

## The Protocol Amending the 1963 Vienna Convention

by Vanda Lamm\*

The Chernobyl disaster of 1986 caused the Vienna Convention on Civil Liability for Nuclear Damage (hereafter called the Vienna Convention), adopted in 1963 under the aegis of the International Atomic Energy Agency, to awaken from its sleep of Briar Rose. For over two decades there had been little, if any, public concern over this instrument apart from that shown by a select segment of nuclear liability professionals.<sup>1</sup> The reasons were several.

The Vienna Convention was adopted three years after the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, (hereinafter called the Paris Convention) and it governs civil liability for nuclear damage on the same conceptual basis as does the Paris Convention.<sup>2</sup> The main difference between the two conventions, other than those arising from their respective provisions, is that the Paris Convention was signed by a group of states, all members of the Organisation for European Economic Co-operation, whereas the Vienna Convention was intended to regulate nuclear liability issues on a world-wide scale. In this connection, the greatest problem was no doubt presented by the fact that by the time the Vienna Convention was concluded, the Paris Convention already existed among the states most affected by this complex of issues, notably the highly industrialised Western European states.<sup>3</sup>

From the mid 1960s onwards, the two conventions followed rather different paths. During the 1960s and the 1970s, the Paris Convention kept “developing”, growing into a living system, with more and more states acceding to it and with the limit of liability being raised on several occasions. In 1963, the Brussels Convention Supplementary to the Paris Convention was adopted to provide additional compensation from public funds to supplement that payable under the Paris Convention.<sup>4</sup> By contrast, the Vienna Convention did not even come into force for nearly 15 years, although it required

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1. The revision of international nuclear liability conventions was on the agenda of the 1984 Symposium of Munich and the Nuclear InterJura '85. Cf. Nuclear Third Party Liability and Insurance – Status and Prospects, Proceedings of the Symposium of Munich, 1984; International Harmonization in the Field of Nuclear Energy (Norbert Pelzer, ed.) Nomos Verlagsgesellschaft, Baden-Baden, 1986.
2. On the basic principles of nuclear civil liability conventions see, J.P.H. Trevor: Principles of civil liability for nuclear damage. in: Nuclear Law for a Developing World, IAEA, Vienna, 1968, p.109-115, and Pierre Strohl: *La Convention de 1971 relative à la responsabilité civile dans le domaine du transport maritime de matières nucléaires*, AFDI, 1972, p. 755-760.
3. Both the Paris Convention and its Additional Protocol signed in Paris on 28 January 1964 entered into force on 1 April 1968.
4. On the Brussels Supplementary Convention see, M. Lagorce: “The Brussels Supplementary Convention and its Joint Intergovernmental Security Fund” in: *Nuclear Law for a Developing World. op.cit.*, p. 143-148.

ratification by as few as five states.<sup>5</sup> When, after so many years, the Vienna Convention finally did come into force, certain of its provisions already called for revision. Its dormant state is amply evidenced by the fact that only 11 states were parties to the convention by the end of the 1980s.<sup>6</sup>

However, the Chernobyl disaster had clearly shown that a nuclear accident could cause enormous damage not only in the Installation State, but also thousands of kilometres away; and after that accident it became obvious that the dormant Vienna Convention might be an appropriate tool for settling the claims of foreign victims in similar cases. Everyone soon came to realise the absolute necessity of adjusting the provisions of the Vienna Convention to respond to technological developments over the past 25 years. It is known that after the Chernobyl accident, the then-Soviet Union refused to pay compensation to any foreign victims; some people believed that if the Soviet Union had been a party to the Vienna Convention, foreign victims would have had at least a chance to receive some compensation. It is a separate issue, of course, whether the amount of compensation eventually payable under the Vienna Convention would have been enough to satisfy anything but a minor, almost ridiculous fraction, of the claims by comparison with the extent of the accident.

Following the signature in 1988 of the Joint Protocol establishing a bridge between the Vienna and the Paris Conventions,<sup>7</sup> several fora within the International Atomic Energy Agency addressed the question of revising the Vienna Convention. The necessity of doing so was stated in Resolution GC (XXXII)/RES/491 of the Agency's General Conference on 23 September 1988, which emphasised that the existing civil liability regime "does not cover all liability issues that might arise in the event of a nuclear accident." The next year, the IAEA Board of Governors, by decision adopted 23 February 1989, established an open-ended Working Group "to study all aspects of liability for nuclear damage" and to "consider ways and means of complementing and strengthening the existing civil liability regime and consider also the question of international liability."<sup>8</sup> In another Decision of 21 February 1990, the Board of Governors dissolved the above mentioned Working Group and at the same time established a new, open-ended Standing Committee on Liability for Nuclear Damage with a wide mandate to "consider international liability for nuclear damage, including international civil liability, international state liability, and the relationship between international civil and state liability."<sup>9</sup>

After more than eight years of negotiations within the framework of the Standing Committee,<sup>10</sup> which covered 17 sessions and several intersessional working group meetings, a Diplomatic Conference to revise the 1963 Vienna Convention took place at Vienna from 8-12 September 1997. The delegates adopted two treaties, the Protocol to Amend the Vienna Convention on Civil Liability

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5. The Vienna Convention entered into force on 12 November 1977.
  6. On the signatures, ratifications, etc. of the Vienna Convention see Document NL/DC/INF.4. prepared by the IAEA to the Diplomatic Conference of 8-12 September 1997.
  7. On the Joint Protocol see, O. von Busekist: "A bridge between two conventions on civil liability for nuclear damage: The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention" in: *Nuclear Law Bulletin*, No.43, June 1989.
  8. IAEA document GOV/OR.707. p.13.
  9. This decision of the Board was based on the second report of the Working Group which recommended that the Board revise the mandate of the Standing Committee and include the questions of international liability and the relationship between international and State liability. See IAEA NL/2/3.
  10. In the work of the Standing Committee, experts from more than 55 states took part, and the representatives of several international organisations were present as observers. The high quality work of the IAEA Secretariat and the NEA expertise on liability issues largely contributed to the success of the negotiations.

for Nuclear Damage (hereafter called the protocol)<sup>11</sup> and the Convention on Supplementary Compensation for Nuclear Damage.

In the first stage of the revision process, the only goal was to amend certain provisions of the Vienna Convention. Later, in what might be called the second stage, the question was seriously raised of establishing a new supplementary convention by which additional funds were to be provided by the international community of states. Most experts felt that the nuclear liability regime of the Vienna Convention, as amended, would really serve the interests of potential victims of nuclear incidents only if it were supported by an international supplementary fund providing additional compensation for nuclear damage to that provided by the operator. Thus, the Standing Committee started to consider the establishment, under the Vienna Convention, of a mechanism for mobilising additional funds for compensation of nuclear damage. During the negotiations it was deemed necessary to establish a separate treaty for such a supplementary fund, and indeed, efforts were undertaken to draw up such an instrument concurrently with the revision of the Vienna Convention.

The outcome of the revision process of the Vienna Convention is a protocol containing 24 articles, some being completely new provisions, with others revising existing articles. Before describing and analysing the outcome of this process, the following preliminary remarks should be made:

- The provisions of the protocol can be divided into three main groups. Some of the new and revised articles deal with matters of substance, and, we may add, with matters of great importance indeed. Other amendments contain rules of a basically procedural nature, which facilitate victims in enforcing their claims for compensation. The third category of amendments raises no new issues, either substantive or procedural, and essentially serves to refine existing provisions of the convention or to bring other provisions of the convention into line with the newly incorporated substantive and procedural changes.
- As regards the articles dealing with matters of substance, it should be stressed that the revision does not affect the basic concept of the Vienna Convention, although attempts in that direction were made during the negotiations in the Standing Committee, particularly in the early stage. I refer to efforts to have the basic civil liability regime of the Vienna Convention replaced by a State liability regime.
- There is no doubt that the revision clarified numerous provisions of the Vienna Convention. An effective liability regime can only work if a considerable number of nuclear liability issues are uniformly regulated by the national legislation of the Contracting Parties. Nevertheless, the revised Vienna Convention continues to leave certain matters to be determined by national law and, despite significant efforts at unification of laws as reflected in the Convention, many questions relating to compensation for damage remain subject to the domestic law of the Installation State or the law of the competent court.

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11. See Consolidated Text of the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1968 as Amended by the Protocol of 12 September 1997 established by the IAEA Secretariat. GC(41)INF/13/Add.1.

## I. Civil liability or state liability?

The nuclear liability conventions currently in force govern liability in respect of third party damage on the basis of civil law, conceptually based on the analogy of liability for activities involving increased danger, under the national laws of states.

In the first stage of the negotiations in the Standing Committee, the debate about the need to devise a regime of state liability to replace the civil liability regime of the convention was crucial.

The experts raised a number of theoretical and practical arguments both for and against the introduction of a state liability regime. An in-depth analysis of these arguments would go far beyond the scope of this paper, but generally those arguing in favour of state liability referred to the Chernobyl disaster, claiming that only the financial resources available to the state would be sufficient to compensate victims of an accident of such a scale. Some authors in the pertinent literature and several experts at the Vienna negotiations referred to state liability in respect of space activities as an example similar to that of liability for nuclear damage, and noted that the related international treaties provide for state liability.<sup>12</sup> The final outcome of the discussions was a decision to retain the conceptual basis of the Vienna Convention and uphold its civil liability regime. However, and this is one of the major improvements to the Vienna Convention, the protocol expressly provides for compensation from public funds (see section VI. below).

## II. Geographical scope of the Vienna Convention

The 1963 Vienna Convention is silent on its geographical scope, and pursuant to the general rules of international law which are clearly laid down in Article 29 of the 1969 Vienna Convention on the Law of Treaties,<sup>13</sup> the convention applies to damage occurring in the territory of a State Party to the instrument, on board aircraft registered in that state and on ships flying its flag.

The protocol adds a new article on the convention's geographical scope [Article IA, of the revised Vienna Convention] which, on the one hand, determines the rules relative to the convention's geographical scope and, on the other, extends its geographical application. Article 3 of the protocol states as a general rule that "this Convention shall apply to nuclear damage wherever suffered" [paragraph 1]. This essentially means that the convention may, at least in principle, be applied to nuclear damage suffered anywhere in the world, even to damage occurring in the territory or territorial waters (internal waters, territorial sea, exclusive economic zone, continental shelf) of a non-Contracting State. Nevertheless, the protocol allows certain exceptions from the said general rule, permitting the Installation State to exclude, by legislation and under specific circumstances, the application of the convention to the territory of a non-Contracting State or in respect of damage occurring in a maritime zone established by such State in accordance with the international law of the sea [paragraph 2]. Any exclusion may apply only to a non-Contracting State which has a nuclear installation on its territory or in any maritime zone and does not afford equivalent reciprocal benefits

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12. Cf. Louise de La Fayette: "Towards a New regime of State Responsibility for Nuclear Activities", in: *Nuclear Law Bulletin*, No. 50 and Jan Lopuski: "Liability for Nuclear Damage", National Atomic Energy Agency, Warsaw, 1993.

13. Article 29 of the 1969 Vienna Convention on the Law of Treaties that "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

[paragraph 3]. The protocol here refers to the principle of reciprocity,<sup>14</sup> and as a consequence, the application of the Vienna Convention may in no way be excluded in respect of non-nuclear states, – in case of a nuclear incident, a non-contracting non-nuclear state or its nationals or legal persons under its jurisdiction are entitled to compensation on an equal footing with nationals of Contracting States.

It should be noted that the application of the aforesaid provision on exclusion in respect of a nuclear state on the basis of lack of reciprocity may, in practice, give rise to problems. The existence of reciprocity can always be established on the basis of some practice between states, and, given the fortunate rarity of nuclear incidents, cases in which a nuclear state is likely to apply this provision in respect of another nuclear state are, in fact, infrequent. In theory, such a situation might occur when damage is suffered in a successor state to the former Soviet Union, and a State Party to the revised Vienna Convention tries to evade compensating damage suffered in the territory of the former Soviet Union by invoking the former Soviet Union's refusal to pay compensation for damage suffered by foreign victims after the Chernobyl disaster.

### III. Concept of nuclear damage

One of most significant changes effected by the Protocol to amend the Vienna Convention is, perhaps, to the concept of nuclear damage.

Well before the Chernobyl disaster, professionals in the field had been fully aware that the definition of nuclear damage under the 1963 Vienna Convention was too narrow or incomplete, notably because the convention did not refer to certain forms of damage (e.g. environmental damage or costs of preventive measures). The 1963 Vienna Convention makes compensation for any nuclear damage other than loss of life, personal injury, and loss of or damage to property subject exclusively to the law of the court having jurisdiction. In other words, victims could not expect compensation for any other head of damage except when such compensation was allowed by the law of the State of the competent court.

During the revision of the Vienna Convention, it became completely clear that the definition of nuclear damage had to be addressed carefully, since domestic laws show significant differences in the interpretation of, for example, loss of profit or economic loss. If, on the other hand, there were such significant differences between the domestic laws of states, such differences could, in practice, operate to produce situations in which compensation to victims of nuclear damage would tend to depend, in no small measure, on the location of the occurrence of damage or on the interpretation of nuclear damage by the law of the competent court. This, in turn, would but ultimately increase the not insignificant differences already existing between victims of different nuclear incidents.

The definition of nuclear damage is a key provision of the Vienna Convention. The entire nuclear liability regime rests on limited liability amounts, that is, on the principle that regardless of the number of victims and the extent of damage, the amount of compensation payable by the operator or from public funds is a specified sum, after all. (Indeed, such is the case even in states under whose national law the operator's liability is unlimited, as is otherwise suggested by Article 9.2 of the protocol, discussed at a later stage.) Therefore, the inclusion of certain forms of environmental damage or indirect damage in the concept of nuclear damage is bound to enlarge the number of victims, direct or indirect, of a given nuclear incident. In the event of a large nuclear incident causing enormous

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14. On the principle of reciprocity see, Emmanuel Decaux: "*La réciprocité en droit international*". *Librairie Générale de Droit et de Jurisprudence*, Paris, 1980, p. 129-159.

damage, this in turn will necessarily put individual victims in a more unfavourable position, since the larger the number of the victims, the less is their chance of receiving full compensation.

Almost from the beginning of the discussions to revise the Vienna Convention, the Standing Committee agreed on the need to broaden the concept of nuclear damage, and to include certain forms of environmental damage, the costs of preventive measures and consequential losses in the definition of that term.<sup>15</sup>

The revision produced a rather detailed definition of nuclear damage in Article 2.2. of the protocol.<sup>16</sup> It gives an almost exhaustive listing of the possible types of damage<sup>17</sup> and, what is particularly important, it renders subject to the law of the competent court only the extent of damage, other than loss of life, personal injury, and loss of or damage to property. By so doing, the protocol has considerably restricted, but not fully eliminated, the significance of the law of the competent court; for, if the legislation of the competent court fails to recognise certain economic loss, victims of a nuclear incident can hardly expect compensation for such damage in a given case.

In addition to loss of life, personal injury, and loss of or damage to property, all of which are already covered by the 1963 Vienna Convention, the protocol clearly includes in the definition of nuclear damage such other loss as is incurred as a result of a significant impairment of the environment, and the costs of certain preventive measures or measures taken to minimise damage under specific circumstances. Accordingly, “nuclear damage” also means:

- further “economic loss” incurred above loss of life, personal injury, loss of or damage to property, provided that the loss is incurred by a victim who can claim in respect of such loss or damage;
- the cost of measures of reinstatement of significantly impaired environment, if such measures are actually taken or to be taken, and insofar as not included in the category of “economic loss”;
- loss of income, also related to the environment, deriving from an economic interest in any use or enjoyment of the significantly impaired environment, insofar as not covered by the preceding paragraph (such use of the environment should be taken to mean use for business purposes in the first place);
- cost of preventive measures and consequential losses caused by such measures. It should be noted on this point that, owing to the widened scope of the definition of “nuclear incident” introduced in Article I.1.(1) of the Vienna Convention,<sup>18</sup> nuclear damage may

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15. Cf. H. Rustand: “Updating the concept of damage, particularly as regards environmental damage and preventive measures, in the context of the ongoing negotiations on the revision of the Vienna Convention”, in: *Nuclear Accidents, Liabilities and Guarantees*. op.cit., p. 218-238.

16. Article I.(k) of the revised Vienna Convention.

17. This notion of “damage” is much more detailed than the notions of damage included in recent conventions on liability for environmental damage. Cf. Article I.(6),(7) of the 1992 London Convention on Civil Liability for Oil Pollution Damage, and Article 2 (7),(8),(9) of 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

18. Article 2.3 of the Protocol provides that “Nuclear incident means any occurrence or series of occurrences having the same origin which causes nuclear damage or, but only with respect to preventive measures, creates a grave and imminent threat of causing such damage.”

also be deemed to be caused by the costs of preventive measures taken before the occurrence of an incident, if taken to remove a grave and imminent threat of causing damage, and according to an additional sentence added at the Diplomatic Conference, provided they were found under the law of the competent court to be appropriate and proportionate having regard to all the circumstances;

- any other economic loss, other than any caused by the impairment of the environment, if permitted by the general civil liability law of the competent court. This element of damage is likewise mentioned by the Protocol in a general clause.

The redefinition by the protocol of nuclear damage is clearly reflective of an intention to ensure as full compensation as possible to victims of nuclear damage. As it virtually covers the broadest range of damage, the protocol has essentially taken civil liability for nuclear damage in the direction of the fullest measure of compensation in an attempt to break with the implied principle that victims of a nuclear incident cannot expect to receive full compensation.

Furthermore, Article 2.4 of the protocol gives very precise definitions of “measures of reinstatement”, “preventive measures” and “reasonable measures”, which must (i) be reasonable; (ii) be approved by the competent authorities of the state where the measures were taken (the national law of the state where the damage is suffered must determine who is entitled to take such measures); and (iii) aim to reinstate or restore damaged or destroyed components of the environment or to introduce, where reasonable, the equivalents of these components into the environment. “Preventive measures” are likewise subject to previous approval by the competent authorities of the state. As for “reasonable measures”, a further criterion for their constituting nuclear damage is that they must be found under the law of the competent court to be appropriate and proportionate having regard to all the circumstances.<sup>19</sup>

It can be said, therefore, that the protocol has considerably broadened the definition of nuclear damage and has definitely taken an important step towards unification of the legislation of States Parties. There is no doubt that the protocol would have created a more clear-cut situation by giving a uniform, all-embracing definition of nuclear damage to all States Parties to the amended Vienna

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19. Article 2.4 of the Protocol adds among others these new paragraphs to Article I of the Vienna Convention:

- “m) “Measures of reinstatement” means any reasonable measures which have been approved by the competent authorities of the State where the measures were taken, and which aim to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. The law of the State where the damage is suffered shall determine who is entitled to take such measures.
- (n) “Preventive measures” means any reasonable measures taken by any person after a nuclear incident has occurred to prevent or minimise damage referred to in sub-paragraph (k)(i) to (v) or (vii), subject to any approval of the competent authorities required by the law of the State where measures were taken.
- (o) “Reasonable measures” means measures which are found under the law of the competent court to be appropriate and proportionate having regard to all the circumstances, for example
  - (i) the nature and extent of the damage incurred or, in the case of preventive measures, the nature and extent of the risk of such damage;
  - (ii) the extent to which, at the time they are taken, such measures are likely to be effective; and
  - (iii) relevant scientific and technical expertise.”

Convention. However, considering the differences existing between the national laws of states in this field, one must appreciate that the protocol has kept touch with reality in upholding the principle that the extent of damage should ultimately be determined by the law of the competent court. At any rate, this rather precise enumeration of the types of damage can be seen as a significant improvement in the Vienna Convention since, in effect, it clearly calls the attention of both legislators and practising lawyers to the need to take into account the various types of nuclear damage listed in the protocol when they occur. Essentially, it constitutes a model or pattern to be followed by states not having legislation containing similar provisions.

#### **IV. Nuclear installations covered by the Convention**

The 1963 Vienna Convention is silent on the question of whether it covers all nuclear installations or only those used for certain peaceful purposes. It is only possible on the basis of an interpretation *a contrario* to state that the convention is not applicable to nuclear damage resulting from military installations.<sup>20</sup> The Standing Committee wanted to clarify the situation, and, at its first meeting, acting upon proposals from several delegates, the Committee tried to reach consensus upon an amendment that would have the Vienna Convention cover military installations as well. This proved to be a rather delicate issue. It also brought to light several political and legal problems concerning the extension of the application of the convention to nuclear installations used for non-peaceful purposes, especially the problem of damage arising in connection with those nuclear installations which are not under the control of the territorial state. For a while, a compromise solution was sought which would have allowed individual states to declare that military installations on their territory are not covered, under special circumstances. Until the 16<sup>th</sup> Session of the Standing Committee, the draft protocol contained a provision stating that the “Convention shall apply to all nuclear installations, whether used for peaceful purposes or not.”<sup>21</sup> Later, in the final stages of the negotiations, however, the Standing Committee rejected the extension of the application of the Vienna Convention to nuclear installations used for non-peaceful purposes. The protocol finally succeeded in clarifying the situation by adding a new Article IB expressly stating that “This Convention shall not apply to nuclear installations used for non-peaceful purposes.”

#### **V. Exoneration**

Article 6.1 of the protocol amends the provisions of the Vienna Convention on exoneration from liability by formulating stricter criteria. On the one hand, the protocol repeals “a grave natural disaster of an exceptional character” as a ground for exoneration, which, even under Article IV.3. of the 1963 Vienna Convention, had operated as such only insofar as the law of the Installation State contained no contrary provisions in this respect. It means that, if a grave natural disaster was not a ground for exoneration under the domestic law of the Installation State, it could not serve as one under the Vienna Convention either. On the other hand, the criteria were tightened for other events (act of armed conflict, hostilities, civil war or insurrection) so that such events do not exonerate the operator from liability except upon proof that the nuclear damage is directly due to such events. The 1963 Vienna Convention does not require such proof by the operator.

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20. According to the Preamble of Vienna Convention “The Contracting Parties, having recognised the desirability of establishing some minimum standards to provide financial protection against resulting from certain peaceful uses of nuclear energy.”

21. Cf. SCNL/16/INF.3.

Other amendments of the same Article IV increase the liability amount for damage to the means of transport upon which the nuclear material involved was at the time of the nuclear incident, and clearly exclude damages to other nuclear installations operating on the same site, including those under construction, and any property on the same site used in connection with any such installation.<sup>22</sup>

### VI. Liability amount

Perhaps the most important amendment of the Vienna Convention affected by the protocol is the increase in liability amounts. This can be explained by the fact that one of the main motives for revising the convention was precisely the consideration that the USD 5 million limit, as the lowest amount at which the liability of the operator may be established, had become unrealistic in view of the extent of damage that might result from an eventual nuclear incident.

It should be remembered that of all the amendments mentioned above, the extension of the geographical scope of the convention and of the concept of nuclear damage are particularly significant, as they will result in a larger number of victims of nuclear incidents, and, as a consequence, there will be more victims to share in the liability available.

Increasing the amount of liability was discussed at length in the Standing Committee. According to revised Article V of the Vienna Convention<sup>23</sup> the legislation of the Installation State may limit the operator's liability for any one nuclear incident to not less than SDR 300 million. (This also means that, in future, the limit of liability for nuclear damage will be fixed, not in US dollars, but in Special Drawing Rights (SDR), the unit of account defined by the International Monetary Fund).<sup>24</sup> The operator's liability amount may be lower than this, but in no case may it be less than SDR 150 million. Naturally, the upper limit of the operator's liability may be a higher amount. If, under the national law of the Installation State, the upper limit of the operator's liability is less than SDR 300 million, the difference between that upper limit and SDR 300 million must be secured from public funds.

The provisions for a phasing-in mechanism were included in Article V.1(c) of the revised Vienna Convention on the motion of some states who are coping with significant economic difficulties. This mechanism allows for a transitional period of 15 years from the date of entry into force of the protocol during which the minimum limit of liability of an operator for nuclear damage occurring during that period may be set at SDR 100 million. The provision makes it possible for the Installation State to limit the operator's liability to an amount less than SDR 100 million within the

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22. The revised Article IV.5 and 6 reads as follow:

- “5. The operator shall not be liable under this Convention for nuclear damage
- a) to the nuclear installation itself and any other nuclear installation, including a nuclear installation under construction, on the site where that installation is located; and
  - b) to any property on that same site which is used or to be used in connection with any such installation.
6. Compensation for damage caused to the means of transport upon which the nuclear material involved was at the time of the nuclear incident shall not have the effect of reducing the liability of the operator in respect of other damage to an amount less than either 150 million SDRs, or any higher amount established by the legislation of a Contracting Party, or an amount established pursuant to sub-paragraph (c) of paragraph 1 of Article V.”

23. Article 7.2 of the protocol.

24. Cf. Article I.1.(p) of the revised Vienna Convention.

phasing-in period, provided that the difference between that lesser amount and SDR 100 million is secured from public funds.

There is no doubt that the inclusion of the phasing-in provisions is a solution less favourable to victims of an eventual nuclear incident. One should not overlook the fact, however, that the SDR 300 million liability amount established by the protocol is not only too high for some states, but that even the phasing-in amount of liability is much higher, over 40 times higher than the amount required under the 1963 Vienna Convention. Many believe that the phasing-in mechanism does a great deal to promote accession to the Protocol to Amend the Vienna Convention.

### **VII. Financial security**

At the time the Vienna Convention was adopted, one hardly anticipated that the national law of any state would provide for the operator's unlimited liability. Thus, little attention was paid to the question of reconciling unlimited liability under national law with the convention's provisions fixing the amount of financial security. This problem was, however, settled by Article 9.1 of the protocol, which adds to Article VII of the Vienna Convention a sentence providing that where the liability of the operator is unlimited, the Installation State shall ensure that the operator's financial security shall not be less than SDR 300 millions.

### **VIII. Amendment of liability amount**

Article VD of the Vienna Convention addresses the adjustment of liability amounts in view of inflation and other factors via a relatively simplified procedure. This "simplified" procedure is, in fact, a rather complicated multi-tier mechanism. Its main advantage lies in allowing the liability amount to be raised without the need for the traditional time-consuming procedure generally followed for amendment of treaties.

The procedure governed by Article 7.2 of the protocol is as follows: a meeting of the Contracting Parties shall be convened by the Director General of IAEA on the proposal of one-third of the States Party to the revised Vienna Convention to amend the limits of liability; amendments shall be adopted by a two-thirds majority, provided that at least one-half of the Contracting Parties are present and voting; any amendment adopted shall be notified by the Director General of IAEA to all Contracting Parties and shall be considered accepted at the end of a period of 18 months after it has been notified, provided that at least one-third of the Contracting Parties have communicated to the Director General that they accept the amendment; an amendment accepted under this procedure shall enter into force 12 months after its acceptance for those Contracting Parties which have accepted it.

This simplified procedure undoubtedly makes it possible for the amounts of liability to be amended, but it should be stressed that the increased amount applies only to those states which have expressly accepted it and, even in that case, 12 months after acceptance. The period of 12 months may, *inter alia*, enable a state accepting the amended liability amount to prepare for fulfilment of its resultant obligations by amending its national laws and regulations accordingly, enabling operators to make contracts of insurance for higher amounts, etc. Nevertheless the question arises as to whether the said 12 month period is really sufficient for a state to prepare for fulfilment of its obligations resulting from the acceptance of a considerably higher amount of liability.

Of course, states may happen to disagree with an amended liability amount. This possibility is also contemplated by the protocol by providing that if within a period of 18 months from the date of

notification by the Director General of IAEA an amendment has not been accepted, the amendment shall be considered rejected. According to Article VD.6, a state which becomes Party to the Vienna Convention after the entry into force of an amendment adopted under the simplified procedure shall be considered bound by the liability amount so amended only if it has failed to express a different intention. This provision can be viewed as helping to guarantee any increased amount of liability.

### **IX. Time limit for submission of claims**

The time limit for submission of claims for nuclear damage was similarly affected by the revision of the Vienna Convention, with Articles 8.1, 8.2 and 8.3 of the protocol differentiating between various types of damage and repealing the rules on special prescription periods for incidents arising from lost, stolen, jettisoned or abandoned nuclear materials. The Vienna Convention originally established a prescription period of 10 years for nuclear damage, specifying a period of 20 years only for nuclear damage caused by lost, stolen, jettisoned or abandoned nuclear materials. The protocol recognises that personal injury caused by radioactive contamination might not become manifest for some considerable time after exposure thereto, and accordingly, it establishes a longer period, 30 years from the date of the nuclear incident for actions for compensation for loss of life and personal injury, while retaining the 10-year prescription period for all other types of damage, and repealing the special 20-year prescription period. Thus, in future it will be irrelevant whether or not the nuclear material causing a nuclear incident was under the operator's control at the time of the incident.

It should be noted that the 10-year prescription period is much longer than that established by the national laws of numerous states for damage resulting from certain ultra hazardous activities, allowing for the fact that damage caused by radioactive contamination to flora, fauna, livestock, etc. may become evident only many years after exposure. The revised Article VI of the Vienna Convention appears to be sufficiently flexible to address problems of such a nature and leaves it up to the legislation of the competent court to regulate related matters.

The discovery rule or the so-called subjective prescription period was likewise modified. Whereas under Article VI. 3 of the 1963 Vienna Convention "the law of the competent court may establish a period of extinction or prescription not less than three years from the date on which the person suffering damage had knowledge of the damage and the operator liable", the revised article provides that an action for compensation shall be brought within three years from the date on which the person suffering damage had knowledge or ought to have had knowledge of the damage and the operator liable. No revision was made to the requirement that the subjective prescription period of three years may not exceed the prescribed 10 and 30 year periods or such or a longer period of extinction or prescription as is established by the national law of the Installation State.

The extension of the prescription or extinction period inevitably gives rise to certain practical problems, notably the question of financial coverage for claims for compensation for loss of life or personal injury decades after the occurrence of a nuclear incident. Since, according to the national legislation of most states, liability for nuclear damage is a specific amount, this may, in practice, convey the suggestion that a certain portion of the liability amount would be available to compensate claims of loss of life or personal injury lodged by victims decades after an incident. Article 8.1(c) of the protocol was intended to eliminate similar suggestions by providing that actions for compensation which, pursuant to the extended period of prescription or extinction noted above, are brought after a period of ten years from the date of the nuclear incident, shall in no case affect the rights to compensation of any person who has brought an action against the operator before the expiry of that period.

Any extension of the prescription or extinction period, either by virtue of the protocol or the law of the Installation State, makes sense only if the operator's liability is covered, by insurance or other financial security, including state guarantee, for such longer period. It is for this reason that Article 8.1(b), of the protocol provides the following: "If, however, under the law of the Installation State, the liability of the operator is covered by insurance or other financial security including state funds for a longer period, the law of the competent court may provide that rights to compensation against the operator shall only be extinguished after such a longer period which shall not exceed the period for which his liability is so covered under the law of the Installation State."

It is clear that the protocol definitely impacts upon the role of nuclear liability insurers, since the revised Vienna Convention has both considerably increased the minimum liability amount to be fixed for operators, and provided for extended prescription periods.<sup>25</sup> As a discussion of this question would go far beyond the scope of this paper, I would rather confine myself to emphasising the need to rely upon the solidarity of states and the international community, it being clear that regardless of whether they are covered by legislative provisions, victims should receive compensation from public funds where the operator's liability is not covered by insurance due to the passage of time.

### **X. Non-discrimination between victims**

Article XIII of the Vienna Convention, prohibiting any discrimination between victims suffering nuclear damage, was amended by Article 15 of the protocol,<sup>26</sup> the result being that in certain extreme cases, rather rare in practice, some foreign victims may be excluded from the compensation provided by the convention. Derogation from the non-discrimination principle is allowed by the protocol only within very narrow limits. Accordingly, discrimination may only be practised (a) in respect of amounts in excess of the operator's liability, namely, it may affect compensation from public funds only; and (b) in respect of nuclear damage suffered in the territory or any maritime zone of a state which has a nuclear installation in such territory, to the extent that it does not afford reciprocal benefits to the Installation State. This latter restriction makes it clear that such discrimination is not allowed in respect of victims of non-nuclear states; for that matter, the underlying motive for this article is similar to that for the article on the geographical scope of the convention.

In point of fact, the new Article XIII. 2 of the convention is understandable, for it reflects the view that compensation from public funds should not be paid to victims whose state ensures no compensation under similar circumstances. Still, an approach that results in innocent victims of nuclear damage not receiving compensation because their state once failed to comply with its obligations under similar circumstances raises the question of how to reconcile that approach with improving the situation of victims and with humanitarian considerations. This, however, is a separate matter which goes beyond the scope of the present paper.

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25. On this questions see, G.C. Warren: "Vienna Convention revision: a review of the exercise and insurance implications in the provisions under discussion". in: *Nuclear Law Bulletin*, No. 55, June 1995.

26. Article XIII.2. of the revised Vienna Convention (Article 15 of the Protocol) reads as follow:

"Notwithstanding paragraph 1 of this Article, insofar as compensation for nuclear damage is in excess of 150 million SDR's, the legislation of the Installation State may derogate from the provisions of this Convention with respect to nuclear damage suffered in the territory, or in any maritime zone established in accordance with the international law of the sea, of another State which at the time of the incident, has a nuclear installation in such territory, to the extent that it does not afford reciprocal benefits of an equivalent amount."

## **XI. Priorities given to certain victims**

During the revision of the Vienna Convention the was most commonly held view was that victims claiming compensation for loss of life or personal injury should be brought into a more favourable position and priority should be given to those claims. This view is reflected not only in the aforementioned articles which extend the period of prescription or extinction to 30 years, but also in the provision amending Article VIII of the Vienna Convention on the nature, form and extent of compensation.

Article 10 of the protocol states in part that "...priority in the distribution of the compensation shall be given to claims in respect of loss of life or personal injury." This provision accords priority only to those claims for compensation for loss of life and personal injury which are submitted within ten years from the date of the nuclear incident; that is to say, priority is inapplicable to claims brought after the ten-year period. Moreover, priority applies to cases where the damage to be compensated exceeds or is likely to exceed the maximum amount of liability made available pursuant to Article V.1. It may be noted that the extension of the priority rule to the whole period of prescription or extinction would entail the risk of attempts being made to withhold a portion of the compensation amount, on the ground that personal injuries would become evident at a later period of time. Obviously this would not serve the interests of victims who bring actions for compensation within ten years from the date of a nuclear incident, for then they could only expect a reduced amount of compensation. Thus, in the interest of all victims, it appears much more equitable to give priority to claims in respect of personal injury or loss of life, but only for a certain specified period.

In reality, it will be naturally rather difficult to specify the manner in which to prioritise claims for compensation in respect of a certain group of victims. Precisely for this reason, it appeared useful to preserve the relevant provision of the Vienna Convention which states that, "Subject to the provisions of this convention, the nature, form and extent of compensation, as well as the equitable distribution thereof, shall be governed by the law of the competent court" [Article VIII.1]. Thus, priority for claims for compensation in respect of loss of life or personal injury is a matter for the law of the competent court to decide.

## **XII. Jurisdictional provisions**

The revision of the Vienna Convention witnessed a rather sharp debate on the question of jurisdiction over claims for nuclear damage which continued right up to the adoption of the protocol at the Diplomatic Conference. Interestingly, the debate addressed not so much the question of jurisdiction in general as one instance thereof, notably the occurrence of nuclear incidents in an exclusive economic zone of a Contracting Party. The debate focused on problems of the law of the sea associated with the fact that issues relating to exclusive economic zones (EEZ) were not precisely regulated by the 1982 Convention on the Law of the Sea. That convention gives coastal states jurisdiction with regard to the preservation of the marine environment in their EEZ. However, to what degree a state would be able to exercise this jurisdiction is still a matter of controversy.<sup>27</sup> States favouring inclusion in the protocol of jurisdictional provisions on exclusive economic zones advanced the argument that, according to Article 56. 1(b)(ii) of the 1982 UN Convention on the Law of the Sea, coastal states have jurisdiction with regard to the preservation of the marine environment, and that if nuclear damage occurred in such a zone, damage would be suffered chiefly by the natural resources

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27. Cf. David Attard: *The exclusive economic zone in international law*, Clarendon Press, Oxford, 1987, p. 94-106.

for which they bear responsibility under maritime law. This argument is otherwise supported by the fact that there are frequently cases of carriage of nuclear materials in exclusive economic zones.

The provisions on jurisdiction were finalised only at the Diplomatic Conference and the outcome is a rather complicated paragraph, breaking with the general rule that is characteristic of nuclear liability conventions, that jurisdiction over actions for compensation lies with the Installation State. Under Article XI.1bis. of the revised Vienna Convention “Where a nuclear incident occurs within the area of the exclusive economic zone of a Contracting Party or, if such a zone has not been established, in an area not exceeding the limits of an exclusive economic zone, were one to be established, jurisdiction over actions concerning nuclear damage from that nuclear incident shall, for the purposes of this Convention, lie only with the courts of that Party.” This is conditional upon there being notification by that Contracting Party to the depositary, of such area, prior to the nuclear incident. In order to avoid any misunderstanding concerning the law of the sea, the same paragraph adds that “Nothing in this paragraph shall be interpreted as permitting the exercise of jurisdiction in a manner which is contrary of the international law of the sea, including the United Nations Convention on the Law of the Sea.”

There is another new paragraph in Article XI on jurisdiction, which incontestably serves the interests of potential victims and facilitates the equitable distribution of compensation funds. That paragraph provides that the Contracting Parties shall ensure that only a single juridical forum has jurisdiction in relation to any one nuclear incident.

### **XIII. Actions for compensation**

The addition to the jurisdiction provisions of the convention of a new Article XIA concerning actions for compensation is very important. It protects the interests of potential victims by allowing states to bring actions on behalf of their citizens and other victims who have suffered nuclear damage and have their domicile or residence in their territory. This provision was inspired by the fact that litigation in a foreign forum may subject the victims to undue inconvenience. It should be noted that it is very important, in cases of industrial accidents where there are potentially thousands of victims, to decide in advance who will have the right to represent the victims. For example, after the Bhopal catastrophe of 2 December 1984, one of the greatest industrial accidents of all time, one primary issue was whether India had the right to represent the victims.<sup>28</sup>

The article in question, which is a procedural innovation of the protocol, accords to victims a kind of protection which is rather special in terms of its legal nature. It differs from traditional diplomatic protection since it is not subject to exhaustion of local remedies and the damage to victims is not caused by a foreign state. Thus, to some extent, this protection is closer in nature to consular protection. At the same time, however, it is different in that the protection in this case is not accorded to persons staying abroad. Since the paragraph provides protection on an equal footing with nationals, for those foreigners who are permanent residents of the particular state, it may be possible for a victim, if there are victims in several states, to rely upon action and protection by both the state of his nationality and the state of his domicile or residence.

The last paragraph of the new Article XI A deals with claims by subrogation or assignment and states that those claims should be also admitted by the competent court.

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28. Cf Warren Freedman: *Foreign Plaintiffs in Products Liability Actions*, The Defense of Forum Non Conveniens. 1988, p. 135.

### **XIV. Involvement of public funds in compensation for nuclear damages**

One of the greatest novelties about the protocol is that it expressly provides for compensation to be made available from public funds for nuclear damage. It should be added, however, that compensation from public funds will occur only if a State Party exempts an operator for up to half of its liability (during the phasing-in period the proportion may be even greater), in which case the Contracting Party must make public funds available to ensure a total amount of compensation as required by Article V.1. To counterbalance these provisions, the protocol incorporates certain guarantees to protect public funds.

Article 4 of the protocol can be said to contain such guarantees, as it adds to Article II of the Vienna Convention a provision under which the Installation State may limit the liability amounts payable from public funds in cases where several operators are jointly and severally liable. This amendment is intended to ensure that, although several operators are liable for nuclear damage, only one payment is made in respect of the incident itself.

Article 7. 2 of the protocol adds a new Article VC to the Vienna Convention, providing for those cases where the competent court is not that of the Installation State.<sup>29</sup> Once again the protection for public funds appears here, since the Installation State is naturally required to reimburse the state of the competent court all payments made from public funds. According to the protocol, the states concerned shall agree on the procedure for reimbursement. Another new provision quite logically allows the Installation State to intervene in proceedings and to participate in any settlement concerning compensation.

A similar provision, added to Article X of the Vienna Convention, extends the right of recourse to the Installation State insofar as it has provided public funds for purposes of compensation.

In point of fact, Article 15 of the protocol mentioned earlier similarly restricts compensation from public funds, protecting them by allowing derogation from the non-discrimination principle in certain cases.

### **XV. Dispute settlement**

The Vienna Convention originally contained no provisions on dispute settlement.<sup>30</sup> Therefore, almost from the beginning of the discussions in the Standing Committee, the experts generally agreed on the need for the convention to be supplemented in this respect. A variety of rather detailed proposals for the settlement of disputes were discussed including setting up a separate international

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29. Article V.C.

“1. If courts having jurisdiction are those of a Contracting Party other than the Installation State, the public funds required under sub-paragraphs (b) and (c) of paragraph 1 of Article V and under paragraph 1 of Article VII, as well as interest and costs awarded by a court, may be made available by the first-named Contracting Party. The Installation State shall reimburse to the other Contracting Party any such sums paid.”

30. There is an optional protocol concerning the compulsory settlement of disputes appended to the Vienna Convention concluded at the same day as the Vienna Convention, however, that protocol never entered into force.

tribunal or a claims commission, and a plan was even drawn up for a separate annex to the Vienna Convention to settle matters relating to the aforementioned tribunal.<sup>31</sup>

Of the many proposals, a rather low-key one was eventually incorporated into Article 17 of the protocol. The core and substance of the new dispute settlement mechanism [Article XXA of the revised Vienna Convention] is this: in the event of a dispute between State Parties to the Vienna Convention concerning the interpretation or application of the convention “the parties to the dispute shall consult with a view to the settlement of the dispute by negotiation or by any other peaceful means of settling disputes acceptable to them”; if a dispute cannot be settled within six months from the request for consultation, any party may submit the dispute to arbitration or refer it to the International Court of Justice; where a dispute is submitted to arbitration and the parties to the dispute are unable to agree on the organisation of the arbitration, any party may request the President of the International Court of Justice or the Secretary-General of the United Nations to appoint one or more arbitrators. It should be noted that in this paragraph the protocol refers to disagreement on the organisation of the arbitration, which could be a disagreement not only on the composition of the arbitral court, but on the rules of procedure as well. However, the protocol points only to the first mentioned difference of opinion, stating that in cases of conflicting requests by the parties to the dispute, the request to the Secretary-General of the United Nations shall have priority. For that matter, a Contracting Party is not under any obligation to accept the dispute settlement mechanism provided by the protocol, and when ratifying, accepting, or approving the convention, it may declare that it does not consider itself bound by either or both of the dispute settlement procedures. The consequence is that the article governing dispute settlement is not to be regarded as valid as between the state making such a declaration and the rest of the Contracting Parties. Such declarations may of course be withdrawn at any time.

### XVI. Textual adjustments

The protocol contains certain provisions which are simply textual adjustments to the Vienna Convention. Mention may be made of the following paragraphs.

- Article 7. 2 of the protocol simply rewords the relevant article of the Vienna Convention to the effect that costs and interest awarded by courts in actions for compensation for nuclear damage shall not be chargeable against the liability amounts fixed by the convention, that is, that such costs and interest shall be payable in addition to those amounts.
- The revised version of Article XII of the Vienna Convention, on recognition and enforcement of judgements, can similarly be regarded as nothing but a rewording of the relevant provisions.
- Article 2.1 of the protocol revises Article I.1(j) of the Vienna Convention by redefining “nuclear installation” to include certain facilities which the IAEA Board of Governors deem to be nuclear installations, as a result of technological developments.
- Article 16 of the protocol amends Article XVIII of the Vienna Convention, governing the relationship between the Vienna Convention as *lex specialis* and international law as *lex generalis*. This change can be viewed as a minor amendment refining the existing text,

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31. Cf. SCNL Third Session, Note by the Secretariat, p. 13-16.

but, unlike the earlier text, the revised wording refers both to rights and obligations under international law, as not being affected by the provisions of the convention.

- Another amendment of lesser importance, relating to the carriage of nuclear material, is that which modifies Article III of the Vienna Convention and which allows the Installation State to exclude the liable operator's obligation to provide a carrier with a certificate of financial security, in respect of carriage of nuclear material within that state.

### **XVII. Peaceful co-existence of two Vienna Conventions**

As was already noted, technically the Vienna Convention was revised by the adoption of the protocol to amend the instrument, and according to Article 19 of the protocol "A State which is Party to this Protocol but not to the 1963 Vienna Convention shall be bound by the provisions of that Convention as amended by this Protocol in relation to other States Parties hereto, and failing an expression of a different intention by that State at the time of deposit of an instrument referred to in Article 20 shall be bound by the provisions of the 1963 Vienna Convention in relation to States which are only Parties thereto." This solution has created a special situation, because after the entry into force of the protocol<sup>32</sup> there will be living together or operating in practice "two" Vienna Conventions, notably the convention's original text of 1963 and its new version as amended by the protocol.

After the protocol has come into force, a state may only accede to the amended version, but in the *inter se* relations of the States Party to the "old" Vienna Convention the provisions of that convention will remain in force until such time as they have acceded to the new protocol. This rather complicated situation is nevertheless understandable and is fully in accord with Article 40 of the 1969 Vienna Convention on the Law of Treaties, which provides for the amendment of multilateral treaties.

In 1989 the negotiations on the revision of the Vienna Convention had begun with the aim of strengthening the existing nuclear liability regime and of improving the situation of potential victims of nuclear accidents. The Protocol to Amend the Vienna Convention serves those purposes; it also reflects a good compromise, since it is the outcome of a negotiation process in which experts from both nuclear and non-nuclear states, from Contracting Parties and non-Contracting Parties were very active. That affords some assurance that the compromise solution reached is acceptable to all States participating in the adoption of the protocol. All of this holds hope for what, perhaps, matters most, that the protocol will enter into force within a relatively short period of time.

Now that the Vienna Convention has been revised, it is to be expected that, on the one hand, there will be accessions to the revised Vienna Convention by further states, chiefly those which have so far steered clear of its liability regime precisely because of its insufficiencies, and, on the other hand, the present States Party to the Vienna Convention will ratify the protocol or accede to it, thereby causing the 1963 Vienna Convention to eventually lose its effect.

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32. According to Article 21 "This Protocol shall enter into force three months after the date of deposit of the fifth instrument of ratification, acceptance or approval."