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**Conference of the Parties to the Basel Convention
on the Control of Transboundary Movements of
Hazardous Wastes and Their Disposal**

Eighth meeting

Nairobi, 27 November–1 December 2006

Item 6 (e) of the provisional agenda*

**Implementation of the decisions adopted by the Conference
of the Parties at its seventh meeting: Legal matters**

**Basel Protocol on Liability and Compensation:
report on workshops**

Note by the Secretariat

Addendum

Attached to the present note is the report of a regional workshop aimed at promoting ratification of the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, which was held in Yogyakarta, Indonesia, from 16 to 18 May 2006. For the list of participants, and responses to the questionnaires issued to provide a basis for discussions at the workshop, please see the Convention website (<http://www.basel.int/legalmatters/index.html>).

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Report of the Workshop

I. Introduction

1. The Basel Convention Regional Centre for South-East Asia, with the Secretariat of Basel Convention (SBC) and the Ministry of Environment of the Republic of Indonesia (MoE), conducted a Regional Workshop Aimed at Promoting the Ratification of the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal in Yogyakarta, Indonesia, from 16 to 18 May 2006. The workshop was supported by the Federal Office of the Environment of Switzerland (FOEN).
2. The Workshop was attended by 36 participants from Parties to the Basel Convention, other States and institutions from the region. The list of participants is presented as Annex 1 of this report.

II. Welcoming remarks

3. The Workshop started on 16 May 2006 at 8:40 with welcoming remarks the representatives of SBC, FOEN of Switzerland, and the MoE of Indonesia.
4. Ms Donata Rugarabamu, Senior Legal Officer of SBC, delivered a message from the Executive Secretary of the Basel Convention, Ms Sachiko Kuwabara-Yamamoto. In this message, Ms Kuwabara noted the leadership demonstrated by the Republic of Indonesia at the international and regional level on environmental issues, and commended Indonesia for the generous support it provided. Noting that none of the countries in the South East Asia region had ratified the Liability Protocol, she called upon delegates to take the opportunity to identify any difficulties they may face in this regard, with a view to making recommendations for the eighth meeting of the Conference of the Parties to the Basel Convention, due to be held in November 2006. Further, she observed that the 2005 World Summit Outcome recognized the need for better integration of environmental activities in the broader sustainable development framework at the operational level, including through capacity building. She drew the attention of the meeting to the opportunities afforded in this regard by the Basel Convention Regional Centre for South East Asia as a source of support, and called upon the countries in the region to be actively involved in the Centre. Finally, Ms Kuwabara commended the support provided by the Government of Switzerland for the workshop.
5. Mr. Jürg Bally, Head, International Affairs, Legal Division, Federal Office for the Environment (FOEN), Switzerland then made some opening remarks. Mr. Bally noted that Switzerland is a host country for many environmental conventions and stated that Switzerland is committed to support the Basel Convention. He observed that Switzerland had already sponsored 3 (three) earlier workshops in other regions on the Liability Protocol.
6. Mr. Rachmat Witoelar, Minister of Environment of the Republic of Indonesia stated that during the second decade of the Basel Convention, the Parties need to strengthen cooperation. He also stated that the Government of Indonesia has a commitment to actively consider the ratification of the Liability Protocol. He stated that Indonesia's Environmental Act of 1997 provides for a hazardous waste import prohibition and environmental damage compensation. However, he observed, the provisions stipulated in this Act are not well elaborated in the implementing regulation and noted that recommendations resulting from this Workshop might become important inputs for revising this Act. The Minister was sure that all participants would get a better knowledge of liability and compensation from this Workshop. The Honourable Minister then declared the workshop open.

III. Overview of the Basel Convention, and related regional/ sub-regional regimes

7. Ms. Donata Rugarabamu, Senior Legal Officer, Secretariat of the Basel Convention provided a brief overview of the main elements of the mechanism for regulating the transboundary movements of hazardous wastes and other wastes, and their disposal, as established under the Basel Convention. She also referred to two relevant mechanisms established under ASEAN, namely the ASEAN Cooperation Plan on Transboundary Pollution and the ASEAN Working Group on Multilateral Environmental Agreements.

IV. Overview of the Protocol on Liability and Compensation (“Basel Protocol”): Key elements of the Protocol, and the Relationship between the Protocol and the Basel Convention

8. Mr. Jürg Bally then followed with an overview of the Liability Protocol, which highlighted the key elements of the Protocol and clarified the relationship between the Protocol and the Basel Convention.

9. Following these presentations, most delegations made comments and observations. During the discussions, the following issues, in particular, were raised:

(a) The means by which to assess and calculate environmental damage, having regard to economic factors, the ecosystem, and the impact on communities;

(b) The difficulty of addressing cases of illegal traffic. Specifically, the inability to ensure the availability of insurance coverage or other financial guarantee when the entity strictly liable for the illegal traffic could not be identified;

(c) How to address the situation where insurance or other financial cover did not meet the total cost of the damage;

(d) A number of countries already imposed mandatory requirements for some form of insurance/financial guarantee requirement in connection with the mining industry and, in the case of a few countries, for potential environmental damage.

10. Information was provided concerning the interim enlargement of the Basel Convention Technical Cooperation Trust Fund by decision V/32 and, specifically, with respect to the mechanism for the provision of assistance when the damage was not entirely covered by the other mechanisms to cover costs/compensation available under the Protocol. It was noted that this element of the mechanism would only enter into force when the Protocol entered into force. It was further observed that decision V/32 also provided for assistance in undertaking preventive measures, and that requests for such assistance should comply with the guidelines adopted by the sixth meeting of the Conference of the Parties.

V. Presentation by each country on the key elements of civil liability under its domestic law

11. Following this general discussion, each country made a presentation on their domestic laws on civil liability. From these presentations, the following circumstances became apparent:

(a) Most countries had a mechanism for establishing fault-based liability, which provided for compensation and/or penalties (fines or imprisonment) which could cover environmental or pollution-related damage. Only a few of those countries present imposed strict liability for losses resulting from environmental incidents;

(b) Almost all countries did not have specific mechanisms for addressing liability for incidents occurring during transboundary movements of hazardous wastes;

(c) Most countries did not have specific insurance or financial guarantees requirements. However, Malaysia had adopted specific legislation regulating imports and exports, and, by administrative measures, imposed requirements of bank guarantees on waste generators. Similarly, Singapore had also enacted relevant legislation, which also required the maintenance of bank guarantees;

(d) Most countries provided a mechanism for addressing personal injury, loss of life, and damage to property. Some countries also had mechanisms for addressing damage to the environment;

(e) With regard to time limits for liability, some countries had time limits after which claims/proceedings could not be brought. However, in other countries, there was no time limit, or relevant time limits would be fixed by the courts;

(f) With regard to financial limits for liability, many countries had neither fixed minimum nor fixed maximum limits;

(g) Domestic entities responsible for enforcement of liability including the national courts, as well as environment ministries and other agencies;

(h) None of the countries had entered into agreements or arrangements under Article 11 of the Basel Convention which addressed liability issues.

VI. Case study 1

12. The Group then undertook a case study. In this case, the countries present were requested to indicate their position under existing domestic law if they were an importing State and an incident had occurred within their national jurisdiction during a transboundary movement of hazardous wastes.

(a) Several countries had imposed import prohibitions on hazardous wastes. Such countries noted that any import would be illegal and, thus, any such shipment would be illegal;

(b) The countries agreed that, even if the generator in the exporting country was liable, it would be difficult to enforce such liability and recover compensation for remediation and personal injury losses;

(c) In most cases, existing law would place liability on the carrier or importer;

(d) In most cases, the Government would bear the initial costs of remediation. In a few cases, mechanisms for recovering such costs from the carrier or importer existed.

VII. Liability mechanisms under other MEAs

13. The session of 17 May 2006 commenced with a presentation by Mr Bally on liability mechanisms under other MEAs. Mr. Bally referred to mechanisms under existing private international law and regulations covering the liability and compensation mechanisms such as the Kiev Protocol. It was noted that the Kiev Protocol is an example which was developed based on important elements of the Basel Convention and Protocol.

14. Following the presentation, most delegates raised questions or made comments, and highlighted certain factors, as summarized hereunder:

(a) The bank guarantee, as an instrument used in Singapore and Malaysia with respect to hazardous waste shipments, is considered another step supporting the application of the Protocol;

(b) The financial requirements under the Liability Protocol would not address cases of illegal traffic as no form of insurance or guarantee would have been secured in respect of such cases. A set of instruments is needed to cope with illegal trafficking of hazardous waste;

(c) In order to require a generator in a foreign country to pay for compensation, a victim will normally have to go to the domestic court of that foreign country. Under the Protocol, a victim can obtain a judgment in its own court which shall be recognized and enforced in the courts of the other countries who are also party to the Liability Protocol;

(d) In case the compensation to be paid is more than the value covered by insurance, a Party can make an application to the emergency fund established in the Basel Convention Technical Cooperation Trust Fund.

VIII. Necessary Actions upon Ratification of the Protocol

15. Ms. Donata Rugarabamu delivered a presentation on necessary actions upon ratification of the Protocol.

IX. Presentation by each country on difficulties faced by countries in ratifying the Protocol

16. Every country attending the Workshop made a presentation on the difficulties faced in ratifying the Protocol. Presentations were made according to the Questionnaire on ratification distributed prior to the Workshop.

(a) Most countries have not taken actions to ratify the Protocol due to difficulties such as lack of capacity, lack of experience, and the absence of an environmental insurance system;

(b) The ratification process involves extensive consultations and assessments in order to raise awareness and to promote common understanding in order to gain support from and among stakeholders within a country;

(c) A few countries have initiated preparatory studies to ratify the Protocol.

X. Working Groups on recommendations for consideration of the Conference of the Parties to the Basel Convention

17. Two working groups were established in which countries identified actions that they consider the Conference of the Parties could take to facilitate the ratification of the Protocol.

XI. Presentation of recommendations formulated by the working groups for the Conference of the Parties to the Basel Convention

18. Following the two group discussions, each Group presented its recommendations resulting from the discussions. These recommendations form the basis of the conclusions of the Workshop, which are set out under paragraph 27 of this report.

XII. Other Basel Convention-related matters: Briefing on the current and future activities and projects of the Basel Convention Regional Centre for Training and Technology Transfer for Southeast Asia

19. Mr. Aboejoewono Aboeprajitno, Director of Basel Convention Regional Centre for Training and Technology Transfer for Southeast Asia, and two of his staff made a presentation on the current and future activities and projects of the Basel Convention Regional Centre for Training and Technology Transfer for Southeast Asia.

XIII. Setting of financial limits to be determined under domestic law

20. The session of 18 May 2006 commenced with a presentation by Mr. Jürg Bally on financial limits. The key questions were addressed.

21. Questions and comments raised during discussions following the presentation are summarized hereunder:

(a) Some delegates raised the issue of difficulties in assessing the extent of damage to the environment, of establishing standards or providing acceptable evidence of damage, and the lack of availability of local experts in the relevant fields of expertise;

(b) It was noted that SBC can recommend experts to Parties in this field.

XIV. Availability of insurance and other financial guarantees: Coverage of the liability for generators, exporters, importers and disposers

22. Mr. Hotbonar Sinaga, an expert on insurance in Indonesia, made a presentation on insurance for the risks addressed under the Protocol. He noted that insurance coverage for such risks was currently not available in the Southeast Asian region.

XV. Presentation by each country on their domestic insurance situation

23. Each country attending the workshop made a presentation on their domestic insurance situation. There was considerable discussion on the issues of the financial limits and insurance/financial guarantees. The following issues were raised during such discussions:

(a) None of the countries had liability insurance mechanisms available to specifically address the damage covered by the Protocol;

(b) While some countries had initiated consultations among governmental entities, none had conducted in-depth consultations with the private insurance sector;

(c) With regard to mechanisms not involving insurance, most countries needed to further consider possible options;

(d) Almost all of the countries present indicated that the minimum financial limits set out in Annex B are too high. Specifically, a number of countries indicated that industry would consider that the premiums would be too high because of the high level of the minimum requirement under Annex B;

(e) None of the countries present considered increasing the limits under Annex B. However, some needed more time to study the limits;

(f) Nevertheless, it was agreed that the limits under Annex B would probably be insufficient to cover all costs relating to damage if an incident actually occurred during a transboundary movement.

XVI. Case study 2

24. Case study 2 was examined. In this case, the countries present were requested to indicate their position under existing domestic law if they were an importing State and an incident had occurred contaminating a river within their national jurisdiction during a transboundary movement of hazardous wastes.

(a) Most countries agreed that under their existing laws the importer would be liable;

(b) The case would be governed by domestic courts;

(c) The possible conclusions if both the States concerned had been party to the Protocol were also considered.

XVII. Working Groups on recommendations for consideration of the Conference of the Parties to the Basel Convention

25. Two working groups were established to discuss and make recommendations to the Conference of the Parties on financial limits and insurance.

XVIII. Presentation of recommendations formulated by the working groups for the Conference of the Parties to the Basel Convention

26. The recommendations are reflected in paragraph 27 below, which sets out the recommendations of the Workshop.

XIX. Preparation of the report of the Workshop and the recommendations of the Workshop

27. The Workshop identified the following difficulties relating to ratification of the Protocol, and recommended that the following actions be undertaken to address those difficulties:

A. Uncertainty or lack of clarity or lack of institutional capacity regarding rights and obligations under the Protocol, as well as the need to assess the benefits/disadvantages of adhering to the Protocol

Recommended action:

(i) Capacity Building should be undertaken internally/domestically by the State concerned:

- To understand the text and the rights and obligations under the Protocol, for government officials, judiciary, insurance industry, waste generators;
- To promote effective enforcement of the Protocol/Convention;
- To provide the mechanisms (including institutional and human resources) and instruments to implement the Protocol.

(ii) SBC should be mandated to undertake a pilot project to facilitate the ratification process with one interested Party, at its request, to gain experience to be shared;

- (iii) SBC, BCRC, donor countries and Parties should organize further workshops and seminars to further clarify the rights and obligations under the Protocol;
- (iv) Interested Parties together with SBC, BCRC and donor countries should facilitate sessions with those countries which have already acceded to the Protocol, to provide an opportunity to share experiences and information as well as the procedures and requirements developed by them;
- (v) The provision of technical and financial support from SBC and other international organizations and donors.

B. Lack of legislation to implement the Protocol or of other legal/regulatory/administrative measures to meet the requirements of the Protocol

Recommended action:

- (i) Legal capacity building to meet requirements of the Protocol should be undertaken internally/domestically by the State concerned, specifically addressing:
 - Legislation
 - The enhancing of capacity of judiciary and legal professionals to address matters falling under the Protocol
- (ii) SBC should be mandated to develop guidelines for reviewing current domestic legislation regarding liability and compensation.

C. Difficulties in achieving the insurance/financial guarantee requirements derived from (a) lack of availability of finance mechanisms, (b) the reaction of industries (SMEs) to the cost of insurance premium, (c) lack of a mechanism in most countries and where there is some form of mechanism available does not meet the minimum limits prescribed in the Protocol, (d) The [insurance] industries find it difficult to cover the minimum financial limits (e) the reaction of industries (SMEs) to the cost of insurance premium

Recommended action:

Each interested Party should:

- (i) Make available mechanisms of insurance (including state owned/controlled insurance) and/or financial guarantees for generators/exporters/disposers within its jurisdiction;
- (ii) Compile and make available to the relevant stakeholders information on existing rules of underwriting of insurance contracts to cover the liability under the Protocol;
- (iii) Provide the relevant stakeholders with examples of appropriate insurance policies and financial guarantees;
- (iv) Establish a legal requirement to have some form of financial guarantee as a pre-requisite to being given approval to undertake a movement;
- (v) Make available information required for the insurance industry to make the necessary risk analysis in order to come up with an appropriate policy to cover movements of hazardous waste;
- (vi) Where possible, provide some sort of government fund to support the insurance industry at the beginning before the market is mature enough to support itself;
- (vii) Where domestic insurers are not able to provide the necessary policy, facilitate domestic insurance industry to make appropriate arrangements with international insurance companies;
- (viii) Where affordable, establish some sort of Environmental Fund.

At a regional/international level, interested Parties should:

- (i) Look into establishing an appropriate Regional Fund;

- (ii) Make available information/statistics;
- (iii) Look into establishing a regional insurer or to regionally recognize an international insurer.

SBC should:

- (i) Invite, at the request of interested Parties, an international insurance company with experience in insuring transboundary movements of hazardous wastes (eg. P&I club or an insurance company in the OECD) to inform them about existing possibilities to cover the liability under the Protocol;
- (ii) Carry out the necessary studies and make available information required by international and domestic insurers;
- (iii) Look into the feasibility and mechanism for having a regional or international Fund;
- (iv) Provide information on other mechanism to establish state organized solutions such as funds, pools, state insurance, etc. (e.g. Superfund);
- (v) Provide capacity building and awareness raising for insurance companies.

D. Concerns regarding the financial limits established under Annex B

Recommended action:

- (i) The exchange of information amongst Parties to the Basel Convention on recorded incidents;
- (ii) To make available information collected by the BCRC and SBC on statistics of recorded incidents;
- (iii) Parties to the Protocol (when it comes into force) should be encouraged to consider amending the minimum financial limits under Annex B.

Regionally/internationally, interested Parties should:

- (i) Consider to agree on a regional position vis a vis the minimum financial limit.

SBC should:

- (i) Be mandated to develop guidelines, at the request of interested Parties, on determining the financial limits;
- (ii) Look into other criteria (eg. characteristic of the hazardous waste Annex III) in determining the minimum limits to be applied;
- (iii) Undertake further studies on incidents/accidents in order to assess whether these limits are realistic or sufficient;
- (iv) Provide information on environmental risk assessment and compensation under the CLC, 1969 and other relevant international instruments;
- (v) Provide experts on environmental risk assessment to assess the limits in Annex B.

E. Difficulties in coordinating activities/responsibilities among relevant national entities

Recommended action:

- (i) Interested Parties should further strengthen cooperation amongst agencies at the national level.

F. Difficulties in coordinating activities/responsibilities between Parties

Recommended action:

- (i) The Conference of the Parties to consider the establishment of a special international dispute settlement body;

- (ii) SBC could support a study on a regional mechanism/approach, possibly in close cooperation with regional groups such as ASEAN.

G. Lack of technical capacity to assess and restore damage to the environment according to the provisions of the Protocol

Recommended action:

- (i) The provision of technical and financial support from SBC and other international organizations and donors;
- (ii) The provision of post-incident/accident expertise, i.e. technical expertise in dealing with the effects of an incident/accident, by SBC and other relevant international and regional organizations.

XX. Adoption of the report of the Workshop

- 28. The Workshop concluded by the adoption of the present report.
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