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(GC(XXXVII)/1052)

## MEASURES TO STRENGTHEN INTERNATIONAL CO-OPERATION IN MATTERS RELATING TO NUCLEAR SAFETY AND RADIOLOGICAL PROTECTION

### (d) Implementation of resolution GC(XXXVI)/RES/585

#### Liability for nuclear damage

#### Report by the Board of Governors

1. In resolution GC(XXXVI)/RES/585, adopted at its last regular session, the General Conference took note of the report submitted by the Board of Governors and Director General on the question of liability for nuclear damage (in document GC(XXXVI)/1009). Further, in that resolution, the General Conference, inter alia, recalled its resolution GC(XXXV)/RES/553 in which it reiterated the priority it attached to the consideration of all aspects of the question of liability for nuclear damage, especially in the light of the requests from Parties to the Vienna Convention to convene a revision conference; reiterated its hope that the Vienna Convention and the Joint Protocol would obtain the widest possible adherence; considered that international co-operation in nuclear safety would benefit from a wide and early acceptance of an effective regime of liability for nuclear damage; and expressed the hope that the Standing Committee on Liability for Nuclear Damage would complete its preparatory work soon, so that a revision conference on the Vienna Convention may then be convened.
2. The Standing Committee on Liability for Nuclear Damage was established by the Board in February 1990 with a mandate, in particular, to:

- (i) consider international liability for nuclear damage, including international civil liability, international State liability, and the relationship between international civil and State liability;
- (ii) keep under review problems relating to the Vienna Convention on Civil Liability for Nuclear Damage and advise States party to the Convention on any such problems; and
- (iii) make the necessary substantive preparations and administrative arrangements for a revision conference to be convened in accordance with Article XXVI of the Convention on Civil Liability for Nuclear Damage.

In accordance with its mandate, the Standing Committee meets as appropriate and reports to the Board periodically on the progress of its work.

3. Since the thirty-sixth regular session of the General Conference, the Standing Committee held two sessions and also an intersessional meeting, during which consideration of all questions in its mandate was continued. Substantial progress was achieved on the revision of the Vienna Convention by reducing to the minimum the number of alternative proposals and adopting, as a basis for further consideration, single texts of draft amendments on most of the issues where need for improvement was recognized. The broad agreement that has been reached provides a good basis for expeditious finalization of the preparatory work on this question. With respect to supplementary compensation, the Standing Committee focused on the alternative systems suggested in two draft conventions (the "levy" and "pool" drafts). In view of similarity in some basic aspects between the proposed systems, consultations are underway on the possibility of reaching a common solution by inclusion of certain key elements of one draft into the other. Differences of principle remain regarding the proposals on international State liability and its relationship to the civil liability regime which have been considered in the context of the revision of the Vienna Convention.

4. As regards the timeframe of the preparatory work, two approaches have been considered. On the one hand, a step-by-step approach was suggested, according to which the need for additional efforts on a supplementary compensation convention should not delay progress on the revision of the Vienna Convention which, it was argued, was sufficient to allow holding a revision conference already in December 1993, so that thereafter the work on supplementary compensation would be vigorously pursued. On the other hand, the need for an integrated approach was reiterated on the grounds that a close relationship existed between the two tasks. It was argued that had the work on them been separated from the beginning, positions of some delegations on such issues as insertion in the Vienna Convention of provisions on State liability would have been different, and that failing additional preparatory work, a revised Vienna Convention would not be attractive for adherence and, therefore, holding a revision conference at the moment was not feasible.

5. In light of the above considerations, the Standing Committee decided to continue simultaneous consideration of revision of the Vienna Convention and elaboration of a convention on supplementary compensation with a view to holding a single diplomatic conference on both questions when preparatory work on them was completed. Accordingly, it was not felt opportune to recommend convening a revision conference for the Vienna Convention in 1993, and it was agreed to consider the matter at the next session of the Standing Committee in October 1993 in light of the progress achieved by that time.

6. The Standing Committee held that while there was need to intensify work on elaborating an enhanced liability regime, in general, wider adherence to the international third party liability regime would contribute to international co-operation in nuclear safety and that it was important that the present regime of the Vienna Convention and the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention obtained the widest possible adherence.

7. The Standing Committee will hold its next session from 11 to 15 October 1993.
8. During the period covered by this report, two States adhered to the Vienna Convention and one State to the Joint Protocol, bringing the number of their parties to 19 and 11, respectively.
9. On 21 September 1993, the Board had before it the report of the Standing Committee on its seventh session (24-28 May 1993). The Board decided to transmit that report (see the Appendix to this document<sup>1/</sup>) to the General Conference.

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<sup>1/</sup> The Appendix reproduces the report of the Standing Committee, with the Annex containing the report of its Drafting Committee. Draft texts for the revision of the Vienna Convention adopted by the Drafting Committee for further consideration, written proposals submitted by delegations and other relevant material are not reproduced in this document; they are available from the Legal Division upon request. Reports of the Standing Committee's sixth session and an intersessional meeting referred to in paragraph 3 above are also available on request.

STANDING COMMITTEE ON  
LIABILITY FOR NUCLEAR DAMAGE

SCNL/7/INF/6  
21 June 1993

Seventh Session  
Vienna, 24-28 May 1993

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

1. The Standing Committee held its seventh session at the Agency's Headquarters in Vienna from 24-28 May 1993, under the Chairmanship of H.E. Mr. Curt Lidgard of Sweden. H.E. Mr. Taher Shash of Egypt and Professor Jan Łopuski of Poland served as Vice-Chairmen. Vice-Chairman Ambassador Laviña of the Philippines and Rapporteur, Mr. Paul Paredes of Peru resigned from their positions.

2. Representatives of the following 50 Member States participated in the meeting: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Chile, China, Croatia, Cuba, Denmark, Egypt, Finland, France, Germany, Greece, Holy See, Hungary, India, Indonesia, Iraq, Ireland, Israel, Italy, Japan, Republic of Korea, Luxembourg, Malaysia, Mexico, Netherlands, Nigeria, Pakistan, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States and Uruguay.

Two non-member States (Czech Republic and Lithuania) participated as observers.

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

4. The Standing Committee held four plenary meetings on 24, 26, 27 and 28 May 1993.

5. At the first plenary meeting, the Committee adopted the following agenda:

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

6. At the same meeting, the Committee considered item 1 of its agenda, "organization of work". In light of the target date for a diplomatic conference in December 1993, the Chairman referred to the possibility that, if preparatory work for a supplementary funding convention proved to require substantially more time than for revision of the Vienna Convention, consideration could be given to focusing, at this juncture, on the revision of the Vienna Convention, with a view to holding a diplomatic conference devoted only to that matter. This would be on the understanding that the work on a supplementary funding convention would be continued immediately thereafter. The Committee was informed, in this connection, that the Secretariat had made the necessary administrative arrangements for holding such a conference in December. In case a meeting of the Committee would be held earlier in the autumn with full interpretation - which the Chairman held as indispensable because of the important organizational matters it would have to deal with - the diplomatic conference would have to be limited to one week.

7. The delegate of France, speaking also on behalf of the delegations of Germany and the United Kingdom, informed the Committee about the consultations among the three delegations to examine a possibility of establishing a bridge between the "levy" and "pool" approaches to a supplementary funding convention. The three delegations concluded that if such a bridge were to be established, it would be most likely based on improvement in nuclear safety. Since a specific compromise solution for such a bridge was not yet identified, the three delegations intended to intensify their consultations and keep the Committee informed on their progress.

8. Under these circumstances, the three delegations were strongly in favour of concentrating, at this session, on revision of the Vienna Convention, where ground for

quick progress existed, so that a revision conference could be convened, as was envisaged, in December. In this connection, the delegations of France, Germany and the United Kingdom made a firm commitment to proceed immediately thereafter with the preparatory work on a supplementary funding convention.

9. A number of delegations welcomed the statement of the three delegations and supported the course of action suggested by them.

On the other hand, a number of other delegations, while accepting the fact that completion of preparatory work on a supplementary funding convention was not as yet within reach, underscored the close relationship between the revision of the Vienna Convention and adoption of a supplementary funding convention which, in their view, made the work on the two issues interdependent. They did not object to concentrating attention at this session on revision of the Vienna Convention provided that in general the work on both issues would proceed simultaneously and a single diplomatic conference would be held when preparations on both issues were completed. In order to expedite a compromise on a supplementary funding convention, a view was expressed that the group of three delegations consulting on this issue could be expanded by inclusion in it of other interested delegations.

10. In light of the views expressed, the Standing Committee decided to continue at this session consideration of both issues with priority being given to revision of the Vienna Convention. Later, if necessary, depending on the progress made, reallocation of time between the two issues could be considered.

11. The Standing Committee subsequently reconvened the Drafting Committee under the Chairmanship of Mr. Melchior of Denmark.

The Drafting Committee was requested to concentrate on finalization of the texts of draft amendments to the Vienna Convention in the form suitable for referral to a diplomatic conference. It was urged to strive, on the basis of broadest possible agreement, for adoption of a single draft text on each particular issue; alternative draft texts could be included, as an exception, when a particular text not preferred by the Committee, notwithstanding, received substantial support.

12. The Standing Committee at its fourth meeting on 28 May 1993, took note of the Drafting Committee report which is reproduced as Annex I to this report.

13. At its third meeting, the Standing Committee considered item 5 of the agenda, "future programme of work". A number of delegations expressed the view that the need for additional efforts to reach a compromise solution on a supplementary funding convention should not delay progress on revision of the Vienna Convention where the preparatory work was already in an advanced stage allowing to hold a revision conference in December 1993. The time was ripe to settle an increased limit of liability in that Convention, to serve as the base level for any supplementary funding convention. They emphasized political urgency for the Standing Committee to produce positive results expeditiously because revision of the Vienna Convention which could be attractive for States that are now not party to it would not only become a landmark in nuclear liability but would also contribute largely to international co-operation in nuclear safety. In the circumstances, those delegations favoured a step-by-step approach so that after revision of the Vienna Convention the work on supplementary funding would be vigorously pursued.

On the other hand, a considerable number of other delegations, including many States Parties to the Vienna Convention, reiterated the need for an integrated approach. It was stressed by some of these delegations that, had the work on the two tasks been separated from the beginning, their positions on issues such as the question of inserting in the Vienna Convention provisions on State liability, would have been different. In case of separation, preparatory work on those issues was not completed. Failing additional preparatory work on a revised Vienna Convention, it would not be attractive for adherence. Accordingly, it was not feasible to hold a revision conference now.

During the discussion, the need for addressing, at the preparatory stage, the question of financial limits of operator's liability under the revised Vienna Convention was emphasized.

14. In light of the discussion, the Standing Committee decided to continue



simultaneous consideration of revision of the Vienna Convention and elaboration of a convention on supplementary funding with a view to holding a single diplomatic conference on both questions when preparatory work on them was completed.

15. While stressing the need to intensify work on elaborating an enhanced liability regime to provide adequate compensation to the victims of a nuclear incident, the Committee felt that in general wider adherence to the international third party liability regime would contribute to international co-operation in nuclear safety and that it was important that the regime of the present Vienna Convention and the Joint Protocol obtained the widest possible adherence.

16. The Committee decided to hold its eighth session from 11-15 October 1993. It was generally felt that at the October meeting, the Standing Committee would be in a better position to determine a target date for the diplomatic conference.

#### DOCUMENTATION OF THE STANDING COMMITTEE

1. Annex I - Report of the Drafting Committee with Attachments I and II
2. Annex II - Proposals before the Standing Committee
3. Annex III - Papers provided by Organizations (observers)

## ANNEX I

**Report of the Drafting Committee**

1. The Drafting Committee held seven meetings from 24-27 May 1993.
2. As requested by the Standing Committee, it focused on formulating draft amendments to the Vienna Convention in the form appropriate for submission to a diplomatic conference. It considered proposals which were dealt with partially or not addressed before, as well as outstanding issues in the draft text adopted at previous sessions.
3. In adopting draft texts, the Committee was guided by the objective to achieve broadest possible agreement. In accordance with its mandate, the Committee concentrated on drafting aspects of proposals and, therefore, adoption of draft texts in the Committee was without prejudice to the positions of delegations on substance.

In order to facilitate agreement, the Committee established two informal working groups, one on definition of damage was chaired by Mr. Rustand of Sweden, and the other on certain aspects of the draft article on geographical scope (the relationship between the definition of a nuclear installation and paragraph 3(a)) chaired by Mr. Nativ of Israel.

4. The Committee adopted texts of draft amendments to the Vienna Convention which are reproduced in Attachment I to this report. On each particular issue, a single draft text is presented except where the Committee decided to submit also an alternative draft text which, although it did not receive prevailing support, attracted significant attention to justify inclusion for further consideration.
5. Due to lack of time, the Committee was not in a position to address the question of a supplementary funding convention.

6. A summary of the Committee's consideration of specific proposals and outstanding issues relating to the revision of the Vienna Convention is set out below:

(a) On application of the revised Vienna Convention to installations used for non-peaceful purposes, the Committee considered the proposal by France (SCNL/6/8 Add. 1). While the proposal got support from some delegations, several of which preferred deletion of its paragraph 3, the prevailing view was in favour of the text adopted previously by the Committee. In this connection, some delegations pointed out that they might reconsider their support for the Committee's basic text in light of the final decision of the Standing Committee regarding coverage of military installations should it prove to prevent adherences to the revised Vienna Convention by States having such installations.

(b) A detailed discussion took place on elements of the proposal by Germany (SCNL/6/5) regarding definition of nuclear damage. There was general agreement that loss of profit related to personal injury and property damage was covered by the Vienna Convention and the basic draft text adopted by the Committee. While several delegations pointed out that under most legal systems, pure economic loss was not recoverable, the prevailing view was in favour of including the provision in subparagraph (iv) of the basic text with deletion of the square brackets, leaving pure loss of profit not related to impairment of the environment to be determined by the law of the competent court. However, views were divided on coverage of pure economic loss related to environmental damage.

While many delegations were in favour of elaborating a definition of impairment of the environment, the definition proposed by Germany, which derived from its national legislation, did not receive much support. There was also a split of opinion as regards the German amendment to Article VIII of the Vienna Convention, in particular as to who should be entitled to make claims for environmental damage and preventive measures, and which law shall apply with regard to this question.

As certain ideas in the proposal by Germany attracted interest, an informal working group chaired by Mr. Rustand of Sweden was set up to produce, in light of

discussion, a single draft based on the Committee's draft text and the German proposal.

The draft (SCNL/7/1) prepared by the group was adopted with inclusion in paragraph (iii) of an alternative phrase "unless at tolerable levels" proposed by some delegations. With regard to pure economic loss related to environmental damage, some delegations maintained their position that the question should be determined by the law of the competent court. The second sentence of a new provision on measures of reinstatement was replaced by the following text based on the proposal by Mexico (SNCL/7/2) suggested as a drafting compromise: "The law of the State where the damage is suffered shall determine who is entitled to take such measures."

(c) With respect to the basic draft text on geographical scope, deletion of paragraph 3 was suggested. It was also pointed out that there was a problem of qualification of nuclear installations in non-Contracting States referred to in that paragraph, in light of draft texts adopted by the Committee on technical adjustments (draft amendments to Articles I.1(j) and I.2). An informal working group chaired by Mr. Nativ of Israel was set up to look into that issue on the premise that the prevailing view in the Committee was in favour of retaining paragraph 3.

Upon the report of the group, the Committee adopted the whole basic draft text on geographical scope with the following changes: (i) in paragraph 2(b), the phrase after the words "international law" in the second line was deleted; (ii) in paragraph 3(a), the phrase after the words "economic zone" and up to the comma, was deleted; (iii) in paragraph 3(b) the word "equivalent" was inserted before the words "reciprocal benefits".

A discussion was held on the scope of exclusion pursuant to paragraph 2. It was agreed that a Contracting Party could decide as to which non-Contracting State or States the exclusion would be applicable.

In connection with geographical scope, drafting changes were also made in Article XIA paragraph 4 of the basic draft text regarding claims commission: a

footnote attached to this paragraph was deleted, and also the term "nuclear damage" was used throughout the text.

(d) No consideration could be given to the proposal by the United States on economic channelling since the United States delegation was not in a position to provide information on the survey being undertaken in that country on the application of strict liability in state law. The delegate of the United States said that he would inform relevant authorities of his country about the interest of the Committee in the survey.

(e) The basic draft text on updating of the liability limits was adopted with the following changes: (i) square brackets were deleted around the title; (ii) a note in paragraph 4 and the paragraph itself were deleted; (iii) paragraph 7 was deleted.

(f) After a brief discussion of the proposals relating to State responsibility and liability (SCNL/4/6 and SCNL/4/7), the Drafting Committee referred those proposals to the Standing Committee for decision on their status.

(g) In addressing the proposal by Austria (SCNL/6/13) the Committee recognized the need for amending Article XVIII of the Vienna Convention. Considerable support was expressed for the Austrian proposal. An equal number of delegations supported the amending proposal by Turkey, namely to delete the words "in respect of liability for nuclear damage". As, due to the split of opinion, there was no preference for any of the proposals, the Committee was not in a position to recommend either proposal as a basis for future work, and referred them to the Standing Committee for a decision on their status.

(h) In the basic draft text on time limitation for submission of claims, it was decided to remove the square brackets in the draft text on discovery rule (new Article VI.4).

(i) The Committee took note of the conclusions made in the note on fusion reactors provided by the OECD/NEA (SCNL/6/4), and decided that it was premature to consider coverage of future fusion installations by the third party liability regime.

(j) The following changes were adopted in the basic draft text on priorities in settlement of claims to amend Article VIII of the Vienna Convention: in paragraph 2, the words "subject to application of the rule of Article VI.3" were inserted at the beginning and the square brackets together with the words in them were deleted.

(k) The Committee held a preliminary exchange of views on final clauses of a draft protocol to amend the Vienna Convention prepared by the Secretariat during which a number of comments were made, in particular with regard to provisions in draft Articles 15 and 16. It was agreed to continue consideration of this matter when the Committee resumed the discussion on revision of the Vienna Convention, and the Secretariat was requested to prepare, in light of the comments made, an amended version of draft Article 16 with two alternative provisions.

#### DOCUMENTATION OF THE DRAFTING COMMITTEE

1. Attachment I - Revision of the Vienna Convention
  - A. Draft texts adopted for further consideration
  - B. Proposals
  
2. Attachment II - Supplementary Funding
  - A. "Levy" text
  - B. "Pool" text
  - C. Proposals