintiffs might be exposed to uncertainty and to discrimination by the courts of the defendant's Installation State. For the same reason we have provided that compliance with any safety rules which may be established or approved by the I.A.E.A. should be prima facie proof that with respect to matters thus regulated there had been nu fault or negligence.

Since we are dealing here only with actions among operators, and not with extraordinary remedies such as actions under Article II(3)(b), it seemes justified to include also the fault or negligence of employees.

3. FINAL JUDGMENTS FOR CONTRIBUTION SHALL BE ENTERED ONLY AFTER ALL CLAIMS BROUGHT WITHIN THE PERIOD OF LIMITATION ESTABLISHED UNDER ARTICLE V HAVE BEEN FULLY SATISFIED.

This Paragraph is intended to make certain that claims for contribution be subordinated to any direct claims for nuclear damage. If the aggregate of such direct claims should exceed the defendant's ceiling of liability, nothing will remain for actions for contribution. Although this solution may seem harsh, there is no doubt in our mind that as between operators limitedly liable under this Convention and victims of a nuclear incident the latter ought to be privileged. Since the aggregate of such third party claims will never be definitely ascertained until the absolute period of limitations has expired, any operator suing for contribution will have to wait until such time before recovering on any judgment. Whether judgments which are not final (i.e. interlocutory decrees) may be entered before is a matter which must be left to the laws of the forum.

ART. X. RECOURSE ACTIONS AND ACTIONS FOR ON-SITE DAMAGE.

1. RECOURSE ACTIONS OTHER THAN ACTIONS FOR CONTRIBUTION, BROUGHT WITH RESPECT TO COMPENSATION FURNISHED FOR OFF-SITE NUCLEAR DAMAGE PURSUANT TO THE TERMS OF THIS CONVENTION, AND ANY ACTIONS FOR ON-SITE DAMAGE, SHALL BE GOVERNED BY THE LAW OF THE INSTALLATION STATE; PROVIDED, HOWEVER, THAT NO SUCH ACTIONS SHALL LIE AGAINST ANY SUPPLIER OF THE NUCLEAR INSTALLATION THE OPERATOR OF WHICH WAS LIABLE UNDER THIS CONVENTION UNLESS :

a) THE SUPPLIER EXPRESSLY ASSUMED RECOURSE LIABILITY BY CONTRACT;
OR

b) THE CONDITIONS OF ARTICLE II(3)(b) ARE MET.

2. NO RECOURSE ACTIONS SHALL LIE AGAINST ANY OPERATOR OR SUPPLIER WITH RESPECT TO COMPENSATION FOR OFF-SITE DAMAGE FURNISHED IN CONNECTION WITH A NUCLEAR INCIDENT COVERED BY THIS CONVENTION IF SUCH COMPENSATION WAS NOT FURNISHED PURSUANT TO THE TERMS OF THIS CONVENTION;

This Article covers both recourse actions and actions for on-site damage. The term "recourse actions" includes any actions (other than actions for contribution) predicated upon payments made by the plaintiff because of a nuclear incident. A recourse action may be an action against a third party by an operator who had to satisfy a judgment under this Convention; it may also be an action against an operator by another person or by a State who because of a nuclear incident had to make a payment to a third party (e.g. payment by a life insurance company).

In the last paragraph of this Article we have proposed that no recourse actions of the second kind be permitted against suppliers or operators unless the payment upon which the action is predicated was made pursuant to this Convention. Such a prohibition may seem severe. We believe, however, that it must be adopted in order to protect the basic principles of this Convention. The prohibition extends to any payment made in connection with a nuclear incident covered by this Convention (i.e. not incidents occurring on the territory of a non-Contracting State, except prior to discharge of a shipment by sea or air); it bars any actions predicated upon compensation furnished by a person or State who was not required to furnish it under this Convention or under the law of the Installation State, or made by order of a court which was not competent under this Convention. Persons or States authorized to acquire claims by subrogation or by substitution (Article VIII (5) and (6)) are of course not affected by this prohibition, nor would persons who furnished financial coverage pursuant to Article VI be barred. This formula represents in our opinion a necessary safeguard against evasions of the key provisions of this Convention, namely limitation of liability and legislative and jurisdictional competence of the Installation State.

As to actions for on-site damage and recourse actions which are not barred under Paragraph (2), we provide only that they shall be governed by the law of the Installation State. Such a provision seems desirable in the interest of nuclear industry in general. It will lead to greater certainty in an area where no such certainty exists at present. In permitting possible defendants to ascertain under what law they would be liable, it may reduce the pressure for excessive insurance coverage in addition to, and to the detriment of the coverage available for third party risks. Finally, by permitting the Installation State to regulate all actions arising from a nuclear incident, it will further discourage evasion of the key provisions of this Convention, as might occur, for instance if suppliers or carriers could be sued at leisure in any State other than that to which the installation pertains.

With respect to actions for on-site damage and recourse actions against suppliers, we have introduced a further limitation (Paragraph 1(a) and (b)). It does not exclude their liability, but places it squarely in the realm of contract bargaining. As it stands, it is chiefly designed to protect sub-suppliers against tort actions by an operator with which they have had no contractual relationship. As was pointed out by Mr. Lokur, the problem does not arise in a number of legal systems. It does in other countries (e.g. the United States and France), where the sub-supplier has no way to protect himself by contract. Consequently, Paragraph (1) meets a practical need for protection. In Paragraph (1)(b), we would allow national legislation to retain liability, even though it may be waived by contract, in instances of wilfulness as discussed in connection with Article II (3)(b). This meets a postulate of public policy recognized in most legal systems.

ART. XI. COMPETENCE AND APPLICABLE LAW.

1. ACTIONS FOR CONTRIBUTION UNDER ARTICLE IX SHALL BE BROUGHT ONLY IN THE COMPETENT COURTS OF THE DEFENDANT'S INSTALLATION STATE, UNLESS THE DEFENDANT VOLUNTARILY SUBMITS TO THE JURISDICTION OF THE COMPETENT COURTS OF THE STATE TO WHICH ANY OTHER INSTALLATION INVOLVED IN THE NUCLEAR INCIDENT PERTAINS. RECOURSE ACTIONS AND ACTIONS FOR ON-SITE DAMAGE UNDER ARTICLE X SHALL BE BROUGHT ONLY IN THE COMPETENT COURTS OF THE COUNTRY WHERE THE DEFENDANT IS DOMICILED OR WHERE HE HAS HIS PRINCIPAL PLACE OF BUSINESS; PROVIDED, HOWEVER, THAT IF THE DEFENDANT'S DOMICILE OR PRINCIPAL PLACE OF BUSINESS IS NOT IN A STATE PARTY TO THIS CONVENTION, OR IF THE DEFENDANT VOLUNTARILY SUBMITS TO THE JURISDICTION OF THE COMPETENT COURTS OF ANY STATE TO WHICH AN INSTALLATION INVOLVED IN THE NUCLEAR INCIDENT PERTAINS, THE COURTS OF THAT STATE SHALL BE COMPETENT TO ENTERTAIN SUCH ACTIONS.

2. THE COURTS IN WHICH ACTIONS ARE BROUGHT PURSUANT TO THE FOREGOING PARAGRAPH SHALL APPLY THIS CONVENTION AND THE LAW OF THE FORUM, INCLUDING ANY RULES ON CONFLICT OF LAWS, UNLESS THE LAW OF THE FORUM IS CONTRARY TO THE PROVISIONS OF THIS CONVENTION.

The first Paragraph of this Article deals only with jurisdictional competence; it establishes a primary forum for actions under Articles IX and X, but gives the defendant an option to agree in advance, or when suit is filed, to submit to the jurisdiction of the courts of any State to which an Installation involved in the nuclear incident pertains. The latter provision is designed to permit the consolidation of actions where it is practically most convenient.

The second Paragraph sets forth the rules of conflict of laws applicable under Part Three of the Convention. We have maintained the principle of the lex fori except as otherwise stated in Articles IX and X. Since the ceiling of liability is only indirectly involved as regards actions under this part of the Convention, "renvoi" would not generate the same uncertainty as in connection with actions under Part Two. Therefore we have not excluded it.

PART FOUR

LIABILITY FOR NUCLEAR DAMAGE CAUSED BY NUCLEAR SHIPMENTS

ART. XII. Introductory Note.

Although provisions concerning transportation could also be inserted in the relevant Articles of Parts Two and Three, we have consolidated them in a special Part of this Convention. This may facilitate discussion of a difficult subject, which is further complicated by the fact that there already exist a number of international conventions dealing with special aspects of liability - though not specifically regarding nuclear shipments - in the course of transport.

Among these Conventions are the following :

1910 Brussels Convention on Collisions at Sea
1924 Convention on Immunity of State Vessels
1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air
1952 Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface.

On regulatory matters concerning transportation, still other conventions are in existence; among them are the 1948 Convention on Safety of Life at Sea, and the Chicago Convention of 1944 on Air Transportation.

In the following Articles we have attempted to avoid as far as possible any conflict with these conventions. However, the relationship between our Draft and these pre-existing compacts should be given additional consideration. We shall attempt to make available for the next Panel meeting

1) sufficient copies of the above Conventions for distribution to the Panel;

2) an analysis of the application of these conventions to the subject matter of the present draft; and

3) an opinion on the legal effect of a possible conflict between certain provisions in the above conventions and the present draft.

We may further propose that one or more specialists on matters of international transportation shall be retained as Panel Consultants for the next meeting. Any suggestion by members of the Panel would be most helpful in that connection.

In spite of the difficulties with which we are faced in this area, it seems certain that any convention on Civil Liability for Nuclear Damage would be incomplete if it did not also cover transportation. This was the conclusion reached by a Conference of Government Experts in connection with the O.E.E.C. draft convention, which though regional in character undertook to regulate liability for international carriage of nuclear fuels and radioactive materials. It was pointed out by several delegates, however, that in their opinion the transportation problem should be solved on a world-wide basis; we were told specifically of the hope that this might be done by our Panel of Experts. For that reason we have prepared the following Articles for discussion at the next Panel Meeting.

ART XII

WHERE A NUCLEAR INCIDENT OCCURS IN CONNECTION WITH A NUCLEAR SHIPMENT, THE FOLLOWING PERSONS SHALL BE LIABLE FOR ANY RESULTING OFF-SITE NUCLEAR DAMAGE.

1. THE OPERATOR OF THE ORGINATING NUCLEAR INSTALLATION SHALL BE LIABLE PURSUANT TO ARTICLE II (2) OF THIS CONVENTION;

2. THE OPERATOR OF THE RECEIVING NUCLEAR INSTALLATION SHALL BE LIABLE IF AT THE TIME OF THE NUCLEAR INCIDENT THE SHIPMENT HAD BEEN TRANSFERRED TO HIM OR TO ANY OF HIS AGENTS IN CONFORMITY WITH ARTICLE II (2) OF THIS CONVENTION, OR IF THE SHIPMENT WAS MADE TO HIM WITH HIS APPROVAL FROM AN INSTALLATION PERTAINING TO A NON-CONTRACTING STATE.

3. THE CARRIER, OR ANY OTHER PERSON DESIGNATED BY THE STATE ON THE TERRITORY OF WHICH THE NUCLEAR INCIDENT OCCURRED, SHALL BE LIABLE AS AN OPERATOR IF THE SHIPMENT WAS MADE WITHOUT THE APPROVAL OF THE RECEIVING INSTALLATION FROM AN INSTALLATION PERTAINING TO A NON-CONTRACTING STATE, OR IF NEITHER THE ORIGINATING NOR THE RECEIVING INSTALLATION PERTAINED TO A CONTRACTING STATE;

4. ANY CONTRACTING STATE MAY PERMIT THAT A PERSON WHO IS NOT LIABLE PURSUANT TO PARAGRAPHS (1), (2) AND (3) BE LIABLE UNDER THIS CONVENTION FOR ANY VOYAGE OR PART OF A VOYAGE ORIGINATING ON THE TERRITORY OF SUCH STATE.

In this Article we have enumerated the persons who should be liable for off-site nuclear damage caused by nuclear shipments. It should be noted that, under Article I (IO), damage to the ship, airplane or other vehicle on which the nuclear incident occurs, to any cargo carried thereon or to any employees of the carrier is not considered "on-site" damage. We have thought of the possibility of including such damage in the definition of "on-site" damage, or at least of giving that right to the Installation State. We do not think, however, that an arbitrary classification would be desirable, even on a national level. Instead, we have provided in Article XIII (5) that actions against the operator for damage to property or employees connected with the transportation shall be permitted only upon proof of fault or negligence. Such an exception to the principle of absolute liability seems less harsh than any arbitrary classification as "on-site" or "off-site" nuclear damage.

Paragraphs (1) and (2), establishing the responsability of the originating or receiving operators, is a direct consequence of Article II (2) of this Convention. It should be noted that the receiving operator is liable also where possession of the nuclear fuels or radioactive materials is taken over by a third party acting as his agent. Whether or not a third party is an agent or an independent contractor may in many instances be a difficult question not only of fact, but also of legal qualification. In our opinion it should be resolved according to the law of the State which has authorized the transfer of possession.

A receiving operator should also be liable for any shipment made with his approval (but not for unsolicited shipments, rare as they may be) from a non-Contracting State. It seems fair to us that an operator should also be able to give conditional approval to a nuclear shipment (i.e. demanding that certain precautionary safety measures be taken); in such event he should not be liable unless his conditions were met.

Where a shipment comes from a non-contracting State without the approval of the receiving operator, or if neither the originating installation nor the receiving installation pertain to a Contracting State, we have provided that the carrier-- i.e. the person who has the largest measure of control over the shipment, and who is most likely to have assets in the place where a nuclear incident occurs -- shall be liable as an operator under this Convention. It should be noted that for shipments originating in a non-Contracting State (including its territorial waters) this Convention does not cover incidents occurring on the high seas, regardless of whether they cause damage in contracting State. The Installation State (i.e. the State on the territory of which the incident occurs), shall be in a position to designate any other person (e.g. anyone who would be liable under normal tort rules) to be absolutely liable under this Convention.

Paragraph (4) of this Article was inserted in order to permit carrier or shipping companies to assume liability in lieu of the originating operator or of the receiving operator otherwise liable under this Convention. The right to <u>permit</u> such assumption of liability (not to <u>require</u> it, although under Article II (3) (a) the originating or receiving Installation State may well require such assumption of liability) is given only to the State on the territory of which the voyage (or the part of a voyage) begins with respect to which the non-operator assumes liability, because it is the only State which has any power to control the qualifications of such non-operator. By virtue of Article XIII (1) (c) that State will be considered the Installation State until the shipment is handed over to the receiving operator in compliance with Article II (2) or to another non-operator in accordance with this Paragraph. There is nothing in this Article to compel a non-operator to assume liability; it should, however, be possible for him to do so. This clause may for instance be resorted to where a carrier specializes in nuclear shipments, or where he wants to load several nuclear shipments on the same vehicle so

as to be covered by a single insurance policy.

ART.XIII

EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, PARTS TWO AND THREE OF THIS CONVENTION SHALL APPLY ALSO TO LIABILITY FOR NUCLEAR INCIDENTS INVOLVING NUCLEAR SHIPMENTS.

1. THE FOLLOWING STATES SHALL BE CONSIDERED INSTALLATION STATES WITH RESPECT TO NUCLEAR SHIPMENTS:
   a) WHERE THE OPERATOR OF AN ORIGINATING INSTALLATION IS LIABLE PURSUANT TO ARTICLE XII, THE INSTALLATION STATE TO WHICH SUCH INSTALLATION PERTAINS;
   b) WHERE THE OPERATOR OF A RECEIVING INSTALLATION IS LIABLE PURSUANT TO ARTICLE XII, ANY STATE WHICH AUTHORIZED THE TRANSFER OF POSSESSION.
   c) WHERE A PERSON WHO IS NOT AN OPERATOR IS EXCLUSIVELY LIABLE PURSUANT TO ARTICLE XII (4), THE STATE WHICH HAS AUTHORIZED SUCH ASSUMPTION OF LIABILITY.
   d) IN ANY OTHER CASE, THE STATE OF THE TERRITORY OF WHICH THE NUCLEAR INCIDENT HAS OCCURRED; PROVIDED, HOWEVER, THAT NO STATE WHICH IS CONSIDERED AN INSTALLATION STATE SOLELY BY VIRTUE OF THIS SUB-PARAGRAPH SHALL BE SUBSIDIARILY LIABLE UNDER ARTICLE VII OF THIS CONVENTION.

The first exception to the rules applicable under Parts Two and Three concerns the designation of Installation State. It is relevant principally because the Installation State is subsidiarily liable pursuant to the principles of this Convention. As to legislative and jurisdictional competence, the role of the Installation State is only an ancillary one under Paragraphs (2) and (3) of this Article.

Where the liability of an originating operator is still engaged, there should be no difficulty in regarding the State to which the installation pertains as the Installation State.

Where possession of the nuclear fuels or radioactive products has been transferred to a receiving operator or to an agent of his in conformity with Article II (2), the possible choices appear to be the State to which the receiving nuclear installation pertains, the State the nationality of which the means of transportation has, and the State which authorized the transfer of possession. We decided in favor of the latter, because it has the greater amount of control of the basic safety measures concerning the shipment. It is true that this selection entails a certain arbitrariness, insofar as it might engage the subsidiary responsibility of the particular State in the situations covered by Article VII. However, it seems to us that this could easily be remedied by the assumption of subsidiary responsibility by another State. Thus before permitting the transfer of nuclear fuels or of radioactive products to the agent of a foreign receiving installation, the originating Installation State could well demand that the receiving Installation State or the State of the flag of

any vessel on which the shipment occurs shall assume subsidiary liability in its stead for the duration of the voyage, or for any damage attributable to the carrier's fault. Possibly, subsidiary liability may be assumed by international indemnity pools which might be organized in the future (e.g. for marine carriage, for air carriage, for carriage on certain international rivers). Finally the Installation State could avoid any subsidiary liability by not lowering the liability norms set in this Convention and by requiring full and responsible insurance coverage therefor.

It should be noted that where no Contracting State has authorized the transfer of possession (e.g. where the shipment comes from a non-member State), this rule would not apply, and the provisions of Sub-paragraph (d) would govern.

Where a non-operator has assumed liability pursuant to Article XII (4), the reasons set forth above have led us to designate as Installation State the State which has authorized such assumption of liability. (Paragraph 1 (c)).

In all cases where sub-paragraphs (a), (b) and (c) do not apply -- i.e. wherever a shipment is not "approved" by the receiving operator, or where it comes from a non-Contracting State to a receiving operator who has not taken over possession with the approval of a Contracting State, or where neither the originating nor the receiving operators pertain to a Contracting State -- we have provided that the State on the territory of which the incident occurs shall be considered the Installation State (Sub-paragraph (d)). No incidents occurring outside the territory of a Contracting State would be covered by this Convention unless the shipment were included in Sub- paragraphs (a), (b) and (c). Moreover, no State designated as Installation State under Sub-paragraph (d) could be held subsidiarily liable.

2. ACTIONS FOR OFF-SITE DAMAGE UNDER ARTICLE XII OF THIS CONVENTION SHALL BE BROUGHT IN THE COURTS OF THE STATE ON THE TERRITORY OF WICH THE NUCLEAR INCIDENT OCCURRED; PROVIDED, HOWEVER, THAT
   a) IF THE NUCLEAR INCIDENT OCCURRED OUTSIDE THE TERRITORY OF ANY CONTRACTING STATE, OR IF THE PLACE WHERE THE INCIDENT OCCURRED COULD NOT BE DETERMINED WITH CERTAINTY, ACTIONS UNDER THIS CONVENTION MAY BE BROUGHT IN THE COURTS OF THE INSTALLATION STATE:
   b) WHERE UNDER THE PROVISIONS OF THIS PARAGRAPH JURISDICTION OVER ACTIONS FOR DAMAGE ARISING OUT OF THE SAME NUCLEAR INCIDENT WOULD LIE WITH COURTS OF MORE THAN ONE STATE, ANY ACTIONS MAY BE BROUGHT, AND ANY PROCEEDINGS UNDER THIS PARAGRAPH SHALL BE CONSOLIDATED IN THE COURTS OF THE INSTALLATION STATE OR, IF THERE ARE SEVERAL INSTALLATION STATES, IN THE COURTS OF THE INSTALLATION STATE WHERE THE FIRST ACTION WAS FILED.

This Paragraph is applicable only to actions against persons primarily liable for off-site damage. Where recourse actions or actions for contribution or for on-site damage are con-

cerned, the jurisdictional rules of Article XI seem quite satisfactory. In the interest of the victims, however, this Paragraph confers exclusive jurisdiction over actions for off-site damage upon the courts of the Contracting State in which a nuclear incident occurs, regardless of the origin or destination of the shipment and of the identity of the person liable. It would undoubtedly be simpler to concentrate all actions in the courts of the Installation State. Such a solution imposes itself in connection with damage caused by fixed installations. Where nuclear shipments are concerned, however, it might work greater hardship upon the persons damaged, since they might have to travel to a distant country to file their claims. Cases where nuclear damage is caused abroad by a fixed nuclear installation will probably be rare, and then they will be limited to contiguous countries or to areas touching upon a body of water contaminated by waste material. The situation is quite different as concerns shipments.

The principle of this provision cannot apply where an incident, though covered by this Convention, occurs outside the territory of a Contracting State (e.g. on the high seas) or, where the place of the incident cannot be determined with certainty (e.g. damage to other cargo detected only when a ship is unloaded). In such cases we have arbitrarily selected the courts of the Installation State as defined in Paragraph (1) of this Article, since that State has power to require insurance coverage payable there, and since its subsidiary liability may become engaged.

A further difficulty arises when a single nuclear incident consisting of a prolonged condition (e.g. leakage) occurs in several countries. Under the principles discussed above, actions could be brought in every country in which part of the incident occurred, and also in the courts of the Installation State if part of the incident occurred on the high seas or in a non-Contracting State. Such multiplicity of suits would make the administration of a single liability fund quite difficult unless, as in a bankruptcy situation, payment of all claims were postponed till the expiration of a given period of limitation, and if the fund were finally distributed by a single court applying its own rules and limitations. On the other hand, it would seem quite arbitrary to provide that the damage caused in each country should be considered a separate incident. As a compromise we have therefore suggested in Sub-paragraph (b) that the courts of the Installation State be competent in such an eventuality. Where pursuant to Paragraph 1 (d) of this Article every State in which the incident occurred would be an Installation State, the courts of the Installation State in which the first suit was filed should have jurisdiction. Since the predicate for this Sub-paragraph may come to light only after some claims have already been filed at one of the places of the incident, we have provided not only that claims may be filed in the competent court of the Installation State, but also that all proceedings started elsewhere shall be removed and consolidated in that forum.

3. THE COURTS COMPETENT UNDER PARAGRAPH (2) OF THIS ARTICLE SHALL APPLY THIS CONVENTION AND THE LAW OF THE FORUM UNLESS IT IS CONTRARY TO THE PROVISIONS OF THIS CONVENTION; PROVIDED, HOWEVER, THAT WHERE THE LAW OF THE INSTALLATION STATE IS MORE FAVORABLE TO THE PLAINTIFF THAN THE LAW OF THE FORUM, THE LAW OF THE INSTALLATION STATE SHALL APPLY.

This means that pursuant to the previous Paragraph the law of the place of injury (and only exceptionally the law of the Installation State) will govern such matters as the limitation of liability in time and in amount. The only exception, necessary in order not to engage the subsidiary liability of the installation State where it would not have been liable under its own law, applies where the provisions of the law of the Installation State are stricter. Such a rule is not new in the practice of private international law, and it should not be difficult for any court to administer it.

We have hesitated before adopting this solution, since it underlined the difficulties in choosing and adequate forum under the previous Paragraph, and since in practice it may expose the same defendant to different terms and ceilings of liability depending upon where an incident occurs in the course of a single voyage. On the other hand, we were told by United Kingdom experts that in their country, and in a number of other States, the application of a lower ceiling pursuant to the law of the Installation State would be contrary to public policy, in that it would discriminate among victims injured on their territory depending upon the Installation State to which a shipment pertained. When insurance experts further assured us that it would be possible to issue transportation policies to cover variable ceilings of liability (even including ceilings applicable in a foreign port where a ship might unforeseeably have to enter for repairs), we decided to suggest the present formula of Paragraph 3.

4. NOTHING IN THIS ARTICLE SHALL REQUIRE ANY STATE SUBSIDIARILY LIABLE PURSUANT TO ARTICLE VII TO SUBMIT TO THE JURISDICTION OF A FOREIGN COURT OR TO PAY MORE THAN WHAT ITS LIABILITY WOULD HAVE BEEN UNDER ITS OWN LAW.

This provision seems necessary to preserve the rights of States to avoid submission to foreign litigation, and in order not to expose them to subsidiary liability measured by the laws of another State. Where a State is itself an operator or directly liable under Article XII (4), this provision would not apply.

5. THE FOLLOWING ACTIONS FOR OFF-SITE DAMAGE SHALL LIE AGAINST AN OPERATOR LIABLE UNDER ARTICLE XII (1) OR (2) ONLY TO THE EXTENT THAT THE NUCLEAR INCIDENT OR DAMAGE WAS CAUSED BY HIS FAULT OR NEGLIGENCE.
   a) ACTIONS FOR DAMAGE TO, OR LOSS OF ANY PROPERTY UTILIZED IN CONNECTION WITH THE TRANSPORTATION;
   b) ACTIONS FOR DAMAGE OR PERSONAL INJURY TO, OR DEATH OF ANY PERSON EMPLOYED IN CONNECTION WITH THE TRANSPORTATION;

c) ACTIONS PREDICATED UPON CLAIMS WHICH ANY PERSON CONNECTED WITH THE TRANSPORTATION MAY HAVE ACQUIRED BY SUBROGATION OR ASSIGNMENT. PROVIDED, HOWEVER, THAT WHERE ANY PART OF THE NUCLEAR INCIDENT OCCURRED OUTSIDE THE TERRITORY OF THE DEFENDANT'S INSTALLATION STATE, COMPLIANCE WITH ANY RELEVANT SAFETY RULES ESTABLISHED OR APPROVED BY THE IAEA WITH RESPECT TO PACKAGING SHALL BE PRIMA FACIE PROOF THAT THERE WAS NO FAULT OR NEGLIGENCE IN CONNECTION THEREWITH.

Under the general rules of this Convention any of the actions enumerated in Sub-paragraphs (a) and (b) would be considered actions for off-site damage, with respect to which the defendant-operator would be absolutely liable, and which would compete with other claims for nuclear damage for a share of the limited liability fund. The same would be true under Sub-paragraph (c) for any claims which the plaintiff acquired by assignment under Article VIII (6) or by subrogation pursuant to Article VIII (5) (e.g. claims of a carrier who was held liable in the courts of a non-Contracting State or under one of the Brussels Conventions for off-site damage covered by this Convention). In view of the fact that any originating operator loses control over the materials which are being shipped, and that the receiving operator never had such control, we suggest that the predicate of fault (though not of unlimited liability) be reintroduced with respect to any such actions brought for damage to property or to employees, or by or on behalf of persons connected with the transportation. In the term "connected with the transportation" we have intended to include any carrier, ship-owner, transportation company or any other person who furnished services in the course of transportation (e.g. a tugboat owner, the owner of an intermediate storage or docking facility). Where the operator himself is a person connected with the transportation, any claims brought against him by his employees would be considered on-site damage under Article I (10) (b), and would therefore not be governed by this Provision. Property of the owner or operator, on the other hand, could be classified as on-site or off-site damage by the law of the Installation State.

It would have been possible to classify all actions covered by this Article as actions for on-site damage, not subject to the ceiling of liability, or to condition them upon a showing of wilfulness like actions under Article II (3) (b). These solutions, however, seemed unduly harsh for the claimant.

We were tempted to allow actions under this Article without proof of fault or negligence where the operator had undertaken such liability by contract. Since these actions would have competed with claims of other victims, however, this solution would also have had undesirable effects.

The definition of the terms "fault" or "negligence" will have to be left to the law of the forum, except where any part of the incident occurred outside the Installation State; in such instances compliance with I.A.E.A. safety regulations with respect to packing of nuclear shipments shall create a presumption that no fault or negligence were present with respect thereto. We have limited the role of I.A.E.A. regulations to packing. Such regulations are being

considered at present by other Panels of the I.A.E.A. They will encompass packing with respect to various types, quantities and combinations or radioactive products and nuclear fuels.

6. THE FOLLOWING ACTIONS SHALL LIE AGAINST ANY PERSON CONNECTED WITH THE TRANSPORTATION ONLY TO THE EXTENT THAT THE NUCLEAR INCIDENT OR DAMAGE WAS CAUSED BY HIS FAULT OR NEGLIGENCE:
   a) RECOURSE ACTIONS FOR ANY SUMS PAID IN SATISFACTION OF LIABILITY FOR OFF-SITE DAMAGE UNDER THIS CONVENTION;
   b) ACTIONS FOR DAMAGE TO, OR FOR LOSS OF ANY NUCLEAR FUELS OR RADIOACTIVE PRODUCTS INVOLVED IN THE NUCLEAR INCIDENT;

PROVIDED, HOWEVER, THAT WHERE ANY PART OF THE INCIDENT OCCURRED OUTSIDE THE TERRITORY OF THE INSTALLATION STATE, COMPLIANCE WITH ANY RELEVANT SAFETY STANDARDS AND REGULATIONS ESTABLISHED OR APPROVED BY THE I.A.E.A. WITH RESPECT TO STOWAGE AND HANDLING OF SUCH SHIPMENTS SHALL BE PRIMA FACIE PROOF THAT THERE WAS NO FAULT OR NEGLIGENCE IN CONNECTION THEREWITH.

This Paragraph introduces the predicate of fault or negligence with respect to recourse actions and to actions for loss of, or damage to the nuclear fuels or materials involved in a nuclear incident. It does <u>not</u> include actions for off-site damage where the person connected with the transportation is an operator, or is liable as an operator under Article XII (4).

Under Article X the recourse actions would be regulated by the laws of the Installation State, and actions for damage to the shipment could be classified by the Installation State as on-site or off-site damage. This exposed non-operators to possible abuses of the legislative power given to the Installation State under this Convention. Although this may to some extent create a conflict with the Warsaw Convention, we have introduced this Paragraph in order to prevent such abuses by States to which the defendant may not pertain and with which it may have no contact at all. The structure of this Paragraph is similar to that of Paragraph (5) and is covered by the explanatory note which follows it.

<u>ART. XIV.</u>

IN RESPECT OF CARRIAGE OF NUCLEAR FUELS OR RADIACTIVE PRODUCTS TO OR FROM A CONTRACTING STATE THE PERSON LIABLE IN ACCORDANCE WITH PART FOUR OF THIS CONVENTION SHALL FURNISH A CERTIFICATE CONTAINING:

1. HIS NAME AND ADDRESS AND THE NAME AND ADDRESS OF THE RECEIVING INSTALLATION.

2. A DESCRIPTION OF THE GOODS AND VOYAGE IN RESPECT TO WHICH THE SECURITY APPLIES;

3. A DESCRIPTION OF THE TYPE AND AMOUNT OF FINANCIAL SECURITY.

THE CERTIFICATE SHALL BE ATTESTED BY THE COMPETENT PUBLIC AUTHORITY OF THE INSTALLATION STATE. SUCH CERTIFICATE SHALL BE CONSIDERED CONCLUSIVE PROOF OF THE FACTS STATED THEREIN AGAINST ANY OPERATOR LIABLE UNDER THIS PART OF THIS CONVENTION, BUT IT SHALL NOT ENGAGE THE RESPONSIBILITY OF THE STATE WHICH ATTESTED THE CERTIFICATE.

A similar provision was suggested in the proposals made by the International Maritime Committee to the C.E.E.C. It seems to us that although it pertains more to the regulation of nuclear shipment, while we are dealing here with problems of liability, such a clause would help to implement the terms of this Convention, and is therefore worth considering.

P A R T F I V E

GENERAL PROVISIONS.

ART.XV.

WITH RESPECT TO ANY RIGHTS OR DUTIES UNDER THIS CONVENTION NO PERSON SHALL BE TREATED LESS FAVOURABLY THAN THE NATIONALS OF THE INSTALLATION STATE OR OF ANY OTHER STATE; NOR SHALL COMPENSATION FOR NUCLEAR DAMAGE WHICH OCCURRED OUTSIDE THE TERRITORY OF THE INSTALLATION STATE BE ANY LOWER THAN IF DAMAGE HAD OCCURRED IN THE INSTALLATION STATE OR IN ANY OTHER STATE.

The principle of non-discrimination expressed in this Article precludes any Installation State from predicating the rights of foreign nationals upon reciprocity. In the opinion of the Secretary this ought to be so even with respect to liability arising under national law in excess of the minimum norms set by this Convention. Reciprocity tends to lead to a vicious circle. In practice a system of reciprocity would greatly complicate the administration of a limited fund. And finally, any State which permits on its territory a hazardous activity capable of causing damage in another country should at the very least guarantee that persons injured in that other country shall be compensated to the same extent as its own nationals. Perhaps the State in which damage has occurred has adopted a lower ceiling of liability; yet such lower ceiling may in turn be predicated on a strict system of licensing, whereby major incidents would be impossible. It would be difficult in such a case to justify any system of compensation based on reciprocity.

Discrimination is prohibited both on the basis of nationality and on the basis of the place where damage was sustained. However, pursuant to Article I (ii) (c), the Convention does not apply to incidents which occur on the territory of a non-Contracting State; the only exceptions would be incidents involving nuclear shipments and waste under Article I (ii) (a) and (b). It would therefore not seem necessary to permit the introduction of reciprocity with respect

to damage suffered by nationals of non-Contracting States.

Nothing in this Article requires equal treatment with respect to government indemnity exceeding the ceiling of liability.

Situations may arise, however, where nationals or residents of an Installation State will automatically receive special compensation in the form of social security benefits or other indemnities which are withheld from non-citizens or non-residents. How will the principle of equal treatment work in such instances? Under the present Convention the Installation State has three possibilities.:

1. under Article VIII (5) the social security fund or any other person who has furnished compensation may acquire by subrogation the claims or part of the claims of any persons who have received such benefits. It may sue in competition with other claimants and recover a proportionate share of the limited liability fund.
   This same right is given to states who indemnify their nationals and may acquire the claims of their nationals pursuant to Article VIII (6). Under VIII (5) it will be left to the Installation State (i.e. generally to the State in which most of the social benefits were paid) to determine the value of these benefits for purposes of subrogation. Under Article VIII (6) this determination would be left entirely to the State to which the claims are assigned.

2. the Installation State may declare that any social benefits which were not subject to subrogation or assignment should be deducted from the amount of damages suffered.

3. the State furnishing social benefits may declare that they are gratuitous indemnities not intended to satisfy any liability under this Convention. Such a declaration would be binding upon the Installation State pursuant to Article XX.

ART. XVI.

ANY IMUNITY FROM LEGAL PROCESS PURSUANT TO RULES OF NATIONAL LAW SHALL BE WAIVED WITH RESPECT TO LIABILITY ARISING FROM OR TO FINANCIAL SECURITY FURNISHED UNDER THIS CONVENTION.

We have sought to reflect in this Article the views expressed by Mr.Winkler at the first Panel Meeting (DG/PL/II, page 32, N° 7)

ART. XVII.

THE CONTRACTING STATES SHALL AS FAR AS POSSIBLE FACILITATE PAYMENT IN THE CURRENCY OF THE STATE WHERE THE DAMAGE OCCURRED OF COMPENSATION UNDER PART TWO OF THIS CONVENTION, AND OF ANY INSURANCE AND

OF ANY INSURANCE AND RE-INSURANCE PAYMENTS RELATED THERETO.

In view of the objections of Mr.Nikolaiev against Article VII (5) of the Secretariat Draft Convention (cf.DG/PL/11, page 31, N° 8), we adopted a more flexible formula which appears also in the 1952 Rome Convention on Damage Caused by Aircraft to Parties on the Surface (Article 27). In view of the importance of insurance and reinsurance in the implementation of this Convention, we have also included payments to and from insurers and re-insurers.

ART. XVIII.

WHERE ANY FINAL JUDGMENT IS PRONOUNCED BY A COURT COMPETENT IN CONFORMITY WITH THIS CONVENTION, ON WHICH EXECUTION CAN BE ISSUED ACCORDING TO THE PROCEDURAL LAW OF THAT COURT, THE JUDGMENT SHALL BE ENFORCEABLE UPON COMPLIANCE WITH THE FORMALITIES PRESCRIBED BY THE LAWS OF ANY STATE IN WHICH EXECUTION IS APPLIED FOR, UNLESS IT IS SHOWN THAT ANY OF THE FOLLOWING CIRCUMSTANCES EXIST :

a) ANY OF THE PARTIES WAS NOT GIVEN A FAIR AND ADEQUATE OPPORTUNITY TO DEFEND HIS INTERESTS;
b) THE JUDGMENT HAS BEEN OBTAINED BY FRAUD OF ANY OF THE PARTIES;
c) THE JUDGMENT IS CONTRARY TO THE PUBLIC POLICY OF THE STATE IN WHICH EXECUTION IS REQUESTED.

Objections had been raised at the first Panel meeting against the insertion of a provision requiring enforcement of foreign judgements entered in conformity with this Convention. Although we tend to agree, since the compulsory financial security will generally make foreign enforcement actions unnecessary, we have inserted a modified Article on enforcement for discussion at the next Panel meeting.

ART. XIX.

ALL STATES AGREE TO COMMUNICATE TO THE INTERNATIONAL ATOMIC ENERGY AGENCY ANY LAWS AND REGULATIONS APPLICABLE TO CLAIMS WHICH MAY ARISE UNDER THIS CONVENTION.

This would be desirable in view of the fact that in this minimum Convention much is left to the law of the Installation State. If the information communicated to the I.A.E.A. were disseminated or at least made available to any interested party, much of the remaining uncertainty would be removed from the field of application of this Convention.

ART.XX.

NOTHING IN THIS CONVENTION SHALL PRECLUDE STATES FROM ASSUMING FURTHER LIABILITY BY LAW, TREATY OR CONVENTION, OR FROM PROVIDING COMPENSATION FOR ANY DAMAGE OR FOR ANY CLAIMS COVERED BY THIS CONVENTION.

It must be recognized that this Convention does not cover every form of liability. In particular -- and pursuant to the wishes expressed at the first Panel meeting -- it does not cover the direct international responsibility of States for nuclear incidents. It seemed therefore necessary to expressly reserve that field, and any other area not covered by the foregoing Articles, for the application of any existing rules of national or international law or for any conventional law to be drafted in the future.

P A R T S I X.

FINAL CLAUSES.

Pursuant to the views expressed at the first Panel Meeting, we have not drafted any Final Clauses at the present time.
