UNEP

CBD

CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/BS/WG-L&R/4/INF/3
22 August 2007

ORIGINAL: ENGLISH

OPEN-ENDED AD HOC WORKING GROUP OF
LEGAL AND TECHNICAL EXPERTS ON
LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY
Fourth meeting
Montreal, 22-26 October 2006
Item 3 of the provisional agenda*

SUPPLEMENTARY COLLECTIVE COMPENSATION ARRANGEMENTS IN INTERNATIONAL ENVIRONMENT-RELATED LIABILITY INSTRUMENTS

Note by the Executive Secretary

I. INTRODUCTION

1. The Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (hereinafter the "Working Group",) held its third meeting from 19 to 23 February 2007, in Montreal. At the end of that meeting, the Working Group requested, among other things, the Secretariat to gather and make available information on supplementary collective compensation arrangements in international environment-related liability instruments.

2. Accordingly, the Secretariat has prepared the present note. The note presents, in section II, a review of the objective and establishment, scope of damage covered, modes of contributions, and strengths and weaknesses, of collective compensation arrangements. The review is accompanied with information on practical examples of how specific supplementary collective compensation arrangements are established and operate, as provided for in the respective international environment-related liability instruments. Section III of the note provides a summary of experiences in the context of other collective compensation arrangements that are proposed or are under consideration under two different processes that are not essentially environment-related, with a view to making available as much information as possible which may be helpful in enriching the consideration of supplementary collective compensation arrangements.

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II. COLLECTIVE COMPENSATION ARRANGEMENTS

A. Establishment and objective

3. Under some international environmental liability regimes, there is a practice of creating collective compensation arrangements in order to provide alternative or supplementary compensation for victims. Collective compensation arrangements are, to a large extent, the result of efforts that have been made overtime to overcome the limitations of insurance as a means of compensation payment guarantee.

4. Collective compensation arrangements are established and operate in conjunction with a strict civil liability regime that channels liability to a specific person or persons and puts limits on the extent of the liability. These arrangements can have their basis in a treaty, a voluntary contract, or in a decision of parties to a relevant treaty. The arrangements could be governed by the same liability regime that necessitated the creation of such arrangements or by a separate international legal instrument.

1. Collective compensation arrangements for nuclear damage

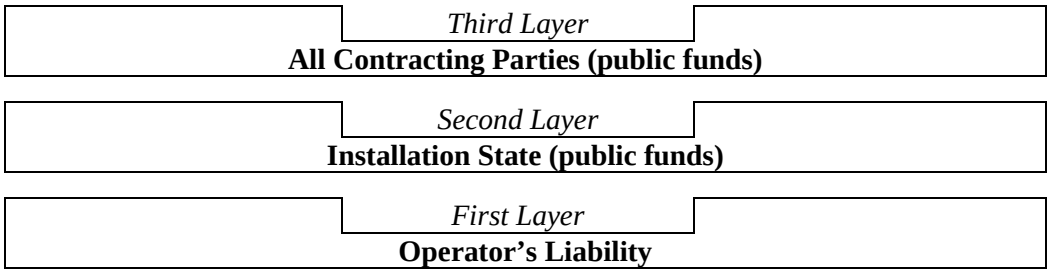
5. The existing international liability regime for nuclear damage consists of two sets of conventions that have eventually been linked: (i) the Convention on Third Party Liability in the Field of Nuclear Energy ("the 1960 Paris Convention"); and (ii) the Vienna Convention on Civil Liability for Nuclear Damage ("the 1963 Vienna Convention"). The Paris and the Vienna Conventions have been supplemented, in relation to maritime transport, by the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 1971 ("the 1971 Brussels Convention"). Furthermore, the Paris and Vienna Conventions have been linked by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 1988 ("the Joint Protocol").

6. Coverage under the Paris Convention has been extended by the Supplementary Convention on Third Party Liability in the Field of Nuclear Energy of 1963 ("the Brussels Supplementary Convention"). The Paris Convention and the Brussels Supplementary Convention have both been amended three times: by Additional Protocols adopted in 1964, 1982 & 2004. The principal objective of the amendments was to provide more compensation to more people for a wider scope of nuclear damage. The most important feature of the revised Brussels Supplementary Convention (2004) is a substantial increase in the three tiers (see figure 1) of compensation under the Convention. The first tier, corresponding to the minimum liability requirement under the Paris Convention, rose from 5 million Special Drawing Rights (SDRs) to a minimum of €700 million 1/ and continues to be provided by the operator's financial security, failing which it must be provided by the Installation State from public funds.

7. The second tier rose from a maximum of 175 million SDRs to a new high of €500 million and continues to be provided from public funds made available by the Installation State which may either require the operator to establish financial security for an amount up to €1.2 billion and/or by some other means than as cover of the liability of the operator. The third tier rises from a maximum of 125 million SDRs to €300 million and continues to come from public funds provided by all Contracting Parties after a nuclear incident. Total compensation available under the revised Paris-Brussels regime is now €1.5 billion, compared to the previous amount of 300 million SDRs (approximately €350 million).

1/ "The unit of account changed to the Euro to avoid fluctuations in the value of the SDR which could seriously affect the level of corresponding national currencies for most Contracting Parties." Nuclear Energy Agency, Background information note for the press communiqué on the revision of the Paris Convention on Nuclear Third Party Liability and of the Brussels Supplementary Convention, 10 February 2004. http://www.nea.fr/html/general/press/2004/2004-01-note.html.

Figure 1: Tiered compensation arrangements for nuclear damage under the Revised Brussels Supplementary Convention



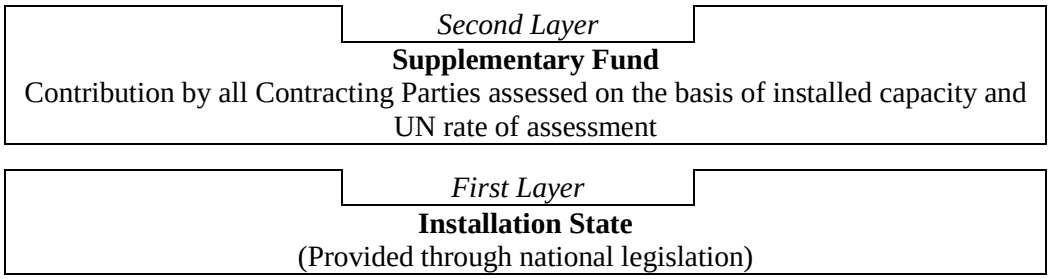
8. In 1997, Parties to the International Atomic Energy Authority adopted the Convention on Supplementary Compensation for Nuclear Damage (CSC). According to its article 2, the purpose of the CSC is to supplement the system of compensation provided pursuant to national law. The Convention establishes a regime to supplement and enhance measures in the Vienna and Paris Conventions, with a view to increasing the amount of compensation available for transboundary nuclear damage.

9. The CSC establishes a tiered structure of funding for compensation (see figure 2). The first tier is provided by the Installation State through national legislation whereas the second tier comprises the "supplementary fund" and is provided by collective contributions of Contracting Parties. Each Installation State is required to ensure the availability of 300 million Special Drawing Rights (SDRs), or a greater amount that it may have specified to the Depositary at any time prior to the nuclear incident or a transitional amount for a maximum of 10 years from the date of the opening for signature of the Convention of at least 150 million SDRs. 2/ The funds made available under this provision constitute the "minimum national compensation amount" that makes up the first tier of compensation available in the event of a nuclear incident in a State Party to the CSC.

10. The first tier of compensation may further be broken into two layers if the Installation State decides to limit the liability of the operator. 3/ The Installation State is allowed to limit the liability of its operators to an amount not less than 150 million SDRs per incident if public funds are available to make up the difference between that amount and 300 million SDRs.

11. In case the compensation exceeds the amount provided by the Installation State (the first tier), then the Supplementary Fund (the second tier) comes in. Paragraph l (b) of Article III of the CSC establishes the obligation on all Contracting Parties to the Convention to make available public funds in cases after a nuclear accident. These contributions make up the international supplementary fund that constitutes the second tier of compensation.

Figure 2. Tiered compensation arrangements for nuclear damage under the Convention on Supplementary Convention of 1997



2/ Paragraph 1(a), article III

3/ Article 4, annex to the CSC

2. Collective compensation arrangements for oil pollution damage

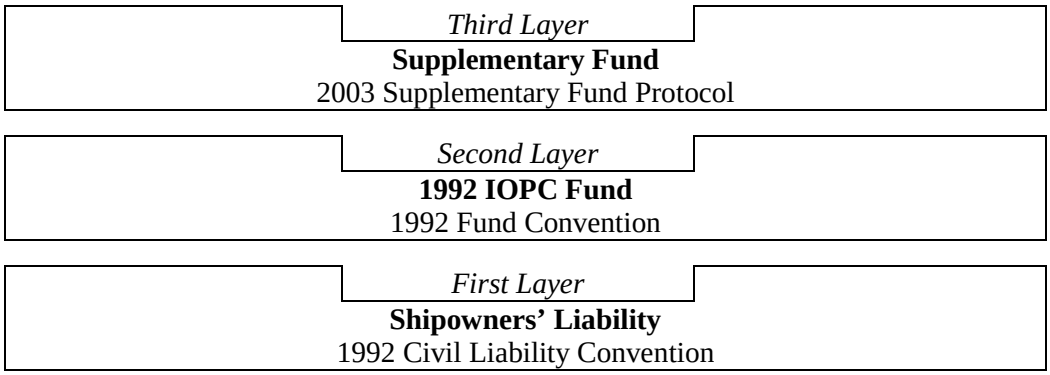
12. The 1992 Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) provides for the perimeters of a civil liability regime, while the 1992 International Oil Pollution Compensation Fund (1992 Fund Convention) actually specifies the terms of the collective compensation arrangement created to supplement the civil liability regime. The Fund Convention establishes a system for compensating victims when the compensation available under the Civil Liability Convention is insufficient. These two conventions replace two earlier conventions, the 1969 Civil Liability Convention and the 1971 Fund Convention.

13. In 2003, a protocol establishing an International Oil Pollution Compensation Supplementary Fund was adopted ("the Supplementary Fund Protocol"). The objective of establishing the Fund is to supplement the compensation available under the 1992 Civil Liability and Fund Conventions with an additional, third tier of compensation (see figure 3 below).

14. The 1992 Civil Liability Convention provides for a limited liability of shipowners linked to the tonnage of their ships. The compensation payable by the 1992 Fund in respect of an incident is limited to an aggregate amount of 203 million SDRs, including the sum amount of compensation paid under the 1992 Civil Liability Convention. 4/

15. Under the 2003 Supplementary Fund Protocol, the total amount of compensation payable for any one incident will be limited to a combined total of 750 million SDRs, including the amount of compensation paid under the 1992 Civil Liability Convention and the 1992 Fund Convention. The Supplementary Fund regime will only be invoked if the 1992 Fund Assembly has considered that the total amount of the established claims exceeds, or is likely to exceed, the aggregate amount of compensation available under the 1992 Fund Convention in respect of any one incident. 5/

Figure 3: Tiered compensation arrangements for oil pollution damage6/



16. Collective compensation arrangements can also be created as a result of voluntary schemes agreed upon by and among operators or participants of the relevant industry. They are established, for example, in the oil sector, by oil companies on the one hand, and tanker owners on the other. The International Group of P&I Clubs agreed to indemnify: (a) the 1992 Fund, established by the 1992 Fund

4/ Article 4

5/ Gwendoline Gonsaeles, "The impact of EC decision-making on the international regime for oil pollution damage: The Supplementary Fund example", Chapter 6, p. 120, in Frank Maes (ed.) *Marine Resource Damage Assessment*, 2005, Springer, The Netherlands

6/ *Ibid*. p. 118

Convention, for damage caused by small tankers to the effect that the maximum amount of compensation payable by the owners of such ships would be 20 million SDRs; and (b) the 2003 Supplementary Fund, established by the 2003 Supplementary Fund Protocol to the 1992 Fund Convention, in respect of 50% of the amounts paid in compensation by that Fund. This offer was to be implemented by the conclusion of legally binding agreements. These agreements, viz. the Small Tanker Oil Pollution Indemnification Agreement (STOPIA 2006) and the Tanker Oil Pollution Indemnification Agreement (TOPIA 2006), became operational on 20 February 2006.7/ STOPIA 2006 and TOPIA 2006 are not contracts between the Funds and the shipowners, but unilateral offers by shipowners which confer enforceable rights on the Funds.

17. STOPIA 2006 and TOPIA 2006 were preceded by other private industry schemes that remained in place as interim arrangements to ensure the availability of an adequate compensation for damage caused by oil pollution until the international oil pollution conventions had worldwide application. These arrangements were known as the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding an Interim Supplement of Tanker Liability for Oil Pollution (CRISTAL).8/

18. There has also been a private scheme, similar to the ones in the field of oil pollution from ships, established between the oil companies with regard to oil pollution damage caused by offshore oil exploration and exploitation and known as the Offshore Pollution Liability Agreement (OPOL).

3. Collective compensation arrangements for damage caused during the transport of dangerous goods and substances

19. The 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea ("the HNS Convention") establishes a two tier scheme (see figure 4) for determining liability to pay compensation in the event of a marine incident involving hazardous and noxious substances, and ensures that a high level of compensation can be made available to the victims of an incident. The definition of "hazardous and noxious substances" (HNS) in the Convention covers about 6,500 substances. These include chemicals, non-persistent petroleum products (such as petrol, diesel and aviation fuel), liquid natural gas and liquid petroleum gas.9/ The regime established by the HNS Convention is largely modelled on the existing regime for oil pollution damage. The HNS Convention provides for the establishment of an International Hazardous and Noxious Substances Fund (the HNS Fund), as a second tier for compensation. 10/

20. As with the Civil Liability Conventions and Fund Conventions, when an incident occurs where compensation is payable under the HNS Convention, 11/ compensation would first be sought from the ship owner, up to the maximum limit of 100 million SDRs. 12/ Once this limit is reached, compensation would be paid from the second tier, the HNS Fund, up to a maximum of 250 million SDRs (including compensation paid under the first tier). 13/

7/ International Oil Pollution Compensation Funds, STOPIA and TOPIA, Note by the Director, submitted to the 10th Extraordinary Session of the Assembly of the 1992 IOPC (92FUND/A.ES.10/13) and 2nd Extraordinary Session of the Assembly of the 2003 Supplementary Compensation Fund (SUPPFUND/A/ES.2/7), , 1 February 2006

8/ Both TOVALOP and CRISTAL ended on 20 February 1997.

9/ Article 1(5)

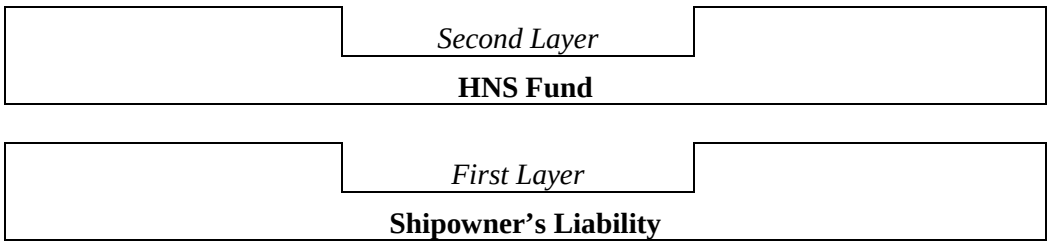
10/ Article 13(1) (a), Chapter III

11/ The HNS Convention has not entered into force yet

12/ Article 9 (1), Chapter II

13/ Article 14(5) (a), Chapter III

Figure 4: Tiered compensation arrangements under the 1996 HNS Convention



21. The Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal provides the basis for the establishment of a revolving fund for emergency response in the event of accidents involving hazardous wastes. 14/ During the negotiations of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Liability Protocol), the idea of establishing a hazardous waste compensation fund was considered but not adopted. Parties to the Protocol 15/ have undertaken to keep under review the need for and possibility of improving existing mechanisms or establishing a new mechanism to use as additional or supplementary compensation arrangement.16/

22. The Conference of the Parties to the Basel Convention decided, at its first meeting, to establish the Technical Cooperation Fund and, at its fifth meeting following the adoption of the Liability Protocol, to enlarge it, in order to make available funds for use by developing country parties and countries with economies in transition in case of an incident occurring during a transboundary movement of hazardous wastes and other wastes covered by the Basel Convention. 17/

4. Arrangements under the Antarctic Treaty System

23. The Consultative Parties to the Antarctic Treaty adopted, in 1991, a protocol on environmental protection. Annex VI of the Protocol on Environmental Protection to the Antarctic Treaty was adopted in 2004 and provides for Liability Arising from Environmental Emergencies. Under article 12 of annex VI, the Secretariat of the Antarctic Treaty is required to maintain and administer a fund.

24. Unlike the other collective compensation arrangements reviewed in the foregoing sections, the aim of the fund under the Antarctic Treaty is not to compensate victims. It rather provides incentives to a Party to take timely response measures in case of environmental emergencies in the Antarctic Treaty area.

B Types of damage covered

25. Collective compensation arrangements cover the same types of damage as envisaged by the corresponding civil liability regime.

14/ Article 14 (2), Basel Convention.

15/ The Basel Protocol has not yet entered into force.

16/ Article 15 (2), Basel Liability Protocol.

17/ Decision I/7 and decision V/32, Conference of the Parties to the 1989 Basel Convention.

1. Nuclear damage

26. The 1963 Brussels Convention Supplementary to the 1960 Paris Convention, as amended by the Additional Protocols of 1964, 1982 and 2004, broadened the definition of "nuclear damage" to include environmental damage and economic costs. .18/

27. The 1997 Convention on Supplementary Compensation for Nuclear Damage (CSC) applies to nuclear damage for which an operator of a nuclear installation used for peaceful purposes in the territory of a Contracting Party is liable under either the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy or the 1963 Vienna Convention on Civil Liability for Nuclear damage, or a national law. The Contracting Party whose courts have jurisdiction over a nuclear incident is required to inform other Contracting Parties of such incident as soon as it appears that the damage caused exceeds, or is likely to exceed, the amount of compensation that is supposed to be made available by the Installation State, first tier of compensation.19 Nuclear damage, for the purpose of CSC, is: (i) loss of life or personal injury; (ii) loss of or damage to property; (iii) economic loss arising from loss or damage referred to in sub-paragraphs (i) and (ii); (iv) the costs of reinstatement of impaired environment, unless such impairment is insignificant; (v) loss of income deriving from an economic interest in any use or enjoyment of the environment; (vi) the costs of preventive measures, and further loss or damage caused by such measures; and (vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law of civil liability of the competent court. 20/

2. Oil pollution damage

28. The 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention) pays compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the 1992 Civil Liability Convention because: (i) no liability for damage arises under the 1992 Civil Liability Convention; (ii) the owner liable for the damage under the 1992 Civil Liability Convention is financially incapable of meeting his obligations in full and any financial security that may have been provided does not cover or is insufficient to satisfy the claims of compensation; or (iii) the damage exceeds the owner's liability under the 1992 Civil Liability Convention. Pollution damage as defined by the 1992 Civil Liability Convention is loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, and the costs of preventive measures and further loss or damage caused by preventive measures. Compensation for impairment of the environment other than loss of profit from such impairment is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

29. Any person suffering oil pollution damage is entitled to seek compensation from the 2003 Supplementary Fund provided such person has been unable to obtain full and adequate compensation for an established claim for such damage under the 1992 Fund Convention, because the total damage exceeds, or there a risk that it will exceed, the applicable limit of compensation available under the 1992 Fund Convention in respect of any one incident.

3. Damage from the transport of dangerous goods and substances

30. The HNS Fund gets involved where: (i) no liability for the damage arises for the shipowner; 21/ (ii) the owner is financially incapable of meeting the obligations under the Convention in full and any

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18/ Article 1(a) (vii), Paris Convention as amended.

19/ Article VI, 1997 Convention on Supplementary Compensation for Nuclear Damage

20/ *Ibid.* article I(f)

21/ This could occur, for example, if the shipowner was not informed that a shipment contained HNS or if the accident resulted from an act of war.

financial security that may be provided does not cover or is insufficient to satisfy the claims for compensation for damage; and (iii) the damage exceeds the owner's liability limits established in the Convention.

31. The Conference of the Parties to the Basel Convention decided, at its fifth meeting, that the Secretariat of the Convention could use the funds available in the enlarged Technical Cooperation Trust Fund, to assist a Party to the Convention which is a developing country or a country with economy in transition in case of an incident occurring during a transboundary movement of hazardous wastes and other wastes covered by the Basel Convention. The funds may be used for the purpose of: (i) estimating the magnitude of damage occurred or damage that may occur and the measures needed to prevent damage; (ii) taking appropriate emergency measures to prevent or mitigate the damage; and (iii) helping find those Parties and other entities in a position to give the assistance needed. .22/ It was also decided that the funds could be used to provide compensation for damage covered by the Basel Protocol on Liability and Compensation. 23/ Damage is defined under the Protocol as loss of life or personal injury, loss of or damage to property, loss of income directly deriving from an economic interest in any use of the environment, the costs of measures of reinstatement of the impaired environment, and costs of preventive measures. 24/

4. The Antarctic Treaty system

32. The fund maintained under the Antarctic Treaty System is intended to provide, *inter alia*, for reimbursement of reasonable and justified costs of response action when an operator has failed to take such measures. 25/ "Response action" includes reasonable measures taken after environmental emergency has occurred to avoid, minimise or contain the impact of that environmental emergency, including clean-up and determining the extent of that emergency and its impact. 26/ In approving reimbursement claims, the Antarctic Treaty Consultative Meeting of Parties may seek advice from the Committee of Environmental Protection and is required to take into account special circumstances and criteria such as: (i) that the responsible operator was an operator of the Party seeking reimbursement; (ii) responsible operator remains unknown or is not subject to the provisions of the annex; (iii) unforeseen failure of the insurance company or financial institution. In this regard, the fund is a substitute rather than a supplementary arrangement.

C Contributions

33. Collective compensation arrangements function by bringing together a group of potential polluters (or, more broadly, potential authors of damage) who pay a contribution based on the risk they create. The payment of contributions may be compulsory or voluntary. Contributions may be collected on a regular basis irrespective of the occurrence of an accident causing damage or on an ad hoc basis following the occurrence of such an accident.

34. States may also be required or invited under such arrangements to pay contributions. Their contribution may be financed through fees charged under national licensing systems. The role of States may also be limited to the collection of contributions from the operators concerned and forwarding such contributions to a collective compensation arrangement.

22/ Paragraph 2, decision V/32, fifth meeting of the Conference of the Parties to the 1989 Basel Convention, Basel, 6-10 December 1999. The fifth meeting also adopted the Basel Protocol on Liability and Compensation

23/ *Ibid.* paragraph 3

24/ Paragraph 2(c), article 2, Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal

25/ Paragraph 1, article 12, annex vi to the Protocol on Environmental Protection to the Antarctic Treaty: Liability Arising from Environmental Emergencies

26/ *Ibid.* article 2(f)

1. Contributions to collective compensation arrangements for nuclear damage

35. Contributions under the revised Brussels Supplementary Convention which form the public funds (third tier) that the Contracting Parties are supposed to make available are determined with 35 per cent, based on a ratio between gross domestic product (GDP) of each Contracting Party and the total gross domestic products of all Contracting Parties, and 65 per cent, based the ratio between the thermal power of the reactors situated in the territory of each Contracting Party and the total thermal power of reactors situated in the territories of all contracting Parties. 27/ Previously, contributions were determined with 50% based on gross national product and 50% based on level of thermal power. Furthermore, the revised Brussels Supplementary Convention allows, the third tier (international tier) to be increased pro rata according to the GDP and the nuclear installations brought into the existing amounts by a new Party.28/

36. Under the Convention on Supplementary Compensation for Nuclear Damage (CSC), it is the obligation of the Installation State to ensure compensation in respect of nuclear damage per nuclear incident as specified under the Convention (first tier of compensation).29/ Additional amounts of compensation need to be made available after a nuclear accident through contributions by the Contracting Parties collectively (supplementary fund) to cover compensation beyond the amount made available by the Installation State. 30/ Accordingly, contributions to this second tier collective compensation arrangement are determined on the basis of each Contracting Party's installed nuclear capacity multiplied by 300 SDRs per "unit of installed capacity", which is defined as one megawatt of thermal power, and an additional amount equal to 10 per cent of the amount assessed on the basis of the United Nations rate of assessment (UNRA) for that State for the year preceding the one in which the nuclear incident occurs. 31/ The maximum contribution which may be charged per nuclear incident to any Contracting Party, other than Installation State is, however, its UNRA expressed as a percentage plus 8 per cent. No Contracting Party is required to make available the public funds under the second tier if claims for compensation can be satisfied out of the first tier funds that need to be made available by the Installation State.

2. Contributions to collective compensation arrangements for oil pollution damage

37. Payments into the International Oil Pollution Compensation Fund are made by oil importers in the contracting states on the basis of the annual number of tons of oil received by sea. The Fund is financed by contributions levied by State Parties on any person who has received in one calendar year more than 150,000 tonnes of crude oil and heavy fuel oil (contributing oil) in a State Party to the 1992 Fund Convention after sea transport. However, for the purposes of the 2003 Supplementary Compensation Protocol, there is a minimum aggregate receipt of 1,000,000 tons of contributing oil in each Contracting State. Annual contributions are levied to meet the anticipated payments of compensation and administrative expenses during the coming year. Each contributor pays a specified amount per tonne of contributing oil received. Contracting States are required to communicate every year to the 1992 Fund the name and address of any person in that State who is liable to contribute, as well as the quantity of contributing oil received by any such person. 32/ This applies whether the receiver of oil is a Government authority, a State-owned company or a private company.

27/ Article 12, revised Brussels Supplementary Convention

28/ Article 12*bis*

29/ Paragraph 1(a), article III, 1997 Convention on Supplementary Compensation for Nuclear Damage

30/ *Ibid*. paragraph 1(b), article III

31/ *Ibid*. paragraph 1, article IV

32/ The International Oil Pollution Compensation Fund 1992: Explanatory note prepared by the 1992 Fund Secretariat, March 2005

3. Contributions to collective compensation arrangements for damage caused by HNS

38. In the case of the HNS Fund, contributions to the second tier (i.e. the HNS Fund) will be collected by Contracting Parties from persons who receive a certain minimum quantity of HNS cargo during a calendar year in a Contracting Party. The tier will consist of one general account and three separate accounts for oil, liquefied natural gas (LNG) and liquefied petroleum gas (LPG). The system with separate accounts has been seen as a way to avoid cross-subsidization between different HNS substances.

39. The Technical Cooperation Trust Fund under the Basel Convention is part of the budget of the Convention. Parties to the Convention have been urged to make contributions to this Fund to support the activities in connection with damage resulting from incidents arising from transboundary movements of hazardous wastes and other wastes and their disposal. Contributions are thus made on a voluntary basis.

4. Contributions to the collective compensation arrangement under the Antarctic Treaty System

40. Any State or person may make voluntary contributions to the Fund under the Protocol on Environmental Protection to the Antarctic Treaty. 33/

D. Advantages and drawbacks

41. The main objective of collective compensation arrangements is to improve the position of the injured parties by providing alternative and supplementary financial resources if liability is channelled and limited by a strict liability regime. Collective compensation arrangements allow circumventing the limitations imposed by a financial ceiling or a floor established by civil liability regimes. This includes cases when, for example, the liable person is insolvent or the person causing the damage is exempted from liability, or liability of the operator has been limited in amount or in time. Compensation arrangements could also conveniently come into operation when a claim through a civil liability system is impossible. This includes cases where, for example, the polluter cannot be identified, or cases of ecological damage which is either not recoverable or no person with clear legal interest exists to bring claim. Such arrangements ensure that the financial burden of redressing environmental damage is spread among a large number of operators or among society at large in case of arrangements fully financed or supplemented by public funds. In this respect, the system is contributing to forging a balance between the need to continue with socially useful activities and the need to compensate damage resulting from such activities.

42. Collective compensation arrangements with their institutional structure could, in addition to paying out compensation, be well suited to provide timely assistance in the case of environmental emergencies. 34/

43. The main drawbacks of collective compensation arrangements include unwillingness on the part of companies to participate in a scheme where they may be required to pay large sums to cover damages arising from other firms' pollution, particularly where these firms are their competitors. There is also a claim that collective compensation arrangements create an environment conducive for free riding. In this connection, it is argued that illegal operators may escape the purview of collective compensation arrangements as the latter depends on the provision of complete and accurate information from the participating operators that are duly registered and licensed by the competent national authorities.

33/ Article 12(4), annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability Arising from Environmental Emergencies

34/. Katharina Kummer, International Management of Hazardous Wastes: The Basel; Convention and Related Legal Rules, Oxford monographs in international law, Clarendon Press, Oxford, p. 257

Furthermore, it is stated that collective compensation arrangements fail to implement the polluter pays principle – and thus fail to create a disincentive to causing pollution or damage.

44. There is also lack of political will from public authorities to agree to commitments associated with collective compensation arrangements, and a strong reluctance to accept the establishment of an independent international arrangement and to impose levies on private operators or to contribute to a supplementary compensation arrangement.

45. As with insurance, collective compensation arrangements work best if a relatively homogenous group of interests can be brought together to share the risk. For example, a lack of homogeneity has been identified as one of the obstacles to participation in the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea. The substances covered by the Convention are not only numerous but also pose different degrees of risk to the environment, persons and property. As a result, the industry concerned with the carriage of these diverse substances have little in common making their participation and their contributions to the HNS Fund difficult to arrange.

46. High administrative and operational costs are also considered to be some of the drawbacks of having collective compensation arrangements.

III. FURTHER EXPERIENCES ON SUPPLEMENTARY COLLECTIVE COMPENSATION ARRANGMENTS UNDER OTHER PROCESSES

A. Draft principles of the International Law Commission on the allocation of loss in the case of transboundary harm arising out of hazardous activities

47. In its draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the International Law Commission includes a principle on prompt and adequate compensation (principle 4). Under this principle, each State has a responsibility to take necessary measures to ensure the availability of prompt and adequate compensation for victims of transboundary damage. Such measures, according to the principle, include imposition of liability on the operator or other person or entity, as appropriate; and the requirement on the operator, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees.

48. Furthermore, the measures by each State may also include the requirement for the establishment of industry wide funds at the national level. In case all these measures are considered insufficient to provide adequate compensation, the Principle requires each State to also ensure that additional financial resources are allocated. In its commentary to the last two elements of the principle regarding additional sources of funding, the International Law Commission stated that such funding could be created out of different accounts that include: (i) public funds in the form of part of a budget; (ii) a collective fund created by contributions either from operators of the same category or from entities for whose direct benefit the dangerous or hazardous activity is carried out. 35/

B. Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

49. A work is being undertaken by a Special Group under the auspices of the International Civil Aviation Organization (ICAO), with an initial objective to modernize the 1952 Convention on Damage

35/ Report of the International Law Commission, Fifty-Sixth Session (3 May- 4 June and 5 July-6 August 2004, General Assembly Official records, Fifty-ninth session, Supplement No. 10 (A/59/10), p.26.

Caused by Foreign Aircraft on the Surface (Rome Convention). The Special Group has developed two draft conventions, namely: (i) draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference (commonly referred to as "the Unlawful Interference Convention); and (ii) draft Convention for Damage Caused by Aircraft to Third Parties (referred to as "the General Risks Convention). Although the objective is not to develop environment-related liability instruments, the text 36/ of each of the draft Convention explicitly states that nothing in the Convention prevents compensation for environmental damage, if and insofar as such compensation is available under the national law of the state where the damage has occurred. 37/ The Unlawful Interference Convention provides for the establishment of a supplementary compensation mechanism, whereas similar arrangements do not apply to the General Risks Convention, as the operator is potentially liable for the full amount of damage caused.

50. Under the Unlawful Interference Convention, the operator is liable for damage sustained by third parties on condition only that the damage was caused by an aircraft in flight (article 3). The draft creates limits on an operator's liability based on the mass of the aircraft involved in the event (article 4).

51. It is envisaged to create an independent organization named the Supplementary Compensation Mechanism (SCM) with the principal purpose to pay compensation to persons suffering damage (article 9). Compensation is paid by the SCM to the extent that the total amount of damages exceeds the limits specified in Article 4 of the draft (article 15). In other words, where there is damage for which the operator is liable, it will pay up to the level of its cap and the SCM will pay additional compensation above and beyond the level of the cap. The maximum amount of compensation available from the Supplementary Compensation Mechanism for each event is set at 3 billion SDRs.

52. It is expected that operators will be able to obtain insurance up to the amount of the cap. However, in case insurance is unavailable to cover, fully or partially, the risks of damage envisaged by the Convention, or "only available at a cost incompatible with the continued operation of air transport", the SCM provides, subject to the decision of the Conference of the Parties, financial support to operators for the payment of compensation for which they are liable (article 15 (3)).

53. The contributions to the SCM are "the mandatory amounts collected in respect of each passenger and each [tonne] of cargo departing on an international commercial flight from an airport in a State Party" (article 13). The operator is required to collect the mandatory amounts and remit them to the SCM. Article 13 *ter* envisages initial contributions in respect of passengers and cargo departing from a State Party to be made from the time of entry into force of the Convention for that State Party. Also, contributions are supposed to be fixed with a view to achieving within four years a certain percentage of the maximum limit of compensation by the SCM.

54. The Supplementary Compensation Mechanism may also make advance payments to natural persons who are entitled to claim compensation under this Convention in order to meet the immediate economic needs of such persons, and to take other measures to minimize or mitigate damages in case of an event (Article 16).

36/ The reference made herein to the texts of the two draft conventions is as they stand at the end of the fifth meeting of the Special Group which was held from 30 October to 3 November 2006. The sixth meeting of the Group was held from 26 to 29 June 2007. However, the report of the meeting as well as the latest versions of the texts of the draft conventions, as revised by the sixth meeting were not available at the finalization of this document.

37/ Draft article 3(3) of the Unlawful Interference Convention and Article 3(3) of the General Risks Convention as presented in appendix a and appendix b, respectively, of working paper, C-WP/12756, 27/02/07, Council 180th Session, International Civil Aviation Organization (ICAO)